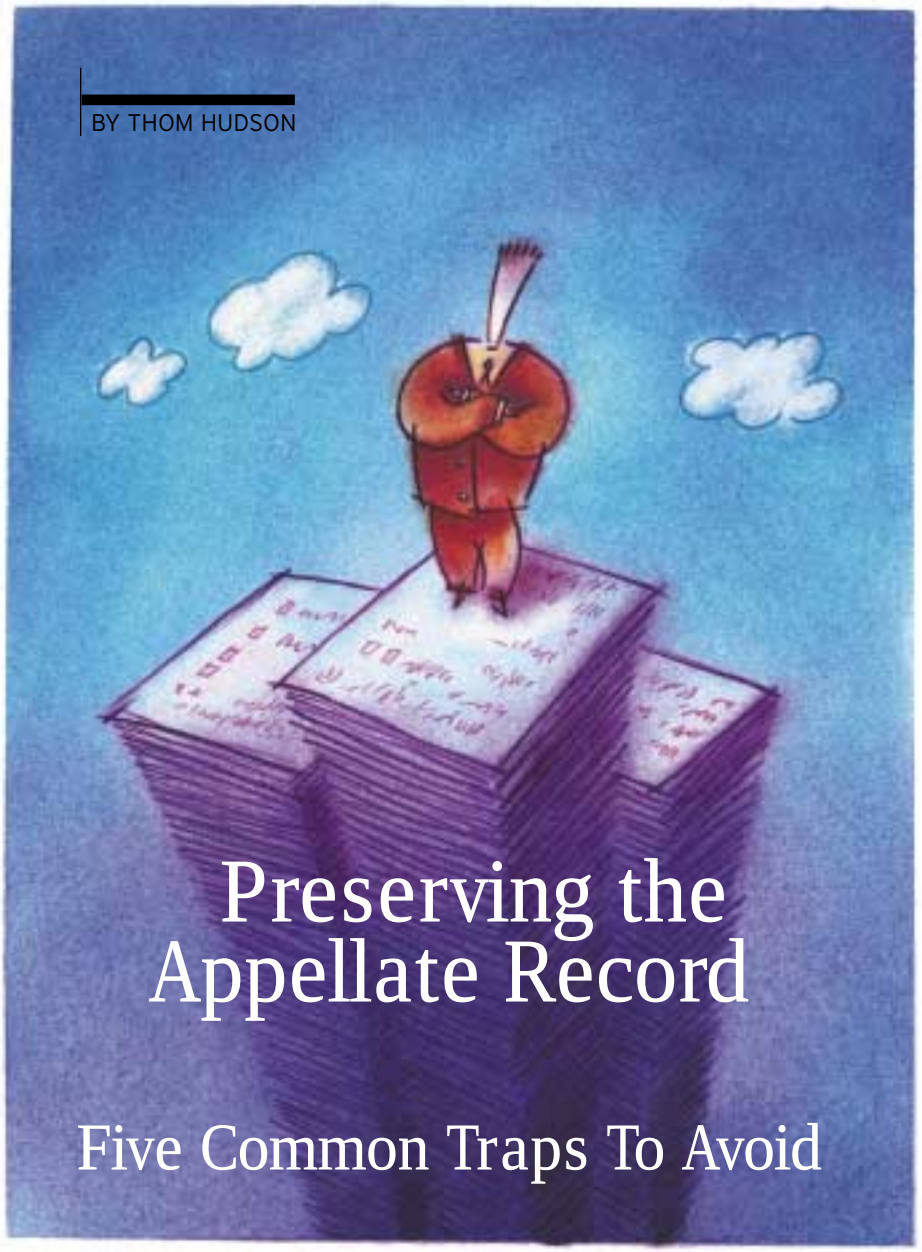

BY THOM HUDSON

Preserving the Appellate Record

Five Common Traps To Avoid

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

This article focuses on five areas of preserving the record in civil matters that are often unintentionally overlooked by trial counsel, rather than part of an overall strategy.[3] It is based on reviewing trial transcripts from trials in Arizona Superior Court. Some of the areas addressed have become issues only recently due to changing trial practice and technology. Others have plagued practitioners for some time.

Deposition and Video Excerpts

In Arizona Superior Court, depositions may be read in evidence regardless of witness availability.[4] 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.

But using depositions creates a record trap. Keep in mind, the mere listing of deposition designations in the 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 indicate precisely which *portions* of a particular deposition were read in evidence, and the record must, somewhere, include the deposition text actually read. However, some court reporters, unless requested, will not note such information. The following are real examples taken from transcripts of recent trials:

- "(A segment of a videotape was played for the jury.)"
- "(Portions of the deposition of [WITNESS] taken on January 21, 1999, 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] And depositions may provide some of the best evidence at trial: They often demonstrate specific facts necessary to establish a claim or reveal severe credibility issues. Such gaps in the record should thus be avoided.

