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Making the Record at Trial

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Part of your job description as a trial lawyer is to know how to “make the record.” Your success on appeal depends on it— no ground is more commonly given for denying an appeal than the appellant's failure to make the record in one respect or another. And doing it correctly is not the judge's job, or the job of the court reporter: it’s yours, and yours alone.[1] Making the record includes learning to "speak for the record," and also learning to raise issues in such a fashion that the trial court can rule on them and the appellate court can determine why the ruling was made.

Think of being an appellate judge for a moment: you read "the record" from the court, and that consists of the transcript made by a court reporter and the exhibits. Even when the proceedings are recorded by audio, the appellate court will get only a transcript later made from the recording, and will not review the audio itself. So if the alleged error doesn't appear in that transcript, it *doesn't exist* as far as the appellate court is concerned.

Aside from the physical record, to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the court has a chance to rule on it.[2] This requires that the issue be raised in a timely manner, that the issue be raised specifically, and that you

[1] *See State v. Linden,* 761 P.2d 1386, 1388 (Utah 1988)

[2] *See* 10TH CIR. R. 28.2(2); UTAH R. APP. P. 24(a)(5); *Boyle v. Christensen* , 251 P.3d 810, 2011 UT 20; *Wohnoutka v. Kelley,* ____ *P.3d* ______*;* 2014 UT App 154, ¶ 3.

offered supporting evidence or authority for your position.[3] You can rarely fix it on appeal if you didn't give the trial judge the opportunity to fix it at trial.

MAKING THE RECORD

Courtroom Manner

- Speak loudly and clearly, but without shouting, and don't let your voice drop off at the end of sentences.

- Understand where you should direct your voice in order to make the physical record. If it's a court reporter, be careful of turning your back on him or her while speaking. If it's a video or audio record, understand that leaving the lectern will mean the microphones may not catch your voice. For example, the affectation of asking questions while standing at the end of the jury box– if the court even allows it– may result in a poor record.

- Speak at the pace of a television newscaster: not too slow, not too fast. Learn to use pauses for emphasis and to allow your listeners time to catch up if you go too fast. (Especially if you are using an interpreter for the witness.)

- Understand that video or audio recording systems often don't work as intended. I know of instances in which a substantial portion of an important witness's trial testimony wasn't recorded, apparently because someone forgot to flip the switch to turn on the equipment. Those witnesses' testimony cannot now be reconstructed.[4] So in an important case, especially where an

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[3] *See In re A.I.G.*, 2012 UT 88, ¶ 21, ______ P.3d ________; *Badger v. Brooklyn Canal Co.*, 966 P.2d 844 (Utah 1998).

[4] Utah Rule of Civil Procedure 50(d) now offers one chance for salvation: "If anything material is omitted from or misstated in the transcript of an audio or video record of a hearing or trial, or if a disagreement arises as to whether the record accurately discloses what occurred in the proceeding, a party may move to correct the record. The motion must be filed within 10 days after the transcript of the hearing is filed, unless good cause is shown. The omission, misstatement or disagreement shall be

appeal is likely, consider using your own court reporter to make the record. This has to be cleared with the judge in advance, surely no later than the final pretrial hearing.[5] You will need to review Utah Code of Judicial Administration 4-201, which provides that except in capital felonies, the judge has the discretion to refuse or permit a court reporter, and the court shall set the terms of providing transcripts and other details. (Perhaps obviously, you will be paying for the court reporter, not the court system.)

- Do not interrupt (and do not allow) interruptions. Let the witness finish her answer, and let opposing counsel finish his question– one at a time makes for a clean record. "Overlapping" (two or more speaking at once) is the bane of every court reporter, whether live or in trying to decipher an audio record later. With a video or audio record, there is no one to remind you of the duty to speak one at a time[6] and an unintelligible transcript, with lost objections or comments, may well be the result. If a witness insists on speaking before you finish the question, just ask them to wait. The only exception to this is when counsel or the witness are spilling out clearly inadmissible matters: then you can and should interrupt.

- Describe non-verbal actions for the record, or ask the judge to do so. "Your honor, may the record reflect that the witness is pointing to the defendant?" or "Your honor, may the record reflect that the witness is holding his hands about two feet apart?"

- The trial judge will generally keep track of the breaks, but be aware that taking a

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resolved by the court and the record made to accurately reflect the proceeding."

[5]One judge tells me that she only approves the use of a court reporter if it is agreed that the reporter will prepare transcripts immediately, and shares them with everyone. The recording system is not used if the is an official court reporter, since there can only be one record.

[6]Other than the judge!

verbatim record requires careful listening by the court reporter at about 200+ words per minute and is quite tiring. Most court reporters need a break at least every hour and a half, and most are nearly worn out after six hours of testimony. So have a little consideration for this other professional in the courtroom.

