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# VERDICT

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# Making the Record: Preserving Issues for Appellate Review

Kent Toland

**T**rying a case is challenging enough without having to think about what might come next.

But preserving the record during trial is vital for any appeal. One appellate court distilled the importance of preserving the trial record for appeal into **Three Immutable Rules**: “First, 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.” (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.)

So how do you prepare a complete record? What are some common pitfalls that can undermine an appeal before it even begins? Here are a few critical issues to keep in mind to set your case up for a successful appeal.

## Ensure that critical proceedings are reported

You’re in the middle of trial. As the jury and court reporter leave for lunch, opposing counsel asks the judge to reconsider a prior in limine ruling and argues their position. After hearing your response, the judge agrees and changes her ruling.

What should you do to preserve your client’s right to raise this issue on appeal? Make a record of the ruling and your arguments against it at the first opportunity – particularly if those arguments involved evidentiary (rather than purely legal) matters. After lunch, before the jury returns to the courtroom, ask the court for a minute to place the core points of the unreported discussion on the record.

Otherwise, the Court of Appeal will have no way of knowing what transpired. In that case, an appeal implicating that unreported

exchange will be fruitless. “Where the record is silent we must presume the court correctly ruled based on what occurred in the unreported proceedings.” (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 429.)

Likewise, it’s not uncommon for judges to discuss jury instructions, verdict forms, and other issues in chambers with counsel. They may also hear and resolve objections with counsel during sidebars.

If any of these discussions can be reported live, make sure they are. But if not, remember to make a record at the first opportunity.

## Ask witnesses to clarify ambiguous descriptions

Consider how a witness’s testimony will read after being transcribed – not just how it appeared live in the courtroom. Perhaps a testifying witness described where he fell and suffered an injury by pointing to a demonstrative. Or a witness said “this document” when she referred to an exhibit. The jury may have known exactly what they meant based on the visual cues, but the Court of Appeal won’t. When in doubt, it’s a good idea to ask the witness to clarify what they said: “You’re pointing toward the right side of the door on Exhibit 1, correct?” Or, you can clarify it yourself before moving to your next question: “Let the record reflect that the witness is pointing to Exhibit 2 on the screen.” That will make the written record of the witness’s testimony clear.

If the witness points to a diagram, a map, or another exhibit, you can also ask them to physically mark the copy and then testify as to what the markup represents. For example: “Draw an X where you fell,” or “draw a circle where you were standing

when you witnessed the accident.” Then make sure to move for admission of the modified exhibit, with a suffix like “-A” on its original number.

Cleaning up these ambiguities will be especially valuable when the standard of review on appeal is the highly deferential substantial evidence standard. In such a case, a single document or a single witness’s testimony can be the “[v]ery little solid evidence” that suffices to affirm the judgment. (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871-872.) Clarifying a gesture or other nonverbal testimony can make all the difference.

## Joint trial documents: Delineate each side’s contributions

Some of the most common sources of reversible error are jury instructions and verdict forms. These documents are typically prepared jointly, and often remain unfinalized until near the end of trial.

An appeal can turn on which party requested (or objected to) a specific jury instruction, or a question in a verdict form. Failing to make a record can be dispositive: “If 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 the error.” (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 678.)

Here, too, take care to clarify the record. In the rush to finalize joint documents before and during trial, that’s not always easy. But such details can determine the outcome on appeal.

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## Craft special verdict forms carefully

The choice of a general verdict or special verdict also has consequences on appeal. In a special verdict, a jury finds facts – typically tracking the elements of each claim or defense – and the trial judge then enters judgment based on the jury’s factual findings. That differs significantly from a general verdict, where the jury decides who prevails on each cause of action.

Special verdicts can be valuable, but they come with risk as well. “[U]nlike with a general verdict, courts cannot imply findings to support a special verdict.” (*Drink Tank Ventures LLC v. Real Sode in Real Bottles, Ltd.* (2021) 71 Cal.App.5th 528, 545.) If the special verdict form does not ask the jury to resolve every necessary factual issue, it is defective.

**Some practical advice:** First, review the special verdict form carefully before finalizing it. Scrutinize it for inconsistencies and omissions. As part of that process, pretend that you’re a juror. Come up with an answer to each question, and see if the verdict form guides you as intended. Second, object to any proposals from the other side that misguide the jury, especially

by permitting them to make inconsistent findings. Third, when the jury returns its verdict, carefully check it for any omissions or contradictions. That may reveal a defect in verdict the form that wasn’t apparent before. Fourth, if you identify a problem, bring it to the judge’s attention *before the jury is discharged*. If you remain silent, the judge has no opportunity to send the jury back to deliberate and fix the mistake. That silence may forfeit an argument on appeal that the verdict is defective. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal. App.4th 1228, 1242–1243.)

## Lodge a transcript of video deposition testimony

As Zoom depositions have become more common, so too has the decision to show the jury a video recording of a remote (or in-person) deposition at trial, in lieu of live witness testimony. Court reporters typically do not transcribe videos of deposition testimony unless you or the court ask them to.

This creates a trap. Unless you take affirmative steps to preserve the record, the deposition testimony won’t be part of the record on appeal. As a result, your

client will “not [be] in a position to claim error based on the unreported proceedings.” (*Green v. Watson* (1964) 224 Cal.App.2d 184, 196.)

The best practice: Lodge a transcript reflecting the portions of the video deposition that were played at trial, and ensure it clearly delineates any portions you wanted to play, but as to which the court sustained objections. ▀

If it’s not in the record, it didn’t happen. As you try a case, pay attention to how the proceedings will appear on paper for the appellate courts. Look for gaps and ambiguities. The good news: in most instances, you can cure them by taking affirmative steps at trial. It just might make all the difference in defending your victory on appeal.



Kent Toland is an associate at Greines, Martin, Stein & Richland LLP (GMSR). GMSR specializes in appeal, writs, and trial consulting.

**Kent Toland**



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