Ensuring that the record correctly reflects the deposition excerpts in evidence requires some vigilance—and cooperation 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 non-signa-

ture) so that the read text is in the record.

Alternatively, ask the court reporter (if he or she is willing) to 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 trial 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 page and line number) any read portions, along with the pertinent deposition transcripts.

Sidebar Rulings and Discussions

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.[6]

Thus, either ensure that the transcript reflects all sidebar conversations, or create a record concerning any significant sidebars (either at the beginning or end of the day or during a recess after letting the court know you need to make a record). Many lawyers maintain a separate list of "make record" items during the trial to ensure the record is made.

Issues in Unsuccessful Summary Judgment Motions

If the Superior Court grants summary judgment in one party's favor, the other side can appeal the summary judgment ruling.[7] However, the denial of summary judgment is ordinarily not an appealable order, either at the time of the order or after a final judgment has been entered.[8] This rule creates another record trap.

To preserve for appeal the argument that a party is entitled to judgment as a matter of law on the grounds set forth in a summary judgment motion, move for judgment as a matter of law at the close of evidence 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 it would change its position. This motion can be renewed after the jury returns the verdict,[9] but renewal of the motion is not required to preserve the issue for appeal.[10]

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.[11] The tricky 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.[12] It must therefore 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' deposition (which should 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 ensure an adequate record. But regardless of the method, 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 fundamental error, result in a waiver of the objection.[13]

Rule 51(a), ARIZ.R.CIV.P., sets forth the procedures governing jury instructions:

> Prior to the commencement of a jury trial or at such other time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Counsel shall be deemed to have waived request for other instructions except those which could not reasonably have been anticipated prior to trial. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

But the rule is more difficult to follow than its language suggests. In practice, complying with Rule 51(a) requires following four steps. First, submit written jury instruc-

tions on every anticipated issue before the trial begins or as the court directs. As the Rule notes, failure to do so "shall be deemed" a waiver with respect to any other instructions "except those which could not reasonably have been anticipated prior to trial."[14]

Second, object to the objectionable instructions submitted by other parties. Ideally, submit all 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,[15] and make the objections concerning instructions specific; general objections simply will not do.[16] For example, consider the following instruction: "The power company may exercise reasonable care for the protection of lives of others … *regardless of the difficulty or expense.*" Although the italicized part of the instruction incorrectly states Arizona law, a general objection that the instruction is "an incorrect statement of the law" is not sufficient to preserve the issue for appeal.[17] Counsel must identify the particular portion of the instruction that is objectionable and must state why it is objectionable. Similarly, if the instruction is objectionable for more than one reason, one must specify *each* of the reasons in detail.[18]

Third, when challenging the wording of an instruction—for example, if the instruction inaccurately states the "evil mind" necessary for an award of punitive damages—submit a proposed alternative.[19]

But keep in mind when submitting alternatives that submitting an instruction on a claim may be deemed an admission that sufficient evidence supports the claim.[20] 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.

Finally, make any final objections after the court settles the instructions. Under Rule 54(b), 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.[21]

In making the record on the jury instructions, also keep in mind the governing standards of review. An appellate court "will affirm the jury instructions if, taken as a whole, they provide the jury with the correct rules for reaching its decision."[22] But "in reviewing whether a requested jury instruction should have been given, [the appellate court] must look at the evidence in the light most favorable to the requesting party, and if there is any evidence tending to establish the theory proposed in the instruction, it should be given even if there are contradictory facts presented."[23] Thus although the Arizona Court of Appeals overturns 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.[24] The Court of Appeals "may only consider the matters in the record before [it]," and "[a]s to matters not in [its] record, [the Court of Appeals will] presume that the record before the trial court supported its decision."[25] It is thus important to take steps throughout the course of litigation to ensure that a proper record is being developed. But as a final step, 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 an appellant's responsibility to include in the record on appeal 'such parts of the proceedings as he deems necessary.'"[26]

