Ten Tips to Improve Your Case on Appeal

By Scott Burnett Smith

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I am an appellate lawyer. That means I read law and write briefs all day, most days. I am more qualified to be a monk than a trial lawyer. My partners rarely come to me for advice before they go off to try a case before a jury. But because they don't, they have to listen to me complain when they bring me their cases to handle on appeal. So recently they asked me to give them my top ten tips to improve their cases on appeal (mainly so they wouldn't have to listen to me gripe). Here is what I told them.

1 Put everything in the record.

Don't tell me what really happened or what the real facts are. It doesn't matter. The only thing that matters on appeal is what is in the record. If it's not in the record, it didn't happen; it's not a fact. The record on appeal consists of those papers and exhibits *filed* in the trial court, along with transcripts of any court proceedings. *See* FED. R. APP. P. 10(a); ALA. R. APP. P. 10(b)(1). Those matters of record are the only things you can cite in an appellate brief, and most appellate rules require you to substantiate everything you say about what occurred in the trial court with citations to the record. *See* FED. R. APP. P. 28(a)(7) and (a)(9); ALA. R. APP. P. 28(a)(5), (a)(7) and (a)(10). Cites to a docket entry for a hearing where no court reporter was present will not do, nor will descriptions of a critical argument in a brief that was never filed. And if something important might be said, be sure there is a court reporter present. This applies not only to pre-trial conferences and hearings but also to trial proceedings. Jury charge conferences and sidebars are places where reversible error happens, but too often they are not transcribed by the court reporter. Thus, be sure to get everything in writing and get it on file.

Along the same lines, please do not write letters to judges. Letter-writing is for lovers, not litigation. In the first place, letters almost never make it into the record. If your opponent sends a letter to the court, respond in a brief that you file with the court and attach the opponent's letter to your brief. More important, a letter is no way to request affirmative relief on your client's behalf. Rather, Civil Rule 7(b) requires that any "application to the court for an order . . . be by motion" which must "be made in writing" unless you are in the midst of trial or a hearing. FED. R. CIV. P. 7(b)(1); ALA. R. CIV. P. 7(b)(1). File a motion. Don't send a letter.

2 Tell your story.

The most important part of an appellate brief is its narrative. You must tell a number of judges your client's story. To do so, you need witnesses who tell the story in the transcript. This rule applies equally to plaintiffs and defendants, but plaintiffs rarely miss this tip. Civil defendants, however, almost always miss it. Instead, defense witnesses at trial inevitably tell only small, discrete pieces of the tale. Stitching together a compelling narrative from such disjointed testimony makes briefing the appeal more difficult.

To improve the story—both at trial and on appeal—use storyteller witnesses. Storyteller witnesses should provide a broad perspective on the case, explaining the client's perspective in the broadest terms. If done effectively, the storyteller witness's testimony will provide much of the narrative needed to explain the case on appeal. Also, if the case involves subjects hard to visualize, have your storyteller use maps, charts or diagrams in her testimony. Those visual aids can be cut into the appellate brief later to bring the story to life.

Also, don't wait until trial to use storyteller witnesses. Most cases these days go out on summary judgment—usually on a cold paper record. Don't forget that the trial court can take live testimony on dispositive motions. Federal Civil Rule 43(e), for instance, allows the court to hold a hearing with live testimony on a motion for summary judgment. Such a hearing provides a stage for storyteller witnesses even if there is no trial.

3 Make proffers of excluded evidence.

Evidentiary rulings are what get a trial lawyer's adrenaline flowing, especially adverse rulings. But if you're not careful, those rulings you thought were reversible error may end up not being error at all. Just because the trial judge excludes your

critical piece of evidence does not seal your victory on appeal. To preserve that evidentiary issue, you must make a proffer of the evidence at trial. Evidence Rule 103(a)(2) requires you to make the substance of the evidence known to the trial judge through an offer of proof, or proffer. FED. R. EVID. 103(a)(2); ALA. R. EVID. 103(a)(2). Without a proffer, the error you thought you had in the bag will turn into a waiver on appeal. Usually, the trial lawyer can make a proffer on the record verbally, immediately after the judge's ruling excluding the evidence. But if the excluded evidence is a witness's testimony, don't forget that you can ask to voir dire the witness outside the presence of the jury. This technique is an effective way to tell the court of appeals exactly what the witness would have said to the jury had he not been prevented from testifying. Getting it in the witness's own words is much more effective than quoting a lawyer's summary of the expected testimony.

