The Silent Appe

The courtroom battle may end with the verdict, but the war can be won or lost on the appellate record. Every year, promising appeals collapse because of hidden procedural traps. These silent appeal killers lurk in the everyday practices of even the most experienced trial attorneys. Here are six record traps that could sabotage your next appeal and how to avoid them.

1. The Missing Transcript Trap

Picture this: You're in the heat of trial, and you've just played that devastating video deposition where the defendant completely contradicts his trial testimony. The jury is riveted. Your opponent is squirming. It's the kind of moment that wins cases.

Here's the problem. The trial transcript just says: Video deposition was played.

That's it. The court reporter did not transcribe the video clip, or it was not recorded clearly by the courtroom's electronic recording system. The crucial piece of evidence effectively disappeared when you need it most—on appeal.

The problem is that the appellate court can only consider what's in the record.[1] The missing transcript trap can affect both sides of the appeal. If you're the appellant, the appellate court may presume that the missing portion of the record supports the verdict.[2] If you're the appellee, the appellate court may find insufficient evidence to affirm, not believing the story that the key evidence all falls in the missing snippet.

This gap in the record can arise any time you play audio or video at trial. Video depo-

sitions, bodycam footage, voicemails, etc., frequently do not get transcribed during trial. Same with sidebars with the judge.

Solution: The solution is straightforward but requires advance planning. First, in any significant case, secure a court reporter to transcribe the proceedings. Second, check to see whether the court reporter is willing to transcribe audio or video evidence played at trial. If the parties hired the court reporter, the court reporter may be more willing to transcribe video or audio clips during trial if asked by the parties to do so rather than viewing this time as an opportunity for a short break. At a minimum, the court reporter should indicate the pages and lines that were played (e.g., "Video of John Doe Deposition, page 5, line 2 to page 6, line 5, played to the jury."). Also make sure that any sidebars get recorded.

Second best: Before trial, ensure that things like bodycam footage or other non-deposition video or audio recordings are trial exhibits. Parties often neglect to secure transcripts of these types of recordings. Before entry of judgment, file a notice or stipulation containing written transcripts of all audio and video evidence played during trial. The filing should specify exactly what was played and when, which means you need to keep track of this during trial. Ideally, both sides will discuss the issues before trial with the court and work together on a joint filing.

If you don't notice the issue until the appeal has begun, you may be stuck trying to correct the record under ARCAP 11(g). But this route adds cost, delay and uncertainty, so it's better to resolve the issue before entry of judgment.

The takeaway: If it was played for the jury, make sure it appears in black and white in the record. (For a fuller discussion of this trap, see the following article beginning on page 34.)

2. The Email Black Hole

Does this sound familiar? As trial comes to an end, the judge asks the parties to submit updated proposed jury instructions. She says, "Email me copies of your proposals

al Killers

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Six record traps that catch even seasoned attorneys

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and objections by 6 p.m. and we'll go over them in the morning." You do exactly what she asked, emailing to her and her judicial assistant a Word version of your proposed jury instructions and objections to your opponents' proposals.

You discuss the proposals the next morning. The judge refuses to give an instruction you requested and overrules your objection on a key instruction proposed by your opponent. She was dead wrong on the law, setting up a slam-dunk appeal.

There's just one problem: your carefully crafted instruction, and your devastating objection, have vanished into the ether, as far as the appeal is concerned. Why? Because you never filed it with the clerk.[3]

The email black hole pops up all the time during trial. During trial, no one has time for the days-long delay between when a party e-files a document and when the judge finally gets it. So, judges tell parties to submit documents by email. Jury instructions, bench briefs, case citations, proposed findings of facts and other emailed documents often fall into this black hole.

It's fine to email judges when they ask you to do so, but the documents also need to get into the record.

Solution: Every time you email something to the judge, be sure to file a copy with the clerk at the same time. Some documents make sense to file directly (e.g., a bench brief). Others make more sense to attach to a "Notice of filing document emailed to Court" (e.g., a copy of a case you emailed during trial).

