

Objections & Preserving the Record



**“If It Isn’t In the
Record,
It Didn’t Happen”**

Preserving the Record Before The Trial Starts

The Responsive Pleading

- Preserving issues/record for appeal begins with the responsive pleadings.
- Preserve your affirmative defenses.

The Responsive Pleading

- Answer - Raise ALL appropriate affirmative defenses (F. R. Civ. P. 8(c))
- 12(b) Motions - File proper, timely motions to preserve the listed defenses (jurisdiction, venue, process, failure to state a claim, etc.)
- Rule 12(c) Motions - Motions For Judgment on Pleadings

Summary Judgment Motions

- Not required to preserve error (i.e., won't waive an issue if you don't move)
- But they can be a useful tool

Summary Judgment Motions

Two Types

1. Challenge sufficiency of evidence
2. Purely legal issue is dispositive

Summary Judgment Motions

To preserve the record....

1. Ensure the best, most complete, admissible evidence to sustain your motion or oppose your opponent's is included in whatever form your jurisdiction requires
2. Ensure that you get a ruling on the record
3. Object/move to strike any improper evidence offered by your opponent (and get ruling) to avoid waiver

Summary Judgment Motions

If your motion was denied . . .

- Generally not appealable (now or after verdict)
- Denial merges into ultimate judgment at trial
- So...the denial generally DOES NOT preserve factual or evidentiary issues for appeal

Summary Judgment Motions

If your motion was denied

- Majority view: to preserve error, must renew all bases for judgment a matter of law in a Rule 50 motion
- Minority view: don't have to renew with Rule 50 motion for purely legal issue
- Don't risk it! (what's purely legal v. factual?)

Summary Judgment Motions

If their motion was granted.....

- Most appellate courts will consider any basis to affirm based on trial court record (so objecting to improper evidence is key)
- Many appellate courts will only entertain opposing legal arguments actually made before trial court

Motions In Limine

- Allow you opportunity to bring specific evidentiary issues to court's attention (in writing) for decision
- Use to avoid trying to “un-ring the bell” (when a motion to strike, curative instruction won't fix things)

Motions In Limine

To best preserve record...

- Get the hearing transcribed
- Get definitive ruling on the record
(provisional ruling [i.e., ruling “for now”] likely not sufficient to preserve error)
- Federal Courts do not require subsequent, contemporaneous objection at trial. Some state courts still might.
- Remember to preserve related objections separately (ex: lack of foundation)

Preserving the Record After The Trial Starts

Making The Record

- As trial counsel you are **MAKING** a record
- The record is a **WRITTEN RECORD**
- Written record is **FOR THE APPEALS COURT** and that is all they will see!

Making The Record

- You and the witness must **BE CLEAR**
- You and the witness must **BE SPECIFIC**
- You and the witness must **USE WORDS** to describe everything that happens in the courtroom
- It's your job to make sure both of you are clear, specific and use words

Making The Record

Unless you're clear, specific and use words,
**the record won't make sense, and
the record will not be preserved**

Making The Record

“ This . . .

and

That . . .”

“Here . . . and . . .There”

Waiver

- Failure to object is waiver of the objection and evidence that is inadmissible is admitted
- An objection sustained or overruled can be waived by subsequent action

How Objections Are Waived

- Objection made too late
- Objecting Party introduces same type of evidence after unsuccessfully objecting
- Objecting Party fails to object to same evidence subsequently offered after objection sustained
- Objecting Party fails to persist when corrections are attempted
- Evidence used by objecting party in support of own case
- Same evidence already introduced (facts) without objection

Example

- Defendant in a civil action had three alcohol drinks and passed field test
- Defense counsel moves *in limine* to preclude testimony that defendant had three drinks and loses motion
- Evidence of the three drinks is admitted
- Defense counsel offers evidence to prove defendant was not intoxicated

Objections

Common Trial Objections Vary Depending on the Stage of the Trial

- Voir Dire
- Opening
- Witness qualification
- Direct Examination
- Cross Examination
- Documents
- Closing
- Jury Instructions

Objections



Common Objections: Voir Dire

- Attempting to commit jurors to a specific verdict
- Asking about votes in prior cases
- Unnecessary probing into background
- Questions not going to ascertain qualifications

Common Objections: During Opening

- Arguing the law
- Discussing inadmissible facts
- Misstatements of the law
- Expressing personal belief on the merits

Common Objections: Witness Qualifications

- Arguing the law
- Discussing inadmissible facts
- Misstatements of the law
- Expressing personal belief on the merits

Common Objections: Direct Examination

- Leading
- Not relevant
- Hearsay
- Calls for speculation
- Calls for narrative answer
- Asked & Answered
- Cumulative
- Misquotes witness
- Missing elements
no foundation
- Lacks personal knowledge
no foundation
- Prejudice outweighs
probative value
- Assumes facts not in
evidence

Common Objections: Cross Examination

- Beyond scope of direct
- Hearsay
- Asked & answered
- Assumes facts not in evidence
- Compound
- Misstatement
- Argumentative
- Improper impeachment
- No good faith basis

Common Objections: Documents

- Identification
- Authentication
- Relevancy
- Best Evidence
- Hearsay
- Privilege

Common Objections: Closings

- Improper Argument
- Facts not in evidence
- Misstatement of facts
- Misstatement of law
- Personal Belief on Merits
- Deals with improper subject matter
- Unduly prejudicial or inflammatory
- Asking jurors to place themselves in party's position

Objections & Preserving the Record

Demonstrations

Saint Vincent Hospital

Position Applied For

Position: Perfusionist
Shift: Varies
Hours: Variable, every 3rd weekend and holiday, plus call

First Name: * Jane
Last Name: * Doe
Address: * 10 Washington St.
City: * Boston
State: * MA
Zip: * 02109
Home Phone: * 617-555-1212
Best Time to Call: * After 5pm
Last 4 digits of SSN: * 7853

Alternate Phone: 508-222-1515
Work Ext:



CURRENT POSITION

Position: * Perfusion
How long in current position: * 8 years 10 months
Department Name: * Cardiac Surgery
Current Status: * FT
Current Shift: * days

000566

CONFIDENTIAL

All information I have provided is correct and complete to the best of my knowledge.

