Appellate Tips for Trial Lawyers

LOS ANGELES COUNTY BAR ASSOCIATION

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California civil and criminal litigation overlap in a crucial area: preserving your record for appeal. Although this series of short articles is mainly designed for civil trial lawyers, some "best practices" apply in every trial. Keep an eye on what our appellate-lawyer writers have to say about how to preserve your trial court victory or how to lay the groundwork for a successful challenge when you've lost.

Motion Practice: Evidence and Objections

Evidentiary issues are fertile ground for appellate review. A key piece of evidence improperly excluded or a bit of damaging testimony improperly admitted can make the difference between victory or defeat not only at trial but also on appeal. But how do you make sure you preserve the record with respect to your evidentiary objections? Here are some basic principles to remember.

State all grounds

It's not enough to object; you must state *specific grounds*. This means the objection must inform the court regarding both the point on which you see a ruling and the defect to be corrected. Grounds not urged are waived. (*Rupp v. Summerfield* (1958) 161 Cal. App. 2d 657, 662.) Note, however, that a ground not urged can nevertheless be a basis for *affirming* a trial court's admission or exclusion of evidence under the rule that a legally correct ruling must be affirmed even if the trial court gave the wrong reason. (*Transamerica Ins. Co. v. Tab Transportation, Inc.* (1995) 12 Cal. 4th 389, 399, fn. 4.)

Get a ruling

Even if you properly present your objections, they won't count unless the judge rules. Without a ruling, your objections are waived, and the objected-to evidence is *in the record* for all purposes, including appellate review—where even the rankest hearsay can support an adverse ruling. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal. 4th 666, 670, fn. 1.)

Despite this clear principle, the courts have crafted so many variations that it's safe to say the law has become a complete mess.

Avoid the *Biljac* trap

For years, some judges have avoided ruling on objections by relying on *Biljac Associates v. First Interstate Bank* (1990) 218 Cal. App. 3d 1410. There, the court of appeal suggested that evidentiary objections were preserved if the trial court simply announced that it was only going to consider competent evidence. (Id. at p. 1419).

That case is no longer good law. Following a line of decisions criticizing it, the court that decided Biljac overruled it in early 2007. (*Demps v. San Francisco Housing Authority* (2007) 149 Cal. App. 4th 564, 566 [court holds, "as dictated by two California Supreme Courts cases and consistent with all published, post-*Biljac* Court of Appeal opinions, that a trial judge's failure to rule on properly presented objections results in their being impliedly overruled"].)

Demps provides an excellent review of how the ruling requirement has evolved over the last decade or so. But it actually raises more questions than it answers. *Demps*' statement that objections not ruled on are "impliedly overruled" is inconsistent with the cases holding that objections are waived. One can challenge on appeal the overruling of an objection; a waived objection is gone, period.

And no sooner did the First District administer the *coup de grâce* to *Biljac* than the Sixth District revived it: "[W]e believe the *Biljac* decision was substantially correct, and was surely more nearly correct than its critics have been. Indeed, based on *Biljac,* in the absence of express rulings by the trial court, as in the present case, we presume either that the trial court ruled correctly on evidentiary objections, or that the court overruled all objections it did not expressly sustain." (*Reid v. Google, Inc.* (2007) 155 Cal. App. 4th 1342, 1355.) (Google filed a petition for review raising some of these issues on December 11, 2007.)

For a comprehensive analysis of this unsettled and evolving area, see the three separate opinions in *Lawal v. 501(c) Insurance Programs, Inc.* (2007) 2007 WL 1751782. (Not coincidentally, the dissenting justice in *Lawal* authored the opinion in *Reid*, with the concurrence of two different justices from those in *Reid*.)

If you can't get a ruling, at least try very hard

Judges aren't always excited about ruling on what may be dozens of pages of objections. That may mean, as one justice put it, that "the objector must yell and scream and stamp his feet, or do whatever else it takes to force the trial court to rule on those objections." (*Gallant v. City of Carson* (2005) 128 Cal. App. 4th 705 (dis. opn. of Vogel, J.)

Maybe you don't have to do quite that much. Some courts have held that it's enough if the trial court refuses an explicit request made at the hearing. (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal. App. 4th 613, 624 fn. 7, citing *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal. App. 4th 780, 784.) In addition, writ relief is available to force a trial court to rule on objections. (Vineyard Springs v. Superior Court (2004) 120 Cal. App. 4th 633 [granting writ petition and directing trial court to rule on objections].)

Choose your battles

One reason these issues exist is lawyers' knee-jerk tendency to object to everything they possibly can, regardless of whether it really matters. There's an easier and better solution than "yelling and screaming and stamping your feet": Choose your battles. Object when it matters. Avoid triviality. Among other things, make sure that objections reflect the seasoned tactical judgment of an experienced lawyer.

Take heed from Justice Rushing's remarks in his dissent in *Lawal*—just because no one can cite this unpublished case doesn't mean you shouldn't worry about an experienced jurist's views. He warned: "The trial court was thus confronted with an enormous number of evidentiary objections, a fair sample of which appear to be utterly without merit. In such a case, I believe, *the trial court can properly overrule, and a reviewing court ignore, all of the offending party's objections* on the ground that they constitute an unacceptably oppressive burden on the opposing party, and an outrageous imposition on the resources of the court." (*Lawal v. 501(c) Insurance Programs, Inc.* (2007) 2007 WL 1751782, at p. 43, emphasis added.)

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