

SPECIAL CONSIDERATIONS IN APPEALING JURY VERDICTS

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TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES.	iii
I. Pre-trial.	1
II. Trial.	1
III. Posttrial.	4
IV. The decision to appeal.	4
V. Perfection of appeal.	5
VI. Brief for appellant.	6
A. Analysis.	6
1. Initial legal research.	6
2. Reviewing the record.	7
3. Application.	8
B. Selecting issues.	8
C. Organization.	9
D. Major research.	12
1. The law.	12
2. The record.	12
E. Writing the brief.	12
1. Statement of facts.	12
2. Summary of the argument.	16
3. Argument.	16
VII. Reply brief for appellant.	17
VIII. Oral argument.	18
IX. Rehearing.	19
X. Conclusion.	20

INDEX OF AUTHORITIES

	Page(s)
CASES	
<i>Brennan’s Inc. v. Dickie Brennan & Co.</i> , 376 F.3d 356 (5 th Cir. 2004).....	2
<i>Centraal Stikstof Verkoopkanter, N.V. v. Walsh Stevedoring Co.</i> , 380 F.2d 523 (5 th Cir. 1967).....	3
<i>Cummings v. Gen. Motors Corp.</i> , 365 F.3d 944 (10 th Cir. 2004).....	4
<i>DIJO, Inc. v. Hilton Hotel Corp.</i> , 351 F.3d 679 (5 th Cir. 2003).....	9
<i>Granberry v. O’Barr</i> , 866 F.2d 112 (5 th Cir. 1988).....	5
<i>Greenwood v. Societe Francaise De</i> , 111 F.3d 1239 (5 th Cir. 1997).....	3
<i>Reeves v. Gen. Foods Corp.</i> , 682 F.2d 515 (5 th Cir. 1982).....	4
<i>Rothstein v. Carriere</i> , 373 F.3d 275 (2d Cir. 2004).....	3
<i>United States v. Reeves</i> , 752 F.2d 995 (5 th Cir. 1985).....	3
<i>Unitherm Food Sys., Inc. v. Swift Eckrich, Inc.</i> , No. 04-597, 2005 WL 443881 (U.S. Feb, 28, 2005).	5
<i>Wells v. State Farm Fire & Cas. Co.</i> , 993 F.2d 510 (5 th Cir. 1993).....	3

RULES

Fed. R. App. P. 10(b)..... 6

Fed. R. App. P. 28(a)(7)..... 16

Fed. R. App. P. 28(a)(8)..... 16

Fed. R. App. P. 28(a)(9)(B)..... 16

Fed. R. App. P. 28(d)..... 15

Fed. R. App. P. 35. 19

Fed. R. Civ. P. 38(b). 1

Fed. R. Civ. P. 50(b). 3

Fed. R. Civ. P. 59(b). 4

Fed. R. Civ. P. 61..... 2

Fed. R. Evid. 103(a)1..... 2

Fed. R. Evid. 103(a)2..... 2

Fed. R. Evid. 103(b)..... 2

MISCELLANEOUS AUTHORITIES

George D. Gopen, *The Sense of Structure* (2004)..... 15

Sidney Powell, *How to Reverse a Case on Appeal*,
in 19th Annual Federal Appellate Practice & Advocacy Seminar (2004). 4

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by Roger D. Townsend¹

This paper discusses the various considerations relevant to the appeal of a jury verdict to the Fifth Circuit. Because many of the issues overlap other papers, I'll truncate their treatment here. I'll primarily elaborate about techniques for maximizing your chances of a successful appeal as appellant.

I. **Pre-trial**

The best time to prepare for the ultimate appeal of a jury verdict is before the trial. In fact, the original complaint and answer are relevant. An obvious prerequisite of any appeal of a jury verdict is a demand for a jury trial, which may have to occur in the initial pleading. Fed. R. Civ. P. 38(b). But also important are the claims and defenses set forth. Certain claims are more likely to be resolved by summary judgment, rather than by a jury. These include, for example, the construction of an unambiguous contract, issues of governmental immunity, and defamation of public figures.

