Robin Meadow and Edward J. Horowitz

PROTECTING THE RECORD ON APPEAL

Trial lawyers must play to two audiences

Although trial lawyers are frequently compared to actors, an actor has the distinct advantage of never having to play to more than one audience at a time. The lawyer not only has to worry about the judge and jury, but he also has to consider a completely different audience: the court of appeal.

The trial lawyer must constantly balance trial goals with the goal of preserving the record on appeal, because these goals sometimes dictate different actions. To complicate matters further, a lawyer in the middle of a trial often has only a moment in which to decide whether to make an objection or motion. There is little time for careful strategic analysis. Yet in each decision, the lawyer may be "running the grave risk of winning before the jury, only to lose upon appeal."[1]

While there will always be times when the lawyer has to sacrifice one audience for another, there are ways he can improve his chances of satisfying all of them.

A truism applies to all aspects of trial practice, but it is worth repeating: a thorough understanding of the facts and the law, both substantive and procedural, is indispensable. That understanding allows the trial lawyer to plan for appellate proceedings even before the trial begins in ways that may avoid the need to make split-second judgments in the heat of battle.

An additional principle to keep in mind is that once you are in the appellate system, for all practical purposes you can never go beyond the record of the trial. Even the court of appeal's discretionary power to augment the record is limited to matters that were before the trial court at the time of its ruling.[2] It is surprising how frequently appellate practitioners face suggestions to discuss evidence that trial counsel failed to offer at trial or that developed after trial. There is virtually never any basis for doing so, and counsel who try invite the wrath of the appellate court.[3]

In any event, your planning goal is to create mechanisms with which the trial court can address potential appeal issues in a way that is most consistent with your basic trial strategy.

Theory of the Case. Effective appellate strategy, like trial strategy, requires an overall theory or theme of the case. The theories of most cases are easy to identify; but where the causes of action are numerous or the facts complex, it becomes all the more important to identify your theories early and to try to stick with them throughout the litigation. Among the many advantages to this approach is the ability to show on appeal that any error in the trial court was prejudicial because the error related directly to the appellant's main theory of the case. (To achieve success on an appeal it is not enough merely to show legal error. The appellant must also show the error was prejudicial—normally a heavier burden than merely showing commission of error in the first place.[4] Conversely, if you are the respondent on appeal, it will be easier to show that any error below was nonprejudicial because it had little bearing on the real issues at trial as shown by your own theory or theories of the case.

Trial Brief. The trial brief is a simple and effective means of

Robin Meadow is a partner at Loeb and Loeb in Los Angeles, where he specializes in business litigation and appeals. Edward Horowitz is an appellate practice specialist in Los Angeles. Both are members of the California Academy of Appellate Lawyers; Horowitz is a former president.

Beverly Hong illustration

helping to preserve the record. Because it will ordinarily lay out your theory of the case, it highlights the key issues and both preserves those issues for appeal in the event of an adverse trial court ruling and provides a means for demonstrating that any error was prejudicial. Although lawyers sometimes dispense with trial briefs in jury trials, if the issues are at all unusual, a trial brief can help ensure that the record adequately shows you raised the key issues that may become pertinent in the appeal.

Motions in Limine. If you are fully familiar with the facts and law of your case, you will anticipate objectionable evidence that your opponent plans to offer. Motions in limine are valuable tools for averting the presentation of prejudicial matter during trial and avoiding the need for constant objections in front of the jury.[5] They are also effective tools for preserving the record. As with trial briefs, motions in limine can highlight significant issues and preserve them in a way that allows you to be sure you have covered all the grounds of objection. Also, the very making of such a motion lends credence to the argument that the issue involved was significant and that any error concerning the issue was prejudicial. Another benefit of a motion in limine is that if the trial court grants the motion, the other side may have to make an offer of proof. If opposing counsel fails to make a proper offer, he will have a difficult time persuading the court of appeal that any error in granting the motion was prejudicial.

