Preserving The Record For Appeal: Top Ten Mistakes

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The four saddest words from the Court of Appeal are these: "Great argument; not preserved." Alas, even the sharpest legal mind and best honed rhetoric cannot resurrect a terrific argument that was not properly preserved for appellate review. Fortunately, unlike the need to file a timely notice of appeal, record preservation is not jurisdictional. Reviewing courts also have considerable leeway deciding to "save" an argument that was arguably waived. And some issues, particularly pure questions of law, can usually be considered on appeal even if not raised below.

Nonetheless, many good appeals have been lost because of counsel's failure to preserve the record. Here are ten key mistakes to avoid:

MISTAKE NO. 1: Ignoring record preservation at the motion stage (particularly summary judgment)

Most civil cases never make it to trial but are decided on motion for summary judgment or other pretrial motion. Here, too, record preservation issues abound. Motions for summary judgment can be especially tricky and present several opportunities for making big mistakes.

In preparing a motion for summary judgment, remember the cardinal rule that if evidence is not in the separate statement, it does not exist. Importantly, it is not sufficient simply to file or lodge the evidence and cite to it in the memorandum of points and authorities. The comprehensiveness of the separate statement is important to record preservation because the court of appeal will affirm a summary judgment if it is correct on any legal theory, not just the legal theory relied on by the trial court (or even necessarily the legal theories raised by the parties in the trial court). In *Taylor* v. *California State Automobile Assn.* (1987) 194 Cal.App.3d 1214, 1223, the Court upheld a summary judgment on a ground offered for the first time on appeal where the opposing party had an opportunity to present evidence on a factual issue but failed to do so. Similarly, in *Juge* v. *County of Sacramento* (1993) 12 Cal.App.4th 59, 68-69, the court upheld the trial court's grant of summary judgment on a ground not specifically tendered by the moving party but rather identified by the trial court. The trial court had applied the new legal theory to an undisputed material fact put in issue by the parties' separate statement of undisputed material facts.

Remember also that unless objections to opposing evidence are made at or before the summary judgment hearing, they are waived. And, even more fundamentally, recent case law holds that Code of Civil Procedure section 437c requires the trial court to hold a hearing on the summary judgment motion; the court of appeal will reverse a summary judgment entered without a hearing. On the other hand, while the statute also requires the trial court to specify its reasons for granting or denying a motion for summary judgment, the trial court's failure to do so is usually harmless error.

MISTAKE NO. 2: Not focusing on motions in limine

In addition to their potential for shaping the conduct of a trial, motions in limine are also an excellent way of preserving the record for appeal. Why? Because they are directed to specific issues, in writing, and unambiguously draw issues to the court's attention for decision. They also avoid the sometimes difficult decision of foregoing an argument—even a good argument—for fear of annoying the judge or alienating a jury. As the court noted in *Hyatt* v. *Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 337, the purpose of a motion in limine "is to avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury."

One important caution: even the best motions in limine may fail to preserve the record if they are not filed with the court or made the subject of a specific ruling. It is also helpful, but not essential, for the court reporter to transcribe the in limine hearing.

MISTAKE NO. 3: Not objecting

The classic failure to preserve the record is not making appropriate objections, particularly regarding the admission and exclusion of evidence. For example, courts of appeal will not generally set aside a verdict or finding based on the erroneous admission of evidence unless the other party made a timely objection to such evidence that makes clear the specific ground of the objection. Evidence Code § 353(a). Likewise, an erroneous exclusion of evidence may not be reviewable on appeal unless the proponent made an adequate offer of proof. See Evid. Code § 354. A party also cannot assert misconduct by opposing counsel as a basis for appeal unless he or she objected to counsel's actions at the time. See *Jensen* v. *BMW of North America, Inc.* (1995) 35 Cal. App.4th 112, 129-130.

