PREPARING THE RECORD ON APPEAL: WHAT TO LEAVE IN, WHAT TO LEAVE OUT

Connie Widenhouse
Assistant Appellate Defender

I. FUNCTION OF RECORD ON APPEAL. Rule 9(a)

The function of the record on appeal is to provide the appellate court everything it needs to understand the nature and facts of the case, the relevant proceedings, and the issues on appeal.

> "In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9. Parties may cite any of these items in the briefs and arguments before the appellate courts."

A. The "Record on Appeal" refers to the documents to be printed by the appellate court's clerk's office and included between the colored sheets. Copies of the record are provided to each judge or justice who will decide the case.

The term "Record on Appeal" also refers generally to the printed record as well as all transcripts, exhibits, or other items incorporated by reference in the printed record.

NOTE: Do not confuse "record on appeal" with "the record" in the trial court. The trial court "record" is all preserved information about what happened in the trial court, including court reporter notes, everything in every transcript, and everything in the superior court files, including all exhibits. The trial court record is the entire universe of materials from which you will select the items to include in the record on appeal.

B. Citation in your brief or oral argument to items not included in the record is a violation of the rules. Therefore, the record on appeal should include everything of possible relevance to any issue on appeal – anything the court will need to properly decide the issues that will or may be argued in the defendant's brief – or anything you think will help them understand the issues.

C. Conversely, counsel has a duty "to avoid including in the record on appeal matter not necessary for an understanding of the issues presented on appeal." Inclusion of unnecessary material may subject counsel to costs or other sanctions. Rule 9(b)(2)

II. GETTING STARTED

A. Some documents from the superior court file must always be in the record. See III(a) below. Others *may* be included depending on the facts and issues specific to your case. Some should not be included at all.

B. There are two guidelines to deciding whether something goes in the record:

(a) Does Rule 9 mandate its inclusion?

(b) Is it relevant to an understanding of the issues to be presented on appeal?

C. TIP: Review the contents of the superior court files as early as possible to make sure it contains all the documents that are required by Rule 9 to be in the record. Sometimes the local clerk overlooks a document when copying the file or fails to copy both sides of a document. They often do not send copies of documentary exhibits. The sooner you discover a necessary document is missing, the better, so you can call or write the clerk and ask for the missing items before your time for preparation of the record runs out.

D. Review the entire file, the transcript, and the exhibits to spot possible issues. Draft your proposed issues before deciding which items to include. Your list of proposed issues is the basis for deciding what other documents should be in the record.

III. WHAT BELONGS IN THE PRINTED RECORD? Rule 9(a)(3); Appendix C, Table 3

A. Items that must be included in every case:
(Items in bold face are documents you must create).

(1) Index of contents. The index is the first page of the record. Rule 9(a)(3)(a).

(2) Statement of organization of trial tribunal identifying:

- the trial judge from whose judgment or order the appeal is taken,
- the session of court or the time and place where the judgment or order was rendered, and
- the party appealing.

(3) Copies of all charging documents, including arrest warrants or magistrate's order for arrest, indictments, informations, and presentments, probation violation reports, etc.

(4) Copies of docket entries OR a **statement describing all arraignments and pleas** (usually the latter).

(5) A statement specifying the verbatim transcript is being filed pursuant to Rule 9(c)(2) or designating the portions of the transcript to be filed. (Assuming there is a transcript). The rules allow a lawyer to substitute a narrative of the evidence or proceedings for a verbatim transcript. This method is rarely necessary or advisable, but could be necessary if part of a transcript is missing or too garbled to be useful, or if a crucial event was not recorded.

(6) A statement specifying any exhibits that will be part of the record. (This requirement is implicit in Rule 12(c)).

(7) Verdicts.

(8) Judgment and Commitment and/or any order from which the appeal is taken, such as an order denying a motion to suppress.

(9) A copy of the written notice of appeal, if there is one, and/or a copy of the page of the transcript showing notice of appeal was given in open court. Rule 9(a)(3)(h).

