Practicing Appellate Aforethought: Appeals and Writs 101 for the Trial Lawyer

By Herb Fox

The Devil's Dictionary defines an appeal as putting "the dice into the box for another throw."[1] Civil appeals are not all that dicey, of course. About 20% to 30% of appeals result in full or partial reversal. Thus, appeals and writs present hope and risk for both the appellant/petitioner and for the respondent/appellee. But there is more to winning an appeal than hope and fear. Good trial lawyers strategize to improve their client's chance of prevailing on review.

AS WITH ALL ASPECTS OF LITIGATION, mastery of the appeals process and advance preparation is critical. Here then are ten tips toward practicing appellate aforethought—preparing oneself and one's case for potential appellate review before that first brief or writ petition is due.

Know the Interlocutory Appeals

One of the great appellate myths is that all interlocutory rulings are preserved for appeal from the final judgment. But that "One Final Judgment Rule" is as airtight as a sieve. In reality, there are scores of appellate opportunities and deadlines strewn throughout the pretrial and trial minefield, in both state and federal courts. Knowing when you have the right to an interlocutory appeal is essential to effective litigation.

Some interlocutory orders are made appealable by statute, such as orders granting or denying injunctions or most probate court orders.[2] Some other interlocutory orders that effectively dispose of the main issue in the case can sometimes be made appealable with leave of court.[3] Still other interlocutory orders can only be reviewed by an immediate writ petition, discussed further below.

The failure to timely appeal these and other interlocutory rulings from which there is a right to an immediate appeal, often waives your right to appellate review in a later appeal from a final judgment.

Other notable examples of immediately appealable interlocutory orders include:

- A pre-trial order that results in a final judgment for, or dismissal of, one of several co-defendants (e.g., dismissal per demurrer or motion for summary judgment)
- An order granting or denying an anti-SLAPP motion[4]
- A state court order denying class certification[5]
- An order granting or denying a motion to disqualify an attorney in state court[6]
- An order denying a motion to compel arbitration[7]
- An interlocutory order requiring the immediate payment of money, including sanctions over $5,000, or affecting certain assets in federal district court[8]

Know the Statutory Writs (State Court)

In addition to interlocutory orders that can be directly appealed, there are many state court interlocutory orders that pursuant to statute can only be reviewed by a writ petition filed immediately after the order is entered (so-called "statutory writs"). In these situations, failure to seek review by writ will bar later appellate review, and so trial attorneys must be aware of this limited appellate remedy when they are handling such motions.

There are two primary differences between an immediately appealable order and a statutory writ. First, writ review is discretionary with the appellate court, notwithstanding that a writ petition is the only means for review. Second, the deadlines for filing statutory writ petitions are extremely short (discussed below). Therefore, all statutory writs must be treated as urgent matters.

Among the most common orders for which the only method of appellate review is a writ petition are those that

- Deny disqualification of a judge, whether peremptory or for cause[9]
- Deny a motion for summary judgment[10]
- Deny a motion to quash service of the summons[11]
- Determines a motion for good faith settlement[12]
- Grant or deny a motion to reclassify a case from limited to unlimited or vice versa[13]

Know the Non-Statutory Writs

Any interlocutory order that is not immediately appealable (or subject to a state court statutory writ) is, in theory, reviewable by a non-statutory writ petition.[14] The decision to "take up" a non-statutory writ petition is, like statutory writs, discretionary with the reviewing court.

In order to win writ review, the petitioner must convince the appellate court that the order is not only erroneous, but is so prejudicial that the relief available by a later appeal from a final judgment is illusory. How difficult is it to win review of a non-statutory writ petition? Sometimes it must be literally a matter of life or death. As one court put it, the death of plaintiff's attorney just before trial can make a petition challenging the denial of a trial continuance "writ worthy."[15]

Before challenging an interlocutory order by writ petition, trial attorneys should be familiar with the factors that reviewing courts apply in considering whether to take up the petition. These factors include:

