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Framing (and winning) your substantial evidence appeal

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Steven A. Hirsch & Kate E. Lazarus

Courts are good at articulating standards of review, but less good at explaining how to comply with those standards when writing an appellate brief. These are two different things, as one soon discovers when trying to write a brief attacking a California jury verdict for lack of substantial evidence – the hardest kind of appeal to win.

Writing the fact statement presents the biggest challenge. One soon confronts questions not answered by the usual statements in the case law. Although the general principles are clear enough, their application to the fact statement is not. Nor is it clear how one gets from an undigested mass of trial transcript to a brief that plays by the rules but still has some chance of winning. The stakes are high: a statement of facts that flouts the standard of review can result in waiver of the substantial-evidence challenge.

The following process is useful for constructing the all-important fact statement in the opening brief:

First, the backbone of the appellant's fact statement should be the testimony and evidence submitted at trial by the respondent. Indeed, the appellant's attorney should consider writing an initial draft using only this body of evidence. See *Brennan v. Townsend & O'Leary Enterprises, Inc*., 199 Cal. App.4th 1336, 1340 (2011) (recounting the "facts in the record in the light most favorable to the jury's verdicts, relying heavily on plaintiff's own trial testimony."). At least initially, the appellant should disregard all evidence that contradicts the respondent's evidence. Of course, appellate courts do not weigh credibility, so don't even try it.

Second, the appellant should layer in any evidence that the appellant submitted at trial that tends to support the verdict, including admissions or stipulations. These may constitute substantial evidence.

Third, the appellant should identify and accept any reasonable inferences necessary to support the judgment. Unreasonable inferences can be identified and attacked later in the argument section. "Inferences may constitute substantial evidence, but they must be the product of logic and reason." *Roddenberry v. Roddenberry*, 44 Cal. App. 4th 634, 651-52 (1996). The best way to identify the specific inferences that the respondent urged on the jury is to read the opening and closing statements by respondent's counsel.

Fourth, the appellant should not rely upon facts "screened out" by the jury instructions. Courts assess substantial evidence in light of the jury instructions actually given at trial. See *Null v. City of Los Angeles*, 206 Cal. App. 3d 1528, 1535 (1988). Limiting instructions given at trial therefore may render some evidence irrelevant for purposes of substantial-evidence review. To the extent that such "screened-out" evidence favors the respondent, it

can be summarized in a separate section which points out that the jury was not allowed to consider it.

Fifth, the appellant can highlight favorable evidence in a separate section arguing the "weight" of the evidence for the limited and express purpose of showing that a trial court error caused prejudice. But the appellant should not taint a pristine substantial evidence presentation by blending these favorable facts into the principal statement of facts.
These procedures constrain the appellant severely. However, the word "substantial" in "substantial-evidence review" is not mere window dressing. Substantial evidence "must be of ponderable legal significance. ... It must be reasonable, credible, and of solid value." *Kuhn v. Dept. of Gen. Services,* 22 Cal. App. 4th 1627, 1633 (1994). Thus, substantial-evidence review implies the following additional rules.

The appellant's fact statement may recite evidence that the respondent himself negated, qualified or retracted his own testimony. This does not require the "weighing" of credibility. Cf. Brennan, 199 Cal. App.4th 1336 (relying on plaintiff's admissions and omissions in affirming JNOV). A respondent who initially testifies, for example, that "the defendant punched me" and later testifies that "actually, the defendant never punched me, but he acted very threatening," has negated his own testimony; and the appellant can take note of that fact in assessing the substantiality of the respondent's evidence.

However, the appellant should consider what inferences the jury reasonably could have drawn from self-contradictory testimony. If a reasonable inference can be drawn that would explain the respondent's apparent self-contradiction or retraction - e.g., that he was confused by a poorly framed question - then the fact statement should describe and accept that inference.

Additionally, under limited circumstances, the appellant's fact statement may include uncontradicted testimony adverse to the judgment. Such evidence can be credited upon appeal if "in view of the whole record, it is clear, positive, and of such a nature that it cannot rationally be disbelieved." Adoption of Arthur M., 149 Cal. App. 4th 704, 717 (2007). And uncontradicted expert testimony on a matter solely within the knowledge of experts is deemed conclusive on appeal. See *Huber, Hunt & Nichols, Inc. v. Moore*, 67 Cal. App.3d 278, 313 (1977).

In the argument section of the brief, the appellant again should rely chiefly on the respondent's own evidence to argue that the respondent failed to prove one or more elements of a claim or defense.

If the appellant adopts the process described above, she can be reasonably certain that the substantial evidence question will be properly presented to the court as a question of law. See *Mau v. Hollywood Commercial Buildings, Inc*., 194 Cal. App. 2d 459, 466 (1961) ("The existence or nonexistence of substantial evidence is a question of law."). The appellate court can then review the case without deference; for "when the facts are undisputed and the question on appeal is wholly a legal issue, the proper standard of review is independent review." *Tien Le v. Lieu Pham*, 180 Cal. App. 4th 1201, 1206 (2010); see also *Jara v. Suprema Meats, Inc*., 121Cal. App. 4th 1238, 1250 (2004) (where appellants predicate their argument solely on respondent's testimony, court "likewise will confine [its] review to the testimony of [respondent], while indulging in every inference favorable to the judgment in construing his testimony.")

Steven A. Hirsch is a partner at Keker & Van Nest LLP, where he leads the firm's Appellate practice. Kate E. Lazarus is an associate at Keker & Van Nest LLP.