



# FRANKEL-Y APPEALING

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As the Courts begin to schedule trials, it is worthwhile to examine the basics of preserving trial arguments for appellate review, the risks of failing to properly preserve a trial issue, and recent Court decisions which have applied statutes and precedent, to evaluate trial issues on appeal.

Many appellate attorneys have been faced with the following scenario: Trial counsel has made a valiant effort to secure a verdict in her client's favor. Unfortunately, an adverse Judgment is issued, and appellate counsel is contacted to evaluate the case for a potential appeal. Appellate counsel reviews the trial transcript and spots 5 arguments that would have had a significant chance of success *but for the fact that* objections were not made; or were made untimely; or the objections did not include the specific grounds that could have been raised on appeal. Under these circumstances, the Appellate Courts may determine that they cannot review these arguments on the merits regardless of how persuasive they are, because the issues were not properly preserved.

So, let's begin our review with CPLR §4017, which requires a party to make known the action it is requesting, or its objection to the Court's action, *at the time a ruling or order is requested or made*. In other words, exceptions to rulings are no longer simply deemed made. Counsel must state their objections at the time a ruling or order is made. Pursuant to CPLR §4017, counsel also must state an objection to the Court's refusal to charge the jury or failure to charge the jury. The legislature's rationale for this requirement, is that requesting a certain jury charge may not represent a grievance against a different charge given. A party must object to the charge as given, and the Court must be given an opportunity to correct a defective charge. The legislature was quite clear that pursuant to CPLR §4017, appellate

review may be restricted as a consequence to a party's failure to make objections known.

CPLR 5501(a) sets forth the scope of appellate review from a Judgment and explicitly limits certain review based upon whether counsel made their objections known at trial. Specifically, this statute states that an appeal from a final judgment brings up for review any ruling *to which the appellant objected or had no opportunity to object*; or a ruling which constituted a refusal or failure to act at the request of the appellant. An appeal from a final judgment also brings up for review any jury charge, or failure or refusal to charge, as requested by the appellant, *to which he objected*. Further it brings up for review any remark made by the Judge, *to which the appellant objected*.

With the forgoing statutes as a backdrop, recent court decisions illustrate how the Courts evaluate the timeliness or thoroughness of objections throughout the course of trial. That is right. I said thoroughness, because there are circumstances where the Appellate Courts will not review trial issues if *all* the grounds for an objection were not stated at the time of trial.

To preserve the right to appellate review of objectional remarks made during opening statements or summations, trial counsel must state the objections *during* the opening or summation (Golimowski v Town of Cheektowaga, 184 AD3d 1195 (4<sup>th</sup> Dept 2020). Golimowski sends the message that preserving a trial issue on appeal will get you a seat at the table, but by no means guarantees success. The appellant challenged a comment made by plaintiff's counsel during opening statements on the ground that it contained facts not in evidence. The Appellate Division, Fourth Department highlighted the importance of trial counsel having properly preserved the issue for appellate review with a timely objection but, nevertheless, concluded that the isolated comment neither diverted the attention of the jurors from the issues at hand, nor was likely to have had any effect on the verdict.

The seriousness with which the Courts view trial counsel's obligation to make timely objections is underscored in People v Wisniewski, \_Ad3d\_, (4<sup>th</sup> Dept 2021),

an appeal brought by a person convicted of criminally negligent homicide for operating a boat while under the influence. Defense counsel argued that his client was denied a fair trial due to prosecutorial misconduct during summation. However, the Appellate Division would not consider the argument, because defense counsel failed to preserve that contention during summation, by making a timely objection.

Attorneys often weigh whether to object during their adversaries' opening statements or summations against the risk of giving the jury the impression they are trying to prevent it from hearing something important. Understanding how the Courts analyze these objections can aid trial counsel in making their judgment calls. When presented with challenges to remarks made during opening statements or summations, Courts consider whether the remarks were "fair comment". However, even if the remarks were not "fair comment", Courts evaluate whether those comments were, "so prejudicial that they deprived a party of a fair trial, warranting a new trial in the interest of justice" (Nemeth v Brenntag N. Am., 183 AD3d 211 (1<sup>st</sup> Dept 2020)). So long as the comments do not substantially prejudice a trial by improperly influencing the jury's verdict, the Court will find no basis for granting a mistrial (Nemeth, 183 AD3d 211).

