MAKE SURE YOUR APPELLATE RECORD GOES PLATINUM

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A successful appeal starts with preserving possible errors in the trial court. Yet the requirements for preserving issues for appeal are surprisingly arcane. They vary between courts. Even *whether* to preserve issues for appeal is sometimes legitimately debatable. The stakes are high and intuition is not a reliable guide. Researching how to preserve an issue for appeal is no one's idea of a good time, but it is mission-critical.

This paper examines some examples of areas where how, or even whether, to preserve issues for appeal is not obvious. Using the federal and California courts as examples, it illustrates how different court systems in fact have different requirements. These differences underscore the importance of identifying in advance the important issues that you want to preserve, identifying the rule of law that determines how to preserve them in your court, and following the rule. It sounds simple, but in the heat of trial it is anything but.

I. THE CONFLICTING MINDSETS: WINNING AT TRIAL VERSUS OBJECTING TO PRESERVE ISSUES FOR APPEAL

The first question is sometimes whether to preserve the issue at all. The most important step in winning on appeal is often to win in the trial court. In U.S. federal courts, fewer than 15% of civil appeals result in reversal. The trial court's judgment is affirmed over 80% of the time.[1] In the largest state-court system (California), just 17% of civil appeals result in reversal of the judgment; over 80% result in affirmance.[2] Therefore, whoever wins in the trial court has a large leg up in winning on appeal.

The odds so steeply favor the prevailing party partly because trial judges usually get the major calls right. But the system also leans toward upholding *whatever* result the trial court reached. On appeal after trial, the facts are typically viewed in favor of the party that won in the trial court. Many trial-court rulings are reviewed deferentially. Even if the trial judge erred, the appellate court will ordinarily not reverse unless there is a reasonable chance that the error changed the outcome. All of these principles push the court toward affirming the trial's outcome -- and if the trial had gone the other way, they would push the appellate court to affirm *that* decision. Winning the trial, on its own, gives you a huge leg up on winning any appeal.

So if you want to win the appeal, preserving issues is important, but winning the trial is often equally important. These goals often conflict. Objections may alienate the jury and judge – lessening the chance of trial victory.

For this reason, objecting is not always the right choice. It is often wise to forego objection, especially to evidence that is not particularly important or persuasive, or where the other side would be able to prove the same thing with admissible evidence. Since evidentiary issues are often foreseeable, it is worth considering the other side's evidence in advance and deciding whether to object and on what grounds to each major item of evidence.

II. CARDINAL RULES FOR PRESERVING THE RECORD

Three overarching principles set the stage for any consideration of preserving issues for appeal.

1. *If it isn't in the record, it didn't happen.* Appellate courts normally do not consider facts that were not before the trial court. *E.g., United States v. Elias*, 921 F.2d 870, 874 (9th Cir.

[1] http://www.uscourts.gov/sites/default/files/data_tables/stfj_b5_1231.2016.pdf (excludes prisoner appeals).
[2] http://www.courts.ca.gov/documents/2017-Court-Statistics-Report.pdf?1512061638381, p. 51 Fig. 25.

1990). Further, the fact must be in the record. Each factual statement in an appellate brief must be supported by citation to the record. *See* Fed. R. App. Proc. 28(a)(6); Cal. R. Ct. 8.204(a)(1)(C), 8.204(a)(2)(C). A factual assertion unsupported by citation to the record is typically ignored.

In the heat of trial, conscious effort is required to make sure important things wind up in the record. For example, deposition testimony used at trial must be recorded. The parties and judge typically want to spare the court reporter from reporting deposition testimony because it has already been transcribed. But the appellate court must be able to tell which testimony was read to the jury and what the deponent said in that testimony. The best practice is to have the court reporter transcribe deposition testimony as it is read or played. But at the very least, the record must reflect which pages and lines of testimony are read, and those pages – or the entire deposition – must be lodged. Some courts have special rules specifying how to put deposition testimony into the record. *See, e.g.*, Cal. R. Ct. 2.1040 (party presenting electronically-recorded deposition testimony at trial must identify on the record the pages and lines of deposition testimony offered, and file copy of those pages and lines), 8.122(b)(4)(A) (unless court orders or parties stipulate, appellate record must not include depositions except in compliance with Rule 2.1040).

