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Issue Preservation

Protecting the Record on Appeal

Creating a robust record and properly preserving all potential issues for appeal is a challenging task, particularly in complex litigation. Because trial counsel tend to focus on winning at trial, rather than preparing for an appeal, they can easily overlook the many preservation pitfalls. However, counsel's ability to anticipate and preserve issues for appeal separates strong appeals from weak ones and provides an important backstop in unsuccessful cases.

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Perhaps nothing frustrates an appellate lawyer more than discovering that a valid argument on appeal is foreclosed by trial counsel's failure to properly raise the argument in the district court. Because federal appellate courts generally are limited to reviewing issues, evidence, and arguments that were brought before the district court, any issues and arguments that are not properly presented to the district court in a timely fashion usually are deemed waived on appeal. As a result, many otherwise promising appeals are lost due to counsel's failure to preserve the record.

Yet, counsel frequently consider an appellate strategy only after an unexpected loss. All too often, novel legal challenges are foregone in the press of trial preparation, or errors are waived in the spirit of compromise, or to avoid offending the trial judge or jury. Or, a case is badly mishandled by trial counsel and handed off to new appellate counsel in the hope that the appeal can "fix" the mistakes. But where errors are waived or key arguments are left unstated, the appellate lawyer's hands are tied.

Generally, to preserve an issue or argument for appeal, trial counsel must both:

- Raise the argument or objection on the record or in writing.
- Give specific and precise reasons for the argument or objection, so that the trial court may rule on it.

(See, for example, *FRCP 46, 51(c); Wilcox v. Wild Well Control, Inc., 794 F.3d 531, 539 (5th Cir. 2015); Belk, Inc. v. Meyer Corp., U.S., 679 F.3d 146, 153 n.6 (4th Cir. 2012)*.)

Because trial counsel typically are preoccupied with preparing witnesses, examination outlines, and closing arguments, and due to the fast pace of trial, counsel rarely have much time to decide whether to raise an objection or argument. To ensure the best chances for success on appeal and avoid the need to make split-second decisions at trial, counsel should become familiar with the applicable rules (see *Box, Applicable Rules on Preservation and Waiver*) and start preparing for an appeal at the outset of litigation. In particular, counsel should:

- Map out a strategy to preserve issues for appeal at the pretrial, trial, and post-trial stages of the case.
- Be ready to navigate around common roadblocks to preservation.
- Know how to address and make the most of strategic missteps.

PRETRIAL STRATEGY

When first approaching a case, trial counsel should:

- Analyze and evaluate the parties' claims, defenses, and legal theories.
- Research the key legal questions and monitor relevant developments in the law.
- Create a specific plan for raising and reiterating the key legal questions to preserve them for appeal.

In some cases, particularly where the stakes are so high that an appeal is inevitable, it could be a good investment to retain specialized appellate counsel at the start of litigation. Having separate appellate counsel adds a fresh set of eyes focused on the law and preservation issues, and allows trial counsel to focus on factual development and trial preparation. For example, appellate counsel can help:

- Identify and evaluate key legal issues.
- Develop and participate in motions strategy.
- Refine proposed jury instructions and verdict forms.
- Ensure that errors are preserved for appeal.

Regardless of whether separate appellate counsel is retained, trial counsel should be mindful of an appellate strategy as the case unfolds and adjust it as needed. If counsel anticipate advocating for a change in the law relating to any claim or defense, they should raise the issue early and often, even while acknowledging existing precedent. At the pretrial stage, counsel should seek to preserve issues for appeal using:

- The pleadings and jury demands.
- Pretrial stipulations.
- Pretrial motions *in limine*.
- Summary judgment motions.

PLEADINGS AND JURY DEMANDS

Like the case itself, preservation begins with the pleadings. Pleadings provide the parties with notice of the issues subject to litigation, and dictate the scope of discovery and motion practice. If the pleadings do not provide the requisite notice of the parties' claims and defenses, waiver results. Counsel should be aware that:

- The parties' claims and any available remedies are limited by those raised or sought in the pleadings.
- Any failure to plead an affirmative defense typically results in a waiver of that defense.

(*FRCP 7, 8, 12(b)*; see *Henricks v. Pickaway Corr. Inst., 782 F.3d 744, 750 (6th Cir. 2015); Kapche v. Holder, 677 F.3d 454, 465 (D.C. Cir. 2012)*.)

Although some courts have permitted defendants to belatedly raise an affirmative defense, counsel should plead any affirmative defenses at the outset of litigation to minimize the risk of waiver (see, for example, *Estate of Hamilton v. City of N.Y., 627 F.3d 50, 58 (2d Cir. 2010)*).