Sometimes the judges and attorneys have back-and-forth email exchanges, creating long chains. These need to be filed, too. At the end of trial, make a PDF of the entire thread and file it, ideally as a joint filing with the opposing party. Be sure to include all replies and attachments. Some judges will do this for you but be sure the documents the judge ends up filing are complete. After trial, search your email for the court's domain name and make sure everything is accounted for.

Even if the judge proactively files the comprehensive email chain with the parties, your job is not done. The email chain filed by the judge may inadvertently omit attachments from the email chain. It is your job to ensure that any email attachments are included with the notice.

Remember, the appellate record is like a time capsule of your case. It can preserve only what you put into it properly. By treating every document shared with the judge as something that might need to be reviewed on appeal, you can avoid the sinking feeling of realizing too late that a key piece of your appellate argument has disappeared into the email black hole.

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3. The Jury Instruction Minefield

For a major issue at trial, you and your opponent each submit a competing jury instruction. The judge decides to give your opponent's suggestion, even though you know it misstates the law.

The problem: You did not object to the judge's refusal to give your proposed instruction, and you did not object to the judge giving the incorrect instruction.

Problems with jury instructions can make for great appeals because they often involve legal questions reviewed *de novo*. But you have to navigate a minefield to properly preserve jury-instruction issues for appeal.

Solution: Ariz. R. Civ. P. 51 specifies exactly what you have to do to preserve an issue. In general, you should follow four steps.

1. If you think the judge should give an instruction, submit it in writing.
2. If you think a proposed instruction is wrong, object. If the judge refuses to give your instruction, object.[4] Also, if the court modifies any proposed instructions, object to any instructions you think are wrong as modified and do so even if you already objected to the instruction before the modification.[5] Don't overlook this step as it is perhaps the no. 1 mistake trial counsel makes on jury instructions. Make your objections specific. Example: "The proximate cause instruction conflicts with the Supreme Court's opinion in Doe v. Acme Corp."
3. Get a ruling. Make sure the judge issues a definitive ruling on the record.
4. If you lose at trial, consider moving for a new trial under Rule 59 before appealing. A new-trial motion is required to appeal some issues about jury instructions.

Also, remember the controlling standard. On appeal, you'll need to show that:

- The evidence presented supports the instruction.
- The instruction is proper under the law.
- The instruction pertains to an important issue.
- The gist of the instruction is not given in any other instructions.[6] Make sure the record supports these elements and treat them as a checklist. If you miss one, your appeal may fail.

4. The Offer of Proof Obstacle

Every experienced trial lawyer has been there. For years, you have carefully prepared your case for trial. You know every element of every claim and have diligently marshalled all of the evidence needed to prove each

point. During trial, you offer a key piece of evidence to support a crucial element, and your opponent objects.

To your surprise, the court agrees with your opponent and wrongfully excludes the evidence. Stunned, you move on, scrambling to figure out how to fill that evidentiary void. You take some comfort in knowing that the judge has just created a great issue for the appeal should you need it.

The problem is that, by immediately moving on after being shut down, you have failed to properly preserve the issue on appeal.[7]

Solution: You must make an offer of proof under Ariz. R. Evid. 103. Under Rule 103(a)(2), you have an obligation to inform the court of the substance of the excluded evidence via an offer of proof to preserve the issue for appeal.[8] This requires obtaining a definitive ruling on the record after making an offer of proof.[9]

What form does an offer of proof take? It depends. The judge may ask you to conduct the offer of proof in question-and-answer format outside the presence of the jury if the excluded evidence is testimonial. An offer of proof on excluded testimony can also be provided by submitting it in writing, by orally summarizing the testimony, or by indicating that the testimony would be consistent with the witness's deposition testimony (in which case the deposition transcript should be filed into the record to complete the offer of proof).

Otherwise, you can ask to submit the excluded exhibit as an offer of proof. Also, be prepared to overcome judicial resistance to an offer of proof. In a jury trial, it is a hassle to request a sidebar to make an offer of proof (and make sure the sidebar is part of the record). And judges can sometimes get irritated when counsel asks them to reconsider their ruling. Don't present the offer of proof as a motion for reconsideration. Don't belabor the point.

