

**PRESERVATION OF ERROR FOR APPEALS:
IT'S NOT THAT HARD BUT IT'S THAT IMPORTANT**

**Tom Moran
Schneider & McKinney, P.C.
440 Louisiana, Suite 800
Houston, Texas 77002
(713) 951-9994
tom6294@aol.com**

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	ii
Cases.....	ii
Statutes and Rules.....	iii
I. THE CONTEMPORANEOUS OBJECTION RULE.....	1
A. Stated Reasons for the Rule.....	2
B. Another Reason for Rules on Error Preservation.....	2
C. Don't Count on a Vindictive Judge/Cowardly Lawyer Exception or Suck It Up, Buttercup.....	3
II. SOURCES OF THE RULE ON ERROR PRESERVATION IN FEDERAL COURT.....	3
A. General Rule for Error Preservation: FED. R. CRIM. P. 51.....	3
1. Timeliness.....	4
2. Specificity.....	4
3. Need for Adverse Ruling.....	5
4. The Ruling Must Be Definitive.....	5
B. FED. R. EVID. 103.....	6
1. What Is a "Definitive Ruling?".....	7
2. The Offer of Proof.....	8
E. Jury Charge Error Preservation: FED. R. CRIM. P. 30.....	8
1. Requested Jury Charges.....	9
2. Objections to Charges Actually Given.....	9
D. What Happens When Error Is <i>Not</i> Preserved: FED. R. CRIM. P. 52.....	10
III. SPECIFIC EXAMPLES OF PROCEDURAL LAND MINES.....	11
A. Waived Error vs. Forfeited Error.....	11
B. Renew That Rule 29 Motion for Judgment of Acquittal.....	12
C. File Timely Pretrial Motions.....	14
D. Watch Those Local Rules.....	14
IV. ADVANCE PREPARATION TO PRESERVE ERROR.....	14
V. DON'T MAKE SILLY MISTAKES.....	15
VI. CONCLUSION.....	16

INDEX OF AUTHORITIES

Cases

<i>Black v. United States</i> , __ U.S. __, 130 S. Ct. 2963 (2010).	10
<i>Chapman v. California</i> , 386 U.S. 18 (1967).	11
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).	4
<i>Lankston v. State</i> , 827 S.W.2d 907 (Tex. Crim. App. 1992).	1
<i>Melendez-Diaz v. Massachusetts</i> , __ U.S. __, 129 S. Ct. 2527 (2009).	4
<i>United States v. Andino</i> , 627 F.3d 41 (2 nd Cir. 2010).	9
<i>United States v. Butler</i> , No. 10-1048 (5 th Cir. March 21, 2011) (not yet reported).	12
<i>United States v. Flonnory</i> , 630 F.3d 1280 (10 th Cir. 2011).	13
<i>United States v. Frazier</i> , 595 F.3d 304 (6 th Cir. 2010).	13
<i>United States v. Gari</i> , 572 F.3d 1352 (11 th Cir. 2009), <i>cert. denied</i> , __ U.S. __, 130 S. Ct. 1562 (2010).	7
<i>United States v. Grissom</i> , 525 F.3d 691 (9 th Cir. 2007).	4
<i>United States v. Helmelt</i> , 769 F.2d 1306 (8 th Cir. 1985).	4
<i>United States v. Hines</i> , __ F.3d __, 2011 U.S. App. LEXIS 393 (4 th Cir. January 7, 2011) (not yet reported).	4
<i>United States v. Kaba</i> , 480 F.3d 152 (2 nd Cir. 2007).	3
<i>United States v. Knezek</i> , 964 F.2d 394 (5 th Cir. 1992).	14
<i>United States v. Leung</i> , 40 F.3d 577 (2 nd Cir. 1994).	3
<i>United States v. Lopez</i> , 392 Fed. Appx. 245 (5 th Cir.), <i>cert. denied</i> , __ U.S. __, 131 S. Ct. 807 (2010) (unpublished).	11, 12
<i>United States v. Marcus</i> , __ U.S. __, 130 S. Ct. 2159 (2010).	10

