



Jeffrey Isaac Ehrlich
Editor-in-Chief

How to preserve it for appeal: The right way to make a record

Why and how do we “make a record?”

Lawyers tend to throw around the term “making a record” without much thought. All too often, it means writing an overly long letter to opposition counsel about some point of disagreement, which will then be attached as an exhibit to a declaration in support of a motion, which will almost certainly go unread. Or it will mean a lawyer taking 15 minutes to repeat all the arguments made in his or her opposition to a motion, even though the judge is not asking any questions, and it is clear that the judge is going to rule against them the moment they stop talking. These are not examples of making a record.

In the broadest sense, “making a record” means taking the steps necessary to ensure that you are able to seek appellate review of an adverse event in litigation, such as an adverse ruling by a court or misconduct by opposition counsel. Typically, this will mean either (a) interposing an objection at the proper time; (b) filing a motion; or (c) seeking appellate review, either by writ or appeal, as appropriate. The lawyer who fails to take one of these steps when appropriate risks waiving, or more accurately “forfeiting” the chance to obtain further review of the adverse ruling. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 n.2. [13 Cal.Rptr.3d 786] [explaining difference between “waiver” and “forfeiture”].) Making a record is, therefore, what a lawyer does to avoid forfeiting a claim.

The justification for the rule requiring a party to make a record in order to preserve appellate review is that it forces the aggrieved party to bring the problem to the attention of the court at a stage of the proceeding when it is still possible to

correct it. In general, procedural defects or erroneous rulings that could have been brought to the attention of the trial court, but which were not, are implied waived. (*Doers v. Golden Gate Bridge, Highway Transp. Dist.* (1979) 23 Cal.3d 180, 184-185 [151 Cal.Rptr.837].)

There are, unfortunately, some circumstances where forfeiture is possible, and yet this rationale has no obvious application. One common trap is the failure to appeal an appealable order. We are taught the “one final judgment rule,” which posits that there is but one final judgment in a lawsuit, and therefore one appeal from that final judgment. (*See, e.g., Eisenberg, Horvitz & Weiner, California Practice Guide – Civil Writs and Appeals* (Rutter Group 2005 rev.) ¶ 2:21. (Civil Appeals).) In theory, the one-final-judgment-rule means that all adverse rulings made in the life of a lawsuit are not separately appealable and will be reviewed on appeal from the one final judgment.

Unfortunately, the rule is riddled with exceptions. (*See, e.g. Code Civ. Proc., § 904.1* [defining which orders are appealable].) Worse, the failure to appeal from an appealable order results in a forfeiture of appellate review of that issue. Section 906 of the Code of Civil Procedure defines the powers of a reviewing court. The last sentence of this section bars a reviewing court from reviewing any decision or order from which an appeal might have been taken, but which was not. This means that review is unavailable either by appeal or by writ when a potential prior appeal was not made. (Civil Appeals, ¶ 2:13.)

A related rule is that when appellate review of a particular order is mandated by writ (a “statutory writ”) and the statute provides that this is the exclusive manner

to obtain review, the failure to file a timely statutory writ will forfeit the right to later appellate review. (Civil Appeals, ¶ 15:96.1.)

The record you need to make will vary depending on the proceeding and the court. There are a seemingly endless variety of ways to forfeit a claim, and this article is not intended to be an exhaustive list. But many of the common traps will be discussed.

This article will be organized by the stage of a lawsuit when things go wrong – such as when a case is initially filed; when the pleadings are settled; on summary judgment; at trial; during post-trial motions; and on appeal. For each adverse ruling or event there is a corresponding explanation of what you must do in order to preserve the right to preserve review.

Things that go wrong at the filing stage

- Adverse ruling: Trial court grants motion to quash service of summons.
► What you must do: Appeal. This is an order made appealable by § 904.1.
- Adverse ruling: Trial court denies motion to quash service of summons.
► What you must do: File a writ within 10 days (subject to a 20-day extension). Code of Civil Procedure section 418.10(c) makes this the exclusive way to obtain review.
- Adverse ruling: Trial court grants motion to stay or dismiss action based on inconvenient forum.
► What you must do: Appeal. This is an order made appealable by § 904.1.
- Adverse ruling: Trial court denies motion to stay or dismiss action based on inconvenient forum.
► What you must do: File a writ within 10 days (subject to a 20-day extension). Code

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of Civil Procedure section 418.10(c) makes this the exclusive way to obtain review.

- Adverse ruling: Trial court either grants or denies an order disqualifying a judge.

- ▶ What you must do: File a writ within 10 days of actual notice of the decision. (Code Civ. Proc., § 170.3, subd. (d).)

Demurrers

- Adverse ruling: Trial court sustains demurrer with leave to amend, but you have no possible new facts to allege, so you decline to amend.

