International Association of Defense Counsel

Trial Academy

Preserving the Record for Appeal

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GENERAL RULES

- If it is not in the record, it never happened.

- To preserve the issue for appeal, you must raise an objection and ask for a cure.

- The principle behind the requirement of preserving error is: (1) to bring it to the trial court's attention, (2) to explain the error to the judge; and (3) to give the judge an opportunity to correct it at a time when the trial judge has the ability to do so.

- An objection is also designed to inform your adversary of an evidentiary issue. Thus, if your objection is not specific and your adversary could have remedied the defect if the grounds were known, the error will be deemed waived.

- If the objection is sustained, ask for a curative instruction (e.g., that the jury disregard the evidence).

- If the trial court is not told what the excluded evidence would have been or would have shown, the ruling excluding the evidence cannot be challenged on appeal.
- Evidence needs to be verbalized or in "black and white" or your record will not be effective.

- If you go "off the record," make sure you memorialize any request and/or rulings when you go back on.

- If you don't get a ruling, the error will likely be waived.

- There is no error that you can count on as being "fundamental." You should preserve all errors if you hope to rely on them in an appeal.
- Objections, motions or requests must be: (1) timely; (2) specific; (3) ruled upon; and (4) accurately appear in the record.

PRE-TRIAL ISSUES

- A federal pre-trial order can limit issues for review. Under F.R.Civ.P. 16, the pre-trial order supercedes the pleadings and "shall control the subsequent course of the action. …" Rule 16 may bar review of an issue that was omitted from the pre-trial order.
- Know the local rules that govern the trial and time allotments for opening, closing, voir dire, etc. If you are allotted an inadequate amount of time for opening, closing, voir dire, or direct or cross-examination, make a timely objection by asking the court for additional time, setting forth the reasons why additional time is necessary.
- Ask for an instruction to the jury, at the beginning of the trial, that objections are not to be held against the maker, even if overruled.

- If the co-defendants are aligned in their interests, obtain a ruling that an objection by one defendant will be deemed to be effective as to all defendants.

MOTIONS IN LIMINE

- If you are seeking to exclude evidence, prepare a written motion in limine setting forth all of the reasons for your objections to the evidence.
- If the trial court reserves ruling on a motion in limine, ask for a limiting instruction that opposing counsel cannot comment on such evidence during his or her opening statement.
- If evidence is admissible only with a limiting instruction, the limiting instruction must be requested and given at the time that the evidence is sought to be admitted.
- If the trial court denies your motion in limine, you must renew your objection to the evidence each time it is offered into evidence. Some courts will allow a continuing objection if you specifically request that relief and the judge clearly rules on the request.
- If you do not get a ruling, you should try to force a ruling i.e., "I assume that the court is overruling my objection to the admission of that document … ."
- Where the court has admitted evidence over your objection, evaluate whether error will be waived if you attempt to diminish the impact of the erroneous ruling by addressing the evidence in your opening statement.

- Timely raise motions in limine to preclude the admission of expert testimony. In many jurisdictions, this motion can be filed well in advance of trial.

JURY SELECTION

- Questions to jurors that incorrectly state the law or the facts are objectionable.
- Generally counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts.
- Denial of a challenge for cause: To preserve this error, you may need to have exhausted your peremptory challenges, plus been denied a request for additional peremptory challenges.
- In order to preserve objections during jury selection for appeal, most courts hold that counsel must additionally object to the final composition of the jury panel. Failure to make such an objection is deemed a waiver of the composition of the jury and all prior objections.

OPENING STATEMENTS

- If you do not timely object to improper statements by opposing counsel, the objection will likely be waived.
- Personal belief comments in opening statements are objectionable because they are not evidence. Personal opinions inject the credibility of the trial attorney into the trial.

- Courts have discretion in prohibiting counsel, during opening statement, to anticipate and present to the jury the defenses it anticipates its opposition will present. Opening statements are supposed to be limited to what evidence counsel intends to prove, as opposed to what evidence opposing counsel intends to prove.

