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Four Easy Ways to Lose Your Ninth Circuit Appeal During Trial

BY THOMAS L. HUDSON

Jury verdicts receive a variety of presumptions on appeal that make overturning them a challenge. The content and quality of the record often affects whether such presumptions will carry the day. However, 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 a powerful issue on appeal (or one important to the defense of the appeal) to go by the wayside. By the time the appeal is under way, it is generally too late to correct such oversights.

This article highlights four pitfalls that plague civil matters and that may turn what might otherwise be a strong appeal into a sure loser.

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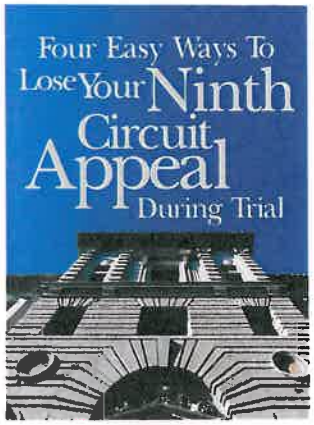


Record of Depositions Used at Trial

Although for good reasons it is quite popular to use depositions during trial, doing so creates a potential record trap. In particular, the mere listing of deposition designations in the joint pretrial order does not mean that they were read in evidence. To be of use on appeal, the record must indicate precisely which portions of a particular deposition were read in evidence (or played to the jury in a video), and the record must, somewhere, include the deposition text actually read (or played). However, some court reporters, unless requested, will not note such information. Here are some real examples:

- (A segment of a videotape was played for the jury.)
- (Portions of the deposition of [WITNESS] taken on January 21, 2010, 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. And such a gap may prove fatal if, for example, the missing testimony provided the foundation for a requested jury instruction.

To avoid such problems, ensure that the record correctly reflects all deposition excerpts, including those used for impeachment. 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-signature) 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 judges) discourage this method, it creates the cleanest record. 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.

Rule 50(a) and Post-Verdict Motions

The denial of a motion for summary judgment or a motion for judgment as a matter of law often provides good fodder for an appeal. But there are a number of traps that may prevent such issues from getting the consideration they deserve. For starters, the denial of summary judgment, subject to a few exceptions, is not an appealable order (either at the time of the order or even after a final judgment has been entered).[1] To preserve the issue for appeal, a party must generally, as an initial matter, move for judgment as a matter of law during trial pursuant to Rule 50(a) and include all reasonable grounds asserted in the unsuccessful summary judgment motion. However, the denial of a Rule 50(a) motion is also generally not an appealable order.[2] Accordingly, to preserve the issue, a party must also timely renew the Rule 50(a) motion in a Rule 50(b) motion.[3] An appeal can then be taken from the denial of the Rule 50(b) motion.

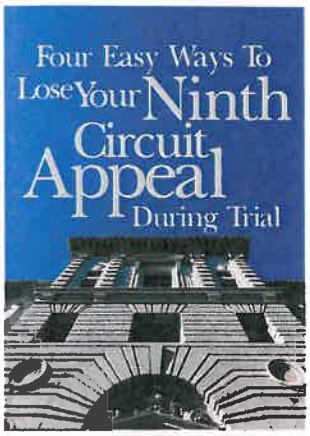
The rules governing Rule 50 also come into play anytime a party challenges the sufficiency of the evidence (regardless of whether an earlier summary judgment motion was made).[4] Consequently, any time a party intends to challenge the sufficiency of the evidence with respect to some issue, the party must make a Rule 50(a) motion during trial and renew it in a Rule 50(b) motion after entry of the final judgment.[5] And only those arguments made in the Rule 50(a) motion may be renewed.[6]

Paying close attention to these rules is important because they are strictly enforced.[7] In fact, absent a proper Rule 50(b) JMOL motion, an "appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand."[8] Consequently, the failure "to comply with Rule 50(b) forecloses" any "challenge to the sufficiency of the evidence."[9]

Definitive Ruling During Trial on Potential Appeal Issues

With few exceptions, the Ninth Circuit, like other appellate courts, only reviews whether the district court erred or abused its discretion in connection with a particular ruling. As a consequence, it is critical to obtain a clear ruling on all issues during trial.[10]