II. **Trial**

Many issues during the trial prove germane to a later appeal. One, of course, is the evidence being presented. You will want to try to present sufficient evidence to support a

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jury verdict in favor of your client. But you may also wish to preserve complaints about the admission or exclusion of evidence. The rules are not terribly complicated, except in unusual situations. Generally, if your evidence is excluded, then you must make an offer of proof of the evidence. Fed. R. Evid. 103(a)(2), (b). It then becomes part of the appellate record, though not in front of the jury. By contrast, if your opponent seeks to introduce inadmissible evidence, then you must timely and specifically object to its admission and obtain a ruling. Both the objection and ruling should be shown in the record. Fed. R. Evid. 103(a)(1).

When a case is on appeal, however, the test for reversible error will not simply be whether an error occurred that you preserved. In addition, the preserved error must be reversible, which means not harmless. Fed. R. Civ. P. 61. In other words, the error must be “inconsistent with substantial justice.” *Id.* During the trial, you may have opportunities to influence the harmfulness of an error. *See, e.g., Brennan’s Inc. v. Dickie Brennan & Co.*, 376 F.3d 356 (5th Cir. 2004). While it is usually better to try to win to the jury than take your chances on appeal, an occasional error may be so clear and prejudicial that the chance of appellate reversal is better than the chance of winning to the jury. In that situation, you may wish to downplay the cross-examination of a witness or references to an exhibit. Your jury argument may need to be adjusted as well.

Probably the most important step at trial related to the eventual appeal of a jury verdict is the motion for judgment as a matter of law under Federal Rule of Civil Procedure 50. You have the right to make that motion at the close of the plaintiff’s case, but you are not required to do so. Regardless of whether you do it then, you *must* make that motion at the close of all

evidence. Fed. R. Civ. P. 50(b); *Wells v. State Farm Fire & Cas. Co.*, 993 F.2d 510, 513 (5th Cir. 1993). While there are (a very few) ways to circumvent that requirement, there is no reason to have to resort to them. *See, e.g., Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1245 (5th Cir. 1997). Get in the habit of *always* moving for judgment as a matter of law when all evidence is closed.

This is important because it affects the standard of appellate review. *See* pp. 4, below. Without that motion, you are relegated essentially to alleging plain error, which requires a showing of absolutely no evidence or inference to support the verdict, plus a blatant miscarriage of justice were the verdict to stand. *E.g., Centraal Stikstof Verkoopkanter, N.V. v. Walsh Stevedoring Co.*, 380 F.2d 523, 528 (5th Cir. 1967). Plain error is seen about as often as a Yeti. Again, there is no reason to subject yourself to that rigorous test.

The other important consideration at trial is the charge of the court. This is significant because – absent fundamental error – your appellate challenge regarding the sufficiency of the evidence will be reviewed under the substantive law as defined in the charge. In other words, the law might be incorrectly submitted, but (absent plain error) you will still be reviewed under that incorrect submission unless you objected. *E.g., United States v. Reeves*, 752 F.2d 995, 1000 (5th Cir. 1985).

The charge is also important to a later appeal of a jury verdict because errors in the charge often directly affect the fact-finding process and are more likely to be considered reversible error. The significance of this tendency will become apparent when I discuss briefing strategy at pages 8 - 12, below.

III. Posttrial

If a party has filed a motion for judgment as a matter of law at the close of all evidence, then it is entitled to file another motion for judgment as a matter of law within 10 days after the entry of judgment. Fed. R. Civ. P. 50(b). And—if it wants to challenge the sufficiency of the evidence to support the verdict—it *must* file this motion. *E.g., Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 951 (10th Cir. 2004).

In addition, a party should file a motion for new trial attacking the sufficiency of the evidence. This motion, too, must be filed within 10 days of the entry of judgment. Fed. R. Civ. P. 59(b). The reason for filing the motion for new trial is to obtain the most favorable standard of review possible for any insufficiency challenges to the evidence supporting the verdict. A party that files only a motion for judgment as a matter of law, but not a motion for new trial, can complain on appeal only that in light of all evidence and reasonable inferences to support the verdict, no reasonable juror could have reached the verdict. *Reeves v. Gen. Foods Corp.*, 682 F.2d 515, 519 (5th Cir. 1982). When a party files both motions, however, the standard of review for the latter is slightly relaxed to whether the trial court clearly abused its discretion. *Id.* at n.6. Whether this is more than a theoretical difference is debatable.

