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BEST PRACTICES IN VIRGINIA FOR PRESERVATION OF APPELLATE ERROR

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Appellate practice gives an attorney the opportunity to help shape the law while handling cases that are being appealed from the trial court to the appellate court. The appellate attorney's work may have wide-ranging precedential effects beyond his immediate case on future cases presenting similar facts or a specific point of law. Before an attorney can aspire to these lofty goals in handling an appeal, however, he must first do the necessary groundwork in the trial court to preserve any reversible error for appeal. This article will examine under Virginia law a number of best practices to follow in the trial court on the critical issues of proper preservation of error in preparation for review by the appellate court.

I. Appellant Is Required to Point Out Where in the Record Each Alleged Error Was Preserved

Under Rule 5:17(c)(1) of the Rules of the Supreme Court of Virginia, in his petition for appeal the appellant must include a section entitled "Assignments of Error," which "shall list, clearly and concisely and without extraneous argument, the specific errors in the rulings below upon which the party intends to rely, or the specific existing case law that should be overturned, extended, modified, or reversed."

The importance of preservation of error is illustrated by this rule's next sentence, which contains the following mandate:

> An exact reference to the page[s] of the transcript, written statement of facts, or record where the alleged error has been preserved in the trial court or other tribunal from which the appeal is taken shall be included with each assignment of error.

With the filing of the petition for appeal, the battle lines in the appeal are drawn between the appellant and the appellee. On the one hand, the appellant is required to show precisely where in the record he has preserved each alleged

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error. In contrast, one of the appellee's principal tasks in the appeal from this initial petition stage onward is to point out to the court that the appellant waived his right to challenge the trial court's rulings on appeal by failing to timely make an adequate contemporaneous objection under Rule 5:25.

II. Unlike the Appellant, the Appellee Is Not Required to Preserve Appellate Error

The duty to preserve error for an appeal to the appellate court lies exclusively with the appellant, the party who lost in the trial court, and does not apply to the appellee, the party who prevailed below. This well-settled principle was recognized in many modern decisions by the Supreme Court of Virginia, such as *Perry v. Commonwealth*,[1] where the Court cited with approval *Blackman v. Commonwealth.*[2] In *Blackman*, the court of appeals rejected the defendant's argument that the prosecutor could not argue in support of a judgment on a particular ground because he had failed to articulate that ground in the trial court. The court of appeals explained,

> [A]n appellee may argue for the first time on appeal any legal ground in support of a judgment so long as it does not require new factual determinations . . . or involve an affirmative defense that must be "asserted in the pleadings."[3]

Thus, as long as there are sufficient facts in the record to prove a legal ground in support of the trial court's ruling and there is no requirement that a particular affirmative defense must be raised in the pleadings, an appellee is free to raise, for the first time in the appellate court, any legal ground whatsoever that supports the trial court's ruling.[4]

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1 Perry v. Commonwealth, 280 Va. 572, 579-80, 701 S.E.2d 431, 436 (2010).

2 Blackman v. Commonwealth, 45 Va. App. 633, 642, 613 S.E.2d 460, 465 (2005).

3 *Id.*

4 *See also* Foltz v. Commonwealth, 284 Va. 467, 472, 732 S.E.2d 4, 7 (2012). There, the court said: "Consideration of arguments not made in the court below is appropriate under the doctrine of the right result for the wrong reason where additional factual matters are not necessary to resolve a newly-advanced rationale." This is commonly known as the "right result for the wrong reason" doctrine, which dates at least as far back as 1853. *See* Schultz v. Schultz, 51 Va. (10 Gratt.) 358, 384 (1853). This doctrine has been discussed in a number of cases. *See, e.g.*, Whitehead v. Commonwealth, 278 Va. 105, 677 S.E.2d 265 (2009); Harris v. Commonwealth, 39 Va. App. 670, 675-76, 576 S.E.2d 228, 231 (2003); Mitchem v. Counts, 259 Va. 179, 191, 523 S.E.2d 246, 253 (2000); Chesterfield County v. Stigall, 262 Va. 697, 704, 554 S.E.2d 49, 53 (2001). *See* Egan v. Butler, 2015 Va. Lexis 86 (June 4, 2015) (arguments that undue prejudice or cumulative proof, arguably in violation of Va. R. Evid. 2:403 did not warrant application of this doctrine); Wagoner v. Commonwealth, 770 S.E.2d 479, 485 (2015); City of Danville v. Tate, 766 S.E.2d 900, 903 (2015); Deerfield v. City of Hampton, 283 Va. 759, 767, 724 S.E.2d 724, 728 (2012).

