

## Protecting the Record for Appeal

It's hard enough learning how to try a case without having to think about what happens after the trial. But practitioners must never forget that what happens next may depend entirely on how well they preserve the record for appeal. In learning how to do this, new lawyers should pay particular attention to the areas in which even very experienced trial lawyers make mistakes.<sup>1</sup>

**MAKING A RECORD.** The court of appeal has “at least three immutable rules” for appellate law practitioners: “[F]irst, 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.”<sup>2</sup>

If there is no reporter present, there is no record. But simply ensuring that a reporter is recording the proceedings does not guarantee that the words on the printed page of the reporter's transcript will make sense to the court of appeal. Descriptions that may be clear to those watching whoever is speaking—“about this big,” “coming from that direction,” “please compare that document to this one”—are unintelligible to someone who was not in the courtroom observing what took place. Practitioners should use words, and witnesses should use words, to make all indications precise on the page. If witnesses are not specific, practitioners should add the words themselves—for example, “let the record reflect that the witness is indicating about two feet.”

Ensure that your exhibits are both identified *and* admitted. You should confirm the status of exhibits with the clerk, the reporter, and opposing counsel at the end of every trial day, and with the court before the jury begins deliberations.

**VIDEO DEPOSITIONS.** Video depositions and other sound recordings pose a special

problem, because ordinarily the reporter does not transcribe them. Comply with Rule 2.1040 of the California Rules of Court and submit a transcript. If you do not, the testimony “did not happen.”

proof before trial so you can be sure it is sufficient. This is far more effective than improvising when the court sustains an objection.

**JURY INSTRUCTIONS.** Jury instructions are such a fertile source of error that they are

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**EVIDENTIARY OBJECTIONS AND OFFERS OF PROOF.** Most practitioners know that an objection not made is waived. Here is another truism: In many situations, an objection not ruled on is also waived.<sup>3</sup> Be sure the court rules—and does so as promptly as possible.

A fundamental principle of appellate practice is that a trial court's error cannot support reversal unless it was prejudicial.<sup>4</sup> When an error results in the admission of evidence, the record will generally show the error's impact. But the exclusion of evidence poses a problem: There is no way the appellate court can gauge prejudice without knowing what the evidence would have shown. If this is not obvious from the record, you must make an offer of proof.

The requirements are strict. The offer “must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued.”<sup>5</sup> The best way to do this is by a written submission that includes all the documents and testimony the party is offering. If possible, draft the offer of

one of the first places an appellate lawyer looks to for a basis for reversal. But trial lawyers often do not spend enough time preparing the instructions, and they also fail to keep track of what happens to them. Complicating the situation is the fact that waiving instructional errors is extremely easy. Here are some basics:

- By statute, all jury instructions are “deemed excepted [i.e., objected] to.”<sup>6</sup> However, because there are many exceptions to this rule, it is a mistake to rely on this automatic objection.<sup>7</sup> State your position clearly on the record.

- It is essential that the record reflect the origin of each instruction, including any changes made to it. The appellant cannot challenge a jury instruction that the appellant requested, so “[i]f the record does not show which party requested an erroneous instruction, *the reviewing court must presume that the appellant requested the instruction* and therefore cannot complain of error.”<sup>8</sup>

- If the court requires you to settle jury instructions off the record, be sure to state your

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position on the record regarding any instructions as to which the record is not already clear. This is particularly important when the court crafts its own language.

- Be sure to make every instruction you offer part of the record, either by filing it or reading it into the record.
- Answers to questions from the jury during deliberations are effectively supplemental instructions. The same rules about making a record apply.

**SPECIAL VERDICTS.** In a special verdict, the jury only finds facts, and the court enters judgment based on those facts.<sup>9</sup> Special verdicts can be valuable. They explain the jury's verdict and may provide ways to attack or support the verdict in posttrial motions and on appeal. However, they are also fraught with risks. The most important is the possibility that the special verdict may fail if it omits an indispensable finding:

The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. The possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings.<sup>10</sup>

Another risk is inconsistencies. A general verdict with special findings “will not be set aside unless there is no possibility of reconciling the general and special verdicts under any possible application of the evidence and instructions.” However, “there is no such presumption in favor of upholding a special verdict.”<sup>11</sup>

To achieve the desired results from a special verdict, you should:

- Review a proposed special verdict carefully for omissions and inconsistencies.
- Be sure that no answer to a question can trigger uncertainty about how the jury should answer other questions.
- Scrutinize the verdict as rendered to be sure there are no omissions or inconsistencies. Problems sometimes do not become apparent until the verdict has been rendered.
- If there is a problem, speak up before the jury is discharged. Failure to do so may waive any error.

**STATEMENTS OF DECISION.** Few trial lawyers—and surprisingly few judges—understand statements of decision. Most lawyers see them as an opportunity to reargue the case, but they are not. Their one purpose is to nail down the basis of the trial court's

decision in a bench trial for purposes of appellate review.

