

# Setting the Record Straight: When and How to Settle the Record on Appeal

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“A settled statement is a summary of the superior court proceedings approved by the superior court. An appellant may ... use a settled statement as the record of the oral proceedings in the superior court, instead of a reporter’s transcript.” (Cal. Rules of Court, rule 8.137.)<sup>1</sup>

## I. INTRODUCTION

Settling the record on appeal refers to situations where certain record items are not only missing from the appellate record, but cannot be produced simply by requesting a correction under either rule 8.340(b) [record omission letter], or rule 8.155 [augmentation]. Instead, the settled statement process seeks to reconstruct “oral proceedings” whenever an appellant can argue the missing proceedings may be useful on appeal. (*People v. Gaston* (1978) 20 Cal.3d 476, 482) “A record is critical to ensure adequate appellate review and fair process.” (*People v. Bradford* (2007) 154 Cal.App.4th 1390, 1420, quoting *Brown v. State* (Minn. 2004) 682 N.W.2d 162, 168.)

There is no strict definition of which “oral proceedings” can be sought. Counsel should therefore be creative with advancing an argument that certain proceedings are necessary for adequate appellate review. Courts have accepted a settled statement request for a variety of proceedings including unreported chambers conferences, unreported sidebars or bench conferences, and times when a transcript could not be produced because the court reporter’s notes were lost. (*People v. Pinholster* (1992) 1 Cal.4th 865, 922, overruled on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, 459 [unreported sidebar]; *People v. Holloway* (1990) 50 Cal.3d 1098, 1116, overruled on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824 [unreported chambers conference]; *People v. Freeman* (1994) 8 Cal.4th 450, 510 [unreported ex parte bench conference].)

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<sup>1</sup> References are to the California Rules of Court unless otherwise specified.

The term “oral proceedings” is also not limited to the verbal. In addition to reconstructing missing reporters’ transcripts, courts have allowed a settled statement to be produced for other items including missing exhibits and pleadings. (See e.g., *St. George v. Superior Court* (1949) 93 Cal.App.2d 815, 816-817 [map used by a witness]; *People v. Harris* (2008) 43 Cal.4th 1269, 1281 [pre-trial lists of proposed jury instructions].)

Generally, rules 8.346 and 8.137, govern the settled statement procedure on appeal. In practice, and as succinctly put by one of our fellow projects, “[a]nyone 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.”<sup>2</sup> In my experience, these truths continue, but I would like to add a third point: notwithstanding the governing rules, not every appellate district follows the same procedure for settling a record. This article focuses on the practice in the Sixth District; for the other districts, contact the relevant appellate project to see if their local procedures differ.

The settled statement process serves two purposes. First, it provides a record on appeal of information that is relevant to the appeal, but that is not contained in the transcripts. (*People v. Anderson* (2006) 141 Cal.App.4th 430, 440 [the settled statement is used for filling gaps in the appellate record].) Second, a settled statement resolves any disputes concerning what occurred in the superior court so that the parties and the appellate court can apply the law to the settled facts. (*People v. Cervantes* (2007) 150 Cal.App.4th 1117, 1122-1123.) The goal of the settled statement process, like the appellate rules generally, “is to provide means for relatively speedy and inexpensive appeals from judgments and appealable orders in criminal cases . . . within the framework of accurate and fair presentation of a record of what happened in the trial court.” (*People v. Jenkins* (1976) 55 Cal.App.3d Supp. 55, 60.)

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<sup>2</sup> See Central California Appellate Program, *Settled Statement Procedures Article*, <[https://www.capcentral.org/procedures/record\\_procedures/settle\\_stmt.asp](https://www.capcentral.org/procedures/record_procedures/settle_stmt.asp)>

This article aims to shed some light on the practice in the Sixth District, and to encourage appellate counsel to look for opportunities to seek a settled statement to ensure adequate appellate review. It can be a lengthy and frustrating process, but please do not be discouraged. Instead, consider the potential for our clients. If an appellant is prejudiced by an inadequate record on appeal, there is only one outcome: reversal. (*In re Steven B.* (1979) 25 Cal.3d 1 [reversal based on inadequate settled statement]; *Bradford, supra*, 154 Cal.App.4th at p. 1421 [due to inadequate record, court could not assess the effect of the trial court’s improper interactions with the jury requiring reversal]; *Jenkins, supra*, 55 Cal.App.3d Supp. at p. 61 [where a settled statement could not be produced, the defendant was entitled to a new trial as a matter of due process].)

