

RECORD COMPLETION IN DEPENDENCY CASES

By Renée E. Torres¹
Staff Attorney, First District Appellate Project
May, 2001

Introduction

- I. Normal Record on Appeal
- II. Informal Record
- III. Correction/Augmentation
- IV. Formal Augmentation
- V. Correcting the Record

VI. Unsealing the Record

VII. Transmitting Exhibits

VIII. Post-Judgment Events & Extrajudicial Info.

IX. Judicial Notice

X. CCP § 909

Introduction

By analogy to the indigent criminal appellant, the indigent parent who faces termination of his or her parental rights is constitutionally entitled to a free appellate record sufficient to permit meaningful review. (*Griffin v. Illinois* (1956) 351 U.S. 12, 20; *Draper v. Washington* (1963) 372 U.S. 487, 496-499; *People v. Howard* (1992) 1 Cal.4th 1132, 1166; *M.L.B. v. S.L.J.* (1996) 519 U.S. 102 [Griffin extended to appeal from termination of parental rights.] Making sure your client has a complete record is important because, generally speaking, appellate review is limited to the appellate record and matters not reflected in that record cannot be considered on direct appeal. (*People v.*

¹ These materials borrow heavily from *Record Correction*, by Mark Shenfield, Staff Attorney, FDAP, prepared for the California Judicial Council's Appellate Advocacy College 2000.

Barnett (1998) 17 Cal.4th 1044, 1183; *People v. Szeto* (1981) 29 Cal.3d 20, 35; Cal. Rules of Court, rule 13 [“The opening brief shall be . . . confined to matters in the record on appeal .”].) It is the appellant’s burden to take all appropriate steps to ensure that the record is as complete as possible (*People v. Chessman* (1950) 35 Cal.2d 455, 460-463; *People v. Malabag* (1997) 54 Cal.App.4th 1419, 1423-1424), and counsel's failure to correct a defect in the record may constitute inadequate assistance of counsel on appeal if full consideration and resolution of the appeal is precluded. (*People v. Barton* (1978) 21 Cal.3d 513.)

There are several ways of enlarging the appellate record to include evidence and information not found within the four corners of the superior court file and reporter’s transcript pages. Chief among these is the petition for writ of habeas corpus, which is not treated in these materials. Judicial notice and Code of Civil Procedure section 909 provide other avenues, and those are discussed below.

I. THE NORMAL RECORD ON APPEAL

In dependency cases, the general rules of court governing the constitution of the normal record on appeal are rules 12, 33, 35(e), 39, 39.1A, and 39.1B. In addition, the Courts of Appeal promulgate local rules which supplement the rules of court.

Rule 39 (a) provides that the **rules governing criminal appeals** [i.e., rules 30-38] are applicable to dependency appeals, “**except** where otherwise expressly provided by this rule or rule **39.1, 39.1A, or 39.1B**, or where the application of a particular rule would be

clearly impracticable or inappropriate.” (See also Advisory Committee Comment) **Rule 33** is the main rule governing criminal appeals.

Rule 39 (c) sets forth the contents of the normal record on appeal. The record on appeal **shall** include:

(1) a clerk’s transcript, containing

- (a) the notice of appeal, and any orders relating to it;
- (b) the petition, and any notice of hearing to the minor, parent, guardian;
- (c) any rehearing application/motion;
- (d) all minutes of the court relating to the action;
- (e) the court’s jurisdictional findings;
- (f) the judgment or order appealed from;
- (g) any report by a probation officer, social worker or guardian ad litem;

(2) a reporter’s transcript of the jurisdiction, disposition, review and §366.26 hearing, including oral arguments and oral opinions of the court, but excluding opening statements;

(3) any exhibit requested to be transmitted by the reviewing court; and

(4) those portions of the clerk’s transcript, reporter’s transcript and exhibits incident to the order appealed from.

