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A Former Appellate Court Judge Offers Tips to Trial Attorneys

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While trial attorneys know they must preserve issues they wish to raise on appeal, they often overlook the basic steps required to help ensure appellate review. During more than 27 years on the bench, former Florida appellate court judge and Carlton Fields shareholder Chris Altenbernd saw attorneys make the same mistakes repeatedly. Based on those observations, he shared tips for trial attorneys during a recent conversation, which has been edited and condensed. **Q.** *What should attorneys keep in mind when seeking to preserve error?* **Mr. Altenbernd**: The very first basic thing lawyers need to understand is that this process puts the other side on notice of your position and also gives the trial judge an opportunity to correct the problem in the trial court. If the judge doesn't have a fair opportunity to correct an error, then it seems a little unfair to reverse that judge and reopen the judgment. **Q.** *What preservation errors did you commonly see as a judge?* **Mr. Altenbernd**: In the middle of a trial a lawyer may simply object and give no reason for the objection, or merely give a one-word explanation. That action may not explain to opposing counsel or the judge what the lawyer is objecting to, and what relief they want. **Q.** *How specific must the objecting lawyer be to preserve an issue?* **Mr. Altenbernd**: Undoubtedly, appellate judges take somewhat differing approaches to this. Some appellate court judges have a heightened sense of what's required, and others have a somewhat looser sense. As a lawyer you need to be aware that you are likely to get the judge with the heightened sense. So, you need to be as careful and thorough as possible. **Q.** *Can you offer any generally applicable guidelines as to the specificity of objections?* **Mr. Altenbernd**: Two things. First, the more advance notice a lawyer has of a problem, the more likely it is that the judge will expect a full and complete objection detailing what the lawyer thinks should be done differently. For example, if a lawyer objects to something in a pleading, the judge will consider that the lawyer had the opportunity to slowly read the pleading and think about the objection. Second, when the problem deals more with the procedure of the case than with its substance, the rules tend to require a heightened level of preservation. For example, if there's a problem related to picking the jury and three weeks of otherwise perfect trial go by, the court is going to expect that you jumped through all the hoops necessary to preserve your claim regarding a jury selection problem. **Q:** *When is this best time to raise preservation issues?* **Mr. Altenbernd**: Every lawyer is trained to raise them contemporaneously. But the truth is, if you plan ahead and think about your case, there are lots of things you can do earlier—pre-trial, for example. So, let's say you have concerns about the