Similarly, beware of off-the-record conferences and rulings; repeat important objections and rulings on the record. Do not just hand bench briefs or other papers to the judge; file them with the clerk. Last, ensure exhibits are properly referenced and admitted – if you want them admitted.

2. *In general, the legal issue raised on appeal must have been raised in the trial court.* Normally, an appellate court will only consider arguments raised in the trial court. Among other things, this rule ensures that the parties were on notice in the trial court to offer all the evidence relevant to the issues now being argued. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008). The matter must have been raised sufficiently for the trial court to rule on it. Mentioning an issue in passing is not always enough to preserve it for appeal. *Conservation Northwest v. Sherman*, 715 F.3d 1181, 1188 (9th Cir. 2013) (argument was forfeited where in district court it had been "buried in the middle of a section" addressing other issues and district court had not addressed it); *Moreno Roofing Co., Inc. v. Nagle*, 99 F.3d 340, 343 (9th Cir. 1996) (issue was waived where counsel had only presented it in district court during oral argument on motion for summary judgment; remarks at argument did not sufficiently present issue to district court or cause the district court to address the issue). The record must affirmatively show that the issue was raised and the trial judge made the error complained of. Some courts require an appellant to show where in the record it raised the issue it complains about on appeal. *See, e.g.,* U.S. Court of Appeals for the Ninth Circuit Local Rule 28-2.5 (for each issue, appellant must state where in the record the issue was "raised and ruled on" and, if an objection was required to preserve the issue, "where in the record on appeal the objection and ruling are set forth.").

In practical terms, this rule means that you must make all your legal arguments in the trial court, on the right grounds, at the right time. *E.g.*, Fed. R. Evid. 103(a)(1) (party may claim error in ruling admitting evidence only if party "timely objects or moves to strike" and "states the specific ground, unless it was apparent from the context"). Identify important evidentiary and other issues in advance, make notes of the specific rules of law on which your argument is based, and cite them to the court.

3. *You need a ruling to complain about.* Even an issue that was raised may be found abandoned or waived if the party failed to obtain a ruling on it. *Compare Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009) ("While Ramirez objected to the declarations' admission, the district court never ruled on the objections, and Ramirez never requested a ruling on the objections. Therefore, we do not consider Ramirez's evidentiary objection*."); People v. Rhodes* (1989) 212 Cal.App.3d 541, 554 (similar).

What does this mean in practical terms? Keep a checklist of unresolved issues. Make sure you get rulings on everything you care about. Renew issues that were not resolved or were decided without prejudice to renewal.

III. SOME EXAMPLES OF HOW TO PRESERVE COMMON ISSUES – AND HOW THE LAWS VARY BETWEEN JURISDICTIONS

The requirements for preserving a given issue for appeal vary between courts. Different states and different federal circuits may follow different rules. When preparing for trial – or any other significant event in the case – think about what issues you will want preserved for appeal. Research your jurisdiction's requirements for preserving those issues. Then follow them.

In federal court, beware circuit splits. If the federal circuits are split over how a given issue must be preserved for appeal, consider following the more stringent rule -- even if your circuit is more permissive. Otherwise you could follow the more relaxed procedure, only to have the Supreme Court resolve the split – in your case or someone else's – in favor of the more stringent requirement. The Supreme Court's decision will then be binding on lower appellate courts. You may have done everything right under your circuit's law and still forfeit your issue. *See Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 398-99, 406 n.6 (2006) (appellant followed applicable circuit's rule that insufficiency of evidence can be preserved by pre-verdict motion for judgment as a matter of law, even without post-verdict motion; Supreme Court granted certiorari, held that post-judgment was required and argument was forfeited, and rejected argument that appellant had justifiably relied on circuit precedent).