Rule 39 (d) sets forth the additional record which may be included in the record on appeal, if the parties request it:

(1) written motions or notices of motions, affidavits filed for or against a motion, and any written opinion of the juvenile court;

(2) reporter's transcripts of the proceedings on any prehearing motion and opening statements;

(3) any exhibit not requested by the reviewing court.

Rule 39.1A is a special rule that applies to appeals from orders/ judgments terminating parental rights pursuant to §366.26. It provides that the **order setting the .26 hearing is not appealable**, and may not be reviewed on appeal following the order of the § 366.26 hearing **unless**:

(1) a timely petition for extraordinary writ from the setting order was filed; and

(2) the petition was summarily denied or otherwise not decided on the merits.

Any appellate review permitted under these narrow circumstances is limited to the issues raised in the writ petition that were supported by an adequate record.

Rule 39.1A (c), sets forth the contents of the normal record on appeal from a § 366.26 hearing. The record on appeal shall include:

(1) Reporter's transcripts of the portions of the hearings from which the appeal is taken;

(2) All findings and orders in the dependency case and any other findings and orders of which the court took judicial notice;

(3) the original petition/s;

(4) any social worker's, therapist's, or expert's report that was prepared and submitted to the court for the .26 hearing, and

(5) any other document or evidence considered by the court in its findings and orders at the .26 hearing.

Rule 39.1A(d) provides that **augmentation** or correction of the record is to be done under rule **12** or rule **35(e)**, **within 15 days** of counsel's receipt of the record.

Rule 39.1A(e) limits appellate review following termination of parental rights to "the record on appeal of the hearings on the issues that were before the court" under § 366.26, and does not include review of prior hearings **unless the party and the court complied with rule 39.1B**.

Rule 39.1B reiterates that review of an order setting the .26 hearing is reviewable only if a timely petition for extraordinary writ from the setting order was filed, the petition was summarily denied or otherwise not decided on the merits, and the issue raised in the writ was supported by an adequate record. However, section 366.26, subdivision (1)(3)(A), and rules 1461(c)(3)(I) and 1462(b)(2)(I) direct the juvenile court to advise the parties, either orally if present or by mail if not, of the requirement to file a petition for extraordinary writ review if they wish to preserve any right to appeal these issues. The court's failure to comply with this duty will permit the court of appeal to review issues otherwise not reviewable. (*In re Cathina W.* (1998) 68 Cal.App.4th 716, 722-724.) The remainder of rule 39.1(B) concerns writs.

Rules 33 and 33.5 governing the normal record in **criminal appeals** authorizes the inclusion of a few items not specifically mentioned in rules 39 et seq. but which are sometimes necessary in a dependency appeal: (1) any demurrer [rule 33(a)(1)(c)]; (2) any transcript of an electronic sound or sound-and-video recording tendered to the court under rule 203.5 [rule 33(a)(k)]; and (3) any *Marsden* motion or other in-camera proceedings [rule 33.5 (a) & (b); see also First District’s Local Rule 4].

II. INFORMAL RECORD CORRECTION/AUGMENTATION

Rule 35(e) provides a mechanism for informally obtaining a missing normal record item directly from the superior court without having to make a formal motion in the court of appeal. “If at any time the clerk or reporter learns that a document or transcript required by rule 33. . . to be included in the record on appeal was inadvertently omitted, the clerk shall copy the document or the reporter shall prepare the transcript and transmit the document or transcript to the reviewing court as an augmentation to the record without the necessity of a court order.” The clerk also sends a copy to each of the parties. A letter to the superior court clerk specifying the item that is missing and as much information as necessary to identify it (i.e., date of hearing, court reporter) is usually sufficient. Often a citation to the rule which designates the requested item as a part of the normal record on appeal can expedite receipt of the item.

- ✓ A Rule 35(e) request to complete the record does not automatically extend the time to file the opening brief in every district. However, the delay caused by completing the record does provide grounds for an extension of time in districts that require a separate request for extension of time.

