THE HON. JAMES G. MIXON TRIAL PRACTICES SYMPOSIUM

Presented by

THE UNITED STATES BANKRUPTCY COURT

EASTERN AND WESTERN DISTRICTS OF ARKANSAS

June 9, 2023

University of Arkansas School of Law

Fayetteville, Arkansas

CLE Credit Hours 6 (including 1 hour of ethics)

PROGRAM AGENDA

AND

HANDOUT MATERIALS

THE HON. JAMES G. MIXON TRIAL PRACTICES SYMPOSIUM

Presented by the United States Bankruptcy Court
Eastern and Western Districts of Arkansas
University of Arkansas School of Law
June 9, 2023

PROGRAM

6 AR CLE hours (5 general hours; 1 ethics hour) – approval pending
Materials: https://www.areb.uscourts.gov/news/james-g-mixon-trial-practices-symposium

8:15 – 8:30 Welcome
Hon. Bianca M. Rucker, *U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas*

8:30-9:30 Why Do You Care?
Buzz Boyer, Watkins, Boyer, Gray & Curry, PLLC
Hon. Richard D. Taylor, *U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas*

9:30-10:30 A Few Nuts and Bolts of Trial Practice and Civility
Hon. John R. Scott, *Circuit Judge for Benton County, Arkansas*
Hon. Christy D. Comstock, *U.S. Magistrate Judge for the Western District of Arkansas*
Moderator: Hon. Phyllis M. Jones, *U.S. Bankruptcy Chief Judge for the Eastern and Western Districts of Arkansas*

10:30–10:45 Break

10:45-11:45 More is More: Ideas for Effective Pre-Trial Communications with the Court
Lindsey Emerson Raines, Friday, Eldredge & Clark, LLP
Alan L. Lane, Odom Law Firm

11:45-12:45 Lunch (provided at cost – select box lunch choice on registration form)

12:45-1:45 A Crash Course in Preservation of Error in Arkansas and Eighth Circuit Appellate Practice
Tim Cullen, Cullen & Co., PLLC

1:45-2:45 Evidence: Effective Use of Deposition Testimony at Trial and Traps to Avoid
Vincent O. Chadick, Quattlebaum, Grooms & Tull, PLLC

2:45-3:00 Break

3:00-4:00 Proving Your Case in Bankruptcy Court
Hon. Phyllis M. Jones, *U.S. Bankruptcy Chief Judge for the Eastern and Western Districts of Arkansas*
Hon. Richard D. Taylor, *U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas*
Hon. Bianca M. Rucker, *U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas*

THE HON. JAMES G. MIXON TRIAL PRACTICES SYMPOSIUM

June 9, 2023

Presentation from 8:30 to 9:30

Why Do You Care?

Buzz Boyer

Watkins, Boyer, Gray & Curry, PLLC

Hon. Richard D. Taylor

United States Bankruptcy Judge for the

Eastern and Western Districts of Arkansas

Handout Materials

THE HON. JAMES G. MIXON TRIAL PRACTICES SYMPOSIUM

JUNE 9, 2023

WHY DO YOU CARE?

RESOLUTION

IN MEMORIAM
of
THE HONORABLE JAMES G. MIXON
United States Bankruptcy Judge
Eastern and Western Districts of Arkansas

Jim Mixon peacefully passed away in the early morning hours of March 10, 2014, just sixteen days shy of thirty years service as a United States Bankruptcy Judge. Judge Mixon loved his wife, his family, his friends, the bankruptcy bar, his court family, the fertile soil of the Arkansas Delta, and his job. All but the dirt loved him back.

James Gordon Mixon was born in Helena, Arkansas, on August 27, 1941. He attended the University of Central Arkansas and the University of Arkansas at Fayetteville. He graduated from the University of Arkansas School of Law at Fayetteville in May 1968. He served two years active duty in the United States Navy as an enlisted man and was discharged Seaman First Class. Judge Mixon's parents are both deceased. He has two sisters, Abigail Mixon McCracken, Houston, Texas, and Sara Lee Mixon McPhillips, Houston, Texas. He was proudly married to Robbie Payton Mixon and had two stepchildren by Robbie: Erin Whitt and Courtney Payton. He had three stepchildren by a previous marriage: Cab Craig, Houston, Texas; Christie Gildehaus, Bentonville, Arkansas; and James Polk Craig, Bella Vista, Arkansas.

Judge Mixon was admitted to the bar in August 1968 and served one year as a law clerk to the Hon. John Fogleman on the Arkansas Supreme Court. Judge Mixon then served as an Assistant United States Attorney under W. H. Dillahunty from June 1969 until

February 1973. From 1973 until 1984, he was engaged in the private practice of law in Bentonville, Arkansas, with the firm Little & Lawrence, later Little, Lawrence, McCollum & Mixon. He was a Chapter 7 Panel trustee from 1980 to 1984. He also served on the Bentonville City Council for two years and spent two years as City Attorney for the City of Bentonville.

Judge Mixon was appointed a United States Bankruptcy Judge for the Eastern and Western Districts of Arkansas on March 24, 1984. He served eight years as the Chief Bankruptcy Judge. He retired in 2006 and was serving as a recall judge at the time of his death. He was a member of the Arkansas Bar Association, the Pulaski County Bar Association, the Debtor/Creditor Bar Association, and the National Conference of Bankruptcy Judges. He served as an adjunct professor for a period of time at the University of Arkansas School of Law at Little Rock.

Judge Mixon will be dearly missed by the bar and his fellow judges. His unassuming manner disguised a sharp mind and a wicked sense of humor. He had an astounding knowledge of the Bankruptcy Code but constantly second-guessed himself. He would mull over the issues and the facts until he felt that he had an exact grasp of the appropriate resolution. He readily admitted his mistakes and shortcomings. He never let pride or arrogance stand in the way of the correct result or proper treatment of the bar. When his fellow judges asked his advice, he patiently outlined the options but made it clear that in the end the decision was theirs. He never tried to impose his views or will. He was a kind, steady, dispassionate, and caring mentor to lawyers and his fellow judges. Well, except several years ago, when a newly minted Judge Barry sought commiseration on his first reversal, and Mixon, after listening patiently, told Ben, “It won’t be the last time.”

He could carry the whole “unassuming” thing too far. Once, he and a friend spent several days camping and fishing on the White River. The lovely family that set up their tent and extensive accoutrement next door unexpectedly and hurriedly broke camp the following morning. Judge Mixon introduced himself to the uncomfortable family. After finally establishing that he was a judge and his companion a respected attorney, the couple confessed that during their sleepless night they had concluded that the unshaven vagrants next door were fugitives.

Judge Mixon’s admiration of casual dress might have contributed to that perception. On weekends, it was not unusual for him to sport tennis wind pants and a bright red t-shirt, topped by a

Greek fisherman's hat. Unfortunately, the hat fell victim to a foul wind.

And finally, Judge Mixon loved trains. They go very few places very slowly; he got to enjoy the journey, not just the destination. All of us that knew him are grateful that we were included in part of his journey.

On behalf of the judges of the Eastern and Western Districts of Arkansas, I move for the adoption of this resolution. May it be made a part of the records of this Conference and copies transmitted to his wife Robbie and the members of his family.

THE HON. JAMES G. MIXON TRIAL PRACTICES SYMPOSIUM

June 9, 2023

Presentation from 9:30 to 10:30

A Few Nuts and Bolts of Trial Practice and Civility

Hon. John R. Scott

Circuit Judge, Benton County Arkansas

Hon. Christy D. Comstock

United States Magistrate Judge for the Western District of Arkansas

Handout Materials

A FEW NUTS & BOLTS OF TRIAL PRACTICE & CIVILITY

ADVANCE SCOUTING

Know how your judge and the judge's staff operates. If you are not familiar with the judge and staff find other attorneys who can give you a scouting report. Find out what technology is available in the courtroom, and know how to use it prior to your trial. Make your witnesses and client aware of how the judge and staff operate.

INSTRUCTIONS FIRST

In a jury trial case, draft your jury instructions first. That will require you to know the elements of your action, help in drafting the complaint, and the instructions will be already be prepared!

CLIENT AND WITNESS PREPARATION

Give your client and witnesses a full orientation as to the trial procedure. Make certain the client understands the trial procedure. Consider taking your client and witnesses to observe trial prior to their trial. Review your testimony outlines with your client and with each witness, including cross-examination questions. Tell your client and other witnesses to answer the questions asked, not to provide some explanation of their actions or some other information, and tell them not to get defensive on cross examination.

CONTINUANCES

If you need a continuance, ask for it sooner, not later. Be totally candid with the court and opposing counsel as to why you think you need a continuance. In the requesting motion state whether not opposing counsel is agreeable to the request or opposed.

MEDIATIONS

If you want to mediate the dispute, also do it sooner, not later. In the requesting motion, state whether or not opposing counsel is agreeable to the request or opposed. Report the result of the mediation to the court immediately. Benton County has a Mediation Grant from the ADR Commission that pays $200 per hour, for four hours, of a mediator's fee.

TRIAL EXHIBITS

Place exhibit stickers on exhibits prior to walking into the courtroom. Have enough copies of each exhibit for use by the witness and opposing counsel, in addition to the exhibit itself. If you have an electronic exhibit, let the Court Reporter see it prior to trial, and review the admissibility process.

OPENING STATEMENTS

Use the Opening Statement to tell the court/jury what the disputed and undisputed issues are, and what relief your client is seeking from the court.

DOCUMENT ADMISSIBILITY

Discuss admissibility of documents with opposing counsel prior to trial to see if the admissibility of documents can be stipulated. There rarely is a dispute as to medical records, academic records, etc.

OBJECTIONS AT TRIAL

Make objections to evidence and testimony when there is a reason that is material to your case.

SETTLEMENT NEGOTIATIONS

Conduct settlement negotiations in advance of the morning of trial.

MENTORS

Seek counsel from experienced trial attorneys. Attorneys love to talk, and one is a big enough crowd.

CIVILITY

Advance the legitimate interests of clients, without reflecting any ill will they have for their adversaries, even if called on to do so, and treat all other counsel, parties, and witnesses in a courteous manner.

Do not seek court sanctions unless they are fully justified by the circumstances and necessary to protect a client's legitimate interests and then only after a good faith effort to informally resolve the issue with counsel.

Never initiate communication with a judge without the knowledge or presence of opposing counsel concerning a matter at issue before the court.

Make good faith efforts to resolve disputes concerning pleadings and discovery.

Agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect you client's legitimate rights.

During a deposition, never obstruct the interrogator or object to questions unless reasonably necessary to preserve an objection or privilege for resolution by the court.

Do not produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

Be punctual and prepared for all court appearances, and, if unavoidably delayed, notify the court and counsel as soon as possible.

Advise clients and witnesses of the proper courtroom conduct expected and required.

Never misrepresent or misquote facts or authorities.

Be respectful and courteous to court marshals or bailiffs, clerks, reporters, secretaries, and law clerks.

THE HON. JAMES G. MIXON TRIAL PRACTICES SYMPOSIUM

June 9, 2023

Presentation from 10:45 to 11:45

More is More: Ideas for Effective Pre-Trial Communications with the Court

Lindsey Emerson Raines

Friday, Eldredge & Clark, LLP

Alan L. Lane

Odom Law Firm

Handout Materials

MORE IS MORE: IDEAS FOR EFFECTIVE PRE-TRIAL COMMUNICATIONS WITH THE COURT

Lindsey Emerson Raines, Friday, Eldredge & Clark, LLP
Alan L. Lane, Odom Law Firm

I. Effective (and Ethical) Communications with the Court

a. **Rule 3.3 of the Arkansas Rules of Professional Conduct Candor Toward the Tribunal**

A lawyer shall not knowingly (1) make a false statement of fact or law to a tribunal; or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false....

b. **Rule 3.5 of the Arkansas Rules of Professional Conduct Impartiality and Decorum of the Tribunal**

"A lawyer shall not (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order . . .."

i. Comment 4: The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the case, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

ii. Comment 5: The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.

RELEVANT CASE LAW:

Fitzhugh v. Comm. on Pro. Conduct, 308 Ark. 313, 317–18, 823 S.W.2d 896, 899 (1992)

Appellant next argues he could not have violated the rules concerning ex parte communications since he only delivered the precedent to the trial court but did not communicate with the Court on the merits of the case. Appellant does not dispute that he agreed with Mr. Acchione at the conclusion of the August 14 hearing to prepare a single judgment. He did in fact prepare, sign and forward to Mr. Acchione such a precedent for his approval and submission. Appellant admitted to the Committee he knew Mr. Acchione claimed an interest in his garnishments. Nevertheless, without any notice to Mr. Acchione, appellant prepared and submitted a precedent to the special judge without any disclosure whatsoever of the material facts. Appellant acknowledged before the Committee all of this was done for the express purpose of obtaining the funds at Worthen Bank for his client before Mr. Acchione could effectuate a lien for Service Finance Corporation on the proceeds of Mrs. Hayes' garnishment. Appellant attempted to justify his conduct on the basis that he was simply protecting the interest of his client.

We are not insensitive to the demands made on or perceived by lawyers to protect the interests of their clients. Nevertheless, if the legal profession is to retain the unique privilege of self-regulation, our ethical standards must not be compromised under the guise of protecting the interests of clients.

We cannot ignore the means by which Mr. Fitzhugh gained an advantage for his client. We agree with the Committee that he had a duty to disclose to the special judge all the material facts of the case and his failure to do so violated the clear wording, as well as the spirit, of the rules of conduct.

c. **Local Rule 7.3 of the Local Rules of the U.S. District Court for the Eastern and Western Districts of Arkansas**
Communications with Court

(a) Attorneys shall not communicate in writing with the Court concerning any pending case unless copies of the writing are served on all attorneys for all other parties in the case. Attorneys shall not furnish the Court copies of correspondence among themselves relating to matters in dispute which are not then before the Court for resolution. Such dispute should either be settled by counsel or made the subject of a formal motion. This rule has special application to correspondence relating to specific money demands and offers in settlement.

(b) Ex parte oral communications with the Court on substantive matters by counsel or a party concerning a pending action are prohibited except when permitted by Federal Rules of Civil or Criminal Procedure.

RELEVANT CASE LAW:

Price v. United Servs. Auto. Ass'n, No. CV 10-2152, 2011 WL 13228215, at *1 (W.D. Ark. Aug. 31, 2011)

Local Rule 7.3(b) of the United States District Court for the Eastern and Western Districts of Arkansas prohibits ex parte oral communications with the Court on substantive matters. As pointed out by Plaintiff's counsel, the undersigned's law clerk contacted Plaintiff's counsel on August 22, 2011, to inquire as to the basis for his request for a hearing on his Motion for Class Certification. The undersigned directed this inquiry for purely procedural—and not substantive—purposes; specifically to determine, pursuant to Rule 78(b) of the Federal Rules of Civil Procedure, whether the Motion for Class Certification could be decided on briefs without a hearing. Plaintiff's counsel stated that he believed oral arguments on the applicable case law would be beneficial to the Court. The undersigned's law clerk then advised Plaintiff's counsel that she would contact Defense counsel to inquire as to whether she believed a hearing was necessary. Defense counsel stated that she wished to address certain assertions made in Plaintiff's Reply to Defendants' Response to the Motion for Class Certification and that she could address these assertions

at a hearing if one were scheduled; if not, she would like to permission to address them by way of a surreply.

Contrary to Plaintiff's counsel's assertions, the communication with Defense counsel did not touch upon the substantive matters before the Court. The communication concerned a mere procedural issue, that being, whether and why a hearing was or was not necessary on the Motion for Class Certification. *Cf. Hoogerheide v. Internal Revenue Serv.*, 637 F.3d 634, 639 (6th Cir. 2011) (finding no grounds for reversal based on concern over ex parte communication with court's law clerk, as conversation was short, nonsubstantive exchange with the clerk confirming that the court struck a motion to dismiss because the party filed it before all of the filings were served); *Carranza v. Fraas*, 763 F. Supp.2d 113, 120 (D.C. 2011) (the court did not engage in an improper ex parte communication evidencing bias by the Court when the Court, through its law clerk, requested the defendant file an opposition to the plaintiff's motion). The same communication was had with Plaintiff's counsel.

Thomason v. Randall, No. 4:12-CV-4155, 2014 WL 7272425, at *1 (W.D. Ark. Dec. 18, 2014)

Local Rule 7.3 provides that attorneys shall not communicate in writing with the Court concerning any pending case unless copies of the writing are served on all other parties in the case. District Courts have broad discretion in the enforcement of local rules. *Reasonover v. St. Louis Cnty., Mo.*, 447 F.3d 569, 579 (8th Cir.2006). Here, after encountering trouble uploading the depositions to the Court's CM/ECF system, Defendants mailed courtesy copies of the entire depositions to the Court without mailing copies to Plaintiff. Plaintiff already possessed the original depositions for three of the deponents and a copy of the fourth deposition. The same deposition transcripts that were mailed to the Court on August 27, 2014 appeared on the CM/ECF system by September 8, 2014. The Plaintiff has not been prejudiced by Defendant's failure to send copies of the depositions, which Plaintiff already possessed. Thus, the Court declines to strike the depositions on these grounds.

d. **Rule 2.9 of the Judicial Code of Conduct**
Ex Parte Communications

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided: (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) [Reserved]

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

COMMENT

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such

consultations are not subject to the restrictions of paragraph (A)(2).

RELEVANT CASE LAW:

Bledsoe v. Lackey, No. CA03-64, 2003 WL 22021953, at *5 (Ark. Ct. App. Aug. 27, 2003) (discussing ex parte communications regarding transfer of district court case to circuit court)

Clearly, the subject of the purported ex parte communication was administrative in nature and no prejudice was shown.

Mallory v. Hartsfield, Almand & Grisham, LLP, 350 Ark. 304, 310, 86 S.W.3d 863, 867 (2002)

The Commentary to Canon 3 indicates that ex parte communication with the law clerk, as part of the judge's staff, is a violation. Therefore, under Canon 3, there was a violation in this case, as there was an ex parte conversation between appellees' counsel and the judge's law clerk. However, [the Judge] cured this violation by calling the parties and allowing an opportunity to respond. Further, appellant has failed to show or demonstrate any bias of the trial court as a result of the ex parte communication.

II. Resolving Discovery Disputes With or Without the Court

a. **Rule 37 of the Arkansas Rules of Civil Procedure**
Failure to Make Discovery; Sanctions

(a)(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested, or fails to permit inspection as requested, or if a party, in response to a request under Rule 35(c), fails to provide an appropriate medical authorization, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion shall include a statement that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

b. **Rule 37 of the Federal Rules of Civil Procedure**
Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

c. **Local Rule 7.2(g) of the Local Rule for the Eastern & Western Districts of Arkansas; Motions**

All motions to compel discovery and all other discovery-enforcement motions and all motions for protective orders shall contain a statement by the moving party that the parties have conferred in good faith on the specific issue or issues in dispute and that they are not able to resolve their disagreements without the intervention of the Court. If any such motion lacks such a statement, that motion may be dismissed summarily for failure to comply with this rule. Repeated failures to comply with be considered an adequate basis for the imposition of sanctions.

d. *Jefferson Hosp. Ass'n v. Davis*, 2020 Ark. App. 562, 10–13, 615 S.W.3d 400, 406–07 (2020)

We agree with the appellants' second argument: Dr. Davis's failure to state that "he in good faith conferred or attempted to confer" was fatal to his motion. . ..

