PREPARING TO PRESERVE
(or, How to Increase Your Chances of Winning)

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1. THE BIG PICTURE: BUILDING, AND PROTECTING, YOUR LEGAL VICTORY

- Goal is to win
  - Case strategy and trial preparation oriented to this goal
  - Strategy encompasses both law and facts, from assignment of case to closing the file.
  - Assembling the law to avoid trial, to win at trial, and to win again (i.e., protect a trial victory on appeal)

- To achieve that goal, we need to 1) have, 2) present, and 3) obtain a ruling on the legal issues that ensure our ultimate success

- Work backwards from delivering to the would-be appellate court the bucket filled with all the law you need to win:
  - Some you will have to make through pre-trial motions (motion in limine, motion for summary judgment, etc.);
  - Some you will have to make through trial argument/motion (evidence, jury instructions, motion for judgment as a matter of law, etc.);
  - Some you will have to make through post-trial motions (renewed motion for judgment as a matter of law, motion for new trial, Rule 60 motion, etc.)
  - Some of the ones you put in that bucket before trial shift at trial and need updating to protect;
  - Some of the ones you put in that bucket during trial shift later at trial, or post-verdict, and need updating to protect.

- Protecting Your Right to Complain
  - "Error preservation" is just protecting the right to complain later if things go south
  - Appeals court can't correct an error if the trial court didn't have an opportunity to correct it first and if it can't point to the error in the record

- Federal (and state) rules contain numerous, and often confusing, rules on how to protect your trial victory, and remembering them during the pressures of trial is difficult

- Lodestar: the trial court must have the opportunity to correct the error.
  - The many specific rules on the substance and timing of objections, and the need to obtain a ruling from the trial court, relate to this need
  - Your objection needs to be in the proper form (motion, objection, renewed motion, etc.), at the right time for court to correct, and specific enough to present the issue to the court for correction
  - "If the opportunity to address an issue is not presented to the trial court, there is no ruling by the trial court on the issue, and thus no basis for review or action by this Court on appeal. An appellate court can only determine whether or not the rulings and judgment of the court below were correct." *Scialdone v. Commonwealth*, 689 S.E.2d 716, 724 (Va. 2010).
  - A trial court's opportunity to correct an error on an evidentiary question looks different than the opportunity to correct an error in a jury instruction

2. PURPOSE OF PRESERVATION RULES

- Preservation rules are "not to trap unwary litigants, but to advance several important and 'obvious' purposes. *In re Under Seal*, 749 F.3d 276, 285–86 (4th Cir. 2014).

- Goals include

  - Respecting the integrity of the lower court, avoiding "unfair surprise to the other party," protecting "the need for finality in litigation," and conserving judicial resources. *In re Under Seal*, 749 F.3d 276, 285–86 (4th Cir. 2014);

  - Ensuring that the parties develop the necessary evidence below. *In re Diet Drugs Prod. Liab. Litig.,* 706 F.3d 217, 226 (3d Cir. 2013);

  - Preventing "parties from getting two bites at the apple by raising two distinct arguments. " *Fleishman v. Cont'l Cas. Co.,* 698 F.3d 598, 608 (7th Cir. 2012);

- "Due regard for the trial court's processes and time investment is also a consideration appellate courts should not overlook." *Wood v. Milyard,* 132 S. Ct. 1826, 1834 (2012);

- Ensuring "that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression." *Exxon Shipping Co. v. Baker,* 554 U.S. 471, 487 n. 6 (2008).

3. GENERAL RULES

3.1. Courts decide legal questions presented to them

- "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 148 n. 10 (2011).

- "Our adversarial system endows the parties with the opportunity—and duty—to craft their own legal theories for relief in the district court. It is the significant but limited job of our appellate system to correct errors made by the district court in assessing the legal theories presented to it, not to serve as a second-shot forum ... where secondary, back-up theories may be mounted for the first time." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir.2011)

3.2 Can't Raise an Issue for first time on appeal.

- "Absent exceptional circumstances, ... we do not consider issues raised for the first time on appeal." *In re Under Seal*, 749 F.3d 276, 285–86 (4th Cir. 2014).

- "When a party in a civil case fails to raise an argument in the lower court and instead raises it for the first time before us, we may reverse only if the newly raised argument establishes 'fundamental error' or a denial of fundamental justice." *Id.*

3.3. Specificity on the Record

- "When put to his mettle, it is the appellant's burden to establish that he has preserved such a claim of error and, relatedly, to furnish the court of appeals with so much of the record of the proceedings below as is necessary to enable informed appellate review." *Faigin v. Kelly*, 184 F.3d 67, 87 (1st Cir. 1999).

- "The onus is on counsel to adequately convey his or her arguments and requests to the court, making an adequate record for appellate review." *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146 (4th Cir. 2012).

