

By Benjamin G. Shatz

- › Make sure the case record is full and complete
- › Objections not made are waived
- › The presumption on appeal is that the trial court ruled correctly

## Preserving Issues for Appeal

The daily heat generated by a litigation battle can distract litigators from focusing on what is around the corner, let alone miles down the road.<sup>1</sup> Failing to plan ahead, however, can prove fatal to an effort to secure appellate relief.<sup>2</sup>

One of the most fundamental maxims of appellate review is “If it’s not in the record, it doesn’t exist.”<sup>3</sup> This rule lies at the heart of what appellate courts do: They examine whether the trial court erred by reviewing the record of what happened in the lower court.<sup>4</sup> The record consists of what was “said” (the reporter’s transcript of the hearing or trial) and what was “read” (the pleadings, motions, exhibits, and other written materials presented to the trial court). Without a record, there is simply nothing to review.<sup>5</sup> It is essential, therefore, for the record to fully reflect any meaningful aspect of the case.<sup>6</sup>

Without careful attention to creating and preserving the record, a future appeal may be lost before it even begins. To help prevent such an unfortunate occurrence, practitioners should follow several basic tips for preserving the record for appeals to California’s appellate courts.<sup>7</sup>

**Unreported events.** The classic example of an important record omission is the “off the record” sidebar conference or meeting in the judge’s chambers. What transpires in these exchanges—for example, a ruling on the admissibility of a vital piece of evidence—may be critical to the case. But if the discussion does not appear in the record, it never happened for appellate purposes and cannot be reviewed.<sup>8</sup>

To avoid this problem, insist that the court reporter record all interactions with the judge and opposing counsel.<sup>9</sup> When that is not possible, memorialize unreported requests and rulings once everyone is “back on” the record. Moreover, submit a pro-

posed order or file a reconsideration motion to create a written record as well.

**Waiving issues.** The cardinal rule of record preservation is the familiar “raise it or waive it” formulation: Objections not made are waived.<sup>10</sup> A reasonable philosophical foundation underlies this rule. Requiring points of error to be raised with the trial court provides a fair opportunity for the judge to correct the errors and potentially avoid the need for appellate review.<sup>11</sup> Conversely, even without a change in the trial court’s ruling, raising the error at least prompts the trial court to consider the ruling and provide reasons supporting it—a process that is useful for the appellate court.

A waiver may be express—such as agreeing with the trial court’s action—or implied—such as acquiescing in the trial court’s action without objection.<sup>12</sup> Either way, the issue will be precluded from consideration on appeal.

**Preserving evidentiary issues.** Evidentiary issues emerge from either of two situations: Your attempt to admit evidence was thwarted, or your opponent succeeded in having improper evidence admitted. In both circumstances, affirmative steps are required to preserve the issue for review.

To preserve a claim of erroneous exclusion, the thwarted party must object to the court’s exclusionary ruling and make an offer of proof.<sup>13</sup> This entails explaining what the excluded evidence is and what it would have shown.<sup>14</sup> Without this context, the appellate court will never understand precisely what was rejected from evidence and why that rejection matters.<sup>15</sup> If the offer of proof involves a document or some other type of tangible exhibit, the exhibit should be marked for identification in order to ensure

its inclusion in the record.

Similarly, to complain about the erroneous admission of an opponent’s evidence on appeal, you must make a timely, proper



objection to the introduction of that evidence when it is offered—and the objection preferably should be coupled with a motion to strike the evidence as improperly admitted.<sup>16</sup> A proper objection provides specific grounds for excluding the evidence.<sup>17</sup>

The ultimate goal is to create a full and complete record of the evidentiary dispute, enabling an appellate court to review precisely what happened and what might have happened had the evidentiary offer been handled differently. This step includes obtaining a definitive, final ruling.<sup>18</sup> Beware of the wishy-washy ruling in which the judge denies admission momentarily but leaves the door open for admission later. When this happens, without a repeated attempt to admit the evidence and a subsequent defini-

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tive ruling, any error may be waived.<sup>19</sup>

