Error-Preservation Strategy in the Trial Court

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Session Title: Adding Ammunition to Your Trial-Preparation Arsenal: How and When to Preserve Error in the Trial Court

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Summary

Losing a big verdict is dispiriting. But even more dispiriting is to discover after that verdict that a potentially winning argument was not timely or adequately preserved on the record and cannot be appealed.

This paper focuses on the *strategy* of error-preservation. It argues that a key part of pre-trial, trial, and post-trial strategy is to plan for and protect the appellate end-game in case of a bad result. Error preservation should not be a mere afterthought when a court makes an adverse ruling, but a part of the overall strategy from the beginning of the case that ensures a built-in back-up plan.

Although the phrase "error preservation" is widely used, it is not an ideal description. As advocates, we are not so much preserving an error made by the trial court as taking steps to ensure the right to complain about a trial court ruling on appeal. Error preservation involves advancing legal arguments for two purposes: (1) trying to convince the court to rule in your favor on legal issues, and (2) if unsuccessful, setting up the appeal.

This is not a comprehensive guide, but a more general approach to error-preservation strategy. Rather than detail the sometime arcane requirements for preservation, which vary from one jurisdiction to another, it focuses on three general topics:

> **1 – General principles for preserving an appellate argument**. Although it is important to know your jurisdiction's specific requirements for preservation in particular situations, following these general principles will preserve an appellate argument most of the time. Part I of this paper summarizes the general principles of error preservation.
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> **2 – Hotspots for preserving error**. It is important to understand what aspects of trial-court proceedings are most frequently appealed and to plan in advance the law strategy for those procedural hotspots. Part II identifies the stages of trial where it is important to focus on preserving error.
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> **3 – The "law" strategy and preservation**. Setting up an appeal is not just about objecting at the right time. The best preparation for an appeal is to plan and implement a legal strategy from the outset of the case. Part III outlines how to employ a robust strategy for preparing for the appeal in the trial court.

I. General principles of preserving an appellate argument

For particular types of rulings, it can be important to know a jurisdiction's technical requirements for error preservation. If you anticipate an adverse trial

ruling, and are not sure how to preserve the right to appeal it, it is useful to look up those requirements in advance.

Nonetheless, it can be difficult to memorize the ways to preserve error for every type of adverse ruling that a trial court may make. The reality is that many error preservation rulings are unexpected and occur in the heat of battle.

To preserve error in those situations, the best way to think about error preservation is to understand its general principles.

First, the purpose of preservation rules is not to weed out the unwary and unprepared so that only the smartest and most prepared lawyers can argue a point on appeal. Rather, the rules reflect important goals of our judicial system:

- Respect for the lower court. *Wheatley v. Wicomico Cty*., 390 F.3d 328, 335 (4th Cir. 2004). Generally, a trial court does not "err" when it is presented with only one course of action. It shows a lack of respect to reverse a trial court ruling as error when the trial court was not given an opportunity to consider a different ruling.

- Avoiding unfair surprise to the other party. *Id*. The other party should be given the opportunity to withdraw a tender of evidence or a request for a legal ruling by understanding the complaint about that evidence or ruling.

- Conservation of judicial resources. *Id*. Appeals, and re-trials, are expensive and time consuming. That time and expense can be saved by rules that require lawyers to call problems to the attention of the trial court in a manner and at a time when the court can correct the problem.

Second, most error-preservation rules derive from a set of four things that lawyers typically need to do to preserve a complaint for appellate review:

A. Make a complaint to the trial court by request, objection, or motion, with sufficient specificity;

B. Make the complaint timely, so that the trial court can correct any error before it is too late;

C. Obtain a ruling from the trial court, on the record, so that it will be clear that the trial court was made aware of the complaint and responded; and

D. Ensure that there is a record for appeal of all the above steps.

Each of these requirements deserves some elaboration.

A. Make a complaint to the trial court with sufficient specificity.

A lawyer must bring to the trial court's attention that an error has, or is about to, occur. "Generally, an appellate court will not consider an issue raised for the first time on appeal." *Tele-Communications, Inc. v. C.I.R.*, 104 F.3d 1229, 1232 (10th Cir. 1997).

The vehicle for making the complaint may depend on the circumstances. Typically, a complaint is raised for appeal by raising a request, motion, or objection:

- **A request** is often appropriate when a party wants to do or ask for something, such as requesting a jury instruction or requesting a ruling on a disputed issue.

