

Another Consideration Involving Unpreserved Error

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Whether to raise a potentially unpreserved point as error can be a difficult decision. Especially in civil cases, the subject of preservation can place trial counsel and the trial court strategy under a microscope — not just with the court but also with the client. In addition, the threshold question of whether a point of error has been preserved may lead to a tangled web that ultimately becomes a distraction that is not worth the point's chances of success.

Not to be overlooked in this analysis is whether the appellant should argue that an error warrants reversal even if the point is unpreserved. Doing so requires the appellant to advocate under a heightened standard of review. Federal courts refer to that standard as plain error. Some state courts refer to it as fundamental error. However labeled, it is difficult to satisfy. The error must generally be so intolerable that justice cannot fairly function despite the appellant's failure to call the problem to the trial court's attention.

In *Mayotte v. U.S. Bank N.A.*, the Tenth Circuit Court of Appeals recently refused to consider whether an asserted error met the plain error standard because the appellant never argued that it did so. The decision again illustrates that once an appellate court determines that a point is unpreserved, the court cannot be expected to conduct a plain error analysis unless the appellant has attempted to show how that standard is satisfied.

In some cases, the appellant may reasonably decide that a point is worth making on the chance it will be considered under the usual standard for reversal, but if the point is not preserved then no good faith argument for plain error exists. That is often true in civil cases, in which the plain error standard is exceedingly difficult to overcome. In all cases, whenever preservation is at issue, whether to argue under the plain error standard should be considered, and an advertent decision should be made on whether to forfeit that argument on appeal.

Tip:

- When considering whether to raise a point that may be unpreserved, consider also whether to argue that the point satisfies the heightened standard for unpreserved error. If that argument is not made, then the appellate court may end its analysis upon finding the point to be unpreserved.