Tips to Preserve the Record for Appeal

by Douglas S. Brierley

Nothing causes more dismay or crushes the sense of self-worth more readily than an adverse appellate court opinion reciting how it disregarded the error below because the client (*i.e.*, counsel) failed to preserve an issue for appeal. This article is designed to assist harried counsel to preserve the client's appellate rights.

As enshrined in Rules of Court 1:7-2 and 2:10-2, the cardinal principle to preserve an argument or issue for review lies in counsel's responsibility to make the trial court aware of what position the party takes on the disputed issue. When in doubt, object; an objection foregone may well be lost forever. The words uttered or mechanics followed matter less than counsel's coherent expression of protest and challenge that notifies the lower court of the position advanced and gives the court the opportunity to respond.[1] As explained by one discerning practitioner, "[t]here is no single or best way to preserve an error for appeal. Instead, the key is to ensure the issue is presented to the trial court, the trial court rules on the issue, and the presentation and ruling are part of the record."[2]

To avoid the pitfalls and dilemmas arising from the failure to object or preserve an issue for appellate review, consider the following tips:

File Motions *In Limine*. To ensure orderly presentations at trial, to limit or narrow the issues to be decided, and to bar injection into trial of matters or proofs that are or may be irrelevant, inadmissible, or unduly prejudicial, a motion *in limine* can be a valuable tool.[3] Such a motion may suffice to preserve the issue for appeal, even if no objection is voiced later at trial.[4] Caution should be exercised, however, on issues that do not transcend the interests of the immediate parties: Only by repeating the objection to an opponent's efforts to introduce at trial what an *in limine* motion previously excluded can counsel be certain the objection is preserved for appeal. Further, the trial court may announce that its *in limine* decision is conditional or subject to reconsideration; in these circumstances, renewal of the objection may be imperative.[5]

Submit Timely Objections to Jury Charges without Inviting Error. Rule 1:7-2 requires counsel to object to proposed jury instructions at the time the charge conference is held or whenever the trial court rules on the charges to be given. As explained by appellate courts, untimeliness is sometimes excused.[6] Because exceptions may be difficult to predict, the wiser course is to avoid testing the tolerance and discretion of the appellate courts and act timely. Also, as with objections on other areas of the law, don't invite error by seeking a certain charge or ruling and thereafter claim on appeal that the charge given or ruling made as proposed was reversible error. The doctrine of invited error bars attacks on the integrity of the judicial process from a litigant who complains on appeal that the lower court committed reversible error by charging the jury as the litigant proposed.[7]

Make Offers of Proof. If the court sustains an objection to proffered proofs and bars their introduction into evidence, as the proponent counsel should make an offer of proof on the record under Rule 1:7-3 to demonstrate the character of the evidence excluded and what fact or event it would establish. This procedure confers the option on counsel—not the court—to preserve the issue for review, and the trial court is ordinarily obliged to permit the offer to be placed on the record.[8] Failure to use this procedure may foreclose the practitioner from contesting the exclusion of the evidence and, thus, deprive the appellate court of a record to evaluate the prejudice suffered.[9]

Object to Evidence with Specificity. Should counsel oppose the introduction of evidence by the other side, object with clarity and specificity. A trial judge's discretion in admitting or excluding evidence will stand unless "so wide of the mark that a manifest denial of justice has resulted."[10] That is,

evidential rulings will be reversed only when there has been a manifest abuse of discretion to the clear prejudice of the party. As astute appellate practitioners have long observed, "[i]t is the issue of prejudice that mandates preservation of the record. Convincing the appellate court that an error occurred is only half of the appellant's task. A showing of prejudice is the touchstone of success."[11]

Make Sure Objections and Rulings are on the Record. Not infrequently, the court will hold conferences in chambers or at sidebar to hear and decide the variety of issues and disputes arising at trial. If the discussion and ruling occur in chamber away from the court reporter or recording system, counsel should make sure, when he or she returns to the courtroom, to recite what transpired and request confirmation of the recital's accuracy. Only then will an appellate court be fully informed so the proper record can be reviewed. If the discussion among counsel and the court occurs at sidebar or during a break, make sure the reporter or recording system is within range to detect the discussion in the normal course or with technical enhancement as necessary.

Insist the Lower Court Rule. On occasion, the trial court will hear argument of counsel on an issue and promise to rule later in the day or at a later stage of the proceeding. However well intentioned the court's promise, and however innocent or understandable the delay in the ruling may be, insist that the promise is kept. Although polite perseverance may still irritate a court, the irritation must be balanced against the loss or preservation of a meritorious appeal.

