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The record on appeal – Part II

By Eric Magnuson

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Last month I wrote about some basic but important issues regarding the record on appeal. Getting the record together and properly presented are crucial steps in every appeal. Fortunately the rules are, for the most part, pretty clear on what needs to be done, by whom, and when.

But some unanticipated issues may arise. You may not always be able to give the appellate court the full record. Moreover, a big and unwieldy record may not serve your client. Finally, there may be holes in the record that need to be filled, and additions that either you or the other side wants to get before the court, despite the seeming inflexibility of the appellate rules.

When the court reporter can't produce a transcript

In the days before stenographic reporting, the evidence presented at trial was summarized by counsel in narrative form, subject to objection by opposing counsel and settlement by the court. Hence the term "settled case." This method of preparing the record still exists in the form of Rule 110.03, which provides for a statement of proceedings where the reported proceedings do not reflect the events or evidence at issue on appeal.

Statements under Rule 110.03 are rare. There are, however, certain circumstances that call for resort to the rule. Certain portions of the trial proceedings may not have been reported, such as voir dire or colloquies in chambers. A transcript may also be unavailable due to the death or unavailability of the reporter or loss of the reporter's notes.

The procedure is simple, although getting what you want may not be. The rule requires the party invoking it (usually the appellant, but not always) to prepare a proposed statement describing the proceedings and evidence in summary form. It's not a verbatim reconstruction, but should be as complete as it needs to be. For example, the statement may describe a conference in chambers, not recorded by the judge's reporter, to discuss a jury instruction issue. The statement would explain the absence of the reporter, recite the positions argued by the parties, and conclude with a statement of the court's decision and expressed reasons. If the instruction is an issue on appeal, a statement of proceedings like this may be necessary for the appellant to show that he or she objected to the instruction that was ultimately given.

The statement is then submitted to the opposing party for approval, or, more often, objection and supplementation. The trial court then approves or modifies the statement based on the submissions of the parties, and its own recollection. Clearly, there is ample ground for disagreement between the parties and the court. But in the end, the judge makes the call. That decision is final.

There are some pitfalls with having to rely on this procedure. If the positions of the parties on what happened are highly dissimilar, the trial judge may refuse to approve either the statement or proposed counter-statement, and may re-write the statement based on his or her own recollection. In some cases, the court may conclude that it cannot resolve the conflict, and refuse to approve either proposal. *See Schore v. Mueller*, 290 Minn. 186, 186 N.W.2d 699 (1971) (transcript of testimony not available because of loss of reporter's notes; trial court refusal to approve either party's statement of proceedings where they conflicted).

A statement of proceedings is different than an agreed statement as the record under Rule 110.04. The agreed statement is just that – an agreement signed by the parties that constitutes the record in lieu of the record as defined in 110.01. This is often a helpful and highly efficient alternative, because it allows the parties to agree on the essential facts, and present a clean, uncluttered record to the appellate court. Think of it as a fact stipulation for summary judgment. Despite its obvious utility, parties often overlook this handy tool.

Fixing the record

In the ordinary case, the record contains pleadings, transcripts, trial exhibits and other tangible evidence filed with the clerk of the trial court. All of these materials automatically become part of the record on appeal as soon as they are filed, without any affirmative act on the part of the parties.

The inclusion of "filed" discovery documents is automatic, but filing them is not. Minn. R. Civ. P. 5.04 prohibits the filing of discovery documents in the ordinary course. As a result, the vast

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majority of discovery requests and responses are not filed with the trial court and not part of the appellate record. If discovery documents are made part of the trial court record, either by filing or attaching them to a filed affidavit, only those parts are included in the record on appeal. And depositions and other discovery in the course of pre-trial activities are not part of the trial record unless they are introduced at trial, even if such materials were previously submitted to the trial court in motion proceedings. *Abbett v. Cnty. of St. Louis*, 474 N.W.2d 431 (Minn. Ct. App. 1991).

The appellate courts take seriously the rule that their review is limited to the record. In a recent case, the Court of Appeals refused to consider statistics contained in website pages when the actual pages were not printed and submitted to the trial court."[A]lthough Crystal Valley provided the website links to that material in its summary-judgment memorandum, copies of the material were not filed in the district court and are not in the record on appeal. See Minn. R. Civ.App. P. 110.01 ("The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases.") *Eischen v. Crystal Valley Co-op.*, ___ N.W. ___, 2013 WL 3968775, at *6 (Minn. Ct. App. Aug. 5, 2013). Whether or not you agree with this decision, it points out how important it is to make sure that the record on appeal is complete.

Claims of errors or omissions in the record must be addressed to the trial court. For example, if a party who believes that the transcript is inaccurate may move the trial court for an order correcting or amending the transcript. Rule 110.05. The rule also authorizes a motion to supplement the record to be made to the appellate court. Such a motion may be appropriate when the official record does not contain materials that were, for example, submitted directly to the trial judge, and not filed with the clerk; they are properly included in the record, but the motion is required. *See Stanek v. A.P.I., Inc.*, 474 N.W.2d 829 (Minn. Ct. App. 1991). It is crucial that the appellate lawyer review the court's version of the record to ensure it contains all that it should.

You want to add something to the record

The appellate courts have recognized extremely limited circumstances for the appellate admission of evidence, generally only when that evidence is conclusive or uncontroverted. *See* 3 *Minn. Prac. App. R. Ann.*, § 110.4 (2013); *In re Objections and Defenses to Real Prop. Taxes for 1980 Assessment*, 335 N.W.2d 717 (Minn. 1983) (uncontroverted affidavits reciting facts taken from public records were admissible at the appellate level). Affidavits of a testimonial nature, however, cannot be considered since the appellate court would have to weigh the evidence presented, which is something only trial courts are supposed to do. Appellate admission of evidence is possible, but difficult.

Non-testimonial evidence fares somewhat better. The appellate courts may consider cases, statutes, rules, and scholarly journal articles not presented or considered in the lower courts, so long as the issues generally are preserved. For example, the Court of Appeals has allowed parties to supplement the record with "publicly available articles" not presented to the trial court. *Allen v. City of Mendota Heights*, 694 N.W.2d 799, 804 (Minn. Ct. App. 2005) (citations omitted). Indeed, if parties were limited on appeal to use of the materials they presented to the trial court, there would be little point in writing appellate briefs. While evidence of economic and social surveys, statistical compilations, etc., may provide an appropriate context for the appellate court's ultimate decision (in the manner of a Brandeis Brief, Black's Law Dictionary 213 (9th ed. 2009), such evidence should rarely, if ever, be submitted as a basis for urging a reversal of factual decisions made by the trial court.

Bottom line advice

The record is the raw material from which a successful appeal is made. The appellate lawyer has to make sure that there is enough to win the case. Sometimes it's as easy as having the clerk ship the record to the appellate court. However, in many cases it takes some planning and effort by the appellate advocate to make sure that the appellate court is given "the right stuff."

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