III. Ensure an Adequate Record Has Been Made Below. Now Is Not the Time to Pinch Pennies!

As the appealing party, the appellant has the duty to ensure that an adequate record has been made in the trial court to enable the appellate court to consider and rule on his assignments of error. "The circuit court's judgment is presumptively correct and the burden is on the appellant to present a sufficient record to permit a determination whether the circuit court committed an alleged error."[5] If the record lacks the necessary transcripts or a written statement of facts for the appellate court to decide the issues presented in the assignments of error, then those assignments of error affected by the absence of the transcripts or statement of facts cannot be considered in the appeal.

The problem is that only at the end of the trial does an attorney learn, for the first time, whether his client will be the appellant or the appellee in any resulting appeal. Due to this uncertainty, for the better part of valor, an attorney should always follow the Boy Scout motto "Be Prepared" and protect the record by making sure that a court reporter is always present for any pretrial or posttrial hearing that deals with any issue that might possibly be of importance in any appeal. The court reporter should also be present and transcribe the court proceedings throughout the entire trial—including all stages of the trial such as the arguments of motions, opening statements, testimony, objections, jury instructions, closing arguments, and so forth—whether the trial proceeding be in the presence of the jury, in open court, or outside of the presence of the jury at a sidebar or in chambers.

The trial judge is not permitted to instruct the court reporter to stop recording. Virginia Code section 8.01-420.3 states: "The Court shall not direct the court reporter to cease recording any portion of the proceedings without the consent of all the parties or of the counsel of record."

Rule 5:11 sets forth the provisions regarding use on appeal of a transcript or, in lieu of a transcript, a written statement of facts. At first glance, a written statement of facts may appear to be a cheaper alternative to hiring a court reporter to prepare a trial transcript. While Rule 5:11 gives the appellant the option of filing a transcript or a written statement of facts, use of a transcript is preferable because one never knows if the trial judge will agree to sign the proffered written statement of facts; and a signature affirmation is required under Rule 5:11(e)(2) before the statement of facts is filed with the clerk.[6]

While there is always a risk, there are selective instances where the court has ruled that there is a sufficient record for adjudication of the issues presented in

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[5] Commonwealth v. Williams, 262 Va. 661, 669, 553 S.E.2d 760, 764 (2001).

[6] *See, e.g.,* White v. Moran, 249 Va. 27, 452 S.E2d 856 (1995) (finding trial court acted reasonably and did not err in refusing to sign plaintiff's proposed statement of facts submitted in lieu of a transcript because plaintiff lacked the financial ability to purchase a transcript).

the assignments of error despite the absence of a transcript and a written statement of facts.[7]

IV. As a General Rule, in the Absence of a Timely and Proper Objection, Any Error Is Waived

The Supreme Court of Virginia's contemporaneous objection rule is codified in Rule 5:25, which states:

> *Rule 5:25. Preservation of Issues for Appellate Review.* No ruling of the trial court, disciplinary board, or commission before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review.

