# **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



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



#### **Two Types**

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



To preserve the record....

- 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
- Object/move to strike any improper evidence offered by your opponent (and get ruling) to avoid waiver



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



#### 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?)



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



- 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!



- 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



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





#### 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

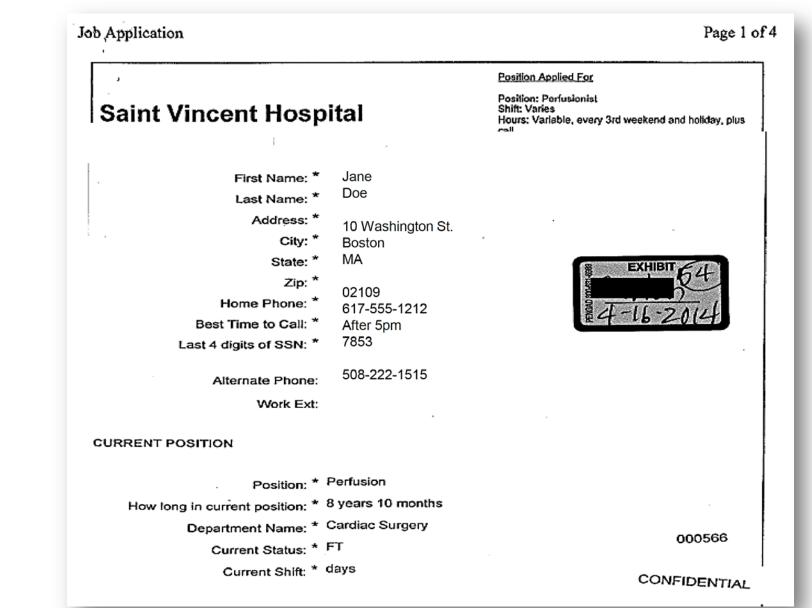
- Deals with improper subject matter
- Unduly prejudicial or inflammatory
- Asking jurors to place themselves in party's position



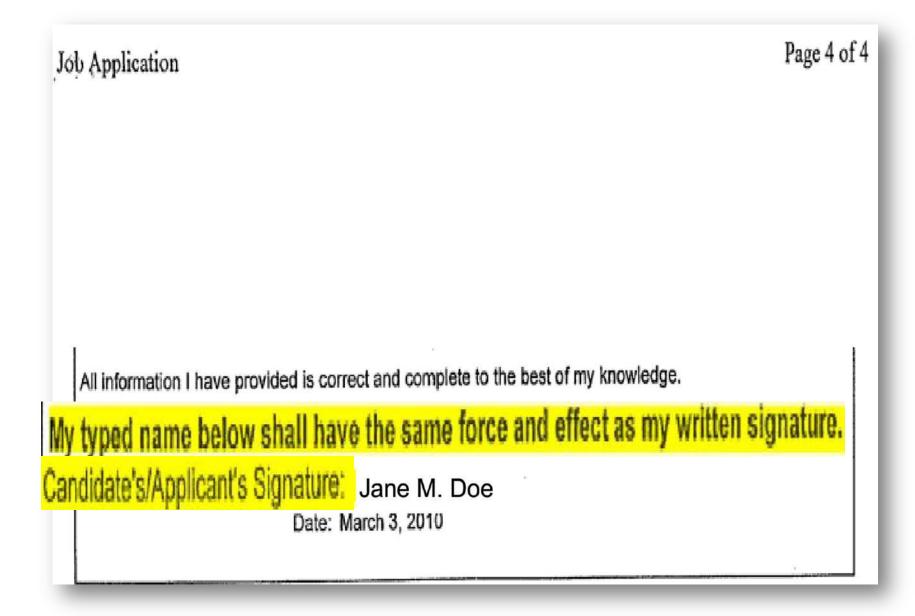
#### **Objections & Preserving the Record**

## Demonstrations

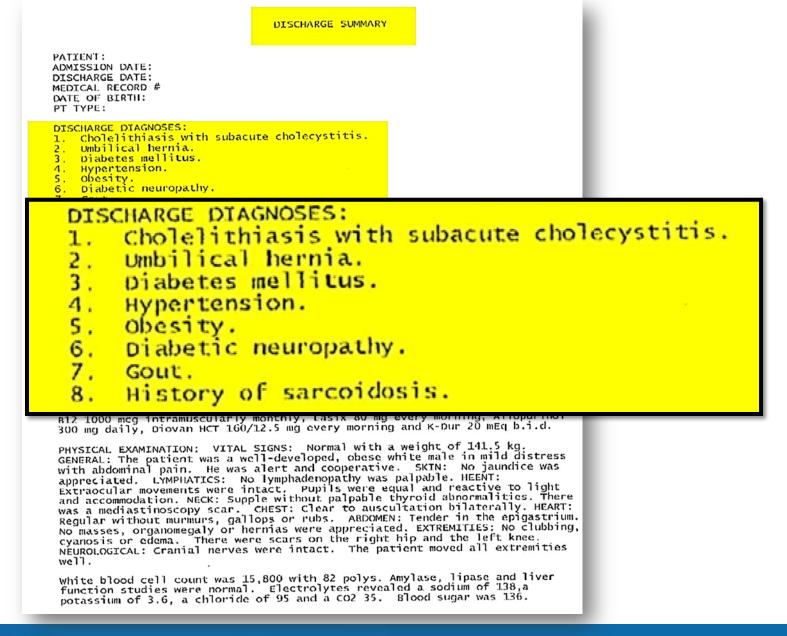














This is not a bill. This is an itemization of your professional services for:

Patient:	Admission Date:	09/23/2013
Account ID	Discharge Date:	09/23/2013

#### **Professional Charges**

Service Date	Service Provider	, Px Code	Px Description	DX CODE	QTY	Amount
09/23/13		1	OFFICE/OUTPT VISIT,EST,LEVL III	659.63,656 .53	1	89.00
Total profes	sional cha	rges;	1		ł	89.00

**Professional Payments and Adjustments** 

Description		• •	••••	1	Amount
Majesta PB/HB CONTR	ACTUAL WRIT	E-OFF (INS) -	10/21/13		-37.62
Majesta Payments					-51.38
Total professional pay	ments and adj	ustments:			-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 <u>on all issues</u>
- 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!

