

Strafford

Presenting a live 90-minute webinar with interactive Q&A

Preserving Civil Issues for Federal Court Appeals: Avoiding Waiver, Making Motions and Objections, Presenting Issues on Appeal

TUESDAY, JUNE 13, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Jerrold J. Ganzfried, Founder, **Ganzfried Law**, Washington, D.C.

Jamie Billotte Moses, Senior Counsel, **Holland & Knight**, Orlando

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-869-6667** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 35.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

PRESERVING CIVIL ISSUES FOR APPEAL IN FEDERAL COURT:
TOOLS TO OPTIMIZE THE PROSPECTS FOR SUCCESS

Jerrold J. Ganzfried
GANZFRIED LAW
5335 Wisconsin Avenue, N.W.
Suite 440
Washington, DC 20015
202-486-2004
JJG@ganzfriedlaw.com
www.ganzfriedlaw.com

APPELLATE PLANNING AS A COMPONENT OF LITIGATION STRATEGY

From the beginning

During discovery and pre-trial

During trial and post-trial proceedings

FOUR PILLARS OF AN APPELLATE ISSUE

Preservation

Record and Legal Support

Standard of Review

Prejudice

SCENARIO

Thursday morning: trial judge reverses ruling on admissibility of a document and announces that a change in schedule will require presentation of closing arguments and submission of the case to the jury on Friday.

DURING DISCOVERY AND PRE-TRIAL

Potential Pre-Trial Appeals

Rule 12 Motion

Class Certification (Rule 23(f))

Preliminary Injunction

§1292(b)

Summary Judgment

Mandamus

Rule 54(b) Judgment

Third Party Discovery Disputes

Immunity

CAUTIONS

Informal procedures

- Telephone conferences
- Untranscribed conferences
- Correspondence (letters, emails, faxes)
- Conferences in lieu of motions

Short cuts

- “Standing objections”
- Deemed objections

CAUTIONS

Idiosyncratic local customs

➤ Motions

➤ Objections

➤ Jury selection

Absence of definitive rulings

Insufficient explanation for rulings

POTENTIAL TRAPS FOR THE UNWARY

Untranscribed hearings/ Off-the-record colloquies

Telephonic conference calls

Correspondence not reflected in filed documents

“Running” objections; “deemed” objections

“Skeleton” motions not supported by written briefs

Trial courts that require a request for permission to
file motions

Preserving Civil Issues for Appeal in Federal Court: Tools to Optimize the Prospects for Success

*Jamie Billotte Moses
Holland & Knight LLP
200 S. Orange Avenue, Suite 2600
Orlando, FL 32801
407-244-5103
Jamie.moses@hklaw.com*

Begin preparing for the appeal as soon as you get the case

- ✓ Before anything else, develop your “roadmap”
- ✓ Analyze all legal theories supporting both sides
- ✓ List essential elements of each cause of action and affirmative defense
- ✓ Identify burden of proof as to each issue
- ✓ Note whether any issue is subject to interlocutory review and the standard of review for the issue
- ✓ Use your roadmap as a checklist for your pleadings, discovery, and motions

Change in the Law -

- ✓ Is there a realistic possibility of a change in the law?
- ✓ Raise the issue, with an acknowledgment of the existing law
- ✓ Of course, be careful what you wish for

Rule 12(b) Motions

✓ Issues which must be raised in a preliminary motion:

lack of subject matter jurisdiction

lack of personal jurisdiction

improper venue

insufficient process

insufficient service of process

failure to state a claim upon which relief can be granted

failure to join a party under Rule 19.

Rule 56 Motion - Summary Judgment

- ✓ Merely moving for summary judgment pretrial, does not preserve the issue for appeal
- ✓ To preserve argument for appeal, must move for judgment as a matter of law under Rule 50(a) before the case is submitted to the jury and renew the motion after trial pursuant to Rule 50(b)

Motions in Limine

- ✓ Serve many purposes even if denied

 - limit objections to be made in front of jury

 - reveal opposing counsel's evidence/strategy

 - obtain stipulations from opposing counsel regarding certain issues

- ✓ Danger zone – judge refuses to rule on motion

- ✓ Even if you lose on your motion, still object at trial to be safe

- ✓ Denial of motion in limine is only preserved as to those issues raised at that time, if new grounds arise during trial raise them

When the Judge is making it hard to do your job....

✓ Examples:

“None of my rulings is final”

“Let’s discuss that later”

“Let’s go off the record....in my chambers...give the court reporter a break”

The non-verbal cues

When the Judge is making it hard to do your job....

✓ Best strategy:

clear

concise

case law

Always remember the jury is watching.

How do deal with a trial plan that is inherently unconstitutional/prejudicial

✓ Object at every stage of the trial:

Pre-trial

At the close of the evidence

Post-trial

Always offer a less problematic alternative

Include your objection in any submission to the court

How to preserve each objection at trial

✓ Improper Admission of Evidence

motion in limine

contemporaneous objection – Rule 46 – must state grounds

request a limiting instruction if overruled

request a limiting instruction if sustained

be careful of standing objections

How to preserve each objection at trial

✓ Improper Exclusion of Evidence

offer of proof – must put forth the substance of the evidence – be careful of generalities – show how it is relevant and how it will prejudice you not to have it in

Rule 103 – get a definitive ruling

Know your circuit's law – some circuits do not require an offer of proof if the court has ruled on the issue pre-trial pursuant to a motion in limine (but still safe to make the proffer)

