Procedures For Settled Statements

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Procedures For Settled Statements

A. Introduction

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1. Criminal Appeals

An appellant in a criminal case has a state and federal due process right to an appellate record that is adequate to permit meaningful appellate review. (*People v. Alvarez* (1996) 14 Cal.4th 155, 198, fn. 8.) However, it is the appellant's burden to show the record is inadequate to permit such review. (*People v. Arias* (1996) 13 Cal.4th 92, 158.) Therefore, if missing portions of an appellate record can be adequately reconstructed, the appellant must use such methods to obtain appellate review. (*People v. Young* (2005) 34 Cal.4th 1149, 1170.) A "settled statement," also known as "record settlement," is the most common form of reconstruction when a portion of an appellate record cannot be prepared.

The procedure for seeking permission to settle a statement in a noncapital felony appeal is set forth in the California Rules of Court, rule 8.346 [record on appeal]. If permission is granted, the parties must comply with the relevant provisions of California Rules of Court, rule 8.137 [settled statements]. Anyone who attempts to settle the record will find two universal truths: 1) these rules do not answer many of the practical questions that arise; and 2) very few trial attorneys or judges understand the procedures on how to do a settled statement.

This article offers some suggestions for understanding the law governing settled statements and the process of doing a settled statement, and for avoiding a few of the pitfalls in both considering and handling record settlement proceedings. It also discusses types of situations where settled statements may be necessary for effective representation.

In addition, sample documents relevant to settled statement proceedings are being posted along with this article, in order to provide tangible illustrations of settled statement filings.

2. Juvenile Appeals

The rule 8.346 procedures used for noncapital felony appeals also apply in juvenile appeals. California Rules of Court, rule 8.407(d) expressly provides for the use of settled statements in juvenile appeals (both dependency and delinquency, under rule 8.400), and directs the parties to comply with rule 8.346. In this article, all references to rule 8.346 will also include juvenile appeals governed by rule 8.407(d), which expressly

incorporates rule 8.346.

Previously, language in *In re Steven B.* (1979) 25 Cal.3d 1, 6-8 was sometimes construed as suggesting that no statute, rule or case specifically provided for a settled statement in a juvenile court appeal, so the remedy was a new hearing. Yet a juvenile opinion contemporaneous to *Steven B.* appeared to approve of settled statements, as it rejected a claim of record inadequacy on the ground that the minor's counsel "[had] available the means to perfect the record by agreed or settled statement." (*In re Kathy P.* (1979) 25 Cal.3d 91, 102; *see also In re Walker* (1958) 159 Cal.App.2d 463, 467.) Subsequent caselaw concluded that "despite certain suggestive language in the *Steven B.* opinion" which suggested *per se* reversal, that opinion should be limited to its facts which involved the prejudicial loss of a major portion of the transcript of a contested trial, and a settled statement was generally a permissible means of record reconstruction in a juvenile appeal. (*In re Ian J.* (1994) 22 Cal.App.4th 833, 838-839.)

At this point, any controversy over the 1979 *Steven B.* language is clearly moot. The Judicial Council's 2005 enactment of (former) California Rule of Court rule 37.1(d) – which according to the Advisory Committee comment was enacted to "fill[] gaps consistently with practice" – made explicitly clear that settled statements were permissible in juvenile appeals, and the procedure was the same as that in noncapital felony appeals. This provision has since been renumbered and is currently contained in rule 8.407(d).

B. What Is A Settled Statement?

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A settled statement is some part of the record or oral proceedings for which there is no reporter's transcript available. Thus, a settled statement operates to make up for the absence of a reporter's transcript of oral proceedings (usually because a reporter was not present or the reporter's notes were lost), and not to supply what was originally omitted from those proceedings. (*People v. Griffin* (2004) 33 Cal.4th 536, 554; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 585 [the "settlement ... process does not allow parties to create proceedings ... which they neglected to [create] earlier"].)

The "oral proceedings" described by rule 8.346 have been defined as an "unreported
matter, the contents of which may be helpful on appeal." (*People v. Gzikowski* (1982) 32 Cal.3d 580, 585, fn.2.) "The test is parallel to that for augmentation of the 'normal record' [rule 8.320] in an indigent's appeal; appellant must establish 'with some certainty *how* the [additional] materials he requests may be useful to him on appeal.' [Citation.]" (*Gzikowski*, at p. 585, fn. 2 [italics in original].) To make such a showing, appellate

counsel may – and often must – draw on the memories and notes of participants in the original proceeding (*ibid*.), most commonly trial counsel or the client.

Record settlement is closely related to record augmentation, in that both seek to add materials to the appellate record that were part of the trial court proceedings, after the original reporter's and clerk's transcripts have been filed in the Court of Appeal. The difference is basically that an application to augment the record addresses existing materials, while an application to settle the record addresses nonexistent or lost materials. More specifically:

- Augmentation seeks to add to the appellate record existing materials that are within the possession of the trial court, or can readily be verified as having been in its possession. It does not require trial court involvement because the Court of Appeal can simply order the county clerk to produce documents from the trial court file or that can be readily transcribed and added to the record. By contrast:

- Record settlement seeks to add to the record materials that were part of the trial court proceedings but require reconstruction because they were subsequently lost, misplaced, destroyed, or – in the case of unreported proceedings – never even created or recorded. It requires trial court involvement because the trial court is generally the most able adjudicator of what happened in its own proceedings, though ultimately the contents of an appellate record are subject to the final decision of the appellate court.

In a way, though, a settled statement is also a form of record augmentation. Once a settled statement is certified by the trial court, it still has to be added to the appellate record, which if not done by the trial court clerk, can be done by some form of record augmentation (motion to augment or rule 8.340(b) request). Appellate counsel has the responsibility to monitor this.

C. Distinguishing Agreed Statements

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Other rules and some caselaw contain references to the term "agreed statement." An "agreed statement," however, is not the same as a "settled statement." An agreed statement is essentially a stipulated statement of the case and facts relevant to the legal issues that will be presented on appeal (*see* Cal. Rules of Court, rule 8.134(a); *see also* Code Civ. Proc., § 1138), while a settled statement is a substitute record for oral proceedings when a reporter's transcript cannot be obtained. An agreed statement is unlikely to be useful in an indigent felony appeal absent a rare confluence of two unusual circumstances (missing transcript, in a proceeding with a pure issue of law for which the respondent would stipulate to the relevant facts), though it might conceivably be

appropriate for readily ascertainable questions of law arising from discrete trial proceedings such as sentencing. (*See People v. Hulderman* (1975) 64 Cal.App.3d 375, 381-382.) In any event, it is important not to confuse the two terms, since court rules and caselaw that apply to "agreed statements" will not necessarily apply to settled statements.

D. What Would And Would Not Qualify As "Oral Proceedings" For Record Settlement Purposes? Go To Index

1. What Would?

An "oral proceeding" that can be the subject of a settled statement is a proceeding (or portion of a proceeding) for which a reporter's transcript cannot be prepared because the reporter's notes have been lost or destroyed, or because no reporter was present, and that can be shown to be material to a potential issue on appeal. (*See People v. Gzikowski*, *supra*, 32 Cal.3d at p. 585, fn. 2.)

Following is an illustrative list of the types of items that may qualify as "oral proceedings" for purposes of settled statements:

a. An unreported sidebar (*People v. Pinholster* (1992) 1 Cal.4th 865, 922);

b. An unreported chambers conference (*People v. Holloway* (1990) 50 Cal.3d 1098, 1116);

c. An unreported jury question or answer to one (*People v. Carter* (2003) 30 Cal.4th 1166, 1215);

d. An unreported evidentiary objection or ruling on one (*People v. Adams* (1988) 198 Cal.App.3d 10, 16-17);

e. An unreported *ex parte* bench conference between the trial judge and a juror regarding the juror's ability to serve (*People v. Wright* (1990) 52 Cal.3d 367, 401, fn. 6);

f. An in chambers discussion between the trial judge and counsel regarding proposed jury instructions (*People v. Freeman* (1994) 8 Cal.4th 450, 510; *People v. Hardy* (1992) 2 Cal.4th 86, 183-184);

g. An in chambers discussion concerning the defendant's mental competence (*see People v. Castro* (1982) 138 Cal.App.3d 30, 33);

h. "[T]he circumstances surrounding notes sent by the jury during its

deliberations (i.e., why only certain portions of a witness's testimony were read back to the jury, exactly when the court received a note, and when or how counsel agreed to a response)." (*People v. Harris* (2008) 43 Cal.4th 1269, 1280-1281);

i. A map used by a witness but not introduced into evidence (*St. George v. Superior Court* (1949) 93 Cal.App.2d 815, 816-817 [settled statement permitted, even though map not introduced as an exhibit, because map was "an integral part of the witness's testimony"]; *see also People v. Harris, supra,* 43 Cal.4th at pp. 1280-1281);

j. Physical gestures by a witness during oral testimony which were not adequately described on the record (*see People v. Harris, supra,* 43 Cal.4th at pp. 1280-1281);

k. A summary of what occurred in a jury's visit to a crime scene during a trial (*see People v. Wisely* (1990) 224 Cal.App.3d 939, 945-946);

l. Courtroom security, shackling, and physical restraints used on the defendant during trial (*United States v. Greenwell* (4th Cir. 1969) 418 F.2d 845, 846 [construing similar provisions of Fed. R App. P. 10(e)]);

m. The fact that the trial judge viewed the premises which were a subject of the proceedings (*San Francisco Unified School District v. Board of National Missions* (1954) 129 Cal.App.2d 236, 241);

n. Who was present, or not present, on behalf of the parties at a given proceeding (*see People v. Bradford* (1997) 15 Cal.4th 1229, 1331 & fn. 14); and

o. Which portions of an audiotape or videotape exhibit were played to the jury, and which portions were not (*People v. Anderson* (2006) 141 Cal.App.4th 430, 440).

