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Preserving error for appellate review

TO PRESERVE ISSUES FOR APPELLATE REVIEW, “SPEAK NOW OR FOREVER HOLD YOUR PEACE.” THIS IS A TASK REQUIRING BOTH ADVANCE PLANNING AND IMMEDIATE ACTION.

In litigation, “wait and see” is not a strategy. Should a trial judge enter an erroneous adverse ruling that prejudicially affects your client, you should have a ready plan and be prepared to implement it immediately to preserve an appellate challenge. This need for quick action arises because, with limited exceptions, appellate courts will not consider issues raised for the first time on appeal. In this article, we tackle the steps required to preserve state court error for appellate review and identify some contexts that call for attention and scrutiny at the trial level.

Generally, a claim of error is forfeited on appeal when counsel fails to object in the trial court

As our Supreme Court has long explained, “[a]n appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method. . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver. . . .” (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1 (*Doers*); see also, e.g., *People v. Simon* (2001) 25 Cal.4th 1082, 1103-1104 [under “general forfeiture doctrine,” party who fails to bring an error to the trial court’s attention by timely motion or objection forfeits the right to complain about the error on appeal]; see *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002 [“Failure to object to the [erroneous] ruling or proceeding is the most obvious type of implied waiver”].)

The preservation-of-issue requirement is not simply a meaningless technical barrier to review. Rather, “[t]he purpose of the general doctrine of [forfeiture] is to encourage a [party] to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . . [¶] ‘The rationale for this rule [is as follows]: In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge’s attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 590 (fn and citations omitted); see also *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265 (*Keener*) [same]; *Doers, supra*, 23 Cal.3d at p. 184, fn. 1 [“Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial”]).

Counsel must take certain actions in the trial court to preserve an error for appellate review

To preserve an error for appeal, counsel should adhere to four basic requirements.

Clearly object and include all applicable bases

Appellate courts will consider objections only if they were raised sufficiently so that the trial court had

notice of the potential error. (See, e.g., *Aljabban v. Fontana Indoor Swap Meet, Inc.* (2020) 54 Cal.App.5th 482, 511-513 [complaint to trial court that opposing party’s behavior during testimony was distracting did not preserve potential error because counsel failed to seek relief or secure confirmation that court observed misconduct].) Likewise, mentioning a potential error in passing is not enough to preserve it for appeal. (Cf. *Conservation Northwest v. Sherman* (9th Cir. 2013) 715 F.3d 1181, 1188 [argument forfeited when “buried in the middle of a section” addressing other issues and district court did not address it].)

Only the specific ground for objection raised in the trial court is preserved for appeal. (*SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 564-565; *Haskell v. Carli* (1987) 195 Cal.App.3d 124, 129; *Miller v. Anson-Smith Const. Co.* (1960) 185 Cal.App.2d 161, 167 [“party cannot be permitted to abandon the ground of objection taken below and assume another one upon appeal”]; see 3 Witkin, Cal. Evidence (4th ed. 2000), Presentation at Trial, § 377, at p. 468 (Presentation at Trial).)

Objection on “the wrong ground is as bad as an insufficient general objection; i.e., urging of the one ground is a [forfeiture] of any others.” (Presentation at Trial, § 378, at p. 469; see Evid. Code, § 353, subd. (a).) And, a general objection typically forfeits any error in that it “does not specify the particular defect” and is “futile.” (Presentation at Trial, § 375, at p. 465.) For this reason, all applicable bases for objection should be raised in the trial court to preserve each for appellate review.

Make a timely objection

A forfeiture occurs when an objection is raised but not asserted at the earliest opportunity. (See Presentation at Trial, § 372, at p. 461; see also, e.g., Evid. Code, § 353, subd. (a) [objection must be “timely made”].) In that regard, an objection raised at a prior proceeding is insufficient. (Presentation at Trial, § 372, at p. 461.) Likewise, “[a] tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection . . . and press for a final ruling in the changed context of the trial evidence itself.” (*People v. Holloway* (2004) 33 Cal.4th 96, 133.)