Statements of decision involve the doctrine of implied findings, a principle of appellate law that “requires the appellate court to infer the trial court made all factual findings necessary to support the judgment.”<sup>12</sup> According to the court of appeal:

The doctrine is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.<sup>13</sup>

If there is no statement of decision, the appellate court will presume that the trial court relied on whatever properly admitted evidence and legal analysis support the judgment and that it rejected all contrary evidence and argument. But if the appellant properly requested a statement of decision and objected to any omissions or ambiguities in a proposed statement of decision, the court of appeal may not presume unfavorable findings as to those issues.<sup>14</sup> Moreover, a statement of decision may reveal that the trial court did not actually rely on certain evidence, relied only on inadmissible evidence, or reached its decision by an erroneous legal analysis.

For these reasons, only the appellant wants a statement of decision; the respondent is better off without one. So except for one-day trials, for which you must request a statement of decision “prior to the submission of the matter for decision,”<sup>15</sup> wait to see what the court decides.

A statement of decision is available “upon the trial of a question of fact” and in certain other proceedings.<sup>16</sup> They generally are not available for motions except when the motion is more akin to a fact-finding trial—in which case the one-day-trial requirement governs.<sup>17</sup> Always check the governing statutory scheme and case law.

The request should seek the factual and legal basis for the court's decision “as to each of the principal controverted issues at trial.”<sup>18</sup> It should not reargue the case. The statement-of-decision process presupposes that you have lost and that your goal is simply to have the trial court explain why. Likewise, the primary reason for you to respond to opposing counsel's proposed statement of decision

is to identify omissions—such as failures to address principal controverted issues—or ambiguities.

**NOTICE OF APPEAL.** Timing is everything. The deadline for filing a notice of appeal is jurisdictional. Missing the deadline means that your client's appellate rights are absolutely, irretrievably gone. Because posttrial motions can extend the deadline for filing the notice of appeal, it is crucial to review every applicable statute and rule carefully and to calculate, and recalculate, the time.<sup>19</sup>

And remember: unlike almost every other trial-level litigation deadline, the deadline for filing a notice of appeal (as well as most post-trial motions) runs from the date of mailing of the notice of entry of judgment—with no extension for service by mail.<sup>20</sup> ❖

<sup>1</sup> For more detailed discussions on appellate law topics, visit the Los Angeles County Bar Association's online publication *Appellate Tips for Trial Lawyers*, for members only at <http://www.lacba.org/showpage.cfm?pageid=8556>.

<sup>2</sup> *Protect Our Water v. County of Merced*, 110 Cal. App. 4th 362, 364 (2003).

<sup>3</sup> See *Gallant v. City of Carson*, 128 Cal. App. 4th 705, 712-13 (2005); *City of Long Beach v. Farmers & Merchs. Bank of Long Beach*, 81 Cal. App. 4th 780, 784 (2000). Although, as these cases note, it used to be the rule that unruled-on objections were also waived in summary judgment motions, the California Supreme Court disapproved that rule last year. *Reid v. Google, Inc.*, 50 Cal. 4th 512, 527 n.5 (2010).

<sup>4</sup> *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 574, 580 (1994).

<sup>5</sup> *People v. Schmies*, 44 Cal. App. 4th 38, 53 (1996); see EVID. CODE §354.

<sup>6</sup> CODE CIV. PROC. §647 (Automatic exception applies to “giving an instruction, refusing to give an instruction, or modifying an instruction requested.”).

<sup>7</sup> See *Agarwal v. Johnson*, 25 Cal. 3d 932, 947-51 (1979), *overruled on other grounds* by *White v. Ultramar, Inc.*, 21 Cal. 4th 563, 574 n.4 (1999).

<sup>8</sup> *Bullock v. Philip Morris USA, Inc.*, 159 Cal. App. 4th 655, 678 (2008) (emphasis added).

<sup>9</sup> CODE CIV. PROC. §624.

<sup>10</sup> *Myers Bldg. Indus., Ltd. v. Interface Tech., Inc.*, 13 Cal. App. 4th 949, 960 (1993) (internal quotation marks, brackets, and citation omitted).

<sup>11</sup> *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.*, 126 Cal. App. 4th 668, 679 (2005) (internal quotation marks and citation omitted); see generally *Zagami, Inc. v. James A. Crone, Inc.*, 160 Cal. App. 4th 1083, 1091-92 (2008).

<sup>12</sup> *Fladeboe v. American Isuzu Motors Inc.*, 150 Cal. App. 4th 42, 58 (2007) (citation omitted).

<sup>13</sup> *Id.*

<sup>14</sup> CODE CIV. PROC. §634.

<sup>15</sup> CODE CIV. PROC. §632.

<sup>16</sup> *Id.*; see also CODE CIV. PROC. §1291; FAM. CODE §§2127, 3022.3.

<sup>17</sup> See, e.g., *Gruendl v. Owel P'ship, Inc.*, 55 Cal. App. 4th 654, 660-61 (1997) (motion to add judgment debtor).

<sup>18</sup> CODE CIV. PROC. §632; see CAL. R. CT. 3.1590.

<sup>19</sup> See CODE CIV. PROC. §§659-663a and CAL. R. CT. 8.104, 8.108. See also *Honey Kessler Amado, Beat the Clock*, LOS ANGELES LAWYER, Mar. 2010, at 26.

<sup>20</sup> CODE CIV. PROC. §1013.