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What to Do When the Judge Makes a Mistake: Preparing Your Case for Appeal

Becky S. James

Most trial lawyers know that it is important to "preserve the record for appeal." If you've ever handled an appeal, you know that the first thing the appellate court will look at is whether the issue that is being raised on appeal was properly raised in the trial court. If it was not, then the issue will be deemed waived or forfeited on appeal. Even armed with this knowledge, however, lawyers often fail to make an adequate record in the trial court.

It may feel daunting, but there are ways to make preserving your appellate record less stressful and more manageable. This article gives strategic advice about preparing your case for appeal, discusses what you need to know about how and when to make certain objections, and gives practical tips for making your appellate record without jeopardizing your case in the trial court.

Rule No. 1: Win

Many trial lawyers feel that worrying about preserving their record for appeal distracts them from their efforts to win their case at trial. It may come as a relief to know that preserving your record for appeal is not at odds with prevailing in the trial court.

In fact, the single best way to improve your odds of winning on appeal is to win in the trial court. Statistically, anywhere from 70 to 90 percent of decisions are upheld on appeal. These statistics flow from deferential standards of review, harmless error review, procedural bars to review (such as the failure to object in the trial court), and even a "presumption of correctness."

But that doesn't mean you shouldn't raise legal issues to the trial court and object to erroneous rulings. Having the trial judge rule in your favor is your best-case scenario. If you can get the trial judge turned around on an evidentiary issue or a jury instruction, for example, it will increase your odds of winning your case in the trial court. If you lose the argument, the consolation prize is that you have preserved the issue for appeal. Either way, you have helped your client by raising the issue.

Issue Preservation 101

While the specific rules about how issues must be preserved vary slightly from jurisdiction to jurisdiction, some basic rules apply across the board, and even across civil and criminal arenas.

Legal Theories Generally May Not Be Presented for the First Time on Appeal

Trial lawyers need to think through not only the factual arguments they will make to a jury but also the legal arguments they will make to the judge. It is important to develop these legal theories early in the case so that you are prepared to present them to the trial court. You may be able to knock out some or all of your opponent's claims, for example, on a motion to dismiss or on summary judgment. Even if you don't win at that level, you have made a record of presenting your legal arguments to the trial court in the first instance. Make sure you have your legal arguments well in hand before preparing the jury instructions, at the very latest. If your legal theory is correct but not presented to the jury by the judge, that can be an appellate bonanza, but only if you proposed an appropriate instruction and objected to any inappropriate ones.

Object Early and Often

Objections must not only be raised in the trial, but they must be timely raised to preserve them for appeal. This generally means raising an objection early enough for the judge to correct the error. Objections also need to be repeated at the appropriate time. Objections or legal theories raised once but never mentioned again may be deemed abandoned.

Explain the Grounds for Your Objections

Just standing up and saying "objection" is not enough. You must state the grounds for your objection, and generally only the grounds you raise will be considered on appeal. Of course, at trial, you don't want to be accused of making "speaking objections." So, state the basis for your objection succinctly and then, if more explanation is needed, follow up at sidebar or at the next conference outside the presence of the jury.

In criminal cases, be sure to "constitutionalize" your objections when you can. Constitutional issues are cognizable in a later habeas corpus petition, but only if they were raised at the appropriate time. For example, don't limit your objection to hearsay; also include the Confrontation Clause violation. If in doubt, throw in a reference to denial of due process or fair trial.

Get Rejected Clearly and Finally

It's important that you get a ruling on your objections, proposed evidence, or instructions. If the court just hears your objection without ruling on it, you might as well not have made the objection. So, as counterintuitive as it may feel, it is better to be rejected outright than to have the judge remain silent in the face of your objections.

Put It on the Record

The general rule on appeal is "if it's not in the record, it doesn't exist." The "record" generally includes the documents filed with the court plus hearing transcripts. Unfortunately, some courts do not provide court reporters as a matter

of course. For any contested hearing or trial, it is always worth the expense of ordering a court reporter. The cost of engaging a court reporter will almost always be less than the cost to your client of losing an issue for appeal.

Also, watch out for times when the judge wants to do things "off the record." Judges will often have "informal" jury instruction conferences, where the parties and the judge sit around a conference table to hash out the jury instructions. That's fine, but the court reporter needs to be in the room too. Some judges also have a practice of not recording sidebars. You need to get sidebars on the record because that is often where critical objections and legal issues are argued. If the judge (or court reporter) won't cooperate, then summarize the objections and argument on the record at the next opportunity.

Specific Record Preservation Scenarios

In this section, we'll talk about some specific scenarios that often come up and the record preservation issues that come along with them.

Pleading Defects

If defects in the pleading are not timely challenged, they are deemed waived. And challenges to the pleadings are an excellent time to trot out your legal theories for testing by the trial court.

On the flipside, if you are representing the defendant and have affirmative defenses to raise, make sure you raise them in your answer. If discovery reveals an affirmative defense that you had not previously thought of, then make a motion to amend your answer. Affirmative defenses not preserved by answer can be deemed waived, and you will not be able to appeal, for example, the judge's refusal to give jury instructions on the defense.

