

## THE RIGHT WAY TO LOSE AT TRIAL: CIVIL

by Gerry Schulze

No matter how good you are, and how good your case is, from time to time you are going to lose. But, since you are such an exceptional trial lawyer, and since your cause was so just, there must be some other reason you lost this time.

You lost, of course, because the trial judge ruled against you on a key point. The trial judge admitted inadmissible evidence against you, and refused to allow you to put in evidence that could have won your case. The trial judge should have granted a mistrial when your unscrupulous opponent "hot poked" the jury with irrelevant and prejudicial information.

Justice may be delayed, but it will not be denied. You will appeal. You will return for a new day in court. You will bill for two trials.

You will, that is, as long as you preserved your error. If you didn't preserve your error, the appellate court will tell you that you didn't preserve your error. The Court does not consider errors raised for the first time on appeal.

You were not entitled to a perfect trial, only a fair one. In order to protect your record for appeal, you must give the trial judge a fair chance to consider your position and correct any error made. Butler v. Hughes, 292 Ark.198, 729 S.W.2d 142 (1987).

You also must give opposing counsel a sufficient objection that any defect can be cured. Smith v. Union National Bank, 241 Ark. 821, 410 S.W.2d 599 (1967). ("It is not our practice to reverse the action of the trial court when a party fails to object to a procedural defect that could have been readily supplied had the point been raised seasonably.").

You must present your argument to the trial judge in a timely manner and get a ruling on the issue presented. An objection must be timely. An untimely objection does not give the trial judge an opportunity to react to the argument and, if convinced, amend his ruling accordingly. Young v. Johnson, 311 Ark. 551, 845 S.W.2d 509 (1993).

"But that error the trial judge made was so plain, so obvious, an objection should not have been necessary."

I'm sorry, but it was. Arkansas does not recognize the plain error rule. Dotson v. Madison County, 311 Ark. 395, 844 S.W.2d 371 (1993); Security Pac. Housing Servs. v. Friddle, 315 Ark. 178, 866 S.W.2d 375 (1993).

"But that other error, it was so difficult and novel, I could not reasonably be expected to have objected at trial."

Sorry again. There is no difficult and tough exception. Lynch v. Blagg, 312 Ark. 80, 847 S.W.2d 321 (1993).

"And then there is that objection I would have made, but the jury would have thought I was trying to hide something."

Sorry again. There is no tactical exception. Powell v.

Burnett, 304 Ark. 698, 805 S.W.2d 50 (1991). When you elect not to object as a matter of trial strategy, you waive your objections. The best solution is to ask to approach the bench.

"Then there's that constitutional error which I should have raised."

Amazingly enough, even with constitutional questions, you have to raise them at the trial court. The Supreme Court of Arkansas discussed this in Seyller v. Pierce and Company, Inc., 306 Ark. 474, 816 S.W.2d 577 (1991):

As their second claim on appeal, appellants argue appellee did not comply with the notice provisions of the materialmen's lien statute. Specifically, appellants claim they should have received pre-construction notice of any potential liens as required by Ark. Code Ann. § 18-44-115 (1987). It is undisputed that appellants did not receive the requisite notice. Appellee responds with the argument that appellants were not entitled to the pre-construction notice because the construction involved was "commercial construction" which is excepted from the notice requirement by section 18-44-115(f). Because we have recently held the commercial construction exception to the notice requirement unconstitutional on equal protection and due process grounds, Urrey Ceramic Tile Co. v. Mosley, 304 Ark. 711, 805 S.W.2d 54 (1991), we must make a threshold choice of law determination regarding which law applies to the current case. In other words, we must first decide whether to apply Urrey retroactively to this case which was pending before us when Urrey was decided.