Procure an express ruling

Although seemingly obvious, the trial court must render an express ruling for error to be preserved. Absent a ruling, no error can exist. (*People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1650 [“usual rule is that when a trial court fails to rule on an objection, the objecting party must do something to precipitate an actual ruling, or be deemed to have waived or abandoned the issue”]; see Presentation at Trial, § 387, at pp. 479-480.) As explained in *People v. Rhodes* (1989) 212 Cal.App.3d 541, when a court “through inadvertence or neglect, neither rules nor reserves its ruling . . . the party who objected must make some effort to have the court *actually* rule. If the point is not pressed and is forgotten, [the party] may be deemed to have [forfeited] or abandoned it, just as if he had failed to make the objection in the first place.” (*Id.* at p. 554, citations omitted.)

Make a record

“[I]f it is not in the record, it did not happen. . . .” (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.) Failure to obtain a record of the oral proceedings can prove to be an irrevocable mistake. For example, an appellant cannot challenge the sufficiency of the evidence absent a record of the oral proceedings. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132;

see also *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186-188.) Likewise, an appellate court does not reverse a discretionary ruling when no record recounts the underlying proceedings or the trial court’s reasoning. (*Rhule v. WaveFront Technology, Inc.* (2017) 8 Cal.App.5th 1223, 1228-1229; *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259.) Indeed, the appellate court could rule that the appellant cannot claim the existence of error. (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 678-670 (*Bullock*) [appellant could not claim instructional error because the record was insufficient to show trial court refused requested instruction; appellate court presumed appellant withdrew requested instruction or omitted it from final instructions].)

For this reason, counsel should always retain a court reporter to transcribe the oral proceedings. In most courts, a court reporter will not attend a hearing unless a party makes advance arrangements. (See Cal. Rules of Court, rule 2.956(b)(3) & (c).) Direct the court reporter to be present at side-bar conferences and proceedings in the judge’s chambers. (See *Verio Healthcare, Inc. v. Superior Court* (2016) 3 Cal.App.5th 1315, 1327 [absent record of chambers discussion, appellate court presumed order was correct and that trial court made, expressly or impliedly, all findings necessary in support]; *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 429 [absent record of side-bar proceeding, appellate court “must presume the court correctly ruled”].) If the side-bar or chambers discussions are unreported, put the substance and results of those discussions on the record when the court reporter is present.

Similarly, if a deposition is used at trial, it must be reported. The best practice is to have the court reporter transcribe the deposition testimony into the trial record as it is read or played. At the very least, the record should reflect the pages and lines of testimony that were read, and the deposition transcript

should be lodged with the trial court. (See Cal. Rules of Court, rule 2.1040(a)(1) [party presenting electronically recorded deposition testimony at trial must identify on the record the pages and lines of the deposition testimony offered, and file copy of those pages and lines]; see also Cal. Rules of Court, rule 8.122(b)(4)(A).)

If the oral proceedings are unreported or if a reporter’s transcript is otherwise unavailable, the party asserting error should proceed by obtaining an “agreed statement” (Cal. Rules of Court, rule 8.134) or a “settled statement” (Cal. Rules of Court, rule 8.137).

Counsel should be aware of contexts in which error tends to arise and know how to preserve appellate review

The requirements for preserving appellate review of trial court error also can be specific to the context. Below are common areas where trial court errors tend to arise and potential traps for the unwary.

Review of arbitration awards

Review of state court arbitration awards is restricted to the grounds set forth in Code of Civil Procedure section 1286.2. (See Posner & Serlin, *Appealing Adverse Arbitration Awards, Advocate*, September 2025.) In general, to preserve an appellate challenge on the statutory bases, i.e., to avoid a claim of forfeiture, the losing party must raise the legal issue before both (1) the arbitrator (e.g., *Comerica Bank v. Howsam* (2012) 208 Cal.App.4th 790, 829-830 [defendant forfeited legal challenge that award exceeded amount allowable in default judgment by withdrawing from the arbitration]; *Blatt v. Farley* (1990) 226 Cal.App.3d 621, 629 [arbitration agreement did not limit damages and objection that demand should have been amended was forfeited]), and (2) the trial court by way of a petition to correct or vacate the award (Code Civ. Proc., §§ 1285, 1288).

