

Getting the Appellate Record Right | The Recorder



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When putting together an appeal, you're going to have to decide which documents to provide to the appellate court. Should you include all documents filed in the trial court? What if your appellate argument focuses on an issue that appeared on one page of a 50-page motion? Do you include the whole motion? The exhibits and the opposition too?

These questions may sound simple, but the answers starkly differ depending on the jurisdiction. Getting it right is important, because the documents you provide to the appellate court can have a huge impact on the success of your appeal. As one court put it, "[w]hen 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*, 110 Cal. App. 4th 362, 364 (2003)). Yet you can't simply provide everything, since both state and federal rules forbid providing the appellate court with "unnecessary" documents, with the possibility of sanctions for breach of the rule.

To start with the basics, the trial court transcript and any material filed with or considered by the trial court before the decision on appeal is fair game for the record on appeal—but nothing else. Those deposition transcripts and stern discovery letters you sent to opposing counsel can't be part of the appellate record unless you filed them or the trial court actually considered them (if, for instance, you handed a copy up to the trial judge during a hearing). Nor are those helpful articles or other discovery documents you noticed for the first time while preparing the appeal. You could file a motion to supplement the record, but appellate courts grant these requests only in very rare circumstances. Relying on documents outside the record that haven't been specially approved by the appellate court can subject you to serious sanctions.

The trial record provides the outer limit of documents for the appellate record. But what documents should you provide to the appellate court along with your brief? In California's courts of appeal, you typically put together an "Appellant's Appendix" under California Rule of Court 8.124, or designate documents for the clerk of the trial court to include in a "Clerk's Transcript" under Rule 8.122. In federal court, you put together an "Appendix" governed by Federal Rule of Appellate Procedure 30, or in the Ninth Circuit an "Excerpts of Record" under Local Rule 30-1.

While these sound similar, California Courts of Appeal will only consider the documents you submit as part of your designated appellate record, so you need to be exceptionally thorough. Failure to include a document in the appellate record can waive any issues implicated by that document. In the Ninth Circuit, by contrast, all the documents that were filed in the trial court are properly before the court on appeal. Almost all federal court filings are online, so every document filed in the district court is available to federal circuit judges (or their clerks) with the press of a button. You need only provide the court with the documents specified by Ninth Circuit Local Rule 30-1.4 and the most important documents you cite.

As a practical matter, that difference is huge. When you're an appellant, you generally bear the burden of showing not just that an error occurred, but that it is more likely than not the court would have reached a different result had the error not occurred. If you don't provide everything the appellate court needs to reach that conclusion, you'll lose. So although preparing

the record for an appeal may seem straightforward—obviously, you should provide a copy of any documents that are the basis for your claimed error—you have an additional challenge to ensure the record is sufficient to show prejudice.

Consider a challenge to a jury instruction on appeal. Even if you prevail on your argument that the trial court gave an incorrect instruction, an appellate court will not reverse unless it determines the error likely affected the result. This requires assessing how the factfinder would have viewed all the evidence admitted at trial under the instruction the trial court should have given. You must include all trial testimony and anything else that relates to the issue if your appeal is in a California court of appeal, or risk waiving your argument. And in addition, an appendix must include all documents that you "should reasonably assume" your opponent will rely on in attempting to refute your arguments.

By contrast, in federal court you can make the prejudice argument and cite the relevant trial evidence without providing the trial transcript. Of course, even in federal court the record must exist in a form the appellate court can use, so you must order transcripts of any possibly relevant proceedings so they are on file with the district court. But you don't need to provide the appellate court with the entire trial transcript, plus all the relevant pre-trial hearings, plus all the relevant filings, oppositions, declarations, exhibits and so forth (and in fact, you're generally prohibited from including trial court briefs unless they're directly relevant to an issue such as waiver or estoppel, and even then you can only include the relevant pages).

Writ petitions in California courts require a similarly lengthy record as ordinary appeals to California's courts of appeal—and that record can be quite difficult to prepare under the time pressures for filing a writ petition, so it pays to plan ahead and order expedited transcripts if you're contemplating taking a writ. In contrast to writ petitions, the California Supreme Court strictly limits the documents you can file with a petition for review to a mere 10 pages plus the opinion below. The U.S. Supreme Court has its own set of rules for supporting documents at both the petition and merits stage, but like federal court practice generally it requires only the key documents.

These differences can have significant consequences. In ordinary civil cases the appellant must generally pay for and provide the record. (The California Supreme Court is currently hearing a challenge to that rule as an equal protection violation for impoverished appellants, but that decision is unlikely to affect appellants with resources to hire counsel). The cost of reproducing multiple copies of the entire trial transcript can be significant, as is the time to compile and prepare the documents. And in some cases there are strategic reasons to prefer a shorter record: judges are unlikely to read through thousands of pages, so a shorter record allows you to highlight the key documents for your argument. But when failure to include all the required documents can jeopardize your entire appeal, it pays to play it safe—at least in California's courts of appeal.