Exhibits

- When referring to places or spatial references on exhibits, do not use "here," "there," and the like, nor allow witnesses to do so without explanation. For example, "When you said 'here,' Mr. Witness, you're referring to the place on the exhibit where I have marked 'A'?"

- Always refer to exhibits by their proper number, and correct witnesses when they fail to do so. "When you said, 'this letter,' Mr. Witness, you were referring to Exhibit 3-P?" Otherwise, the appellate court may have no idea which letter or document you are referring to.

- A good practice is to provide the court reporter (if you have one) with a glossary of terms relevant to the case, including medical terms and names of witnesses. One way to do this is to simply give the reporter the indexes from the depositions. An even better way is to give the reporter a CD with the ASCII transcripts– from this, he can enter the relevant vocabulary directly into their stenography software.

Sidebar and Chambers Conferences

- Be sure to make the record in sidebar and chambers conferences. In the Third District's audio recording system, these are routinely recorded, but it never hurts to make sure. If you have a court reporter, sometimes they cannot fit at bench conferences, or sometimes they are not asked to be there. If a record isn't made during the sidebar conference, be sure to "put it on the record" at the next convenient opportunity when the jury is out of the courtroom.

■ In some courts, the reporter won't transcribe jury voir dire and attorney arguments unless asked to do so. Ask. You need a record of the entire trial, and voir dire and arguments are important parts of it.

Objections

■ When you object, state the fact of the objection (objection!) not some generalized comment on the questioning ("I don't see where this is going . . ."). Then state the particular ground for your objection, e.g. "relevance" or "hearsay." Whether more is allowed or necessary depends on the circumstances and the judge's preferences.

■ Understand that a general objection (an objection that doesn't state any grounds) that is sustained will not constitute error unless *no* grounds support it. On the other hand, a specific objection (Objection! Hearsay) that is sustained will only constitute error *if the specific ground stated* in support of the objection was correct, even if other unstated grounds might have also supported it.[7]

■ Sometimes merely objecting is not enough to preserve the point for appeal. For example, misconduct of opposing counsel in argument probably requires an objection and a motion for mistrial, or you might waive the point for appeal. This point remains unclear in Utah practice.[8]

■ If improper evidence is volunteered by a witness (or counsel) before you have a

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[7]*See, e.g., State v. Eldredge,* 773 P.2d 29, 35 (Utah 1985) (an objection based on a witness's competency to testify does not call the trial court's attention to the question of the reliability of the witness's testimony.)

[8]*See Barrientos ex rel. Wilson v. Ogden City* 282 P.3d 50, 64 at n.3, 2012 UT 33 (Lee, J., dissenting, noting decisions regarding the need to move for a mistrial with a curative instruction.)

chance to object, the proper technique is to "move to strike" and ask for a cautionary instruction that the jury disregard the evidence. In an egregious case, move for a mistrial. Again, failure to do that may waive the point for appeal, as the appellate court may deem your acceptance of a cautionary instruction as sufficient.

- Obviously, object when you need to object and the objection is worth making. (See my paper *Objections at Trial* elsewhere in the materials.) You need to object to improper argument by counsel.[9] And get a ruling on your objection.[10]

Proffers

- If the court sustains an objection to your offered evidence, you usually must make an offer of proof (or proffer) explaining to the appellate court what the excluded evidence would have been. (See my paper *The Offer of Proof*, elsewhere in the materials.) This can even be required, though it is less likely, where cross examination is cut off.

Jury Instructions

- Be especially careful on jury instructions:

• You must offer instructions that support each of your theories of relief, or those claims are waived on appeal.

• You must object on instructions that were offered but refused by the trial judge.[11]

• You must object to instructions offered by your opponent and given by the judge,

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[9]*See Heslop v. Bank of Utah*, 839 P.2d 828 (1992) at ¶17; *State v. Ross*, 782 P.2d 529 (Ut. Ct. App. 1989); *Boyle v Christensen*, 2011 UT 20, 251 P.3d 810.

[10]*See James v. Preston,* 746 P.2d 799, 802 (Utah Ct. App. 1987) (issue not reached on appeal where appellant did not object to trial judge's failure to rule.)

[11]Utah Rule of Civil Procedure 51(f): "Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice."

or waive the issue on appeal.[12]

- Your objections must specifically state the grounds for objection (a generalized objection that the instruction "misstates the law" is worthless).[13]

- You should offer an alternative instruction where feasible.[14]

- You must make your objections before the jury deliberates.[15] Do not fall prey to the formerly-common practice of having a chambers conference to decide on instructions, then moving on to closing argument, and only putting objections to instructions on the record *after* the jury retires to deliberate.[16]

And all of this must be properly done on the record.

Pretrial Motions- Renewal at Trial?

