BRIEFING PRESERVATION ISSUES and PRESERVING ISSUES IN BRIEFS

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This paper addresses two issues: (1) briefing preservation issues on appeal; and (2) preserving issues in appellate briefs.

I. Briefing Preservation Issues on Appeal

Dare to dream the impossible: All potential appellate complaints were properly preserved during trial. What do you do with those preserved complaints when writing an appellate brief?

A. Brief for appellant

Although one usually thinks of a preservation challenge as an issue for the appellee, the appellant also must consider preservation issues in drafting the appellant's brief.

1. *Do you mention preservation even if it should not become an issue?*

Usually the appellant will want to reference the record where its issue presented was preserved, even if there will be no fight over preservation. This gives the Court immediate confidence that the appellant's lawyer is competent and that the Court will not be wasting its time on an issue that it later discovers was waived.

An exception could be made, however, when threatened by the limitation on the number of words that can be used in the brief. If you are sure the preservation is clear, so that it should not be an issue on appeal, you could omit it. But this should occur only as a last resort, and then only in the *rare* case when you are pushing against the word limit.

2. *When do you foreshadow a preservation challenge by the appellee?*

If the appellant already knows, say from post-trial briefing, that the appellee will argue waiver, then the appellant should deal with the preservation issue, though perhaps not fully. The appellant should at least spell out what preservation steps occurred, leaving it to the appellee to argue why they are insufficient. Then the appellant's reply brief can explain why those steps should be sufficient.

In the unfortunate case when there has been no preservation at all, the issue usually should not even be presented on appeal. A possible exception is when the appellant needs a finding of waiver in order to pursue a malpractice claim against its trial counsel.

While the doctrine of plain error excuses the absence of preservation, it is a doctrine limited to the most exceptional cases:

> There must be "error" that is "plain" and that affects "substantial rights," and even then we have discretion not to correct the error unless it "seriously affects the fairness, integrity or public reputation of judicial proceedings."
>
> *U.S. v. Phipps*, 319 F.3d 177, 189 (5th Cir. 2003).

If you are forced to proceed under the plain-error doctrine, then you should do so explicitly and demonstrate why your case is sufficiently exceptional.

B. **Brief for appellee**

Paradoxically, the most difficult questions about preservation challenges usually arise while drafting the appellee's brief.

1. ***Which preservation issues do you raise?***

Rarely is any appellate complaint perfectly preserved. Usually there is some wiggle room for a technical argument that something was not done right. Should you, therefore, always raise a preservation challenge?

No one answer fits all cases. Certain factors should guide your decision. For instance, appellate courts are busy. Would they welcome the chance to avoid deciding an issue, if it might be waived? Or, because they are busy, will they be infuriated by an appellee's raising a waiver issue that must be decided, when there has been no waiver? Will the court suspect that the appellee has raised the preservation challenge because the appellee cannot support the trial court's ruling on the merits? Will the court want to stretch to subject a lawyer to a potential malpractice claim by finding waiver on a technical basis? Or will the preservation challenge impel the court to affirm the ruling on a different ground, so that it does not have to hold the complaint waived?

My suggestion for exercising your judgment under these factors is to weigh the strength of your defense on the merits against the strength of your preservation challenge. This results in a matrix on whether to brief or not to brief a preservation challenge:

	Strong on Merits	***Medium on Merits***	***Weak on Merits***
Strong on Waiver	Brief challenge	Brief challenge	Brief challenge
Medium on Waiver	Brief challenge	Brief challenge	Brief challenge
Weak on Waiver	Do not challenge	Do not challenge	Brief challenge

Thus, whether to brief a preservation challenge usually depends on the strength of the challenge, unless you are just about as weak on the merits as you are on waiver. But the matrix can influence *where* you include the challenge in your brief.

2. ***Where do you brief them?***

Where you brief your preservation challenge also depends on its strength and the strength of your position on the merits. A new matrix shows my recommendation:

	Strong on Merits	***Medium on Merits***	***Weak on Merits***
Strong on Waiver	Before merits	Before merits	Before merits
Medium on Waiver	After merits	Before merits	Before merits
Weak on Waiver	N/A	N/A	After merits

Usually, as chronological logic would dictate, a challenge to preservation should precede the argument on the merits. If the issue truly is waived, then the court need not consider it. The court may still read the merits section of the brief, but it will do so either for confirmation that no serious substantive injustice will result from a waiver holding or for an alternative basis on which to affirm.

