Protecting the Record

The top 10 ways lawyers unwittingly waive error for appeal.

BY **KRISTEN JERNIGAN**

As an appellate attorney, nothing is more frustrating than reviewing a reporter's record and finding an error that might entitle your client to relief that has not been preserved for appeal. Appellate courts are exceptionally strict about preservation of error, and while most attorneys are familiar with Texas Rules of Appellate Procedure 33.1, which requires a timely objection, motion, or request to preserve error for appeal, there are a number of other requirements for preserving appeal that must be observed. Listed below are the top 10 ways lawyers routinely and unwittingly waive error by failing to abide by those requirements. They apply primarily to criminal cases but have general applicability to all areas of practice. Along with the rules, I have included some practice tips I have learned along the way.

1) The attorney fails to continue to object every time the evidence he or she seeks to exclude is offered. A vast number of attorneys think that if they have objected to the evidence in question once, the objection is sufficient to preserve error for appeal, especially when a motion to exclude the evidence has been filed. However, caselaw is clear that a party must continue to object every time the evidence he or she seeks to exclude is offered.[1] In fact, any error in the admission of evidence is cured when the same evidence is admitted elsewhere without objection.[2]

Practice Tip: When in doubt, always object. And, if you are concerned about annoying the jury with continued objections, ask for a running objection. That will suffice.[3]

2) The attorney fails to make a specific objection citing the rule of evidence, legal principle, or constitutional basis upon which the challenge is made. A challenge on appeal must comport with the objection made at trial.[4] If the trial objection is general, rather than specific, error is not preserved as to a specific claim raised on appeal.[5]

Practice Tip: To be on the safe side, when you make an objection at trial, list every rule of evidence, legal principle, or constitutional basis for your challenge. For example, if you are objecting that a piece of evidence is illegally seized, object on the basis of Texas Code of Criminal Procedure Article 38.23; Article 1, Section 9 of the Texas Constitution, and the Fourth Amendment to the U.S. Constitution. That way, all of the bases are covered for the appeal.

3) The attorney fails to obtain a ruling on his or her objection. It is well settled that as a prerequisite to presenting a point of error for appellate review, the record must show that the complaint in question was made to the trial court by a timely request, objection, or motion, and the trial court ruled on the request, objection, or motion.[6] Therefore, you must always obtain a ruling.

Practice Tip: After an objection is made, oftentimes a trial court will say something to the effect of "move along" or "rephrase your question." These are not rulings. You must press the court to give you an actual ruling to preserve error for appeal. If the court refuses to rule, you are required to object to the court's refusal.[7]

4) The attorney fails to submit a written or oral proposed jury instruction. Texas Code of Criminal Procedure Article 36.14 requires that a proposed jury instruction be submitted in writing or dictated into the record to preserve a challenge on appeal that the instruction was not included in the court's charge. Likewise, in the civil context, Texas Rule of Civil Procedure 278 imposes the same requirement.

Practice Tip: A trusted colleague taught me to prepare my own jury charge before each trial. This is extremely helpful in identifying any special issues that may come up in your case. Also, during the charge conference, you can submit your own proposed charge and preserve any requested instructions at the same time. However, if you choose not to prepare your own charge, be sure to dictate your requested instruction into the record at the charge conference.

5) The attorney fails to obtain a written order memorializing the court's ruling. While not always fatal if there is an oral ruling, it is always best to obtain a written ruling on your request or motion. For example, in the discovery setting, the 5th Court of Appeals in Dallas held that because the record did not contain an order granting the appellant's request for disclosure of the state's expert witness, the trial court did not err in allowing a detective to testify.[8] Also, in the mandamus setting, whether in the civil or criminal context, the courts of appeals will summarily deny your mandamus petition if a signed, certified copy of the order you are challenging is not included in the appendix of your opinion.[9]

Practice Tip: We've all been there. We file our motions and the trial court doesn't want to sign them because they know we are going to appeal their ruling. You must continue to urge the trial court to sign your proposed order or deny your request in writing to ensure your challenge will be preserved on appeal. If the trial court absolutely will not put its ruling in writing, make sure that an oral ruling is on the record and that your request that the ruling be in writing was made.

6) The attorney fails to request findings of fact and conclusions of law on a dispositive motion. In the criminal context, the losing party on a dispositive motion, such as a motion to suppress evidence or statements, is required to request findings of fact and conclusions of law so that the appellate court can properly review the trial court's analysis in making its ruling.[10] While the remedy for the failure to request findings and conclusions is a remand to the trial court and not a complete denial of the claim, it is always better to request findings of fact and conclusions of law when the facts and circumstances are clear in everyone's minds.[11]

Practice Tip: Even if I am the losing party, I always file my own proposed findings of fact and conclusions of law as a way of giving the court another chance to rule in my favor and to signpost how I plan to challenge the court's ruling on appeal in hopes the court will reverse its ruling.

