Trial Practice Series

Protecting the Record: To Object or Not to Object, That Is the Question

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Every trial lawyer has heard phrases, in court or at deposition, about "the record: "on the record", "let's go off the record", or "I'd like to make this statement for the record". This article defines the record, discusses how the record is made, and outlines what can occur if the record is deficient. It is a practical discussion of how to protect the record and strategic considerations about making objections.

Objections are made for immediate use, to challenge evidence, for improper conduct, or for future purposes on appeal. It is counsel's responsibility to make objections to highlight an issue, which allows the trial court to rule on the disputed issue, preserves the potential for successful appeal of an unfavorable ruling, and allows the court to refer to testimony, exhibits or pleadings to assist in making rulings or confirm previous rulings. Ultimately, the purpose of making the record is to allow the appellate courts to know what happened during the proceeding and to assess whether the substantial rights of the parties have been impaired by those proceedings. After all, if the objectionable evidence is not objected to, counsel will not have a basis to complain later.[1]

I. What is the record?

The record is made up of the court file and the transcript of proceedings. It consists of testimony and all documents filed with the court and entered into evidence at trial. The record for appeal is defined in Wis. Stat. § 809.15(1)(a). Supreme Court Rule 71.01 requires the court to transcribe all proceedings during trial. While counsel may request that certain matters be off the record, only the judge has the authority to determine what will be on the record or off. During trial, court reporters are not likely to go off the record at the request of an attorney unless directed by the court. What is on and off the record during depositions is determined by counsel and in some instances the judgment of the court reporter.

If a discussion, comment, or objection is not made part of the record, the Court of Appeals has no basis for making a ruling when error is claimed.[2]. During court proceedings, there may be discussion in pretrial conferences or at sidebar about matters which may be considered by counsel to be rulings on issues being presented. When discussions are held off the record, counsel should ask initially to reserve the right to place this on the record and then summarize what occurred on the record so that it can be confirmed by opposing counsel and the court. If this is not done, the conversations at sidebar or in the pretrial do not take the form of orders, are not part of the record, and there will be nothing for an appellate court to review if error is later claimed.[3] There are occasions when the court reserves ruling on the evidence. The judge may wish to hear more foundation or how the testimony fits into the case to determine relevance. When a ruling is reserved, ultimately the ruling must be placed on the record.

II. What is the purpose of the record?

The purpose of objections and making the record is one of fundamental fairness. Parties cannot fail to take action at trial and then seek relief on appeal.[4],[5] Thus, the failure to make an objection or create a clear record may result in a party's inability to raise the issue on appeal. Although older cases sometimes use the words "forfeiture" and "waiver" interchangeably, the words have different legal meanings. When the right to make an objection or assert a right on appeal is lost because of a failure to do so in the trial court, the proper term is "forfeiture".[6]

III. Counsel Must Preserve the Error to Avoid Forfeiture.

Perhaps no greater fear of counsel wanting to correct perceived wrongs at the trial court is to read the resulting appellate opinion in which the court of appeals concludes that the error was forfeited.[7] Forfeiture prevents a party from raising that argument on appeal.[8] "It is a fundamental principle of appellate review that issues must be preserved at the circuit court."[9] If forfeiture occurs, the appeal on that issue is over and no redress for any claimed error is available. Hence, it is important that a clear record be made at the trial court.

Not only is preservation of the error for appeal important to avoid forfeiting the argument, it is an important part of judicial administration. The appellate court wants the issue to be raised and decided at the trial court level because the appellate court is an error correcting court.[10] It cannot correct error if that error was not preserved for review.[11] Counsel cannot fail to object and then seek redress later.[12] The appellate court wants the trial court to have the opportunity to correct error and avoid the need for an appeal.[13] Further, the appellate court benefits from the trial court's analysis.[14]

IV. What techniques can be used to make a clear record?

Verbalization. The record is made up of a written transcript. While a jury can see that the witness may be pointing to something or is holding his hands a foot apart, the written record does not capture this. For example, a witness may say, "He went this way and that way" and counsel needs to follow up with a statement, such as, "The record should reflect that the witness indicated that the vehicle first traveled south on Oak Street and then turned left." On occasion, one may even need to make a statement on the record such as, "Your Honor, I would like the record to reflect that counsel is standing and screaming at the witness." Although this may be uncommon in the courtroom, counsel needs to verbalize the gestures and conduct. The written word is without inflection or volume. It does not identify humor or sarcasm. Tone and inflection may be less offensive when written than in delivery.