<i>United States v. Nichols</i> , 169 F.3d 1255 (10 th Cir. 1999).	7
<i>United States v. Redlightning</i> , 624 F.3d 1090 (9 th Cir. 2010).	5
<i>United States v. Robinson</i> , 627 F.3d 941 (4 th Cir. 2010).	10
<i>United States v. Rodriguez</i> , ___ F.3d __, U.S. App. LEXIS 26010 (11 th Cir. December 22, 2010) (not yet reported).	3, 16
<i>United States v. Roth</i> , 628 F.3d 827 (6 th Cir. 2011).	9
<i>United States v. Taylor</i> , 514 F.3d 1092 (10 th Cir. 2008).	5
<i>United States v. Troxler</i> , 390 F. Appx. 363 (5 th Cir. 2010) (unpublished).	11, 12
<i>United States v. Wilson</i> , 605 F.3d 985 (D.C. Cir.), <i>cert. denied</i> , ___ U.S. __, 131 S. Ct. 841 (2010))4

Statutes and Rules

FED. R. CRIM. P. 12(b)(3).	14
FED. R. CRIM. P. 12(e).	14
FED. R. CRIM. P. 29.	12, 13
FED. R. CRIM. P. 30.	8, 9
FED. R. CRIM. P. 52.	10
FED. R. CRIM. P. 51.	3
FED. R. EVID. 103.	6, 8
FED. R. EVID. 105.	8, 13
FED. R. EVID. 403.	5
FED. R. EVID. 404(b).	5
FED. R. CRIM. P. 12(h)	14
U.S. CONST. amend. V.	15

U.S. CONST. amend. VI..... 4
U.S. CONST. amend. XIV..... 15

[All a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it.

Lankston v. State, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992).

Lankston was written by Judge Fortunato P. Benavides before he was appointed to the Fifth Circuit by President Clinton. However, the rule set out in *Lankston* is as valid in federal court as it is in Texas courts.

Proper preservation of error can mean the difference between a summary affirmance or a new trial or sentencing for a client. It can be the difference between a client serving a long prison term or being acquitted on appeal. It is as much a trial lawyer's job as presenting witnesses or showing up in court for the trial.

This paper is designed to give new practitioners an overview of how error is preserved in federal court and what can happen when it is not preserved. It is not designed to be a comprehensive look at all possible types of error and how they can be preserved for appellate review and it is not designed to be a treatise on how to litigate an appeal.

I. THE CONTEMPORANEOUS OBJECTION RULE

As a general rule, appellate courts only review trial court judgments for legal errors made by the trial judge. So, most points of error read something like:

The District Court erred in overruling Appellant's motion to suppress evidence.

Or,

The District Court erred in sustaining the Government's objection to the admission of Defendant's Exhibit 1, a sworn statement by John Doe that he in fact committed the crime for which Appellant was convicted.

Or,

The District Court erred in overruling Appellant's objection to the admission of Government's Exhibit 1, a custodial statement of a non-testifying co-defendant.

In each case set out above, a person is complaining on appeal of an adverse ruling by the trial judge. In all three examples, the issue was preserved for appeal, that is, the trial judge ruled adversely to the defendant. If there is no request for a ruling, it is impossible to claim on appeal that the trial judge erred.

A. Stated Reasons for the Rule

The contemporaneous objection rule is based on the theory that parties to litigation must give notice to the trial judge of errors they believe he is making. This allows the trial judge to correct his error. It also allows opposing counsel the chance to correct errors.

So, for example, if an attorney does not include all of the necessary proof for admission of a business record, the opposing attorney must make a specific objection such as, "Objection, there is no evidence that the entries were made by a personal knowledge of the events recorded therein." That informs the court and all parties of the substance of the complaint and allows the lawyer to correct the omission or error.

B. Another Reason for Rules on Error Preservation

No appellate judge will admit it, but it is a lot easier to write an opinion saying error was not preserved than it is to deal with a possibly complex legal argument raised on appeal. And, it is a lot easier to affirm a conviction if important appellate issues are *not* preserved.