Rule 37(d) plainly provides that a motion seeking sanctions for a failure to answer interrogatories "shall include a statement that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action." Ark. R. Civ. P. 37(d) (emphasis added). The word "shall" is mandatory, *Smith v. Fox*, 358 Ark. 388, 393, 193 S.W.3d 238, 242 (2004), and the purpose of the requirement is "to encourage litigants to resolve discovery disputes by informal means before filing a motion with the

court." *Shuffle Master, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 171 (D. Nev. 1996) (applying federal rule). Consequently, parties seeking sanctions under Rule 37(d) "must adequately set forth in the motion essential facts sufficient to enable the court to pass a preliminary judgment on the adequacy and sincerity of the good-faith conferment between the parties." *Id*. at 171. That is, a statement must include, among other things, "the names of the parties who conferred or attempted to confer, the manner by which they communicated, the dispute at issue, as well as the dates, times, and results of their discussions, if any." *Id*. In the absence of such a statement, a court simply cannot consider a motion for sanctions. *See In re Spears*, 265 B.R. 219, 223 (W.D. Mo. 2001). Here, Dr. Davis's motion does not contain any statement that he conferred, or attempted to confer, in good faith with the appellants.

Dr. Davis also asserts that he was not required to make a good-faith statement because Rule 37(d) requires conferment only before a motion seeking sanctions for failures to serve answers or objections to interrogatories. Dr. Davis alleges that while the appellants' responses were false, they were served. He suggests that our decision in *Tully* supports dispensing with good-faith conferment when, as he alleges here, a litigant serves false answers. We are not persuaded by this contention. Dr. Davis stretches our decision in Tully well beyond its limits. We did not address the good-faith-conferment requirement in Tully or suggest that false answers should be treated differently than failures to answer under Rule 37(d). Indeed, Ark. R. Civ. P. 37(a)(3) provides that evasive or incomplete answers are treated as failures to respond for purposes of orders compelling discovery, and we treat false or misleading responses and failures to respond as one and the same under Rule 37(d). *See Tully*, 84 Ark. App. at 251, 255, 139 S.W.3d at 164, 166. Certainly, the circuit court considered the appellants' responses as evasive. The court specifically stated that the appellants were attempting to "hide the ball." Thus, Dr. Davis was required to make a good-faith statement in his motion, and the circuit court abused its discretion when it struck the appellants' answer in the absence of this statement.

Finally, we conclude that the circuit court abused its discretion when it found that a two-sentence email communication that Dr. Davis later filed with the circuit court meets the requirements of Rule 37(d). It did not. Dr. Davis sent an email requesting that JRMC supplement its responses before Dr. Nixon's deposition. In this email, Dr. Davis did not warn that he

would seek court intervention if the appellants either failed to act on his request or otherwise demonstrate a meaningful attempt to resolve the discovery dispute. *Cf. Hunter v. Moran*, 128 F.R.D. 115 (D. Nev. 1989) (holding that a letter demanding supplemental responses was insufficient under local federal rule). Furthermore, the rule does not allow for an email; rather, it requires litigants to make a statement of good-faith conferment in the motion itself. Therefore, because Dr. Davis's motion did not contain any statement that he had in good faith conferred, or attempted to confer, with JRMC about its alleged discovery violations, we hold that the circuit court erred in striking the answer of the appellants under Rule 37.

e. *HIT Servs., L.P. v. Caddo Energy Co., LLC*, 2009 U.S. Dist. LEXIS 12235, *3-5, 2009 WL 185590

CCC fails to state in its Motion to Compel that good faith efforts have been made to resolve this purported discovery dispute. Rather, CCC merely directs the Court's attention to one letter and one email where CCC demands that the Third-Party Plaintiffs fully comply with its discovery requests and produce "all responsive documents." Simply demanding compliance with a discovery request does not amount to a good faith effort to resolve a discovery dispute. Further, merely attaching such demands as exhibits to the Motion does not comply with Rule 7.2(g).

In neither its email or letter demand for full compliance with the requests for production, nor in its Motion to Compel, does CCC actually identify what documents have not been produced. CCC fails to even identify what category or type of documents have not been produced. Bean responds to the Motion to Compel by asserting first that CCC has not made a good faith effort to resolve this dispute, second that CCC fails to tell specify what documents have not been produced and finally stating that Bean and Caddo have complied with all outstanding discovery requests.

The Court agrees with Bean. Based on the foregoing, the Court finds that CCC has failed to comply with Local Rule 7.2(g). Further, without some indication of what documents or categories of documents have been withheld by Bean, the Court can not order production.

III. Know Your Judge & Pretrial Tools

a. Pretrial Practice Forms
    i. https://www.arwd.uscourts.gov/judge-brooks-forms
b. General Orders & Local Rules
    i. https://www.arwd.uscourts.gov/local-rules
    ii. https://www.are.uscourts.gov/court-info/local-rules-and-orders/general-orders
    iii. https://www.areb.uscourts.gov/court-info/local-rules-and-orders
    iv. https://www.arwd.uscourts.gov/general-orders

THE HON. JAMES G. MIXON TRIAL PRACTICES SYMPOSIUM

June 9, 2023

Presentation from 12:45 to 1:45

A Crash Course in Preservation of Error in Arkansas and Eighth Circuit Appellate Practice

Tim Cullen

Cullen & Co., PLLC

Handout Materials

James G. Mixon Trial Practice Symposium
University of Arkansas School of Law
June 9, 2023

A Crash Course in Preservation of Error in Arkansas and Eighth Circuit Appellate Practice

Tim Cullen
CULLEN & CO., PLLC
P.O. Box 3255
Little Rock, AR 72203
(501) 370-4800 Telephone
(501) 370-9198 Facsimile
tim@cullenandcompany.com
www.cullenandcompany.com

The sponsors of this program gave me latitude on how to fill my allotted one-hour on the broad topic of appellate practice. I considered lots of catchy metaphors (the Serbonian Bog is the king of appellate practice metaphor), top-ten lists, caselaw updates, a discussion of the brave new world of e-filing, or a grab-bag of random quirks about appellate practice. But considering this is a *trial practice* seminar, I landed on the one thing about appeals that matters most to a trial attorney – preserving issues for review on appeal.

Preservation of error rules in Arkansas state courts and in the Eighth Circuit are similar but not identical. The Arkansas rule is wholly unforgiving. Hundreds of appeal decisions each year in Arkansas avoid the merits issues briefed by the parties by finding they were not adequately preserved below.

In a slight contrast, the Eighth Circuit holds out some hope for forgiveness in the plain error doctrine. In addition to plain error, the preservation of error doctrine *seems* to arise less often in Eighth Circuit caselaw than Arkansas cases.

Over the next hour, we will discuss preservation of error in both Arkansas and Eighth Circuit caselaw. I will generally rely on five secondary sources that are included with the course materials. And at the end I will pose some discussion questions about the limits of the preservation of error doctrine.

Here's the outline for our discussion:

1. What is preservation of error?

2. What is "waiver" of an appeal issue?

3. Why must error be preserved?

4. How to preserve error and avoid waiver.

   A. Raise issues squarely through pre-trial motions, motions in limine, objections, proffers, and post-trial motions.

   B. Raise issues at the right times – often more than once.

   C. Issues versus arguments.

   D. Building a record before, during, and after trial.

   E. Appellate waiver.

Discussion Questions

1. Does Arkansas Rule 4-3(a) open the door to plain error?

> **(a) Court's Review of Errors in Death or Life Imprisonment Cases.** When the sentence is death or life imprisonment, the Court must review all errors prejudicial to the appellant in accordance with Ark. Code Ann. Sec. 16-91-113(a). To make that review possible, the appellant must include, in addition to the contents required by Rule 4-2, a list of all rulings adverse to him or her made by the circuit court on all objections, motions and requests made by either party, and the list must include the information needed for an understanding of each adverse ruling and the page number where each adverse ruling is located in the appellate record. The list shall be placed in the brief after the request for relief. The Attorney General will make certain and certify that all of those objections have been listed and will brief all points argued by the appellant and any other points that appear to involve prejudicial error.

Ark. Sup. Ct. R. 4-3.

2. To preserve a structural or constitutional argument about an administrative agency, must those issues first be raised to the agency? Even if the agency has no authority to declare its own organic act to be unconstitutional?

3. Can the absence of plain error review create a due-process violation? For instance, a silly hypothetical – What if a statute says trial court judges must have blue eyes. The Plaintiff was not too concerned about that statute, so it wasn't mentioned at the trial – until the blue-eyed judge remitted the Plaintiff's verdict to zero and dismissed his case. Because it was not timely raised, does the waiver of a challenge to the Blue-eyed Judge Act create a deprivation of due process or otherwise create precedent that is clearly erroneous but unreviewable?

Bibliography

Leon Holmes, *Pitfalls of the Appellate Practice: Avoiding the Serbonian Bog*, 35 Arkansas Lawyer 10 (2000).

Teresa Wineland, *Handling Constitutional Challenges to a Statute*, 44 Arkansas Lawyer 22 (2009).

Luke K. Burton, *It's All or Nothing: Preserving Errors for Arkansas Appeals*, 2016 Arkansas Law Notes 1938 (2016).

Robert F. Parsley, *Litigating Waiver of Issues for Appeal and on Appeal in Federal Courts*, 2013 WL 574524 (Aspatore 2013).

Steven K. Hayes, *What Have you Got to Lose? Perhaps your Appeal, if you Don't Use Error Preservation to Sell Your Case at Trial*, 28 Appellate Advocate 391 (2016).

Table B-1 excerpt for Eighth Circuit Court of Appeals, 2022 Federal Judiciary Statistical Tables.

In addition to the five secondary sources specifically addressing preservation of error, above, I also recommend two general appellate practice guides.

For Arkansas appeals, the best shortcut out there is a guide published by the Arkansas Bar Association called *Handling Appeals in Arkansas*.[1] This publication was updated in 2022 and covers all aspects of the appellate process. It is a valuable resource full of good advice from experienced appellate attorneys and judges.

[1] Available from the Fastcase Store for $225. Arkansas Bar Association Member price is $150.

The best resource for Eighth Circuit Appeals is the aptly named *Eighth Circuit Appellate Practice Manual*. The most recent is the 10th edition, updated in August 2022. It is available as a hard copy ($189) or online ($125) through Minnesota Continuing Legal Education.

https://www.minncle.org/publication/60098400

The appellate courts' own websites also include a lot of helpful material.

Arkansas has model briefs posted on the court's website.

https://www.arcourts.gov/courts/clerk-of-the-courts/electronic-records-on-appeal

The model briefs will give you some idea of what an appeal brief should look like, and is a good template for the cover page, table of contents, jurisdictional statement, table of cases, and how to cite to the electronic record volumes. It also is a visual resource on things like fonts, spacing, and pagination.

The Eighth Circuit website also includes detailed how-to documentation on appeals.

- The Record on Appeal (UPDATED 5/1/2015)
- Criminal Case Briefing Checklist (UPDATED 12/01/2016)
- Civil Case Briefing Checklist (UPDATED 12/01/2016)
- Record on Appeal in Criminal Cases (UPDATED 5/1/2015)
- Pointers on Preparing Briefs (UPDATED 12/01/2013)

Tim Cullen
tim@cullenandcompany.com
June 9, 2023

35-SUM Ark. Law. 10

Arkansas Lawyer
Summer, 2000

Features
Leon Holmes

Copyright (c) 2000 by Arkansas Bar Association; Leon Holmes

PITFALLS OF THE APPELLATE PRACTICE: AVOIDING THE SERBONIAN BOG

"I have come to the conclusion that it is hazardous for a lawyer to file any motion for post-judgment relief. He will enter a maze of our rules and our decisions which qualifies for the legal 'Serbonian Bog' award (which, no doubt, Justice Cardozo intended to establish by his dissent in the case of *Landress v. Phoenix Mutual Life Ins. Co.*, 291 U.S. 491 [1934])."

Poole v. Poole, 298 Ark. 550, 551-2, 768 S.W.2d 544 (1989) (Hickman, J., concurring).

This outline is not a complete handbook on all aspects of handling appeals in Arkansas: It is merely a checklist of the major pitfalls that could result in your appeal not being decided on the merits. [1]

1. Your Appeal Will Not be Decided on the Merits if You Fail to Make a Record at Trial.

- **Always raise all of your issues in the trial court**. Issues raised for the first time on appeal will not be considered. *Western World Ins. Co. v. Branch*, 332 Ark. 427 (1998). Arkansas does not have a "plain error" rule. *Stacks v. Jones*, 323 Ark. 643, 916 S.W.2d 120 (1996). Even constitutional arguments are waived if not raised at trial. *Sebastian Lake Pub. Util. Co. v. Sebastian Lake Realty*, 325 Ark. 85, 923 S.W.2d 860 (1996). Although Ark.R.Civ.P. 59(f) says that a motion for new trial is not necessary to preserve for appeal on an argument that could be the basis for granting a new trial, the court has construed the rule to say that every point argued on appeal must have been directed to the trial court in some manner. *Stacks v. Jones*, supra; *United Ins. Co. of America v. Murphy*, 331 Ark. 364 (1998).

- **Always state specific grounds for evidentiary objections**. Ark. R. Evid. 103(a)(1); *Thomas v. Littlefield*, 319 Ark. 648, 893 S.W.2d 788 (1995) ("I don't think it would be proper to go through the fault section of the report" held not to be an adequate objection).

- **Always obtain a ruling**. *McLane Co. v. Weiss*, 332 Ark. 284 (1998); *Morrison v. Jennings*, 328 Ark. 278, 943 S.W.2d 559 (1997); *Nichols v. Wray*, 325 Ark. 326, 925 S.W.2d 785 (1996); *Brumley v. Naples*, 320 Ark. 310, 896 S.W.2d 860 (1995) (failure to obtain a ruling on an issue operates as a waiver on appeal).

- **Always insure a letter opinion of the trial court is in the record**. *Winters v. Elders*, 324 Ark. 246, 920 S.W.2d 833 (1996) (affirming without reaching the merits because the letter opinion was not in the record on appeal).

- **Always proffer excluded testimony**. Ark. R. Evid. 103(a)(2); *Duque v. Oshman's Sporting Goods*, 327 Ark. 224 (1997) (review on appeal is precluded by failure to proffer evidence so the appellate court can see if prejudice resulted).

- Always state specific grounds when moving for a directed verdict. *Stacks v. Jones*, 323 Ark. 643, 916 S.W.2d 120 (1996) (refusing to decide an issue not specifically asserted in the directed verdict motion).

- Always renew the motion at the close of the evidence. *Trans Union Corp. v. Crisp*, 49 Ark. App. 76, 896 S.W.2d 446 (1995) ("Because the motion for a directed verdict was not renewed at the close of appellant's case, it was not preserved for our review.")

- Always make your record on the jury instructions before or at the time the instructions are given to the jury. *Houston v. Knoedl*, 329 Ark. 91, 947 S.W.2d 745 (1997).

- Always offer a correct instruction even though Ark.R.Civ.P. Rule 51 only requires that an instruction be offered when the point on appeal is the failure to instruct on an issue. *United Ins. Co. of America v. Murphy*, 331 Ark. 364 (1998).

***11 - Always include in an order from which an interlocutory appeal will be taken an express determination, supported by specific factual findings, that there is no just reason for delay and an express entry of judgment**. Ark. R. Civ. P. 54(b); *Stockton v. Sentry Ins. Co.*, 332 Ark. 417 (1998); *Davis v. Wausau Ins. Co.*, 315 Ark. 330, 867 S.W.2d 444 (1993) ("In order to determine that there is no just reason for delay, the trial court must find that a likelihood of hardship or injustice will occur unless there is an immediate appeal and must set forth facts to support its conclusion. ... That factual underpinnings supporting a Rule 54 (b) certification may exist in the record is not enough. They must be set out in the trial court's order.")

2. Your Appeal Will Not be Decided on the Merits if You File the Notice of Appeal Too Late or Too Early.

- Unless the notice of appeal is timely filed, the appellate court lacks jurisdiction. *LaRue v. LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980).

- Always file the notice of appeal within 30 days from entry of judgment, decree, or order. Ark. R. App. P. 4(a).

- The time may be extended up to an additional 60 days upon a showing of failure to receive notice of the judgment. Ark. R. App. P. 4(a).

- Always file a notice of cross-appeal (if you are cross-appealing) within 10 days after receipt of notice of appeal or within 30 days from entry of judgment, whichever is longer. Ark. R. App. P. 4(a).

- Always file a notice of appeal after the final judgment from which appeal is taken. *Reed v. Arkansas State Highway Commission*, No. 99-994 (June 1, 2000)(holding that a notice of appeal was premature and therefore ineffective when it was filed after judgment but before the circuit judge entered a corrected judgment pursuant to Ark. R. Civ. P. 60).

3. Your Appeal Will Not be Decided on the Merits if You are Not Extremely Careful with Your Post-Judgment Motions.

- Upon timely filing in the trial court of (1) a motion for judgment notwithstanding the verdict under Rule 50(b), (2) a motion to amend the court's findings under Rule 52(b), or (3) a motion for new trial under Rule 59(b), the time for filing the notice of appeal is extended. Ark. R. App. P. 4(b).

- This rule applies only to the three listed motions. *Pennington v. Harvest Foods*, 322 Ark. 820, 913 S.W.2d 758 (1995) (holding that a motion for remittitur is not contemplated by 4(b)). *Shivey v. Shivey*, 337 Ark. 262 (1999) (holding that a Rule 60 motion does not extend the time for filing a notice of appeal because it is not expressly listed in Rule 4(b)). Cf. *Reed v. Arkansas State Highway Commission*, No. 99-994(June 1, 2000)(holding that a notice of appeal filed after judgment but before a Rule 60(b) corrected judgment was premature and ineffective).

- It does not appear that a motion for reconsideration of summary judgment would extend the time for filing a notice of appeal. But see *Williams v. Hudson*, 320 Ark. 635, 898 S.W.2d 465 (1995).

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

- The time for filing a notice of appeal runs from the entry of the order granting or denying a new trial or other such motion. Ark. R. App. P. 4(c).

- Provided that such motion is deemed denied on the 30th day if it is not ruled on before. Ark. R. App. P. 4(c). This means if the trial judge has not ruled on your post-judgment motion within 30 days after it is filed, the motion is denied by operation of law. In that case, your notice of appeal must be filed between the 31st day and the 60th day after the post-judgment motion is filed; and your notice of appeal is invalid if it is filed before the 30th day or after the 60th day.

- The trial court loses jurisdiction to act on the motion 30 days after it is filed. *Phillips v. Jacobs*, 305 Ark. 365, 807 S.W.2d 923 (1991) (also holding that a decision made within the 30 days but not entered of record within 30 days fails to satisfy Rule 4(c)).

