Creating the Appellate Record and Tips to Avoid Problems

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As the California Fourth District Court of Appeal observed in one published decision: "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two."

Continue reading the article below or watch this short video for key points and takeaways.

Because state appellate courts and federal circuit courts were not involved in the trial or district court proceedings below, it is essential that the appellant, respondent/appellee, and cross-appellant prepare an adequate record for the reviewing court. Here are some tips for creating an adequate appellate record while avoiding problems that could result in issues not being reviewed due to an incomplete record:

- ***Create a proper appellate record at the trial/district court level.*** To show legal error or that an abuse of discretion occurred, attorneys at the trial/district level must take steps—or prudently consult appellate counsel who can help—to create an adequate record. For example, it is highly

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advisable to get a court reporter's transcript of sidebars, chamber conferences, jury instruction settling conferences, oral rulings on motions in limine, and oral rulings on motions, especially motions that deal with discretionary decisions. (If a lower court does not put it on the record, trial counsel should consider summarizing the oral ruling and requesting the trial judge to confirm its correctness.)

- ***Follow appellate rules.*** Most state courts and the federal system have very detailed rules of court governing deadlines and the form of the record to be assembled in appeals. At the federal level, it is the Federal Rules of Appellate Procedure, with many circuit courts supplementing with their own nuances to these rules. You need to follow these procedures strictly. Also, in some specialized areas such as California Environmental Quality Act (CEQA) cases, an appellant can choose to prepare an administrative record; if it is not complete and properly indexed, an appeal could be dismissed or an order reversed for noncompliance. Finally, the federal appeal procedure requires a separate appendix to the briefs (also known as "Excerpts of Record in the Ninth Circuit") calling attention to relevant docket entries, pleadings, orders, and reporter transcript excerpts, as well as the judgment being appealed—because that is what the circuit justices will focus on.
- ***Court reporter's transcripts.*** Due to financial constraints in court funding and in the aftermath of the COVID-19 pandemic, trial counsel should consider hiring a court reporter who will then be sanctioned as one by the trial judge. You should not assume all departments or divisions have court reporters because many do not, so this particular concern needs to be researched before a hearing or a trial occurs. In California, for example, some appellate divisions will deny summarily an appeal of an attorney's fees order where no reporter's transcript was provided.
- ***Augmentation and settled statements.*** Usually, the appellate record of docketed materials is made through a clerk's transcript or an appellant's appendix (with the respondent/appellee being able to supplement the

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designations made by an appellant). If any party to an appeal finds that they need to add some documents to the appellate record, there are augmentation procedures which can allow that to happen with the appellate court's consent, although it is best to make an augmentation request early in the process. In California, if you failed to get a court reporter's transcript, there is a settled statement mechanism by which you can fill in that deficiency through a cooperative process between the adverse party and the trial court.

- ***Judicial notice.*** Appellate parties also should consider asking for judicial notice of certain materials even if the materials were not judicially noticed by the trial court. While the request sometimes will be denied because the materials were not before the trial court, judicial notice is frequently granted with respect to ongoing developments related to an issue that might give necessary background or clarity to the subject under review.
- ***Special rules for the record supporting an extraordinary writ petition.*** Most courts have special, detailed rules for presenting the record in support of, or in opposition to, an extraordinary writ petition. Under such rules, the petitioner is usually tasked to develop an adequate record (explaining, for instance, why a reporter's transcript of a proceeding was not obtained) given the emergency nature of the relief being sought.

Frost Brown Todd's appellate advocates have a proven record of success in appeals involving questions of first impression, bet-the-company judgments, and decisions that shape the rules under which our clients will operate well into the future. For information, contact the author or any attorney with the firm's Appellate Practice Group.

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