- ✓ Follow-up with a call to the superior court clerk if you do not receive any response within a few weeks of your Rule 35 letter. (In extreme situations, where the superior court fails to furnish the missing items despite persistent efforts by appellate counsel, it may be necessary to file an augment motion in the court of appeal.)

III. FORMAL AUGMENTATION

Rule 12 governs formal augmentation by motion in the court of appeal. On its own motion or that of a party, the reviewing court may order the record on appeal augmented to include “any part of the original superior court file, including any paper or record on file or lodged with the superior court,” or any “portion of the oral proceedings” or any “agreed or settled statement of portions of the oral proceedings.” Generally, an **augmentation motion is reserved for** getting a part of the **record not** considered part of **the normal record on appeal**, and a brief statement of the necessity for the item is required.

- ✓ When requesting an additional court reporter’s transcript, the application to augment should specify why it may be useful to the appeal. (*People v. Silva* (1978) 20 Cal.3d 489; *People v. Gaston* (1978) 20 Cal.3d 476; *People v. Landry* (1996) 49 Cal.App.4th 785, 791-792.) In addition, it should also specify the date and nature of the proceedings and, if indicated in the clerk’s minutes, the name of the court reporter and the department in which the proceedings were conducted.
- ✓ When requesting other materials which are not part of the normal record on appeal, the application to augment should specify the particular documents sought and how they may be useful to the appeal.

- ✓ Some districts may require a greater showing of specificity and good cause for augmentation than others. (See district-by-district practice tips, *infra*.) In those district especially, counsel should always take care to make applications to augment the record as complete as possible. For example, the application for augmentation should be supported whenever possible by trial and/or appellate counsel's declaration establishing the material's content and its relevance to possible issues which might be raised on the appeal.

- ✓ Certified copies of the requested material may be attached to the application to augment. If these documents were presented to the trial court and are part of the superior court file, counsel may ask the appellate court to take judicial notice of them. (*People v. Hayes* (1990) 52 Cal.3d 577, 611 fn. 3; *People v. Preslie* (1977) 70 Cal.App.3d 486, 494-495; Evid. Code, §§ 459, subd. (a) & 452, subd. (d).)

- ✓ Some of the district courts of appeal have adopted local rules establishing presumptive deadlines for filing an application to augment the record, after which a showing of good cause for the delay is required. (See, e.g., First Appellate District, Local Rule 6 [30 days after record is filed or after expiration of 10-day administrator review]; Second Appellate District, Local Rule 2 [40 days after record filed]; Fifth Appellate District, Local Rule 2 [same].) Counsel should therefore file all augmentation requests as soon as possible.

- ✓ In some districts, counsel also should combine an application for an extension of time within which to file the opening brief with an application to augment the record. In others, extensions are automatically granted.

IV. CORRECTING THE RECORD

A certified court reporter's transcript is presumed to be accurate. (Code Civ. Proc., § 273; Evid. Code § 602.) Occasionally, however, the accuracy of the transcript

may appear doubtful. In such a case, a party may move to correct the record pursuant to **Cal. Rules of Court, rule 12(c)** if a stipulated correction cannot be obtained.

- ✓ The party challenging the accuracy of a certified transcript must introduce evidence sufficient to rebut the presumption of accuracy. (*People v. Kronemyer* (1987) 189 Cal.3d 314, 356.)

V. UNSEALING THE RECORD

Portions of the record on appeal may have been sealed by the trial court to protect the child, or confidential documents. Counsel may request augmentation of the record on appeal with the sealed portions of the record pursuant to **Cal. Rules of Court, rule 33.5(b)**. If made part of the record on appeal, the sealed transcripts or other documents will be transmitted to the court of appeal in sealed envelopes which, without further court order, can only be examined by a judge of the reviewing court personally. (Cal. Rules of Court, rule 33.5(b).) However, only a party to whom the sealed information was accessible in the trial court shall be permitted to examine the materials. (Cal. Rules of Court, rule 33.5(b).) Consequently, an application to examine a sealed transcript or document may be predicated upon its accessibility to appellant during the trial.