C. Don't Count on a Vindictive Judge/Cowardly Lawyer Exception or Suck It Up, Buttercup

In two cases, *United States v. Kaba*, 480 F.3d 152 (2nd Cir. 2007); and *United States v. Leung*, 40 F.3d 577 (2nd Cir. 1994), the Second Circuit carved an exception to the contemporaneous objection rule to case in which a judge makes an improper statement during a sentencing hearing. The theory was that if the lawyer objected to a judge's statement during the sentencing hearing, a vindictive judge would take it out on the client. The 11th Circuit rejected this exception in *United States v. Rodriguez*, 627 F.3d 1372 (11th Cir. 2010).

The 11th Circuit's held the fact that a judge may be unhappy with an objection and retaliate is demeaning to both the judge and the cowardly lawyer who does not make the objection. It is likely that most circuits will agree with the 11th Circuit and reject the 2nd Circuit's exception.

Practice Note: Even in the 2nd Circuit, it would be unwise to rely on this exception. Your client is likely to get a *very* bad result.

II. SOURCES OF THE RULE ON ERROR PRESERVATION IN FEDERAL COURT

Three provisions of the Federal Rules of Criminal Procedure and one in the Federal Rules of Evidence govern error preservation. They will be discussed separately.

A. General Rule for Error Preservation: FED. R. CRIM. P. 51

- (a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.
- (b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take, or the party's objection to the court's actions and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

Rule 51(a) simply provides that lawyers need not say, "Note my exception" after the trial judge

rules. It once was the rule that “exceptions” were necessary to preserve error. Most states have abrogated that rule along with the federal courts.

Rule 51(b) has two components: timeliness and specificity.

1. Timeliness

An objection must be timely, that is, it must be made at a time when the judge can do something about the complaint. If an objection is not lodged in a timely manner, error is not preserved. *United States v. Hines*, __F.3d __, 2011 U.S. App. LEXIS 393 (4th Cir. January 7, 2011) (not yet reported).

2. Specificity

Specificity is important in preserving error. For example, an objection without stating the grounds has been found insufficient to preserve error for the prosecution asking questions on redirect essentially vouching for the credibility of a witness. The appellate court held that nothing in the context showed that the district court understood the reason for the objection. *United States v. Wilson*, 605 F.3d 985, 405 (D.C. Cir.), *cert. denied*, __ U.S. __, 131 S. Ct. 841 (2010). However, error is preserved if the specific ground is apparent from the context or if the trial court notes it understands. *United States v. Grissom*, 525 U.S. 691, 695 (9th Cir. 2007) (government did not waive objection to sentence when district court stated it knew the grounds for the general objection).

This can be important when there are multiple possible grounds for objection. One important example is the relationship between a hearsay objection and one under the Confrontation Clause of the Sixth Amendment. An objection on hearsay grounds does *not* necessarily implicate the Confrontation Clause and therefore does not preserve a confrontation objection for appeal. *United States v. Helmel*, 769 F.2d 1306, 1316-17 (8th Cir., 1985). This is especially important in light of *Melendez-Diaz v. Massachusetts*, __ U.S. __, 129 S. Ct. 2527 (2009), and *Crawford v.*

Washington, 541 U.S. 36 (2004). Evidence which might be admissible under the hearsay rule may be inadmissible under the Confrontation Clause and vice versa. Therefore, it is incumbent on counsel to raise both issues.

The same is true for objections to extraneous offenses or other acts the prosecution wishes to introduce pursuant to FED. R. EVID. 404(b). A Rule 404(b) objection normally should be accompanied by an objection under FED. R. EVID. 403 that the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues etc.

3. Need for Adverse Ruling

It is axiomatic that a party cannot complain on appeal if the trial judge gives him everything he asks for. To preserve error for appeal, the lawyer must press the district judge until he makes an adverse ruling. *United States v. Taylor*, 514 F.3d 1092, 1096 (10th Cir. 2008) (when objection is sustained and trial court gives curative instruction on defendant's request, defendant has received all the relief he sought. Mistrial motion required to preserve error).