Moreover, to avoid waiver, a party must:

- Raise certain defenses in a motion to dismiss, or first responsive pleading if no motion is made, including:
  - lack of personal jurisdiction;
  - improper venue;
  - insufficient process; and
  - insufficient service of process.

  (*FRCP 12(b), (h)*.)
- Plead any compulsory counterclaims in the answer. A defendant may not assert in a later action a claim that was an unpleaded compulsory counterclaim in an earlier action (see *FRCP 13(a); Jones v. Ford Motor Credit Co., 358 F.3d 205, 209 (2d Cir. 2004); Publicis Commc'n v. True N. Commc'ns Inc., 132 F.3d 363, 365-66 (7th Cir. 1997)*).
- Timely request a jury trial by serving and filing a written demand (*FRCP 38(d)*).

Applicable Rules on Preservation and Waiver

Although the issues raised on appeal vary from case to case, the means by which they are preserved for appeal largely do not. However, certain requirements vary among courts and judges. Therefore, counsel always should consult the applicable rules, including:

- The Federal Rules of Civil Procedure (FRCP), which address:
  - the timing of filing and serving motion papers (*FRCP 6*);
  - the form of pleadings, motions, and other papers (*FRCP 7(b), 10*);
  - pleading requirements (*FRCP 8, 9, 13, 14, 15*);
  - defenses and objections (*FRCP 12*);
  - objections to a ruling or order (*FRCP 46*);
  - jury instructions and verdict forms (*FRCP 49, 51*); and
  - post-judgment motions (*FRCP 50, 59*).
- The Federal Rules of Appellate Procedure (FRAP), including FRAP 4(a)(1), which governs the time for filing a notice of appeal.
- The Federal Rules of Evidence (FRE), including FRE 103, which addresses preservation of claims of evidentiary errors.
- Any relevant local rules, including the official local court rules and any pertinent general orders issued by the court (sometimes called administrative or standing orders).
- Any relevant case-specific orders issued by the judge.

Courts typically post their local rules, standing orders, and judges' individual rules on their websites. Case-specific orders usually are posted on the electronic docket for a particular case and are accessible using the court's Case Management and Electronic Case Files (CM/ECF) system.

Search Commencing a Federal Lawsuit: Drafting the Complaint and Responsive Pleadings: Answering the Complaint for more on preparing effective complaints and answers, including pleading standards, accompanying documents, and service and filing requirements.

PRETRIAL STIPULATIONS

A pretrial stipulation (sometimes called a pretrial order or final pretrial order) that a court issues under FRCP 16(d) provides a roadmap for trial. A party's failure to include required items in a pretrial stipulation could have disastrous consequences. For example, some courts have held that the pretrial stipulation supersedes the pleadings, and that claims and defenses can be waived if they are not listed or described in the stipulation (see, for example, *United States v. $84,615 in U.S. Currency, 379 F.3d 496, 499 (8th Cir. 2004)*; *Rios v. Bigler, 67 F.3d 1543, 1549 (10th Cir. 1995)*; *Gorlikowski v. Tolbert, 52 F.3d 1439, 1443-44 (7th Cir. 1995)*).

A party's failure to include other mandatory items in, or adhere to, the pretrial stipulation also could lead to other negative consequences, such as:

- Evidence preclusion.
- A ruling barring counsel from making certain arguments at trial or raising issues on appeal.
- Monetary sanctions, including attorneys' fees and costs.

To minimize the risk of waiver, counsel should confirm that:

- All claims and defenses are included in the pretrial stipulation.
- Opposing counsel has not included improper claims, defenses, or evidence in the pretrial stipulation.

Although a party may move to modify or amend a pretrial stipulation once the court enters it, the moving party generally must show that some manifest injustice would result if the pretrial stipulation is not modified or amended (*FRCP 16(e)*).

PRETRIAL MOTIONS *IN LIMINE*

Motions *in limine* can be used to obtain an advance ruling on whether evidence, arguments, or issues should be admitted at trial. By moving to exclude inadmissible, unfairly prejudicial evidence and argument before trial (as opposed to simply objecting at trial), counsel can help prevent an opponent from tainting the jury.

If the trial court issues a definitive ruling on a motion *in limine*, the moving party typically does not need to renew the objection to preserve the issue for appeal (*FRE 103(b)*). Nonetheless, it is best practice to renew objections to make the record as clear as possible.

If the court reserves decision on the motion, however, or otherwise does not issue a definitive ruling, counsel must renew their objection to the introduction of the disputed material when it is offered at trial to preserve the issue.

Search Motion in Limine: Motion or Notice of Motion (Federal) and Motion in Limine: Memorandum of Law (Federal) for a sample motion *in limine* and an accompanying memorandum of law, with explanatory notes and drafting tips.

