

THE APPEAL KILLERS:
AVOIDING THE TRAPS THAT CAN DOOM YOUR APPEAL BEFORE IT BEGINS

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start
mouse trap game
short cut

#1: Holes in the record

- "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two."

Common record holes

- No court reporter (B.Y.O.R.)
- Unreported sidebars
- In-chambers jury instruction conferences
- Witnesses pointing, marking up diagrams, etc.
- Video depositions

#2: Concessions and other agreements

- Stipulations
- Concessions
- Invited error

#3: Jury instruction issues

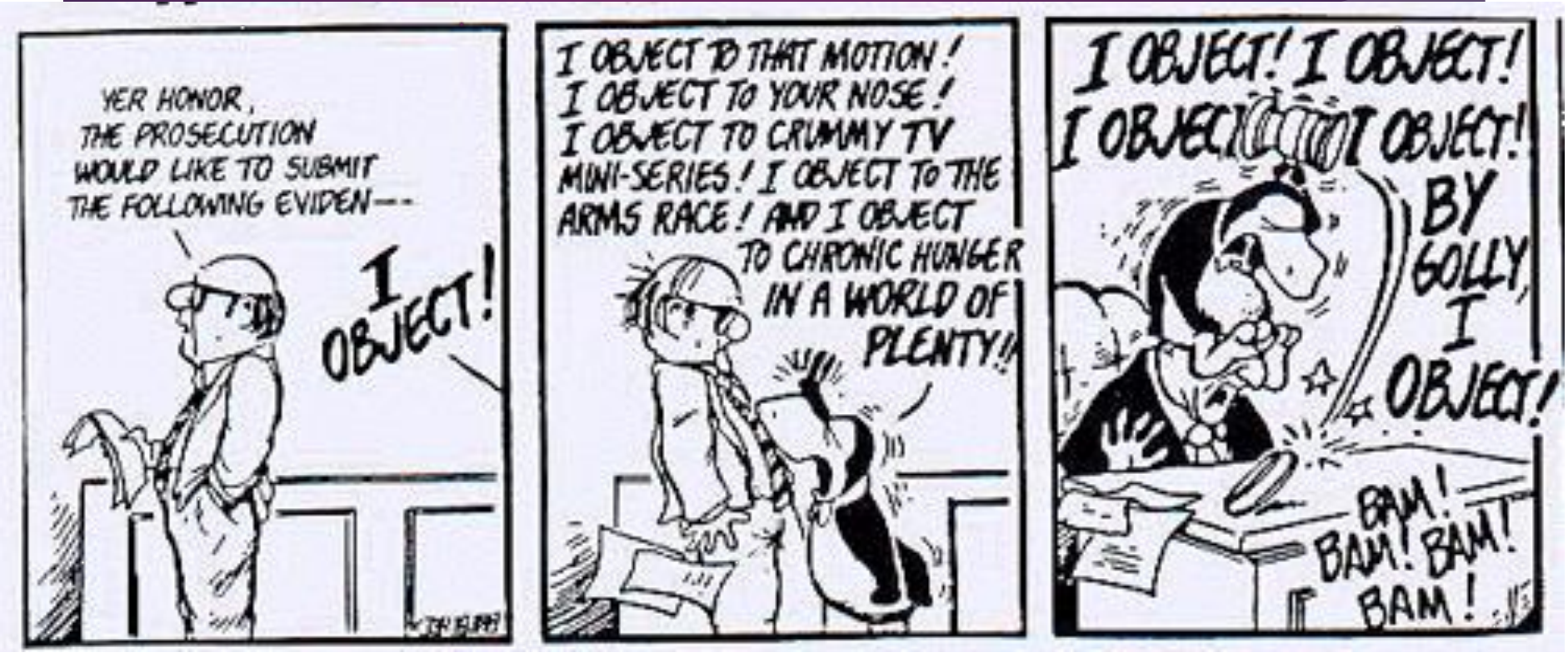
Your instructions

- Correct
- Non-argumentative
- Clear record

Their instructions

- Specific objections
- Propose alternatives
- Clear record

#4: Evidence admissibility issues



Preserving evidentiary objections

- On the record
- Specific grounds
- Get a definitive ruling
- Motion in limine denied w/o prejudice? Keep objecting

Offers of proof

- Describe proffered evidence in detail (what witness would testify to, what document says, etc.)
- Explain why the evidence supports your position
- Explain why the evidence is necessary.