Remember, appellate counsel starts issues in the brief with: "The District Court erred..." Therefore, in trial, counsel should object and, if the objection is sustained request a curative instruction from the trial court. If the court gives the requested instruction, counsel must move for a mistrial.

4. The Ruling Must Be Definitive

The adverse ruling must be a definitive ruling, not a preliminary ruling. For example, in *United States v. Redlightning*, 624 F.3d 1090, 1113 (9th Cir. 2010), held that no error was preserved in the exclusion of expert testimony when the preliminary order said it was without prejudice to laying a sufficient predicate at trial. The *Redlightning* Court also held that to preserve error on pretrial exclusion of any evidence, failure to reoffer it at the appropriate stage of trial waives error.

Practice Note. While pressing the trial court to an adverse ruling is necessary to preserve error, as a matter of trial strategy, preservation of error may not be a factor. For example, it would be rare indeed for an appellate court to reverse a conviction for a leading question, regardless of whether the error is preserved. So, simply getting an objection sustained would be sufficient as a matter of strategy.

Also, there might be cases where the Government's case is so weak or some Government witnesses have cratered to the extent that the defense lawyer is confident of an acquittal. In those circumstances, as a matter of trial strategy not ask for a mistrial. You don't want to give the Government a chance to fix its messes.

B. FED. R. EVID. 103

Rule 103 governs objections and rulings on admission of evidence. Rule 103 provides:

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

1. What Is a “Definitive Ruling?”

The general rule is that pretrial motions *in limine* do not preserve error because they are not definitive rulings. *United States v. Gari*, 572 F.3d 1352, n. 2 at 1356 (11th Cir. 2009), *cert. denied*, ___ U.S. ___, 130 S. Ct. 1562 (2010). Generally, the objection must be renewed at the time the evidence is offered or error is not preserved. *United States v. Nichols*, 169 F.3d 1255, 1264 (10th Cir. 1999).¹

All pretrial orders on admission of evidence are subject to review by the trial court during the trial. Even motions to suppress evidence may be reconsidered if, for example, a party does something to open the door to admissibility.²

Practice Note: The bottom line is that a party should *not* rely on a motion in limine to preserve error. If the party is attempting to exclude evidence, it should renew its objection at the time it is offered. If the party is attempting to admit evidence tentatively excluded by a motion *in limine*, it should approach the bench and get a definitive ruling at the time the evidence is offered.

¹The 10th Circuit recognized an exception if 1) the issue was fairly presented to the district court, it is the type of issue which can be fairly decided in a pretrial hearing and the district court’s ruling is without equivocation. *Id. Don’t rely on this holding. Object again.*

²For example, a response from the defendant on cross-examination, “I never possessed drugs in my whole life,” could open the door to admission of the cocaine found during the illegal search of his car.

2. The Offer of Proof

Rule 103(b) requires that to preserve error in exclusion of evidence, the trial judge be informed of the substance of the evidence. The trial judge has the option of requiring the offer of proof to be made in question and answer form.

Unless the trial court orders question and answer offers of proof, they can be made orally or in writing. All offers of proof should be made outside the jury's presence. The offer of proof is designed to fairly apprise the trial judge of the evidence. However, it serves another purpose for preservation of error. The appellate court cannot determine if the evidence was improperly excluded unless it knows *what* evidence was excluded and the reasons for its offer. And, it cannot conduct a harmless error analysis unless it can see how the excluded evidence fit into the trial and the defense case.

Practice Note. When making offers of proof, counsel must remember FED. R. EVID. 105, the rule of limited admissibility. For example, if there is a hearsay objection, the proponent of the evidence may be able to have the evidence admitted if it is offered for a non-hearsay purpose. If the evidence is offered for a proper non-hearsay purpose and the trial judge excludes it, there would be error on appeal. However, if it were offered without a limited purpose, exclusion would not be error.

E. Jury Charge Error Preservation: FED. R. CRIM. P. 30

Rule 30 provides:

(a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.

(b) Ruling on a Request. The court must inform the parties before closing arguments how it intends to rule on the requested instructions.