- ✓ Transcripts of hearings upon a defendant's motion for substitution of counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 are sealed, but made available by rule to appellant's counsel. (Cal. Rules of Court, rule 33.5(a).) If appellant raises a *Marsden* issue in the opening brief, the respondent shall be sent a copy of *Marsden* transcript(s) unless appellate counsel served and filed with the opening brief a notice that the transcript(s) contain confidential material not relevant to the points raised in the appeal;

in this case, the People may move to obtain a copy of the relevant portions of the transcript(s). (*Ibid.*)

- ✓ Appellate counsel may also request the court of appeal to review sealed materials to determine whether they were properly sealed in the first instance (cf. *Copley Press, Inc. v. Superior Court* (1998) 63 Cal.App.4th 367 [writ of mandate issued directing trial court to unseal settlement decree; student plaintiff's interest in sealing the settlement did not outweigh the public right of access to court records] .

VI. TRANSMITTING EXHIBITS TO THE COURT OF APPEAL

Exhibits may be transmitted to the court of appeal upon counsel's request, or the court's own motion, pursuant to **Cal. Rules of Court**, rules 33(a)(3), 33(b)(3), and **10(d)**.

- ✓ Counsel should review the trial exhibits when they are relevant to a potential appellate issue.
- ✓ Procedures for examining trial exhibits vary from county to county. Counsel should therefore consult with the exhibits clerk to make an appointment for these purposes.
- ✓ The timing of a rule 10(d) motion may vary from district to district. Rule 10(d) requires designation of the exhibit when the case is set for hearing (i.e., when oral argument is set or waived). The First District, however, requires designation within 10 days after the Respondent's brief is filed. (**Local rule 12**)

VII. POST-JUDGMENT EVENTS AND EXTRAJUDICIAL INFORMATION.

Sometimes it is necessary to bring before the court information about events that postdate the judgment under appeal. Some districts ask counsel to keep the court apprised of post-judgment events that may render the appeal moot. Others do not.

Sometimes an adoption or other placement may have fallen through, and that fact is relevant to issues raised on appeal. For example, a child may be “adoptable” but only in the context of his or her placement with a particular family, or during a particular time-frame. (See e.g. *In re Elise K.* (1982) 33 Cal.3d 138.) In such cases, counsel may wish to bring such information before the court. In addition to a petition for writ of habeas corpus, which is not discussed here, there are two other avenues advising the court about post-judgment events or other extrajudicial information: (a) judicial notice and (b) Code of Civil Procedure section 909 motion.

VIII. JUDICIAL NOTICE

Although as a general rule an appellate court will ordinarily look only to the record made in the trial court, it has the same power to take judicial notice of a matter as a trial court. (Evid. Code, § 459, subd.(a),(c).)

Compulsory Notice: A court of appeal must take judicial notice of any matter properly noticed by the trial court and any matter of which the trial court was required to take notice under Evidence Code sections 451. (Evid. Code, § 459, subd.(a).) It must also take judicial notice of an optional matter if the trial court erroneously denied a properly-made request for judicial notice under Evidence Code sections 452 and 453. (Evid. Code, § 459, subd.(a) and Comment.)

Optional Notice: An appellate court may upon request take judicial notice of any matter specified in Evidence Code section 452 (e.g., the decisional, constitutional, or

statutory law of any state, the records of any California court, federal court, or court of another state, facts and propositions that are of such common knowledge within the jurisdiction of the court that they cannot reasonably be the subject of dispute, and facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy).

(Evid. Code, § 459, subd.(a).) Before taking judicial notice of an optional matter not noticed by the trial court, and of substantial consequence to the determination of the case, an appellate court must afford each party the opportunity present information relevant to the propriety of taking judicial notice and the tenor of the matter to be noticed. (Evid. Code, § 459, subd.(c).)