■ Don't forget about making the record on pretrial motions. Most discovery materials– interrogatory answers, disclosures, deposition transcripts– are no longer filed, and won't be in the court files or the record unless you put them there. If the trial court did not have

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[12]*Id*. Utah Rule of Civil Procedure 51(f): "Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In objecting to the giving of an instruction, a party shall identify the matter to which the objection is made and the grounds for the objection."

[13]Utah Rule of Civil Procedure 51(f): "In objecting to the giving of an instruction, a party shall identify the matter to which the objection is made and the grounds for the objection." *See also Nielson v. Cook*, 2002 UT 11, 40 P.3d 1119; *Diversified Holdings v. Turner*, 2002 UT 129, 63 P.3d 686. Stating that "the instruction is not suggested by, and is contrary to law," isn't good enough, *Godesky v. Provo City*, 690 P.2d 541, nor is that the "instruction is not a correct statement of the law involving the case nor is it supported by any evidence in the record," *Beehive Medical Elecs. v. Square D. Co.,* 669 P.2d 859 (Utah 1983).

[14]*See Kesler v. Rogers,* 542 P.2d 354, 358 & n.7 (Utah 1975), with supporting authorities, *e.g., Moore v. McGraw Edison Co.,* 804 F.2d 1026, 1033 (8th Cir. 1986).

[15]Utah Rule of Civil Procedure 51(f)("Objections to written instructions shall be made before the instructions are given to the jury"); *Nielson v. Pioneer Valley Hospital*, 830 P.2d 270 (Utah 1992); *State v. Cowan*, 490 P.2d 890 (Utah 1971); *Hill v. Cloward*, 377 P.2d 186 (1962).

[16]A practice condemned by the court in *Jones v. Cyprus Plateau Mining Corp.*, 944 P.2d 357, 360 (Utah 1997).

them before it on your motion, the appellate court won't be likely to consider it.[17]

■ What about pretrial motions for summary judgment: do you need to renew them at trial in order to preserve the issue for appeal? Generally, this is not necessary, but you must fully litigate the issue at trial.[18] However, it may be different where the motion was denied on a "purely legal basis." This was the thorny issue addressed in *Normandeau v. Hanson Equipment, Inc.*, 215 P.3d 152, 2009 UT 44. Defendant had made a motion for summary before trial on its alleged lack of duty to plaintiff's decedent. The trial judge denied this motion, although it was unclear whether the denial was based on lack of duty (a legal issue) or lack of foreseeable cause. (a fact issue). The court of appeals held that it could not review the ruling because Hanson did not litigate the issue of "duty" at trial and failed to make a rule 50(b) motion for directed verdict on the issue. *Normandeau v. Hanson Equip. Inc.*, 2007 UT App 382, ¶¶ 13–14, 174 P.3d 1.

The Supreme Court reversed, acknowledging the lack of clarity in prior decisions on the need to re-assert a denied motion for summary judgment at trial, and holding that it *could* review the trial court's denial of the motion for summary judgment:

> "We therefore hold that when a court denies a motion for summary judgment on a purely legal basis, that is where the court denies the motion based on the undisputed facts, rather than because of the existence of a disputed material fact, the party denied summary judgment may challenge that denial on appeal. Any time "that reasonable minds could not differ as to the conclusion to draw from the evidence or that the evidence adduced was simply insufficient to sustain the legal claim, then the trial court should rule on the issue as a matter of law." On the other hand, when disputed facts bear on the decision or when new material facts emerge at trial that change the nature of the legal determination, parties then have an obligation to re-raise the issue at trial in order to preserve it for

[17] *See English v. Keinke*, 774 P.2d 1154, 1156 n.1 (deposition transcripts).

[18] *Blosch v. Natixis*, 2013 UT App 214, ¶20, ____ P3d _____; *ASC Utah, Inc. v. Wolf Mountain Resorts, LC*, 2013 UT 24, ¶ 12, ____ P.3d _____; *Wayment v. Howard*, 2006 UT 56, ¶ 19, 144 P.3d 1147.

appeal."[19] (citations omitted.).

The bottom line is that if your summary judgment motion *might* be deemed to be based on at least partially-factual ground, you must renew it in some form at trial.[20] See, *ASC Utah v. Wolf Mountain Resorts, LC,* 2013 UT 24, _____ P.3d ________ (appellate review of denial of motion for summary judgment not available since factual disputes involved) and *Kerr v. Salt lake City,* 2013 UT 75, 322 P.3d 669 (same).