- A second post-judgment motion relates back to the first post-judgment motion and does not begin a new 30 day period for filing the notice of appeal. *Williams v. Hudson*, 320 Ark. 635, 898 S.W.2d 465 (1995).

4. Your Appeal May Not be Decided on the Merits if You Fail to Comply with Ark. R. App. P. 3.

The notice of appeal must:

1. specify the party or parties taking the appeal;

2. designate the judgment, decree, ***12** order or part thereof appealed from;

3. designate the contents of the record on appeal;

4. state that the transcript or specific portions thereof have been ordered by the appellant; and

5. state that appellant has made the required financial arrangement with the court reporter. Ark. R. App. P. 3(e).

- Always include in the notice of appeal a statement of the points on appeal or designate the complete record and all proceedings and evidence. Ark. R. App. P. 3(g). You must do one or the other.

- Always order the transcript from the court reporter and state in the notice of appeal that you have done so. *Hudson v. Hudson*, 277 Ark. 183, 641 S.W.2d 1 (1982) (dismissing an appeal where the appellant did not state in the notice of appeal that he had ordered the transcript and where he failed to order it for three months).

- If the appellant in fact timely orders the transcript but fails to state in the notice of appeal that he has done so, but no delay is caused, the Supreme Court in the past was likely to hear the appeal. *Phillips v. Lavalle*, 293 Ark. 364, 737 S.W.2d 652 (1987).

- If the appellant says in the notice of appeal that the transcript has been ordered, but the statement is false and delay is caused, the appeal will be dismissed. *McElroy v. American Medical Int'l, Inc.*, 297 Ark. 527, 763 S.W.2d 89 (1989).

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

- Always state in the notice of appeal that financial arrangements have been made with the court reporter. *Valley v. Bogard*, No. 00-535 (May 12, 2000) (a notice of appeal that did not contain this statement was not void, but failure to include the necessary statement precluded expedited review).

5. Your Appeal Will Not be Decided on the Merits if You Fail to File the Record with the Supreme Court Clerk on Time.

- The appellant has the responsibility for transmitting the record from the clerk of the trial court to the Clerk of the Supreme Court and the Court of Appeals. Ark. R. App. P. 7(b); *Christopher v. Jones*, 271 Ark. 911, 611 S.W.2d 521 (1981) ("The responsibility of the timely filing of appeals must rest with the litigant and his attorney, not the trial judge or court reporter.").

- For an interlocutory appeal, the record must be filed with the Clerk of the Supreme Court within thirty days from entry of the order appealed from. Ark. R. App. P. 5(a).

- For an appeal from a final judgment, order or decree, the record must be filed with the Clerk of the Supreme Court within 90 days from the filing of the first notice of appeal. Ark. R. App. P. 5(a).

- In cases where proceedings have been stenographically reported, the trial court can extend the time if the following conditions are met:

1. the trial court must find that the reporter's transcript has been ordered;

2. the trial court must find that an extension is necessary; and

3. the order extending the time must be entered (i.e., filed in the record of the circuit or chancery clerk) before the record on appeal is due to be filed with the Supreme Court Clerk. Ark. R. App. 5(b).

- The maximum extension is seven months from the date of the entry of the judgment, order or decree or from the date a timely post judgment motion under 4(b) is deemed denied.

- Always file the order extending the time before the time expires for filing the record. *Christopher v. Jones*, 271 Ark. 911, 611 S.W.2d 521 (1981) (holding that Rule 5 was not complied with when the trial court granted the order before expiration of the time for filing the record but did not file the order until afterward); *Osburn v. Arkansas Dept. Of Human Serv.*, No. 99-1296 (May 4, 2000)(an order filed three days after the record was due was ineffective to extend the time).

- Never rely on a trial court order extending the time for more than seven months from the date of the judgment appealed from. *Morris v. Stroud*, 317 Ark. 628, 883 S.W.2d 1 (1994) (holding that only the Supreme Court can extend the time beyond seven months).

- Always keep in mind when calculating the due date for filing the record on appeal that the three different time periods in Ark. R. App. Rule 5 start from different dates.

- For interlocutory appeals, the record must be filed with the Supreme Court Clerk within 30 days from the entry of the order appealed from.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

- For all other appeals the record is due to be filed with the Supreme Court Clerk within the 90 days from the filing of the first notice of appeal.

- However, the maximum extension of time a trial court can grant to file the record with the Supreme Court Clerk is seven months from the entry of the judgment (not the notice of appeal) or from the date a post-judgment motion is deemed denied.

- In a multi-party appeal, the due date for different parties can be different, and the party with an earlier deadline must file the record by its deadline. *Pennington v. Harvest Foods*, 322 Ark. 820, 913 S.W.2d 758 (1995).

- The rules do not provide for an extension of time to file the record if the appeal does not require a stenographer's transcript. If the record consists of the clerk's record without any transcript prepared by a reporter, the record must be filed within 90 days after the notice of appeal was filed. *Jordan v. White River Medical*, 301 Ark. 292, 783 S.W.2d 836 (1990) (dismissing an appeal where the record was filed more than 90 days after the notice of appeal in reliance on a trial court order extending the time; and holding the trial court has no authority to extend the time in a case where the record on appeal consists only of pleadings).

- If the clerk or the reporter does not have the record prepared before the deadline for filing it in the Supreme Court, you must file in the Supreme Court a petition for writ of certiorari. The petition must be filed before the time expires for filing the record, and it must include a dated and certified copy of the order or judgment appealed from. Supreme Court Rule 3-5. *Campbell Soup Co. v. Gates*, 316 Ark. 704, 874 S.W.2d 373 (1994).

- If the Supreme Court clerk refuses to accept the record, you can file a motion for rule on the clerk pursuant to Supreme Court Rule 2-2.

6. Your Appeal will not be Decided on the Merits if You Fail to Abstract the Record Properly.

- "As this court has written numerous times, we will not go to the single transcript. Our review of the case on appeal is limited to the record as abstracted in the briefs, not upon the *13 one transcript, since there are seven judges involved in the appellate decision-making process." *Stroud Crop, Inc. v. Hagler*, 317 Ark. 139, 875 S.W.2d 851 (1994).

- Supreme Court Rule 4-2(a)(6) requires the appellant to abridge the record into an impartial condensation of the material parts of the record.

- Always abstract the complaint and the responsive pleadings. *Jolly v. Hartje*, 294 Ark. 16, 740 S.W.2d 143 (1987) ("the basic pleadings ... are essential constituents of the abstract.").

- Always attach to the brief photocopies of the order, judgment, decree, ruling, letter opinion, or ALJ opinion from which appeal is taken; and do not abstract the contents of the addendum. Supreme Court Rule 4-2(a)(8), adopted by opinion dated January 29, 1998.

- Always abstract the arguments made and the testimony given to the trial court. *City of West Memphis v. City of Marion*, 332 Ark. 421 (1998).

- Always abstract exhibits the court must read to decide the issues. *Zini v. Perciful*, 289 Ark. 343, 711 S.W.2d 477 (1986) ("It is impossible for us to consider the appellants' contentions because counsel has not provided us with an exact quotation of the instrument in question or with an abstract of it.").

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

- Always abstract proffered testimony you contend should have been admitted. *Duque v. Oshman's Sporting Goods*, 327 Ark. 224 (1997).

- Always abstract any objections made at trial with respect to which you are contending on appeal that the trial court erred in his ruling.

- Always abstract motions for directed verdict if you are contending on appeal that the evidence was insufficient to support the verdict. *Stroud Crop, Inc. v. Hagler*, 317 Ark. 139, 875 S.W.2d 851 (1994).

- Always abstract any jury instructions you are contending were erroneously given or erroneously refused.

- Always abstract bench rulings you will argue were in error.

- Always abstract testimony in the first person. *Edwards v. Neuse*, 312 Ark. 302, 849 S.W.2d 479 (1993).

- Never simply reproduce the transcript or any substantial part of it. *Oaklawn Jockey Club, Inc. v. Jameson*, 280 Ark. 150, 655 S.W.2d 417 (1983) (dismissing an appeal where the "261 page abstract consists almost entirely of word for word reproductions of the pleadings, orders by the court and [other documents]."). *Board of Educ. v. Ozark Sch. Dist. No. 14*, 280 Ark. 15, 655 S.W.2d 368 (1983) (dismissing an appeal where "no attempt was made to condense [the] record to include only material necessary to an understanding of the case.").

- Never submit an abstract that omits material unfavorable to the appellant, that omits material favorable to the appellee, or that is otherwise biased. *Haynes v. State*, 314 Ark. 354, 862 S.W.2d 275 (1993).

- Always attach to the abstract a copy of any photograph, plat or other exhibit the appellate court needs to review to decide the case if the exhibit cannot be abstracted in words, unless it is impossible to do photocopy and attach a copy of the exhibit *60. *Coney v. State, 319 Ark. 709*, 894 S.W.2d 583 (1995) (affirming a conviction of attempted murder because the abstract did not reproduce the three photographs appellant contended should not have been admitted). When it is impractical to reproduce such an exhibit and attach a copy, always file a motion asking the appellate court to waive the abstracting requirement.

- Always remember that the goal is to abridge the record so the judges have what they need to decide the case but not more than they need to decide the case.

- If you omit something that should have been abstracted, always file a motion for leave to supplement the abstract. Supreme Court Rule 4-2 (b)(2), adopted January 29, 1998, effective July 1, 1998.

7. Two Miscellaneous Observations to Keep You from Falling into a Pit:

- The Supreme Court Clerk can, by telephone, extend the due date for filing a brief by seven days, provided no written motion for extension has previously been filed. The Clerk cannot extend the deadline for filing the record on appeal.

- If you want to argue orally, you must request oral argument in writing in a letder separate from the briefs or a cover letter tendering briefs. The letter must be filed with the Clerk at the same time as your brief. Within 15 days after the letter requesting oral argument, counsel must send a letter to the clerk stating dates when they are unavailable. Supreme Court Rule 5-1(a). It might be dangerous to rely on another party's request for oral argument because that party could withdraw the request after the time has expired for you to make a request for oral argument.

Footnotes

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

[1] A complete guide, *Handling Appeals in Arkansas*, has been published by the Arkansas Bar Association.

35-SUM ARLAW 10

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

44-WTR Ark. Law. 22

Arkansas Lawyer
Winter, 2009

Feature

Practice Tip

Teresa Wineland [a1]

Copyright © 2009 by Arkansas Bar Association; Teresa Wineland

HANDLING CONSTITUTIONAL CHALLENGES TO A STATUTE

Since the passage of the Civil Justice Reform Act, the constitutionality of many of its provisions has been challenged in state and federal courts all across Arkansas. Attorneys who have long forgotten how to spell "constitutional law" are now being confronted routinely with the need to make or defend a challenge to the constitutionality of a state statute. This Practice Tip is not intended to address substantive arguments for or against constitutionality, but to familiarize practitioners with procedural aspects of constitutional challenges.

A party challenging constitutionality of a statute has an uphill battle. Statutes are presumed to be constitutional. The party attacking a statute has a heavy burden of proving unconstitutionality. Any doubt as to the constitutionality of a statute is resolved in favor of constitutionality. Courts construe statutes as constitutional if it is possible to do so. Only where the conflict between a statute and the constitution is clear will a statute be held unconstitutional.

The issue of constitutionality of a statute or ordinance is generally raised by a pleading or motion seeking declaratory relief. In the CJRA context, for example, the challenge may come in the form of a motion in limine directed to evidence of medical expenses not recoverable under the Act, or a motion to strike a notice of non-party at fault. However the constitutional issue is raised, it should be fully briefed and supported by affidavits or evidence if necessary. It should also be raised in a timely manner to allow full development and consideration by the court.

Ark. Code Ann. § 16-111-106(b) provides that if a statute or ordinance is alleged to be unconstitutional, the Arkansas Attorney General shall be served with a copy of the proceeding and is entitled to be heard. While failure to notify and serve the Attorney General does not deprive a court of jurisdiction to decide constitutional issues, it is generally reversible error not to give the notice. Any party may give the required notice. If the Attorney General is not notified, litigants unsuccessfully challenging constitutionality risk losing the right to have the issue considered on appeal. Even litigants successfully defending constitutionality risk a reversal and remand. However, if the constitutional issue is fully developed before the trial court in an adversarial manner, failure to notify the Attorney General does not necessarily bar appellate review of the merits of the issue. The Attorney General often declines to appear and participate in response to a notice when it is evident that the issue is or will be fully presented to the court by the other parties.

If a case begins as an administrative proceeding, the constitutional challenge must be made before the administrative tribunal, even if the agency lacks authority to declare the statute unconstitutional. It is not sufficient to first raise the issue on an appeal to circuit court from an administrative ruling. However, if there is no administrative proceeding instituted, the issue may be raised for the first time in a lawsuit.

The challenge must be made and adequately developed before the trial court to preserve the issue for appeal. Each basis for the constitutional challenge must be squarely raised in order to argue that basis on appeal. The appropriate standard for reviewing a statute for constitutionality, either the "rational basis" standard or the "strict scrutiny" standard, must also be presented and argued. The challenge must be ruled upon by the trial judge to be preserved for appeal. It is the duty of the challenging party to obtain a ruling.

A party must have standing to challenge the constitutionality of a statute. The law must be unconstitutional as applied to that particular litigant. The litigant must have suffered injury or belong to a class that is prejudiced by the application of the statute.

Appeals of constitutionality rulings are usually taken to the Arkansas Court of Appeals, although the case may be reassigned, transferred or certified to the Supreme Court under Rule 1-2(b)(6) or Rule 1-2(d), Rules of the Supreme Court and Court of Appeals of the State of Arkansas.

Federal court challenges to constitutionality are governed by Rule 5.1, Fed.R.Civ.P. If the government is not a party, Rule 5.1 requires a party challenging the constitutionality of a statute to promptly file a "notice of constitutional question" stating the question and identifying the pleading or motion that raises it. The notice and the document raising the question must be served on the U.S. Attorney General if a federal statute is involved, or on the state attorney general if a state statute is involved, either by certified or registered mail or electronically if the attorney general has an email address designated for this purpose. Rule 5.1 also follows 28 U.S.C. § 2403 in requiring the court to certify to the appropriate attorney general that a statute has been questioned. The attorney general may intervene within 60 days, during which time the statute may not be held unconstitutional although a constitutional challenge can be rejected. Failure of a party to file and serve the notice or failure of the court to certify the challenge does not forfeit the constitutional claim.

Cases are often won or lost, and the scope of a lawsuit is often significantly affected, by rulings on the constitutionality of applicable statutes. While it is important to make persuasive substantive arguments on the issue of constitutionality, it is equally important to follow proper procedure. Rulings on constitutionality are frequently appealed, and the goal is always to obtain a favorable appellate court decision, giving the appellate courts no avenue to avoid reaching a decision on the merits.

Footnotes

a1 ***Teresa Wineland is an attorney with Williams & Anderson PLC in Little Rock, where she practices in the areas of general, business and commercial litigation.***

44-WTR ARLAW 22

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

2016 Ark. L. Notes 1938

Arkansas Law Notes
November 18, 2016

Appellate Practice, Extended Article, Featured Story

Luke K. Burton [1]

Copyright © 2016 University of Arkansas School of Law, Arkansas Law Notes, Luke K. Burton

IT'S ALL OR NOTHING: PRESERVING ERRORS FOR ARKANSAS APPEALS

Perhaps more than the most paranoid litigation attorneys lose sleep (or find nightmares) when reflecting on the topic of preserving issues for appeal. Seemingly well-versed in the teachings of Murphy's Law, preservation stumbling blocks haunt us, and we should all strive to educate ourselves on this fickle topic to better assist clients and, more selfishly, to maintain personal sanity.

Locating these stumbling blocks brings to mind humanity's age-old pursuit of the pesky kitchen fly, whose skillful dodges make it difficult to locate and swat. Our goal is to corner that fly and prevent it from buzzing away by cutting off its escape routes. Similarly, an adept attorney should locate and corner preservation stumbling blocks and swat them down to prevent problems.

This article focuses on a particular preservation-law fly that has received considerable attention in Arkansas's appellate courts. [2] It is no study in rocket surgery that we must move the trial court for relief before seeking appellate review. [3] The trial court must also rule on our motion before we may trouble an appellate court. [4] The specificity of such a ruling is the point that has gotten so much airtime recently on the Arkansas appellate courts' airwaves, and the resulting law is somewhat surprising and perhaps counterintuitive. For example, suppose you move the trial court for relief on three grounds, and it denies your motion and explains why one of your three grounds fails. Are the two unmentioned points preserved? What if the trial court denies the motion with no explanation? Is anything preserved? Hopefully the following discussion will help you resolve some of these questions.

The All-or-Nothing State of the Law

The story begins with the Arkansas Supreme Court's 2012 decision in *Arkansas Lottery Commission v. Alpha Marketing*. [5] The appellant moved the trial court to dismiss the appellee's amended complaint because the appellant was entitled to sovereign immunity, among other reasons. [6] The trial court reiterated the parties' arguments in its ruling, including the sovereign-immunity arguments, but it did not resolve or elaborate on that issue. [7] Instead, the trial court addressed and rejected the appellant's other arguments and denied the motion. [8] The appellant filed an interlocutory appeal. [9]

In a 4-3 decision, the Arkansas Supreme Court dismissed the appeal because "the absence of an express ruling [on sovereign immunity was] fatal." [10] It explained that "[l]ogic dictates that, before an interlocutory appeal may be pursued from the denial of a motion to dismiss on the ground of sovereign immunity, we must have in place an order denying a motion to dismiss on that basis." [11] The court further concluded that it could not and should not presume a ruling from the trial court's silence. [12] Finally, it extrapolated the principle behind the ruling requirement to situations where the trial court ruled upon the challenged action but for reasons other than those raised on appeal:

> We have no way of determining from the record that the trial court did in fact make a ruling, nor, assuming one was made, the nature or extent of the ruling. It may be that the trial court reserved a ruling until the evidence was more fully developed and that the issue was left unresolved. It may be that depending on the ruling, appellant waived

> any objection on appeal, because it was he who elicited proof of the convictions during his case in chief. The point is that with no record of a ruling we can only speculate as to whether a ruling was made and what the particulars of the ruling may have been. Obviously, for an accurate and fair review of the question, that information is critical. [13]

The Arkansas Supreme Court, again in a 4-3 decision, relied on *Alpha Marketing* to resolve*TEMCO Construction, LLC v. Gann*, a 2013 decision involving a final judgment. [14] The appellees in *TEMCO* moved to dismiss the appellant's complaint on three grounds, one of which was the appellant's failure to satisfy certain statutory requirements. [15] The appellant responded by contesting these grounds as well as by arguing that if the trial court bought the appellees' statutory-requirements argument, then the statute in question is unconstitutional. [16] The trial court bought the appellees' statutory-requirements argument and dismissed the complaint. [17] The trial court explained that it had considered "all arguments, pleadings, briefs, and exhibits," but its order discussed only its acceptance of the appellees' statutory-requirement argument. [18] It did not discuss the appellant's response to that argument, the appellant's alternative argument that the statute in question is unconstitutional, or the parties' other arguments. [19]

The appellant raised its contentions to the Arkansas Supreme Court, but that court concluded that the appellant did not preserve its arguments. [20] The court determined that the trial court's consideration of "all arguments, pleadings, briefs, and exhibits" carried no preservational weight, [21] and it rejected the appellant's contention that the trial court effectively ruled on its arguments by dismissing on the very ground that the appellant's arguments sought to counter. [22] The court emphasized, moreover, that its lack of original jurisdiction precludes it from resolving issues in the first instance. [23]

While *Alpha Marketing* and *TEMCO* suggest that some discussion of each argument is required for preservation, subsequent decisions provide a more Seinfeldian requirement: The ruling should be about nothing, or at least not say anything more than "granted" or "denied." [24] For example, the Arkansas Supreme Court later distinguished *TEMCO* by explaining that a trial court's grant of summary judgment, which contained no specific findings, could have been based on any of the grounds raised below because Arkansas Rule of Civil Procedure 52(a) does not obligate trial courts to make findings of fact or conclusions of law when deciding a motion. [25] Because the trial court essentially said nothing, everything was preserved.