(c) Time for Giving Instructions. The court may instruct the jury before or after the arguments are completed, or at both times.

(d) Objections to Instructions. A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

1. Requested Jury Charges

Rule 30 by its own terms requires that requested jury charges be submitted to the trial court before the jury is charged and that they be in writing and served on all other parties. To preserve error, the requested instruction must be 1) a correct statement of the law; and 2) represent a theory of defense with a basis in the record which could lead to an acquittal. *United States v. Andino*, 627 F.3d 41 (2nd Cir. 2010). Another court of appeals phrases it differently but with substantially the same requirements for error preservation. The Sixth Circuit will reverse a trial court for refusing a requested instruction if 1) the requested instruction is a correct statement of the law; 2) the requested instruction is not substantially covered by other instructions actually given; and 3) the failure to give the instruction impairs the defendant's theory of the case. *United States v. Roth*, 628 F.3d 827 (6th Cir. 2011).

Therefore, to preserve error in denial of a jury instruction, counsel must request a charge in writing which is a correct statement of the law and is raised by evidence in the record. He also must obtain an adverse ruling on the request.

2. Objections to Charges Actually Given

Rule 30(d) requires a specific objection. All that is required is the objection, stating the specific reason to the proposed instruction. An objection is required even of settled law at the time of the trial

is contrary to the defendant's position. *United States v. Robinson*, 627 F.3d 941 (4th Cir. 2010) (objection required to charge applying settled law even though a Supreme Court case after trial reversed the settled law). An objection to the charge preserves error and it is unnecessary to agree to a compromise such as special verdict forms for the jury. *Black v. United States*, __ U.S. __, 130 S. Ct. 2963 (2010).

Practice Note. There is nothing to lose by objecting before deliberations to the trial court's failure to give an instruction even though the judge already ruled against a Rule 30(a) request for the instruction. So, do it.

D. What Happens When Error Is *Not* Preserved: FED. R. CRIM. P. 52

Rule 52 sets two levels of how error is reviewed on appeal, harmless error if the error is preserved for appeal and plain error if it is not. Rule 52 provides:

- (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
- (b) Plain Error. A plain error that affects substantial rights may be considered even though it is not brought to the court's attention.

An appellate court may reverse based on plain error, that is error that is not preserved in the trial court, only if

- 1) there is error;
- 2) the error is clear and obvious rather than subject to reasonable dispute;
- 3) the error affected the defendant's substantial rights, which normally means that it affected the outcome of the proceedings in district court;
- 4) and, the error affects the fairness, integrity or public reputation of judicial proceedings.

United States v. Marcus, __ U.S. __, 130 S. Ct. 2159, 2164 (2010).

This is a very high hurdle to jump. As rare as reversals of convictions have become, reversals based on plain error are much rarer.

The distinction is most important for the appellate lawyer but should not be lost on the trial lawyer. For the trial lawyer, the difference is simple. If error is preserved, the defendant has a chance of obtaining a reversal on appeal. If it is not, he has very little chance of prevailing.

Practice Note: If possible base objections in constitutional grounds as well as other grounds such as the Rules of Evidence. Non-constitutional error is harmless unless it affects a party's substantial rights. However, when the objection is based on constitutional grounds, the Government must prove beyond a reasonable doubt that the error did not contribute to the conviction. *Chapman v. California*, 386 U.S. 18, 24 (1967).

III. SPECIFIC EXAMPLES OF PROCEDURAL LAND MINES

This section is not meant to be a catalogue or listing of all possible error preservation traps. It just points out a few examples of how the appellate courts have adopted rules that can cause clients to lose the chance for meaningful appellate review.

A. Waived Error vs. Forfeited Error

Appellate courts often are sloppy and imprecise in describing the difference between a “waiver” and a “forfeiture” of error. Some courts use the terms interchangeably or simply talk about waiver. However, the distinction can make the difference between having an issue on appeal and a loss on appeal.