(10) Appellate Entries and/or any other order finding defendant is indigent for purposes of appeal.

(11) Order assigning appellate counsel.

(12) Any orders extending time for production of the transcript or preparation of the record on appeal.

(13) A numbered list of Proposed Issues on Appeal. The issues must be stated without argument, and they belong at the end of the record on appeal. Rule 10(b).

****Be sure to say the magic words, "plain error," if the issue concerns evidence or jury instructions and you think it may not be preserved. Rule 10(a)(4)

****The purpose of the Proposed Issues is to facilitate preparation of the record on appeal. You should prepare the proposed issues before gathering the remaining documents. Then make sure the record contains everything necessary for the court to understand and rule on these issues.**

(14) Certificate of service.

(15) Any agreement, notice of approval, or order **settling the record on appeal (and settling the transcript, if one is to be filed)**. Rule 9(a)(3)(h). (See the forms used by AOD for stipulation and certification of settlement).

(16) Names, addresses, phone numbers, email addresses and State Bar numbers of counsel for all parties to the appeal. Rule 9(b)(4) (For the state, just list the Attorney General).

B. Items that <u>may</u> be included in the printed record, depending on the facts and the issues on appeal. (Anything you want the judges, not just their clerks, to see).

(1) Verbatim transcript. You may want to include the entire transcript in the printed record if very short and you want to be certain the judges will look at it.

(2) Jury instructions. A copy of the complete jury charge MUST be in the record if you brief an issue related to the giving or omission of instructions to the jury. Yes, you have to do this even though the instructions are part of the verbatim transcript that is filed by the court reporter.

You also might want to include the jury instructions if you expect to refer to them in one or more of your arguments and you want the judges to be able to see them easily. Example: The jury instructions required the jury to find a fact for which the evidence was insufficient. Here, you would not be arguing about the instructions but would want to point out to the court that the state was bound by the instructions.

I advise always including the jury instructions in the record unless you have an unusual reason to leave them out.

(3) Supplemental jury instructions. If the jury asks a question and the judge gives additional instructions, include in the record both the question and the additional instructions, even if the judge merely repeats the original instructions.

(4) Omitted jury instructions. If an issue on appeal concerns the omission of jury instructions, you MUST include the omitted instruction or its substance. Omitted instructions are placed in the record immediately after the jury instructions that were given. Rule 9(a)(3)(f) and Rule 9(c).

(5) Written requests for jury instructions. Written requests should be included to support an argument about the omission of a requested instruction. Inclusion of written requests shows the issue was preserved by trial counsel.

(6) Pretrial motions pertinent to an issue on appeal. Example: If a possible issue on appeal is that the court should have excluded evidence because the state violated rules of discovery, you may want to include defendant's request for discovery or motion for discovery.

(7) Notes from jury. Examples: jury question during deliberations, juror discovers she knows defendant's family, allegations of juror misconduct.

(8) Bench briefs filed by trial counsel.

(9) Copies of documentary exhibits may be in the printed record OR you can file three legible copies – NOT the original.

Rule 9(d)(1) says you MUST include plats, diagrams, and other documentary exhibits that were filed as part of, or attachments to, other items that are required to be in the record – unless they are not necessary to understand the issues presented on appeal AND the parties agree to exclude them. For example, a motion with another document attached to it should include the attachment unless the attachment has nothing to do with the issues on appeal and the district attorney agrees it can be excluded.

If you leave out a part of the document or exhibit, you should mention the omission and the reason for it in your cover letter to the district attorney.

(10) Omitted findings of fact. (if defendant requested a specific finding).

(11) Omitted mitigating factors that were requested by defendant at sentencing (include when the sentence was outside the presumptive range and the court's failure to find a mitigating factor is an issue on appeal). These belong in the record immediately after the part of the Judgment on which the trial judge made findings of aggravating and mitigating factors.