The purpose of the contemporaneous objection rule is two-fold: to give the trial judge the opportunity to consider and correct a perceived error at the trial court stage before that error is taken up to the appellate court for review,[8] and to give the opposing party the opportunity to confront and respond to that objection while the case is still in the trial court.[9] "Rule 5:25 exists to protect the trial court from appeals based upon undisclosed grounds, to prevent the setting of traps on appeal, and to enable the trial judge to rule intelligently, and to avoid unnecessary reversals and mistrials."[10]

While the Rule 5:25 contemporaneous objection rule has the "good cause" and the "ends of justice" exceptions, a quick review of the cases addressing these exceptions cited in the annotations shows that both exceptions are narrow and rarely applied. It is preferable for counsel to comply with the contemporaneous objection requirement of stating the objection with reasonable certainty at the time of the ruling. Failing to do so means having instead to try to use either of these narrow exceptions, which are rarely applied.

Stated with Reasonable Certainty: Under the contemporaneous objection rule, the objection must be stated with specificity. "Not just any objection will

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7 *See* Richmond v. Randall, 215 Va. 506, 2011 S.E.2d 56 (1975) (finding, despite the judge's refusal to sign and certify the proposed written statement of facts, that there nevertheless were sufficient documents in the record for the appellate court to rule); Smyth v. Midgett, 199 Va. 727, 102 S.E.2d 575 (1958) (finding record consisting of the pleadings, the exhibits filed, and the orders of the trial court were sufficient for the appellate court to decide the questions of law presented in the appeal).

8 *See* Williams v. Gloucester Sheriff's Dept., 266 Va. 409, 411, 587 S.E.2d 546, 548 (2003); Scialdone v. Commonwealth, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010).

9 *See, e.g.,* Nusbaum v. Berlin, 273 Va. 385, 403, 641 S.E.2d 494, 503 (2007).

10 Fisher v. Commonwealth, 236 Va. 403, 414, 374 S.E.2d 46, 53 (1988), *cert. denied*, 490 U.S. 1028 (1989).

do. It must be both specific and timely—so that the trial judge would know the particular point being made in time to do something about it."[11]

At the Time of the Ruling: In addition to objecting with the requisite specificity, under Rule 5:25, counsel must also be sure that he objects in a timely fashion "at the time of the ruling" to preserve the objection for possible appellate review. "[A]n objection to a ruling of the trial court must be made . . . at the time the occasion arises, otherwise the objection is waived."[12]

A representative sampling of cases holding that the party has or has not objected in a timely manner include—but are not limited to—the following.

A. OBJECTION TO VOIR DIRE RULINGS

To preserve an objection that you have been denied the opportunity to ask questions of a juror or a panel, you must object to the seating of that juror or jury panel.[13]

B. OBJECTION TO THE SEATING OF A JUROR

An objection to the seating of a juror must be made *before* the jury is empaneled and sworn.[14]

C. OBJECTION TO IMPROPER OPENING STATEMENTS OR CLOSING ARGUMENT

Objection to opposing counsel's opening statement or closing argument comes too late if it is made only after the opening statement or closing argument is concluded or after the case has been submitted to the jury.

The proper procedure is to object to the challenged statement or argument at the precise time it is made and before the case has been submitted to the jury, giving each of the reasons for that objection and either moving for the court to direct the jury to disregard the argument, for a cautionary jury instruction to the jury to disregard the argument, or for a mistrial.[15]

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[11] Dickerson v. Commonwealth, 58 Va. App. 351, 356, 709 S.E.2d 717, 719 (2011).

[12] Witt v. Merricks, 210 Va. 70, 73, 168 S.E.2d 517, 519 (1969).

[13] Spencer v. Commonwealth, 238 Va. 295, 306-307, 384 S.E.2d 785, 793 (1989), *cert. denied*, 493 U.S. 1093 (1990) (finding defendant waived his objections made during the voir dire of a particular juror by failing to voice any objection when the court seated that juror on the jury panel).

[14] Green v. Commonwealth, 266 Va. 81, 94, 850 S.E.2d 834, 842 (2003) (finding defendant failed to renew his pretrial motion for change of venue, which had been taken under advisement, before the jury was empanelled and sworn or at least to remind the trial judge that the motion was still pending and defendant wanted the court to rule on that motion).

