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Monday morning quarterbacking

AN APPELLATE ATTORNEY'S TOP 10 TIPS FOR TRIAL

As appellate attorneys, we have the pleasure of experiencing those truly magical moments of trial through a transcript, like a novel that we cannot put down, hanging on every word until the end. It is so impressive to watch many of you glide through the trial, seamlessly interposing objections and making snap decisions as to arguments and tactics, all while maintaining the theme of the case before the judge and jury. With this perspective, where we are perched above and watching the trial unfold in the pages before us, we are gifted with 20-20 hindsight. It is from this hindsight perspective that we offer the following tips for trial; those recurring issues and nail-biting moments where the sound of an appellate attorney in your ear might help save the day on appeal.

1. Get it on the record

There is one mantra appellate lawyers recite more than any others: "*Make a record*." Appellate courts often remind litigants that if it is not in the record, it did not happen. While everyone knows this to be true, trial is and can be a fast-moving train with unexpected stops and detours. Often, critical rulings are made in an "off the record" sidebar conference or in the judge's chambers. Without a reporter's transcript or a statement on the record concerning the ruling, it may be difficult, if not impossible, to argue on appeal that the trial court abused its discretion or otherwise erred.

While it may be possible to present an agreed statement or settled statement on appeal as to what occurred off the record (see Cal. Rules of Court, rules 8.134 and 8.137), it is best to avoid this predicament altogether by requesting that all interactions with the court be transcribed by the reporter. If having the reporter transcribe the interaction is not possible, counsel should immediately detail any unreported rulings when back on the record. Given the dynamic nature of trial, consider keeping a log of any rulings or discussions held off the record and at the conclusion of each day of trial, and outside the presence of the jury, detail such rulings before the court with the reporter present. In those situations where that too may be impossible, consider preparing a proposed order or declaration detailing what occurred and filing with the court so that there is at least a written record describing the events.

Also be mindful of the reporting of jury instructions and video depositions played at trial. Although relieving a court reporter from recording jury instructions or a video deposition may be well-intentioned during a long trial, it must be done with caution. For jury instructions, make sure to file the final instructions with the court and that they mirror the instructions actually read to the jury.

To ensure that the video depositions become a part of the record on appeal, consider filing a written transcript of the portions played to the jury with the trial court. Another idea is to lodge or file the video itself with the specific portions identified that were played to the jury.

Otherwise, you can ask that the reporter transcribe the video testimony as a part of the reported proceedings. California Rules of Court, rule 2.1040 details certain procedures for the introduction of electronic evidence, including video depositions, at trial. Be sure to familiarize yourself with these rules prior to trial. Given the use of video deposition testimony in cross-examinations as well as closing statements, it is worth taking the time to ensure that such critical testimony makes it into the record.

2. Get it *in* the record

Aside from oral proceedings and testimony, preserving the record for appeal also means making sure that documents, exhibits and even emails between the court and the parties make it into the trial court's record. Although this may seem obvious for exhibits that are admitted over objection, or excluded over objection, it is not always done.

All too often parties will hash out the admissibility of an incident report, a tape-recording, or a purportedly privileged document – all the while never properly filing the subject document with the trial court. In such situations, the Court of Appeal will likely find any objection waived as the party challenging the ruling bears the burden of providing the reviewing court a full and complete record to review the ruling.

More than ever, trial attorneys are using PowerPoints, video presentations and other demonstrative tools to present their case. Such visual advocacy can have a huge impact on the jury. So too, for the Court of Appeal. Although such demonstrative exhibits may or may not be admitted at trial, they are a part of the record and counsel must ensure that they actually make it into the record.

In other words, even though exhibits admitted in evidence, refused, or lodged are deemed part of the record, the appellate court may never see the actual exhibit or document if it was not specifically filed or lodged with the court below. Whether admitted or not, make sure to lodge or otherwise file exhibits, visual presentations and any other documents with the trial court. Just like with the jury, these visual presentations may help the court of appeal understand the context of the incident even if not ultimately relevant to the issue before the court.

