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Formaldehyde Is Your Friend!

How to Best Preserve Critical Claims, Arguments, and Objections for Appeal

A stack of papers, rendered in a green and black color scheme, is visible in the background of the bottom section.

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Properly Preserving Issues for Appeal



Preserving Issues for Appeal

- In general, an appellate court won't consider issues (e.g., facts or legal arguments) not properly raised below.
- Waiver v. forfeiture
- Claims v. theories v. arguments



Preserving Issues for Appeal

- There are rare exceptions:
 - Plain error affecting substantial rights
 - To prevent a miscarriage of justice or to preserve the integrity of the judicial process
 - Change in law (as long as issue was before trial court)
 - The issue on appeal is purely a question of law and the factual record has been adequately developed



Preserving Issues for Appeal

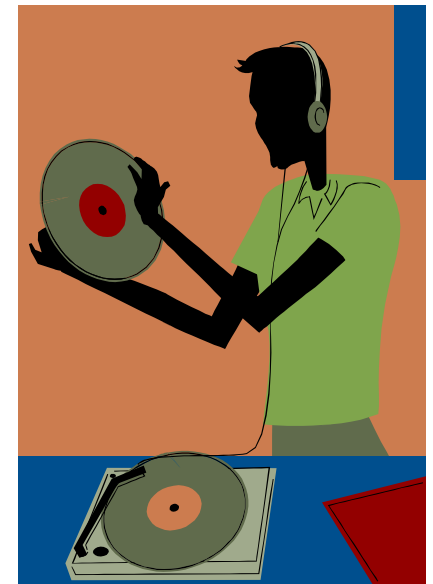
- May be tactical reasons to waive (e.g., don't want to antagonize judge)



- BUT err on side of preservation

Preserving Issues for Appeal

- Make your objections on the record
- If it's not on the record, it didn't happen
- Request to go back on the record afterward, to memorialize request and ruling



Preserving Issues for Appeal

So how to avoid forfeiture/waiver?

- Hints aren't enough!
- You must press a position, allow opposing counsel to respond, and give the district court an adequate opportunity to address it



Preserving Issues for Appeal

- Objecting to improper voir dire
- Evidentiary objections and offers of proof
- Objections to jury instructions
- Making timely motions for JMOL and/or new trial
- Post-trial possibilities



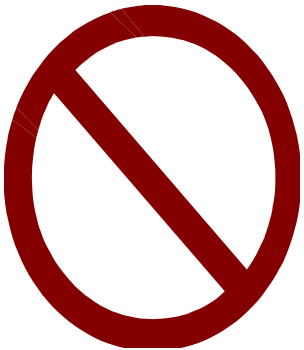
Improper Voir Dire



- Waiver by failure to object
- Motions in limine
 - If you anticipate improper questioning, address in MILs
- During jury selection ...
 - State the specific ground
 - Don't argue in front of jury
 - Ask that the jury be admonished
 - Motion for mistrial

Objections To Evidence

- Motions in Limine
 - MIL helpful for preserving record, because judge considers issues you have specified in writing
 - If judge reserves ruling on MIL, new objection must be made at trial
 - Beware morphing evidentiary arguments post-MIL



Objections To Evidence

- Objecting at trial
 - State objection and “grounds therefor” sufficient to put district court “on notice as to [the] concern.” *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988)
 - Don’t argue the objection in front of the jury



Objections To Evidence

- Example of Proper Objection: EEOC v. Wal Mart Stores, Inc., 35 Fed. App. 543, 546 (9th Cir. 2002):
 - “We reject Wal-Mart's argument that the EEOC waived any objection to this error because it did not object at trial. The EEOC did object to the relevance of the evidence Wal-Mart presented on this issue. This objection is sufficient to preserve this issue on appeal.”



Objections To Evidence

- Limiting instructions
 - Consider requesting if objection is overruled
 - Evidence can be limited to party or purpose
- Instruction to disregard evidence erroneously admitted
 - May cure error
 - Unless evidence is too prejudicial

Offers of Proof

- Preserve the right to appeal from the improper *exclusion* of evidence
 - Failure to make offer of proof may = waiver
- Offer must:
 - Identify the specific evidence
 - State or outline the substance, purpose and relevance of the evidence
 - Include preliminary facts required for admissibility

Offers of Proof

- Procedure
 - Ask the court for permission to make offer out of jury's presence
 - Make the request immediately after the objection is sustained
 - Can ask to make offer before the judge rules on the objection
 - Make sure you're on the record!

