RYNEARSON, SUESS, SCHNURBUSCH & CHAMPION, LLC
ATTORNEYS AT LAW

Preserving the Record
(Just in case in the unlikely possibility that you might someday lose occasionally or something)

By Kevin Schnurbusch

INTRODUCTION

Everyone who tries lawsuits loses lawsuits. It is inevitable that at some point in your career you will want to appeal a bad decision from a Trial Court or an unwarranted jury verdict. As we all know, however, not liking the outcome is not a proper grounds for appeal. Either your opponent, the Judge or the jury must have done something wrong which will constitute reversible error before a Court of Appeals. The trick is making sure that the error is properly pointed out at the time it occurs and preserving the record so that a Court of Appeals can clearly see that error was committed.

There are two types of error which can take place during a trial. The first type consists of error that is so obviously prejudicial that it cannot be cured by any action taken by the Trial Judge. Such error usually results in a mistrial or can be brought to the Court of Appeals' attention under a theory of "plain error" regardless of whether an objection was made at the time of trial. This type of error is rare, but you will know it when you see it. For all other occasions an objection must be made by the aggrieved party. It must be the proper objection. It must be sufficiently clear so that the Trial Judge knows what you are asking them to do. If the Trial Judge does not grant the relief you request, then the objection must be accompanied with sufficient information so that the Court of Appeals can understand what was before the Trial Judge at the time the ruling was made. This presentation will talk about objections, offers of proof and preserving the record for appeal.

STARTING AT THE BEGINNING

The first time to start thinking about preserving the record for appeal is when you are preparing the Answer to the plaintiff's Petition. Defenses raised in the Answer will impact the scope of evidence at trial. Constitutional challenges to request for punitive damages and the like must be raised at the first opportunity in order to be preserved for appeal. The care you take in wording the defenses in your Answer will be reflected in the points you raise on appeal, possibly years down the road.

Evidence introduced at trial can also be directly affected by how discovery objections and responses are handled. Although informal production of documents and correspondence updates to Interrogatory answers look like the friendly way of practicing law, they can create problems when trying to establish for the Trial Court the admissibility of documents or answers given in response to Interrogatories. Making the other side respond to your discovery by verified signature, or obtaining orders to compel complete answers to Interrogatories, may seem like playing unnecessary hardball. The truth is, the failure to do so may make it impossible to prove things at trial and therefore later on appeal.

STARTING TRIAL

Once you are told to appear at a particular division to begin trial, your first contact with preserving the record will probably come in the form of Motions in Limine. The primary purpose of Motions in Limine is to obtain a Court ruling beforehand to keep allegedly prejudicial evidence out of the hearing of the jury. Some things, once said, cannot be unsaid. A Motion in Limine can keep your opponent from discussing matters during voir dire or opening statement that he or she should not be able to get into evidence. If you lose on a Motion in Limine, it is always good practice to renew the Motion and specifically state the objection on the first occasion when your opponent attempts to introduce the evidence you sought to have limited by the Motion in Limine. There are conflicting cases on the question of whether or not a Motion in Limine will properly preserve an issue so that further objection need not be made at trial. The best answer is that you always want to give the Judge the chance to change their mind. Even though you lost prior to trial, once the Judges start to hear the evidence, they might later decide that your argument was correct and foreclose the other side from introducing that evidence. The flip side is also true. If your opponent has been successful in keeping out an important piece of your evidence, you should always give them the opportunity to change their mind. This occurs during the process of making an offer of proof which will be discussed later.

Another issue often discussed during a pre-trial conference is whether or not "the rule" as to witnesses in the court room will be invoked. Although it is not actually a rule that can be found written down anywhere, the Court will usually agree to order that witnesses in a case not be present in the court room before they are called to testify. Throughout the course of trial, it is important to note that a court reporter does not list which witnesses are present in the court room. Should a witness appear in the court room in violation of the Court's order, it is necessary to call that to the Court's attention on the record and request whatever relief is consistent with the violation.

