



Handling Your First Jury Trial/Appeal

TYLA EL PASO ROADSHOW

Co-Sponsored by Government Law Section

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Presented by:

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Preserving Error

- Basic rules
 - OBJECT
 - MOVE
 - REQUEST
 - OBTAIN A RULING

See, Tex. R. App. P. 33.1(a)

Preserving Error

1. Make a Timely Objection, Request, or Motion

- Issue must be presented while the Court has the opportunity to correct.
- Don't wait until jury is deliberating to make offer of proof.

See, Dryer v. Greene, 87 S.W.2d 697, 698 (Tex. 1993); *Waldon v. City of Longview*, 855 S.W.2d 875, 880 (Tex. App.—Tyler 1993, no writ); *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 274-75 (Tex. App.—Amarillo 1998, writ denied).

Preserving Error

2. Specifically identify the error & basis for your objection
 - Must be specific enough to allow Court to make informed ruling & give the opposing party chance to cure.
 - Overly generalized objections do not preserve error.
 - Raise every legitimate basis.

See, McKinney v. Nat'l Union Fire Ins. Co., 772 S.W.2d 72, 74 (Tex. 1989); *Lassister v. Shavor*, 824 S.W.2d 667, 668 (Tex. App.—Dallas 1992, no writ); *Sefzik v. Mady Dev., L.P.*, 231 S.W.3d 456, 464 (Tex. App.—Dallas 2007, no pet.); *Rhodes v. Batilla*, 848 S.W.2d 833, 847 (Tex. App.—Houston [14th Dist.] 1993, writ denied); *Exxon v. Allsup*, 808 S.W.2d 648, 655 (Tex. App.—Corpus Christi 1991, writ denied); *Pfeffer v. S. Tex. Laborers' Pension Trust Fund*, 679 S.W.2d 691, 693 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

Preserving Error

3. Obtain a ruling

- If Court refuses, object to that refusal.
- There do not seem to be any cases indicating the need to then object to the trial court's refusal to rule on that objection.

See, TEX. R. APP. P. 33.1(a)(2)(B); *Martin v. Commercial Metals Co.*, 138 S.W.3d 619, 623 (Tex. App.—Dallas 2004, no pet.).

Preserving Error

4. Show Harm (Civil cases)

- Error “probably caused the rendition of an improper judgment” OR
- “prevented the appellant from properly presenting the case to the court of appeals”
- Without such a record, the error will not support reversal.

See, Tex. R. App. P. 44.1(a).

For Criminal cases, *see*, Tex. R. App. P. 44.2(a).

Preserving Error

Seating a Jury: Challenges for Cause

1. Challenge panelist for cause.
2. State the basis for the challenge and ask that panelist be removed.
3. Obtain a ruling.
4. Before giving Clerk your peremptory strikes, complete the following steps, in this sequence, on the record:

Preserving Error

Seating a Jury: Challenges for Cause

5. Inform the court, that, because of its refusal to strike the challenged panelist, you will be compelled to use all of your peremptory challenges before being able to strike a panelist whom you would remove but who will remain on the jury.
6. Identify the panelist whom you would strike.

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Seating a Jury: Challenges for Cause

7. Ask the court to reconsider its ruling OR grant you additional peremptory challenge.
 8. Obtain a ruling.
 9. Then give the Clerk your peremptory strikes.
- *Make sure the record reflects this sequence.

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Seating a Jury: *Batson* Challenges

1. Object that your opponent has exercised strikes on a racial basis.
2. Establish a prima facie case by showing a pattern in your opponent's use of strikes.
 - This requires showing 1) the racial/ethnic background of the venire persons the opponent struck and 2) the racial/ethnic background of the other members of the venire panel.

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Seating a Jury: *Batson* Challenges

3. Opponent must then present a race-neutral explanation for the strikes.
4. You can then submit evidence to show that this explanation is merely a pretext for discrimination.
5. The court determines whether the race-neutral explanation is plausible.

Preserving Error

Motions in Limine vs. Motions to Exclude

1. Court's ruling on MIL preserves nothing for appeal.
2. If MIL granted, the party who wishes to present the evidence must still offer it at trial or waive any complaint about its exclusion.

See, Sw. Country Enter., Inc. v. Lucky Lady Oil Co., 991 S.W.2d 490, 493 (Tex. App.—Fort Worth 1999, pet. denied); *Johnson v. Garza*, 884 S.W.2d 831, 834 (Tex. App.—Austin 1994, writ denied).

