

Preserving the Appellate Record

Justice Shama Mesiwala

Fundamental premise of this
presentation:

You cannot preserve the appellate
record unless you:

- (1) understand the appellate process
- &
- (2) your role in it.

I'm here to teach you all that.

Who am I to teach you about appeals?

- Been doing appeals for over 20 years:
 1. Spent 5 years as appellate lawyer filing over 100 appellant's opening briefs. Argued in CA Courts of Appeal + Cal Supremes
 2. Spend 13 years as a research attorney at the Third District Court of Appeal and wrote 500 draft opinions
 3. Have been an associate justice for 3.5 years
 4. Have been the professor of Appellate Advocacy at UC Davis Law for the last 14 years
- Was a commissioner + judge for 6 years.

Before we get started...

Please participate!

- Ask questions
- Answer questions
- You will learn more
- We will have more fun
- And the session will be shorter!

In California, we follow these fundamental premises on appeal:

- We review a trial court's rulings for prejudicial error
- “No judgment shall be set aside . . . [unless] the error complained of has resulted in a miscarriage of justice.” (Cal. Const. Art. 6, sec. 13.)
- Remember it this way: you are not entitled to a perfect trial; you are entitled to a fair one!
- Exceptions to prejudicial error review: structural error (examples: deprived of your right to a jury trial; deprived of your right to represent yourself.)

Getting started with an appeal: appealability

- “[A]n appeal may be taken only from a final judgement in an entire action.” (*In re Baycol Cases I and II* (2011) 51 Cal.4th 751, 756.)
 - This is the one final judgment rule. To be appealable, a judgment or order must fully terminate the litigation on the merits and leave nothing further for the court to do but enforce it. (*Sullivan v. Delta Airlines, Inc.* (1997) 15 Cal.4th 288, 304.)
- Frequent errors we see on appealability:
 - Appealing from a grant of summary judgment. The appeal is from the resulting judgment
 - Appealing from an order sustaining a demurrer without leave to amend. The appeal is from the order of dismissal
- Exceptions to final judgment rule:
 - Dismissal of a party for all purposes
 - Orders regarding arbitration
- Question of appealability is jurisdictional. An appellate court must consider it even if its not raised by the parties. (*Olson v. Cory* (1983) 35 Cal.3d 390, 398.)

Getting started with an appeal: timeliness

- Normal time to appeal: 60 days after judgement or making of the appealable order
- But look up the specific rules:
 - Civil cases = Cal. Rules of Court, rule 8.104(a)
 - Criminal cases = Cal. Rules of Court, rule 8.308(a)
- “The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal.” (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins.* (1997) 15 Cal.4th 51,56.)
- You file the notice of appeal in the trial court (not appellate court).

What guides appellate review: 4 principles

- 1) Presumption of correctness
- 2) Standards of review
- 3) Standards of prejudice
- 4) Stare decisis.

1) Presumption of correctness

- All presumptions are indulged by the appellate court to support the trial court's judgment (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)
- Appellate courts presume the trial court:
 - followed the law;
 - considered only admissible evidence; and
 - made findings that were supported by the evidence
- Appellate courts presume the jury:
 - followed the jury instructions
- All of this means that it is always appellant's burden to affirmatively demonstrate error. (*Lynch v. Birdwell* (1955) 44 Cal.2d 839.)

2) Standards of review

- Three basic standards of review:
 - If reviewing a question of law – de novo review
 - If reviewing the trial court's exercise of its discretion – abuse of discretion review
 - If reviewing the trial judge's or jury's findings of fact – substantial evidence review
- Let's talk about each one in detail in the next slides....

De novo review = no deference

- Appellate court gives no deference to the trial court's ruling
- Applies to questions of law
- Examples:
 - Interpretations of statute, including voter initiatives
 - Constitutional amendments adopted by voter initiative
 - Constitutionality of a statute
 - Validity of a jury instruction
 - Interpretation of a contract
 - Duty of care
 - Grant or denial of summary judgment
 - Sustaining a demurrer
- Why do we give no deference?
 - The trial court is in no better position to make these calls than the appellate court

Abuse of discretion = substantial deference

- Appellate court gives substantial deference to the trial court's ruling

- Applies to decisions that trial courts have some leeway in making

- Examples:

- The length of a sentence

- Whether to admit certain evidence (pursuant to Evidence Code 352)

- Whether to place someone on probation

- Grant or denial of a continuance

- What constitutes an abuse of discretion

- 1) When a trial court exercises its discretion in an “arbitrary, capricious, or patently absurd manner” (*People v. Williams* (2013) 58 Cal.4th 197, 270-271) OR

- 2) Is mistaken about the scope of its discretion (such as exercising discretion in a way that the law does not allow) (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298.)

