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The Importance of Privately Arranged Court Reporting to Making a Record for Appeal

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By Orly Degani

The California Supreme Court recently granted review in a case involving a local policy of the San Diego Superior Court that "[o]fficial court reporters are not normally available in civil, family, or probate matters," and "[p]arties, including those with fee waivers, are responsible for all fees and costs related to court reporter services" that the parties arrange privately. (*Jameson v. Desta* (2015) 241 Cal.App.4th 491, review granted and opinion superseded (2016) 197 Cal.Rptr.3d 522 (*Jameson*).)

In the wake of California's financial troubles and resulting steep cuts to judicial branch funding, similar policies have been adopted by other superior courts in counties throughout the state, including Los Angeles, San Francisco, Alameda, Fresno, Kern, and Ventura, among others.

NO REPORTER'S TRANSCRIPT OFTEN MEANS NO APPEAL

These widespread superior court policies, putting the onus on litigants to arrange and pay for court reporter services in civil cases, have serious ramifications for civil appeals. For appeals, there are "three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two." (*Protect Our Water v. County of Merced* (2003) 110 Cal. App. 4th 362, 364.)

Without a court reporter's transcript of the oral proceedings that occurred in the trial court, it is extremely difficult if not impossible in many cases to prepare an adequate record for appeal, and an inadequate record may be fatal to an appeal. (See *Foust v. San Jose Constr. Co.* (2011) 198 Cal. App. 4th 181, 185-86 ["In numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided."].)

For example, an appellant cannot challenge the sufficiency of the evidence to support a judgment, or raise any other evidentiary issues, when there is no transcript of the oral proceedings. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) Similarly, the absence of a transcript precludes a determination that the trial court abused its discretion. (*Wagner v. Wagner* (2008) 162 Cal. App.4th 249, 259; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448.) In these situations, the appellate court will presume that the missing transcript would have revealed a sufficient basis for the trial court's judgment or ruling.

This follows from the cardinal rule of appellate review that a trial court judgment or order is always presumed correct and the appellant bears the burden of overcoming this presumption by affirmatively showing error. (*Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1140-1141.) Not only is this rule "a general principle of appellate practice," it also is "an ingredient of the constitutional doctrine of reversible error." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, internal quotations and citation omitted.) "A necessary corollary to this rule is that a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed." (*Osgood v. Landon* (2005) 127 Cal. App.4th 425, 435, internal quotations and brackets omitted.)

THE *JAMESON* DECISION

In *Jameson*, for example, appellant Jameson, an indigent prisoner prosecuting a civil action, *pro se*, for alleged negligent medical treatment provided to him during his incarceration, appealed from a nonsuit judgment entered against him at the conclusion of his opening statement, based on the trial court's conclusion that he could not establish causation. (*Jameson,* 241 Cal.App.4th at pp. 494, 504-505.) On appeal, Jameson raised several claims of error related to the trial court's decision, including the court's refusal to permit him to establish causation through his own expert's deposition testimony, or by relying on the defendant's expert or the doctrine of *res ipsa loquitur*. (*Id.*, at pp. 504-505.)

The Court of Appeal declined to reach the merits of any of Jameson's arguments, finding that "none of [them] is cognizable in the absence of a reporter's transcript." (*Jameson,* 241 Cal.App.4th at p. 505.) The court reasoned that "[b]ecause an order granting a nonsuit is dependent on a review of the evidence to be presented at trial, an appellant cannot obtain reversal of such order in the absence of a reporter's transcript." (*Id.*, at p. 504.)

"CIVIL JUSTICE IS NOT FREE"

The appellate court in *Jameson* recognized that, as an indigent prisoner, Jameson was unable to pay the appearance fee for a private court reporter and thus could not obtain a transcript of the trial proceedings. (*Jameson, supra*, 241 Cal.App.4th at p. 504.) But the court considered Jameson's "financial circumstances" no excuse for failing to provide an adequate record on appeal. (*Id.* at p. 495 ["While this court is sympathetic to the plight of litigants like Jameson whose incarceration and/or financial circumstances present such challenges, the rules of appellate procedure and substantive law mandate that we affirm the judgment in this case."].) As the Court of Appeal bluntly put it, "civil justice is not free." (*Ibid.*)

When the Supreme Court decides *Jameson*, its decision likely will address superior court policies requiring civil litigants to pay for court reporters' attendance at trial court proceedings only as those policies apply to indigents. But the problem is far more widespread, affecting not only the poor but also many middle-income Americans.

