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HEADLINE: Preserving and Protecting the Trial Record

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BODY:

There can be no doubt that the goal of every trial attorney who sets foot in a courtroom is the same--to win the case. For all practical purposes, however, not all cases can be won and when there is a winner, there inevitably must also be a loser. For those lawyers who brag that they have never lost a case, the reality is that either they have not tried very many, or they have successfully pawned off and assigned the "dogs" to the younger, less experienced attorneys in their office. Irrespective of whether the case starts out as a good or a bad one, quite often the success or failure of the trial attorney is determined by how faithfully the trial lawyer adheres to the practice of protecting and/or preserving the trial record. Thus, even the best of cases can be lost simply because the lawyer failed to protect the trial record.

To say that protecting the record is an important aspect of trial practice is a gross understatement. Indeed, it is essential. Protection of the trial record serves a crucial function at both the trial and the appellate levels. At the trial level, proper protection will ensure that the record is sufficiently developed to create a logical and compelling argument for summation, to guarantee that in the event of a request for a read-back by the jurors during deliberation, that sufficient proof has been adduced to answer any concerns the jurors might have and to withstand a trial or post-trial motion to dismiss and/or to set aside the verdict. Upon review, at the appellate level, the trial record must be sufficiently protected to preserve any legitimate basis for appeal. Put another way, the failure to preserve the trial record for appeal will likely result in waiver of the issue sought to be reviewed.

The Crucial Answer

For a variety of reasons, trial testimony tends to proceed at a very fast pace. Court congestion, judicial economy and keeping the interest and focus of the jurors are often the reasons the presiding judges push to have the testimony move even faster. Haste makes waste. The trial lawyer is, therefore, cautioned to not get caught up in the speed of the trial to the detriment of having the trial record not truly reflect what actually took place. A trial lawyer's keen ability to watch the witness, listen to his answers and craft probing follow-up questions are for naught if the written record does not accurately reflect what was seen but not heard. The following is an example of a question and answer sequence where the attorney failed to "hear" what the witness was trying to convey and consequently failed to protect the record:

Q: Tell us exactly what the man did with the gun?

A:He pointed it that way. And then he slowly turned this way and then pointed in the other direction.

Q: What happened next?

Needless to say, in this example the trial lawyer undoubtedly observed the witness but failed to preserve the record. That failure has made meaningless any chance for clarification during a read-back and, worse, has left the appellate court without a clue as to what actually happened. That failure could have been cured in one of two ways. First, by asking the court to let the record reflect the manner and direction in which the witness pointed: "Your honor, may the record reflect the witness pointed forward, directly in front of him, then to his left and then to his right."

As an alternative, the trial lawyer could have had the witness himself describe in clear terms the movements he just made:

Q: Tell us in words what you mean when you say "he pointed that way"?

Words must constantly be used to describe what is happening in the courtroom. References to "that exhibit" or "the document" offer little value in informing a reviewing court as to what actually took place. The better approach is to always ask the court to let the record reflect "The witness is referring to plaintiff's exhibit 22" or "the contract of June 12, 2010." Clarity, not expediency, wins cases. What is obvious to people in the courtroom is hardly obvious to those reviewing the trial transcript.

In much the same way as in the above example, the trial lawyer must be acutely aware if the witness merely nods his head in response to an answer instead of offering a verbal response. For instance, in the morning session, a court reporter might interrupt the proceedings and indicate that the witness has failed to offer an audible response. The same realization and declaration by the court reporter, however, might not repeat itself in the afternoon session when the court reporter (along with the judge and the attorneys), are tired. Imagine the scenario in which one of the most sensitive and crucial questions was asked in the late afternoon and the final record reflects the following:

Q: Doctor, were you aware at that time that the patient's oxygen saturation levels fell below 80?

A:Witness nods.

Here, the lesson is obvious. The record reflects nothing. A "nod" does not equal a "yes" or a "no." Do not rely on the court reporter to clarify the nod. Either describe the nod for the court stenographer to report: "Let the record reflect that the witness nodded in agreement;" or remind/instruct the witness that the court reporter cannot transcribe a nod and that therefore, he needs to verbalize his answer in a "yes" or "no."

Along the same lines, the trial lawyer must always be on the lookout for ambiguous or equivocal terms used in an answer. Consider the following examples:

Q: How would you describe the traffic conditions immediately before the accident?

A:Traffic was good.

Q: Tell us what you observed?

In this example, the answer "good" is of little value. The attorney should have followed up with the question:

Q: Tell us what you mean by "good"?

Even answers which are seemingly responsive must constantly be clarified for content:

Q: How would you describe the man's height?

A:He was tall.