Below we address some common traps for the unwary in preserving arguments for appeal.

A. Evidentiary Objections

Rulings on evidence are a common basis for appeal. At a 50,000-foot level, the requirements for preserving evidentiary issues can be summed up as the four R's:

- Right time (before answer if question objectionable; right after answer if question is fine but answer objectionable);
- Right ground (only the legal grounds raised in the trial court are ordinarily preserved)
- Ruling (one must be obtained)
- Record (of your objection or your proof excluded)

For example, Federal Rule of Evidence 103 specifies that a "ruling" admitting evidence is preserved for appeal only if the party "timely objects or moves to strike" and "states the specific ground, unless it was apparent from the context." Fed. R. Evid. 103(a)(1); *see* Cal. Evid. Code §

353(a) (admission of evidence is not basis for reversal unless, *inter alia*, "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion.") If the ruling excludes evidence, the ruling is preserved only if the party "informs the court of its substance by offer of proof, unless the substance was apparent from the context." Fed. R. Evid. 103(a)(2); *see* Cal. Evid. Code § 354 (exclusion of evidence is not basis for reversal unless party made "substance, purpose, and relevance of the excluded evidence" known to court "by the questions asked, an offer of proof, or by any other means," or unless the court's rulings made doing so futile or evidence was sought on cross-examination).

Because only the specific grounds advanced in the trial court are normally preserved, it is important to think in advance about the legal grounds for objecting to the other side's key evidence and for admitting your key evidence -- and to articulate them clearly when the time comes. Thus, objecting that evidence is irrelevant will normally not preserve the argument that it is hearsay. Objecting that evidence is "improper" probably will not preserve anything at all.

But courts differ in the specific way these general principles apply. For example, motions in limine are an infamous trap for the unwary in preserving evidentiary issues. In limine rulings help the parties plan, and help the court make considered decisions outside the heat of trial. But they do *not* always preserve issues for review. The rules differ between jurisdictions, and it is critical to know the rule in yours.

Some courts hold that an on-the-record, definitive in limine ruling preserves the error and you need not object or offer proof during trial. *See, e.g.*, Fed. R. Evid. 103(b) ("Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal."). But the ruling must be "definitive," meaning that the court intended the ruling to be the final determination of whether the evidence was admissible. If the district court makes tentative in limine ruling excluding evidence, "the exclusion of that evidence may only be challenged on appeal if the aggrieved party attempts to offer such evidence at trial." *Tennison v. Circus Circus Enterprises, Inc.*, 244 F.3d 684, 689 (9th Cir. 2001).

Some other jurisdictions presume that rulings in limine do *not* preserve points for appeal and the party must object or offer proof again at trial. For example, in California, "Generally when an in limine ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal." *People v. Jennings*, 46 Cal.3d 963, 975 n.3 (1988). "The reason for this rule is that until the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility." *Id.* A motion in limine can sometimes preserve an objection for appeal, but only if: "(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." *People v. Lucas*, 60 Cal.4th 153, 220 n.29 (2014), *disapproved on other grounds, People v. Romero*, 62 Cal.4th 1, 53 n.19 (2015).

These principles lead to some practical advice: Know and follow the rule in your jurisdiction. Plan out objections and offers of proof for critical evidence. If you object to evidence, get a definitive ruling. If the ruling is not definitive, or if rulings in limine do not preserve evidentiary points in your jurisdiction, renew the issue at trial by, as appropriate, (a)

objecting on all grounds when the other side's evidence is introduced, referencing the motion in limine to ensure all grounds are covered, or (b) offering the evidence at trial. If in doubt, object or make an offer of proof at trial.

B. Jury Instructions

Another common ground for appeal is asserted errors in jury instructions. Here again, the procedure to preserve error is not intuitive. The steps needed to preserve errors for appeal vary wildly between jurisdictions, and are sometimes specified in intricate detail.

