BEYOND MERE PRESERVATION:

Partnering to Prepare the Best Record for Appeal

By Derek J. Linkous, Brittney D. Kohn, and Jeffrey A. Turner

Appellate courts often tell us they are courts of review, not first view.[1] That is a pithy distillation of the well-worn preservation rule that appellate courts will generally limit their review to issues presented to the trial court. But even better than appellate reversal is winning an issue below. Embedding an appellate specialist on the trial team can provide significant benefits to your client's cause long before any appeal by providing everything the trial court needs to decide in your favor and, if necessary, everything the appellate court needs to reverse.

THE IMPORTANCE OF PRESERVATION

Record preservation is the bread-and-butter job of embedded appellate counsel. Every lawyer undoubtedly knows to object to improper evidence, but not every issue is so simply preserved. State and federal courts are full of preservation traps for the unwary. For instance, in Michigan state courts, a jury-instruction challenge requires two steps to preserve the issue: The party must request a different instruction and also object to the instruction the court ultimately gives.[2] Similarly, a party hoping to raise a sufficiency-of-evidence argument on appeal must renew its directed verdict motion at the close of evidence to preserve that challenge.[3] While those rules appear simple enough, they are but a couple of many a trial lawyer must keep front of mind — all while selecting a jury, preparing cross-examination, and fending off barbs from opposing counsel.

These preservation traps are not limited to trial. A litany of pretrial legal issues — summary judgment motions, motions in limine, jury instructions, and more — are brimming with preservation issues counsel must consider. For example, Michigan state courts allow a party to raise posttrial challenges to a summary disposition ruling based on the record that existed at the time of summary disposition.[4] This look-back to the pretrial record, however, is not always available in federal court: Some do not permit appeal of a summary judgment denial unless the question is a pure question of law, while others forbid any posttrial review of a summary judgment motion.[5] Similar preservation nuances exist with motions in limine. Under both federal and state rules, a motion in limine ruling preserves an evidentiary objection only if the trial court's ruling is "definitive."[6] Many courts, however, treat decisions on these motions as advisory. To preserve an objection, the objected-to evidence must still be offered, or the objection must still be renewed, at trial.[7] Taking the proper steps to determine whether such a ruling is "definitive" is important to ensure a winning pretrial motion does not become a sad footnote on appeal.

A successful appeal, however, usually requires more than just preserving the issue. The time and manner in which the issues are raised before the trial court, as well as the arguments in support, significantly affect the likelihood of appellate success. For example, while objecting to evidence preserves the objection for appeal, that objection has little effect if the party does not raise the best arguments.[8] And presenting an evidentiary issue in a manner that makes it appear central, not tangential, to your case provides the best chance that an appellate court will consider the erroneous admission or denial of that evidence to have affected "a substantial right of the party."[9] It is areas such as these where having an appellate specialist on the team, one whose focus is on researching and preparing the best arguments, can have the greatest impact.

HOW BEST TO TEE UP COMMON APPELLATE ISSUES IN THE TRIAL COURT AND HOW EMBEDDED APPELLATE COUNSEL CAN HELP

Keeping track of and ensuring adequate presentation steps are taken while simultaneously preparing for and litigating a trial is a daunting task for even the most experienced attorney. Utilizing appellate counsel early on (and throughout trial) can ease that burden. Below are several instances for how to use appellate counsel to optimize your likelihood of success, whether that's a win at trial or a well-preserved record for appeal.

Consider shaping the record at the motion stage. Defining the issues and building the record starts at the summary judgment stage, or even the motion to dismiss stage. Strong briefing on these early issues can also signal to the other side that the wins won't come easily and your client is in it for the long haul. That not only strengthens your case at trial and on appeal; it also drives up the likelihood of settlement. Take, for instance, *Thomas v. Ford Motor Co*. That case involved a claim of an allegedly defective seatback, where the plaintiff sought to exclude evidence of his preexisting spinal condition. The court denied that request,[10] and the preexisting condition was set to become a big issue at trial. The case soon settled. Negotiating positions can often quickly change from dead set on trial to racing for the settlement table when key experts are lost, damaging evidence comes in, or entire theories are barred. Convenient for trial counsel, dispositive motions frequently set up exactly the sort of legal issues that appellate counsel are so well equipped to address.

Don't underestimate the importance of jury instructions. Errors in instructions can be a fertile ground for appeal (particularly since the court of appeal will review the

instruction *de novo*[11]), but they are also easy to accidentally waive. Different courts treat these instructions differently, and appellate counsel can help trial counsel figure out exactly what approach to take.