News flash: Certiorari has recently been granted on this issue:

Whether, and to what extent, a court of appeals may review the sufficiency of evidence supporting a civil jury verdict where the party requesting review made a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before submission of the case to the jury, but neither

renewed that motion under Rule 50(b) after the jury's verdict, nor moved for a new trial under Rule 59?

Unitherm Food Sys., Inc. v. Swift Eckrich, Inc., No. 04-597, 2005 WL 443881 (U.S. Feb. 28, 2005).

IV. **The decision to appeal**

Before filing a notice of appeal, a party should seriously consider the standard of review. Few jury verdicts are reversed for insufficient evidence. *See* Sidney Powell, *How to Reverse a Case on Appeal*, in 19th Annual Federal Appellate Practice & Advocacy Seminar (2004). The seventh amendment of the United States Constitution has been interpreted to limit the ability of federal appellate courts to second-guess jury verdicts. *E.g.*, *Granberry v. O'Barr*, 866 F.2d 112, 113 (5th Cir. 1988). As a result, the standards of appellate review are extremely deferential to the jury's opportunity to observe the demeanor of the witnesses and to make credibility determinations. In short, your chances on appeal are going to be slim no matter how unjust you believe the verdict is. Before undertaking the expense of an appeal, trial counsel should seriously consider asking a more objective appellate lawyer to review the case as the appellate court will.

Another consideration depends on the equities. In short, which party wears the black hat and which the white? This is important because judges, believe it or not, actually possess some characteristics of human beings. They like to think of themselves as doing justice under the law. And most "law" has some play in the joints precisely to avoid unjust results. Thus, a technical "gotcha" seldom prevails in the courtroom, no matter how good it may

sound in the lawyer's office. Thus, unless your client looks particularly clean, or the opposing party looks particularly malevolent, do not get your hopes up about the court's setting aside the jury's verdict, even when the evidence to support the verdict seems thin or another error occurred.

V. **Perfection of appeal**

Obviously, if you are planning to challenge the sufficiency of the evidence, then you must perfect an appeal and request a transcript of that evidence. Upon filing the notice of appeal, therefore, be sure to complete the transcript purchase order form and to make financial arrangements with the court reporter. It is always best, and often essential, to order a transcript of the entire proceedings. Otherwise, you run the risk of a presumption that omitted proceedings support the verdict. *E.g.*, Fed. R. App. P. 10(b).

VI. **Brief for appellant**

A. *Analysis*

The goal in initial legal analysis is to uncover reversible error. You do this by considering the evidence in light of the controlling law. But you also must play detective, so that you can explain in convincing fashion why the jury found what it found despite the evidence favoring your client. Without this extra step, you are unlikely ever to convince the court of appeals that the case should be reversed.

1. *Initial legal research*

Unless the anticipated issues are within your existing knowledge, it is wise to begin with background research into the issues. Gaining familiarity with the basics of the areas of law involved will enable you to approximate the most likely position of the judges hearing the appeal. In addition, it gives you the ability to review the record with an eye toward what ultimately will be relevant to the appellant's brief.

Preferably, first read all briefs in the district court. While reading them, you should make notes of any other arguments that come to mind. Then conduct some basic legal research (read an annotation, treatise, or article) to gain familiarity with the relevant area of law.

Some procedural research also may be necessary if there are questions about preservation of appellate complaints or other unusual events. Because the court will rarely consider waived issues, a bit of research into preservation can sometimes alter your selection of the issues.

2. *Reviewing the record*

Although many lawyers turn the record over to a junior associate or even a legal assistant, there is no substitute for having the lawyer in charge of the appeal read the entire record, or at a minimum, the parts that will be germane to the appeal. An experienced lawyer will notice things in the record that a less experienced lawyer will not.

