

Tips for Making Your Record for Appeal

Before an appellate court can address whether the trial court committed error, the adversely affected party must have properly preserved the alleged error in the trial court. Preservation principles apply to administrative cases, civil and criminal cases, and cases subject to de novo review on appeal, such as dissolution appeals.

Generally, the keys to preservation are specificity and timeliness. In determining whether a particular legal point has been preserved for appeal, the reviewing court looks to see whether the appellant (1) raised the issue, (2) identified a source for the claimed position, and (3) made a particular argument at trial. The first requirement is ordinarily essential, the second is less important, and the third is the least important.

Do not rely on the record made by co-counsel; you must make your own record on behalf of your own client. You can adopt and incorporate arguments made by another party, but do not remain silent and expect any record made by another party to preserve your position.

Preservation Before Trial

Pre-Trial Motions. To avoid potential problems with an insufficient record on appeal, when in doubt, have pre-trial motions recorded.

Motions on the Pleadings. You must raise the following defenses by motion before pleading or in a responsive pleading or they are automatically waived (and thus not preserved for appeal) if not made: (1) lack of personal jurisdiction; (2) another action pending between the same parties for the

same cause; and (3) insufficiency of summons or process or insufficiency of service of summons or process.

The following defenses are also waived if not made by motion before pleading or in a responsive pleading, but the waiver may be overcome with leave of the court to amend the pleading under very limited circumstances: (1) plaintiff lacks the legal capacity to sue; and (2) the action has not been commenced within the applicable statute of limitations.

Exceptions. The following defenses are not waived by failure to raise them in a motion before pleading or in a responsive pleading, but they must be raised in a motion for judgment on the pleadings or at trial to preserve them for appeal: (1) failure to state ultimate facts constituting a claim; (2) failure to join a party indispensable under Rule 29; and (3) failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense.

Motions to Strike. A pretrial motion to strike an allegation will not adequately preserve error for appeal unless you also move at trial to take the allegation from the jury or otherwise give the trial court an opportunity to correct any error in the pretrial ruling.

Motions in Limine. Rulings on motions in limine can preserve objections for appeal, but only if the record is developed in a way that would adequately preserve the issue if raised during the trial. If you seek a ruling on a motion in limine regarding admission of evidence, you must make an actual offer of

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proof as to the contents of the proposed evidence. Make all arguments as to the admission or exclusion of the evidence in question; a motion in limine based on one ground will not support an appeal on a different ground.

Summary Judgment. If evidence is admitted without objection in support of or opposition to a summary judgment motion, the court will not consider the admissibility of the evidence on appeal. You must make evidentiary objections before the motion is decided.

Materials not submitted within the statutorily mandated time frames are not necessarily part of the record for purposes of appellate review of the summary judgment ruling. If the trial court did not consider the late-filed materials and is found to have acted within its discretion on the facts presented, the late materials are not part of the record on appeal.

Preservation at Trial

Admission or Exclusion of Evidence – Know and Follow OEC 103. Evidentiary error is not presumed to be prejudicial. An appellate court will not find error unless a substantial right of the party is affected and: (a) in the case of a ruling *admitting* evidence, you made a timely objection or motion to strike on the record stating the specific ground of objection, if it was not apparent from the context; or (b) in the case of a ruling *excluding* evidence, you informed the court of the substance of the evidence through an offer or proof, or it was apparent from the context.

Merely submitting written objections to testimony or evidence at trial without objecting when the evidence is offered is not enough to preserve an issue for appeal. You must object and seek and obtain a ruling from the trial court.

When evidence is excluded, you must declare on the record before or immediately after the ruling why the evidence is admissible and make an offer of proof. If the trial court excludes references to materials offered in connection with your expert's testimony, you must lay a foundation for the materials to properly preserve the issue for appeal. If the court precludes you from cross-examining a witness, you must make an offer of proof of what the prohibited questioning would have shown. You can show this by questioning the witness with the jury excused.

Mistrial Motions. Motions for mistrial must be made immediately after the objectionable statement or conduct to be preserved.

Sufficiency of the Evidence/Directed Verdict. In a jury trial, you must move for a directed verdict before the jury is instructed. The motion must specify the grounds; grounds not argued to the trial court cannot be raised on appeal. In a trial to the court, the sufficiency of the evidence cannot be raised on appeal unless you have asserted the legal insufficiency of the evidence in the trial court.

When there are multiple claims or specifications of wrongdoing in a jury trial and you have arguments as to the sufficiency of an entire claim or to the sufficiency of individual specifications of wrongdoing, be sure to make your record by moving for a directed verdict on the whole claim and to strike the individual allegations.

Jury Instructions – Know and Follow ORCP 59 H.

To obtain appellate review of a trial court's giving *or refusing to give* a jury instruction, you must identify the asserted error to the trial court and note your exception on the record immediately after the court instructs the jury. Your exception must be stated "with particularity" and may be made "either orally on the record or in a writing filed with the court." **Note:** As to instructions requested but not given, this is a change in the law. The rule previously did not require a party to take exception to the court's *refusal* to give an instruction.

An appeal based on alleged error in refusing a jury instruction will succeed only if the requested instruction (a) correctly states the law in all particulars; (b) is based on current pleadings; and (c) is supported by the evidence.

If you are objecting to a jury instruction given, merely citing a case is insufficient. Moreover, an exception to a jury instruction on one ground does not preserve a claim of error on a different ground.

Verdict Form. A deficiency in a verdict form is waived unless excepted to before submission of the form to the jury. If you object to the submission of one or more claims or allegations as being legally erroneous or factually insufficient but agree to the use of a general verdict form, an appellate court may not be able to tell whether the jury actually based its verdict on the factually insufficient or legally erroneous claim or allegation and will treat any error as harmless. Appellate courts may no longer employ the "we can't tell" rule to vacate a judgment; for error to be reversible, the court must be able to determine that the error is prejudicial.

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Findings in Court Trials. In a court trial, the trial court is not required to make special findings unless you request them before trial. You do not have to object to the findings themselves to challenge them on appeal. If, however, you wish to challenge the sufficiency of the evidence to support the findings, you must assert this at trial to raise it on appeal.

Preservation After Verdict or Decision

Defective Verdict. You must object to a defective verdict before the jury is discharged or the alleged error will be waived.

Polling the Jury. If you fail to request a jury poll, the right to request a poll is waived.

JNOV. The denial of a judgment notwithstanding the verdict is not an appealable order. However, a motion for JNOV that does not include an alternative motion for a new trial on the same claim waives the right to request relief in the form of a new trial in any subsequent appeal.

Motion for New Trial. An order denying a motion for a new trial is not appealable, and denial of a new trial motion may not be assigned as error.

JANET M. SCHROER
HOFFMAN, HART & WAGNER LLP

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