- **A motion** asks for legal relief, such as a motion for sanctions, a motion for summary judgment, a motion to strike a witness, a motion for directed verdict, or a motion for entry of judgment.

- **An objection** is a complaint about something that is going on before or during a trial, such as an objection to a summary-judgment affidavit, an objection to a biased venire member being seated on the jury, an objection to an improper question asked of a witness, an objection to a piece of evidence being offered, or an objection to a proposed judgment.

The complaint must be stated in such a way that the trial court is made aware of the precise complaint that will be made on appeal and has the chance to correct it. It is not an effective trial strategy to hide your complaint.

Examples of situations where a party is likely to not preserve a complaint include:

- "a bald-faced new issue";
- "a situation where a litigant changes to a new theory on appeal that falls under the same general category as an argument presented at trial";
- "a theory that was discussed in a vague and ambiguous way";
- "issues that were raised and then abandoned pre-trial"; and
- "an issue raised for the first time in an untimely motion."

Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 721 (10th Cir. 1993).

When preserving a complaint, it is important to be specific. "Arguments raised in the District Court in a 'perfunctory and underdeveloped ... manner' are waived on appeal…." *Kensington Rock Island Ltd. Partnership v. American Eagle Historic Partners*, 921 F.2d 122, 124–25, n.1 (7th Cir. 1990). For example, vague evidentiary objections like "objection," or "hearsay," or "prejudicial" are not likely

to preserve anything without a more specific description of why the evidence or question is objectionable. Similarly, a broad statement like: "That violates the motion in limine" is not likely to preserve anything without more of an explanation.

The requirement of specificity does not mean that lawyers need to cite specific sub-section numbers of statutes or evidentiary rules or pleadings. The specificity required is simply an explanation of the substantive nature of the complaint.

B. Make the complaint timely

A second requirement of error preservation is timeliness. The United States Supreme Court has recognized that a "right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Puckett v. United States*, 556 U.S. 129, 134, 129 S. Ct. 1423, 1428, 173 L. Ed. 2d 266 (2009) (quoting *Yakus v. United States*, 321 U.S. 414, 444, (1944)). The timely raising of claims and objections is required to give the trial court "the opportunity to consider and resolve them." *Id*.

For this reason, in most situations, a complaint must be made before the objectionable event occurs, or at least immediately after it has happened, but certainly before it is too late to correct any harm. If not, even a proper objection will be considered waived.

This principle is best illustrated through examples.

- **A *Batson* challenge to voir dire** must be preserved by a timely objection "*during* the voir dire process, or at the latest before the venire is dismissed." *United States v. Reid*, 764 F.3d 528, 533 (6th Cir. 2014) (emphasis in original).

- **A complaint about the admission of evidence** is preserved only by "a timely objection or motion to strike." FED. R. EVID. 103(a). The objection must be at least "nearly contemporaneous" with the admission to give the trial court an opportunity to cure the claimed error through a curative instruction. *Deppe v. Tripp*, 863 F.2d 1356, 1363 n.10 (7th Cir. 1988).

- **An objection to improper closing argument** must be made at the time of the closing argument or immediately after it. *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 619 (5th Cir. 1988); *see also Portugues-Santana v. Rekomdiv Intern. Inc.*, 725 F.3d 17, 26 (1st Cir. 2013) (holding that, when there is no timely objection, claims of improper closing argument are forfeited and may be reviewed only on the basis of plain error).

- **An objection to jury charge instructions** ordinarily must be made after the court informs the parties of its proposed jury instructions and before instructing the jury. FED. R. CIV. P. 51(b)(2); 51(c)(2). Otherwise it is waived.

C. Obtain a ruling

The federal rules require that, at a minimum, a party make the court aware of the complaint. *See* FED. R. CIV. P 46 ("When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection."). "[T]heories not raised squarely in the district court cannot be surfaced for the first time on appeal." *McCoy v. Mass. Inst. of Technology*, 950 F.2d 13, 22 (1st Cir. 1991). "This prophylactic rule requires litigants to spell out their legal theories face-up and squarely in the trial court; if a claim is 'merely insinuated' rather than 'actually articulated,' that claim ordinarily is deemed unpreserved for purposes of appellate review." *Iverson v. City of Boston*, 452 F.3d 94, 102 (1st Cir. 2006) (quoting *McCoy*, 950 F.2d at 22). Hinting at an argument, without squarely requesting a ruling, does not preserve anything.