Offers of Proof. The flip side of a motion in limine is an offer of proof. Again, with proper preparation you will anticipate those areas where your opponent will object to evidence, and of course a motion in limine by your opponent is a direct warning that an offer of proof may be necessary. The time to prepare your offer of proof is before the trial. Offers of proof must meet certain technical requirements:

> *An offer of proof must consist of material that is admissible, it must be specific in indicating the purpose of the testimony, the name of the witness and the content of the answer to be elicited. . . . Merely setting forth the substance of facts to be proved does not constitute compliance with Evidence Code section 354, subdivision (a).*[6]

In some cases, it might even be appropriate to have the witnesses testify out of the jury's presence.[7] These are not the kind of details you can safely leave for the moment when the court sustains your opponent's objection.

Aside from preserving your record for appeal, an offer of proof also presents an opportunity to place facts into the record that may influence the court of appeal, even if the specific item of evidence is inadmissible. Most importantly, an offer of proof may be necessary to demonstrate prejudice from the erroneous exclusion of evidence. If the court of appeal cannot determine from the record what the excluded evidence was, it will have a difficult time concluding that the error was prejudicial.

Finally, if your opposition is making an offer of proof, be alert to any objections you may be able to raise to its specific components. These might include grounds that the trial court did not rely upon or that were not apparent at the time of the court's ruling (for example, facts excluded as irrelevant might be offered by hearsay testimony).

Preparation of Special Evidence. The court of appeal will not see all of the evidence. In a personal injury or medical malpractice case, for instance, the jury may be able to see the plaintiff's injuries; in a property damage or construction defect case, the jury may be able to visit the site. But the court of appeal usually has only verbal descriptions of the relevant problem.

The fact that appellate justices are limited to reviewing legal errors does not mean that they do not need to understand the facts. As part of your planning, find a way to create a record of visual evidence. Plan for testimony that describes what the jury will see. Better still, find a reason to include photographs if necessary as part of an offer of proof or even in a brief. If personal injuries, property damage or other things that people can see are insignificant, the court of appeal should see them too.

Jury Instructions. Jury instructions are responsible for an inordinate share of appellate grief because there are so many things you can do wrong. Of course, many cases reach the appellate courts on questions of substantive law that arise from jury instructions, but many other cases arise from careless trial practice. It is a little surprising to see them, because this is one of the few parts of the trial where it is possible for counsel to create a complete record without worrying about the jury's reaction, simply because jury instructions are settled without the jury's involvement. Preserving a record that will protect you in the appellate courts is crucial.

Jury instructions are inherently part of your advance planning, since you must ordinarily submit them at the beginning of the trial. It is the plaintiff's duty to submit instructions that cover all the theories of his case. The defendant has no duty to provide instructions on the plaintiff's theories, and technically he does not have to object to erroneous instructions because they are "deemed to have been excepted to."[8] However, a defendant has some duty to call errors to the court's attention.[9] In addition, a party who claims that a legally correct instruction is too general must offer a clarifying instruction.[10] Regardless of which side you are on, it is probably (though not necessarily always) in your interest to ensure that the instructions are reasonably clear, so that the jury's verdict will make sense.

Perfunctory preparation of instructions—for example, submitting instructions directly out of BAJI—may result in the failure to make a sufficient record for an appeal.[11] Many cases have held that in the absence of a request for a specifically tailored instruction, the trial court has no duty to prepare such an instruction itself and may rely on more general form instructions without fear of reversal on appeal. Further, preparation of specifically tailored instructions is an effective way of focusing an appellate court's attention on the existence and prejudicial effect of error at trial.

Your planning is all done, the court has ruled on pretrial motions and the trial is about to begin. It is now time to begin expecting the unexpected. Your decisions must be quicker, and the natural tendency is to focus most intensely on the immediate problems at hand. It is harder, but still necessary, to remember your other audience, the court of appeal.