In novel or aberrant situations, appellate counsel may also consider the possibility of more innovative uses of the settled statement process. After all, it is appellate counsel's duty to make a record adequate for the appellate review sought. So appellate counsel should not be reluctant to take whatever appropriate steps are necessary to do so.

For example, in one capital appeal, lengthy video exhibits of the defendant's statements to police were played for the jury, but no transcripts were prepared. Many of the statements made on the videos were important to issues appellate counsel intended to raise. But as a practical matter, referring to specific portions of lengthy videos without a transcript would have been very cumbersome and fraught with uncertainty – not to mention time-consuming – if all counsel, the court and the research attorneys had to try to

find precisely specified places in the videos hundreds of times over, without anything other than the general descriptions of particular spots in the videos to guide them.

Appellate counsel therefore proposed to respondent's counsel a procedure by which a secretary in the DA's office would do draft transcriptions of the videos, the attorneys would review the drafts and propose corrections, a secretary at the AG's office would enter agreed-upon corrections, and that process would continue until the attorneys reached full agreement (with any remaining disputes subject to resolution by a settled statement hearing). In order to ensure the cooperation of the prosecutor's office, counsel first sought and obtained a court order for such a procedure. The process resulted in a stipulated settled statement of transcripts for all of the videos. As a result, appellate counsel ended up with the desired record, respondent's counsel was grateful for appellate counsel's initiative, and no doubt the Court and its research attorneys were happy to avoid the mess that would have been created by hundreds of briefing citations to lengthy untranscribed, unindexed videos.

2. What Would Not?

The term "oral proceedings" does not include the reasoning or thought processes of either the trial judge or counsel regarding their actions or failure to act. This was the holding in *People v. Williams* (1988) 44 Cal.3d 883, where, over objections, the trial court settled the record to include trial counsel's explanation that a certain motion was not made as a part of his trial strategy. The Supreme Court there recognized that the "recital regarding counsel's trial strategy may not reflect an oral proceeding that may be settled under rule 36(b) [now rule 8.346] . . . ." (*Id.* at p. 921.)

Counsel may therefore object to the inclusion of any statements being placed on the appellate record or included in the settled statement which are an expression of reasons or thought processes for what was done or not done, that did not appear in the record below. Where counsel wishes to keep such matters out of the statement, counsel should object at every opportunity in the trial court. If such matters are included in the certified settled statement over objection, counsel must renew the objections in the Court of Appeal under rule 8.155(c) [former rule 12(b)], such as by moving to strike that portion of the prepared settled statement. (*People v. Williams, supra*, 44 Cal.3d at pp. 921-922; *accord People v. Hardy, supra*, 2 Cal.4th at pp. 183-184 & fn. 30.)

As a corollary, matters which were not before the trial court at the time of a particular motion or ruling cannot properly be the subject of record settlement or augmentation with respect to that motion or ruling, even if they were presented to the trial court at a later time. (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 732, fn. 6.) Because most appellate issues with respect to a particular motion or ruling can only be based on matters that were actually before the trial court at the time of that motion or

ruling (*see, e.g., People v. Berryman* (1993) 6 Cal.4th 1048, 1070), post-ruling matters are necessarily not a proper subject for addition to the record. (*Accord Steele v. Int'l Air Race Ass'n* (1941) 47 Cal.App.2d 61, 62.)

Similarly, unexpressed thought processes or observations of the prosecutor or trial judge, that were not put on the record at the time, should not qualify for record settlement. (*Cf. People v. Jones* (1997) 15 Cal.4th 119, 149, fn. 6 [not deciding the question]; *see also People v. Griffin* (2004) 33 Cal.4th 536, 554, fn. 3 [prosecutor's motion to "augment" the record to permit prosecutor to state reasons for challenging African-American prospective jurors, opposed by the defense on the ground that there was nothing further to put in the record, was denied by the trial court].) In this regard, the following admonition from the Supreme Court bears quoting at length:

> The rules authorizing settlement, augmentation, and correction of the record on appeal concern documents "file[d] or lodged" in the superior court and transcripts of "oral proceedings" that occurred therein. [Citations.] These provisions--much like the entire network of rules governing matter properly included in the appellate record--are intended to ensure that the record transmitted to the reviewing court preserves and conforms to the proceedings actually undertaken in the trial court. [Citations.] The settlement, augmentation, and correction process does not allow parties to create proceedings, make records, or litigate issues which they neglected to pursue earlier. . . . [A party] is entitled to an appellate record that accurately reflects what was done and said in the trial court--not what he wishes had been done or said. (*People v. Tuilaepa, supra,* 4 Cal.4th at p. 585 [emphasis added].)

So if during an appeal, a prosecutor or trial judge wants to add matters to a record that were not previously in the record, such as an extra argument or basis for a ruling, that should not be a proper subject of record settlement. (*See also Shively v. Kochman* (1937) 20 Cal.App.2d 688, 692-693.)

Of course, that can work both ways. In *People v. Griffin, supra,* 33 Cal.4th 536, appellate counsel who would eventually raise a *Batson* issue (*Batson v. Kentucky* (1986) 476 U.S. 79) requested permission to settle the record, for the purpose of identifying all of the prospective jurors who were both African-American and peremptorily challenged by the prosecutor. The Supreme Court denied the application, on the ground that a settled statement is intended to make up for the absence of a reporter's transcript of matters that actually transpired, not allow parties to create a new record or supply matters that were previously omitted. "If the record on appeal is inadequate, it is defendant who is responsible, inasmuch as he failed to include in the oral proceedings at trial the information that he improperly sought to insert through a settled statement." (*People v. Griffin, supra,* 33 Cal.4th at p. 554, fn. 4.)

The term "oral proceedings" also does not include the contents of materials that were created prior to the trial, even if those materials were presented to the trial court or the jury during the trial.

For example, in *People v. Anderson* (2006) 141 Cal.App.4th 430, a pretrial *Miranda* motion asserted that the defendant had invoked her *Miranda* rights during a police interview a few days after a homicide. Portions of the audio were difficult or impossible to understand; one such portion contained what the defendant claimed was her *Miranda* invocation, and a transcript prepared by a police transcriptionist supported the claim. Nonetheless, the trial judge found this portion to be inaudible, and denied the *Miranda* motion partly for want of a showing that the defendant had invoked her rights. After conviction and judgment, the defendant's appellate attorney – without objection from the trial prosecutor or the Attorney General – sought and obtained a settled statement hearing which was conducted by a second judge. The second judge concluded instead that the defendant had invoked her *Miranda* rights, and certified a settled statement to that effect.

The Court of Appeal rejected the settled statement *sua sponte*, on the ground that there was a complete record consisting of the audio and videotapes of the interview, so there was no "gap in the record" for a settled statement to fill. Instead, the settled statement procedure was being utilized by appellant to relitigate the first trial judge's factual findings on the contents of the audio – which is not a proper function of a settled statement. (*Anderson*, 141 Cal.App.4th at pp. 441-442.) While appellate counsel made his best effort (and managed to persuade the prosecution's trial and appellate attorneys of its soundness), in the end the Court of Appeal's result was entirely understandable.

Finally, for purposes of the settled statement rules, "[a]n unreported discussion that has no bearing on appeal is not an oral proceeding that may be settled under rule [8.346]." (*People v. Gzikowski*, *supra*, 32 Cal.3d at p. 585, fn. 2.) While it may be an "oral proceeding" in the abstract, the appellant's counsel must also satisfy the requirement described in section (B) above – by making a showing equivalent to that required for a motion to augment in an indigent appeal – in order for the unreported discussion to qualify as an "oral proceeding" under the settled statement rules. (*Ibid*.)

