Your Outside Counsel May Be Waiving Arguments For Appeal

From the Experts

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If you are an in-house counsel whose case is heading for trial, you may worry whether your outside trial counsel is properly preserving potential arguments for appeal. And for good reason. Some trial attorneys, caught up in the immediate twists and turns of trial, can lose sight of the appellate record being created, which can lead to vital arguments being lost for appeal.

Here we share the top ways that your outside trial counsel may be waiving good arguments, so that when your next case goes to trial you can be alert to what you *don't* want your trial counsel to do.

Object, but Only Kind Of Sort Of

To properly preserve an objection, counsel should clearly state the objection, on the record, and the grounds for the objection. That sounds easy enough, but in the blistering pace of trial, it is all too easy to take shortcuts, resulting in a less-than-clear appellate record. The rules as to how much specificity is required, or allowed, for an objection can vary by jurisdiction or court, so make sure that trial counsel knows those rules in advance of trial and complies with those rules at trial. A naked "objection" might end up not only being overruled, but could later be deemed a waiver of the intended objection.

Accidentally Agree to a Bad Jury Charge or Verdict Form

Filing a proposed jury charge and verdict form before trial is a good first step, but may not be sufficient to effectively preserve objections to the charge that ultimately goes to the jury. Trial counsel should remain vigilant about the jury charge and verdict form, making detailed objections to any erroneous instruction proposed by opposing counsel or the court, or any such charge or form ultimately given to the jury.

Diligent preparation is critical; by crystalizing the objection in advance, counsel is less likely to garble the objection on the record. Ideally, the objections should also be made in writing in a

Relatedly, counsel may be tempted to rely on a "standing" objection to a particular witness or line of questions. But counsel should proceed with caution, making sure to understand the applicable rules regarding such objections in the specific court, and to get a clear ruling defining the parameters of any standing objection from the judge. The key is to limit any ambiguity later on the record as to which questions were included in that objection.

Let Bad Evidence Linger Before the Jury

If, despite trial counsel's best efforts, bad evidence is heard by the jury, counsel needs to be ready to take immediate action. Depending on the circumstances, counsel may want to move to strike the offending evidence, or request an instruction for the jury to disregard the evidence, or move for a mistrial. Unless the jury is specifically instructed, either by the judge at the time the evidence is heard or as part of a charge at the end of trial, to disregard the evidence, and that it cannot be the basis of their determinations, the jury may consider what it has heard. And any appellate claim that the bad evidence influenced or misled the jury could be lost.

If the court refuses to strike, or gives a mitigating instruction that does not go far enough, counsel should object clearly on the record. Absent these measures, counsel may later be limited in challenging the verdict.

Make Great Arguments—Off the Record

An argument is not in the appellate record unless it is made *on* the record. But sometimes counsel voices a key objection during an off-the-record moment, such as in an in-chambers hearing, a side-bar during voir dire of evidence or a discussion in open court outside the presence of the jury, when the court reporter is not present. If this happens, counsel should consider asking for a court reporter to be present. If a court reporter's presence is not immediately feasible, repeat the objection on the record at the next available opportunity. If counsel doesn't say it on the record, it may be lost for good.

Make an Overly Casual Motion for Directed Verdict

In the thick of trial, some counsel may be tempted to make an overly casual motion for directed verdict. But failing to take adequate care with the motion can lead to waiver of key arguments. If feasible, trial counsel should file a written motion for directed verdict, even if the court allows or encourages a verbal motion, and make a fully developed argument, citing the relevant legal authority, on each count. If the plaintiff is claiming punitive damages, defense counsel should make sure to include any argument that there is no basis for punitive liability. If lead counsel lacks the bandwidth to take on the motion with sufficient rigor, designate a different trial team member to tackle the job.

Sit Quietly Through an Improper Closing Argument

When opposing counsel is reaching a dramatic crescendo in a closing argument, it can be downright awkward to object. But to best preserve an objection to an improper argument, it is

pleading filed on the docket.

As the trial unfolds, counsel should be clear and specific on the record as to precisely which instruction or verdict form question is objected to, what counsel proposes instead and why. When objecting to an instruction, counsel should be sure to object to the corresponding portion of the verdict form, and vice versa. Objecting to one does not preserve an objection to the other automatically, and indeed can lead to waiver of a proper objection.

File a Motion *in limine*, Then Forget About It

Motions *in limine* are a powerful tool for keeping objectionable, or potentially inadmissible, evidence and arguments out of the trial, sometimes even before they have the opportunity to be raised in front of a jury. Equally important, these motions are also a great way to preserve arguments clearly and in writing right up front—but only so long as counsel follows through. Just making the motions may not be enough to preserve the issue for appeal. Too many lawyers file a bunch of motions before trial, only to fail to fully preserve the arguments raised in the motions.

If the court denies a motion, trial counsel should ensure that ruling is on the record, and object to the ruling on the record. If those rulings are made pre-trial, counsel may consider reasserting the objection on the first day of trial, if practicable.

Finally, when the objectionable evidence is actually offered later in the trial, trial counsel should timely renew the objection on the record. The goal is to use the motion *in limine* process to assert objections in detail in advance, but also to timely reiterate the objection as the evidence comes in so as to fully preserve the arguments.

Get Ambiguous, Off-the-Record Rulings

Counsel should obtain clear, on-the-record rulings from the court on any issue of importance at trial, including for example rulings on motions, objections or proposed jury charges. If the judge reserves ruling on an objection to "see how the evidence comes in," counsel should follow up once the evidence is offered or comes in, obtain a ruling and note the objection to any adverse ruling.

Similarly, if a document is offered for identification, not entered immediately and revisited later in the trial, counsel should follow up to obtain a ruling and note any objection to an adverse ruling.

Be Too Polite to Keep Objecting

It happens all the time: Trial counsel objects to a line of questioning and is overruled. Trial counsel objects to the next question and is overruled. Starting to become uncomfortable with the repeated objections and how they are playing with judge and jury, trial counsel holds his tongue for the next questions on the same line. But by being polite, counsel may invite danger; if evidence comes in without objection, any later appellate argument on the point may be waived. Trial counsel will need to balance the importance of preserving the objection with the effect on the jury in the here and now.

important to object on the record. Counsel should be well-versed in the specific jurisdiction's rules as to what constitutes improper argument, such as personally vouching for a witness, or asking the jury to stand in the shoes of the victim in a manner that creates a biased perspective on the case. Of course, an objection may call the jury's attention to a damaging argument, so counsel must weigh the cost-benefit equation inherent in the decision to object. But counsel should know that sitting quietly may lead to waiver.

The Bottom Line

As in-house counsel overseeing the trial strategy, you can play an invaluable role in guarding against waiver. Ask the tough questions: Was the court reporter there when you made that objection? Can we file a written objection to the court's proposed jury charge? Can we seek a curative instruction on that improper question that the jury heard? Your trial counsel will no doubt appreciate another set of seasoned eyes making sure that the appellate record is as strong as it can be.

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