Some courts do not even require objections to jury instructions. In California, a party does not even need to have objected to a jury instruction in the trial court before arguing on appeal that the instruction was wrong (as opposed to vague or incomplete). Cal. Code Civ. Proc. §§ 646-647 ("giving an instruction" is deemed objected to); *e.g. Lund v. San Joaquin Valley R.R.*, 31 Cal.4th 1, 7 (2003) (under section 647, appellant could argue on appeal that trial court erred in giving jury instruction even though it had not objected in trial court); *Worford v. Jiminez*, 262 Cal.App.2d 449, 450 n.2 (1968) ("erroneous instructions can always be challenged on appeal since they are deemed by statute to have been excepted to.").

A lawyer accustomed to the California procedure would be in for a rude shock in federal court. In federal court, the appellant must almost always have objected to the error in jury instructions, or the error is forfeited. The procedure needed to preserve error in jury instructions is specified in considerable detail in Federal Rule of Civil Procedure 51. The court sets a deadline for requesting instructions. Subsequently the parties can request additional instructions on issues they could not have foreseen, or request permission to submit untimely additional instructions. The court must inform the parties of its proposed jury instructions and proposed action on requests for instructions, and provide an opportunity for the parties to object. Fed. R. Civ. Proc. 51(b). To preserve an error in giving an instruction, a party must object. Fed. R. Civ. Proc. 51(d)(1)(A). To preserve an error in refusing an instruction, a party must request it and either object to the failure to give the instruction or obtain a definitive ruling rejecting the request. Fed. R. Civ. Proc. 51(d)(1)(B). Objections must be on the record, "stating distinctly the matter objected to and the grounds for the objection." Fed. R. Civ. Proc. 51(c)(1). A party who does not comply with these requirements is generally out of luck (though the court of appeals has residual power to address "plain error" in jury instructions even where the error was not properly preserved). Fed. R. Civ. Proc. 51(d).

C. Insufficiency of Evidence

Directed verdicts and judgment as a matter of law provide one last illustration of how the rules for preserving arguments for appeal are variable and far from intuitive -- and why it is critical to know the rule in your jurisdiction and follow it.

In some states, like California, a party can argue for the first time on appeal that the evidence is not sufficient to support the judgment. *Tahoe Nat'l Bank v. Phillips,* 4 Cal.3d 11, 23 n.17 (1971) ("Generally, points not urged in the trial court cannot be raised on appeal…. The contention that a judgment is not supported by substantial evidence, however, is an obvious exception to the rule."); *Orange County Flood Control Dist. v. Sunny Crest Dairy, Inc.*, 77 Cal.App.3d 742, 761 (1978) ("Failure to object to evidence or to move for a nonsuit or directed verdict does not preclude an appellant from attacking a finding on the ground of insufficiency of

the evidence to support it."). Similarly, "a contention that the uncontradicted facts establish as a matter of law that the decision below was wrong may be made for the first time on appeal." *Orange County Flood Control Dist.,* 77 Cal.App.3d at 761.

Federal courts are far more stringent. A federal appellate court cannot reverse a judgment for insufficiency of evidence and render judgment for the appellant unless the appellant moved for judgment as a matter of law both before the case went to the jury and *again* after the verdict was returned. *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400-02 (2006); *see* Fed. R. Civ. Proc. 50(a),(b). A federal appellate court cannot even grant a new trial based on insufficiency of the evidence, unless the appellant made both of these motions or moved for a new trial in the trial court. *Unitherm*, 546 U.S. at 400-04.

IV. CONCLUSION

As these examples demonstrate, there is no one-size-fits-all answer to how or even whether to preserve issues for appeal. A lawyer who relies on general knowledge or intuition about how to preserve issues does so at his or her peril. The best advice is to evaluate at every stage what issues are important and should be preserved, research the rule of law that dictates how to preserve them – and follow that rule.