E. Can Counsel Reconstruct A Record As To Documents Or Other Tangible Materials That Do Not Themselves Appear To Be "Oral Proceedings"?

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1. By Settled Statement

Although the literal language of the rule governing settled statements is limited to "oral proceedings," the governing law also permits an appellant to seek reconstruction of tangible items – such as exhibits – that were part of the proceedings below. "Reconstruction of [tangible items] is essentially the same as preparing a settled statement for unreported portions of trial proceedings; it provides 'evidence,' for want of a better term, of the trial proceedings." (*People v. Coley* (1997) 52 Cal.App.4th 964, 969.)

In particular, settled statement reconstruction of this nature can be requested for missing exhibits. (*See, e.g., People v. Osband* (1996) 13 Cal.4th 622, 661-664 [reconstruction of 68 exhibits lost by the superior court clerk's office; 62 could be reproduced from prosecution negatives, three were not admitted into evidence, and six more were properly the subject of a settled statement; resulting record was adequate to permit meaningful review]; *People v. Coley, supra,* 52 Cal.App.4th at pp. 972-973 [appellate counsel did not seek reconstruction of lost exhibit consisting of the knife for which appellant was convicted of illegal possession; held that appellant could not complain of error related to the characteristics of the knife, because appellant had failed to perfect an appellate record by seeking reconstruction].)

However, most any tangible item that was part of the trial proceedings below can be the subject of a request for reconstruction, as long as appellate counsel can meet the minimum legal standard for requesting a settled statement. (*See, e.g., People v. Galland* (2008) 45 Cal.4th 354, 372 [lost affidavit in support of a search warrant].) To put it another way, the phrase "oral proceedings" may be construed broadly rather than narrowly, to include basically anything that was before the trial court or the jury in the proceedings leading to the judgment on appeal.[1]

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[1] Even juror questionnaires that were lost or destroyed can be the subject of a request for reconstruction, no matter how imprecise or partial the reconstruction might end up being. In some situations, counsel may need to make such a request though knowing the results will be highly incomplete, before making an appellate argument that the loss or destruction of the questionnaires resulted in an inadequate record and was therefore reversible error. (*See post,* section (E)(2).)

While there does not appear to be a California appellate opinion to date that has reversed a conviction based on the trial court's destruction of jury questionnaires when an

2. By Record Augmentation

When a document or set of documents has not been retained by the superior court, but an identical copy is available from another source (such as trial counsel), record augmentation – which is preferable to record settlement when it is available – may sometimes be used to complete the record. In *People v. Barnard* (1982) 138 Cal.App.3d 400, the issue on appeal was a DEA file which the trial court had examined *ex parte*, and then returned to a DEA agent. After the defendant appealed, the trial court apparently obtained the file again, certified it as accurate, and sent it to the Court of Appeal. The Court of Appeal held this was a proper form of record augmentation; it rejected defendant's contention that the DEA file was not a document "filed or lodged [in the case] in the superior court" under what is now rule 8.155(a)(1)(A), since the file had once been in the trial court's possession or control for purposes of determining a contested issue. (*Id*. at pp. 406-407.)

This type of procedure can therefore be used by appellate counsel, as long as proper formalities are observed which are equivalent to the trial court's certification in *Barnard*. For example, suppose the prosecutor gives the trial judge a document to examine during a pretrial motion hearing and also gives trial counsel a copy, and the judge later returns the original to the prosecutor but fails to retain a copy in the court file. On appeal, counsel can attach trial counsel's copy to a motion to augment, along with a declaration from trial counsel affirming that this is a copy of the document examined by the judge and briefly stating the circumstances by which trial counsel received the copy. In the language of *People v. Barnard* above, this too would qualify as a document "'filed or lodged with the court,' since it was in the court's possession and control for purposes of determining the [motion]." (*People v. Bernard*, *supra*, 138 Cal.App.3d at pp. 406-407.)

Examples of other documents that might be suitable for such an augmentation-with-declaration procedure under *Barnard* include a proposed defense instruction and supporting argument emailed by counsel and reviewed by the judge, a defense motion or memorandum that was originally filed with the trial court but later went missing from the court file, or a psychiatrist's report that was reviewed by the trial judge during Penal Code section 1368 proceedings but was never formally filed. Even an unsigned document might suffice to replace a lost signed original with an adequate declaration, especially if there are no objections (*see People v. Galland*, *supra*, 45 Cal.4th at p. 372);

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issue was raised at trial under *Batson v. Kentucky* (1986) 476 U.S. 79, a brief review of the caselaw suggests the possibility that California appellate courts might not have been using correct legal standards in this area. Counsel who are dealing with a problem of this nature should contact the CCAP staff attorney assigned to the case.

the worst that could happen is that appellate counsel might be required to seek a settled statement – which would mean appellate counsel is no worse off for trying augmentation first.

F. How Do I Determine Whether Record Settlement Will Be Necessary?

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Determining whether record settlement will be necessary starts with thorough and accurate record review and transcript notes by appellate counsel.

In particular, while reading the record, counsel should keep an eye out for mistakes and missing material. For example, in the reporter's transcripts, counsel might note typos and mistakes in transcription, misspellings, garbled or unintelligible text, missing text, references to motions that aren't mentioned in the clerk's minutes, references to unreported proceedings such as conferences in chambers or at bench, and transcripts that appear to proceed out of sequence or refer to nonexistent material (since sometimes, only a portion of a proceeding or a single witness's testimony might be missing). When a reporter's transcript refers to another proceeding, counsel should check to make sure there are either clerk's minutes or a reporter's transcript for that proceeding. In the clerk's transcript, counsel might note missing pages, unreadable copies, references to sealed material not in the transcripts, etc.[2] Counsel should also compare the clerk's and the reporter's transcripts to determine whether the record contains a reporter's transcript for every proceeding and session (a.m. and p.m.) noted in the clerk's transcript, and a corresponding minute order in the clerk's transcript for every proceeding and session included in the reporter's transcript. If there are exhibits that appear to be particularly important which appellate counsel may need to see in order to understand the record, appellate counsel may either contact trial counsel, move for augmentation of the exhibits, or seek to view them at the superior court.

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[2] For potential sealed material questions, appellate counsel should usually check first with the Court of Appeal (beginning with a review of its docket), as the superior court often sends sealed transcripts directly to the Court of Appeal under rule 8.45. If that has happened, appellate counsel may simply file a request to view the sealed transcript. For sealed transcripts of proceedings that were or may have been conducted outside of the presence of the prosecution, appellate counsel may also request that no copy be sent to the Attorney General at that time.

Unfortunately, despite the provisions of rule 8.45(c), superior court clerks do not always prepare the required index of confidential materials; and despite the provisions of rule 8.45(d), superior court clerks do not always send *Marsden* transcripts to appellate counsel or the appellate project. So appellate counsel should be alert to the possibility that sealed transcripts may be lodged with the Court of Appeal, even if no specific notice was sent to appellate counsel.

It is also very important for appellate counsel to speak with trial counsel early in the case whenever possible. Sometimes, trial counsel will have insights on the trial which would be difficult or impossible for appellate counsel to glean from a cold record. With regard to record settlement specifically, if trial counsel refers to a proceeding, discussion, document or exhibit for which counsel cannot find any mention in the appellate record, and a motion to augment results in a declaration that the transcript cannot be prepared or the item no longer exists, appellate counsel may again wish to consider record settlement.

In determining whether to request record settlement, appellate counsel should always keep in mind a cardinal principle of appellate review: The party who seeks appellate review always "bear[s] the burden of providing a record on appeal that is adequate to adjudicate [its] claims." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 149.) This means that an appellant must provide a record that is sufficient to show affirmatively – without any need for speculation, conjecture, or theorizing as to the contents of missing material – the existence of reversible error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

When this does not happen, the reviewing court will construe gaps or omissions in the record in favor of the respondent. "A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*In re Julian R.* (2009) 47 Cal.4th 487, 498-499; *Denham v. Superior Court, supra,* 2 Cal.3d at p. 564.) So "[i]f the record furnished is insufficient to establish the merits of an appellant's legal position, it is the appellant who bears the risk of uncertainty caused by the lacuna." (*Aguilar v. Avis Rent A Car System, Inc., supra,* 21 Cal.4th at p. 149; *see also, e.g., Ballard v. Uribe* (1985) 41 Cal.3d 564, 574; *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1201.)