EVIDENTIARY ERRORS

- An objection to the admission of evidence must state the grounds to preserve the error for appeal.
- If you make a specific evidentiary objection that is overruled, different grounds for objecting cannot be raised on appeal unless the error is "fundamental."
- A proper objection by one party may not preserve the issue for appeal if another party, not aligned fully in interest, has not joined in the objection.
- If a deposition transcript is being read to the jury, object to testimony that you deem inadmissible or it will be waived.
- A proper foundation is required for admission of evidence. Absent a stipulation, documents must be authenticated. If you fail to object to the foundation of a document, the error will be waived.
- A proper foundation for a photograph requires a stipulation or testimony that it fairly and accurately represents the object/scene at the relevant time.
- If an exhibit you have offered is excluded from evidence, make an offer of proof, stating the relevancy and materiality of the proffered exhibit. Make sure the exhibit is part of the record.

- If testimony is excluded, make an express offer of proof as to what the witness would say if your line of questioning was permitted.
- To make an effective offer of proof of deposition testimony, the offering party must formally offer the transcript into evidence.
- Goals for the offer of proof: (1) to permit the court to reevaluate its decision to exclude the evidence, in light of the actual evidence to be offered; and (2) to permit the reviewing court to determine whether excluding the evidence affected a substantial right of the offering party.
- Federal Rule of Evidence 103 (b) authorizes the trial court to accept an offer of proof in the form of questions and answers between the attorney and the witness. Alternatively, you can summarize what you believe the evidence would show.
- Be careful when your opponent makes an offer of proof and "summarizes" what he/she believes the testimony would be. If you believe it is exaggerated or unsupported, raise your concern.
- If the trial court refuses an offer of proof, make a written offer of proof and file it with the court.
- If the court excludes an exhibit, ask to admit the document as a "court exhibit" so it will be part of the record for review.
- If admitted testimony later proves to have been erroneously admitted, move to strike all the prior testimony and ask for a curative instruction to the jury.

- Protect yourself from the opponent offering evidence subject to "being connected up" later. Ask for an offer of proof now.
- When opposing counsel has failed to connect up evidence so as to render it admissible, you must move to strike the unconnected evidence, or the issue will be waived.
- Make sure that each admitted exhibit is published to the jury.
- If a witness unexpectedly volunteers information that is not responsive to the question, object immediately thereafter and ask that the answer be stricken and that the jury be instructed to disregard the testimony (or move for a mistrial).
- Where testimony is admitted subject to objection (e.g., reserved ruling), the evidence will be considered as properly admitted if the objection is not renewed and no motion is made to strike the testimony, in the record.

EXPERT TESTIMONY

- Know the standard for admission of expert testimony in your jurisdiction. Many states still employ the *Frye* standard: Testimony is admissible if the methodology or scientific principle on which the opinion is based is "generally accepted."
- The *Daubert* standard has been adopted in federal court and is also employed by a number of states. To be admissible, the expert must have derived his or her conclusions from the "scientific method." Is the method subject to empirical testing or peer review? Is there a known or potential

error rate? Are there standards controlling the technique's or method's operation? Is the theory generally accepted?

- Is the expert qualified to render the opinion?

CURATIVE REQUESTS

- When an objection is sustained, ask for the appropriate curative relief. This might include: "instructing the jury to disregard the answer" or "instructing the witness to answer the question." Where the error is serious, a mistrial should be requested.
- When requesting a mistrial, consideration should be given to whether an immediate ruling on the mistrial is in your clients' best interests. If you are 3 weeks into the trial, you might want to consider moving for a mistrial, but requesting that the judge reserve ruling on the issue until after the case has been submitted to the jury. If the jury rules in your client's favor, the mistrial motion is moot and you will not have to retry the case – based on that error. If the jury rules against your client, the motion for mistrial is still viable.

MOTIONS FOR DIRECTED VERDICT/JUDGMENT AS A MATTER OF LAW AT THE CLOSE OF EVIDENCE

- A Rule 50 (a) motion for judgment as a matter of law in federal court can be filed at any time prior to the case going to the jury. It is a challenge to the sufficiency of the evidence, such that the issues should not go to the jury, but be resolved in your client's favor as a matter of law. The motion should be as inclusive as possible and state specific grounds for the relief

requested. Often this motion is filed at the close of your adversary's case. If the motion is denied, you can renew the motion at the close of all of the evidence, although that is no longer mandatory in federal court. Whether a motion for directed verdict/judgment as a matter of law needs to be renewed at the close of the evidence may be required in some state courts. Therefore, you should check the law in your jurisdiction.

