

# Appellate Tips for Trial Lawyers

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## Trial: Technology in the Courtroom

**Playing videotaped deposition testimony from a key witness or jazzing up a closing argument with a PowerPoint presentation may be effective ways to get the jury's attention, but they'll be lost on an appellate court unless trial counsel takes steps to include them in the record. These steps are easy to overlook in the heat of battle, but they can make all the difference on appeal.**

### Video depositions

A court reporter generally does not have to transcribe videorecorded testimony played in the courtroom. (Cal. Rules of Court, Rule 2.1040.) Instead, a party showing a video is supposed to provide a transcript of it, which becomes part of the record. (*Ibid.*) This party-provided transcript is the only way that an appellate court will know what testimony was presented by video unless the video itself becomes part of the record—a cumbersome and unreliable solution.

Failure to submit a transcript can have serious appellate consequences. Appellants who do not provide a complete transcript of proceedings cannot attack the judgment on the ground that it was unsupported by substantial evidence—a common basis for appeal. As one court observed, "Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be conclusively presumed correct as to all evidentiary matters. To put it another way, *it is presumed that the unreported trial testimony would demonstrate the absence of error.*" (*Estate of Fain* (1999) 75 Cal. App. 4th 973, 992, original emphasis omitted, new emphasis added.) That's too high a price to pay.

While it may be possible to reconstruct a transcript after trial, that exercise opens the door to disputes about which portions of the video were actually shown. To avoid this situation and protect the appellate record, trial counsel should prepare in advance and submit a transcript whenever a video is shown at trial, and should ensure that opposing counsel does the same.

### PowerPoint presentations

PowerPoint presentations present a similar challenge. A misstatement of law or other error in a PowerPoint presentation may be a basis for appeal. But like a video, a PowerPoint presentation will not automatically be part of the record—and if it isn't, the appellate court will have no way to evaluate the alleged error. Parties therefore should have a disk with the PowerPoint presentation marked as an exhibit and insist that opposing counsel do the same. The disks then can be used to show the appellate court exactly what the jury court saw, including any

animation. As a fail-safe—and always if for some reason you can't submit a disk—mark a printout of the relevant components of the PowerPoint presentation as an exhibit.



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