

On the Record: The Importance of Issue Preservation Throughout Litigation

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Litigators are notorious for maintaining checklists — checklists for discovery, dispositive motions, pre-trial, trial, and even post-trial. Checklists should include identifying the evidence necessary to win and steps for preserving all issues related to that evidence for post-trial motions, a new trial, or appellate review. Preserving excluded evidence that may substantially affect your case is a critical part of ongoing analysis throughout litigation, not just something to think about the day after trial.

The trial court's ability to admit or exclude evidence is perhaps one of the broadest discretions enjoyed by trial judges. That said, when confronted with a ruling barring key evidence, there are several steps lawyers should take during a civil trial to preserve issues on the record and, if necessary, make an effective offer of proof. When done properly, the offer of proof should preserve the substance of improperly excluded evidence into the record for post-trial motions or appellate review.

In Virginia, it is well-established that it is the duty of counsel to preserve a record sufficient to permit review of errors assigned on appeal.¹ To avoid waiving the right to raise error post-trial or the right to a new trial or appeal based on a trial court's erroneous exclusion of evidence, the party who offered the excluded evidence must make an "offer of proof," or a proffer, that explains the substance, purpose and relevance of the excluded evidence.² Offers of proof must be made outside the presence of a jury, and the proffer must be specific, based

on admissible evidence, and on the record.³ It is not enough to simply object and state the facts or issues you believe the excluded evidence will address. The proffer must explicitly reference the substance, the purpose, and relevance of the excluded evidence to your theory of the case.

For example, perhaps in an insurance coverage action you seek to introduce evidence related to the insurer's handling of other similar claims; evidence that you believe is particularly critical to your case. Opposing counsel, predictably, objects on the basis of relevance. The judge sustains opposing counsel's objection. In this scenario, an offer of proof is paramount and litigators should do three things:

First, challenge the improper exclusion of evidence. Make sure the judge understands your challenge and can reconsider her initial ruling. If the judge stands on her ruling to exclude your evidence or testimony, request to make an offer of proof. The judge will likely ask you and opposing counsel to approach the bench or she may take a short recess, to excuse the jury, and permit you to make your proffer. In some instances, the judge may ask if your proffer can wait until a scheduled break or until after the witness is finished testifying.

Second, clearly state the basis of your challenge. Once you are permitted to make your offer, state what the evidence will show; why the evidence is relevant, and why it should be admitted. Continuing with the example above, your colloquy about evidence of other similar claims could be:

Your Honor, if this evidence is admitted it will show that ABC Insurance Company previously interpreted the policy language at issue in favor of coverage.

This is relevant because it shows that ABC's interpretation of the policy language in this case is inconsistent with its prior practice or, at minimum, shows that the language is ambiguous.

This evidence is admissible. In Plaintiff v. Defendant case, this court found evidence of how an insurer handled other similar claims relevant to aid in the interpretation of what it considered to be ambiguous policy language. The court should do the same here.

A similar colloquy can be used to make an offer of proof about witness testimony that is erroneously excluded. If the proffer pertains to an exhibit, it is imperative that the exhibit

is marked and identified for purposes of post-trial motions or appellate review — even if not admitted. If the proffer pertains to a witness, the judge may request that you proceed with questioning the witness outside of the jury to elicit with particularity what the witness would testify to if permitted.⁴

Third, ensure that the judge rules on the objection. With counsels' back and forth, the judge may neglect to issue a specific ruling. Returning to the example referenced earlier, imagine that opposing counsel objected to your evidence of other similar claims, which resulted in a back and forth between you and opposing counsel. Opposing counsel objects and argues that the evidence is irrelevant and vague because there is no effective way for the court to determine if the other similar claims are truly similar to your client's claim. You argue that the evidence is relevant and goes to the insurer's unfounded refusal to pay your client's claim. Instead of ruling on the objection, the judge asks you to move on; the parties can discuss the evidence of other similar claims at break. It is imperative that you remember to raise the issue again. Be certain to obtain the court's ruling for the purpose of preserving the issue for potential arguments during post-trial briefing or on appeal. If the court admits or excludes evidence subject to objection and forgets to rule on it later, there can be no assignment of error for appellate review.⁵ An appellate court generally cannot review a trial court's failure to do something it was not asked to do. You must obtain a ruling on the objection.