Further, in the post-Covid era, it seems that more and more courts are communicating with counsel by email. Such emails, however, may not make it into the trial court's record. Consider filing a declaration attaching these emails should they concern potential appellate issues. Even innocuous subjects such as scheduling might be relevant to an issue of waiver. Should the importance of a document not previously lodged arise after the verdict is reached, consider including the document in any post-trial

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briefing. However possible, the goal is to ensure that whatever is seen by the jury, or excluded by the court, is a part of the trial court's record.

3. Be consistent and clear re exhibits

In a scene from one of my favorite movies, *Office Space*, three frustrated office workers take their miserable laser printer to the middle of a field and take turns beating it to death with a baseball bat. It makes me laugh every time. Reviewing trial transcripts on appeal, and particularly testimony of a key witness discussing exhibits, is often my *Office Space* moment. I want to scream – *which exhibit*? Number 5, or 5-5, or 555? Or is it Number 40 from the deposition? Or defendant's exhibit 120? It can be maddening. Although I understand and am sympathetic to the circumstances, given that deposition exhibits may have one exhibit number, trial another – it is best practice to be clear regarding the exhibit designation from the outset and consistent throughout trial.

Pre-trial preparation of exhibits can be extremely helpful during trial. Consider giving each exhibit a trial designation and short name. For example, "Exhibit 5, October Incident Report." Also, any time a witness is being questioned about numerous exhibits, take the time to state the exhibit number and name in each question.

You can also organize your exhibits for each witness ahead of time, and have the depositions marked and tabbed with the corresponding trial exhibit number and name on important testimony. Taking time with exhibits to ensure that the testimony is clear should be a priority. This is especially true where the case centers on exhibits.

Also, before the jury deliberates, run through all the exhibits you believe were admitted during trial and confirm the same with the court on the record. It may also be helpful to confer with the clerk to make sure all parties, the jury, and the court have both sides' exhibits – including those admitted and excluded.

4. Make an offer of proof

An "offer of proof" is a showing made out of the jury's presence establishing the substance, purpose and relevance of proffered evidence. A party's failure to make an "offer of proof" waives the right to a new trial or appeal based on the erroneous exclusion of evidence: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless … [t]he substance, purpose and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means …" (Evid. Code § 354, subd. (a).)

When key evidence is excluded, whether an exhibit or through the testimony of a witness, make an offer of proof so that the record clearly shows what the exhibit or witness would have revealed. This may include providing the court with a declaration and attached deposition testimony, or a summary of the testimony excluded. An expert's report may also be necessary as an offer of proof. Conclusory statements, such as "the witness will testify as to causation," are likely insufficient to warrant a finding of prejudice on appeal. Be specific in the offer of proof. Further, consider requesting an Evidence Code section 402 hearing if appropriate.

Another option is if you know there is an issue concerning the exclusion of certain evidence that will be argued during motions in limine or may come up during trial, be prepared with a pocket brief detailing a written offer of proof and including any relevant documents, exhibits or testimony.

5. Pocket briefs

When heading into trial, counsel is often aware of lingering issues that may arise during trial. Planning ahead with pre-prepared pocket briefs is a great strategy not only to preserve any objection, but also to provide the court with adequate briefing on the issue. The brief is usually short and directed to a discrete point of law.

6. Know your audience

I'm not just talking about the jury. Knowing your audience also applies to the judge presiding over your trial as well as the corresponding appellate court. In some instances, perhaps where a prior writ petition was filed and denied, you may even know which division of the Court of Appeal will likely be assigned to your case. In these situations, when you argue the law, try to find cases cited by that appellate division. The same is true for the trial court. Rather than starting from scratch in your briefing, search prior orders from other cases decided by the same judge to see if you can use the same legal reasoning and authority.

7. Plan, prepare and refine jury instructions

As noted by one court, "Nothing results in more cases of reversible error than mistakes in jury instructions." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 252-253.) Despite the fact that an erroneous jury instruction is fertile ground for reversal on appeal, counsel often ignore jury instructions until the very end of trial. Worse, arguments about jury instructions with the court can often take place *off the record* – either in chambers or after the court reporter has been relieved for the day. The court may issue an order stating only that the parties discussed the instructions and edits were made. There is no record as to whether a party objected to an instruction or acquiesced to the final language given in an instruction. Although jury instructions requested by the other side are "deemed excepted to," there are exceptions and without an adequate record it may be unclear whether a necessary objection was made.