SUMMARY JUDGMENT MOTIONS

The federal rules do not require a party to move for summary judgment. Because these motions are discretionary, a party does not risk waiving its claims or defenses by not moving for summary judgment.

Further, moving for summary judgment does not automatically preserve issues for appeal in most cases, although it may in

some (see *Int'l Turbine Servs., Inc. v. VASP Brazilian Airlines, 278 F.3d 494, 497 n.2 (5th Cir. 2002)* (noting that a party preserved an argument raised in its summary judgment motion and that fact "alone may be sufficient to preserve the issue for appeal by either party")). Additionally, a court's denial of a summary judgment motion is an interlocutory order that does not finally dispose of the issues raised in the motion (see *Ortiz v. Jordan, 562 U.S. 180, 184 (2011)*; *Hill v. Homeward Residential, Inc., 799 F.3d 544, 550 (6th Cir. 2015)*).

However, moving for summary judgment is still good practice and frequently beneficial. A successful summary judgment motion can end a case, sparing the parties and court the time and expense of an unnecessary trial. Even if only partially successful, a summary judgment motion can narrow the issues for trial, and minimize the time and resources required to resolve the case.

If a party moves for summary judgment, counsel should take care in selecting the arguments they raise to avoid potential waiver issues. If a summary judgment motion is successful, both sides typically are limited to defending or opposing the decision based on the arguments raised in their briefs. This means that:

- The prevailing party can defend a summary judgment decision on any ground raised in its brief, and is not limited to the court's reasons for its decision (see *Gerald v. Univ. of Puerto Rico, 707 F.3d 7, 27 (1st Cir. 2013)*).
- The opposing party must raise any and all arguments in its opposition or risk waiver on appeal (see *Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067, 1077 (2d Cir. 1993)*).

TRIAL STRATEGY

To properly preserve issues and arguments for appeal, counsel should be prepared to raise challenges during trial to:

- The admission or exclusion of disputed evidence.
- Any improper arguments or conduct.
- The legal sufficiency of the evidence.
- Inaccurate or incomplete jury instructions and verdict forms.

EVIDENTIARY ISSUES

Parties frequently challenge on appeal the trial court's:

- Improper admission of unfairly prejudicial evidence.
- Exclusion of highly probative evidence that likely impacted the outcome at trial.

(*FRE 103(a)*; see, for example, *Young v. James Green Mgmt., Inc., 327 F.3d 616, 623 (7th Cir. 2003)*.)

A district court's evidentiary rulings are reviewed on appeal for abuse of discretion, and are given great deference (see *Aycock v. R.J. Reynolds Tobacco Co., 769 F.3d 1063, 1068 (11th Cir. 2014)*). In applying the abuse of discretion standard, an appellate court reviews the record and arguments as presented to the district court (see *Lewis v. City of Boston, 321 F.3d 207, 214 n.7 (1st Cir. 2003)*).

Objections to Disputed Evidence

It is critical for counsel to articulate challenges to the admission or exclusion of evidence to adequately preserve those issues. Counsel must both:

- Timely raise a contemporaneous objection.
- Clearly state the objection's basis.

(*FRCP 46*; *FRE 103(a)*.)

If the court overrules the objection, counsel should both:

- Move for a limiting instruction, asking the court to instruct the jury that it can consider the disputed evidence only for a limited purpose.
- Request a continuing or standing objection.

In some cases, evidence is put in the record before counsel can object, such as where opposing counsel's question to a witness is not objectionable, but the answer is. To preserve an objection in these situations, counsel should lodge the objection immediately and state its specific basis. If the objection is sustained, counsel should ask that the improper evidence be stricken and the jury be instructed to disregard it.

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to avoid drawing attention to the disputed evidence. These decisions are highly contextual, depending on the nature of the testimony and the impact on the jury. However, counsel should be aware that they are bound by any strategic non-objection both in the trial court and on appeal.

Proffers

Where evidence is improperly excluded, counsel must incorporate the substance of the evidence into the record through an offer of proof, or proffer, to preserve the claim of error for appeal (*FRE 103(a)(2)*). Without a proffer, the appellate court cannot evaluate the prejudice caused by the exclusion or the exact nature of the error. To make a proper proffer, counsel must:

- Provide the relevant documents and a summary of the testimony.
- Answer questions about the proffered evidence outside the jury's presence.

(*FRE 103(a)(2)*; see, for example, *Wright v. Ford Motor Co., 508 F.3d 263, 276 (5th Cir. 2007)*.)

Where the trial court is hostile to the proffer, counsel should ensure that the court's refusal to accept the proffer appears on the record.

