

HOW TO PREPARE FOR AN APPEAL

This letter was sent to trial attorneys in Nov. 2005 to inform them of things they could do better to prepare cases for appeal. I've been pleased to receive a number of referrals from family lawyers in Santa Clara County and other parts of California, now that I've been a certified appellate law specialist since 2004. Unfortunately, I see recurring patterns of weaknesses on the trial level which wipe out appeals and could be avoided with a little more awareness on the trial level.

Requesting a Statement of Decision isn't enough---you must state the "controverted issues."

CCP § 632 requires you to "specify those controverted issues" as to which you are requesting a statement of decision. Merely requesting a statement of decision is an inadequate request. In a short trial you must make this request before the case is submitted. What is the point of doing this? (1) Having a statement of decision avoids the doctrine of implied findings under which the appellate court presumes that the trial court made all factual findings necessary to support the judgment/order for which substantial evidence exists in the record; i.e., the necessary findings will be implied. (2) The trial court's failure to make a required statement of decision is supposed to mean automatic reversal. Incidentally, as to some motions the Family Code guarantees you the right to a statement of decision, even after a the hearing of a short motion---if you timely request it:

§ 3654

At the request of either party, an order modifying, terminating, or setting aside a support order shall include a statement of decision.

§ 2127

As to actions or motions filed under this chapter [Chapter 10 of the Family Code, relief from judgment], if a timely request is made, the court shall render a statement of decision where the court has resolved controverted factual evidence.

Rule 232 has the procedure the court is supposed to follow in having a statement of decision prepared.

If the court's statement of decision has errors, you must call them to the court's attention at the trial level.

Specific objections to the court's proposed statement of decision must be made, not merely an alternative statement of decision. Sometimes the court tells counsel to prepare a statement of decision a certain way (and it's wrong); you still have to bring this error to the court's attention separately.

Object and state a basis

The most frequent problem that wipes out appeals is failure to object on the trial level. If evidence is wrongly admitted or excluded, you need to object. And if the judge keeps repeating the error, you need either to keep objecting or to get a standing objection on the record. If the judge says they'll decide question-by-question, you have to object question-by-question. After the objectionable testimony is given, you must move to strike. Ev. Code § 353.

Make an offer of proof

If your evidence is excluded, you must make a clear offer of proof, stating what the evidence would have been. Ev. Code § 354. The judge may be rushing you, but if you don't put on the record what the witness would have said, the appeal is gone. When I anticipate that, due to supposed time constraints a judge won't let me introduce my evidence, sometimes I get ready in advance with a typed, detailed version of what the evidence would have been, and I file it or have it marked as an exhibit and ask that it be admitted. Incidentally, whenever you want to introduce a document, and the judge says no, don't let them refuse to mark it as evidence; that deprive you of a record and deprives you of appeal. Say, "For the record, I'd like it marked." If they still refuse, tell them that having a record is part of due process of law.

If the judge makes an error, move for a new trial under CCP § 656-662.5 or move to vacate the judgment under CCP § 663-663.2.

These are great code sections that provide for a new trial when there has been a legal error. Sometimes, when the error is clearly called to the attention of the trial judge, they'll see it and change their mind. These code sections have short deadlines and need to be read immediately when the problem arises.

A motion to reconsider under CCP 1008 is for newly discovered evidence and useful particularly if events transpired after the hearing and before the entry of Judgment.

Sometimes things change after the hearing and before the Judgment is filed. The classic case was *In re Marriage of Olson* (1980) 27 Cal.3d 414, 165 Cal. Rptr. 820, [court erred in failing to reopen case after notice of intended decision where house went into foreclosure after trial]. That wasn't a motion under 1008, but it's an interesting example of how you can have evidence that you couldn't present at trial, and it pops up shortly after trial and before a final Judgment. It's also interesting that the California Supreme Court treated a "decision" as a tentative decision, not as an order.

There is no excuse for missing the deadline for notice of appeal---Rule 2 has deadline.

Normally, deadline is the earliest of: (1) 60 days after clerk mails "Notice of Entry" or a file-stamped copy of the judgment, showing the date either was mailed, (2) 60 days after the party filing the notice of appeal serves or is served with "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by a proof of service; or (3) 180 days after entry of judgment. Note that there is no 5-day extension for the mailing.

The safest thing is to count 60 days from date of filing of the judgment/order and file the notice of appeal by then, except as explained below.

Warning: Rule 2(d)'s definition of when a judgment is "entered" may mean your deadline for notice of appeal runs before you know it even begins.

Rule 2(d) defines what constitutes entry which triggers the deadline for filing a notice of appeal, and 2(d)(2) provides:

The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. But if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed; . . .

The Rutter book "Civil Writs and Appeals" describes this as "**a trap for the unwary**," (3:50.2), stating:

Upon rendition of a minute order, a careless attorney, knowing that there will be a subsequent written order [in the ordinary course of events], might assume--not unreasonably--that the time for appeal will begin to run after rendition of the written order. In fact, the time will have commenced to run upon notice of entry of the minute order. The result could be failure to file a timely notice of appeal.

Without seeing the actual minute order in your case, you can't be sure what it says, and it is the minute order itself that triggers a different deadline for the notice of appeal. So, if your case went badly, get a copy of the minute order from the date of oral pronouncement of the decision. Of course, if a written decision, rather than an oral one, was made, this won't be a problem.

At the end of a problem case, I work with you on these issues.

By the time things take a bad turn, you may want to contact me. There is a stage at which both trial and appellate counsel work together. I file a Notice of Limited Scope of Representation, so that I appear only on appeal-related issues such as the drafting of the statement of decision (which I need to do in tandem working with trial counsel) or making a motion for a new trial (also working closely with trial counsel but advising you as to form). I can't do these things for you, but I can advise you on questions of form. We work together to maximize the client's chances of preserving an issue on appeal.

Prepare your client for the appeal process.

The majority of family law litigants who contact me are people complaining of a judge's exercise of discretion, and that isn't going to be reversed. It helps me if you begin stressing to the client that the court of appeal does not do a new trial but only looks at questions of law. It won't look at perjury, and it won't redecide the facts. If you begin to tell the clients these things, it'll help prepare them for doctrines like "harmless error" which can be really tough to swallow.