Getting the Record Straight. The reporter's transcript is central to many appeals, but it is useless if it is not complete. Unfortunately, in the midst of a rapid-fire exchange at trial the crucial question or answer can easily get lost forever—leaving the appellate lawyer with nothing but the trial lawyer's recollection of his brilliant cross-examination that somehow never made it into the record. There are several simple precautions you can take:

- *Be sure the transcript is intelligible.* Watch your delivery: are you speaking too quickly or too quietly for the reporter to get everything? There is no law against asking the reporter during a break if he has an difficulty following you.
- *Be sure the crucial answer got into the record.* If there is any doubt, such as where several people may have been speaking at the same time or the witness dropped his voice, ask, "Did the reporter get the answer?"
- *Use words to describe what is happening in the courtroom.* Few things are more uninformative or frustrating for a reviewing court than lengthy exchanges in which everyone refers to "this document" or "that exhibit" without any indication of what they are talking about. Remember that what is obvious to people in the courtroom may not be obvious to those who read the transcript. Use exhibit numbers and other unambiguous identifiers whenever you can. Describe physical activities in the courtroom, such as when a witness indicates a size or distance with a physical gesture. Identify parts of documents by letters or numbers so witnesses can be specific in their testimony. Maps, diagrams and even photographs also can be marked on the sides with letters and numbers.

Remember that the court of appeal will never see or hear the witnesses testify, at least until audio or videotapes become the standard record on appeal.[12] You should note for the record any significant non-verbal aspects of a witness's testimony.

- *Help the reporters.* Court reporters are human. They

encounter the same difficulties with spelling unusual names and rare words that the rest of us do. You can assist the reporter and save potential problems on appeal by providing the reporter with a list of names that may come up in trial, along with technical words and the like.

● *Keep track of the reporters.* Currently the most significant delay in the appeals process is the preparation of the record. Sometimes a contributing factor is the difficulty of trying to identify and locate a reporter. You may be able to accelerate the process somewhat by obtaining during trial the name and phone number of each reporter who reports any part of the proceedings.

● *Obtain electronic transcripts.* If the technology is available, ask the reporter to prepare and maintain electronic copies of the transcript. An appellate lawyer with the necessary equipment can access a lengthy record much more effectively than with only a typewritten version.

Handling Documentary and Physical Evidence. Another potential problem area is the handling of documentary and physical evidence. Needless to say, evidence that has not been admitted is unavailable not only to the jury but also to the appellate court. It follows that you must take steps to ensure that your collection of smoking guns is not only marked but actually received in evidence. A careful judge will require counsel to go over their exhibits before submitting the case, but you cannot expect the court or the clerk to do your job for you. Especially in the relatively casual atmosphere of a court trial, there is a tendency to defer moving exhibits into evidence. Such a practice creates the risk that something will be left out. You should keep your own running log of exhibits, noting when each item is marked, when it is offered, and the basis for its rejection if the court refuses to admit it. In addition, check with the clerk and court from time to time to be sure the court's record is the same as yours.

Avoid using blackboards and boards with movable cars or other objects; the court of appeal will never see them. If witnesses need to use drawings to illustrate their testimony, provide an easel with a pad. The entire pad can be marked as an exhibit and each page numbered as witnesses make their drawings on it. Individual pages may then be received or rejected.

Large or unusual exhibits such as photographs, videotapes, bulky records and drawings made in court should be prepared with identification and preservation problems in mind. Put yourself in the place of the clerk in the courtroom and the clerk in the exhibit room and plan the size and durability of your exhibits with that state of mind. Then keep in contact with the exhibits after trial if they are important to the appeal. The time to nip problems in the bud is after the trial, when the exhibits have gone to whatever storage site the court uses. Be sure you know where and how they are kept, so that when the case is set for argument you can request their delivery to the court of appeal with some assurance that they'll get there.[13]

Also keep in mind that you can minimize the risk of losing some kinds of exhibits by being sure the record includes smaller-size versions of them. Offer both sizes during the trial, and you can probably rest assured the court of appeal will have everything it needs. An additional advantage to this approach is that you can include the small-size versions in the clerk's transcript or Rule 5.1 appendix, so the court will have access to the material during the workup of the case instead of just before argument.

Getting the Court to State What It Is Doing. Another area with the potential for an incomplete record is where the record does not adequately reflect the basis for a ruling or, worse, does not reflect a ruling at all. Remember that if it isn't in the record, it may as well not have happened.

● *Be sure the court makes a ruling.* To begin with, be sure the court actually rules on objections or reserves a ruling; without a ruling, there is no error.[14] The court will ordinarily depend on counsel to remind it when a ruling is necessary. Note that if the court reserves a ruling but later fails to rule, there is a presumption that it overruled the objection.[15] Compare the rule when the court receives evidence subject to a motion to strike: if counsel fails to make the motion, the objection is waived.[16]

Just as you expect the unexpected during a trial, recognize that you cannot always know in advance what issues will be important in the court of appeal. As you think of that second audience, remember that once the trial is over you cannot change the script you have written.