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endnotes

1. *See, e.g., Hutcherson v. City of Phoenix,* 961 P.2d 449 (Ariz. 1998) (explaining that an appellate court "review[s] the evidence in the light most favorable to upholding the jury verdict").
2. *See, e.g., GH Dev. Corp. v. Community Am. Mortgage Corp.*, 795 P.2d 827 (Ariz. Ct. App. 1990) (Court of Appeals refused to consider deposition transcripts filed with the trial court after judgment was entered).
3. By far the most common record preservation issue concerns failing to make appropriate and timely evidentiary objections. This article concerns inadvertent failures, recognizing that counsel often intentionally do not object because of the effect of such objections on the jury.
4. Rule 32(a), ARIZ.R.CIV.P. *Compare* Rule 32(a)(3), FED.R.CIV.P. (limiting the use of nonparty depositions unless the witness is unavailable or "exceptional circumstances" exist).
5. *Cf. Ashton-Blair v. Merrill,* 928 P.2d 1244, 1246 (Ariz. Ct. App. 1996) ("We may only consider the matters in the record before us. As to matters not in our record, we presume that the record before the trial court supported its decision.").
6. *See Spillios v. Green,* 671 P.2d 421, 424 (Ariz. Ct. App. 1983) ("If lawyers want to preserve the record for appellate review, they must make sure that their arguments to the trial judge are being transcribed by the court reporter and that any ruling is in the record."); *cf. Van Dever v. Sears, Roebuck & Co.*, 629 P.2d 566, 568 (Ariz. Ct. App. 1981) (refusing to address issue allegedly raised in oral motion for directed verdict that was not transcribed in the record).
7. A.R.S. § 12-2101(B).
8. *Sorensen v. Farmers Ins. Co. of Arizona,* 957 P.2d 1007, 1008-09 (Ariz. Ct. App. 1997) ("It is … well-settled that a denial of a motion for summary judgment is not considered to be a final judgment and, consequently, it is unappealable."); *Francini v. Phoenix Newspapers, Inc.*, 937 P.2d 1382, 1390 (Ariz. Ct. App. 1996) ("Ordinarily, this Court does not review the denial of a motion for summary judgment, even in connection with a proper appeal of a later appealable order or judgment."). But there is an exception to this rule if the "denial was made strictly on a point of law, and that because of such ruling the losing party thereafter was precluded from offering

evidence or urging the point at the time of trial on the merits." *Navajo Freight Lines, Inc. v. Liberty Mut. Ins. Co.*, 471 P.2d 309 (Ariz. Ct. App. 1970).

9. *See* ARIZ.R.CIV.P. 50(b).
10. *See de la Cruz v. State*, 961 P.2d 1070, 1071 (Ariz. Ct. App. 1998).
11. *See* ARIZ.R.EVID. 103(a)(2): "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."
12. *See generally* JOSEPH M. LIVERMORE, ET AL., ARIZONA LAW OF EVIDENCE § 103.3, at 8 (4th ed. 2000).
13. *Data Sales Co. v. Diamond 2 Mfg.*, 74 P.3d 268, 275 (Ariz. Ct. App. 2003).
14. ARIZ.R.CIV.P. 51(a).
15. *Edward Greenband Enters. of Arizona v. Pepper*, 538 P.2d 389, 392 (Ariz. 1975).
16. *S. Dev. Co. v. Pima Capital*, 31 P.3d 123, 132 (Ariz. Ct. App. 2001); *Rhue v. Dawson*, 841 P.2d 215, 224 (Ariz. Ct. App. 1992).
17. *Grant v. Arizona Pub. Serv.*, 652 P.2d 507, 519 (Ariz. 1982).
18. *Bahman v. Estes Homes*, 710 P.2d 1087, 1089 (Ariz. Ct. App. 1985) ("When the objection to an instruction in the trial court is on a different basis from that urged on appeal, the reviewing court will not reverse for other error in such an instruction.").
19. *White v. Mitchell*, 759 P.2d 1327 (Ariz. Ct. App. 1988).
20. *See Walter v. Simmons*, 818 P.2d 214 (Ariz. Ct. App. 1991). *Walter* was decided before the 1995 "jury reform" amendments that generally require parties to submit jury instructions before the trial begins. It is unclear that a party submitting an instruction before any evidence had been presented would be deemed to have conceded. There is sufficient evidence for the claim set forth in the instruction.
21. *See Data Sales Co.*, 74 P.3d at 275 (finding that a party had waived challenge to the court's refusal to give three requested instructions because the party "did not make any objections to the jury instructions ultimately given by the court").
22. *Lifeflite Med. Air Transp., Inc. v. Native Am. Air Servs., Inc.*, 7 P.3d 158, 160 (Ariz. Ct. App. 2000).
23. *Willett v. Ciszek-Olsen*, 823 P.2d 97, 98 (Ariz. Ct. App. 1991).
24. *See Plattner v. State Farm Mut. Auto. Ins. Co.*, 812 P.2d 1129, 1137 (Ariz. Ct. App. 1991) (noting that it is the appellant's "burden to see that all documents necessary to his arguments on appeal were made part of the record on appeal").
25. *Ashton-Blair v. Merrill*, 928 P.2d 1244, 1246 (Ariz. Ct. App. 1996).
26. *In re Property at 6757 S. Burcham Ave.*, 64 P.3d 843 (Ariz. Ct. App. 2003), *quoting* ARIZ.R.CIV.APP.P. 11(b)(1).