In *United States v. Troxler*, 390 Fed. Appx. 363 (5th Cir. 2010) (unpublished), and *United States v. Lopez*, 392 Fed. Appx. 245 (5th Cir. 2010) (unpublished), the court explained the difference. When error is “waived,” the party intentionally relinquishes or abandons a known right.

Error is forfeited if there is no objection.

The difference is crucial. Waiving error for purposes of *Troxler* and *Lopez*, there can be *no* appellate review (other than ineffective assistance of counsel). For example, the Fifth Circuit in *United States v. Butler*, No. 10-1048 (5th Cir. March 21, 2011) (not yet reported), held that the defendant “voided” his objections to the presentence report by saying he had no objections at the sentencing hearing. Slip op., n. 1 at 3.

Forfeited error, that is unobjected to error, is subject to plain error review. While plain error review does not give the defendant much of a chance of prevailing on appeal, it is much greater than the zero chance if error is waived.

Practice Note. Don’t give the government the chance to argue waiver. So, for example, if a pretrial motion to suppress evidence is overruled, when the prosecution moves to admit the evidence at trial, do *not* say, “No objection.” Instead, say, “Other than the objections we have already made, we have no further objections,” or “Your Honor, we renew the objections previously made.”

B. Renew That Rule 29 Motion for Judgment of Acquittal

Unlike the practice in some state courts, the federal courts require a motion for judgment of acquittal pursuant to FED. R. CRIM. P. 29 at the close of the government’s case in order to have review for sufficiency of the evidence. That would seem to preserve error for appellate review as to whether the government presented sufficient evidence to sustain a conviction.

And, that would be wrong.

In reviewing sufficiency of the evidence, appellate courts look to all of the evidence, not just that presented by the government. So, if a defendant (or a co-defendant) presents evidence that plugs a hole in the government’s case, the appellate court will consider that when reviewing sufficiency.

Courts of appeals have held in innumerable cases that it is necessary to renew the Rule 29 motion at the close of *all* the evidence. See e.g. *United States v. Flonnory*, 630 F.3d 1280 (10th Cir. 2011); *United States v. Frazier*, 595 F.3d 304 (6th Cir. 2010). If the motion is not renewed at the close of all of the evidence, sufficiency is reviewed only for plain error. That means, the client probably will lose.

Practice Note. Make the Rule 29 motion as specific as possible while not telling the government what it missed. That way, it can't move to re-open and fill the gap. *Don't forget to renew the motion.*

If a co-defendant is about to introduce evidence that will plug a hole in the government's case against your client, approach the bench and pursuant to Rule 105, move that the evidence not be admitted against your client. If the trial court rules against you, there is an argument which can be made on appeal that there should be full review of insufficiency, not plain error, and the review should be limited to the evidence against your client. Also object that admission of the evidence against *your* client by a co-defendant deprives *your* client's right to effective assistance of counsel by having another defendant's lawyer admit the evidence making the case against your client legally sufficient. And, if the evidence still is coming in, move to sever your client out. Keep giving the trial judge ways he can protect your client's rights. He just might pick one. An appellate argument can be made that your client was deprived of *his* right to effective assistance of counsel by the co-defendant's lawyer. Neither argument likely will be successful but it beats having a co-defendant's lawyer torpedo your client's case while you sit on your hands.

C. File Timely Pretrial Motions

Certain motions *must* be made pretrial or they are waived. They include motions alleging defects in the charging instrument or the institution of the prosecution; motions to suppress; motions to sever; and motions for discovery. FED. R. CRIM. P. 12(b)(3). They are waived if not made within the time set by the trial court. FED. R. CRIM. P. 12(e). So, for example, a defendant was found to have waived his motion to suppress evidence because no timely motion was filed. *United States v. Knezek*, 964 F.2d 394 (5th Cir. 1992).

Practice Note. Statements of adverse witnesses must be produced at hearings on motions to suppress. And, law enforcement officers are considered to be government witnesses. FED. R. CRIM. P. 12(h). So, you are entitled to agents' statements even if you call them at a hearing on a motion so suppress evidence. Don't let the government or the trial judge convince you that the *Jenks* Act allows the statements to be withheld until the agents are passed for cross-examination at trial.

