

Appellate Game Is More Like Playing Chess Than Poker

By Barry M. Wolf

Trial and appellate law bear roughly the same resemblance to each other as baseball and cricket.

They seem related, and certain skills are similar, but each is a different game, played with different rules in a different ball park.

Here are 10 tips for trial lawyers with little or no appellate experience who are handling a civil appeal in a California state court:

■ **Don't miss the deadline for filing a notice of appeal or cross-appeal.** "The timely filing of a notice of appeal or cross-appeal is jurisdictional." *Gulf Ins. Co. v. TIG Ins. Co.*, 86 Cal.App.4th 422 (2001). Several potentially applicable time limits are set forth in Rules 2 and 3 of the California Rules of Court.

Determining the correct time limit is crucial, because the failure to timely file the notice of appeal or cross-appeal cannot be corrected. Rule of Court 45(e).

Therefore, missing the deadline for filing the notice of appeal or cross-appeal dooms the appeal or cross-appeal.

Don't make this mistake. If you do, get ready to notify your malpractice carrier.

■ **Appeal does not automatically stay execution on a money judgment.** If a money judgment has been entered against your client, filing a notice of appeal generally does not automatically stay execution of the judgment. Code of Civil Procedure Section 917.1(a)(1).

To prevent execution, the client typically will have to provide "an undertaking," which can be a bond or certain other types of security. See generally Code of Civil Procedure Sections 917.1, 995.210, 995.710.

However, the judgment creditor can agree in writing to waive the

undertaking and might do so in order to avoid potential liability for the premium of a surety bond or any other costs of securing that bond if the appeal succeeds. See Code of Civil Procedure Sections 995.230, 995.250; Rule of Court 26(c)(5), (6).

■ **Make sure the Court of Appeal gets the record.** The Superior Court will not transmit the record to the Court of Appeal sua sponte. Several different procedures can be used to provide a record to the Court of Appeal. See Rules of Court 4 to 7.

Typically, the appellant begins the process by designating the reporter's and clerk's transcripts. Rules of Court 4, 5.

The respondent then has an opportunity to designate additional proceedings. Rules of Court 4(a)(2), 5(a)(3).

The parties can prepare an appendix containing the relevant documents in lieu of the clerk's transcript. Rule of Court 5.1. In rare cases, the parties will use an "agreed statement" or a "settled statement" instead of the reporter's or clerk's transcripts. Rules of Court 6, 7.

■ **Include in the record only materials relevant to potential appellate issues.** The reporter's transcript can include all oral proceedings, not just testimony.

Therefore, you should designate pre-trial hearings on motions in limine and other matters, opening statements, closing statements, voir dire or post-trial motions, if relevant to a potential appellate issue.

Do not designate material in the reporter's or clerk's transcript if it cannot conceivably relate to an appellate issue, for example, pre-trial motions to compel discovery when the only issue on appeal will be alleged juror misconduct.

Note, however, that some docu-

ments must be made part of the record. Rules of Court 5(b), 5.1(b).

Remember also that relevant evidence might include material unfavorable to your position, such as adverse witness testimony when your appeal is based on the theory that substantial evidence does not support the judgment.

■ **Respondents: Look for a fast exit.** If you represent a respondent or cross-respondent, the first thing you should do after receiving a notice of appeal is determine whether the appeal has been taken

on other grounds. See, for example, *People v. Kings Point Corp.*, 188 Cal.App.3d 544 (1986) (standing); *Rancho Solano Master Ass'n v. Amos & Andrews Inc.*, 97 Cal.App.4th 681 (2002) (mootness).

■ **Appellants: Look for issues that have the most favorable standard of review.** Perhaps the factor that most affects an appellant's chances of success is the standard of review applying to the issues raised on appeal.

Just as walking uphill can make a journey more difficult, the standard

84 Cal.App.4th 208 (2000). Look for potential issues on which the standard of review is as favorable as possible and try to avoid basing your appeal solely on a lack of substantial evidence.

■ **Not all error results in a judgment being reversed.** Even if a court concludes that error has occurred, the judgment will not be reversed unless "there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached." *Soule v. General Motors Corp.*, 8 Cal.4th 548, 574 (1994).

Appellants must show that an error was made and that there was a reasonable probability that the outcome would have been favorable to them if not for that error.

Respondents should consider two lines of defense on any issue the appellant raises: Was error committed?

If so, was that error serious enough to warrant the case being reversed?

■ **You're playing chess, not poker.** Both players in a chess game see the entire board, so deception cannot be based on withholding information. In poker, the players cannot see all of each other's cards, so bluffing is a useful tactic.

In this respect, an appeal is far more like chess than poker. All parties and the court have access to the record, which, along with any judicially noticeable material, supplies the factual basis for the court's opinion. See *County of Inyo v. Jeff*, 227 Cal.App.3d 487 (1991); *Doers v. Golden Gate Bridge, Highway & Transp. Dist.*, 23 Cal.3d 180 (1979).

Omitting a relevant fact from your brief generally backfires, either because your opponent will cite the fact or because the judges

or their research attorneys will spot the omission and start wondering what else you have left out.

For similar reasons, ignoring an adverse California decision with highly analogous facts is about as effective as an ostrich putting its head in the sand in the hope that a predator won't notice the rest of it.

■ **Briefs are significantly more important than oral argument.** Written advocacy is far more important than oral advocacy in appellate practice.

This should not be surprising, because oral argument is held after the briefs have been filed and is very restricted in length.

It is probably not an exaggeration to say that oral argument is rarely significant except in close cases.

Therefore, put the great bulk of your time and effort into researching and writing your briefs. Do not attempt to "sandbag" by raising a contention for the first time at oral argument; you almost certainly will be given a very chilly reception by the court.

Finally, remember that you are not in front of a jury that can be swayed by emotional appeals.

■ **Don't be afraid to seek assistance.** The Rutter Group's "California Practice Guide: Civil Appeals and Writs" provides a useful overview of the appellate process and is often the quickest way to find an answer to basic questions.

Other attorneys in your firm may have had some appellate experience.

And, of course, you always could attempt to persuade the client — or the responsible partner — to hire or at least consult an appellate practitioner. However, that's a subject for another article.



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from an appealable judgment or order and whether the jurisdictional deadline for filing the notice of appeal has been met.

Appeals from nonappealable judgments or orders must be dismissed unless the Court of Appeal chooses to treat the matter as a writ petition. *Doran v. Magan*, 76 Cal.App.4th 1287 (1999). An untimely appeal must also be dismissed. *Gulf Ins. Co. v. TIG Ins. Co.*, 86 Cal.App.4th 422.

Dismissal motions on these grounds can be made even before the record is filed and can end the case at very little cost to the client. A motion to dismiss also can be based

of review can make an appeal harder to win.

An appellant climbs a steep hill by arguing that judgment should be reversed because substantial evidence does not support the verdict, because the respondent gets the benefit of all reasonable inferences and evidentiary conflicts are resolved in the respondent's favor. *Thompson v. Tracor Flight Systems Inc.*, 86 Cal.App.4th 1156 (2001).

In contrast, an appellant is walking on level ground when contending that the judgment should be reversed because the trial court misinterpreted a statute, since the Court of Appeal reviews such questions de novo. *Harustak v. Wilkins*,

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