International Municipal Lawyers Association, 2023 Mid-Year Seminar, Washington, DC.

Section 1983: Appellate Practice Pointers: Preserving Issues For Appeal

Ruth Masters,
MastersLaw,
7061 W. North Ave, # 296
Oak Park IL, 60302
(708) 445-8031
rmasters@ruthmasterslaw.com

© 2023 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2023 Mid-Year Seminar, held April 21-24, 2023, in Washington, DC. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.



Preserving Issues for Appeal

Appellate Overview

- Appellate court deference on the facts
- Generally courts are looking for legal error that affected the outcome
- Be wary of waiver

Appellate Jurisdiction

- Final judgments only
- Interlocutory under limited circumstances

Pre-Trial Federal Court

- Fed. R. Civ. P 12 motions to dismiss
- Summary judgment

Standard of Review Motion to Dismiss

De novo!

(or why appellate lawyers sometimes find defending dismissals on appeal to be challenging)

What to do if your complaint has been dismissed and you have leave to replead:

No repleading obligation for claims previously dismissed with prejudice, but facts and admissions from an earlier complaint do need to be repled if they are to form the basis of the new complaint.

Amending Complaints Fed. R. Civ. P. 15

- Attach proposed amended complaint to a motion to amend.
- Failure to do so waives on appeal denial of a motion to amend
- Why? Because an appellate court cannot tell what you wanted to say so they cannot rule the failure to amend was erroneous

Keep in mind . . .

Courts don't have to allow amendment where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile.

Defending Denial of a Motion to Amend

Standard of review is abuse of discretion.

BEWARE!
IN STATE COURT THINGS COULD BE VERY DIFFERENT.

Answers To Complaints

Never say more than you have to because you don't want to later have something construed as an admission

Affirmative Defenses

- Raise them; Move to amend later if necessary to add more
- Can move to strike but do so within time to file a responsive pleading
- Usually only waived if failure to raise sooner prejudices the other side.

As a practical matter . . .

New affirmative defenses have successfully been raised at the summary judgment stage, though it is a gamble to wait until then.

Summary Judgment

- Resolve discovery disputes before hand
- Double check your local rules
- How many undisputed facts can you have?
- What form do the responses have to take

How To Respond To Statements Of Fact

Don’t admit anything you don’t have to; but make sure to back up denials.

Matthews v. Donahoe, 493 F. App'x 796, 799 (7th Cir. 2012) cert. denied, 133 S. Ct. 2352, 185 L. Ed. 2d 1078 (U.S. 2013) (“In Matthews's response to the Postal Service's statement of material facts, she admitted most of the factual assertions and denied others, but did not cite to the record to support her denials. Because of her noncompliance with Local Rule 56.1(b), the judge justifiably accepted the Postal Service's factual assertions as undisputed.”)

Example Of A Good SJ Response

Fact: Plaintiff complained to her union that her detail to Unit 124 was retaliation (cites).



Good SJ Response

Response: The City denies the first sentence because it is not supported by the cited testimony. Plaintiff could not specifically recall what she said to her union about her detail to Unit 124, but merely said she asked "how could they just remove me, you know, without me knowing about it." (Cite omitted). Plaintiff did not testify that she said anything to her union about retaliation. (Cite omitted).

Summary Judgment

Move to strike offending statements (but still respond in the alternative)

WHAT NOT TO DO:

Plaintiff A and plaintiff B were taken from the school in handcuffs in front of their children, who were crying. Plaintiff B pleaded with defendant not to lock up her mother because she had nothing to do with anything and was sick. Defendant appeared angry as he said he was going to have both plaintiffs locked up.[21]

Summary Judgment Response

Response:

Move to strike as immaterial. The only material facts in this case are the ones showing that defendant had or did not have probable cause to believe plaintiffs were disturbing the peace.

Risk of this type of response

- Facts neither admitted nor denied are deemed admitted.
- What if you are wrong?

Evidentiary issues

- Motion in *limine.* FRE 103(a)
- No need to renew at trial unless motion ruling was conditional but you can because circumstances change and you might get an "open the door" ruling.
- If not a MIL issue, object at trial

Be specific in the objection!