We have stated that once a statute is declared unconstitutional, it is treated as if it had never been passed. Bob Hankins Distrib. Co. v. May, 305 Ark. 56, 805 S.W.2d 625 (1991); Huffman v. Dawkins, 273 Ark. 520, 622 S.W.2d 159 (1981). However, in this particular case, to treat the statute as if it had never been passed would require us to ignore the well-settled rule that even constitutional arguments are waived on appeal unless raised below. Smith v. City of Little Rock, 305 Ark. 505, 806 S.W.2d 371 (1991). Thus, before addressing the

merits of appellants' second argument, we must make a choice of law. In other words, we must decide if Urrey is applicable to the present case such that section 18-44-115(f) is considered never to have existed; or, if because appellants failed to preserve the constitutional argument for appellate review, is Urrey not applicable to the present case such that section 18-44-115(f) is considered to exist in this case.

In reaching our determination of the applicability of Urrey we consider the recent decision, James B. Beam Distilling Co. v. Georgia, \_\_\_ U.S. \_\_\_, 111 S. Ct. 2439 (1991), where a plurality of the United States Supreme Court stated its position on the retroactive application of a decision to claims arising on facts antedating the decision. That position, as stated by Justice Souter who announced the judgment of the Court, is that once the Court has applied a rule of law to the litigants in one case, it must apply the same rule of law to all other litigants not barred by procedural requirements or res judicata. Thus, having no procedural bars, James B. Beam Distilling Company, as petitioner, received the benefit of a prior decision of the Court, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), although it did not begin to litigate its case until after the Bacchus decision was rendered.

It is important to note that petitioner James B. Beam Distilling Company was not barred by res judicata, a statute of limitations, or other procedural requirements from litigating its case. In that respect, the factual situation in James Beam differs from the factual situation in the current appeal. Here, appellants are barred by the procedural requirement of preserving an issue in the trial court for our review. It is true that in their answer appellants asserted the materialmen's lien statute violated the Fourteenth Amendment of the United States Constitution and Ark. Const. art. 2, § 3; however, something more than a mere assertion of an argument in the pleadings is required to preserve an issue for appellate review. In Bond v. Dudley & Moore, 244 Ark. 568, 426 S.W.2d 780 (1968), we held that a party's conduct at trial can have the effect of abandoning an issue raised in the pleadings so that it cannot be relied upon in this court. We have also held that we will not address a constitutional argument that was not called to the trial court's attention for a ruling on the constitutionality during trial or at some point prior to the entry of final judgment. May v. Barg, 276 Ark. 199, 633 S.W.2d 376 (1982); Wilson v. Wilson,

270 Ark. 485, 606 S.W.2d 56 (1980). In the current case, although appellants raised the constitutional question in the pleadings, and although they raised a question of insufficient notice in their proposed findings of fact and conclusions of law, they did not request or receive a ruling on the constitutional issue from the trial court, nor did they argue the issue before to the trial court. Thus, in accordance with May, supra; Wilson, supra; and Bond, supra; we find appellants did not properly raise the constitutional argument to the trial court and the argument is not subject to appellate review. Accordingly, we hold the Urrey decision is not applicable to this case.

Seyller v. Pierce and Company, Inc., 306 Ark. 474, 816 S.W.2d 577 (1991).

The error must be prejudicial. You cannot appeal on the basis of a ruling you won at the trial court level. McDonald's Corp. v. Hawkins, 315 Ark. 487, 868 S.W.2d 78 (1984). If you win on an issue in spite of the trial court's error, you are the prevailing party on the issue and cannot complain. Kelly v. Medlin, 309 Ark. 146, 827 S.W.2d 655 (1992). You need not lose the whole case. In Young v. Johnson, 311 Ark. 551, 845 S.W.2d 510 (1993), a car wreck case, the plaintiff argued that the trial court erred in denying her motion for a partial directed verdict on the issue of comparative fault. Plaintiff argued that the evidence showed that she had done absolutely nothing wrong to cause the accident, that the burden of proof on the issue of her fault was on the defendant, and there was an absolute failure of proof on that issue. The trial court denied the motion and submitted the case to the jury on comparative fault. The jury returned a verdict for the plaintiff, but in an amount plaintiff deemed inadequate. Plaintiff appealed.