● *Evidence Code Section 352.* This statute authorizes the court to exclude evidence if its prejudicial impact outweighs its probative value. Because the ruling is discretionary, it is particularly difficult to attack on appeal.[17] On the other hand, its discretionary nature means that the court must actually weigh the competing factors; failure to do so is an error.[18] It follows that the record must affirmatively show that the court weighed probative value against prejudice.[19]

In order to invoke the court's discretionary power, it is essential to state the objection properly. The point of Section 352 is that even though the evidence is relevant, the court may exclude it for policy reasons. You should therefore mention Section 352 or otherwise make it clear that the basis of your objection is that the probative value of the evidence is outweighed by other considerations.[20]

Ordinarily the party who prevails on the objection will want the court to state its reasons so as to establish that it undertook the necessary weighing process. However the losing side should not encourage the court to do so, since the ruling may constitute error if the record does not affirmatively show that the court weighed the appropriate factors.

● *Do not seem to be agreeing when you really are not.* Another risky area is failing to make your position clear. The paradigm for this kind of mistake is *Cummings* v. *Cummings.*[21] There plaintiff's counsel made a pretrial motion in which he apparently misstated some facts. The court asked defendant's counsel whether he had anything to say, and he said he did not. On appeal, the defendant challenged the resulting adverse ruling. The court of appeal held that the defendant waived any error because his counsel had not expressed opposition to the motion. Even if counsel felt there was nothing in particular he wished to say, a simple statement of opposition would have preserved the error for appeal.

(Continued on page 74.)

● *Invited error.* Many appeals are lost on the principle of invited error. The reason is obvious in some cases, such as where a party requests a particular ruling and then later complains of it on appeal. But invited error can also arise from counsel's failure to act in response to events, such as failing to move for a continuance based on surprise at trial.[22] Strategy decisions involve many considerations, but you must be always aware that what seems best for the trial will not necessarily work on appeal.

Objections and Motions to Strike. One of the most frequent sources of mistakes is objections to evidence. To understand how frequently counsel fail to preserve the record, simply read any evidence handbook: a substantial part of the decisional law arises from situations where counsel made an untimely or incorrect objection.

The basic rule is that counsel must make a timely objection and state a proper ground.[23] The philosophy is that opposing counsel and the court should have an opportunity to cure the defect if possible.[24]

Failing to object amounts to a waiver that precludes an appellant from challenging the admissibility of the evidence. This is an extremely important principle. It means that the court of appeal can affirm a judgment on the basis of incompetent or inadmissible evidence, as long as there was no objection to it.[25] There are some related rules:

● *General rule.* Your objection must include all applicable grounds; those not stated are waived and cannot be raised on appeal.[26] Stating the wrong ground is the equivalent of failing to make an objection.[27] (Despite years of "Perry Mason" and "L.A. Law," no one should be surprised to learn that "incompetent, irrelevant, and immaterial" is an insufficient general objection.[28] The only exception is where there is no possible basis on which the evidence would be admissible; it happens so rarely that no one should rely on it.)

● *Evidence comes in for all purposes.* Once the court has admitted evidence on any basis, the trier of fact may consider it for all purposes unless the court has given a limiting instruction.[29] This rule is particularly important when the appellant seeks to show the judgment is not supported by substantial evidence: even though the effect of evidence could have been limited properly, it will support the judgment if there was no effort to limit it.[30]

● *Objections to judge's questions.* It is proper and necessary to object to a judge's questions.[31] This situation underscores the difficulty of some of the strategy decisions counsel may face, since there are many reasons why one would not want to object to the judge's questioning, especially in front of a jury.[32]

● *Continuing objections.* When your

opposing counsel launches into an entire area of questioning that you claim is objectionable, you need not become a jumping jack, rising to object to every question. An appropriate response is to ask the court to permit a "standing" or "continuing" objection. From an appellate perspective, the important thing is to be sure the record accurately reflects what is happening. Witness examination tends to be fluid, and when the questioning flows into a new area your "continuing objection to this line of questioning" may no longer apply. You should try to define the scope of your objection ("questions concerning the content of the documents the witness read") and state additional objections as necessary ("Since Ms. Jones is now asking about the witness's state of mind, may I have a continuing relevancy objection to questions on that subject?").