(12) A statement regarding any other matter that arose in the trial court but is unclear from the trial court record and is important to an issue on appeal. Examples: a statement explaining why a document is missing a necessary file stamp but should still be in the record, a narrative of an unrecorded bench conference, a statement about something that happened during unrecorded closing arguments, etc. You can be creative, but do not get cute. A statement explaining something that is unclear from the court file and transcript must be reasonable and the state will have to agree to it.

IV. ITEMS NOT IN THE PRINTED RECORD BUT THAT ARE PART OF THE RECORD ON APPEAL.

A. The verbatim transcript.

You may designate only the portions you need, which ordinarily means all of the trial proceedings after jury selection. You may leave out the jury selection or pretrial motions if those parts of the transcript do not have anything to do with any issues in the appeal. You must include in the printed record a description of the portions of the transcript that are to be part of the record. Rule 9(a)(3)(e), 9(c) (2).

As a practical matter, your ability to limit the transcript is constrained by the fact that the court reporter, not the lawyer, now files the transcript. But you can ask the court reporter to only the volumes that are necessary for the court to understand the facts and the legal issues presented on appeal.

After the settled record is filed in the Court of Appeals and the clerk's office mails back the printed record, you MUST promptly notify the court reporter, provide the docket number, and ask him or her to file the transcript electronically.

Rule 7(b)(2). "The appellant shall promptly notify the court reporter when the record on appeal has been filed" and "the court reporter must electronically file the transcript with [the] court using the court using the docket number assigned by [the] court." Rule 9(c) (3)(b) says "appellant shall cause the settled record and transcript to be filed pursuant to Rule 7."

Ask the court reporter to let you know when the transcript is filed. You should also check the docket sheet on the court's website to make sure it was filed.

B. Documentary exhibits, including court exhibits.

"Any exhibit filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be made a part of the record on appeal if a party believes that its inclusion is necessary to understand an issue on appeal." Rule 9(d)

You must file three legible copies of any documentary exhibits that are necessary to understand the issues on appeal. Each of the three copies must be paginated. If multiple exhibits are filed, you must include an index. Do not file copies that "impair the legibility or original significance of the exhibit." Rule 9(d)(2)

If you really want to make sure all the judges see a documentary exhibit, you may include a copy of the document in the printed record. The document must be "of a size and nature to make inclusion possible without impairing the legibility or original significance of the exhibit." Rule 9(d)(1)

C. Other exhibits.

When an exhibit is (1) a tangible object or (2) a document that cannot be copied without impairing its legibility or original significance, you may have the original exhibit sent directly to the clerk of the appellate court by the clerk of superior court. Rule 9(d)(2) The most common non-documentary exhibits you may want to include in the record are photographs and electronic recordings of witness interviews. Sometimes a map or diagram or other document cannot be copied successfully and you will need to include the original exhibit in the record.

When you are preparing the record on appeal, you must view or listen to any recording used as an exhibit in the trial court. Some clerk's offices do not have the means to make copies of electronic recordings. Trial counsel should have copies, and you can try getting them. Otherwise, you may request the assistance of a cooperative district attorney or a local public defender or private counsel who has the equipment and is willing to copy the recording(s) for you. If all else fails, you may need to visit the county clerk's office to examine audio or video recordings.

If you have a transcript of an electronic recording, you will just send up the transcript to the appellate court as a documentary exhibit unless there is something in the recording you feel the court should see or hear. If a recording was never transcribed, you may want to ask the trial court to order preparation of a transcript for use in perfecting the appeal. I have had mixed success with having transcripts of recordings made after a case is on appeal.

If you do have a transcript of a recording, the court does not want the recording itself and you must have the approval of the appellate court to send both the recording and the transcript to the court. Rule 9(c)(5)

To include a non-documentary exhibit in the record, you should say in your statement regarding exhibits that "State's Exhibit X is necessary to an

understanding of the issue on appeal. It shall be a part of the record on appeal and shall be sent to the Clerk of the Court of Appeals by the clerk of superior court."

NOTE: Rule 9(d) was changed for cases in which notice of appeal was entered on or after April 15, 2013.