- ✓ In dependency appeals, as in criminal appeals, judicial notice may be used for legislative history materials when a statute's meaning is uncertain and in dispute. It may also be used for records in the court files of related cases. (See, e.g., *People v. Hardy* (1992) 2 Cal.4th 86.)
- ✓ Although an appellate court may take judicial notice of the optional matters specified in Evidence Code section 452, it may decline to do so for other jurisprudential reasons. Appellate courts are reluctant to consider matters not presented to and considered by the trial court in the first instance because of the perceived unfairness that would flow from permitting one side to press an issue or theory on appeal that was not raised below. (*People v. Cruz* (1996) 13 Cal.4th 764, 134; *People v. Meza* (1984) 162 Cal.App.3d 25, 33; *People v. Preslie* (1977) 70 Cal.App.3d 486, 493.)
- ✓ Portions of materials, even though judicially noticed, may also be subject to other evidentiary objections, like hearsay. (See, e.g., *In re David C.* (1984) 152 Cal.3d 1189, 1205; *People v. Rubio* (1977) 71 Cal.3d 757.) For these reasons, a motion pursuant Code of Civil Procedure section 909, or a petition for writ of habeas corpus, may provide a better alternative to

judicial notice for presenting issues based on materials not presented to or considered by the trial court.

- ✓ In the First District, requests for judicial notice “shall not be made in the body of a brief or included as an attachment to a brief.” It must be made by separate motion. A motion seeking permissive notice “must include a showing of the relevance of the information to be judicially noticed.” (See **Local Rule 10(a)**.)

IX. CODE OF CIVIL PROCEDURE SECTION 909

“In all cases where a trial by jury is not a matter of right . . . the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. . . The reviewing court may . . . take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal. . . . This section shall by liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on all of the issues.” (C.C.P § 909. See also **Cal. Rules of Court, rule 23**, “Findings and Additional Evidence on Appeal.”)

In re Elise K., supra, was an appeal from the termination of mother’s parental rights under former Welfare and Institutions section 232. During the pendency of the appeal, Elise’s adoptive placement was terminated and she was returned to foster care. Both parties conceded Elise was not no longer adoptable due to her age, and therefore sought to bring “evidence of these postjudgment circumstances to the attention of the Court of Appeal” but that court refused to consider it. In a per curiam opinion, the Supreme Court accepted the parties’ stipulated reversal “in light of the subsequent

material evidence concerning the adoptability of the subject minor.” (33 Cal.3d at p. 138.) In her concurring opinion, Chief Justice Bird elaborated on the court’s decision, and identified Code of Civil Procedure section 909, as well as the California Constitution, as the source of the court’s power and duty, “if compelling new circumstances arise which undermine the basis for a [termination of parental rights] order during a parent’s appeal from such an order,” to “take cognizance of and consider those changed circumstances.” (33 Cal.3d at p. 150.) See also *In re Jonathan M.* (1997) 53 Cal.App.4th 1234, 1236, fn.2 [4th Dist., Div.3 routinely accepts evidence per C.C.P. § 909 in dependency cases.]; *In re Marcus G.* (1999) 73 Cal.App.4th 1008, 1011, fn.2 [attachment to respondent’s brief properly stricken when not accompanied by motion to take evidence]; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423, fn.3 [C.C.P. § 909 motion denied where evidence did not affect CA’s analysis].

X. SOME DISTRICT-BY-DISTRICT PRACTICE POINTERS

The First, Third, Fifth and Sixth Districts vary somewhat from each other in what items they include in the normal record on appeal, how receptive they are to motions to rule 35(e) letters or augment motions to get the missing items, and whether extensions of time need to be requested. The following list is not exhaustive and in each district counsel should check with FDAP, CCAP or SDAP, and review the local rules, on procedures and practices in a particular district when questions arise. Samples of rule

35(e) letters, augment motions and other miscellaneous motions and notices filed in the different districts are included for easy reference.

1. First District. Most appellate records include a complete clerk's transcript with notices, minute orders and reports for the relevant hearing under review, but petitions are often missing. In an appeal from a § 366.26 hearing, the record never includes a 39.1B writ if one was filed, and often does not include the court's opinion in the writ proceedings. These are important to have, because it is necessary to know what issues were raised and disposed of by writ before one can determine what issues are barred or not barred on appeal. These items can usually be obtained by way of rule 35(e) letter.

