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PROPER DESIGNATION

OF THE RECORD ON APPEAL

by
Liz Sitgreaves

Anyone handling an appeal, especially if it is for the first time, should review Tennessee Rule of Appellate Procedure 24. The Rule provides a detailed explanation of the proper designation of the appellate record. The goal of the record is "to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Many practitioners incorrectly assume that the responsibility for preparation of the appellate record falls entirely on the trial court clerk's office. However, this responsibility is on the party seeking appellate review.[1] Different clerk's offices have different, sometimes quirky, requirements regarding designation of the record. It would be good practice to call the trial court clerk's office, particularly in a county where you might not regularly practice, and ask how their office handles the designation and preparation of the record.

What should be included? Rule 24(a) provides that the following "shall" be included in the record on appeal:

1. Copies, certified by the clerk of the trial court, of all papers filed in the trial court except those excluded by other provisions of Rule 24;
2. The original of any exhibits filed in the trial court;
3. The transcript or statement of the evidence or proceedings, which shall clearly indicate and identify any exhibits offered in evidence and whether received or rejected;
4. Any requests for instructions submitted to the trial judge for consideration, whether expressly acted upon or not; and
5. Any other matter designated by a party and properly includable in the record as provided in subdivision (g) of this rule.[2]

IN THIS EDITION

What should not be included? Rule 24(b) states that the following are excluded from the record:

1. Subpoenas or summonses for any witness or for any defendant when there is an appearance for such defendant;
2. All papers relating to discovery, including depositions, interrogatories and answers thereto, reports of physical or mental examinations, requests to admit, and all notices, motions or orders relating thereto;
3. Any list from which jurors are selected;
4. Trial briefs;
5. Minutes of opening and closing of court.

The Rule goes on to provide that "any paper relating to discovery and offered in evidence for any purpose shall be clearly identified and treated as an exhibit." The Rule also states that no paper need be included in the record more than once. Failure to properly designate the record can result in a large, cumbersome record that can hurt you in your efforts on appeal. For example, in one Tennessee Court of Appeals' opinion, the Court began its analysis not by delving into the issues raised on appeal and the argument made by the parties, but by scolding the parties: "As an initial matter, we must first discuss the deficiencies in both parties' appellate briefs and in the appellate record as a whole."[3] The

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CAR INSURANCE BASICS

FOR THE NON-INJURY LAW PRACTITIONER

by
Laura Baker

Unless you are involved in a car wreck, you may not know what auto insurance coverage you have purchased or how that coverage will apply to cover your liability or compensate you for your losses in a wreck. The same goes for your family, friends, and even your clients. Most people don't understand how car insurance coverages work until it's too late.

Whether you are the at-fault driver, or the injured party, the fact that you or the other driver has "full coverage" does not necessarily mean that there are adequate insurance monies available. "Full coverage" means that you purchased multiple types of coverage on your vehicle, such as liability, uninsured motorist, collision and comprehensive, property damage, medical payments, rental car reimbursement, and roadside assistance coverage. However, each coverage type has a dollar limit. For example, in Tennessee, the lowest required liability coverage limit is $25,000 per person and $50,000 per occurrence. This means that if you cause a wreck and hurt someone, you have insurance coverage for the injuries and losses you caused up to $25,000 for each person hurt, but your policy will pay no more than $50,000 total. So, if three people are hurt in the wreck, the most the insurance company will pay for the combined losses is $50,000 with no one person getting more than $25,000. If the people who were hurt have more damages than your coverage, you are personally responsible for the additional sums. Therefore, it is advisable to purchase more than the minimum limits of liability coverage.

If you are in a wreck with a driver who has no insurance (or has less insurance than you do), and that other driver is at fault, your uninsured motorist coverage is available to cover your losses. This coverage also has a dollar limit, and in Tennessee, that limit cannot be more than your liability coverage limits. So, for example, if you purchase liability coverage of $100,000 per person and $300,000 per occurrence, then your uninsured motorist coverage cannot be more than 100/300. Drivers can opt for less uninsured motorist coverage, but doing so does not significantly reduce your insurance premiums and it exposes you to a significant risk that your own injuries will not be covered. Recent statistics show that nationwide, 1 in 8 drivers is uninsured.[1] In Tennessee, 1 in every 5 drivers is uninsured.[2] In 2017, there were more than 51,000 injury crashes in Tennessee.[3] If you are hurt by a driver with no insurance, your only source of recovery for your medical bills, lost wages, and other damages may be your own uninsured motorist coverage.