[15] *Compare* Reid v. Baumgardner, 217 Va. 769, 773-74, 232 S.E.2d 778, 781 (1977) (finding defendant made timely objection to plaintiff's counsel's closing argument by renewing his objection, specifying the reason for the objection and requesting the trial court to direct the jury to disregard the improper argument) *with* Maxwell v. Commonwealth, 287 Va. 258, 268-69, 754 S.E.2d 516, 520-21 (2014) (finding counsel who stated at the close of the prosecution's closing argument, "Actually, before I make my argument, there is a motion I would like to make outside the presence of the jury" and then responded to the trial judge's statement that he would "deal with it when the jury goes out to retire" by acquiescing to the judge with the response "very well" rather than articulating at that time the contemporaneous objection to the Commonwealth's argument and waited

D. OBJECTION TO THE ADMISSIBILITY OF EVIDENCE

"An objection to the admissibility of evidence must be made *when* the evidence is presented. The objection comes too late if the objecting party remains silent during its presentation and brings the matter to the court's attention by a motion to strike made after the opposing counsel has rested."[16]

In *Bitar v. Rahman*,[17] the court held that the trial court did not err in allowing the jury to consider the plaintiff's medical malpractice claim even though plaintiff's expert failed to express his opinion to a reasonable degree of medical probability because that evidence was admitted without objection. The court explained,

> [A]n objection based on the fact that a medical expert's opinion is not stated to a reasonable degree of medical probability, lacks an adequate factual foundation, or fails to consider all the relevant variables challenges the admissibility of the evidence rather than the sufficiency of evidence. As the Court, however, has stated, "[a]n objection to the admissibility of evidence must be made when the evidence is presented. The objection comes too late if the objecting party remains silent during its presentation and brings the matter to the court's attention by a motion to strike made after the opposing party has rested."

E. MOTION FOR MISTRIAL

The general rule is that a motion for a mistrial must be made at the time an objectionable element is injected into the trial of the case. Making a casual remark in passing that a judge's ruling is grounds for a mistrial is insufficient. Counsel must actually make a motion for a mistrial.[18] "[W]hen a defendant learns of alleged juror misconduct during the trial, but fails to move for a mistrial at the time the misconduct is discovered, the defendant waives appellate review of the juror's misconduct."[19]

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until later in the trial to make his objection sufficiently clear to the court made it too late to preserve the issue for appeal).

16 Banks v. Mario Indus., 274 Va. 438, 457, 650 S.E.2d 687, 697 (2007) (finding since defendants failed to timely object to plaintiff's expert's testimony and that evidence was admitted without objection, even if defendant has moved to strike the plaintiff's evidence at the close of his case-in-chief or at the close of all the evidence, which defendant failed to do, the question of the admissibility of this evidence was not the proper subject of a move to strike the evidence that tests sufficiency).

17 Bitar v. Rahman, 272 Va. 130, 139, 630 S.E.2d 319, 324 (2006).

18 Hall v. Commonwealth, 213 Va. 736, 737, 195 S.E.2d 882, 883 (1973) (finding defendant's motion for mistrial related to trooper's testimony came too late when it was made only after the Commonwealth had rested, the trial court had overruled the defendant's motion to strike the Commonwealth's evidence, and the defense had rested).

19 Perry v. Commonwealth, 58 Va. App. 655, 676, 712 S.E.2d 765, 776 (2011).

F. OBJECTIONS TO JURY INSTRUCTIONS

An objection to a jury instruction must be made *when* the instruction is tendered to the court. If an instruction is given without any objection, it becomes the law of the case (regardless of whether it accurately states the law) and cannot be challenged later on appeal.[20] "Under [the] law of the case doctrine, a legal decision made at one [stage] of the litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time."[21]