The Supreme Court reversed the trial court on the failure to grant the directed verdict. The Court held that the error was not cured by the verdict in favor of plaintiff, because her damages might have been reduced by some degree of her imagined fault. The court therefore reversed and remanded for a new trial.

The key is that the adverse ruling had to hurt you. National Bank of Commerce v. HCA Health Services, 294 Ark. 525, 745 S.W.2d 120 (1988). If the error was later cured at trial, there is no prejudice. Bryant v. Eifling, 301 Ark. 172, 782 S.W.2d 580 (1990).

You must object on specific grounds and you must get a ruling on your specific grounds. Mine Creek Contractors, Inc. v. Grandstaff, 300 Ark. 516, 780 S.W.2d 543 (1989). The burden to obtain a ruling on a motion is on the movant. Britton v. Floyd, 293 Ark. 397, 738 S.W.2d 408 (1987). Questions left unresolved are waived and may not be relied upon on appeal. Id.; Morgan v. Neuse, 314 Ark. 4, 857 S.W.2d 826 (1993). The burden to obtain a ruling on a particular theory of recovery is on the appellant. Guaranty National Ins. v. Denver Roller, Inc., 313 Ark. 128, 854 S.W.2d 312 (1993). Further, it is essential that the ruling be on the record.

In McDonald v. Wilcox, 300 Ark. 445, 780 S.W.2d 17 (1989), there was an argument in chambers off the record. The appellant contended that the trial judge denied appellant's motion in limine.

But as the record did not reflect a written order showing denial of the motion or any record of proceedings in chambers, there was no showing on the record that the motion in limine was denied. In

order to fairly and accurately review the ruling, the appellate court must have a record of the ruling below. Id.

Once you have properly raised an issue, don't abandon it. You can abandon it by silence. In Bond v. Dudley & Moore, 244 Ark. 568, 426 S.W.2d 780 (1968), the appellee's attorney told the trial judge on opening statement that priority of a lien was the only issue. The appellant's attorney declined to make an opening statement. At the end of the hearing, the trial judge stated that he believed that the only issue before the court was which lien had priority. Appellant's counsel did not respond to that statement. The Court said, "While appellant's attorney did not specifically agree that the question of priority was the only issue, he certainly had a duty to advise the trial judge if he disagreed. His silence constituted at least a tacit acquiescence in the judge's statements relative to the issues and burden." Id.

You can abandon an issue by conceding it. You must be very careful not to accidentally concede an issue. For example, in Mine Creek Contractors, Inc. v. Grandstaff, 300 Ark. 516, 780 S.W.2d 543 (1989), the Court considered an issue conceded as follows:

We will not reach this argument for not only did appellants fail to raise it below, they conceded the adequacy of the appellees' proof. The following was stated at the close of the plaintiffs' case:

Appellants' Counsel: Your Honor, I will move the Court to instruct a verdict in favor of the defendants on the plaintiffs' theory of trespass because of the doctrine and the plaintiffs' tortious contractual relations. I make that motion only on the merits of the

case presumed by the plaintiff, not including the prayer for damage. To be honest with the Court, I think they've made a case on negligent construction except for damage. . .

A motion for a directed verdict must state the specific grounds. ARCP Rule 50(a). Failure to state the specific grounds of a motion or objection below constitutes a waiver of that argument on appeal. *Bond v. State*, 296 Ark. 1, 751 S.W.2d 339 (1988). Nor can grounds for an objection be changed on appeal. *Hart v. State*, 296 Ark. 290, 756 S.W.2d 451 (1988). Of course, conceding a point before the trial court precludes a claim of error on appeal.

*Mine Creek Contractors, Inc. v. Grandstaff*, 300 Ark. 516, 780 S.W.2d 543 (1989).

