

To Err is Human; To Preserve Error, Divine:¹
Strategies for Making the Record for Appeal

Winning Strategies Seminar

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“[F]irst, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two.”²

1. Assume you will lose and assume you will appeal.

- “Aim, fire, and engage with an appeal in mind. It is important to think about a possible appeal at every stage of the litigation.”³ Know your case: identify the issues you expect to lose and anticipate potential adverse rulings. Build the appellate record by preserving your objections (draft dispositive motions and motions in limine, object at trial at the proper time and on the proper grounds, get key rulings on the record, submit proposed instructions that adequately preserve claims of instructional error, etc.). Consider assigning one person on the trial team the specific task of preserving appellate issues.

2. If it’s not in the record, it didn’t happen.

- The record is what was “said” (the transcript of the hearing or trial) and what was “read” (the pleadings, motions, exhibits, and other written materials presented to the trial court).
- “[T]he only proper function of a court of appeals is to review the decision below on the basis of the record that was made before the district court.” *Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1474 (10th Cir.1993); *United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000) (“This court will not consider material outside the record before the district court.”).
- Preserving error and compiling the record is counsel’s responsibility. “The court need not remedy any failure by counsel to designate an adequate record. When the party asserting

² *Protect Our Water v. Merced County*, 110 Cal. App. 4th 362, 364 (2003) (stating “three immutable rules” of appellate practice).

³ Alex Wilson Albright and Susan Vance, *Ten Practical Tips for Making Your Case Appealable (Or, How Not to Lose Your Appeal at Trial and when to Call in the Cavalry)*, 35 No. 2 Litigation 41 (Winter 2009) (attached).

an issue fails to provide a record sufficient for considering that issue, the court may decline to consider it.” 10th Cir. Rule 10.3(B).

3. Inadequate preservation kills (availing arguments).

- “It is the general rule ... that a federal appellate court does not consider an issue not passed upon below.” *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).
- “If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed.” *Puckett v. United States*, 556 U.S. 129, 134 (2009); *see, e.g., Chambers v. Barnhart*, 389 F.3d 1139, 1142 (10th Cir. 2004) (“The scope of our review ... is limited to the issues the claimant properly preserves in the district court and adequately presents on appeal.”).
- “Absent compelling reasons, we do not consider arguments that were not presented to the district court.” *Crow v. Shalala*, 40 F.3d 323, 324 (10th Cir.1994); *see also Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721–22 (10th Cir.1993) (appellate court will not consider a new theory on appeal, even if it falls under the same general category as an argument raised below).

4. Know when a ruling becomes appealable.

- Final decisions. A final judgment after trial is appealable. Fed. R. Civ. P. 54(a); 28 U.S.C. § 1291. A final judgment is one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Catlin v. United States*, 324 U.S. 229, 233 (1945). As a general matter, the following orders at other stages of the litigation also are “final” and appealable: orders dismissing complaint without leave to amend; orders granting summary judgment as to all claims; and orders imposing a sentence in a criminal case.
- Interlocutory orders. Rulings that decide some issue(s) in the case, but not the whole case, are “interlocutory orders.” Certain interlocutory orders, though not final, also are properly appealed. The most common example is an order granting or denying a motion for injunctive relief. 28 U.S.C. § 1292(a) (1).

5. Know the applicable standards of review.

- “Few issues are more critical to the success of an appeal than the standard of review. See *Dickinson v. Zurko*, 527 U.S. 150, 152-61 (1999) (“The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used.”); *News-Press v. U.S. Dep’t of Homeland Sec.*, 489 F.3d 1173, 1187 (11th Cir. 2007) (“In even moderately close cases, the standard of review may be dispositive of an appellate court’s decision.”).
- Familiarity with the standard of review can guide trial counsel in ensuring that the record on that issue is properly developed. The standard of review varies depending on the nature of the issue and the error.
 - a. Generally, questions of law and constitutional issues are reviewed de novo (no deference to trial court decision); factual determinations are reviewed for clear error under an abuse of discretion standard (significant deference to trial court); mixed questions of law and fact are reviewed either for clear error or under a de novo standard, depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles.
- When an issue is not preserved, the court may, in its discretion review for plain error. See *United States v. Rosales–Miranda*, –F.3d –, 2014 WL 3033419, at *3 (10th Cir.2014) (“The parties also agree that [the defendant] failed to preserve an objection to that error. This forfeiture triggers plain-error review.”). Plain error review is a “rigorous” standard to satisfy. *United States v. McGehee*, 672 F.3d 860, 876 (10th Cir. 2012).

6. Object.

- A specific objection is better than a general objection; an earlier objection is better than a later objection; and any objection is better than no objection.

- Be precise. Exactly what evidence are you seeking to exclude? Which rule supports your objection? If you cannot cite the rule, describe the problem and explain the legal theory. If you object on multiple grounds, make each theory known.
- If your preferred form of relief is not granted, request something else. If you are not granted a mistrial, ask for the testimony to be stricken, or request an instruction to the jury. If you disagree with a jury instruction, supply an alternative.
- Watch for changed circumstances.
 - a. Renew your objection at critical junctures—after the magistrate issues a report, after the close of each side’s case, before the jury is charged, after the verdict, etc.
 - i. On evidentiary issues, once the court rules definitively on the record-- either before or at trial--a party need not renew an objection or offer of proof to preserve a claim of error for appeal. FRE 103(a).
 - b. To be sure you have preserved the issue, objections made and overruled in pre-trial motions should be renewed during trial, especially if the ground for objection has changed.
- Trial counsel will point out the dangers of objecting too much (you will anger the district judge or appear unreasonable in front of the jury). Knowing the key issues in your case will allow you to target your objections and “let slide” what is inconsequential. Do not back down from your objection when you need to preserve the record. Keep in mind the potential harm from cumulative errors—those small issues you let pass can add up.