In all instances of evidentiary error, once the court rules definitively on the record, either before or during trial, a party technically does not need to renew an objection or a proffer to preserve a claim of error (*FRE 103(b)*). In practice, however, a party should renew the argument, particularly because:

- Ambiguity might exist on whether the court issued a definitive ruling.
- Conditional or tentative decisions remain subject to reconsideration.
- A court may issue a ruling without prejudice to renewal at trial.
- The denial of a motion *in limine* permits admission of evidence at trial only if a proper foundation is laid. If no foundation is laid, the objection must be renewed.
- A party must renew an objection if the court or a party contravenes the court's ruling.
- Changed facts or circumstances might cause the court to reconsider its ruling.

(See, for example, *United States v. Poulsen, 655 F.3d 492, 510 (6th Cir. 2011)*.)

IMPROPER ARGUMENT OR CONDUCT

Beyond evidence, counsel can seek to exclude improper arguments made by or object to the improper conduct of:

- The court.
- Opposing counsel.
- The parties.
- A witness.

(See, for example, *Caudle v. D.C., 707 F.3d 354, 359 (D.C. Cir. 2013)*; *Armenian Assembly of Am., Inc. v. Cafesjian, 783 F. Supp. 2d 78, 85 (D.D.C. 2011)*; *Park W. Galleries, Inc. v. Global Fine Art Registry, LLC, 732 F. Supp. 2d 727, 733 (E.D. Mich. 2010)*.)

If counsel anticipate any improper arguments or conduct, they should seek an advance ruling from the court by moving *in limine* before trial (see above *Pretrial Motions in Limine*). If not, in certain circumstances, such as where counsel object to the improper conduct of a particular witness, counsel should raise a contemporaneous objection either at the time of the misconduct or the next available opportunity outside the jury's presence (*FRE 614(c)*). Additionally, to minimize any damage caused by the improper argument or conduct, counsel should both:

- Move for a mistrial.
- Request a curative instruction.

Search Opening Statements and Closing Arguments in Civil Jury Trials for more on making and responding to objections during opening statements and closing arguments.

MOTION FOR JUDGMENT AS A MATTER OF LAW

A motion for judgment as a matter of law (previously known as a directed-verdict motion) allows a party to challenge the evidentiary basis for a claim or defense in a civil jury trial. To preserve any challenge to the sufficiency of the evidence at trial, counsel must both:

- Move for judgment as a matter of law before the case is submitted to the jury (*FRCP 50(a)*).
- Renew the motion within 28 days after entry of judgment, raising the same grounds as the original, pre-verdict motion (*FRCP 50(b)*) (see below *Renewed Motion for Judgment as a Matter of Law*).

If a party fails to move for judgment as a matter of law before a case is submitted to the jury, it may not:

- Move for judgment as a matter of law after the jury reaches a verdict (see *2006 Advisory Committee Note to FRCP 50*; *Tortu v. Las Vegas Metro. Police Dep't, 556 F.3d 1075, 1081, 1083 (9th Cir. 2009)*).
- Later appeal the decision based on a challenge to the sufficiency of the evidence (see *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 404-405 (2006)*).

Because legal errors are reviewed under the most favorable, *de novo* standard on appeal, those issues have the best chance for success. Courts are split over whether a party must raise purely legal issues on appeal without raising them in the motion for judgment as a matter of law (compare *Belk, Inc., 679 F.3d at 160-61* with *Ji v. Bose Corp., 626 F.3d 116, 128 (1st Cir. 2010)*). To ensure that all challenges to the sufficiency of the evidence are properly preserved, a party should raise both legal and factual arguments when moving for judgment as a matter of law.

Search Motion for Judgment as a Matter of Law Under FRCP 50(a): Motion or Notice of Motion and Motion for Judgment as a Matter of Law Under FRCP 50(a): Memorandum of Law for a sample motion for judgment as a matter of law and an accompanying memorandum of law, with explanatory notes and drafting tips.

JURY INSTRUCTIONS AND VERDICT FORMS

Jury instructions are one of the most important aspects of a jury trial, and can provide a fruitful basis for appeal. Trial counsel must advocate for instructions that accurately state the law in a manner as favorable as possible to the client and are defensible

on appeal. Counsel should pay close attention to the exact language at issue in each instruction.

Jury instructions are objectionable if they either:

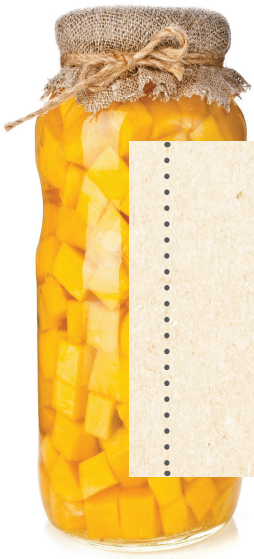
- Misstate the law.
- Are incomplete.