## II. LEGAL PRINCIPLES

Under both California law and the United States Constitution, a criminal defendant is entitled to a record on appeal that is adequate to permit meaningful appellate review. (*People v. Alvarez* (1996) 14 Cal.4th 155, 198, fn. 8.) This principle protects an indigent defendant’s right to equal protection and due process on appeal. (*Draper v. Washington* (1963) 372 U.S. 487, 496-497; U.S. Const., 6th & 14th Amends.) “[A]n appellate record that will permit a meaningful, effective presentation of the [defendant’s] claims” is “constitutionally necessary for a ‘complete and adequate’ appeal by [a defendant] . . . .” (*People v. Barton* (1978) 21 Cal.3d 513, 518; accord, *Draper, supra*, 372 U.S. at pp. 496-497.) As a component of due process, the United States Supreme Court has repeatedly identified an appellate record that permits a meaningful, effective presentation of a defendant’s claims as a “basic tool” that is constitutionally necessary. (*Britt v. North Carolina* (1971) 404 U.S. 226, 227; *Griffin v. Illinois* (1956) 351 U.S. 12; see also *Barton, supra*, 21 Cal.3d at pp. 519-520; *People v. Howard* (1992) 1 Cal.4th 1132, 1166.)

Corollary burdens and duties exist for appellants and their counsel. Appellants bear the burden of developing and presenting a record to ensure review of their claims. (*People v. Carter* (2003) 30 Cal.4th 1166, 1215.) Appellate counsel has a duty to raise all viable issues on appeal (*Barton, supra*, 21 Cal.3d at p. 519), a duty to exhaust all methods to reconstruct

necessary record items, and to ensure the record on appeal is complete in order to affirmatively demonstrate error. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 66 [if the record can be reconstructed with other methods, such as “settled statement” procedures, the defendant must employ such methods to obtain appellate review]; *People v. Whalen* (2013) 56 Cal.4th 1, 85 [it is appellant’s burden to present a record adequate for review and to affirmatively demonstrate error].)

The failure of appellate counsel to procure a complete record can be devastating for an appellant. Where the record is inadequate and appellate counsel has not objected, an appellate court must presume facts in favor of the judgment. (See *Randall v. Mousseau* (2016) 2 Cal.App.5th 929, 935-936 [appealed judgments and orders are presumed correct and error must be affirmatively shown]; *Elena S. v. Kroutik* (2016) 247 Cal.App.4th 570, 577 [without a record, either by transcript or settled statement, a reviewing court must make all presumptions in favor of the validity of the judgment].) Where the record of certain “oral proceedings” are unavailable, appellate counsel has a duty to settle the record whenever possible in order to avoid forfeiture. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102; see also *Rhne v. Superior Court* (2017) 17 Cal.App.5th 892, 897-898.)

An adequate record is vital to protect an appellant’s rights. The court in *Cervantes, supra*, 150 Cal.App.4th 1117, explained: “[t]he loss or destruction of a court reporter’s notes is an uncommon occurrence. As such it randomly burdens isolated appellants, denying them adequate appellate review. It does not advance the cause of justice to require these appellants to proceed with such a handicap. *It is far better that a defendant be retried than that the state should permit itself to be subject to the criticism that it has denied an appellant a fair and adequate record on appeal. The burden of requiring a new hearing is small indeed compared to the importance of ensuring that justice is done on an adequate record on appeal.*” (*Id.* at pp. 1121-1122, quoting *Steven B., supra*, 25 Cal.3d at p. 9, emphasis in original.)

An adequate record also protects an appellant’s right to appeal. In *Randall, supra*, 2 Cal.5th 529, 935, the trial court denied the defendant’s request to settle the record. (*Id.* at p. 935.) The *Randall* court found this to be a prejudicial abuse of discretion. (*Ibid.*) The Court reasoned that an appellant has the burden of providing an adequate record because

“appealed judgments and orders are presumed correct, and error must be affirmatively shown.” (*Ibid*, internal citations omitted.) Furthermore, it is well established that an appellant’s “failure to provide an adequate record on an issue requires that the issue be resolved against [the defendant] and that without a record a reviewing court must make all presumptions in favor of the validity of the judgment.” (*Ibid*.) Because the appellant in *Randall* was unable to procure an adequate record, the Court held he was “effectively deprived of the right to appeal.” (*Ibid*; see also *People v. Serrato* (1965) 238 Cal.App.2d 112, 119 [lack of trial transcript deprived the appellant of “the right to an effective presentation of his appeal”].)

### **III. WHEN TO SEEK A SETTLED STATEMENT**

Spotting when to seek a settled statement is a case-by-case determination. In the first instance, the need for a settled statement may arise out of appellate counsel’s efforts to correct or augment the record under rules 8.340(b), and/or 8.155. For example, upon review of the clerk’s transcript, you see a minute order indicating that a defense objection was denied, but there is no information about what the objection concerned or the trial court’s rationale. Having sought the reporter’s transcript via the normal process (either by filing an omission letter under rule 8.340(b), or requesting an augmentation under rule 8.155), you receive the court reporter’s certified statement that the transcript is unavailable because the notes have been lost. In order to preserve any potential issue for appeal, you must seek a settled statement in order to reconstruct those oral proceedings.