Under the rules applicable to cases in which notice of appeal was entered prior to April 15, 2013, no specific provisions exist for exhibits that are not documents. When the record is settled, you should write to the clerk of superior court and ask the clerk to transmit the exhibit directly to the clerk of the appellate court. If the clerk balks at doing so, you must file a motion asking the court to direct the clerk to send the exhibit to the appellate court.

For cases in which notice of appeal was entered on or after April 15, 2013, the rules expressly provide that no motion is necessary. You simply have to file a request with the clerk of superior court to send the original exhibit to the clerk of the appellate court.

NOTE: Original exhibits should always be submitted directly to the appellate court by the local clerk's office. **The county clerk's office should never send original exhibits to you.**

V. WHAT TO LEAVE OUT OF THE RECORD ON APPEAL.

Rule: Other than items specifically required by Rule 9, you should leave out materials that are not necessary to understand the issues presented on appeal.

****If you violate this rule, any costs of including such matter may be charged to the party or counsel who included it or permitted its inclusion. Rule 9(b) (2).

Examples of unnecessary materials include:

A. Subpoenas

B. Notice of return of bill of indictment

C. Motions that are not the subject of any issue on appeal and are not helpful to understanding any issue on appeal

D. Search warrants and affidavits that are not relevant to any issue on appeal

E. Any other documents in the Superior Court file that have nothing to do with any issue on appeal.

F. Exhibits or transcripts that don't have any relevance to any issue on appeal, i.e., transcripts of bond hearings or pretrial motion hearings that are not the subject of any issue on appeal; items of physical evidence such as bullets and bloody clothing.

I also advise specifically leaving out prejudicial documentary exhibits or photographs that don't have anything to do with issues on appeal, i.e., GORY photos of dead victim, psychiatrist's report concluding your client is a psychopath, etc.

G. Electronic recordings for which you have a transcript. Rule 9(c)(5)

H. Materials that are not in the superior court file or were not made a part of the record in the trial court.

VI. ODDS AND ENDS REGARDING FORM OF RECORD. Rule 9(b)

A. Items should be in chronological order to the extent practical. Rule 9(b)(1)

B. All pleadings, motions, and other documents must have a file stamp showing the date filed and, if verified, the date and name of person who verified. Judgments and orders must be dated and signed.

C. The pages of the record must be numbered. You can wait to do this before you file it in the Court of Appeals in case you need to make changes before the record is settled.

D. REMOVE SOCIAL SECURITY NUMBERS FROM EVERY DOCUMENT YOU INCLUDE IN THE RECORD ON APPEAL, INCLUDING EXHIBITS. Rule 9(a)(4); Rule 9(b)(1)(2); Rule 9(d)(3).

VII. SETTLEMENT OF THE RECORD. Rule 11

A. Serve the proposed record on appeal by mail on the district attorney within the time prescribed by Rule 11(a) and (b) (within 35 days of the court reporter's certification of delivery of the transcript or within 35 days of the date of notice of appeal if no transcript is ordered).

At the same time, write a short letter to the Clerk of Superior Court saying the proposed record has been served. Include for filing in the superior court a copy of your cover letter to the district attorney. (See example letters provided in handout).

B. The state has 30 days in which to respond. Several things can happen:

(1) The state doesn't respond. This often happens. If the state does not respond, the proposed record automatically becomes the settled record on appeal. When this happens, throw away the stipulation page and update the page numbers in the Index before filing. Rule 11(b)

(2) The state may agree by serving upon the defendant a notice of approval of the proposed record (or by signing and returning the stipulation provided by you).

This happens frequently. The proposed record becomes the settled record on appeal. Rule 11(b)

(3) The DA may call you and suggest changes to the proposed record. If the changes are reasonable and don't violate the rules, you should agree to make the changes and then ask the DA to sign and return the stipulation. If the changes are not reasonable or would violate the rules, you might be able to get the DA to see it your way. Most differences of opinion about the record are resolved amicably by a phone call or two.