(See, for example, *Jin v. Metro. Life Ins. Co., 310 F.3d 84, 91 (2d Cir. 2002)*.)

To preserve any challenges to the court's jury instructions, counsel must:

- Submit in writing each specific instruction that they want the court to provide to the jury.
- Timely object to proposed instructions or their exclusion and clearly state the grounds for the objection, before the jury deliberates.
- Restate any written objections at the charge conference, which gives the court an opportunity to:
  - correct any errors; and
  - reconsider the request for charge or objection.

(*FRCP 51*.)



Jury instructions are one of the most important aspects of a jury trial, and can provide a fruitful basis for appeal. Counsel should pay close attention to the exact language at issue in each instruction.

Where the court does not give a properly requested instruction, counsel's objection must include an explanation on why the jury should receive the instruction, unless the court has made a definitive ruling on the record regarding the proposed instruction (*FRCP 51(d)(1)(B)*; *2003 Advisory Committee Note to FRCP 51*).

Objections to jury instructions are timely if made:

- When the court gives the parties the opportunity to object under FRCP 51(b)(2), out of the jury's hearing and before jury instructions and closing arguments are delivered to the jury (*FRCP 51(c)(2)(A)*).
- Promptly after a party first learns that an instruction will be or has been given or refused, if a party was not informed of the instruction (or the court's action on or refusal to give the proposed instruction) before the opportunity to object under FRCP 51(b)(2) occurs (*FRCP 51(c)(2)(B)*).

In either instance, a party must object to a proposed instruction or the failure to give a proposed instruction before the jury deliberates (*Lavoie v. Pac. Press & Shear Co., 975 F.2d 48, 55 (2d Cir. 1992)*).

As with jury instructions, a party must timely object to a proposed verdict form or the failure to give a proposed verdict form to preserve the issue for review. Objections to the verdict form must be raised before the jury deliberates. (*FRCP 49(a)(3)*; see *Baisden v. I'm Ready Prods., Inc., 693 F.3d 491, 507 (5th Cir. 2012)*.)

Should the jury reach an inconsistent verdict, counsel typically must object both:

- Before the jury is discharged.
- In a post-trial motion.

(See, for example, *Radvansky v. City of Olmsted Falls, 496 F.3d 609, 618-19 (6th Cir. 2007)*.)

Search Drafting Jury Instructions and Verdict Forms for key issues to consider when drafting and submitting proposed jury instructions and verdict forms.

POST-TRIAL STRATEGY

Post-trial motions offer parties a significant opportunity to properly preserve issues and arguments for appeal. These motions can:

- Clarify points that were raised before or during trial.
- Expand on arguments previously raised only in passing.

Therefore, counsel must:

- Familiarize themselves with the rules governing these motions.
- Raise any and all grounds for judgment as a matter of law and for a new trial.
- Timely file the motions.

Top Tips for Protecting the Record

To successfully navigate the path from pleadings to trial to appeal, a party and its counsel must overcome numerous procedural obstacles, which can lead the unwary to sacrifice strategic advantages and waive issues for appeal. To minimize these risks, counsel must:

- Begin planning for appeal at the outset of litigation.
- Raise timely objections, obtain rulings on the record, and renew objections that the court has overruled.
- Ensure the record is complete and accurately reflects what happened in the trial court.
- Move for judgment as a matter of law before the case goes to the jury, and renew the motion within 28 days after entry of judgment.
- Pay attention to technical requirements, including time limits and formalities, relating to post-trial motions and the notice of appeal.

Additionally, when mapping out a post-trial strategy, counsel should consider whether to object to any magistrate judge rulings, as well as the timing and content of the notice of appeal.

RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

To preserve all challenges to the sufficiency of the evidence at trial, counsel must renew a motion for judgment as a matter of law no later than 28 days after:

- Entry of judgment that adjudicates all of the parties' rights and claims.
- The jury is discharged, if the motion addresses a jury issue that is not decided by the verdict.

(*FRCP 50(b)*.)

The 28-day time limit is mandatory and cannot be extended by court order (*FRCP 6(b)(2)*).

If a party fails to renew a motion for judgment as a matter of law, it:

- May not challenge the sufficiency of the evidence post-trial or on appeal.
- Is limited to seeking a new trial.

(See *Unitherm Food Sys., 546 U.S. at 404-405*.)

These rules apply even if a party moved for judgment as a matter of law under FRCP 50(a) before the case was submitted to the jury (see *Rural Water Dist. No. 4. v. City of Eudora, 659 F.3d 969, 975 (10th Cir. 2011)*).

