Rearranging the Deck Chairs when the Ship Is Going Down: Protecting Your Condemnation Record for Appeal

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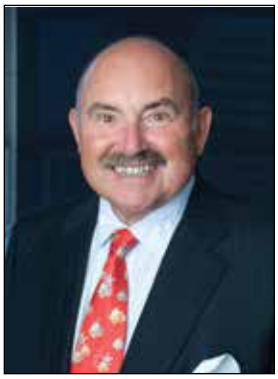

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No trial is ever perfect, so be ready to go to the next level.

ALTHOUGH THE TITLE of this article is about the preservation and protection of appeal rights "when the ship is going down," it is often difficult to know that a case will result in a decision or award that should be appealed. No trial is perfect, and even the best, most carefully laid plans can seem to fall apart when the judge makes an unexpected ruling, a witness proves weak or is unable to testify, or the jury returns a verdict seemingly unsupported by the evidence. Because in every case there may be error warranting appeal, the best practice is to assume that every case will be appealed and, therefore, that the record at trial must be protected.

At times protecting the record may slow down presentation of the evidence and disrupt the rhythm of witness examination. It may even appear bothersome to the judge and the jury. However, protection of the record and effective trial advocacy are not mutually exclusive. In fact, they are necessarily integrated components of a winning litigation strategy. When the need for an appeal arises, all that is left is the record. It must be complete and accurate in order to present winning arguments to the appellate court.

Below, we present guidelines for protecting the record on appeal. These guidelines fall roughly into two categories: a group of practices designed to ensure that necessary information becomes part of the trial court record, and a collection of areas where attorneys must take additional steps to preserve an evidentiary issue when faced with a contrary ruling from the court.[1] Before moving to the guidelines, however, we first offer a few practical tips for ensuring a readable, lucid transcript and a complete collection of exhibits.

THE TRANSCRIPT • The transcript is the most important part of the appellate record. In almost every case, it will be the only record you have of objections made by you and your opponent; of rulings by the court; and of the content of witness testimony. Going through a lengthy trial only to end up with a transcript that is difficult to read, contains inaccuracies, or is incomplete will undermine even the most cogent arguments on appeal.

There are several ways to ensure that the transcript is the basis of a sound appeal. First, make sure that the court reporter takes down everything. Protect the record from "off the record" comments from the court. Request that any meaningful, substantive discussion or argument take place on the record, even if out of the jury's presence. If a reporter is not present, ask for the conversation to be recorded. Second, prevent misspellings in the record and delays in its preparation by providing a glossary of terms and names to the reporter. This is particularly important in eminent domain cases, where many terms are foreign even to the most experienced reporter. Verbal shorthand that makes sense to you, your opponent, and the judge may be meaningless to the court reporter. Third, make sure you have the reporter's name and contact information, as well as the name and contact information of any replacement reporter. Finally, and most importantly, speak slowly, clearly, and loudly, and not over or at the same time as anyone else. You do not want the transcript to be interrupted with "[indiscernible]" or "[inaudible]".

To ensure a complete collection of exhibits, mark all of your exhibits for identification. That means every document, photo, report, slip of paper, or drawing should be marked either as an exhibit or for identification. An exhibit that is not marked for identification cannot be part of the record on appeal. Once an exhibit is marked for identification, however, you are entitled to have it incorporated into the record so that the appellate court can determine whether it was competent and admissible.

PROTECT THE RECORD BY ENSURING THAT EVERYTHING IS ACTUALLY RECORDED • The most important step you can take to create an accurate record for appeal is to consistently and firmly ensure that arguments, decisions, and important information are included in the written record of the case. Too often, attorneys fail to memorialize all issues as part of the record when discussing issues with opposing counsel and the court off the record, or choose to withdraw a question in the face of an objection before receiving a ruling from the court. Sometimes these shortcuts are appropriate, but they can also result in a record that is deficient in areas that later become the grounds for an appeal. Ensuring the completeness of the written record is important throughout the trial, but the task is often ignored in a few common areas.

Challenges and Objections

As an initial matter, challenges and objections must be timely, and they must be stated on the record. Do not make your objections at an off-the-record bench conference. If an objection is not on the record, for appellate purposes it may as well not

[1] Because valuation findings are usually fiercely contested questions of fact, we do not address the requirements for preserving a motion for a directed verdict, a motion for judgment as a matter of law, or a motion for summary judgment.

have been made. For the same reasons, if the judge makes a statement off the record that is prejudicial or improper, make a record of what transpired—and object—as soon as possible. Judges generally do not offend easily when the goal is to preserve the record; and for those that do, that is all the more reason to preserve the record for appeal. Do not hesitate to do so.

When making the objection or challenge, you must clearly and specifically state the grounds. For example, when challenging a potential juror for cause, articulate for the record the basis for the challenge. The basis for cause may appear obvious at the time, but months or years later when the case is on appeal, the appellate court may be unable to discern it from a written record that contains no express explanation.

Similarly, objections to the admissibility of evidence, whether documentary or testimonial, must be on the record, and they must specifically state the grounds for inadmissibility. If you fail to state a particular ground—for example, by choosing to rely on privilege rather than relevance as the basis for an objection, and then not mentioning relevance at all—that ground may be deemed waived by the appellate court.