Even if you don't concede an entire issue, you can concede that you are not entitled to a remedy. *Allen v. Burton*, 311 Ark. 253, 843 S.W.2d 821 (1992). If you concede you are not entitled to a particular remedy, and then you fail to ask for a different remedy, you can concede the issue.

You can abandon an issue by not getting a ruling. In *Stotts v. Johnson*, 302 Ark. 439, 791 S.W.2d 351 (1990), the appellant contended that the complaint had not been served within the time limits of Arkansas Rules of Civil Procedure 4(i). This was raised in the answer, as required, but not otherwise brought to the attention of the trial court. Since there was no ruling, there was no issue reserved for appeal.

Jurisdiction. There is one thing that the Court will consider whether or not it was raised below, and that is jurisdiction. *Hilburn v. 1st State Bank of Springdale*, 259 Ark. 569, 535 S.W.2d 810 (1976).

The Court will raise appellate jurisdiction on its own motion, even when none of the parties have raised it. John Cheeseman Trucking, Inc. v. Dougan, 305 Ark. 49, 805 S.W.2d 69 (1991). The Court will consider the subject matter jurisdiction of the lower court for the first time, even if it was not raised below. Miles v. Southern, 297 Ark. 274, 760 S.W.2d 868 (1988).

With respect to circuit versus chancery matters, it is only when the trial court is totally without jurisdiction that the Court will reverse without an objection. "It is only when the court of equity is "wholly incompetent" to consider the matter before it will we permit the issue of competency to be raised for the first time on appeal." Liles v. Liles, 289 Ark. 159, 711 S.W.2d 447 (1986). Where the nature of the action is such that it could be tried either in circuit or in chancery court and there is no objection to the jurisdiction of the court, the appellate court will not consider an objection to jurisdiction on appeal. Hooper v. Ragar, 289 Ark. 152, 711 S.W.2d 148 (1986).

Not only must all the elements to a successful appeal be in the record, you must also abstract them. Matters such as the pleadings, the verdict, post trial motions, or anything else necessary for the Court to understand the questions presented must be abstracted. Montgomery v. Butler, 309 Ark. 491, 834 S.W.2d 148 (1992); Pennington v. City of Sherwood, 304 Ark. 362, 802 S.W.2d 456 (1991).

Pleadings. Some legal theories must be pleaded. The statute

of frauds must be affirmatively pleaded. Majewski v. Cantrell, 293 Ark. 360, 737 S.W.2d 649 (1987). Adverse possession, laches, and estoppel must be pleaded. Bowlin v. Keifer, 246 Ark. 693, 440 S.W.2d 232 (1969).

Raising an issue on the pleadings is necessary, but is not enough. A party, by his conduct at trial, can abandon an issue made by the pleadings. Bond v. Dudley & Moore, 244 Ark. 568, 426 S.W.2d 780 (1968).

Discovery. Discovery disputes must be raised by the trial court and resolved by the trial court before they are proper grounds for an appeal. Mount Olive Water Association v. City of Fayetteville, 313 Ark. 606, 852 S.W.2d 309 (1993). The way to raise them is to file a motion to compel discovery and get a ruling on the record.

Motions for Summary Judgment. A motion for summary judgment which is denied is not an appealable order. Rick's Pro Dive and Ski Shop v. Jennings-Lemon, 304 Ark. 671, 803 S.W.2d 934 (1991). You must move for directed verdict under Rule 50 to preserve your record.

Often parties will move for summary judgment before discovery is complete. You can ask for additional time to respond to the motion under Rule 56(f). If you do not ask the trial court for the extra time in your response, however, you cannot raise the question in the Supreme Court. Young v. Paxton, 316 Ark. 655, 873 S.W.2d 546 (1994).

Although it doesn't have anything to do with preserving your record on appeal, now is a good time to reconsider Rule 54(b). Where more than one claim is presented, the court can grant summary judgment on one claim and leave the rest for trial. If so, consult Rule 54(b). The judgment is not appealable until the end of the case unless the court expressly finds that there is no just reason for delay and expressly enters judgment. The express determination that there is no just reason for delay must be supported by specific factual findings. Otherwise, the case is not appealable.