A renewed motion for judgment as a matter of law must be based on the same grounds as the original, pre-verdict motion (see *Costa-Urena v. Segarra, 590 F.3d 18, 26 n.4 (1st Cir. 2009)*). As with pretrial motions for judgment as a matter of law, counsel should raise any legal errors committed by the trial court in a renewed motion under FRCP 50(b).

Search Renewed Motion for Judgment as a Matter of Law Under FRCP 50(b): Motion or Notice of Motion and Renewed Motion for Judgment as a Matter of Law Under FRCP 50(b): Memorandum of Law for a sample renewed motion for judgment as a matter of law and an accompanying memorandum of law, with explanatory notes and drafting tips.

MOTION FOR A NEW TRIAL

Depending on the circumstances, a new trial motion might not be required to properly preserve objections made for appellate review, nor is its filing a prerequisite to appeal (*FRE 103(b)*; see *Fuesting v. Zimmer, Inc., 448 F.3d 936, 941 & n.2 (7th Cir. 2006)*). Still, to avoid any potential waiver issues, it is good practice to move for a new trial within 28 days after entry of judgment (*FRCP 50(d), 59(b)*). The trial court can consider a motion for a new trial even if a party failed to move for judgment as a matter of law (see *Unitherm Food Sys., 546 U.S. at 404-405*).

Counsel should seek a new trial on any and all available grounds to complete the record on appeal and fully present the strongest possible arguments. Common grounds for new trial motions include, but are not limited to:

- Legal errors, such as:
  - the court's refusal to admit or exclude evidence; and
  - claimed errors in jury instructions or the verdict form.
- Misconduct by the court, counsel, the parties, or a witness.
- Newly discovered evidence.
- Errors in jury selection and deliberations.
- Inconsistent verdicts.
- A verdict that is against the clear weight of the evidence.
- Excessive or inadequate damages.

To raise a specific error in a new trial motion, the moving party typically must first raise a contemporaneous objection at trial or move for a mistrial on those grounds (*FRE 103(a)*; see *Park W. Galleries, Inc. v. Hochman, 692 F.3d 539, 547-48 (6th Cir. 2012)*).

Moreover, a party must move for a new trial to:

- Raise issues that otherwise cannot be raised in a motion for judgment as a matter of law, such as challenges to the court's evidentiary rulings or jury instructions.
- Obtain a new trial where insufficient evidence supports the jury's verdict, even where the moving party failed to move for judgment as a matter of law under FRCP 50(b) (see *Unitherm Food Sys., 546 U.S. at 405*).

Issue Preservation Toolkit

The Issue Preservation Toolkit available on Practical Law offers a collection of resources to assist counsel with raising and preserving issues and arguments for appellate review at the pretrial, trial, and post-trial stages of civil litigation in federal court. It features a range of continuously maintained resources, including:

- Common Deadlines in Federal Litigation Chart
- Motion to Dismiss: Overview
- Responsive Pleadings: Answering the Complaint
- Drafting Jury Instructions and Verdict Forms
- Motion for Judgment as a Matter of Law: Basic Principles
- Motion for a New Trial: Basic Principles
- Notice of Appeal (Federal)

- Raise and preserve any grounds for a new trial that arose after the jury reached its verdict (see *Hardeman v. City of Albuquerque, 377 F.3d 1106, 1122 (10th Cir. 2004)*).

Search Motion for a New Trial: Basic Principles and Motion for a New Trial: Drafting and Filing for more on moving for a new trial, including when the motion must be filed, grounds for the motion, disposition of the motion, and appeals from the denial of a new trial.

MAGISTRATE JUDGE RULINGS

A district court judge may designate a magistrate judge to issue:

- Written orders on non-dispositive matters.
- Proposed reports and recommendations to the district court judge on dispositive matters.

A party seeking to object to a magistrate judge's order or report and recommendation must do so by serving and filing objections with the district court within 14 days after being served with a copy of the order. (*FRCP 72(b); 28 U.S.C. § 636(b).*)

Absent a timely objection, a party waives the right to appeal any order on non-dispositive matters (*FRCP 72(a)*). However, the rules are silent on whether a party waives appellate review of reports and recommendations by failing to raise a timely objection. Many appellate courts have held that the failure to timely and specifically object to a report and recommendation may operate as a waiver of appellate review of the decision, if the parties receive clear notice of the consequences of their failure to object (see, for example, *Garayalde-Rijos v. Municipality of Carolina, 747 F.3d 15, 21-22 (1st Cir. 2014)*). Therefore, in practice, parties always should timely raise any and all objections to reports and recommendations, and file specific written objections to preserve their appellate rights.

