Janet Gusdorff
GUSDORFF LAW, PC

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2017 Issue

Establishing the record

AN APPELLATE LAWYER'S PERSPECTIVE ON WHAT TRIAL LAWYERS NEED TO KNOW ABOUT PRESERVING THEIR RECORDS FOR APPEAL

After months or years of preparation, your trial begins and the court inexplicably rules against you – suddenly you must try the case without your key expert, or without that crucial piece of evidence. How did defense counsel get that key point instruction? What about *your* instruction that the court refused? Whatever the ruling, you are sure it is the reason the jury ruled against your client. You call your trusted appellate lawyer, who repeatedly asks you whether you objected "on the record." Of course you did… right?

What is "the record" for purposes of the appeal?

A normal record on appeal consists of a record of written documents from the superior court proceedings and a record of oral proceedings. In California appellate courts, the record of written documents may be presented to the appellate court in a variety of ways, such as a clerk's transcript, an appendix, an agreed statement, a settled statement, and in certain circumstances the original Superior Court file or record of an administrative proceeding. The record of oral proceedings may be presented to the appellate court through a reporter's transcript, an agreed statement, or a settled statement. The California Rules of Court, Rules 8.120 through 8.163 set forth requirements for each of these options. In the Ninth Circuit Court of Appeals, the record of written documents and oral proceedings are presented in Excerpts of Record.

Why is "the record" so important?

Failure to provide an adequate record on an issue requires that the issue be resolved *against* appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281.) Why? The most fundamental rule of appellate review is that an appealed judgment or order is *presumed to be correct*. Error must be affirmatively shown. The appellate court will never assume or speculate that trial court error occurred. Ambiguities in the record will be resolved in favor of the appealed judgment or order. Therefore, the appellant has the burden of overcoming the presumption of correctness and has a duty to provide an adequate appellate record demonstrating error.

This duty applies even where the appellate court will be reviewing an issue de novo. Although the court will not defer to the trial court's ruling, the *scope* of review will be limited to those issues that have been adequately raised and supported (i.e., via the record and legal authority) in appellant's brief. There is good news for appellants, however. Where an appellant presents an adequate record showing what the trial court did and demonstrating error, appellants overcome the presumption of correctness. (*Steuri v. Junkin* (1938) 27 Cal.App.2d 758, 760, 82 P.2d 34, 35.)

Appellants who proceed with an abbreviated record, beware. There is a general presumption that the abbreviated record "includes all matters material to deciding the issues raised." (Cal. Rules of Court, rule 8.163.) In other words, appellate courts will *not* presume that correctness of the judgment or absence of error would have been shown by something omitted from the record. *However*, if the error is not apparent on the face of the record, *and* the appellant failed to present a reporter's transcript, it is presumed the unreported oral proceedings would have shown the *absence* of error. (Cal. Rules of Court, Rule 8.163.)

What do I have to do at trial to preserve or make an adequate "record" on appeal?

The following categories are not intended to be an exhaustive survey on preserving the record. Rather, they are intended as lightning rods to remind trial attorneys to pay attention to various common traps as well as opportunities for creating a complete appellate record.

• ***Object, object, object***

Trial lawyers focus on obtaining favorable verdicts, not on creating the perfect appellate record. Ideally, there will not be an appeal. So understandably, there is a tension between presenting evidence and your client in a way that will best secure the desired verdict, and between preserving your client's appellate rights. Objecting to every error, regardless of its effect, may frustrate the judge and jury alike, and seem either overly aggressive or overly defensive. Moreover, there are often tactical reasons to not make certain objections, or to make objections outside of the jury's presence. That being said, most errors at trial will be deemed waived on appeal absent a showing that appellant objected to them.

• ***In-chambers discussions***

Most attorneys know they need to make their objections on the record, i.e., in writing or orally before a court reporter. Problems arise, however, during informal (or sometimes even formal) discussions outside of the jury's presence. For example, counsel might have an in-chambers discussion regarding what jury instructions to use, or what verdict form to submit, or what evidence to admit, etc. These discussions often are held outside of the presence of a court reporter. When it is possible to include the court reporter for such discussions, it is a best practice to do so. The court reporter will be able to accurately document what parties requested which instructions or verdict forms, any compromises the attorneys made, any objections made and overruled, and any other potential concessions or disputed topics.

Practically, attorneys do not always realize when discussing one matter in chambers that another more controversial topic might suddenly arise, or might not realize the significance of a discussion until after it occurs. Should such scenario occur, upon resuming proceedings in open court, the attorney should request the opportunity to "make the record" of the discussion, noting the points discussed and specific objections raised and overruled. It might be most prudent to do so outside of the jury's presence, however.