7) The attorney fails to request an extra peremptory strike and identify an objectionable juror during jury selection. After hours of voir dire and challenges for cause, it is such a shame to see that most attorneys do not preserve error with this final step. Specifically, in order to preserve error for review, a lawyer must show that: (1) he or she asserted a clear and specific challenge for cause; (2) he or she used a peremptory challenge on the complained-of venire member; (3) his or her peremptory challenges were exhausted; (4) his or her request for additional strikes was denied; and (5) an objectionable juror sat on the jury.[12]

Practice Tip: Jury selection is often hectic and confusing. When possible, have another attorney sit with you during jury selection to keep track of your challenges for cause, peremptories, etc., and keep the above list handy so you can check off the requirements as you go. Also, be sure to identify the objectionable juror who sat on the jury by name or juror number and state why they were objectionable.

8) The attorney fails to ask for a continuance. When previously undisclosed evidence, witnesses, or experts are disclosed just before or during trial in violation of a discovery order, the defendant is required to ask for a continuance to preserve error for review on appeal.[13] Even when *Brady* violations come to light in the middle of trial, the defense is required to ask for a continuance and the failure to do so waives any violation.[14]

Practice Tip: If previously undisclosed evidence or a witness comes to light just before or during trial, object to its admission and ask for a continuance to investigate the evidence or witness' proposed testimony (especially if it's an expert witness). It is also helpful to put on the record how your client has been prejudiced by the late disclosure of the evidence or witness since that is an integral part of the analysis on appeal.

9) The attorney fails to make an offer of proof. In order to preserve a claim on appeal that evidence was improperly excluded, you must make an offer of proof of what the evidence or testimony would have been.[15] This is because the appellate court cannot review whether the evidence should not have been excluded if it does not know what, specifically, it was.

Practice Tip: If the evidence excluded is testimony, you can either question the witness or proffer what the testimony would have been. You can do this with just the court reporter. The judge does not have to be present. If the evidence is a document, a video, etc., you can mark the evidence as a record exhibit and tender it to the court reporter to make sure it gets up to the Court of Appeals.

10) The attorney fails to challenge the indictment prior to the day of trial. While this topic is solely for criminal practitioners, it is an important one. Texas Code of Criminal Procedure Article 1.14 sets out that a defendant must object to any defect in an indictment before the day trial commences or the defect is waived. Filing a motion to quash on the day of trial is too late.[16]

Practice Tip: The foregoing rule has been extended in some unpublished cases to also implicate Texas Code of Criminal Procedure 28.01, which requires that all pre-trial motions be filed seven days prior to any scheduled pre-trial hearing and 10 days prior to trial. Do yourself a favor and file any motion to quash at your earliest convenience so you do not waive a serious issue that could result in an ineffective assistance of counsel claim. Also, the motion must be "presented" to the court, not just filed.[17]

By keeping the foregoing rules, cases, and tips in mind, you will have done your best to preserve appellate issues for your client and will make the appellate attorney that comes behind you very happy. **TBJ**

Notes

1. *Ethington v. State of Texas*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991); *Hudson v. State of Texas*, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984).
2. *Id.*
3. *Martinez v. State of Texas*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003).
4. *Coffey v. State of Texas*, 796 S.W.2d 175 (Tex. Crim. App. 1990).
5. *Id.*
6. Tex. R. App. P. 33.1; *Tucker v. State of Texas*, 990 S.W.2d 261, 262 (Tex. Crim. App. 1999).
7. *State of Texas v. Boyd*, 202 S.W.3d 393 (Tex. App.—Dallas 2006).
8. *See, e.g., Chamberlain v. State*, 05-13-01213-CR, 2015 WL3413543 (Tex. App.—Dallas, delivered May 27, 2015).
9. Tex. R. App. P. 52.3(k)(1); *In re Cullar*, 320 S.W. 3d 560 (Tex. App.—Dallas 2010).
10. *State of Texas v. Cullen*, 195 S.W.3d 696 (Tex. Crim. App. 2006).
11. *Id.*
12. *Comeaux v. State of Texas*, 445 S.W.3d 745, 750 (Tex. Crim. App. 2014).
13. *Barnes v. State of Texas*, 876 S.W.2d 316, 328 (Tex. Crim. App. 1994).
14. *Williams v. State of Texas*, 995 S.W.2d 754 (Tex. App.—San Antonio 1999).
15. Tex. R. Evid. 103(a)(2), (b).
16. *State of Texas v. Lohse*, 881 S.W.2d 171 (Tex. App.—Houston [1st Dist.] 1994); *Buccarelli v. State of Texas*, 793 S.W.2d 289, 290 (Tex. App.—Corpus Christi 1990).
17. *Guevara v. State*, 985 S.W.2d 590, 592 (Tex. App.—Houston [14th Dist.] 1999).

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