If all of the parties to an action give their consent, a magistrate judge may conduct any or all of the proceedings in a jury or non-jury civil matter and order entry of judgment in the case (*FRCP 73(a); 28 U.S.C. § 636(c)(1)*; see *Holt-Orsted v. City of Dickson, 641 F.3d 230, 233-34 (6th Cir. 2011)*). Appeals from a judgment by a magistrate judge in a civil case are taken in the same way as appeals from any other district court judgment (*FRAP 3(a)(3); FRCP 73(c); 28 U.S.C. § 636(c)(3)*). Therefore, issues brought before a magistrate judge must be preserved for appeal in the same way as issues before a district court judge.

Search US Magistrate Judges: Roles and Responsibilities for more on objecting to a magistrate judge's written order or proposed report and recommendation.

NOTICE OF APPEAL

A party generally must file a notice of appeal within 30 days after entry of the order or judgment from which it is appealing (*FRAP 4(a)(1)(A)*). Filing deadlines are mandatory and jurisdictional. Failure to timely file a notice of appeal results in dismissal of the appeal. (See *Johnson v. Univ. of Rochester Med. Ctr., 642 F.3d 121, 124 (2d Cir. 2011).*) However, under certain circumstances, if a party is unable to appeal on time, it may move for an extension, on a showing of excusable neglect or good cause for not timely appealing (*FRAP 4(a)(5)(A)(ii)*).

The notice of appeal presents several potential obstacles to preservation. Counsel must ensure that the notice of appeal:

- **Specifies only the three items listed in FRAP 3(c)(1).** The body of the notice of appeal should not contain any information beyond:
  - the appellants;
  - the judgment, order, or portion of the judgment or order, being appealed; and
  - the appellate court hearing the appeal.

  For example, the notice of appeal should not contain any legal or factual argument (see *Celske v. Edwards, 164 F.3d 396, 398 (7th Cir. 1999)*). Also, it should not name the appellees unless it is necessary to identify the judgment or order being appealed. Naming only some of the appellees could prevent an appeal against the omitted parties (see *Williams v. Henagan, 595 F.3d 610, 616 (5th Cir. 2010)*).
- **Makes "objectively clear" who is appealing.** Where there are only two parties to a case (the plaintiff and defendant), this does not present a problem. Where there are multiple parties, however, counsel must take care to include in the notice of appeal each client wishing to appeal. Parties not included in a notice of appeal usually may not appeal. (*1993 Advisory*

Committee Note to FRAP 3(c); see *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd., 230 F.3d 549, 554 (2d Cir. 2000)*.)

- **Includes all relevant judgments or orders.** Appeals typically are limited to those determinations that:
  - are expressly designated in the notice of appeal; or
  - the appellate court can fairly infer that the appellant intended to challenge.

  (See *Sulima v. Tobyhanna Army Depot, 602 F.3d 177, 184 (3d Cir. 2010)*.) Therefore, counsel always should ensure that the notice of appeal clearly designates the judgment or order being appealed.
- **Where possible, states that the appeal is taken from the final judgment in an action.** An appeal from a final judgment usually brings up for review all prior judgments or orders in the action (see *McBride v. CITGO Petrol. Corp., 281 F.3d 1099, 1104 (10th Cir. 2002)*). Therefore, counsel filing a notice of appeal from the final judgment should not be concerned about listing (or omitting) interlocutory judgments or orders. Because generally there is one final judgment in an action, there is little risk of misidentifying it.
- **If applicable, specifies that the appellant wants to appeal from only part of a judgment or an order.** Counsel should make certain that the client does not want to appeal from anything else before filing a notice of appeal from only part of an order or a judgment. Although it is possible to narrow the scope of an appeal in the appellant's briefs, it is almost impossible to expand it (see *Bloom v. Fed. Deposit Ins. Corp., 738 F.3d 58, 61-62 (2d Cir. 2013)*).

If there is any argument for claiming that an issue was raised and preserved, counsel should make it. Waiver is such a serious consequence that appellate courts might hear argument on an issue that is related to, or a gloss on, an issue that was properly preserved.

Additionally, if a party makes a post-judgment motion, counsel must file a new or an amended notice of appeal if the appellant wants to appeal from the decision of that post-judgment motion (*FRAP 4(a)(4)(B)(ii)*).

Search Notice of Appeal (Federal) for a sample notice of appeal that can be used to commence an appeal as of right in a civil action in federal court, with explanatory notes and drafting tips.

COMMON ROADBLOCKS

Through each stage of litigation, there are a variety of common roadblocks that can impact preservation and result in waiver of particular issues for appeal, such as where:

- The judge does not definitively rule on an objection.
- Counsel does not make an objection for fear of alienating or angering the jury.
- The transcript does not fully or accurately reflect what happened in the proceedings.

The ability to foresee, recognize, and effectively deal with these obstacles in a timely manner is essential for counsel to ensure that issues are preserved and not waived.