• ***Where applicable, request a statement of decision and object to deficiencies***

In a nonjury trial, the judge is required to issue a "statement of decision"

See Gusdorff, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2017 Issue

upon a party's timely request, explaining the grounds (factual and legal) for his or her decision as to each of the principal controverted issues for which the statement was requested. (Code Civ. Proc. § 632.) *Do not accidentally waive the statement of decision.* The statement of decision provides the appellate record of the trial court's reasoning on key disputed issues. If there is no statement of decision, either because it was not requested or because counsel waited too long to request it, the appellate court will presume that the trial judge made all factual findings necessary to support the judgment. (*Homestead Supplies, Inc. v. Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 984.)

This doctrine of implied findings may also apply where the court actually renders a statement of decision, but it is, for whatever reason, defective. Defects in a statement of decision are *waived* unless either party timely requested clarification before entry of judgment or in conjunction with a motion for a new trial (Code Civ. Proc., § 657) or motion to vacate and enter different judgment (Code Civ. Proc., § 663).

• ***Make an offer of proof***

Sometimes simply objecting is insufficient to preserve an appellate challenge. For instance, to preserve an appellate challenge to a court's exclusion of witness testimony, counsel must make an adequate offer of proof. (Evid. Code, § 354; *Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1113.) Because appellants must affirmatively show prejudicial error, a record showing exclusion of a witness – without more – does not show how that exclusion affected the trial. Request a hearing pursuant to Evidence Code section 402 (a "402 hearing") to make a record in front of the court reporter, but not the jury, as to *what* the excluded witness would have testified. That way, the reviewing court may evaluate not only the propriety of the exclusion, but also its affect on the proceedings.

• ***Bring appropriate post-trial motions, even following a bench trial***

A full discussion of post-trial motions is beyond the scope of this article. However, for purposes of establishing a complete appellate record, there are a few important points to highlight. Certain legal arguments may not be raised in the Court of Appeal without first challenging them in the trial court.

For example, an appellant may not challenge the amount of damages, sufficiency of evidence, newly discovered evidence, or jury misconduct, without having first made such challenge in a new trial motion. But post-trial motions may have strategic advantages for aggrieved litigants in bench-trials as well. Section 662 of the Code of Civil Procedure grants the trial judge wide latitude to reopen a case, consider additional evidence, or modify or vacate a decision, even *after* the statement of decision has been filed and the judgment entered.

Where there is no challenge to the sufficiency of the evidence, and there is only concern of a legal error, a motion to vacate under Code of Civil Procedure Section 663 enables the aggrieved party to seek correction of the error from the trial court without the expense and delay of an appeal.

• ***Remember to transcribe audio/video***

Commonly, video deposition excerpts are introduced during trial. Sometimes, video excerpts contain the most powerful evidence in a trial, undermining key witnesses, or providing "silver bullet" testimony. Yet, in a generous gesture, counsel often gives the court reporter a "break," assuming the video need not be transcribed. This can be devastating to creation of the appellate record because just as often, the video is not entered into evidence, there is no transcription offered in its stead, and your best evidence never becomes part of the record. When in doubt, transcribe. At minimum, be certain that the deposition transcript of all videotaped testimony presented at trial was *filed* with the clerk at some point during the trial, so that it can be referenced on appeal. Without this, there is no way for the appellate court to know what testimony that jury saw on the videotape.

What if there was no court reporter?

When the State budget cuts resulted in the reduction of services, including court reporters for most civil cases, many trial attorneys opted to hire private court reporters, but there was also an increase in the number of hearings that attorneys opted not to have reported or transcribed. Moreover, cost considerations may influence counsel's decision to hire a court reporter for each hearing date. If you find yourself in a situation in which you do not have a court reporter for a particular significant hearing date (or dates), you have a harder job ahead of you for creating an adequate appellate record, but it is still very doable. Here are some ideas to help you do so.

• **Make a contemporaneous summary of important testimony and objections**

If you are currently in trial, or have recently participated in a hearing or trial, while the matters are still fresh, take some time to write down as much detail as you can about significant aspects of the proceedings, including witness testimony, evidence you introduced, objections raised and sustained, offers of proof, discussions on jury instructions or verdict forms, oral motions, oral admissions, and anything else that seemed helpful to justify a judgment in your client's favor, or that seemed to negatively affect your case.

Obviously, there are many moving parts during trial, so it can be particularly helpful to have another person present whose sole role is taking notes and drafting a summary of each hearing or trial proceeding. A summary of testimony will be invaluable if a writ is required, or, if an agreed or settled statement becomes necessary.

• **Trial has been over for months; now what?**

Contemporaneous note-taking and summarizing is fine in theory, but trial has been over for months and you're forgetting details. Now what? The proceedings will simply continue to blur, so as soon as practical, write down everything you remember that might have any significance for justifying or attacking the judgment.

