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# Appellate Practice Corner

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## Preserving Error for Appellate Review

An appeal is only as good as the record from which it arises. Strong issues can be lost if counsel is not careful to construct a complete appellate record that includes all matters necessary to support his contention of error. Generally speaking, an appellate court will consider only those issues that were raised and preserved before the circuit court. *Dopp v. Village of Northbrook*, 257 Ill. App. 3d 820, 824, 630 N.E.2d 84 (1st Dist. 1993). Indeed, the purpose of appellate review is to evaluate the record as presented to the circuit court. The court will only review those facts and evidence that were made part of the record on appeal. Referencing certain deposition testimony during a motion hearing is of no avail if the deposition containing those facts is not made part of the record during the motion hearing or as part of the motion itself.

In its simplest sense, the record on appeal is a mechanism to preserve error for reviewing court analysis. A record on appeal properly consists of 1) the common law record (all pleadings, exhibits, and orders) (see *Hall v. Turney*, 56 Ill. App. 3d 644, 647, 371 N.E.2d 1177 (1st Dist. 1977), and S. Ct. Rules 321, 328, and 329), and 2) the report of proceedings. S. Ct. Rule 323 (transcripts of hearings and trial testimony). The reports of proceedings and the record on appeal are read together as a whole. From this collection of documents the appellate court reviews the case and decides whether the circuit court committed error, and if so, whether that error prejudiced a party. The record is best looked upon as a "box" containing everything that the appellate court can consider in evaluating an appeal. Anything not contained in the box, no matter how enticing, cannot be considered on review. *City of Chicago v. Hutter*, 58 Ill. App. 3d 468, 469, 374 N.E.2d 802 (1st Dist. 1978).

### Major Mistakes in Preserving Appellate Issues

The following items represent the most common mistakes made in failing to preserve issues for appellate review. Being aware of these and preparing to preserve errors prior to a significant hearing or trial will save much time and make the entire appellate process proceed smoothly.

#### A. Failing to Preserve Court Rulings

Counsel must always obtain a ruling on any motion or objection presented to the court. Illinois law is well settled that even where a proper objection has been made, the error is not preserved for review if the circuit court did not rule on the objection. *Watson v. City of Chicago*, 124 Ill. App. 3d 348, 353, 464 N.E.2d 1100 (1st Dist. 1984). The burden is on the moving party to either obtain a ruling or a refusal to rule, which itself can form the basis of a reversal. *Swieton v. City of Chicago*, 129 Ill. App. 3d 379, 385, 472 N.E.2d 503 (1st Dist. 1984). This concern is especially apparent where the circuit court reserves its ruling on a motion or objection. A good example is where the court takes a party's

motion *in limine* under advisement pending the presentation of the evidence or testimony at trial when the evidence or testimony later surfaces, the opponent fails to seek a ruling. *Selby v. Danville Pepsi-Cola Bottling Co.*, 169 Ill. App. 3d 427, 439, 523 N.E.2d 697 (4th Dist. 1988). In that situation, the error is not preserved. The movant must seek some decision by the court in order to preserve the issue for subsequent review.

### B. Failing to Preserve Objections

A similar result occurs where a party fails to make a proper objection. The objection is the key to preserving for review any error in the admission of evidence, whether the evidence is a document or a witness' testimony. As a general rule, counsel must object contemporaneously with the offer of the objectionable evidence or testimony.

Moreover, when an objection is made, specific grounds (and all grounds) must be stated as grounds not stated are waived. Objections other than those stated on the record are waived and cannot be asserted on appeal. A *general objection*, "I object," preserves only relevancy and materiality grounds. A *specific objection*, such as, "Objection, violates the hearsay rule" preserves the objection on hearsay grounds, but waives all other specific objections, if not stated.

One exception to this rule is the continuing objection. In some circumstances, counsel may object to an entire line or area of questioning. The continuing objection permits counsel to raise the objection once, and then indicate that the objection is continuing. *O'Keefe v. Fitzpatrick*, 153 Ill. App. 3d 384, 388, 505 N.E.2d 1355 (2d Dist. 1987). This dispenses with the need to repeat the objection each time the issue is breached. Be aware, though, that continuing objections are not always accepted by the circuit court. Thus, the court's preference should always be clarified prior to trial.

### C. Offer of Proof

An offer of proof serves the opposite purpose of an objection and is used to *preserve* error in the exclusion of evidence. *Turgeon v. Commonwealth Edison Co.*, 258 Ill. App. 3d 234, 241, 630 N.E.2d 1318 (2d Dist. 1994). An offer of proof permits the appellate court to see for itself the evidence that the circuit court deemed inadmissible. Case law states that the primary purpose of the offer of proof is to indicate to the circuit court, opposing party, and the appellate court the substance of the excluded testimony sought to be offered. *Turgeon*, 258 Ill. App. 3d at 240. In the absence of an offer, the appellate court will typically refuse to speculate about what the evidence would have shown and will simply affirm the lower court's ruling.

Most situations call for a formal offer of proof whereby the proponent of the testimony calls the witnesses to the stand and asks questions. An offer of proof must contain facts and not conclusions. *Romine v. City of Watseka*, 341 Ill. App. 370, 376, 91 N.E.2d 76 (2d Dist. 1950). In certain cases, counsel may present the offer by way of representations of what the evidence, if allowed, would show. However, this should be clear and there should be no objection to this method voiced by opposing counsel. If counsel does object, the witness will have to testify.