Objections To Jury Instructions

- FRCP 51 explains procedure for:
 - Requesting instructions;
 - Reviewing and objecting to a trial judge’s proposed instructions; and
 - Preserving objections for appeal.



Objections To Jury Instructions

- A party must request instructions before or at close of evidence.
FRCP 51(a)(1)
- A party may request new instructions after the close of evidence only in limited circumstances. FRCP 51(a)(2)



Objections To Jury Instructions

- The court must tell the parties about its proposed instructions AND what it intends to do on their requested instructions. FRCP 51(b)(1)
- The court also has to give the parties an opportunity to object on the record before the jury is instructed and closing arguments. FRCP 51(b)(2)



Objections To Jury Instructions

- Two principal kinds:
 - Objections to failure to give requested instruction on a valid point; and
 - Objections to the giving of an erroneous instruction



Objections To Jury Instructions

- Failure to give requested instruction:
 - Requested instructions must be supported with legal citations
 - If part of a requested instruction is legally erroneous, a court is not required to give any of it
 - A party must provide suggested instruction AND object when the instruction is not given but before the jury retires to deliberate



Objections To Jury Instructions

- Failure to give requested instruction:
 - Objection not required IF the court rejected the requested instruction in a definitive ruling on the record. FRCP 51(d)(1)(B)
 - Practice Pointer: Consider asking the district court to rule on the record that all proposed instructions not given have been considered and rejected

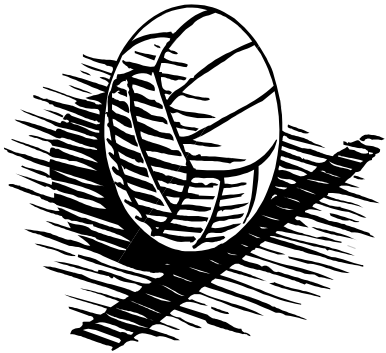


Objections To Jury Instructions

- Erroneous Instructions:
 - Object when the court presents its proposed instructions
 - If you're objecting to a proposed (erroneous) instruction because it is vague/ambiguous, you must offer an alternative instruction that is more specific



Objections To Jury Instructions



- The content of the objection limits appellate review
- Example: Hynes v. Energy West, Inc., 211 F.3d 1193, 1200 (10th Cir. 2000)

Objections To Jury Instructions

- An objection is timely if:
 - party objects when district court gives it the chance to do so,

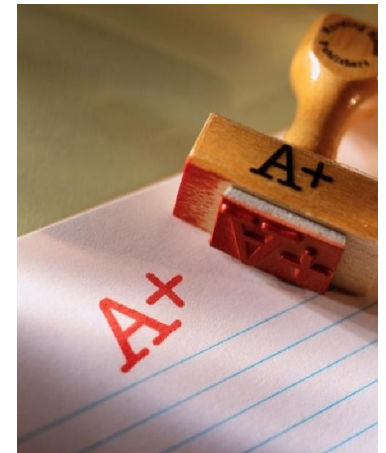
OR

 - the court does not give it the chance, and the party objects “promptly.” FRCP 51(c)(2)



Objections To Jury Instructions

- Example of proper objection
 - “Because plaintiffs made their objections during the jury instruction conference, their issues were preserved for appeal.” *EEOC v. Loral Aerospace Corp.*, 1998 WL 769820, at *1 (10th Cir. 1998)



Jury Instructions and Charge Conferences

TOP 10 “DON'TS”

1. Don't Start with Bad Instructions

- Proposed jury instructions should be a clear, practical model for the actual charge
- Counsel should use simple language jurors can understand, not legalese (“Mr. Smith” vs. “Plaintiff”)
- Consider filing a written objection to opposing counsel’s instructions

2. Don't Get Trapped into Submitting Instructions You Don't Really Want



2. Don't Get Trapped into Submitting Instructions You Don't Really Want

- If you object to an instruction being given at all, state so clearly on the record
- If opposing counsel proposes language for the unwanted instruction, make clear in the written submission that you object to it being given at all, but ask that if it is given over your objection, that the proposed be modified