- "Vague, arguable references to [a] point in the district court proceedings do not ... preserve the issue on appeal. While we have at times given a liberal reading to pleadings and motions in the trial court, we have consistently turned down the argument that the raising of a related theory was sufficient." *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 721–22 (10th Cir. 1993)

3.4. Obtain a ruling

- "A party seeking to preserve the objection must give the district court an opportunity to rule on the specific ground on which the objection rests." *United States v. Browning*, 533 Fed. App'x 401, 405 (5th Cir. 2013).
- "An issue [must] be presented to, considered [and] decided by the trial court." *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 721 (10th Cir. 1993).

4. SPECIFIC TRIAL ISSUES

4.1. Summary Judgment

- Ideal for avoiding trial, narrowing issues at trial, framing critical questions for court to consider at trial, force opponent to telegraph their legal arguments, provide additional analysis for possible appeal

- Counsel must ensure all evidence is included in motion (or opposition to motion) to avoid a preservation problem

- "Nonmovant cannot attack summary judgment on appeal by raising distinct issues that were not before the district court or by introducing

new materials into the record on appeal." *John v. State of La. (Bd. of Trustees for State Colleges & Universities)*, 757 F.2d 698, 710 (5th Cir. 1985).

4.2. Motion in Limine

- Requirements for preservation vary in different circuits and my depend on whether your motion was granted or denied

- "As a general rule, motions in limine may serve to preserve issues that they raise without any need for renewed objections at trial, just so long as the movant has clearly identified the ruling sought and the trial court has ruled upon it." *United States v. Williams*, 81 F.3d 1321, 1325 (4th Cir. 1996) (citing 21 Charles Alan Wright and Kenneth W. Graham, Jr., Federal Practice and Procedure § 5037, at 195 (1977) ("If a ruling is made at the pretrial stage, it is 'timely' and there is no need to renew the objection at trial.").

- "A pretrial motion in limine to exclude evidence will not always preserve an objection for appellate review. However, a motion in limine may preserve an objection when the issue (1) is fairly presented to the district court, (2) is the type of issue that can be finally decided in a pretrial hearing, and (3) is ruled upon without equivocation by the trial judge. When counsel diligently advances the contentions supporting a motion [in limine] and fully apprises the trial judge of the issue in an evidentiary hearing, application of the rule [requiring parties to reraise objections at trial] ... make[s] little sense." *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993).

- "Several circuits appear to follow our rule that, to preserve error for appeal, an objection or offer of proof as to the subject presented by a motion in limine must be made at trial. Those decisions do so in the context of an overruling of a motion in limine." *U.S. v. Graves*, 5 F.3d 1546, 1552 and n.6 (5th Cir. 1993) (citing cases).

4.3. Admissibility of Evidence

- If an evidentiary ruling "affects a substantial right of the party," Rule 103 requires a party to:
    - (for ruling admitting evidence) timely object or move to strike on the record, and state the specific ground unless its obvious from the context;

  - (for ruling excluding evidence) provide offer of proof, unless substance was obvious from the context
  - DANGER: do you really want to rely on "apparent from the context" to save you? (No, you don't)

- Purpose of offer of proof is for appellate court to weigh the evidence excluded and whether error was committed

- "While an offer of proof is not an absolute prerequisite in every appeal from the exclusion of evidence, it is required where, as here, the significance of the excluded evidence is not obvious or where it is not clear what the testimony of the witness would have been or that he was even qualified to give any testimony at all." *Henry v. Wyeth Pharms., Inc.*, 616 F.3d 134, 151–52 (2d Cir. 2010).

- "It is not the district court's duty to attempt to extract from a party details about what evidence he plans to present. Nor is the court obliged to wait until trial, and see what kind of evidence he shows up with. Rather, when the opposing party has made a motion to exclude potential evidence, the burden falls on the non-movant to describe the content of the evidence and its relevance to the case. …Even if we assume the district court applied an incorrect standard when weighing the exclusion of the challenged testimony, we cannot conclude that the error could have affected the outcome of the case, as is required to warrant reversal." *Id.*

- "Specificity requirement applies with equal force to *Daubert* objections." *Callahan v. Pac. Cycle, Inc.*, 756 F. App'x 216, 223 (4th Cir. 2018).
  - Rule 702 addresses multiple avenues for possible exclusion. Vague references to *Daubert*, Rule 702, or competency are insufficient to preserve objections to the admission of expert testimony.
  - *See Callahan v. Pac. Cycle, Inc.*, 756 F. App'x 216, 223 (4th Cir. 2018) ("mentioning speculation and hinting at the reliability of an expert's testimony is not sufficient to preserve a Daubert argument for appeal");
  - *See United States v. Diaz*, 300 F.3d 66, 75 (1st Cir. 2002) ("*Daubert* assigns to the district court the function of evaluating the proffered expert testimony pursuant to the requirements of Rule 702. [Parties'] general references at trial to *Daubert* or competency, particularly in light of a pretrial challenge limited to the *qualifications* of the experts, was woefully deficient for the purpose

of … raising a challenge to the *reliability* of the experts' methods and the application of those methods under Rule 702.") (emphasis added).