As a generalization, there are three common types of situations where record settlement may be necessary:

(1) Where the contents of a proceeding, or portion of a proceeding, are necessary for purposes of evaluating and/or presenting an issue on appeal;

(2) Where the *absence of* a portion of a proceeding (or of certain documents) is necessary for such purposes; or

(3) Where counsel needs a record of nonverbal events in a proceeding, or the absence of nonverbal events.

In many of these situations (and for that matter, in appellate advocacy generally),

counsel should be thinking ahead and asking themselves the all-important question "How would a Court of Appeal nowadays approach my argument?" Counsel with the foresight to ask themselves this question should do so while remembering the cardinal rule, that it is always the appellant's burden to show reversible error from the face of an appellate record suitable for the task.

To elaborate briefly on the three common situations described above:

1. Contents Necessary

This is probably the most common situation for record settlement: If the contents of a missing proceeding would be of potential importance to an issue on appeal and augmentation has not been fruitful, counsel should request to settle the record. For example, if trial counsel made a particular objection or motion or requested a particular instruction which was followed by a trial court ruling that would have been necessary to preserve an issue on appeal, but a reporter's transcript of the proceeding cannot be prepared (and the clerk's transcript is inadequate to ensure adequate presentation of the issue), appellate counsel may need a settled statement for non-transcribed proceedings. If the prosecutor did not make a particular argument or objection on an issue counsel is considering for appeal, that too can be a subject of record settlement. Similarly, if a trial court ruling or instruction is missing from the record and no reporter's transcript can be prepared, a settled statement may be needed. Further examples can be found in section (C)(1) above.

Because it is the appellant's burden to show error affirmatively from the face of a suitable record, gaps in the record will be construed in favor of the judgment and against the appellant. Even if appellate counsel believes it is clear that nothing more can be accomplished by record settlement, a reviewing court may well conclude otherwise. Appellate counsel must always be aware of the likelihood that a reviewing court is likely to construe a missing record against the party – whether civil or criminal – that is trying to make an appellate argument which may arguably implicate a gap in the record.

2. Absence Necessary

It is rarely if ever appropriate to *assume* that an adequate record cannot be created. Unless the record affirmatively shows this to be true – i.e., unless counsel has made all necessary augmentation motions or rule 8.340 requests, and has then requested record settlement if augmentation or rule 8.340 fail to provide an adequate record – an argument for reversal based on an inadequate record is unlikely to succeed.

In other words, counsel may have to show affirmatively that there is no satisfactory record, and that none can be created. In these types of situations, appellate

counsel seeks to create a record which shows affirmatively that a record sufficient for meaningful review of an issue cannot be created. The absence of an adequate record may have its own significance in an appeal, but only if appellate counsel has first done everything possible to create an adequate record.

This may look like "proving a negative," but it only means that counsel must exhaust all reasonably available remedies in trying to create a record, including record settlement if all else fails. Without such an effort and showing, the Court of Appeal – applying the cardinal rule above, that the appellant must show reversible error from the face of an appellate record suitable for the task, and gaps in the record are construed against the appellant – may presume that a satisfactory record *could* be created. It may then affirm on the assumption that had such a record been created, it would have been adverse to the appellant's claim.

An example is *People v. Malabag* (1997) 51 Cal.App.4th 1419, where the clerk's minutes showed that appellant waived his rights to a formal revocation hearing, but the reporter's transcript – which appeared to be incomplete – did not contain the waivers. The appellant's claim of error based on the silence of the reporter's transcript was rejected, on the ground that he could have sought a more complete record by requesting a settled statement; because he failed to do so and the clerk's minutes showed there were waivers, the record provided no basis on which to reverse. (*Id*. at pp. 1425-1427.)[3] Similarly in *People v. Coley* (1997) 52 Cal.App.4th 964, 973, the appellant sought reversal on the basis that the State had destroyed a key exhibit on the sole potential issue (the knife that was the subject of conviction). The Court of Appeal rejected the argument on the ground that trial counsel had failed to seek reconstruction of the exhibit, so the record failed to provide an affirmative basis for concluding there was error, and the Court could and did presume that the exhibit had characteristics adverse to the appellant.

However, if counsel in an appeal with missing transcripts or exhibits goes through the steps of trying to create a satisfactory record, and the end result is that this proves to

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[3] In all likelihood, a Court of Appeal would reach the same result today even if the clerk's minutes had not mentioned the waivers. Absent an affirmative showing to the contrary, it is presumed that public officials have performed their duties (Evid. Code, § 664; *People v. Martinez* (2000) 22 Cal.4th 106, 125); this applies equally to a judge presiding over a trial. (*People v. Carter, supra,* 30 Cal.4th at p. 1215.) Since the law imposes upon a judge the duty to obtain the defendant's waiver of a hearing before revoking probation without a hearing (*People v. Coleman* (1975) 13 Cal.3d 867, 895, fn. 22; *People v. Vickers* (1972) 8 Cal.3d 451, 457), the reviewing court would presume the trial judge did so, unless the record affirmatively showed there were no waivers. Again, if an appellant claimed reversible error based on a missing transcript that might or might not have contained a waiver, the absence of a settled statement would generally be fatal to the appellant's claim of error. (*Accord In re Kathy P., supra,* 25 Cal.3d at p. 102.)

be impossible, the presumption of a satisfactory record can be overcome. Counsel may then be in a much better position to show reversible error affirmatively appearing on the face of record – which, in that situation, may also include reversible error due to the lack of an adequate record.

For example, in *People v. Bradford* (2007) 154 Cal.App.4th 1390, the issue was the trial judge's numerous entries into the jury room for unreported *ex parte* communications with the jury during deliberations. While there was good authority that such an error would be reversible *per se*, appellate counsel could not assume the Court of Appeal would agree, since not every infringement on the right to a jury trial or right to counsel is automatically reversible. Accordingly, appellate counsel requested and obtained permission to prepare a settled statement regarding the trial judge's unreported communications with the jury. The judge was able to remember some of the things he said, but not all, and some of the things he could not remember touched on key subjects that would have been important to the primary issue the jury was considering.

The Court of Appeal in *Bradford* did not decide whether the judge's *ex parte* communications were reversible *per se*. But it reversed anyway, because the settled statement affirmatively showed that no record sufficient to permit meaningful review could be prepared, for reasons attributable to the State. (*See id*. at p. 1420.)

By contrast, if appellate counsel had not made the effort to obtain a settled statement, the reviewing court would have had no basis to assume that the judge's *ex parte* communications with the jury were on matters material to the jury's deliberations. In that event, the court may well have affirmed, because the appellant would not have provided the court with a record showing the need for reversal, and therefore would not have met his burden of affirmatively showing reversible error on the face of the record. Counsel's extra effort to obtain a settled statement paid dividends because it affirmatively showed the absence of a meaningful record, which was probably necessary for an appellate reversal.

Similarly in *People v. Apalatequi* (1978) 82 Cal.App.3d 970, the issue was whether certain arguments by the prosecutor amounted to prejudicial misconduct, but the court reporter lost her notes of the argument and was unable to furnish a transcript. Appellant's counsel requested permission to prepare a settled statement, and contended that the prosecutor made certain remarks to which trial counsel objected, which probably would have amounted to prejudicial misconduct had they been made. Although the trial judge said he did not have a specific memory of the arguments of counsel, he accepted the prosecutor's claim that the prosecutor did not make the remarks attributed to him.

The *Apalatequi* court concluded that the settled statement did not provide an adequate record for an appeal based on prosecutorial misconduct, because the specific

contents of the prosecutor's argument were highly relevant, and the judge's certification of the settled statement was unreliable because the judge didn't remember. (*Id*. at pp. 973-974.) Accordingly, it granted the appellant's motion to vacate the judgment. (*Id*. at p. 974.) By contrast, without the settled statement process, there would have been no basis for the reviewing court to assume either that the prosecutor actually did make the remarks or that no adequate record could be made, and the judgment would have been affirmed because of the appellant's failure to show reversible error affirmatively appearing on the face of the record.

3. Record Of Nonverbal Events

Sometimes, nonverbal events during oral proceedings can have independent significance in an appeal. For example, if a defendant or his counsel was not present during an entire day of trial, and a complete record showed no reason why this should have happened, appellate counsel would spot a possible issue and would want the record to reflect the absence of the defendant or counsel. If the reporter's transcript does not state who was present and who was not, then a settled statement may be necessary to make that clear. (*See People v. Bradford, supra,* 15 Cal.4th at p. 1331 & fn. 14; *People v. Bradford, supra,* 154 Cal.App.4th at p. 1400, fn. 4.) Other illustrative examples might include the contents of buttons worn by members of the victim's family who sat in the front row during trial, if the buttons were the subject of a defense motion below; gestures made by a witness or the defendant (*see People v. Horton* (1991) 54 Cal.3d 82, 89); the attire or hair color of a minority prospective juror who was the subject of a *Batson* dispute at trial in which attire or hair color was discussed; or periods of time during which the defendant was seen sleeping in his trial while on antipsychotic medication and the judge's lack of independent recollection of such incidents (*see People v. Jones* (1997) 15 Cal.4th 119, 148-149).