For the most part, a challenge to an arbitration award cannot be brought for the first time on appeal. (See *Louise Gardens of Encino Homeowners’ Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82

Cal.App.4th 648, 659 [failure to make motion to vacate on basis that arbitrator should have disqualified himself or been disqualified forfeited argument on appeal]; *Knass v. Blue Cross of California* (1991) 228 Cal.App.3d 390, 392-393 [party precluded from seeking reversal of judgment on appeal after failing to challenge arbitration award in the trial court].)

Evidentiary issues

A challenge to the erroneous admission of evidence requires a timely, specific, and proper objection or motion to exclude or strike the evidence. (Evid. Code, § 353, subd. (a).) A challenge to the erroneous exclusion of evidence requires an offer of proof including the “substance, purpose, and relevance of the excluded evidence. . . .” (Evid. Code, § 354, subd. (a).) Failure to make an adequate proffer forfeits any error. (*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1113; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 282; *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 344.)

To be valid, an offer of proof must state “the testimony of specific witnesses, writings, material objects, or other things presented to the senses, to be introduced to prove the existence or nonexistence of a fact in issue.” (*United Sav. & Loan Assn. v. Reeder Dev. Corp.* (1976) 57 Cal.App.3d 282, 294.) The offer of proof must state the evidence to be elicited, not simply the facts counsel seeks to prove because “facts do not constitute evidence.” (*Ibid.*; see also *Semsch v. Henry Mayo Newhall Memorial Hospital* (1985) 171 Cal.App.3d 162, 168 [offer of proof must include “the precise testimony” the witness would offer].)

Motions in limine

A proper motion in limine to exclude evidence preserves an appellate challenge when “(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context. . . .” (*People v. Lucas* (2014) 60 Cal.4th 153,

220, fn. 29; *People v. Morris* (1991) 53 Cal.3d 152, 190 (*Morris*); *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1675 (*Boeken*).) If the trial court denies the motion, to preserve an appellate challenge, objection generally should be made again when the evidence is actually offered. (*People v. Jennings* (1988) 46 Cal.3d 963, 975, fn. 3; *Morris*, at p. 190.)

Indeed, “[e]vents in the trial may change the context in which the evidence is offered to an extent that a renewed objection is necessary to satisfy the language and purpose of Evidence Code section 353.” (*Morris, supra*, 53 Cal.3d at p. 190.) As such, in limine rulings are inherently tentative “because the court retains discretion to make a different ruling as the evidence unfolds.” (*People v. Gonzalez* (2006) 38 Cal.4th 932, 958.)

Jury instructions

In California, a party is “deemed [to have] excepted to” the “giving” of a jury instruction, the “refusing to give an instruction,” or the “modifying [of] an instruction requested” (Code Civ. Proc., § 647; see *Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 530.) This automatic objection, however, can be a trap because it is limited in scope. It applies only to instructions that contain an incorrect statement of law. (*Lund v. San Joaquin Valley Railroad* (2003) 31 Cal.4th 1, 7; *Alaniz v. Sun Pacific Shippers, L.P.* (2020) 48 Cal.App.5th 332, 338-340.) Other problems can abound.

For example, an appellant cannot assert error based on the trial court’s failure to give a particular instruction when the appellant did not request it. (*Martinez v. Rite Aid Corp.* (2021) 63 Cal.App.5th 958, 972.) Nor can an appellant claim error if the instruction given is correct in law but too general or incomplete unless the appellant requested a clarifying instruction. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130-1131.) Likewise, the trial court can refuse to give a legally correct instruction if as requested it is argumentative or slanted. (*Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1108.)