You should also avoid the temptation to trust a trial lawyer's recollection about the witnesses' testimony or the important parts of exhibits. If the entire exhibit is in evidence, any part of it can support the judgment. (The legal fiction is that the jury reads all the exhibits before reaching a verdict.) Thus, it is particularly important to study all the exhibits to evaluate whether they might support the verdict.

To master the transcript, you should abstract it. This requires reading the record, noting the volume and page numbers, and summarizing what is reported on the page. The most efficient method is to use software that expedites abstracting issue by issue. The goal is to reduce the massive record into bite-sized bits of topical information that can be readily used in drafting the brief.

3. *Application*

When you have gained familiarity with the evidence, you must apply the standard of review to isolate which facts are undisputed, which are in dispute (so that the version supporting the verdict will be taken as true), and which are reasonable inferences supporting the verdict. You then must consider whether those facts collectively demonstrate that no reasonable juror could have rendered the verdict that was rendered. This is a difficult burden, but must be done if you are to successfully challenge the verdict head-on.

An easier burden is to find a legal or procedural error that probably influenced the jury's verdict. This permits you, in essence, to flip the standard of review. No longer must

you show that no reasonable juror could have reached the verdict; instead, you must show only that it was probable that a reasonable juror would have been affected by the error.

B. *Selecting issues*

In addition to trying to find a legal or procedural error that reduces the burden on appeal, you must consider whether to challenge all jury findings or to concede some findings. This is a difficult decision. If the evidence clearly supports a finding, then you may be better off merely challenging the error that deprived your client of a fair opportunity to have the jury decide the fact. On the other hand, if the evidence is weak, but perhaps not quite weak enough to justify reversal on its own, you may wish to challenge the sufficiency of the evidence to support the finding, because the challenge will support the challenge to the legal or procedural error. *See* pp. 10-12, below.

Beware, however, that a finding which is unchallenged either on sufficiency of the evidence or other (substantive, evidentiary, or procedural) grounds will be taken as binding on appeal. It is possible, therefore, to have a remand for a new trial solely to determine liability or solely to determine damages. *E.g., DIJO, Inc. v. Hilton Hotel Corp.*, 351 F.3d 679, 685 (5th Cir. 2003). Thus you should carefully weigh your options before selecting the issues you will appeal.

C. *Organization*

The key to a successful appeal of a jury verdict usually involves the selection and organization of issues. Except in the most unusual case, a challenge to the sufficiency of the

evidence, standing alone, will not suffice. Instead, it must be combined with a challenge to a substantive, evidentiary, or procedural error that probably affected the jury's view of the evidence.

Perhaps the easiest way to explain this is through an illustration. In one large appeal involving an enormous construction project, I faced an initial problem. The trial had lasted four months, the dispute covered about 10 years of design and construction, and the evidence consisted of scores of witnesses and several hundred thousand pages of exhibits. I faced an even bigger problem: My client had lost the jury verdict. How could I convince a court of appeals to remand the case for another lengthy trial?

Fortunately for me (unfortunately for my client), the trial court had dismissed one of our key claims before trial, putting us to trial on our weakest theory. Moreover, it had permitted the defendant to introduce into evidence numerous newspaper reports containing hearsay statements by my client. I decided to contend: (1) the court had erred in dismissing a key claim; (2) the admission of the newspaper reports was reversible error; and (3) jury's verdict was not supported by sufficient evidence. The beauty of this approach lay in its flipping the standard of review. For the first contention, all facts supporting the claim had to be taken as true. Thus, I could largely ignore contrary evidence and tell solely my client's side of the story, replete with its white hat and the defendant's black one.

