Ten Practical Tips for Making Your Case Appealable

(or, How Not to Lose Your Appeal at Trial and When to Call in the Cavalry)

by Alex Wilson Albright and Susan Vance

In the heat of battle at trial, it can be challenging to remember that the legal war may not end with the trial court's judgment. If the parties choose to fight on, another battlefield awaits them at the appellate level, and final victory ultimately may depend upon the record created and preserved for appeal. The best lawyers on the front lines develop an appellate battle plan early in the campaign and follow it throughout the trial. They also know when to "call in the cavalry" of appellate specialists to help with the complex task of preserving appellate rights.

Here are 10 practical tips to help litigation counsel better plan for an appeal, preserve the record, and effectively use appellate counsel before, during, and after trial. Follow these tips to ensure that your case is appealable—and "appealing"—to a reviewing court.

Tip number 1: Make an appellate battle plan. The most important step to prevailing on appeal is to plan for it—plan for it prior to trial, even prior to filing suit. Ideally, you should begin preparing for the possibility of an appeal as soon as you get a case. Anticipate potential appellate issues and proactively plan to preserve error and build the record.

Start by preparing a thorough written analysis of the legal theories at issue in your case. Be certain to include the elements of each cause of action and defense you plan to allege, and of those you anticipate your opponent will raise. Include all applicable standards and burdens of proof for getting to the jury (such as requiring expert testimony on the standard of care). As you analyze, consider whether your case presents any potential constitutional claims. Constitutional issues are of keen interest to appellate courts, and presenting interesting constitutional arguments may increase the chances for a grant of discretionary review or of oral argument on appeal.

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After you have analyzed the legal issues, draft the charge, also anticipating your opponent's charge issues, objections, and requests. Yes, we know this is "Trial Ad. 101" stuff and an exercise most litigators preach but seldom practice (although some jurisdictions require parties to submit a proposed charge early in the litigation). Just do it. Your performance at trial and your record on appeal will both benefit. Along with your legal analysis, the charge will serve as a valuable record-building guide for pleadings, discovery requests, motions to dismiss or for summary judgment, pretrial orders, witness outlines, exhibits, post-trial motions, and, if necessary, appeals.

Looking ahead to trial and using your analysis and draft charge, create a section in your trial notebook for supporting and recording anticipated objections and other possible appellate issues that may arise as litigation proceeds. At this stage, it's a good idea to make sure you know the trial court's authority and jurisdiction (you must know the court's jurisdiction in order to recognize any errors resulting from the court acting outside of it). In addition, look ahead to the appellate standards of review so that you'll be aware of how they will apply to various actions of the trial court. (For example, it is helpful to know which trial court orders are reviewed de novo instead of for abuse of discretion—those reviewed de novo are far easier to overturn on appeal.) You should also be aware of what trial court orders may be subject to interlocutory review, either by interlocutory appeal or mandamus.

Should you consider consulting or engaging appellate counsel at this early stage before the first legal shot is fired? In some cases, the answer is yes. In high-stakes litigation, or in cases involving complex or novel legal theories, the likelihood of some kind of interlocutory review is great, and an ultimate appeal is almost certain. In a particularly risky or complex matter, an appellate lawyer can be invaluable in developing the critical legal analysis "battle plan" and helping to effectively shape the trial record from the beginning of

litigation, rather than trying to salvage a case from a limited arsenal after the smoke has cleared.

Tip number 2: As the battle begins, begin building the record. If it's not in the record, it didn't happen. There is nothing more important to an appeal than ensuring that there is an adequate record to present to the appellate court. The trial record is all that the appellate court may consider when deciding appellate issues.

As you move into the pretrial and trial phases, you must make sure that all issues are presented to the trial court, that error is preserved, and that harm from the error is shown on the appellate record. The court of appeals is not the place to try to perfect the trial record: Almost every appellate argument must first be raised in the trial court to be preserved for appeal. This means you must be thorough in your writings to the court and ensure the record is complete, clean, and comprehensive.

