Reprinted with Permission by The Daily Recorder

What To Do When You Can't Get a Reporter's Transcript

In the California courts, a court reporter is not automatically provided to transcribe hearings or trials in most non-criminal cases. Usually the parties must arrange for a court reporter ahead of time and pay for his or her services to be present at the proceedings. If these arrangements are not made, then the proceedings will not be transcribed and thus, a reporter's transcript will not be available on appeal. This article discusses some options when pursuing an appeal where transcripts of the proceedings are not available.

Do you really need a transcript?

The first thing to consider is whether a transcript is needed at all. In some appeals, a transcript is unnecessary. For example, a transcript is not always needed in a summary judgment appeal, because the issues on appeal are essentially legal: were there triable issues of material fact and is the moving party entitled to judgment as a matter of law? Those questions are determined based on the documents submitted in support of and in opposition to the summary judgment motion. However, if evidentiary objections were made orally at the hearing, a transcript might be needed to establish that those objections were preserved and not waived. In short, the appellant must carefully consider the arguments to be presented on appeal and whether a transcript of the oral proceedings is needed to support those arguments. If the issues on appeal concern the sufficiency of evidence presented at trial, or other factual issues, a transcript is probably needed; if the issues are purely legal and can be determined by reviewing the documents in the record, then a transcript is probably unnecessary.

Alternatives to a transcript: agreed and settled statements

If a transcript is required to make certain arguments on appeal, but it is not available, there are some other options to consider. Rules 8.134 and 8.137 of the California Rules of Court permit parties to present a summary of the oral proceedings by using an "agreed statement" or a "settled statement" if a transcript is unavailable. Note that an agreed or settled statement may be used in lieu of a clerk's transcript as well.

An agreed statement is one where the parties jointly present a summary of the proceedings. A settled statement is one that is approved by the trial court. So, the main difference between these two alternatives is whether the parties agree to the statement or whether the trial judge issues the statement.

On appeal, the presumption of completeness (see California Rule of Court 8.163) applies to a settled or agreed statement. *See Kovacik v. Reed*, 49 Cal.2d 166, 170 (1957). Therefore, the appellate court is bound to assume that the settled or agreed statement contains enough

information to determine whether there was reversible error. *People v. Bond*, 231 Cal.App.2d 435, 437 (1964).

Rule 8.134 governs agreed statements. Under that rule, the appellant must file with the designation of record required under Rule 8.121 an agreed statement or a stipulation that the parties are attempting to agree on a statement. The designation and agreed statement or stipulation is filed in the trial court, not the appellate court. If a stipulation is filed, then the agreed statement must be filed within 40 days after filing the notice of appeal. (Note that in the Third District, the appeal is stayed until the court decides whether to send the case to mediation; the time to file the designation and an agreed statement does not occur until after that period.)

An agreed statement "must explain the nature of the action, the basis of the reviewing court's jurisdiction, and how the superior court decided the points to be raised on appeal." Cal. Rules of Court, Rule 8.134(a)(1). "The statement should recite only those facts needed to decide the appeal and must be signed by the parties." *Id.* If the parties are unable to agree, then the appellant must file a new designation of record under Rule 8.121 within 50 days after filing the notice of appeal. The appellant can try the settled statement procedure instead after attempting an agreed statement if the parties cannot agree.

Rule 8.137 provides the settled statement procedure. First, the appellant must file a motion to use a settled statement in the superior court along with the designation of record. The appellant must show that a "substantial cost saving will result and the statement can be settled without significantly burdening opposing parties or the court;" the proceedings "were not reported or cannot be transcribed;" or "the appellant is unable to pay for a reporter's transcript and funds are not available from the Transcript Reimbursement Fund...." Cal. Rules of Court, Rule 8.137(a)(2). The moving party should also show that the subject matter of the settled statement is part of the proceedings and that the materials may be useful on appeal. *See People v. Gzikowski*, 32 Cal.3d 580, 586 (1982).

If the trial court court denies the motion for a settled statement, the appellant must file a new designation of record within 10 days. Trial court judges may not arbitrarily refuse to settle a statement unless there is some justification to do so. *See Eisenberg v. Superior Court*, 142 Cal.App.2d 12 (1956). Writ relief is available where the judge has arbitrarily refused to allow a settled statement. *Id.*

If the trial court grants the motion, the appellant must file and serve a "condensed narrative of the oral proceedings that the appellant believes necessary for the appeal." Cal. Rules of Court, Rule 8.134 (b)(1). If the narrative "describes less than all the testimony, the appellant must state the points to be raised on appeal; the appeal is then limited to those points unless, on motion, the reviewing court permits otherwise." *Id.*, subd. (b)(2). The respondent has 20 days after the proposed settled statement is filed to file and serve proposed amendments.

The superior court will then schedule a hearing for the trial judge to settle the statement no later than 10 days after the respondent files proposed amendments or the time to do so expires. The clerk must provide at least 5 days' notice of the hearing. At the hearing, the trial judge will "settle the statement" and that statement will serve as a substitute for the reporter's transcript on appeal. The appellant will be directed to prepare, file and serve the settled statement. The respondent may file objections within 5 days.

Some practical tips

If a transcript is unavailable for all or part of a proceeding, see if the hearing was audio recorded. A transcription of an audio-recorded hearing can be very useful to ensure an accurate settled or agreed statement of the case.

Otherwise, when using an agreed or settled statement, it is crucial to start the process early. Trial counsel and parties should review their notes and write down their recollection of what occurred at trial as soon as possible, since memories can fade over time. Also make sure that the trial judge will be available if using a settled statement. Judges may retire or otherwise be unavailable, and if the parties cannot agree about what occurred at the trial, the trial judge is the only one who can settle the statement.

Finally, note that the settled and agreed statement procedures are used rarely. You may need to educate the court clerk about the process. Take a copy of the rule with you and make sure the court is aware of the procedures.

In sum, when pursuing an appeal where an official reporter's transcript is not available, all is not lost. A reporter's transcript may be unnecessary if the appeal focuses on legal issues that can be decided based on the other documents in the record. If it is important for the appellate court to review testimony or other information that occurred in oral proceedings, then consider using an agreed or settled statement instead.

C. Athena Roussos is an attorney in Elk Grove, California. She is certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Roussos can be reached at (916) 670-7901 or athena@athenaroussoslaw.com.

Peg Carew Toledo contributed to this article. Toledo is a partner at Mennemeier, Glassman & Stroud LLP, a Sacramento civil litigation boutique. She is also certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Toledo can be reached at (916) 551-2592 or toledo@mgslaw.com.