



# (Why) I Object!

Ten ways to avoid common mistakes when preserving an issue for appeal.

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## TRIAL PRACTICE IS A FAST-MOVING ENDEAVOR; PRACTITIONERS MUST MAKE

frequent decisions, often without access to all the facts. At the end of all that preparation and hard work, a judge or jury inevitably anoints a winner and a loser. But the trial outcome need not be the final word on the matter. Below are 10 tips to preserve some commonly occurring issues for appeal in Illinois courts.

1.

### At the complaint stage

Plaintiffs who wish to amend their complaint should attach a proposed amended complaint to a motion to amend. Failure to attach a complaint waives on appeal the denial of the motion to amend because the trial court—and therefore the appellate court—has no basis on which to consider whether the amendment would cure the defects in the existing pleading.<sup>1</sup>

Additionally, plaintiffs who want to preserve previously dismissed claims for appellate review need to incorporate the dismissed claims into any amended complaint. Allegations not incorporated into the final amended complaint are deemed waived.<sup>2</sup>

2.

### At the answer-or-otherwise-plead stage

Defendants who move to dismiss a complaint must specify under which statutory provision the motion is being made: 735 ILCS 5/2-615, 2-619, or 2-619.1. Trial courts do not need to consider motions under section 2-619.1 that do not specify under which section each argument for dismissal is being made.<sup>3</sup> Defendants also should raise any affirmative defenses

1. *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 128 (2d Dist. 2010).

2. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17.

3. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 21.



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when filing their answer; although, failure to raise a defense at the answer stage may not constitute a waiver.

3.

### Summary judgment movants

Some of the biggest waiver issues arising from summary judgment surround the factual record. Affidavits in support of summary judgment must be based on personal knowledge of the affiant, set forth admissible facts with particularity, and attach sworn or certified copies of documents relied upon.<sup>4</sup> Motions to strike affidavits in whole or in part for failing to comply with the requirements of Illinois Supreme Court Rule 191 may be advisable if anything about an affidavit is questionable. This is because any challenge to the sufficiency of an affidavit is forfeited if not raised in the trial court.<sup>5</sup>

4.

### Summary judgment nonmovants

Additionally, a party opposing summary judgment must be sure to do so in a manner that properly challenges facts claimed by the moving party. Waiver issues arise when the nonmovant denies a factual allegation but fails to produce a counter affidavit in support of that denial. Facts contained in an affidavit in support of a motion for summary judgment that are not contradicted by a counter affidavit must be taken as true for purposes of the motion and cannot later be challenged on appeal.<sup>6</sup>

5.

### *In limine* issues

The basic rule of preserving evidentiary issues for appeal

is to object, object, and object again. First, a party seeking to exclude evidence should make a motion *in limine*. But *in limine* rulings are considered interlocutory; therefore, making a motion *in limine* is not sufficient to preserve the issue for appeal.<sup>7</sup>

Second, the party also must make a contemporaneous objection at trial when the evidence is introduced to allow the court the opportunity to revisit its earlier ruling.<sup>8</sup> And third, if the matter was tried before a jury, the losing party must raise the objection again in a posttrial motion to preserve the issue for appeal.<sup>9</sup>

Additionally, if a party violates a motion *in limine* by straying into evidence that was excluded, the party in whose favor the *in limine* order was entered must both contemporaneously object and raise the issue in a posttrial motion to preserve any claim of error.<sup>10</sup>

6.

### Offers of proof

On the flip side, a party on the losing end of an *in limine* order must make an offer of proof specific enough so that a reviewing court can assess the nature of the witness's testimony to judge the propriety

4. Ill. S. Ct. R. 191(a); *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335–36 (2002).

5. *Performance Food Group Co., LLC v. ARBA Care Center of Bloomington, LLC*, 2017 IL App (3d) 160348, ¶ 20.

6. *CitiMortgage, Inc. v. Sconyers*, 2014 IL App (1st) 130023, ¶ 9.

7. *Douglas v. Arlington Park Racecourse, LLC*, 2018 IL App (1st) 162962, ¶ 79.

8. *Id.*

9. Ill. S. Ct. R. 366(b)(2)(iii).

10. *Hardy v. Cordero*, 399 Ill. App. 3d 1126, 1134–35 (2010).

## TAKEAWAYS >>

- Parties often get into trouble on appeal because they didn't specify the basis of an objection during trial or they raise new arguments for exclusion on appeal.
- The foundation of a strong appeal often is set during the pretrial stage and motions *in limine*.
- Motions to dismiss must specify the relevant statutory provision, such as 735 ILCS 5/2-615, 2-619, or 2-619.1.