TRIAL

Voir dire can be an interesting process in creating a record. It is good practice to create a seating chart with the names of the panel filled in and to always address a panel member by their name. Any gratuitous answer to an attorney's question should be identified on the record by which panel member made the statement. If you ask a question to which no panel member responds, it is important to indicate for the record that there were no responses. Some of the responses may be non-verbal and, if important to your case, should be explained on the record. If a juror rolls their eyes when you mention that you are representing a particular insurance company, but makes no negative comment about that company, you should state that on the record at the time the Court asks for strikes for cause. Another interesting dilemma which has been discussed recently in Missouri cases is the issue of making a challenge to the other side's jury strikes because you feel they were exercised based on the race of the panel members. The record will not reflect the race of the persons sought to be struck or the remaining members of the panel unless you so indicate.

Once opening statement begins, you are dealing primarily with typical trial objections. The objections can be to some piece of offered testimony or evidence, the manner in which a question is asked, the conduct of a witness, counsel, or the

Judge and later to the law to be read to the jury. The manner in which objections should be made has created a great deal of its own case law. What follows is the authority for some general rules about making objections.

Make the objection at the time the evidence is first offered. If you wait, you waive it. Fallert Tool & Engineering Company, Inc. v. McClain, 579 S.W. 2d. 751 (Mo. App. E.D. 1979).

Go ahead and object even if your Motion in Limine was already overruled. State v. Johnson, 586 S.W.2d 437 (Mo. App. E.D. 1979).

Make the objection specific. A general objection of "irrelevant" preserves nothing without telling the Trial Court why it is irrelevant. Stafford v. Lyon , 413 S.W.2d 495 (Mo. 1967).

Make the right objection. If you object on one ground at the Trial Court, you cannot change grounds or raise an additional ground during appeal. Halford v. Yandell, 558 S.W.2d 400 (Mo. App. S.D. 1977).

Once you make a clear objection on one piece of evidence you do not have to keep objecting as additional questions are asked on the same subject. Pickett v. Stokard, 605 S.W.2d 196 (Mo. App. W.D. 1980).

You cannot rely on another party's objection. You must join in the objection, or state your own separate objection or you have no right to rely on the other party's position on appeal. Thomas v. Bank of Springfield, 631 S.W.2d 346 (Mo. App. S.D. 1982).

Make the Judge rule on your objection. If you do not get a ruling, nothing is preserved. Brandt v. Csaki, 937 S.W.2d 268 (Mo. App. W.D. 1996).

If you objection is sustained to something that is already been said or shown, you must ask for further relief. You must ask the Court to instruct the jury to disregard, rebuke counsel, discharge the jury or grant a mistrial. Kaiser Aluminum & Chemical Sales, Inc. v. Lingle Refrigeration Company, 350 S.W.2d 128 (Mo. App. W.D. 1961).

OFFERS OF PROOF

Should the Court sustain your opponent's Motion in Limine or objection to some piece of proffered evidence you intended to introduce, you must make an offer of proof in order to preserve the issue for appeal. Offers of proof are made outside the hearing of the jury. If a piece of physical evidence was offered, it should be marked and offered into evidence. The Court should make a specific ruling that the described exhibit was tendered and refused. If the evidence is in the form of a deposition, the relevant sections can either be read into the record or marked with a copy being identified as an exhibit and tendered to the Court. If the testimony sought to be preserved is that of a live witness, the best procedure is to ask the Court to remove the jury from the court room and go ahead and ask the questions to the live witness and have the testimony put on the live record.

There are a few cases that have held an offer of proof to be adequate when a narrative is given by an attorney explaining in detail what the evidence would be. This is not the preferred or safest method. In general, however, if all parties will agree that if Witness X were allowed to testify, he would state "A, B and C" then that is probably an adequate offer of proof. Keep in mind that once an offer of proof is made by your opponent, it is necessary for you to object to that offer of proof. The Court must not only sustain the objection to the initial tender of the evidence, they must sustain the objection to the offer of proof for it to be properly preserved for the Court of Appeals.

The timing of making an offer of proof is sometimes dictated by the availability of witnesses. It may become necessary for a witness to wait around for a break when the jury is scheduled to leave the court room to give the remainder of the testimony necessary for the offer of proof. If the witness cannot wait, the Court will usually indulge you in sending the jury out on a short break. Other types of offers of proof can be reserved until the close of your case and made during a convenient break. It is crucial that you do not forget to make those offers.

