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In This Issue
Preserving the Record for Appeal

Common Traps in Making the Record for Appeal

By Thomas L. Hudson & Keith Swisher

Jury verdicts and bench rulings receive a variety of presumptions on appeal that make overturning them a challenge.[1] Although the content and quality of the record often affects whether such presumptions will carry the day, experienced trial counsel—who are quite naturally focused on the immediate concern of a favorable verdict—sometimes overlook aspects of preserving the appeal and making the record. When that happens, what would otherwise provide a powerful issue on appeal (or an effective rebuttal thereof) may go by the wayside. By the time the appeal is under way, it is generally too late, of course, to correct such oversights.[2]

This article focuses on several areas of preserving the record in civil matters that often are unintentionally overlooked by trial counsel.[3] Some of the areas addressed have become issues only recently due to changing trial practice and technology, while others have plagued practitioners for some time.

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Advisory Committee Proposes Draft Federal Rule of Evidence 502: Waiver of Privilege

By Courtney Ingraffia Barton

In April 2006 the Advisory Committee on Federal Evidence Rules recommended the further consideration of a proposed Federal Rule of Evidence 502 addressing waiver of attorney-client privilege and work product protection and related issues. This article summarizes the background for the proposal and the comments received by the Advisory Committee at an April mini-conference addressing the concept; provides in full the text of the rule as recommended by the Advisory Committee in mid-May; and summarizes the next steps for consideration of the proposed rule.

Background

For years the Advisory Committee has considered and studied a Federal Rule of Evidence addressing the attorney-client privilege and work product protection in one form or another.[1] Such consideration is complicated, particularly given that any Federal Rule of Evidence modifying an evidentiary privilege may only be enacted by an affirmative congressional act (and not, as is true for other Federal Rules of Evidence, by the U.S. Supreme Court alone).[2]

Earlier this year, the Advisory Committee considered a rule addressing, among other things, when the privilege is waived. Several factors undoubtedly prompted such consideration, including a January 2006 letter from the chairman of the House Committee on the Judiciary asking that the Federal Judicial Conference initiate such a rulemaking process.[3] The Advisory Committee's consideration of such a provision also is a logical next step given changes to the Federal Rules of Civil Procedure scheduled to become effective December 1, 2006, that address

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Common Traps in Making the Record for Appeal

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Deposition and Video Excerpts

Skilled trial counsel often use depositions to supplement live trial testimony, impeach witnesses, refresh witnesses' recollections, and provide context for witness testimony. Increasingly, lawyers also play videotaped depositions at trial.[4] Used wisely, depositions can provide some of the best evidence at trial by demonstrating specific facts and revealing severe credibility issues.

But using depositions creates a record trap. Keep in mind that the mere listing of deposition designations in a joint pretrial order does not mean that they were read in evidence, and thus does not make the excerpts part of the record. To be of use on appeal, the record must (1) indicate precisely which portions of a particular deposition were read in evidence and (2) include the particular deposition text actually read. However, some court reporters, unless requested, will not note such information, which can result in an incomplete record. The following examples, taken from actual trial transcripts used on appeal, powerfully make this point:

- "(A segment of a videotape was played for the jury.)"
- "(Portions of the deposition of [WITNESS] taken on January 21, 2002, were read to the jury.)"
- "(Whereupon portions of the videotaped deposition of [WITNESS] were played to the jury.)"

Suffice it to say that such a transcript makes it impossible to ascertain the substance of the testimony, and thus makes for a nearly useless record.[5]

Ensuring that the record correctly reflects the deposition excerpts admitted in evidence requires some vigilance—and assistance from the court reporter. At a minimum, provide the court reporter designations for the read or played portions (by deposition, page, and line number), and ask the court reporter to include the designations in the trial transcript (again by deposition, page, and line number) to ensure the trial transcript reflects precisely the read deposition designations.

Also make sure to file the pertinent original transcripts (with the signature page, corrections, or affidavit of nonsignature) so that the read text is in the record. Alternatively, ask the court reporter if he or she would stenographically record read portions directly into the transcript. To ensure the accuracy of the read portions, provide the court reporter the deposition transcript along with the designations. Although some court reporters (and judges) discourage this method, it creates the cleanest record because the appellate court (and appellate counsel) need not locate the deposition transcript to ascertain the testimony. As a last resort, supplement the record with a filing that indicates precisely (by deposition, page, and line number) any read portions, along with the pertinent deposition transcripts.