The best practice is to obtain a ruling by the court on the record. A ruling on the record demonstrates to the appellate court that the trial court was made aware of the complaint and addressed it.

Any lawyer should strongly prefer an express ruling rather than an implicit ruling or a failure to rule after a motion, objection, or complaint was made. Nonetheless, some judges occasionally will not rule. In that situation, the record should reflect that the party attempted to obtain the ruling. The clearest way to do this is to object to the refusal to rule on the record.

D. Ensure that the record reflects all of the above steps.

An appellate argument can be meritorious and preserved by a timely objection or request, yet lost on appeal because of "holes" in the appellate record. If the appellate record does not reflect the objection or complaint, the appellate court cannot consider it. In trial and at hearings that may result in an appealable ruling, it is critical to remember the appeal and ensure that all necessary parts of the hearing are recorded.

When making an objection or complaint with an eye to preserving it for appeal, always glance at the court reporter to make sure that the complaint is being made on the record. In the heat of battle, lawyers often present their arguments without realizing that the discussion is off the record. If an argument and ruling occur off the record, make sure that you repeat your objection or complaint when on the record, and then also attempt to secure a ruling on the record

II. Hotspots for error preservation

The following are the stages of trial when I most often see appellate issues arise, or when trial lawyers are most likely not to preserve an appellate complaint. It is important to plan in advance the legal and preservation strategy for these stages.

A. Motions for summary judgment

Summary judgments are a hotspot because they are a frequent basis for appeal. Justice Alito has noted, "In my experience, a substantial percentage of the civil appeals heard each year by the courts of appeals present the question whether the evidence in the summary judgment record is just enough or not quite enough to support a grant of summary judgment." *Tolan v. Cotton*, 134 S. Ct. 1861, 1868–69 (2014) (J. Alito concurring).

Given the frequency of summary judgments, and summary judgment appeals, it is critical for both nonmovants and movants to ensure the motion and response contain their best arguments and evidence. The courts of appeals rarely consider new arguments on appeal.

"The 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); *see also Johnson v. Sawyer*, 120 F.3d 1307, 1316 (5th Cir. 1997) ("[O]n appeal, we will not consider a new ground in opposition to … summary judgment."). The nonmovant must "set forth specific facts sufficient to raise a genuine issue for trial." *Weicherding v. Riegel*, 160 F.3d 1139, 1142 (7th Cir. 1998). Appellate courts frequently decline to consider arguments or evidence that were not presented to the trial court until after summary judgment was granted. *See., e.g., Reardon v. Peoria & Pekin Union Ry. Co.*, 26 F.3d 52, 54–55 (7th Cir. 1994) ("Plaintiff did not present any such argument to the district court until after that court had entered summary judgment, and it is accordingly not available here.").

This is a corollary of the general rule that complaints to the trial court must be specific. A nonmovant ordinarily must give specific reasons why a summary judgment should not be granted in order to argue those reasons on appeal.

Similarly, appellate courts ordinarily will not consider a new ground in *support* of summary judgment that was not raised before summary judgment was granted. *Johnson*, 120 F.3d at 1316. "[N]ew grounds raised by an appellee in defense of summary judgment" generally should not be considered by an appellate court when "the parties were not afforded an opportunity to develop the issue below, and it was not implicit or included in the issues or evidence tendered below, so that the party was not on notice of the need to meet it, and the record appears not to be adequately developed in that respect." *Fed. Deposit Ins. Corp. v. Laguarta*, 939 F.2d 1231, 1240 (5th Cir. 1991).

B. Motions in limine

In many jurisdictions where a ruling on a motion in limine is prophylactic, and only requires that evidence shall not be mentioned to the jury until the other party has an opportunity to object, a ruling on a motion in limine preserves nothing. For instance, if a motion for limine is overruled on a point, the party opposing the admission of that evidence still must object at trial to preserve the error. *Blount v. Bordens, Inc*., 892 S.W.2d 932, 944 (Tex. App.—Houston [1st Dist.] 1994), *rev'd on other grounds*, 910 S.W.2d 931 (Tex. 1995); 579 So.2d 908, 909 (Fla. App. 1991). Or if a motion in limine is granted and evidence is excluded, the party seeking to introduce the evidence still must offer the evidence on the record to preserve error in its exclusion. *See Roberts v. Tatum*, 575 S.W.2d 138, 144 (Tex. Civ. App.— Corpus Christi 1978, writ ref'd n.r.e.).

