PRESERVING THE RECORD
AN EXERCISE IN TRIAL ADVOCACY

by Fellow Gary L. Sasso

I. Introduction

Appellate courts don't want to bother with issues that trial counsel should have raised below Thus they speak of a need to "preserve the record " But trial lawyers cringe when appellate practitioners talk about preserving the record It sounds like something you have to do in case you lose – something that gets in the way of winning at trial, but that you can't afford to omit lest you be second-guessed by your client, appellate counsel, and ultimately your insurance carrier

This misses the main point of why issues must be preserved at trial in the first place The idea is to present issues to the trial court *to avoid the need for an appeal* Proper and timely motions, objections, proffers, and the like can help you win at trial They can narrow issues, establish credibility with the judge and jury and even get outcome-determinative rulings Appellate lawyers do a disservice to the trial process when we speak of taking steps to *preserve* the record – these steps are an integral part of *presenting* the case in the trial court With that concept in mind, here are some thoughts appellate lawyers may want to suggest to trial counsel

II. Preparation

To preserve the record effectively, you must plan ahead just as you plan ahead to present the facts of your case Edward Ohlbaum says

> Making and meeting objections is perhaps the most difficult of all trial skills to master – or even to perform competently. Opposing or proposing the admission of evidence often triggers a short, concentrated exchange that requires the advocate to resolve a trilogy of substantive, tactical, and technical questions. can I object, should I object, and if so, how do object? .. [T]rial counsel must argue succinctly how and why a particular fact, piece of evidence, or line of testimony advances, confuses, or prejudices the inquiry. It is a speech that invariably can be anticipated beforehand; it is a speech that will usually be heard by the factfinder, be it judge or jury. Prepare it, polish it, and deliver it accordingly. A well-phrased objection or offer of proof is not a demonstration in spontaneity. Like an opening or closing, it must be drafted, crafted, and tested in advance.

Edward D Ohlbaum, "Objections and Offers Tell It Again, Sam," *Litigation* 25 3 (1999), at 8 The same holds true with proffers, motions, and virtually every other aspect of "preserving the record" for appeal If you react instead of anticipate, "preserving error" will become a self-fulfilling prophecy

Careful preparation helps effective presentation As Judge Warren Wolfson points out, effective presentation serves many purposes "Obviously, it will win a particular ruling, but there is more to it than that It is a confidence builder Competent lawyers are taken more seriously than incompetent trial lawyers by judge and jury Part of competence is the ability to handle evidentiary situations " Warren D Wolfson, "Evidence Advocacy The Judge's Perspective," *Litigation* 28 1 (2001), at 3 He explains

> It does not escape a jury's attention when lawyers consistently win evidentiary points at trial It is a way of controlling the course of the trial, and jurors get caught up in that process. It is a trust stimulus. Then there is the other side of that coin. If the lawyer is seen as a blunderer, unable to get his exhibits into evidence or successfully deliver three questions in a row, the jury will be inclined to distrust all of that lawyer's endeavors.

Ibid Success in evidentiary disputes not only impresses the jury, it intimidates opponents

There are many things you can do in preparing for trial that enhance your chances of winning as well as preserve the record For example, trial briefs can lay the groundwork for important legal arguments, jury instructions, and dispositive motions Similarly, you can use motions in limine and prepare bench memos when particularly complicated evidentiary issues are anticipated And you can research and prepare motions for judgment as a matter of law in advance of need (although you will have to adapt your planned arguments to what happened at trial)

Perhaps the most important and most overlooked area where preparation helps is developing good jury instructions They are an indispensable persuasive tool that should be rooted in the particular facts of your case Jury instructions provide a rare opportunity to have the *judge* tell the jury something you want them to know or believe about your case What could be more powerful?

III. Presentation at trial

Be forceful in presenting your arguments Judges, like juries, can sense whether you believe in your case, so you must avoid giving the appearance that you are just going through the motions "for the record " Doing that assumes you will not convince the trial judge, which is a dangerous, self-defeating presumption As Judge Florence Rivas says, "The worst moments on the bench happen when lawyers forget their obligation to the record and the client [T]hey want to challenge my ruling, but, instead, they hesitate They interpret the decisive tone in my voice as a signal that I am resolute, close-minded on the topic at hand This is a mistake " Florence Synder Rivas, "Just One More Lawyer Working on the Case,"

