

Witnesses and Appellate Preservation

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Summary

- ❑ The unpredictability of witness testimony can make preserving or avoiding error at trial more challenging.
- ❑ Pretrial discovery, disclosures, and motions help rein in testimony and predict potential pitfalls.
- ❑ Timely objections and proffers at trial are key.
- ❑ There are often strategic reasons *not* to object to testimony.
- ❑ Exercising a proper strategy means understanding the preservation rules—and when to break them.



Kate Dehler

The best advice an appellate lawyer can provide to a trial lawyer is, quite frankly, win the case at trial. Appeals are protracted, costly, and rarely successful. When they do occur it's always easier to be the appellee.

Fortunately, the more specific advice an appellate lawyer can provide about preserving any trial errors for appeal can also help ensure those errors don't occur in the first place. That's because a primary function of preservation rules is to ensure the trial judge is informed of potential errors and has an opportunity to avoid or correct them. The rules thereby promote efficiency and finality. They also protect against a party strategically remaining silent about a known error only to seek a do-over if the verdict doesn't go their way.

Human nature being what it is, witnesses pose specific challenges for avoiding or preserving error. Witnesses are part of the building blocks of a successful trial. They relay your story to the jury or judge through their testimony and review of key documentary evidence. Unlike documentary evidence, they are maddeningly unpredictable. Avoiding and preserving error often depends on properly preparing your witnesses and readying to challenge your opponent's. (To aid you in avoiding or preserving error regarding witnesses, we have created a downloadable [witness preservation checklist](#).)

Pretrial Tools to Shape Witness Testimony

Discovery and Disclosures

Given the primacy witnesses hold at trial, one early order of business is to make certain your witnesses will be able to testify to fill in the necessary elements of your claims or defenses. Perhaps the most important step in this process is to strictly comply with any disclosure requirements and deadlines.

Federal Rule of Civil Procedure 26(a)(1)(A)(i) requires disclosure of any witnesses “likely to have discoverable information” that you may use to support claims or defenses, and Rule 26(e) requires supplementing that disclosure “timely” upon learning it is “incomplete or incorrect.” As your case develops through discovery, make sure you revisit your disclosures to ensure they are complete. Additional provisions in Rule 26(a)(2) and (e)(2) address disclosures related to expert witnesses. Ideally when it comes time to file a pretrial witness list, that will align perfectly with the disclosures you have already made.

Deadlines regarding witnesses set in case management and pretrial orders should be treated as gospel—timely comply or seek needed extensions. Under Federal Rule of Civil Procedure 37(c)(1), a party who does not comply with Rule 26(a) or (e) “is not allowed” to use that witness unless the court finds the failure was “substantially justified” or “harmless.” And good luck finding an appellate court that will hold a trial court abused its discretion when it struck a witness because a litigant failed to comply with established rules or court-ordered deadlines.

On the flip side, track carefully your opponent’s disclosures, discovery responses, and compliance with pretrial deadlines. If a surprise witness suddenly appears on a pretrial statement past the close of discovery, take immediate action. If you delay, a judge may be disinclined to strike a witness at trial if it appears an earlier objection could have resolved any prejudice and your delayed objection was to gain an unfair tactical advantage.

Expert witnesses deserve heightened attention in the lead up to trial. Before the deadline for disclosing your experts and their opinions, make sure you know where the *Daubert* challenges might lie and how you will address them. Revisit this once they’ve been deposed to determine if any weaknesses have been exposed. Remember that as the proponent of the expert, it is going to be your burden under Federal Rule of Evidence 702 to show by a preponderance of the evidence that the testimony should be admitted.

Upon receiving your opponent’s expert disclosures, promptly provide them to your experts in case they will alter the nature of the testimony your experts will provide. And make sure you timely raise any known *Daubert* challenges to your opponent’s experts so that they are not waived.

Motions in Limine

Depositions often reveal potential pitfalls that a witness's testimony may present for you at trial. Motions in limine provide an opportunity to avoid those pitfalls, or at least to be prepared to vault over them.

Avoid the boilerplate or "omnibus" motion in limine that asks the court to make a number of theoretical rulings based on well-established principles for testimony that might never be offered. Instead, review the case for specific testimony and themes you see your opponent developing to identify likely areas of inquiry that could result in error or unfair prejudice. The judge should be well-equipped to handle an objection to a witness blurting out hearsay at trial. But objections requiring the judge to weigh competing factors will benefit from advance analysis.

A motion in limine may also be merited if there is a particularly damaging line of inquiry that you reasonably anticipate and want to forestall. And in some cases, a judge's pretrial ruling on one type of evidence may impact whether other evidence is admissible, such that an advance ruling helps streamline the trial.

