

Preservation of Error: It's More Than Shouting "Objection!"

by Chad Ruback

You don't need to be an appellate geek to understand that error can frequently be preserved by shouting "Objection!" Anyone who has a T.V. knows that's what you're supposed to do when things don't go your way in the courtroom. However, many errors can't be preserved orally. The following is a list of ten documents you need to file to preserve error, along with a brief description of what the documents are, when is the latest you can file them, and how some of them are commonly messed up.

Special appearance

What: If your client is not a resident of Texas and has not had "minimum contacts" with Texas, but is nevertheless sued in Texas, you must file a special appearance to contest the court's jurisdiction.

When: You must file the special appearance before filing an answer, motion, or any other pleading.

How: A special appearance must be verified.

Motion to transfer venue

What: If your client is sued in an improper county, you must file a motion to transfer venue.

When: You must file the motion before or concurrently with the filing of answers, motions, or any other pleading except a special appearance.

How: The motion must be filed with one or more supporting affidavits.

Motion asserting forum non conveniens

What: If your client is sued in Texas, but a court outside of Texas has jurisdiction over the case and is a more appropriate forum, you must file a motion asserting forum non conveniens.

When: In a personal injury or wrongful death case, you must file the motion not later than 180 days after filing your answer. In cases other than personal injury / wrongful death, you must simply file the motion before commencing trial.

Motion to disqualify attorney

What: If your opposing counsel has a conflict of interest, you must file a motion

to disqualify.

When: You must file the motion shortly after learning of the conflict.

Motion to recuse judge

What: If the judge should be recused, you must file a motion seeking recusal. Texas Rule of Civil Procedure 18b(2) lists situations in which a judge should be recused.

When: You must file the motion at least ten days before the hearing or trial from which you'd like the judge to be recused. When the judge is assigned to the case less than ten days before the hearing or trial, you must file the motion ASAP. Similarly, when the basis of recusal is not known until less than ten days before the hearing or trial, you must file the motion ASAP.

How: The motion must be verified.

Motion for continuance

What: If you have a trial setting so soon as to keep you from completing discovery, you must file a motion for continuance.

When: Although there is no state-wide deadline to file the motion, such a deadline is frequently imposed by local rules.

How: The motion must be filed with a supporting affidavit.

Plea in abatement

What: You must file a plea in abatement if your client (1) is sued by a plaintiff who does not have the capacity to sue; (2) is sued but does not have the capacity to be sued; (3) is sued but other necessary parties have not been sued; or (4) is sued while a substantially identical case is already pending between your client and the plaintiff.

When: You must file the plea without much delay. There is no bright line rule as to how much delay is too much. In any case, you must file the plea before your case goes to trial.

How: The plea must be verified.

Special exceptions

What: If your client is sued and the plaintiff's petition fails to give you "fair notice" of the facts and / or the legal theories under which the plaintiff seeks to recover, you must file special exceptions.

When: You must file the special exceptions before the jury charge is given. In a

non-jury case, you must file the special exceptions before the court signs its judgment.

Request for findings of fact

What: When a judge has served as finder of fact and has ruled against you, you should request findings of fact. You must also request findings when the trial court's judgment differs substantially from or exceeds the scope of a jury verdict. The trial court should enter findings within twenty days of your request. If the trial court fails to do so, you must file a notice of past-due findings. If findings are given, but they do not address all of the issues important to you, you must file a request for additional findings.

When: You must file the request within twenty days of the date the judgment was entered. You must file the notice of past-due findings within thirty days of the date you filed your initial request. You must file a request for additional findings within ten days of the court's entering the initial findings.

Motion for new trial

What: If you lose at trial and there was not sufficient evidence to support the jury's finding of liability or award of damages, you must file a motion for new trial.

When: You must file the motion within thirty days of the date the judgment was signed.

How: You must pay a filing fee when filing a motion for new trial. A legal sufficiency attack raised for the first time in a motion for new trial will support only a remand, not a rendition. To seek rendition on a legal sufficiency point, you must file a motion for directed (a/k/a instructed) verdict, objection to the court's charge, motion for JNOV, or motion to disregard a jury finding.



Chad Ruback practices appellate law at Godwin Gruber. His hobbies include advising trial attorneys on error preservation issues. He is a true appellate geek.