In addition, and although various exceptions exist, the general rule is that a party waives legal theories that arise for the first time in the court of appeal. See, e.g., *Mattco Forge, Inc.* v. *Arthur Young & Co.* (1997) 52 Cal. App.4th 820, 846. On the other hand, if the "new theory" raises a purely legal issue and the underlying facts are not substantially in dispute, reviewing courts can (and usually will) consider it on appeal. See *Yeap* v. *Leake* (1997) 60 Cal.App. 4th 591, 599. Interestingly, a respondent is usually able to assert a new theory on appeal in order to support a judgment (even if the trial court did not rule on that basis) as long as doing so would not unfairly prejudice the appellant. See *D'Amico* v. *Board of Medical Examiners* (1974) 11 Cal. 3d 1, 18-19.

MISTAKE NO. 4: Not devoting sufficient time to preparing – and objecting to – jury instructions

An erroneous jury instruction is one of the very best appellate issues for an appellant, particularly since the court of appeal will review the instruction de novo.

But record preservation issues abound. The basic rules seem simple enough. Erroneous instructions requested by the other side are deemed excepted to. Practically speaking, however, on most critical issues each side proposes its own instructions; and a party in most cases cannot appeal from an erroneous instruction it requested. A party cannot claim error in the court's failure to give a particular instruction if the party did not request that instruction. Similarly, a party cannot claim a correct jury instruction was too general or incomplete unless it requested a clarifying instruction.

Beware: if the court of appeal cannot tell from the record who requested an instruction, it will assume the appellant requested the instruction and thus waived the error. Consider this basic tenet against the backdrop of the following common scenario. At the trial readiness conference, often neither side's jury instructions are

complete and either the parties' draft instructions are not actually filed or the draft instructions the parties do file have gaping holes. Arguments about the jury instructions with the judge may not take place until well into the trial and are often off the record. The judge may make his or her own changes, to which it is awkward for the parties to object. Then, when back on the record, the judge may say something to the effect of: "It looks like all of the changes we have discussed to the jury instructions you prepared have been properly made," and the parties will acquiesce. The result: there is effectively no record on which a party can base instructional error.

The solution: prepare jury instructions early, before the heat of trial. Make sure your initial set of proposed instructions is actually filed (and you have a copy with a conforming stamp). If the parties' discussions with the judge regarding the instructions are not reported, make sure to put your objections on the record. Make sure the final set of instructions used by the court shows who offered it, its disposition (given, refused, modified), the specific modifications, and who requested them. If the issue is a critical one, you may want to file a trial brief on the issue.

Take heart: if you fail to preserve the record as to the jury instructions during trial, all may not be lost. It is sometimes possible to reconstruct the record by filing declarations in connection with post-trial motions.

MISTAKE NO. 5: Giving short shrift to verdict forms

When a jury returns a general verdict on multiple causes of action, the court of appeal will presume the jury found in favor of the prevailing party on each cause of action. On appeal challenging the sufficiency of the evidence, the appellate court will affirm so long as the judgment is supported by substantial evidence on any one sufficient cause of action. The court will make an exception and not affirm the general verdict where the jury was given two instructions on the same issue, one correct and one incorrect. The presumption in favor of the correctness of the general verdict is also overcome where a jury responds to special interrogatories or completes a special verdict form.

The same concerns about record preservation apply to special interrogatories or a special verdict form as apply to jury instructions. Make sure the record is clear on who proposed which special verdict form, who proposed the changes adopted, and any objections you have to the form used.

MISTAKE NO. 6: Not requesting a statement of decision (non-jury trials)

After a court trial, there are no jury instructions to review to make sure the trial court followed the law, and no special verdict form or special interrogatories to make sure the trial court correctly decided all of the necessary ultimate facts. Instead, if one of the parties makes the proper request, the trial court is required to issue a statement of decision. The statement of decision, which gives the trial court's reasoning on particular disputed issues, helps the court of appeal determine whether the trial court's decision is supported by the evidence and the law.

If no statement is requested, the court of appeal will presume the trial court made all of the factual findings necessary to support the judgment for which substantial evidence exists in the record. In other words, the appeal will often be reduced simply to a substantial evidence review. The same holds true where the trial court does issue a statement of decision, but the statement of decision is deficient because it is ambiguous or fails to resolve principal controverted issues. If the appellant fails to specifically and properly object to the deficiencies in the trial court, the defects are waived and it is presumed the trial court made the factual findings necessary to support the judgment.

