BY WESLEY SHIH

# Civil Appellate Considerations in State Trial Court

**WHILE FILING AN APPEAL PRESENTS NEW** procedural and financial hurdles for attorneys and their clients, the appellate process actually begins in the trial court. If a potential appellate issue is not preserved on the record, it cannot be appealed, no matter how dispositive.

The failure to preserve an issue most often happens in one of two ways. First, when making evidentiary objections at trial, it is not enough to simply object or make the common foundational, argumentative, or cumulative objections. If there is a genuine evidentiary issue with a question, statement, or exhibit, the proper objection (for example, hearsay, relevance, or Evidence Code Section 352) must be made at the time of the objection, or that ground for exclusion is not preserved.

Second, during trials, attorneys and judges frequently have sidebar discussions and conferences in chambers. If an attorney anticipates that an issue for appeal will arise during one of these encounters, the attorney should request the the court reporter and get the discussion recorded as it occurs. If the judge keeps the discussion off the record, the attorney should make a record of the issue at the earliest possible convenience of the court—for example, after the jury is dismissed for its next recess.

Once judgment is entered, the appellate process accelerates. A judgment can be executed on immediately—a plaintiff can begin serving abstracts of judgment and writs of execution on a defendant's assets. The only way to avoid this is to obtain a stay of execution of the judgment. (For more on this topic, see "The Discretionary Stay against Enforcement of a Judgment" by David J. Cook on page 10.) The parties may stipulate to one or, on motion, the court may order one. A stay provides breathing room and engenders goodwill, which can be beneficial for resolving postjudgment issues or facilitating settlement discussions. When the defendant is a business or corporation, it will typically have insurance or sufficient assets to satisfy a judgment, so a plaintiff loses little in agreeing to a stay.

The most important filing for an appeal is the notice of appeal. The notice is filed with the trial court and lists what is being appealed, which typically is the final judgment. Subject to a few exceptions—such as the ability to decide motions for new trial and for costs—a notice of appeal divests the trial court of jurisdiction and vests it in the appellate court. Because it is a jurisdictional prerequisite, a notice of appeal must be filed timely. There are no extensions or relief for mistake. An untimely appeal will be dismissed.

The notice of appeal must be filed by the earliest of three potential deadlines: 1) 60 days after the party filing the notice of appeal serves or is served with notice of entry of judgment, 2) 60 days after the court clerk serves the party filing the notice of appeal with notice of entry of judgment, or 3) 180 days after entry of judgment. The clock does not start to run when the notice of entry of judgment is filed.

After the notice of appeal, the last part of starting the appellate process is the designation of the appellate record, which is filed with the trial court within 10 days of filing the notice of appeal. The burden is on the appellant to provide the appellate court with the information necessary for the appeal. Because error is never presumed on appeal, counsel for the appellant must provide an adequate record to overcome that presumption. The record must also be complete. Designating a partial record that fails to present the trial proceedings on which the trial court could be affirmed is grounds for a ruling against the appellant.

An appellate record consists of two parts, both of which must be identified in the record designation. The first is copies of the relevant trial court documents, and the second is a record of the oral proceedings.

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For the documents, counsel for the appellant can choose to provide the copies by designating the use of an appendix; alternatively, counsel can request the trial court clerk to compile them by designating the use of a clerk's transcript. For the latter, counsel must list the specific documents for inclusion; the clerk will only compile the listed documents. Counsel will also have to deposit funds with the trial court clerk.

For the oral component, almost all appellants designate a reporter's transcript. Counsel must list on the designation the dates of the oral proceedings requested for inclusion in the reporter's transcript. Counsel must also include either a deposit for the transcript's cost or a waiver of this deposit from the court reporter.

The costs of an appeal go beyond transcripts. In addition to the expenses for prosecuting the appeal (including attorney's fees and the costs of the appellate record), once judgment is entered, postjudgment interest begins to accrue at 10 percent simple interest per year. Because an appeal can take one to two years to complete, interest can become a sizeable cost and must be taken into consideration.

Lastly, a stay, if one is obtained, can extend at most to 10 days beyond the last date a notice of appeal may be filed. In order to have a stay during the appeal, an appellant must post a security, which an appellant cannot provide directly. The law permits two types of entities to post the security for the appellant. One is a third person (or personal surety); the other is a bonding or insurance company (admitted surety insurer). For large judgments, the latter are typically the only option, but they charge a premium for their services. This is another cost that must be considered when deciding to pursue an appeal. ■

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