The act of preserving evidence on the record is only half the battle. Equally as important is understanding what evidence is critical to win your case; the evidence that will likely be the subject of an offer of proof. Many litigators may ignore issue preservation during the motions stage of litigation. This is a mistake. Motions practice (particularly motions for summary judgment), including trial briefs, objections to exhibit lists or deposition testimony designations, and motions *in li-*

mine, are instructive as to the evidence opposing counsel will try to later exclude at trial. Use this information to plan ahead. Analyze and evaluate opposing counsel's claims, defenses, and legal

theories. Research key legal questions and create a specific plan for raising and reiterating key legal questions to preserve them on the record. If you have a jury trial, refine proposed instructions. Make sure the verdict form aligns with key issues you believe must be preserved. Examine the potential exclusion issues and prepare offers of proof for use during trial in advance, including identifying any relevant documents such as designat-

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ed deposition testimony or intended exhibits.⁶ Also important is reviewing and understanding state and local court rules that address the preservation of claims of evidentiary errors.

Another common mistake some litigators may make with issue preservation is not placing enough emphasis on motions *in limine*. Instead of looking at motions *in limine* as just one more thing on your pre-trial checklist, motions *in limine* should be considered opportunities to narrow issues, address the conduct of trial, and provide a great way to preserve specific issues on the record. For this reason, it is vital that you spend the time necessary to fully develop motions *in limine*, including having a court reporter at motions *in limine* hearings. If the court does not issue a definitive ruling on your motions *in limine* (which is not uncommon), renew your objections at trial. This guarantees the appellate court will have a clear record of the specific issues and know the issues were the subject of the court's respective rulings, as opposed to another ancillary issue.⁷

Finally, during trial, litigators should not forget the basics. Ensure the transcript is intelligible by obtaining clear, audible answers from witnesses, verbally record visual presentations, and use words to describe what is happening in court if it would not otherwise be reflected in the transcript. Ensure all exhibits are properly marked and identified. Ask the court to clarify any ambiguous rulings on the record and review trial transcripts to confirm they do not contain any errors that would impact potential appellate review.

Not even the sharpest legal mind or best rhetoric can resurrect a great argument that was not properly preserved on the record. Good litigators take time throughout their case to evaluate and prepare offers of proof in advance so they are ready to object to the erroneous exclusion of evidence and make an adequate proffer to preserve critical evidence for post-trial motions, a new trial, or appellate review so they are not left with their hands tied the day after trial. ☺

Endnotes:

- 1 Va. Sup. Ct. R. 2:103; *Brown v. Com.*, 246 Va. 460, 466, 437 S.E.2d 563, 565 (1993).
- 2 *Id.*; *Williams v. Harrison*, 255 Va. 272, 277, 497 S.E.2d 467, 471 (1998).
- 3 *White v. Morano*, 249 Va. 27, 30, 452 S.E.2d 856, 858 (1995) (“[T]he onus is upon the appellant to provide the reviewing court with a sufficient record from which it can be determined whether the trial court erred as the appellant alleges. If an insufficient record is furnished, the judgment appealed from will be affirmed.”).
- 4 *Whittaker v. Com.*, 217 Va. 966, 234 S.E.2d 79 (1977) (holding that the Supreme Court [of Virginia] will not consider an error assigned to rejection of testimony unless such testimony has been given in absence of jury and made a part of record in manner prescribed by the rules of court).
- 5 *Taylor v. Commonwealth*, 208 Va. 316, 324 (1967).
- 6 *White*, 249 Va. at 30, 452 S.E.2d at 858.
- 7 *Id.*



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