Instead, present it in a non-argumentative manner with the gentle, but firm, reminder to the court that it is your obligation to obtain a definitive ruling on the record under Rule 103(b). With the definitive ruling in hand, move on with the knowledge that you have preserved a great issue for appeal.

5. The Discovery and Disclosure Dilemma

Arizona practitioners are spoiled. We have some of the most robust automatic disclosure rules in the country. We are used to obtaining fulsome disclosure statements from our opponents without having to ask for them. Like discovery responses, these disclosure statements can provide a goldmine of information for your case. But these discovery responses and disclosure statements are not filed with the court.

Consider this. In the lead up to trial, your opponent moves to preclude your damages expert's opinions as untimely disclosed. To your surprise, the court agrees and precludes those opinions. Disappointed, you present alternative damages evidence at trial and relish in the fact that you have a rock-solid issue for appeal.[10]

The problem is that you did not put the key disclosure statement into the record. Without any basis to verify your claim, you will lose this issue on appeal.

Solution: Take affirmative steps to make key disclosure statements and discovery responses part of the record throughout the case. The easiest way to do this is often to attach them as exhibits to a dispositive motion or response.[11] Disclosure statements and discovery responses are often critical parts of the record on appeal. Make sure every disclosure statement or discovery response that might be relevant on appeal becomes part of the record somehow.

What do you do if it is impractical to attach as exhibits all of the relevant disclosure statements and discovery responses due to their number or length? In that case, treat it like an offer of proof. First, provide the trial judge with specific and clear references to the relevant disclosure statements and discovery responses on the record. If the trial judge excludes a key piece of evidence over your objection, file a notice of lodging attaching the documents you identified on the record.

You have an obligation to inform the court of the substance of the excluded evidence via an offer of proof to preserve the issue for appeal. This requires obtaining a definitive ruling on the record after making an offer of proof.

One final practical tip. If your opponent provides inadequate discovery responses or disclosures, you must avail yourself of any remedies below—while discovery remains open.[12] File a motion to compel under Rule 37(a). Or use the discovery dispute mechanisms laid out in Ariz. R. Civ. P. 26(d) or in your judge's case management orders. You can't hold this issue in your back pocket and expect to prevail at trial or on appeal.

6. The Inconsistent Verdict Conundrum

After a grueling trial, the jury returns a verdict. The jury found your client not liable but awarded damages to your opponent

anyway. The judge thanks the jurors for their service and begins to dismiss them.

Stop. If the jury walks out the door, you may lose your right to appeal the inconsistent verdict.

The inconsistent verdict trap is particularly dangerous because the verdict is handed down at the end of trial when everyone is exhausted. You must recognize the inconsistency, formulate an objection, and place it on the record all before the jury leaves the courtroom.

Solution: First, prepare in advance. Before trial, anticipate potential verdict inconsistencies based on your claims and the verdict forms. During trial preparation, create a checklist of logically consistent verdict combinations. Have this at the ready when the judge reads the verdict.

Second, when the verdict is returned, ask the judge for a few minutes to review it before the jury is discharged. Many judges will grant this reasonable request. Use this time to methodically check for inconsistencies using your prepared checklist.

Third, if you spot an inconsistency, object immediately and specifically. Arizona law generally requires that inconsistent verdict objections be raised before the jury is discharged.[13] Request that the jury be sent back to deliberate further with clarifying instructions to resolve the inconsistency.[14]

The takeaway is straightforward. When the verdict comes in, focus first on whether it is logically consistent. Those few minutes before the jury walks out the door may be your only chance to resolve an inconsistency that could otherwise plague your case through appeal.

Trial Checklist

- Ask the court reporter whether audio and video clips played at trial will be transcribed and, if not, make alternative arrangements to ensure the record reflects which clips were played at trial.
- Keep a log of all video depositions and other audio or video played during trial. Record the page and line numbers that were played, and when they were played.
- Make an offer of proof for all evidence excluded during trial. Ensure that you have obtained a definitive ruling on the record as required by Rule 103(b).
- Save all emails sent to and from the judge, including all attachments.
- When discussing jury instructions with the judge, print a copy of Rule 51. Remember to propose in writing, object on the record (including to any modified instructions) and get a definitive ruling.