Arguably a clear objection to a particular type of evidence may be sufficient if it is made once, without the need for repeated objections each time the subject comes up.[33] But it is unwise to gamble on that result, at least not without a compelling trial strategy reason.

If you anticipate the line of questioning you can file a motion in limine. Even if the judge overrules the motion, you will have defined the basis and scope of your objection in a way that both the trial court and the court of appeal will understand. When the evidence begins to come in, you should call the court's attention to the objectionable evidence, not only to preserve your objection but also to insure that the appellate court will understand the relationship between your motion and the evidence. (For example: "Counsel is now moving into the area covered by the motion in limine. May I have a continuing objection on the grounds stated in that motion?")

● *Motions to strike.* If the evidence has already come in before you could object (particularly where the question is not objectionable but the answer is), all is not lost; you may be able to preserve your record by making a motion to strike. In addition to being prompt, your motion should address the specific defect in the testimony. Again, the reason is to be sure the record adequately shows the basis of your objection. If you object to a small portion of a lengthy answer, unless your motion is specific neither the trial judge nor the court of appeal will be able to determine what you objected to—and therefore whether the objection was proper.

● *Other waivers.* Your job is by no means over with the first objection. You can easily allow your carefully constructed record to be undermined by not diligently maintaining your position while your opponent continues to offer objectionable evidence. The easiest way to lose the benefit of your objection is by later consenting to the admission of the evidence (although there is no waiver when the evidence comes in through cross-examination or rebuttal).[34] The real issue here is one of preparing for trial with an eye on the appellate court. If you know what kind of evidence to expect—and in most cases you should—you can plan your in limine motions, continuing objections, cross-examination and rebuttal in ways that will make it clear you have not consented to the admission of any of the objectionable evidence.

Misconduct of Court Counsel or Jury. Misconduct may take many forms, and it can begin with the first voir dire question or opening statement. Ordinarily it is not a basis for reversal unless there is an objection in the record; the misconduct must be truly flagrant before an appellate court will do anything without a proper objection.[35]

Preserving the record has different requirements, depending on whose misconduct is involved. But the record has to reflect the misconduct somehow. If it is not verbal, you must find some way to get it into the record, perhaps by making a statement on the record or by declarations.

Where opposing counsel is the guilty party, you must "assign" the actions as misconduct. The typical practice is to both

assign and object.[36] Most important, you must also request a curative admonition.[37]

The court can also commit misconduct, and again you must object or waive the error.[38] However, in that case a request for an admonition is not necessary.[39] Also, the rule does not apply to "any statement or other action of the court in commenting upon or in summarizing the evidence," because in those cases the court's actions are "deemed excepted to."[40] Except for the clearest of cases, prudence dictates objecting rather than gambling on how an appellate court will interpret the trial court's conduct.

Finally, objections are also necessary for jury misconduct, and incurable misconduct must be followed by a motion for a mistrial.[41]

Trial and appellate strategies can easily collide in the area of admonitions. Trial lawyers may argue that admonitions accomplish very little—they can't "unring the bell,"[42] the jury may misinterpret the events, and the process may give undue emphasis to some unfavorable aspect of the complaining party's case. The complaining party faces a dilemma. If he fails to request an admonition, he will have to carry the heavy burden of demonstrating to the appellate court that the misconduct was so extreme that an admonition would have been useless. Yet in all but the most extreme cases an admonition may cure any error because of the presumption that the jury follows the court's instructions.[43] And when the misconduct starts, there is often no way of knowing how frequent it will be. It may make sense to let an isolated incident pass without an admonition, but you must vigilantly gauge the point at which it becomes necessary to start making your record.

The offending party also has to be aware of the trial-appellate dilemma. Most lawyers would rather not be on the receiving end of an admonition for misconduct, but consider the fact that if the court gives an admonition, the offending party has a substantial basis for arguing on appeal that the admonition eliminated any prejudice from the misconduct.