- ▶ What you must do: Appeal from final judgment. (Civil Appeals, ¶ 2:238.2.)

- Adverse ruling: Trial court sustains demurrer without leave to amend.

- ▶ What you must do: Appeal from a final judgment. You can challenge the failure to grant leave to amend on appeal even if you did not request it in the trial court. (Code Civ. Proc., § 472.) CAUTION: An order sustaining a demurrer without leave to amend *and dismissing the action* is an appealable final judgment. (Civil Appeals, ¶ 2:41a.)

- Adverse ruling: Trial court sustains demurrer without leave to amend to some, but not all causes of action.

- ▶ What you must do: If you amend, you waive the right to review of the order sustaining the demurrer with leave to amend. (Civil Appeals, ¶ 2:238.3.) But this rule applies on a cause-of-action by cause-of-action basis; in other words, appellate review is available of the demurring ruling for claims that were not amended. (*Ibid.*) If the demurrer has gutted your case, you can seek a writ. If it is denied, then you can try the remainder, and appeal the ruling from the final judgment.

Law and motion rulings/summary judgment

- Adverse ruling: Trial court denies motion for summary judgment or summary adjudication.

- ▶ What you must do: There is authority saying that the exclusive means of appellate review is a writ filed timely under Code of Civil Procedure section 437c, subdivision (m)(1). But there is contrary authority saying that this order can be

reviewed on appeal from a final judgment. (Civil Appeals, ¶ 2:242.1.) The safest course is to take a writ. If it is denied, you can then appeal from the final judgment.

- Adverse ruling: Trial court grants motion for summary judgment.

- ▶ What you must do: Appeal from the final judgment entered based on the order granting summary judgment. (Code Civ. Proc., § 437c, subd. (m)(1).)

- Adverse ruling: Trial court grants summary adjudication of some, but not all causes of action in the complaint.

- ▶ What you must do: Seek writ within 20 days. (Code Civ. Proc., § 437c, subd. (m)(1).) If denied, appeal from final judgment. *But*, if summary adjudication ruling moots all remaining causes of action, appeal right away. (Civil Appeals, ¶ 2:65.) If trial court intended to dispose of all causes of action, but inadvertently failed to, this ruling is also appealable. (Civil Appeals, 2:67.)

- Adverse ruling: Trial court refuses to rule on individual evidentiary objections.

- ▶ What you must do: Make every effort to obtain a ruling. The trial court's failure to rule on objections is treated as an implied overruling of the objection, the effect of which is that the objected-to evidence is in the record for purposes of appellate review, and review of the objection is forfeited. (*Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 566 [57 Cal.Rptr.3d 204].) Note: *Demps* overruled the court's decision in *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410 [267 Cal.Rptr. 819], which allowed the trial court to avoid making individual rulings on each objection, and instead allowed it to consider only the evidence which it considered admissible. If the trial court refuses to rule on objections even after counsel makes a diligent attempt to obtain a ruling, then appellate review of the objections is preserved. (Civil Appeals, 83334.1.)

- Adverse ruling: Trial court denies motion for class certification.

- ▶ What you must do: File appeal. "A decision by a trial court denying certification to an entire class is an appealable order." (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470 [174 Cal.Rptr. 515].)

- Adverse ruling: Court grants an injunction, dissolves an injunction, or denies motion to grant or dissolve an injunction.

- ▶ What you must do: Appeal. These are appealable orders under Code of Civil Procedure section 904.1.

- Adverse ruling: Court refuses to grant motion to compel arbitration.

- ▶ What you must do: Appeal. This is an appealable order under Code of Civil Procedure section 1294, subdivision (a).

- Adverse ruling: Court grants petition to compel arbitration over your objection.

- ▶ What you must do: Seek relief by writ; this is not an appealable order. (*Medeiros v. Superior Court* (2007) 146 Cal.App.4th 1008, 1014, n.7 [53 Cal.Rptr.3d 307].) *Medeiros* contains helpful language for seeking a writ: "We believe any arbitration compelled in the absence of a valid, enforceable arbitration agreement is an unduly time consuming and expensive proposition. Writ review is the appropriate way to review the challenged order and avoid having parties try a case in a forum where they do not belong, only to have to do it all over again in the appropriate forum." (*Ibid.*) If the writ petition is denied, you can seek appellate review of the order granting the petition to compel arbitration on an appeal from a judgment entered on the arbitration award.

Trial

- Adverse ruling: Erroneous denial of for-cause challenge of juror.

- ▶ What you must do: Exhaust your peremptory challenges. (Civil Appeals, ¶ 8.270.2.) If all peremptories were exercised, erroneous denial of a challenge for cause mandates reversal if the challenging party wanted to excuse another juror. (Wegner, Fairbank, Epstein, et al., California Practice Guide - Civil Trials & Evidence (Rutter 2005 rev.) (Civil Trials, ¶ 5:498).)