Section 366.26 appeals also do not include the transcripts of the referral hearing, i.e., the hearing at which the section .26 hearing was set. These transcripts are important to have because the minute orders do not necessarily reflect whether the juvenile court advised the parent of the necessity to file a rule 39.1B writ if review of orders made at the hearing is desired. As noted earlier, if the court did not properly advise the parent(s), issues normally barred on the later appeal are raisable. This transcript is usually obtainable by augment motion.

Transcripts of the earlier hearings (jurisdiction, disposition, review) are not usually included in the record provided for a section 366.26 appeal, but can be obtained by way of rule 35(e) letter or augment motion if a reason for their usefulness to the appeal can be articulated. Note that by local rule 6, the First District directs counsel to use the

rule 35(e) procedure for normal record items rather than the augment motion. Of course, if a rule 35(e) request is denied, it would be appropriate to make an augment motion for that item.

Extensions of time are not automatically granted when a rule 35(e) letter is sent; or an augment motion is filed. A separate EOT request must be filed if necessary after a rule 35(e) letter. An EOT request should be included as part of the augment motion.

2. Third and Fifth Districts. The normal record on appeal usually included all previous hearings. If anything is left out, it is usually a *Marsden* motion or a detention hearing transcript. The detention hearing transcript is sometimes useful to show that placement with a relative, or a request for counsel, was made at the earliest possible juncture. As a general rule, the Third District prefers counsel to use the rule 35(e) procedure for normal record items, and the Fifth District prefers counsel to use the augment motion even for normal record items.

If a copy of the rule 35(e) request is sent with a proof of service to the Third District, the deadline for filing the AOB is automatically stayed until the material requested is received by the court. This is also the rule in the Fifth District, but it is best to call that court to make sure the deadline has been stayed.

In the Third District, an augment motion automatically extends the deadline without a request not only for the party making the request but also for any other co-appellants, whether or not they joined in the motion. In the Fifth District, however, only

augmentation for items which are NOT part of the normal record on appeal will automatically extend the deadline for the brief. If normal record items are outstanding, a request for extension of time is required. Also, only co-appellants who join in another party's motion to augment, or file their own motions, will automatically get their deadlines extended.

3. Sixth District. Disposition appeals usually include all petitions, minute orders and reports. The transcript of the detention hearing is not usually included. Review hearing appeals and § 366.26 appeals usually include the transcript for the hearing under review, and all the prior reports, but not the transcripts for previous hearings. Rule 35(e) requests are used to get normal record items listed in the rules. In termination appeals, **augment motions for the transcript of the referral hearing**, where it looks as if the parent did not get notice of the writ requirement, **are routinely denied.**

XI. SAMPLE MATERIALS (NOT AVAILABLE ON WEBSITE VERSION)

1. Rule 35(e) letter, First District
2. Application to Augment Record on Appeal, First District
3. Second Motion to Augment the record on Appeal and Motion for Extension of Time, First District
- 4.. Notice Pursuant to California Rule of Court 10(d), First District
5. Appellant-Father's Notice of Joinder of Opening and Reply Brief Arguments of Appellant-Mother, First District.
6. Notice of Dependency Review Status Hearings, First District

7. Motion and Declaration for the Court to Consider Evidence of Post-Judgment Events Pursuant to C.C.P. § 909, and County Counsel's Response, First District.
8. Sample rule 35(e) letter, Third District.
9. Sample Augment Motion, Third District.
10. Excerpt, CCAP Newsletter, Rule 35(e) and Augmentation in 3rd and 5th Districts.
11. Sample Rule 35(e) letter, Sixth District.
12. Sample Request for Judicial Notice or Augmentation of the Record of the Record of a Prior Appellate Record, A Separate Request for Augmentation, and Request for Extension of Time.