Jury Instructions. Submitting the instructions is only the first step; settling the instructions can prove to be a minefield on the road to the appellate court. Ordinarily you cannot complain of trial court error in giving instructions you proposed or instructions on a subject as to which you proposed instructions.[44] But this principle does not apply when you offer alternative instructions—that is, where you request Instruction A but offer Instruction B if the court refuses Instruction A.[45]

How you make your record is all-important. For example, the appellate court will presume that an unidentified instruction was given at the appellant's request:

> . . . *there is no indication in the record as to whether the various instructions which were given were proposed by plaintiffs or by defendants or were given on the court's own motion.* . . . Since the record fails to show who requested the instructions which were given it must be presumed by a reviewing court . . . that the instructions . . . were given at appellants' (defendants') own request.[46]

Similarly, in *Phillips* v. *Noble*[47] the plaintiff claimed that the trial court's modification of instructions made them uncertain and erroneous. However, the record did not show the original form of the instructions. The supreme court held that the appellant had not provided a sufficiently complete record to show he had not invited the errors.[48]

You face a difficult situation where you contend that an issue should not go to the jury at all but, if it does, the opponent's proposed instruction is improper. Submitting an alternative instruction without preserving the record could lead you into invited error. You must make clear on the record that you oppose giving *any* instruction on the subject.[49] If you anticipate this kind of situation, it may be advisable to

brief the issue—not only to be sure the trial court considers the dispute fully, but to ensure that the record fully reflects your position.

A similar problem exists where the court or opposing counsel proposes modifications to your own proposed instructions. You should not ordinarily agree to them, unless it is clear that your agreement extends only to the language of the modification and not the substantive change.[50]

In order to avoid these pitfalls you must be sure the record shows, as to each instruction, who offered it, its disposition (given, refused, modified), the specific modifications and who requested them. Accomplishing this goal is more difficult than it sounds. Settling the instructions involves a lot of off-the-record colloquy and handwritten changes to the instructions, followed by an on-the-record session in which the parties' positions and the court's actions are recorded. You have to make sure that the second stage accurately reflects what happened in the first. Meticulous attention to memorializing these events is essential. It is particularly important to make specific reference to the instructions by source and number. Make a set of copies of both sides' instructions and indicate on each page exactly what is being done, noting the source of changes. Before you go on the record, review the court's "given" and "refused" sets of instructions to be sure they are complete and consistent with your own notes. If possible, photocopy them. When you go on the record, state clearly the source of each change and any other positions you need to preserve. And finally, when the court reads the instructions to the jury, follow along to be sure there are no changes and be prepared to object if there are.

There is a special problem when the court refuses instructions that are otherwise proper because they do not comply with court rules. In such a case, California Rules of Court Rule 229 (c) requires the court to "endorse [on the instruction] the reason for refusal." If the court fails to give the reason, the court of appeal may conclude that the refusal was on the merits. If the refused instruction would have been required on the merits, the effect of a conclusion that the refusal was on the merits can be to transform a refusal that might have been within the trial court's discretion—and therefore relatively easy to sustain on appeal—into prejudicial error.[51] It follows that if the trial court is going to reject your opponent's instructions for procedural reasons, it is essential to ensure that the court complies with Rule 229(c) so that the court of appeal will apply an abuse-of-discretion standard of review.

Post-Trial Proceedings. It is beyond the scope of this article to devote detailed discussion to post-trial procedures, which are already the subject of countless texts. However, it is important

to remember that these procedures in particular must be undertaken with an appeal in mind; indeed, the prospect of an appeal is the main reason for much of what counsel must do.

● *Motions after a jury trial.* Motions for a new trial, for judgment notwithstanding the verdict, for entry of a different judgment or for remittitur/additur should be submitted with a view toward preserving an appeal record. Most significant is the requirement that a defendant must make a new trial motion on the ground of excessive damages in order to argue that issue on appeal.[52] Almost as important are motions that require declarations to show facts otherwise outside the record. Examples of these include motions based on jury misconduct or other improper but unreported occurrences during trial. Without proper declarations, the court of appeal will have no record to evaluate.