Exhibits. Protecting the record also involves proper identification of and reference to exhibits. Many courts require that exhibits be pre-marked prior to trial, and a list provided to the clerk. Exhibits may be admitted by stipulation or laying the proper foundation for admissibility. Exhibits may be offered into evidence at the time identified or before the evidence is closed. The usual practice is to offer exhibits when requested by the judge. Usually, the judge will review the exhibits moved into evidence and admitted before the party rests its case. However, some judges may require that an exhibit be admitted and received into evidence before it is published or shown to the jury.[15] When an exhibit is to be used, the proper procedure is to show the exhibit to the witness, give a copy to counsel and the court, to ask the person to identify the exhibit, ask questions to establish relevance and foundation, and then request permission from the judge to publish to the jury.[16] Given the use of projection equipment to show exhibits to the jury in the courtroom, the exhibit's admissibility must be proven before it is published and projection to the jury before admissibility may result in an objection on the grounds of prejudice.

Once a document or photograph is admitted into evidence and is used in the examination of a witness, reference should be made to the exhibit by the number or letter designation assigned to the exhibit. Often exhibits are described by their content, such as the history and physical in a medical record or the photograph of the left front fender of a vehicle. This is insufficient to precisely identify the exhibit being referenced. Care must be taken to use the exhibit numbers assigned for trial if different from the number used at deposition.

Demonstrative evidence. Demonstrative evidence is used in most trials and takes many forms, including charts, diagrams, summaries, models, and dioramas. All must be marked. References to them must be described verbally. Frequently photographs can be taken of the exhibit and made part of the court file to use as part of the permanent record. The demonstrative exhibit may be marked with a number and the photograph of the exhibit with a letter, *i.e.*, the exhibit marked as 8 and the photograph marked as 8A. Some demonstrative evidence is not case specific and the witness may wish to obtain the exhibit. For example, an anatomic model of the lumbar spine may be used to illustrate a herniated disc. The owner of the model may not wish to have the exhibit be part of the court record for months or years. When demonstrative evidence is referenced during testimony, care should be taken to describe what is being referenced to make the record clear. When reference is made to a specific item or location on a demonstrative exhibit, it is often wise to have the witness describe the location on the exhibit or identify it on the exhibit with a letter or number.

V. When Should Objections Be Made?

Considerations. The purpose of objections is two-fold: To prevent inadmissible evidence from being heard and to prevent error. To protect the record, objections may be made at different times during the course of the litigation. Objections may be raised during discovery, by motion, and at various stages of a trial. However, at trial it is critical that objections be made timely.[17] While technical legal objections may be made, counsel should be mindful of the effect an objection may have on the court and, ultimately, on the jury. Thus, there is a strategic component about the timing and frequency of objections, particularly during trial.

Most trial lawyers are concerned about the effect objections may have on the jury. Counsel wishes to avoid being perceived on one hand as the "obnoxious objector" and on the other as a passive non-entity that will let opposing counsel do whatever they wish. Reaching an acceptable compromise is often difficult. The fear of over-objecting may be reduced to some extent by the fact that the jury is instructed that lawyers have a "duty" to object to what they feel are improper questions and the jury is not to draw any conclusion from the judge's ruling.[18]

As a practical matter, confidence is gained when the court sustains an objection and reluctance to object is increased when objections are repeatedly overruled. Objections to trivial matters, even if sustained, may be annoying to the court and to the jury. When deciding to object, counsel may give consideration to the significance of the evidence being offered, whether the objection will call attention to the evidence under consideration, and whether opposing counsel will skillfully avoid the objection with further questioning. For example, sometimes allowing opposing counsel to lead his or her own witness so that witness testifies "yes" or "no" to questions is preferable to actually having the witness testify in response to more "proper" non-leading questions. The bottom line is that the decision to object is based on judgment of counsel and trial strategy.