If the at-fault driver's liability insurance coverage is less than your uninsured motorist coverage, you may seek additional compensation from your own insurance policy. For example, if the at-fault driver purchased only minimum coverage of $25,000 and you have uninsured motorist coverage of $250,000, only the first $25,000 of your losses will be covered by the at-fault driver's insurance. If you have losses in excess of that amount, you can seek up to $225,000 more from your own insurer under the uninsured motorist coverage. Your insurer is entitled to offset the $25,000 payment from the other driver's policy against your $250,000 coverage. So, uninsured motorist coverage not only protects you against drivers who do not have insurance, it also protects you from those who purchase too little insurance.

The minimum coverage limit required in Tennessee of $25,000 per person and $50,000 per accident is grossly insufficient coverage if the injured person has more than just a few bruises. The median cost of an emergency room visit across the U.S. is more than $1,200.[4] That amount doesn't include the ambulance ride to get there. If you have injuries requiring x-rays, MRIs or CT scans, surgery or another procedure, the cost will be even more. Follow-up medical appointments, physical therapy, prescriptions, etc. will also increase the costs. In Tennessee, the damages recoverable in personal injury cases also include lost wages, lost earning capacity, permanent impairment, scarring and disfigurement, pain and suffering, lost enjoyment of life, and loss of consortium for the injured person's spouse.[5] Think about how much money you would need if you were unable to work and unable to support your family.

Generally speaking, higher coverage limits do not substantially increase the overall insurance premium. Ask your insurance company to give you a quote for the premium for a $1 million policy, a 250/500 policy ($250,000 per person injured and $500,000 total per wreck), a 100/300 policy, and a 25/50 policy (the minimum amount required in TN). You are sure to be surprised at how little additional money it costs for the extra coverage.

1 http://www.statisticbrain.com/uninsured-motorist-statistics/.
2 *Id.*
3 *https://www.tn.gov/content/dam/tn/safety/documents/CrashType.pdf*
4 *http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0055491#s3*
5 T.P.I. – Civil 14.01 and 14.20.

Laura Baker is a shareholder with The Law Offices of John Day, where she has been representing clients for more than 11 years in personal injury, wrongful death, motor vehicle, medical negligence and products liability cases across the state of Tennessee.

PUTTING YOUR BEST FOOT FORWARD

WITH THE TRIAL COURT JUDGE

by
Liz Sitgreaves

Many of you may have read this title and immediately laughed, especially considering different judges have different preferences ranging from whether they want courtesy copies of pleadings sent directly to them to how they want you to conduct hearings. While some of the suggestions in this article may seem simplistic or, really, common sense, even the best trial lawyers can forget their (courtroom) manners on occasion. Consider this an "Emily Post" style article for your trial practice.

- Be prepared and organized. Know the law cited in your motions or briefs. I like to have copies (yes, actual paper copies) of the significant cases cited with me at the hearing in case I need to review anything or provide copies to the judge. Also, be familiar with the facts and the status of the case (especially if you are covering a hearing for a colleague). Has discovery been completed? Are depositions scheduled? Do you have a trial date? The judge's caseload is often much larger than yours so do not expect them to have the status of your case memorized, that is your job.

- Know the local rules. Judges will not be impressed with a statement that you don't practice often in that county. Sometimes there are unwritten rules or practices in certain jurisdictions, so it can benefit you to reach out to an attorney that practices in that jurisdiction or who has appeared before the judge before to get a feel for that judge's preferences.

- Arrive at court on time, maybe even early. Now, there are times when you may have two motions set at the same time that will require you to bounce between courtrooms. If that's the case, stop by each courtroom and alert the judges' clerks. You may even want to contact the clerks and your opposing counsel ahead of time and let them know the issue so that it is noted the motion may be heard on the second call of the docket. The last thing that you want is the judge wondering whether you will show and slow down his or her docket.