Importantly, parties can contract their way right out of a mistrial or appellate challenge to judicial or attorney conduct, underscoring the importance of ensuring that all future rights are protected regardless of the trial format. In Vargas v LaMacchia, 179 AD3d 611 (1<sup>st</sup> Dept 2020), the parties stipulated to a summary jury trial, pursuant to the rules and procedures for Bronx County. The rules provided that the parties agree to waive motions for directed verdict or to set aside the verdict. The rules also provided that *the Court* shall not set aside any verdict or judgment or order a new trial. At trial, the Court declared a mistrial to correct an admittedly erroneous evidentiary ruling. However, the First Department held that the trial Court erred in sua sponte declaring a mistrial because the stipulation to abide by the Bronx County rules constituted a legally binding contract and those rules precluded the Court from setting aside the verdict. Notably, the First Department noted that *the parties could have, but did not*, agree to reserve their rights to appeal or move to set aside the verdict.

As I alluded to in the beginning of this article, the thoroughness of trial objections is critical and mistakes in this regard can result in limiting appellate review. For example, simply making an objection to a general ruling is insufficient to preserve a party's right to appeal specific testimony later given, even where that testimony flowed from a general ruling to which counsel objected. In People v Kinsman, 191 AD3d 539 (1<sup>st</sup> Dept 2021), the appellate court was presented with defense counsel's challenge to expert testimony as well as references to that testimony during summation. At trial, defense counsel had objected to the trial court's general ruling that permitted plaintiff's expert to be called in the first place. The First Department held that defense counsel's objection to the ruling was not enough to preserve specific objections to the particular portions of the expert's testimony and related summation remarks.

Along those same lines, and I anticipate some reluctance here, trial counsel must state all grounds for an objection in order to preserve each ground for appellate review (People v Wisniewski, \_Ad3d\_, (4<sup>th</sup> Dept 2021). While the presiding judge may very well glean the grounds for an objection after counsel simply utters the word "objection", without each ground articulated on the record, the appellate court may not consider the arguments raised on appeal (*see also*, Dirschberger v Lawson, 187 AD3d 1562 (4<sup>th</sup> Dept 2020) (defendant failed to preserve argument that admitted evidence was privileged because that specific ground was not stated at the time of the objection). The Dirschberger Decision is also a reminder for trial counsel to check every page of their adversaries' packaged exhibits and object to any part of that exhibit that could not stand alone, or risk the appellate court finding that any error in admitting the evidence would be harmless.

CPLR 4110-b provides the timing and specificity requirement for an objection to charge. Specifically, this statute states that an objection to the giving or failure to give a jury instruction must include the grounds for the objection and must be made *before the jury retires* for deliberation. The Court must give counsel the opportunity to state the objection outside the hearing of the jury. The rationale for the time requirement, is to give the trial court the opportunity to correct the charge and avoid reversible error. The Courts have also stated that to challenge the trial court's jury instructions on appeal, trial counsel must request different instructions or, at the very least, object to the charge given (People v Wisniewski; Alonzo v City of NY, 188 AD3d 1123 (2d Dept 2020).

Demarco v Demarco, 154 AD3d 1226 (3d Dept 2017) presents an example of the specificity necessary to make a proper objection to a jury charge under CPLR 4110-b. Here, the defendant raised a general objection to the Court's decision to charge the jury on implied assumption of risk, but not to charge on primary assumption of risk. On appeal, in addition to arguing the basis made at trial, the defendant raised several other issues in connection with the applicability of the implied assumption of risk charge. Unfortunately, since those other grounds regarding the implied assumption of risk were not raised at the time of the trial objection, the arguments were unpreserved for review.

The Appellate Division has the power to order a new trial, when an unpreserved jury charge error is fundamental and this issue, along with other trial preservation issues, are discussed more fully in my CLE course called, Preserving Trial Arguments for Appellate Review, which can be found on nacle.com. At the heart of this article, is the point that while exercising judgment as to *whether* to make a trial objection is critical, exercising *informed judgment* is key. Keeping in mind that counsels' actions at trial can limit the Court's appellate review of trial issues following an adverse verdict, can, and should, be of primary consideration when the trial team is formed.