Preserving Issues for Appeal in Criminal Cases

By Lawrence S. Katz

Fast Facts

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No amount of skill, dedication, or preparation can guarantee the acquittal of a criminal defendant. On appeal, the result will usually be controlled by what appears in the plain record. This article proposes that defense counsel make a potential appeal an integral part of their trial preparation and strategy. Simply put, it is possible to lose the case at trial but still walk off with a winning record.

Appellate courts dislike parties raising new legal arguments on appeal, theorizing that the problem could have been corrected if it had been properly presented to the trial court.[1] In fact, the Michigan Supreme Court has developed doctrines of decision avoidance. Thus, issues may be lost to review because they were not properly preserved in the trial court.

When an error is unpreserved, appellate counsel is faced with easily avoidable problems of forfeiture of the issue, with a higher threshold for reversal than preserved error, or waiver, where the issue is lost entirely. When trial counsel fails to act (which is technically a forfeiture), appellate counsel generally has to show *plain error;* in other words, proving not only that the error is outcome determinative, but that the client is actually innocent or the proceedings were unfair or corrupt—a great burden indeed. When there is actual waiver by some affirmative conduct, there may be no review at all. In either case, sometimes appellate counsel decides the best way to raise issues that were forfeited or waived is to request a hearing and ask trial counsel why he or she did not raise the issues.[2]

But all of this is preventable. Here are 25 suggestions to help improve the quality of advocacy for both trial attorneys seeking to preserve issues and appellate attorneys seeking to reopen issues that were not properly preserved.

1. **Be a good housekeeper.** Title your motions so the relief requested is obvious and make sure orders are clear from their titles as to relief granted and relief denied. Appellate counsel should be able to get a feel for what happened during the proceedings and know which transcripts to order after an initial review of the docket entries.

2. **File timely pretrial motions, notices, and objections.** To avoid forfeiture or waiver on appeal, file all potential motions, particularly dispositive motions, as soon as possible before trial. Include any federal constitutional grounds. Request evidentiary hearings when factual support is needed.

3. **Anticipate trial issues.** A trial brief is one way to frame the case from the defendant's vantage point. A motion in limine is another effective way to preserve and crystallize an issue before it gets lost in the mess of a trial and prevents having to figure out ways to "unring the bell." These motions might include requests to exclude proposed exhibits whose probative value is outweighed by the risk of unfair prejudice[3] or requests for rulings on the impeachment of witnesses, including your client, concerning a prior criminal record.[4] If the court says it will defer a decision on a motion in limine until the witness takes the stand, make sure the witness is identified and that the prosecutor does not refer to the witness or the evidence in the opening statement. If the judge allows the evidence for a limited purpose, make sure the evidence does not go beyond the scope of what was allowed.

4. **Raise legal issues.** Courts of review do not favor arguments directed at the sufficiency or weight of the evidence. The defendant has been convicted on that evidence, so the courts usually want to know where the law went wrong. No case is just about the facts. Before trial, make a list of anticipated legal issues and evidentiary objections and prepare proposed jury instructions. This will increase the chance that an appealable issue will arise at trial.

5. **Do not be colorblind.** Objections to the jury composition—with a verbal description of those jurors—may be waived if they are not made before trial unless they could not have been made earlier. Challenges for purposeful discrimination in jury selection must be made before the jury is sworn. This includes the use of peremptory challenges on the basis of race in violation of the equal protection clause[5] or for violation of the "fair cross-section" requirement—basically, using some means to systematically exclude minorities from the jury pool that violates your client's right to an impartial jury.[6]

6. **Insist on a complete record.** Get rulings and the court's reasoning on the record for all decisions. The presumption on appeal will be that the trial court ruled correctly. Additionally, any sidebars or decisions in chambers need to be in the record. Remember this maxim: if it's not in the transcript, it didn't happen.

7. **Bring the outside world into the courtroom.** Likewise, if something occurs outside of the courtroom affecting the proceedings—perhaps involving jurors, the prosecution, or defense witnesses—make a separate and explicit record. You may also need an evidentiary hearing or at least an offer of proof.