- Whether the party seeking the writ has no other adequate means, such as a direct appeal, to attain the desired relief
- Whether the petitioner will be damaged or prejudiced in a way not correctable on appeal
- Whether the trial court's order is clearly erroneous as a matter of law
- Whether the trial court's order is an oft-repeated error, or manifests a persistent disregard of the rules, or is of widespread interest to the bench, bar or public
- Whether the trial court's order raises new and important problems, Constitutional issues or issues of law of first impression[16]

Most writ petitions fail because they do not meet these standards. What are not grounds for a successful writ petition are factors such as inconvenience to the parties or counsel; the hardship and cost of engaging in trial; and the mere prospect that the order might be prejudicial to a party at trial. Considering their complexity, cost and the right to later review by an appeal, non-statutory writ petitions should be filed sparingly and only to attack the most egregious of orders.

Don't Overlook the Potential Arbitration Appeal

The hallmark of a binding arbitration award is, in theory, the lack of judicial review of the merits of the award. But the walls of appellate impenetrability of arbitration awards are crumbling, at least in cases governed by the California Arbitration Act.

For starters, the California Supreme Court recently held that parties to an arbitration can agree to allow judicial review of the merits of the award.[17] Further, the existing statutory grounds for vacating an arbitration award are broader than conventional wisdom holds. In one recent case, for example, an arbitration award was reversed on appeal because the arbitrator improperly refused to consider evidence material to the case—the functional equivalent of a reversal for evidentiary error.[18]

Other grounds for vacating an arbitration award include the failure of the arbitrator to disclose conflicts; failure of the arbitration proceeding to meet the terms of the parties' agreement; failure of the arbitrator to grant a continuance of the hearing; and the arbitrator's loss of jurisdiction for failing to render an award within the agreed-upon time.[19]

Finally, some of the major arbitration providers offer an optional appeal from the arbitration award, presided over by a panel of three appellate arbitrators. Trial attorneys facing an adverse arbitration award should therefore very carefully assess the available scope of judicial review and not simply assume that binding arbitration awards are beyond the reach of the courts or other appellate forum.

Preserving Error

One of the most important jobs of trial counsel is preserving error for review. An issue that is not properly preserved is usually waived on appeal, and waiver is one of the most common ways to defend a judgment from appellate attack.

Some appellate errors are preserved automatically without objection—most notably jury instructions (unless the error was invited).[20] But in most situations, error must be expressly preserved—from pleading affirmative defenses in the answer to filing a Motion for New Trial to assert excessive or inadequate damages, jury misconduct or newly discovered evidence.[21]

Few potential appeal issues are more prone to waiver than evidentiary error. In fact, the duty to preserve evidentiary error is codified.[22] Some of the thorniest evidentiary error preservation issues arise in the context of Motions for Summary Judgment/Adjudication. The summary judgment statute expressly states that evidentiary and foundational are waived if not made "at the hearing on the motion."[23]

Merely making an objection at the hearing is no guarantee that the judge will rule on it. Until recently, even properly made evidentiary objections in an MSJ proceeding were waived on appeal absent an effort to actually obtain a ruling from the trial judge. But the Supreme Court has now eased that burden on counsel, holding that as long as the evidentiary ruling is made in writing or raised orally at the MSJ hearing, it will be deemed preserved on appeal even if the trial court does not rule.[24]

Yet another tricky preservation issue arises from motions-in-limine. The general rule is that a motion-in-limine seeking the exclusion of specified evidence is

sufficient to preserve the evidentiary issue for appeal without renewing the objection. However, if the evidence (or its context) as later offered at trial is substantially different than that presented in the pre-trial motion, the party making the motion must renew the objection in order to preserve the issue for review.[25]

Finally, there is no more important aspect to preserving error than to have a reporters' transcript of the hearing or trial, something that has become more difficult with the recent Los Angeles Superior Court budget woes. The absence of a reporter's transcript can doom any appeal.[26]

If a motion hearing is set on a day where the court will not be providing a reporter, one must ensure to make arrangements to have one's own reporter. And for trials, there is no excuse for not having a reporter if there is any chance at all of an appeal. The alternative to a certified transcript—a settled or agreed statement[27]—is a procedural nightmare and a poor substitute for an accurate record of proceedings.

