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### **SDTLA CALENDAR OF EVENTS 2007**

December 13	Board Conference call, 5 p.m.
<b>2008</b>	
January 10	Winter Town Hall Meeting, USD Law School
January 18	Board conference call, 5 pm
Jan 8 - Feb 27	South Dakota Legislative Session
February TBA	PAC Phonathon, 1-3 pm, SDTLA Office, Pierre
	Board Meeting, 3-5 pm, SDTLA Office, Pierre
	Legislative Dinner, Pierre
April 9	Board Meeting, Sioux Falls Sheraton
April 10-11	Spring Seminar, Sheraton, Sioux Falls

**BAR RISTIER**

# MAKE YOUR RECORD, OFFER YOUR PROOF

By Robert Van Norman & John R. Murphy

When preparing for trial, we spend large amounts of time gathering evidence, researching instructions, preparing witnesses and sweating out our closing arguments. During that process, we may overlook one of the most important aspects of trial preparation: preserving our client's case for appeal. After all, we don't want to think about losing, much less preparing for a loss.

The reality is that appellate review is unforgiving, especially when it comes to the process of preserving the record on evidentiary matters. *State v. Boston*, 2003 SD 71, 665 N.W.2d 100, is an instructive example.

In *Boston*, the defendant raised a number of substantive issues on appeal from his second degree murder conviction, for which he received the mandatory life sentence. Repeatedly, he was denied substantive appellate review because he had not preserved his record. The issue of whether "other acts" evidence should have been admitted at trial was deemed waived because he did not object during trial, even though the matter had been litigated pretrial. The trial court's decision to exclude his psychological defense evidence was upheld because *Boston* failed to make an offer of proof, even though his counsel articulated a number of reasons why the evidence should be admitted. And, an issue regarding the propriety of the prosecutor's closing statement was deemed waived due to the lack of a timely and specific objection.

When the admissibility of evidence is at issue, there are two fundamental principles that trial counsel must heed. First, a trial court's evidentiary rulings are presumed to be correct unless an appellant can show that the trial court abused its discretion. *E.g.*, *Kaiser v. University Physicians Clinic*, 2006 SD 95, 724 N.W.2d 186. This standard requires that error be demonstrated and that the error was prejudicial. *Boston*, at 105. Second, evidentiary issues not preserved for appeal through a timely, specific objection or not supported by an offer of proof (when necessary) are deemed waived. *Boston*, at 108. The focus of this article is the second principle: the preservation of evidentiary issues and the making of offers of proof.

To begin this analysis, litigators must know Federal Rule of Evidence 103(a), which was incorporated into the South Dakota Code at SDCL §19-9-3. This rule provides as follows:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

- (1) 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) 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.

The final sentence was added to the federal rule in 2000 and to the South Dakota version in 2006. As we will discuss below, that sentence addresses some, but not all, of the most common problems with preserving evidentiary issues for appellate review.

On its face, it would appear that the rule is both simple to comprehend and easy to comply with: "To preserve error for appeal, a party complaining of the admission of evidence must make a timely and specific objection or motion to strike. To preserve error as to the exclusion of evidence, the proponent must make an offer of proof." Goode and Wellborn, *Courtroom Handbook on Federal Evidence*, p. 221 (West 2007). However, application of the rule is problematic.

The rule only permits review of evidentiary objections in cases where a litigant's substantial rights are affected. It does not tell you what a "substantial right" is, so counsel may not know in advance (at the trial stage or going into

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an appeal) whether the rule applies to an issue. How, then, do you know if your client's substantial rights have been implicated by a trial court's evidentiary ruling? You do not, at least not until the appellate court issues its opinion. The way you know if an evidentiary ruling has affected your client's substantial rights is if the appellate court does not apply the harmless error analysis to your claim for relief. See Fed. R. Civ.P. 61; Fed. R. Crim. P. 51 & 52. Further complicating the matter is the circuitous manner in which harmless error is typically defined. For instance, in the South Dakota Code, part of the definition of harmless error is an error that "does not affect the substantial rights of the parties," leading us back to where we began. See SDCL § 15-6-61.