**Summary judgment.** Evidentiary objections also are required to preserve evidentiary errors relating to summary judgment motions. The summary judgment statute provides that objections to declarations or affidavits are deemed waived if not made at the hearing on the motion.<sup>20</sup> Objections may be made in writing and filed before the hearing or at the hearing.<sup>21</sup> Again, merely making an objection is not enough: Preserving errors for appeal requires obtaining a final ruling. Without a final ruling, objections are deemed waived.<sup>22</sup>

**Case theories and issues.** Because appellate courts are in the reviewing business, they do not take kindly to parties raising new legal theories or issues on appeal.<sup>23</sup> For that reason, ensure that the topics and arguments for appeal are raised in the trial court.<sup>24</sup> While it is true that appellate courts may consider pure issues of law based on undisputed facts on appeal,<sup>25</sup> the safest approach is to get the issues in the record.

**Jury instructions.** Jury instructions are a fertile ground for error. Although the Code of Civil Procedure provides that jury instructions are “deemed excepted to,” the careful advocate will not rely on this built-in statutory objection.<sup>26</sup> Case law has limited the scope of this automatic objection—and it has dangerous exceptions.<sup>27</sup> The statutory objection does not preserve an objection to a jury instruction if the aggrieved party provided the same or similar instruction.<sup>28</sup> Nor does it preserve error if the instruction is correct as a matter of law but incomplete, and the aggrieved party failed to offer clarifying language.<sup>29</sup> Therefore, if a jury instruction is wrong in some way, make a full record by objecting, explaining the basis for the objection and, if appropriate, proposing an alternative instruction.

**Improper jury arguments.** With respect to misconduct by counsel or improper jury arguments, make a proper objection, and request an admonishment.<sup>30</sup> Further, request a mistrial to prevent the argument that the claim was waived.<sup>31</sup>

**Bench trials.** Bench trials may avoid preservation issues related to juries, but they create issues of their own. If the losing party at a bench trial fails to timely request a statement of decision, the appellate court will assume that the trial court made whatever findings were necessary to support the judgment.<sup>32</sup> Similarly, once a statement of decision issues, a party wishing to raise omissions or ambiguities in the statement

on appeal must object to the statement or else a waiver applies.<sup>33</sup>

**Challenging damages.** To challenge the amount of damages on appeal as either excessive or inadequate, the appellant must first raise the issue by way of a motion for a new trial.<sup>34</sup>

**Trial exhibits.** Materials not presented to the trial court generally cannot be presented

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to the appellate court. This makes sense because the appellate court’s function is to review what happened in the trial court, not provide an opportunity for a do-over. It would be unfair for an appellate court to reverse a trial judge based on materials the trial judge never saw in the first place.<sup>35</sup> Accordingly, all exhibits must be marked for identification, and you should ensure the integrity of those exhibits after trial.<sup>36</sup>

Remember, the presumption on appeal is that the trial court ruled correctly. The appellant bears the burden of demonstrating prejudicial error by citing to the record.<sup>37</sup> This can be done only if there is a record to cite and if the issues on appeal have not been waived. ■

<sup>1</sup> North Coast Bus. Park v. Nielsen Constr. Co., 17 Cal. App. 4th 22, 28-29 (1993).

<sup>2</sup> For further information on record preservation in California courts, see IMRE & SCHIAVELLI, PRESERVING THE RECORD FOR APPEAL, CALIFORNIA CIVIL APPELLATE PRACTICE 3d, ch. 2A (2004); CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS & WRITS §§8:170–8:280 (2004).

<sup>3</sup> Protect Our Water v. Merced County, 110 Cal. App. 4th 362, 364 (2003) (stating three immutable rules of appellate practice: “[F]irst, take great care to prepare a complete record; and second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two.”); Pulver v. Avco Fin. Servs., 182 Cal. App. 3d 622, 632 (1986).

<sup>4</sup> In re Zeth S., 31 Cal. 4th 396 (2003).

<sup>5</sup> Rancho Santa Fe Ass’n v. Dolan-King, 115 Cal. App. 4th 28, 46 (2004).

<sup>6</sup> Hernandez v. California Hosp. Med. Ctr., 78 Cal. App. 4th 498, 502 (2000).

<sup>7</sup> For record preservation doctrines in federal practice, see FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE §§7:80–7:198 (2002).