Invited Error: Beware of Getting What One Asks For

Error can be invited in two ways: by opening the door at trial to the error that you later raise on appeal, or, by overreaching at trial and creating an appellate issue for the opposing party. Either path can be a road to appellate disaster.

Invited error typically means an appellant's waiver of an appeal issue by "inviting" the erroneous ruling. Common examples include erroneous jury instructions or verdict forms that were proposed at trial by the appellant, and witness examination that opens the door to the erroneous admission of evidence, such as inquiring about topics that were successfully excluded by your own motion-in-limine.

There is an equally lethal type of invited error that comes from overreaching during trial, and inadvertently creating an appellate issue that the opposing party uses later if the judgment is in your favor. One example of overreaching is a successful motion to strike an expert's entire testimony because the expert strayed into a forbidden topic. The wholesale striking of the expert's testimony could result in a powerful appellate argument by the opposing party that it was denied the right to put on its case. A more limited motion restricted to the errant testimony might have been as effective and not lead to an appeal issue.

Other examples include proposing erroneous but favorable jury instructions; disregarding an order granting the opponent's motion-in-limine; and engaging in improper closing argument despite the court's admonitions. All such trial tactics may offer an immediate advantage to your client. However, by creating an appellate issue that might not otherwise exist, that short term gain could result in long term pain for your client.

Statements of Decision: Don't Leave Court Without One!

In a state court bench trial, there is no more important method of preserving potential appellate issues than making a timely and complete request for a Statement of Decision. (In federal court bench trials, the judge is required to prepare written findings without the necessity for any party to make the request.[28]) Yet few trial procedures are more misunderstood—or more frequently bungled.

The reason why a Statement of Decision is critical to an appeal is simple: it is, first and foremost, an appellate document whose main function is to guide the reviewing court in tracking how and why the trial judge came to the conclusions reflected in the judgment.

The absence of a request for Statement of Decision, or deficiencies in the Statement, can, in different ways and for different reasons, have a dispositive impact on the outcome of an appeal. On the appellant's side, the failure to make a timely and proper request for a Statement of Decision—or the failure to make proper and timely objections—waives any error in the sufficiency of the document. Worse, the omission compels the Court of Appeal to infer that the trial court made all of the findings necessary to sustain the judgment. In short, the failure to perfect a Statement of Decision can mean losing an otherwise winning appeal.[29]

There are two basic steps to perfecting a Statement of Decision. First, ask the trial court to issue a Statement of Decision. Second, object to the contents of the Statement of Decision if it is ambiguous or incomplete. A request for a Statement of Decision must be timely and must specifically identify all of the contested issues for which findings are requested. If the trial lasts eight hours or less, the request must be made before submission of the case; if the trial takes over eight hours, the request must be made within ten days of the announcement of the tentative decision.[30]

To be safe, the initial request for a Statement of Decision should be set forth in the trial brief, with a specific list of all issues that need to be resolved. To punch home the request, the request should be repeated during closing argument, refining the issues as they developed at trial. Once the trial court issues a tentative decision, another request should be made that specifically highlights any errors or ambiguities in the tentative. When the court or a party prepares a proposed Statement of Decision, a new round of proposals and objections begin. Finally, once the court signs and enters the final Statement of Decision, counsel must again assert any ambiguities or omissions within that final document, prior to entry of judgment or in association with a Motion for New Trial.[31]

While the burdens and penalties of Statements of Decision fall heavily on the appellant, the respondent is not out of danger. First, if a timely and proper request for a Statement of Decision is made and erroneously denied, the failure of the trial court to issue the document can be grounds for reversal per se. It is therefore risky to object to the preparation of the Statement of Decision. Further, once a request is made, trial courts will typically assign the task of drafting the Statement of Decision to the prevailing party (i.e., the future respondent). This is a task that the prevailing party should take seriously, because a deficient Statement of Decision can itself be grounds for reversal.[32]