If you appeal, and there was no order complying with Rule 54(b), the appeal will be dismissed. If, in the meantime, the rest of the case was terminated and you did not file a new notice of appeal, it is too late. You are out of court.

Also, note that a summary judgment on less than all the issues which is not final under Rule 54(b) remains subject to revision until entry of final judgment.

Motions in Limine. One of the rare exceptions to the rule that you must object at the time that the offending evidence is offered is where the court has ruled on a motion in limine. As the Supreme Court stated in Massengale v. State, 319 Ark. 743, 894 S.W.2d 594 (1995), there are three things that can happen on a motion in limine:

When a motion in limine is filed, a trial judge will usually make one of three rulings. One, he may grant the motion, and the evidence will not be admitted. Two, he

may decline to rule on the motion for various reasons; for example, the motion may be too broad. See, e.g., Schichtl v. Slack, 293 Ark. 281, 737 S.W.2d 628 (1987). In that case it is necessary for counsel to make a specific objection during the trial. Brown v. State, 316 Ark. 724, 875 S.W.2d 828 (1994). Third, he may deny the motion. A motion in limine which is denied preserves the issue for appeal and no further objection is required. Ward v. State, 272 Ark. 99, 612 S.W.2d 118 (1981).

Id. at 746, 894 S.W.2d 594.

Where the judge "conditions" the admissibility of the evidence on "how the proof develops," it is necessary to make a specific objection at trial to preserve the issue for appeal. Delta School of Commerce, Inc. v. Wood, 298 Ark. 195, 766 S.W.2d 424 (1989).

If you lose a motion in limine, you do not waive your argument by being the first to broach the subject of the motion. Burnett v. Fowler, 315 Ark. 646, 869 S.W.2d 694 (1994).

Although it is not the intent of this article to cover federal law in depth, a caveat is necessary on this point. In federal court, a motion in limine is not sufficient to preserve an issue for appellate review. Huff v. Heckendorf Mfg. Co., 991 F.2d 464 (8th Cir. 1993). There is a very limited exception, found in Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir., 1985). I've tried to use the exception on one occasion. Suffice it to say it's easier to spell "Sprynczynatyk" than to use the

exception.

Pretrial Hearings: Some trial courts are notorious for holding pretrials which are not on the record. Any ruling made by the judge must be made a part of the record if you plan to rely on it on appeal. See, e.g., McDonald v. Wilcox, 300 Ark. 445, 780 S.W.2d 17 (1989). Therefore, if you lose a ruling at a pretrial, it is necessary to make it a part of the record somehow. The best way is with a well drafted order. If the pretrial is the same day as the trial, however, it is better to ask the judge to call the court reporter in to make your record.

Jury Selection: The trial court's denial of a challenge for cause is not reviewable unless the challenged juror actually sits on the jury. National Bank of Commerce v. HCA Health Services, 304 Ark. 55, 800 S.W.2d 694 (1990).

Opening Statement: The court reporter should take down the opening statement. If you are going to appeal on the basis of something your opponent said in opening, you must either abstract the opening statement as recorded or you should reconstruct the statement. Smith v. Babin, 317 Ark. 1, 875 S.W.2d 856 (1994). This is consistent with the general rule that any error you rely on must appear on the record and be abstracted.

Evidence: Objections to evidence must be timely. The word "contemporaneous" appears in some decisions. Callahan v. Clark, 321 Ark. 376, 800 S.W.2d 694 (1990) (an objection seventeen questions later is not contemporaneous). Remember the philosophy,

you must give the judge a chance to correct the error. You must give the opponent an opportunity to cure the defect. That is why your objection must be sufficient to apprise the court of the particular defect alleged. Halbrook v. State, 319 Ark. 350, 801 S.W.2d 379 (1995). You are bound by the scope and nature of your objections are presented at trial. Stricklin v. State, 318 Ark. 36, 883 S.W.2d 465 (1994). You cannot change arguments or theories on appeal. If you objected on the basis of hearsay, and the real reason was relevance, you cannot argue to the appellate court that the evidence was irrelevant.

