The trial lawyer as appellate lawyer

If you must handle an appeal yourself, we present a short list of pointers

By Jerry Clausen

If you've just won a seven-figure judgment and the defendant is appealing, my advice to you is this: hire an appellate specialist.

Not every appeal, however, justifies the expense of an appellate lawyer. Even if the plaintiff has won a substantial judgment, after accounting for fees, costs and liens there may not be enough left to support hiring a separate attorney to handle the appeal. Conversely, if the plaintiff has lost, the potential upside in the event of a reversal may not be enough to warrant the expense of appellate counsel no matter how meritorious the appeal. In these situations you, the trial counsel, may opt to handle the appeal yourself; this article is for you.

What follows is neither a primer on appellate procedure nor a how-to guide on brief-writing. Most trial attorneys already have some familiarity with the basics. Instead, what follows is a short list of pointers to help trial lawyers avoid potential pitfalls on appeal and assist them in facilitating and presenting the appeal.

Before you begin

• ***Understand the principles of appellate procedure.*** Like trials, appeals are subject to certain procedural ground rules. Under the so-called "presumption of correctness," all intendments and presumptions are indulged to support the judgment on matters as to which the record is silent, and error must be affirmatively shown. (E.g., *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

This rule obligates the appellant to provide an adequate appellate record, affirmatively demonstrating any alleged error. In the absence of such a record, the appellate court will imply any findings necessary to support the judgment (provided those findings are supported by substantial evidence). It also obligates the appellant to provide argument and legal authority for each point raised on appeal – and this is true even if review is *de novo* and even if no respondent's brief is filed. The failure to do so may result in a waiver of the point on appeal.

Taking the appeal

• ***Don't miss the deadline to appeal after a motion for new trial.*** Where the clerk or a party has served notice of entry of judgment, the deadline to file a notice of appeal is 60 days after such service. (Cal. Rules of Court, rule 8.104.) A timely and valid motion for new trial extends the deadline until 30 days after denial of the motion. (Cal. Rules of Court, rule 8.108.) But there's a potential trap here. If the judge fails to rule on the motion within 60 days after service of notice of entry of judgment, the motion is *deemed* denied by operation of law and the 30-day period to file the appeal is triggered. (Code Civ.Proc., § 660.) A written order issued by the judge after the 60-day period is a nullity. I personally know of two cases where the right to appeal was lost because the judge issued a written denial of the motion after it was already deemed denied and the would-be appellant measured the 30-day period from the date of the written denial.

Bottom line: Generally speaking, if you file a motion for new trial, the *latest possible date* for filing notice of appeal will be 90 days from the date notice of entry of judgment was served – and may be earlier if there's a timely order denying the motion.

• ***Appeal every appealable ruling you want reviewed.*** Failure to appeal from an appealable ruling results in a loss of the right to appeal. (See, e.g., Code Civ. Proc., § 906; *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 966, fn. 3.) There are basically three types of trial court rulings: final judgments, interlocutory judgments, and orders. Generally speaking, a final judgment is one that finally and completely adjudicates all of the rights of all the parties to the action, leaving nothing further to be done in the way of judicial action. (E.g., *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 962-963.) Not only is a final judgment appealable (Code Civ. Proc., § 904.1, subd. (a)), under the "one-final-judgment" rule an appeal generally can be taken only from the final judgment and not from an interlocutory judgment or order. (Code Civ.Proc., § 904.1, subd. (a)(1); *Kinoshita*, *supra*, 186 Cal.App.3d at pp. 962-963.)

There are, however, exceptions to this rule. One is a severable, partial adjudication that disposes of all issues as to one party in a multi-party case. (*Justus v. Atchinson* (1977) 19 Cal.3d 564, 567-568, overruled on other grounds in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159.) Thus, for example, a summary judgment entered in favor of one of a number of defendants is immediately appealable

even though the case continues as to the remaining defendants. In addition, certain orders after judgment are separately appealable – such as, for example, an order awarding attorney fees to a prevailing party or awarding expert witness fees under Code of Civil Procedure section 998.

