

Karen S. Precella in Litigation Section of State Bar of Texas's News for the Bar: Error Preservation: Making a Record Without an Express Written Ruling

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PRACTICES Appellate, Litigation

The Texas Supreme Court is reluctant to turn away claims based on waiver. As a result, Texas courts should not apply rules of error preservation “so strictly as to unduly restrain appellate courts from reaching the merits of a case” and should construe the rules “liberally, so that decisions turn on substance rather than procedural technicality.” But, absent a rare fundamental error, arguments raised for the first time on appeal are not preserved and will not be considered.

For preservation, the record must show that (1) a specific, timely request, objection, or motion was made to the trial court and (2) the court ruled, or refused to rule, on that request, objection, or motion. If the trial court refused to rule, the complaining party must object to that refusal. An express written ruling obviously is the clearest, best path to preservation. But, in some circumstances, a lack of written order may not be fatal to preservation.

A. Substitutes for a written ruling

1. Implicit or deemed ruling in an ordinary appeal.

Rule 33.1(a)(2) permits preservation by an implicit ruling. An implicit ruling is one that may be reasonably inferred from something else in the record.⁶ But the implication must be clear. “An express ruling on one motion may imply a contrary ruling on an opposing motion.”⁸ For example, granting one remedy rather than a competing or alternative remedy may impliedly deny that competing or alternative remedy. But a ruling on a motion alone does not necessarily imply a ruling on other requests. For example, “if sustaining the objections to [summary judgment evidence] was not necessary for the trial court to grant summary judgment, the summary-judgment ruling [cannot be] an implication that the objections were sustained.” If there is any doubt about whether one ruling implicitly rules upon a different request, consider asking for an express ruling.

Excerpted from the Litigation Section of the State Bar of Texas’s *News for the Bar*. To read the full article, click on the PDF linked below:

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