

Basic Appellate CLE

Magistrate C. Michael Walsh

Starting an Appeal

Notice of Appeal

Notice of Cross-Appeal

Where do you file?

What if you want to dismiss?

Move to Dismiss – App.R. 28

Do Nothing

Cost Deposit

Pay \$125 in the trial court

OR

Cost Deposit Alternative



Time to Appeal

App.R. 4(A)(1) – 30 days from date of entry

Time to Appeal

Tolling the time to appeal

Timely and appropriate

- (a) motion for arrest of judgment under Crim.R. 34;
- (b) motion for a new trial under Crim.R. 33 for a reason other than newly discovered evidence;
- (c) objections to a magistrate's decision under Crim.R. 19 or Traf.R. 14; or
- (d) request for findings of fact and conclusions of law under Crim.R. 19(d)(3)(a)(ii),

Time to Appeal

Motion to Remand

If the notice of appeal is filed before one of those timely and appropriate motions is ruled on, upon suggestion of any party, the court of appeals shall stay and remand for the trial court to rule on the motion.

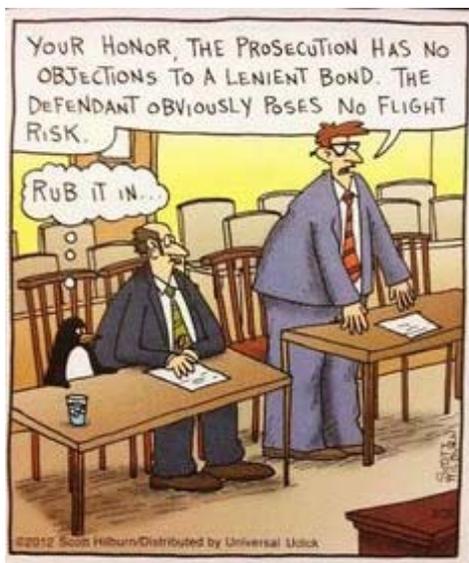
App.R. 4(A)(3).

Docketing Statement

Check the appropriate box for the record.

Attach the order appealed (here and to the brief of appellant and appellee).

Motion to Stay/Motion for Bond



Motion to Stay/Motion for Bond

Ask the trial court first and tell the Court of Appeals you did.

Emergency – Local Rule 4(D).

- affidavit – nature of the emergency and efforts made to notify opposing party

Motions and Journal Entries

You must file a motion.

You do not have to prepare an order and file it with your motion.

Forms

Available on Ninth District web site:

<http://www.ninth.courts.state.oh.us/FormsSamples.htm>

<http://www.ninth.courts.state.oh.us/ProSe.htm>

Record on Appeal

Trial vs. Appeal

“An appeal differs fundamentally from a trial. At trial, a dispute is judged on its merits. On appeal the record below is reviewed to determine whether there was prejudicial error that probably affected the outcome of the case.”

- *Protecting Your Record on Appeal*,
Willis J. Horvitz, 4 *Litigation* 34 (1977-
1978)

Three Rules

“When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two.”

Protect Our Water v. County of Merced,
110 Cal. App. 4th 362, 364 (2003).

The Record on Appeal

Appellate Rule 9(A)(1)-the record includes

- the original papers and exhibits filed in the trial court**
- the transcript of proceedings, if any, including exhibits**
- a certified copy of the docket and journal entries prepared by the clerk of the trial court**

The Record on Appeal

Two different considerations

- 1. Making the record in the trial court**
- 2. Transmitting the complete record to the court of appeals for the appeal**

“Good trial lawyers try every case with a third eye – two eyes on the trial and the third on the record that an appellate court may ultimately review.”

- Paul Mark Sandler, *Anatomy of a Trial: A Handbook for Young Lawyers* (2011)

The Record in the Courtroom

The court of appeals can only “see” what is in the transcript.

Excerpt from trial testimony

The witness was sworn-in.

Q: Name?

A: J. Edgar Hoover.

Q: Occupation?