On occasion, the absence of nonverbal events may have independent significance warranting record settlement. As one hypothetical example, appellate counsel considering a peremptory challenge issue under *Batson v. Kentucky* (1986) 476 U.S. 79 might not be able to get the trial attorneys or the trial judge to remember what a peremptorily challenged excluded prospective juror was wearing or how she was acting, but the attorneys and the judge might at least be able to agree that there was not (or could not have been) anything out of the ordinary about the attire or behavior of that prospective juror. In that event, the absence of remarkable overt characteristics could be an appropriate subject for record settlement, as a potential factor supporting an argument that the prosecutor's explanation for the peremptory challenge was a pretext.

G. What Is The Record Settlement Process?

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The steps in the record settlement process, from a court's perspective, are set forth

in *Marks v. Superior Court* (2002) 27 Cal.4th 176, 193-194. That is an excellent starting point to gain more familiarity with the process. But the current article is intended to approach the process more from the perspective of the steps appellate counsel may need to take.

To begin with, like any other record correction procedure, settled statements should be sought as promptly as possible under the circumstances, and without undue delay. (*People v. Preslie* (1977) 70 Cal.App.3d 486, 492.)

First, appellate counsel should speak to trial counsel. Usually, the only way to discover some of the more unusual happenings during trial, or to try to determine what was in proceedings that are missing from the record, is to explore the "off the record" proceedings with trial counsel.

Appellate counsel should also speak with trial counsel to determine whether material might be uncovered which would be adverse to the contentions to be made on appeal. If such material exists, counsel should consider whether settling the record may undermine the arguments to be made on appeal, rather than supporting them. On the other hand, if – as is more often the case with missing records – the only hope of obtaining an adequate record or of showing an attempt to obtain one lies in the settled statement process, counsel is more likely to want (or need) to settle the record no matter what.

Second, if there is any doubt, appellate counsel should move to augment for a transcript of a proceeding rather than assume it was unreported. For example, even if the absence of a minute order in the clerk's transcript indicates that no proceeding was held on a certain subject (and trial counsel can't remember), one possibility is that no proceeding was held – but another possibility is that the clerk's transcript is in error, there should have been a minute order, and there really was a proceeding. An actual record is inevitably better than a reconstructed record such as a settled statement (*People v. Bradford*, *supra*, 154 Cal.App.4th at p. 1420), and there is rarely if ever any harm in seeking an actual record through augmentation. If augmentation is impossible, the superior court clerk will file a declaration to that effect, and counsel will then have an affirmative record showing that there was no proceeding.

Furthermore, rule 8.346(a) specifically requires that an application to settle the record explain why the transcripts cannot be obtained. So counsel should not merely assume the transcripts cannot be obtained; rather, counsel should make the effort to obtain them. The return certificate from the superior court clerk will indicate that a transcript "cannot be obtained" and will be useful in satisfying this requirement.

Third, appellate counsel should file the documents required for permission to

prepare a settled statement. Rule 8.346(a) states that counsel is to "serve and file in superior court an application to prepare a settled statement" (underscoring added), but different courts interpret this requirement differently. In the Fifth District, appointed appellate counsel should first file a motion in the Court of Appeal, seeking permission to file an application to settle the record in the trial court. (The application to prepare a settled statement is still filed in the trial court; the motion initially filed in the Court of Appeal is a request for permission to file that application in the trial court. A Court of Appeal order granting that motion may sometimes direct the trial court to permit appellant to prepare a settled statement, but even if it does not, an order from the Court of Appeal may still make for easier and smoother proceedings in the trial court.)

By contrast, appellate counsel in the Third District should file a motion to settle the record directly in the trial court, and need not ask the appellate court's permission.

In either case, appellate counsel will need to monitor deadlines and file requests for extensions of time for filing the opening brief, as the pending motion in either the trial court or the Court of Appeal will not toll the opening brief due date. (However, if appellate counsel initially requests permission from the Court of Appeal, counsel can ask in that request that the time for filing the AOB be reset to a specified number of days (e.g., 30 days) after the supplemental settled statement record is filed in the Court of Appeal. Whether the Court of Appeal grants such a motion, or instead grants extension requests only in the usual 30-day increments, would be entirely within the Court's discretion.)

As a part of the motion to settle the record, a supporting declaration should set forth "with some certainty how the contents of an unreported matter, as he understands them, constitutes an 'oral proceeding,' i.e., one that may be useful on appeal." (*People v. Gzikowski*, *supra*, 32 Cal.3d at p. 585, fn. 2.) Thus, in order to show potential usefulness on appeal, appellate counsel should specify the issue on appeal to which the statement will relate, and to the extent possible should include a general summary of what the statement is expected to be. As a practical matter, a request to settle the record in lieu of an unavailable reporter's transcript may require less of a showing than a request in lieu of other material, for which appellate counsel will have to draw on the memories and notes of the participants and therefore is expected to do so. (*Ibid*.)

In more serious criminal appeals where federalization is a consideration, the application itself can be federalized. The first sample document posted with this article is an example of this technique.

In deciding whether to grant the motion for permission to settle the record, the trial court should accept appellate counsel's version of the expected content of the statement. (*People v. Gzikowski, supra,* 32 Cal.3d at p. 585, fn. 2.) If the Attorney General opposes

the motion, appellate counsel should immediately request a hearing to argue the matter. (But see section (J), *infra*.) At this stage, it is appellate counsel's burden to make a requisite showing of a colorable need for a complete transcript.

Unlike most motions filed in the Court of Appeal, which need only be served on the Attorney General and counsel for any other parties to the appeal, an application to settle the record must be served on the district attorney and trial counsel as well. When filing in superior court, the trial court judge must be served with an original and three copies of the application. (Cal. Rules of Ct., rule 8.346(c).)

(Note: In Sacramento County, the appeals desk clerk should also be sent a copy of the motion, in addition to the one that is addressed directly to the trial judge's department. The superior court appeals desk clerk will then track the application in that court, which will increase the likelihood that subsequent augmentation of the settled statement will be handled smoothly.) This seems to be a good idea in other counties as well, since there is no harm in giving notice to the clerk's office, and doing so helps maximize the likelihood that the application and subsequent record settlement papers will be placed in the permanent trial court file and will eventually make it into the appellate record.

An alternative is to send the entire packet directly to the superior court appeals desk clerk, to be filed and then forwarded to the judge. That way, all documents go through the usual repository for court filings, the chances of something getting mislaid because a judge's clerk is unsure of what to do with a packet received directly from counsel is lessened, and there is more likely to be a regular filing and file-stamp procedure which would set the five-day time frame in motion.

In Fifth District cases, an order granting permission to settle the record will normally include due dates for filing the initial application to settle the record in the trial court, and sometimes also for other portions of the process.

The superior court judge has five days to rule on the application to settle the record. (Cal. Rules of Ct., rule 8.346(b).) It may be useful to call the trial judge's clerk and inform him or her that an application to settle the record is forthcoming, because trial judges do not receive such applications regularly and may therefore be unaware that they require immediate attention. Alternatively, a gentle and brief cover letter (with copies served on everyone who received a copy of the application), with appropriate citation, may help point the judge toward rule 8.346(b) and its five-day requirement.

After the trial court has granted an application permitting preparation of the settled statement, the applicable time deadlines are set forth in rule 8.137. (*See* Cal. Rules of Ct., rules 8.346(b).)

Rule 8.137(b)(1) allows 30 days in which to prepare and serve a proposed settled statement. During this time, appellate counsel should contact trial counsel (and the prosecutor, if appropriate) to solicit their input for the statement. The proposed statement is usually in narrative form, and is limited to matters that counsel is expecting to raise in or evaluate for the appeal. However, the proposed statement may be accompanied by copies of any exhibit, or any document filed or lodged in the case in superior court. (Cal. Rules of Ct., rule 8.137(b)(5) [incorporating rule 8.122(b)(3)-(4)].) The respondent then has 20 days in which to file any proposed amendments to the appellant's proposed statement, which may also be accompanied by any exhibit or document filed or lodged in superior court. (Cal. Rules of Ct., rule 8.137(b)(4)-(5).)