Raising objections is a risk/benefit analysis. A jury may not take kindly to repetitive objections even if they are sustained, but sustained objections may give the jury the impression that opposing counsel is not following the rules. Multiple objections that are overruled may give the jury the impression that the objecting party is trying to hide information or trying to win with technicalities.

Procedure. Objections are required to be made with specificity. Wis. Stat. § 805.11(2) requires a party raising an objection to specify the grounds of the objection or the claim for error.[19] The objection should be made precisely and accurately. The precision to which an objection must be made is relative as "objection" is insufficient and elaborating the grounds and case authority is likely too much. Counsel should be cautioned against overstating the objection or arguing in front of the jury.

Overstated objections are often described as "speaking" objections, which contain far more information than is necessary for the court to make a ruling. If further explanation is needed to explain the basis for the objection, counsel can request the opportunity to be heard outside the presence of the jury. Frequently, these discussions are in chambers or at sidebar and the basis for objection and the ruling may not be put on the record. The trial may go on without the ruling being stated on the record.

In the event that a witness answers a question before the ruling is made and/or while the objection is in progress, the court should be asked to move to strike the answer.

The most common objections made are:[20]

- Lack of foundation;
- Hearsay;
- Leading question;
- Calling for speculation;
- Irrelevant;
- Lack of competency of the witness; and
- Improper impeachment.

Some objections, such as leading, may be used to disrupt the flow of opposing counsel's presentation, but such objections are easily overcome by merely rephrasing the question. One of the simplest ways to overcome the leading objection, is rephrase the question leading off with: "What, if anything . . ." Since the question no longer suggests an answer, it is no longer a leading question.

If an objection is sustained, it is appropriate for counsel to ask the court to explain the basis for the objection so that it can be overcome. Counsel has a right to request the court to explain why evidence is excluded. When counsel requests an explanation in good faith, the court must indicate the specific grounds for its ruling.[21] If an objection is sustained based on a general objection, counsel can require the court to give a specific basis for its ruling if requested.[22] The purpose of an objection is to prevent inadmissible evidence, but counsel should be given an opportunity to lay a proper foundation to make the evidence admissible.

Continuing objections. At times, particularly during discovery, counsel may ask for a "continuing" objection. The purpose is to raise an objection to a line of questioning; they are most frequently used during discovery depositions when a line of questioning is being pursued. It allows counsel to continue the questioning without an objection being posed to every question. The practical effect is the preservation of the entire line of questioning for a later ruling by the court. While continuing objections are rarely used in trial, they are an approved method to preserve appellate rights.[23]

When a continuing objection is used, there should be an understanding as to the objection's scope. For example, counsel may seek to question the witness about other evidence that is deemed admissible. The line of questioning on which the continuing objection is based should be stated with a degree of specificity so that the objectionable question can be identified. At trial, counsel should make sure that the trial court has agreed that the continuing objection obviates the need to object to each and every question.[24] A stipulation from opposing counsel is also an option.[25]

Offers of proof. Counsel may attempt to exclude a complete line of inquiry with a single objection. When that occurs, counsel must ask the court to be permitted to make an offer of proof unless the substance of the evidence is apparent from the context or risk failing to preserve the error for appeal.[26] The offer of proof is directed to show that the evidence is admissible.[27] An offer of proof

has a two-fold purpose. First, when the judge hears the complete line of testimony, including the foundation for it and the nature of the proof, the basis for the objection may be removed. Second, if the objection is sustained, the entire line of proof is made part of the record. An offer of proof may be made by questioning the witness or simply by counsel summarizing the content and foundation for the testimony. Without an offer of proof, the appellate court can only speculate what the proof would have been. The offer provides the foundation and substance of the testimony, which enables appellate review. Unless the substance of the testimony is apparent from the context of the trial, a failure to provide a proper offer of proof will prevent appellate review.[28]

Preparation for raising objections. When preparing for trial, counsel may give consideration to potential evidentiary issues. These issues may be addressed by motion in *limine*. One may anticipate a potential objection to testimony or exhibits not the subject of a motion in *limine*. In those instances, one may prepare a trial brief on the issue. Another approach is to have "pocket" briefs or references to evidentiary issues that are not uncommon, such as admissibility of a police report, use of possibility testimony by the defense, foundation for a learned treatise, admissibility of the driver's handbook, and other issues. When the issue arises at trial, counsel provides the court and opposing counsel a copy of the brief for consideration.