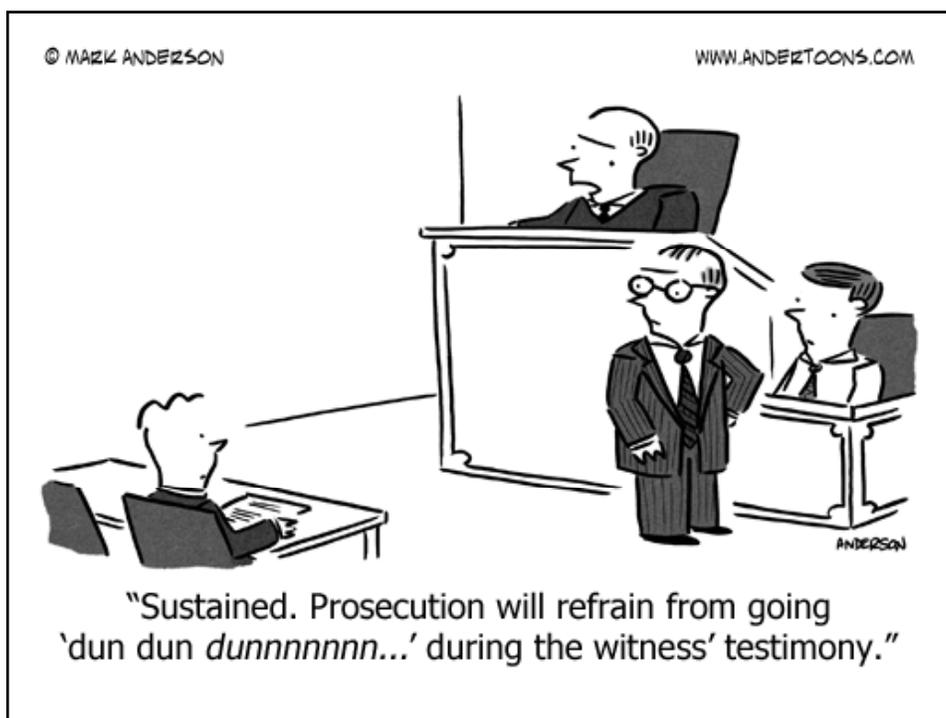
A: Head of the Federal Bureau of Investigation.

Q: Will you tell the court why you are dressed like this?

A: I have many enemies and I rarely go out unless I am in disguise.

Q: Mr. Hoover, in your opinion...





Transcript

Praecipe signed by the court reporter.

Transcript Alternatives

App.R. 9(C) – Statement of the evidence

- Only if no recording was made or if the recording is no longer available.

App.R. 9(D) – Agreed statement as the record

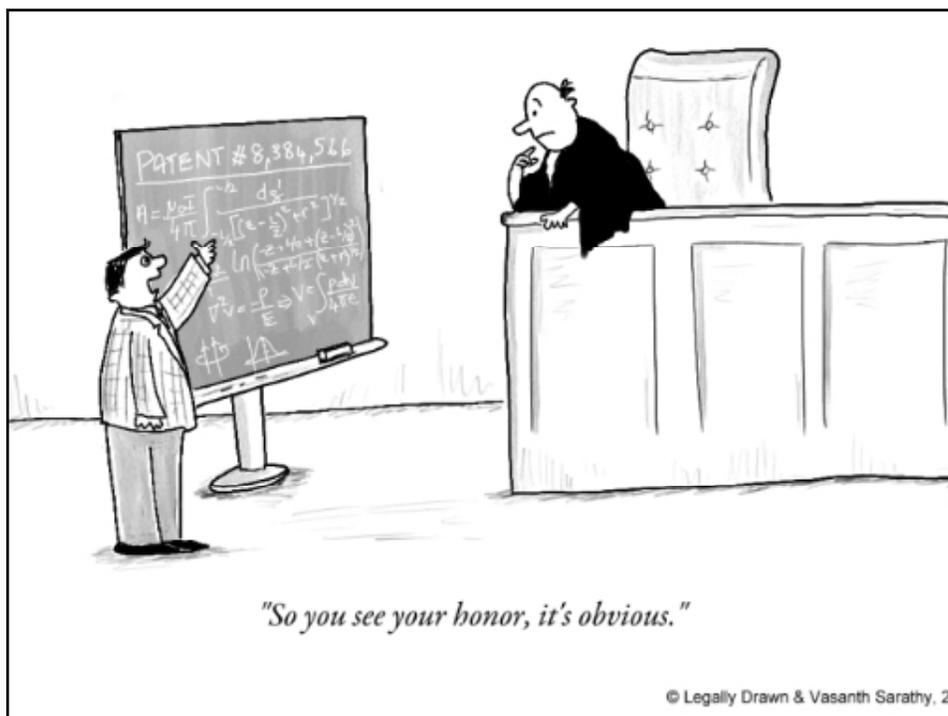
- Agreed statement takes the place of everything that was filed in the trial court.

The Record in the Courtroom

Handling Documentary and Physical Evidence.

Blackboards and magnetic boards with movable objects cannot be preserved. Models pose a problem, too.





The Record in the Courtroom

Objections and Motions to Strike.

Generally, counsel must make a timely objection and state a proper ground.

Opposing counsel and the court should have an opportunity to cure the defect if possible.



The Record in the Courtroom

Objections and Motions to Strike.

Failing to object amounts to a forfeiture that precludes appellate review except for plain error.