Tracking exhibits

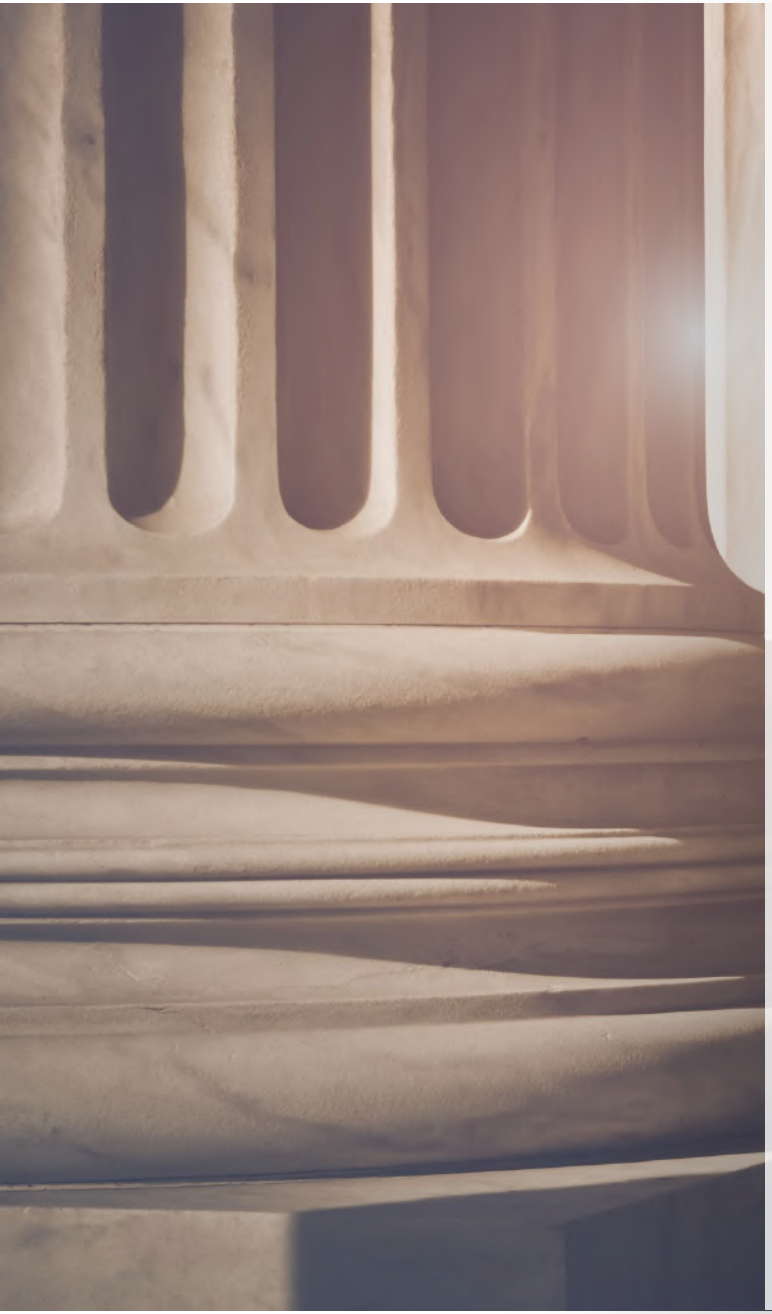
- Record should clearly show which exhibits were admitted (minute order, written exhibit list, stated on the record in reporter's transcript, etc.)



#5: Is the evidence sufficient?

- State court: some jurisdictions require directed verdict motion *and* JNOV motion to preserve evidentiary sufficiency challenge, and some require new trial motion to preserve challenge to damages award

- Federal court: must make FRCP Rule 50 motion *both* at close of evidence ***and*** at end of trial



Thank You

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