- Some hypos (class participation)

Hypothetical #1

The sentence a judge can pick from for a defendant convicted of robbery is two, three, or five years.

The court selects the low term of two years because defendant has no criminal history but the current robbery was very violent.

Based on these facts, did the judge abuse her discretion in selecting the low term?

→ No

Hypothetical #2

Same facts as hypothetical #1.
But the court selects the high term of five years because the current robbery was very violent.

Based on these facts, did the judge abuse her discretion in selecting the high term?

→ No

Hypothetical #3

Same facts as hypothetical #1.
But the court selects the term of six years because the current robbery was very violent.

Based on these facts, did the judge abuse her discretion in selecting the six-year term?

→ Yes

Substantial evidence = substantial deference

- Appellate court gives substantial deference to trial court's or jury's ruling
- Applies to factual decisions made in the trial court
- Prime example:
 - Substantial evidence to support the jury's verdict
- What constitutes "substantial" evidence?
 - Evidence is that reasonable in nature, credible, and of solid value
 - Appellate courts views the evidence in the light most favorable to the prevailing party, given it the benefit of every reasonable inference and resolving all conflicts in its favor
 - "[O]ur power begins and ends with a determination as to whether there is any substantial evidence to support [the trial court's factual determinations]; that we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses, or to resolve conflicts in the evidence or the reasonable inferences that may be drawn therefrom." (*Capra v. Capra* (2020) 58 Cal. App. 5th 1072, 1094-1095, quoting *Overton v Vita-Food Corp.* (1949) 94 Cal. App. 2d 367, 370.)
- Some hypos (class participation)

Hypothetical #1

A jury found defendant guilty of robbery after hearing testimony from the victim that defendant snatched the purse she was wearing. The jury also heard testimony from five other witnesses who watched the incident and testified the victim was not wearing a purse and defendant never snatched anything from the victim.

On appeal, defendant argues there was no substantial evidence to support the guilty verdict.

Is this a winning issue?

→ No

Hypothetical #2

Same facts as hypothetical #1. But the victim was the disgruntled ex-wife of defendant. And the five witnesses were simply bystanders who happened to be walking by and watch the tussle between the victim(ex-wife) and defendant. And this evidence was put before the jury. The jury still chose to believe the victim over the bystanders' testimony to the contrary.

Again on appeal, defendant argues there was no substantial evidence to support the guilty verdict.

Is it a winning issue this time?

→ No

What standard is most favorable if you are appellant (de novo, abuse of discretion, substantial evidence)?

→ De novo

What standard is most favorable if you are respondent (de novo, abuse of discretion, substantial evidence)?

→ Substantial evidence

3) Standards of prejudice

- Two basic standards of review:
 - If it's federal constitutional error – it is a reversal unless the respondent can prove beyond a reasonable doubt that the error was harmless (*Chapman v. California* (1967) 386 U.S. 18.)
 - If it's state law error – it's an affirmance unless the appellant can show a “reasonable probability” that a result more favorable to appellant would have been reached absent the error. (*People v. Watson* (1956) 46 Cal.2d 818.)
- But remember, if it's structural error, then it's reversible per se (eg: total denial of right to counsel).

How do standards of review and standards of prejudice interact?

- Standards of review determine the level of deference an appellate court gives to the trial court's ruling
- Standards of prejudice determine the threshold for reversing the decision once the appellate court finds error

4) Stare decisis

- “To stand by things decided”
- So which courts do the CA state appellate courts follow?
 - California Supreme Court in all matters (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)
 - US Supreme Court in interpreting the federal constitution or federal statutes
 - This is interesting: the state appellate courts are not bound by the decisions of other intermediate appellate courts (or even their own)

THE END