D. Watch Those Local Rules

District courts can adopt local rules which may relate to preservation of error. For example, in the Southern District of Texas, Local Rule CrLR 55.2(B) requires objections to documents be filed within seven days before trial. Miss that date and you've waived objections.

IV. ADVANCE PREPARATION TO PRESERVE ERROR

When an attorney is preparing for trial, he or she should recognize legal issues which likely will arise in trial. Each of those issues is a potential issue resulting in reversible error in case of a conviction.

Prepare for those issues. Read and copy cases. Highlight the parts you want the judge to read. Prepare memoranda of law and drop them in your trial file. Nothing makes a judge more nervous

than having a lawyer pull out a written memo during a bench conference.³ And, it increases the chances the judge will rule in your favor.

Many issues come up in trial after trial, so it is easy to recycle memoranda with only a few changes to make them fit the current trial. And, it is hard for the government to argue lack of error preservation when the appellate brief looks almost exactly like a memorandum of law handed to the trial judge. Also, you can frame issues much more easily and more completely in your office before trial than you will in a rushed bench conference.

If you believe that a trial judge likely will exclude some of your evidence, prepare a written offer of proof. Include in the offer different theories for admission of the evidence and different purposes for its admission.

The best of all possible worlds is to have an appellate specialist help you prepare and sit second with you at trial. But, that will rarely be possible in cases involving indigents. But all trial lawyers can prepare pretrial to meet legal issues raised by the government.

V. DON'T MAKE SILLY MISTAKES

Make sure you cite the correct rule, statute or constitutional provision. If you don't, at a minimum you will look silly. At worst, an appellate court might find that your objection or motion was insufficient to preserve error.

A classic example is mixing the Due Process and Equal Protection Clauses of the Fourteenth Amendment with the Due Process Clause and Equal Protection component of the Fifth Amendment. The Fourteenth Amendment applies to the states, not the federal government. The Fifth Amendment Due Process Clause and Equal Protection component apply to the federal government.

³Of course, make sure you get a file marked copy of any memoranda you give to the judge.

The Bill of Rights originally did not apply to the states. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Most (but not all) of the provisions of the Bill of Rights apply to the states through the Due Process Clause of the Fourteenth Amendment.

VI. CONCLUSION

Preserving error for appellate review is as much the job of the trial lawyer as is presenting evidence, cross-examining the government's witnesses and making final argument. It cannot and should not be ignored or given short shrift.

It may be justifiable to ignore erroneous rulings that are unlikely to result in reversible error but it is not an excuse to ignore error in general. When in doubt, object. And, keep pressing until there is an adverse ruling.

File written motions and memoranda. Give the trial judges highlighted copies of cases. Object, object and keep objecting. If the trial judge gives you something, keep asking for more until the judge says, "No."

Some attorneys say they are reluctant to make objections for fear of making the judge angry or giving the jury the impression that they are trying to hide something. These concerns should have little affect on the decision on whether to object.

Ask yourself, who would *you* rather be standing between *you* and the penitentiary, the shrinking violet, cowardly lawyer from *Rodriguez* or a lawyer who rips opposing counsel's heart out just to watch him die? Most of us probably would want the nice guy lawyer if we plan to plead guilty but we would want the aggressive, prepared lawyer if we go to trial.⁴

⁴Of course, the best of all possible worlds is to have a lawyer who is a genuinely nice guy who knows when to get along and when to turn into Attila the Hun.

The key is showing both the trial judge and the jury that you have respect for the court. Make your record but always be polite and respectful of the judge and the prosecutor.

A smart (or even a not very smart) judge will have respect for lawyers who make good objections and preserve error. Not only will the judge be on notice that he could be reversed but he will see the lawyer as a knowledgeable professional.

If you have any time to voir dire the jury, you can inoculate the jury against bias by simply telling them that at times there will be difference interpretations of the rules of evidence between you and the prosecutor. Tell them it is your job to bring those to the attention of the judge and for the judge to decide. Then, ask the jury panel if anyone has a problem with that law.