Timing of objections. Objections to admissibility may be raised at many points during the litigation. These include during discovery, by motion in *limine*, and at various stages of the trial. The substantive basis for objections is beyond this article's scope.

Discovery. The most common objections to discovery occur during depositions. The scope of discovery allows a party to ask any question that is relevant to the subject matter and reasonably calculated to lead to the discovery of admissible evidence.[29] Some courts limit objections available to one during a discovery deposition to the form of the question while others allow a bit more.[30] "Speaking" objections are improper because it "undermines the basic purpose of the discovery process, contaminating the ascertainment of truth set forth as the goal."[31] If deposition testimony is to be used at trial, objections may be made at that time in the same manner as if the witness is present.[32] There are limitations placed on the use of deposition testimony of witnesses[33], but the statute allows use of a deposition of a medical expert for any purpose.[34] Often counsel make objections in a deposition that would be made at trial, despite the limitations of the rule.

Motions in *limine*. There is no procedure for using motions in *limine*. While motions in *limine* were developed primarily to preclude inadmissible evidence, they are also used to proactively obtain advance rulings on the admissibility of evidence.[35] Thus, a party can move the court to obtain an advance ruling with regard to admissibility and inadmissibility of evidence. The court's ruling on motions in *limine* can be verbal or written. If the ruling is significant to the case, a transcript of the court's ruling may be obtained. Motions in *limine* generally preserve the right to appeal an issue raised in the motion, unless the issue on appeal is different in law or fact from the decision on the motion.[36] It should be noted that the adverse ruling on a motion in *limine* preserves the party's right to appeal the ruling without objecting at trial, but only to the extent that the evidence is opposed and the argument is presented in the motion.[37] Despite this, counsel may ask the court to recall the court's ruling on the motion in *limine* and confirm the objectionable issue before the witness begins testifying about it.

If a ruling on a motion in *limine* excluding evidence is violated during trial, the appropriate procedure is to object and to ask to be heard outside the presence of the jury.[38] If a piece of evidence is sufficiently significant, the reference to it is likely to be prejudicial error. The remedy for prejudicial error of sufficient magnitude is a motion for mistrial.[39] The court may choose to offer a curative instruction. Curative instructions often emphasize the piece of evidence. Some courts try to involve counsel in drafting a curative instruction.

Trial objections. Objections may be made at various stages during the course of trial, including during *voir dire,* opening statements, instructions in verdict, and argument. The proper content of *voir dire*, opening statements, instructions, verdicts, and closing arguments is beyond the scope of this article.

Video depositions. The testimony of experts and witnesses may be presented on videotape. Depositions are taken without a judge being present. The same rules for objection are applicable to videotaped testimony. The transcript of the videotaped deposition becomes part of the trial record.[40] Most courts require that the objections in an evidentiary deposition be dealt with prior to the video being played for the jury. As with other testimony, the ruling on objections should be clearly placed on the record.

Certain objections during videotaped testimony must be made at the time of deposition questioning or they are waived. Wisconsin Statute § 804.07(3)(c)1 provides that objections to "competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition" unless the basis for the objection could have been addressed at the time of the deposition.[41] This means that if the basis for the objection could have been overcome by additional questions at the time of the deposition, then the failure to lodge the objection results in a waiver of that objection. However, if no amount of foundational questions and corresponding answers would have overcome the basis for the objection, then counsel can assert that objection to potentially bar that witness or a portion of the testimony even if no objection was made at the time of the videotaping of the deposition.

There are logistics involved in the presentation of video deposition testimony. Frequently, the rulings are made when actual editing cannot be accomplished. In those situations, the testimony is muted for the jury. At times, objections made during the deposition turn out to be unnecessary and the objection is waived. If there are significant questions about admissibility of videotaped testimony, efforts should be made to have the rulings made well in advance of trial and the video edited if possible.