The other two issues required a slightly more elaborate strategy. For the second contention, I was sure that I could demonstrate error, but concerned about proving harm. For the third contention, I was concerned about being able to meet the standard of review. By

combining those two contentions, they each strengthened each other. Thus, I decided to outline the second section of the brief as follows:

- II. The judgment should be reversed, because improperly admitted hearsay influenced the jury into rendering a verdict based on insufficient evidence.
 - A. The appellant preserved its complaint about the admission of hearsay newspaper reports.
 - B. The trial court abused its discretion in admitting hearsay newspaper reports.
 - C. The admission of hearsay newspaper reports is reversible error.
 - 1. The hearsay newspaper reports probably caused an improper judgment.
 - 2. The jury's verdict lacks the support of sufficient evidence.

For our purposes, the last two subsections are the important part. For the first subsection, my burden is to show that the error more likely than not caused the verdict. For the second subsection, my burden is to discuss all the evidence, though in the light most favorable to the verdict. But by arranging the presentation in this manner, every time I was faced with an unfavorable fact, I simply reiterated that it might not have loomed so important for the jury if the jury had not been poisoned by the hearsay newspaper reports. I also was able to flip the appellee's arguments: whenever the appellee argued that the court must not second-guess the jury with regard to weighing the evidence, I replied that the court should not second-guess the jury by saying the hearsay had not affected the jury.

A similar approach can be used when the court omits a claim or instruction from the charge. Assuming proper preservation, the issue may come down to whether the evidence was sufficient to support submission. In that instance, the standard of review flips to favor the appellant at least with regard to the review of the evidence. The appellant can then freely argue its side of the case, since merely demonstrating the presence of a fact issue should support reversal.

D. ***Major research***

1. *The law*

At this stage, you should have substantial familiarity with the appellate record and a decent grasp of the specific issues likely to arise on appeal. Now you can fine tune your research by looking to specific holdings or language supporting your position. Thus, you may need to re-read some cases for more specific gems. It also is important to note the procedural posture of the cases, since the language and holdings may have been affected by the applicable standard of review.

2. *The record*

After you have conducted more refined legal research, review your issues abstracts of the record to see if specific facts fit the authorities you have uncovered. Often you will find nuggets in the record that initially did not seem important, but suddenly loom large after you find a new case involving analogous facts.

E. *Writing the brief*

1. *Statement of facts*

Usually the most important part of the brief is the statement of facts, because experienced appellate judges usually have some idea as to the applicable law, but don't know the facts of your particular case. Also, a persuasive statement of facts will convince the court of the justice of your client's position, so that the judges will want to decide in your favor without reading any more of your brief.

A great statement of facts is comprehensible, interesting, neutralizes unfavorable facts, and satisfies the curiosity of the court on peripheral facts. Given the volume of cases before the court, you should edit, trim, and reduce the statement of facts as much as possible. Omit not only all immaterial facts, but also all immaterial details about the material facts. Adding needless details in the statement of facts weakens your brief, because appellate judges have a tendency to try to recall every fact that you state. When you give them immaterial facts, you distract them from the key facts. If there are inferences to be drawn or more details that are pertinent, work those into the argument section later in the brief.

Nearly all cases can have their material facts stated in no more than four pages. More details than that are simply more than most readers can absorb at the outset. If you cannot state the facts within four pages, you should question whether the facts you are stating are really material.

Excessive length is frequently generated by the addition of too many needless details, such as dates: “On or about such and such date this happened.” Usually the dates are irrelevant, although in some cases a certain contract issue may depend on when an offer expired or an acceptance occurred. But it truly does not matter on what day an automobile accident occurred or when a contract was entered into, unless you have a statute of limitations or pre-judgment interest question. The same is usually true about colors of things, what the weather was like, and the parties’ full names. As a result, a good brief can never read like a good novel.

A second technique for an effective statement of facts concerns its organization. If the appeal is simple, or if you have successfully interrelated the issues into a thematic presentation, a chronological order usually is best. By contrast, if you have a large case with disparate issues that cannot be thematically related, then the facts can be marshaled topically. For a lengthy statement of facts, moreover, topic headings can be useful. Similarly, when writing a statement of facts, never simply list the witnesses and describe their testimony. Instead, you should highlight the key facts and skip contextual or unnecessary details. Because credibility is an issue exclusively for the jury, the name of the witness and his expertise often is irrelevant to the appellate court unless there is a *Daubert* issue.