Once again, the answer "tall" is not specific enough. The appropriate follow-up question should be asked:

Q: What do you mean when you say "tall"?

While many trial lawyers like to use demonstrative exhibits such as enlargements of photographs, maps or diagrams to enhance their case, the manner in which these exhibits are marked is crucial to the proponent of such evidence. Take the scenario in which a photograph of an intersection is offered in an accident case where a pedestrian was struck by a car. Too often trial lawyers fail to insure that the photograph is appropriately marked to reflect the descriptive testimony referencing what is depicted in the photograph. Questions like these are sadly more the norm than the rare occasion:

Q: Put a mark on the photo where you were standing when you observed the accident.

Your Honor, let the record reflect the witness put an "X" in that spot.

Q: Now put a mark where you first observed (the pedestrian)?

Let the record reflect the witness put an "X1" in that spot.

Q: Now put a mark where the impact took place?

Let the record reflect the witness put an "X2" on that spot.

Here, not only did the attorney fail to protect the record and avoid confusion, but he missed an ideal opportunity to do what a good trial attorney should do--be persuasive. The better way to mark such an exhibit is to think through the manner in which the exhibit should be marked before the witness ever takes the stand. Careful planning in this regard will serve three purposes: First, if marked properly, the exhibit will serve to allow the attorney to forcefully argue his point during summation. Second, if appropriately marked, that exhibit will "talk" to the jury in the event the jurors are permitted to view that exhibit during deliberation. Third, proper marking will serve to educate any appellate court as to testimony they never saw or heard.

To achieve this goal the following approach is suggested. Bearing in mind that although you, as the trial lawyer, and the witness, are familiar with the enlarged photograph, the jurors have never seen it before. Therefore, prior to allowing the witness to put whatever marking he or she wants on the exhibit, carefully guide the witness to ensure that the witness has not made a mistake, and then put a descriptive marking on the appropriately identified exhibit.

Q: Using Exhibit 24 in evidence show us where South Street is by pointing it out on

the exhibit.

(Once you have assured yourself that the witness has pointed to the right spot, then have the witness put an informative marking on the exhibit. Rather than having the witness write "SS" for South Street, the following is better):

Q: Write the words "South Street" right on Exhibit 24.

Q: Point out where you were standing at the time you witnessed the accident.

Q: Now write your initials right on the exhibit in that location.

Q: Show us where the impact took place by first pointing to it on the exhibit.

Q: Now put a large "X" on the exhibit where the impact took place.

By properly marking the exhibit, the exhibit will continue to "testify" whenever it is shown to the jury or appellate court.

In the event your adversary chooses to use the same exhibit during cross-examination, make sure to have a transparent overlay or different colored marker to avoid any potential confusion. Make sure to let the record reflect what color is being used by your adversary if the same exhibit is being marked during cross examination.

In the event a black board or chalkboard is used, make sure to request permission from the court to take a photograph of the board and offer the photo in evidence to properly preserve the record. Likewise, if movable model cars or other such objects are used as proof during a witness' testimony, make sure to let the record reflect exactly what was done during the demonstration to properly preserve the record. If a large pad on an easel is used to illustrate a particular point, be sure to offer that page in evidence at the time the witness is on the stand.

Get a Ruling

One of the most difficult problems facing a trial attorney is where the court has failed to state on the record what it is doing. An incomplete record is created when the court does not adequately reflect the basis for its ruling or where the court fails to rule on a motion, an objection, or a request to charge. Without such a ruling it is hard to argue that there was an error committed at the trial court level.

Objections

In the same manner, an incomplete record is created where the attorney fails to object in a timely manner. While formal exceptions are no longer necessary and a simple, but specific, objection will suffice, to properly preserve the record, the objection must be timely and counsel should state a proper ground. Objections must be specific and an objection made on one ground will not preserve an objection on a different ground. The rationale behind these requirements is to insure that your adversary and/or the court, are afforded sufficient opportunity to cure any alleged error or defect. Finally, the failure to make such a specific and timely objection often amounts to a waiver that may preclude the appellant from challenging the error. Although the appellate courts may review and determine an unpreserved error, it is generally limited to situations where the claimed error is considered to be fundamental; notably, very few errors will be deemed fundamental. The better

practice, therefore, is to preserve and protect.

Conclusion

The importance of protecting and/or preserving the trial record cannot be overly stressed. Protection of the record and preservation of any claimed errors must always be an integral component of every trial lawyer's trial strategy. Not only does a properly protected trial record assist the trial attorney in achieving his or her ultimate goal of obtaining a favorable result for his or her client, but in the untoward event that the trial is lost, preservation of any alleged errors and a fully protected record is the key to obtaining appellate review and possible reversal of any unfavorable judgment.

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