8. **Avoid off-the-record or tacit understandings.** Always place agreements with the prosecutor on the record. For example, if the prosecutor agrees to dismiss a case or give your client a state-sanctioned polygraph if he or she passes a private polygraph, make a clear record of the stipulation before the polygraph is given.

9. **Avoid "waiver" by omission.** Technically, this is forfeiture. Whenever in doubt, object. Balance any concerns about alienating the jury with the knowledge that an objection not made is unpreserved unless an appellate court decides the objection could not have cured the error. And when objecting, state every possible ground for the objection. An objection on one ground is not sufficient to preserve the objection on another ground.[7]

10. **Avoid "waiver" by delay.** Technically, this too is forfeiture. Objections must be contemporaneous. The rationale on appeal is that if the issue had been raised in a timely manner, the trial judge would have had an opportunity to correct the error before it was too late.

11. **Avoid "waiver" by acquiescence.** Avoid comments or silence from which an appellate court might infer that you agreed with, or acquiesced in, an adverse ruling.

12. **Avoid waiver by act.** This is actual waiver resulting in the loss of the issue on appeal. For example, do not withdraw a question before the court rules on an objection to it. Also, do not waive objection to prejudicial prosecutorial questioning by venturing into that area yourself. This occurs when your direct or cross-examination, on a matter having low relevance but high potential for prejudice, is followed by cross-examination or redirect by the prosecutor in that damaging area. This may also occur when you venture into other dangerous territory, call risky witnesses, or request harmful jury instructions. Appellate courts call this invited error.

13. **Call for a ruling.** Make sure all proposed evidence is ruled on. Likewise, if the judge is silent concerning an objection you make during trial, request a ruling.

14. **Remember the past.** When the judge either delays a decision or rules adversely but without prejudice to reconsidering the ruling, don't forget to call for a ruling later at the opportune time.

15. **Federalize.** Reference to the Michigan Rules of Evidence or common law principles may not be good enough to preserve an objection to a constitutional violation for appeal

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purposes. For example, an objection to testimony that violates the confrontation clause[8] requires more than an objection on hearsay grounds.

16. **When arguing a legal issue with the court, explain how an adverse ruling would affect the verdict.** When an error may have a major effect on the case, request a separate record and explain the significance of an adverse ruling on the outcome. Explain that this error is not harmless and the prejudice cannot be cured by any limiting instruction to the jury. Move for a mistrial and explain why it is the only remaining remedy.

17. **When arguing a legal issue with the court, include favorable facts.** Get out your version of the facts at every opportunity. You do not have to wait for all the evidence to come in to do so. State the factual grounds for your motions.

18. **Be the eyes and ears of the appellate court.** Do not leave anything, such as gestures and demonstrations, to the transcript reader's imagination. Do not presume the court reporter is transcribing nonverbal events. Do what you can to make sure audio equipment is positioned to pick up voices in the courtroom.

19. **Call an expert.** Expert witnesses can testify as to a variety of potential issues.[9] Whether you are retained or appointed, if your client cannot afford an expert witness, you can request that the trial court appoint one for you.[10] The possibilities range far beyond the list of "usual suspects" (psychiatrists and psychologists; firearms and ballistics experts; arson investigators; toxicologists; biological scientists; DNA, fingerprint, and footprint experts; analysts of substances such as glass and soil; and crime scene reconstruction experts) and include anyone with reliable scientific, technical, or other specialized knowledge who will shed light on the evidence or facts in issue.[11]

Experts can be useful to the defense even if no physical evidence is involved and the prosecution has not included an expert on its witness list. For example, consider using experts on the following:

- The psychology of eyewitness identification, the process of perception and recollection, and the reasons for eyewitness misidentification;
- The proper and improper methods for questioning children by parents, police, and social workers; or
- The reasonable and excessive use of force in a given situation.

20. **Make an offer of proof regarding potential evidence.** When the judge refuses to admit your evidence or admits the prosecutor's improper evidence, you must preserve the issue for review. To preserve a claim that your evidence was improperly excluded, you should support your objection with an offer of proof, explaining the purpose and relevance of the excluded evidence. If the evidence is tangible, mark it for identification and make it part of the record. Any motion to strike improper prosecution evidence should include reasons why it is irrelevant or unfairly prejudicial.