If you need help triggering memories, check out the docket, which will offer a list of which witnesses testified which days, what evidence was introduced

See Gusdorff, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2017 Issue

and admitted, motions, other significant matters, and jury questions. Review trial briefs and trial notes. Speak with co-counsel, if possible. Your summary does not need to be in question-and-answer form. It simply needs to include matters of significance in as accurate and complete (and not unfairly slanted to exclude all adverse testimony) a way as possible.

• Agreed and settled statements in the California Courts of Appeal

Agreed statements may replace a reporter's or a clerk's transcript, and may constitute the entire or part of an appellate record. California Rules of Court, rule 8.134 sets forth the procedure and contents governing agreed statements. For instance, the statement must explain the nature of the action, the basis of the reviewing court's jurisdiction, and how the superior court decided the points to be raised on appeal. It should receive only those facts needed to decide the appeal, and must be signed by the parties. As the name suggests, an agreed statement requires the parties to agree on the contents of the statement. Where this is possible, it is a more efficient process than proceeding by settled statement, and will move the appeal forward faster.

Of course, opposing counsel may differ in their recollections of testimony and proceedings, or they may not wish to memorialize certain aspects of trial that adversely affect their client. If the parties are unable to resolve their dispute, California Rules of Court, rule 8.137 offers appellants the option to proceed by settled statement. The Rules of Court detail a specific motion process, including when to file the motion, what it must include, how to proceed if the court denies the motion, etc. It is essential to read and follow the current version of the applicable rules.

The decision to proceed by agreed or settled statement occurs in the designation of record on appeal, which is filed shortly after the notice of appeal. Regardless of whether you proceed by agreed or settled statement in lieu of a reporter's transcript, as the appellant, you will need to offer a condensed narrative of the oral proceedings that you believe will be necessary for the appeal. As respondent, you will need to make sure appellant's version is accurate, and having your own condensed narrative or summary can assist you in making such determination. Again, it is invaluable to have an already-prepared summary of the hearing(s). Remember, however, the appellate court will not rely on statements set forth in trial briefs. The facts set forth in trial briefs may form the substance of the ultimate agreed or settled statement, but the additional step is important.

Continuing duty to procure "the record"

Even after counsel makes a sufficient "record" for use on appeal, counsel's obligations to procure the record continue. For instance, if appellant fails to timely do an act to procure the record (e.g., fails to designate the record, fails to file a timely motion to proceed by settled statement, etc.), California Rules of Court, Rule 8.140, authorizes the court to send a warning notice, and then impose sanctions, including dismissing the appeal.

Moreover, even when a reporter's transcript and clerk's transcript are completed and filed, counsel has an obligation to review it and augment the record with necessary documents, or serve and file a notice in the superior court requesting that any designated or required portions of the record that were omitted be prepared, certified, and sent to the reviewing court. Beware that although California Rules of Court, rule 8.155 governs augmenting and correcting the appellate record, local rules may also impose shorter deadlines on motions to augment and omissions letters.

A note on appendices and exhibits

A common practice is for the appellant to create an appendix of written documents as opposed to proceeding by clerk's transcript. California Rules of Court, Rules 8.122 and 8.124 set forth what material *must* be included in an appendix, as well as what material *may* be included. In California State courts, an appendix must *not* include oral testimony, whereas in the Ninth Circuit, the Excerpts of Record should do so. Parties may prepare separate appendices or may stipulate to a joint appendix. The format and requirements are detailed, and require reviewing the court rules carefully so that the court accepts the appendix.

However, to ensure that the appendix is not rejected, make sure that it does not include: any oral proceedings that may be designated as part of the reporter's transcript; any documents that are unnecessary for proper consideration of the issues; any record of an administrative proceeding that was admitted into evidence, refused, or lodged; or incorporate any document by reference (other than the record on appeal in another case pending in the reviewing court or in a prior appeal in the same case).

Additionally, keep in mind that all exhibits admitted into evidence, refused, or lodged, are deemed part of the record, whether or not the appendix contains copies of them. This does not include documents or exhibits that were merely discussed during trial if they were not offered into evidence. To ensure that this does not occur, before resting at trial, review all of the exhibits and make sure that any exhibit desired has actually been moved into evidence.

Janet R. Gusdorff, a Certified Appellate Law Specialist (SBLS), handles appeals in state and federal court. Janet is the owner and principal of Gusdorff Law, P.C., *in Westlake Village, CA. She has been repeatedly voted as one of the Super Lawyers Rising Stars in Appellate Law (Southern California). She has been AV-rated by Martindale-Hubbell. Pasadena Magazine recognized Janet as one of its 2016 and 2017 "Top Attorneys." Janet graduated from Loyola Law School, where she served as Note and Comment Editor on the Loyola Law Review. She is also licensed to practice in New York and New Jersey.*