Multnomah Bar Association

Appellate Practice: What Every Trial Attorney Needs to Know

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Continuing Legal Education Seminar

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A. Preservation

ORAP 5.45(1): "No matter claimed as error will be considered on appeal unless the claimed error was preserved in the lower court * * *."

Purpose and policies behind the rule of preservation:

Procedural fairness to parties and court: Preservation is generally met if (1) the trial court has had the chance to consider and rule on the contention, and (2) the opposing party has had the opportunity to respond to a contention. *See Peeples v. Lampert*, 345 Or 209, 219 (2008).

Exceptions:

No ability: The preservation requirements may give way entirely, as when a party has no practical ability to raise an issue. *See, e.g.*, *McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84, 95 n 6, *modified on recons.*, 327 Or 185 (1998).

Futility: If a party can show that preservation would have been futile, because the trial court would not have permitted an issue to be raised or the record to be developed. *See, e.g.*, *State v. Olmstead*, 310 Or 455, 461 (1990).

Plain error: ORAP 5.45(1) – When an error is apparent on the record, an issue of law, and the court may exercise its discretion to consider the error.

Making Your Record – Preserving Your Issues for Appeal

Evidentiary Issues:

Generally, a **motion in limine** is sufficient to preserve your argument regarding evidentiary issues at trial. *State v. Whitmore*, 257 Or App 664, 668 (2013) ("Parties are not required to repeat their objections after the trial court has ruled against them."). However, if the trial court reserves ruling on the motion in limine, or if the evidence comes in different than anticipated, you need to object at trial.

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If no motion in limine is filed, you must **timely object** or **move to strike** the evidence.

If you are offering the evidence, you must make an offer of proof.

Sufficiency of the evidence:

You must bring a **motion for directed verdict** to preserve the argument that a claim (or an element of a claim) should not proceed to the jury, either because the claim is insufficient as a matter of law, or because the court should rule in your favor on the claim as a matter of law.

If your motion for directed verdict is denied on a specific element of a claim, you must submit a special verdict form as to that specific portion of the claim to the jury – i.e., causation. *Purdy v Deere & Co.*, 355 Or 204, 228-29 (2014).

Jury Instructions:

ORCP 59(H) provides that "[a] party may not obtain appellative review of an asserted error by a trial court in submitting or refusing to * * * give an instruction to a jury unless the party seeking review identified the asserted error to the trial court and *made a notation of exception immediately after the court instructed the jury or at such other time as the trial court directed*." (Emphasis added).

In *State v. Vanornum*, 354 Or 614, 623 (2013) the Court held that ORCP 59(H) does not govern preservation of instructional error or preclude an appellate court from reviewing a claim of error pursuant to the court's traditional plain error doctrine.

Caution: Make your Record! Many judges want you to submit your proposed jury instructions, and/or objections to the other party's proposed jury instructions, via email. There is no guarantee that this exchange will become part of the record. The best practice is to always file proposed jury instructions and your objections.

Verdicts:

You must object to any deficiencies or inconsistencies in the verdict before the court discharges the jury. *Building Structures, Inc. v. Young*, 328 Or 100, 108 (1998).

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Other issues: MAKE YOUR RECORD

"An appellant bears the burden of providing a record sufficient to demonstrate that error occurred". *Ferguson v. Nelson*, 216 Or App 541, 549 (2007)

Sidebars: Any substantive, procedural, or other important discussions that occur during a sidebar may not be picked up by the court reporter. If it isn't, it won't be on the record. If it isn't in on the record, it isn't appealable. You must make sure you summarize the main points of the discussion on the record in some capacity.

Discussions with Judges in Chambers: If you have a judge that likes to have discussions in chambers, request that the court reporter join you in chambers. If this is not realistic or possible, then immediately summarize your position and the judge's ruling on the record once you return to the courtroom. If the judge does not want to dismiss the jury, then do so as soon as the jury takes its next break.

B. Reviewable Judgments and Orders

Final judgments-- limited, general, or supplemental judgments are appealable. ORS 19.205 (1).

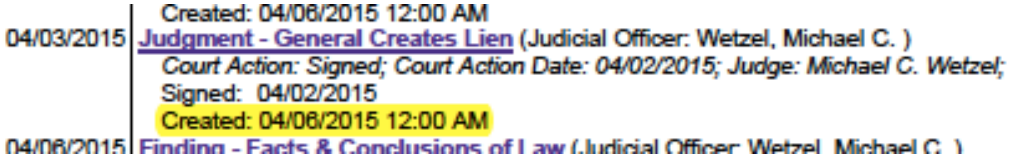
Orders that Prevent a Judgment – Orders that "affect a substantial right, and that effectively determine the action so as to prevent a judgment in the action * * *." ORS 19.205(2).

Orders Made After a Final Judgment – "An order that is made in the action after a general judgment is entered and that affects a substantial right, including an order granting a new trial * * *." ORS 19.205(3)

C. When to Appeal

30 days after a final judgment is entered. ORS 19.255(1) ("Notice of appeal must be served and filed within 30 days after the judgment appealed from is entered in the register").

