How not to lose an appeal before it starts

Winning or losing on appeal depends on whether issues were properly raised and preserved in the trial court

By Jay-Allen Eisen

Appellate courts seldom reverse. In California, the reversal rate in civil cases is just under 20 percent. (Judicial Council of California, 2012 Court Statistics Report, p. 27.) In other words, the odds of winning an appeal in a civil case are 4 to 1 against appellant. As one appellate justice once drily commented, "People think that D.C.A. stands for District Court of Appeal. It doesn't. It stands for District Court of Affirmance."

Winning or losing on appeal depends on whether issues raised in the appeal were properly raised and preserved in the trial court. With few exceptions, an appellate court will not entertain issues that were not raised below.

Probably the best-known example is failure to object to inadmissible evidence. Evidence Code section 353 expressly prohibits reversal of a judgment based on erroneous admission of evidence unless there was a timely, specific objection to, motion to exclude, or motion to strike the evidence. An appellate court will not reverse based on inadmissible, even incompetent, evidence that was admitted without objection. (See, e.g., *In re S.C.* (2006) 138 Cal.App.4th 396, 420 (no objection to competency of developmentally disabled child witness with IQ of 44).)

But preserving error for appeal goes far beyond simply objecting to evidence. No matter how wrong other rulings or actions of the trial court may be, the error can be waived by failing to take the right action at the right time in the right way.

This article will point out some ways in which an otherwise winning appeal can be lost before it starts. Some are fine points, but success on appeal can depend entirely on them. And, if you should find yourself defending a judgment on appeal, this article may help you defeat even the strongest showing of trial court error.

Rule 1: Make an adequate record

The rule on appeal is almost absolute: "if it is not in the record, it did not happen. . . ." (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.) So, facts that do not appear in the record but are asserted in a brief must be disregarded. (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632.) Documents not in the record must, likewise, be ignored. (*Doers v. Golden Gate Bridge, Highway & Transp. Dist.* (1979) 23 Cal.3d 180, 184.)

This rule is particularly important to keep in mind when there are sidebar or in-chambers conferences without a court reporter. A conscientious judge may state on the record what happened in the conference. But don't rely on the judge to make your record for you. Appellate courts presume that trial courts do not err, and it is always appellant's burden to present a record that affirmatively shows error. (*Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1672, reh'g denied, review denied, cert denied, (2006) 547 U.S. 1018.) If the judge ruled against you in an unreported conference and does not announce his or her ruling on the record after the conference, state briefly on the record what happened – e.g., that the court sustained an objection, ruled evidence to prove a specific point inadmissible, and so forth.

There is an exception to the rule against considering matters not in the record for judicially noticeable facts and documents. Under Evidence Code section 459, an appellate court has the same power as a trial court to take judicial notice, and must take notice of matters as to which judicial notice is mandatory under Evidence Code section 451, even when those matters are not in the record. But if judicial notice is discretionary, absent "exceptional circumstances," the appellate court will not take notice of matters of which the trial court did not and was not asked to take notice. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.)

Rule 2: When the error is not reversible

"An appellate court will ordinarily not consider procedural defects or erroneous rulings in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method." (9 Witkin, Cal. Procedure 5th (2008), Appeal § 400; Eisenberg, Horvitz & Wiener, Cal. Pract. Guide: Civil Appeals and Writs (2012) § 8:266, ff.) Even a constitutional right may be forfeited by not asserting it timely and properly. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, reh'g denied, cert denied sub nom. *Saunders v. California* (1994) 501 U.S. 1131, 114 S.Ct. 1101.) "[I]t is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial." (*Doers*, 23

Cal.3d at 184-185, fn. 1 (Court's italics); *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1138.)

Corollaries of Rule 2: Estoppel, waiver and invited error

A party may not consent to a procedure, gambling on a favorable outcome and, if the judgment is unfavorable, complain on appeal that the procedure was erroneous or irregular. If the record does not show that appellant objected, the appellate court will hold that the error was waived. (*Pena v. Toney* (1979) 98 Cal.App.3d 534, 543.) If appellant's own conduct caused the court to err – such as by improperly excluding evidence on appellant's objection or giving an incorrect instruction at appellant's request – the doctrine of "invited error" will estop appellant from complaining of the error on appeal. (*Diamond Springs Lime Co. v. American River Constructors* (1971) 16 Cal.App.3d 581, 606.) A party may not "blow[ ] hot and cold with the judicial process," inducing the trial court to commit error, then asserting that same error to attack an adverse judgment. (*Ibid.*)

Now, here are some particular ways in which failing to take proper steps in the trial court can doom an appeal.

