

## Preserving the Record for Appeal: A Trial Lawyer's Checklist

This checklist is intended as an overview to help trial lawyers preserve the record for appeal. It is not exhaustive of all steps necessary to preserve error in every situation. Certain rules may vary by state/federal jurisdiction.

### PRE-TRIAL

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#### Motion for Summary Judgment

- If you lose, assert again as a motion for directed verdict (DV). If you win, make sure issue is not interjected into the trial.

#### Motions in Limine

- Get definitive ruling(s) for each motion before trial. Object at trial, at first opportunity, on same ground(s).
- Ask for a standing objection. Watch for evidence at trial that “opens the door” despite ruling.

#### Expert Testimony

- Ask for *Daubert/Frye* evidentiary hearing, where appropriate.
- Assert other challenges based on applicable evidence rules.

#### Pre-Trial Stipulation

- Make sure issues are not included that were not pleaded or the subject of discovery, and that witnesses/exhibits are not improperly included.

### TRIAL

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#### The Record

- If it is not on the record, it does not exist for appeal. Have everything transcribed: sidebars, chamber conferences, depositions read at trial, recordings played at trial, informal counsel conferences on jury instructions, verdict form—or any other legal issues. File all documents; don't just hand them to the judge.
- Make record of actions in courtroom that will not be recorded, e.g., crying, shouting, use of demonstrative aids.

#### Rulings

- Make sure there is a clear, definitive ruling on the record. Restate it if it is not clear and definitive.

#### Voir Dire

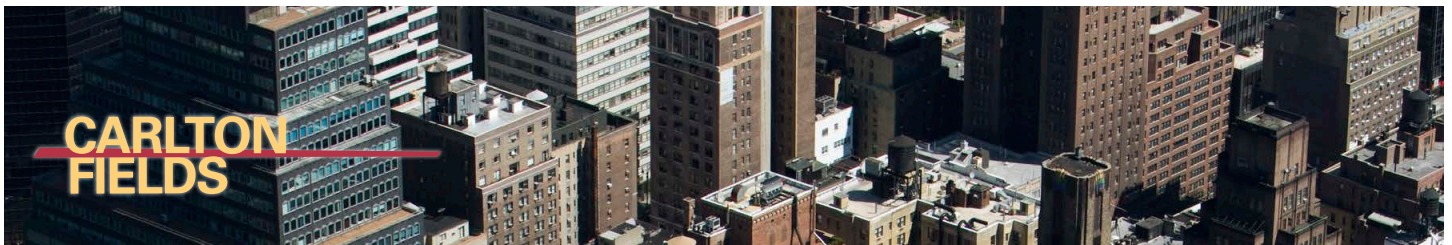
- Must renew all objections immediately prior to jury being sworn.
- To preserve the denial of a cause challenge: move to strike juror; exhaust all peremptories; request additional peremptories; identify specific juror whom you would strike with the additional peremptory.
- To preserve improper use of peremptory challenge: state that juror is member of distinct group; burden shifts to proponent of strike to come forward with a neutral explanation.



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- If a race or gender-based objection is asserted (*i.e.*, your peremptory challenge is improper/prejudicial), articulate specific non-race fact that is basis for your challenge. General reasons may not suffice.

## Evidentiary Objections

- Make objections as specific as possible, but a general objection is better than nothing. Make objection contemporaneously, but later, with a motion to strike, is better than never.
- Ask for limiting instructions, while making clear your objection stands.
- Ask for a standing objection. But, be watchful for need to renew objection or make a new objection as evidence comes in context. If there is any doubt, object again.
- Always consider whether you need to ask for a mistrial if evidence is allowed over objection. You don't want to ask every time—only where truly egregious and prejudicial. Consider asking for court to reserve ruling on mistrial until after the verdict.
- Move to strike testimony at its conclusion, where all of the testimony is objectionable.
- Do not withdraw your objection after the ruling. Do not say “okay” after the ruling.
- Listen to objections; you may be able to correct the problem.
- Object to witnesses or exhibits not disclosed in pre-trial stipulation.

## Expert Testimony

- Raise all issues as to expert's qualifications and as to viability of bases for the expert's opinions. Ask for standing objection at outset of testimony and move to strike at conclusion of testimony.
- Object to opinions not disclosed in reports or discovery. Move to strike and move for mistrial if such opinions are allowed.

- Watch for opinion testimony that “opens the door” for otherwise inadmissible evidence.
- Proffer your expert's opinions (and bases) if not allowed into evidence.

## Proffers of Evidence

- Make both as specific and as broad as you can. Incorporate (and file) prior deposition testimony, reports, and the like as part of your proffer. Proffer opinions that would have been offered at trial, including rebuttal, if beyond those in deposition. Incorporate (and file) all exhibits witness would identify and use. Do not rely only on your proffer if there is other evidence you would put on at trial.
- Pay attention to opposing counsel's proffers. If witness testifies, cross-examine if that will help make the point of why testimony was properly excluded. If narrative is given, give your cross-exam in narrative. If proffer goes beyond pre-trial disclosures or beyond expertise, make that point.

## Motions for Directed Verdict

- Make motion at the end of opposing party's case and again at the close of all evidence. Where appropriate, move for DV on affirmative defenses, cross-claims, and/or counterclaims.
- Address all claims/defenses and all elements of each claim/defense.
- Do this in writing, if possible.
- If you forget something, assert it as a motion for DV in the charge conference.

## Jury Instructions

- Craft proper instructions, not instructions that are so one-sided that they will not be given.
- File your requested instructions with the clerk's office.
- Have the charge conference on the record.
- Get clear rulings on record to your objections to instructions and on rulings about your requested instructions.



- Do not acquiesce in modified instructions. Make it clear you are only agreeing those changes are proper since court has ruled instruction is going to be given. If, however, opposing counsel or court contends that your requested instruction is confusing, skewed, etc., attempt to fix while preserving what is critical to your case.
- Request instructions on law as you believe it should be, even if that requires a change in the law.
- Do not just object to instructions; make it clear on the record how you request the jury be instructed on the issue.
- At the close of charge conference, renew objections to the instructions you challenge, and ask that your requested instructions be given instead. Get ruling from court that you need not object when instructions are read to the jury.
- Listen when court reads instructions and object if they are not consistent with court's rulings.

### Verdict Form

- Decide whether general or special is better in your case. Consider two-issue rule.
- Object to potential for inconsistent jury findings. Request verdict form that eliminates that risk.
- If jury's verdict is in fact inconsistent, you will almost certainly waive the issue if you do not raise it before the jury is discharged. But, if jury does reconsider, it should reconsider entire verdict.
- Poll jurors after verdict.

### Closing Argument

- Object or risk waiver. If objection is sustained, request curative instruction. You also need to move for mistrial if closing argument is so prejudicial as to preclude fair trial.

### POST-TRIAL

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- Consult appellate counsel immediately after the verdict. Some issues must be raised post-trial and sometimes the record can be bolstered by post-trial motions.