Further, if the record does not

identify the party requesting the instruction, the appellate court presumes the appellant requested it and thus forfeited a claim of error or is estopped under the doctrine of invited error from complaining about it. (See *Lynch v. Birdwell* (1955) 44 Cal.2d 839, 847; *Bullock, supra*, 159 Cal.App.4th at p. 678.) Similarly, if the record does not indicate that the trial court refused an instruction, the appellate court will presume the complaining party withdrew it. (*Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 312.)

Special verdicts

A party’s “[f]ailure to object to a verdict before the discharge of a jury and to request clarification or further deliberation precludes a party from later questioning the validity of that verdict if the alleged defect was apparent at the time the verdict was rendered and could have been corrected.” (*Keener, supra*, 46 Cal.4th at pp. 263-264, italics omitted.) Moreover, objections to the verdict form generally must be asserted before the jury is discharged. (*TRC Operating Co., Inc. v. Chevron USA, Inc.* (2024) 102 Cal.App.5th 1040, 1115.)

Statements of decision

Following a bench trial, the court explains in a statement of decision the factual and legal basis for its determination of each of the principal controverted issues at trial. (Code Civ. Proc., § 632; Cal. Rules of Court, rule 3.1590.) The most important aspect of a statement of decision is that it enables a party to avoid the doctrine of implied findings. (*Gordon v. Wolfe* (1986) 179 Cal.App.3d 162, 168 [absent a statement of decision, “the judgment is effectively insulated from review”].) Indeed, should a trial court fail to provide required findings on material issues in a statement of decision, “[r]eversal is compelled if there was evidence introduced on such issues and this evidence was sufficient to have sustained [a] finding in favor of the party complaining.” (*Duff v. Duff* (1967) 256 Cal.App.2d 781, 785.)

Although the importance of a statement of decision cannot be understated (see Posner & Serlin, *Requesting the*

statement of decision: A process that can preserve, if not enhance, your chances on appeal after a bench trial goes awry, *Advocate*, December 2022), the party requesting it must do so in a timely manner (see Code Civ. Proc., § 632; *Jones v. Adams Financial Services* (1999) 71 Cal.App.4th 831, 840). A party's failure to timely request a statement of decision forfeits the right to one. (*University of San Francisco Faculty Assn. v. University of San Francisco* (1983) 142 Cal.App.3d 942, 946.)

A request for statement of decision must specify the principal controverted issues to be addressed by the trial court. (Code Civ. Proc., § 632; Cal. Rules of Court, rule 3.1590(d).) If the court's proposed statement of decision fails to address the particular issues identified or is ambiguous, the requesting party must then file timely objections. (Cal. Rules of Court, rule 3.1590(g).) Those objections must be specific and contain "sufficient particularity to allow the trial court to correct the defect." (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 498; *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380 [objection must allow "the court to focus on the facts or issues the party contends were not resolved or whose resolution is ambiguous"].) Failure to object constitutes a forfeiture and allows the appellate court to imply findings in favor of the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134; *Trenk v. Soheili* (2020) 58 Cal.App.5th 1033, 1046-1047; *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 60.)

Post-trial motions

California's general rule is that post-trial motions are not required to preserve issues on appeal. An "appellant's right to appeal [i]s not lost by the failure to file a motion for a new trial . . ." (*In re Barber's Estate* (1957) 49 Cal.2d 112, 118; see also *Greenwich S.F. LLC v. Wong* (2010) 190 Cal.App.4th 739, 759 (*Greenwich*).) There are, however, three well-known exceptions to this general rule.

The most common exception is that "[a] failure to timely move for a new trial

ordinarily precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate, whether the case was tried by a jury or by the court. The power to weigh the evidence and resolve issues of credibility is vested in the trial court, not the reviewing court." (*Greenwich, supra*, 190 Cal.App.4th at p. 759, citations omitted.)

