Appellate Counsels' Tips for Navigating Trial and Post-Trial Practice

By Noreen L. Slank and Michael J. Cook

Trial attorneys captain the ship through the trial court. From the perspective of civil-side appellate attorneys, here are a few ways to avoid a shipwreck once it is time to hoist the appeal flag.

Speak now or forever hold your peace about evidentiary objections

Some appellate preservation rules provide wiggle room to raise issues that were not presented in the trial court. But typically, evidentiary objections are not of that variety. Raise all your evidentiary objections because they usually cannot be expanded on appeal.[1]

What happens at sidebar should not always stay there

Sidebars and in-chambers discussions are essential. There are some things juries shouldn't or can't hear, and some discussions are better had without on-the-record formality. But don't leave your objections and offers of proof at sidebar or in chambers, because that's where they will stay. Appellate courts thrive on the efficiencies presented by unpreserved issues.[2] No matter how significant the issue or well stated the objection, if it's not on the record, it's going to be difficult to show it was preserved for appeal or to get an appellate panel to listen to your argument on this issue.

"Trial Practice" is designed to provide advice and guidance on how to effectively prepare for and conduct trials.

Do not be overly agreeable after jury instructions are read

Trial attorneys battle royally over jury instructions. You win some, you lose some. If judges ask if you have any objections after they read the instructions, do not answer "no." Only answer "no" if the judge asks about the way the instructions were read (assuming the judge read them accurately). Otherwise, appellate courts may say that you waived *all* objections to the instructions. The former trial judges in appellate courts probably know that is incorrect, but don't count on them throwing you a life ring. If the jury instructions are not exactly what you asked for, the best answer is something like, "Subject to our former objections, we have no objections to the way the jury instructions were read."

To dismiss with or without prejudice, that can be the question

Sometimes a trial court's ruling on one claim or against one party in a civil case eliminates the incentive to pursue the other claims or parties, so the parties want to stipulate to dismiss them. But the party with the potential claim only wants to put it on a back burner, not incinerate it. The party may insist on a dismissal "without prejudice," but that can give the Court of Appeals jurisdictional indigestion. The Court doesn't like parties' manipulating its jurisdiction by creating "faux finality," so it has dismissed some appeals when parties stipulate to dismissals without prejudice. One workaround the Court has accepted is an order dismissing a claim with prejudice but expressly reserving the right to re-raise it if the trial court's other rulings are reversed on appeal. However, that is not always a suitable cure.

Signing versus entry

A trial judge often signs a judgment on one day, but it is entered a day or two later. The appellate rules play nice. A claim of appeal can be filed within 21 days of *either* the day a judgment is signed *or* the day the judgment is entered on the register of actions.[3] Trial court rules aren't so forgiving. Those rules say that an order is entered the day it is signed.[4] And motions for judgment notwithstanding the verdict or a new trial must be filed within 21 days of when the judgment is signed.[5] There's no "either-or."

Beware of extending the time for filing post-judgment motions

The appellate rules permit a timely claim of appeal within 21 days of an order denying a new trial or other order seeking relief

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from a judgment if the post-judgment motion was filed on time. The time for filing such motions is 21 days from the signing of the judgment.[6] The appellate rules *also* say that a claim of appeal is timely reckoned from a later-filed, post-judgment motion if the motion was filed "within further time the trial court has allowed for good cause during that 21-day period."[7] The extension can be tempting, but you will need a delaying order signed within 21 days of the judgment. If the delaying order is entered later or extended at a later date, your client is toast. The claim of appeal will be late and your client will be stuck filing a delayed application for leave to appeal, but only if no more than six months have passed since the judgment was entered.[8]