Tip number 3: Aim, fire, and engage with an appeal in mind. It is important to think about a possible appeal at every stage of the litigation. Laying the groundwork for a successful appeal begins in earnest when you fire the opening salvo of a lawsuit by pleading your case.

Because your pleadings will prescribe the universe of substantive issues to be tried—and ultimately to be considered on appeal—plead properly and well. In federal court, make sure the Rule 16 pretrial order properly states all your claims and defenses. Because the pretrial order supersedes the pleadings and controls the subsequent course of the action, Rule 16 may bar review of an issue that was omitted from the pretrial order. Check your pleadings and pretrial order against your battle plan analysis and draft charge to make sure nothing is waived.

Remain mindful of record preservation as you begin to narrow the battlefield through discovery, pretrial motions, and hearings. The history of all pretrial skirmishes will be told at the appellate level only through the record, and you might be relying on these early rulings to establish reversible error.

Motions for summary judgment can be especially tricky and present a number of potential record-preservation pitfalls that vary from jurisdiction to jurisdiction. For example, in some jurisdictions, summary judgment evidence must be fully included in a separate statement, not simply cited in the motion containing legal points and authorities. The comprehensiveness of the statement of summary judgment evidence is also important because some appellate courts may affirm a summary judgment if it is correct on any legal theory, not just the legal theory relied on by the trial court (or even necessarily the legal theories raised by the parties in the trial court). And remember that objections to opposing evidence must be made before or at the summary judgment hearing to avoid waiver.

If you haven't called in the cavalry before filing suit, now may be a good time to consider getting an appellate lawyer involved. Beyond simply prosecuting interlocutory appeals, appellate counsel also may be able to help the trial team with motion practice, discovery disputes, and privilege questions. Using separate appellate counsel at this stage may supply a fresh perspective and allow the trial team to focus on discovery and trial preparation. Appellate specialists can also help with pretrial mediation and arbitration—preparing the written statements, evaluating the odds of appellate success when the case is being valued, and simply demonstrating seriousness about pursuing all available legal options if the litigation continues.

Tip number 4: Tell a clear and compelling story . . . on the record. Once you are in trial, you (properly) will be thinking about the story that is unfolding in front of the jury. However, you must also be aware that the record will have to tell a story to the appellate court as well.

As you move through pretrial and trial, look ahead to the statement of facts on appeal. Because the appellate court will view your case only through the cold record, the statement of facts is a critically important section of an appellate brief: It must tell a coherent tale, preferably an interesting one. So plan your presentation of evidence at trial so that you will have fully fleshed out facts on appeal. There is nothing more tedious in preparing an appellate brief than searching the record for that one small—but now essential— fact that you are certain was mentioned somewhere, sometime.

Tip number 5: Make good objections and get a ruling . . . on the record. Here are the four saddest words you can hear from an appellate court: "Great argument; not preserved." Many otherwise promising appeals have been lost because of trial counsel's failure to preserve appellate complaints. To preserve the issue for appeal, you must raise an objection, ask for a cure, and secure a ruling. You must ensure that the trial record accurately reflects timely, meaningful objections, made on clearly stated grounds and followed by a ruling by the court (or a clear request to rule).