But such happenstance is not the exclusive means by which the need for a settled statement may surface. In order to determine when to seek a settled statement, be creative. It is worth appellate counsel’s time to seek a settled statement whenever there is cause to believe material information from an “oral proceeding” is missing from the appellate record. Consider the following approaches.

Like requests for missing normal record items and augmentation requests, there are some fundamental techniques to apply upon record review. Always be on the lookout for mistakes and missing materials mentioned in the record such as transcription errors,

unintelligible text, references to motions that are not included in the clerk's transcript, and/or references to unreported proceedings including chambers or bench conferences.

It is also crucial to compare the clerk's transcript with the reporter's transcript to ensure that there is a reporter's transcript for every proceeding, including all morning and afternoon sessions. Talking to trial counsel early on in your case may yield fruitful information that is not readily apparent from the transcripts. Ask them for their thoughts on what might be appealable issues, and whether they remember particularly contentious moments during trial that may or may not have been reported.

Next, what kinds of "oral proceedings" should appellate counsel be on the lookout for? Courts have found that there are specific scenarios that qualify as an "oral proceeding" for purposes of settled statements.<sup>3</sup> The following list is by no means exhaustive.

1. Unreported pre-trial chambers discussion between trial court judge and defense counsel concerning a request to withdraw from representation (*People v. Gzikowski* (1982) 32 Cal.3d 580, 587);
2. Unreported pretrial discussions about jury advisements and waivers (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1117 [appeal from a mentally disordered offender extension, the Court of Appeal directed, on its own motion, that the trial court settle the record]);
3. An unreported sidebar (*Pinholster, supra*, 1 Cal.4th at p. 922) [but there is no authority that all such sidebars must be reported];
4. An unreported chambers conference involving legal arguments (*Holloway, supra*, 50 Cal.3d at p. 1116; *Lipka v. Lipka* (1963) 60 Cal.2d 472, 480-481 [equivalent of settled statement of chambers discussion during trial proper part of record on appeal]);
5. An unreported jury question or answer to one during deliberations (*Carter, supra*, 30 Cal.4th at p. 1215);

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<sup>3</sup> See also Central California Appellate Program, *Settled Statement Procedures Article*, <[https://www.capcentral.org/procedures/record\\_procedures/settle\\_stmt.asp](https://www.capcentral.org/procedures/record_procedures/settle_stmt.asp)>

6. An unreported evidentiary objection or ruling on one (*People v. Adams* (1988) 198 Cal.App.3d 10, 16);
7. 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, overruled on other grounds by *Williams, supra*, 49 Cal.4th 405, 459);
8. An in-chambers discussion between the trial judge and counsel regarding proposed jury instructions (*Freeman, supra*, 8 Cal.4th 450, 510; *People v. Hardy* (1992) 2 Cal.4th 86, 183-184);
9. An in-chambers discussion between trial counsel and trial court judge concerning the defendant's mental competence (*People v. Castro* (1982) 138 Cal.App.3d 30, 33);
10. "[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)" (*Harris, supra*, 43 Cal.4th at pp. 1280-1281);
11. A map used by a witness but not introduced into evidence (*St. George, supra*, 93 Cal.App.2d at pp. 816-817 [settled statement permitted, even though map not introduced as an exhibit, because map was "an integral part of the witness's testimony"]);
12. Contents of unreported pretrial hearings, lists of proposed jury instructions submitted by the prosecutor and defense counsel, proposed questions for voir dire, contents of trial court's written questions to potential jurors, and copies of letters sent to jurors after the verdict (*Harris, supra*, 43 Cal.4th at p. 1281);
13. A summary of what occurred in a jury's visit to a crime scene during a trial (*People v. Wisely* (1990) 224 Cal.App.3d 939, 945-946);
14. Courtroom security, shackling, and physical restraints used on the defendant during trial (*United States v. Greenwell* (4th Cir. 1969) 418 F.2d 845, 846);
15. 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);

16. Who was present, or not present, on behalf of the parties at a given proceeding (*People v. Bradford* (1997) 15 Cal.4th 1229, 1331 & fn. 14);
17. Which portions of an audiotape or videotape exhibit were played to the jury and what occurred in court on a day when defense counsel and defendant were absent from the courtroom (*Anderson, supra*, 141 Cal.App.4th 430, 440);
18. “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 [appellate counsel could have, but did not seek reconstruction of lost exhibit consisting of the knife for which appellant was convicted of illegal possession]; see also *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]).