- If the district court admits the contested evidence, the opponent must make a timely objection or motion to strike, stating the specific ground of objection, if the specific ground was not apparent from the context.
- Further, arguments for excluding testimony, when made on appeal, are not preserved by motions in limine that reference different arguments. *Downing v. Abbott Lab'ys*, 48 F.4th 793, 813 (7th Cir. 2022)

Why?

Because appellate courts review trials for error in rulings. And a district court's evidentiary ruling is not erroneous if a reason for admission or exclusion has not been presented to it.

MIL Violations

- Object, object, object and don't open the door yourself

(Don’t) Invite error

Invited error if a party injects a topic into a proceeding that has either been barred, or turns out to be prejudicial after the fact

Exhibit A – Invited Error

Before trial Morrow's lawyer had moved the judge to bar any "questions, argument, and innuendo regarding gang affiliation and tattoos," and the motion had been granted. Yet at the trial Morrow's lawyer—not the government's lawyer—asked May: "Drugs are sold by gang members predominantly?“ Officer May replied: "Not all the time; no, ma'am." The lawyer's question was harmful to her client, and the officer's answer helpful to him.

A further perverse inquiry along the same lines by the lawyer's co-counsel of Officer Town, asking "Did you ever come to learn that any particular gang controlled drug activity in that area?" (the area in which Morrow was arrested), elicited the reply: "There are numerous amounts of gangs in the Eleventh District." The lawyer pressed Officer Town, asking whether the Four Corner Hustlers was one of them and whether "it is a very dangerous gang?" Town replied that the Four Corner Hustlers was indeed one of the gangs in the area but that "they are all [that is, all the gangs in the district] dangerous, sir."
Morrow v. May, 735 F.3d 639, 641-42 (7th Cir. 2013)

Offers of Proof:
Do what you need to do

Offers Of Proof – Do What You Need To Do

- FRE 103(a)(2)
- Has to be specific enough so reviewing court can tell what witness would testify to and basis of testimony in order to judge propriety of exclusion
- Must demonstrate materiality, relevancy, admissibility
- Must include the evidence (i.e. photographs, expert report etc.)
- Consider voir dire

Offers of Proof

When the relevance of a particular line of questioning is not self-evident, an explanation of what the anticipated answers will be and how those answers advance the party's theory of the case is critical. Without that explanation there is no way for a reviewing court to determine whether excluding the evidence was prejudicial. *Wilson v. City of Chi.*, 758 F.3d 875, 885 (7th Cir. 2014)

Exhibits

Move in *limine*

Object at Trial

Gain Some Love! (from an appellate attorney). Do the housekeeping!

- Move into record
- Actually, file into the record

Directed Verdict

Must move for directed verdict before close of evidence in Federal Court to preserve JNOV. Fed. R. Civ. P 50.

See Unitherm Food Systems, Inc. v. Swift Eckrich, Inc., 546 US 394 (2006)

Jury Instructions



Jury Instructions

- Read as whole: Make sure to object wherever problem appears in instruction
- Submit alternative "correct" version

Objectionable Instruction

The plaintiffs claim that the defendant-officers searched their apartment without any legal justification in violation of the Fourth Amendment.

A search does not require physical entry into a home or apartment. **Simply breaching an entry door and seeing inside an apartment constitutes a search.**

When executing a search warrant, police officers must take reasonable steps to correctly identify the correct premises to search. Such precautionary measures must be taken to avoid making a mistake and searching the wrong home or apartment.

Before the door was breached, if the officer knew, or should have known, that the Plaintiffs' apartment was not the apartment targeted by the search warrant, the breach was not a reasonable mistake.

Ruling on Appeal

- Instruction was "excessively favorable to the plaintiff."
- "A search resulting from an innocent mistake is not unreasonable and so does not violate the Fourth Amendment."
- "We even doubt that what happened here should be considered a 'search'" -- officers weren't looking for anything when door opened. "Seeing can be searching, but isn't always."