Notices of Appeal: File Early and Often

Most trial lawyers are familiar with the general Notice of Appeal deadlines for unlimited jurisdiction cases: 60 days from service of notice of entry, and 180 days if there is no service.[33] That seems easy enough, but the exceptions—and the traps—are everywhere, and trial lawyers need to carefully analyze the Notice of Appeal deadlines in order to preserve their clients' appeal rights. The deadlines are jurisdictional. The state appellate courts have no discretion to extend the deadline, and while the 9th Circuit has the discretion to excuse a late filing, it will rarely do so.[34]

Here is one trap: the deadline for filing a Notice of Appeal from a federal district court judgment, and from judgments in state court limited jurisdiction cases, are both 30 days, not 60 days.[35] Other traps include:

- The 30 day period for filing a Notice of Appeal in the 9th Circuit runs from the date that the judgment is entered and is not governed by the date of notice of entry.[36]
- If multiple parties in state court serve notice of entry, or if the clerk mails a copy before any party does, it is the earliest service date that triggers the countdown.[37]
- A copy of the judgment or order with a proof of service attached is sufficient to start the clock (there is no actual need for a document called "Notice of Entry"), and the time runs from the date on the proof of service and not the date of receipt or the date of a file stamp.[38]

The deadline for filing a Notice of Appeal from an appealable state court order is similar, but not identical, to that for judgments. A common trap is the definition of "entry" of the order. If the minute order does not reflect the court's direction to a party to prepare and serve a formal Order after Hearing, the time to appeal runs from service of the minute order or a notice of entry of the same, or 180 days from entry of the minute order.[39] Under these circumstances, the deadline is not affected by a party's voluntary preparation and service of a formal order.

Writ Deadlines: No Time to Spare

Even more problematic are writ petition deadlines. The deadline for non-statutory writ petitions in the state courts are the same as for Notice of Appeal deadlines but for three critically important factors:

- There are no extensions.
- Writ petitions are subject to a laches analysis, and so unless there is a good reason to wait 60 days, don't.
- The deadline is for the petition itself, not a mere notice. Thus the effective equivalent of an opening brief and record must be filed within the 60 day period.

As for statutory writ petition deadlines, there is only one rule: read the governing rule. The time for filing varies from statute to statute, from 10 days to 20 days, and sometimes—but not always—the trial court has discretion to grant a short extension.[40] Again, it is the entire petition, equivalent to an opening brief, that must be filed within that 10 or 20 day period!

In short, all writ petitions must be treated as urgent matters with the highest priority in your office. And, if you intend to retain outside appellate counsel to handle the petition, do so as soon as possible, if possible, prior to entry of the ruling that is challenged.

Understand the Standards of Appellate Review

Finally, but perhaps most importantly, to prepare for appellate possibilities, trial attorneys should have a working knowledge of the standards of appellate review.

Appellate courts view cases through a prism called the "standard of review." There are only three such standards. In order of deference to the trial court and jury, they are:

- Substantial evidence (also called the "clearly erroneous" standard in the federal appellate courts)
- Abuse of discretion
- De novo or independent review

But that is where the simplicity ends. In fact, in many appeals the most contested and most important issue is what is the proper standard of review? The classic description of the substantial evidence standard of review is that: "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination..."[41]

In deciding whether to even raise a substantial evidence claim on appeal, counsel must remember that the appellate court accepts the evidence most favorable to the order as true and discards the unfavorable evidence, and that any inference that can be supported by the evidence will be affirmed.

The next standard of review, abuse of discretion, is the most amorphous. It is "not a unified standard; the required deference varies according to the aspect of a trial court's ruling under review."[42] What is clear, however, is when the evidence merely presents an opportunity for a difference of judicial opinion, the ruling was discretionary and the appeal is doomed. An appellate court will not substitute its judgment for that of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion, it must "clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice."[43]

Finally, there is the independent ("de novo") standard of review, which assures the appellant that the reviewing court will not merely defer to the trial court, but will instead decide the matter anew.[44] The de novo standard of review presents the best opportunity for the appellant who hopes to snatch victory from the jaws of trial court defeat.

