Appellate Advocacy College 2000

Lecture

Record Completion

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The Record On Appeal

Importance of a Complete Record on Appeal

- ☐ Appellate review is limited to the appellate record; evidence and matters not reflected in the record cannot be considered on direct appeal. (People v. Barnett (1998) 17 Cal.4th 1044, 1183; People v. Szeto (1981) 29 Cal.3d 20, 35; Cal. Rules of Court, rule 13 ["The opening brief shall be . . . confined to matters in the record on appeal ."].)

- ☐ An indigent criminal appellant is constitutionally entitled to a free appellate record sufficient to permit meaningful review. (Griffin v. Illinois (1956) 351 U.S. 12, 20; Draper v. Washington (1963) 372 U.S. 487, 496-499; People v. Howard (1992) 1 Cal.4th 1132, 1166.)

- ☐ Practice Pointers:

  It is the appellant's burden to take all appropriate steps to ensure that the record is as complete as possible. (People v. Chessman (1950) 35 Cal.2d 455, 460-463; People v. Malabag (1997) 54 Cal.App.4th 1419, 1423-1424.)

  Counsel's failure to correct a defect in the record which precludes the full consideration and resolution of the appeal may constitute the inadequate assistance of counsel on appeal. (People v. Barton (1978) 21 Cal.3d 513.)

Normal Record On Appeal

- ☐ In criminal cases, Cal. Rules of Court, rule 33(a), provides that the clerk's transcript on appeal should contain:

  a. The notice of appeal, any certificate of probable cause executed and filed by the court, and any request for additional record and any order made pursuant thereto;

  2. The indictment, information, or accusation with any amendments;

  3. Any demurrer;

  4. Any motion for new trial, with supporting and opposing memoranda and affidavits;

5. All minutes of the court relating to the action;

6. The verdict;

7. The judgment or order appealed from and any abstract of judgment – commitment;

8. All written instructions given or refused indicating on each instruction the party requesting it;

9. All written communications, formal or informal, between the court and jury or any individual jurors;

10. Any written opinion of the court;

11. Any transcript of an electronic sound or sound-and-video recording that was provided to the jury or to the court under rule 203.5; and if the appeal is by the defendant,

12. Each written motion made by the defendant and denied in whole or in part, with supporting and opposing memoranda and related affidavits, search warrants and returns, and the transcript of any preliminary hearing or grand jury hearing related thereto;

13. The report of the probation officer; and

14. Any certified records of a court or of the Department of Corrections introduced in evidence to prove a prior conviction or prison term.

☐ In criminal cases, Cal. Rules of Court, rule 33(b), provides that the reporter's transcript on appeal should contain:

15. The oral proceedings taken on the trial of the cause, including motions in limine heard by the trial judge, jury instructions, and proceedings at the time of sentencing, granting of probation, or other dispositional hearing, but excluding the voir dire examination of jurors and opening statements;

16. The oral proceedings on the hearing of the motion for new trial, and on entry of any plea other than a plea of not guilty;

17. Any oral opinion of the court; and if the appeal is by the defendant,

18. The oral proceedings on any motion made by the defendant under section 1538.5 of the Penal Code and denied in whole or in part;

19. Closing arguments to the jury, comments on the evidence by the court before the jury, and all communications to and from the jury after instructions have been given whether or not denominated as questions or instructions.

☐ Transcripts of Marsden hearings are also part of the normal record on appeal in criminal and juvenile cases, but initially are made available only to appellant's counsel. (Cal. Rules of Court, rule 35.5(a).)

☐ The normal record on appeal in juvenile and termination of parental rights cases are specified in Cal. Rules of Court, rules 39(c) and 39.1A(c), respectively.

☐ Some of the district courts of appeal have added to the items to be included in the normal record on appeal by local rule. (See, e.g., First Appellate District, Local Rule 4.) Counsel should therefore always check the local rules of court for expanded normal record definitions.

