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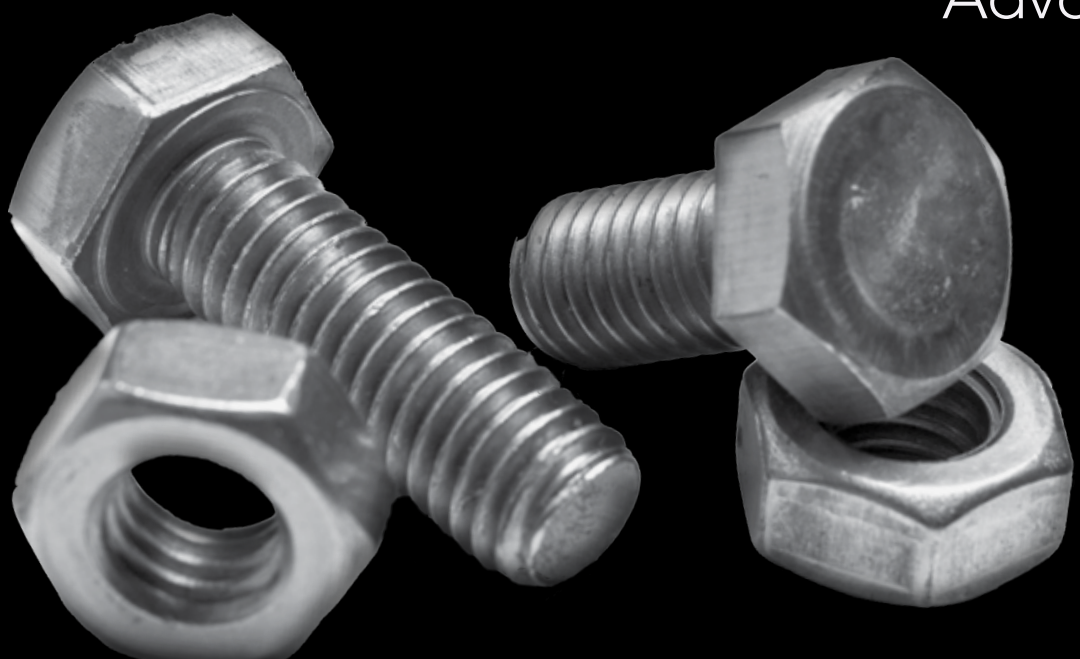

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Navigating the New Settled Statement Procedures

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The record on appeal is one of the most important aspects of appellate practice, because what's included in the record (or omitted from it) determines what issues can be raised and argued on appeal. One long-standing method of designating oral proceedings has been the settled statement, a summary of trial court proceedings prepared by an attorney and certified by a judge.

But use of settled statements in California was relatively rare until budget cuts resulted in a severe cutback in the number of court-funded reporters provided during trials. The increasing use of settled statements has necessitated amendments to the Rules of Court, to make the settled statement process less burdensome. Nonetheless, an anecdotal survey among jurists indicates that the simplified procedures have had mixed success due to lack of knowledge about the amended rule. (The authors express particular appreciation to the Honorable Samantha P. Jessner, Supervising Judge of the Civil Division of the Los Angeles Superior Court, for her contributions during that survey.)

This article outlines how to obtain a settled statement under the amended rule, identifies some of the rule's shortcomings, and proposes additional solutions for improving the settled statement process.

Importance of the Record

"When practicing appellate law, there are at least 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, italics added.) An inadequate record can be fatal to even the most promising appeal.

Appellants face an uphill battle from the start — appealed orders are presumed correct, and appellants must affirmatively demonstrate prejudicial error based on an adequate record. With an incomplete record, this task becomes even more burdensome, if not impossible, since appellate courts may presume that any error was corrected in the missing parts of the record, or that the omitted proceedings would have supplied whatever evidence is needed to support the judgment.

To present a complete appellate record, counsel has several tools. The traditional approach is to provide the Court of Appeal with a trial transcript prepared by a certified court reporter. But when a reporter's transcript is not available or a significant event at trial was not reported, a settled statement can be useful.

The New Settled Statement Rule

Why It Changed

A settled statement is a summary of trial court proceedings that has been approved by the judge who presided over the trial. Over time, the rule permitting settled statements was amended to make them available only in limited circumstances — the large number of available court reporters, most often supplied by the court itself, led to a presumption that reporter's transcripts would always be available. (Judicial Council of Cal., Appellate Advisory Com. Rep., Appellate Procedure: Settled Statements in Unlimited Civil Cases (2017) p. 3 (hereafter JC Report).) Under that regime, a settled statement could be obtained only through a trial court motion. (*Ibid.*)

But the number of court reporters has significantly declined in recent years. Because of budget reductions, many superior courts have adopted policies limiting the availability of official court reporters to a narrow category of civil cases, which does not include ordinary contract, personal injury, or professional negligence cases. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 610.)

