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Playing the Long Game: Preserving Issues for Appeal

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Trials happen fast. Trial counsel are rightly preoccupied with preparing to give opening statements or closing arguments, preparing to examine or cross-examine witnesses, or simply keeping track of admitted exhibits.

In the heat of battle, some attorneys may give little attention to maneuvering around future appellate issues that also must be part of a successful case strategy. Focusing on telling the client's story and persuading the jury are—rightly—at the forefront of trial counsel's mind. But trial counsel should always hope for the best, but prepare for the worst. That means preserving objections and testimony for appeal, in the event the trial does not go your way.

This article examines one of trial counsel's most foundational—and important—responsibilities, preserving issues for appeal. There are three key things to remember. First, if trial counsel wants to exclude evidence, they must make an appropriate and timely objection. Second, once trial counsel objects, they must ensure that the trial court actually rules on their objection. Finally, should trial counsel be on the losing end of an objection, they must be prepared to provide an offer of proof, so that the appellate court can review the trial court's decision.

Make your objections

Making an objection sounds simple. For example, trial counsel should object when a question calls for hearsay. But what happens if the hearsay testimony is addressed in a motion in limine, or if multiple witnesses continue to bring up the same objectionable testimony? Knowing to object is not enough. Trial counsel must know when to object to preserve the issue for appeal.

Many trials begin with motions in limine—an effort by trial counsel to exclude a witness, part of a witness's testimony, or certain exhibits. In many cases, trial courts defer ruling on motions to dismiss or deny them in favor of letting the evidence come in. So what effect does making, and losing, a motion in limine have on preserving the client's appellate rights? None. Motions in limine are "preliminary in nature." So, while a motion in limine might help streamline a trial by forecasting the judge's view on the evidence at issue, merely making a motion in limine does not preserve an issue for appeal "if the [party] fails to further object to that evidence at the time it is offered at trial." That rule remains the case despite North Carolina Rule of Evidence 103(a)(2), which purports to limit a party's need to renew an objection once the trial court makes a definitive ruling on a legal issue. Our Supreme Court has held that Rule 103 conflicts with, and is superseded by,

Appellate Rule 10.

Because trial counsel must make contemporaneous objections, it's also critical that trial counsel understand *when* to object. In North Carolina, the general rule is that the "benefit of an objection, seasonably made, is lost if thereafter substantially the same evidence is admitted without any objection." It's often unnecessary to object to every question. The Supreme Court has authorized the use of a "continuing" or "line" objections. Using a line objection may be a strategic choice—should trial counsel disrupt the witness' flow at the risk of irritating the jury? Even when using line objections, trial counsel should renew the objection each time the witness returns to the objectionable testimony.

Get a Ruling

Objecting is important, but it's not enough to simply object. Under Appellate Rule 10, which governs the preservation of issues for appeal, it is "necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."

Trial counsel bears the burden of ensuring that the court addresses any objection. If a judge defers or tries to delay ruling on an objection, trial counsel should renew their objection or ask the judge clearly for a ruling. It's easier to forget this step than one might think. In *Truth Temple v. Word Proclaimed Church of God in Christ*, the trial court responded to the defendant's objection by saying, "let me hear what [plaintiff's counsel has] got to say, and I'll address it accordingly." The Court never revisited the issue. As a result, even though the defense counsel *made* an objection, the objection was not preserved for purposes of appellate review.

Make an Offer of Proof

Obtaining a ruling is not enough if the trial counsel loses an objection and the trial court excludes challenged evidence. Under Civil Rule 43(c), "if an objection to a question propounded to a witness is sustained by the court, the court on request of the examining attorney shall order a record made of the answer the witness would have given." This "record" is called an offer of proof.

An offer of proof must be "specific" and "must indicate what testimony the excluded witness would give." It is not enough to provide the substance of the excluded witness' testimony. Instead, trial counsel should be prepared to examine the excluded witness, or put on the excluded portion of a witness's testimony, outside the presence of the jury. The specific questioning will be an essential part of the record on appeal, especially if the evidence is critical to the prosecution or defense of a case.

Conclusion

In sum, trial can be hectic, but preserving issues for appeal is a critical aspect of trial counsel's job. In the absence of an embedded appellate attorney, who can remind trial counsel to object and help press the court for rulings, trial counsel should remember to follow each of these steps. Hopefully, they won't be necessary. But if trial counsel must appeal, objecting, obtaining a ruling, and making an offer of proof are vital prerequisites for the Court of Appeals or Supreme Court to thoroughly review all of the issues presented in a case.

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circumstance or fact situation. No action should be taken in reliance upon the information contained in this article without obtaining the advice of an attorney.

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