Rule 35 Request for Missing "Normal Record" Items

☐ Upon receipt of the record, counsel should immediately review the clerk's transcript and compare it with the reporter's transcript to determine if they are complete and readable. In determining which missing items are "normal record" materials and which will require an augmentation motion, remember to consult the specific appellate district's *local rules*, as noted above, as well the statewide "normal record" definition (Cal. Rules of Court, rule 33 [summarized above]). All items falling with the "normal record" definitions–under either Rule 33 or the district's local rules–should be sought through a Rule 35 letter, not through a formal augmentation motion.

☐ A formal pleading or court order is not required for completing the normal record on appeal. (Cal. Rules of Court, rule 35(e).) If a part of it is missing or illegible, counsel should write a letter to the clerk of the trial court requesting that the missing items be certified and sent to the reviewing court. A copy of the letter should be sent to the court of appeal and to the appellate project.

☐ A Rule 35(e) request to complete the record does not automatically extend the time to file the opening brief. However, the delay caused by completing the record may provide grounds for an extension of time.

☐ Follow-up with a call to the superior court clerk if you do not receive any response within a few weeks of your Rule 35 letter. (In extreme situations, where the superior court fails to furnish the missing items despite persistent efforts by appellate counsel, it may be

necessary to seek intervention from the appellate court.)

Augmenting The Record On Appeal

- ☐ The normal record on appeal may be expanded by augmentation.

- ☐ Augmentation of the record, however, is generally limited to transcripts of proceedings held before, or materials on file or lodged with, the trial court. (People v. Jones (1997) 15 Cal.4th 119, 171 fn.17; People v. Brown (1993) 6 Cal.4th 322, 331-332; People v. Brooks (1980) 26 Cal.3d 471, 484.)

- ☐ As soon as practicable, appellate counsel should consult with trial counsel, as well as review the clerk's transcript, to determine whether materials beyond the normal record on appeal may be required. For example, a transcript of the voir dire examination is necessary to evaluate a potential jury selection issue (see, e.g., Batson v. Kentucky (1986) 476 U.S. 79; People v. Wheeler (1978) 22 Cal.3d 258), while a transcript of the opening statements is necessary to evaluate the viability of a potential misconduct issue arising during opening arguments (see, e.g., People v. Purvis (1963) 60 Cal.2d 323, 346; People v. Perez (1958) 58 Cal.2d 229; People v. Estrada (1998) 63 Cal.App.4th 1090).

- ☐ After the record is transmitted to the court of appeal, either party may move to augment it pursuant to Cal. Rules of Court, rules 12(a) and 33(b).

- ☐ When requesting an additional court reporter's transcript, the application to augment should specify why it may be useful to the appeal. (People v. Silva (1978) 20 Cal.3d 489; People v. Gaston (1978) 20 Cal.3d 476; People v. Landry (1996) 49 Cal.App.4th 785, 791-792.) In addition, it should also specify the date and nature of the proceedings and, if indicated in the clerk's minutes, the name of the court reporter and the department in which the proceedings were conducted.

- ☐ When requesting other materials which are not part of the normal record on appeal, the application to augment should specify the particular documents sought and how they may be useful to the appeal.

- ☐ Practice Pointers:

  Some districts require a greater showing of specificity and good cause for augmentation with the transcript of the voir dire examination. (See, e.g., First Appellate District, Local Rule 6(d); People v. Shambatuyev (1996) 50 Cal.

App.4th 267, 272-273.) Counsel should therefore always take care to make applications to augment the record as complete as possible.

The application for augmentation should be supported whenever possible by trial and/or appellate counsel's declaration establishing the material's content and its relevance to possible issues which might be raised on the appeal.

Certified copies of the requested material may be attached to the application to augment. If these documents were presented to the trial court and are part of the superior court file, counsel may ask the appellate court to take judicial notice of them. (People v. Hayes (1990) 52 Cal.3d 577, 611 fn. 3; People v. Preslie (1977) 70 Cal.App.3d 486, 494-495; Evid. Code, §§ 459, subd. (a) & 452, subd. (d).)