Balthazar v. City of Chicago et al., 735 F. 3d 635 (7th Cir. 2013)

Verdict Forms

Fed. R. Civ. P. 49 Options

- General verdict
- Special verdict – requests jury to return specific findings on issues of disputed fact raised by the parties during trial. Check pattern instructions
- General verdict with special interrogatories

Jury instruction waiver

- Waiver problems if you don't ask for anything specific

General Verdict

WE, THE JURY, UNANIMOUSLY FIND THAT THE FOLLOWING DEFENDANT(S) INTENTIONALLY VIOLATED PLAINTIFF'S FOURTH AMENDMENT RIGHT NOT TO BE SUBJECTED TO EXCESSIVE FORCE.

(Place an "X" on the line next to the defendant(s) whom you find against)

OFFICER _____ _____

OFFICER _____ _____

WE AWARD DAMAGES IN THE FOLLOWING AMOUNT(S):

COMPENSATORY DAMAGES FOR THE AMOUNT

THAT WILL FAIRLY COMPENSATE PLAINTIFF

FOR ANY INJURY HE SUSTAINED AS A RESULT

OF DEFENDANT(S)' CONDUCT _____

PUNITIVE DAMAGES, IF ANY, AGAINST OFFICER _____

PUNITIVE DAMAGES, IF ANY, AGAINST OFFICER _____

Special Verdict Forms – 7th Cir. ADA

1) Did Plaintiff have a disability?

Answer Yes or No:

(If you answered "Yes," answer Question 2; otherwise, sign, and return this verdict form)

2) Was Plaintiff qualified to perform [his job] [the job he sought]?

Answer Yes or No:

(If you answered "Yes," then answer Question 3; otherwise, sign and return this verdict form.)

3) Did Plaintiff request an accommodation?

Answer Yes or No:

(If you answered "Yes," then answer Question 4; otherwise, sign and return this verdict form.)

4) Was Defendant aware of Plaintiff's disability at the time of Plaintiff's request?

Answer Yes or No:

(If you answered "Yes," then answer Question 5; otherwise, sign and return this verdict form.)

5) Did Defendant fail to provide Plaintiff with a reasonable accommodation?

Answer Yes or No:

(If you answered "Yes," then answer Question 6; otherwise, sign and return this verdict form.)

- 6) Would giving Plaintiff a reasonable accommodation have been an undue hardship on
- Defendant's business?
- Answer Yes or No:
- (If you answered "Yes," sign and return this verdict form; otherwise, answer Question 7.)
- 7) Has Plaintiff suffered a net loss of wages and benefits as a result of [describe adverse
- action]?
- Answer Yes or No:
- (If you answered "Yes," then answer Question 8; otherwise sign, and return this verdict
- form.)
- 8) What was the amount of net wages and benefits that Plaintiff lost up to the time of trial?
- Answer: $
- (Answer Question 9.)

Stating the Obvious?

- Be present when the jury returns: otherwise may waive right later to object to entry of an inconsistent verdict

Post Trial - Federal Court

- Fed. R. Civ. P. 50 and 59
- Don't miss the deadline!
- 28 days, no exceptions no extensions.
- Even if the judge says so.
- Even if the other party agrees.

How Do I Meet That Deadline?

Complete your post-trial motion, leave blanks for citations to the record and tell the court you will file a revised motion with cites (but no other changes) once you receive the transcripts.

Post Trial - Federal Court

JNOV: Comply with Fed. R. Civ. P. 50

- Sufficiency of the evidence. Make motion prior to close of evidence. Fed. R. Civ. P. 50(a)
- Renew motion after jury verdict returned for entry of judgment. Fed. R. Civ. P. 50(b)

New Trial

New trial available Rule 59

- Can move for new trial under Fed. R. Civ. P. 59, even if no Fed. R. Civ. P. 50(a) motion.
- Manifest weight of Evidence, Evidentiary Rulings, Closing/Opening Argument Issues

Motions for Reconsideration

- Fed. R. Civ. P. 60(b)
- Not cure alls
- Newly discovered evidence, changes in the law, errors in court's application of existing law



One BIG Takeaway

Always check all of the possible rule sources!

Preserving Issues for Appeal



Questions?



Thank You