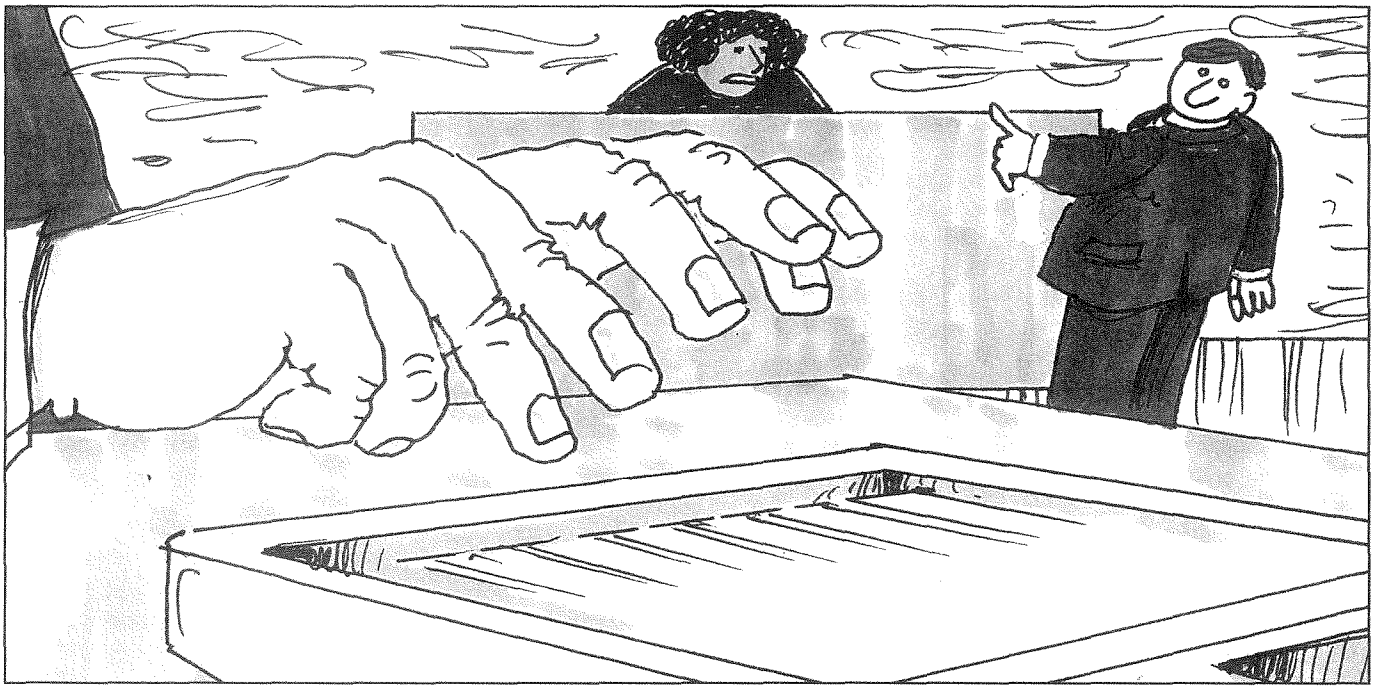
Pay attention to the timeliness of your objections. Generally, the objection must be made as soon as the objectionable situation arises. Timing is key: A premature or late objection is like no objection and does not preserve error. When in doubt, object. But balance your objections wisely so as to avoid irritating the jury without prejudicing your case. Here's a bonus tip: If an aligned co-party is making the objection, motion, or request, and you want to join, be sure that the record shows it. If you end up being the only appellant, you will want the benefit of the other party's objections. And here's a cautionary note: A key record-preservation mistake is "inviting error" by relying upon evidence that you have objected to at trial.

Failure to state the precise—and correct—grounds for an objection is one of the greatest pitfalls in effectively preserving error for the record on appeal. Be specific: A general or "stock" objection may not be sufficient to preserve objections on appeal. The principle behind the requirement

When in doubt, object.

of preserving error is (1) to bring it to the trial court's attention, (2) to explain the error to the judge, and (3) to give the judge the opportunity to correct it while the judge has the ability to do so.

An objection also is designed to inform your adversary of an evidentiary or procedural issue. Thus, if your objection is not specific and the judge or your adversary could have remedied the defect if the grounds were known, the appellate complaint will be waived. Your pretrial research should provide you with the proper grounds for your objection and authority if necessary. When possible, submit your



position to the court in writing—your grounds will be clearly set out, and your request will be in the clerk's record.

Make sure the court issues a ruling on your objections. In order for matters raised by means of objections or motions (either oral or written) to be properly considered on appeal, rulings and orders must be obtained prior to final disposition of the case by the trial court. If the trial judge never ruled, and you did not persistently ask the trial judge to rule, the error likely will be waived. Also remember to re-urge and re-new your requests for relief throughout trial to ensure that you preserve the complaint. For example, to preserve objections during jury selection for appeal, most courts hold that counsel must also object to the final composition of the jury panel. And where testimony is admitted subject to objection (e.g., a reserved ruling), the evidence may be considered as properly admitted if the objection is not renewed and no motion to strike the testimony is made on the record.