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of its exclusion.<sup>11</sup> An offer of proof should demonstrate materiality, relevancy, and admissibility.<sup>12</sup> For a jury trial, the exclusion should also be raised in a posttrial motion.

## 7. Other evidentiary issues arising during trial

Jumping out of one's seat and broadly pronouncing "Objection!" only works in television legal dramas. A real courtroom requires that evidentiary objections to trial testimony be made contemporaneously with the testimony and specify the reason or reasons the testimony is problematic.<sup>13</sup> A litigant should then reiterate those objections in a posttrial motion.<sup>14</sup> Parties often get into trouble on appeal either because they did not specify the basis of an objection during trial or they raise new arguments for exclusion on appeal. On appeal, bases for exclusion not raised before the trial court are waived.<sup>15</sup>

### ISBA RESOURCES >>

- ISBA Books, *Appeals to the Illinois Supreme and Appellate Courts-2018 Edition*, (Fastbook PDF included), [law.isba.org/2NsX2T7](http://law.isba.org/2NsX2T7).
- ISBA Free On-Demand CLE, *How to Not Throw Away Your Shot at Appeal: Protecting and Preserving the Record for Review* (recorded May 19, 2017), [law.isba.org/2SXmVvR](http://law.isba.org/2SXmVvR).
- Don R. Sampen, *Appealing Final Judgments in Ongoing Litigation*, 107 Ill. B.J. 36 (Apr. 2019), [law.isba.org/2YYQUHq](http://law.isba.org/2YYQUHq).

## 8. Jury instructions and verdict forms

Law students are surprised to learn that a party's lawyer is responsible for drafting jury instructions. With that responsibility comes the potential pitfall of waiver on appeal. A party that opposes an instruction must take two steps to preserve an issue for the appellate court: 1) Make a specific objection to point out what is wrong with a proposed instruction or verdict form; and 2) Submit a remedial instruction or verdict form to the trial court. These are both required because "[t]imely objection and submission assists the trial court in correcting the problem and prohibits the challenging party from gaining an advantage by obtaining reversal based on the party's own failure to act."<sup>16</sup>

## 9. Special interrogatories

Special interrogatories are necessary to test the basis of a jury verdict where a plaintiff or defendant presents more than one theory. "[T]he supreme court's rulings with regard to general verdicts provide that when multiple claims, theories, or defenses were presented to the jury, without the submission of special interrogatories or separate verdict forms, the return of a general verdict creates a presumption that the evidence supported at least one of the claims, theories, or defenses and will be upheld."<sup>17</sup> A party that fails to submit a special interrogatory that tests an ultimate issue of fact upon which the rights of the parties depend may end up waiving an objection that a verdict is against the weight of the evidence.<sup>18</sup>

Further, proper wording of special interrogatories is crucial: The wording must accurately reflect the law relevant to the ultimate issue of fact on which the rights of the parties depend.<sup>19</sup> For instance, in *Stanphill v. Ortberg*, the Illinois Supreme Court found that a special interrogatory in a wrongful-death suit asking whether the decedent's suicide was reasonably foreseeable to the defendant—as opposed to asking whether the suicide was foreseeable to a reasonable person—was improper in form.<sup>20</sup> The court consequently concluded that judgment should be entered on the general verdict.<sup>21</sup>

## 10. Posttrial motions

To preserve an issue for review from a jury trial, a party must file a posttrial motion raising the issue.<sup>22</sup> This rule allows the decisionmaker most familiar with the events at trial to review the decision and also crystallizes the issues for both the trial and appellate courts.<sup>23</sup>

Although a reversal of an unfavorable disposition at the trial-court level can be hard to come by, the preceding guidelines can at least give a party a fighting chance to have a claim of error reviewed on appeal. **EB**

11. *Snelson v. Kamm*, 204 Ill. 2d 1, 23 (2003).

12. *Id.*; *People v. Burgess*, 2015 IL App (1st) 130657, ¶¶ 147-148.

13. *People v. Casillas*, 195 Ill. 2d 461, 490-91 (2000).

14. *Id.* at 491.

15. *Id.*

16. *Baumrucker v. Express Cab Dispatch, Inc.*, 2017 IL App (1st) 161278, ¶ 63, 84.

17. *Great American Insurance Co. of New York v. Heneghan Wrecking & Excavating Co.*, 2015 IL App (1st) 133376, ¶ 15.

18. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 101 (2010).

19. *Stanphill v. Ortberg*, 2018 IL 122974, ¶¶ 33-36.

20. *Id.*

21. *Id.* at ¶ 44.

22. *Thornton v. Garcini*, 237 Ill. 2d 100, 106-07 (2010).

23. *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶ 114.

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