Don't Shrink from Objecting to an Opponent's Summation. Before closing in a jury trial, remind opposing counsel and the court that certain issues and matters were deemed, during trial or pre-trial proceedings, to be off limits or unduly prejudicial. To avoid alienation of the jury by interrupting counsel's closing remarks, preface the objection with a deferential apology to the court and jurors, request that counsel adhere to the prior rulings or restrictions, and seek a curative instruction. Although counsel may be allowed broad latitude in summation,[12] there are boundaries in advocacy that should not be crossed. Summations must be fair and courteous; counsel should neither disparage the opposition's motives nor make statements that would undermine an impartial jury's deliberations.[13]

Move for a New Trial. Under Rule 2:10-1, an appellate court will not entertain a weight-of-the-evidence argument against a verdict in the absence of a new trial motion.[14] The appellate court will uphold the trial judge's ruling on such a motion unless it 'clearly' appears the ruling is a miscarriage of justice under the law, with deference to the lower court with respect to only the intangible aspects of the case, such as witness credibility, demeanor, and the "feel of the case."[15]

Timely File the Notice of Appeal. Mark the calendar. It is critical to file and serve a notice of appeal and case information statement (CIS) within the time prescribed by Rule 2:4-1. Although there are provisions tolling and extending the time within which to appeal—Rule 2:4-3 and 2:4-4, respectively—timely filing of the notice of appeal is jurisdictional: Absent exceptionally unusual circumstances or policy interests, when the time for appeal has expired, the parties to the lower court judgment have a vested right that cannot be subsequently impaired.[16]

Identify Appealable Issues in the Appellate CIS. However unclear the notice of appeal is or may be, the more explicit language that should appear in the appellate CIS is often sufficiently clear for an appellate court to consider in determining what issues have been raised in an appeal.[17] Ordinarily, the final order or judgment adverse to a party renders appealable as of right all interlocutory orders previously entered against the aggrieved litigant.[18]

Don't Raise an Issue for the First Time on Appeal. Unless an issue has been properly raised for adjudication below, it is deemed waived on appeal: New Jersey's appellate courts will decline to consider questions or issues not properly advanced to the trial court when the opportunity presents itself.[19] Arguments first raised at trial in a motion for reconsideration come too late and are not properly raised for evaluation on appeal—a motion for reconsideration is a tool to reiterate an issue timely raised for the trial court's review and decision, not a means to expand the record and introduce new issues that counsel previously failed to raise.[20]

Properly Brief the Issues on Appeal. Whatever diligent effort is expended at trial and in the notice of appeal to preserve the record on appeal, all can be lost if the issue is not properly briefed for the appellate court. Quite apart from the persuasive value of well-honed point headings, Rule 2:6-2(a)(5) requires legal argument to be raised under appropriate point headings in the merits brief, for both the appellate court and the opposing party on appeal are entitled to know precisely what arguments are offered for review and decision.[21] Issues not briefed are not properly before the court; they are waived.[22]

Exercise discretion in the number of points or arguments raised. Focus on the significant ones. As one court framed the choice, appellate counsel should resist the temptation to challenge an adverse judgment with the "blunderbuss" or scattershot approach involving nominal points because "[t]he strength of meritorious arguments is dissipated by the weakness of the groundless ones."[23] A reminder: Appeals are taken from judgments, not from opinions, particular words, phrases, sentences, or

sections of an opinion that a party may find objectionable.[24]

Assert Plain Error as a Last Resort. Under Rule 2:10-2, plain error arises when the supposed error has not been preserved below, but remains "clearly capable of producing an unjust result." Plain error can arise in practically any context (*i.e.*, from the failure to object to untoward closing remarks,[25] to a failure to challenge jury charges in a timely manner).[26] In any event, plain error is sparingly recognized. Unless the error "is clearly capable of producing an unjust result," the appellate court will not reverse, but affirm for want of: 1) not being presented below, 2) not being preserved for appeal, 3) not being properly presented on appeal, or 4) not constituting a sufficiently significant ground that would change the outcome of the case. In many instances, the appellate court will simply pass on the purported error as not being appropriately presented and, therefore, not a ground for reversal.[27] In other cases, although the court may recognize the error as not having been properly reserved, it still may consider the error without any guarantee the appellant will prevail on the merits.[28]

Conclusion

The above presentation of recommended dos and don'ts to preserve issues for appeal is not comprehensive. It is intended to guide appellate counsel to become more educated to protect the interests of the client. If there is one immutable principle counsel should absorb to preserve the record and have the opportunity to select for appeal the most persuasive issues and arguments to change an adverse outcome below, it is this: Be diligent and vocal.