It has been well documented that litigants of average means face difficulty affording lawyers' fees and regular litigation costs, let alone the added cost of court reporter appearance fees. "For decades, bar studies have consistently estimated that more than four-fifths of the individual legal needs of the poor and a majority of the needs of middle-income Americans remain unmet." (Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research* (2013) 62J. Legal Educ. 531, 531-532.) "It is not only low-income communities that are priced out of the current civil justice system. Millions of moderate-income Americans suffer untold misery because legal protections that are available in principle are inaccessible in practice." (Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice* (2004), 17 Geo. J. Legal Ethics 369, 372.)

Given the costs involved, lawyers representing clients with limited resources have been and likely will continue to be tempted to forego arranging privately for court reporters to attend trial or motion proceedings where official reporters are not otherwise available. But *Jameson* should put every

trial practitioner on notice that opting not to have trial court proceedings recorded by a court reporter could preclude any hope of success on appeal for a client who loses at trial.

BEST PRACTICE: BRING YOUR OWN COURT REPORTER

Given the potentially devastating consequences of not having a reporter's transcript available for a possible appeal, the best practice is to arrange privately for a court reporter's attendance at all trials and hearings, at least on dispositive issues. When making arrangements for a court reporter, it is worth considering the following:

- Policies on the availability of court reporters vary between counties. Even within a single county, court reporters may be available in some departments but not others, or only on certain days or during certain hours. Counsel should call the particular court in which counsel is appearing to verify whether arrangements will need to be made for a private court reporter.

- Courts generally will not allow more than one court reporter to transcribe a proceeding. Counsel for all parties should coordinate so that only one court reporter appears at the trial or hearing, and the reporter's appearance fee thus also can be shared.

- Unless a private court reporter hired by counsel is on the court's approved list, the trial court will have to appoint the reporter as an official court reporter *pro tempore*. A directory listing court-approved reporters is usually available on the superior court's webpage in each county.

- If possible, counsel should request that the court reporter consecutively paginate all trial court proceedings, so that it will not be necessary to pay to repaginate the transcripts for appeal. Certified original trial transcripts can be lodged with the Court of Appeal as part of the record on appeal only if the transcripts are consecutively paginated.

THE AGREED STATEMENT AND SETTLED STATEMENT ALTERNATIVES

If paying for a private court reporter is absolutely not an option for a client, and a trial transcript is therefore not available for an appeal, the Rules of Court provide two alternatives – a "settled statement" or an "agreed statement." (Cal. Rules of Court, rules 8.134, 8.137.)

A settled statement is a "condensed narrative of the oral proceedings that the appellant believes necessary for the appeal." (Cal. Rules of Court, rule 8.137(b)(1).) The appellant files a proposed statement, the respondent has an opportunity to file proposed amendments, and the superior court then approves the final "settled statement." (*Id.*, rule 8.137(b) & (c).)

An "agreed statement" also is a narrative summary of the oral trial court proceedings. (Cal. Rules of Court, rule 8.134.) It differs from a settled statement in that it is prepared by agreement of the parties instead of through appellants' proposal, respondent's counterproposal, and settlement by the court.

Both the settled statement and agreed statement options should be used only as a last resort, because neither is ideal. Both were designed for use only rarely and in unusual circumstances, such as when a court reporter unexpectedly passes away before completing a transcription. The procedures for obtaining either a settled statement or agreed statement can be complicated and time-consuming, and they may end up costing as much if not more than the appearance fee for a court reporter. Because the procedures are not used frequently, trial courts and trial lawyers typically are not familiar with them and the time restrictions they impose. Even if properly prepared, a settled or agreed statement may not be a sufficient substitute for a reporter's transcript, and sometimes neither type of statement can be obtained at all. It is advisable to seek the assistance of appellate counsel when a settled or agreed statement is required.

Better yet, bring your own court reporter, despite the hassle and expense, and preserve the record properly for appeal.