(4) The state may serve objections, amendments, or a proposed alternative record on appeal. Rule 11(c). This seldom happens. If it does, you may wish to consult with the Office of the Appellate Defender. The state's objections or proposed amendments may be based on either:

> (a) An item in the proposed record was never filed, served, submitted to the trial court for consideration, admitted in evidence, or made the subject of an offer of proof, *i.e., it was not part of the trial court record and therefore, isn't proper under Rule 9*, OR
>
> (b) The content of a statement or narrative is factually inaccurate

At this point, the rule gets confusing, but the gist is that you can either agree to the state's proposed changes or you can serve your own objections, amendments, or alternative proposed record. All the documents required by Rule 9 and all documents on which the parties agree become the record on appeal. Any documents on which the parties can't agree but which comply with the rules, end up in a supplement to the record on appeal which must be filed in triplicate along with the record on appeal and may be used and cited just like the record. For this reason, it almost never makes sense to fight about it.

Either party may request a judicial settlement within ten days after expiration of the time within which the state might have served amendments, objections, or proposed alternative record. The only questions a judge can resolve are whether:

> (a) An item in the proposed record was never filed, served, submitted to the trial court for consideration, admitted in evidence, or made the subject of an offer of proof, *i.e., it was not part of the trial court record and therefore, isn't proper under Rule 9*, OR
>
> (b) The content of a statement or narrative is factually inaccurate

Practically, the only issues that are likely to require a judicial settlement are disagreements about the content or wording of a statement or narrative. You are expected to make every effort to reach an agreement with the district attorney about the wording of these documents.

The parties can still settle the record by agreement anytime during the time limits set out in the rules for judicial settlement.

VII. FILING AND DOCKETING THE SETTLED RECORD. Rule 12

A. The appellant must file the settled record in the appellate court clerk's office within fifteen days of the date the record is settled.

B. The settled record can only be filed by mail. Hopefully the electronic filing site will be set up soon to accept records on appeal.

C. Do this:

(1) File one copy of the settled record by mail in the appellate court. Make sure the pages are numbered properly before filing. Include a cover letter, addressed to the Clerk of the appellate court and copied to the district attorney.

(2) File three legible copies of documentary exhibits. Tell the clerk in your cover letter that exhibits are included.

(3) Direct the court reporter to file the transcript electronically. I do this as soon as the appellate court assigns a docket number.

(4) Serve the district attorney with notice that you have filed the settled record. You can simply send the DA a copy of your signed certificate of settlement along with a copy of your cover letter to the appellate court.

(5) If the settled record includes non-documentary exhibits, write to the local clerk. Explain the settled record has been filed and it includes these exhibits. Ask the clerk to forward the original exhibits to the clerk of the appellate court. Ask the clerk to let you know when the exhibits have been sent. Copy the letter to the clerk of the appellate court.

(6) Periodically monitor the docket sheet on the court's website to make sure the court received everything.

VIII. AMENDING THE RECORD ON APPEAL AFTER IT IS SETTLED. Rule 9(b)(5)(b)

You may need to amend the record after it is settled if you discover that you left out an important item or you included something that was not accurate or did not comply with the rules.

If your initial preparation of the proposed record was thorough, you should seldom need to amend the record.

Amending the record is simple as long as your request is reasonable. File a short motion in the appropriate court explaining the reason for amending the record. Attach to the motion copies of any documents you would like to add or change.

A. Any party can file a motion to have additional items from the trial court record or transcript added to the record on appeal.

B. Any party can file a motion to amend the record to correct errors as to form or content.

C. Motions to amend the record must be filed in the appellate court if the settled record has already been filed. You have to file a motion if the record has been filed.

D. If the settled record has not been filed in the appellate court, the motion must be filed in the trial court.

**** If the settled record has not been filed yet, the district attorney may agree to amendments without a motion being filed. A phone call could save time.

UNTIL THE SETTLED RECORD IS FILED AND DOCKETED, THE APPELLATE COURT HAS NO JURISDICTION TO ENTERTAIN ANY MOTIONS OTHER THAN MOTIONS FOR EXTENSIONS OF TIME.