The failure to appeal from an appealable ruling will generally result in a loss of the right to appeal that ruling or have it reviewed on an appeal from the final judgment. (See, e.g., Code Civ. Proc., § 906; *Kinoshita, supra*, 186 Cal.App.3d 959, 966, fn. 3.) You must therefore be sure to appeal each appealable ruling you wish to attack on appeal.

• Take a protective cross-appeal if you've won a post-judgment motion. You lost at trial, but then won a post-judgment motion for vacatur, for judgment n.o.v., or for a new trial. Your opponent has appealed the post-judgment order. You should cross-appeal from the original judgment to protect against a reversal of the favorable post-judgment ruling. Such a reversal will automatically reinstate the original judgment – which will not be subject to appellate review in the absence of a protective cross-appeal. (§ 3:169, p. 3-73.)

For example, suppose your post-judgment order complained of instructional error and exclusion of expert testimony. The judge agrees that the latter was prejudicial error and grants you a new trial, but the appellate court disagrees and reverses the new trial order. Unless you've filed a protective cross-appeal from the judgment, the appellate court will have no jurisdiction to review the instructional error.

Perfecting the record on appeal

Typically, the record on appeal will consist of one or more of the following: a record of documents filed or lodged in the trial court, a reporter's transcript of oral proceedings, and exhibits.

• Use an appendix, not a clerk's transcript. Content-wise, they are essentially the same thing. The advantage of an appendix is you file it with your brief. Consequently, you don't decide what to include until you've written the brief. In contrast, the appellant must designate the contents for a clerk's transcript within ten days of filing the notice of appeal. And if he later realizes he left something out, he must make a motion to augment the record. Such motions are usually granted, but who needs the added hassle of having to make one?

• Transmit relevant exhibits to the appellate court. Although all exhibits admitted into evidence, refused admission, or even simply lodged with the trial court are deemed to be part of the record on appeal, they are not automatically conveyed to the appellate court. (Cal. Rules of Court, rule 8.124(a)(3).) The easiest way to put relevant exhibits before the appellate court is to include them in the appendix. If that's not feasible (e.g., the exhibit is oversized, in digital format, etc.), then the appellant must, within 10 days after the respondent's brief is filed, file a notice under California Rules of Court, rule 8.224 designating the exhibits to be transmitted to the Court of Appeal. The notice is filed in the *superior court* and a copy is served on the appellate court.

Presenting the brief

• Understand – and apply – the standard of review. The standard of review has been called "the keystone of appellate decision making" (Pregerson, The Seven Sins of Appellate Brief Writing and Other Transgressions (1986) 34 UCLA L.Rev. 431, 437) and "the compass that guides the appellate court to its decision" (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018). Yet it is astonishing how often briefs on appeal pay only lip service to the applicable standard of review or indeed ignore it altogether.

There are four general standards of appellate review: substantial evidence, abuse of discretion, independent (or "*de novo*"), and presumption in favor of appellant. Under the last (presumption in favor of appellant), the appellate court views the evidence and/or pleadings in the light most favorable to the *appellant*. For example, on review of an order sustaining a demurrer the appellate court assumes the truth of all facts properly pleaded by the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

On any given appeal different standards of review may apply to different issues or different sub-issues. For example, an order denying a petition to compel arbitration may raise both the issue of whether the arbitration agreement is unconscionable and the issue of whether the moving party waived the right to arbitrate. In the absence of conflicting extrinsic evidence, the former would be subject to independent review; the latter would be subject to substantial evidence review. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶¶8:129.3, 8:129.5, pp. 8-93 – 8-94.) Similarly, on an appeal from a summary judgment the overall standard of review is *de novo*, meaning that the appellate court will determine independently whether a triable issue of fact exists. (*Id.*, ¶¶8:118, 8:165, pp. 8-81, 8-134.5 – 8:134.6.) But in making that determination the court must apply a standard that presumes in favor of the appellant – it must construe the moving papers strictly and the opposing papers liberally and draw all reasonable inferences in favor of the appellant. (*Id.*, ¶8:117, p. 8-81.)