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By contrast, the Fourth Circuit requires a separate Statement of Facts and provides that it will "include exhibit, record, transcript, or appendix references showing the source of the facts stated" (4th Cir R 28(f)) The Seventh Circuit rule provides "No fact shall be stated in this part of the brief [the Statement of Facts] unless it is supported by a reference to the page or pages of the record or the appendix where the fact appears" (7th Cir R 28(c))

The Sixth Circuit requires filing a "proof" brief with citations to the record, and a "final" brief with citations to the appendix (or paginated record) within 21 days after the appendix (or record) is prepared (6th Cir R 28(a)) The other circuits do not have special rules and follow Fed R App P 28(e) The Tenth Circuit does this but also provides "For each issue raised on appeal, all briefs must cite the precise reference in the record where the issue was raised and ruled on (10th Cir R. 28 2(c)(2)(3))

Like the California courts, those federal circuits whose local rules contain mandatory provisions are intolerant of briefs that fail to cite to record In the Ninth Circuit, a total failure to cite to the record can result in striking the brief and dismissing the appeal *See, N/S Corp v. Liberty Mutual Ins Co*, 127 F 3d 1145, 1146-47 (9th Cir 1997), *Han v Stanford University*, 210 F 3d 1038, 1040 (9th Cir 2000) Other circuits also enforce failure to cite to the record with dismissal and other sanctions *See, Harold Stores, Inc v Dillard Dept Stores*, 82 F 3d 1533, 1540 n 3 (10th Cir 1996), *accord Mile High Industries v Cohen*, 222 F.3d 845, 853-54 (10th Cir 2000), *Reyes-Garcia v Rodriguez & Del Salle, Inc*, 82 F 2d 13-16 (1st Cir 1996); *Moore v F D I C*, 993 F 2d 106, 107 (5th Cir 1993) In *United States v Juno Construction Corp*, 759 F 2d 253, 206 (2d Cir 1985), the Second Circuit refused to award costs on appeal where the prevailing party did not cite to the record

By contrast, the Seventh Circuit does not require record citations in the argument section of the brief, but strictly enforces its rule requiring record citations in the statement of facts *See, L S.F Transportation, Inc v N L R B*, 282 F 3d 972, 975 (7th Cir. 2002) Failure to provide record citations in the statement of facts could lead to striking the brief, summary affirmance or other sanctions *Id* Other circuits are more lenient The Eighth and Eleventh Circuits have simply admonished appellants for wasting their time and resources by failing to cite to the record in the argument section of the brief *See, Minnesota Assn of Nurse Anesthetists v Allina Health Systems Corp.*, 276 F 3d 1032, 1055 n 14 (8th Cir 2002), *DiCarlo v Keller Ladders, Inc.*, 211 F 3d 465, 468 (8th Cir. 2000), *United States v Francis*, 131 F 3d 1452, 1458 (11th Cir 1997). In *Bush v Dictaphone Corp.*, 161 F 3d 363, 366 (6th Cir 1998), the Sixth Circuit refused to dismiss an appeal for lack of record cites in the opening brief where the record was fully cited in reply

The foregoing survey suggests that it would be good practice to cite to the record in the argument portion of the brief as well as in the statement of facts Often the rules require it More importantly, it makes the work of the clerks and judges easier and they will like you for it ❖

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Litigation, 28 2 (2002), at 70

Similarly, be tenacious (within the limits of propriety) in renewing motions, objections, and offers of introducing evidence As Judge Rivas advises, "if I have improvidently sustained or overruled an objection and do not recognize the error myself, I usually can count on counsel to correct my mistake by rephrasing the question or revisiting the subject matter Most testimony is capable of being elicited or minimized in countless ways through a variety of witnesses" *Id* at 4 Renewing objections and offers of evidence not only ensures that you have preserved the court's error in its first denial, but also helps to demonstrate prejudice from the error This in turn increases your chances of ultimately winning the point at trial or, if necessary, on appeal While an erroneous ruling may not be prejudicial if the evidence was material only to a narrow, insignificant line of testimony, consider how much more powerful your position will be if you make repeated efforts to use the excluded evidence in different contexts

IV. Conclusion

Trial counsel should not look upon what appellate lawyers teach as a technical nuisance or counter-productive to trial efforts To the contrary, "preserving the record" is a way of thinking about how to win at trial Telling the story may be paramount, but you have to be practical – to win, you must master the rules When you do, you can use the rules to win at trial, but if the case takes a bad turn, you can know that you have not only preserved the record on appeal but have made a showing that your client was prejudiced at trial and deserves another chance to prove his case ❖

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