Under the Federal Rules of Evidence, a pretrial ruling on a motion in limine can preserve a complaint if it is a "definitive ruling." FED. R. EVID. 103 ("Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.").

The problem is often determining, based on the appellate record, whether the pretrial evidentiary ruling was a "definitive ruling" or a tentative, preliminary, or merely prophylactic ruling. To decide whether a ruling is definitive, appellate courts tend to look at factors such as:

- Whether the court made clear that the ruling was "definitive" or "tentative." See, e.g., *Adkins v. Mireles*, 526 F.3d 531, 542 (9th Cir. 2008) (holding that, after indicating a pretrial ruling was "tentative," the failure to make a later offer of proof barred appellate review); *U.S. v. Moore*, 311 Fed. Appx. 957, 958 (9th Cir. 2009) (holding a ruling was not definitive when the trial judge said he would rule on each document at the time it was offered in evidence); *United States v. Williams*, 561 F.2d 859, 863 (D.C. Cir. 1977) (holding that error was preserved by pretrial ruling where "the problem has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views are…"); and

- Whether the issue was fully presented or briefed before the pretrial ruling. *Pineda v. State*, 88 P.3d 827 (2004) (holding that complaint was preserved when both parties fully briefed the issue and the trial court ruled that it would admit defendant's prior convictions).

The best practice is to avoid altogether any argument about whether the trial court's pretrial ruling was definitive. To ensure the error is preserved, it is always best to re-urge the complaint about the admission of evidence, or seek its introduction, on the record at trial.

C. Jury selection

Although judgments rendered after trial are rarely reversed on voir dire errors, they are a hotspot for error preservation because the appellate complaint is frequently waived.

The most common complaint about jury selection concerns *Batson* challenges to the opposing side's use of a peremptory strike in a purposeful manner to exclude jurors of a race, gender, or ethnicity. *See Batson v. Kentucky*, 476 U.S. 79 (1986).

Batson claims should be raised when the trial court still has the ability to correct the error. The Supreme Court has stated that "[t]he requirement that any *Batson* claim be raised not only at trial, but in the period between the selection of the jurors and the administration of their oaths, is a sensible rule" *Ford v. Georgia*, 498 U.S. 411, 422–23 (1991). A *Batson* complaint should be raised before the panelist at issue has been dismissed and before the jury is seated.

Many *Batson* complaints are waived because of a failure to follow the procedural requirements needed to preserve the complaint. Preserving a complaint is a four-step process:

1. Immediately after the exercise of peremptory strikes, the complaining party must make a prima facie case of racial or gender discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 230 (2005).

2. The party exercising the strikes then must present a reason for the strikes that is neutral as to race, gender, or ethnicity. *Id.*

3. Then the challenging party may rebut the explanation offered in support of the strikes, the trial court must determine whether purposeful discrimination occurred. *United States v. Davis*, 816 F.2d 433, 434 (8th Cir. 1987) ("The defendant must then be given the chance to rebut the proffered explanation as a pretext."); *United States v. Rudas*, 905 F.2d 38, 41 (2d Cir. 1990) ("Once the Government has offered reasons for its peremptory challenges, defense counsel must expressly indicate an intention to pursue the Batson claim.").

4. The trial court then should articulate the reason for overruling the *Batson* objection—or the challenging party must complain about its failure to do so. *See Hopson v. Fredericksen*, 961 F.2d 1374, 1377 (8th Cir. 1992) (holding that issue was not preserved for appeal because, after "the trial judge listened to [appellee's] reasons for striking the black venireman" the appellant "did not object nor request the trial judge to articulate her reasons on the record for overruling the *Batson* objection.").

It is rarely possible to predict before trial whether *Batson* will be an issue. For this reason, it is advisable to bring to trial a checklist that can serve as a quick reminder of the *Batson* procedure.

D. Evidentiary rulings during trial

Evidentiary rulings are rarely a basis for reversal on appeal. One reason is that trial courts have broad discretion and do not err by admitting or excluding evidence unless "a substantial right of the party is affected." *See* FED. R. EVID. 103(1). A second reason is that the rules for preserving error are not followed. *See* FED. R. EVID. 103(1)(a) – (b).

The requirements for preservation depend on the type of complaint.