The result is the following rule as the Arkansas Court of Appeals recently summarized:

> [W]hen a circuit court's order specifies a particular ground for the court's decision, that ground alone is subject to our review. Other arguments that the appellant raised below but did not obtain a ruling on are not preserved for appeal, and we are precluded from addressing them. By contrast, if the circuit court's order is more in the nature of a "blanket" decision and does not articulate a particular basis for its ruling, then the order encompasses all of the issues presented to the circuit court in the parties' briefs and arguments. [26]

What Attorneys Should Do

After chewing on this all-or-nothing ruling rule, you probably wonder why you should not obtain a blanket ruling limited to the words "granted" or "denied." A blanket ruling would have lower costs than an all-encompassing ruling in terms of resistance from opposing counsel and the trial court. Indeed, a blanket ruling may be advisable in some circumstances, but consider a few things.

First, the law occasionally requires something more than a blanket ruling. [27] For example, if you plan to seek certain types of interlocutory review, be sure that the trial court addresses the jurisdictional hook that gives the appellate court power to review. The Arkansas Supreme Court said as much in *Alpha Marketing* when it explained that "before an interlocutory appeal may be pursued from the denial of a motion to dismiss on the ground of sovereign immunity, we must have in place an order

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

denying a motion to dismiss on that basis."[28] So if the appellate court's jurisdiction rests on a specific finding, opt for the all-encompassing order.

Constitutional challenges also require an express ruling.[29] The Arkansas Supreme Court stated in *TEMCO* that it "has consistently required express rulings from trial courts on constitutional challenges," and it is not enough that the trial court seemingly ignores your constitutional challenge by applying the challenged statute.[30] This rule may fall within the ruling requirement, but cautious counsel should elect for a detailed ruling in light of the court's expansive language in *TEMCO*.

Arkansas Rule of Civil Procedure 52(a), moreover, requires trial courts to make findings of fact and conclusions of law at a party's request following bench trials and when granting or refusing interlocutory injunctions. Rule 52 generally does not require findings and conclusions when resolving motions, so if you plan to appeal the resolution of a motion, a blanket ruling may work. Note that I say "generally" because sometimes more-detailed findings and conclusions are required for resolving motions,[31] like rulings on motions for class certification.[32] In short, do not allow your desire for a blanket ruling to contravene a rule requiring flesh on the bones.

Of course, it may be your strategic preference to get a specific ruling, in which case you need specifics on every issue that you may appeal. For example, you may want the reviewing court to have a front-row seat to faulty reasoning, and a mere "granted" or "denied" just will not do. The possibilities here are endless and best left to the practitioner's judgment.

Second, it is unclear how long the more-permissive attitude toward blanket rulings will continue. If reviewing courts cannot discern the contours of rulings that actually contain some analysis, then it seems odd that their telepathic powers would be keener when confronted with a blanket ruling. Therefore, the Arkansas Supreme Court could quickly reverse course on its blanket-ruling attitude by importing the logic supporting its refusal to review issues not analyzed in non-blanket rulings. Of course, you do not want your case to prompt the turnaround, so the extra-cautious will obtain detail on every potentially reviewable point. Better safe than sorry. Although you may find yourself in an uncomfortable position asking the trial court to provide more detail, you could seek a writ of mandamus should the trial court refuse.[33] Remember that the appellant must obtain a ruling; a trial court's failure to rule is not error correctable by ordinary appeal.[34]

Finally, if you are drafting a specific order or opinion, consider adding a sentence that says something like, "The Court has considered each and every argument presented by [PARTY] in opposition of this motion and rejects them all." This sentence should alleviate concerns that the lower court did not rule or deferred doing so.[35] Just keep in mind that the trial court's mere consideration of an issue, coupled with its implicit rejection, is presently not enough. The sentence may also ease concerns that an argument was unintentionally omitted and unpreserved for review.

Conclusion

Preserving issues for appeal can be daunting. Hopefully this article shines light on the current law on a particular aspect of preservation--ruling specificity--and enables you to swat the next preservational fly that comes your way.

Footnotes

1 Luke K. Burton is the career law clerk for the Honorable Morris Sheppard Arnold of the U.S. Court of Appeals for the Eighth Circuit. He was formerly an associate at Kutak Rock LLP where he practiced appellate advocacy. He would like to thank Samantha Leflar of Kutak Rock LLP for her assistance in the preparation of this essay. Nothing in this essay should be construed as representing the views of the Honorable Morris Sheppard Arnold or the U.S. Court of Appeals for the Eighth Circuit.

2 This essay focuses only on preservation in Arkansas, not federal, courts.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

3 Silkman v. Evangelical Lutheran Good Samaritan Soc'y, 474 S.W.3d 74, 76 (Ark. 2015).

4 Grunwald v. McCall, 446 S.W.3d 217, 221 (Ark. App. 2014).

5 Arkansas Lottery Com'n v. Alpha Marketing, 386 S.W.3d 400,403 (Ark. 2012).

6 Id. at 401-02.

7 Id. at 403.

8 Id.

9 Id. at 403-04; *see also* Ark. R. App. P.--Civ. 2(a)(10) (allowing interlocutory appeals of orders denying a motion to dismiss based on sovereign immunity).

10 386 S.W.3d at 403-05.

11 Id. at 404.

12 Id.

13 Id. at 405 (quoting McDonald v. Wilcox, 780 S.W.2d 17, 19 (Ark. 1989)).

14 TEMCO Const., LLC v. Gann, 427 S.W.3d 651, 654-55 (Ark. 2013).

15 Id. at 653-54.

16 Id. at 654.

17 Id. at 654-55.

18 Id.

19 TEMCO, 427 S.W.3d at 654-55.

20 Id. at 655-60.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

21 Id. at 655-56.

22 Id. at 655-57.

23 Id. at 659-60.

24 *See* J-McDaniel Const. Co., Inc. v. Dale E. Peters Plumbing Ltd., 436 S.W.3d 458, 465 (Ark. 2014).

25 Id.

26 Sloop v. Kiker, 484 S.W.3d 696, 699 (Ark. App. 2016) (citations omitted).

27 *See* Alpha Mktg., 386 S.W.3d at 404-05.

28 Id. at 404.

29 TEMCO, 427 S.W.3d at 658-59.

30 Id.

31 *But see* Ark. R. Civ. P. 52(a)(1).

32 *See* BPS Inc. v. Richardson, 20 S.W.3d 403, 411 (Ark. 2000).

33 *See* TEMCO, 427 S.W.3d at 661-62 (Hannah, C.J., dissenting) (acknowledging the "unenviable" position in which TEMCO places counsel, but noting that a petition for relief to the Arkansas Supreme Court may help attorneys facing a trial court's intransigence).

34 *See* Eversole v. Eversole, 476 S.W.3d 199, 205-06 (Ark. App. 2015) (rejecting that trial court committed reversible error by failing to make a specific ruling).

35 *See* Smith v. Daniel, 452 S.W.3d 575, 578 (Ark. 2014) (reasoning that a similar sentence acknowledging the trial court's consideration of "all of the other arguments" that appellants submitted in favor of summary judgment and its denial of summary judgment "as to each argument" preserved the issues for appeal).

2016 ARLN 1938

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

2013 WL 574524

Aspatore

***1**

March, 2013

STRATEGIES FOR APPELLATE LITIGATION

LEADING LAWYERS EXAMINE THE UNIQUE DIFFERENCES BETWEEN APPELLATE AND TRIAL PRACTICE

Robert F. Parsley [a1]
Member, Chair of Appellate Practice Group
Miller & Martin PLLC

Copyright © 2013 by Thomson Reuters/Aspatore

LITIGATING WAIVER OF ISSUES FOR APPEAL AND ON APPEAL IN FEDERAL COURTS

Introduction

Fundamentally important to federal appellate practice is the question whether an issue has been preserved for appeal. No matter how convincing your appellate brief may be, if an issue has not been properly preserved, the appellate court will likely decline to consider it. In other words, the United States Court of Appeals or Supreme Court will deem an unpreserved issue forfeited or waived. Such waiver can yield potentially devastating consequences, such as when a potentially successful appeal is thwarted because the appellate court refuses to address an issue.

The doctrine of appellate waiver applies both offensively and defensively. On the one hand, by convincing the appellate court that your opponent has waived an issue, you can narrow the range of dispositive issues and sidestep an otherwise problematic contention. On the other hand, you can take steps in the district court to prevent waiver of an issue and, on appeal, you can sometimes repair an arguable waiver, thereby retaining the opportunity to advance a helpful issue. In either case, understanding the waiver doctrine is crucial.

Although waiver can arise solely based on practice before the appellate court, in most instances waiver arises from some mistake made in the district court. This aspect of waiver highlights the connection between appellate practice and trial practice. Preserving issues *for* appeal requires squarely and timely raising issues in the district court and building a suitable factual record that will permit the issue to be addressed by a reviewing court. Although waiver contentions themselves, when not advanced *sua sponte* by the appellate court, are matters for appellate debate, effective appellate strategy-- including the handling of waivers-- thus begins not when the notice of appeal is filed, but rather when the complaint is filed, if not earlier.

Waiver can also result from mistakes made *on* appeal. Even when an issue was raised in the district court and finds factual support in the appellate record, it can still be waived as a result of deficient appellate practice. Issues must be prominently spelled out in the appellate brief, must be supported by pinpoint citations to the factual record and legal authorities, and must be raised at the appropriate phase in the appellate process.

Because the rules governing waiver entail substantial gray areas and exceptions, the question of waiver is frequently litigated on appeal. Although federal appellate courts typically have the discretion to forgive a waiver, the exercise of such discretion is rare, and it is better to avoid the need for judicial grace. Because litigation's ultimate endgame is not trial but appeal, significant lawsuits deserve, from early on, a coherent appellate strategy that encompasses both defensively preserving issues for appeal and offensively mounting waiver arguments.

***2** This chapter proposes to help trial and appellate counsel craft appellate strategies that properly account for and effectively handle the appellate waiver doctrine in federal courts. This chapter does not attempt to identify conflicts among the federal circuits, but rather focuses on the general waiver principles that commonly prevail in federal appellate courts. This chapter also does not address waiver matters that are specific to criminal litigation. Our topic is the general, black-letter law of waiver, along with its inherent nuances, discussed with an eye toward practical application.

The General Waiver Rule and Its Rationale

It is a well-settled, general rule that federal appellate courts will not entertain issues that were not raised in the district court; in other words, issues raised for the first time on appeal are typically deemed forfeited or waived. [1] This rule applies equally to claims and defenses, appellants and cross-appellants, and the rule will be enforced notwithstanding the fact that its enforcement can determine the outcome of an appeal. [2] Although, as will be discussed, the waiver rule is ultimately discretionary and has its exceptions, federal appellate courts apply it unapologetically when the failure to raise an issue below is clear. In fact, appeals have been dismissed wholesale based on the failure to raise the central issue or an argument in the district court, and such examples are not limited to cases involving parties operating *pro se*. [3]

The general waiver rule is supported both by the Federal Rules of Civil Procedure and common-law reasoning. [4] Understanding this rationale offers insight into how federal courts apply--or choose not to apply--the waiver rule.

Federal Rule of Civil Procedure 46 provides that, although formal exceptions to court rulings are unnecessary, when a ruling has been made, an objecting party must "state the action that it ... objects to, along with the grounds for the ... objection." The general principle embodied in Rule 46 is that an objecting party must make its objection known to the district court, along with its reasons for the objection. It follows that *failing* to voice an objection and its grounds to the district court deviates from the spirit of the rules by depriving the district court of an opportunity to correct its own errors. [5] These principles are consistent with the common law reasoning undergirding the waiver doctrine.

There are multiple common-law reasons for the general waiver rule. The two primary reasons concern (1) the institutional differences between federal district and appellate courts, and (2) fairness. First and foremost, except for the Supreme Court's occasional exercise of original jurisdiction, the federal appellate courts are not designed to operate as fact finders. [6] The district court is a dynamic forum that oversees discovery and receives live testimony, and the factual record for appeal is and must be forged within this crucible. By contrast, appellate courts review a documentary record that has become cold and inert, and they typically avoid resolving disputed facts. Consequently, parties are obligated to develop in the district court the factual record regarding all issues, and the failure to raise an issue there can inhibit the development of the factual record necessary not only for district court decision but also for appellate review. [7]

***3** This is so because the Courts of Appeals are by nature courts of review. Although the Courts of Appeals, along with the Supreme Court, exercise the power to declare the law, thereby setting precedent for future cases, for each case at hand they must determine whether the district court erred. In this regard, the district courts are courts of "decision," and the appellate courts are courts of review and correction. [8] Even when it comes to legal arguments, the district courts are expected to have grappled with them, and appellate courts cannot properly review for error when the issue was simply not raised or decided below. [9] In other words, the district court should be afforded the first opportunity to correct or to reconsider its own purported errors, which obviously requires that the issue be brought to the district court's attention. [10] Thus, the general waiver rule--which encompasses the principle that appellate courts will typically decline to reverse the district court based on an issue never raised below--is partially a matter of institutional integrity and respect for the district courts' particular province or "turf." [11]

The second primary rationale for the waiver rule concerns fairness. When a new issue is raised for the first time on appeal, it can subject parties to unfair surprise, depriving them of the opportunity of having developed a corresponding factual record. [12] To put it colloquially, the waiver rule is designed to prevent the sandbagging of opponents. [13] At base, then, the rule promotes due process: timely notice and a meaningful opportunity to be heard.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

There are other related reasons for the appellate waiver rule. It promotes judicial economy and finality. [14] It is also consistent with our adversarial system in which the issues to be adjudicated are primarily party-driven: although federal courts are not precluded from recognizing issues on their own initiative, they generally depend on the parties to uncover and to advance the issues they want decided. [15] The waiver rule encourages the parties to advance all relevant issues in the district court, and it binds counsel to their strategic choices regarding whether, when, and how to raise an issue. [16]

Preserving Issues and Arguments in District Court

Having touched on the general rule and its rationale, more needs to be said about how issues are preserved. Issue preservation occurs primarily, and in the first instance, in the district court, thereby necessitating concern for appellate strategy long before an appeal is filed. Although the choice of whether to raise a particular issue depends on legal judgment, attorneys may have a duty to their clients to preserve issues in the record for appeal. [17] Once it is decided that an issue or argument should be advanced, it typically should be advanced in a manner that preserves it for potential appellate review. Most appellate litigation about waiver--and there is plenty of it--concerns whether the conduct of litigation in the district court was sufficient to preserve an issue for appeal.

***4** Although there is a variety of specific waiver rules--discussed later in this chapter--in most instances, the question of waiver hinges on general principles regarding the manner of issue preservation. What does it take to preserve an issue for appellate review? Although courts are quick to point out that there is no bright-line rule, generally speaking, preserving an issue requires expressly advancing it at each meaningful opportunity. Appellate courts usually phrase it as raising issues in the district court "squarely" and "timely." [18] Stated another way, the issue must be raised sufficiently for the district court to be able to rule on it. [19] These principles warrant some unpacking.

Raising Issues Squarely

Raising an issue "squarely" in the district court requires advancing it prominently, specifically, and with reasonable thoroughness. Raising an issue prominently entails ensuring that the issue is brought to the attention of both opposing counsel and the district court in a way that gives notice that the issue has been joined and is to be decided. [20] Federal appellate courts frown on attempts to manufacture appellate arguments out of passing comments buried in some district court brief, particularly when it is viewed as an effort at sandbagging. [21] The First Circuit has observed, "One should not be allowed to defeat the system by seeding the record with mysterious references to unpled claims, hoping to set the stage for an ambush should the ensuing ruling fail to suit." [22] Numerous panels of the Courts of Appeals have, for example, refused to entertain issues that were addressed in the district court merely in a cursory footnote, which is all too easily overlooked. [23] Fairness requires that for an issue to be preserved for appeal, it must be raised conspicuously in the district court.

Similarly, for preservation purposes, issues or arguments must be spelled out specifically and reasonably thoroughly. [24] "Judges are not expected to be mind readers. Consequently, a litigant has an obligation 'to spell out its arguments squarely and distinctly,' or else forever hold its peace." [25] Vague, ambiguous, or cursory discussions of an issue typically will not suffice to preserve it for appeal. [26]

Sometimes appellant's counsel, in researching for an appellate brief, discovers that the appellant's best argument for reversal is an argument that was not made distinctly (if at all) in the district court. In such event, the attorney understandably ransacks the appellate record for some passage or reference that arguably demonstrates that the argument was preserved below. Although such efforts can potentially circumvent waiver, all too often the reference in the district court is simply too tenuous.

***5** For example, merely reciting in the district court the facts underlying an issue or argument is not, in itself, sufficient to preserve the issue or argument. [27] Likewise, merely citing a case in the district court that contains the argument to be advanced on appeal is not enough. [28] The issue or argument itself must have been expressly advanced below. [29] It follows that the most auspicious time to discover new angles of attack or defense is while the lawsuit remains pending in district court. "Afterthought

theories--even cleverly constructed afterthought theories--cannot be introduced for the first time in an appellate venue through the simple expedient of dressing them up to look like preexisting claims." [30]

The rule requiring that issues be raised squarely is instructive when it comes to mounting alternative or fallback arguments. Sometimes there are sound strategic reasons for de-emphasizing an issue or argument before the district court while at the same time preserving it for appeal, where it might end up taking center stage. To avoid a waiver problem on appeal, the issue or argument should typically be set forth before the district court in the brief's main text, fall under its own heading, and be supported by discussion of all necessary elements with appropriate citations. Relegating the issue or argument to a footnote or an aside, though sometimes tempting, risks waiver. The Tenth Circuit has explained, "In order to preserve the integrity of the appellate structure, we should not be considered a 'second-shot' forum, a forum where secondary, back-up theories may be mounted for the first time. Parties must be encouraged to 'give it everything they have got' at the trial level." [31]

Raising Issues Timely

To be preserved for appeal, issues must be raised not only squarely but also seasonably or timely. [32] The question of timeliness depends largely on the procedural circumstances that gave rise to the opportunity or obligation to raise an issue or argument. Special rules relating to particular procedural situations sometimes govern the timeliness question, such as the rule that evidentiary objections at trial must be made promptly once the ground for objection is known. [33] In such events, the special rules should be followed. (This chapter does not attempt to catalogue them all, but rather focuses on more general principles.) Where special rules do not govern, the general principle is that an issue or argument should be raised at each meaningful opportunity.