A third technique concerns the tone and selection of facts. Use the standard of review in writing the statement of facts when it is in your client’s favor. In that rare instance, an appellant can draw reasonable inferences from the facts in the record; thus, you can usually afford to admit the presence of disputed facts. Nevertheless, the statement of facts should

be different from the argument, because your credibility as an advocate is at stake. You can, however, add certain background facts to show the justice of your position, but avoid the use of emotional words in a statement of facts. Instead, use clarity and organization to be persuasive. The clever use of conjunctive adverbs, such as “although,” “nevertheless,” and “however,” can also be effective in juxtaposing information.

Since the standard of review will usually be against the appellant, if the specific facts are bad for your client, you will usually need either (1) to manipulate the level of linguistic abstraction until you reach facts that can honestly be stated in your favor, or (2) to show procedural barriers to the decision impelled by the facts. Sometimes the force of unfavorable facts can be diminished either by placing them in the context of good facts or by stating them in footnotes. Another sound technique is the control of focus and emphasis. See George D. Gopen, *The Sense of Structure* (2004). When unfavorable facts cannot be minimized, you should try to settle the case. If you cannot, then you must at least be candid about the bad facts.

A stylistic technique to make the statement of facts interesting is to tell a story that has characters and a plot. In telling this story, it is useful to summarize the critical facts in the first paragraph. Then, in subsequent paragraphs, state the key facts in a topic sentence, adding details in the remainder of the paragraph. It is useful to give names or labels to the parties, rather than procedural phrases such as appellant or appellee. Fed. R. App. P. 28(d). “Plaintiff” or “defendant” is better, and probably best is “Microsoft,” “Jones,” “the widow,”

“the bank,” “the insurance company,” and the like. *Id.* For ease of comprehension, jargon should be explained, and you can even attach a glossary as an appendix if necessary.

Finally, the statement of facts should be neither exaggerated nor loosely paraphrased. Yet quotations should be used sparingly in the statement of facts. Particularly pithy phrases can be quoted, but by-and-large, use accurate paraphrasing. Exaggeration is deadly for an appeal. The statement of facts *must* be accurate, objective, and have record references for every assertion. Fed. R. App. P. 28(a)(7). No exceptions exist for this requirement. A major pet peeve of appellate judges (and good appellate lawyers) is the assertion of facts without record references. To avoid irritating them, have a record reference for every fact.

2. *Summary of the argument*

The summary should be a succinct condensation of your arguments, rather than a mere repetition of headings. Fed. R. App. P. 28(a)(8). Nevertheless, the summary of the argument should not be just a mere topic sentence rendition of the arguments you make. Instead, use the summary of the argument to explain your theory of the appeal: what happened below; why did you lose; why should the case be reversed? The summary should have no citations, unless one or two authorities are dispositive.

You can also use the summary as an analytical overview to set the stage for your argument. In particularly complex cases, this can be a helpful introduction to the structure of the argument. It can also provide an analytical overview of how the issues relate to each other.

3. *Argument*

At the beginning, set out the standard of review, completely and candidly. Fed. R. App. P. 28(a)(9)(B). But try to use cases showing where it has been met. Then explain how your facts fit the standard.

The argument section is where your analysis comes to shine. Perhaps a substantive rule of law renders some of the evidence immaterial. For instance, in a public-figure defamation case, there may be overwhelming evidence of negligence, but none of actual malice. You can then explain away all the bad facts as being mere distractions from the ultimate question to be decided. Another example would be parol evidence in a case dealing with the construction of an unambiguous contract. Again, you can admit the presence of the unfavorable interpretations, simply explaining that they are immaterial to what is a question of law for the court.

In other cases, a rule of evidence can come to your rescue. The most obvious example is a *Daubert*-challenge to an expert's testimony. Once the expert's testimony is knocked out, you can then demonstrate that the remaining evidence is insufficient to support the verdict. Another example would be improperly admitted hearsay, when the hearsay was the only basis for sustaining the verdict.