The responsibility for offering alternative jury instructions does not rest with the trial court. "[A]fter refusing to give the instruction which the defendant below proposed to the court to give, upon the ground that it did not rightly propound the law, it was not incumbent on the court, unasked, to instruct the jury as to what was the law . . . . A party can only require the court to pass upon the proposition of law which he submits. He cannot by submitting an erroneous instruction impose upon the court the duty of giving a correct one."[22]

Instead, it is the litigant's duty to try to properly instruct the jury. "It is the duty of a litigant, who thinks the instructions given do not fairly present the case from the standpoint of the evidence which is favorable to him, to prepare and offer such instructions as will accomplish this purpose. If he does not do it, censure for the omission lies at his door."[23]

G. OBJECTION TO COURT'S RESPONSE TO A JURY QUESTION

Any objection to the response that the judge gives to a question from the jury must be made during the discussions between the judge and counsel and before the response is submitted to the jury. "An objection to a response to a jury question must be made during discussions between the trial court and counsel, prior to the response being submitted to the jury . . . . Only specific arguments raised in the trial court at the time of the objection are preserved for appeal."[24]

H. OBJECTION THAT THE JUDGMENT OR AWARD WAS CONTRARY TO THE LAW AND THE EVIDENCE

Rule 5:25 states: "A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review." Thus, a motion to set aside the jury verdict that is limited to the bare

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20 Kordaurov v. Kerdasha, 271 Va. 646, 658, 629 S.E.2d 181, 188 (2006).

21 *Id.* (quoting Virginia Vermiculite, Ltd. v. W.R. Grace & Co.—Conn., 108 F. Supp. 2d 549, 609 (W.D. Va. 2000)).

22 Keen's Ex'r v. Monroe, 75 Va. 424, 428-29 (1881).

23 Whitmer v. Marcum, 214 Va. 64, 67, 196 S.E.2d 907, 909 (1073) (quoting Commonwealth v. Mason, 177 Va. 684, 688, 15 S.E.2d 114, 116 (1941)).

24 Lutwig v. Commonwealth, 52 Va. App. 1, 10, 660 S.E.2d 679, 683 (2008).

argument that the jury verdict is contrary to the law and the evidence insufficiently preserves that issue for review on appeal.

I. RELIANCE ON ANOTHER PARTY'S OBJECTIONS

A party cannot rely on the objections made by another party in order to preserve that issue for appeal *unless* he expressly joins in that other party's objection. "We adopt the general rule articulated in these cases and hold that one party may not rely on the objection of another party to preserve an argument for appeal without expressly joining in the objection."[25]

J. WAIVER OF OBJECTIONS BY YOUR INTRODUCTION OF SIMILAR EVIDENCE

If a party objects to evidence of the opposing party but later introduces in his case similar evidence, he waives his earlier objection to the admissibility of that evidence. "Generally, when a party unsuccessfully objects to evidence that he considers improper and then introduces on his own behalf evidence of the same character, he waives his earlier objection to the admissibility of that evidence."[26]

K. OBJECTION TO JURY VERDICT FORM

An objection to a jury verdict form must be made *before* the jury retires to deliberate.[27]

V. AN OBJECTION OR MOTION NEED NOT BE RESTATED TO BE PRESERVED FOR APPEAL

Virginia Code section 8.01-384 provides:

> A. Formal exceptions to rulings or orders of the court shall be unnecessary; but for all purposes for which an exception has heretofore been necessary, it shall be sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. *No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court.* No party shall be deemed to have agreed to, or acquiesced in, any written order

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25 Linnon v. Commonwealth, 287 Va. 92, 102, 752 S.E.2d 822, 828 (2014).

26 Combs v. Norfolk & W. Ry., 256 Va. 490, 499, 507 S.E.2d 355, 360 (1998).

27 Banks v. Mario Indus., 274 Va. 438, 450, 650 S.E.2d 687, 694 (2007) (finding defendant's posttrial objections are waived because defendant never objected to the jury verdict form).