Offers of proof are required in all but a few circumstances, namely: (1) the court has refused to permit counsel to make an offer of proof; (2) it is apparent from the record that the court's attitude toward the witness would have prevented an offer; and (3) the question is in such a form that it indicates that a particular answer would have been elicited. However, counsel should not rely on these and try to present an offer. Also, counsel opposing an offer must remember to raise any objections during the offer of proof that would have been raised if the testimony was actually being presented to the jury so that the objections are properly preserved.

Offers of proof must indicate to the court the purpose of the proffered evidence and must be conducted outside the presence of the jury. The court reporter must record any offer of proof to make the offer part of the record. If the offer consists of physical evidence, the evidence should be identified

and described. If the evidence is admitted, its relevancy should be explained. The exhibit should then be made available for the court record so that it may be reviewed by the appellate court.

### D. Jury Instructions

To preserve for appeal an issue relating to a jury instruction, the party must object to the instruction during the instruction conference and renew that objection in the subsequent post trial motion. *Barrett v. Fritz*, 42 Ill. 2d 529, 532-33, 248 N.E.2d 111 (1969). Including the objection in the latter only is not sufficient. Here, counsel should make sure that the jury instruction conference, or at least a formal record of the rulings on the instructions, is recorded by the court reporter. The same caveat applies to *voir dire*; always ensure that jury selection is recorded by a court reporter. *American State Bank v. Woodford County*, 55 Ill. App. 3d 123, 129, 371 N.E.2d 232 (4th Dist. 1977). As with objections to testimony, objections on jury instructions must be specific.

Equally important to preserving instructional errors is tendering an alternative instruction. *Auton v. Logan Landfill, Inc*., 105 Ill. 2d 537, 549, 475 N.E.2d 817 (1984). It is not enough to simply object. Where appropriate, counsel should tender a version of how the instruction should read and have the court rule on the submission. The same holds true with special interrogatories. Objections must be made and ruled on in the same manner as standard jury instructions.

### E. Motions *in Limine*

Motions *in limine* are the best way to challenge questionable evidence (or get a pre-ruling on the evidence) before the trial begins. Most important, the court's ruling on a motion *in limine* is not the end of the process. If evidence will be allowed after the denial of a motion *in limine*, counsel must also reassert the objection to the testimony or evidence when it actually appears in the trial and when it is offered as evidence. Otherwise, the objection on the admissibility of that evidence is waived. *Chubb/Home Ins. Co. v. Outboard Marine Corp*., 238 Ill. App. 3d 558, 567, 606 N.E.2d 423 (1st Dist. 1992).

## Other Items of Interest

Exhibits can sometimes be the key to explaining a position on appeal. Given that, counsel should be careful to provide the court with complete copies of all documents that are necessary to support the point. It goes without saying that any exhibit should be clearly and properly marked. If the exhibits are lengthy, file excerpts in support of the motion, then follow with a "Notice of Filing" that contains the complete document. Also, make sure the filing is referenced in the motion and at the hearing on the motion. *Spencer v. Community Hosp. of Evanston*, 87 Ill. App. 3d 214, 215, 408 N.E.2d 981 (1st Dist. 1980).

Another area of interest is the preservation of legal issues raised. Arguments and issues must be raised before the circuit court or they are waived on appeal. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 413, 775 N.E.2d 951 (2002). For example, in the recent *Robinson* case, the Illinois Supreme Court rejected the appellant's full faith and credit argument, because it was raised for the first time on appeal. *Id.* Moreover, it is important to include all arguments in the post trial motion and then select the best arguments once the appeal is underway.

## Tips for Record Preservation

Counsel can help ensure that all issues are preserved for appeal by following some basic rules. First, keep a separate file folder clearly marked "potential errors for appeal" and place in that folder all notes, documents and orders that might eventually create an appellate issue in the case. These documents would include significant or dispositive motions, motions *in limine*, and appropriate orders. Second, for cases proceeding to trial or at least some type of evidentiary hearing, maintain a running

list of all exhibits to ensure that each is offered and ruled upon, and track all motions *in limine*. This list can also be used to ensure that any alternative jury instructions are presented. Consult this list before dismissing each witness and at the close of your case and, where necessary, obtain the proper rulings.

Third, prepare a short memorandum prior to trial on potential issues that might arise from the trial testimony, any evidentiary foundations, and possible offer of proof. Preparing these as much as possible prior to the trial, provides a quick reference for all evidentiary matters that will ensure you have the necessary foundations when the need arises. Finally, remember that there are options for capturing the court's verbal rulings if no court reporter is present. Counsel can elaborate the rulings and reasoning in a written order or prepare a bystander's report.

Hopefully this short primer will help better preserve errors for appellate review. Remember, the responsibility for preparing a full and accurate record belongs to the party seeking the appeal. Any discrepancies in the record are resolved against the party appealing. *Gilmore v. City of Zion*, 237 Ill. App. 3d 744, 754, 605 N.E.2d 110 (2d Dist. 1992).

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