Also, to avoid waiver, grounds set forth in a previously denied motion for summary judgment should be re-urged in a motion for directed verdict, motion for judgment, and/or motion for judgment notwithstanding the verdict. In many courts (but not in Texas), your motion for judgment notwithstanding the verdict must be preceded by a motion for directed verdict. Suggestion: Make a list of the grounds for a motion for directed verdict and motion for judgment notwithstanding the verdict as the case is progressing.

Here again, it may be a good idea to have a member of the team focused solely on the pretrial motions and hearings, and the task of making sure the objections are effective, because the law of preserving arguments for appeal is complex, and some objections must be raised at a particular time before or during trial.

Tip number 6: Keep the record complete. To present your case fully on appeal—and to preserve clearly an error for review—you must be sure that the appellate record be complete, reflecting all substantive issues argued, any complaint about error and its preservation, and the harm that error caused.

To begin, make sure the clerk has filed all your pleadings and motions, as well as all orders, the jury verdict, and the judgment. Get a file-marked copy for your file. Ensure that exhibits are actually admitted into evidence or made part of the record as excluded. Exhibits that are merely marked and offered are *not* part of the record on appeal. If the trial court excludes an exhibit, ask the court to admit the document as a "court exhibit" so you can show the appellate court what was excluded in order to obtain reversal on appeal. An erroneous exclusion of any other type of evidence likewise is generally not reviewable on appeal unless the proponent makes an adequate offer of proof. Keep your own list of all exhibits as they are offered into evidence, indicating what has and has not been admitted.

A record needs to be made of all important parts of the proceedings, including pretrial motion hearings where evidence is presented, jury voir dire, and post-trial proceedings. Although it may technically be error when a court reporter fails to make a full record of the court proceeding, this error will be reviewed for harmless error and can be waived if the party seeking the transcription fails to object to the lack of recording.

Generally, for example, you cannot allege error in the voir dire selection if it cannot be shown in the record. A cautionary note, however, on review of default judgments: The making of a record *cannot be* waived by an absent party, so a default judgment must be taken on the record in order to provide a transcript of the proceedings to support the judgment on review.

If you go off the record for conversation and sidebar discussions, make sure you request to be put back on the record when ready. Also, make sure you memorialize any requests and rulings that occurred off the record when you go back on. Particularly, make sure the court reporter is recording your objections, and see to it that the court reporter's fingers are moving when you want what is being said to be on the record.

We once heard a tale about a defendant-manufacturer who insisted on using national counsel for a trial in South Texas. As the trial proceeded, the Chicago-based defense attorney made multiple objections, but approached the bench to make

them. The court reporter's practice was to take his fingers off the steno machine when there was a bench conference unless asked specifically to record the conference. The Chicago lawyer never noticed this (and the hometown court reporter and plaintiff's counsel apparently did not see fit to enlighten him). After a plaintiff's verdict and judgment, the Chicago lawyer discovered that none of his objections were on the record. So, despite defense counsel's off-the-record objections, these complaints could not be the basis of appeal.

Make sure that any important non-verbal communication and gestures are described and then made a part of the record or clarified for record purposes. Evidence needs to be verbalized, or in black and white, or your appellate record will not be effective. Imagine this scenario (based on another true story): The trial judge begins to weep as plaintiff's counsel makes her emotional closing argument. Everyone in the courtroom, including, most importantly, the jury, sees that the judge is moved by the plaintiff's plight. The defense lawyer is stunned, the bias is obvious in the courtroom, but there are no words to transcribe. What to do? The defense lawyer must make a record describing the judge's non-verbal communication to the jury in order to seek a reversal on that basis on appeal.

And finally, to ensure the record will include everything that will enable the appellate court to perform an objective review, request that the entire trial proceeding be transcribed. Even though your appellate *errors* may be shown in the transcript of a few minutes of testimony, proof of *harm* may require a review of the entire record. For example, in Texas, a short part of the record will show that the trial court erroneously failed to dismiss a juror for cause, requiring you to use one of your peremptory strikes. But to show harm and obtain reversal on this error, you must show the appellate court that the evidence was "sharply conflicting" on issues the jury decided, which generally requires that the entire record be brought up on appeal.