> of a trial court so as to forfeit his right to contest such order on appeal except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal.
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> B. The failure to make a motion for a new trial in any case in which an appeal, writ of error, or supersedeas lies to or from a higher court shall not be deemed a waiver of any objection made during the trial if such objection be properly made a part of the record.[28]

VI. Renew Pretrial Motions That the Trial Court Took under Advisement or Has Not Yet Ruled on

It is imperative that the court rule on your motion or objection.[29] A party's failure to request a ruling on a pretrial motion that the court has neither ruled on nor taken under advisement waives that issue on appeal.[30] If the trial court has taken a pretrial motion under advisement or simply failed to rule on a motion, it is incumbent on counsel to renew the motion before the jury is empaneled and sworn or at least to remind the judge that the motion is still pending and ask for the court to rule on it.[31]

If the trial court refused to rule on the party's motion, then the appellant needs to assign error to the court's refusal to rule.

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[28] Emphasis added.

[29] Fisher v. Commonwealth, 16 Va. App. 447, 455, 431 S.E.2d 886, 890 (1993) (Defendant "failed to obtain a ruling from the trial court. He requested no relief. Because he was denied nothing by the trial court, there is nothing for us to review.").

[30] Galumbeck v. Lopez, 283 Va. 500, 508-509, 722 S.E.2d 551, 555 (2012) (finding defendant doctor waived his objections to testimony about the lack of board certifications of one of the doctors in his medical practice by failing to request a ruling on his pretrial motion in limine raising objections to testimony about the doctor's lack of board certifications).

[31] Flippo v CSC Assocs. III, LLC, 262 Va. 48. 60-62, 547 S.E.2d 216, 223-25 (2001) ("[W]e conclude that the mere filing of a demurrer and objection to the final order under the circumstances of this case did not comply with the requirements of *Rule 5.25* that objections be 'stated with reasonably certainty at the time of the ruling.'"); Green v. Commonwealth, 266 Va. 81, 94, 580 S.E.2d 834, 842 (2003) (finding pretrial motion for change of venue that was taken under advisement waived when defendant failed to request a ruling from the trial court before the jury empaneled and sworn).

VII. If Any of Your Evidence Is Excluded, Make an Adequate Proffer of the Excluded Evidence to Preserve That Issue for Appeal

Virginia has consistently adhered to the principle that its appellate courts will not consider testimony rejected by the trial court because the court has no basis for adjudication unless there has been a proper proffer.[32]

To preserve an issue for appeal as to any excluded evidence, counsel must be sure that an appropriate proffer has been made. A proffer can be made through several means, including

- an unchallenged unilateral avowal
- a mutual stipulation of the expected testimony
- by questioning the witness on the stand on the record outside the presence of the jury.[33]

VIII. Defendant Should Move to Strike the Evidence at the Close of Plaintiff's Case-in-Chief, at the End of Defendant's Case, and at the Close of All the Evidence to Preserve Challenges to the Sufficiency of the Evidence

In order to preserve challenges to the sufficiency of the plaintiff's evidence, a defendant must move to strike the plaintiff's evidence at the close of plaintiff's case-in-chief, renew that motion at the end of defendant's case, renew it again at the close of all the evidence, and then move to set aside the verdict after it has been returned.[34] As the court in *United Leasing Corp*. explained,

> We begin our analysis by restating the rule of appellate procedure that an appellate court will not review a challenge to the sufficiency of the evidence when a defendant who has chosen to introduce evidence in his or her defense, after the trial court has overruled his or her motion to strike made at the conclusion of the plaintiff's case, does not make either a motion to strike at the conclusion of all the evidence or a motion to set aside the verdict . . . . In those circumstances, the defendant cannot rely on a previously made motion to strike, because any challenge to the sufficiency of the evidence, which included evidence

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32 *See* Commonwealth Transp. Comm'r v. Target Corp., 274 Va. 341, 348-49, 650 S.E.2d 92, 96 (2007) (finding trial court's redaction of certain portions of a key exhibit could not be reviewed on appeal because the commissioner had failed to make a proffer of the unredacted documents, thus depriving "this Court of the ability to determine the admissibility of those documents and, if admissible, whether the circuit court's exclusion of that evidence prejudiced the Transportation Commissioner").

