Beyond the Verdict: Preserving Issues for Appeal

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There are thousands of state and federal cases throughout the United States that contain some variant of a finding along the lines of "[o]bjections presented for the first time on appeal furnish nothing for us to review . . ." *E.g., Tise v. State*, 273 Ga. App. 201, 202 (2005). The goal of this paper is to help provide an understanding of some of the key rules and concepts involved to make sure your next appeal does not add to that ever-growing body of similar findings. While not covered in this outline, this presentation will also discuss noteworthy appellate decisions of particular significance to the retail and hospital industry in courts throughout the U.S.

While there are entire practice manuals dedicated to the litany of things counsel should consider both before and during trial to properly preserve issues for appeal, this paper and corresponding presentation focuses on what we believe to be the "core" areas of focus before and during trial.

I. PRESERVATION PRIOR TO TRIAL:

To ensure appellate errors are properly preserved, trial attorneys should plan for an appeal at the outset of litigation, which necessarily includes preparing an appellate strategy to preserve legal issues at every stage of litigation, including pre-trial.

A. <u>Pleadings</u>

1. Failure to Deny an Allegation - Fed. R. Civ. P. 8(b)(6)

- Failure to deny allegation in Complaint = admission. *Sun-Maid Raisin Growers Ass'n v. Neustadter Bros*., 115 F.2d 126 (Cal. COA, 9th Cir) (1940).

2. Affirmative Defenses – Fed. R. Civ. P. 8(c)(1)

- Certain affirmative defenses must be raised in responsive pleading or they will be deemed waived.

- Lack of jurisdiction = affirmative defense that must be asserted in Answer or other responsive pleading or else it will be deemed waived. *Croney v. Louisville & N.R. Co.*, 14 F.R.D. 356 (S.D.N.Y. 1953).[1]

3. Defenses Raised by Motion – Fed. R. Civ. P. 12(b)

[1] Unlike personal jurisdiction, subject matter jurisdiction is a procedural right that cannot be waived, and a party may raise the issue at any time, including for the first time on appeal.

- Certain defense may be asserted by motion (but the motion must be made before the responsive pleading would be due):

  (1) Lack of subject matter jurisdiction;

  (2) Lack of personal jurisdiction;

  (3) Improper venue;

  (4) Insufficient process;

  (5) Insufficient service of process;

  (6) Failure to state a claim upon which relief can be granted; and

  (7) Failure to join a party under Rule 19.

4. Compulsory Counterclaims – Fed. R. Civ. P. 13

- Waived if not set forth in Answer. *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357 (7th Cir. 1990).

5. Jury Trial Demand – Fed. R. Civ. P. 38

- A party waives a jury trial unless its demand is properly served and filed. FRCP 38(d).

6. Summary Judgment – Fed. R. Civ. P. 56

- A party waives no claims or defenses by not moving for summary judgment; however, if a party moves for summary judgment, failing to raise or respond to an argument may cause a waiver of that argument on appeal. A party also fails to preserve error if it does not specifically object to summary judgment evidence.
- While the denial of a summary judgment motion may preserve a purely legal issue, the better practice is to re-raise the issue in a directed verdict motion. *E.g.*, *Rekhi v. Wildwood Indus.*, 61 F.3d 1313, 1318 (7th Cir. 1995).

7. Discovery

- A party must raise an objection to a discovery request in a written response to the discovery request or the objection is

waived. To preserve the objection, the party must raise it again when the evidence is sought to be introduced at trial.

- Similarly, a party that objects to the opposing party's failure to supplement discovery responses or disclose witnesses before trial must raise the objection against at trial if the opposing party seeks to introduce the supplemental information or witnesses.

8. Motions *in Limine*/Experts

- Know your jurisdiction. Some require trial counsel to renew objections to a ruling on a motion *in limine* when the evidence is offered at trial.

  - **Fed. R. Evid. 103(b):** Once the court rules definitively on the record – either before trial or at trial – a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

  - **GA**: in the event Court denies a motion in limine, there is "no reason for another objection at trial in order to preserve the denial of the motion on appeal" as "[a]ll the purposes of an objection have already been fulfilled by the proceedings on the motion in limine." *Harley-Davison Motor Co. v. Daniel*, 244 Ga. 284, 285 (1979).

  - **FL**: if a definitive ruling is obtained, a party is not required to renew an objection throughout trial to preserve a claim for appeal. § 90.1004(1) Fla. Stat.

  - **MI:** Generally, a party must renew an objection at trial, and the proponent must make an offer of proof regarding evidence that has been excluded. MRE 103(a)(2) and (b)

- Also, if you prevail on a motion *in limine*, make sure the opposing party complies with the ruling during trial and object if the opposing party does not comply in order to avoid waiver. On a similar note, in some states, a litigant who obtains a favorable ruling on a motion to keep evidence out cannot be heard to complain about its admission later on if it was that party that offered the evidence. *E.g. Smith v. CSX Transp.*, 306 Ga. App. 897 (2010).

- Make sure to request a *Daubert/Frye* hearing if you intend to challenge an opposing party's expert.

II. PRESERVATION DURING TRIAL

A. Objections

If you have but one takeaway from this paper or presentation, we hope it is this: to preserve an argument for appellate review, you must make:

- A timely/contemporaneous objection;
- With specificity; and
- Obtain a ruling

1. *Timeliness*

A litigant must object at the time the evidence is offered. *U.S. v. Parodi*, 703 F.2d 768 (4th Cir. 1983). At its core, this rule seems fundamentally fair. After all, "[a] party cannot during the trial ignore what he thinks to be an injustice, take his chance on a favorable verdict, and complain later." *Smith v. State*, 277 Ga. 213, 219 (2003).