A good rule of thumb is to carefully divide up the proposed instructions so that the court must issue a ruling on each component. Offer alternative forms of the same instruction where possible in case the court rejects a more aggressive form, because, in some jurisdictions, the failure to provide an alternate instruction might be fatal to your instructional objection. Still other places — particularly those that lean heavily on standard instructions — won't provide any obvious opportunity to make objections to instructions or to propose special ones. In that case, appellate counsel might assist in preparing a motion to have the instructions issue resolved before or during trial. And even in places that utilize a charging conference, many are off the record. So objections aren't preserved unless subsequently placed on the record.

It is important not to forget to pay attention when the instructions are read: Object to the trial court's instructions as given to the extent that they deviate from the proposed version. Timing and the form of objection are also crucial considerations. In Michigan, for example, "[a] party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection."[12] Some of this, of course, can be obviated by a charging conference. But remember: A mis-instructed jury might increase your burden of proof.

Know when and how to object. As described above, different jurisdictions apply different requirements for objections. Be familiar with your jurisdiction's specificity and timing requirements and know whether your jurisdiction requires a ruling on each objection to preserve the issue for appeal. Familiarity with those distinctions is critical to ensure successful preservation of issues for appeal.

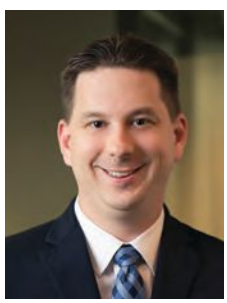
This is an obvious place for embedded appellate counsel to help. Use appellate counsel to anticipate what objections might arise, and if trial counsel is amenable, appellate counsel could then prepare scripts for trial counsel's use when issues arise. For objections that are not tied to any specific witness, an embedded appellate counsel might even be able to handle the objection themselves, as they would not then be violating the "one lawyer, one witness" rule that is usually imposed in trial courts. If an objection is likely to be especially complicated, bench briefs with attached cases — highlighted for a busy trial court — might be especially useful.

Remember: the earlier, the better. Often, the volume of records leading up to trial is enormous; bankers' boxes stacked wall to wall (or the electronic equivalent) are not unusual for a complex trial. The task of reviewing the record prior to trial and then within the abbreviated time frames required for appeals can often be overwhelming. For this reason, and all the reasons listed above, you should consider involving appellate counsel early. This way, appellate counsel can live and breathe the record as it develops and flag and prioritize appellate issues along the way.

Be practical. Good embedded appellate counsel know that a win at trial is better than a strong appellate issue. Perfect appellate preservation may sometimes be sacrificed where it would do substantial harm to a case. Every trial lawyer knows, for example, that jumping to one's feet to object to some crucial piece of evidence serves to hang a flashing sign on the damaging evidence. Some successful arguments in the trial court turn into back-pocket appellate issues for the other side that can jeopardize a trial win. Embedded appellate counsel should advise a client and trial counsel not only of available arguments but also the risks of losing or winning them.

CONCLUSION

Trials are often juggling acts with many moving pieces. Preservation issues are complicated and only one of the countless considerations on trial counsel's mind at trial. Embedded appellate counsel can help shoulder that burden early on and through trial to provide trial counsel the time to focus on the immediate issues at hand while simultaneously offering the client the peace of mind that, if the case heads to appeal, the record is preserved and the case is primed for success.



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Footnotes:

1. See, e.g., *Booth Newspapers, Inc. v. Univ. of Michigan Bd. of Regents*, 507 N.W.2d 422, 432 (Mich. 1993) (noting "[i]ssues raised for the first time on appeal are not ordinarily subject to review"; collecting cases); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) ("Ours is a court of final review and not first view") (cleaned up).
2. *Leavitt v. Monaco Coach Corp.*, 241 Mich. App. 288, 300, 616 N.W.2d 175, 182 (2000).
3. *Napier v. Jacobs*, 414 N.W.2d 862, 864 (Mich. 1987) (citation omitted).
4. *Doster v. Covenant Med. Ctr.*, Nos. 349560, 350941, 2020 WL 5581713, at *6 (Mich. Ct. App. Sept. 17, 2020).
5. *Hanover Am. Ins. Co. v. Tattooed Millionaire Entm't, LLC*, 974 F.3d 767, 786 n.10 (6th Cir. 2020) (citations omitted) (noting split; collecting cases).
6. See Mich. R. Evid. 103(a); see also Fed. R. Evid. 103.
7. See, e.g., *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1297–98 (11th Cir. 2021).
8. See, e.g., *Coppola v. Edward Rose & Sons, LLC*, No. 343172, 2019 WL 2605770, at *4 (Mich. Ct. App. June 25, 2019) (rejecting an Evidence Rule 704 argument on appeal because, at trial, counsel made only a Rule 701 objection).
9. Mich. R. Evid. 103(a).
10. No. 17-cv-888, 2019 WL 1293605 (E.D. Wis. March 21, 2019).
11. See, e.g., *Hill v. Hoig*, 672 N.W.2d 531, 532 (Mich. Ct. App. 2003).
12. Mich. Ct. Rule 2.512.