admissibility of scientific evidence. You should file motions to determine the admissibility of the evidence under the new *Daubert* requirements well before trial. The lawyers who wait and try to object contemporaneously in the courtroom invariably do it poorly and also annoy the trial judge. While some lawyers file way too many so-called 'boilerplate' motions in limine, if you have specific issues as to what must be kept out of evidence or away from the jury, it's a good idea to try to get them resolved through a motion in limine. **Q.** *Are there any tools that can help trial lawyers to be prepared?* **Mr. Altenbernd**: There are certain things you ought to have in a trial book that you take to court with you every time you go to trial. For example, one issue that commonly recurs is how to preserve an objection either when the court denies a motion to strike a juror for cause, or grants the other side's. Likewise, you may have a similar problem with a peremptory challenge to a juror. There are multiple steps a lawyer must take to preserve such errors. But very few lawyers will know each and every one of those steps on the fly. There's no reason not to have a trial book with you that helps ensure you know the steps to take when an issues arises. Anybody who's preparing for trial has at least a sense of the admissibility issues they're going to face with any particular witness, whether the issue is hearsay or something else. You'll present your argument far more effectively, and it will be better preserved, if you simply put a folder into your trial notebook that's specific to the issue you anticipate. Unfortunately, many good lawyers think they can forego that kind of preparation. **Q.** *What issues are particularly likely to arise for defense counsel?* **Mr. Altenbernd**: If you represent the defendant, at the end of the plaintiff's case you'll move for a directed verdict. There's really no reason why you can't write down, at least in outline form, what you want to include in that motion ahead of time—all the elements of the defense in a criminal case, or the requirements of the civil cause of action. **Q.** *Why are these seemingly preventable mistakes so common?* **Mr. Altenbernd**: Some lawyers don't think things through as well as they should. Some are too busy, especially in a criminal setting where the prosecutors and public defenders have so many files that it's hard for them to give each sufficient time. Sometimes a lawyer has a tight trial budget and doesn't think he can afford to spend the time on these things. But there's money, and then there's malpractice. **Q.** *Once a lawyer objects during trial, what must happen next?* **Mr. Altenbernd**: When you object to something, you have to make sure the trial court actually rules. There are many trial judges, who either intentionally or by temperament, don't directly rule on an objection. The lawyer has to be persistent about attempting to get a ruling. 'Sustained' or 'overruled' are words that usually need to be in the record. **Q**. *What should a trial attorney do once the judge sustains an objection?* **Mr. Altenbernd**: If it's still harmful and you plan to seek relief on appeal, you need to move for a mistrial, or for something that corrects the problem. 'Sustained' is supposed to mean that you won the objection and have prevented the potential harm. If the harm still exists, you need to do more. Without a motion for mistrial or a motion to correct the problem, you have nothing for your appeal. On the other hand, many lawyers move for mistrial and immediately ask the judge to defer ruling on the motion until the end of the trial. This causes most appellate judges to think they weren't all that serious about the mistrial. **Q**. *Once a trial judge rules that testimony will not come into evidence, what steps must the lawyer take?* **Mr. Altenbernd**: Many lawyers either forget, or get sloppy about the requirement that the record must demonstrate what the witness would have said if allowed to testify. That means the

lawyer needs to proffer the evidence. **Q.** *What's the best way to do that?* **Mr. Altenbernd**: The formal way is to actually put the witness on the stand, ask them questions, and get their answers. But most judges, understandably, don't want to do that in the middle of a busy trial. The best way around that is to ask the judge if you can do the proffer during the next break. That way you get the complete information you need. What often happens is a lawyer says upfront, 'Let me tell you what the witness would say' and then gives a summary description of what the testimony would be. **Q**. *Why is that problematic?* **Mr. Altenbernd**: Unless the other side expressly agrees that your description is a proper proffer, there are many risks that the appellate court will think it was inadequate to prove what the witness was going to say. **Q**. *What other types of reversible error do lawyers sometimes overlook?* **Mr. Altenbernd**: Lawyers must be aware of their environments and take the necessary steps to ensure the transcript reflects what's going on. Many courtroom errors involve activities that are not sounds a court reporter takes down. For example, a juror may be sleeping, a judge may keep rolling his eyes in front of the jury in reaction to evidence, the plaintiff's spouse may be acting like a cheerleader, people in the front row may be trying to influence the case. And, sometimes it's nothing that egregious. For example, a witness may have an exhibit in front of him and say that "right here it says this is the answer." Well, right where? A lot of times when people are handling exhibits, such as photographs, the description in the transcript doesn't allow you to pick up the document and understand what they were referring to. The all-too-common failure to preserve evidence that appears temporarily during trial—for example, a diagram written on a whiteboard—is particularly surprising and easy to avoid. **Q.** *How should attorneys preserve this type of evidence?* **Mr. Altenbernd**: In this day and age, there's no reason you can't take a digital photo that will remain in the record once the board, for example, is wiped clean. **Q.** *What are your thoughts on post-trial motions?* **Mr. Altenbernd**: While there are some things you can raise on appeal even if you don't file a post-trial motion on the subject, there aren't a whole lot of tactical reasons to forego your post-trial motion. Even if it isn't essential, it is one more step that can help you clean up your argument and give the trial judge one last opportunity to correct a mistake. If you file a post-trial motion, you just may win it.

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