Sometimes you have a difficult decision to make in a split second. Assume your ignoble adversary has just tried to sneak in some inadmissible hearsay. If you jump up, you might alienate the jury. Your adversary might call the declarant as his next witness.

The declarant can make the point much better than this witness parroting hearsay from the stand. But if you do not object, the evidence comes in. It can be considered by the court and the jury as substantive evidence. Wilson v. Kemp, 7 Ark. App. 44, 644 S.W.2d 306 (1982). There is a good law journal article about weighing your options. Bennett, Fred Warren, Preserving Issues for Appeal: How to Make a Record at Trial, 18 Am. J. Trial Advoc., 87 (Sum. 1994). You should read it before trial.

Assume you choose to object. The trial court sustains your objection, but despite your immediate action, the witness blurts out the inadmissible answer. At the least, you must move to

strike. You may want to request even stronger relief. Although a cautionary instruction tends to emphasize the error in some cases, sometimes it is your best relief. You must request a cautionary instruction. Allen v. Burton, 311 Ark. 253, 843 S.W.2d 821 (1992).

In some cases, the error is incurable. You must request a mistrial. Each remedy must be requested. If you move for a mistrial and it is denied, you face the rule that a mistrial is an extreme remedy, to be taken only when it is apparent that justice cannot be served by continuing the trial. Powell v. Burnett, 304 Ark. 698, 805 S.W.2d 50 (1991).

When the trial court turns down your evidence, you must proffer it. Garner v. Kees 312 Ark. 251, 848 S.W.2d (1993). The adequacy of the proffer is often a hotly litigated issue. It need not be. The safest way is to ask the court for an opportunity to actually put the evidence you want into the record in a question and answer format. If that doesn't work, explain in detail what the evidence would be. For example, it is not enough to say that the evidence would "rebut the testimony" of another witness. Wade v. Grace, 321 Ark. 482, 902 S.W.2d 785 (1995). You have to say how it would rebut the testimony.

There are a couple of exceptions to the proffer rule. Where there are co-plaintiffs, if one plaintiff proffers evidence, the other can use that proffer as a ground for appeal. Ice v. Bramblett, 311 Ark. 157, 842 S.W.2d 29 (1992). When the substance of the evidence sought to be introduced is "apparent from the

context within which questions were asked," an offer of proof is not required. Ark. R. Evid. 103(a)(2); Lewis v. Gubanski, 50 Ark.App. 255, S.W.2d (1995). It is best not to rely on that kind of rule, however.

Jury Instructions. If you want a particular instruction given you must give the judge the instruction you want. Arkansas Rule of Civil Procedure 51 reads as follows:

Rule 51. INSTRUCTIONS TO JURY: OBJECTION

At the close of the evidence or at such earlier time as the court may reasonably direct, any party may submit requested jury instructions to the court. The court shall inform counsel of its proposed action upon the requested instructions and also inform counsel of all other instructions it proposes to submit to the jury. The court shall instruct the jury prior to the arguments of counsel. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection, and no party may assign as error the failure to instruct on any issue unless such party has submitted a proposed instruction on that issue. Opportunity shall be given to make objections to instructions out of the hearing of the jury.

A mere general objection shall not be sufficient to obtain appellate review of the trial court's action relating to instructions to the jury except as to an instruction directing a verdict or the court's action in declining to do so.

Ark. R. Civ. P. 51.