Motions *in limine* seem to create the most problems. The denial of a motion *in limine* may be appealed, but only if the district court makes a definitive ruling.[11] In all other cases, any objection made in the motion *in limine* will be considered waived unless the objection is also renewed (and ruled upon) during trial. So when the district court indicates, for example, that it is inclined to grant or deny the motion, but will need context to rule, the objection must be renewed during trial.[12]



Appropriate Record Concerning Jury Instructions

In most civil cases, both sides submit instructions, and disagreements ensue. On appeal, issues can arise over whether a party has properly preserved an objection to the district court's giving or failure to give an instruction. The good news is that the proper procedure for preserving jury instruction issues is now detailed in Federal Rule of Civil Procedure Rule 51.

In 2003, Rule 51 was revised "to capture many of the interpretations that [had] emerged in practice," including ones not "anchored in the text of Rule 51."[13] Rule 51 now specifies in detail (1) when requests must be made (generally before or at the close of the evidence on an issue), (2) what the court must do (inform the parties of the proposed instructions and give the parties an opportunity to object), (3) how and when to make objections (on the record with specificity during the charge conference or promptly after learning of an instruction if there was not a prior opportunity), and (4) how to assign error.[14] In addition, Rule 51 explicitly embodies a "plain error" exception, but you never want to have to rely on that, particularly in a civil case.[15]

The text of Rule 51 accordingly makes clear that failing to request an instruction that you believe the evidence supports, failing to object if the requested instruction is not given, and failing to object to an instruction actually given can all result in waiver.

Litigants, however, often still get bit by Rule 51's requirements. For example, because it is the district court's "proposed instructions and proposed action on the requests" that require an objection, merely objecting to your opponent's proposed instruction before the district court indicates that it plans to give the instruction may not suffice.[16]

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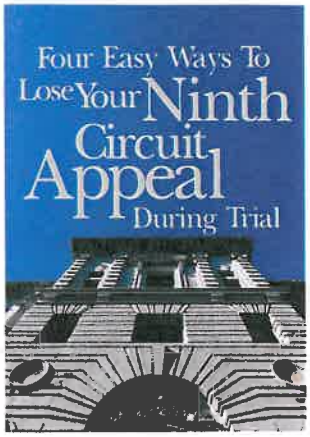
In addition, to preserve a challenge to the district court's refusal to give a requested instruction, a party must not only "properly request[]" a proposed instruction, but also must generally object to the district court's "proposed action" on the request.[17] Although Rule 51 does not require a renewed objection if the district court rejects a requested ruling in an earlier "definitive ruling on the record," renewing the objection makes for a cleaner record and avoids any issue of waiver. In one case, for example, the litigants on appeal disagreed so much about jury instruction issues that the Ninth Circuit, after deciding to remand, advised the parties and district court to make a cleaner record at the next charge conference:

> [G]iven the parties' manifest willingness endlessly to dispute on appeal who argued what and when, and who presented what in the multiple conferences on instructions, we would advise both the district court and the parties—now that they will have a fresh start—to take great care to respect Rule 51 and to leave nothing either to inference or to the imagination.[18]

The Ninth Circuit's advice—to "leave nothing either to inference or to the imagination"—should be heeded in any case. The Ninth Circuit prides itself as one of "the strictest enforcer[s] of Rule 51."[19] As a consequence, it will find waiver if an objection lacks specificity or pertains to a different ground than the objection made at trial.

In one case, for example, the district court held three charge conferences on the jury instructions, but only the "third and final conference was formal and on the record."[20] Unfortunately for the appellant, at that conference the party "only objected to the 'last sentence on



paragraph 2' of Instruction 15," which assigned error to a portion of an instruction not challenged on appeal.[21] Unsurprisingly, the Ninth Circuit found the assignments of error waived.[22] The Ninth Circuit also found the party's "general objection" to the district court's failure to use its "proposed instructions" insufficient to preserve a challenge to the district court's refusal to give a particular instruction.[23]

Conclusion

If it is not in the record, it does not—for appellate purposes—generally exist. Accordingly, plan your potential appeal issues early, and make the appropriate record. And hopefully when you prevail at trial, and become the appellee, you can note your opponent's failure to preserve the issues raised on appeal.