In addition, it requires up to two years to complete a court reporter degree, and to become a certified reporter requires passing a state licensing exam. Passing requires transcribing 200 words per minute with a 97.5 percent accuracy rate. (*Court Reporter Jobs and Training Opportunities in California*, CourtReporterEDU.org <www.courtreporteredu.org/california/> [as of Apr. 9, 2020].) The pass rate is far lower than for lawyers taking the California bar exam: in March 2019, 111 individuals took a recent California certification exam but only six actually passed. (Gravely, *The Silent Problem Facing the Nation's Courtrooms* (July 28, 2019) Wall St. J. <www.wsj.com/articles/the-silent-problem-facing-the-nations-courtrooms-11564315200> [as of Apr. 9, 2020].)

These court reporting trends have caused a decrease in the availability of reporter's transcripts and a corresponding increase in attempts to use settled statements. (JC Report, *supra*, at p. 3.) Appellants, especially self-represented litigants, have struggled with the motion process required to use settled statements. As a result, the rule governing settled statements — rule 8.137 of the Cal-

ifornia Rules of Court — was amended on January 1, 2018, to address the difficulties inherent in the former settled statement procedures. (JC Report, at p. 3.)

Rule 8.137 was rewritten to make the process for attaining a settled statement less burdensome for both appellants and the courts. For courts, inadequately prepared statements hamper judicial efficiency. Because judges must review the statements for accuracy prior to certifying them, an attorney's failure to follow the proper procedures causes delays in proceedings and can even result in defaults in procuring the record on appeal. The amendments to rule 8.137 make settled statements more accessible by adding the option to proceed by election (rather than only by motion), by amending the existing form for designating the record on appeal to incorporate these amendments, and by creating new forms to make it easier for attorneys and self-represented litigants to navigate the settled statement process.

How It Works

Preparing a settled statement is a four-step process involving a back-and-forth between the appellant (who proposes a settled statement), the respondent (who proposes amendments), and the trial judge (who "settles" any disputes between the parties regarding the statement's content). Before the process begins, appellants must determine if they are permitted to use the rule.

A settled statement may be obtained either by election or by motion. Proceeding by election is permissible if (1) the oral proceedings were not reported (the usual situation in which a settled statement will be necessary) or (2) the appellant has already obtained a court order waiving costs and fees. (Cal. Rules of Court, rule 8.137(b)(1)(A), (B).)

In other circumstances, a motion is required. The motion must be filed in the superior court at the same time as the party's notice designating the record on appeal. (Rule 8.137(b)(2).) The motion must show one of the following: (1) that the statement can be settled without significantly burdening the court or opposing parties, and will result in a substantial cost savings; (2) that the designated oral proceedings cannot be transcribed; or (3) that the appellant is unable to pay for a reporter's transcript and funds from the Transcript Reimbursement Fund are not available. (Rule 8.137(b)(2)(A)(i)-(iii).)

The first category should rarely apply — in light of the attorney time required to prepare the motion and proposed settled statement and to resolve disputes regarding its content, simply paying for the reporter's transcript will usually be more cost effective. Realistically, it is always burdensome for a court to certify a settled statement when a reporter's transcript is available. Regarding the third category, the "Transcript Reimbursement Fund" has not been available for some time so that factor is easily met, but courts will require a declaration or other evidence to support the appellant's claim of insufficient available funds.

If the motion is denied, the appellant must file a new notice designating the record on appeal within 10 days after the clerk sends or a party serves the order of denial. (Rule 8.137(b)(2)(B).)

Whether proceeding by election or motion, the appellant must specify the date of each oral proceeding to be included, indicate whether it was reported, and if so, must provide the name of the reporter (if known), and whether a certified transcript was prepared. (Rule 8.137(b)(3)(A), (B).)

If the oral proceedings *were* transcribed by a court reporter, a respondent has the option of bypassing the entire settled statement process. Within 10 days of receiving notice that the other side intends to use a settled statement, a respondent may simply file a notice indicating his or her intent to provide a reporter's transcript. (Rule 8.137(b)(4)(A).) This shifts the cost of providing a reporter's transcript from the appellant to the respondent — but a respondent may prefer that option over a settled statement to ensure a more accurate record, and to avoid the delay and expense of litigating the content of the settled statement.