Finally, a procedural rule may save the day. Absent plain error (which almost always *is* absent), the sufficiency of the evidence to support the verdict will be construed in light of the court's charge (unless there was a charge objection). Perhaps the charge failed to ask the correct question or to provide the correct instruction. Testimony that is relevant only to what

would be a correct charge may be unavailing, unless someone made the right charge objection. Other examples could include deposition testimony that should have been excluded because certain formalities were not properly observed, or similar errors involving other discovery.

VII. Reply brief for appellant

When it comes time to file a reply brief, the key will be to minimize factual disputes. The appellee will almost surely have tried to turn everything into a credibility dispute solely for the jury's determination. If possible, the appellant should admit those issues, but demonstrate why they are immaterial to the jury finding being challenged.

If the appellee relies solely on inferences, then you should attack the reasonableness of the inferences. Perhaps they are too attenuated or logically unconnected. Particularly when reviewing the reasonableness of inferences to be drawn will the court's sense of justice about the case occasionally prove determinative.

In other situations, stress the paradox of the appellate court's deferring to the jury's exclusive right to weigh the evidence when the appellate court is deciding whether a procedural or evidentiary error is harmful. Argue that, as umpire, the court should be reluctant to say the error did not affect the jury's mental processes.

VIII. Oral argument

All the usual tips about oral argument apply, but especially the caution about exaggeration. You simply must be completely candid about the record and use procedural, substantive, or evidentiary rules to bar the consideration of adverse facts.

For instance, I once successfully reversed a large plaintiff's judgment in a malicious prosecution case by taking advantage of the substantive law. To prevail, the plaintiff was required to prove the defendant had no reasonable basis whatsoever for believing the plaintiff had committed the crime. Since the burden was effectively on the plaintiff to prove a negative, I was able to use various snippets of evidence to make it look very likely that the plaintiff was in fact guilty. Thus, I began my argument by telling that court that I had five undisputed facts that established probable cause. The court then waited for me to list them, and I noticed the judges writing them down. Aside from meeting the standard of review, this tactic also appealed to the court's sense of justice, which made it unwilling to see a probable thief not only successfully escape conviction, but also pocket \$6 million in civil damages from his victim.

Be sure, also, not to over argue. During preparation determine the least amount that you must have to win; then, be prepared to concede everything else. In the example I just gave, I added one sentence about the plaintiff's never having moved to dismiss the criminal prosecution against him for want of probable cause. Judge Garwood immediately leapt forward, pointing out that no such motion exists. Realizing that I had said something on a subject I knew nothing about, I quickly conceded the point, being careful to admit that it was not at all germane to my contentions. He graciously resisted the temptation to ask me "Then, why did you say it in the first place?" for which "Sheer stupidity, your Honor," could have been my only truthful answer.

IX. Rehearing

If the case concerns the sufficiency of the evidence, it would be very rare to seek rehearing en banc, unless the panel had clearly applied the wrong standard of review or a substantive, procedural, or evidentiary rule relevant to the case were in great flux. *See Fed. R. App. P. 35.*

The appellant has little chance with a panel rehearing, even if the court clearly misstates something. If the correct statement of a fact is important for some reason other than pedantry, be sure to explain that to the panel. Otherwise, the busy workloads and near-assembly line handling of cases those workloads sometimes require may force the panel to let the original opinion stand, even though it contains a factual inaccuracy.

A petition for panel rehearing in a case about insufficiency of the evidence has a better chance of being granted if filed by the *appellee* after the panel has voted to *reverse*. The appellee might be able to bring a fact or inference to the court's attention that had previously been overlooked.

X. Conclusion

The appeal of a jury verdict is difficult, especially when the complaint centers on the insufficiency of the evidence. Except for the rarest of cases, you have little chance of prevailing unless the complaint of insufficiency can be coupled with some other procedural or evidentiary complaint, or unless a substantive rule of law bars consideration of some of the evidence. Accordingly, you should think through the slim chances *before* wasting your time, the client's money, and the court's time on such an appeal. While the appeal may

arguably not be frivolous, it certainly distracts the court from giving fuller consideration to appeals that actually have a chance of prevailing.