Counsel should prepare jury instructions early, with an initial set of proposed instructions filed with the court. Be sure that proposed instructions reviewed by the court identify which party requested the instruction. Throughout any proceedings concerning instructions, counsel should insist on the presence of a court reporter. If unable to have a

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reporter present, counsel should memorialize the discussion, and particularly the objections, on the record as soon as possible. If there is an objection to a jury instruction that appears critical to the case, counsel should detail the objection, either on the record or in a brief, and if appropriate, propose an alternative instruction. Secure rulings from the court as to the proposed instructions so there is a clear record as to which instructions were "given" or "refused." If the record does not show the trial court refused a requested instruction, the court of appeal will presume you withdrew it.

8. Verdict forms – Keep it simple

A general verdict is one by which a jury pronounces generally either in favor of the plaintiff or defendant on all or any of the causes of action. A general verdict will imply findings in favor of the prevailing party on every fact essential to support the claim or defense at issue. A general verdict with special interrogatories instructs the jury to return a general verdict, while also answering specific questions of fact.

A special verdict is one by which the jury finds the facts only, leaving the judgment to the court. The special-verdict form generally tracks the elements of the applicable cause of action as defined in the instructions. "The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law." (Code Civ. Proc., § 624.)

Use of general verdicts is rare and litigants most often use special verdicts or general verdicts with special interrogatories. As with jury instructions, take the time necessary to ensure that the verdict is concise and complete. Go through each question to be sure that there is no uncertainty or inconsistency in the proposed verdict. Also, ensure that the record reflects any objections to the verdict. Even where an issue with the verdict arises after the jury has begun deliberations, bring the issue to the court's attention immediately to avoid waiver of any error.

9. Object to misconduct

There can often be a thin line between zealous advocacy and attorney misconduct. As noted by one court, "zealous advocacy does not equate with 'attack dog' or 'scorched earth'; nor does it mean lack of civility." (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1537.) "Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive." (*Ibid*.)

We often can see and feel when the other side has gone too far. However, strategically, the thought may be *not* to object. Perhaps objecting will only highlight the offensive rhetoric. Or it may annoy the court to interrupt closing statements with objections. Whatever the reasoning might be, keep in mind that with respect to misconduct by counsel, there must be an objection and a request for admonishment to preserve the issue on appeal. While there are some limited exceptions, the rule is generally that you must object. One thought, to avoid objecting during closing, is to object immediately after closing statements. At that time, you can request an admonishment to the jury before deliberations and/or a mistrial if the misconduct is serious enough.

10. It's not over yet: Post-trial motions

Securing a well-deserved verdict for your client can feel amazing. So amazing that you forget what's coming next. Soon after the notice of entry of judgment, the defense will likely file post-trial motions. The deadlines for such motions and oppositions can move fast and you will want to be prepared. Make sure you have all of the transcripts from the trial before any post-trial motions are filed. If you anticipate issues concerning the jury, make sure that you have voir dire transcripts ready as you may need it to counter any allegations of bias.

Also, you may need to submit counter-declarations from jurors in a quick turnaround and will thus need to know their whereabouts and availability during the weeks following entry of judgment. Research the applicable opposition deadlines to make sure you can docket them correctly.

Also, post-trial motions can be a useful way to ensure that the record on appeal is full and complete. Take time to ensure that any documents not previously filed or lodged are within the trial court's record. Ensure that a full set of jury instructions given and/or requested are included in the record. Post-trial motions can be a way to preserve issues that might otherwise be forfeited for failure to raise it sooner.

Hopefully, the above will be helpful in preserving the right to raise all meritorious arguments on appeal – and hopefully those arguments will all be made attempting to preserve a judgment in your favor.

Holly N. Boyer is a certified appellate specialist and a partner at Esner, Chang & Boyer, *a boutique appellate firm. In addition to handling all aspects of appellate litigation, she also assists trial lawyers with dispositive and post-judgment motions. Holly received the Appellate Attorney of the Year from the Consumer's Attorney Association of Los Angeles in 2019.*