MISCELLANEOUS OBJECTION ISSUES

Sleeping jurors

A litigant is entitled to the attention and deliberation of all 12 jurors. Occasionally you will find one or more jurors who appear to be falling asleep while part of your evidence is being put on. If a juror actually missed anything significant, this is usually grounds for a new trial. As is typical with visual cues, it is necessary to make a record that "Juror Number 4 has had her eyes closed and has not moved for the past 10 minutes, and has now begun snoring." This should begun at side bar and not in the direct hearing of the jury. You cannot come back later and contend that the jurors have been sleeping through your trial and expect to get any kind of relief.

Deposition objections

Often some part of your evidence will involve reading the deposition of an absent witness. In video depositions you usually get the Court to rule on all objections prior to the deposition being played for the jury. This is also a good habit for typewritten depositions which will be read. Many attorneys, and even a good many Judges, believe that any objection not made at the time the deposition was taken is waived at trial. There is a Missouri Rule on Civil Procedure which is clearly to the contrary, indicating that only objections as to form of the question and other objections where the error could be easily obviated during the deposition are waived if not made during the deposition. Generally all objections other than form of the question and as to the manner in which the deposition is taken (place, court reporter, etc.) are preserved for trial. If you believe your opponent is going to read a portion of a deposition it is best to ask them what portions they intend to read and to make any objections to that testimony before it is read. Likewise, professional courtesy dictates that you should tell your opponents beforehand which depositions or portions thereof you intend to read to the jury.

Marking exhibits

Nothing should be shown to the jury without first being admitted into evidence. There are times when certain demonstrative exhibits are used in the court room, but because of their size or transient nature cannot be easily preserved for the record. Oversized exhibits should be described on the record in some detail so that the Appellate Court can later identify them. If plaintiff's attorney writes on a blackboard in closing argument and objections are made to the contents, you need to be prepared to copy down the information from the board or to read it into evidence for purpose of preserving the record. The general rule is if you can put a sticker on it and get it in the Court file, mark it as an exhibit. If not, describe it in as best detail as possible and get your opponent to agree that you have properly described the exhibit.

DIRECTED VERDICT MOTIONS

If you wish to object to the submissibilty of your opponent's case or give the Court one last chance to realize they made a mistake, you must file a Motion for Directed Verdict at the Close of All the Evidence. These Motions should be in writing and should be filed in every case to preserve the question of your opponent's failure to make a submissible case or state a cause of action as a whole or on any particular issue within the case. Failure to include such a point in a Motion for Directed Verdict may constitute a waiver of that issue. Motions for Directed Verdict will almost never be granted at this stage of a jury trial, but by rule, they are deemed to be taken under submission even if specifically overruled by the Court. That way, after the jury verdict comes back, the Court can reopen the Motion for Directed Verdict and grant it if that was their intent. Failure to file that Motion waives this possibility.

INSTRUCTIONS

Although the instruction conference often takes place before the case is officially over, it is in essence the last chance to object to the plaintiff's submission of the case to the jury. Although Rule 70.03 says specific objections to instructions can be made in a Motion for New Trial and need not be made at the time of the instruction conference, the better practice is to go ahead and make the objection in detail with the explanation as to why the instruction is not proper. Even in light of the clear wording of the Rule, there have been cases (See for example, Fowler v. Park Corporation, 673 S.W.2d 749 (Mo. banc 1984) that implied it was not proper to "sandbag" the Judge by allowing a clearly erroneous instruction to be read to the jury without objecting. The more recent cases, however, have moved back toward a more literal reading of the rule and seem to once again condone sandbagging. Business Men's Assurance Company of America v. Graham, 891 S.W.2d 438 (Mo. App. W.D. 1994).

If you do make specific objections to jury instructions during the instruction conference, it is sufficient in a Motion for New Trial to make only general allegations regarding instructional error. Walsh v. St. Louis National Baseball Club, 822 S.W.2d 559 (Mo. App. E.D. 1992).

Once the case is submitted to the jury, your chance to object to the evidence is closed. Information that develops after the case is submitted must become the

subject of a Motion for New Trial. The Motion for New Trial becomes the depository for all objections you had overruled during the course of trial so that the Trial Judge is given one last chance to correct his errors. This issue and the effective post-trial motions on the appellate process will be handled in the second part of the program.