Voir dire. Objections during *voir dire* are uncommon. The scope and content of *voir dire* is usually determined by the court. An objection may be raised to the propriety of counsel informing the jury of the law or questioning the jury with repetitious and hypothetical questions.[42] Objection may also be made with regard to contact between parties, witnesses, and counsel. For example, jurors are present in the courthouse prior to selection. On occasion, counsel and/or a party may inadvertently engage in discussion with a prospective juror. Objection to the participation of the prospective juror should be raised.

Often the trial court will inform the jury that they may see counsel during the course of the trial and that counsel will ignore them. The trial court will explain that counsel is not being rude, but rather is following the court order not have any contact with jurors outside of the courtroom. If the trial court neglects to do so, a gentle reminder to the trial court at a sidebar or at the first break in the trial is a good idea.

Opening statement. The content of the presentation by counsel in opening statements is not considered evidence.[43] Therefore, the scope of objection during opening statement is limited. Objection may be raised if counsel discusses clearly irrelevant information. In addition, if counsel begins to argue the case in opening statement, it is improper and an objection may be made.

Instructions and verdict. Trial judges request that suggested jury instructions and a proposed special verdict be filed with the court well in advance of trial. The court's role is proper jury instruction and special verdict framing; counsel's role is to request the proper instructions and to object to instructions that are improper. The proper jury instruction must be warranted by the evidence. If an improper jury instruction or improper verdict question is asked, objection should be raised.

The purpose of such an objection is to allow the court to overcome the error. Failure to object to the instructions or the verdict will result in a waiver of any error, absent extraordinary circumstances.[44] This rule applies to instructions or verdict questions that were requested, but not given by the trial court.[45] The mere submission of alternative instruction or verdict forms is not sufficient to preserve error to an improper instruction that the trial court gives or fails to give to the jury. The alternative submission must be accompanied by an explanation of the basis for the objection or any alleged error will not be reviewable by the appellate courts.[46] In addition, the party claiming impropriety must establish the error in the record and show that it was specifically called to the attention of the court.[47]

Closing argument. When it comes to the record, improper argument by counsel is not presumed to be prejudicial.[48] However, there should always be objection to an improper remark because some remarks are sufficiently prejudicial to warrant a new trial.[49] Trial counsel has the responsibility to challenge improper argument. The trial court also has a duty to interfere when improper argument is being made. Counsel should be mindful of the fact that merely sustaining an objection to the argument and instructing the jury to disregard it fails to remedy the prejudice.[50] If there is prejudice, a motion for a mistrial should be made.

Objections in final argument often result from improper characterization of counsel and/or witnesses, misstatement of the evidence, and/or arguing evidence that is not presented, as well as improper statements of the law. While counsel is often reluctant to interrupt argument, protecting the record may require an objection and discussion outside of the record.

Mistrial. Attempts to introduce prejudicial information in violation of a motion in *limine* may require a motion for a mistrial. A motion for mistrial is usually based upon prejudicial misconduct at trial or when inadmissible matters are brought to the attention of the jury and the prejudice cannot be removed by a curative instruction.[51] A motion for mistrial should be made at the time an attempt is made to offer prejudicial evidence. The grounds for a mistrial may include prejudicial arguments or questioning the witnesses, misconduct or illness of a judge or juror, references to inadmissible evidence, absence of witnesses, or surprise. Examples of prejudicial information that may result in a mistrial would be improper reference to insurance, a Golden Rule argument, asking the jurors to put themselves in the position of the plaintiff, statements or arguments related to the evidence that is inadmissible or was not introduced, or prejudicial derogatory descriptions of the parties or counsel. Again, the decision to object is one of trial strategy.

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References

1 *Allen v. Allen,* 78 Wis.2d 263, 270, 254 N.W.2d 244, 248 (1977) ("The burden is on the party alleging error to establish by reference to the record that the error was specifically called to the attention of the trial court.").

2 *LaCombe v. Aurora Medical Group, Inc.*, 2004 WI App 119, ¶5, 274 Wis. 2d 771, 683 N.W.2d 532.