Practice Tip: Don't wait until a break at trial to make your objection.

i. Objections During Closing Argument

Many practitioners are reticent to object during closing arguments, often for fear of bringing the jury's attention to a particular argument or piece of evidence, or otherwise highlighting it. There are few practitioners who actually feel like a curative instruction does anything at all to alleviate the problems of an argument improperly made or raised, which begs the question, to object during closing arguments or not? If you think the argument is important enough to truly implicate your client's rights and likelihood of success, we suggest asking to approach the bench and make your record there.

Practice Tip: The trial court record must reflect the objection, and many courts do not routinely take down sidebars. If that is the case, be sure to ask the Court to have the jury step out so the objection can be fully voiced or make the objection at the bench and then make a proffer of what was said at the next available opportunity.

2. *Specificity*

Just as important as the timing of the objection is the content. "Objections and the grounds therefore should be made with particularity." *U.S. v. Adamson*, 665

F.2 d649 (5th Cir. 1982). In practice, litigants often object to evidence or argument as "improper," without additional explanation, or some do far worse and simply shout the uninformative "Objection!" that we so often see in courtroom television shows. Both of these risk waiving any right to raise the objection on appeal, whether the objection is one as to evidence or argument. The specific ground for reversal of an evidentiary ruling on appeal must be the same specific ground as that stated in the proper objection at trial.

3. ***Obtain a Ruling***

Lastly, even if you have made a timely and specific objection, no issue will be preserved for appellate review unless the trial court actually rules on the issue. If the jury hears evidence or argument that it should not, trial counsel should move for the jury to be admonished or for a mistrial to preserve the issue that the improper evidence or statement has prejudiced the jury despite the court's ruling sustaining the objection.

Practice Tip: Be wary of unreported sidebar conferences during trial. Either request that the court reporter take down sidebar discussions (especially related to matters that will be critical for appellate review) or make the record on the record after the sidebar.

B. Proffers/Offers of Proof

It is almost certain that there will be a time in your career as a trial lawyer where you will seek to have evidence (testimonial or otherwise) admitted and that request will be rejected by a trial judge. In such a scenario, a proffer is an essential, yet often forgotten about tool. FRE 103(a)(2). Indeed, "[o]ne of the most fundamental principles in the law of evidence is that in order to challenge a trial court's exclusion of evidence, an attorney must preserve the issue for appeal by making an offer of proof." *Holst v. Countryside Enterprises, Inc.*, 14 F.3d 1319, 1323 (8th Cir. 1994). Failure to make a proffer can be fatal on appeal.

1. ***The Rule – FRE 103. Rulings on Evidence***

(a) A party may claim error in a ruling to admit or exclude evidence only if the error affects a **substantial right of the party** and:

(1) if the ruling **admits evidence**, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the **specific ground**, unless it was apparent from the context; or

(2) if the ruling **excludes evidence**, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

2. ***Renewing Objections***

There is no requirement to renew objection once court rules (but better practice is to renew on the record). FRE 103(b).

3. ***Exceptions to Waiver***

Appellate courts can hear an issue on appeal where it involves **plain error affecting a substantial right**, even if the claim was not properly preserved. FRE 103(e).

D. Motions for Judgment as a Matter of Law

A party may move for judgment as a matter of law if at the close of evidence, no reasonable juror would have a sufficient evidentiary basis to find for the party on an issue. Fed. R. Civ. P. 50(a). To preserve the ability to challenge the sufficiency of the evidence at trial, counsel must also renew the motion within 28 days after judgment is entered. Fed. R. Civ. P. 50(b). **NOTE**: A party's failure to move for judgment as a matter of law before a case is submitted to a jury bars the party from making the motion after the jury reaches a verdict and from challenging the sufficiency of the evidence on appeal.

E. Jury Charges/Verdict Form

Jury charges are one of the most common grounds for appellate issues. To preserve an objection to a jury instruction, trial counsel must submit in writing each specific instruction counsel wants the court to provide to the jury, timely object to proposed instructions or the failure to give a proposed instruction, and distinctly state the matter objected to and the grounds for the objection. Counsel should also restate any written objections at the charge conference. Fed. R. Civ. P. 51.

> **EXCEPTION:** A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights. Fed. R. Civ. P. 51(d)(2).

Likewise, a party must object to a proposed verdict form or the failure to give a proposed verdict form before the jury deliberates (preferably at the charge conference). Trial counsel also should object before the jury is discharged if the jury reaches an inconsistent verdict. Fed. R. Civ. P. 49.

III. PRESERVING ERROR AFTER TRIAL

A. Renewing Motions for Judgment as a Matter of Law

As previously stated, failure to renew a motion for judgment as a matter of law precludes a party from challenging the sufficiency of the evidence post-trial or on appeal, and the party is limited to seeking a new trial. Fed. R. Civ. P. 50(b).

B. Motion for New Trial

Moving for a new trial is not a prerequisite to appeal and is usually unnecessary to preserve objections for appeal. But to be safe, trial counsel should move for a new trial within 28 days after entry of judgment. Remember, in order to move for a new trial based on a specific objection, the party must have first raised the objection at trial or before.

C. Notice of Appeal

Make sure to timely file a notice of appeal. Fed. R. App. P. 4(a)(1) (requiring notice of appeal to be filed within 30 days after entry of the order or judgment). Filing deadline is mandatory and jurisdictional absent exigent circumstances. Keep the notice of appeal broad and remember to file an amended notice if appealing a post-judgment ruling.

CONCLUSION

Like it or not, appeals are won and lost at the trial court level. One sure route to losing on appeal is by not objecting with specificity at the right time. "Procedural" losses are the hardest ones to swallow; if you have a good argument or objection, make it correctly, with specificity, and at the proper time so that your appeal can get to the merits. And for those of you who may be Hamilton fans, just remember – you don't want to miss your shot.