Complaints about improperly admitted evidence. To preserve an objection to improperly admitted evidence, the rules require (1) "a timely objection or motion to strike" that (2) "appears on the record," (3) "stating the specific ground for objection, if the specific ground was not apparent from the context." FED. R. EVID. 103(a)(1). Lawyers should be reluctant to rely on the "apparent from the context" clause and explain the specific ground for the objection whenever possible. Ideally, the objection should not only identify what specific evidence is objectionable, but also why it is objectionable.

Complaints about excluded evidence. To preserve error in the exclusion of evidence, the offering party must make an offer of proof of the "substance of the evidence," unless it is "apparent from the context"—and, again, that phrase should rarely be trusted. FED. R. EVID. 103(a)(2).

In the case of documentary evidence, when possible, the document itself should be offered and marked, and counsel should be sure to include those documents in the appellate record.

For testimonial evidence, an offer should be made, on the record. Most courts permit a narrative form with counsel describing what the witness would testify to if allowed. *See McQuaig v. McCoy*, 806 F.2d 1298, 1301 (5th Cir. 1987) ("While the evidence must be offered to the court, we do not require a formal proffer; instead, the proponent of excluded evidence need only show in some fashion the substance of the proposed evidence."). However, the court or a party may demand that the offer be made in question-and-answer form. *Newton v. Consol. Gas Co. of New York*, 258 U.S. 165, 178 n.1 (1922) (approving narrative summary, "save that if either party desires it, and the court or judge so directs, and part of the testimony shall be reproduced in the exact words of the witness.").

Reliance on complaints by co-parties. In multi-party cases, a party should be careful about relying on the objections or offers of proof by a co-party. In some courts a party may not complain on appeal about a co-party's evidentiary objection or complaint. *See, e.g., U.S. v. Faul*, 748 F.2d 1204, 1217 n.10 (8th Cir. 1984)

(holding that defendant did not preserve complaint based on co-defendant's motion for mistrial on admission of evidence); *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1331 (holding that objections by co-defendant did not preserve error). Other courts hold that an objection by one party may be the basis for an appellant complaint by another party without further objection. *See, e.g., Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 496-97 (5th Cir. 1982); *Kenney v. Lewis Revels Rare Coins, Inc.*, 741 F.2d 378, 382 (11th Cir. 1984).

Given the split of authority on this issue, the best practice is for each party to make its own objections.

E. Motion for judgment as a matter of law

Many legal arguments, such as arguments challenging the sufficiency of the evidence, must be preserved through a motion for judgment as a matter of law (JMOL). To be preserved for appeal, any ground for JMOL must be asserted at *both* of two stages:

> 1 – A motion for judgment as a matter of law, which can be "made at any time before the case is submitted to the jury." FED. R. CIV. P. 50(a)(2). "The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment." *Id*.
>
> 2 – A renewed motion for judgment as a matter of law, which can be made after the case has been submitted to the jury, but "not later than 28 days after the entry of the judgment—or if the motion addresses a jury issue not decided by a verdict, not later than 28 days after the jury was discharged…." FED. R. CIV. P. 50(b).

For many advocates, the biggest hurdle is in raising all specific issues that will be raised on appeal in the initial motion for JMOL, before the case is submitted to the jury. "A motion under Rule 50(b) [renewed motion for JMOL] is not allowed unless the movant sought relief on similar grounds under Rule 50(a) [Motion for JMOL] before the case was submitted to the jury." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5 (2008). The problem for defense counsel is that they frequently identify an insufficiency in a plaintiff's proof only on reflection, after the case has been submitted to the jury, when it is too late to raise the complaint.

A best practice is to prepare a draft motion for judgment as a matter of law *before* trial in anticipation of what the evidence may or will be. The motion then should be modified during trial. In a complex case, it can be a serious mistake to consider the motion for the first time at the close of evidence.

F. Jury charge.

The charge conference is a particularly critical juncture for preserving and waiving error. In federal courts, the preservation of error for jury-charge complaints is governed by Federal Rule of Civil Procedure 51(d):

> **(1)** ***Assigning Error***. 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.
>
> **(2)** ***Plain Error***. A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

FED. R. CIV. P. 51(d) (emphasis in original). As in other situations, it is almost never advisable to rely on the rare possibility that a ruling will be "plain error." Instead, the best strategy is to attempt to preserve the error under Rule 51(d)(1).