While creativity is encouraged, courts have ruled that some materials do not qualify as an “oral proceeding.” For example, 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. (*People v. Williams* (1988) 44 Cal.3d 883; cf. *People v. Jones* (1997) 15 Cal.4th 119, 149, fn. 6, overruled in part on other grounds by *People v. Hill* (1998) 17 Cal.4th 800,823 [not deciding the question of “whether the trial court’s previously unexpressed observations of defendant constitute unreported “oral proceedings”]; see also *People v. Griffin* (2004) 33 Cal.4th 536, 554, fn. 3, overruled on other grounds by *People v. Riccardi* (2012) 54 Cal.4th 758, 824 [prosecutor was denied a request to “augment” the record in order to state reasons for challenging African-American prospective jurors; the defense had opposed the request on the ground that there was nothing further to put in the record].)

The term “oral proceedings” also does not include the contents of police interview tapes (video and audio), despite being played for the court and during trial, because they were not “oral proceedings” of the court, but statements made months earlier in police

headquarters. (*Anderson, supra*, 141 Cal.App.4th at pp. 440-441; cf. *Ibid.* [determination of which portions of the interview tapes were shown to the trial court and jury on a day when counsels were absent is proper subject for a settled statement]). In addition, a defendant was not denied meaningful appellate review when the appellate court denied his application for permission to prepare a settled statement to identify the race of potential jurors challenged by the prosecution. (*Griffin, supra*, 33 Cal.4th at p. 554, fn. 4.)

Finally, although the Supreme Court has suggested that certain items should be preserved for appellate review by trial counsel rather than by a settled statement on appeal, an argument for usefulness on appeal is not precluded. (See *Harris, supra*, 43 Cal.4th at p. 1281 [physical gestures by witnesses or the prosecutor, the specific portion of recorded statements played during closing argument, and circumstances surrounding notes sent to jury during deliberations are not the proper subject for a settled statement “absent some special circumstance”].)

#### **IV. RULE 8.137 & THE ROLE OF THE TRIAL COURT**

Under rule 8.137(a), “[a] settled statement is a summary of the superior court proceedings approved by the superior court.” (See also *Marks v. Superior Court* (2002) 27 Cal. 4th 176, 193-194 [discussing steps in record settlement process].) Rules 8.137(b)-(h) describe the appropriate procedures to be followed. The first step is for the appellant to file a “proposed settled statement” containing a “statement of the points” to be raised on appeal and a “condensed narrative” of the proceedings being reconstructed. (Rule 8.137(d).) The district attorney then has 20 days to file any proposed amendments to the statement. (Rule 8.137(e).) Finally, the trial court reviews the proposed statement and may order a hearing to settle factual disputes, request amendments to the proposed statement, make any corrections or modifications itself, or may certify the settled statement. (8.137(f)-(h).) Notably, in lieu of the trial court’s certification, rule 8.137(h)(2), allows the parties to file a stipulation that the proposed statement is correct.

As a general matter, trial judges have “full and plenary power” to settle the record, “subject only to the limitation that [they do] not act arbitrarily.” (*Keller v. Superior Court* (1950)

100 Cal.App.2d 231, 234; *Marks, supra*, 27 Cal. 4th at p. 195.) The trial court has broad discretion to accept or reject counsel's representations in accordance with its assessment of their credibility, but cannot refuse to make an assessment. (*Gzikowski, supra*, 32 Cal.3d at p. 586.) The trial court may rely upon the suggestions of counsel, the court's own memory, the court's notes made during trial . . . and the memories of the trial attorneys and jurors. (*Keller, supra*, 100 Cal.App.2d at p. 234; *People v. Moore* (1988) 201 Cal.App.3d 51, 56 ["a satisfactory record may at times be prepared through the use of notes taken during the trial by the attorneys and the trial judge; by the memories of attorneys, witnesses, and jurors; by agreement of the parties; and possibly from other sources"].)

Moreover, the trial court cannot simply refuse to settle the record; "it is the obligation of the parties and the court to work together to prepare the settled statement." (*Rhue, supra*, 17 Cal.App.5th 8at p. 895.) "California law has long recognized this obligation: a trial court may not deprive a litigant of his right of appeal by simply refusing to perform a plain duty." (*Ibid.*) Indeed, the court may not decline to settle the record unless after resorting to all available aid, the court is affirmatively convinced of its inability to do so, in which case it must state reasons on the record. (*Marks, supra*, 27 Cal.4th at p. 196.)