Another issue is the absence from the rule and the official commentary of the meaning of "definitive ruling." Justice Breyer, during the oral arguments in *Ohler v. United States*, 529 U.S. 753 (2000), simply defined the term this way: "The judge says, I rule, Government, you can admit this evidence, and you [counsel] wish under [Rule] 103 to appeal that ruling." The rule also gives no guidance as to what makes an objection or motion to strike timely. In light of the presumption of correctness of evidentiary rulings at the trial level, these are matters that are likely to be addressed one by one at the trial stage.

Counsel must be aware of some of the pitfalls in applying the rule during trial. As noted above, the 2000 revision to the federal rule and the 2006 revision to the State rule have partially addressed one common problem in application.

Prior to 2000, there was a split among the federal circuits as to whether an evidentiary matter raised pretrial (for example, by a motion in limine) had to be raised again at trial (for example, by a specific and timely objection on the record), in order to be preserved for appellate review. The "traditional rule" was that even if a matter was litigated pretrial, a record had to be made during trial to preserve the issue for appellate review. Counsel often forewent raising the issue during trial, having already lost the issue pretrial and (presumably) not wanting to lose it again, especially in front of the jury. This failure to preserve the issue meant that the appellate court would not review the propriety of the trial court's pretrial ruling, which as demonstrated in the Boston case, *supra*, forecloses appellate options. As an aside, additional options which may be foreclosed in criminal cases are challenges in habeas corpus proceedings.

The revised rule dispenses with the express requirement that matters litigated pretrial must be raised again during trial. No doubt many litigators welcomed this revision. However, it has some limitations.

First, for an issue to be deemed preserved pretrial, it must have been fully presented to the trial court. It also must be an issue that was finally determined prior to trial.

Accordingly, if an issue is raised but not completely resolved, or if the trial court intimates that resolution of the matter is dependent on some fact or circumstance not yet in the record, counsel must plan to address the issue through a specific and timely objection at trial plus, perhaps, an offer of proof if evidence is excluded.

Second, a pretrial ruling only preserves the exact issue already presented to the court. If the issue mutates into something else, if new theories of admissibility are proposed, or if the factual context broadens, be prepared to make a specific objection to preserve the issue.

Third, another matter not directly addressed by the rule is the form of the offer of proof. Commentary to the rule suggests that an offer of proof may be made in the form of an "avowal" by counsel, that is, a recitation by counsel of the facts or circumstances warranting admission of the evidence, its relevancy, and the prejudice if it is excluded. The commentary, further, notes that a question and answer presentation with the witness out of the presence of the jury is the preferred format. It is appropriate for the party seeking exclusion of the evidence to ask the trial court not to allow an avowal alone by counsel. Insist that the witness take the stand to prevent the offering counsel's avowal of the evidence to have an unsupported spin as to relevancy and prejudice issues. See *Boston, supra*, at 108: While Boston sought to introduce psychiatric and psychological evidence, his arguments were "vague," he made no offer of proof on any pertinent matters, and he "made no showing before the trial court or this Court [sic] of the relevance of the proffered evidence."

Last, the use of "continuing objections" is common, especially when a matter has been litigated pretrial and is likely to arise during trial. Continuing objections are only as good as the initial objection. Therefore, to preserve issues for appellate review, the initial objection must be specific and clear. Further, as trial progresses, that initial objection may no longer be sufficient to cover the matter as new facts and theories are introduced to the mix. Counsel must plan to supplement earlier objections to address and preserve the issue as it develops.

In the end, counsel should not view preservation of matters for appeal as a destructive or useless process. Rather, it is part of the process of protecting your clients' interests at trial and for appeal. If you are not fortunate enough to prevail at trial, at least you will give your clients a better chance for success on appeal through proper record preservation.