For the jury charge, the timing of complaints is critical. Under Rule 51(b) the trial court is required to inform the parties of its proposed instructions and proposed actions on the requests before instructing the jury. FED. R. CIV. P. 51(b)(1). The court also is required to give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered to the jury. FED. R. CIV. P. 51(b)(2). An objection is timely if it is made during this opportunity to object. FED. R. CIV. P. 51(c)(2)(A).

The only other situation in which an objection is timely is if a party was not informed of an instruction or action before the opportunity to object, and the party objects promptly after learning of that instruction or action. FED. R. CIV. P. 51(c)(2)(B).

The rules also specify how to object. "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." FED. R. CIV. P. 51(c)(1). "[T]o satisfy Rule 51 'the judge must be told precisely what the problem is, and as importantly, what the attorney would consider a satisfactory cure.'" *Parker v. City of Nashua*, 76 F.3d 9, 12 (1st Cir. 1996). "And the lawyer must propose a lawful instruction or correction, and not one that substantially overstates the law in that party's favor." *Id*.

The procedures required under Rule 51 are a minefield for waiving error. As one court noted:

> Rule 51 is quite strict. Even if the initial request for instruction is made in detail, the requesting party must object again after the instructions are given but before the jury retires for deliberation. "[I]t is not enough for counsel in renewing an objection merely to refer back generically to objections made before the charge."

Foley v. Commonwealth Elec. Co., 312 F.3d 517, 521 (1st Cir. 2002) (citations omitted).

The best approach is to research and consider the charge extensively in advance of trial. A party should draft any instructions it may want to request before trial. And when learning what the other side's requests may be, it is important to research whether they are proper. Also, giving the timing of the charge conference—usually at a time when trial counsel is preparing for closing argument—it is often helpful to assign a different lawyer the task of researching and drafting charge requests and specific, developed objections, as well as following the precise requirements of Rule 51 for preserving error.

G. Post-verdict motions

After an adverse verdict, a party should consider six possible post-verdict motions or requests:

1. Renewed motion for JMOL under Rule 50(b). See supra Part II.F.
2. Motion for new trial under Federal Rule of Civil Procedure 59(a).
3. Motion for remittitur of excessive damages under Rule 59.
4. Motion to alter or amend judgment under Rule 59(e).
5. Motion to amend the trial court's findings after a bench trial under Rule 59(b)
6. Motion for relief from judgment under Rule 60.

The first four of these items must be filed within 28 days of the judgment. FED. R. CIV. P. 50(b); 52(59(b), 59(e).

As discussed above, a renewed motion for JMOL is limited to re-asserting the points raised in the motion for JMOL during trial. *See supra* Part II.F.

Motions for new trial, and motions for remittitur, are often based on the weight of the evidence. The trial judge has "discretion to grant a new trial if the verdict appears … to be against the weight of the evidence." *Gasperini v. Center of Humanities, Inc.*, 518 U.S. 415, 433 (1996). "This discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction" — also known as remittitur. *Id.*

Motions for new trial also can be used to address other complaints, such as jury misconduct or newly discovered evidence. *See, e.g.*, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017) (regarding motion for new trial as vehicle to complain about juror racial bias); *U.S. v. Hernandez-Rodriguez*, 443 F.3d 138, 145-46 (1st Cir. 2006) (regarding motion for new trial for newly discovered evidence).

Motions to alter or amend a judgment may be used as a vehicle to request the court to reconsider "matters properly encompassed in a decision on the merits." *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982). It may be used to correct a court's failure to award relief to which it previously determined a party was entitled. *See Hicks v. Town of Hudson*, 390 F.2d 84 (10th Cir. 1967).

A motion to amend findings should be used to complain about a court's failure to make an essential finding. *See Armstrong v. Collier*, 536 F.2d 72, 77 (5th Cir. 1976). But Rule 52 specifies that a motion to amend findings is not required for a party to "later question the sufficiency of the evidence supporting the findings." FED. R. CIV. P. 52(a)(5).

A judge's authority to grant relief from a judgment must be "made within a reasonable time" and for certain specified grounds, no more than a year after the entry of judgment. FED. R. CIV. P. 60(c). Grounds may include mistake, newly discovered evidence, fraud, a void judgment (such as for lack of jurisdiction), and the satisfaction, release, or discharge of the judgment. FED. R. CIV. P. 60(b). The court's "authority to amend the judgment is perhaps clearest where the judgment as entered merely failed to express the court's intention." *F.A.C., Inc. Cooperativa de Seguros de Vida*, 449 F.3d, 185, 191 (1st Cir. 2006).