"The duty imposed on the trial judge to settle a truthful statement of the evidence is not satisfied by merely taking the appellant's proposed statement and the respondent's proposed amendments and certifying both to the appellate court." (*Jenkins, supra*, 55 Cal.App.3d Supp. at p. 64.) "Where there are conflicts as to what transpired at the trial, the court must resolve the dispute as to the facts and see to it that a single unified statement is prepared which sets forth the evidence and testimony received at the trial. To assist [] in carrying out [the] responsibility to prepare an accurate statement of the evidence the trial court may rely on the appellant's proposed statement, the respondent's proposed amendments, and [its] own notes or memory of the evidence." (*Jenkins, supra*, 55 Cal.App.3d Supp. at pp. 64-65.) If a reporter was present the trial court may order the testimony to be read back to refresh its memory. (See *Keller, supra*, 100 Cal.App.2d 231, 235; *Eisenberg v. Superior Court* (1956) 142 Cal.App.2d 12, 20.) As a last resort the trial judge may recall witnesses to give testimony anew. (*Western States Const. Co. v. Municipal Ct.* (1951) 38 Cal.2d

146, 148-151.) In sum, “the trial judge *must* settle the record.” (*Jenkins, supra*, 55 Cal.App.3d Supp. at p. 64, emphasis in original.)

Counsel should be on the lookout for material conflicts in the settled statement because the inclusion of conflicting accounts cannot be squared with the purposes of the statement on appeal process. The court’s opinion in *Cervantes, supra*, 150 Cal.App.4th at pp. 1122-1123, is instructive on this point.

In *Cervantes*, the defendant argued the evidence was insufficient to support his conviction because the trial court’s settled statement on appeal was inadequate. (*Id.* at p. 1121.) The settled statement was intended to be a substitute for an unavailable trial transcript, which included testimony from the prosecution’s only witness. (*Id.* at pp. 1119-1121.) Following a defense motion for summary reversal on the grounds of the absent transcript, the Second District Court of Appeal remanded the matter to the trial court for “determination of whether a settled statement [could] be obtained.” (*Id.* at p. 1120.) The trial court held hearings on the preparation of a settled statement, but the defendant’s trial counsel was unavailable to participate. (*Ibid.*) Despite acknowledging that it had no recollection of the case, the trial court nevertheless approved the settled statement prepared with only the prosecutor’s recollections, which included a critical fact that had been in conflict during trial. (*Id.* at pp. 1120-1122.)

The appellate court held that the settled statement was not an “adequate substitute for a trial transcript” because defense counsel was unavailable to participate, the trial court had no independent recollection of the testimony, had not taken trial notes, and had relied solely on the prosecutor’s memory. (*Cervantes, supra*, 150 Cal.App.4th at p. 1122.) The *Cervantes* court explained that the trial judge could not approve the settled statement because resolution of the critical factual conflict necessitated the input of the defendant’s trial counsel. (*Id.* at p. 1122.) The appellate court vacated the order approving the settled statement and remanded the matter to determine whether defense counsel was available or, in the alternative, if the trial court was unable to settle the record, it was ordered to “vacate the judgment and order a new trial.” (*Ibid.*)

Appellate counsel must keep these principles in mind as they navigate the settled statement process. In theory, when attempting to produce a settled statement, appellate counsel could simply follow the procedural steps outlined in rule 8.137. In the Sixth District, however, counsel is encouraged to take a more active approach.

## **V. OBTAINING A SETTLED STATEMENT IN THE SIXTH DISTRICT**

### **A. Initiating the process in the Court of Appeal.**

The first step in the Sixth District is to file an “application for leave to obtain a settled statement” in the Court of Appeal.<sup>4</sup> With this application, appellate counsel is asking the Court of Appeal to grant the request to settle the record. Also with the application, it is wise to include a request for an extension of time to file the appellant’s opening brief. Typically, this would be for 30 days beyond the filing of the settled statement.

In your application, be prepared to show why the unreported or unavailable proceedings may be useful on appeal. In the pleading, an appellant need only establish “with some certainty how the materials” may be useful on appeal. (*Gaston, supra*, 20 Cal.3d at p. 482.) The showing of “some certainty” must be made as to the *manner* in which the materials may be useful, not as to the contents of the materials themselves.” (*Ibid.*, emphasis in original.) In order to make such a showing, it is permissible to rely on the “memories and notes of the participants” and so, “counsel may fairly be required to draw on those sources to demonstrate how a particular unreported matter may be useful on appeal.” (*Gzickowski, supra*, 32 Cal.3d at p. 585, fn. 2.) Typically, this would be in the form of a declaration by trial counsel, the district attorney, or other participant such as a witness or potential juror.

Then, assuming the request for leave is granted, the Court of Appeal will issue an order directing the superior court to “undertake preparation of the settled statement.” A recent such order included the following directions,

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<sup>4</sup> See Appendix A [sample application].

“If it should appear to the Superior Court that for sufficient reason a settled statement cannot be prepared, the Superior Court shall forthwith prepare and transmit to this court its specific written findings to that effect, stating its reasons. The Superior Court and the parties shall otherwise conform, as far as practicable to the procedural provisions of rule 8.137, Cal. Rules of Court, provided that either the settled statement or findings that it cannot be prepared shall be filed in this court not more than 30 days from the date of this order unless the time is extended by this court’s order for good cause shown.”