Some of the district courts of appeal have adopted local rules establishing presumptive deadlines for filing an application to augment the record, after which a showing of good cause for the delay is required. (See, e.g., First Appellate District, Local Rule 6 [30 days after record is filed or after expiration of 10-day administrator review]; Second Appellate District, Local Rule 2 [40 days after record filed]; Fifth Appellate District, Local Rule 2 [same].) Counsel should therefore file all augmentation requests as soon as possible.

Appellate counsel also should combine an application for an extension of time within which to file the opening brief with an application to augment the record.

Settling The Record On Appeal.

- ☐ Occasionally, the court reporter's notes of oral proceedings in the trial court cannot be transcribed because they were lost or destroyed. In other cases, unreported oral proceedings during a bench or chambers conference may also be relevant to potential appellate issues. In these circumstances, a settled statement pursuant to Cal. Rules of Court, rule 36(b), may provide an adequate substitute for a verbatim transcript.

- ☐ Although the language of Rule 36(b) appears limited to oral proceedings, the procedures for settling the record may also be used for missing documents and other materials.

- ☐ An application for permission to prepare a settled statement or to settle the settle the record should be filed as soon as counsel discovers the impossibility of obtaining a court reporter's transcript or other record. (Cal. Rules of Court, rule

36(b).) The application, which may be filed in either the trial or the appellate court, must be verified and contain a statement of the facts or the certificate of the superior court clerk that a court reporter's transcript or other record cannot be obtained. (Cal. Rules of Court, rules 4(e), 7, 36(b).)

☐ When the transcription of an unreported event is sought, the application should also demonstrate how the proceedings may be useful on the appeal. (People v. Gzikowski (1982) 32 Cal.3d 580, 584-585 fn. 2.)

☐ Unless the parties can agree on a settled statement, an application to settle the record filed in the court of appeal, if granted, will be remanded to the trial court for a settlement conference or evidentiary hearing at which the trial court and counsel attempt to reconstruct the proceedings based on their notes, memories, and other aids.

☐ Settlement of the record is primarily a question of fact to be resolved by the trial court. (People v. Clark (1993) 5 Cal.4th 950, 1011; People v. Hardy (1992) 2 Cal.4th 86, 183, fn. 30; People v. Beardslee (1991) 53 Cal.3d 68, 116.) A trial court has broad discretion to accept or reject counsel's representations in accordance with its assessment of their credibility once settlement is ordered. (Id., at 116; People v. Gzikowski (1982) 32 Cal.3d 580, 584-585, fn. 2.)

☐ Practice Pointers:

Appellate counsel should play an active role in settling the record. Unlike other parts of the record on appeal, which are basically "written in stone" because they are verbatim accounts of oral proceedings or copies of documents lodged in the trial court file, settling the record is an attempt to reconstruct past events or lost writings. Appellate counsel can use advocacy skills to shape how those facts are reconstructed and presented in the settled statement.

A good starting point is to discuss the missing record(s) with trial counsel to identify the particular facts which might be useful to the appeal. Appellate counsel can then draft a declaration for trial counsel, to be used as a basis for obtaining a stipulated settled statement in subsequent discussions with the prosecuting attorney and/or trial court.

Appellate counsel should attend any settlement conference or evidentiary hearing ordered in the event a stipulated settled statement cannot be reached.

Since a settled statement becomes part of the appellate record (People v. Williams (1988) 44 Cal.3d 883, 921-922), appellate counsel should move to correct the record if the settled statement ultimately prepared by the trial court includes improper matters. (See, e.g., People v. Hardy (1992) 2 Cal.4th 86, 183 fn. 30.)

Correcting The Record

- ☐ A certified court reporter's transcript is presumed to be accurate. (Code Civ. Proc., § 273; Evid. Code § 602.)

- ☐ Occasionally, however, the accuracy of the transcript may appear doubtful. In such a case, a party may move to correct the record pursuant to Cal. Rules of Court, rule 12(c) if a stipulated correction cannot be obtained.

- ☐ The party challenging the accuracy of a certified transcript must introduce evidence sufficient to rebut the presumption of accuracy. (People v. Kronemyer (1987) 189 Cal.3d 314, 356.)