From this point, the most efficient way to proceed is by obtaining a written stipulation of the settled statement's correctness from the Attorney General or District Attorney's office. Under rule 8.137(c)(4), "[t]he parties' stipulation that the statement as originally served or as prepared is correct is equivalent to the judge's certification." (*See also Quail v. Municipal Court* (1985) 171 Cal.App.3d 572, 576; *Potter v. Solk* (1958) 161 Cal.App.2d Supp. 870, 871-872 [both to the effect that parties' stipulation of the correctness of a settled statement would be legally equivalent to the trial judge's certification]; *Saporta v. Barbagelata* (1963) 220 Cal.App.2d 463, 472 & fns. 2-3 [appeal considered on settled statement of which parties stipulated correctness].) It may often be appropriate to seek the trial judge's certification on a stipulated settled statement anyway, to be on the safe side and because the settled statement rules are not universally well understood. Nonetheless, the rules do indicate that such a certification is unnecessary in stipulation cases, although counsel who seeks to proceed by stipulation without a certification should make sure to cite authority in the Court of Appeal showing that this is permissible.

If there is no stipulation to the appellant's proposed settled statement or the respondent submits proposed amendments, the trial court is directed to set the matter for hearing within 10 days. This rule designates the trial judge as fact finder. (*Marks v. Superior Court*, *supra*, 27 Cal.4th at p. 195; *Burns v. Brown* (1946) 27 Cal.2d 631, 636.) Counsel has the right to request that another judge preside at the hearing, especially where the recollections of the attorney and the judge conflict (*see, e.g., Cross v. Tustin* (1951) 37 Cal.2d 821, 824; *People v. Hawthorne* (1992) 4 Cal.4th 43, 62), but granting this request would be purely discretionary. Ultimately, it is the function of the trial judge to adjudicate the settled statement so as to fairly reflect the evidence or other oral proceedings (Cal. Rules of Ct., rule 8.137(c)(3)), and the trial judge cannot decline to perform such adjudication unless convinced of his or her inability to do so. (*Marks v. Superior Court*, *supra*, 27 Cal.4th at p. 196.) As long as the trial judge does not act arbitrarily, his or her action is final. (*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 376, fn. 1; *People v. Hardy*, *supra*, 2 Cal.4th at p. 183.)

At the hearing, the trial judge will settle the statement, based on testimony if necessary. In this context, the trial court "has broad discretion to accept or reject counsel's representations in accordance with its assessment of their credibility [and] cannot refuse to make that assessment." (*People v. Gzikowski*, *supra*, 32 Cal.3d at 585, fn. 2.) In addition, the trial judge may rely on his/her notes or those of the attorneys; the judge's memories or those of the attorney's, witness, and jurors; the agreement of the parties; or other appropriate sources. (*People v. Moore, supra,* 201 Cal.App.3d at p. 56; *People v. Everett* (1990) 224 Cal.App.3d 932, 937.) The judge will then make his or her findings and fix the time within which counsel must prepare, serve, and file the settled statement. (Cal. Rules of Ct., rule 8.137(c)(2).) Opposing counsel has five days in which to file objections to the prepared statement. (Cal. Rules of Ct., rule 8.137(c)(3).) The objections may be the original amendments and objections not adopted by the judge, or new objections based on the court's findings. If objections are not filed, the rule presumes that the statement is properly prepared in accordance with the findings of the court. (Cal. Rules of Ct., rule 8.137(c)(3).)

[Note: Older caselaw referred to the terminology of the former rules of court, which called for "engrossing" a settled statement; the current rule uses the simpler term "prepare." The term "engross" meant to put the statement as settled in final written form. (*People v. Jenkins* (1976) 55 Cal.App.3d Supp. 55, 64.)]

The final step is to present the prepared statement to the trial judge for certification. (Cal. Rules of Ct., rule 8.137(c)(3).) However, if appellate counsel is able to get a written stipulation of correctness from respondent's counsel as a result of the settled statement proceeding, that might obviate the need for a separate certification from the trial judge; though as discussed above, in many cases prudence may dictate that counsel seek a certification anyway.

Once the settled statement is certified or is made the subject of a written stipulation, appellate counsel can get it into the appellate record. In Fifth District cases, appellate counsel should file a motion to augment the record with the certified settled statement. In the Third District, a rule 8.340(a) supplemental record request may work at an early stage of the appeal.

In some cases, appellate counsel may wish to consider whether the clerk's minutes, pleadings, and oral record of the settled statement hearing itself should also be prepared and made part of the record on appeal. This may be particularly important to consider where (i) there has been a contested evidentiary hearing as to the contents of the settled statement, or (ii) as part of an affirmative showing that no satisfactory record can be made. If (noncapital) appellate counsel is considering the possibility of a further challenge to the adequacy or fairness of the settled statement or the record on appeal, irrespective of the means by or court in which that challenge might be made, the entirety

of the settled statement proceedings should generally be included in a motion to augment the record. Even if appellate counsel is not considering such a further challenge, the possibility that the adequacy of the record settlement procedure might become relevant to later review may weigh in favor of making a complete record of the record settlement proceedings.

H. Who Is In Charge Of The Process?

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It is appellate counsel's responsibility to prepare and to file the settled statement as outlined above. However, it is also appellate counsel's responsibility to file any objections to a settled statement prepared by the respondent, and to work with the trial attorney to insure that as little harm as possible comes from this record. It is not the responsibility of the trial judge, district attorney, or trial defense counsel to get the statement together. Often trial counsel understands little about the appellate process or how helpful or damaging the statement can be to the appeal.

As a result, appellate counsel must be in charge. Of course, having a cooperative trial counsel helps – trial counsel can talk directly with the trial judge and district attorney who are known and familiar to them. This lessens the impact of feelings that an "outsider" is meddling in their court. In addition, because the local trial judge, prosecutor and trial counsel often have no idea how to conduct a settled statement hearing, sometimes all of them will welcome appellate counsel's ability to take charge of the process. (To gain their cooperation, appellate counsel may often prefer an overall tone of being a facilitator who is merely seeking a complete record, rather than a hard-core advocate who has an "angle" and is seeking a particular result toward that end from the proceedings.) And sometimes, local trial counsel's involvement may enable appellate counsel to obtain stipulations from the prosecutor, or otherwise lessen the likelihood of contentious adversarial proceedings.

In this respect, it might be advantageous to notify both trial counsel and the district attorney in advance that you plan to move to settle the record. A courtesy notification to the Attorney General's office may also be a good idea, both to decrease the likelihood of misunderstanding, and because it may prove beneficial to work with the Attorney General's office in the event the appellate attorneys may be able to agree on matters related to the hearing – or, at a later point, on a stipulated settled statement. Notifying the parties in advance may also enable you to work out a tentative timeline for submitting the proposed statement and amendments, and for scheduling the hearing. Since trial attorneys tend to have very full schedules, they might be more receptive to working with appellate counsel on the settled statement if counsel shows that he or she is willing to take their schedule into account to the extent possible.

Although permission to prepare a settled statement is usually sought by the

appellant, who is responsible for procuring a record suitable for raising his or her appellate issues, the rules governing reporter's transcripts also appear to permit any other party to make a settled statement application. (*See* Cal. Rules of Court, rule 8.130(g) [based on former rule 4(g)].) If the respondent moves for a settled statement, appellate counsel then must work with trial counsel to understand the proceedings below and file objections if needed.

I. Can An Appellant Challenge A Settled Statement Certified By The Trial Court, On A Ground Such As Unreliability, Unfairness, Unconstitutionality, Or Violation Of Court Rules?

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As a practical matter, usually not. "As long as the trial judge does not act in an arbitrary fashion he has full and complete power over . . . a [settled statement] record." (*Marks v. Superior Court, supra*, 27 Cal.4th at p. 195.)

But occasionally, yes. For example, when a transcript cannot be prepared for a material portion of the trial, and either the trial judge cannot adequately certify a settled statement (whether due to lack of basis or unavailability) or defendant's trial counsel is unable to participate meaningfully in the process, appellate counsel may be able to persuade the reviewing court to reject a settled statement or reverse the judgment outright.

This was the situation in *People v. Cervantes* (2007) 150 Cal.App.4th 1117. There, the reporter was unable to prepare a transcript of opening statements and the testimony of the prosecution's only witness. More than a year after the trial, the prosecutor submitted a proposed eight-page settled statement covering both. However, appellant's trial counsel was on medical leave, and his appellate counsel had not been present at the trial. The trial judge said he had little or no recollection of the proceedings, but he approved the prosecutor's proposed settled statement anyway. The Court of Appeal granted the defense motion to vacate the trial court's settled statement, and remanded with directions for the trial court to determine whether trial counsel was able to assist the court in preparing a settled statement, failing which the trial court was duty-bound to grant a new trial. (*Id*. at pp. 1122-1123.)