III. Error preservation as part of the "law" strategy

Error preservation should not be viewed in isolation or considered only at the last minute in response to an adverse ruling. Rather, it should be an integral part of overall strategy of a case.

An essential part of the long-term strategy for a case should be the legal issues that may arise on appeal. Litigation strategy has two components: facts and law. Many lawyers approach litigation by exploring the facts first and law second. They explore the facts through discovery and then developing a legal strategy, including the strategy for appeal, late in the process. But to ensure the best chance of success at trial and on appeal, especially in a big or complex case, it is critical to incorporate a law strategy throughout the litigation process.

A necessary part of that law strategy is error preservation. Lawyers should identify as early as possible their best legal arguments for disposing of the case without a jury verdict or for prevailing on appeal. Then they should identify in advance how and when to present their legal arguments so that they are preserved for appeal.

The following is a brief overview of "law" strategy that incorporates advanced planning for preservation of error.

A. Identify law issues early as a template for discovery and presentation of evidence.

Winning the appeal often requires the right evidence. As an appellate lawyer, I often see trial lawyers approach a case with too optimistic a view of how the courts will apply the law, only to find after trial that the appellate court applies a different legal standard that the evidence presented does not meet. Exploring the appellate possibilities early can help the trial team discover, develop, and present the best evidence to support the case on appeal.

B. Develop evidence to support legal rulings.

Identifying the key legal arguments early can help the trial team predict potential legal rulings (good or bad) and identify the type of evidence that will be necessary to support or reverse that ruling on appeal

One example is summary judgment. Focusing on the law strategy early can help identify what evidence is necessary to defeat a claim or defense in a potential motion for summary judgment. And focusing on the law strategy can help identify what evidence is needed to create a fact issue that will defeat a no-evidence motion for summary judgment, a motion for judgment as a matter of law, or a sufficiency challenge on appeal.

The law strategy also should inform preparation for trial. I recommend preparing a set of comprehensive law memo that analyzes the larger legal themes and important nuances of the claims and defenses that will be tried. Such a memo helps organize the trial team's strategy and provides a useful tool for quickly producing trial briefs, motions for judgment as a matter of law, charge instructions, and the like during intensive trial periods. It also allows for a consistent message on evidentiary and substantive issues that the can help ensure that errors are preserved at each stage of the litigation process.

C. Trial preservation checklists.

As discussed in Part II, error is often waived during certain hotspots in the trial process, such as *Batson* challenges in voir dire or preservation of complaints about excluded evidence. One way to address these problems is to create and bring to trial checklists or scripts for particular preservation situations.

When I assist trial teams at trial with error preservation, the most frequent issue that I see trial lawyers waive are complaints about the exclusion of evidence. So I ultimately prepared a series of scripts to hand to the trial team—or to read myself—when making an offer of proof under various scenarios. The following is

an example of one of those scripts for preserving a complaint about excluded testimony on direct examination:

Excluded testimony (direct)

Timing: Do this before the charge is read *and* while our witness is still available – in case we have to do Q&A or the Court grants the offer.

- "Defendants make an offer of proof regarding the testimony of _____. To expedite trial, I will describe the testimony that the witness would have given unless opposing counsel insists that we use extra time by putting the witness on the stand." [If Plaintiff objects, do the offer in question and answer format]
- "The Court has excluded testimony by Mr./Ms. _____ about _____. Mr./Ms. _____ would have testified that _____."
- [Explain briefly the purpose of the evidence, why it is admissible, and why exclusion harms Defendants, for instance:]
    - "This testimony is relevant to the issue of ____ because it shows _____.
    - My client will be harmed by the exclusion of this testimony because _____ [i.e., no other evidence before the jury proves this relevant information]"
- "We urge the Court to reconsider its ruling excluding this testimony and ask that the witness be permitted to testify in front of the jury."
- [If the court has not ruled on the offer] "Your honor, we request a ruling on this offer."

Note that this checklist is designed to hit all the preservation highlights – when to make the complaint, how to make it specifically, and how to request a ruling.

D. Pretrial briefing of likely legal issues during trial.

Similarly, it is critical to prepare in advance for likely legal issues during trial. When I anticipate an issue, my frequent practice is to prepare a draft bench memorandum with authorities to offer when the issue arises at trial.

