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The Keys to Preserving Error for Appeal

APPELLATE & TRIAL SUPPORT | SEPTEMBER 24, 2018

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During a judicial career that spanned more than 25 years, Carlton Fields Shareholder Peter Webster presided over numerous jury trials as a circuit judge and authored hundreds of appellate opinions following his appointment to Florida's First District Court of Appeal. Those experiences, and his appellate practice with the firm have shaped his views on how to best preserve issues for appellate review. The issue is critical because decisions of courts and administrative agencies are generally presumed to be correct, and an error in a lower tribunal does not exist for purposes of appellate review unless it has been properly preserved. Judge Webster recently shared his thoughts on the keys to preserving error.

Q: *What is the basis for the concept of preservation of error?*

A: The rationale for the concept is to prevent litigants from seeking to gain an unfair advantage over their opponents by sitting back and doing nothing until after they learn the outcome of the litigation and then, if they are dissatisfied, complaining about an issue for the first time on appeal. If we permitted that, we would not encourage the prevention of correctable errors in the lower tribunal.

Q: *So, how do we seek to prevent errors that could have been corrected in the lower tribunal from being raised for the first time on appeal?*

A: One key is to recognize that the appellate court must be able to determine what facts were presented to the lower tribunal. Without some record of what the evidence was, the appellate court cannot review it and therefore considers evidence-based issues improperly preserved in the lower tribunal.

Q: *How might this situation arise?*

A: It can come up when the litigants are pro se – for example, former spouses appearing in connection with a motion related to child support. Often in such cases, no court reporter is present, either because the parties cannot afford one, or because they are unaware that they need one. However, if a ruling is made without a court reporter present, an appellate court has no way to determine what the testimony was if the parties later disagree. As a result, in any appeal, the result will be an affirmance. But even attorneys frequently fail to arrange for court reporters to be present – perhaps because they didn't realize an evidentiary determination would be made at the hearing. It is critical that any lawyer who is arguing a motion of any substance ensure that a court reporter is present.

Q: *Once a court reporter is present, what steps must a lawyer take to preserve error?*

A: He or she must make a contemporaneous objection or another timely request for action by the tribunal. Lawyers often fail to make these objections during closing arguments and, to some degree, opening statements as well. When opposing counsel makes objectionable statements during a closing argument, lawyers often hesitate to object repeatedly because they fear the jury will think they are just trying to disrupt their opponent. In situations where the judge has already ruled against the objection a few times during the closing argument, the lawyer may be even more loathe to continue to object. But the law in Florida and most other jurisdictions is clear that, unless you contemporaneously object, you don't preserve issues based on improper closing argument except in the rarest circumstances.

Q: *How can a lawyer handle the very real possibility of alienating a jury by objecting constantly?*

A: It's a judgment call. The lawyer must balance the likelihood that the argument is sufficiently improper, that the objection will be sustained, and that the jury will be told to disregard the comment, against the possibility that the judge will overrule the objection while implying to the jury that the lawyer is just trying to disrupt her opponent. One way to deal with this is to request a continuing objection, although, of course, the judge does not have to grant one. The decision has to be made in the moment, which is one reason why it's a good idea to have an appellate lawyer there providing trial support.

Q: *What must a lawyer do in the moment besides simply object?*

A: The lawyer must provide the judge with a specific reason for the objection. Otherwise, the judge is in no position to understand and rule on the objection. This issue arises with some frequency in criminal cases when the defense lawyer moves for a judgment of acquittal at the conclusion of the state's case. The defense lawyer may make what appellate courts refer to as a 'boilerplate' motion for judgment of acquittal, merely stating, 'We move for a judgment of acquittal because the

state has failed to prove its case.' This is insufficient. Instead, the lawyer must state the specific elements of the offense that the state failed to prove. Of course, this issue also comes up with objections to testimony in civil and criminal cases — any time a lawyer stands up and says, without more, 'Your honor I object.' It's also important to remember that a lawyer cannot object on one ground in the lower tribunal and then argue on appeal that the testimony or ruling was incorrect for some other reason. Again, it goes back to the basic concept that a trial court needs to have a fair opportunity to rule on the issue and, if it's not properly explained, it does not have that opportunity.

Q: *Are there steps lawyers should take after giving a trial judge the opportunity to rule?*

A: Generally, though there's an exception, they need to actually get a ruling. Sometimes, during trial, a party may object to a continuing line of questioning as, for example, irrelevant to the case. Perhaps several witnesses from the other side will testify about the issue. Often the judge will reserve ruling on the objection until she hears how the testimony develops. As the trial progresses, the objecting lawyer may forget the judge took that issue under advisement, and fail to request a ruling. If there's no ruling, there can be no error.

Q: *What is the exception to the general rule that requires a ruling?*

A: If a judge refuses to rule despite your request, that refusal alone is almost always reversible error. But most judges understand that you have a right to a ruling on your objection. And, though it may seem obvious, that ruling has to be adverse to preserve the issue for appeal. If the ruling is favorable, the objecting lawyer must often take additional steps.

Q: *Is the issue preserved once the judge sustains the objection?*

A: Not necessarily. During a jury trial, a lawyer may object to her opponent's question, but the witness may answer before the judge can rule. Even if the judge sustains the objection, to preserve the issue, the objecting lawyer has to move to strike the answer. Moreover, while the judge may tell the jury to disregard the answer they just heard, it is not always possible to 'unring' the bell. In cases where the objecting lawyer is especially concerned and wants to preserve the issue for appellate review, she must move for a mistrial. But this carries risks. If the lawyer thinks the case is going well, she will, obviously, not want the judge to end the trial. It's possible to ask the judge to delay ruling on a motion for mistrial until after the jury returns a verdict, but the judge doesn't have to agree. So, again, you get into a balancing situation. Because this decision also has to be made in the moment, it's helpful to have an appellate lawyer there, providing trial support.