- Failure to make a motion for a directed verdict can be deemed to waive the sufficiency of the evidence issues on appeal.
- Listen to the other party's motion for a directed verdict. Assess if you can remedy the flaws in your proof through rebuttal testimony or by asking for leave to reopen your case. If the request is denied, make an offer of proof.

JURY INSTRUCTIONS

- In federal court, the mere submission of a proposed jury instruction does not form a sufficient basis for the Court of Appeals to review the trial court's refusal to give the proposed instruction, unless specific grounds of objection are stated. Then, only the grounds so specified will be considered on appeal.
- To preserve a challenge to the failure of the court to instruct on a particular principle, you must both tender a proposed instruction that accurately states the principle and object when the trial judge fails to give it.
- Your proffered instructions must be in the record or the failure to give such an instruction cannot be challenged on appeal.

- Even if you object to a jury instruction during an informal charging conference on the record, you must still object to the instruction after the instructions are given and before the jury retires under Federal Rule of Civil Procedure 51.
- Verdict form: decide whether a special or a general verdict form is best for you in your jurisdiction. Know the rule on multiple theories.
- In some jurisdictions where a general verdict form is used and two or more theories are submitted to the jury, the appellate court will affirm if there is evidence to support one of the theories or if there is no error with respect to one of the theories.
- To preserve error regarding the use of a general verdict form, you must object to the general verdict form and request a special verdict form.

CLOSING ARGUMENT

- A contemporaneous objection is required to preserve error regarding the argument of counsel. If the objection is sustained, a curative instruction must be requested to preserve the issue for appeal.
- Golden rule arguments are objectionable. A golden rule argument suggests to jurors that they put themselves in the shoes of one of the parties. It is impermissible because it encourages the jurors to decide the case on the basis of personal interest and bias rather than on the evidence.
- Attacks on opposing counsel are objectionable.
- It is objectionable for an attorney to assert personal knowledge of the facts in issue or state his view of the justness of a cause, the credibility of a

witness, etc. A statement of personal belief suggests that the lawyer has access to off-the-record information.

- Many courts view per diem arguments for damages to be objectionable. A per diem argument is a formula argument in which time units of life are multiplied by a price of pain per unit. For example, would 50 cents an hour for that kind of suffering be too high?

JURY VERDICT

- If a jury verdict is inherently inconsistent or inadequate, you must raise your concern before the jury is discharged. Ask the court to have the jury deliberate further to resolve any inconsistencies.
- If you fail to object on the record to the form of the verdict before the jury is released, you will be deemed to have waived the objection.
- If you believe there has been juror misconduct, raise the issue with the court immediately. Make clear what remedial action you seek: discharge of the juror, a cautionary instruction or a mistrial.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR MOTION FOR A NEW TRIAL AFTER JUDGMENT IS ENTERED

- A Rule 50(b) motion is a post judgment motion that must be filed within 10 days of the entry of the judgment. Typically the motion *renews* the request for judgment as a matter of law filed prior to verdict or, *alternatively*, seeks a new trial.
- A Rule 59 motion is also a post judgment relief that seeks solely a new trial. It also must be filed within 10 days of the entry of the judgment.

- To challenge an excessive or inadequate award of damages, you must file a motion for a new trial. Otherwise, that issue may not be preserved for appeal.
- If you fail to renew your challenge to the sufficiency of the evidence after the verdict is rendered (i.e., if you fail to file a Rule 50(b) motion), or if you fail to request a new trial (i.e., request alternative relief in your Rule 50(b) motion or file a Rule 59 motion), the Court of Appeals has no power to direct the district court to enter judgment contrary to the one it permitted to stand **or** to order a new trial.
- A post-verdict motion is necessary because determining "whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Unitherm Food Systems, Inc. v. Swift-Eckrich,* 126 S.Ct. 980 (2006).
- The Seventh Circuit has ruled that a failure to file a Rule 50(b) motion will not preclude an award of a new trial on appeal, if the errors appealed from are prejudicial evidentiary errors as opposed to an appeal based on insufficient evidence. *Fuesting v. Zimmer*, 448 F. 3d 936, 940-41 (7th Cir. 2006). Court noted that "better practice" is the filing of post verdict motion even in cases where the appeal is on the basis of evidentiary errors.