Respondents who exercise this option must either (1) deposit certified transcripts of all proceedings mentioned in the settled statement, or (2) file a notice requesting preparation of the reporter's transcript and a deposit or waiver of the costs needed to prepare it. (Rule 8.137(b)(4)(A)(i), (ii).) If the respondent timely deposits the certified transcripts, the appellant's motion for a settled statement will be dismissed. (Rule 8.137(b)(4)(B).) The appellant's motion will also be dismissed if the respondent deposits the funds (or waiver of funds), and the clerk will then send the reporter a notice to prepare the transcript. (*Ibid.*)

If the respondent opts not to pay for a reporter's transcript, the appellant has 30 days from election (or the court granting the motion) to serve and file a proposed statement. (Rule 8.137(c)(1).) This is where the settled statement process really begins.

First, the appellant proposes a statement. The statement *must* include a condensed narrative of the material facts and the points the appellant is raising on appeal, including a summary of the evidence, witness testimony (which can be presented in question and answer format if the court permits), and also jury instructions given only orally. (Rule 8.137(d)(1) & (2)(A), (B).) Failing to include all this information will (with certain narrow exceptions) limit the scope of the appeal to points identified in the statement, and the omitted information will be presumed to support the judgment being appealed. (Rule 8.137(d)(1) & (2)(A).) The appellant must also attach to the statement a copy of the judgment being appealed. (Rule 8.137(d)(3).)

Second, the respondent has 20 days to proceed in one of two ways: (1) file proposed amendments to the proposed statement (Rule 8.137(e)(1)) or (2) preempt the settled statement process by electing to provide a reporter's transcript instead *and* following the same steps outlined above for exercising that option at the motion stage. (Rule 8.137(e)(2)(A), (B).)

Third, the trial court reviews and settles the statement. Within 10 days of the respondent filing proposed amendments (or failing to do so in a timely manner), either side may request a hearing to review and correct the statement. (Rule 8.137(f)(1).) However, the court will hold a hearing only if there is a dispute about a material aspect of the proceedings. (*Ibid.*) If the proceedings were reported, and the court wants to avoid dealing with the dispute, as permitted by local rules it can simply order (and pay for) a transcript to be prepared in lieu of the statement, upon determining that doing so will save time and resources. (Rule 8.137(f)(2).) In reality, budget restrictions may foreclose this option. The Los Angeles Superior Court, for example, has no funds to pay for transcripts in general civil cases absent a fee waiver.

Regardless of whether any hearing is held, the court must either make any correc-

tions necessary for accuracy or identify the necessary changes and order the appellant to incorporate them. (Rule 8.137(f)(3)(B) & (4)(A), (B).) And if no hearing is held, and the proposed settled statement omits information required by rule 8.137(d), the court may order the appellant to file a new statement by a specified date. (Rule 8.137(f)(3)(A).)

If the appellant fails to file the corrected or new statement, he or she will be deemed to be in default and rule 8.140 (the rule outlining default for failure to procure the record on appeal) will apply. (Rule 8.137(f)(3)(A) & (g)(1).) Once a corrected statement is served on the parties, any party may submit additional proposed modifications. (Rule 8.137(g)(2).) And 10 days after the time to file amendments passes, the judge, after reviewing the corrected statement and proposed modifications, either certifies the statement, or orders additional changes — beginning the cycle all over again. (Rule 8.137(g)(3).)

The final step is the certification and filing of the settled statement. If the court did not order a transcript to be prepared or the process has reached the stage where no additional modifications are required, the statement must be promptly certified. (Rule 8.137(h)(1).) Alternatively, the parties may file a stipulation that the original statement (or the statement with the incorporated modifications) is correct, which has the same effect as the court's certifying the statement. (Rule 8.137(h)(2).)

Judicial Perspective

An informal survey of superior court judges in Los Angeles reveals that settled statements are not regularly used. In some types of cases, such as probate matters, settled statements are typically unnecessary because court reporters are provided by the court. In other cases, there appears to be a consensus among judges that the process is not often used because it is so time consuming for the parties, and impractical for courts given the sheer volume of cases on their docket. And litigants may be reluctant to pay the attorney fees generated by all the extra work in preparing the statements.

When settled statements *are* used, the fast pace at which judges move through cases makes timely preparation of the statements essential. It is unrealistic to expect litigants and judges to accurately recall what was said and decided days or even months after the relevant oral proceedings. To avoid the difficulties of recalling events, some judges require counsel to remain in the courtroom each day until they agree on a settled statement for that day's proceedings. In such courtrooms, the settled statement process may take up to three hours each day to complete, creating a strong incentive for the parties to simply hire a reporter.