Post-trial Checklist

- Video and audio clips. For any audio or video clips not transcribed during trial, coordinate with opposing counsel to file a stipulation that attaches written transcripts containing exactly what was played at trial.
- Emails with the court. File any documents emailed to the judge (including proposed jury instructions, objections, bench briefs, cases and proposed findings of fact). For email threads, coordinate with opposing counsel to file a notice containing the full threads, including responses and attachments.
- Jury instructions. Consider moving for a new trial under Rule 59.

Preserving the record on appeal may require taking other steps, including filing other post-trial motions, but this checklist covers what trial counsel needs to do to avoid falling into the record traps outlined in this article.

endnotes

1. *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4 (App. 1990) ("Consequently, unless the deposition transcripts were part of the record before the trial court at the time it considered the motion for partial summary judgment, we cannot consider them on appeal.").
2. *Blair v. Burgener*, 226 Ariz. 213, 217, ¶ 9 (App. 2010) ("[I]n the absence of a transcript, we presume the evidence and arguments presented at the hearing support the trial court's ruling."); ARCAP 11(c)(1)(B) ("If the appellant will contend on appeal that a judgment, finding or conclusion, is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record transcripts of all proceedings containing evidence relevant to that judgment, finding or conclusion.").
3. The appellant has the "burden to ensure that the record on appeal contains all transcripts or other documents necessary for [the appellate court] to consider the issues raised." *Blair v. Burgener*, 226 Ariz. 213, 217, ¶ 9 (App. 2010) (quotation marks and citation omitted).
4. "Failure to object to the given instruction in compliance with Rule 51[] precludes appeal on the issue and, likewise, precludes assertion of the alleged error as a ground for a new trial." *Long v. Corvo*, 131 Ariz. 216, 217 (App. 1981).
5. *Dawson v. Withycombe*, 216 Ariz. 84, 106, ¶ 67 (App. 2007) ("Appellants did not raise any further objections to the draft and modified instructions, thus waiving any further objection on appeal.").
6. *Ibarra v. Gastelum*, 249 Ariz. 493, 495, ¶ 6 (App. 2020).
7. *Hall v. Keller*, 9 Ariz. App. 584, 586-87 (1969) (finding objection to admission of evidence waived on appeal where trial counsel failed to make an offer of proof for excluded evidence).
8. "To preserve a claim of error in the admission of evidence, the objecting party must make a timely and specific objection." *Thompson v. Better-Bilt Aluminum Products Co., Inc.*, 187 Ariz. 121, 129 (App. 1996).
9. "Unless the court's ruling is definitive, a party cannot ignore its ongoing obligation to make an offer of proof." *Coleman v. Amon*, 252 Ariz. 107, 114, ¶ 25 (App. 2021) (citing Ariz. R. Evid. 103(b)).
10. *Olguin v. Campbell*, 2015 WL 4619858, *8, ¶¶ 34-35 (Ariz. App. Aug. 3, 2015) (affirming trial court's order precluding expert testimony "due to untimely and inadequate disclosure" where appellant failed to include contrary evidence in the record).
11. *Tardy v. Murphy*, 2012 WL 2989975, *2, ¶¶ 8-9 (Ariz. App. July 23, 2012) ("The record on appeal . . . shows [appellee] filed witness lists, contact information, and testimonial affidavits before the court-imposed disclosure deadline . . . .").
12. *Reed v. Farmer*, 2018 WL 2436807, *2, ¶¶ 10-11 (Ariz. App. May 30, 2018) (affirming trial court decision on inadequate disclosure where appellant "had not filed a motion to compel further information" while discovery remained open).
13. *Trustmark Ins. Co. v. Bank One, Ariz., NA*, 202 Ariz. 535, 543, ¶ 38 (App. 2002) (We conclude that [appellee/cross-appellant] waived this issue by not objecting to the jury verdict when rendered.").
14. *Id.* at 543, ¶ 39 ("Under [Ariz. R. Civ. P. 49(c)], the court is required to call the jury's attention to the inconsistency in the verdict and send the jury to further deliberate.").