

Preserving A Record For Appeal While Keeping The Jury On Your Side

by Theodora R. Lee



Theodora R. Lee

is a shareholder with Littler Mendelson P.C., in San Francisco. Ms. Lee is a trial lawyer and represents employers in wrongful termination and employment discrimination litigation; Title VII proceedings, including race, sex, religious, and age harassment and discrimination; unfair competition proceedings; state and federal wage and hour litigation; and counsels employers on employee terminations, litigation avoidance, reductions in force, and the development of personnel policies and procedures. This article is based on a paper the author prepared for a seminar sponsored by the ABA's Labor and Employment Law section. Ms. Lee can be reached at lee@littler.com.

**“Use it or lose it” makes all the difference on appeal.
But you have to be very careful about how you use it.**

IN THE BEST-CASE SCENARIO, a jury trial will go along in a smooth, satisfying way. Voir dire will be thorough and identify the best potential jurors; the opening statements will be clear, cogent, and illuminating; the direct examination will firmly establish the case theme; cross-examination will flush out inconsistencies and contradictions with precision; the rulings on objections will be correct; the closing statements will construct persuasive arguments; and throughout, the trial judge will keep the courtroom and the process under control. But this isn't a perfect world. Things can go wrong—especially in employment cases—so you need to listen for them and object to them.

Grounds For Mistrial

The first thing you have to do is to focus on a theory on appeal. The most likely theories—and the ones you can begin to build during trial—are:

- Prejudicial misconduct of counsel;
- Juror misconduct; and
- Judicial misconduct.

Motions In Limine

Motions in limine allow the parties to present arguments and briefing on particular evidentiary issues and not disrupt the trial or taint the jury with inappropriate evidence. Evidentiary issues that may be raised in a motion in limine include:

- Evidence of unlawful intent through discriminatory comments;
- The employer's disparate treatment of other similarly situated employees ("me too" evidence);
- Evidence related to the administrative process;
- Prior bad acts of the parties;
- Limits on the damages issues that a jury may consider in a discrimination case;
- Issues related to harassment against other employees;
- Evidence of the sex-related conduct of the alleged harasser or of the victim (Fed. R. Evid. 412).

Preserve The Record

You have to plan for appeal before you ever set foot in the courtroom. Some tips:

- Go into trial planning for the worst outcome;
- Don't worry about whether the judge likes you or not;
- Don't stipulate to get along;
- Be mindful of the record on appeal;
- Be polite but firm.

Attorney Misconduct

Doing something about attorney misconduct is always risky. Handled poorly, it can make you look

as bad as the attorney who is engaging in the misconduct. You must timely object and:

- Request an admonition; and
- If appropriate, request a jury instruction.

If you don't do these things, you waive any complaint about attorney misconduct.

Objections: Remember That The Jury Is Watching

Jurors hate to think that something is being kept from them, but they generally understand what objections are for, and they can handle them. When you object:

- Stand up and state the objection firmly;
- Ask for a sidebar; and
- Be clear and polite.

You may have to object multiple times in order to get relief or have a record for mistrial.

What's Sauce For The Goose . . .

Never forget that your own conduct has to rise to the level that you expect from the other side, so:

- Make sure you know the rules and follow them;
- Review the ethical rules, the rules of evidence, and rulings on motions in limine before making a presentation to the jury;
- Win with the truth and without games;
- Fight hard within the rules of the courtroom.

Violation Of Rules Of Professional Conduct

Violations of the Rules of Professional Conduct may supply the grounds for mistrial. I practice in California, and the key rule is Cal. Rules of Professional Conduct, Rule 5-200, which states:

"In presenting a matter to a tribunal, a member:
(A) Shall employ, for the purpose of maintaining the causes confided to the member, such means as are consistent with the truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.”

Regardless of your jurisdiction, it is virtually certain that all of the above are prohibited by a relevant ethical rule. Be sure you know which rules apply, and be prepared to raise appropriate objections.

Improper Voir Dire Questions

How do you spot an improper voir dire question? By its purpose. A voir dire question is improper if it is not propounded to find out if jurors can be fair and impartial but to:

- Precondition the jury to a particular result;
- Argue the case;
- Compel jurors to commit themselves;
- Prejudice the jury;
- Instruct or question on the law.