33 Galumbeck v. Lopez, 283 Va. 500, 508, 722 S.E.2d 551, 555 (2012) (finding because plaintiff failed to acquiesce or stipulate to a statement that he was unaware that defendant had made, the defendant's statement neither qualified as a proffer nor was properly preserved for appellate review).

34 United Leasing Corp. v. Lehner Family Bus. Trust, 279 Va. 510, 517, 689 S.E.2d 670, 673-74 (2010).

presented by the defense, will necessarily raise a new and distinct issue from the issue presented by the denied motion to strike.[35]

IX. For the Appellate Court to Consider Arguments on Appeal, Appellant Must Make Them in the Trial Court

An objection on appeal that differs from counsel's objection made in the trial court is not reviewable on appeal.[36]

Even if an argument relates to the same general issue, if the argument made on appeal differs from the specific argument made below, the appellate court will not consider that new argument on appeal.[37] "On appeal, though taking the same general position as in the trial court, an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court."[38]

X. Use the Final Order and Posttrial Motions to Preserve Issues for Appeal

To preserve issues for appeal, counsel should consider incorporating his objections and arguments in support thereof on his client's endorsement page on the final order.

To the extent that counsel wants to bring a new issue that has not yet been raised to the attention of the trial court before entry of the final order, he should file posttrial motions with supporting briefs and try to get the trial judge to rule on them.

XI. Move All Your Exhibits into Evidence and Ask the Trial Court to Mark as "Refused" or "Denied" Any Exhibit Unsuccessfully Offered

If any of your proffered exhibits were not admitted into evidence, request that the trial court mark as "refused" or "denied" each of them in order to preserve for appeal any issues related to their exclusion. Before the exhibits introduced into evidence go back to the jury room, counsel should inspect the entire set of trial exhibits to ensure that all exhibits admitted by the trial court are present and that there are no extraneous documents that were never admitted into evi-

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35 *Id.*

36 Witt v. Merricks, 210 Va. 70, 73, 168 S.E.2d 517, 519 (1969) (finding because counsel's objections to the jury instruction failed to set out with "reasonably certainty" any of the grounds that the appellant made on appeal, his objection was deemed to be waived).

37 Kolesnikoff v. Commonwealth, 54 Va. App. 396, 402-403, 679 S.E.2d 559, 562 (2009) ("Making one specific argument on an issue does not preserve a separate legal point on the same issue for review."); Commonwealth Transp. Comm'r v. Target Corp., 274 Va. 341, 352, 650 S.E.2d 92, 98 (2007) (finding appellant not permitted to assert for the first time on appeal a new argument in support of its jury instruction that was not raised below).

38 West Alexandria Prop., Inc. v. First Va. Mort. and Real Estate Inv. Trust, 221 Va., 134, 138, 267 S.E.2d 149, 151 (1980) (finding because the appellant made arguments on appeal different from those it made in the trial court, the appellate court would not consider the new arguments made for the first time on appeal).

dence. If any redactions were made, be sure that the trial exhibits have the appropriate redactions.

XII. Appellant Prohibited from Taking Inconsistent Positions in Litigation

> [A] party may not approbate and reprobate by taking successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory. Nor may a party invite error and then attempt to take advantage of the situation created by his own wrong.[39]

XIII. Proofread the Transcript and Review the Trial Court Record

Counsel should obtain the transcript and also *read* it to ensure that it accurately reflects what transpired in court. This is the only way to make sure that the record contains everything relevant to the appeal. While the record can be inspected after it has been filed with the clerk's office of the Supreme Court of Virginia in Richmond, this inspection should be done while the record is still in the trial court in the event that it needs to be supplemented with missing items. While the record can also be inspected after it has been delivered to the clerk's office of the Supreme Court of Virginia, it can become much more complicated if something critical is missing from the record since the record can be supplemented at that point only by a writ of certiorari directed to the clerk of the trial court.