This general timeliness principle is best illustrated by reviewing waiver in relation to particular procedural events. For example, mounting an argument for the first time in opposition to summary judgment where the issue was not properly identified in or raised by the complaint can result in waiver of the argument on appeal. [34] Similarly, federal appellate courts have held that failing to advance an argument in opposition to a motion for summary judgment can result in waiver. [35] Raising an issue or argument for the first time in a reply, in a motion for rehearing, or in a post-trial motion can also result in waiver on appeal, unless the district court exercised its discretion to address it. [36] Where an issue had been previously raised but the district court declined to address it, a motion for rehearing regarding the omitted issue might even be necessary to preserve it for appellate review. [37] And when there is a change in governing law while the case is pending in the district court, failure to bring this change to the district court's attention before judgment can result in waiver of the right to rely on the new law on appeal. [38] The upshot is that, for purposes of preservation, an issue or argument should be advanced in the district court whenever the procedural circumstances reasonably call for it. Failing to do so yields a risk of waiver.

***6** It is never too late, however, to raise an issue on appeal that was actually decided by the district court. "The rule is that if an argument is raised belatedly in the district court but that court, without reservation, elects to decide on it on the merits, the argument is deemed preserved for later appellate review." [39] But as a practical matter, as stated above, it is better to not rely on judicial grace--or luck.

Preserving Issues versus Preserving Arguments

The appellate waiver doctrine has been applied to both issues and arguments. The Courts of Appeals have often held that new arguments or theories--not just new claims or issues--are waived when asserted for the first time on appeal. [40] "An appellant cannot change horses in mid-stream, arguing one theory below and a quite different theory on appeal." [41] But this well-established extension of the waiver doctrine to arguments and theories poses a variety of interpretive problems and even conflicting precedents relating to issue preservation.

An "issue" has been defined as "[a] point in dispute between two or more parties," and a "claim" has been defined as "the aggregate of operative facts giving rise to a right" as well as the assertion of that right. [42] By contrast, an "argument" is defined as "[a] statement that attempts to persuade," and a "theory of law" is "[t]he legal premise or set of principles on which a case rests." [43] Although the federal appellate courts have acknowledged the difference between raising a new issue or claim,

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

on the one hand, and raising a new argument or theory, on the other, the distinction is seldom articulated in the case law, and the terminology is often applied inconsistently. [44] One may question the desirability and even the possibility of precisely distinguishing these concepts.

Regardless, the takeaway point here is that when it comes to extending the waiver doctrine to arguments and theories, the federal appellate courts are not fully consistent. The Supreme Court has held that once a federal claim has been properly presented below, "parties are not limited to the precise arguments they made below," [45] provided that the new argument was raised in the petition for certiorari. [46] This flexibility understandably acknowledges the Supreme Court's momentous power and obligation to declare the law. [47] Some panels of the Courts of Appeals have viewed these statements by the Supreme Court as generally authorizing the raising of new arguments on appeal--at least so long as they relate to an issue or claim that has been preserved. [48] Yet in at least one instance, the Sixth Circuit has construed the Supreme Court's flexibility to entertain new arguments as restricted to the Supreme Court's certiorari jurisdiction and not as a rule of general application. [49] And, as stated above, the Courts of Appeals frequently recite and enforce the rule that new arguments and new theories may not be raised on appeal.

***7** As a practical matter, the question whether an argument or theory has been waived is really a matter of degree. [50] Federal appellate courts typically allow parties to refine arguments and theories advanced below, to shift emphasis from one preserved theory to another, and even to flesh out theories and arguments that are necessarily subordinate to preserved issues. [51] Parties may also cite new authority on appeal in support of issues or arguments that have been preserved. [52] Appellate courts--which set precedent as well as decide cases--are, and must be, free to announce the governing law correctly. [53] Determining whether an argument or theory has been preserved, therefore, is no exact science.

The line is typically drawn and the waiver doctrine applied where it appears to the appellate court that it is being asked to decide a case that no longer appears to be the "same" case decided below or when it determines that the argument or theory in question calls for evidence that could not have been anticipated as necessary in the district court. [54] To put it another way, for an argument or theory to be preserved, the district court must have had a reasonable opportunity to consider it and to render a decision accordingly.

As with other aspects of the waiver doctrine, preserving arguments and theories for appeal requires working from early on in a case to discover potential angles of attack, to make strategic choices about which arguments and theories to advance, and to advance the chosen arguments and theories squarely before the district court. This burden of due diligence falls most heavily on parties that end up losing in the district court, not only because most district court judgments are affirmed, but also because appellees, as the winners below, have more leeway to push the envelope of new arguments and theories on appeal. As a matter of institutional comity with the district court, appellate courts normally will not reverse a district court based on an argument or theory not presented to it, while they may affirm a judgment on any ground supported by the factual record, so long as the losing party had a reasonable opportunity to address it. [55] Appellate strategy is thus ultimately most effective, especially for appellants, when it begins in the district court before judgment is rendered.

Specific Waiver Rules

As noted above, there are special waiver rules that arise in particular procedural circumstances. Although it is beyond the scope of this chapter to catalogue them all, a few are worth discussing by way of example. [56] These rules often demand strict compliance, and the failure to follow them can severely damage one's prospects for appeal.

Preserving Issues in Pleadings

The fundamental purpose of pleading--complaint and answer--is to put opponents and the court on notice of the claims and defenses to be decided. [57] Because the pleadings shape the issues to be adjudicated, pleadings are expected to set the stage not only for trial but also for appeal. Despite the liberal construal of pleadings, the failure to raise an issue by means of a pleading can result in waiver on appeal, even when the issue is subsequently discussed in the district court. [58] Where new issues arise based on discovery and other progress in a case, the issue should be raised by an amended pleading. [59] Because superseded

pleadings are rendered ineffectual,[60] issues raised by an initial pleading, but not by an amended pleading, may be deemed waived. For the same reason, actions reasserted following a voluntary dismissal without prejudice may not rely on the nonsuited complaint to raise an issue.[61] Where some but not all of a plaintiff's claims have been dismissed with prejudice, however, an amended complaint does not necessarily need to reassert the dismissed claims for them to be preserved for appeal.[62]

***8** Counsel should bear in mind, however, that raising an issue by means of pleading is not necessarily sufficient in itself to preserve an issue for appeal.[63] To preserve the issue for appeal, it should be reasserted at each subsequent opportunity, including in relation to motions and at trial. The failure to reassert the issue at any significant phase in the district court can result in waiver on appeal.

Preserving Issues by Objecting to Magistrate's Report

Where a federal magistrate judge has issued a report and recommendation to the district court, by statute, any objections to the report must be filed within fourteen days.[64] The failure to file objections timely or specifically results in waiver of the objections on appeal.[65]

Preserving Issues in Jury Trial via Motion for Directed Verdict

To preserve for appeal a challenge to the sufficiency of the evidence in a jury trial, a party must move for directed verdict under Federal Rule of Civil Procedure 50 both before the case is submitted to the jury and within a specified time following trial.[66] By the same token, the party responding to a Rule 50 motion must, to preserve its objections for appeal, assert before the district court any grounds for the purported defectiveness of the Rule 50 motion.[67] The lesson here is that waiver arguments on appeal can themselves be waived when there was an opportunity or obligation to raise the waiver before the district court.

While by no means exhaustive, these examples of specific waiver rules illustrate the need to pay close attention to potential appellate waiver throughout the course of the district court proceedings, including by complying with special rules. Because appellate practice and trial practice often demand differing skill sets, significant litigation may warrant consulting appellant counsel during district court proceedings for the purpose of preserving issues for appeal as well as coordinating trial strategy with potential appellate strategy. This collaboration is all the more valuable when it is expected that any appeal will be handed over to an appellate specialist.

Building the Record for Appeal

A basic corollary to the raising of issues in the district court is the need to build an appropriate appellate record. For an issue to be considered on appeal, the appellate record should include not only the references to it in the district court--whether in a pleading, brief, or transcript--but also the evidence necessary for the issue to be decided. The obligation to build the record and to transmit it to the appellate court is particularly crucial when it comes to relevant facts. Although appellate courts have the discretion to entertain a waived issue and can take judicial notice of the law, as a general rule they will not make decisions based on absent facts.[68] Where an issue for appeal is not supported by the factual record, the best that can typically be hoped for is a remand for further proceedings, which might itself be a provisional win but which is never an assured result.

***9** Preserving issues and arguments for appeal by advancing them in the district court demands not only stating the issue or argument on the record, but also properly introducing into the record the allegations, exhibits, and testimony necessary to substantiate the issue or argument. This obligation applies equally to alternative and fallback issues, which, if they are to be advanced on appeal, must also be factually supported. Although this rule is commonplace, in practice it is all too easy, particularly in documentintensive cases, to omit some piece of evidence from the record that turns out to be crucial on appeal. For this reason, trial counsel should persistently pay careful attention to record building with an eye toward appeal.

Exceptions to the Waiver Rule

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

The rule that issues not raised before the district court are waived on appeal is ultimately discretionary and prudential, as opposed to jurisdictional. [69] The Supreme Court has held, "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the Courts of Appeals to be exercised on the facts of individual cases. We announce no general rule." [70] Consequently, just as there has been considerable appellate litigation concerning whether an issue was adequately raised, federal appellate courts also must frequently determine whether to apply an exception to the waiver doctrine.

In most cases, the Court of Appeals pretermits a waived issue--that is to say, the Court of Appeals intentionally ignores it, except perhaps for dropping a footnote stating that the issue is barred from decision by the waiver rule. And appellate courts often will address the merits of a waived issue only to conclude that the issue ultimately does not matter because the appellant still loses regardless of its outcome; such a holding--which perhaps constitutes mere dicta and serves only to add another nail to the appellant's coffin--does not involve a true exception to the waiver doctrine. [71]

There are some bright-line exceptions to waiver. The failure to timely file a notice of appeal deprives the appellate court of jurisdiction. [72] Similarly, a federal court's lack of subject-matter jurisdiction may be raised at any time, even for the first time on appeal. [73] But these kinds of exceptions do not require the appellate court to exercise its discretion and prudence.

Federal appellate courts are required to exercise discretion and prudence when choosing to address a waived issue that goes to the merits of the action. Generally, they should entertain a waived issue rarely and only when justified by extraordinary or unusual circumstances. [74] More specifically, the Courts of Appeals have articulated a variety of criteria guiding their exercise of discretion in determining whether to address a waived issue. These criteria are broad and varied, and they have often been criticized as vague, unpredictable in application, and even incoherent. [75]

***10** A brief survey of the major criteria is instructive. First, some appellate courts have stated that an issue may be addressed for the first time on appeal when it involves a pure question of law and no prejudice would result from deciding it. [76] Because prejudice is often deemed to result from the lack of an opportunity to develop the factual record below, as a practical matter, this rationale applies where the factual development could not have been affected by the new issue. [77] When, for example, an action is on appeal from a summary judgment involving no factual dispute, the proponent of a new issue on appeal could potentially get traction by emphasizing this criterion. Similarly, where a contractual provision was overlooked below and is relied on for the first time on appeal, the appellate court might choose to address the argument so long as the entire contract is in the appellate record. [78]

Second, appellate courts may address a waived issue when it promotes the public interest or is necessary to avoid manifest injustice. [79] These criteria are hardly less broad than the general rule that exceptions are discretionary, and their invocation by parties is usually doomed to failure. Where the purported "injustice" is merely that the appellant has a meritorious case, appellate courts will not necessarily relieve the party from the consequences of deficient trial advocacy. [80] The proponent of the new issue must offer a good reason why the new issue was not raised below, and neither strategic choice nor overlooking legal authority will typically suffice. [81] All too often, the proponent seeks exception without offering any reason for it, which does nothing but invite a rap on the knuckles in the forthcoming opinion. [82] For purposes of invoking these exceptions, look for constitutional issues and issues that directly affect persons other than just the parties.

The appellate courts may--and occasionally do--use manifest injustice or similar criteria to justify addressing an unraised issue *sua sponte* to ensure correct decision or the issuance of reliable precedent, [83] but these decisions provide little or no guidance for parties' appellate strategy.

Third, appellate courts may address a waived issue to correct plain error, which is applied especially stringently in civil cases. [84] For this criterion to apply, the proponent must show that an error clearly committed by the district court has prejudiced substantial rights, with the result that the fairness or integrity of the proceedings is called into question. [85] This criterion--like the criteria relating to manifest injustice and public interest--is difficult to satisfy in the civil context, where property interests rather than liberty interests are most often at stake.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

***11** And even plain error might not justify exception when the error complained of below was "invited" by the appellant. The doctrine of invited error provides that where the appealing party itself was responsible for the district court's error--for example, by urging the district court to make some ruling that the party later regrets--the Court of Appeals will typically decline to reverse the purported error. [86] Some appellate courts, treating invited error as a true waiver (an intentional relinquishment of a known right) as opposed to a mere forfeiture (resulting from neglect) have simply refused to consider whether an exception to invited error may be warranted. [87]

There are other reasons why an appellate court might exercise its discretion to decide a waived issue. Appellate courts will decide a waived issue when its resolution is "beyond any doubt." [88] Practically speaking, contested issues can seldom be legitimately characterized as beyond doubt, and this criterion--like manifest injustice and the public interest--is likely to apply only when a waived issue is so fundamentally important that the failure to address it would yield a patently unfair result, a grossly unreliable precedent, or both. In the vast majority of cases, the parties will not fail to litigate issues of this magnitude in the district court.

Additionally, appellate courts will address new issues when they arise from a change in the governing law that occurs while the action is pending on appeal. [89] When this occurs after appellate briefing has concluded, the proponent of the new issue should promptly bring the change in law to the appellate court's attention in compliance with the Federal Rules of Appellate Procedure and any applicable local rules, whether by motion or by notice of supplemental authority. [90]

That the Court of Appeals will address new issues based on intervening changes in the law highlights the fact, noted above, that appellate courts are always free to apply the law correctly. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." [91] This power includes the discretion to entertain a waived issue (thus in effect concluding that it is "properly before the court") if necessary to state the law correctly.

Recognizing this, the proponent of a waived issue should often try to convince the appellate court that declining to address the issue would muddle the law. For example, when the waived issue can be so entwined with a preserved issue that it appears they must be addressed together to get the preserved issue right, the appellate court may be more likely to exercise its discretion to address it or even to deem it non-waived as logically included under the preserved issue. Such a tack is not risk-free, however, for if the appellate court declines to address the waived issue, the proponent's argument regarding the preserved issue might thereby be undermined. It all depends on the significance of the waived issue and other particular circumstances.

***12** Parties opposing the appellate court's exercise of discretion to address a waived issue have the easier job. This job is easiest when it can be pointed out that the new issue calls for factual development that was unavailable in the district court. In most instances, a waiver argument should be coupled with argument regarding the merits of the waived issue just in case the appellate court should decide to address it, despite the fact that there is always an unavoidable, concomitant risk that briefing the merits of the waived issue might only encourage the appellate court to address it.

Waivers Arising from Deficiencies in Appellate Practice

Although most waivers arise from the conduct of litigation in the district court, waivers can also arise from deficiencies in appellate practice. For the most part, these kinds of waivers result from the untimely advancement of issues or the failure to follow the rules for appellate procedure. While the summary provided below is not exhaustive, it highlights the kinds of waivers that most typically occur on appeal.

First, it is improper for appellate argument to depend on facts that are not included in the appellate record, and such arguments are likely to be deemed waived. [92] Where the facts were presented to the district court but omitted from the appellate record, counsel may seek to correct or to supplement the appellate record. [93] But because motions to supplement the record are not necessarily granted, it is better not to need to make one. Motions to supplement the appellate record with matters that were never proffered to the district court will almost certainly be denied, and the making of such a motion can undermine one's credibility with the appellate court. Simply arguing facts that fall outside the record risks both undermining one's credibility and exasperating the appellate court, which ought to be avoided.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Second, the federal rules require citation to the appellate record. This requirement is often bolstered by local rules. Failing to provide specific citations to the appellate record can cause an issue or argument to be discounted. [94] The First Circuit has explained that "[p]arties pursuing appellate review must supply us with enough raw materials so that we can do our job." [95]

Third, issues should be advanced on appeal at each opportunity, including in docketing statements, issue sections of briefs, and in the body of briefs. The failure to identify and advance an issue at any point--most especially in the body of the brief--can potentially result in the issue being discounted as waived. [96]

Fourth, arguments should be spelled out on appeal, just as they are required to be spelled out before the district court. Raising an issue in the statement of issues but failing to argue it, arguing an issue in merely a vague or perfunctory manner or by relegating it solely to a footnote, or failing to support an argument with citation to relevant legal authority can all result in the appellate court declining to consider the issue or argument. [97] Incorporating by reference portions of district court briefs in appellate briefs is also prohibited. [98] As stated above, however, citing new authority on appeal for a preserved issue or argument is not prohibited. [99]

***13** Fifth, as in the district court, arguments on appeal must be made timely to be preserved for review. Arguments mounted for the first time in reply, at oral argument, or in a motion for rehearing *en banc* are typically discounted as waived. [100]

Sixth, appellate waiver arguments themselves should be advanced in the appellate briefing. The burden of proving waiver falls on the party asserting it, and the failure to argue that an opponent's issue or argument has been waived can result in the waiver being overlooked. The Ninth Circuit has said, "When a party waives waiver, we proceed directly to the merits." [101]

The same general principles that govern waiver in the district court apply also to appellate practice: the district court, not the appellate court, is the place for developing facts, and issues should be advanced squarely and timely at every meaningful opportunity.

Conclusion

Issues and arguments raised for the first time on appeal are usually deemed waived. Preserving issues in the district court requires advancing them squarely and timely at every meaningful opportunity, including in compliance with specific procedural rules, thereby keeping opposing counsel and the district court on notice that the issue has been joined and is to be decided. For each issue to be preserved, the factual record should be correspondingly developed. Although appellate courts have the discretion to address waived issues, this discretion is exercised sparingly, and the proponent of a waived issue should offer a good reason for the exception. Issues and arguments can also be waived on appeal based on deficiencies in appellate practice, such as insufficient briefing or the belated advancement of the issue or argument, which can typically be avoided by carefully reviewing and following the applicable rules of appellate procedure.

Ultimately, preserving issues for appeal is one of the fundamentals not only of appellate practice, but also of trial practice. The task of preserving issues begins when a lawsuit begins, and it continues through appeal. The best appellate strategy for handling waiver, therefore, is making issue preservation a part of your trial strategy.

Key Takeaways

- All issues for appeal in federal appellate courts must have been properly preserved in the district court, otherwise the issue may be discounted as waived, with potentially devastating consequences.

- The rationale for the general waiver rule focuses above all on two considerations: (1) the institutional differences between district and appellate courts--the district court is a fact finder while the appellate court is not; and (2)

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

fairness--when a new issue is raised for the first time on appeal, it can subject parties to unfair surprise, depriving them of the opportunity of having developed a corresponding factual record.