The Record in the Courtroom

When a party makes a specific objection to the admission of evidence, he waives all other objections and cannot assert them on appeal.

State v. Tomlin, 9th Dist. Summit No. 96CA006488, 1997 WL 379650 (June 18, 1997).

The Record in the Courtroom

Rulings on motions in limine are interlocutory.

The objection must be renewed at the appropriate time during trial or any error in the trial court's denial of the motion is forfeited.

The Record in the Courtroom

Offers of proof are generally required to preserve error in the exclusion of evidence. Evid.R. 103(A)(2).

Extensions for the Record

First request – ask the trial court.

Subsequent requests – ask the court of appeals.

Supplementing the Record

Transcripts prepared for a prior appeal.

**Presentence investigation report.
R.C. 2951.03(D).**

Something you want to include for appeal.

What if something is missing?

If all parties agree – file a joint motion to supplement.

If parties disagree – ask the trial court pursuant to App.R. 9(E).

Number of Copies

Motions – original and three

Briefs – original and four

Briefs

Extension of Time for Briefs

First extension – Certificate of Extension

- 20 days automatically

Second extension – by motion

- disfavored

- 20 days

No extension of time for reply briefs.

Statement of the Issues

A succinct, clear, and accurate statement of the arguments made in the body of the brief.

Local Rule 7(B)(4).

Example

Whether the trial court erred by admitting the evidence.

Statements that result from custodial interrogation are inadmissible. Defendant was in custody at the time police questioned him and he was not given Miranda warnings. Were these statements inadmissible?

Statement of Facts

Only facts *relevant* to the issues raised on appeal.

Cite to the record.

Use names or labels, not appellant and appellee.

Example

Officer Smith testified first. She testified that she was the first officer on the scene of the accident. She was then called away to another emergency.

Officer Thomas testified next. He testified that he drove car 476. He collected debris from the street.

Detective Unger testified third. He testified that he talked with defendant at the scene. The defendant did not tell him anything.

Example

Officer Smith testified first. She testified that she was the first officer on the scene of the accident. She was then called away to another emergency.

Officer Thomas testified next. He testified that he drove car 476. He collected debris from the street.

Detective Unger testified third. He testified that he talked with defendant at the scene. The defendant did not tell him anything.

The issue on appeal is whether defendant's right to a speedy trial was violated.

How to Cite to the Record

Transcript:

Husband testified that he owed wife \$3,000. (Tr. at 273).

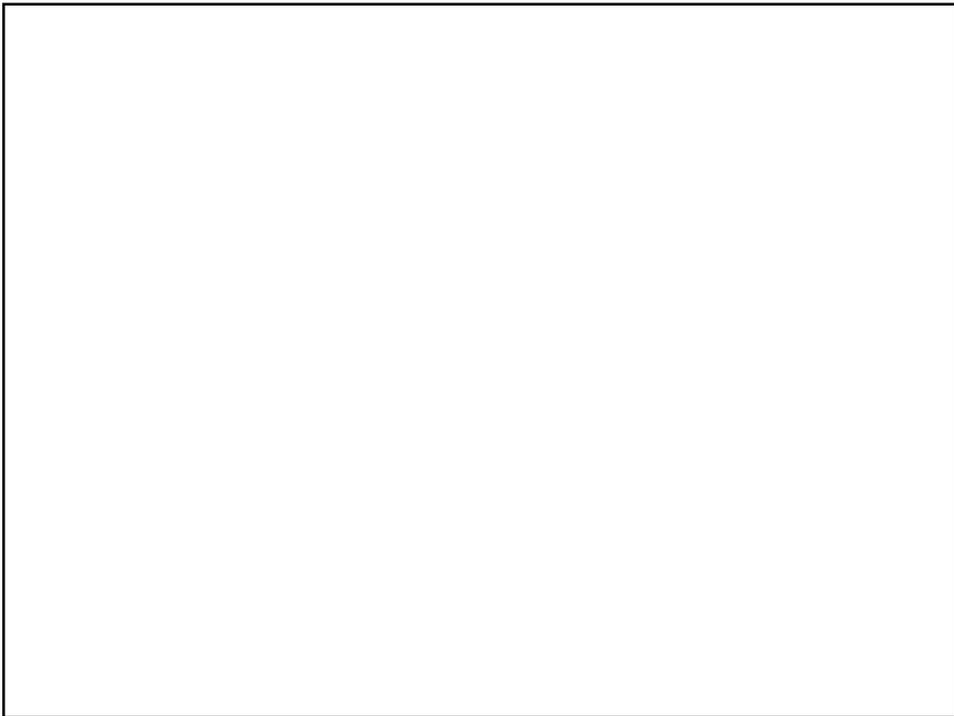
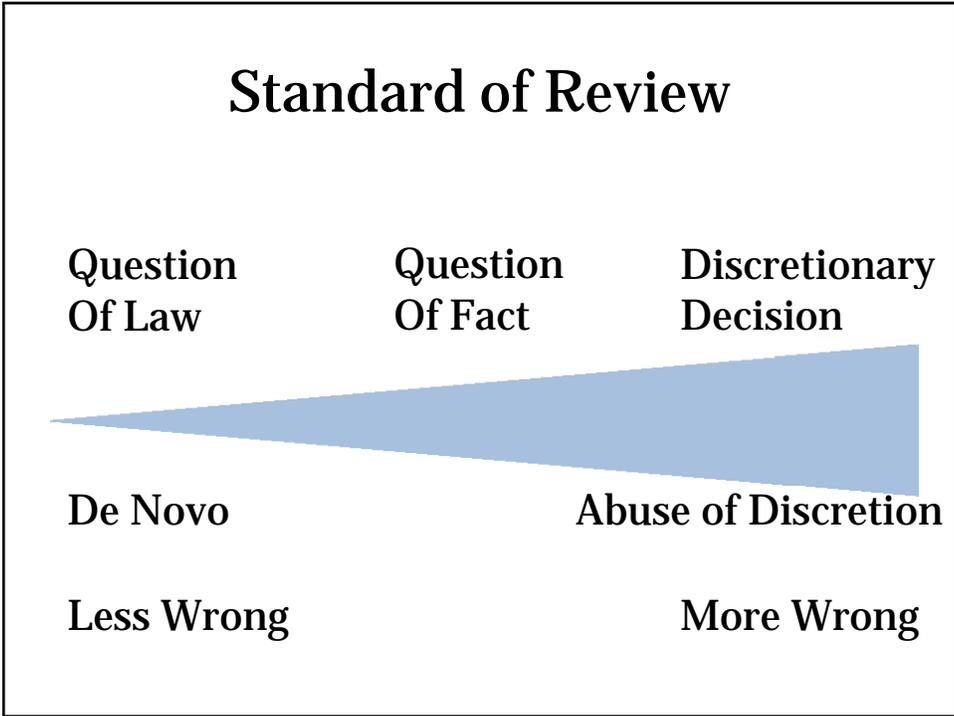
Pleading:

