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Appellate Tips

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Make Sure You Have A Complete Transcript For Appeal
By: Eileen Dennis GilBride and Jennifer B. Anderson

The appealing party has the burden of providing the appellate court with the record to support his/her argument on appeal. Sometimes you will need the entire transcript to support your argument – for example, if you want to argue that the evidence is insufficient to support the verdict. Other times, the judge will have made important comments and rulings before trial begins or after it ends that day, or between witnesses. You might also need the arguments on a rule 50 motion made in the middle of trial. Whatever the circumstance, it is critical for the appealing party to have complete transcripts so that the appellate courts can determine what happened at trial. One of the biggest gaps in trial court records occurs when parties fail to ensure that a court reporter reports bench conferences, at least those you know relate to a critical issue. If an appellate lawyer attends a big trial, he or she can help make sure the record looks good for the court of appeals while you make sure the case looks good for the jury. Here are some examples of areas where the record could become unclear.

Speak clearly at trial to avoid post-trial arguments as to what was really said. Mistakes can be made regardless of whether the record is being captured by a court reporter or FTR. One time, for example, "in the fall" was transcribed as "at fault" – a potential disaster.

Using technology in the courtroom is a tremendous help at trial … but if you are showing a witness a document on a computer screen, the record will not pick up if your technology person has zoomed in on (or "called out") a particular sentence or portion of a document, unless you have identified that portion for the record. Say for example you ask the witness to, "Turn your attention to Exhibit X on the screen. You see the portion that is called out there? Can you tell me what that portion means to you?" The reader of a transcript will not know which portion was called out. If possible, have the witness read the called-out portion into the record (or at least identify what portion was called out) and then ask him about it. This will make the record clearer.

In superior court, depositions may be read into evidence regardless of witness availability. Ariz. R. Civ. P. 32(a). Trial counsel often read deposition excerpts at trial, or play excerpts from videotaped depositions. But deposition testimony read at trial does not necessarily become part of the record. Many court reporters will not take down this information unless specifically asked, and trial judges like to give their reporters a break. The trial transcript will say something like "(Portions of the deposition of John Smith taken on January 31, 2014 were read to the jury)." Having listed deposition designations in a joint pretrial statement does not necessarily mean those designations were read into evidence. Things change in a fast-paced trial. The record needs to reflect which portions of a particular deposition were actually read or played, and must include the deposition text itself. You can ensure the record correctly reflects deposition excerpts read or played at trial by:

- Providing the court reporter with the specific page and line designations and asking him or her to include them

in the trial transcript. Make sure to file the original deposition transcripts with the court. Include the court reporter affidavit as well as the signature page and corrections, if applicable.

- Asking the court reporter to stenographically record the read or played portions directly into the transcript. To ensure accuracy, give the court reporter the deposition transcript and designations.

- Supplementing the trial court record with a filing that indicates precisely (by page and line numbers) which portions of depositions were read or played at trial, making sure to attach the pertinent transcripts. Actually including the text saves time and money when it comes time to draft an appellate brief. Otherwise, the attorney drafting the brief will have to go back and forth between designation and actual transcript to determine what was said at trial.

Many trial lawyers order dailies of witness testimony. These dailies often do not capture important court comments and rulings made before or after the witness's testimony, so you cannot necessarily rely on daily transcripts for purposes of appeal. In addition, dailies for each witness are paginated starting from page 1 for each one. This means there is not a consecutively paginated record of the entire trial, and it becomes very difficult to craft an appeal brief with concise citations to the record. Appellate counsel also will have to rely on minute entries to demonstrate the order in which the testimony was presented. So even if you have asked for daily transcripts during trial of witness testimonies, you still might need to order the entire trial day for purposes of appeal to capture court comments or important arguments on legal matters and thus preserve your record for appeal. If you do not provide the relevant part of a transcript on appeal, the court of appeals will assume that the missing part supports the verdict and the trial court's rulings.

The appellate lawyers at Jones, Skelton & Hochuli stand ready to assist you in making sure your trial transcripts are complete. 602-263-1700.

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