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Preserving Appellate Complaints in Federal Court

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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 led 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.

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