Note that this procedure does not track perfectly with rule 8.137, but the procedure outlined above is the only way to begin the settled statement process in the Sixth District.

**B. The record settlement process in the trial court.**

Although the Court of Appeal ordered the superior court to “undertake preparation of the settled statement,” in practice, it behooves appellate counsel to do as much of the work toward producing a settled statement as possible. Because the burden is on an appellant to obtain an adequate record (*Carter, supra*, 30 Cal.4th at p. 1215), appellate counsel must participate in the record settlement process armed with the requisite legal knowledge. Not only will the process be more efficient, a more accurate settled statement will result.

If not done previously, the first step would be to contact your client’s trial counsel for her recollection as to the oral proceeding at issue. Next, contact the district attorney and any other relevant individuals who may have recollections to contribute to the record. If all the relevant parties are in agreement about what occurred during the missing proceeding, the process may be a relatively short one. Since the parties can agree on a settled statement, repeated hearings in front of the trial judge may be unnecessary. If the parties disagree, however, appellate counsel would be well advised to appear before the superior court early and often to help usher the settled statement process along in conformity with the law.

For example, let’s say that you received the reporter’s transcript of a guilty plea hearing, but the phrase “unintelligible” is written throughout. In particular, the word “unintelligible” is written every time your client speaks on the record. Appellate counsel could contact the client, trial counsel, and the district attorney to see if they recall if there

were any issues or problems with the taking of the plea. Assuming all relevant participants agree on what happened, appellate counsel could draft a settled statement that accurately explains the circumstances of the plea hearing and seek agreement from the participants by way of signed declarations. Appellate counsel would then file the proposed settled statement, along with the declarations, in the superior court and request that the superior court certify the statement. This would foreclose the need for multiple, or possibly any, hearings.

In contrast, let's say that you discover the reporter's transcript of a *Batson/Wheeler* motion is unavailable because the court reporter's notes are lost.<sup>5</sup> Appellate counsel contacts both trial counsel and the district attorney concerning their recollections from the motion. Unfortunately, there are material disagreements between the parties about what happened. At this stage, it would be crucial to give the trial court an opportunity to try to "settle" the record. This would begin with requesting an initial hearing, so that the parties can appear before the trial judge to discuss how to approach settling the record. In order to ensure this happens quickly, appellate counsel is well advised to take the lead by contacting the trial court's clerk to request a hearing date. At the hearing, appellate counsel must be prepared to explain the legal principles and necessary procedural steps the trial court will need to undertake in order to settle the record.

Appellate counsel's responsibility bears repeating: appellate counsel should be well prepared. Without question, appellate counsel should strive to be the most informed person in the courtroom concerning what the trial court can and cannot do in order to settle the record. For example, appellate counsel must advocate for a settled statement that actually settles the material issues. (See *Jenkins, supra*, 55 Cal.App.3d Supp at pp. 64-65 ["Where there are conflicts as to what transpired at the trial, the court must resolve the dispute as to the facts and see to it that a single unified statement is prepared which sets forth the evidence and testimony received at the trial"].) Similarly, an appellant who fails "to incorporate in the settled statement a condensed statement of all or such portions of testimony as [they] deems material to determination of points on appeal, [they are] in no position to attack the

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<sup>5</sup> See *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal. 3d 258.

sufficiency of evidence to support the findings of fact.” (*Agnew v. Contractors Safety Asso.* (1963) 216 Cal.App.2d 154, 163, cert. denied, (1964) 375 US 976, superseded by statute on other grounds as stated in *Mehdi v. Superior Court* (1989) 213 Cal.App.3d 1198.)

In settling the record, the trial court must resort to “all available aid,” including taking testimony, requesting input from the pertinent parties, and relying on its own notes and memory. (See *Marks, supra*, 27 Cal.4th at p. 196.) Whenever the trial court appears to stray from these principles, appellate counsel must state their objections.<sup>6</sup> The best outcome is that a timely objection in the trial court may persuade the trial court to follow the requisite legal principles before certifying any statement. At a minimum, a timely objection will forestall any later claims of forfeiture. (*Kathy P., supra*, 25 Cal.3d at p. 102.)

Once the trial court has certified a settled statement, appellate counsel must ensure the certified settled statement is filed in the Court of Appeal. Sometimes, the superior court will file its statement in its own court, but fail to ensure the Court of Appeal is served. In that scenario, it is appellate counsel’s duty to ensure the settled statement reaches the Court of Appeal. (*Barton, supra*, 21 Cal.3d at p. 519 [appellant’s burden to present a complete record for appellate review].) This could be in the form of an augment motion or simply a notice indicating to the Court of Appeal that the settled statement was filed only in the superior court and that you are transmitting the document to the Court of Appeal as a courtesy. Once the Court of Appeal has accepted the settled statement, it will usually augment the record to include the settled statement on its own motion. Again, however, it is appellant’s burden to ensure that this is done.