How trial counsel behave on the record can subtly influence the appellate court.

Tip number 7: Keep the record clean . . . and don't be a jerk (or a boob). Correct any misstatement of the court or opposing counsel immediately—these can come back to haunt you on appeal. Also, take remedial measures to clean up prejudicial evidence in the record and preserve the error if it remains: a motion for mistrial (if prejudicial evidence is before the jury), a motion to strike (if evidence that should not be in the record finds its way into the record), or a request for curative instructions to the jury (if the court denies either of the other two motions). Let the court know if these instructions are insufficient, and object if denied.

Remember that the record serves as a sort of written "Candid Camera" (or "YouTube" for younger readers). Keep in mind that you are on the record and behave accordingly. Be respectful to the court and others at all times and do your best not to act foolishly in other ways. The written record may be the only picture of trial counsel that the appellate court will see, and how trial counsel behave on the record can subtly influence the appellate court—for better or worse. As alumnae of federal circuit court chambers, we offer the following inside note, which will not come as a surprise to litigators who have done clerkship time at an appellate court: The person reading your briefs and record on appeal—and likely recommending whether the court should rule for or against you—will not be the learned jurist, but rather a young and cloistered "law nerd" who may either take a shine to your arguments or not, and who, in the latter instance, will delight in pointing out your memorialized trial court shenanigans in his bench memo to the judge. Don't irritate the appellate clerks, and certainly don't allow yourself to be the source of their amusement.

Tip number 8: Craft the perfect jury charge and preserve objections to the court's imperfect one. Many appellate issues arise from the court's instruction to the jury. As a result, error in the court's charge is among the most likely sources of reversible error on appeal.

In a recent Texas study of reversal rates, charge error accounted for 14 percent of the reversals from jury verdicts. Lynne Liberato & Kent Rutter, "Reasons for Reversal in the Texas Courts of Appeals," 44 *S. Tex. L. Rev.* 431, 435 (2003). Therefore, it is essential that careful attention be paid to drafting requested jury instructions and questions, and to noting grounds for (and to making) objections to the instructions and questions that are actually given or omitted.

Although charge preservation rules differ from jurisdiction to jurisdiction, some general rules seem to apply to all. Generally, parties are presumed to have consented to erroneous submissions in the absence of an objection by either party, and a party cannot claim error in the court's failure to give a particular instruction if the party did not request that instruction. Similarly, a party cannot claim that a correct jury instruction was too general or incomplete unless it requested a clarifying instruction. Questions, instructions, and definitions submitted to the jury are restricted to those raised by the written pleadings and the evidence—an opponent's proposed submission of an unpleaded theory of recovery or affirmative defense should be the subject of an objection.

Specificity in objections is the key to preserving arguments about charge error: A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. To avoid waiving complaints of harmful charge error, be certain to make all objections to the charge on the record (even if those objections have been thoroughly discussed in an informal, off-the-record charge conference). Object *before* the charge is read to the jury and be sure to obtain rulings on the record to all oral objections to the charge. Another cautionary note: An appellant cannot complain about an error that it created or invited. A classic example of "invited" error is an erroneous jury instruction that an appellant requested—parties may not request a submission and then object to it.

One of the most frequent charge-related mistakes is failure to tender a proper request, question, definition, or instruction in substantially correct form when tender (as opposed to an objection) is required to preserve harmful charge error. If there is any doubt about whether an objection is sufficient or tender is required to preserve charge error, do both. Caveat: Cautious counsel who choose both to request and object should do so separately and make sure that the duplication does not obscure a legitimate complaint. Prepare each instruction and question

of your draft charge on a separate page that can be tendered to the court for inclusion or refusal. Have all refused or modified tenders marked by the court as "refused" or "modified as follows: (stating how the request was modified)" and file them with the clerk to preserve error. Follow, of course, any more specific requirements of your jurisdiction.