There is one more requirement that is not explicitly mentioned in the rule. You must also explain to the judge why you want the instruction. Gilliam v. Thompson, 313 Ark. 698, 856 S.W.2d 877 (1993). In Jacuzzi Brothers, Inc. v. Todd, 316 Ark. 785, 875 S.W.2d 67 (1994), the Supreme Court made it clear that it is not

enough to merely proffer a jury instruction, you must explain to the court why it is applicable. The Court explained:

In its brief, appellant has carefully summarized all the evidence lending support to its argument that appellee went beyond the scope of his invitation. Although the trial court was aware of such evidence, the trial court was not aware of the particular argument appellant makes on appeal. As abstracted, the only basis for appellant's objection to the AMI 1104 business invitee instruction was that the proffered AMI 1106 should be given instead. Appellant did not give a reason why AMI 1104 should not be given, nor did it give a reason why AMI 1106 should be given. Such an objection accomplished nothing as far as informing the trial court of the particular error appellant saw in AMI 1104. We have recently held that a proffered instruction without an accompanying reason for the objection to the instruction given is insufficient to preserve the issue for our review. Gilliam v. Thompson, 313 Ark. 698, 856 S.W.2d 877 (1993).

We do not intimate that appellant should have summarized all the evidence for the trial court as it did in its brief to this court. However, an objection simply stating that there was evidence indicating Mr. Todd had exceeded the scope of his invitation into the plant and therefore the jury should be allowed to make the determination of fact as to whether Mr. Todd was a business invitee, licensee, or trespasser was required as a bare minimum to apprise the trial court of the particular error of which appellant complains on appeal.

Accordingly, appellant has waived this argument on appeal. Gilliam, 313 Ark. 698, 856 S.W.2d 877.

Id. at 790-91.

The dissent pointed out that a careful reading of Rule 51 does not require a party proffering an instruction to accompany the proffered instruction with argument. Such a change, reasoned the dissent, should "come only after fair warning and a revision of Rule 51." Id. at 795. The rule, however, remains in effect. It is not enough to proffer an instruction. It is necessary to

explain, on the record, why the instruction is applicable.

Cases such as Jacuzzi Brothers, Inc. v. Todd, 316 Ark. 785, 875 S.W.2d 67 (1994), are traps for the wary and the unwary alike. The only way to anticipate such traps is to remember the underlying philosophy of objections and proffers.

"No party may assign as error on appeal 'the giving or failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the manner to which he objects and the grounds of his objection.' Ark. R. Civ. P. 51." Delta School of Commerce, Inc. v. Wood, 298 Ark. 195, 766 S.W.2d 424 (1989).

If you object to an instruction you must tell the trial judge your objection. You must inform the judge of the legal grounds for your objection. You will be bound by the objection you make. For example, in Allen v. Burton, 311 Ark. 253, 843 S.W.2d 821 (1992), the appellant, in an unreported conference, objected to giving AMI 902. After the jury was instructed and sent out, the parties made their formal record. At the earlier unreported conference, the appellant had merely objected to the giving of AMI 902 in any form. At the recorded conference, appellant objected not only to the use of AMI 902, but to the wording of the version of AMI 902 as given to the jury as well. Appellee complained on the record that appellant's only objection before the jury went out was to the applicability of AMI 902, not the wording of the instruction proffered. Appellant's response was, "I believe what I said was

what I said." On appeal, however, appellant explicitly objected to the wording of AMI 902. The error in the wording could have been cured easily if it had been brought to the trial court's attention in a timely manner. Since the objection to the wording of the instruction was not made in a timely manner, it could not be considered by the trial court in time for the trial court to correct the error. The error, therefore, was not preserved on appeal.

If the instruction proffered by your adversary is an incorrect statement of the law, you may have a duty to proffer a correct statement in its stead. Baxter v. Grobmyer Bros. Const. Co., 275 Ark. 400, 631 S.W.2d 265 (1982); Wallace v. Dustin, 284 Ark. 318, 681 S.W.2d 375 (1984). If your proffered instruction is also an incorrect statement of the law, you do not preserve your argument on appeal. See, e.g., Delta School of Commerce v. Wood, 298 Ark. 195, 766 S.W.2d 424 (1989) (Justice Glaze, concurring), but see Tandy Corporation v. Bone, 283 Ark. 399, 678 S.W.2d 312 (1984). Remember, the trial court is not required to give repetitive instructions. Porter v. Lincoln, 282 Ark. 258, 668 S.W.2d 11 (1984); Baxter, supra.