- Be reasonable towards your opposing counsel. A trial judge will not be impressed by a lawyer taking an unreasonable position simply for the sake of it. This includes behavior outside the courtroom. Write your emails to opposing counsel in a respectful manner. If you need to attach an email to a motion to compel discovery to demonstrate that you have made a good faith effort to resolve the dispute, you want to make sure that the trial judge sees that you were being respectful and reasonable in your efforts.

- Acknowledge your mistakes. If you misspeak or make an error in a document that was filed with the court, acknowledge it on the front end. You will gain credibility and not risk giving your opposing counsel an opportunity to capitalize on your mistake.

- Lastly, make sure you know the appropriate title to use for the judge, and how to properly pronounce the judge's name. Nothing is more awkward then realizing you have been mispronouncing a judge's name when addressing him or her.

TECH TIPS FOR TRIAL LAWYERS

If technology is part of your litigation strategy, be sure to have a plan "B" as things can, and often do go wrong when you least expect them to.

- Practice using the software and equipment you'll be using at trial so you're comfortable in front of the judge, jury and co-counsel.
- Prior to trial, visit the courtroom to ensure that your device(s) work with the courtroom's A/V equipment.
- When possible, bring someone with you who can serve as a courtroom technologist so that if something goes wrong, you can focus on winning your case while they troubleshoot technology issues.
- Always bring a backup drive with your presentation materials so that if something fails you can continue uninterrupted.

PROPER DESIGNATION

OF THE RECORD ON APPEAL, CONTINUED

Court later stated that it was not calling attention to the deficiencies to "embarrass or berate the parties or their counsel, but to remind litigants of this Court's Rules so as to serve the interests of judicial economy and promote the expediency of appeals."[4] You want the focus of your brief to be on the issues raised and your argument related to those issues and not on the Court diving through a cumbersome record to find support for your arguments.

Without proper support in the record, you also risk the Court being unable to review the issues or waiving your issues on appeal. "[W]ithout a proper designation of the record, appellate courts must affirm the decision of the trial court and presume that 'there was sufficient evidence before the trial court to support its judgment.'"[5] The Courts of Appeal can still reverse based upon an error of law if that is evident in the technical record.[6] You also want to make sure that the relevant evidence to your appellate issues is in the record. For example, in one Court of Appeals' case, a party challenged the introduction of photographs in a jury trial. However, those photographs were not contained in the appellate record. The Court held "in the absence of these photographs, this Court cannot review them so as to make an independent assessment of their potential impact on the jury."[7] Remember that every factual statement in your brief needs to be supported by a citation to the record.

The takeaway from this article? Prepare a record that includes all the necessary information to convey a fair and accurate record and does not unnecessarily include motions, pleadings, discovery, and other documents that are not relevant to your appeal.

[1] *Douglas v. Caruthers & Associates, Inc.*, No. W201302676COAR3CV, 2015 WL 1881374, at *7 (Tenn. Ct. App. Apr. 24, 2015) (citing *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983)).
[2] Tenn. R. App. Proc. 24(a).
[3] *Douglas v. Caruthers & Associates, Inc.*, No. W201302676COAR3CV, 2015 WL 1881374, at *5 (Tenn. Ct. App. Apr. 24, 2015).
[4] *Douglas*, 2015 WL 1881374, at *7.
[5] *Hayes v. Hayes*, No. M201400237COAR3CV, 2015 WL 1450998, at *8 (Tenn. Ct. App. Mar. 26, 2015) (citing *In re Sarah E. L.*, No. 09–002186/09–002185, 2011 WL 676006, at *2 (Tenn. Ct. App. 2011) (citing *Outdoor Mgmt., LLC v. Thomas*, 249 S.W.3d 368, 377 (Tenn. Ct. App. 2007))).
[6] Id. (citing In re M.R., No. M2007-002532-COA-R3-JV, 2008 WL 2331030, at *3 (Tenn. Ct. App. June 3, 2008)).
[7] *Monypeny v. Kheiv*, No. W201400656COAR3CV, 2015 WL 1541333, at *17 (Tenn. Ct. App. Apr. 1, 2015).

Liz Sitgreaves is an attorney at the Law Offices of John Day, P.C., where she practices appellate law in addition to personal injury and tort litigation. She is former law clerk to Judge Frank G. Clement on the Tennessee Court of Appeals.

QUOTES FOR TRIAL LAWYERS

"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."

– Thomas Jefferson (1788)