> "To determine whether a settled statement is adequate, we consider the issues defendant raises on appeal and the ability of the parties and the trial court to reconstruct the record. In considering whether it is possible to adequately reconstruct the trial proceedings in a settled statement we consider: (1) whether the trial judge took detailed notes; (2) whether the court is able to remember the missing portion of the record; and (3) the ability of defendant's counsel to effectively participate in reconstructing the record."

(*People v. Bradford, supra,* 154 Cal.App.4th at p. 1418 [citations omitted]; *see also People v. Apalatequi, supra,* 82 Cal.App.3d at p. 974 [conviction reversed when trial judge was unable to settle key portion of the record and trial attorneys disagreed on its contents].)

A settled statement may also be challenged if constitutional requirements have not been followed. For example, rare situations have been noted where after the AOB is filed (and thus long after the court reporter has certified and filed the official transcripts), a trial judge has contacted the court reporter *ex parte* – sometimes at the behest of a prosecutor or the Attorney General's office – and obtained the reporter's agreement to change a transcript, on grounds such as a purported omission or error in the prior transcript. Such an *ex parte* procedure is legally erroneous, in that it deprives the defendant of due process and his right to counsel in the record correction process, both of which have been recognized by the U.S. Supreme Court as applicable constitutional guarantees. (*See Chessman v. Teets* (1957) 354 U.S. 156, 162-165 & fn. 9.) Also, when a court makes a conscious decision to deny a transcript to an indigent defendant (or other indigent person threatened with a loss of liberty) in a situation where the Fourteenth Amendment or state law would require one, there is a greater likelihood that a reviewing court may reverse or vacate an ensuing judgment on that basis alone. (*See, e.g., Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1150-1151.) A settled statement generated in such a situation may be subject to challenge not necessarily because it is inaccurate or procedurally deficient, but because it is constitutionally inadequate. (*March v. Municipal Court* (1972) 7 Cal.3d 422, 428-429; *Waltz v. Zumwalt* (1985) 167 Cal.App.3d 835, 839.)

The trial court also cannot properly correct the reporter's transcript *sua sponte* – e.g., by certifying that a jury instruction which would be prejudicially erroneous if it had been correctly reported was instead erroneously reported – because the judge is not the reporter, and in addition, what matters is what was heard in open court by listeners (particularly the jury) rather than what the judge in hindsight thinks he or she said. Nor can a trial judge properly tell a court reporter to correct the transcript to reflect what the judge believes he or she said, if that is not what is actually in the reporter's notes. (*See People v. Kronemeyer* (1987) 189 Cal.App.3d 314, 358-359; *United States v. Marshall* (9th Cir. 1973) 488 F.2d 1169, 1194-1196.)

In addition, either of these procedures would violate the requirement of rule 8.137(b)(1) of the California Rules of Court (which is incorporated into rule 8.346(b)) that the appellant – not the trial court – is to serve and file the proposed settled statement in superior court in the first instance. "[U]nder the rules it is the duty of the trial court to settle a proposed statement, not to make one." (*Marks v. Superior Court, supra,* 27 Cal.4th at p. 195; *see also Nevin v. Mercer Casualty Co.* (1936) 12 Cal.App.2d 222, 226 [granting motion to strike order made by trial court purporting to correct the reporter's transcript by adding certain matters, for failure to follow the steps required for record

correction].) Rule 8.137(b)(1) similarly makes clear that it would be improper for the respondent to prepare, serve or file a settled statement, if (as is usually the case) the appellant was the party that initiated the settled statement procedures. (*See Quail v. Municipal Court, supra,* 171 Cal.Appp.3d at p. 575.)

If an *ex parte* or otherwise improper "corrected" record is sent to the Court of Appeal during an appeal, the remedy is to move to strike it, on the ground that it violates the established legal requirements for record correction. (*Accord Nevin v. Mercer Casualty Co., supra,* 12 Cal.App.2d at p. 226; *People v. Townsel* (No. S022998, order of July 20, 2005, item (3) [available on the Supreme Court public docket; reprinted at 2005 Cal. LEXIS 7972].) A motion to strike an improper settled statement or other form of record correction is cognizable under rule 8.155(c)(1) of the California Rules of Court, by which an appellate court always has discretion to order the correction of any part of the record on which it will be adjudicating an appeal. Code of Civil Procedure section 923 also reiterates the power of a reviewing court to make any order in aid of its own jurisdiction, which would include correction of the appellate record on which it is to exercise its jurisdiction. (*See Quail v. Municipal Court, supra,* 171 Cal.App.3d at p. 576.)

J. What Are The Legal Standards Used To Determine Whether A Judgment Should Be Reversed For Inadequacy Of The Record, And How Do Those Standards Affect Appellate Counsel's Decision-Making Processes With Respect To Record Settlement?

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1. Need For Record Settlement Before Seeking Reversal Due To Missing Record

An appellant may be entitled to reversal of the judgment for a missing record, if he or she is "deprived of the [due process] right to an effective presentation of his appeal due entirely to a failure on the part of an official of the trial court to comply with the law." (*People v. Serrato* (1965) 238 Cal.App.2d 112, 119.) However, reversal is only required for a missing record if "in light of all the circumstances it appears that the lost portion is 'substantial' in that it affects the ability of the reviewing court to conduct a meaningful review and the ability of the defendant to properly perfect his appeal. It is not every loss of any part of the reporter's notes that requires vacating of the judgment." (*People v. Morales* (1979) 88 Cal.App.3d 259, 267.)

Therefore, in a typical case, appellate counsel will need to go through the settled statement process first before seeking reversal due to a missing record, because the loss of even a major portion of the record is not itself a ground for reversible error if an adequate settled statement can be prepared. (*People v. Scott* (1972) 23 Cal.App.3d 80, 85-86 [affirming a conviction under such circumstances].) "The rule that emerges is that

reversal is indicated only where critical evidence or a substantial part of a [record] is irretrievably lost or destroyed, and there is no alternative way to provide an adequate record so that the appellate court may pass upon the question sought to be raised." (*People v. Galland, supra,* 45 Cal.4th at p. 370 [citations omitted].) "[C]ase law holds that the unavailability of a full reporter's transcript does not automatically entitle a defendant to a new trial; where other methods of reconstructing the trial record are available, the defendant must proceed with those alternatives in order to obtain review." (*People v. Jones* (1981) 125 Cal.App.3d 298, 300.)

As discussed in section (F) above, appellate counsel will usually have nothing to lose and potentially everything to gain by going through the settled statement process, because that is generally the only way appellate counsel can show that the settled statement process could not result in reconstruction of a record adequate to permit meaningful review.

While occasional older authority may suggest that such efforts need not be made if too much time has passed to permit adequate reconstruction under the circumstances (*see People v. Moore* (1988) 201 Cal.App.3d 51, 56-57), presently, counsel who deliberately eschews an available method of reconstruction takes a major risk that the reviewing court might not see this as adequate. Why run that risk, when taking the action contemplated by the rules – i.e., initiating settled statement proceedings – might enable counsel to make an affirmative showing that adequate record reconstruction is impossible? Even if it turns out that adequate reconstruction is possible, the reviewing court would be expected to reach that conclusion anyway if appellate counsel did nothing, as discussed in section (F) above.[4]

In other words, counsel who takes action may end up with a better record, or an affirmative showing that no adequate record can be made. Counsel who does nothing ends up with the court making every presumption possible against counsel's arguments – presumptions that would be analytically correct under modern caselaw, because counsel will not have fulfilled an appellant's obligation to make a proper record that affirmatively

[4] The hypothetical possibility that an appellate court might reverse under a *Moore* rationale if counsel does nothing, but that the record could be adequately settled if counsel made the effort, is now far too remote for serious consideration nowadays (and might also be a breach of counsel's ethical duties to the client and/or the court). Notably in *Moore* itself, the Court of Appeal went to great lengths to find that the missing portion of the record – most of the closing arguments – was not sufficiently important to entitle the appellants to a new trial, based on its analysis of other portions of the 4,000-page record, and its perception that "defendants received . . . a vigorous, aggressive and extremely competent defense by experienced and well prepared attorneys." (*Id.* at pp. 57-59.)

shows reversible error on its face.