In civil trials involving well-heeled litigants who understand the necessity of an accurate record in anticipation of possible appeal, the parties generally do pay for a court reporter. But even in reported trials, there will be gaps in the record — for pretrial proceedings, in-chambers conferences, unreported sidebars, jury instruction conferences, discussions with counsel after the jurors and reporter have been dismissed for the day, and even for unreported audio-visual presentations. Where an unreported event's importance becomes apparent only after trial has concluded, a settled statement can be useful to fill in gaps. Many judges and attorneys assume that use of a court reporter and a settled statement are mutually exclu-

sive, but nothing in the rules precludes using settled statements for such gap-filling.

Of course, it is far better to summarize such events on the record soon after they occur and a reporter is available to record that summary — avoiding the dimming of memory and inevitable squabbles over the details of what actually occurred. But in a pinch, it appears that settled statements are underutilized in situations where they could profitably preserve issues for appeal that would otherwise be waived due to an inadequate record.

Analysis of Reported Decisions Involving Settled Statements

In practice, the amended rule's simplified procedures do not yet appear to have yielded substantial benefits. In fact, a review of over 140 decisions (published and nonpublished) issued after the amended rule took effect — each of which discusses the use of settled statements — reveals four general categories of decisions.

In the first, only 17 percent involved a settled statement that was successfully filed and used to support argument. In the second and largest category (63 percent of the decisions), it was noted that a settled statement *should* have been filed but was not, generally resulting in an adverse disposition due to failure to procure an adequate record. In the third category (10 percent), there was no settled statement due to procedural error or denial, generally resulting in the same outcome. And in the fourth category (another 10 percent), a settled statement was filed but failed to include facts adequate to support the claim on appeal.

Thus, in the vast majority of cases — more than four-fifths of decisions — appellants did not use a settled statement because they were unaware of its availability or, if they knew about the rule, failed to follow it.

Proposed Solutions

The decline in available court reporters and the judiciary's shrinking budget triggered changes to the settled statement rule. But our findings confirm that settled statements are not the long-term answer. The obvious solution, adopted in other jurisdictions, is to broadly permit the electronic recording of trials. Even if the preparation of certified transcripts based on electronic recordings continues to be precluded in most cases, electronic recording could be permitted for the limited purpose of assisting in preparing settled statements. Indeed, some judges have reported that they permit self-represented litigants to record proceedings for that sole purpose.

But in the absence of electronic recordings to prepare settled statements, litigants can improve their use of settled statements in several ways.

First, it bears repeating that settled statements are best used for filling gaps in the reported record, such as portions of reported proceedings where, for whatever reason, the court reporter was not available or otherwise did not report what occurred. While settled statements can be used for short court trials, for longer proceedings and jury trials, the settled statement process will almost always be more costly than hiring a court reporter. The process also places a generally unwelcome burden on judges, especially where the resolution of disputes regarding content is required. And longer proceedings tend to have more potentially material facts that need to be included, making their prepara-

tion even more difficult as time passes and memories fade.

Second, accuracy is crucial when preparing the settled statement. Where a proposed statement fails to align with recollections of other parties and especially the court, the amended rule contemplates continuing rounds of revisions that will cause unnecessary delay and expense. Litigants should not only prepare objective statements, but should plan ahead by notifying the court before the start of trial of an intent to use a settled statement. All parties involved will then be more attentive to contemporaneously noting material points for inclusion, ensuring that the arguments that may be raised on appeal are preserved in the settled statement or other portions of the record.

Third, attorneys should read rule 8.137 carefully and closely follow its procedures. Even though the recent amendments were intended to make the settled statement process simpler, there remain complexities and deadlines to trip up the unwary.

Fourth, litigants should use the new forms created and updated by the Judicial Council to prepare procedurally sound settled statements. For example, Judicial Council form APP-003 (Appellant's Notice Designating the Record on Appeal (Unlimited Civil Case)) was amended so appellants could state their intent to use a settled statement. Form APP-014 (Appellant's Proposed Settled Statement (Unlimited Civil Case)) was created to help litigants prepare settled statements by identifying what information is mandatory or optional in the statement. And form APP-014-INFO (Information Sheet for Proposed Settled Statement) provides a comprehensive overview of both form APP-014 and the settled statement process.

Finally, cooperation with opposing counsel in preparing a settled statement can expedite the process. In fact, stipulating to the proposed settled statement will have the same effect as its certification by the court, reducing expense to the parties and burden on the trial judge. (Rule 8.137(h)(2).) By working together parties can avoid potential procedural pitfalls, prepare more objective statements, and help facilitate greater judicial efficiency. Of course, all aspects of litigation would go more smoothly if attorneys were more cooperative and less adversarial regarding procedural matters — but as Harriet Tubman once said, "Every great dream begins with a dreamer."