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Sidebar Rulings and Discussions; Courtroom Noises and Gestures

Some newer courtrooms include microphones that feed to the court reporter so that the reporter may transcribe any sidebar conversations with the judge that occur during trial. But courtrooms that lack this newer technology create another record trap. Unless the court or counsel puts something on the record (or unless the court reporter is particularly vigilant and close enough to hear and transcribe the conversation), there will be no record of what was said at the sidebar.

In many instances nothing of significance is lost, but that is not always the case. For example, a series of rulings may gain significance when considered collectively, even though each individual sidebar ruling is innocuous. Other sidebar rulings gain significance long after they have been made. As with deposition transcripts, a transcript that says "(A discussion was held at the bench between the Court and counsel out of the hearing of the jury)" is of no use on appeal.

Accordingly, you should make sure that the transcript reflects all sidebar conversations and other pertinent events, or create a record concerning any significant sidebars (by letting the court know as soon as practicable after the event, including during the next recess or at the beginning or end of the day, that you need to make a record).

You should also ensure that potentially favorable or prejudicial courtroom behavior makes its way into the record. When the opposing party laughs and points at your client, for instance, you must ensure that the court reporter describes the behavior for the record; ask the judge to do so or describe it yourself on the record.[6] Many lawyers maintain a separate list of "make record" items during the trial to make certain the record is made.

Failing to Comply with Rule 50 Pre- and Post-Verdict

Avoid the Rule 50 trap. To challenge the legal insufficiency of the evidence pre-verdict, you must file a Rule 50(a) motion for judgment as a matter of law.[7] Despite that it probably will be denied, you must renew your motion (Rule 50(b)) after the ver-

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dict. Otherwise, you may join the likes of ConAgra—a company that, according to a recent U.S. Supreme Court opinion, lost its ability to appeal the evidentiary insufficiency by failing to heed Rule 50.[8] The result must have been particularly troubling to ConAgra because the Federal Circuit Court of Appeals below had considered the merits and agreed that the other side had presented insufficient evidence. The Supreme Court nevertheless reversed because failure to file both motions for judgment as a matter of law barred consideration on appeal.

Furthermore, treat your Rule 50 motions with care. Because Rule 50(a) is designed to alert the nonmoving party to alleged defects in the evidence (so they may be corrected if possible), "[a] party cannot raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion."[9]

Therefore, to preserve your challenge for another day, you must carefully file a Rule 50 motion pre- and post-verdict that includes all issues you plan to raise on appeal.

Unsuccessful Summary Judgment Motions

This Rule 50 procedure also should be followed to preserve issues presented in an unsuccessful summary judgment motion. Technically, if the summary judgment issue involves a pure "error of law that, if not made, would have required the district court to grant the motion," Rule 50 motions need not be filed to preserve the issue.[10] But the far better (and safer) practice is to move for judgment as a matter of law during trial per Rule 50 and include all reasonable grounds asserted in the unsuccessful summary judgment motion (as well as any other grounds). No matter how psychologically difficult, re-urge these grounds even though the court previously rejected the theories, and even though the trial court has not indicated that it would change its position.[11] Fortunately, however, it is likely that after December 1, 2006, a rule change will take effect pursuant to which Rule 50 will no longer require you to re-urge your prior motion at the close of the evidence.[12] Nevertheless, make sure that your prior motion is comprehensive of all issues before you decide that a subsequent one is superfluous.

Detailing Excluded Evidence in Offers of Proof

If the trial court excludes some important evidence, either by a ruling on a motion *in limine* or otherwise, one must generally make an offer of proof indicating the nature of the evidence that would have been presented had the court ruled differently.[13] A failure to make an offer of proof generally precludes appellate review of the exclusion.[14] The trickier part is making the offer of proof complete. A proper offer of proof allows the trial court to determine whether it should revise its decision and allows the appellate court to determine whether the exclusion of the evidence requires reversal. It therefore must include sufficient detail concerning what facts the evidence would establish and demonstrate why the evidence should be admitted. Unfortunately, the adequately detailed offer of proof is the exception rather than the rule.