LACK OF A DEFINITIVE RULING

It is critical that the trial court actually rule on objections. Without a ruling, there can be no error. In many cases, the court relies on counsel to remind it when a ruling is necessary. Failure to do so results in an incomplete record and precludes appellate review of the issue. Therefore, counsel must keep track of issues on which the court has reserved ruling and remind it to make a ruling at the appropriate time.

FEAR OF ALIENATING OR ANGERING THE JURY

Counsel always must seek a balance between properly preserving issues for appeal and avoiding alienating or angering the jury with constant objections and interruptions. There are few strategies for perfecting this balance. In most cases, counsel can anticipate their objections and avoid disruption through motions *in limine* and court conferences outside the jury's presence. By anticipating objections, counsel can make succinct or continuing objections to minimize jury annoyance.

INACCURATE OR INCOMPLETE RECORD

In most cases, there are both formal and informal proceedings. However, for appellate purposes, if a proceeding is not in the record, it did not happen.

Formal Proceedings

Although formal proceedings are documented in transcripts by a court reporter, the words transcribed might not adequately capture what happened in court. Counsel must take care to ensure that:

- The transcript is intelligible. In particular, counsel should:
  - obtain clear, audible answers from witnesses;
  - clarify what a witness is trying to convey, in counsel's own words, if the witness provides unclear information;
  - verbally record visual presentations; and
  - use words to describe what is happening in the courtroom (to the extent that it would not otherwise be reflected in the transcript).
- Depositions played or read at trial are reflected in the transcript.
- All exhibits are properly marked and identified, so that they will be accurately referenced in the transcript.
- Objections and rulings are made on the record, and any ambiguous rulings are clarified on the record.

Counsel should then review the trial transcript to confirm that it does not contain any errors.

Informal Proceedings

Counsel also must keep track of informal proceedings, including:

- Informal conferences or hearings.
- *In camera* appearances.
- Telephone conferences.
- Correspondence.
- Oral motions.

These types of informal proceedings, which might not be memorialized in formal transcripts, are still part of the record and could potentially be important to issues or arguments in the case on appeal. To ensure a proper record of these proceedings is made, counsel should:

- Later memorialize key objections on the record.
- Ask the court or clerk to docket relevant correspondence and other informal documents.
- Ensure the court memorializes any informal rulings on the record.

STRATEGIC MISSTEPS

Even the most diligent lawyer makes mistakes. Where missteps have occurred, there are a few arguments appellate counsel can make to resurrect improperly preserved issues. For example, counsel can still attempt to argue preservation or that an exception applies. Or, in some limited circumstances, counsel can seek to invoke "plain error" review.

ARGUE PRESERVATION

If there is any argument for claiming that an issue was raised and preserved, counsel should make it. Even if the argument advanced in the appellate court is not identical to the one in the trial court, waiver is such a serious consequence that appellate courts might hear argument on an issue that is related to, or a gloss on, an issue that was properly preserved. (See *Nelson v. Adams USA, Inc., 529 U.S. 460, 469-70 (2000)*.)

Further, if trial counsel failed to raise an issue in the trial court, appellate counsel should consider whether the failure could be attributed to extraordinary circumstances, such as an intervening change in the law, or newly discovered evidence or facts (see *State Indus. Prods. Corp. v. Beta Tech., Inc., 575 F.3d 450, 456 (5th Cir. 2009)*).

ARGUE THAT AN EXCEPTION APPLIES

Although the general rule is that an appellate court decides only issues that were properly preserved for review, in limited circumstances and on a case-by-case basis, an appellate court may exercise its discretion to consider those that were not.

For example, an appellate court may exercise discretion to decide an issue of great public concern even if it was not properly preserved. The scope of this exception is understandably limited, and there is little appellate guidance on what constitutes a matter of great public concern. However, the exception generally does not cover case-specific or fact-specific errors.

CONCEDE PLAIN ERROR REVIEW

Where an issue clearly was not preserved and is not of significant social value, appellate counsel can raise the issue under the highly deferential plain error standard of review.

Although the federal appellate courts apply slightly different tests when considering an unpreserved issue under plain error review, they generally consider whether:

- There was an error.
- The error was plain and obvious.
- The error was prejudicial, in that it affected substantial rights.
- Review is needed to prevent a miscarriage of justice.

(See, for example, *Smith v. Kmart Corp., 177 F.3d 19, 26 (1st Cir. 1999)*; *Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989)*; *Thomure v. Truck Ins. Exch., 781 F.2d 141, 143 (8th Cir. 1986)*; *Rojas v. Richardson, 703 F.2d 186, 190 (5th Cir. 1983)*.)

In most cases, however, this standard of review is unlikely to result in a reversal or *vacatur* of the trial court's ruling.