Preserving Error

Motions in Limine vs. Motions to Exclude

3. If MIL denied, the party who wants the evidence excluded must object when it is offered at trial or waive any complaint about its exclusion.

See, Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963); *Boulle v. Boulle*, 254 S.W.3d 701, 709 (Tex.App.—Dallas 2008, no pet.).

Preserving Error

Motions in Limine vs. Motions to Exclude

1. Court's ruling on MTE under Tex. R. Evid. 103 does preserve error, whether made before or during trial.

See Greenberg Traurig, P.C. v. Moody, 161 S.W.3d 56, 91 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Huckaby v. A.G. Perry & Sons, Inc.*, 20 S.W.3d 194, 203-04 (Tex. App.—Texarkana 2000, pet. denied).

See also, TEX. R. EVID. 103(a)(1).

Preserving Error

Objection to Opponent's Evidence

1. Make a timely objection.
2. Identify the inadmissible portion(s) to which you object.
3. Raise every legitimate basis.
4. Obtain a ruling. If overruled, then...

See generally, TEX. R. EVID. 103(a)(1) and 105.

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Objection to Opponent's Evidence

5. Request a limiting instruction if the evidence is being admitted for only certain purposes or parties.
6. Obtain a ruling on that request.
7. Repeat the objection each time the same or similar evidence is offered again (or obtain a valid “running objection”).

See generally, TEX. R. EVID. 103(a)(1) and 105.

Preserving Error

Running Objections

1. Request a running objection.
2. Identify the evidence to which the running objection will apply.
3. Describe the forms in which that evidence may be offered.
4. Identify the potential witnesses to whom it will apply.
5. Must be made & granted on the record.

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Running Objections

6. Renew the objection at any point where there could be any doubt about its application.

See generally, Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 907 (Tex. 2004), *State v. Baker*, 574 S.W.2d 63, 65 (Tex. 1978); *Freedman v. Briarcroft Prop. Owners, Inc.*, 776 S.W.2d 212, 217-18 (Tex. App.—Houston [14th Dist.] 1989, writ denied); *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 203 (Tex. App.—Texarkana 2000, pet. denied); *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 242-43 (Tex. App.—Corpus Christi 1994, writ denied).

Preserving Error

Exclusion of your evidence

1. Make an offer of proof (substance of the excluded evidence).
2. For testimony, state a precise summary (must be in Q&A form if any party or the court requests).
3. For exhibits, identify them, have them marked, and present them to be filed.
4. Specify the purpose(s) for which the evidence is offered.

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Exclusion of your evidence

5. Explain why the evidence is admissible.
6. Explain how the evidence is relevant & significant to your case.
7. Offer it again.
8. Obtain a ruling.

*Must be made before the court's charge is read to the jury.

See TEX. R. EVID. 103(a)(2) and 103(b).

Preserving Error

Court's Charge (by requests)

1. Make the request in writing.
2. Make the request separate and apart from your objections to the charge.
3. Tender the definition or instruction in “substantially correct” wording.
4. Explain why the request is raised by the pleadings, supported by the evidence, and how it will assist the jury in answering the court's charge.

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Court's Charge (by requests)

5. Make sure the judge endorses each request as “Refused” or “Modified as follows” and signs it.
6. File with the clerk the requests that were refused.

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Objecting to the Court's Charge

1. Make your objection separate from your written requests.
2. Make your objections either in writing or stated on the record, with the trial court and opposing counsel present.
3. Distinctly point out what portion of the question, instruction, or definition is objectionable so that the court could cure the error.

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Objecting to the Court's Charge

4. Explain why that portion of the question, instruction, or definition is defective or erroneous.
5. Do not incorporate by reference objections you have made to another part of the charge.
6. Obtain a ruling on your objections.

Preserving Error

Closing Argument

1. Make a timely objection.
2. Ask for an instruction to disregard.
3. Move for a mistrial.

See, Tex. R. App. P. 33.1; *see also*, *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839-41 (Tex. 199); *Armellini Exp. Lines v. Ansley*, 605 S.W.2d 305 (Tex. Civ. App.—Corpus Christi 1980, write ref'd n.r.e.)

Preserving Error

Verdict

1. Review the verdict to see that the answers are complete & not in conflict.
2. Object on the record if the answers are incomplete or in conflict.
3. Request the jury be instructed to cure the deficiency & retire for further deliberations.
4. Include both the original verdict & the subsequent verdict in the record.

See, Tex. R. Civ. P. 295; Fleet v. Fleet, 711 S.W.2d 1, 2-3 (Tex. 1986).

Questions?

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