While motions in limine are an important tool, they do not ensure preservation (or avoidance) of error. True, Federal Rule of Evidence 103(b) says a party need not renew an objection "[o]nce the court rules definitively on the record—either before or at trial." "Definitively" is the problem here. Sometimes the facts develop differently than anticipated at trial and a pretrial in limine ruling no longer holds. And if a witness unexpectedly violates a motion in limine, a contemporaneous objection and motion to strike are still required.

Designations

In today's trials, testimony is increasingly offered via deposition testimony, often by video. Comply with the court's orders and deadlines on designating portions of depositions for presentation at trial and, more importantly for preservation purposes, with the deadline to submit any objections to designated testimony. At trial, ensure that any deposition testimony offered actually tracks the designations and be sure to bring it to the trial court's attention if there is a deviation.

Exclusion of Witnesses

If there are grounds to exclude an opponent's witness, file a timely motion to do so. Ideally, you should seek this relief shortly after the necessary facts come to your attention.

If the trial court excludes your witness or a portion of their testimony in advance of trial, preserving that error will likely require an offer of proof (or proffer) of the testimony you intended the witness to offer. The appellate court must be able to assess not only whether the exclusion was error, but also that it was harmful—i.e., that it would or could have had a meaningful impact on the result of the trial.

Sometimes the harm may seem patently obvious, for example, if the court excluded a key damages expert. Still, a detailed proffer is advisable. For an excluded witness, their deposition testimony might suffice. If you anticipated expounding on that deposition testimony, an affidavit can explain what additional testimony the witness could offer.

When a court excludes only a part of your witness's testimony, the ideal proffer would involve questioning the witness outside of the jury's presence but in front of the trial judge (who could then presumably revisit the exclusion ruling). Yet judges are sometimes loath to set aside the time for that type of proffer while the jurors wait impatiently in the jury room or at the expense of tackling other critical matters during recesses. In that case, a lawyer's detailed summary of the anticipated testimony or the filing of an affidavit providing the testimony will often suffice.

Objections at Trial

Trial is where the rubber meets the road on preserving objections to evidence. A primary requirement is that the objection be timely, meaning in most cases, contemporaneous with the objectionable testimony. The objection must also be specific, making clear—preferably in a word or a few—what the basis for the objection is. Sometimes a judge may overzealously forbid stating the ground for the objection, concerned about “speaking objections,” which are typically argumentative or suggestive objections meant to improperly influence a jury. If so, and the objection is important and its basis unclear, ask for a sidebar.

Vigilance is important. If you object to one instance of an inadmissible fact but it comes in later without objection, any previously preserved objection may be deemed waived or harmless.

It can be tempting to seek or fall back on a standing objection at trial when you know similar objectionable testimony will recur. One does so at one's peril. If there is any nuance or shading to how far an objection stretches, or whether testimony would actually fall within the objection, or whether there is a strategic purpose for objecting to some but not all of the problematic testimony, the issue may not be properly preserved.

If the testimony was provided to the jury before your objection could be heard, be sure to move to strike the answer. Consider also whether you need to seek a curative instruction to try to dispel any prejudice, or if the information was catastrophic enough to merit a motion for mistrial. These situations involve tough, strategic decisions, made on-the-spot and largely requiring some intuition about where the trial stands, what the jury may be thinking, and how the rest of the trial will proceed. If possible, take a moment to confer with your team and client before trying to pull a ripcord. And if you do seek a mistrial and it is denied or the ruling deferred, renew the motion at the close of evidence and in a motion for new trial under Federal Rule of Civil Procedure 59.

As important as it is to make an objection, it is almost equally important to make sure you get a ruling on the objection. Appellate courts review rulings, not objections. The appellate court also wants to understand the basis for a ruling if there could be more than one. To truly demonstrate error on appeal, you may need to press an impatient judge for a specific ruling.

If it's your witness's testimony and the other side successfully objects to prevent certain testimony, remember to make an offer of proof if it is not clear from context what the testimony would have been. Again, the appellate court will not reverse unless it concludes the excluded evidence was material to the outcome.

Easier Said than Done

As an appellate attorney, it's fairly straightforward to convey the rules on preservation and the many, many ways in which appellate courts have found trial lawyers fell short of preserving error in the past. Yet the reality is that preservation of error is only one aspect of the art of litigation. At trial, you must balance the needs of your case (the evidence you need to get in as well as the evidence you need to combat), the idiosyncrasies of your presiding judge, the limited patience and potential sensitivities of the jurors, and myriad other considerations, typically under immense time pressure. There are often strategic reasons *not* to object to testimony: that it isn't that harmful; that continued objections are annoying the judge or alienating the jurors; or that it could open the door to otherwise inadmissible testimony. But exercising a proper strategy means understanding the preservation rules—and when to break them while your appellate counsel bites her fingernails behind you.

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