● *Motions after a court trial.* Following a court trial, the losing party should almost always request a statement of decision.[53] Note that the statement must be requested before submission of the matter for decision, if the trial lasts less than one calendar day or is less than eight hours over more than one day.[54] You should not merely make a broad, undelineated request for a statement of decision. Instead, the request should specify the particular significant issues that should be covered in the statement. If the statement of decision does not cover those issues, the appellate court will not be required to assume that substantial evidence supported the existence of that particular fact. Further, in the absence of a statement of decision, the appellate court will not rely on statements from the bench which appear to explain particular rulings. Instead, the appellate court will assume the trial court correctly decided the issue if there was a correct basis in theory for the ruling.

Finally, if you are the prevailing party at trial, remember that writing the statement of decision is a golden opportunity to clarify your own record for the appeal you are about to defend. Pity the poor attorney who has an opportunity to draft a statement of decision that could assist the appellate court in affirming the judgment and who, instead, pays so little attention to the task that his successful efforts during trial are wasted when the higher court rules in favor of an opposing attorney who made a better record for the appeal.

Sensitivity to the possibility of an appeal must be part of both your planning for trial and your conduct of the trial itself. Just as you expect the unexpected during a trial, recognize that you cannot always know in advance what issues will be important in the court of appeal. As you think of that second audience, remember that once the trial is over you cannot change the script you have written. ◆

---

[1] Valentine v. Kaiser Foundation Hospitals, 194 Cal.App.2d 282, 292 (1961), *overruled on other grounds,* Siverson v. Weber, 57 Cal.2d 834, 839 (1962).

[2] 9 WITKIN, CALIFORNIA PROCEDURE, Appeal §§466–67, at 457–58 (2d ed. 1985) (hereinafter CALIFORNIA PROCEDURE).

[3] CALIFORNIA PROCEDURE, Appeal §§649 *et seq.*, at 631 *et seq.*

[4] CALIFORNIA PROCEDURE, Appeal §§324 *et seq.*, at 334 *et seq.*

[5] *See* Clemens v. American Warranty Corp., 193 Cal.App.3d 444, 451 (1987).

[6] Semsch v. Henry Mayo Newhall Memorial Hospital, 171 Cal.App.3d 162, 167–68 (1985).

[7] CEB, CALIFORNIA PROCEDURE DURING TRIAL ¶9.46 (1982).

[8] Valentine v. Kaiser Foundation Hospitals, *supra,* 194 Cal.App.2d at 290 (1961).

[9] *Id.* at 291.

[10] Switzer v. State of California, 269 Cal.App.2d 627, 636 (1969).

[11] *See* Null v. Los Angeles, 206 Cal.App.3d 1528, 1535 (1988); Orient Handel v. U.S. Fidelity & Guar. Co., 192 Cal.App.3d 684, 699 (1987).

[12] "The cold record cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration." Maslow v. Maslow, 117 Cal.App.2d 237, 243 (1953). (*See* Gerstein, *Appeal by Video,* in this issue at page 21.)

[13] CAL. RULES OF CT., Rule 20(c).

[14] 3 WITKIN, CALIFORNIA EVIDENCE §2030, at 1992 (3d ed. 1986) (hereinafter CALIFORNIA EVIDENCE).

[15] CALIFORNIA EVIDENCE §2028, at 1990.

[16] CALIFORNIA EVIDENCE §2031, at 1993.

[17] *See* Engineering Serv. Corp. v. Longridge Inv. Co., 153 Cal.App.2d 404, 419 (1957).

[18] People v. Ford, 60 Cal.2d 772, 801 (1964).

