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Briefly: Objections can make—or break—appellate odds

By: Eric J. Magnuson and Katherine Barrett Wiik July 12, 2018


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When you represent the appellant in a post-trial appeal, the appellate journey is always uphill. But preservation and thoughtful cultivation at trial of potential appellate issues will have substantial implications for your client's chances on appeal.

As appellate lawyers, we have the opportunity to work with a lot of talented, experienced trial lawyers. They often bring us onto the case team to handle, or contribute to, the appellate proceedings. We talk a lot with trial counsel about their trial objections, and pour over pages of trial transcript, identifying and crafting appellate arguments around trial counsels' objections. This has taught us that even experienced and highly capable trial lawyers commonly have misconceptions about objecting at trial. Here are a few that we have seen more than once.

"That issue is definitely preserved. I objected all the time."

Are you sure about that?! If we had a dollar for every time trial counsel's perceptions of how actively they objected at trial differed from how the trial transcript actually reads, we would be very wealthy appellate attorneys. OK, maybe not VERY wealthy, but we could certainly buy you a nice dinner out.

Trial counsel nearly always genuinely believe that they objected non-stop at trial, and yet all too often, when we are reading trial transcripts, we find that trial objections are spotty at best. Many trial lawyers are hesitant to be too lawyer-like at trial, and they shy away from the formality and repetition of objections when they know the objections will be overruled.

Don't fall into that trap – make a clear record of your objection, and make sure that it is consistent and constant. Practically speaking, it is not possible to object too many times to prejudicial and inadmissible evidence. Object, and regardless of whether your objection is sustained, or overruled, if the same problematic question or evidence is offered again, object again. And again! Your objections must be timely and the grounds for the objection stated specifically. Objections must be specific enough to make it clear to the trial court what action you want the court to take and why the court should take such action.

"I brought a motion in limine to prohibit this testimony, so I don't need to object again."

Not true. Even if evidence has been the subject of an unsuccessful motion in limine, you need to object to it again on the record during trial. This is sometimes necessary to keep the issue alive for appeal, because the appellate court may conclude that the reasons for the court's ruling in limine don't control during trial, in light of changed circumstances. Similarly, if the trial judge excluded evidence you want in as part of a pretrial order, respectfully and outside the presence of the jury, renew your objection to the exclusion during trial. And make a detailed offer of proof.

"Offers of proof are unnecessary and overkill."

Incorrect. Offers of proof are critical. Remember, you not only have to convince the appellate court that the judge made the wrong evidentiary ruling, but that the error was prejudicial to your client. In many instances, the only way to show that is to make a detailed record of what the excluded evidence was, so that the appellate court can fully weigh its significance.

Make an offer of proof, with enough specificity to allow the trial court properly to understand the relief sought and the basis for that relief. If possible, get excluded exhibits marked and made part of the record – even if not part of trial evidence that goes to the jury – so that excluded evidence can be considered by the appellate court.

If witness testimony is excluded, ask the trial court to allow the witnesses to testify outside the presence of the jury as part of an offer of proof, so that the excluded testimony can be preserved and made part of the record. Being able to read the excluded testimony first-hand may make an appellate court more willing to overturn an evidentiary ruling than having to rely only upon argument from counsel about what would have happened if the witness had been allowed to testify.

And if you have a hostile judge who does not want to take the time to allow you to make a contemporaneous record, write up the offer of proof over the next recess and offer it into the record, so that you have something in black and white that lays out your proffer.

"There's no such thing as a continuing objection in Minnesota"

The topic of continuing objections in Minnesota is a bit murky. Continuing objections are not specifically referenced in either the Rules of Civil Procedure or the Rules of Evidence. It is clear from appellate cases, however, that they are made and relied upon by appellate courts and are proof of an issue having been preserved, so they can be a useful tool to obtain clarity that an objection to a particular line of questioning or type of evidence remains ongoing.

A number of appellate decisions mention continuing objections when describing how assignments of error were preserved below. See, e.g., State v. Marty, 376 N.W.2d 515, 517 (Minn. Ct. App. 1985) (concluding that an issue was properly preserved despite failing to object a second time because counsel's earlier objection "was a continuing objection" because the court stated that appellant had "a right to be reserved on the matter."); Benson v. Johnson, 392 N.W.2d 890, 894 (Minn. Ct. App. 1986) (quoting language from trial where an objection was deemed to be continuing by the trial court).

A continuing objection cannot be retroactive, however, and a continuing objection does not absolve counsel of the obligation timely to object the first time the prejudicial or inadmissible evidence is offered. In State v. Naylor, the Minnesota Supreme Court rejected counsel's attempt to construe a late-made objection as a "continuing objection," where trial counsel had failed to make any specific objections to the problematic questioning when it first

occurred. 474 N.W.2d 314, 318 (Minn. 1991). The court explained, "Each of the co-defendants was questioned by the state about Naylor's involvement in witchcraft, despite what Naylor characterizes in his brief as a continuing objection. Naylor's trial counsel referred to such a continuing objection on relevancy grounds near the conclusion of the trial, but no specific objection was raised when testimony about witchcraft involvement began." Id.

Nor is there any requirement that trial counsel use the magic words "continuing objection" to preserve objections to ongoing problematic trial conduct. But if the prejudicial conduct or inadmissible evidence continues at trial, you must continue to object unless the judge has clearly said that she will deem your prior objections to be ongoing. Rule of Evidence 103(a) only provides safe harbor from potential wavier arguments if the trial court makes a "definitive ruling on the record admitting or excluding evidence."

"Once my objection has been ruled upon, I've done all I need to do."

Not quite. Curative and limiting instructions are also critical. After objections have been ruled upon, trial counsel too seldom asks for these remedies. Provide the trial judge with the language you would like her to provide to the jury, and explain why that language is necessary to limit prejudice. Be specific in what curative or limiting language you want.

Requesting limiting instructions is particularly important when there are evidentiary rulings that are not black and white, but rather where the court allows in evidence that could be probative to a specific issue or element but prejudicial to a party if construed or considered beyond that limited scope. If you have concerns that something might be prejudicial to your client if considered more generally, propose a limiting instruction at the time the evidence is admitted to specify its narrow relevance and then ask for one again as part of the jury instructions.

If the court provides those instructions, you have improved your client's chances with the jury by contextualizing the concerning testimony. If the court refuses to provide those instructions, then you have created a much more detailed and fulsome record to explain how your client was prejudiced and how the trial judge erred in curing those problems, despite the clear and helpful remedies that you proposed.

Employing these appellate-minded strategies and tactics at trial will maximize your chance of prevailing on appeal, and ensure that your client never hears the dreaded words, "That's a great argument, but your trial counsel never made it to the trial court."

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