A new trial motion also is required to obtain appellate review of a claim of jury misconduct or newly discovered evidence. This is so because these claims require evidentiary support. (See Code Civ. Proc., §§ 657-658; see *Garcia v. Myllyla* (2019) 40 Cal.App.5th 990, 1005 [trial court should not reach merits of jury misconduct claim absent admissible evidence of misconduct].) Furthermore, both jury misconduct and newly discovered evidence often are revealed only after trial. As such, a new trial motion serves as the sole way to preserve claims of jury misconduct and newly discovered evidence before the matter heads to the appellate court.

Counsel should also be aware that the failure to object in the trial court does not constitute a forfeiture of certain appellate challenges

As detailed above, the general rule is that trial court objection is required to preserve an appellate challenge. But it would not be California jurisprudence were there not a whole host of exceptions to this general rule. (See Eisenberg et al., Cal. Prac. Guide: Civil Appeals & Writs (The Rutter Group 2024) ¶¶ 8:271-8:277, pp. 8-205 to 8-213.) Here are some:

Pure issues of law

California's appellate courts have the discretion to address for the first time on appeal pure questions of law applied to undisputed facts. (*Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 699-700; e.g., *Allen v. Stoddard* (2013) 212 Cal.App.4th 807, 811 ["this case presents a pristine issue of law, and since the [party] makes no attempt to show any prejudice, we exercise our discretion to address [it]").)

New legal authority reflecting a departure from prior law

An appellant can raise a new unpreserved theory on appeal when it rests on recent authority issued after the trial court's ruling that could not reasonably have been anticipated. (*Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1334; *Boeken, supra*, 127 Cal.App.4th at p. 1681.)

Lack of subject matter jurisdiction

A challenge to the trial court's subject matter jurisdiction is never forfeited. (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 339-340; see Posner & Serlin, *Take a Deep Breath: Ten Seemingly Intractable Appellate Problems That Can Be Fixed, Advocate*, December 2021.) This challenge can be raised at any time, directly or collaterally, even for the first time in a rehearing petition (*Sime v. Malouf* (1950) 95 Cal.App.2d 82, 116) or a petition for review (*In re Marriage of Oddino* (1997) 16 Cal.4th 67, 73). Once raised, the appellate court must address the jurisdictional issue. (*Consolidated Theatres, Inc. v. Theatrical Stage Emp. Union, Local 16* (1968) 69 Cal.2d 713, 721; *Saffer v. JP Morgan Chase Bank, N.A.* (2014) 225 Cal.App.4th 1239, 1246.)

Lack of standing

The absence of standing is a jurisdictional issue that can also be raised for the first time on appeal. (*Zolly v. City of Oakland* (2022) 13 Cal.5th 780, 789; *Drake v. Pinkham* (2013) 217 Cal.App.4th 400, 407.)

Statutory exceptions to the preservation requirement

Code of Civil Procedure section 647 makes specified matters "deemed accepted to," and subject to review even if not raised in the trial court. These matters include an order refusing a continuance, a jury verdict, an interlocutory/final decision, and orders granting/denying nonsuit or a motion to strike evidence.

Insufficiency of evidence

A claim that substantial evidence does not support the judgment can be asserted for the first time on appeal. (*Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17 ["contention that a judgment is not supported by substantial evidence . . . is an obvious exception to

the [general] rule” that points not urged in the trial court are forfeited for purposes of appellate review]; *Nationwide Ins. Co. of America v. Tipton* (2023) 91 Cal.App.5th 1355, 1365.)

Conclusion

Preservation of issues for appellate review is an essential component of trial practice. Although trial practitioners might see the trial court proceedings as the only matter before them, the reality is that, because of the need for preservation of issues, appellate practice begins in the trial court. Engaging appellate counsel at

the trial court level can be effective to ensure the preservation of issues for appeal. But, in general, as they say at weddings, to preserve issues for appellate review, “speak now or forever hold your peace.”

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