Common methods for making an offer of proof include submitting it in writing, orally summarizing the expected witness testimony on the record, or indicating that the witness will testify with respect to a particular issue consistently with the witness's deposition (which should then be included in the record). The far better practice from an appellate perspective, however, is to have the witness testify outside the presence of the jury. On significant issues, insist on this method to guarantee an adequate record. Either way, the key is to be thorough and complete.

Jury Instruction Issues

Properly preserving jury instruction issues is another area that raises record traps. Typically, both sides submit instructions, and in all but the simplest cases disagreements arise between the parties, requiring the court to settle the instructions. But failing to detail the basis for an objection, failing to specify all bases for an objection, and failing to provide written alternatives to objectionable instructions may, absent plain error,[15] result in a waiver of the objection.[16]

Rule 51 of the Federal Rules of Civil Procedure sets forth the procedures governing jury instructions:

> A party may, at the close of the evidence . . . file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests. . . . After the close of the evidence, a party may . . . file requests for instructions on issues that could not reasonably have been anticipated at an earlier time. . . . A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection. An objection is timely if . . . a party . . . objects . . . before the instructions and arguments are delivered.

But the Rule is more difficult to apply than its language suggests. In practice, complying with Rule 51 requires at least four steps.

First, submit written jury instructions on every anticipated issue before the close of evidence or as the court directs. As the Rule notes, failure to do so will waive any other instructions except those involving "issues that could not reasonably have been anticipated at an earlier time. . . ."[17]

Second, object to the objectionable instructions submitted by other parties. Ideally, submit objections in writing to create a clean record, and remember that clarifications that occur during informal conferences between the court and counsel should be put on the record. Also, make a record with respect to any requested instructions that the court refuses to give,[18] and make the objections concerning instructions specific—general objections simply will not do.[19] Thus, an objection that an instruction is "an incomplete statement of the law" will not suffice to preserve the issue for appeal.[20] Instead, counsel must identify the particular portion of the instruction that is objectionable, and must state why it is objectionable, that is, how it misstates the law. Similarly, if the instruction is objectionable for more than one reason, counsel must specify each of the reasons in detail.

Third, when challenging the wording of an instruction—for example, if the instruction inaccurately describes the "willful and wanton" misconduct necessary for an award of punitive damages—submit a proposed alternative.[21] But keep in mind when submitting alternatives that submitting an erroneous instruction on a claim may invite error.[22] If no instruction should be given at all—because, for example, the facts do not warrant a

consequential damages instruction—that threshold objection should be made clear.

Fourth, make any final objections after the court settles the instructions. Under the rules, the court may modify the instructions submitted by the parties. To the extent the court incorporates suggestions from both sides (or provides its own input) and the instructions remain objectionable, an objection to the revised instructions should be made. Do not assume that an objection to an earlier version of an instruction carries over to the final form of the instructions given to the jury. In addition, while the "pointless formality" doctrine or some other exception could, in theory, rescue your failure to object, do not count on it.[23]

Make sure that the appellate record includes the refused jury instructions; otherwise, there will be nothing to argue about on appeal.

In making the record on the jury instructions, also keep in mind the governing standards of review. An appellate court will "review the instructions in their entirety de novo to determine whether the jury was misled in any way."[24] And it is reversible error to refuse a correct instruction, not otherwise incorporated into the instructions given, that is "integral to an important point in the case."[25] One final, but important, note: Make sure that the appellate record includes the refused jury instructions; otherwise, there will be nothing to argue about on appeal.[26] In sum, although the courts overturn comparatively few verdicts on the basis of a challenge to jury instructions, the standard of review on appeal for refused instructions is favorable and deserves extra vigilance.