My typed name below shall have the same force and effect as my written signature.

Candidate's/Applicant's Signature: Jane M. Doe

Date: March 3, 2010

DISCHARGE SUMMARY

PATIENT:
ADMISSION DATE:
DISCHARGE DATE:
MEDICAL RECORD #
DATE OF BIRTH:
PT TYPE:

DISCHARGE DIAGNOSES:

1. Cholelithiasis with subacute cholecystitis.
2. Umbilical hernia.
3. Diabetes mellitus.
4. Hypertension.
5. Obesity.
6. Diabetic neuropathy.

DISCHARGE DIAGNOSES:

1. Cholelithiasis with subacute cholecystitis.
2. Umbilical hernia.
3. Diabetes mellitus.
4. Hypertension.
5. Obesity.
6. Diabetic neuropathy.
7. Gout.
8. History of sarcoidosis.

RTZ 1000 mcg intramuscularly monthly, Lasix 80 mg every morning, Atropine 1
300 mg daily, Diovan HCT 160/12.5 mg every morning and K-Dur 20 mEq b.i.d.

PHYSICAL EXAMINATION: VITAL SIGNS: Normal with a weight of 141.5 kg.
GENERAL: The patient was a well-developed, obese white male in mild distress
with abdominal pain. He was alert and cooperative. SKTN: No jaundice was
appreciated. LYMPHATICS: No lymphadenopathy was palpable. HEENT:
Extraocular movements were intact. Pupils were equal and reactive to light
and accommodation. NECK: Supple without palpable thyroid abnormalities. There
was a mediastinoscopy scar. CHEST: Clear to auscultation bilaterally. HEART:
Regular without murmurs, gallops or rubs. ABDOMEN: Tender in the epigastrium.
No masses, organomegaly or hernias were appreciated. EXTREMITIES: No clubbing,
cyanosis or edema. There were scars on the right hip and the left knee.
NEUROLOGICAL: Cranial nerves were intact. The patient moved all extremities
well.

White blood cell count was 15,800 with 82 polys. Amylase, lipase and liver
function studies were normal. Electrolytes revealed a sodium of 138, a
potassium of 3.6, a chloride of 95 and a CO2 35. Blood sugar was 136.

This is not a bill. This is an Itemization of your professional services for:

Patient: Admission Date: 09/23/2013

Account ID Discharge Date: 09/23/2013

Professional Charges

Service Date	Service Provider	Ix Code	Ix Description	DX CODE	QTY	Amount
09/23/13			OFFICE/OUTPT VISIT,EST,LEVEL III	659.63,656.53	1	89.00

Total professional charges: 89.00

Professional Payments and Adjustments

Description	Amount
Majesta PB/HB CONTRACTUAL WRITE-OFF (INS) - 10/21/13	-37.62
Majesta Payments	-51.38
Total professional payments and adjustments:	-89.00

Motion JMOL - Rule 50(a)

Motion for Judgment as a Matter of Law
(Ye old “motion for a directed verdict”)

- Brought *any time* before case is given to jury
- No legally sufficient basis to find for Plaintiff on dispositive issues

To Preserve Record

- Specify judgment sought on all issues
- Specify law & facts that entitle you to judgment
- Renew motion JMOL at close of evidence

Common Objections: Jury Instructions

- Misstating facts
- Misstating law
- Undue weight on certain issues or evidence
- Failure to be consistent with theory of case
- Failure to give requested instructions
- Confusing/ambiguous
- Renew objections previously made

Verdict Form

- General Verdict Form
- Damages
- Interest Awarded
- Special Interrogatories

Renewed Motion For JMOL

Under Rule 50(a) (f/k/a renewed MDV)

Under Rule 50(b) (f/k/a JNOV)

- Renew motion JMOL under 50(a) at close of evidence
- Then within 28 days after entry of judgment renew JMOL again
- Standard is same as original motion JMOL
- Post-trial JMOL can only be granted on ground advanced in pre-verdict JMOL
- **So preserve record by making sure your JMOL under 50(a) included all issues**

Motion For a New Trial

Under Rule 59

- Must be filed within 28 days of adverse judgment
- Grounds for new trial
 - All grounds previously approved by federal courts, i.e. federal common law. Examples:
 - Juror or counsel misconduct, or other trial “injustice”
 - Verdict unsupported by weight of evidence
 - Excessive award
- Prior proper trial objection must have been made at the time of complained of “injustice” to be basis of new trial motion
- Courts have sua sponte authority to issue new trial

Interplay Between Rule 59 & 50(c)

Motion For a New Trial (Rule 59) &
Motion for Conditional Ruling (Rule 50(c))

- Motion for New Trial should be filed at time of renewed JMOL
- If Court grants renewed JMOL post judgment, then Rule 50(c) requires Judge to conditionally rule on motion for new trial

Interplay Between Rule 59 & 50(c)

Motion For a New Trial (Rule 59) &
Motion for Conditional Ruling (Rule 50(c))

- To preserve record:
 1. File Motion for New Trial within 28 days of adverse judgment
 2. Renew Motion for JMOL at same time
 3. Make sure Court conditionally rules on Motion for New Trial even if JMOL is allowed

CONCLUSION

If It Isn't in the Record &
If It Isn't Preserved,
It Never Happened!