---

[1] See http://www.richardgingras.com/devilsdictionary/a.html.
[2] Civ. Pro. §904.1(a)(6); 28 USC §1292(a)(1)); Probate Code §§1300 et seq.
[3] See, e.g., Family Code §2025; 28 USC §1292(b); FRCP 23(f) and 54(b).
[4] Civ. Pro. §§425.16(i); 904.1(a)(13).
[5] *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429.
[6] *Meehan v. Hopps* (1955) 45 Cal.2d 213.
[7] Civ. Pro. §1294(a); 9 U.S.C. §16.
[8] *Lima v. Vouis* (2009) 174 Cal.App.4th 242; Civ. Pro. §904.1(a)(11,12); *United States v. Roth* 912 F.2d 1131 (9th. Cir., 1990)
[9] Civ. Pro. §17 0.3(d).
[10] Civ. Pro. §437c(m)(1).
[11] Civ. Pro. §418.10(c).
[12] Civ. Pro. §877.6(e).
[13] Civ. Pro. §403.080.
[14] Cal. Const., Art. VI, §10; 28 U.S.C. §1651.
[15] *Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242.
[16] *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App. 3rd 1266; *Bauman v. U.S. District Court,* 557 F.2d 650 (9th Cir., 1977).
[17] *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334. But see *Hall Street Associates, L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576 (no such right to consensual judicial review under the federal Arbitration Act).
[18] *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524; Civ. Pro. §128.2(a)(5)).
[19] Civ. Pro. §1286.2; see e.g., *Parker v. McCaw* (2005) 125 Cal.App.4th 1494; *Rusnak v. General Controls Co.* (1960) 183 Cal.App.2d 583.
[20] Civ. Pro. §647.
[21] Civ. Pro. §657; *Schroeder v. Auto Driveaway Co.*, (1974) 11 Cal.3d 908.
[22] Evidence Code §§353, 354.
[23] Civ. Pro. §437c(b),(d).
[24] *Reid v. Google, Inc.* (2010) 50 Ca.l4th 512.
[25] *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155.
[26] See, e.g., *Aguilar v. Avis Rent-A-Car System, Inc* (1999) 21 Cal.4th 121.
[27] Rules of Court 8.134, 8.137.
[28] FRCP 52.
[29] Civ. Pro. §634; see Marriage of Arceneaux (1991) 51 Cal.3rd 1130 and Marriage of Ditto (1988) 206 Cal.App.3d 64.
[30] Civ. Pro. §632; Rule of Court 3.1590.
[31] Civ. Pro. §634; Rule of Court 1590(c),(e,f,g).
[32] Marriage of Hardin (1995) 38 Cal. App.4th 448.
[33] Rule of Court 8.104(a).
[34] Rule of Court 8.104(b); FRAP 4(a)(5).
[35] FRAP 4(a)(1)(A); Rule of Court 8.122.
[36] FRCP 77(d).
[37] Rule of Court 8.104(a)(1).
[38] Rule of Court 8.104(a).
[39] Rule of Court 8.104(d)(2).
[40] Compare, for example, Civ. Pro. §170.3(d) [judicial disqualification, 10 days, no discretion to extend) and Civ. Pro. 403.080 (reclassification, 20 days plus discretion to extend by additional 10)
[41] *Bowers v. Bernards* (1984) 150 Cal.App.3d 870.
[42] *Haraguchi v. Superior Court* (2008) 43 Cal. 4th 706.
[43] Estate of Gilkison (1998) 65 Cal.App. 4th 1443.
[44] *Stone Street Capital, LLC v. California State Lottery Commission* (2004) 165 Cal. App. 4th 109.

Herb Fox is a Certified Appellate Law Specialist with over 25 years of appellate experience. He handles a wide variety of civil appeals and writs throughout California, and consults with trial counsel in cases that present potential appellate issues. He can be contacted at hfox@foxappeals.com.