Your brief should set forth the standard of review applicable to each issue and *apply* that standard in analyzing the issue.

• Understand and apply the standard of prejudice. An appellant must not only demonstrate error, he or she must further demonstrate that the error was *prejudicial* (except in those exceedingly rare circumstances where prejudice is presumed). The standard of prejudice most commonly applied in a civil case is whether, upon examination of the entire case, including the evidence, "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

(*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.) However, in some cases the courts have articulated specific factors to be considered in applying this standard to a particular issue. (E.g., *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1054 [five factors to be considered in determining whether improper instruction prejudicial].)

In my experience, one of the more common deficiencies in an opening brief is the failure to adequately argue prejudice. Demonstrating error is only half the job. You must also thoroughly research, analyze, and address the issue of prejudice.

•Never short-shrift the statement of facts.

Many years ago, so the story goes, an esteemed Los Angeles appellate attorney put out a standing offer to all of his opponents: rather than the appellant and respondent filing their own brief, he would agree to the filing of a joint brief. His only proviso was that he would be entitled to write the statement of facts.

Although the story is obviously apocryphal, that doesn't diminish the force of its teaching point: no matter what the issue on appeal, the statement of facts is commonly the most critical component of an appellate brief. Yet many attorneys seem to treat the statement of facts as little more than a bothersome predicate to the argument, spending most of their time on the latter and very little on the former. Usually that allocation of time should be reversed.

Before you begin the statement of facts, always read and digest the entire transcript, even if you tried the case – indeed, *especially* if you tried the case. A trial attorney brings to a trial a great deal of pre-knowledge (from depositions, consultations with witnesses, etc.) that can color not only the way he or she hears when it is given but also how he or she recalls it later on. On a cold transcript that same testimony may give rise to subtly but significantly different perception.

Write the facts with the standard of review in mind. If you're appealing from an adverse judgment, that usually means presenting the facts in the light most favorable to the prevailing party. Never try to "hide" relevant bad facts (by, for example, putting them in a footnote) and never simply omit them. That will only increase their negative impact when they eventually come out. Instead, begin the process of desensitizing the court to those facts by dragging them out into the light.

Make sure you present the facts fully and without bias. Having said that, however, remember that your goal is persuasion. A dry, academic recitation is rarely persuasive and usually boring. You mustn't omit, misrepresent, or exaggerate. But you can and should present the facts in a manner that forcefully and compellingly supports your client's position.

•Write a concise and focused reply brief. The purpose of a reply brief is to *rebut* arguments made by the respondent. Too often it goes beyond rebuttal, repeating (sometimes verbatim) arguments made in the opening brief.

The court will read the opening brief. The arguments made there will not become more persuasive merely because they are repeated in the reply brief. Instead, use the reply brief to sharpen the issues and rebut counterarguments made by the respondent. I've heard some appellate court research attorneys say they read the reply brief first in order to get a better sense of the issues that are truly in dispute. (They will no doubt read it again after they've read the other briefs in order to understand the reply arguments in context.) Help them in that process by focusing the reply brief on the disputed issues.

It is, of course, often necessary to summarize the opening brief arguments and the respondent's counterarguments in order to provide context for or otherwise set up your rebuttal. But try to do so briefly and cogently, citing to the locations in the opening and respondent's briefs where those arguments can be found in case the reader feels the need to review them. Alternatively, if you feel the respondent's argument was already adequately addressed in the opening brief, simply say that and cite to the applicable pages of the opening brief.

Do you have the time?

If you're going to handle the appeal yourself, make sure you can devote enough time to the task. Giving the appeal the time it deserves – and demands – will decrease the chance of making a (possibly critical) mistake, increase the odds of ultimately prevailing, and make the whole process much less stressful.

Clausen

Jerry Clausen is a plaintiff-side appellate lawyer specializing in tort, insurance, and employment law, with an emphasis in public entity liability law. He speaks and writes frequently on various tort and appellate law topics and is an author of California Government Tort Liability Practice *(published by CEB). He is a State Bar Certified Appellate Specialist. Visit him on the Web at clausenappeals.com and clausenblawg.com.*