

Preserving Your Ability to Appeal

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Creating a Good Record

- “If it’s not in the record, it did not happen.”
(*Protect Our Water v. County of Merced* (2003)
110 Cal.App.4th 362, 364.)
- Facts must be proven by evidence *in the record*; a lawyer’s argument is not evidence
- What’s the record? At trial, marked exhibits, the reporter’s transcript, and judicially noticed documents and facts

Reporter's Transcript

- Clearly identify exhibits being discussed
- Short questions, short answers

Request for Judicial Notice

- “[W]hile courts are free to take judicial notice of the *existence* of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files.” (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.)
- Income and expense declaration?

Erroneous Admission of Evidence

A judgment will not be set aside for the erroneous admission of evidence unless

1. A timely objection was made, and
2. There was a miscarriage of justice (i.e. it would have made a difference in the outcome).

(Evid. Code § 353)

Good Objections

- Talking, non-evidentiary objections, unhelpful. The “specific ground of the objection” must be clearly stated.
- “No foundation.” No provision in the Evidence Code -- Could mean many things. Has witness failed to establish a foundation for his or her personal knowledge of the matter? (Evid. Code, § 702) Has the witness failed to show facts indicating the document is authentic? (Evid. Code, §§ 1400-1401.)

Erroneous Exclusion of Evidence

A judgment or order cannot be reversed based on the erroneous exclusion of evidence unless

1. There was a miscarriage of justice (it would have made a difference)
2. An offer of proof is made, unless it would be futile

(Evid. Code § 354)

When and how to make an offer of proof

- If the relevance of the evidence is obvious, you don't need an offer of proof
- If you need to make an offer of proof, respectfully acknowledge the court's ruling before asking to make an offer for the record
- Refrain from making too many offers of proof. Why? Rarely does an erroneous ruling on an objection to a question result in reversal; don't be obnoxious

Statement of Decision

- What is the deadline to ask for one? Read CCP § 632 carefully.
- Why do you want one?
 1. Get the trial judge to think about the issues critical to your case.
 2. Judgment is presumed correct. A statement of decision is a means of avoiding implied findings in favor of the judgment.

How do you ask for a statement of decision?

- Best way is in writing.
- Goldilocks rule
 1. Request must “specify the controverted issues.”
 2. If the request is too onerous, it is improper. (*People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 525 [16 demands with subparts, totaling 75 questions].)

Statement of decision strategy: specify the trial court's decision of law

- In *People v. Louis* (1986) 42 Cal.3d 969, the California Supreme Court adopted the three-step approach described in *United States v. McConney* (9th Cir. 1984) 728 F.2d 1195.
- Example of strategy involving a split of authorities:
 - *In re Marriage of Paul* (1985) 173 Cal.App.3d 913
 - *In re Marriage of Serna* (2000) 85 Cal.App.4th 482.

Objections to Statement of Decision

- The main purpose of an objection is not to reargue the merits
- An objection should
 1. Point out an obvious error not subject to dispute (e.g. math mistake, child's date of birth), or
 2. Point out a major omission (e.g. court did not address a main issue),
 3. Request clarification regarding an irreconcilable inconsistency (e.g. husband and wife are both awarded 100% of same property)