One part of preserving the record on appeal in a court trial, therefore, is first to request a statement of decision as to specific issues. If the court issues such a statement, a party claiming deficiencies in the statement must preserve the record by bringing the defects to the trial court's attention. Also, a tentative decision or memorandum of intended decision by the trial court is not a substitute for a statement of decision unless the trial court expressly deems it to be so. If a trial court refuses to render a statement of decision or refuses to correct a deficient statement of decision, the court's refusal is reversible error.

MISTAKE NO. 7: Not moving for a new trial on the grounds of excessive damages

In the great majority of cases, it is not necessary to file post-trial motions for either judgment not withstanding the verdict or new trial in order to preserve an issue for appeal. There is, however, one important exception. Arguments based upon excessive or inadequate damages must first be made in a motion for new trial or they cannot be raised for the first time on appeal. See CCP § 657(5). See also *Christiansen v. Roddy* (1986) 186 Cal. App.3d 780, 789. A new trial motion is not usually necessary, on the other hand, to make other types of damages arguments on appeal -- for example, that the court applied the wrong measure of damages or improperly instructed the jury as to damages.

MISTAKE NO. 8: Inviting error

Here, the general principle is clear: an appellant cannot complain about an error that it created (or invited). Classic examples of invited error would be a jury instruction you requested, a verdict form you submitted, or reliance upon evidence that you objected to at trial. In this sense, "invited error" is just another name for estoppel. See *Mesecher* v. *County of San Diego* (1992) 9 Cal.App.4th 1677, 1686: "Where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error."

On the other hand, one of the more generous principles of California law is that not objecting to an incorrect jury instruction is not invited error. Nor, as discussed above, does failing to object to an erroneous instruction waive that issue for review on appeal. Neither does requesting a fall-back instruction when the court refuses to give a proper instruction that you requested, or requesting an instruction only because the court erroneously refused to exclude some particular issue at trial. See *Horseman's Benevolent & Protective Association* v. *Valley Racing Association* (1992) 4 Cal.App.4th 1538, 1555.

MISTAKE NO. 9: Accepting the benefits of a judgment/voluntary compliance

Despite standing to appeal from an appealable judgment or order, a party may lose the right to appeal by complying with, or accepting the benefits of, the judgment. This does not often happen, but you might be surprised. For example, under certain circumstances, paying a judgment could run the risk of waiving the right to appeal. However, the court of appeal will imply a waiver only if the payment is either by way of compromise, or coupled with a voluntary agreement not to appeal. The court will not imply a waiver where compliance with or satisfaction of the judgment was compelled or coerced by threat of execution (for example, where a judgment debtor pays a judgment to avoid posting security on appeal). To be safe, the judgment debtor may want to wait until execution is actually threatened and then get the creditor's agreement that payment does not constitute waiver of the right to appeal.

There is also a risk that by voluntarily accepting all or part of the benefits of the judgment, a party impliedly waives the right to appeal. For the court of appeal to find waiver, the appellant must have clearly, unmistakably, unconditionally and voluntarily acquiesced in the judgment by accepting its benefits. Even then, there are numerous exceptions to the rule.

MISTAKE NO. 10: Not requesting reconsideration from the court of appeal

One last pitfall: the need to pay attention to preserving the record does not necessarily end in the trial court. One important issue of record preservation may come into play if you lose in the court of appeal and intend to petition the California Supreme Court for review. Here's how. If you intend to petition the Supreme Court for review of any issue or material fact that was omitted from or misstated in the opinion of the court of appeal, you must first file a motion for reconsideration by the court of appeal. See Rule 29(b)(2), Cal. Rules of Court: the Supreme Court will not normally consider "any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for hearing." In addition, Rule 29(b)(1) generally provides that the Supreme Court likewise will not ordinarily not review any issue that could have been, but was not, timely raised in the briefs in the court of appeal.

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Practice Areas

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