• ***Declarations***

Evidence in motion hearings is almost always presented by declarations or affidavits. The following rules apply to both. The first is that sufficiency of declarations is subject to the same rules of evidence as oral testimony. (*McLellan v. McLellan* (1972) 23 Cal.App.3d 343, 359.) Think of declarations as live testimony in writing: if the declarant could not make the statement over objection on the witness stand, it's not admissible in a declaration (unless you're lucky enough that opposing counsel fails to object).

A declarant must show that he or she is competent to make the statements in the declaration – i.e., has personal knowledge of the matters stated. (*Fisher v. Cheeseman* (1968) 260 Cal.App.3d 503, 506.) The pro forma incantation, "I have personal knowledge of the following facts and could testify competently thereto," is a bare conclusion and useless to satisfy this requirement. Note: "That which is required is not a sworn statement that the affiant would so testify, but a showing that he can competently do so." (*Ibid.*)

The rule is particularly important in summary judgment where Code of Civil Procedure section 437c(d) expressly requires that affidavits or declarations be made "on personal knowledge . . . and shall show affirmatively that the affiant is competent to testify to the matters stated. . . ." In *Fisher*, for example, plaintiff, assignee of a note, won summary judgment against defendant, the maker, for the allegedly unpaid balance. The motion was based on two affidavits. One was from the assignor, who swore that nothing was paid on the note after the assignment. The other was from an attorney who had employed plaintiff when the note was assigned to her; he also swore that no payments were made. The court of appeal reversed. The assignor's affidavit "does not *show* that she knows what may have happened after she assigned the note." (*Id.* at 506 (court's italics).) The attorney's affidavit suffered the same defect; it did not affirmatively show how he could competently testify as to payment or nonpayment. (*Ibid.*)

Declarations often contain statements on information and belief. They are not proof of facts. As a strong general rule, they "must be disregarded" and are "'unavailing for any purpose' whatsoever." (*Star Motor Imports v. Superior Court* (1979) 88 Cal.App.3d 201, 204; *Baustert v. Superior Court* (2009) 129 Cal.App.4th 1269, 1279, fn. 5.)

And a declaration containing only opinions, conclusions or ultimate facts is not substantial evidence. (*Fuller v. Goodyear Tire & Rubber Co.* (1970), 7 Cal.App.3d 690, 693.) Declarations are under penalty of perjury and, therefore, must state facts that, if false, could support a perjury charge. A statement of an opinion or conclusion does not suffice. (*Ibid.*)

• ***Summary judgment***

Appellate courts are split on whether every fact offered in support of or in opposition to a motion for summary judgment must be included in the separate statement of undisputed or disputed facts. *United Comm. Church v. Garcin* (1991) 231 Cal.App.3d 327, 337, states the strict view: "This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, *it does not exist*. Both the court and the opposing party are entitled to have all the facts upon which the moving party bases its motion plainly set forth in the separate statement." (Court's italics.)

Other courts follow "a rule composed of a baser metal," holding that the trial court has discretion whether to consider evidence not included in the separate statement. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 315-316.) These courts rely on Code of Civil Procedure section 437c(b), which states that the failure to comply with the requirement of a separate statement "'may *in the court's discretion* constitute a sufficient ground for denial of the motion.'" (*Ibid.* (Court's italics).)

The California Supreme Court has yet to resolve these conflicting holdings. Don't take the chance that, if your case is dismissed on summary judgment, the appellate court that hears your appeal is one that follows *Garcin* and, therefore, will not consider facts that are not in your separate statement, even though you stated them and cited the supporting evidence in your argument to the trial court. Even if your case goes to an appellate court that follows *San Diego Watercrafts*, if the trial court refused to consider facts that were not in your separate statement, the court of appeal may hold that the trial judge did not abuse his or her discretion in refusing to consider them and affirm the summary judgment.

Don't take these chances. If you assert a fact in your argument on summary judgment, be certain to include it, with citation to the supporting evidence, in your separate statement.

• ***Motions in limine***

A motion in limine to exclude evidence preserves an objection to the

evidence *only if* the motion satisfies three requirements: "(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." (*People v. Morris* (1991) 53 Cal.3d 152, 190 720.) If the motion does not satisfy all of those requirements and the court denies it, to preserve the issue for appeal the objection must be made again when the evidence is actually offered. (*Ibid*.)