• To preserve issues and arguments for appeal, you must bring them to the attention of the district court and opposing parties both *squarely* by advancing the issues and arguments prominently, specifically, and with reasonable thoroughness, and *timely* by raising them at each meaningful opportunity. The district court should be given a reasonable opportunity to rule on the issue or argument. Trial counsel should also take care to comply with special waiver rules in the district court.

***14** • Trial counsel must be careful to build a factual record supporting each issue and argument that might be advanced on appeal. Appellate courts typically decline to address issues when the appellate record does not contain the relevant facts.

• Although the general waiver rule is discretionary and prudential, as opposed to jurisdictional, federal appellate courts typically enforce it unapologetically and make exceptions only rarely. It is better not to need to rely on an exception.

• The time to begin building an appellate strategy is while the action remains pending in district court. By doing so, you maximize your ability to preserve issues for appeal and to build a corresponding factual record.

• While most waivers arise from the conduct of litigation in the district court, they can also arise as a result of deficiencies in appellate practice. These deficiencies can be avoided by paying close attention to rules for appellate practice and by advancing issues and arguments on appeal both squarely and timely.

Footnotes

a1 *Robert F. Parsley is with Miller & Martin PLLC in its Chattanooga, Tennessee office. He practices in the areas of commercial litigation and appellate practice, and he is chair of Miller & Martin's Appellate Practice Group.*

Acknowledgment: *My gratitude to Travis Thompson for proofreading the chapter.*

1 *See* *Wood v. Milyard*, 132 S. Ct. 1826, 1834, (2012); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 399 (1997); *Chase Bank USA, N.A. v. City of Cleveland*, 695 F.3d 548, 558 (6th Cir. 2012); *In re FEMA Trailer Formaldehyde Products Liab. Litig. (Mississippi Plaintiffs)*, 668 F.3d 281, 290 (5th Cir. 2012); *Millea v. Metro-N. R. Co.*, 658 F.3d 154, 163 (2d Cir. 2011); *Douglas Asphalt Co. v. QORE, Inc.*, 657 F.3d 1146, 1152 (11th Cir. 2011); *Jones v. Horne*, 634 F.3d 588, 603 (D.C. Cir. 2011); *Wallace v. McGlothan*, 606 F.3d 410, 425-26 (7th Cir. 2010); *Pub. Water Supply Dist. No. 3 of Laclede County, Mo. v. City of Lebanon, Mo.*, 605 F.3d 511, 524 (8th Cir. 2010); *AlohaCare v. Haw., Dept. of Human Servs.*, 572 F.3d 740, 744 (9th Cir. 2009); *Webb v. City of Philadelphia*, 562 F.3d 256, 263 (3d Cir. 2009); *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 242 (4th Cir. 2009); *Golden Bridge*

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Tech., Inc. v. Nokia, Inc., 527 F.3d 1318, 1322 (Fed. Cir. 2008); *F.D.I.C. v. Kooyomjian*, 220 F.3d 10, 14 (1st Cir. 2000). Additional citations are available in Lawrence Kaplan, *Comment Note: Sufficiency, in Federal Court, of Raising Issue Below to Preserve Matter for Appeal*, 157 A.L.R. FED. 581 (1999 & Supp. 2012).

2 *See, e.g.*, *Veneklase v. Bridgewater Condos, L.C.*, 670 F.3d 705, 715 (6th Cir. 2012) (waiver of affirmative defense); *Sac & Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 575

3 *See, e.g.*, *Libertyville Datsun Sales, Inc. v. Nissan Motor Corp. in U.S.A.*, 776 F.2d 735 (7th Cir. 1985) (dismissing appeal because plaintiff's sole argument on appeal had not been made in the district court).

4 FED. R. CIV. P.

5 *See* 9B FED. PRAC. & PROC. Civ. § 2472 (3d ed. 2012).

6 *See* *Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp.*, 677 F.3d 1286, 1291 (11th Cir. 2012); *3M Co. v. Avery Dennison Corp.*, 673 F.3d 1372, 1378 (Fed. Cir. 2012).

7 *See* *Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678, 686 (D.C. Cir. 2010).

8 *See* *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004); *Venuto v. Carella, Byrne, Bain, Gilfillan, Cecchi & Stewart, P.C.*, 11 F.3d 385, 393 (3d Cir. 1993).

9 *See* *Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 701 (5th Cir. 2004) ("We have frequently said that we are a court of errors, and that a district court cannot have erred as to arguments not presented to it.").

10 *See* *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992).

11 *See* *Boyers v. Texaco Ref. & Mktg., Inc.*, 848 F.2d 809, 811-12 (7th Cir. 1988).

12 *See* *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1220 (7th Cir. 1984).

13 *See* *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004).

14 *See* *HTC Corp. v. IPCom GmbH & Co., KG*, 667 F.3d 1270, 1282 (Fed. Cir. 2012); *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 627 (1st Cir. 1995).

15 *See* *Greenlaw v. United States*, 554 U.S. 237, 243 (2008).

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

16 *See* *Broaddus v. Shields*, 665 F.3d 846, 853-54 (7th Cir. 2011); *Alioto v. Town of Lisbon*, 651 F.3d 715, 722 (7th Cir. 2011).

17 *See* *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 160 (4th Cir. 2012), *as amended* (May 9, 2012) ("A lawyer has a duty to preserve issues on the record for his client.").

18 *See* *Thomas v. Rhode Island*, 542 F.3d 944, 949 (1st Cir. 2008) (squarely and timely); *Warren Freedenfeld Assocs., Inc. v. McTigue*, 531 F.3d 38, 48 (1st Cir. 2008) (squarely); *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir. 1992) (timely).

19 *See* *Walsh v. Nev. Dept. of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006) (stating that a "'workable standard' is that the issue must be raised sufficiently for the trial court to rule on it").

20 *See* *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1141 (10th Cir. 2007) ("An issue is preserved for appeal if a party alerts the district court to the issue and seeks a ruling."); *Teumer v. Gen. Motors Corp.*, 34 F.3d 542, 546 (7th Cir. 1994) (The failure to draw the district court's attention to an applicable legal theory waives pursuit of that theory in this court."); *Portis v. First Nat'l Bank of New Albany, Miss.*, 34 F.3d 325, 331 (5th Cir. 1994) ("The raising party must present the issue so that it places the opposing party and the court on notice that a new issue is being raised.").

21 *See* *B & T Masonry Const. Co., Inc. v. Pub. Serv. Mut. Ins. Co.*, 382 F.3d 36, 40 (1st Cir. 2004) (veiled references to legal theories are insufficient); *United States v. Slade*, 980 F.2d 27, 30-31 (1st Cir. 1992) (passing allusions are insufficient).

22 *Paterson-Leitch Co., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990 (1st Cir. 1988).

23 *See, e.g.,* *Fifth Third Mortg. Co. v. Chicago Title Ins. Co.*, 692 F.3d 507, 513 (6th Cir. 2012).

24 *See* *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 262 (3d Cir. 2009) (only arguments presented with a minimum level of thoroughness are preserved for appeal); *Iverson v. City of Boston*, 452 F.3d 94, 102 (1st Cir. 2006) (stating that litigants must spell out their legal theories face-up and squarely).

25 *Rivera-Gomez v. de Castro*, 843 F.2d 631, 635 (1st Cir. 1988) (quoting *Paterson-Leitch Co., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990 (1st Cir. 1988)).

26 *See* *F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) (merely intimating an argument is insufficient); *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721 (10th Cir. 1993) (stating that vague, arguable references to a point in the district court proceedings do not provide the kind of specificity required to preserve an issue for appeal); *Kensington Rock Island Ltd. P'ship v. Am. Eagle Historic Partners*, 921 F.2d 122, 124 (7th Cir. 1990) (perfunctory and undeveloped arguments are insufficient).

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

27 *See, e.g.*, *City of Nephi, Utah v. F.E.R.C.*, 147 F.3d 929, 933 (D.C. Cir. 1998).

28 *See, e.g.*, *In re Fairchild Aircraft Corp.*, 6 F.3d 1119, 1128 (5th Cir. 1993) ("Citing cases that may contain a useful argument is simply inadequate to preserve that argument for appeal.").

29 *See* *Rocafort v. IBM Corp.*, 334 F.3d 115, 121-22 (1st Cir. 2003).

30 *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 22 (1st Cir. 1998).

31 *Tele-Communications, Inc. v. C.I.R.*, 104 F.3d 1229, 1233 (10th Cir. 1997).

32 *See* *Sparkman v. C.I.R.*, 509 F.3d 1149, 1159 n.9 (9th Cir. 2007) (timely); *Toren v. Toren*, 191 F.3d 23, 29 (1st Cir. 1999) (seasonably).

33 *See, e.g.*, *United States v. Meserve*, 271 F.3d 314, 324 (1st Cir. 2001) (stating that, for an evidentiary objection to be timely, it must be made as soon as its ground is known or reasonably should have been known to the objector).

34 *See, e.g.*, *Cutrera v. Bd. of Sup'rs of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005) ("A claim which is not raised in the complaint but, rather, is raised only in response to a motion for summary judgment is not properly before the court.").

35 *See, e.g.*, *Vaughner v. Pulito*, 804 F.2d 873, 878 n.2 (5th Cir. 1986); *Liberles v. Cook County*, 709 F.2d 1122, 1126 (7th Cir. 1983).

36 *See, e.g.*, *Csiszer v. Wren*, 614 F.3d 866, 871 (8th Cir. 2010) (issue raised for first time in post-verdict motion in district court deemed waived); *Barany-Snyder v. Weiner*, 539 F.3d 327, 331 (6th Cir. 2008) (issue raised for first time in reply brief in district court deemed waived); *Cochran v. Quest Software, Inc.*, 328 F.3d 1, 11 (1st Cir. 2003) (issue raised for first time in motion for reconsideration in district court deemed waived); *Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co.*, 124 F.3d 508, 519 n.12 (3d Cir. 1997) (issue raised for first time in post-judgment motion in district court deemed waived). *But see* *Instone Travel Tech Marine & Offshore v. Int'l Shipping Partners, Inc.*, 334 F.3d 423, 431 n.7 (5th Cir. 2003).

37 *See* *Malbon v. Pa. Millers Mut. Ins. Co.*, 636 F.2d 936, 940-41 (4th Cir. 1980).

38 *See Rentrop v. Spectranetics Corp.*, 550 F.3d 1112, 1117 (Fed. Cir. 2008) ("We hold that when there is a relevant change in the law before entry of final judgment, a party generally must notify the district court; if the party fails to do so, it waives arguments on appeal that are based on that change in the law.")

39 *Negron-Almeda v. Santiago*, 528 F.3d 15, 26 (1st Cir. 2008); *see also* *Moriarty v. Svec*, 164 F.3d 323, 328 (7th Cir. 1998).

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

40 *See, e.g.*, *Trustees of Electricians' Salary Deferral Plan v. Wright*, 688 F.3d 922, 926 (8th Cir. 2012); *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 576 (5th Cir. 2010); *S. Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1142 (10th Cir. 2004); *B & T Masonry Const. Co., v. Pub. Serv. Mut. Ins. Co.*, 382 F.3d 36, 40 (1st Cir. 2004); *Stewart v. Dep't of Health & Human Servs.*, 26 F.3d 115, 115 (11th Cir. 1994); *Dir., Office of Workers' Comp. Programs, U.S. Dept. of Labor v. Edward Minte Co.*, 803 F.2d 731, 736 (D.C. Cir. 1986); *Libertyville Datsun Sales, Inc. v. Nissan Motor Corp. in U.S.A.*, 776 F.2d 735, 736-37 (7th Cir. 1985).

41 *Ahern v. Shinseki*, 629 F.3d 49, 58 (1st Cir. 2010).

42 *See* BLACK'S LAW DICTIONARY 264, 849 (8th ed. 2004).

43 *See id.* at 114, 1516.

44 *See, e.g.*, *Schriro v. Landrigan*, 550 U.S. 465, 488 (2007) ("An *argument*--particularly one made in the alternative and in response to another party--is fundamentally different from a *claim*."); *Hintz v. JPMorgan Chase Bank, N.A.*, 686 F.3d 505, 508 (8th Cir. 2012) ("There is a difference between a new argument and a new issue."); Sarah M. R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251, 298 n.21 (2004) (discussing the inconsistent use of terminology).

45 *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992); *see also* *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

46 *See* SUP. CT. R. 14.1(a) (2010); *Yee*, 503 U.S. at 535-36.

47 *See* *Kamen*, 500 U.S. at 99 ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

48 *See, e.g.*, *Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1304 n.3 (11th Cir. 2008); *Teva Pharms., USA, Inc. v. Leavitt*, 548 F.3d 103, 105 (D.C. Cir. 2008); *Bew v. City of Chicago*, 252 F.3d 891, 895 (7th Cir. 2001).

49 *See, e.g.*, *Ky. Sch. Boards Ins. Trust v. Horace Mann Ins. Co.*, 188 F.3d 507, 1999 WL 685929, at *3 (6th Cir. 1999) (table).

50 *See Montalvo v. Gonzalez-Amparo*, 587 F.3d 43, 48 (1st Cir. 2009) ("[W]hether a contention has or has not been raised in a proceeding is not always absolutely clear; it is at times a matter of degree.").

51 *See* *Cordis Corp. v. Boston Scientific Corp.*, 658 F.3d 1347, 1359 (Fed. Cir. 2011); *United States v. Castellanos*, 608 F.3d 1010, 1017 (8th Cir. 2010); *Teva Pharms., USA, Inc.*, 548 F.3d at 105; *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 604 (4th Cir. 2004); *Wilburn v. Mid-S. Health Dev., Inc.*, 343 F.3d 1274, 1280-81 (10th Cir. 2003); *Pernice v. City of Chicago*, 237 F.3d 783, 787 (7th Cir. 2001); *Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513, 515 (2d Cir. 1982).

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

52 *See* *Elder v. Holloway*, 510 U.S. 510, 512 (1994); *Dixon v. ATI Ladish LLC*, 667 F.3d 891, 895 (7th Cir. 2012).

53 *See generally,* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447 (2009).

54 *See, e.g.,* *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 753 (6th Cir. 2011) ("Our function is to review the case presented to the district court, rather than a better case fashioned after a district court's unfavorable order." (citation omitted)); *Pernice*, 237 F.3d at 787 ("We generally are inclined to permit plaintiffs to hypothesize a new theory on appeal as long as it can be reconciled with the written complaint. On the other hand, a plaintiff may not respond to the dismissal of his complaint by arguing 'a case that was not before the district court."DDD' (citations omitted)); *Universe Tankships, Inc. v. United States*, 528 F.2d 73, 76 (3d Cir. 1975) ("[A] different theory of recovery may not be urged on appeal where prejudice would result to the other party. The test for prejudice in this context is whether the other party 'had a fair opportunity to defend and whether it could offer any additional evidence on the different theory."DDD' (citation omitted)).

55 *See* *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1296 (11th Cir. 2010); *Jones v. Bernanke*, 557 F.3d 670, 676 (D.C. Cir. 2009); *Frederick v. Marquette Nat'l Bank*, 911 F.2d 1, 2 (7th Cir. 1990); *Boyers v. Texaco Ref. & Mktg., Inc.*, 848 F.2d 809, 812 (7th Cir. 1988).

56 *See generally* 9B FED. PRAC. & PROC. Civ. § 2472 (3d ed. 2012).

57 *See* FED. R. CIV. P. 8; *Kanter v. Barella*, 489 F.3d 170, 175 n.4 (3d Cir. 2007).

58 *See, e.g.,* *Elena v. Municipality of San Juan*, 677 F.3d 1, 8 (1st Cir. 2012); *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1366 (Fed. Cir. 2002); *Atlanta Prof'l Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 806 (11th Cir. 1991).

59 *See* *Cloaninger ex rel. Estate of Cloaninger v. McDevitt*, 555 F.3d 324, 336 (4th Cir. 2009).

60 *See* *Kelley v. Crosfield Catalysts*, 135 F.3d 1202, 1204-05 (7th Cir. 1998).

61 *See* *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012).

62 *See* *id.* at 928.

63 *See, e.g.,* *Violette v. Smith & Nephew Dyonics, Inc.*, 62 F.3d 8, 11 (1st Cir. 1995) ("Merely mentioning an issue in a pleading is insufficient to carry a party's burden actually to present a claim or defense to the district court before arguing the matter on appeal."); *Stanspec Corp. v. Jelco, Inc.*, 464 F.2d 1184, 1187 (10th Cir. 1972) ("In the absence of very unusual circumstances, issues raised in the pleadings but not pressed at trial will not serve as a basis for review.").

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

64 28 U.S.C. § 636(b)(1) (2009) ("Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.").

65 *See* *Ridenour v. Boehringer Ingelheim Pharms., Inc.*, 679 F.3d 1062, 1067 (8th Cir. 2012); *Lockert v. Faulkner*, 843 F.2d 1015, 1017-18 (7th Cir. 1988).

66 *See* *Ortiz v. Jordan*, 131 S. Ct. 884, 892 (2011); *Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 154-55 (4th Cir. 2012), *as amended* (May 9, 2012); *A Helping Hand, LLC v. Baltimore County, Md.*, 515 F.3d 356, 369 (4th Cir. 2008).

67 *See* *Howard v. Walgreen Co.*, 605 F.3d 1239, 1243 (11th Cir. 2010).

68 *See* FED. R. APP. P. 10; *C.N. v. Willmar Pub. Sch., Indep. Sch. Dist. No. 347*, 591 F.3d 624, 629 n.4 (8th Cir. 2010); *Solis v. Matheson*, 563 F.3d 425, 437 (9th Cir. 2009); *LaFollette v. Savage*, 63 F.3d 540, 544-46 (7th Cir. 1995), *op. supplemented by* 68 F.3d 156 (7th Cir. 1995); *Stewart v. Dep't of Health & Human Servs.*, 26 F.3d 115, 115-16 (11th Cir. 1994).

69 *See* 28 U.S.C. § 2106; *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008); *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008); *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385 (4th Cir. 2004).

70 *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

71 *See, e.g.*, *Lytes v. DC Water & Sewer Auth.*, 572 F.3d 936, 942 (D.C. Cir. 2009).

72 *See* FED. R. APP. P. 4; *Dill v. Gen. Am. Life Ins. Co.*, 525 F.3d 612, 616 (8th Cir. 2008).

73 *See* *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008).

74 *See* *Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *City of Columbus, Ohio v. Hotels.com, L.P.*, 693 F.3d 642, 652 (6th Cir. 2012); *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 576 (5th Cir. 2010).

75 *See, e.g.*, Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023 (1987).

76 *See, e.g.*, *Trigueros v. Adams*, 658 F.3d 983, 988 (9th Cir. 2011).

77 *See* *Cold Mountain v. Garber*, 375 F.3d 884, 891 (9th Cir. 2004).

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

78 *See, e.g.*, *Simkins v. NevadaCare, Inc.*, 229 F.3d 729, 736 (9th Cir. 2000).