<sup>8</sup> Marriage of Dunn, 103 Cal. App. 4th 345, 348 (2002).

<sup>9</sup> Furthermore, ensure that all deposition transcripts read aloud and all videotapes played at trial are transcribed for direct insertion into the record.

<sup>10</sup> Telles Transp. v. WCAB, 92 Cal. App. 4th 1159, 1167 (2001).

<sup>11</sup> Doers v. Golden Gate Bridge Dist., 23 Cal. 3d 180, 185 n.1 (1979); JRS Prods. v. Matsushita Elec. Corp., 115 Cal. App. 4th 168, 178 (2004).

<sup>12</sup> Marriage of Hinman, 55 Cal. App. 4th 988, 1002 (1997); Sperber v. Robinson, 26 Cal. App. 4th 736, 742-

43 (1994); Nevada County Office of Educ. v. Riles, 149 Cal. App. 3d 767, 779 (1983).

<sup>13</sup> In re Mark C., 7 Cal. App. 4th 433, 444 (1992).

<sup>14</sup> Heimer v. Kmart Corp., 84 Cal. App. 4th 335, 344 (2000); Tudor Ranches v. SCIF, 65 Cal. App. 4th 1422, 1433 (1998).

<sup>15</sup> EVID. CODE §354.

<sup>16</sup> EVID. CODE §353(a).

<sup>17</sup> *Id.*

<sup>18</sup> Juarez v. BSA, 81 Cal. App. 4th 377, 398 n.7 (2000).

<sup>19</sup> Ford v. Carew & English, 89 Cal. App. 2d 199, 208 (1948).

<sup>20</sup> CODE CIV. PROC. §§437c(b)(5), 437c(d).

<sup>21</sup> CAL. R. OF CT. 343, 345.

<sup>22</sup> CODE CIV. PROC. §437c(d); Sharon P. v. Arman, Ltd., 21 Cal. 4th 1181, 1186 n.1 (1999).

<sup>23</sup> North Coast Bus. Park v. Nielsen Constr. Co., 17 Cal. App. 4th 22, 29 (1993).

<sup>24</sup> Brown v. Boren, 74 Cal. App. 4th 1303, 1316 (1999).

<sup>25</sup> Ward v. Taggart, 51 Cal. 2d 736, 742 (1959); Yeap v. Leake, 60 Cal. App. 4th 591, 599 n.6 (1997).

<sup>26</sup> CODE CIV. PROC. §647.

<sup>27</sup> Susman v. BMW, 23 Cal. App. 4th 1, 9 (1994).

<sup>28</sup> Indeed, in that instance the appellant is estopped from raising the instructional error. Henderson v. Harnischfeger Corp., 12 Cal. 3d 663, 670 (1974); Stevens v. Owens-Corning Fiberglas, 49 Cal. App. 4th 1645, 1653-55 (1996).

<sup>29</sup> Conservatorship of Gregory, 80 Cal. App. 4th 514, 520-21 (2000).

<sup>30</sup> Cassim v. Allstate Ins., 33 Cal. 4th 780, 794-95 (2004).

<sup>31</sup> Of course, to complain about an improper argument, the record must include a transcript of the argument. Calhoun v. Hildebrandt, 230 Cal. App. 2d 70, 71-72 (1964).

<sup>32</sup> CODE CIV. PROC. §§632, 634; CAL. R. OF CT. 232(b).

<sup>33</sup> Marriage of Arceneaux, 51 Cal. 3d 1130, 1133-34 (1990).

<sup>34</sup> CODE CIV. PROC. §657(5); Los Angeles County v. Southern Cal. Edison, 112 Cal. App. 4th 1108, 1121 (2003).

<sup>35</sup> JRS Prods. v. Matsushita Elec. Corp., 115 Cal. App. 4th 168, 178 (2004).

<sup>36</sup> See Hiser v. Bell Helicopter, 111 Cal. App. 4th 640, 656-67 (2003); Western Aggregates v. Yuba County, 101 Cal. App. 4th 278, 291 (2002).

<sup>37</sup> CAL. R. OF CT. 14(a)(1)(C).