- Adverse event: Misconduct by opposing counsel.

- ▶ What you must do: (1) make a timely and proper objection, and (2) request that the jury be admonished. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780,

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794-795 [16 Cal.Rptr. 3d 374].) But if the misconduct is so prejudicial that it could not be cured with a cautionary admonition, then the failure to request an admonition will not preclude review. (*Ibid.*) If the misconduct is truly egregious and prejudicial, you should make a motion for mistrial, or move for a new trial.

● Adverse ruling: Erroneous denial of motion in limine to exclude evidence

► What you must do: A motion in limine will preserve the right to appellate review if (1) it is directed to a specific, identifiable body of evidence; (2) a specific legal ground for exclusion is raised; and (3) the motion was made at a time before or during trial so that the trial judge could determine the evidentiary question in context. (Civil Appeals, ¶ 8:3229.) In some circumstances, a court cannot rule intelligently until the evidence is actually offered, and it can evaluate its probative value and potential for prejudice, confusion, or undue consumption of time in light of the other evidence in the trial. In these cases, a proper objection must be made when the evidence is offered to preserve the issue for appeal. (*Id.*, ¶ 8:3300.)

● Adverse ruling: Erroneous admission of evidence.

► What you must do: Make proper, timely objection and move to strike. (Civil Appeals, ¶ 8:270.) You must obtain a ruling on the objection to preserve the issue for appeal. (*Ibid.*) You must object on the proper ground. An objection made on one ground does not preserve other grounds for appellate review. (*Id.*, ¶ 8:3317.) An objection that offers no legal grounds preserves no grounds for review. (*Id.*, ¶ 3319.) An objection that evidence is “incompetent, irrelevant, and immaterial” is too general to preserve appellate review (Civil Trials, ¶ 8:3321.) [But would seem to be sufficient to preserve a relevance objection — JIE.] Likewise, the objection “lacks foundation” may be too general to identify the specific reason the foundation is insufficient. (*Id.*, ¶ 8:3323, 3324.) But an objection that is sustained on an erroneous ground can be reviewed on appeal, since the appellate court can affirm if exclusion is proper on any theory. (*Id.* ¶ 8:3318.)

● Adverse ruling: Erroneous exclusion of evidence.

► What you must do: Make adequate offer of proof. (Civil Appeals, ¶ 8:270.)

● Adverse event: Opponent uses improper graphic or chart to illustrate argument or to question a witness.

► What you must do: Object; if overruled, have the graphic marked for identification so it can be included in the appellate record. (Civil Trials, ¶ 8:488-490.) (The authors of the Civil Trials treatise suggest bringing a Polaroid camera to court, so that with the judge’s permission, you can take a photo of an offending graphic.)

● Adverse ruling: Judge allows or requires witness to give a demonstration.

► What you must do: A demonstration given under similar circumstances to the event in question is *evidence*, which can be relied upon to support a verdict. (*People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1656 [241 Cal.Rptr. 550]; *People v. Buttles* (1990) 223 Cal.App.3d 1631, 1639 [273 Cal.Rptr. 397].) Unless an adequate record is made of the demonstration there can be no appellate review. (Civil Trials, ¶ 8:493.) If you expect an opposing witness to demonstrate anything during trial, bring a video camera, so that (with court permission) you can tape the demonstration. Failing that, use the Polaroid, and make sure that you make an attempt to clearly describe for the record what the witness is doing.

● Adverse event: Counsel plays only part of video or audio tape for jury.

► What you must do: Describe on the record exactly what parts of the tape were presented to the jury. (Civil Trials, ¶ 8:542.)

● Adverse ruling: After a bench trial, court issues an adverse decision.

► What you must do: Request a statement of decision. A statement of decision explains the factual and legal basis for the court’s decision, much like findings of fact and conclusions of law did. It supplements the record for appeal, allowing the reviewing court to examine the trial court’s reasoning on disputed issues to determine whether the appealed decision is supported by the evidence and the law.

(*Whittington v. McKinney* (1990) 234 Cal.App.3d 123 [285 Cal.Rptr. 586].) Where no statement of decision is issued (either because it is not requested, or was waived by failure to make a timely request), the appellate court will apply the doctrine of implied findings; that is, it will presume on appeal that the trial court made all necessary factual findings to support the judgment. On appeal, the only issue will be whether there is sufficient evidence to support the judgment. (*Michael U. v. Jaime B.* (1985) 39 Cal.3d 787, 792-793 [218 Cal.Rptr. 39].)