Summary Judgment

A great many appeals involve summary judgment rulings, so this is an important arena in which to preserve appellate issues. It is important to articulate for the trial court exactly what your legal theories are, as well as what facts are in dispute (or not) and how those facts support judgment in your favor. Be mindful of court rules requiring separate statements of disputed/undisputed facts. If you fail to comply with these requirements, you may waive your right to rely on any omitted facts on appeal.

Motions in Limine

Motions in limine (i.e., pretrial motions addressing anticipated evidentiary issues) can be a great way to present your evidentiary issues to the trial court. But beware. Just bringing a motion in limine and even getting a ruling on your motion in limine may not be enough to preserve the evidentiary issue for appeal. This is because rulings on motions in limine are generally considered preliminary and subject to change as the evidence at trial comes in. So, you should raise the issue again when the evidence is offered at trial. If you're in federal court, Federal Rule of Evidence 103(b) may give you a little relief because it provides that so long as the court rules "definitively" on a motion in limine, the objection does not need to be repeated to be preserved for appeal. The problem is, what does it mean for a ruling to be made "definitively"? The answer is unclear, so your safest bet, even in federal court, is to ask the court again at the appropriate time at trial for a ruling on the evidence you propose to admit or exclude.

Evidentiary Objections at Trial

Making evidentiary objections at trial can be one of the most stressful points of issue preservation because it requires extemporaneous objections at the same time you're trying to listen to the answers and prepare for your next question. First, take a deep breath. Evidentiary rulings at trial rarely result in reversal on appeal. The reason for that is twofold: First, evidentiary issues are reviewed for abuse of discretion, and second, the evidentiary ruling must have been prejudicial to be reversed on appeal (i.e., it would have made a difference in the outcome at trial).

That said, *important* evidentiary issues can be effective issues for appeal. So, take some time as you're preparing for trial to think through what significant evidentiary objections you may have. You can front the issues through your motions in limine and therefore may only need to refer back to the relevant motion to preserve your objection. As to

those issues that matter, be sure to object at the appropriate time. Unfortunately, that generally means every time the disputed evidence comes in. If you fear annoying the jury as you object to every question, consider asking the court for a "standing" objection. State clearly the grounds and scope of your standing objection and make sure the court agrees to let you preserve your objection that way, and you will generally be okay for appeal.

Offers of Proof

If you are the party proposing to introduce evidence and are facing an objection to its admission, make sure you make an offer of proof. An offer of proof is a summary by counsel of what the evidence proposed to be admitted would be. If the appellate court doesn't know exactly what the evidence would have been, there is no way for the court to determine whether it should have been admitted or whether its exclusion was prejudicial. For this reason, appellate courts will generally view an argument for the admission of evidence as not adequately preserved in the absence of a detailed offer of proof.

Jury Instructions

Jury instructions are one of the most fruitful areas for appellate review. While the precise formulation of jury instructions is generally reviewed for abuse of discretion, legal errors in the jury instructions are reviewed de novo. And because jurors are presumed to follow the instructions they are given, it's difficult to argue that a legally erroneous jury instruction is harmless.

Make sure you have both proposed jury instructions that are consistent with the law as you interpret it and objected to any proposed jury instructions that are inconsistent with that law. And make sure you have proposed instructions on your theory of the case or your theory of defense. If your claim or defense is viable, then the failure to instruct the jury on it can be reversible error—but of course, only if you requested such an instruction.

Post-Trial Motions

Post-trial motions can generally be raised on two theories: (1) the evidence was insufficient to support the verdict, or (2) there were errors at trial that warrant a new trial. If you want to challenge the sufficiency of the evidence on appeal, make sure you have challenged it in a post-trial motion in the trial court. That is your opportunity to pull together all your legal and factual arguments and present them to the trial court in the first instance.

Motions for a new trial can also be a good place to make your record for appeal. Do *not,* however, think that you can save all your objections for post-trial motions. On a post-trial motion, most trial errors that were not properly objected to during trial will be disregarded, so objections raised for the first time in post-trial motions will generally be deemed untimely and therefore not adequately preserved for appeal.

Some trial errors simply cannot be raised before a post-trial motion. Jury misconduct, for example, often does not come to light until after trial, so there is no way to raise it any earlier in the proceedings. Another example is withheld discovery. If your opponent improperly failed to provide important discovery, it's critical that you spell out for the trial court in a post-trial motion why the discovery violation made a difference and warrants a new trial. A final example is cumulative error. Any one of your objections at trial might not give rise to reversible error, but if considered together, they might. Give the trial court the first opportunity to consider the cumulative effect of multiple trial errors.

Improving the Odds for Success

Preserving the record for appeal need not be frightening or stressful, and it certainly need not distract you from the primary task of winning your case in the trial court. Be respectful but firm with your objections, and you will improve your odds of success both in the trial court and on appeal.

Becky S. James is a certified appellate specialist. She clerked on the Ninth Circuit Court of Appeals, was the criminal appellate chief for the U.S. Attorney's Office for the Central District of California, and was a partner and co-chair of the national appellate practice of a major law firm. She practices with James & Associates in San Antonio, Texas, and Waymaker LLP in Los Angeles.