79 *See, e.g.*, *Bylin v. Billings*, 568 F.3d 1224 (10th Cir. 2009); *LNC Invs., Inc. v. Nat'l Westminster Bank, N.J.*, 308 F.3d 169, 176 n.8 (2d Cir. 2002).

80 *See, e.g.*, *Hartmann v. Prudential Ins. Co. of Am.*, 9 F.3d 1207, 1214-15 (7th Cir. 1993).

81 *See, e.g.*, *LNC Invs., Inc. v. Nat'l Westminster Bank, N.J.*, 308 F.3d 169, 176 n.8 (2d Cir. 2002).

82 *See, e.g.*, *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008).

83 *See, e.g.*, *In re Chevron Corp.*, 650 F.3d 276, 289 n.15 (3d Cir. 2011).

84 *See* *Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1148 (10th Cir. 2012); *Wallace v. McGlothan*, 606 F.3d 410, 425-26 (7th Cir. 2010).

85 *See* *Tasker v. DHL Ret. Sav. Plan*, 621 F.3d 34, 41 (1st Cir. 2010); *Csiszer*, 614 F.3d at 871.

86 *See* *Eateries, Inc. v. J.R. Simplot Co.*, 346 F.3d 1225, 1229 (10th Cir. 2003); *Thunderbird, Ltd. v. First Fed. Sav. & Loan Ass'n of Jacksonville*, 908 F.2d 787, 794-95 (11th Cir. 1990).

87 *See, e.g.*, *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 609 (7th Cir. 2006); *United States v. Rodriguez*, 311 F.3d 435, 437 (1st Cir. 2002).

88 *See* *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 361 (11th Cir. 1984).

89 *See* *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012); *Stoiber v. S.E.C.*, 161 F.3d 745, 754 (D.C. Cir. 1998).

90 *See, e.g.*, FED. R. APP. P. 27 & 28(j).

91 *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); *see also* *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

92 *See* *Solis v. Matheson*, 563 F.3d 425, 437 (9th Cir. 2009); *Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.*, 528 F.3d 556, 559-60 (8th Cir. 2008); *Werner v. Werner*, 267 F.3d 288, 294 (3d Cir. 2001).

93 *See* FED. R. APP. P. 10(e).

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

94 *See, e.g.*, FED. R. APP. P. 28(a)(9)(A); 3D CIR. R. 28.1(a)(1); 7TH CIR. R. 28(c); 10TH CIR. R. 28.2(C)(3); *see also Long v. Teachers' Ret. Sys. of Ill.*, 585 F.3d 344, 349 (7th Cir. 2009); *Han v. Stanford Univ.*, 210 F.3d 1038, 1040 (9th Cir. 2000); *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993); *S.E.C. v. Thomas*, 965 F.2d 825, 827 (10th Cir. 1992).

95 *Rodriguez v. Señor Frog's de la Isla, Inc.*, 642 F.3d 28, 37 (1st Cir. 2011).

96 *See* FED. R. APP. P. 28(a)(5); *Brenner v. Local 514, United Broth. of Carpenters & Joiners of Am.*, 927 F.2d 1283, 1298 (3d Cir. 1991); *Adams-Arapahoe Joint Sch. Dist. No. 28-J v. Cont'l Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989).

97 *See Otsuka Pharm. Co., Ltd. v. Sandoz, Inc.*, 678 F.3d 1280, 1294 (Fed. Cir. 2012); *N.L.R.B. v. McClain of Ga., Inc.*, 138 F.3d 1418 (11th Cir. 1998); *Pino v. Higgs*, 75 F.3d 1461, 1463 (10th Cir. 1996).

98 *See Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452-53 (6th Cir. 2003).

99 *See Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749 (7th Cir. 1993).

100 *See Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 604 (4th Cir. 2010); *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147 (9th Cir. 2009); *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 586 (7th Cir. 1999).

101 *Norwood v. Vance*, 591 F.3d 1062, 1068 (9th Cir. 2010).

ASPATORE

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

28 App. Advoc. 391

Appellate Advocate
Summer, 2016

Article

Steven K. Hayes [1]

Copyright © 2016 by Appellate Section, State Bar of Texas; Steven K. Hayes

*391 WHAT HAVE YOU GOT TO LOSE? PERHAPS YOUR APPEAL, IF YOU DON'T USE ERROR PRESERVATION TO SELL YOUR CASE AT TRIAL

1. Error Preservation: What Do You Have to Lose? Perhaps the entire appeal, if error preservation was not used to sell your case in the trial court.

Sometimes, parties take positions because they figure they have nothing to lose by doing so. Appellants might pursue a point on appeal as to which error was arguably not preserved at trial for that reason. Appellees might feel the same way about challenging whether error was preserved on an issue. But the numbers seem to indicate that, with a few exceptions, they are both wrong. The numbers seem to show that, with a few exceptions, finding yourself on the losing side of an error preservation fight correlates with an increased likelihood you will lose on the merits of your appeal.

For those of us who might be future appellants--which includes everyone--we need to convince our trial lawyers to remedy this problem by taking advantage of the opportunity that error preservation provides us to sell our cases in the trial court. Every time their opponent objects to what they do, or tries to put the bum's rush on them, or does something which they should not do, that gives our trial lawyers the opportunity to show the trial court--and perhaps the jury--not only that the opponents are wrong, but also that they are improperly trying to avoid the justness of our trial lawyer's cause. But if ***392** no complaints are raised in the trial court, we will not have the ability to raise those complaints on appeal, unless they are among the very few complaints which can be raised for the first time on appeal.

So let's take a look at error preservation and the lessons we can glean from how courts of appeals have decided hundreds of error preservation decisions they have faced. The first installment of this paper will not contain many citations to specific court decisions--instead, it will look mostly at tendencies and trends and what lessons we learn from those. The next installment of this paper will spend more time focusing upon specific holdings concerning the issues which provide the most frequent error preservation decisions, among other things.

2. The most general lessons from the error preservation universe.

A. The universe: civil cases decided by the courts of appeals in fiscal years 2014 and 2015.

According to my interpretation of the annual reports from the Office of Court Administration, in fiscal years 2014 and 2015, the courts of appeals issued 4,690 opinions on the merits in civil cases. [2] In those years, I found 862 opinions which dealt with civil error preservation. Collectively, those opinions contained 1,022 holdings concerning error preservation. I won't tell you I caught all the error preservation rulings by courts of appeals in civil cases in fiscal years 2014 and 2015. But I'm pretty sure I caught almost all, if not all, the opinions which cited TEX. R. APP. P. 33.1 (605). I also know I caught a lot of opinions in those fiscal years which ruled on error preservation issues without citing Rule 33.1 (257).

***393 B. Overwhelmingly, lawyers took advantage of opportunities to sell their cases.**

The numbers indicate that, as a rule, parties overwhelmingly agree as to what issues were raised in the trial court-i.e., we overwhelmingly agree as to what the case was about. In roughly 83% of the cases decided on the merits during 2014 and 2015, and roughly 95% of the issues in cases decides on the merits in those two years, the parties seem to agree there is no error preservation issue.

Why do I say that? Well, only about 18.4% of the cases decided on the merits during 2014 and 2015 involved error preservation--meaning that nearly 83% did not. As to the percentage of issues which did involve error preservation, assume with me for a moment that, on average, civil appellate cases decided on the merits by courts of appeals during fiscal years 2014 and 2015 involved four issues. I cannot tell you that I kept track of how many issues were raised in the error preservation cases I profiled, much less in all the cases decided by the courts of appeals. But I can tell you that I published a summary of the issues raised in civil appeals in the Second Court of Appeals for about 12 years. Based on that experience, I believe that four issues per case represents a conservative estimate. *See Issues Presented in Some Civil Cases Pending Before the Second Court of Appeals*, compiled and updated by Steven K. Hayes; copyright 2003 to present.

If every one of the 4,690 opinions on the merits in civil cases handed down by appellate courts in Texas in 2014 and 2015 had 4 issues each (on average), that means the cases decided by those opinions raised about 18,760 issues. I only found 1,022 issues (more or less) on which error preservation was challenged-- i.e., only about 5% of the issues dealt with on the merits by the courts of appeals on civil cases in fiscal years 2014 and 2015. That means that the parties agreed that roughly 95% (or possibly more) of the issues on appeal were appropriately raised in the trial court. That's not bad.

***394 C. However, when parties disagreed as to whether an issue was preserved, courts almost always held it was not.**

The sobering news is that, for that 5% where the parties disagreed as to whether error was preserved, the courts of appeals held that error was not preserved about 81% of the time, for these reasons:

- 52.8%, the complaint not raised at all in the trial court;
- 8.4%, the complaint was not timely, or did not comport with other rules;
- 8.8%, no ruling was made on the complaint, or there was a failure to make a record of the complaint;
- 6.4%, the complaint raised at trial differed from that raised on appeal;
- 4.5%, the complaint was not specific enough.

Total: 80.9%, more or less.

D. Other lessons from "The Unpreserved Average": While in the trial court, make a record, get a ruling, and repeatedly contemplate what your case is about.

Think about the numbers set out above. More than half the time the courts of appeal held that error was not preserved because the complaint simply was not raised at all in the trial court. These represent missed opportunities to sell our cases. In yet another

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

19% of the error preservation decisions, the courts of appeals hold that error was not preserved because of what I refer to as "mechanical" deficiencies, to wit:

- the party did not raise the complaint in a timely fashion;

- the party did not get a ruling on the complaint;

- the complaint failed to comply with the governing rule (e.g., TRE 103 concerning an evidentiary ruling, or TRCP 251-254 for continuances); or

- the record did not reflect the complaint or the ruling.

Nearly 10% of the time, the mere making of a record or obtaining a ruling might have preserved error. Here is a table which ***395** compiles the foregoing numbers for the two years:

TABLE 1. ERROR PRESERVATION RATES: WHY COURTS OF APPEALS HOLD ERROR WAS NOT PRESERVED

	FYE 2014	FYE 2015	BOTH YRS.
Error was Preserved	13.3%	10.4%	11.7%
Error Not Preserved	81.3%	81.9%	81.6%
Obj. specific enough	13.3%	10.6%	11.8%
Obj. not specific enough	5.8%	3.4%	4.5%
Obj. not raised at all	51.7%	53.7%	52.8%
Other (no ruling or record, not timely, d/n follow rules	18.9%	Not timely, d/n follow rules [aa1] 8.4% [aa1]	8.4% [aa1]
No record or no ruling	[a1]	No record, no ruling [aa1] 8.8% [aa1]	8.8% [aa1]
Issue on appeal diff. than at trial	4.9%	7.5%	6.4%
D/n have to raise issue at trial	5.4%	7.7%	6.6%

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes

a1 I did not separately compile this data for FYE 2014.

aa1 Since data was not compiled separately for these components in FY 2014, these reflect only the 2015 data.

***396** As you can see, these elements of error preservation remained remarkably constant over the two year period. I will refer to these combined numbers as "The Unpreserved Average." First, we will talk about what that "Unpreserved Average" tells us about lost error preservation opportunities to sell cases in the trial courts. Then we will look at error preservation decisions on specific topics to see if they might identify future opportunities for selling cases while preserving error.

What do I take from "The Unpreserved Average?" First, "The Unpreserved Average" should remind us to make a record of, and get a ruling on, our objections. Rule 33.1 not only entitles us to both, it demands that we do both. That is a threshold reminder that might change the error preservation outcome a little less than 10% of the time. After all--why wouldn't we want a record to show us selling our case, and get some feedback from the judge on what we're selling? If nothing else, that feedback might give us a heads up about how to argue our case during the rest of the time it's in the trial court.

Much more than that, "The Unpreserved Average" suggests we might not spend as much time as we should thinking about all the issues our cases involve, or how to preserve and use them properly. When preservation was challenged, over 60% of the time parties apparently thought of an objection or complaint after it was too late to raise it. I am not going to say that lawyers can realistically anticipate every complaint that might arise at trial. No one can. And perhaps identifying the complaints involved in our cases 95% of the time is as much as we can realistically hope for.

But maybe we can do better. I categorized the error preservation holdings in 2014 and 2015. Here are those categories, listed in descending order (i.e., ranked in order of the most to the fewest error preservation holdings) for the two years combined:

TABLE 2. THE MOST COMMON ERROR PRESERVATION ISSUES

ISSUE	2014	2015	TOTAL	RUNNING TOTAL
Evidence	10.1%	11.1%	10.7%	10.7i%
Jury Charge (incl. Jury Instructions	5.8%	7.5%	6.7%	17.4%
Summary Judgment	7.9%	5.2%	6.5%	23.9%
Attorney's Fees	3.0%	5.4%	4.3%	28.2%

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Legal Sufficiency	3.4%	4.5%	4.0%	32.2%
Affidavits	3.2%	3.6%	3.4%	35.6%
Expert Witness	3.9%	2.9%	3.3%	38.9%
Continuance	3.4%	2.0%	2.6%	41.5%
Discovery	3.0%	1.8%	2.3%	43.8%
Pleadings	1.7%	2.5%	2.2%	46.0%
Due Process	3.0%	0.9%	1.9%	47.9%
Notice	1.1%	2.5%	1.9%	49.8%
Constitutional Challenges [a1]	1.7%	2.0%	1.9%	51.7%
Factual Sufficiency	1.5%	.14%	1.5%	53.2%
Sanctions	0.9%	1.8%	1.4%	54.6%
Jury Argument	1.5%	1.1%	1.3%	55.9%
Judgment [aa1]	1.5%	0.7%	1.1%	57.0%
Family Law [aaa1]	3%	1.1%	2%	

Footnotes

a1 Not including Due Process claims

aa1 This table does not list categories with fewer than 11 holdings for the two years.

aaa1 I segregated some Family Law rulings because of the unique Family Law statutory and common law predicates they involved. I won't discuss those further in this paper.

***398** I detected several notable conclusions from the foregoing table. The top twelve categories--those which comprise nearly half of the error preservation issues the courts of appeals deal with--remained relatively constant. Seven of the ten categories in which error is most commonly not preserved related to issues for which lawyers have the time to prepare (e.g., Jury Charge, Summary Judgment, Attorney's Fees, Affidavits, Continuance, Discovery, and Pleadings). That same observation holds true for at least five of the next seven most common categories (Due Process and Constitutional Challenges, Notice, Sanctions, and Judgments). Maybe these trends indicate that it would not hurt for all of us periodically to spend some quiet time reflecting about our cases, and perhaps recruiting a sounding board to assist us in that exercise. Perhaps one way to couch our ongoing case reviews is periodically to ask ourselves the following questions on each aspect of our cases:

What will I argue if the court disagrees with me on this?

What will the other side argue in response to my position on this?

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

What will the other side do to try to thwart my efforts to raise this issue, present this piece of evidence, or make this argument?

How can I take these opportunities to sell my case?

Just a thought.

3. The big picture from looking at preservation rates as to the most common individual error preservation issues.

I've compiled a table showing the preservation rates for the most common error preservation issues in Appendix 1 to the full version of this paper, which you can find on my ***399** website.[3] For each category, that table also compares the error preservation rates for FYE 2014 and 2015. That table also shows whether, at least for the period from September 1, 2015 through May 18, 2016, the party which claimed adequate preservation won, or won in significant part, or lost on the merits of the appeal (I did not keep track of all those numbers in FYE 2014 and 2015). This comparison shows some things.

A. Appellate lawyers must ruthlessly evaluate each error preservation issue. Those who lose on the error preservation fight fare dismally on the merits.

Successful, seasoned appellate practitioners should advise their parties to pare their appeals ruthlessly to their three or four strongest issues. We probably should follow that same advice when deciding whether to pursue an issue on appeal as to which there is an error preservation problem--and when deciding to challenge whether error has been preserved. It is a sword that cuts both ways. Let me tell you why I've come to that conclusion.

For this subsection of the paper, I want to set a baseline. In their exhaustive paper on why courts of appeals reverse trial courts, Lynne Liberato and Kent Rutter sliced and diced a year's worth of appellate decisions concerning why courts of appeals reverse--that is, why appellants win. *See* Lynne Liberato and Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUSTON LAW REVIEW 994 (2012). Overall, they found there was about a 36% reversal rate on civil cases in Texas courts of appeals. *Id.* at 999. For their study, a "reversal" meant the "court of appeals reversed a significant part [though not necessarily all] of the judgment," and an affirmance meant that the court of appeals at most "reversed or modified only a relatively small" part of the judgment. *Id.*, at 1024-1025. 36% is not a terribly high success rate-- that's ***400** not an evaluation of the work of the courts of appeals, but rather just an observation about the odds disfavoring the appealing party.

I do not have success rate numbers for 2014-2015 comparable to those Lynne and Kent compiled. But for the first nine months of FYE 2016 (through May 18, 2016), I kept track of whether the party claiming adequate error preservation won outright on the merits of the appeal, won in significant part on the merits, or lost outright on the merits. I realize that whether a party won in "significant part" an appeal is probably in the eye of the beholder, and the way I evaluate that criterion may not match how Lynne and Kent viewed it. But what I can tell you is that through the writing of this version of this paper (roughly May 18, 2016):

1) only about 1/3 of the most commonly seen error preservation issues correlate with a win on the merits at a level seen by Lynne and Kent in their study;

2) the average rate of success on the merits for the seventeen most commonly seen error preservation issues is about one-fifth less than the average success rate for appeals seen by Lynne and Kent; and

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

3) parties that unsuccessfully *challenge* error preservation see their opponents win on the merits at a rate nearly twice the average success rate seen by Lynne and Kent.

The following tables show why I come to those conclusions:

TABLE 3. CORRELATING ERROR PRESERVATION ISSUES WITH SUCCESS ON MERITS OF THE APPEALS.

ISSUE	PERCENT OF ERROR PRES. DECISIONS	ASSOCIATED WITH SUCCESS ON THE MERITS FOR PARTY CLAIMING PRESERVATION
Evidence	10.7%	22.0%
Jury Charge (incl. Jury Instructions)	6.7%	34.9%
Summary Judgment	6.5%	22.2%
Attorney's Fees	4.3%	39.1%
Legal Sufficiency	4.0%	37.5%
Affidavits	3.4%	25.0%
Expert Witness	3.3%	0.0%
Continuance	2.6%	14.3%
Discovery	2.3%	0.0%
Pleadings	2.2%	40.0%
Due Process	1.9%	0.0%
Notice	1.9%	0.0%
Constitutional Challenges [a1]	1.9%	0.0%
Factual Sufficiency	1.5%	0.0%
Sanctions	1.4%	0.0%
Jury Argument	1.3%	0.0%
Judgment**	1.1%	42.9%
AVERAGE	100.0%	**30.3%**

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes

a1 Not including Due Process claims

***401** I feel certain that getting another year and a half or so of data will affect the foregoing numbers. In the meantime, only five of the seventeen most common error preservation categories are associated with a winning percentage on the merits that rival even the average success rate found on appeal by Lynne and Kent. Those five categories are Jury Charge, Attorney's ***402** Fees, Legal Sufficiency, Pleadings, and Judgment, in order of frequency. The remainder of the most commonly seen error preservation issues were associated with winning on the merits no more than about 2/3 as often as the average reported by Lynne and Kent--and, for this nine months' worth of decisions, most of the remainder were *never* associated with winning on the merits. Overall, the *average* rate of success on the merits for the seventeen most common error preservation issues was about 30%--about a fifth less than the average success rate on appeal found by Lynne and Kent.