When the preservation challenge is weaker than the merits defense, I recommend placing the waiver argument after you brief the merits. This expresses confidence in your merits arguments, with the waiver presented as a possible alternative holding for the court if it does not want to dignify the merits issue by addressing it. For the same reason, I would brief a weak preservation challenge after a weak merits response, in the hope of expressing more confidence in the merits argument that it deserves. Whenever the preservation challenge follows the merits argument, nevertheless, the preservation challenge should be highlighted in the summary of the argument, in the introduction to the argument of the entire issue, and in a subheading, so that the Court can quickly preview the challenge if it wants to before reading the merits arguments.

3. ***What do you say about them?***

Here are some things to look for:

- Was there an objection, motion, or request?
- Was it timely?
- Was there a ruling?
- Was the ruling invited?

Usually you should mention what minuscule preservation was attempted and explain why that did not fulfill the purpose behind the requirement of preservation—to clearly apprise the trial court of the complaint and why counsel is right and the court is wrong, so that the trial court can correct its ruling and avoid a retrial.

C. Reply brief for appellant

The appellant's reply will, of course, largely be dictated by the appellee's challenge. In explaining why your steps toward preservation should be considered sufficient, always focus on the purpose behind the technical requirements—to make sure the trial court understands the problem so that it has a fair chance to fix any error at that time. You may wish to attach a page or two from the record to demonstrate precisely what trial counsel or the court said.

Also, don't forget to present the best case you can on the merits. It should be beyond cavil that the court's view of the substantive merits of the appeal influences how far it is willing to stretch to find either preservation or waiver. At some point, the preservation or waiver may be too clear to ignore, but short of those extremes, there is some play in the joints.

II. Preserving Issues in Appellate Briefs.

A. Failing to present an issue

Issues not presented in the original statement of issues presented in the appellant's opening brief will not (usually) be considered. *E.g., Quick Tech. v. Sage Group PLC*, 313 F.3d 338, 343 n.3 (5th Cir. 2002); *SEC v. Recile*, 10 F.3d 1093, 1096-97 (5th Cir. 1993). Occasionally an appellee's raising an issue to which the appellant replies will present the

issue sufficiently for decision. *E.g., Harris v. Atchison, T. & S.F. Ry*., 538 F.2d 682, 684 n. l (5th Cir. 1976).

Of course, the statement of issues is liberally construed. *E.g., Carmon v. Lubrizol Corp.,* 17 F.3d 791, 794 (5th Cir. 1994). Thus, the inclusion of an issue in the statement of issues is presumed to include all subsidiary issues argued. *See, e.g., West v. Caterpillar Tractor Co*., 547 F.2d 885, 887 (5th Cir. 1977). What is a subsidiary issue presented in the arguments that is subsumed in the statement of issues presented is not really clear. Thus, you are much wiser to include the issue specifically in the statement of issues presented.

B. **Failing to provide record references**

The brief must cite to the record in arguing the issues presented. *E.g*., Fed. R. App. P. 28(a)(7); *Bettersworth v. FDIC*, 248 F.3d 386, 394 (5th Cir. 2001).

C. **Failing to provide argument and authorities**

To avoid waiver, the appellant also must provide "cogent argument, supported by citation to relevant authorities," as well as the standard of review. E.g., Fed. R. App. P. 28(a)(9)(A, B); *Smith v. Cockerell*, 311 F.3d 661, 679 n.12 (5th Cir. 2002); *Bettersworth v. FDIC*, 248 F.3d 386, 394 (5th Cir. 2001).

III. Conclusion

Preservation is the flip side of waiver. Both implicate a tension between means and ends that is at the heart of judging. Does any substantive injustice on the merits sufficiently outweigh any procedural injustice from not strictly enforcing preservation rules? Are the preservation rules only standards? Did the trial court have a reasonably fair chance to get it right? Did the appellee have a reasonably fair chance to join issue?

When is preservation a subspecies of subject-matter jurisdiction? Will the appellate courts' disposition of its caseload be unfairly affected by difficulties in processing the appellant's brief? Will counsel unfairly be subjected to a malpractice claim? These factors influence the judicial decision whether a complaint is waived.