2. Considerations Underlying A Reviewing Court's Determination Of Adequacy Of Record Settlement

In a reviewing court's determination of whether record settlement is an adequate remedy, the ability or inability of trial defense counsel to participate meaningfully is often a key consideration. (*See People v. Cervantes, supra,* 150 Cal.App.4th at pp. 1122-1123 [order approving settled statement vacated; case discussed in section (H) above]; *People v. Jones, supra,* 125 Cal.App.3d at pp. 301-302 [section 1181 motion granted when confusing and misleading instructions of county clerk and CRC counselor led defendant to wait six years to file notice of appeal, court reporter destroyed her notes during this time without legal authorization, and trial counsel disclaimed any recollection of the trial that would have facilitated record settlement]; *In re Andrew M.* (1977) 74 Cal.App.3d 295, 299-300 [section 1181 motion granted where murder trial of minor occurred when he was 15, no transcript of closing arguments was available because reporter violated a statutory duty to report them, and trial counsel had died by the time the reviewing court learned this]; *see also People v. Serrato, supra,* 238 Cal.App.2d at pp. 118-119 [judgment reversed where superior court improperly failed to provide a trial record, reporter's notes had been destroyed and judge had died by the time the reviewing court found out, and defendant was unrepresented after conviction and had only a sixth-grade education]; *see generally People v. Wilson* (1977) 72 Cal.App.3d Supp. 59, 64 [record settlement is a "critical stage" at which right to counsel applies]; *Chessman v. Teets, supra,* 354 U.S. at pp. 162-165 & fn. 9.) The unavailability of the trial judge, or his or her inability to remember the relevant proceedings when their contents are contested, may also be a consideration. (*See People v. Apalatequi, supra,* 82 Cal.App.3d at p. 974; *see also People v. Serrato, supra,* 238 Cal.App.2d 112.)

Consequently, in seeking to make a record that a settled statement would be inadequate, appellate counsel should be prepared to show facts that demonstrate the inability of either defense counsel or the trial judge to participate meaningfully in the record settlement process.

3. Appellate Motions For Reversal Due To Inadequate Record (Penal Code Section 1181, Subdivision (9))

When the procedural posture of the case arguably may show that the settled statement process is insufficient as a matter of law, appellate counsel may wish to move for summary vacatur of the judgment under Penal Code section 1181, subdivision (9), with a declaration explaining the circumstances that counsel believes make record settlement inadequate for purposes of meaningful appellate review. One advantage of the section 1181, subdivision (9) procedure is that appellate counsel can invoke it before

briefing – i.e., without having to file an opening brief that tries to make an appellate argument without an adequate record, or having to speculate on what an adequate record might have contained.

In most cases, counsel contemplating a motion of this nature will want to go through record settlement proceedings first. Usually, only by going through record settlement proceedings can counsel persuasively argue that record settlement proceedings would be inadequate, because then counsel could point to the tangible result of those proceedings and show specifically why it is inadequate. It is much more difficult to show that hypothetical record settlement proceedings which have never happened will automatically be inadequate as a matter of law. This is discussed further in section (F)(2) above.

For such extreme types of cases, there may be nothing to lose by counsel making a section 1181, subdivision (9) motion before briefing. If the motion is granted, the appeal is successful. If the motion is denied, counsel can still file a brief, and can then argue that the record settlement proceedings were inadequate to permit meaningful appellate review, along with making whatever appellate arguments can be made on the merits.

If a motion to vacate the judgment under section 1181, subdivision (9) is granted, the defendant should receive a new trial, and the appeal itself should be dismissed as moot. (*People v. Apalatequi, supra,* 82 Cal.App.3d at pp. 974-975.) That is the maximum possible relief the appellant can obtain on the basis of an inadequate record.

K. What Are Some Of The Pitfalls And Limitations Of Record Settlement?

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Being "home-towned" is one possible pitfall. Appellate counsel will be the "outsider" trying to conduct an evidentiary hearing with an unfamiliar judge and local attorneys. In order to maintain credibility, and persuade the court to include his or her version of the statement in the final outcome, appellate counsel must be prepared. Counsel should know the facts as well as possible before filing the motion. The proposed statement should stick to the facts needed to support the appellate issues. This is not a discovery device for the development of other issues or "expanding" the record. Be watchful for this.

There are constraints on investigation and on the amount of travel that will be permitted for court appearances. In both the Third and the Fifth Districts, travel expenses will not be reimbursed unless prior written application and approval has been obtained for each appearance on this matter. Therefore, the bulk of the work in preparing the

motion and the proposed statement should be done by telephone.

Appellate counsel should make sure they know the purpose for each hearing set in the superior court. If the appearance is merely for the purpose of filing the proposed statement, for example, then appellate counsel should explore other options. Such options might include inquiring whether the court will permit a telephonic appearance, or ascertaining whether trial counsel would make a special appearance for this limited purpose. Ideally, the only appearance appellate counsel should make would be for the evidentiary hearing itself, and then only if appellate counsel believes the trial attorney cannot adequately manage the hearing without appellate counsel's assistance.

(Hint: in your travel request, you will need to disclose to the Court of Appeal why the defense trial attorney cannot fairly represent the client's interests at the hearing without your assistance. That may happen because of trial counsel's complete lack of familiarity with the settled statement process; or more likely, because trial counsel is not in a position where he or she can zealously seek the full record that appellate counsel is trying to create. One example was a case where the trial attorney felt strongly that the record should be deliberately "vague"; thus, defense counsel was working at cross purposes with appellate counsel's effort to obtain an adequate record for appeal in light of established appellate standards. Another example might be a case where a *Marsden* hearing transcript could not be prepared due to the loss of reporter's notes – in that event, the issue may involve a claim of trial counsel's inadequate representation, which would present a significant possibility of conflict for trial counsel. We also sometimes see hesitant or resentful trial counsel who fear an IAC claim is developing – even if reassured. In your written request, explain this reluctance on the part of trial counsel, possibly with details to support your concerns about adequate representation on behalf of the client, and explain how your presence at the hearing appears to be necessary in light of this reaction.)

Another potential problem is that the trial judge – the very one who may be the subject of a claim of error on appeal – is the ultimate fact-finder. This may be a less likely source of problems (though certainly not an impossible one) in situations where a significant normal part of the record on appeal is simply missing, since counsel's desire to obtain a complete record in such situations is readily understandable. But in other situations, where it may be more obvious that counsel is seeking a particular record settlement result favorable to an argument by which counsel intends to challenge the judgment, there might occasionally be a judge who would be particularly eager to insert himself or herself into the process.

One way to obviate the possibility of a trial judge's overly enthusiastic involvement is to work closely with the Attorney General on the proposed statement and amendments, toward the end of reaching a stipulation of the correctness of a proposed

settled statement. As previously noted, a stipulation of the parties to the correctness of a proposed settled statement has the same effect as a formal record settlement process, and therefore may eliminate the necessity for a trial judge's involvement or formal trial court certification. (Cal. Rules of Court, rule 8.137(c)(4); *Quail v. Municipal Court, supra,* 171 Cal.App.3d at p. 576; *Potter v. Solk, supra,* 161 Cal.App.2d Supp. at pp. 871-872.) (Counsel who seeks to utilize this stipulation procedure without the trial judge's certification should make sure to cite authority showing that this is permitted, in the subsequent motion to augment the settled statement in the Court of Appeal.)

A final potential pitfall is one inherent in every evidentiary hearing: the tables can turn. One way to avoid this is to know what the anticipated statement will be before undertaking the process. This means that appellate counsel will have done a lot of investigation (hopefully with the cooperation and participation of trial counsel) before filing the motion. The prepared settled statement should look essentially the same as the general summary included in the original motion. Surprises are usually not good news.

L. Concluding Thoughts

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While the above procedures may seem complex and cumbersome, they reflect the difficulties that can be faced in reconstructing a record months or even years after the fact. Both parties are obviously entitled to due process of law in record correction – yet both parties are represented by counsel who are advocates; sometimes advocates will disagree; and even when they don't, a formalized procedure is necessary to reflect that fact. Since both parties are represented by advocates, a neutral referee is required to settle any factual or evidentiary disputes. In our legal system, that is the role of the trial judge, who is charged with the duty of fairly overseeing the entire trial; although the appeal is in the Court of Appeal, none of the appellate Justices were at the trial, so the trial judge is usually considered the best possible referee if there is a dispute over what happened at trial. And since it is usually the appellant's attorney who seeks a more complete record to pursue the appellant's effort to overturn a presumptively valid judgment, the burden of creating a more complete record for the appeal would naturally be imposed on appellate counsel.

So while the settled statement procedure may be daunting, ultimately it may be about as good a procedure as an appellant could ask for in the American adversarial system. One advantage, though, is that local prosecutors often have little understanding of the process, and even trial judges are often inadequately informed. These real-life factors may make the process more complicated, but that often provides appellate counsel with extra opportunities for shaping it. The attorney who best understands what needs to be done, often is also in the best position to do it!

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