

PRESENTED AT

UT Conference on State and Federal Appeals

June 10-11, 2021

Austin, Texas

Preserving Appellate Complaints in Federal Court

Reagan W. Simpson

Reagan W. Simpson
Yetter Coleman LLP
Houston, Texas

rsimpson@yettercoleman.com
512.779.1391

Reagan W. Simpson is a Senior Partner with Yetter Coleman LLP in Houston, Texas. He is a fellow of the American Academy of Appellate Lawyers, a Fellow of the American College of Trial Lawyers, a Member of the American Board of Trial Advocates, and a Member of the American Law Institute. After graduating from the University of Texas Law School, Reagan clerked for Thomas Gibbs Gee of the United States Court of Appeals for the Fifth Circuit. Reagan has spent his 42-year career trying cases to juries and appealing cases tried to a jury.

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Denied Motions for Summary Judgment.....	2
III.	The Pretrial Order	3
IV.	Motions in Limine.....	5
V.	Motions to Exclude Experts.....	6
VI.	Jury Selection.....	8
VII.	Trial Motions for Judgment as a Matter of Law	10
VIII.	Court’s Charge	15
	A. Exceptions to the requirement of objecting to the charge.....	17
	1. Plain error review in the absence of objections	17
	2. The futility or pointless formality exception	17
	3. The change in law exception.....	18
	B. Requesting additions to the court’s charge	18
	C. Presenting objections to the court’s charge	20
	D. Objections must be on the record.....	20
	E. Objections must be specific	21
	F. Timing of objections	22
IX.	Jury Deliberations and Verdict	24
	A. Communications with the jury.....	24
	B. Inconsistent verdicts.....	25
	C. Partial verdicts	27
X.	Post-Trial Motions	27
	A. The available motions and time for filing.....	27
	B. Renewed motions for judgment as a matter of law under Rule 50(b)	30

XI.	Findings of Fact and Conclusions of Law	33
A.	The procedures for findings of fact and conclusions of law at the end of a bench trial	33
B.	Granting judgment during a bench trial under Rule 52(c).....	34
C.	Motions to amend findings of fact	36
1.	Purposes of a Rule 52(b) motion	36
2.	When a 52(b) motion may be needed for appeal	36
3.	Time for moving to amend findings	38

I. INTRODUCTION

80% of Preservation: On the record, clearly say what you want the court to do and get a definitive ruling or object to the failure to rule.

This paper is intended for an advanced audience, so it covers some nuances and troublesome issues regarding preserving appellate complaints. I use the term preserving complaints, because that is what we appellate and trial lawyers do. As a law professor with whom I was working on a project remarked, “Why would anyone want to preserve error?” We don’t. Judges make errors, and we preserve the right to complain on appeal.

Although this paper will not discuss the basics, the main rules for preserving complaints on appeal can be summarized briefly:

- Explain specifically and clearly what you want the trial court to do on the record. Often you do that by making an objection, but also by other means, such as offering proof of what you would have presented to the jury, or by asking the court to remove a prospective juror or to invalidate the other side’s discriminatory jury strikes. Whatever you want the trial court to do, express it clearly and specifically on the record.
- Ask the trial court and obtain on the record a definitive ruling on what you told the trial court you wanted it to do. Here you need to be careful because now you are depending not on yourself but on someone else—the trial court. Make sure the ruling is definitive rather than preliminary, and make sure it is on the record.
- Object to any failure of the trial court to rule. You should not need to do this, but from time to time you do, and you may have to endure the ire of the trial court.
- Finally, make sure that the appellate court will know what you are talking about. An issue may have become a dead horse that you have beat over and over again during pretrial and again at trial. That can lead to the use of shorthand references about the issue. The issues will be new to the appellate court, which may not decode any shorthand references.

Following the above rules will suffice probably 80% of the time in preserving complaints for appeal. This paper will focus on the other 20% of the time, when you have to know some other rules or procedures to follow.

A final introductory note is to recommend another resource on the issues about preserving appellate complaints, a book published by Tort, Trial, and Insurance Section of the American Bar Association. I was a main author and the editor of the book, from which I derive no royalties. As far as I know, it is the only such publication on all aspects of preserving appellate complaints that covers all circuits. If you have any problem in locating this book, email me at rsimpson@yettercoleman.com.

II. DENIED MOTIONS FOR SUMMARY JUDGMENT

The denial of a summary judgment preserves nothing for appeal, but if that is all you have, argue the “pure legal issue” exception.

I have had trial lawyers tell me how they have preserved an issue because they raised it in a summary judgment. But that is seldom sufficient for preservation. A denial of a motion for summary judgment does not ordinarily raise an appellate issue. *See Rekhi v. Wildwood Indus. Inc.*, 61 F.3d 1313 (7th Cir. 1995). There is a limited exception that you need to know if you are hired after trial, and all you have to preserve an issue on appeal is a denied summary judgment.

In most federal circuit courts, an issue can be reviewed based solely on the denial of a summary judgment if the issue is a pure legal issue. *See generally* Aaron S. Bayer, “When can you appeal a summary judgment denial?” *The Nat’l L.J.* (Jan. 7, 2013). A number of courts, while recognizing the general rule that the denial of a summary judgment is not appealable, have been willing to consider pure legal issues that have been decided only by summary judgment. *See Rothstein v. Carriere*, 373 F.3d 275 (2d Cir. 2004); *Tompkins v. Crown Corr., Inc.*, 726 F.3d 830 (6th Cir. 2013); *Richison v. Ernest Group*, 634 F.3d 1123 (7th Cir. 2014) (plain error review only); *Houskins v. Sheahan*, 549 F.3d 480 (7th Cir. 2008); *Banuelos v. Constr. Laborers’ Trust Funds for S. Calif.*, 382 F.3d 897 (9th Cir. 2004); *Revolution Eyewear Inc. v. Aspex Eyewear Inc.*, 563 F.3d 1358 (Fed. Cir. 2009); *Feld v. Feld*, 688 F.3d 779 (D.C. Cir. 2012).

But the First, Fourth, Fifth Circuits, and Tenth Circuits have taken a hard line against reviewing on appeal the denial of a summary judgment. *See Ji v. Bose Corp.*, 626 F.3d 116 (1st Cir. 2010); *Varghese v. Honeywell Int’l Inc.*, 424 F.3d 411 (4th Cir. 2005); *Blessy Marine Servs., Inc. v. Jeffboat, L.L.C.*, 771 F.3d 894 (5th Cir. 2014); *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515 (10th Cir.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Preserving Appellate Complaints in Federal Courts

Also available as part of the eCourse

[2021 eConference on State and Federal Appeals](#)

First appeared as part of the conference materials for the
31st Annual Conference on State and Federal Appeals session
"Preserving Appellate Complaints in Federal Courts"