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ENDNOTES

1. *See* case law recited in Pressler & Verniero, *Current N.J. Court Rules* R. 1:7-2 cmt. 2, at 99 (2016).
2. J. Keller, What Every Litigator Needs to Know About Appellate Argument Preservation, *NJ Lawyer Mag.* 28 (Dec. 2003).
3. *See Luce v. United States*, 469 U.S. 38, 40 & n.2 (1984).
4. *Cf. Waterson v. Gen. Motors Corp.*, 111 N.J 238, 250 (1988)(discussing a jury charge about application of the mandatory seat belt law).
5. *E.g., Wilson v. Williams*, 182 F.3d 562, 565-66 (6th Cir. 1999). The best guidance about reliance on *in limine* motions originates in the 10th Circuit: *United States v. Mejia-Alacorn*, 995 F.2d 982, 988 (1993) (warning "counsel must exercise caution in relying exclusively upon rulings made in connection with pretrial motions *in limine* as the basis for preserving claims of error in the admission and exclusion of evidence. Prudent counsel will renew objections at trial....").
6. *E.g., Waterson* decision cited in endnote 4 above.
7. *See Titus v. Lindberg*, 49 N.J. 66, 78 (1967), cited with approval in *New Jersey Div. of Youth & Family Servs. v. M.C., III*, 201 N.J. 328, 340-41 (2010).
8. *State v. Johnson*, 46 N.J. 289, 291 (1966).
9. *Compare Duffy v. Bill*, 32 N.J. 278, 294 (1960), *with State v. Millett*, 272 N.J. Super. 68, 100 (App. Div. 1994)(recommending preservation of the record of excluded evidence by affidavit, testimony, or other formal means).
10. *Bitsko v. Main Pharmacy, Inc.*, 289 N.J. Super. 267, 284 (App. Div. 1996).
11. M. Friedman, Preserving the Record For Appeal, *NJ Lawyer Mag.* 38, 40 (April 1993).
12. *See Brenman v. Demello*, 191 N.J. 18, 33 (2007) (*quoting Bender v. Adelson*, 187 N.J. 411, 431 (2006)).
13. *E.g., Risko v. Thompson Muller Automotive Group, Inc.*, 206 N.J. 506, 522 (2011).
14. *See Ogborne v. Mercer Cemetery Corp.*, 197 N.J. 448, 462 (2009); *Fiore v. Riverview Med. Center*, 311 N.J. Super. 361, 362-63 (App. Div. 1998).
15. *See Lanzet v. Greenberg*, 126 N.J. 168, 175 (1991).
16. *See Ridge at Back Brook, LLC v. Klenert*, 437 N.J. Super. 90, 97 n.4 (App. Div. 2014); *In re Hill*, 241 N.J. Super. 367, 372 (App. Div. 1990).
17. *See Tara Enter., Inc. v. Daribar Mgmt. Corp.*, 369 N.J. Super. 45, 60 (App. Div. 2004).
18. *See In re Carton*, 48 N.J. 9, 15 (1966); *Daly v. High Bridge Teachers' Ass'n*, 242 N.J. Super. 12, 15 (App. Div.), *certif. denied*, 122 N.J. 356 (1990).
19. *See U.S. Bank Nat'l Ass'n v. Guillaume*, 209 N.J. 449, 483 (2012) (*quoting Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973)).
20. *See Bostock v. High Tech Elevator Indus., Inc.*, 260 N.J. Super. 432, 447 (App. Div. 1992). *See also Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945).
21. *Almog v. Israel Travel Advisory Serv., Inc.*, 298 N.J. Super. 145, 155 (App. Div. 1997), *appeal dismissed*, 152 N.J. 361, *cert. denied sub nom., Zienke v. Almog*, 525 U.S. 817 (1998). For the persuasive power of well-crafted point headings, *see* B. Garner, Pointed Advice on Point Headings, *ABA Journal* 24-28 (Sept. 2015).
22. *Sklodowsky v. Lushis*, 417 N.J. Super. 648, 657 (App. Div. 2011); *Bolyard v. Berman*, 274 N.J. Super. 565, 582 n.6 (App. Div.), *certif. denied*, 138 N.J. 272 (1994).
23. *Goins v. Lane*, 787 F.2d 248, 254 (7th Cir.), *cert. denied*, 479 U.S. 846 (1986).
24. *Bandler v. Melillo*, 443 N.J. Super. 203, 210 (App. Div. 2015).
25. *Szczecina v. PV Holding Corp.*, 414 N.J. Super. 173, 185 (App. Div. 2010).
26. *See Cavuoti v. New Jersey Transit Corp.*, 161 N.J. 107, 129 (1999); *Ford v. Reichert*, 23 N.J. 429, 435 (1957).
27. *E.g., Battaglia v. Union Cty. Welfare Bd.*, 88 N.J. 48, 56 n.1 (1981) (deciding "[s]ince the issue was not raised below, we see no need to pass upon the matter"), *cert. denied*, 456 U.S. 965 (1982).
28. *E.g., Johnson v. Benjamin Moore & Co.*, 347 N.J. Super. 71, 97 (App. Div.), (considering a plain error claim and finding no such error), *certif. granted & remanded for reconsideration*, 172 N.J. 176 (2002). For a comprehensive discussion of plain error, *see* J. Mandel, *New Jersey Appellate Practice* ¶33 (2013 ed.).