3 *State v. Mainiero*, 189 Wis. 2d 80, 95, 525 N.W.2d 304, 310 (Ct. App. 1994) (sidebar with court was not transcribed but counsel summarized the sidebar on the recording, including the objection raised and reasoning for the objection. However, neither the court nor counsel summarized the basis for the trial court's decision to overrule objection and thus the record inadequately set forth the trial court's reasoning for its ruling. Appellate review was thus limited to searching the record to sustain the trial court's ruling).

4 *Vollmer v. Luety*, 156 Wis. 2d 1, 456 N.W.2d 797 (1990).

5 However, if the error is significant enough such that the real controversy between the parties has not been tried or there is some other miscarriage of justice, then the Court of Appeals may decide to exercise its discretionary authority under Wisconsin Statutes §725.35 to reverse the trial court's decision and either direct judgment to be entered or allow the parties the opportunity to retry the case. However, a prudent attorney should not count on the exercise of this discretionary authority to preserve the error that counsel should have done at the trial court level.

6 *State v. Ndina*, 2009 WI 21, 315 Wis.2d 653, 761 N.W.2d 612.

7 *Neumann v. Neumann (In re Estate of Neumann)*, 2001 WI App 61, 242 Wis. 2d 205, 224, 626 N.W.2d 821, 830-31, *see also*, Wis. Stat. § 901.03(1)(a)(requiring a timely objection or motion to strike stating the specific ground of objection).

8 *Behning v. Star Fireworks Mfg. Co.*, 57 Wis. 2d 183, 187, 203 N.W.2d 655 (1973).

9 *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

10 For example, admissibility of evidence is left to the discretion of the trial court unless the court has committed an error of law that is an erroneous exercise of its discretion. *Nelson v. Zeimetz,* 150 Wis.2d 785, 799, 442 N.W.2d 530, 535-36 (Ct. App. 1989).

11 *Krolikowski v. Allstate Ins. Co*., 283 F.2d 889 (7th Cir. 1960).

12 *State v. Bullard*, 2001 WI App 280, 248 Wis. 2d 982, 638 N.W.2d 393 (unpublished).

13 *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999).

14 *Seifert v. Balink*, 2017 WI 2, ¶89, 372 Wis. 2d 525, 888 N.W.2d 816, reconsideration denied, 2017 WI 32, 374 Wis. 2d 163.

15 *Baugh v. Cuprum S.A. De C.V.*, 730 F.3d 701, 705 (7th Cir. 2013) ("The general rule is that materials not admitted into evidence simply should not be sent to the jury for use in its deliberations.").

16 *Krause v. Milwaukee Mut. Ins. Co*., 44 Wis. 2d 590, 603, 606-07, 172 N.W.2d 181 (1969) (An exhibit becomes evidence when received by the court. An exhibit marked for identification, but not received, is not evidence).

17 *Caccitolo v. State*, 69 Wis. 2d 102, 113, 230 N.W.2d 139, 145 (1975) (citing *Bennett v. State*, 54 Wis. 2d 727, 735, 196 N.W.2d 704, 708 (1972)).

18 Wis. JI-Civil 115: Objections of Counsel.

19 See also, Wis. Stat. § 901.03(1)(a), objections to evidence must be made with specificity unless the specific ground(s) of the objection are clear from the context. Counsel is advised to make the specific objection as opposed to reliance upon the context.

20 See *Trial Practice* Chapter 6, Page 16.

21 *Coburn v. Chicago, ST. P., M. & O. RY, Co*., 109 Wis. 377, 85 N.W. 354 (1901).

22 *Rosenberg v. Sheeahan*, 148 Wis. 92, 133 N.W. 645 (1911).

23 *State v. Lomprey*, 173 Wis. 2d 209, 216, 496 N.W.2d 172, 175 (Ct. App. 1992).

24 *Id*.

25 *County of Wash. v. Schmit*, 2000 WI App 161, 238 Wis. 2d 92, 617 N.W.2d 676. (unpublished).

26 Wis. Stat. § 901.03(1)(b).

27 *Kuklinski v. Rodriguez*, 203 Wis. 2d. 324, 552 N.W.2d 869 (Ct. App. 1996).

28 *State v. Williams*, 198 Wis. 2d 516, 538, 544 N.W.2d 406 (1996); *Lambert v. State*, 73 Wis. 2d 590, 605, 243 N.W.2d 524 (1976).