Unsealing the Record

- ☐ Portions of the record on appeal may have been sealed by the trial court to protect the identity of jurors, informants, or other confidential materials.

- ☐ Counsel may request augmentation of the record on appeal with the sealed portions of the record pursuant to Cal. Rules of Court, rule 33.5(b).

- ☐ If made part of the record on appeal, the sealed transcripts or other documents will be transmitted to the court of appeal in sealed envelopes which, without further court order, can only be examined by a judge of the reviewing court personally. (Cal. Rules of Court, rule 33.5(b).)

- ☐ However, a party to whom the sealed information was accessible in the trial court shall be permitted to examine the materials. (Cal. Rules of Court, rule 33.5(b).) Consequently, an application to examine a sealed transcript or document may be predicated upon its accessibility to appellant during the trial.

- ☐ Transcripts of hearings upon a defendant's motion for substitution of counsel pursuant to People v. Marsden (1970) 2 Cal.3d 118 are sealed, but made available by rule to appellant's counsel. (Cal. Rules of Court, rule 33.5(a).) If appellant raises a Marsden issue in the opening brief, the People shall be sent a copy of

Marsden transcript(s) unless appellate counsel served and filed with the opening brief a notice that the transcript(s) contain confidential material not relevant to the points raised in the appeal; in this case, the People may move to obtain a copy of the relevant portions of the transcript(s). (Ibid.)

☐ Appellate counsel may also request the court of appeal to review sealed materials to determine whether they were properly sealed in the first instance (cf. Copley Press, Inc. v. Superior Court (1998) 63 Cal.App.4th 367 [writ of mandate issued directing trial court to unseal settlement decree; student plaintiff's interest in sealing the settlement did not outweigh the public right of access to court records] or whether a criminal appellant's right of reasonable access to information upon which to base an appeal outweighs the confidentiality interests involved (see, e.g., People v. Hobbs (1994) 7 Cal.4th 948 [public need to protect identities of confidential informants outweighs defendant's right of access to search warrant affidavit]).

Transmitting Exhibits And Physical Evidence To The Court Of Appeal.

☐ Exhibits and physical evidence are not part of the normal record on appeal. However, they may be transmitted to the court of appeal upon counsel's request, or the court's own motion, pursuant to Cal. Rules of Court, rules 33(a)(3), 33(b)(3), and 10(d).

☐ Consequently, counsel should review the trial exhibits when they are relevant to a potential appellate issue.

☐ Procedures for examining trial exhibits vary from county to county. Counsel should therefore consult with the exhibits clerk to make an appointment for these purposes.

☐ When notice that the case has been set for argument is received, counsel should file a notice with the superior court clerk specifying the original exhibit(s) to be transmitted to the court of appeal. (Cal. Rules of Court, rule 10(d).)

Reversal May Be Required When Significant Portions Of The Record Are Missing And An Adequate Substitute Is Unavailable.

☐ When, through no fault of appellant, the record on appeal is inadequate for meaningful appellate review, both section 1181, subdivision 9 of the Penal Code and the due process clauses of the federal and state constitutions may require

reversal of the conviction. (People v. Pinholster (1992) 1 Cal.4th 865, 921 [discussing Pen. Code, § 1181, subd. (9)]; Mayer v. Chicago (1971) 404 U.S. 189, 195 [due process]; March v. Municipal Court (1972) 7 Cal.3d 422, 427-428 [same]; People v. Serrato (1965) 238 Cal.App.2d 112, 119 [same]; United States v. Mohawk (9th Cir. 1994) 20 F.3d 1480, 1483-1485.)

☐ However, no presumption of prejudice arises from the absence of materials from the appellate record. (People v. Samoya (1997) 15 Cal.4th 795, 820; People v. Cummings (1993) 4 Cal.4th 1233, 1333-1334, fn. 70.)

☐ Appellant therefore bears the burden of demonstrating that the record is inadequate to permit meaningful appellate review. (People v. Arias (1996) 13 Cal.4th 92, 158; People v. Freeman (1994) 8 Cal.4th 450, 509; People v. Pinholster (1992) 1 Cal.4th 865, 921; People v. Holloway (1990) 50 Cal.3d 1098, 1116.)