3. Don't Be Caught Unprepared



3. Don't Be Caught Unprepared

- Prepare proposed jury instructions well before trial
- At trial, designate one person on trial team to manage jury instructions and verdict form
- If the judge circulates a written proposed charge, redline the judge's proposed instructions so that verbal or written objections can be clear
- Have model jury instructions for your jurisdiction on hand when writing a proposed charge and at charge conference

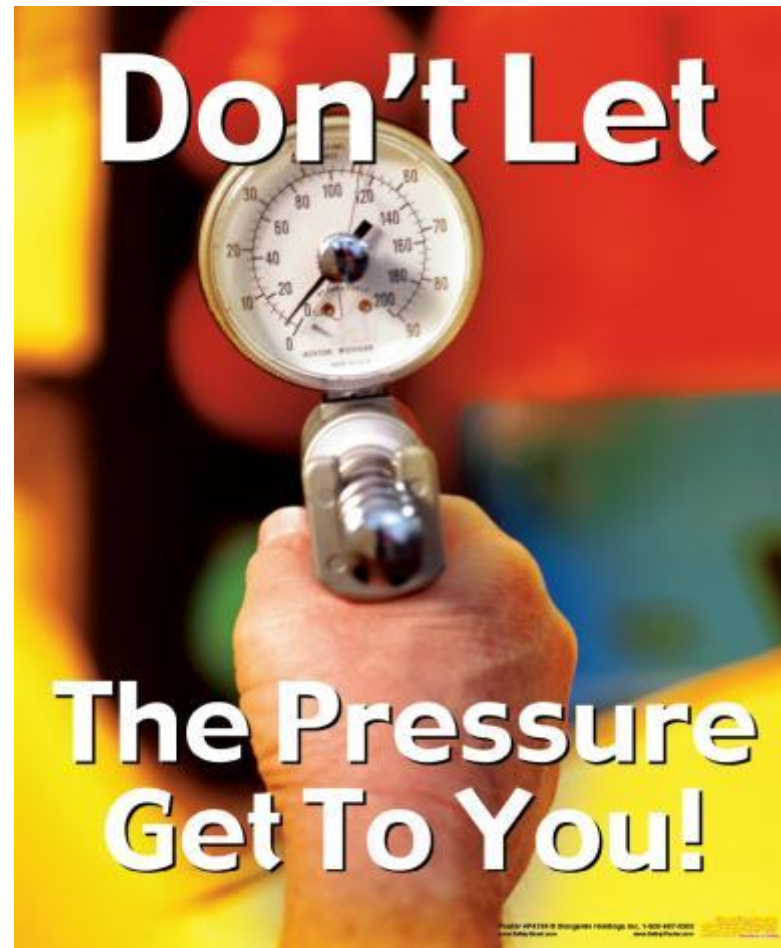
4. Don't Lose Sight of the Key Issues



4. Don't Lose Sight of the Key Issues

- Especially at charge conference, you will not have time to argue every little point at length
- Know what your most important issues are – both for persuading the jury, and for preserving your appellate record -- and make sure you give these the focus they deserve
- For less-important objections, state them clearly and succinctly, and move on

5. Don't Be Pressured Into Not Making the Record



5. Don't Be Pressured Into Not Making the Record

- Recognize that it's a pressurized environment, and the judge wants to move on
- Counsel must politely insist on making the record
- Counsel should state objections clearly and succinctly
- If judge is not allowing counsel to make a record, counsel should say so

6. Don't Give Opposing Counsel Appellate Hooks If You Don't Have To



6. Don't Give Opposing Counsel Appellate Hooks If You Don't Have To

- Be careful what you ask for
- Be wary of asking for instructions that present a risk that they will not be upheld on appeal
- Careful balancing: How much will the better instruction matter in winning the trial vs. what is the chance of reversal?