7. Get a ruling.

- Making an objection is not enough: preserving errors for appeal requires obtaining a final ruling. If the discussion moves away from the underlying objection, remember to request a ruling on the objection before moving on. Requesting an explanation of a ruling can also ensure that the district judge has understood your objection.

8. Memorialize off-the-record rulings.

- Do more than note the fact that your objection was made and overruled—explain the context on the record so the appellate court can understand the objection.

9. Forfeiture v. Waiver.

- “Waiver is accomplished by intent, but forfeiture comes about through neglect.” See *United States v. Zubia–Torres*, 550 F.3d 1202, 1205 (10th Cir. 2008) (distinguishing between waiver and forfeiture).
- You forfeit an issue by failing to object. Though the issue is not preserved, it can still be reviewed by the appellate court under plain-error review.
- Waived issues will not be considered. An affirmative decision to give something up or an agreement that a ruling was correct is a waiver. If your objection is overruled, move on but be careful not to concede that the court was correct in its ruling.

10. Be careful what you wish for.

- Under the invited error doctrine, when a litigant requests and receives a favorable ruling, he or she cannot later complain on appeal that the trial court erred in acceding the request. See *United States v. Deberry*, 430 F.3d 1294, 1302 (10th Cir. 2005) (“[T]he invited-error doctrine precludes a party from arguing that the district court erred in adopting a proposition that the party had urged the district court to adopt.”).

11. Supplementing the Record. The general rule of a closed appellate record is not absolute.

Under certain circumstances, counsel can file a motion to supplement the record:

- a. FRAP 10(e)(2)(C) permits supplementation to correct inadvertent admissions, not to present new evidence.
- b. FRE 201 permits appellate courts to take judicial notice of indisputable facts or other court proceedings that directly relate to the issues on appeal. Use this rule when seeking to supplement the appellate record with new materials.
- c. Inherent equitable authority allows for supplementation when it will advance the principles of fairness, truth, or judicial efficiency. See *United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000) (recognizing appellate court’s “inherent equitable power to supplement the record on appeal” with matters that were not before the district court).

Additional Resources on Preserving the Record for Appeal

5 AM. JUR. 2D *Appellate Review* § 441-88 (West 2014).

George C. Harris and Xiang Li, *Supplementing the Record in the Federal Courts of Appeals: What if the Evidence You Need is not in the Record?* 14 J. App. Prac. & Process 317, 317 -318 (2013).

Brock A. Swartzle, *Using “Inherent Equitable Authority” to Expand the Record on Appeal*, App. Prac. J. 1, 3 (Fall 2010).

James D. Masterman and Michael Rifkon, *Rearranging the Deck Chairs when the Ship is Going Down: Protecting Your Record For Appeal*, SV023 ALI-ABA 639 (2014).

Brenda C. See, *Written in Stone? The Record on Appeal and the Decision-Making Process*, 40 Gonz. L. Rev. 157, 157 (2004-2005).

David M. Axelrad, *Paint Me a Picture: A Conversation on the Appellate Process*, FOR THE DEFENSE, Nov. 2009, at 26.

James F. Bogan III, *Best Practices in Appellate Litigation*, ASPATORE, Mar. 2013, at 2013 WL 574532.

Renée C. Callantine, *Preserving the Record for Appeal*, BRIEF, Fall 2012, at 50.

Michael Catalano, *Making and Preserving the Record—Objections*, 6 AM. JUR. Trials 605 (West 2014) (1967).

Christine R. Davis, *Striking a Balance to Win: Balancing the Need to Win the Trial with the Need to Preserve the Record on Appeal*, 81 FLA. B. J. 18 (2007).

Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 MINN. L. REV. 2016 (2012).

L. Steven Emmert, *Preserving Issues for Appeal: Do It Right and Don't Let It Wait*, PRAC. LITIGATOR, Sept. 2008, at 15.

Thom Hudson, *Preserving the Appellate Record: Five Common Traps to Avoid*, 40 Ariz. Attorney 32, 32 (Mar. 2004).

Lawrence Kaplan, Comment Note, *Sufficiency, in Federal Court, of Raising Issue Below to Preserve Matter for Appeal*, 157 A.L.R. Fed. 581 (West 2014) (1999).

Ronald I. Mirvis, Annotation, *Correction, Modification, or Supplementation of Record on Appeal Under Rule 10(e) of Federal Rules of Appellate Procedure*, 60 A.L.R. Fed. 183 (West 2014) (1982).

Robert F. Parsley, *Litigating Waivers of Issues for Appeal and on Appeal in Federal Courts*, ASPATORE, Mar. 2013, at 2013 WL 574524.

Kirk A. Pittard & Leighton Durham, *How Can Appellate Counsel Add Value to Your Case Throughout Litigation?*, in 2 AM. ASS'N FOR JUSTICE, ANNUAL CONVENTION REFERENCE MATERIALS 1907 (2007).

Fred Warren Bennett, *Preserving Issues for Appeal: How to Make a Record at Trial*, 18 Am. J. Trial Advoc. 87, 87 (Summer 1994).

George A. Stein, *The Six Commandments of Effective Appellate Preparation*, THE CHAMPION, Feb. 2009, at 26.

MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS JURISDICTION AND PRACTICE (3d ed. 2013).

Julie M. Williamson & Scott S. Evans, *Preserving the Record for Appeal*, COLO. LAW., Nov. 1999, at 63.