Some judges ask attorneys to make their records on instructions after the jury is out. That is a time saving procedure in two ways. First, the attorneys and court can fill the time that the jury is deliberating. Second, it does away with the need for a time consuming appeal, because an objection to an

instruction made after the jury has already been instructed is too late and therefore not preserved. Young v. Johnson, 311 Ark. 551, 845 S.W.2d 510 (1993).

Closing argument. In Butler Mfg. Co. v. Hughes, 292 Ark. 198, 729 S.W.2d 142 (1987), the appellee's attorney made certain statements during closing argument. After the appellee's lawyer sat down, the appellant's lawyer approached the court outside the hearing of the jury, objected and moved for a mistrial. The trial court's denial of the motion was affirmed. The Supreme Court held that by waiting until after the appellee's closing argument, appellant did not give the trial court the opportunity to correct any error made during the closing argument, and as such waived the objection. The Court ruled that to be timely, an objection must be made at the time the alleged error occurs, so that the trial judge may take such action as is necessary to alleviate any prejudicial effect on the jury.

It is not sufficient to raise a legal issue in closing argument. In Hastings v. Planters and Stockmen Bank, 307 Ark. 34, 818 S.W.2d 239 (1991), the appellant contended on closing argument that the assignment of a note was invalid. It offered no proof of that at the trial. It merely raised the argument at the end of the hearing. The appellate courts will not consider arguments that were not fully developed at the trial level.

Verdict. "As a general rule, the failure to object to some irregularity in a verdict prior to the discharge of the jury

constitutes a waiver of that irregularity." Coran v. Keller, 295 Ark. 308, 748 S.W.2d 349 (1988).

Sufficiency of the evidence. Rule 50(e) reads as follows:

(e) Failure to Question the Sufficiency of the Evidence. When there has been a trial by jury, the failure of a party to move for a directed verdict at the conclusion of all the evidence, because of insufficiency of the evidence will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict.

You must test the sufficiency of the evidence by motions for directed verdict in a jury trial. A motion for new trial will not preserve the error. Rule 50(e); Majewski v. Cantrell, 293 Ark. 360, 737 S.W.2d 649 (1987). It is not necessary to move for a directed verdict in a bench trial in order to appeal on the basis of insufficiency of the evidence. Firstbank of Arkansas v. Keeling, 312 Ark. 441, 850 S.W.2d 310 (1993). It is, however, essential that you get a ruling giving the basis of the trial court's action. Id. In Keeling, the trial court awarded actual and punitive damages, but did not state the theory on which the damages were awarded.

Post-trial motions. The biggest danger with post-trial motions, of course, is that you will get confused on the proper time to file your notice of appeal under Rule 4(c) of the Arkansas Rules of Appellate Procedure. A motion for new trial is not necessary to preserve for appeal an error which could be the basis for granting a new trial. Ark. R. Civ. P. Rule 59(f).

Changes. Look at a set of the Southwestern Reporter, Arkansas

Cases. The old ones have occasional "Court Rules" volumes. The modern ones all have "Court Rules" noted on the cover. The Court is constantly fixing rules of Civil Procedure and Appellate Procedure. Sometimes the corrections are to fix obvious injustices, such as the rule of Lawrence Brothers, Inc. v. Jones Excavating Contractor, Inc., 318 Ark. 328, 884 S.W.2d 620 (1994) (holding ineffective a notice of appeal filed ten minutes before an order denying a motion for judgment notwithstanding the verdict; corrected by Per Curiam Order 321 Ark. Appx., effective July 10, 1995). Other times, they are just revisions. Just like the most recent computer book, this essay was already obsolete when I sent it to the printer. I just hope it will raise the right questions in your mind. Only research will tell you what the answers are.