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Law

Preservation and related appellate pratfalls

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It's too bad that there's no such thing as time machines and videocasts of oral arguments in the U.S. Court of Appeals for the Fourth Circuit, because both would have come in really handy for a presentation I made recently to a trial lawyer association in Washington, D.C.

When I was first asked to address this group, my first thought was that my stock-in-trade tips on brief writing and oral advocacy would probably be of little interest to a bunch of lawyers who try cases for a living, even if I narrowed the list to the top 10 sexiest and presented them by Power Point doing my best Dame Edna dancing impersonation with strobe lights and disco music.

So I leapt with great enthusiasm and even greater relief when the suggestion was made that perhaps I could talk about common mistakes I've seen lawyers make that can hamper the appeal. Had I been able to time-travel and return with a video of the 4th Circuit argument I had several weeks after the actual presentation, I could have started it by showing a classic case of what an appeal beset by preservation issues looks like.

And given the spirited oral argument which took place, I wouldn't even have had to cross-dress to keep the audience's attention.

Waiving waiver?

Two preservation issues arose when one of the judges who had pressed the government about a particular legal point I had made in my brief and at the argument inquired whether it had been raised in the trial court. The government responded that it had not been, and was promptly queried whether it had argued in its brief that the point had not been preserved. Following the government's acknowledgment that its brief made no such argument, the government was asked whether it had waived arguing waiver.

This was an interesting question, at least from my perspective, and not one that the government is often asked, probably because it rarely misses the opportunity to argue waiver when given the chance to raise it. Governmental parties, of course, do not have a monopoly over waiver arguments, which can come up in a variety of scenarios. Regardless of which side of the appellate courtroom you occupy, make sure you timely raise such an argument because you otherwise might relinquish the right to do so.

The preservation issue that triggered the exchange I just described arises far more frequently. Instead of pinning your hopes on the other side's failure to argue that your brief makes an argument not raised below, you can control your own destiny by stating in the trial court all of the grounds in support of your motion for judgment.

Jury instructions

Another preservation issue which came up in the argument was raised by one of the judges, who pointed out that my client's trial lawyer stated he had no objection to the jury instructions. The statement by the trial lawyer could be problematic if my argument constituted a challenge to the instructions, but I responded that it did not.

Many cases do, however, involve such a challenge. In those cases, be sure to review the court's proposed jury instructions carefully; be specific if you think they are wrong; be clear that the other side requested the instructions at issue, not you; and be sure to state how they are erroneous.

If the court modifies the instructions and they're still wrong, you need to object again. If you don't, then, as someone on Apollo 13 apparently once said, Houston, we have a problem.

An issue that did not come up in oral argument arose when I discovered, after ordering and reviewing the trial transcript, that there was a meeting which apparently took place in the judge's chambers. As I later learned from the court reporter, the meeting was never recorded and, as a result, could not be transcribed. Its substance turned out to be inconsequential in this case, but that will not always be true, as I've learned from other appeals I've handled.

Any kind of off-the-record sidebar conference or meeting in the trial judge's chambers should be avoided at all costs. Request that any and all interactions with the judge and your opposing counsel be recorded. If it's not (because your request is denied or you forgot to make the request in the first place), make sure when you are on the record that you memorialize what took place during the conference or meeting. Because if you fail to do this and it covered an important issue in the case, it's likely the issue is waived.

Other contexts

The preservation issues just discussed are the tip of the iceberg, because these types of problems can show up in many other contexts. The D.C. Court of Appeals not too long

ago held that a defendant waived the statute of limitations as an affirmative defense, even though the defense was raised in the defendant's answer, because the defendant failed to raise it in either its summary judgment motion or the parties' joint pretrial statement.

I am representing a plaintiff in an appeal in which the trial judge held that the defendant waived contributory negligence as a defense and could not assert it at trial, even though this defense was also raised in the defendant's answer, because the defendant answered the plaintiff's interrogatories by stating that it did not intend to argue that the plaintiff was contributorily negligent.