Although that memo may need to be edited slightly depending on what events occur at trial, preparing a draft regarding anticipated issues in advance can save precious time during trial and ensure the issue is thoroughly briefed.

E. Early preparation of the draft jury charge.

It is surprising how many lawyers do not prepare a draft jury charge until it absolutely must be prepared. And it usually is not required by the court until just before or during trial.

Yet there are many benefits to preparing a draft charge early, even before discovery, and revisiting it periodically as the case progresses. A draft charge is the best map and plan of the law and a useful guide for the fact strategy.

Identifying pivotal fact issues. A draft jury charge may be the single best tool to identify the pivotal factual issues to develop in discovery. This is because an accurate draft charge shows the questions that the jury will be asked. It is critical that the "fact strategy" for the case be focused on these ultimate questions to be answered by the jury.

For the defendant, developing the charge early helps identify the best opportunities to create holes in that case and to develop defenses. Preparing the charge focuses attention on questions that need to be considered *before* discovery.

For instance, appellate lawyers are often brought into a case right before trial to draft the charge. We frequently raise possible defenses or claims that might fit the facts, but that the trial team has never considered and never developed. Preparing the charge early would prevent that sort of late revelation and help maximize the possibilities of discovery.

Identifying key words and phrases. Jurors often struggle with the court's charge because it uses legal terms and phrases with which jurors are unfamiliar. Typically, the charge defines those terms and phrases. Still it often can be difficult for jurors to understand this language and apply it to the facts.

The problem is amplified when witnesses use a word or phrase for a concept that is different from the word or phrase used for the same concept in the ultimate jury charge.

Preparing a draft charge early helps the lawyers frame discovery questions using the likely language of the charge—the words that are most likely be used in the charge. This helps make the answers more understandable to the jury in light of the questions that they ultimately will be asked by the court.

Expert testimony. Similarly, one key to getting effective expert testimony from your experts is asking the expert to answer the right questions. The best guide to the right questions is often the draft charge.

One illustration of this issue concerns expert testimony that applies the facts to a particular legal standard. If the expert provides an opinion applying the facts to one standard, but the charge asks the jury to answer based on a different legal

standard, the jury may not know how to apply the expert opinion to their question. For instance, if the ultimate jury question will ask about causation in terms of "proximate cause," it helps to have the expert answer questions about causation in terms of proximate cause rather than using some other causation term.

Preparing for the jury-charge conference. Of course, the biggest benefit of preparing draft charge instructions early is to identify issues to prepare for the jury-charge conference and objections. Charge error often is not preserved unless the legal basis for charge error is carefully considered before trial.

F. Summary judgment: the pre-trial appellate brief.

The benefits to your client of winning a summary judgment or partial summary judgment are obvious:

- Avoid the time, expense, risks, and potentially bad publicity of trial.
- Narrow the scope of trial for the same reasons.
- End and win the litigation.
- Pressure the other side to settle by demonstrating the weakness of their case.

But if the benefits of summary judgment are so obvious, why do so many appellate lawyers see cases that could have been good candidates for summary judgment, but no motion was ever filed?

For instance, most cases where a trial court grants a judgment as a matter of law or the appellate court reverses on grounds of sufficiency are cases that could have been won at the summary-judgment stage. Of course, there are many cases in which the trial judge denies summary judgment improperly. But I see just as many cases where a sufficiency point succeeds on appeal after a trial, yet was never raised in a motion for summary judgment.

The obvious benefit of summary judgment is avoiding the expense of trial. But even when summary judgment is denied, raising an "as a matter of law" issue early can cause the trial judge to begin considering the issue, possibly resulting in a judgment as a matter of law during or after trial.

Most defendants would benefit from taking a hard look at the summary-judgment potential for their case early enough to seek summary judgment.

IV. Conclusion

Error preservation may involve a complex set of rules. But three practical suggestions can help ensure arguments are preserved for appeal:

- To preserve an appellate complaint in most situations, remember the four general principles of preservation:

1. make a complaint to the court with sufficient specificity;
2. make it timely;
3. obtain a ruling, or at least request a ruling;
4. do all of the above steps on the record.

- Be aware of hotspots where the rules are more rigorous about preserving error or where error is often waived, such as in the jury charge or for preserving a record of excluded evidence—and plan ahead for those hotspots.

- Plan the law strategy case of your case early and include in that plan a strategy to preserve potential appellate issues before, during, and after trial.