It is also important to note that a trial court will rarely, if ever, request an extension of time to complete the settled statement process. The Sixth District Court of Appeal’s online docket will usually indicate a due date for the statement under “scheduled actions.” If this date looms without any notice from the trial court, appellate counsel is encouraged to communicate with the Court of Appeal concerning the status of the settled statement

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<sup>6</sup> See also Part V, *infra*.

proceedings. This could be by an extension request you file yourself, but you may also have success with a phone call or email to the relevant Court of Appeal clerk.

## **VI. OBJECTING TO THE CERTIFIED SETTLED STATEMENT**

Sometimes, the record settlement process in the trial court does not produce an adequate settled statement. This part of the article discusses why, when, and how to object.

In order to argue that the record precludes meaningful appellate review, an appellant must exhaust all remedies to correct an inadequate settled statement. (*Hawthorne, supra*, 4 Cal.4th at p. 66 [if the record can be reconstructed with other methods, such as “settled statement” procedures, the defendant must employ such methods to obtain appellate review]; see also *Kathy P, supra*, 25 Cal.3d at p. 102 [where the record of certain “oral proceedings” are unavailable, appellate counsel has a duty to settle the record whenever possible in order to avoid forfeiture].)

An appellate court has no authority to determine the accuracy and propriety of a settled statement; the goal of judicial efficiency “would be frustrated if the appellate court were to settle a statement instead of the trial court.” (*Burns v. Brown* (1946) 27 Cal. 2d 631.) Moreover, “[t]he failure to comply with [rule 8.137], and the resulting absence of a record, is more than significant to the appellant. Appealed judgments and orders are presumed correct, and error must be affirmatively shown.” (*Randall, supra*, 2 Cal.App.5th at p. 935 citing *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Appellate courts “are bound to assume that enough appears” in a settled statement to enable a decision on whether reversible error was committed and to allow the courts to rule “upon the basis of what affirmatively appears in the record.” (*Sloan v. Stearns* (1955) 137 Cal.App.2d 289, 293; see also *People v. Scott* (1972) 23 Cal.App.3d 80, 86 [the defendant had not argued that material information was missing from the settled statement, so it was deemed a “fair substitute” for a complete transcript].) Given these principles, it is crucial to object to an inadequate settled statement.

In order to determine if the settled statement is inadequate, first look to make sure that it resolves all material conflicts. (See *Jenkins, supra*, 55 Cal.App.3d Supp. at pp. 64-65.) Consider whether the trial court failed to resort to “all available aid” to procure the settled

statement. (*Marks, supra*, 27 Cal.4th at p. 196.) Was testimony taken, were both the defense and district attorney’s recollections fairly considered? Did the trial court’s statement accurately reflect your understanding of what transpired during the settled statement process? To what extent does the statement comport with the version of events that trial counsel recalls? Did the trial court act arbitrarily? (See *Hardy, supra*, 2 Cal.4th at p. 183, fn. 30.)

As to when to object, there are three key moments. The first is to object in the trial court. Either during a hearing on the settled statement or, if the procedure tracks rule 8.137, via the filing of an amendment. If your objections were not sustained in the trial court, the second crucial time to object is in the Court of Appeal. If erroneous findings are included in the certified settled statement over objection, counsel must renew the objections in the Court of Appeal by filing a motion to correct the record to strike that portion of the prepared settled statement or the statement as a whole. (*Williams, supra*, 44 Cal.3d at pp. 921-922; accord *Hardy, supra*, 2 Cal.4th at pp. 183-184 & fn. 30.)

The third critical moment is once the Court of Appeal has augmented the certified settled statement to the appellate record. If an objection is still required, appellate counsel must seek a petition for review in the Supreme Court. The petition would argue for a reversal of the Court of Appeal’s denial of appellant’s request to strike or remand the settled statement.

## **VII. ARGUING AN INADEQUATE RECORD ON APPEAL**

Once the settled statement is part of the record on appeal and appellate counsel has exhausted their remedies for objection, the final step is to argue on appeal that the record is inadequate for meaningful appellate review.

The defendant bears the burden of demonstrating that the record is inadequate to permit meaningful appellate review. (*People v. Samayoa* (1997) 15 Cal.4th 795, 820.) “To determine whether a settled statement is adequate, [appellate courts] consider the issues defendant raises on appeal and the ability of the parties and the trial court to reconstruct the record. [Citation.] In considering whether it is possible to adequately reconstruct the trial

proceedings in a settled statement [appellate courts] 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.” (*Bradford, supra*, 154 Cal.App.4th at p. 1418, internal citations omitted.)