XIV. Appellee's Ability to Challenge the Sufficiency of the Record

If the appellant attempts to prosecute an appeal without an adequate record, the appellee should be prepared to take full advantage of and use the objection provisions of Rule 5:11(g). This Rule provides a procedure by which the appellee can object to a transcript or written statement of facts on the grounds that it is erroneous or incomplete. If the transcript or written statement of facts filed by appellant is either erroneous or incomplete, the appellee's counsel should file a written objection within the requisite fifteen days of the appellant's filing of the notice of filing transcript or written statement of facts or, if the transcript or written statement of facts was filed before the notice of appeal, within ten days after the notice of appeal is filed. Prompt notice of the filing of this written objection must be given to the trial judge. Within ten days of the filing of appellee's notice of objection, the trial court "shall" do one of five things, namely:

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[39] Rowe v. Commonwealth, 277 Va. 495, 502, 675 S.E.2d 161, 164 (2009).

- overrule the objections, or
- make any corrections that the trial judge deems necessary, or
- include any accurate additions to make the record complete, or
- certify the manner in which the record is incomplete, and
- sign the transcript or written statement of facts.

At any time while the record resides in the office of the clerk of the trial court and has not yet been forwarded to the clerk's office of the Supreme Court of Virginia, the trial judge may correct the transcript or written statement of facts. The trial judge's signature on the transcript or written statement of facts, without more, will constitute certification that the procedural requirements of Rule 5:11 have been duly satisfied.

If, after review of the transcripts and other incidents of trial, the trial judge has certified that the record is complete under Rule 5:11, that certification of the transcript or statement of facts by the judge is a judicial act and the burden is on the appellee challenging the adequacy of the record to show that the evidence, as certified by the trial judge, is incorrect or incomplete.[40]

Conversely, if, after review of the proposed statement of facts or partial transcript, the trial judge certifies that the record is incomplete for purposes of appeal under Rule 5:11(d) in that it omits the facts or transcript necessary for a determination of the issues for which those facts or transcript are necessary, then the appellant has placed himself at a significant disadvantage in the prosecution of his appeal and runs the risk of the appellate court refusing to rule on those assignments of error for which a transcript or statement of facts is necessary.[41]

If the trial judge certifies the manner in which the record (*i.e.*, transcript or written statement of facts) is incomplete and then the appellant fails to correct the record by adding whatever the judge deemed was missing before the record is transferred to the clerk's office of the Supreme Court of Virginia, the appellee may consider filing a motion to dismiss the appeal on the grounds that the appellant failed to cure the deficiencies of the record certified by the trial judge.

XV. Conclusion

In summary, as an attorney prepares for and tries his case in the trial court he should always keep an eye on properly preserving any error in case he is forced to challenge an adverse result in the trial court through an appeal. The attor-

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[40] *See* New Bay Shore Corp. v. Lewis, 193 Va. 400, 69 S.E.2d 320 (1952) (Supreme Court of Virginia's holding in overruling the appellee's motion to dismiss (which asked that the record certified by the trial judge be rejected) that the appellee had failed to carry his burden of proving that the evidence certified by the trial judge was incorrect or incomplete).

[41] *See, e.g.,* Morris v. McGuire, 72 Va. Cir. 379 (2007) (certification by trial judge that the record in that case was incomplete for purposes of appeal under Rule 5:11(d) because, in the absence of a transcript of the trial testimony, the proposed statement of facts proffered by appellant was insufficient insofar as it failed to contain the facts or transcript needed for a determination of those issues for which these facts were necessary and merely stated plaintiff's argument of his case and not a recitation of any of the testimony presented at trial).

ney's failure to follow best practices in contemporaneous objection and in the preservation of error in the trial court may well foreclose his client from ever being able to correct an injustice in the trial court through an appeal.