The car is wife's separate property. Pretrial Brief at 7 (filed May 1, 2013).

Standard of Review

Set out before discussing each assigned error.

Analyze using the appropriate standard of review.



Assignments of Error

Do not combine separate issues into one assignment of error.

APPELLANT'S CONVICTION IS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND IS ALSO AGAINST THE WEIGHT OF THE EVIDENCE, ALL IN VIOLATION OF THE UNITED STATES AND OHIO CONSTITUTIONS.

Assignments of Error

Do not combine separate assignments of error and discuss together.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED WHEN IT ADMITTED THE HEARSAY TESTIMONY OF DR. SMITH.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR NEW TRIAL BECAUSE OF THE ERRONEOUS ADMISSION OF DR. SMITH'S TESTIMONY.

Because these errors are related, they will be addressed together.

Law

Apply Ninth District case law.

If there is no Ninth District case on point, tell the judges that in your brief.

Length

Either

- 30 pages and 12 point font

or

- 9,000 characters and 14 point font

Filing

For merit briefs only, the date of mailing is the date of filing. App.R. 13(A).

What if you are not served?

Contact the filing party to ask about service.

Move to strike.

Oral Argument

Oral Argument

Must be requested by including
“ORAL ARGUMENT
REQUESTED” on cover of brief in
chief.

If you request it, you must attend.

The judges like oral argument.

Oral Argument

Know the record.

Answer hypothetical questions.

Supplemental Authority

New authorities, not *newly-discovered* authorities.

Postjudgment Motions

Postjudgment Motions

“Angry post-judgment motions that disparage the decision and/or the judges are, generally, not effective.”

Application to Reconsider

Disagreement with the decision does not make it wrong. Or appropriate for reconsideration.

Apply the standard (obvious error or issues not considered properly) to show why reconsideration is appropriate.

En banc consideration

Review the Court's standing order on en banc consideration.

[http://www.ninth.courts.state.oh.us/En Banc Standing Order.pdf](http://www.ninth.courts.state.oh.us/En%20Banc%20Standing%20Order.pdf)

Motion to Certify a Conflict

Conflict with another appellate district.

The motion must specify the issue proposed for certification.

Application to Reopen

Only in criminal appeals.

Only to raise ineffective assistance of appellate counsel.

It must be timely and include assignments of error and a sworn statement in support.

Motion to Withdraw as Counsel

Local Rule 11(D).

Show good cause.

Proof of service on client.

Questions?