Where a record contains certain omissions that preclude a reviewing court from determining the issues on appeal, “a new trial is in order.” (*Moore, supra*, 201 Cal.App.3d at p. 57.) Penal Code section 1181, subdivision (9), invests a reviewing court with the power to vacate a judgment and order a new trial “because of the loss or destruction, in whole or in substantial part of the reporter’s notes.) “The test is whether 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.” (*People v. Morales* (1979) 88 Cal.App.3d 259, 266.) But only “substantial” omissions constitute an inadequate record, inconsequential portions do not. (*Moore, supra*, 201 Cal.App.3d 51, 56 [omission of defense counsel’s closing arguments inconsequential])

*People v. Apalatequi* (1978) 82 Cal.App.3d 970, is instructive on what might be a “substantial” lost portion. In *Apalatequi*, the defense filed a motion in the appellate court under section 1181, subdivision (9), seeking to vacate the judgment of conviction due to an incomplete appellate record. (*Id.* at p. 971.) On appeal, the defendant had claimed prejudicial prosecutorial misconduct concerning certain arguments by the prosecutor. (*Id.* at pp. 971-972.) The relevant portions of the reporter’s transcript could not be produced, however, because the court reporter’s notes of the argument were lost. (*Id.* at p. 971.) The defendant’s counsel proposed a settled statement on appeal, which contended that the prosecutor made certain remarks over defense counsel’s objection that amounted to prejudicial misconduct. (*Id.* at p. 972.) The prosecutor objected to the statement averring that he had not made the statements. (*Ibid.*) The trial court held an evidentiary hearing concerning the proposed statement, ultimately rejected the defense’s version and issued its own settled statement that accepted almost all of the prosecutor’s recollections. (*Ibid.*) The defendant then filed a motion in the Court of Appeal seeking to vacate the judgment on grounds of an inadequate appellate record. (*Id.* at p. 971.)

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. (*Apalatequi*, *supra*, 82 Cal.App.3d at pp. 973-974.) Accordingly, it granted the defendant's motion to vacate the judgment. (*Id.* at p. 974.)

Case law provides further examples of what constitutes a record that is missing a "substantial" portion. In *People v. Jones* (1981) 125 Cal.App.3d 298, 300-302, the record was inadequate because the reporter's notes from the whole trial were unavailable and defense trial counsel had no independent recollection of the trial to facilitate a settled statement. In *Steven B.*, *supra*, 25 Cal.3d 1, 3, the court reporter's notes from one day of a two-day jurisdictional hearing were inadvertently destroyed. Because the appellant intended to raise a sufficiency of the evidence claim and trial counsel had a failure of recollection, the *Steven B.* court held that the record was inadequate for appellate review and vacated the judgment. (*Id.* at pp. 9-10; see also *In re Ray O.* (1979) 97 Cal.App.3d 136, 138-139, overruled on other grounds by *People v. Horn* (1989) 213 Cal.App.3d 701, 708 [no reporter's transcript of juvenile disposition hearing].)

In *People v. Curry* (1985) 165 Cal.App.3d 349, 353-354, an inadequate record was found where part of an officer's probable cause statement to a magistrate was missing. Finally, in *Bradford*, *supra*, 154 Cal.App.4th 1390, 1418-1419, the trial court judge made repeated unreported visits to the jury room. The subsequent settled statement of the court's communications was deemed inadequate for meaningful appellate review because the trial court's memory was vague, and the statement did not allow the court to review what affect the communications had on the jury. (*Id.* at p. 1420.) Reversal was thus required. (*Id.* at p. 1421.)

Counsel must be prepared to argue prejudice. An appellate record is inadequate "only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal." (*Alvarez*, *supra*, 14 Cal. 4th at p. 196, fn. 8.) Inconsequential inaccuracies or omissions are insufficient to demonstrate prejudice. (*Howard*, *supra*, 1 Cal. 4th at p. 1165.)

“Each case must stand on its own merits, and the outcome will depend upon the circumstances of the particular case.” (*Moore, supra*, 201 Cal.App.3d at p. 56.) When determining the prejudicial effect of an inadequate record, courts will apply the “harmless beyond a reasonable doubt standard” articulated in *Chapman v. California* (1967) 386 U.S. 18, 24. (*Bradford, supra*, 154 Cal.App.4th at p. 1417; see also *Rose v. Clark* (1986) 478 U.S. 570, 579.)

## **VIII. CONCLUSION**

It is hoped that appellate counsel will rarely find themselves in the trial court assisting with a settled statement proceeding. But it does happen. Especially in this environment of dwindling court budgets where court reporters are not always present at every hearing. If you spot a potential need for a settled statement in your case, first take a look at this article, which aimed to cover the basic considerations. Recognizing that this article may raise more questions than it answers, however, please don't hesitate to contact your SDAP buddy for advice.