Conclusion

If it is not in the record, it does not—for appellate purposes—exist. The appellate courts place the burden on the "appealing litigant [to] ensure that sufficient facts are developed at trial to support a challenge on appeal."[27] It thus is critical to take steps throughout the course of litigation to ensure that a proper record is being developed. Accordingly, before the notice of appeal is filed, be sure to take the time to review the record index and reflect on whether anything additional is needed on appeal. Remember it is your responsibility to do "whatever else is necessary" to guarantee that a complete record makes its way to the appellate court.[28] Whatever your trial skills, you never know when you will wind up as an appellant, when making the record for appeal may be case-dispositive.♦

Endnotes

1. *See, e.g.*, Patrick v. Burget, 486 U.S. 94, 98 n.3 (1988) (noting that an appellate court must review the evidence in the light most favorable to upholding the jury verdict); Venegas v. Wagner, 831 F.2d 1514, 1517 (9th Cir. 1987) (same).
2. *See, e.g.*, Inland Bulk Transfer Co. v. Cummins Engine Co., 332 F.3d 1007 (6th Cir. 2003) (noting that appellate courts rarely allow parties to supplement the record and denying the motion to supplement).
3. By far the most common record preservation issue concerns failing to make appropriate and timely evidentiary objections. This article concerns only inadvertent failures, however, recognizing that counsel often intentionally do not object because of the effect of such objections on the jury.
4. *See* FED. R. CIV. P. 32; *see also* FED. R. EVID. 106.
5. *Cf.* Andersen v. Cumming, 827 F.2d 1303, 1305 (9th Cir. 1987) (noting that appellate court cannot decide issue without a sufficiently developed factual record); *see also* FED. R. APP. P. 11(a) (placing burden on appellant to procure appellate record).
6. *See, e.g.*, United States v. Schuler, 813 F.2d 978, 980 (9th Cir. 1987) (noting difficulty of reviewing claim based on defendant's courtroom laughter when counsel failed "to ask the trial court to have it included in the record").
7. *See, e.g.*, Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003).
8. Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 126 S. Ct. 980 (2006).
9. *Freund*, 347 F.3d at 761.
10. Banuelos v. Constr. Laborers' Trust Funds for S. Cal., 382 F.3d 897, 902 (9th Cir. 2004).
11. *See* FED. R. CIV. P. 50(b).
12. The text of the new rule, effective December 1, 2006, is available at http://www.uscourts.gov/rules/newrules6.html ("Civil Rule 50").
13. *See* FED. R. EVID. 103(a) ("Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.").
14. Walden v. Georgia-Pac. Corp., 126 F.3d 506, 518 (3d Cir. 1997).
15. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2558 (Supp. 2005).
16. FED. R. CIV. P. 51; Voohries-Larson v. Cessna Aircraft Co., 241 F.3d 707, 714–15 (9th Cir. 2001).
17. FED. R. CIV. P. 51(a).
18. *See, e.g.*, Kirschner v. Uniden Corp. of Am., 842 F.2d 1074, 1077–78 (9th Cir. 1988) (striking documents not presented to the district court before judgment or order).
19. Palmer v. Hoffman, 318 U.S. 109, 119 (1943); *Voohries-Larson*, 241 F.3d at 715 ("Here, as stated above, the record reveals that the district court did not know the specific constitutional and statutory grounds on which the appellants now object.").
20. *Voohries-Larson*, 241 F.3d at 713–14.
21. *Cf. id.* at 715.
22. *See* Parker v. Champion, 148 F.3d 1219, 1222 (10th Cir. 1998).
23. Thornley v. Penton Publ'g, Inc., 104 F.3d 26, 30 (2d Cir. 1997); *Voohries-Larson*, 241 F.3d at 714–15 (quoting Glover v. BIC Corp., 6 F.3d 1318, 1326 (9th Cir. 1993)) (listing elements of doctrine: "(1) throughout the trial the party argued the disputed matter with the court; (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction; and (3) the party offered an alternative instruction").
24. Townsend v. Lumbermen's Mut. Cas. Co., 294 F.3d 1232, 1237 (10th Cir. 2002) (*quoting* Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 552 (10th Cir. 1999)).
25. Seahorse Marine Supplies v. P.R. Sun Oil, 295 F.3d 68, 76 (1st Cir. 2002) (*quoting* United States v. DeStefano, 59 F.3d 1, 2 (1st Cir. 1995)).
26. *See, e.g.*, Sabari v. United States, 333 F.2d 1019, 1021 (9th Cir. 1964) (refusing to infer error when counsel failed to include the proposed jury instructions in appellate record).
27. Andersen v. Cumming, 827 F.2d 1303, 1305 (9th Cir. 1987).
28. FED. R. APP. P. 11(a).