A motion in limine can be insufficient to preserve error for appeal because it tries to be too comprehensive. For instance, in *Boeken*, defendant sought to exclude "any and all evidence that *might* relate to" evidence that defendant contended federal law preempted plaintiff from using. The motion was inadequate because it was not "directed to a particular identifiable body of evidence." (*Boeken*, 127 Cal.App.4th at 1675.)

And a motion in limine will not preserve an objection for appeal when it is not made "at a time when the trial court can determine the evidentiary question in its appropriate context." (*Morris*, 53 Cal.3d at 190; *Boeken*, 127 Cal.App.4th at 1675; *see also Karlsson v. Ford Motor Co*. (2006) 140 Cal.App.4th 1202, 1228, (motion to exclude evidence that did not then exist and was not referred to until close of trial 15 months later.)) This can be a problem because an in limine motion is typically made before the start of trial, so the court must rule on the evidentiary issue it raises more or less in the abstract, not truly in "its appropriate context" as *Morris* requires.

Furthermore, "[e]vents in the trial may change the context in which the evidence is offered to such an extent that a renewed objection is necessary to satisfy the language and purpose of [§ 353]." (*Morris*, at 190.) Consequently, an in limine ruling is, by its very nature, tentative "because the court retains discretion to make a different ruling as the evidence unfolds." (*People v.* Gonzalez (2006) 38 Cal.4th 932, 958, reh'g denied, cert. denied *sub nom Gonzalez v. California* (2007) 549 U.S. 1140, 127 S.Ct. 996.)

The Supreme Court advised in *Morris* that, to preserve an objection when an in limine motion to exclude evidence is denied, counsel should get a clear understanding on the record that it will not be necessary to object again when the evidence is proffered. *Id*., 53 Cal.3d at 190. Counsel can stipulate to the effect of the in limine ruling, or the trial judge can make it clear whether he or she wants to hear further objections or argument when the evidence is presented. (*Id*., 53 Cal.3d at 190.) If you can't reach a stipulation, or the trial judge leaves any doubt about the issue, don't take chances. Renew the objection when the evidence is offered.

• ***Objections to evidence***

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless "There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear *the specific ground* of the objection or motion. . . ." (Evid. Code, § 353(a) (emphasis added).) One occasionally hears the objection, "incompetent, irrelevant, and immaterial." This "general objection" waives any error in admitting the evidence; it "does not specify the particular defect" and, therefore, is "futile." (3 Witkin, Cal. Evidence 5th (2012), Presentation at Trial § 387 (Witkin, Presentation).) The same is true of any other non-specific objection. (*Ibid*.)

But even a specific objection may be insufficient to preserve error in admitting evidence. An objection preserves error only as to the ground specified in the objection. As Witkin puts it, "an objection that specifies the wrong ground is as bad as an insufficient general objection; i.e., urging of the one ground is a waiver of any others." (*Id*., § 390.) And, taking the next step, an objection on the wrong ground waives other grounds that may have been proper. "[A] party cannot be permitted to abandon the ground of objection taken below and assume another one upon appeal." (*Miller v. Anson-Smith Constr. Co*. (1960) 185 Cal.App.2d 161, 167, (hearsay objection waived lack of foundation); see also *SCI Cal. Funeral Svcs, Inc. v. Five Bridges Fdn*. (2012) 203 Cal.App.4th 549, 564-565.))

This rule is frequently applied when evidence is admitted over an objection to relevance, and appellant argues on appeal that it should have been excluded under Evidence Code section 352. "Since Evidence Code section 352 deals with the exercise of the judge's discretion to exclude evidence concededly relevant, a relevancy objection to proffered evidence is normally not construed as a request that he exercise his discretion to exclude relevant evidence." (*People v. Reid* (1982) 133 Cal.App.3d 354, 360-61.)

• ***Lack of foundation***

The bare objection, "lack of foundation," is often held to be a general objection and insufficient to preserve the issue for appeal. Evidence Code section 353(a) requires that an objection be "specific." So, unless the missing foundational fact is readily apparent, "'counsel must point out specifically in what respect the foundation is deficient.'" (*People v. Moore* (1970) 13 Cal.App.3d 424, 434 n. 8.) Neither the court nor opposing counsel has a duty to divine the reasons for the objection. They must be stated. (*Baron v. Sanger Motor Sales* (1967) 249 Cal.App.2d 846, 856.)

• ***Offers of proof***

Under Evidence Code section 354(a), failure to make a proper offer of proof when such an offer is required waives error in excluding evidence. (*Heiner v. Kmart Corp*. (2000) 84 Cal.App.4th 335, 344, reh'g denied, review denied.) Section 354(a) requires that an offer of proof include "[t]he substance" of the evidence counsel seeks to have admitted." To be valid, therefore, an offer of proof must state "the testimony of specific witnesses, writings, material objects, or other things presented to the senses, to be introduced

to prove the existence or nonexistence of a fact in issue." (*United Sav. & Loan Assn. v. Reeder Dev. Corp.* (1976) 57 Cal.App.3d 282.)