endnotes

1. *See Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1359 (9th Cir. 1987) (holding that the denial of a motion for summary judgment is not reviewable on an appeal from a final judgment entered after a full trial on the merits); *Millender v. County of Los Angeles*, 620 F.3d 1016, 1023 (9th Cir. 2010) (noting the exception to the general rule "where the motion is based on a claim of qualified immunity"); *F.B.T. Productions, LLC v. Aftermath Records*, 621 F.3d 958, 963 (9th Cir. 2010) (Ninth Circuit may review "the district court's denial of summary judgment despite full trial on the merits" when it turns on a question of law that if correctly decided would have required the district court to grant the motion).
2. *See Unitherm Food Sys., Inc. v. Swift-Ekrich, Inc.*, 546 U.S. 394, 400-401 (2006); *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003).
3. *Unitherm*, 546 U.S. at 405; *Freund*, 347 F.3d at 761.
4. Rule 50(a) previously required "a party to move for judgment as a matter of law after the opposing party has been fully heard and prior to the submission of the case to the jury." *Freund*, 347 F.3d at 761. In 2006, Rule 50 was amended so that the Rule 50(a) motion need not be made "at the literal close of all the evidence." *See* FED.R.CIV.P. 50 Comment to 2006 Amendment.
5. *Freund*, 347 F.3d at 761.
6. *Id.* (explaining that because Rule 50(a) is designed to alert the non-moving 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.").
7. *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 887 (9th Cir. 2002 (Ninth Circuit "strictly" enforces Rule 50's requirements).
8. *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 218 (1947); *see also Desrosiers v. Flight Int'l of Fla, Inc.*, 156 F.3d 952, 957 (9th Cir. 1998).
9. *Unitherm*, 546 U.S. at 404. Although one still may be able to file a motion for new trial on the ground that the verdict is against the weight of the evidence, the denial of a motion for new trial is reviewed for an abuse of discretion. *See Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1013 (9th Cir. 2007); *cf. Unitherm*, 546 U.S. at 402 (Rule 50(b) permits a party to "alternatively request a new trial" under Rule 59, but "a party may only pursue on appeal a particular avenue of relief available under Rule 50(b), namely the entry of judgment *or a new trial*, when that party has complied with the Rule's filing requirements by requesting that particular relief below.").
10. *See, e.g., Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066-67 (9th Cir. 1996) ("We conclude Pacific Lumber waived its *Daubert* objections to EPIC's scientific evidence of impaired breeding by failing to request a ruling on the admissibility of the evidence in the district court.").
11. *See* FED.R.EVID. 103 ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."); *see also United States v. Pablo-Varela-Rivera*, 279 F.3d 1174, 1177 n.2 (9th Cir. 2002) (explaining the 2000 amendment to FED.R.EVID. 103 that included this change).
12. *See, e.g., Scott v. Ross*, 140 F.3d 1275, 1285 (9th Cir. 1998) ("issue of admissibility ... not properly preserved for review because the district court's ruling lacked the necessary definitiveness" in that the court indicated a willingness to consider objections to specific testimony at trial).
13. FED.R.CIV.P. 51 Comment to 2003 Amendments.
14. FED.R.CIV.P. 51(a), (b), (c), and (d).
15. FED.R.CIV.P. 51(d). The Ninth Circuit also recognizes a "pointless formality" exception, *e.g., Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1012 n.10 (9th Cir. 2004), but that is also a risky exception to rely upon.
16. FED.R.CIV.P. 51(b), (d).
17. *See* FED.R.CIV.P. 51(b)(1), 51(d)(1)(B).
18. *Medtronic, Inc. v. White*, 526 F.3d 487, 499 (9th Cir. 2008).
19. *Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 713 (9th Cir. 2001) (citation omitted).
20. *Snake River Valley Elec. Assoc. v. Pacificorp*, 357 F.3d 1042, 1053 (9th Cir. 2004).
21. *Id.*
22. *Id.*
23. *Id.*; *see also Voohries-Larson*, 241 F.3d at 713-14 (explaining that to require Rule 51's specificity requirement an objection must be "sufficiently precise to alert the district court not only that the instruction was defective, but that it was defective" for the reasons urged on appeal).