

The Basics of Error Preservation

Presented by: **Elizabeth Brooks Scherer**
434 Fayetteville Street, Suite 2800 | Raleigh, NC 27601
T: 919-755-8790 | E: beth.scherer@smithmoorelaw.com

Best Strategy For An Appeal Is To Be The Appellee

- In the Court of Appeals, approximately 2/3 of appeals result in a complete affirmance of the trial court
- Appellant May “Win” the Battle but Still Lose the War
 - The majority of appellant “wins” include the phrase “REVERSED AND REMANDED”

Numerous Appellate Doctrines Afford Trial Court Rulings—And Appellees—Distinct Advantages During An Appeal

- Presumption of Regularity
- Deferential Standards of Review
- Harmless Error
- Error Preservation

Error Preservation: Other Than Jurisdictional Errors, Easiest Way For Appellate Courts To Dispose Of Appeals

- Saddest words ever uttered to an appellate attorney: “Great argument, but not preserved”
- No matter how meritorious an argument might be, if it was not properly preserved below it is usually worthless on appeal

Appellate Rule 10

To preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review ... may be made the basis of an issue presented on appeal.

Components Of Error Preservation Under Appellate Rule 10

- A Timely Request, Objection, or Motion
- State Specific Grounds
- Obtain a Ruling

Component 1: A Timely Request, Objection, Or Motion

- Non-Trial Context: Must make request, objection, or motion before the trial court issues its ruling
- Contemporaneous Objection Rule: Adds heightened timing requirements during trial:
 - To preserve an error for appellate review, a timely objection, request, or motion must be made at a *particular time* during the trial if the error relates to: (1) the admission or exclusion of evidence; (2) insufficiency of the evidence to submit a case to jury; (3) jury instructions; or (4) improper argument or statements

Component 1: A Timely Request, Objection, Or Motion

- Motions In Limine and Evidence Rule 103(a)
 - *State v. Oglesby* (2007): Motions in limine are not definitive rulings under Appellate Rule 10; a party must object to the admission of or seek to produce excluded evidence *at trial* to preserve the objection for appellate review

Component 1: A Timely Request, Objection, Or Motion

- Directed Verdict motions: sufficiency of the evidence to support submission of the case to the jury, and ultimately to support the verdict
 - Objection must be made or renewed at the close of all evidence or is waived

Component 1: A Timely Request, Objection, Or Motion

– Jury Instructions:

- Appellate Rule 10(a)(2) requires a party to object to or request a particular jury instruction before jury *retires*, but Practice Rule 21 requires objection or request be made before jury is *charged*
- “Special” jury instructions must be submitted in writing (and filed!) at or before charge conference

Component 1: A Timely Request, Objection, Or Motion

- Improper Argument or Statements of the Trial Court or Counsel
 - Immediate objections
 - Prejudicial statements: Motion to strike or request for corrective instructions
 - Prejudicial statements that cannot be corrected: mistrial

Component 2: State Specific Grounds

- Same Grounds: Grounds asserted in trial tribunal and on appeal must match
- “Defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal”
- Evidentiary Objections: general versus specific objections
- Unless Obvious from the Context . . .
 - Only a fallback
 - “There is nothing more deceptive than an obvious fact” — Sherlock Holmes

Component 3: Obtain a Ruling

- “Off the record” rulings are . . . your imaginary friend
- Reserved Rulings: Trial court reserves ruling, and then forgets to rule
- Preliminary rulings are insufficient
- Definitive rulings on the record are required

Component 3.5: Obtain a Ruling - In Writing?

- Oral Rulings: Court of Appeals has stated that oral rulings are “non-existent and thus cannot support an appeal”
- Written Orders are the Gold Standard: signed, sealed, and delivered
- Entry of Judgment under Civil Rule 58: reduced to writing, signed by the trial court judge, and filed with the clerk of the superior court

Golden Rule of Error Preservation

As a rule of thumb, you can preserve an error for appellate review by giving timely and fair notice to the court and the opposing party that you disagree with a ruling, your reasons for that disagreement, and obtaining a written ruling on your request.

Working With The Court Reporter To Preserve Your Appellate Record

Presented by:

Elizabeth Brooks Scherer

434 Fayetteville Street, Suite 2800 | Raleigh, NC 27601
T: 919-755-8790 | E: beth.scherer@smithmoorelaw.com
and

Ranae McDermott, RMR, CRR

Official Court Reporter – Rover | North Carolina Judicial Branch
P.O. Box 1114 | Wrightsville Beach, NC 28480
T: 919-602-2110 | E: d.ranae.mcdermott@nccourts.org

Get To Know Your Court Reporter

- The record is blind
- Always state your appearance on the record at the beginning of a hearing/proceeding, even when everyone in the room knows you

Do Not Assume That Because The Court Reporter Is In The Courtroom, A Record Is Being Built

- Use the phrase “Judge, I would like to put this on the record, please,” to ensure the court reporter is being asked to capture your record
- Make eye contact with the court reporter or let her/him know ahead of time if there is any question

Video Depositions And Deposition Transcripts

- Court reporters routinely do not transcribe video depositions and other taped recordings at trial
- Reconstructing precisely which portions of the video were played at trial and how the court ruled on any objections can result in a costly (and contentious) ordeal when preparing an appellate record

Video Depositions And Deposition Transcripts

- Better than nothing option: Detailed pre-trial order that designates the portions of video testimony to be played during trial
 - Problem 1: Pretrial designations only list what counsel intends to introduce at trial and often change based on real-time modifications to trial strategy or on rulings by the trial tribunal
 - Problem 2: Separate live-testimony and video-testimony transcripts can be confusing and time-consuming for appellate courts

Video Depositions And Deposition Transcripts

- Best Option : Ask the court reporter to transcribe the testimony being offered by video (or deposition transcript) into the actual trial transcript as though the witness was present
 - Discuss (and clear) this option with the court reporter ahead of time
 - Offer written deposition transcripts or copies of video depositions for the court reporter to cross-reference when transcribing the testimony presented by video

First Question To A Witness

“Please state and spell your name for the record”

Court Reporters Capture What Is Being Spoken, Not What Is Being Done

- “um-hum” and “uh-huh”
- Pointing, shrugging of shoulders, air quotes are indicated in the record parenthetically as (indicates) or (indicating)
- Head nods and shakes are shown in the record as (No verbal response)
- Ask the witness to answer “yes” or “no” instead of shaking or nodding his/her head

The Consequences Of Interrupting

- Court reporter may interrupt to ask that everyone speak one at a time
- Transcripts cost more when there are interruptions

Exhibit Notebooks

- Best practice is to compile and mark all your exhibits prior to trial or hearing
 - Copies, copies, copies: Support the paper mill industry
 - Extra copies for the deputy clerk and court reporter are usually appreciated
 - Keep a copy for the file

Exhibit Notebooks

- Tabbed notebooks: Great organizational tool for trial, but useless in an appellate record
 - Supplement tabs with (1) physical exhibit stickers on first page of a document or (2) cover page for each exhibit (with description)
 - Index the exhibits or legal authorities submitted

Exhibit Notebooks

- Index's descriptions of exhibits *usually* will find their way into the transcript and the exhibit logs
 - Attorney's preferred index descriptions are guaranteed when spoken into the record
- Descriptive trial indices become descriptive appellate indices
- North Carolina's trial court judges are presumptive speed readers

Non-Documentary And Oversized Exhibits

- 8 ½ x 11 duplicate of oversized documents
- Use your iPhone to build an appellate record
 - Photos of posters or non-documentary exhibits
 - Take videos of live demonstrations

Questions?