Practice tip: The date of entry of judgment is the "created" date in the register of actions in OECI. It is NOT the date the judgment is signed.



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After 30 days from an order ruling on a motion for new trial or judgment notwithstanding the verdict or the time expiring to rule on such motion. ORS 19.255(2)

Supplemental judgments

If you have an attorney fee motion or other matter pending after entry of the general judgment, make sure you first appeal within 30 days from the general judgment. Do not wait for the supplemental judgment to be entered, or you will lose your right to appeal the general judgment.

In order to appeal the supplemental judgment, you must amend your notice of appeal within 30 days of entry of the supplemental judgment.

D. Mandamus

A party may immediately seek review of a trial court's order to the Oregon Supreme Court (mandamus) pursuant to ORS Chapter 34 under certain circumstances.

It is an extraordinary remedy aimed at correcting errors of law for which there is no other "plain, speedy and adequate remedy in the ordinary course of law." ORS 34.110. It is meant to correct legal errors or decisions "outside the permissible range of discretionary choices." Mandamus is not appropriate for trial court decisions that involve discretion. *Lindell v. Kalugin*, 353 Or. 338, 347 (2013).

Typically, you must prove you will suffer some immediate harm by the trial court's decision, rather than waiting to appeal the decision. Orders denying discovery, and orders involving venue and personal jurisdiction, tend to be decisions that are reviewable by mandamus.

A party must seek mandamus within 30 days of the trial court's order. ORAP 11.05 n 4.

E. The Bare Necessities of the Appellate Process:

1. File Notice of Appeal (from trial court judgment) or Petition for Judicial Review (from agency order). ORAP 2.05 (outlining contents of Notice of Appeal); ORAP 4.15 (outlining contents of Petition for Judicial Review).

2. File An Undertaking for Costs within 14 days.

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3. A stay of any judgment is not automatic on appeal. ORS 19.330. File a motion or petition for stay with the trial court or agency. ORS 19.335 – 19.340 (motions for stay before trial court); ORS 183.482(3) (motions for stay before agency); ORS 19.360 (review of trial court orders regarding stays); ORAP 4.30 (review of agency's denial of motion to stay).

4. In appeals in civil cases, make financial arrangements with the court reporter for preparation of the transcript. ORAP 3.33(2)(b). Once the transcript is prepared, settle the transcript. ORAP 3.40. After the transcript is settled, the Court will notify the parties of the briefing schedule.

   On judicial review, the agency shall transmit to the appellate court the record, including a transcription of the proceedings. ORAP 4.20(1). Within 15 days after the agency files the record, any party may move to correct the record. ORAP 4.22(1).

   Practice tip: When you receive the transcript or agency record, you need to review it to make sure it is complete and correct any errors. You cannot argue on appeal or on judicial review that the record is incorrect. This is your opportunity to make sure the record is accurate.

5. Briefs Filed – Opening, Answering, and Reply Brief.

   Opening and Answering Briefs – 49 days; Reply Briefs – 21 days (unless otherwise specifically provided by rule or statute). ORAP 5.80; ORAP 4.05

   Motions for Extension of Time are routinely granted and should not be opposed absent extenuating circumstances.

6. Oral Argument Set (You must opt-in) (usually within 6 months after reply brief is filed).

7. AWOP Issues in 2-3 weeks OR Opinion Issues (6 mo – 2 years)

F. So You Want to File an Appeal:

Biggest Mistakes Trial Lawyers Make On Appeal

1. Failure to Properly Assign Error to a Ruling of the Trial Court – Decisions, Holdings, or Reasonings are Not Proper Assignments of Error

   "Assignments of error are required in all opening briefs of appellants and cross-appellants." ORAP 5.45(1)

   "Each assignment of error must identify precisely the legal, procedural, factual, or other ruling that is being challenged." ORAP 5.45(3).

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2. Tone – You are Not in Front of a Jury Anymore

   Do not insult the trial court or opposing counsel
   Avoid using adjectives or adverbs.
   Stick to the issues.

3. Seeking the Proper Relief – So What It is You Want and How Do You Win?

   Total reversal?
   Remand for further proceedings?
   Vacate an order?

4. Narrow Your Arguments for Appeal – Don't Kitchen Sink It!!

   Not every error the trial court made is reversible on appeal. Only error substantially affecting the party's rights. ORS 19.415(2).

G. Know When to Retain Appellate Counsel

When to Hire Appellate Counsel
Hiring appellate counsel is not necessarily just about the appeal. It is important to bring in appellate counsel early on an important case where legal or procedural issues may end up being appealed. Appellate counsel may help with the following important stages of litigation:

Drafting the Complaint
Venue and/or Personal Jurisdiction
Motions to Amend to Seek Punitive Damages or other Complex Motions
Dispositive Motions
Pretrial Motions
Trial – Assisting with Preservation

Working with Appellate Counsel
As trial counsel, you can take certain steps to make it easier to bring on an appellate attorney. For instance, if you need to pay appellate counsel via a contingency fee agreement, you should consider the following:

Factor in an increase in your contingency fee percentage for appeals.

Provide an informed consent clause in your contingency fee agreement regarding fee splitting pursuant to ORPC 1(d).

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