[19] People v. Green, 27 Cal.3d 1, 25 (1980). *See also* JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK §22, at 587–91 (2d ed. 1982); CEB, CALIFORNIA TRIAL OBJECTIONS §2.2, at 14 (2d ed. 1984) (hereinafter TRIAL OBJECTIONS).
[20] *See* People v. Gibson, 56 Cal.App.3d 119, 136 (1976).
[21] 97 Cal.App.144, 148–49 (1929).
[22] CALIFORNIA PROCEDURE, Appeal §313, at 324–25.
[23] CALIFORNIA EVIDENCE §2012, at 971.
[24] *See* Baron v. Sanger Motor Sales, 249 Cal.App.2d 846, 855 (1967) ("[O]bjections must be accompanied by a reasonable, definite statement of the grounds. The purposes of the requirement are that the judge may understand the question raised, and that the adversary may have an opportunity to remedy the defect if possible. . . ."); CALIFORNIA EVIDENCE §§ 2016, 2018, at 1976, 1979.
[25] CALIFORNIA PROCEDURE, Appeal §281, at 293; CALIFORNIA EVIDENCE §2033, at 1994.
[26] *See* Haskell v. Carli, 195 Cal.App.3d 124, 129 (1987) (three grounds of objection, but no parol evidence objection; held, parol evidence could not be urged on appeal).
[27] CALIFORNIA EVIDENCE §2019, at 1980.
[28] CALIFORNIA EVIDENCE §2016, at 1976.
[29] Foreman & Clark Corp. v. Fallon, 3 Cal.3d 875, 886–89 (1971); CALIFORNIA EVIDENCE §2023, at 1985.
[30] Mosesian v. Pennwalt Corp., 191 Cal.App.3d 851, 865, 867 (1987) (expert used hearsay opinions of other experts, normally inadmissible but not objected to); Wicktor v. County of Los Angeles, 177 Cal.App.2d 390, 404–06 (1960) (hearsay admissible to prove decedent's intent, also supported truth of matter stated where no limitation was sought); CALIFORNIA EVIDENCE §2033, at 1994.
[31] People v. Corrigan, 48 Cal.2d 551, 555–59 (1957); EVID. CODE §775; CALIFORNIA EVIDENCE §1741, at 1695.
[32] *See* TRIAL OBJECTIONS §29.14.
[33] *See* CALIFORNIA EVIDENCE §2022, at 1984.
[34] *See* CALIFORNIA EVIDENCE §2014–15, at 1974–75.
[35] *See generally* Sabella v. Southern Pacific Co., 70 Cal.2d 311, 318–19 (1969); Horn v. Atchison, T. & S.F. Ry. Co., 61 Cal.2d 602, 610–11 (1964); Grimshaw v. Ford Motor Co., 119 Cal.App. 3d 757, 797–98 (1981).
[36] CALIFORNIA EVIDENCE §2027, at 1988; TRIAL OBJECTIONS §29.12, at 280.
[37] Horn v. Atchison, T. & S.F. Ry. Co., 61 Cal.2d 602, 609–11 (1964).
[38] People v. Corrigan, *supra*, 48 Cal.2d at 556 (1957).
[39] Delzell v. Day, 36 Cal.2d 349, 351 (1950).
[40] CODE CIV. PROC. §647.
[41] TRIAL OBJECTIONS §29.35, at 298.
[42] Love v. Wolf, 226 Cal.App.2d 378, 392 (1964).
[43] Little v. Stuyvesant Life Insurance Co., 67 Cal.App.3d 451, 465 (1977).
[44] CALIFORNIA PROCEDURE, Appeal §302, at 314 (3d ed. 1985).
[45] Huebotter v. Follett, 27 Cal.2d 765, 769–70 (1946); Christensen v. Bocian, 169 Cal.App.2d 223, 226–29 (1959).
[46] Lynch v. Birdwell, 44 Cal.2d 839, 846–47 (1955) (emphasis added).
[47] 50 Cal.2d 163, 168 (1958).
[48] *See also* 2 CEB, CALIFORNIA CIVIL PROCEDURE DURING TRIAL §17.32, at 353 (1984) (hereinafter TRIAL PROCEDURE).
[49] *Id.*
[50] TRIAL PROCEDURE §17.31, at 351.
[51] *See* Ng v. Hudson, 75 Cal.App. 3d 250, 256–57 (1977).
[52] Schroeder v. Auto Driveaway Co., 11 Cal.3d 908, 918–19 (1974); Glendale Fed. S. & L. Assn. v. Marina View Heights Dev. Co., 66 Cal.App.3d 101, 122 (1977).
[53] *See* CODE CIV. PROC. §632; CAL. RULES OF CT., Rule 232.
[54] CODE CIVIL PROC. §632.