Another tricky area of potential charge error lies in the court's submission of a general charge or "broad-form" question incorporating multiple theories of liability. In some jurisdictions, when a single broad-form question erroneously commingles valid and invalid liability theories and the appellant's objection is timely and specific, the error is harmful when it cannot be determined whether the jury based its verdict on an improperly submitted, invalid theory. In other jurisdictions, when a jury returns a general verdict on multiple causes of action, the appellate court will presume the jury found in favor of the prevailing party on each cause of action. In an appeal challenging the sufficiency of the evidence, the appellate court will affirm so long as the judgment is supported by sufficient evidence on any one cause of action. In either type of jurisdiction, it is important to object in a timely manner to *any* invalid theories of liability within a broad-form question or general charge.

Finally, if there is ever a time during trial court proceedings to summon help from an appeals specialist, it is when the charge is being drafted and argued. Given the importance of the charge to the outcome both at trial and on appeal—and considering the level of complexity a charge may entail in novel or complex litigation—having someone centered solely on drafting and then arguing the charge, and preserving error in the conference, is invaluable. It can be difficult to analyze the jury charge carefully when you are thinking about the final argument you will make to the jury in the next few minutes.

Tip number 9: Be the appellee. What is the best way to set the stage for a successful appeal? Win at trial! In the above-mentioned study of reversal rates in Texas, the statewide reversal rate in civil cases was about one in three. But this is somewhat misleading and actually understates the appellee's advantage: The reversal rate for jury verdicts was only 25 percent, for bench trials 22 percent, and for summary judgments 33 percent. So, how did the overall rate get boosted to 33 percent? This leads us to the exception to this rule: Be the appellant if you have a default judgment. In the same Texas study, almost 80 percent of no-answer default judgments were reversed, and almost half of post-answer defaults were reversed.

Tip number 10: Preserve appellate arguments post-trial, and prepare for attack on the appellate front. Preservation of the record after verdict and judgment is critical to an effective appeal. It is essential that post-trial motions be carefully drafted to preserve appellate arguments. These motions include motions for judgment, motions for judgment notwithstanding the verdict, motions to disregard certain parts of the jury's verdict, motions for new trial, and motions to modify, correct, or reform the judgment. If your trial was before the court rather than a jury, carefully follow your jurisdiction's rules for preserving appellate complaints about the court's findings of fact and conclusions of law. Also, be mindful of time limitations for filing post-trial motions. In both state and federal courts, generally a narrow window exists to take this important step on the way to appeal.

As you craft or respond to post-trial motions, keep in mind that legal issues, which are reviewed de novo, have better odds for reversal than fact issues, which will be reviewed more deferentially. If you have lost at trial, and especially if you have lost in a jury trial, look for legal issues to raise on appeal. For example, we once worked on the appeal of a jury's verdict that a rancher's negligent fencing had caused a crash between his livestock and a car. The appeal turned not on the tough facts concerning the fence's condition, but on whether the law requiring fences was invalid due to an obscure legal rule in stock law known as the "jack-ass exception" (no, really).

Remember, post-trial motions are a good time for losing parties to find constitutional issues, which may help you obtain discretionary review in higher-level appellate courts as well as improve your chances for a grant of oral argument.

Call in the cavalry post-trial? Absolutely. Even when an appellate specialist has not been hired before or during trial, the need for one becomes more pronounced after a jury verdict. Post-trial motions often contain the arguments that shape the outcome of the appeal and also may provide an opportunity to clean up the record by elaborating on previous points. Moreover, appellate specialists' familiarity with appellate rules and procedures minimizes the risk of technical violations that can be detrimental, or even fatal, to an appeal. Appellate lawyers also are more familiar with appellate courts: the judges, staff, and trends in the courts' jurisprudence, including the types of issues that will interest the court and the arguments that will be unpersuasive to the judges.

Victory in litigation is often elusive—a win in the trial court can become a loss on appeal, and vice versa. A successful lawyer must focus not only on the trial but also on the possibility of appeal. This requires early planning and constant vigilance. With careful attention to detail, pretrial completion of the legal homework, steady awareness of the record, and a well-timed call to the appellate cavalry for additional resources when needed, you will be well on your way to a final and decisive victory.