☐ Appellant must also first attempt to settle the record for standing to invoke the retrial provision of Penal Code section 1181, subdivision 9. (People v. Moore (1988) 201 Cal.App.3d 51, 56.)

Judicial Notice

☐ Although as a general rule an appellate court will ordinarily look only to the record made in the trial court, it has the same power to take judicial notice of a matter as a trial court. (Evid. Code, § 459, subd.(a),(c).)

☐ Compulsory Notice: A court of appeal must take judicial notice of any matter properly noticed by the trial court and any matter that the trial court was required to take notice under Evidence Code sections 451. (Evid. Code, § 459, subd.(a).) It must also take judicial notice of an optional matter if the trial court erroneously denied a properly-made request for judicial notice under Evidence Code sections 452 and 453. (Evid. Code, § 459, subd.(a) and Comment.)

☐ Optional Notice: An appellate court may upon request take judicial notice of any matter specified in Evidence Code section 452 (e.g., the decisional, constitutional, or statutory law of any state, the records of any California court, federal court, or court of another state, facts and propositions that are of such common knowledge within the jurisdiction of the court that they cannot reasonably be the subject of dispute, and facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of

reasonably indisputable accuracy). (Evid. Code, § 459, subd.(a).)

- ☐ Before taking judicial notice of an optional matter not noticed by the trial court, and of substantial consequence to the determination of the case, an appellate court must afford each party the opportunity present information relevant to the propriety of taking judicial notice and the tenor of the matter to be noticed. (Evid. Code, § 459, subd.(c).)

- ☐ In criminal appeals, judicial notice is most commonly used for legislative history materials when a statute's meaning is uncertain and in dispute (see, e.g., People v. Cruz (1996) 13 Cal.4th 764) and to ascertain the law of another jurisdiction when a foreign conviction is used for enhancement purposes (see, e.g., People v. Bartow (1996) 46 Cal.App.4th 1573, 1582, citing In re Finley (1968) 68 Cal.2d 389, 392- 393). It is also sometimes used for records in the court files of related cases. (See, e.g., People v. Hardy (1992) 2 Cal.4th 86.)

- ☐ Practice Pointers:

  Although an appellate court may take judicial notice of the optional matters specified in Evidence Code section 452, it may decline to do so for other jurisprudential reasons.

  Appellate courts are reluctant to consider matters not presented to and considered by the trial court in the first instance because of the perceived unfairness that would flow from permitting one side to press an issue or theory on appeal that was not raised below. (People v. Cruz (1996) 13 Cal.4th 764, 134; People v. Meza (1984) 162 Cal.App.3d 25, 33; People v. Preslie (1977) 70 Cal.App.3d 486, 493.)

  Portions of materials, even though judicially noticed, may also be subject to other evidentiary objections, like hearsay. (See, e.g., In re David C. (1984) 152 Cal.3d 1189, 1205; People v. Rubio (1977) 71 Cal.3d 757.)
  For these reasons, habeas corpus may provide a better alternative to judicial notice for presenting issues based on materials not presented to or considered by the trial court.

Sample Materials **(Unavailable)**

A. Rule 35(e) letter, People v. Freeney, A088677

B. Application for Order Augmenting Record, People v. Foster, A084218

C. Application to Augment Record on Appeal and for Extension of Time, People v. King, A088996.

D. Verified Application to Settle the Record on Appeal, People v. Belton, A031468

E. Application to Settle the Record on Appeal, People v. Arnold, A085230

F. Appellants' Joint Motion to Unseal Transcripts and for Extension of Time, People v. Seales and Lankfordbyrd, A075669

G. Argument: The Loss of a Crucial Portion of the Suppression Hearing Transcript Deprives Appellant of his Right to Meaningful Appellate Review and Requires Reversal of His Conviction, from the opening brief in People v. Lewis, A073849.

H. Request for Judicial Notice, People v. Clifford C. (1997) 15 Cal.4th 1085