7. Don't Assume that General Objections Are Sufficient



7. Beware of General Objections

- Counsel should be wary of relying too heavily on general objections instead of specific objections to charge
- General objections may not provide a clear record for appeal
 - For example, “We object to all the instructions on malice” may not be clear enough to preserve your objection on a specific instruction for appeal

8. Don't Speak in Generalities about Prejudice and Confusion



8. Don't Speak in Generalities About Prejudice and Confusion

- Avoid general objections that a proposed instruction is prejudicial, or that it will confuse the jury
 - Judge is likely to ignore that general objection as boilerplate
- Instead, paint a picture—explain to judge precisely *how* the jury will be confused, or *why* the instruction will hurt your client

9. Don't Let Your Objection Fade Away



9. Don't Let Your Objection Fade Away

- Repeat and reincorporate objections to eliminate any danger of waiver
- After actual charge, consider asking to be heard briefly at sidebar to reincorporate your objections from the conference, and repeat most salient objections

10. Don't Let Your Record Get Muddy



10. Don't Let Your Record Get Muddy

- Resist temptation to get lazy at trial
- Avoid statements like, “On the next instruction, we have the same objection we discussed earlier, your honor, on the standard of proof”
- Objections must be specific and crisp

So What's the Bottom Line?

- OBJECT!

OBJECT!!

OBJECT!!!



Motions for JMOL/New Trial

- Party generally may not appeal denial of SJ after a full trial on the merits (Ortiz v. Jordan, 131 S.Ct. 884 (2011)) Thus . . .
- Move for JMOL!
- Denial of that motion merges into final judgment and subsumes all legal rulings (preserving them for appeal)
- Examples?



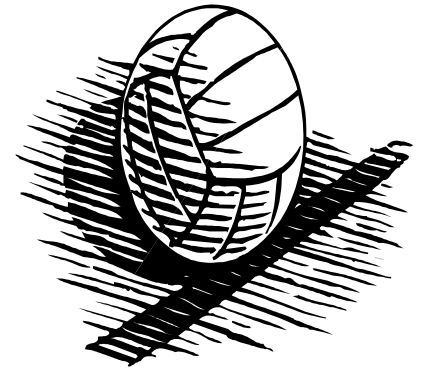
Motions for JMOL/New Trial

- JMOL essential for preserving challenges on appeal based on sufficiency of the evidence
- FRCP 50(a) motion must be made before case is submitted to jury
- FRCP 50(b) motion can then be renewed – along with alternative FRCP 59 motion for new trial -- within 28 days after entry of judgment or jury is discharged



Motions for JMOL/New Trial

- The scope of a motion under FRCP 50(a) dictates what losing party may raise on a motion under FRCP 50(b)
 - But this cuts both ways!



Motions for JMOL/New Trial



- Failure to timely renew JMOL under FRCP 50(b) and/or for new trial under FRCP 59 based on sufficiency-of-evidence arguments precludes appellate review. Unitherm Food Sys. v. Swift-Eckrich, 546 U.S. 394 (2006)

Motions for JMOL/New Trial

- A motion under FRCP 59 is a prerequisite for appeals on certain other grounds (*e.g.*, juror misconduct or newly discovered evidence)



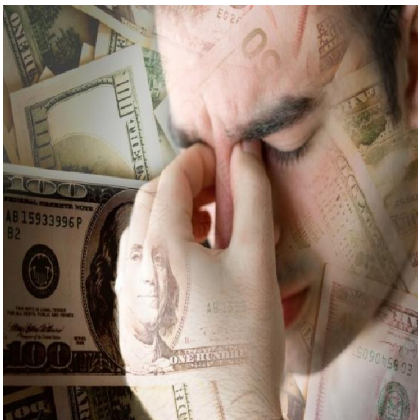
Post-Trial Possibilities

- Consider a FRCP 49(b) motion challenging the verdict and its answers to written questions as internally inconsistent
- If such a challenge isn't brought before the jury is discharged, it likely is forfeited on appeal



Post-Trial Possibilities

- If district court failed to order appropriate (*e.g.*, equitable) relief, consider a timely FRCP 59(e) motion to alter or amend the judgment
 - FRCP 59(e) motion must be filed to challenge insufficiency of a damages award on appeal



Post-Trial Possibilities

- Last ditch effort: FRCP 60
 - BUT: Appeal of denial of FRCP 60 motion can only challenge the denial of the motion itself and NOT the underlying judgment



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