Introduction

This book updates and revises an Annual Meeting Paper I prepared years ago for the TIPS Appellate Practice Committee. It is for civil trial and civil appellate lawyers who practice in federal court. Primarily, the book sets out the rules to follow in order to preserve complaints on appeal. The book focuses on opinions from United States courts of appeals and attempts to cite many examples of case law from all circuits, but it does not purport to do so exhaustively.

The appendix to the book contains two features. The first feature is a checklist of preservation items. The other feature comprises two aids to further research.

The first aid appears in the checklist itself. Listed with each preservation item are West’s Key Numbers relating to that topic. As a result, the reader can use those key numbers to do additional, updated, and jurisdiction-specific research on preservation topics. Second, the appendix contains an index to Wright & Miller’s respected treatise, Federal Practice and Procedure. The index is shown as it would appear if the reader were to expand the treatise in its online form on Westlaw. The index includes sections from the treatise that are relevant to preservation issues covered in this book. In this way, the reader can easily find helpful sections in the treatise, sections that contain many more case citations and nuances that are beyond the scope of this book.

The editor and authors of this book express their appreciation to TIPS sponsor Thomson Reuters for permitting us to include these two aids to further research, and also for providing comments that improved both the listing of the Key Numbers and the Wright & Miller index.

The focus of this book is preserving appellate complaints in federal trial courts. Not addressed are the subjects of sanctions and privileges, which are covered by other publications and do not raise the traditional issues of preserving appellate complaints to reverse a judgment. Perfection of appeals is also outside the scope of this book, as are requirements of briefing. The term “preservation of complaints” is used rather than the
more colloquial “preservation of error,” except in quotations from case law or other sources. After all, no one really wants to preserve error.

Federal court is the focus because preservation rules vary too much state by state to cover in one publication, and state preservation rules often change, whereas federal preservation rules tend to be more static as well as less onerous. Nevertheless, there are general philosophies behind preservation that are near universal. Those philosophies are discussed in the first chapter of this book.

Although the main purpose of this book is to aid in taking the right steps to ensure preservation of appellate complaints, the trial lawyer may not always take every step that is usually required to preserve a complaint. After all, trial lawyers must focus on winning their trial and often must make split-second decisions and judgment calls that do not follow all the procedural steps required to ensure presentation of an issue on appeal. Consequently, secondary aims of this book are to provide a resource for litigating exceptions to preservation rules and citations to cases that assist in arguing against exceptions to strict preservation rules. Exceptions to preservation rules and arguments against such exceptions are often court specific and case specific. Consequently, this book is not an answer to all preservation problems, but it is a resource for research on how to pull the proverbial appellate chestnuts out of the fire of a trial.

This book typically follows Bluebook citation form, but it does not do so slavishly. The signals “See, e.g.” and “E.g.” are not used, because almost all cited cases are examples. Unreported cases are cited, primarily to the Federal Appendix, without regard to, or any notation as to, whether they can be cited at all or cited as authority in their jurisdictions, because they may still benefit our readers in analyzing issues and taking steps to preserve appellate complaints. The citations to the Wright & Miller treatise that appear in the book are to the online Westlaw version and thus do not include volume numbers or the additional authors whose names appear on those volumes.

The authors wish to thank the following for their proofreading, comments, and edits: Barbara Patton of Bradley Arant Boult Cummings LLP and the following lawyers in the appellate practice group of Yetter Coleman LLP: April L. Farris, Dori Kornfeld Goldman, Christian J. Ward, and Cody T. Rutowski.

Finally, the editor and authors express appreciation to the TIPS Book Board for supporting the publication of this book.

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