Too often, an offer of proof is inadequate because it describes facts counsel intends to prove, not the evidence being offered to prove them. That does not comply with section 354(a) "since *facts* do not constitute *evidence*." (*Ibid*.)

An example is *Semsch v. Henry Mayo Newhall Mem'l Hosp*. (1985) 171 Cal.App.3d 162, 168. Plaintiff alleged that nursing malpractice at the defendant hospital left her so disabled that she was discharged from her job as a medical assistant at another hospital for excess absenteeism and inability to perform her duties. The defense wanted to prove she was actually fired for wrongdoing. Defense counsel made the following offer of proof: "I will expect to prove, if not through the testimony of this witness [plaintiff], through the testimony of [her supervisor], that she was fired for diverting drugs." (*Id*. at 167.)

The court of appeal affirmed judgment for plaintiff. The rejected defendant's argument [was] that the trial judge erred in excluding the evidence. The offer of proof, the court held, was "quite deficient" to preserve the error for appeal as it did not include "the precise testimony" the witnesses would offer. (*Ibid*.)

To put it another way, an offer of proof must state what the evidence *is*, not what it is *about*.

• ***Jury instructions***

In *Lynch v. Birdwell* (1955) 44 Cal.2d 839, defendant asserted instructional error on appeal. The California Supreme Court agreed that the instructions contained "egregious errors," but still affirmed. (*Id*. at 847.) The record did not show which party requested the instructions. Since it is never presumed that the trial court erred, the court had to presume that defendant requested the instructions and, therefore, under the doctrine of invited error, could not complain. (*Ibid*.)

Moral: Be certain that the record shows the source of every instruction – i.e., which party proposed it or whether it was the court's own instruction.

And, be sure the record shows why an instruction you requested was not given. If the record does not show the trial court refused it, the appellate court must presume you withdrew it. (*Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 312.)

• ***Statement of decision***

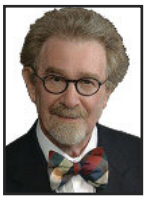
Code of Civil Procedure section 632 and California Rules of Court, rule 3.1590 set out the procedure for requesting a statement of decision. If a statement of decision is timely and properly requested, the trial court's failure to render a statement of decision is reversible error. (*Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1530, reh'g denied.) But appellate courts seldom reverse for failure to render a statement of decision. The chief reason is that the request for statement of decision was improper.

A party may request a statement of decision "to address the principal controverted issues," which "must be specified in the request." (Cal. Rules of Court, rule 3.1590(d). So, merely stating, "We request a statement of decision" isn't enough.

But the court must address only the "*principal* controverted issues" – the "ultimate" issues, "those on which the outcome of the case turns" and "determine the case. . . ." (*People v. Casa Blanca Convalescent Homes, Inc*. (1984) 159 Cal.App.3d 509, 524; *Vukovich v. Radulovich* (1991) 235 Cal.App.3d 281, 295.) A party may not conduct an "interrogation" of the judge by asking for detailed evidentiary findings on such matters as the weight or credibility the court gave particular evidence and the reasons why, particularly when the requests are in the form of questions to the court – e.g., "Why did the court not believe witness X? "Why did the court not find Exhibit A sufficient to establish that. . . ?" (*Casa Blanca Convalescent Homes*, 159 Cal.App.3d at 524.)

On the other hand, if the trial court does not address all of the principal issues on which a statement of decision is requested, the omission must be brought to the trial court's attention or the defect is waived. (*Arceneaux*, 51 Cal.3d at 1134.) "[I]t would be unfair to allow counsel to lull the trial court and opposing counsel into believing the statement of decision was acceptable, and thereafter to take advantage of an error on appeal although it could have been corrected at trial." (*Id*. at 1138.) If appellant does not point out to the trial court that the statement of decision fails to address one or more issues, the appellate court will treat the case as if a statement of decision was not requested as to those issues and, under the doctrine of implied findings, imply that the trial court found against appellant on those points. (*Ibid*.)

These are not all the ways in which trial court error can be waived by failure to take the proper steps to preserve the issue for appeal. Far from it. They are types of errors where the requirements to preserve error on appeal are often overlooked or misunderstood, and the result is that an appeal that should be a winner becomes a dead-bang loser.



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