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Tips to Think About When Preserving the Record for Appellate Review

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Tips to Think About When Preserving the Record for Appellate Review

Preservation of issues is critical to ensuring that if an appeal is needed, the issues raised on appeal will have the best likelihood of success.

1. Except in very limited circumstances, issues must be preserved for an issue to have any realistic chance of success at the appellate level. Objections and offers of proof have to be made to ensure the best chance of success on appeal.

2. To preserve an issue, you must make an objection and, when applicable, an offer of proof. You cannot "harbor an appellate parachute" by failing to object to an error that you realize is occurring.

3. The intersection between preservation of an issue and how the issue is reviewed is discussed in *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). So in addition to the well-known standards of review for issues – de novo, clear error, and abuse of discretion – whether an issue is non-constitutional or constitutional and whether an issue is preserved or non-preserved impacts the ultimate review by the appellate court.

4. Consider if there is an arguable constitutional aspect to your objection. Many evidentiary issues may also implicate constitutional rights, such as the Confrontation Clause or the Due Process Clause or a defendant's right to present a defense. So when objecting, state the evidentiary reason why and the constitutional reason why – e.g., MRE 404(b) and right to present a defense. Raising the constitutional aspect will allow the appellate attorney to have the maximum range of options to consider when crafting the appeal.

5. Do not forget to "federalize" your issues when applicable. Do not just cite the Michigan Constitution, but also cite to the United States Constitution and applicable cases from the United States Supreme Court. Cases need to be federalized in case the defendant needs to file a habeas petition.

6. Note that the Michigan Supreme Court now has a new Court composition, so issues that may have been settled or seemed impossible to win now have a different Court that may ultimately consider them, so raise the objection because it's a new day.

7. When evidence has been excluded, be sure to make an offer of proof. An offer of proof is necessary for the reviewing court to know the substance of the evidence that was excluded. For example, if the court excludes evidence because it states that it is inadmissible because of the rape shield law, it is necessary to make an offer of proof for the appellate court to know what evidence the jury did not hear. And do not forget to object to the exclusion based on your client's constitutional rights, such as due process and the right to present a defense.

   An offer of proof can be made in various ways.

* A witness can answer questions that you pose. If there is a jury, then the jury would need to excused while the offer of proof is made. This method, however, is not always practical.

* You can provide a narrative on the record of what the excluded evidence would be.

* You can do a hybrid method where you provide a narrative and you also submit a notarized affidavit from the witness about what the testimony would cover.

* If the item excluded is a proposed exhibit, be certain that the record indicates what the proposed exhibit is so that it is clear for the appellate court.

8. There is a difference between waiver and forfeiture. A "waiver" is an intentional relinquishment of abandonment of a known right. "Forfeiture" is the failure to timely assert a right. If a defendant waives his rights, he may not then seek appellate review of a claimed deprivation of those rights because his waiver has extinguished any error.[1] Forfeiture, however, does not extinguish an error.

   Examples of a waiver are an explicit expression of satisfaction with jury instructions or the waiver on the record of any defect in notice when you are handed an amendment to a probation violation right before entering court. Examples of a forfeiture are the failure to object to jury instructions or raise the defect in notice on the record.

   Note, however, that "waiver" involves the intentional relinquishment of a *known* right, so this is an area that an appellate attorney can use to still arguably raise an issue when a defendant has not said a word on the record.

9. Remember to note gestures for the record. If a witness says "yes," but she is shrugging her shoulders and shaking her head from side to side while she does so, be sure to state this on the record so that your transcript will accurately convey what was occurring in the courtroom during the testimony. If a complainant has a support person sitting right be her side or is clutching a teddy bear, be sure to make a record of this if it may be an issue on appeal.

10. Clarify comments that an appellate court will not be able to understand. For example, if a witness is describing a distance as "from here to there," an appellate court will not be able to see that the witness is pointing from the witness stand to a table that is three feet away.

11. Watch for jokes that can be taken out of context to cast you in a negative light. For example, if you walk into court with three big binders and a joke is made about your lack

[1] See, e.g., *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Dobek*, 274 Mich App 58, 65-66; 732 NW2d 546 (2007).

of preparation and you jokingly agree, no one will be able to tell that it is a joke when the transcript is read. Be sure to briefly clarify on the record.

12. Saying "strike that" does not strike anything that was said from the record that is transcribed. What was "stricken" may no longer be part of your question, for example, but it will still show up on the appellate record, but with the words "strike that" following.

13. Remember that the entire exhibit must be admitted if you want to use the entire exhibit on appeal. During trial, even if you only need 2 pages of a 100-page medical record and your opponent is not moving to admit the rest of the record, consider if there *may* be value to having the entire record admitted to an appellate lawyer. Often there is great value in the other pages when an issue is being examined on appeal. So while you may not need the other pages during the trial to question a witness, seriously consider admitting the entire exhibit so that the other pages are available to be used if needed.

14. If you lost your pretrial motion and your client wants to plead, consider whether an issue is worth pursuing by using a conditional plea under MCR 6.301(C)(2). A conditional plea reserves for appeal by application a specific pretrial ruling. The plea can only be entered with the approval of the court and prosecutor, and the specific issue to be addressed must be part of the record either orally or in writing.

15. Trust your instincts. Many of the greatest legal decisions are based on an attorney's view that something is inherently wrong with the law and then the challenges begin!