21. **Make sure the record is complete.** Whenever an audio or video recording is played for the jury, request that the court reporter transcribe it for the record.

22. **Coordinate trial strategy with the co-defendant's lawyer.** In a joint trial involving another defense attorney, maintain close communication with the attorney to avoid having all your best efforts negated by the acts of another person. On the other hand, if your co-counsel makes a motion or objection that benefits your client, concur on the record in the motion or objection.

23. Look for the diamond in the coal pile. When searching for appealable issues, know what issues attract appellate courts. Appellate courts have shown particular interest in the following areas:

- Prosecutorial misconduct—This can include a range of acts and omissions. Acts include improper cross-examination and closing arguments. Omissions commonly include the failure to provide full discovery. While trying to avoid unnecessary interruptions, make a contemporaneous objection.
- Jury instructions—Discussions about jury instructions commonly occur in chambers. As stated earlier, a transcribed record is essential. If the judge refuses to give your requested charges, make a record to show how they explain the law necessary for the jury to reach a fair verdict. You should also explain why the omitted or erroneous instruction is serious enough to overcome the law given to the jury in the rest of the instructions.
- Sentence guideline scoring—Challenges to scoring must be raised at the time of sentence or in a timely post-sentence motion. Otherwise, they may be waived for appeal purposes. While a scoring error that is plain from the record and affects the guideline range may not require preservation, preservation is required to appeal a sentence imposed within the guidelines.[12]

  Keep in mind the range of factors for downward departure from the guidelines, including not only factors not considered in the guidelines but also those not given sufficient consideration in the guidelines.

24. Preserve all materials for appeal. Safeguard all proposed exhibits, whether admitted or not, and video or audio materials that were not transcribed. Likewise, preserve your trial file (including the discovery and any other materials affecting the case, whether part of the record or not) for at least five years for appeal purposes, and make your file readily available to appellate counsel.[13]

25. Do not close shop too early. The appeal stage begins the moment your client is convicted. A timely motion for a new trial may be filed by trial counsel or appellate counsel. If something has troubled you during the course of trial, this may be your last chance to bring up the matter. In fact, the court rules require you to do so if appropriate and appellate counsel has not been retained or appointed.[14] However, do not file a motion for a new trial until you have read the applicable court rules and spoken to both your client and an experienced appellate attorney. Several issues are waived on appeal unless they are raised by a timely motion for new trial. These include arguments that a jury verdict was against the great weight of the evidence; there is newly discovered evidence; your client deserves a nunc pro tunc hearing on capacity to stand trial;[15] there were jury irregularities during the trial; or the defendant received ineffective assistance of counsel (unless a serious mistake of counsel is obvious from the record).[16]

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In conclusion, someone once said that if trial lawyers are the surgeons, appellate lawyers are the coroners. These suggestions are intended to give the appellate bar a promotion to the ER, where they might save a few lives. These suggestions should also help trial lawyers become better surgeons. ■

This article was adapted from a seminar presented to the Macomb County Bar Association in January 2012.

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ENDNOTES

1. MCR 7.212(C)(7): "Page references to the transcript, the pleadings, or other document or paper filed with the trial court must also be given to show whether the issue was preserved for appeal by appropriate objection or by other means."
2. See *People v Ginther,* 390 Mich 436, 441–442; 212 NW2d 922 (1973).
3. See MRE 403.
4. See MRE 609.
5. See US Const, Am XIV; *Batson v Kentucky,* 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).
6. See US Const, Am VI; *Duren v Missouri,* 439 US 357; 99 S Ct 664; 58 L Ed 2d 579 (1979).
7. *People v Kimble,* 470 Mich 305, 309; 684 NW2d 669 (2004).
8. See US Const, Am VI; *Crawford v Washington,* 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).
9. See MRE 702.
10. See MRE 706.
11. MRE 702; *Daubert v Merrell Dow Pharmaceuticals, Inc,* 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).
12. *People v Francisco,* 474 Mich 82, 88–89; 711 NW2d 44 (2006).
13. MCR 6.005(H)(5).
14. MCR 6.005(H)(4).
15. *People v Lucas,* 393 Mich 522; 227 NW2d 763 (1975).
16. *Ginther,* n 2 *supra.*