Rulings by the Court

Any time the court is asked to decide an issue, whether it is a challenge to a juror for cause, an objection to the admission of evidence, or some other request for judicial intervention, do not move on until the judge has ruled on that issue and you understand what that ruling is (unless, of course, the judge reserves decision until later in the trial). It can be easy to move on without a ruling because, for example, the court suggests that your opponent withdraw a question—without actually requiring him to do so. And if you do not understand what the judge's ruling was, neither will the appellate court.

Do not be timid in asking the court to clarify a ruling or in putting the rationale for a ruling on the record. Judges know that cases are appealed. It is not uncommon for a trial judge to state the reasons for the ruling using the phrase, "and I'm speaking directly to the appellate court as I make this ruling, here are my reasons for doing so…."

Statements and Actions by Witnesses or Others

When questioning a witness, make sure your questions are answered. Many lawyers prepare their examination of witnesses and at trial go through the questions without ensuring that each question is answered accurately. It may be helpful to have a colleague at counsel's table confirm that each question has been answered, as you may be so engaged in asking the questions or planning ahead that you miss an answer or the lack thereof. Further, make sure each witness answers each question verbally. Nods of the head or "uh huhs" do not read well in a transcript and lead to a confusing record or one open to interpretation.

Non-verbal events that occur during the course of trial may also prove important on appeal. For example, a witness's use of hand gestures to convey information may be relevant to the sufficiency of evidence on a particular issue; or a juror's falling asleep may be relevant to whether the trial court should have discharged that juror. When non-verbal events occur, state their occurrence for the record: "let the record show…."

Expert Qualifications

Do not accept a "gracious" offer by your opponent to deem your witness an expert. This is not only important as a fundamental predicate to persuasion, particularly in expert-heavy eminent domain trials. It is also important in order to protect the record. Conduct at least a minimal *voir dire* during which the expert's educational background, professional experience, professional designations, and prior judicial experience are explored. If appropriate, ask the expert to identify his or her semi-

nars, publications, and teaching experience as well. This information is commonly in the record on appeal regardless of whether the expert testifies to it, but the appellate court is far more likely to read it in the transcript than in a separate appendix.

WHEN THE COURT RULES AGAINST YOU, COMPLETE THE RECORD BEFORE MOVING ON • After the court rules against you, it is easy to move on without taking any additional steps to protect the record for appeal. Skipping those steps, however, can be a mistake. Appellate courts commonly deem an argument or objection waived, even if it was raised at trial, if the attorney did not take an *additional* step to protect the record.

When the Court Sustains Your Opponent's Objection

If the appellate court does not know what that testimony would have shown, it will have difficulty finding that its exclusion was error. Many judges will not allow lawyers to state their reasons for an objection in open court, so a bench conference or sidebar may be required. When there is evidence excluded that must be part of the record in order to ensure that an appellate court understands its impact, if a judge rules against an attempt to elicit testimony, ask to make an *offer of proof* on the record. If granted permission, detail what the evidence would have been had the witness been permitted to testify: "the testimony of Ms. Jones, had she been permitted to testify, would have been as follows…."

If the court bars the admission of an exhibit, mark the exhibit for identification and state on the record how the exclusion is prejudicial. If a jury is present, ask for bench argument or that the judge withdraw the jury. At argument, ask the judge to identify the basis for non-admission and try to correct any defect. If necessary, ask for a short continuance. For example, if the court holds that a different witness is needed to provide a foundation for the exhibit, ask for a short adjournment to secure the proper witness.

When the Court Overrules Your Objection

On the other hand, when you wish to object to your opponent's elicitation of testimony but the witness answers the questions before you can object, quickly move to strike. If necessary, you may also ask the court to issue a curative instruction to the jury. The point is to demonstrate your timely effort to address the evidentiary problem at trial so that the appellate court does not view your concern as having been waived once the case reaches appeal.

Motions in Limine

In many cases, a motion in limine is appropriate to head off an evidentiary issue that is likely to arise at trial and that could cause significant prejudice if not addressed in advance. Common areas in eminent domain and valuation litigation that raise these concerns are contamination, prior tax reduction applications, or the recent purchase price.

Jurisdictions differ, however, on whether an issue raised in a motion in limine must be renewed at trial if the court denies the motion. In those jurisdictions that require renewal, a concrete ruling denying the motion is insufficient to preserve the issue for appeal. Instead, the moving party must renew the objection at trial when the evidence is proffered. A failure to renew may constitute a waiver of the objection entirely. You must therefore pay close attention to the rule that applies to the jurisdiction in which the case is being tried. Some attorneys choose to renew objections in every case, regardless of the local rule, to ensure that accidental waiver never occurs. You will know best which approach is best for your practice.

CONCLUSION • During the course of a hectic trial, it can be easy to forget the importance of ensuring a record that will demonstrate to an appellate court exactly why something should have happened differently—why an important piece of evidence

should have been admitted, or why misleading testimony tainted the jury's findings. Without a record that shows exactly what happened, and more importantly demonstrates to the appellate court that you made a timely, complete effort to resolve your concerns at the trial level before raising them on appeal, the appellate court cannot evaluate the trial proceedings in a complete way.

Fortunately, a few relatively simple steps can avoid many of the record problems that arise on appeal. With practice and time, these steps will become second nature. And at some point, you may find yourself appealing a judgment that is inexplicable and unpredictable. When that happens, you will be grateful that you took the appropriate steps at trial to preserve your concerns on appeal.