Hindsight, of course, is always 20/20. But a little bit of foresight would have preserved the limitations defense in the first of these cases and made it unnecessary in the second one to devote the substantial time and energy now being spent in an effort to overturn the trial court's contributory negligence ruling.

Raise issues early

In addition to making sure you don't waive issues which you have raised, you need to preserve those issues in the first place by raising them at the earliest opportunity.

One example would be the 4th Circuit argument I discussed earlier in which the government was asked whether it had waived its waiver argument by failing to timely raise it. Another example would be if the defendant's motion for summary judgment is supported by an affidavit based on hearsay or other evidence which is inadmissible. Your opposition needs to challenge the admissibility of this evidence when that occurs, because if you don't, and the trial court grants the defendant's motion on the basis of this evidence, you just generated a serious waiver problem for the appeal.

I recently argued a case before the Maryland Court of Appeals in which the plaintiffs, who are the parties I represent, are challenging the constitutionality of a Maryland statute which caps the amount of non-economic damages which can be awarded in a personal injury action. The cap did not become an issue in the case until the jury returned a verdict awarding the plaintiffs more than $4 million for the pain and suffering they experienced as a result of the defendant's negligence. After the trial court granted the defendant's motion to reduce the award to $1 million, which was the maximum award allowed under the Maryland statute for this type of case, the plaintiffs preserved the challenge to the cap's constitutionality by filing a motion to alter or amend the judgment on the ground that the statute is unconstitutional.

Recording the inadmissible

Another preservation issue I've seen involves the failure to make an adequate record when important evidence has been ruled inadmissible. If it's a document, ask to have it marked and made part of the record. If it's testimony, ask the trial judge to allow you to question the witness outside of the jury's presence to make your record. If your request is

denied, then you need to make as detailed a proffer as possible, which describes what that testimony will be, what it tends to show, and what the grounds are for admitting it.

If you don't do this, the appellate court has no basis for determining whether its exclusion was erroneous and, even if it was, whether it was prejudicial error or would not have affected the outcome of the case even had the trial court admitted it. If the trial judge snarls at you when you ask to make a proffer, make sure the record reflects your willingness to make the proffer and the judge's refusal to allow you to do so.

Less is not more

One preservation issue I've encountered on more than one occasion has reared its ugly head when I've searched the record in vain for the other side's interrogatory answers or a key witness's deposition transcript. Although discovery notices are filed with the trial court, the discovery itself is not unless it's filed in connection with a motion or opposition. Make sure that the trial record contains this evidence.

Scorched-earth litigation is not the place for thinking about saving trees and being green. Don't be selective when deciding which pages of the expert's deposition transcript should be attached to your opposition to the other side's motion in limine. Order a condensed transcript that puts four pages on one and file the whole thing as an exhibit. Because if you don't and the trial court grants the motion, then guess what, Houston.

Special verdict forms

Two last points worth making concern special verdict forms, particularly those that contain special interrogatories. First, if the other side presents a special verdict form which contains confusing language, you need to make your objection known so the trial judge can fix the problem. If you don't, the issue is waived.

Second, be aware of a line of medical malpractice cases decided by the D.C. Court of Appeals addressing the situation where the special verdict form asks the jury to find whether the defendant violated the standard of care as to separate legal theories, but fails to ask the jury to find whether each violation proximately caused the plaintiff's injuries. The D.C. Court of Appeals has held that when this omission occurs, the appellate court has no way of knowing which violation or violations were a proximate cause, with the result that a new trial will be required if any of the different liability theories is unsupported by legally sufficient evidence or is otherwise impermissible.

My cursory review of Maryland cases has not uncovered a similar approach taken by our appellate courts, but that does not mean that they have not handled special verdict forms afflicted with this problem the same way. And even if they have not done so yet, they very well may if the opportunity presents itself in the future, although your guess here is as good as mine because my time machine is on the fritz.

So in the meantime, as the sergeant from “Hill Street Blues” used to say, let’s be careful out there. Because even without Dame Edna lurking about, it’s a perilous place to