OTHER PRACTICAL SUGGESTIONS

- Make a list of the grounds for a motion for directed verdict and judgment N.O.V. as the case is progressing.
- Make a list of evidentiary errors that may be used to seek a motion for a mistrial or a motion for a new trial.
- Make a list of all of the exhibits as they are offered into evidence, indicating what has been admitted and what has not been admitted.
- At the close of your case, review the admission of each piece of documentary or demonstrative evidence that you have identified and that you believe to have been admitted.
- If you missed offering an exhibit during trial, ask that it be admitted at the close of your case.
- Keep a filed, stamped copy of all exhibits in case one is lost.
- Do not allow opposing counsel to take trial exhibits back to the office at the end of trial. Ask that the clerk of the court keep all exhibits.
- Under the Federal Rules, exhibits must be placed in the custody of the Clerk of the District Court to be included in the original record. Exhibits must be marked, offered, and included in the evidence filed with the court even if it is not received. Exhibits that merely are marked and offered are not part of the record on appeal.
- If there are oversized exhibits, get a stipulation that a photograph, diagram or other reproduction of the exhibit may be used for purposes of the appellate record.

- If you cannot get a ruling, remind the trial court that you are just seeking to make your record for appeal.
- Do not be pressured into waiving objections or arguments or conceding points – verbally adopt all grounds set forth in your written motions.
- If you fail to include a legal theory in the pre-trial order, move to amend the pleadings pursuant to Federal Rule Civ. P. 15 (b) to conform with the evidence.
- If it is necessary, ask for a mistrial. You can also ask that the trial court reserve ruling on the motion for a mistrial until after the jury returns its verdict because, if you prevail, your motion will be moot.
- The proper way to challenge an inadequate or excessive verdict is a motion for a new trial (Rule 59).
- Be careful to abide by the time limitations for filing motions for judgment as a matter of law or for a new trial. (it is due 10 days after judgment is entered in federal court).
- If you do not file a post verdict motion under Rules 50(b) or 59, then the Court of Appeals will lack the power to assess the sufficiency of the evidence and cannot award a new trial or order the entry of judgment for the defendant. *Unitherm Food Systems, Inc. v. Swift-Eckrich*, 126 S. Ct 980 (2006).
- Don't forget previously filed motions for summary judgment. If a motion for summary judgment is denied, counsel must make a post-trial motion for judgment as a matter of law on that issue in order to preserve the issue

for appeal. For example, if the defendant's previously filed motion for summary judgment on a statute of limitations defense is not renewed in its post-trial motion, that issue will be waived.

Additional Resources for Preserving the Record on Appeal

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 126 S.Ct. 980 (2006)

Montz, Craig Lee, "Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials," Pepperdine Law Review (Jan. 2002).

Williamson, Julie M., and Evans, Scott S., "Preserving the Record for Appeal," Colorado Lawyer (November 1999).

Wabolt, Sylvia H. and Landy, Susan L., "Pointers on Preserving the Record, Litigation, (American Bar Association, Winter 1999).

Fegan, Thomas H., "Preservation of Record in Trial Court," Illinois Appellate Practice Manual (West Group, 11/2/2000).

Vogel, Karin Dougan and Stumpf, Jr., Robert J., "Preserving the Record for Appeal: Top Ten Mistakes (Jan 10, 2000), http://www.smrh.com (web site of Sheppard Mullin Richter & Hampton LLP).

Magnuson, Eric J. and McGuire, Michael J., "Preserving Appellate Issues," American Bar Association, (Fall 1995).

SMB/tmd/rdd/378115 9932-206 7/07