Jury Selection

- In selecting the jury, you must object on the record to the judge's failure to give your requested voir dire or waive the point on appeal. Merely submitting written proposed voir dire isn't enough; make a record at trial of any part of the questioning to which you object.[21] The "cure-or-waive" rule may require you to use a peremptory challenge on a juror that you believe ought to be stricken for cause.[22] And you have to object to a panelist– on the record– in order to

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[19]215 P.3d at 157. On remand to the Court of Appeals, that court held there was an enforceable duty running to plaintiff's decedent. *Normandeau v. Hanson Equipment, Inc*., 233 P.3d 546, 2010 UT App 546. *See also Blosch v. Natixis*, 2013 UT App 214, ¶¶20- 26, ____ P3d _____.

[20]Also read the discussion of this point in *Hone v. Advanced Shoring and Underpinning, Inc.*, 2012 UT App 327, ¶ ¶ 8- 14, _____ P.3d _______ (upholding denial of so-called "motion for directed verdict" in bench trial) and see, *Skypark Airport v. Jensen*, 2013 UT App 229, ¶¶ 19-20 (Because the trial court denied motion based on the existence of disputed factual issues rather than on purely legal grounds, the trial court's ruling was not reviewable on appeal.)

[21]*See. e.g., Boyle v Christensen*, 2009 UT App 241, 219 P.3d 58, *rev'd on other grounds*, 2011 UT 20, 251 P.3d 810 (counsel did not adequately preserve record on "tort reform" questions that he proposed submitting to the jury; judge gave his own questions to the panel on tort reform, did not propound the questions requested by plaintiff; counsel did not object and passed the jury for cause); *Boyle v. Christensen*, 251 P.3d 810, 2011 UT 20 (affirming lower court on need to preserve record on voir dire objections) and *Doe v. Hafen*, 772 P.2d 456, 458 (Utah Ct. App. 1989) (no preservation where party failed to object to specific question in a set of voir dire questions that had been rejected by the trial court.)

[22]*Turner v University Hospital*, 2011 UT App 431, 271 P.3d 156 cert. granted, 280 P.3d 421 (appellate court did not need to address challenges to three out of four questionable jurors, since the first

later challenge the impartiality of that juror on appeal.[23] If you have a *Batson* challenge, a clear record must be made (and a ruling obtained) before the jury is sworn and the venire is released– no matter if the trial judge wants to have you do it later, during a break.[24] That means *not* saying "yes" when the judge asks you, "is this the jury you have selected?"[25]

- **Findings of Fact on Bench Trials**

On bench trials, where the decision is made under Rule 41(b), understanding *438 Main Street v. Easy Heat, Inc.*, 99 P.3d 801, 2004 UT 72 is crucial– in that case, the trial judge granted defendant's 41(b) motion and entered findings of fact. Plaintiff objected to the findings of fact as "inaccurate and incomplete," and also moved for a new trial. On appeal, plaintiff argued that the trial judge's findings were insufficiently detailed because they failed to disclose the steps by which he reached the final conclusion in favor of defendant.

The Supreme Court found that argument had been *waived* because plaintiff never articulated the objection that they were *insufficiently detailed*, only that they were *wrong*: "It is one thing to say that findings are erroneous because they are contrary to or unsupported by the evidence, and quite another to say that the findings are insufficiently detailed." 99 P.3d at 814. So in order to raise the insufficiency of the findings of fact on appeal, you must do so in a proper

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one was not biased, and therefore plaintiff had enough peremptory challenges to remove all three of the remaining jurors she unsuccessfully challenged for cause); *State v. Baker*, 935 P.2d 503, 505, 510 (Utah 1997), and other cases cited in my paper *Outline of Civil Jury Selection in Utah.*

[23] *Butterfield v. Sevier Valley Hosp.*, 246 P.2d 120, 2010 UT App 357

[24] *See State v. Harris, ____ P.3d _____, 2012 UT 77, Pars. 14- 21 (Party must raise and press Batson challenge before jury is sworn and venire dismissed; cannot agree with court's question, "Is this the jury you have selected?").*

[25] *Id.*

manner before the trial court, or waive the issue on appeal. And this applies not only for Rule 41(b) motions, but for any non-jury trial where findings are entered.[26]

CONCLUSION

This is a tough and tricky area of the law, and it always will be. Making the proper record is a constant worry for the trial lawyer, and it gets only minimally easier with the years of practice. You must in the back of your mind always be thinking about it and not lose yourself in the moment of the trial itself.

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[26]This is a very tricky area. *See,, e.g., Pitt v. Taron*, 210 P.3d 962, 2009 UT App 113 (*438 Main* requirements*); In re K.F.*, 201 P.3d 985, 2009 UT 4 ¶ 60 (challenges to sufficiency-of-evidence supporting factual findings are different from challenges to adequacy or detail of factual findings; sufficiency-of-evidence challenges would not require preservation); *Trubetzkoy v. Trubetzkoy*, 2009 UT App 77, ¶ 22, 205 P.3d 891 (appellate court could not review adequacy of factual findings due to lack of preservation but could review sufficiency-of-evidence supporting factual findings)