What Sugar Ray Leonard and final orders have in common

Remember how boxer Sugar Ray Leonard kept saying he was retired only to return to the sport time after time after time after time? Because of the trial court final order rule,[9] some cases resemble his career. A trial court's judgment or order must state whether it "resolves the last pending claim and closes the case."[10] But that designation is not always right. The appellate court rules define a "final order," and that definition has nothing to do with whether the trial court said it was a final order.[11] As a result, judgments or orders sometimes say a case is closed when it actually is not; for example, 21 days later, a motion for new trial is filed and the case continues. And, just as (if not more) important, an order can be a final order even when the trial court does not include the "closes the case" designation. So be safe. Do not rely on the "this is a final order" designation to signal when it is time to appeal. A final order for appellate purposes is only what the appellate court rules say it is.[12]

There can be more than one

The *Highlander* TV series used the tagline, "There can be only one." Nonfrequent appellate flyers can be forgiven for thinking that line also applies to final orders—after all, they are defined as orders that resolve all claims and defenses of all the parties.[13] But as catchy as the "there can be only one" line is, it does not apply to final orders. There can, in fact, be more than one final order. In particular, the often-seen order awarding or denying case evaluation sanctions is a separate, appealable final order. Thus, don't wait for it to file your appeal even if the judgment says "costs and case evaluation sanctions to be taxed." You must appeal the first final order promptly, and then you must appeal the case evaluation sanctions order on time because that's another final order.[14]

This is the view from the cheap seats. We don't "do" trials. We just read them. We couldn't possibly tell the captain of the trial ship how to cross-examine a witness, formulate a persuasive opening statement, or conduct an effective voir dire. Not a chance. But when no one alerts the ship's captain that a storm is brewing, we all end up following the path of the Edmund Fitzgerald. ■

Noreen L. Slank heads the Appellate Practice Group at Collins Einhorn Farrell PC. She focuses her appellate practice on post-trial and appeal work in professional liability cases, including medical and legal malpractice, and also in catastrophic injury cases.

Michael J. Cook is an associate in the Appellate Practice Group at Collins Einhorn Farrell PC. He focuses his practice on state and federal court appeals and dispositive motion practice in civil litigation matters, including professional liability, contractual indemnity, business torts, and general liability cases. Before joining Collins Einhorn, Mike was a law clerk for Michigan Supreme Court Chief Justice Robert P. Young Jr.

ENDNOTES

1. See, e.g., *Meagher v Wayne State University*, 222 Mich App 700, 723–724; 565 NW2d 401 (1997) (finding that an objection based on lack of authenticity didn't preserve hearsay argument).
2. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) ("Michigan generally follows the 'raise or waive' rule of appellate review."); *Cates v Argentine Twp*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2011 (Docket No. 296861) ("In civil cases, we are not required to consider unpreserved issues.").
3. MCR 7.204(A).
4. MCR 2.602(A)(2).
5. MCR 2.610(A)(1); MCR 2.611(B).
6. MCR 2.610(A)(1); MCR 2.611(B).
7. MCR 7.204(A)(1)(b).
8. MCR 7.205(G)(3).
9. MCR 2.602(A)(3).
10. MCR 2.602(A)(3). The staff comment explains that its purpose, "which stemmed from a proposal of the Michigan Judges Association, is to facilitate docket management." In other words, it's a signal to the clerk's office—nothing more.
11. See *Davis v Highland Park Bd of Educ*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2014 (Docket Nos. 315002, 315511, and 316235) ("MCR 7.202(6)(a) defines the meaning of a final order, and MCR 2.602(A)(3) merely imposes a requirement for entry of a final order . . . . MCR 7.202(6)(a) does not define a final order as one certified as a final order under MCR 2.602(A)(3).").
12. MCR 7.202(6).
13. MCR 7.202(6)(a)(i).
14. See MCR 7.202(6)(a)(iv). The rule is actually quite broad. It includes any "postjudgment order awarding or denying attorney fees and costs under MCR 2.403 [case evaluation sanctions], 2.405 [offer of judgment sanctions], 2.625 [taxable costs] or other law or court rule."