How to preserve each objection at trial

✓ Improper Argument

anticipated argument – motions in limine

contemporaneous objection

if you win, seek a curative instruction

if you lose, move for a mistrial

How to preserve each objection at trial

- ✓ **Inconsistent Verdict**

 - analyze whether it's truly inconsistent versus inadequate or excessive

 - object before the jury is released – key: if the jury can fix it right then

- ✓ **Insufficiency of the evidence**

 - move for judgment as a matter of law

- ✓ **Excessive damage**

 - Post-trial motion

How to preserve each objection at trial

- ✓ Jury Instructions – preliminary issues

 - Rule 51(a) – very clear on what to do and when

- ✓ Considerations when drafting instructions

 - pattern v. unique

 - have variations

 - be prepared to explain why unique instruction is need (in writing, on the record)

How to preserve each objection at trial

✓ Jury Instructions - Error

(1) when an erroneous instruction is given

Rule 51(b)(2) – object on the record; provide alternative

(2) when the court refuses to give an instruction

Rule 51(d) – if a diversity case – instructions are procedural and thus federal law applies; under federal law, a party is entitled to a jury instruction that accurately and fairly sets forth the current status of the law.

Refusal to give an instruction is error if the instruction is (1) correct, (2) not otherwise covered, and (3) the failure to give it impair the party's case.

Motions for judgment as a matter of law under Rule 50

- Start drafting the motion early, but amend to conform to evidence presented at trial
- File a written motion
- Be as inclusive as possible; use your checklist
- Renew arguments made in prior motions, particularly those made at summary judgment phase
- Rule 50(a) motion must be made before the case is submitted to the jury
- Rationale for Rule 50(a) is to allow other party to cure deficiencies
- To preserve appeal of insufficiency of evidence, arguments must be renewed post-trial under Rule 50(b)

PRESERVING CIVIL ISSUES FOR APPEAL IN FEDERAL COURT:
TOOLS TO OPTIMIZE THE PROSPECTS FOR SUCCESS

Jerrold J. Ganzfried
GANZFRIED LAW
5335 Wisconsin Avenue, N.W.
Suite 440
Washington, DC 20015
202-486-2004
JJG@ganzfriedlaw.com
www.ganzfriedlaw.com

▶ Transcript/Record Checklist

- ▶ Accuracy
- ▶ Comprehensiveness
- ▶ Reflects rulings on all applications to admit evidence into the record
- ▶ Reflects objections that will be required to establish issue preservation (or your opponent's waiver)
- ▶ Contains all exhibits and demonstratives that will play a role on appeal and reflects admission (where appropriate)

TRIAL TRANSCRIPT REVIEWERS

Know what transpired at trial

Understand the significance of events at trial

Excellent proofreading skills

KNOW WHAT TRANSPIRED AT TRIAL

This is not mere proofreading. The reviewer should detect transcription that does not sound right, or does not correspond to the reviewer's recollection.

Encourage frequent inquiries to a trial lawyer who was present in the courtroom and can confirm what actually occurred.

UNDERSTAND THE SIGNIFICANCE

The transcript may not be clear on vital points, such as whether an objection was raised (and ruled on), or whether an exhibit was admitted into evidence, or whether the court reporter picked up a witness' full answer when interrupted by a multi-person colloquy. Make sure such items are detected and accurate.

EXCELLENT PROOFREADING SKILLS

An obvious point that should go without saying. But worth saying nonetheless.

TRANSCRIPT CHECKLIST

Accuracy

Reflects rulings on all applications to admit evidence into the record

Reflects objections that will be required to establish issue preservation (or your opponent's waiver)

Contains all exhibits and demonstratives that will play a role on appeal and reflects admission into evidence (where appropriate)

EXAMPLE 1

The Court: Are there any objections to the jury instructions?

EXAMPLE 1

The Court: Are there any objections to the jury instructions?

Lawyer: No....

EXAMPLE 2

The Court: Your opponent established....

The Court: Your opponent proved....

The Court: The case law is against you on.....

The Court: You conceded....

EXAMPLE 2

The Court: Your opponent established....

A: Yes

The Court: Your opponent proved....

A: Yes

The Court: The case law is against you on.....

A: Yes

The Court: You conceded....

A: Yes

FOUR PILLARS OF AN APPELLATE ISSUE

Preservation

Record and Legal Support

Standard of Review

Prejudice

PRESERVATION

Know what is needed in your jurisdiction to preserve an issue for appeal. These requirements can be idiosyncratic and, even within a single jurisdiction, can differ from issue to issue (*e.g.*, evidentiary objections, jury instructions, voir dire, judgment as a matter of law, juror misconduct).

RECORD AND LEGAL SUPPORT

Make sure you know what is needed in your jurisdiction to prevail on any given issue. Preserving the issue is only the first step. Preserving it in a way that optimizes your prospects for success on appeal is the ultimate, practical goal.

STANDARD OF REVIEW

It is important for the trial team to be mindful of the applicable appellate standards of review. For example, if a trial judge exercises discretion in ruling in your favor on a point, try to make sure that the record reflects the discretionary nature of the decision (which will provide a more deferential standard of review than a decision issued as a matter of law).

PREJUDICE

Many appellate issues turn on the appellant's ability to establish prejudice flowing from the incorrect ruling. If you find yourself in that position, it is important that you get into the record the predicate points for arguing prejudice. You will be in a stronger position on appeal if you can show that the facts and circumstances creating the prejudice were developed in the record and presented to the trial judge.

SCENARIO

Thursday morning: trial judge reverses ruling on admissibility of a document and announces that a change in schedule will require presentation of closing arguments and submission of the case to the jury on Friday.

No objection

Skeleton objection

Objection with weak explanation

Objection with powerful explanation. Potential benefits in all circumstances.