4.4. Sufficiency of the Evidence

- Challenge must comply with Rule 50 via a Motion for Judgment as a Matter of Law.

- Must be made before case submitted to jury (Rule 50(a)), and must be renewed under Rule 50(b).
    - "A postverdict motion is necessary because determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." The requirement "is ... an essential part of the rule, firmly grounded in principles of fairness." *Unitherm Food Systems, Inc. v. Swift–Eckrich, Inc.*, 546 U.S. 394, 401-02 (2006).
    - "There is no requirement that the Rule 50 motion be in writing and be filed with the court; oral motions, in which a party specifically invokes the rule, or perhaps even colloquy with the court, fulfill the requirements of Rule 50 in some instances" as long as "these oral exchanges … comply with the demands of the rule." *Belk, Inc. v. Meyer Corp.*, U.S., 679 F.3d 146, 156–57 (4th Cir. 2012).
    - "Rule 50(b) is construed liberally, and we may excuse 'technical noncompliance' when the purposes of the rule are satisfied." *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 288 (5th Cir. 2007).
    - Rule 50 motion is not condition precedent to appeal of properly preserved argument that does not challenge sufficiency of evidence. 9B Wright & Miller, Federal Practice and Procedure: Civil § 2540 (3d ed. 2008).

4.5. Jury Instructions.

- Rule 51 addresses timing and substance of requests, instructions, and objections.
    - "Belk fails to provide a record citation to where it objected to any given or omitted jury instruction, pointing only to the portions of the Joint Appendix in which it submitted proposed instructions ….A party who objects to an instruction or the failure to give an

> instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection." *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 154 (4th Cir. 2012) (quoting Fed. R. Civ. P. 51(c)(1)).

- A party may assign as error:
  (A) an error in an instruction actually given, if that party properly objected; or
  (B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected. *Rule 51(d)(1)*.

- Ruling-on-the-record language is meant to balance majority view that simply asking for instruction is not enough to preserve for appeal with "trap for the unwary" who fail to object after court makes clear it has considered and rejected instruction on its merits. *United States ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 912 F.3d 731, 737 (4th Cir. 2019).

- Court may "review the failure to grant a timely request, despite a failure to add an objection, when the court has made a definitive ruling on the record rejecting the request." *Id.*

- "Definitive ruling on the record" requires that the record "provide a reviewing court with a sufficient basis from which to determine the district court's rejection was" 1) on the merits (i.e., that court "rejected the *substance* of the proposed instruction, not merely the litigant's choice of words) and 2) "final rather than tentative." *Id.*

- But some circuits have more stringent approach. *See EEOC v. New Breed Logistics*, 783 F.3d 1057, 1075 (6th Cir. 2015); *C.B. v. City of Sonora*, 769 F.3d 1005, 1032 (9th Cir. 2014); *Consumer Prod. Research & Design, Inc. v. Jensen*, 572 F.3d 436, 439 (7th Cir. 2009); *Colon-Millin v. Sears Roebuck De P.R., Inc.*, 455 F.3d 30, 41 (1st Cir. 2006); *Collins v. Alco Parking Corp.*, 448 F.3d 652, 656 (3d Cir. 2006).

5. PLANNING AHEAD

- Incorporate into your trial preparation whatever methods you need to preserve

- Find a method that works for you, considering your style, the size of your legal team, resources at hand, length of trial, etc.

- Checklists and scripts
  - What are the elements of my claims/defenses?
  - What evidence do I need to obtain the legal ruling I want?
  - How will I proffer evidence if need arises? And when?
  - Do I need to renew any of my pre-trial motions? When?
  - Should I list each basis for my objection so I don't forget them?
  - TOC for the bucket of law to be delivered to would-be appellate court
  - Do jury instructions cover all claims and defenses? Do they track with my expert testimony? Etc.
  - Are my objections to opponent's jury instructions sufficient? Do they track with my objections to their experts? Etc.

- Pre-trial drafting
  - Can I anticipate any trial motions?
  - Will any require written argument that I can prepare now?

- Preservation checklists
  - Did I make the objection/present the argument?
    - At the right time?
    - With sufficient specificity?
  - Was it on the record?
  - Did I obtain a ruling?
  - Is renewal required?

- Post-trial motions
  - Did any pre-trial rulings forecast a need for post-trial motions?
  - Do I have legal analysis ready to go?
  - Have I updated my research?
  - Can I organize and prioritize trial events for post-trial motion?
  - Do I have the transcript?