29 Wis. Stat. § 804.01(2)(a)

30 Cochran, "*But The Examination Still Proceeds": A Primer On Surviving the Difficult Deposition*, ABA Section of Litigation 2012 Section Annual Conference April 18–20, 2012, page 4; see also, *Cincinnati Ins. Co. v. Serrano*, No. 11-2075-JAR, 2012 U.S. Dist. LEXIS 1363, at *9 (D. Kan. Jan. 5, 2012), see also, Aprahamian & Beringer, "Out of Sight, Not out of Mind: Deposition Ethics and Best Practices", *Wisconsin Lawyer*, May 2015, Vol. 88, No. 5.

31 *Alt v. Cline*, 195 Wis. 2d 679, 538 N.W.2d 860 (Ct. App. 1995) (referencing *Hickman v. Taylor*, 329 U.S. 495, 507-08, 91 L. Ed. 451, 67 S. Ct. 385 (1947), *State ex rel. Dudek v. Circuit Court*, 34 Wis.2d 559, 576, 150 N.W.2d 387, 397 (1967)).

32 Wis. Stat. § 804.07(1).

33 Wis. Stat. § 804.07(1)(c)1.

34 Wis. Stat. § 804.07(1)(c)2.

35 See, for example, *Gainer v. Koewler,* 200 Wis. 2d 113, 117, 546 N.W.2d 474, 476 (Ct. App. 1996).

36 *State v. Jenkins*, 168 Wis. 2d 175, 188, 483 N.W.2d 262, 266 (Ct. App. 1992); *Wentland v. American Family Mutual Insurance Company*, 195 Wis. 2d 84, 537 N.W.2d 147 (Ct. App. 1995) (unpublished).

37 *State v. Bustamante*, 201 Wis. 2d 562, 571, 549 N.W.2d 746 (Ct. App. 1996).

38 *Gainer v. Koewler*, 200 Wis. 2d 113, 546 N.W.2d 474 (Ct. App. 1996).

39 As counsel did in *Gainer*, 200 Wis. 2d at 119, 546 N.W.2d at 477.

40 Wis. Stat. §§885.40 to 885.47.

41 *Strelecki v. Firemans Ins. Co.*, 88 Wis. 2d 464, 475-76, 276 N.W.2d 794, 799 (1979).

42 See Wis. Stat. § 805.08 (1).

43 *Merco Distrib. Corp. v. O & R Engines, Inc.*, 71 Wis.2d 792, 795-96, 239 N.W.2d 97, 99 (1976). In fact, the jurors are told by the trial court that such statements are not evidence. Hence, improper opening statements rarely result in a mistrial or a new trial as jurors are presumed to follow the instructions of the court. *Ford Motor Co. v. Lyons,* 137 Wis.2d 397, 457 n.20, 405 N.W.2d 354, 378 (Ct. App. 1987).

44 *Wingrad v. John Deere*, 187 Wis. 2d 441, 523 N.W.2d 274 (Wis. Stat. § 805.13 requires that objections to instructions are waived if there is a failure to object at trial or objection is not stated with specificity or particularity on the record), *see also*, *Suchomel v. Univ. of Wis. Hosp. & Clinics*, 2005 WI App 234, ¶11, 288 Wis. 2d 188, 708 N.W.2d 13.

45 *State v. Gomaz,* 141 Wis.2d 302, 318, 414 N.W.2d 626, 633-34 (1987).

46 *Id*., and see also, *State v. Schumacher,* 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988).

47 *Allen v. Allen*, 78 Wis. 2d 263, 254 N.W.2d, 244 (1977).

48 *Roeske v. Schmitt*, 266 Wis. 557, 64 N.W.2d 394 (1954).

49 *Wagner v. American Family Mut. Ins. Co.*, 65 Wis. 2d 243, 222 N.W.2d 652 (1974).

50 *Markowitz v. Milwaukee Elec. R. & L. Co.*, 230 Wis. 312, 284 N.W.31 (1939).

51 *Conwell v. Milwaukee Automobile Mut. Ins. Co.*, 19 Wis. 2d 298, 120 N.W.2d 68 (1963).