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Tips on Securing the Record for Appeal

APPELLATE ANSWERS: One hallmark of a good trial attorney is the ability to work simultaneously on two planes—advocating to win at trial while laying the groundwork for any necessary appeal.

By **Marie E. Lihotz and Marianne Espinosa** | August 28, 2020



Every trial lawyer is familiar with that flash of recognition shooting like electricity through you when an event occurs at trial—an unexpected answer from a witness, an unfair attack by an adversary, an erroneous ruling from the judge—that you instinctively know can torpedo your case or leave it seriously wounded. Prompt, skillful action can correct the course at trial and, also, have a significant impact on the likelihood of success on appeal.

The Rules of Court establish a high bar for reversal. Although Rule 2:10-2 is invariably linked to the plain error standard, it actually defines the standard for any “noticeable” error, commanding, “Any error or omission shall be disregarded by the appellant court unless it is of such a nature as to have been clearly capable of producing an unjust result” The standard for errors not brought to the attention of the trial court is even higher, according the appellate court discretion to “notice” plain error “in the interests of justice.” That means “[t]he error must have been of sufficient magnitude to raise a reasonable doubt as to whether it led the jury to a result it would otherwise not have reached.” Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 2:10-2.

In short, it is critical to show the error was harmful and not harmless. Such an effort begins with properly preserving the issue for appeal. Rule 1:7-2 establishes two requirements for this: timing and specificity. Counsel must act “at the time the ruling or order is made or sought,” and the action taken must “make known to the court specifically the action which

the party desires the court to take or the party's objection to the action taken and the grounds therefor."

There is a sound basis for these requirements. Issues are best raised and tested in the trial court where a complete record can be made. It is the trial judge who has the advantages of immediacy, context and the ability to take curative action when it can make a difference in the outcome of the trial. Of course, there must be a reasonable opportunity to present the issue to the trial court. See *State v. Robinson*, 200 N.J. 1, 20 (2009); R. 1:7-2 ("A party shall only be prejudiced by the absence of an objection if there was an opportunity to object to a ruling, order or charge.")

Compliance with these requirements lays the foundation for a convincing argument that the error was harmful. In contrast, the failure to make a timely objection signals to the reviewing court that, in the moment, counsel did not view the complained of event or ruling as error or something that prejudiced the client's case. This is a totally rational takeaway that is hard to square with a conclusion that the alleged error was "clearly capable of producing an unjust result."

So, what makes it timely?

There are Rules of Court that establish the appropriate time to raise certain issues. For example, a challenge to a juror must be made before the juror is sworn or, if good cause exists, after the juror is sworn but before evidence is presented. R. 1:8-3(b). Rule 1:7-2 precludes appellate challenges to any portion of the jury charge or omission from the charge unless an objection is made before the jury retires to begin deliberations. To argue that the jury's verdict was against the weight of the evidence, there must be a motion for a new trial made on that ground. R. 2:10-1.

Absent an instructive court rule, the timeliness inquiry is fact-sensitive: Did the timing afford the trial court a realistic opportunity to take corrective action?

The second requirement is specificity. Counsel must articulate the argument and advance a correct legal basis for that argument. The level of specificity required alerts the trial court to what the error is and identifies what action is requested to correct the error.

Importantly, the specificity of the argument made at trial also frames the issue on appeal. If one argument is made at trial and a different argument is advanced on appeal, the newly formed argument will be governed by the plain error standard of Rule 2:10-2. The same is true regarding the relief sought. So, if counsel only seeks a curative instruction at trial, an argument on appeal that a mistrial should have been granted will suffer a similar fate. If the trial court offers only a half a loaf "cure," take care not to prejudice your argument by either explicit acquiescence or outright rejection of the offer without making your position clear.

Counsel must also ensure that the information necessary for a full consideration of the appellate issue is in the record.

The trial court's ruling and reasoning should be apparent. If the trial court makes a ruling that is ambiguous, like "just move along," or fails to provide reasoning, request a clarification. Although appeals are from judgments and not from the court's reasons, the wrongness of a ruling may be more evident when the reasoning is plainly mistaken. Sometimes, conferences in chambers can be more expansive than the formal argument in the courtroom. It does no good to argue on appeal that no objection was made in court because it would have been futile in light of the judge's "ruling" in chambers. Instead, make a record of what occurred and your objection when you return to the courtroom.

Because trial courts are accorded a great deal of discretion in making evidentiary rulings, it is important to support an argument that evidence was erroneously excluded with a record that shows what the proffered evidence is and why its exclusion is prejudicial. The evidence itself should also be preserved. Rule 1:7-3 provides the mechanisms for preserving the evidence in both jury and non-jury trials.

The final leg in preserving the legal issue lies in adequately presenting the issues to the Appellate Division by properly identifying and briefing them. As to the first of these, take care in drafting the notice of appeal or motion for leave to appeal because the listed points set forth the bounds of the appellate court's jurisdiction. Even if so identified, any issue that is not briefed is deemed waived. Further, that briefing must appear in the initial merits brief and not in the reply brief, an inappropriate vehicle for raising issues and arguments for the first time.

One hallmark of a good trial attorney is the ability to work simultaneously on two planes—advocating to win at trial while laying the groundwork for any necessary appeal. Securing the record advances your client’s position in both arenas.

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