Let's flesh out this out a little bit by looking at the rates of success on the merits for those parties which unsuccessfully claim error was preserved, and which unsuccessfully challenge whether error was preserved, as compared to the average success rate on the merits found by Lynne and Kent in their study. Here is a table which does that:

TABLE 4. CORRELATING SUCCESS ON ERROR PRESERVATION WITH SUCCESS ON THE MERITS.

CATEGORY	COMPLAINING PARTY'S WINNING % (ON THE MERITS) ON APPEAL.
Overall Average, Liberato/Rutter, 2012	36%
Preservation cases in which error was not preserved, FYE 2016	17.4%
All error preservation cases, FYE 2016	26.5%
Preservation cases in which error was preserved, FYE 2016	57.1%
Preservation cases in which error did not have to be preserved FYE 2016	67.9%

***403** See Appendix 3.B to full version of this paper posted on my website.

Folks, the foregoing is significant. Lynne and Kent found that an appeal nets a significant reversal 36% of the time. In roughly nine months in 2016, when a party pursued an issue on which it failed to preserve error, it only won significant relief on the

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

appeal as a whole about 17% of the time--less than half the success rate found in Lynne and Kent's study. And when a party *unsuccessfully* contended that error was *not* preserved (either because error was preserved or because it did not have to be raised at trial), the likelihood that the opponent will significantly prevail on the merits of the appeal skyrockets to nearly 60-70%--nearly twice the reversal rate found in the study done by Lynne and Kent. So, unsuccessfully challenging error preservation correlates with nearly doubling the success rate of your opponent.

What does that tell us about cases involving error preservation in the courts of appeals? That both pursuing an issue which has not been preserved below, or challenging an issue as to which error has been preserved, correlates to losing on the merits at a much higher rate than normal.

I do not think being on the wrong side of an error preservation issue disposes the courts against us, nor can I say that it indicates that we have grasped at straws in a desperate situation. But I do know the above-mentioned correlations exist. And I think that such a correlation behooves us to evaluate carefully whether to pursue an issue where error preservation is involved--or whether to challenge preservation on an issue which has probably been preserved. Or, perhaps, when we find ourselves in either of those situations, perhaps we should carefully, and candidly, evaluate the strength of our position on appeal, and talk to the client about the strengths and weaknesses of the case, and what options the client might have.

In ruthlessly evaluating whether to assert an issue as to which there is a preservation problem, or to challenge an issue which is probably preserved or did not have to be, consider the following observations from the patterns I've seen in the last ***404** two to three years.

1. Do not unwittingly succumb to that most frequent and perhaps unfulfilling of error preservation sirens, to wit, complaints about Evidence.

The most common error preservation topic is Evidence. Evidence accounts for about ten percent of the error preservation docket. Evidentiary complaints have survived a preservation challenge on appeal only about 10% of the time, for all the reasons you would expect in what is a situation typically necessitating immediate reaction and constant diligence:

- thirty percent of the time, the complaint was untimely, did not comply with other rules, was not ruled on or on the record--nearly double the rate of the Unpreserved Average;

- nearly forty percent of the time, the complaint was not raised at all.

Keep in mind, too, that an evidentiary complaint will only succeed on appeal if we show an abuse of discretion, coupled with a showing that the incorrect evidentiary ruling resulted in an erroneous judgment. *Willie v. Comm'n for Lawyer Discipline*, 2015 Tex. App. LEXIS 2466, 27 (Tex. App-. Houston [14th Dist.] Mar. 17, 2015). That does not happen terribly often--when an evidentiary complaint has been challenged on error preservation grounds, the party asserting that the evidentiary complaint was preserved obtained a favorable judgment from the court of appeals less than 20% of the time.

In a world where the courts of appeals tell us to limit the number of our issues to no more than six, and preferably as few as three, and with a huge hill to climb in order to prevail on this most frequently pursued, and overwhelmingly unsuccessful, error preservation issue, it makes sense to at least ensure that the complaint satisfies the mechanical requirements of TRAP 33.1. If your complaint about an evidentiary ruling is questionable in any respect, you might be better off placing it at the top of your "cull" list.

***405 2. Complaints about factual sufficiency as to a jury verdict which have error preservation problems are as unfulfilling as complaints about evidence.**

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

In a non-jury trial, factual sufficiency complaints can be raised for the first time on appeal. Not so in jury trials--in a jury trial, you *must* raise a factual sufficiency complaint in a motion for new trial, or it is not preserved. TEX. R. CIV. PRO. 324(b)(2).

The error preservation rate for a factual sufficiency complaint averages about 6.3%, and roughly 90% of the time the party claiming error preservation as to a factual sufficiency complaint failed to obtain a favorable judgment on any aspect of the appeal.

3. A complaint about a continuance which has error preservation problems is not often associated with a favorable judgement for the party asserting the complaint.

Complaining about the granting or denying of a continuance yields only a 20% success rate. Nearly half of the preservation-challenged complaints about continuances failed because they did not satisfy the mechanical requirements of TRAP 33.1--that is, the complaint was not timely, did not comply with other rules, or was not accompanied by a ruling or a record of the objection. The poor success rate on appeal for preservation-challenged parties complaining about continuances paints the entire appellate enterprise as a bit desperate. Keep that in mind.

4. Similarly, if you have a preservation problem concerning a constitutional complaint, ruthlessly evaluate whether to raise that complaint on appeal.

In terms of decisions involving error preservation, 90-100% of the time Constitutionality and Due Process issues fail because they are not raised at all in the trial court, and (as you would expect) their error preservation rate is abysmal (3% or ***406** less, overall). Furthermore, the parties asserting a preservation-challenged complaint concerning a constitutional issue other than due process never got a completely favorable judgment on appeal, and they only got a partially favorable judgment about 18% of the time; the due process complainers *never* obtained a favorable judgment on appeal.

But all of these complaints shared one other common characteristic which led to the desperation label: when error preservation was involved as to these complaints, the parties which asserted these complaints virtually never got a favorable judgment from the court of appeals on the merits of the appeal (parties asserting Constitutionality and Due Process complaints never got a favorable judgment on appeal, and parties asserting an Evidentiary complaint got a favorable judgment on appeal less than 20% of the time).

B. None of the most common error preservation issues yields a ruling that error was preserved more than about 1/3 of the time--and most of those issues find error preserved a tenth of the time or less.

If you look at the first column in Appendix 1 to the full version of this paper posted on my website, you will notice some pretty wild swings in error preservation rates between 2014 and 2015 on some issues. For example, error was preserved on legal sufficiency challenges 40% of the time in 2014, and not at all in 2015. But you will also notice that, for the three most common categories (the "Big Three"--Evidence, Jury Charge, and Summary Judgment) the error preservation rates were pretty consistent between 2014 and 2015. It could be that, unless you have 30-40 error preservation decisions a year (such as you have with the Big Three), you get swings like we see from year to year (if you only look at a group of 15 decisions, for example, one decision can swing the numbers by 6%).

But the point is, *none* of these categories do well, from an error preservation standpoint. Even the most promising issue--Jury Argument--saw error preserved only about 30% of the time. ***407** The remainder of the most common error preservation issues saw error preserved 20% of the time or less, and most were at 10% or less. There are no common error preservation issues where the courts have indicated a tendency toward leniency.

C. Except for legal (and factual) sufficiency in a bench trial, none of the issues which can be raised for the first time on appeal are among the most common error preservation issues.

In addition to legal and factual sufficiency in a bench trial, there are other issues which can be raised for the first time on appeal (jurisdiction, etc.), and we will mention them later. But note that none of these other issues are really among the most commonly raised error preservation issues. Perhaps everyone understands they can be raised for the first time on appeal.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

D. Two of the six most frequent error preservation issues on appeal--summary judgment and attorney's fees--most often fail because the complaints were not raised at trial. This may be explained by the time constraints in Summary Judgment practice, and by a corresponding failure to treat a claim for attorney's fees as a significant cause of action.

Summary Judgment and Attorney's Fees are the third and fourth most common error preservation issues on appeal, respectively, counting for nearly 11% of the error preservation docket. Yet despite the frequency with which they appear on the error preservation docket, most of the time these complaints fail because they were not raised at trial (50% of the time Summary Judgment complaints fail because they are not raised at trial; that is true 75% of the time as to Attorney's Fees complaints).

As to Summary Judgments, I think the most significant problem comes from the time constraints of summary judgment practice. Many times, we have three weeks--often in the middle of an otherwise busy practice and in a case which is coming ***408** down to the trial setting or to other trial-related deadlines-- to respond to a motion for summary judgment, as well as to object fully to that motion and the evidence supporting it. And, despite the protections which discovery and special exceptions practice afford us, summary judgment practice may be the moment when our opponents' position first comes completely into focus. Having three weeks to respond in the midst of a hectic schedule is not necessarily the best time to think of everything that can thwart your opponents' arguments and tactics.

As to Attorney's Fees, I think we often do not fully embrace, or address, the fact that attorney's fees can comprise a really significant part of an adverse judgment. We need to approach, from the very beginning, the claim for attorney's fees as a separate, distinct, element-driven cause of action, one deserving as much of our attention as any of the other causes of action in the case. If we intend to thwart--or prosecute, depending on which position we advocate--a claim for fees, we cannot treat that claim as an afterthought if we intend to preserve error for appeal.

The “failure to raise in the trial court” aspect of both of these error preservation categories reinforces the argument that we should periodically review and reflect on the issues in our cases, and think about what ammunition we will need on appeal as to each cause of action should the case go wrong in the trial court.

E. You have to make a record of your complaint and get a ruling on it. We see the failure to do so most frequently regarding complaints about affidavits, continuances, summary judgments, and jury arguments. Draft an order for, and use the order during, the hearing on the same.

With the exception of jury argument, these issues probably demonstrate more than any other areas the need to have a well-drafted order before your hearing, and to make sure the judge ***409** uses it at the hearing. Judges will tell you such an order is an invaluable road map for them, and an essential checklist for you. A signed order not only confirms the judge's ruling but also reminds you in advance of all the topics you need to cover, and should remind you to create a record of the same, as well.

Complaints about jury arguments are more difficult, heat of the moment, perceive-and-react-affairs. This phenomenon suggests the wisdom of having a template in your trial notebook, in bullet point or schematic format, which outlines the essentials for a complaint about an improper jury argument. This paper covers jury argument later. At the very least, ensure you make a record of the jury argument--and also ensure that the judge rules, on the record, in response to your complaint.

4. Conclusion

In the next issue of *The Advocate*, we will take a look at some other lessons which come from looking at several years' worth of error preservation. Those will include rulings on the most common error preservation issues, some unusual error preservation issues, and some reflections about error preservation decisions in the individual courts of appeals. In the meantime, I hope this initial installment discussing error preservation has helped you with some suggestions for you to pass along to your trial lawyers, and with some suggestions about ruthlessly evaluating whether it is best to undertake or forego error preservation fights on appeals in the future.

Footnotes

[1] Law Office of Steven K. Hayes, 500 Main Street, Suite 340, Fort Worth, Texas 76102. Many thanks to Hannah Cline, Candidate for Juris Doctor 2017, SMU Dedman School of Law and 2015 Summer Clerk for the Honorable Martin Hoffman, 68th District Court. Hannah edited an earlier version of this paper (If you find mistakes, it's because Steve ignored Hannah's advice, or has added stuff since then).

[2] I include in this number the cases OCA designated as: Cases affirmed; Cases modified and/or reformed and affirmed; Cases affirmed in part and in part reversed and remanded; Cases affirmed in part and in part reversed and rendered; Cases reversed and remanded; and Cases reversed and rendered.

[3] Here is the link to that paper. In case the link gets broken, here is the link to the page on my website where you can find a link to that paper. http://www.stevehayeslaw.com/resume.html.

28 APPADVOC 391

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Table B-1.
U.S. Courts of Appeals–Cases Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding,
During the 12-Month Period Ending December 31, 2022

Circuit and Nature of Proceeding	Filed			Terminated									Pending
					On Procedural Grounds				On the Merits				
	Total	Original	Reopened	Total	Total	By Consoli-dation	By Judge	By Staff	Total	By Consoli-dation	After Oral Argument	After Submission on Brief	
8th	**2,621**	**2,612**	**9**	**2,704**	**514**	**5**	**234**	**275**	**2,190**	**262**	**317**	**1,611**	**1,481**
Criminal	975	972	3	929	138	-	61	77	791	36	95	660	650
U.S. Prisoner Petitions	231	229	2	236	41	-	24	17	195	2	6	187	59
Other U.S. Civil	101	101	-	105	26	1	9	16	79	6	28	45	73
Private Prisoner Petitions	475	473	2	443	156	-	83	73	287	11	12	264	157
Other Private Civil	445	443	2	615	115	3	39	73	500	201	155	144	378
Bankruptcy	10	10	-	11	5	1	3	1	6	-	2	4	6
Administrative Agency Appeals	96	96	-	91	25	-	9	16	66	5	18	43	116
Original Proceedings and Miscellaneous Applications	288	288	-	274	8	-	6	2	266	1	1	264	42

https://www.uscourts.gov/statistics/table/b-1/statistical-tables-federal-judiciary/2022/12/31

THE HON. JAMES G. MIXON TRIAL PRACTICES SYMPOSIUM

June 9, 2023

Presentation from 1:45 to 2:45

Evidence: Effective Use of Deposition Testimony at Trial and Traps to Avoid

Vincent O. Chadick

Quattlebaum., Grooms & Tull, PLLC

Handout Materials

THE HON. JAMES G. MIXON TRIAL PRACTICES SYMPOSIUM

June 9, 2023

Presentation from 3:00 to 4:00

Proving Your Case in Bankruptcy Court

Hon. Phyllis M. Jones

United States Bankruptcy Chief Judge for the

Eastern and Western Districts of Arkansas

Hon. Richard D. Taylor

United States Bankruptcy Judge for the

Eastern and Western Districts of Arkansas

Hon. Bianca M. Rucker

United States Bankruptcy Judge for the

Eastern and Western Districts of Arkansas

Handout Materials

Discussion Questions

1. You filed an AP, properly served the summons and complaint, and the defendant didn't answer or otherwise respond. You have filed your motion for entry of default (the first step). Now you need to file a motion for default judgment. You are preparing an affidavit to be filed with your motion for default judgment. You plan to include:

    a. That the defendant is not currently in active military service.
    b. That the defendant is not an infant or incompetent.
    c. Both a and b.
    d. What affidavit?

2. Your chapter 13 debtor has a confirmed plan providing for payments of $200 a month over 60 months based upon her projected disposable income calculation determined at the time of confirmation. In year three, she gets a raise netting an additional $100 a month. Must you amend her plan?

    a. Maybe.
    b. Maybe not.
    c. Negotiable?
    d. Remain very quiet.

3. You represent a chapter 13 debtor. There is an objection to confirmation pending for hearing. You have previously asked the debtor to appear at the hearing. The day before the hearing, you resolve the objection with the chapter 13 trustee. You have spoken with this client many times, and you know that the best way to reach him is by telephone. You should immediately:

    a. Mail your client a letter letting him know he does not have to appear.
    b. Email your client letting him know he does not have to appear.
    c. Call your client and let him know not to appear. If you don't reach him, leave a voicemail and send a follow-up email and/or text if he has an email address and/or textable phone number.
    d. Do C and if you still cannot reach him, let the Court know just in case he appears at the hearing.

4. Your client needs relief immediately for whatever reason. You say no problem, I'll file a motion and ask the Court for an expedited hearing. You draft your motion and title it, "motion" for whatever is needed. Then at the end of the motion you add a paragraph saying your client would like to have this matter set for an expedited hearing. After filing your motion, you should:

   a. File a separate motion for expedited hearing.
   b. Call to alert the Court that you need an expedited hearing.
   c. Both a and b.
   d. Sit back and wait for the hearing to be set in due course.

5. While members of an LLC or partnership, one debtor committed fraud, the other did not. If both file Chapter 7, will both be unable to discharge the resulting debt despite differing degrees of culpability?

   a. Only the guilty shall pay.
   b. Both are guilty, both should lose.
   c. Some parts of the code are agnostic.
   d. All of the above.

6. You have a confirmed plan and it is getting to the end of the plan term. The debtor needs more time to complete the plan due to various reasons, including illness. You propose a "Covid" plan extending the plan to 74 months. You expect:

   a. No objections.
   b. The plan to be confirmed.
   c. The Trustee to object.
   d. The Court to set a confirmation hearing.
   e. The sun to come out tomorrow.

7. You represent A Bank in an action to determine the dischargeability of a debt under 11 U.S.C. § 523(a)(2). You appear on the trial date. You seek to admit Plaintiff's exhibits 1-50, several exhibits of which contain hearsay, including a written statement by a lay witness that the debtor told her "Today, I got a giant loan from A Bank based on fraudulent numbers I put on my personal financial statement." The lay person is not present to testify. The debtor is pro se, does not appear for trial but was properly noticed, and she was not subpoenaed. Because no party objects to the introduction of any exhibit, should the Court admit Exhibits 1-50?

   a. Yes. The Debtor's failure to object to exhibits is a waiver of all objections.
   b. No. The trial must be continued to give the debtor the opportunity to object.
   c. Maybe. The Debtor's failure to object to exhibits is a waiver of all objections unless admitting such evidence constitutes a plain error resulting in manifest injustice.

8. You just filed amended schedules for your client. Right after doing so you see a hearing has been set on the amended schedules. You are not sure why the hearing has been set. You should:

   a. Call the staff attorney to ask why the hearing was set.
   b. Call a fellow bankruptcy attorney to see if they know what is going on.
   c. Note the date on your calendar so you can make an appearance.
   d. Ignore it – it must be a mistake.

9. You have a hearing coming up next week. Your client lives in Florida and you need him as a witness. Your client would rather not travel to Arkansas for the hearing but is available to appear by telephone or by Teams that became so useful during Covid. You should:

   a. File a motion with the Court requesting permission for your client to appear telephonically or by video.
   b. Call the judge's staff attorney to ask if he should plan to appear by telephone or by video.
   c. Prepare an affidavit for your client to sign to introduce into evidence at the hearing in lieu of his appearance.
   d. Ask for a continuance and hope the matter settles before the next setting.

10. You file an objection to a proof of claim filed by ABC Bank. You should serve the objection and notice of opportunity to respond:

    a. By first class mail addressed to the person most recently designated on the claim as the person to receive notices, at the address so indicated.
    b. By certified mail addressed to an officer of ABC Bank.
    c. Both a and b.
    d. No need to serve the objection and NOTO, that's what ECF is for.

11. You file two motions to avoid lien in a case: one against First Bank and the other against ABC Lumber Co. You serve both motions by certified mail addressed to an officer of each respective organization. Was service good?

    a. Yes – certified mail is always the superior method of service.
    b. Yes as to First Bank but no as to ABC Lumber Co.
    c. Yes as to First Bank and maybe as to ABC Lumber Co.
    d. No – try again.