

Scott Key --- Scottkeylaw.com

Preserving a Record for Appeal

In 3 “Acts”

Introduction

What do We Mean When we Say “Preserve a Record”

The Goal in Preserving a Record

- ❖ To Win Your Case At Trial (This Point only SOUNDS Counterintuitive)
- ❖ But also to win your case on appeal if you must

Act I

- ❖ Have a Big Picture Approach to Your Trial from the Minute the client hires you

If you start planning your appeal in the middle of the trial, you will be too busy to do it right

When you Get a New Case

- ❖ **Step One** — Open a New Matter
- ❖ **Step Two** — Start Drafting Your Requests to Charge
- ❖ **Step Three** — Take Out a Big Piece of Paper and Draft Your Theory of the Case

We Don't Care About Harmless Error

- ❖ Know what harms you before the trial starts
- ❖ Know what helps you before the trial starts
- ❖ Be prepared enough to explain both to the judge in 20 words or less
- ❖ You want be able to do the above at all without advance planning

“A theory of the case is a cogent statement of an advocate’s position that justifies the verdict he or she is seeking.”

–Larry Pozner & Roger Dodd

Develop Your Theory Early

- ❖ Talk to your client
- ❖ Talk to lawyers
- ❖ Talk to “jury-like” people
- ❖ Talk to judges not involved in the case
- ❖ Think about your case a good bit

Theory is Not Just for Trial

- ❖ It should shape your pretrial motions (exclude things that hurt your theory; include things that help)
- ❖ It should shape your requests to charge
- ❖ It should shape the things you object to
- ❖ but most importantly ...

It will help you articulate why an
error is harmful

Without a theory of harm, all error
is trivial.

Without a theory of the case you don't know what error matters and what doesn't

Here's Where the Action is ...

- ❖ Remember the top three places where judges make error:
 - ❖ Jury Charges
 - ❖ Pre-trial motions
 - ❖ Jury Selection
- ❖ Focus and Prepare for All 3

Act 2

- ❖ Think long and hard about pretrial motions, and file them on time

Motions in Limine are Better than Trial Objections

- ❖ The judge somewhat less likely to yell at you
- ❖ If he does yell at you, the jury won't see it
- ❖ You can plan and think
- ❖ You can state every basis for error in advance
- ❖ You can press the judge for a decision
- ❖ The subject matter is likely important

Motions in Limine Generally Cover Your record

- ❖ Pre-trial ruling preserves most of the time
- ❖ Doesn't hurt to ask for objection to be continuing
- ❖ Doesn't hurt to "re-object" or to say at trial "no objections other than those the Court has already heard."
- ❖ Don't be annoying about it, but do watch out

Ways to Eliminate Deferrals

- ❖ Pretrial motions because the judge doesn't feel rushed
- ❖ Reference voir dire, opening, importance of the matter as you argue the motion
- ❖ If judge insists on deferral, try to pinpoint the time when you will raise the matter again — have someone there to remind you to bring it back up

Act 3 – Get Tactical at Trial

- ❖ Don't confuse "Pseudo-Rulings" (move to along, hurry it up, what's your point?) with Actual Rulings (Sustained, overruled, granted, denied)
- ❖ Don't get robbed of your proffer

When in Doubt, Ask for a Ruling

Be sure the judge actually ruled. If not, then kindly say “Your honor, so did you sustain their objection?”

Court Reporters are your Spirit Animal

- ❖ Error committed away from a court reporter is like a tree falling in a forest, so have everything taken down. And remember that the transcript doesn't record gestures and tone of voice
- ❖ Hire court reporters, and pay them to take down everything

Everything

- ❖ Voir dire
- ❖ Openings
- ❖ Closings
- ❖ Bench conferences (especially those)
- ❖ Charge Conference
- ❖ Notes from the Jury
- ❖ Gestures and tone of voice (state for the record)

Other Resources

- ❖ For Crafting a Theory of the Case: The Advocate's Key Podcast Episode 8 – With Doug Peters
- ❖ For Managing Developing a Big Picture Approach to Your Case: The Advocate's Key Podcast Episode 3 – Lester Tate
- ❖ For More On *Rice*, 357 Ga. App. 873 (2020):
<https://scottkeylaw.com/how-we-won-the-rice-v-the-state-case/>