Under section 632 of the Code of Civil Procedure, you have 10 days from the time the court announces its tentative decision to request a statement of decision. *NOTE:* if the bench trial lasts less than one day, or less than eight hours spread over more than a day, you must request the statement of decision at the time the matter is taken under submission. (Code Civ. Proc., § 632.) The request for statement of decision must specify the controverted issues on which the statement of decision is requested. (*Ibid.*) After a request, any party has 10 days to make objections and counter-proposals for the contents of the statement of decision. (*Ibid.*)

Once the Court issues the proposed statement of decision, the losing party has 15 days to serve and file objections to the statement of decision on the grounds that it omits findings on critical issues or that its findings are ambiguous. (Code Civ. Proc., § 634.) The objections must be specific, not generalized, or they will not preserve the issue for appellate review. (Civil Trials, & 16:183.) The failure to object waives the issue on appeal. (*Id.*, & 16:186.) But legal errors appearing on the face of the statement of decision are not waived, and need not be objected to in order to preserve the issue. (*Id.*, & 16:187.)

● Adverse ruling: Judge uses inadequate jury-verdict form.

► What you must do: Object; propose a proper form. (*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1158 [defense counsel fails to object to form that does not segregate components of economic

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damages, precluding post-trial reduction of medical expenses].)

- Adverse ruling: Court gives defective jury instruction.

- ▶ What you must do: If the instruction is legally correct, but is insufficiently specific or incomplete, you must object. (Civil Appeals, ¶ 8:274, 275.) But if the instruction is legally incorrect, no objection is necessary to preserve the issue for appeal. It falls within the class of matters “deemed excepted to” under Code Civ. Proc. section 647. (*Ibid.*) It is better practice to propose a correct instruction, but not necessary to preserve the issue for review. (Civil Trials, ¶ 14:216.)

- Adverse event: Jury issues an inconsistent or defective verdict.

- ▶ What you must do: Bring the error to the court’s attention and have the jury re-empanelled so they can address the problem before they are discharged. (Civil Trials, ¶ 14:247.2.) But an inconsistent verdict is “against law” and will support a motion for new trial, and can also be raised on appeal, even if the issue was not raised in the trial court before the jury was discharged. (Civil Appeals, ¶ 8:276.2.)

- Adverse ruling: Court conducts informal jury-instruction conference to select jury instructions to be read to the jury, and adopts some instructions you object to.

- ▶ What you must do: Do not rely on Code Civil Procedure section 647 to preserve your objections. Instead, make sure

that the judge goes on the record and formally makes its rulings, or issues a minute order. Make sure that the record accurately reflects the proponent of each instruction — you do not want to be accused of inviting error for an instruction you did not propose. Make sure the record reflects the judge’s ruling and rationale, as well as your objections. If the instruction is too general, incomplete, or vague, both object and propose language to cure the problem. (Civil Trials, ¶ 14:225.)

Post-trial issues

- Adverse ruling: Jury’s verdict awards inadequate or excessive damages.

- ▶ What you must do: Make a timely motion for new trial on this basis. (Code Civ. Proc., § 657(5).) Ordinarily, errors are not waived on appeal by the failure to make a motion for new trial. (Civil Appeals, ¶ 8:278.) But this rule does not apply for a claim of inadequate or excessive damages. In order to preserve the issue for appeal, you must seek a new trial on damages. But the failure to move for a new trial on this ground does not preclude appellate review of asserted errors concerning the trial of damages issues, such as erroneous evidentiary rulings, instructional errors, or legal error concerning the measure of damages. (*Id.*, ¶ 8:279.)

- Adverse ruling: In federal court, jury renders a verdict that is not supported by substantial evidence.

- ▶ What you must do: In federal court (but not in California court) in order to preserve a challenge to the sufficiency of the evidence to support the verdict in a civil case, a party must make two motions. First, a party must file a pre-verdict motion pursuant to Federal Rules of Civil Procedure 50(a); Second, a party must file a post-verdict motion for judgment as a matter of law or, alternatively, a motion for a new trial, under Rule 50(b). (*Nitco Holding Corp. v. Boujikian* (9th Cir. 2007) 491 F.3d 1086.)

On appeal

- Adverse ruling: Appellate opinion rules against you, and contains important factual **misstatements or omissions**.

- ▶ What you must do: Petition for rehearing if you wish to seek review in the California Supreme Court. While seeking rehearing is not a prerequisite for seeking review, the Court will generally accept the appellate court’s statement of the facts unless the party has called any omission or misstatement to the appellate court’s attention in a timely petition for rehearing. (Cal. Rules of Court, Rule 8.500(c)(2).)

Jeffrey Isaac Ehrlich is the principal of the Ehrlich Law Firm in Claremont. His practice emphasizes insurance bad-faith and appellate litigation. He is certified by the State Bar of California as an appellate specialist, and is the editor-in-chief of this magazine.