

# BEST PRACTICES FOR PRESERVING TRIAL ISSUES FOR APPEAL

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# SUMMARY

To preserve a record on appeal, make timely objections on the record.



# OVERVIEW

1. Preservation and Waiver
2. Pretrial Motions
3. Jury Selection
4. Judgments as a Matter of Law
5. Jury Instructions

# MAKING OBJECTIONS

State the specific ground of the objection if the specific ground of the objection is not apparent from the context. *Am. Fam. Mut. Ins. Co. v. DeWitt*, 28 P.3d 318, 325 (Colo. 2009).

# MAKING OBJECTIONS (CONT'D)

An issue is unpreserved for review when no objection was made. *People v. Ujaama*, 302 P.3d 296, 304 (Colo. App. 2012).



# RAISING ISSUES FOR APPEAL

Provide a citation to the precise location in the record where the issue was raised and ruled on.

*People v. Notyce*, 328 P.3d 302, 303 (Colo. App. 2014).

# DOCTRINE OF WAIVER

Arguments not raised before the trial court may not be reviewed for the first time on appeal. *Am. Fam., supra; Weld Cty. BOCC v. Ryan*, 536 P.3d 1254, 1258, n.2 (Colo. 2023).

# TAKEAWAYS

- Make clear, concise, nonrepetitive objections.
- State the rule of evidence, the specific ground of the objection, or use language that alerts the trial judge to impending error.
- Be sure the objection is ruled upon by the trial judge.



# RULE 702 MOTIONS

Motion to strike expert at the close of evidence is insufficient to preserve the issue for review. *Macsentini v. Becker*, 237 F.3d 1224, 1230-31 (10<sup>th</sup> Cir. 2001).

# RULE 702 MOTIONS (CONT'D)

Must raise timely objection to the validity or reliability of expert testimony to preserve a challenge on appeal. *U.S. v. Diaz*, 300 F.3d 66, 74 (1<sup>st</sup> Cir, 2002).

# MOTIONS IN LIMINE

Contemporaneous objection must be made when evidence is offered at trial. *McEwen v. City of Norman*, 926 F.2d 1539, 1544 (10<sup>th</sup> Cir. 1991).



# MOTIONS IN LIMINE (CONT'D)

Pretrial motion in limine will not preserve an objection if it is not renewed at the time the evidence is introduced. *U.S. v. McVeigh*, 153 F.3d 1166, 1200 (10<sup>th</sup> Cir. 1998).

# TAKEAWAYS

- Object to an expert's testimony contemporaneously at trial.
- Make contemporaneous objections at trial on issues in limine.
- Request striking offending material; consider curative instruction.

# TAKEAWAYS (CONT'D)

- If violation of orders in limine, object contemporaneously at trial.
- Object at least twice to multiple questions on a given topic.
- If topic is revisited in later part of examination, objection should be re-raised.



# JURY SELECTION

## Challenges for Cause

## Peremptory Challenges



# CHALLENGES FOR CAUSE

Failure to object to the qualifications and competency of a prospective juror before the jury is sworn in results in waiver. *People v. Ambrose*, 506 P.3d 57, 67 (Colo. App. 2021).

## CHALLENGES FOR CAUSE (CONT'D)

A defendant waives his appeal claim for denial of a challenge for cause when he does not use his peremptory challenge on a juror. *People v. Vergari*, 521 P.3d 391, 394-95 (Colo. App. 2022).

# TAKEAWAYS

- Lawyers must preserve for-cause challenges for prospective jurors.
- Exercise reasonable diligence by questioning prospective jurors.
- If a challenge for cause is denied, use a peremptory challenge on a prospective juror.

# RULE 12(B)(6) MOTIONS TO DISMISS

Denial of a motion to dismiss for failure to state a claim isn't reviewable on appeal following a trial on the merits.

*Credit Serv. Co., Inc. v. Skivington*, 469 P.3d 531, 534 (Colo. App. 2020).

# MOTIONS FOR SUMMARY JUDGMENT

Issue that is addressed in summary judgment motion, but not motion for directed verdict cannot be raised in motion for judgment as a matter of law. *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1251 (10<sup>th</sup> Cir. 1992).



# MOTIONS FOR DIRECTED VERDICT

To preserve issue for purposes of appeal, litigant must make a motion for directed verdict or for judgment notwithstanding the verdict. *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1251 (Colo. 1996).

# TAKEAWAY

Always move for a directed verdict or judgment as a matter of law at “halftime” and at the end of the presentation of evidence.



# JURY INSTRUCTIONS

A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection. *Bitler v. A. O. Smith Corp.*, 400 F.3d 1227, 1241 (10<sup>th</sup> Cir. 2005).



# SUMMARY

If an issue is not raised with the trial court, it generally cannot be raised on appeal. Therefore, it is incumbent on lawyers to make timely motions and objections on the record.



# THANK YOU

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