To be raised, each improper question has to be objected to and an admonition requested.

Voir Dire Misconduct

Improper voir dire questions are bad enough. Worse still is outright voir dire misconduct. Here are some egregious and all-too-common examples.

- Attempts to curry favor with the jury:
 - ___ “Juror number seven looks cold, Your Honor. Could we turn up the heat in the courtroom?”
 - ___ “During the trial, if you can’t hear something, just raise your hand and I’ll let the judge know.”
 - ___ “If you want to discuss an answer in private, let me know and I’ll ask the judge to move the discussion to chambers.”
- Attempts to precondition the jury:

___ Watch for questions that aren’t really designed to obtain information regarding the fairness of the juror, but seek to precondition the jury to plaintiff’s case;

___ Watch for questions that precondition the jury to a particular position on a trial issue.

- Commenting on the personal lives of parties or counsel:
 - ___ “Are you sure you haven’t seen my client’s picture in the paper as Volunteer of the Year at the Hospice Center of the East Bay?”
 - ___ “Have you read about XYZ’s fraud conviction?”

___ Discussion of the law:

___ It is improper to ask jurors if they agree or disagree with the law, but it is permissible to ask them if they will follow instructions;

___ Misstatements of law during voir dire can be grounds for reversal or new trial but you have to timely object to them.

Mistrial

When misconduct is egregious and can’t be cured by admonition or limiting instruction, it is appropriate to ask that a mistrial be declared. The misconduct that could support such a motion is often cumulative, so object timely and clearly and seek a remedy.

Improper Opening Statement

During the opening statement, listen for and object to any mention of:

- Excluded matters;
- Irrelevant matters;
- Settlement offers;
- Subsequent repairs;
- Insurance;
- Statements of personal belief or opinion.

Don’t Be Too Quiet

Failure to object is a waiver of misconduct, so think carefully before abandoning proper objec-

tions. The record can't be created after the fact. Jurors are not as troubled by objections as some will tell you. The key is to raise the objections with confidence and to react with dignity if the objections are denied.

Other Curative Measures

When you need to, ask that:

- Improper remarks be stricken;
- The jury be given a curative instruction; and
- Mistrial be declared.

Improper Direct

During direct examination, listen for and object to:

- Leading questions;
- Inadmissible evidence;
- Cumulative evidence; and
- Irrelevant evidence.

Improper Cross-Examination

During cross-examination, listen for and be ready to object to:

- Argumentative questions;
- Questions without an evidentiary basis;
- Questions that ask for cumulative evidence;
- Compound questions; and
- Questions asked in bad faith for the purpose of unduly harassing or embarrassing the witness.

Improper Argument

Whether in objections or motions in the presence of the jury, listen for and object to:

- Inadmissible matters raised in presence of jury;
- Arguments on the merits or self-serving remarks in the guise of an objection.

Improper Closing

During the closing, listen for and be ready to object to:

- Any argument based on excluded evidence;
- Unsupported inferences;
- Misstatements of evidence;
- Misleading arguments;
- Appeals to passion or prejudice;
- Claims of personal knowledge by the attorney;
- "Rebuttal" arguments that rebut arguments that weren't raised in the first place.

Other Grounds

Also be on the lookout for:

- Willful concealment of evidence; and
- Improper communications with jurors.

CONCLUSION • This is not a perfect world. Things can—and often do—go wrong during trial. Counsel may attempt to go on the attack in *voir dire*. The opening statements might include impermissible arguments or tactics. The direct examination might impermissibly lead the witness. The cross-examination might go beyond direct or misstate the record. The rulings might be wrong. The closing might get into matters that weren't established through the examinations. The judge might not have been in control of the courtroom. And the jurors might have misbehaved. So always keep these key reminders in the forefront:

- Object, make your record, and ask for admonition and other cures before moving for mistrial;
- Don't be intimidated by the judge;
- Make objections clearly, politely, but forcefully; and
- Warn the client of what might happen if you don't seek a mistrial, and that if a mistrial is granted, the case has to be tried again.