

CDLA TRIAL SKILLS REFRESHER SERIES

Preserving Your Record: Trial and Appellate Perspectives

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AGENDA

- Why preservation matters
- Preservation standards and strategies
 - Pre-trial
 - During trial
 - Post-trial
- Interactive examples
- Questions

WHY PRESERVATION MATTERS



UNPRESERVED MEANS UNREVIEWED



UNPRESERVED MEANS UNREVIEWED

- No entitlement to civil plain error review
- Available only in “rare civil cases involving unusual or special circumstances”
- Even then, “only when necessary to avert unequivocal and manifest injustice”
- Trial counsel’s failure to preserve an issue below does not satisfy this standard

UNPRESERVED MEANS UNREVIEWED - SOURCES

- *Blueflame Gas, Inc. v. Van Hoose*, 679 P.2d 579 (Colo. 1984)
- *In re E.R.S.*, 2019 COA 40
- *Harris Grp. v. Robinson*, 209 P.3d 1188 (Colo. App. 2009)
- *Robinson v. City & Cty. of Denver*, 30 P.3d 677 (Colo. App. 200)

Trial Attorney Tips for Preservation



- Be prepared
- Be diligent
- Slow down
- Consult with appellate counsel

PRESERVATION STANDARDS AND STRATEGIES



PRE-TRIAL STANDARDS

- Affirmative defenses and compulsory counterclaims
 - Specifically asserted in a party's pleading
- Motion to dismiss
 - Must re-raise at appropriate time, unless statutory right
- Summary judgment motions
 - Generally must re-raise at appropriate time at trial
 - Federal court allows review of “pure questions of law”
- Trial management order
 - Should assert all issues for trial, or else waived

PRE-TRIAL STANDARDS - SOURCES

- *Dinosaur Park Invs., L.L.C. v. Tello*, 192 P.3d 513 (Colo. App. 2008) (affirmative defenses and compulsory counterclaims); C.R.C.P. 13(a)
- *Bentley v. Cleveland Cnty. Bd. of Cnty. Comm'rs*, 41 F.3d 600 (10th Cir. 1994) (affirmative defenses); Fed. R. Civ. P. 13(a) (compulsory counterclaims)
- *Podboy v. Fraternal Or. of Police, Denver Sheriff Lodge 27*, 94 P.3d 1226 (Colo. App. 2004)
- 28 U.S.C. § 1291
- *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244 (Colo. 1996) (denial of motion for summary judgment nonreviewable on appeal after trial on the merits)
- *Dupree v. Younger*, 143 S.Ct. 1382 (2023) (pure issues of law reviewable)
- *Mid-Century Ins. Co. v. HIVE Constr., Inc.*, 2023 COA 25 (TMO)

Trial Attorney Strategies: Pre-Trial



- Affirmative defenses
- Motions to dismiss
- Summary judgment
- Trial management order

PRESERVATION STANDARDS AND STRATEGIES



TRIAL STANDARDS

- **Motions in limine**
 - Definitive ruling preserves issue for appeal
 - Beware the conditional rulings
- **Defenses**
 - Use them or lose them
- **Excluded evidence**
 - Make your offer of proof

TRIAL STANDARDS

- Clarity of transcript
 - Assume record supports the judgment
 - Think about what it looks like on paper
- Rule 50 and 52 motions
 - Make legal arguments
 - Difference between state and federal rules
- Jury instructions
 - Don't just identify problems, offer solutions

TRIAL STANDARDS - SOURCES

- *Bernache v. Brown*, 2020 COA 106 (motions in limine)
- *U.S. v. Bedford*, 536 F.3d 1148 (10th Cir. 2008) (motions in limine)
- *U.S. v. Crockett*, 435 F.3d 1305 (10th Cir. 2006) (offers of proof and excluded evidence)
- *Vu v. Fouts*, 924 P.2d 1129 (Colo. App. 1996) (offers of proof and excluded evidence)
- *People v. Duran*, 2015 COA 141 (omission of material record evidence)
- Fed. R. Civ. P. 50(a); C.R.C.P. 50; Fed. R. Civ. P. 52(c)
- Fed. R. Civ. P. 51; C.R.C.P. 51; C.R.C.P. 51.1

Trial Attorney Strategies: Trial



- Motions in limine
- Excluded evidence
- Transcript clarity
- Half-time motions
- Jury instructions

PRESERVATION STANDARDS AND STRATEGIES



POST-TRIAL STANDARDS

- Motions to amend the judgment
 - Think through preservation - what do you need to shore up?
- Motions for judgment notwithstanding the verdict
 - Difference between state and federal
- Rule 60 motions
 - Very rarely necessary
 - Will not stay notice of appeal deadline
- Notice of appeal
 - **DO NOT MISS THE DEADLINE**

POST-TRIAL STANDARDS - SOURCES

- Fed. R. Civ. P. 59; C.R.C.P. 59 (motions for new trial)
- Fed. R. Civ. P. 50(b); C.R.C.P. 59 (jnov motions)
- Fed. R. Civ. P. 60; C.R.C.P. 60
- Fed. R. Civ. P. 4; C.A.R. 4

Trial Attorney Strategies: Post-Trial



- Motions to amend
- Motion for new trial
- Rule 60 motions
- Notice of appeal

INTERACTIVE EXAMPLES



EXAMPLE #1 - OFFERS OF PROOF

The trial court just ruled that your witness cannot testify to a key piece of evidence that you believe would be dispositive of your client's liability.

How do you preserve your record?

EXAMPLE #2 - CLARITY OF TRANSCRIPT

Your witness is on the stand, testifying about the distance between her and the car in front of her when she slammed on the brakes to avoid hitting the Plaintiff.

How do you preserve your record?

EXAMPLE #3 - JURY INSTRUCTIONS

Your trial judge just asked you to stay after dismissing the jury has been dismissed to do a “preliminary” jury instruction conference. She has handed you a stack of proposed instructions in hard copy and asked if, to be respectful of his time, the court reporter may be dismissed.

How do you preserve your record?

EXAMPLE #4 - LEGAL ISSUES

You raised several legal issues in your summary judgment motion. That motion was ultimately denied. You're now in trial.

How do you preserve your record?

QUESTIONS