Also, don't overlook written proffers. Motions *in limine* are now used to control the admissibility of critical evidence before the trial ever starts. If you have important evidence that is excluded on a motion *in limine*, you should consider making a written proffer of the evidence, attaching copies of the evidence if it is documentary or an affidavit from the witness if it is testamentary. This can be done either before trial or at trial. If you are in federal court, be sure to ask the trial court to make a definitive ruling on the evidence's exclusion; if the judge makes a definitive ruling before trial, you will not need to renew your objection at trial to preserve the error for appeal. *See* FED. R. EVID. 103(a). (Note that the Alabama version of Evidence Rule 103(a) does not allow this procedure, however.) Written proffers made at trial can speed things along and also serve the same purpose as a *voir dire* of the witness outside the jury's presence.

4 Don't object without reasons.

Experienced trial judges know how to "bully" lawyers off their objections. Don't be bullied. A stern stare from the trial judge is nothing compared to the stare you will get from an appellate judge when she realizes you did not object to the ruling on appeal. If you have an important objection to make, get it on the record. But for gracious sakes, don't simply "object" and then sit down. Such cursory objections fail to preserve anything for appeal. If you are going to make an objection, be sure to provide the "grounds therefore" in the words of Civil Rule 46. FED. R. CIV. P. 46; ALA. R. CIV. P. 46. Exceptions to trial rulings are no longer necessary to preserve an objection. *See id.* But what *is* required is an objection that specifies the legal basis for the objection. Without that, an objection for the sake of objecting will only frustrate the jury without helping the appeal.

5 Double-check your exhibits.

As fewer cases are tried, more mistakes are made—especially when it comes to exhibits. You must make sure that all exhibits offered at trial are deemed "admitted" or "excluded" on the record. Too often trial lawyers get on a roll with a witness's testimony on a critical document and forget to ever offer the document into evidence. Moreover, trial judges are frequently lazy with evidence, saying "okay" when an exhibit is offered, instead of making a definitive ruling. Use your legal assistant or second-chair trial lawyer to assure these mistakes are not made in the whirl of trial. Nothing beats a good old-fashioned chart enumerating all of your exhibits along with columns to check whether each has been "admitted," "excluded" or "reserved." And once the trial is over, confer with the courtroom deputy to make sure he has a complete set of both side's exhibits, those that are admitted and excluded. (Remember, the exhibits that are excluded will also be a part of the record on appeal.) This will not only ensure the jury has all the evidence in the jury room before they begin their deliberations, but it also assures the record is complete before the appeal.

6 Make written (not oral) motions for judgment as a matter of law.

The most important motion you will file at trial is your motion for judgment as a matter of law. This motion sets the stage for most of your issues on appeal. If you forget to raise a ground in the motion made at trial you cannot raise it post-trial or on appeal. *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404–05 (2006). If you typically make these motions orally, please consider filing a written motion instead. First and foremost, a written motion for judgment as a matter of law saves time with an impatient trial judge. More important, a written motion ensures you won't forget anything. Ideally, your written motion should have broad, general grounds that cover any potential issue that might come up, such as a challenge to every adverse evidentiary ruling and every adverse ruling on jury instructions. In addition, it should include grounds tied specifically to the issues raised in your case. The object is to cover every potential ground that might be raised later on appeal if you happen to lose the case. Written, not oral, motions are the best insurance under these circumstances.

7 Remember the verdict form.

The verdict form is another critical document for preserving issues for appeal. Before trial ever starts, trial lawyers should think as hard about the verdict form as they do about the jury instructions. In some cases you may prefer a general verdict. In Alabama, we have a good count/bad count rule that allows a defendant to obtain a new trial if it can show one of the theories submitted to a jury in a general verdict was legally insufficient (because there is no way to know whether the jury found liability based upon the bad count or the good count). *Long v. Wade*, 980 So. 2d 378, 385 (Ala. 2007). But you may not be able to make that argument on appeal unless your request for a special verdict was denied. In other cases, you may want to use a special verdict or special interrogatories. Regardless of the form you choose, getting the court to decide on the form to be used before the trial starts will help you structure your case from opening to closing arguments, telling the jury exactly what questions it must answer when it deliberates.

Giving advance thought to the verdict form has the added benefit of helping you avoid waiving important issues on appeal. Say the plaintiff in your case is seeking punitive damages. Under ALA.

CODE § 6-11-21(e), the jury must apportion punitive damages according to the fault of each defendant, but you forgot to request a verdict form that apportions fault. You may have lost your punitive damages argument before the appeal even gets started. Filing your proposed verdict form will help you avoid such procedural traps.

8 Watch your jury instructions.

Sorting out what jury instructions were requested by each party and refused or given by the trial judge is one of the most difficult things to reconstruct on appeal from a paper record. If you know this up front, there are a few tricks you can use to make the job easier.

First, submit your proposed instructions in writing in numbered paragraphs. Be sure to file those with the court. And if your opponent or the judge drafts proposed instructions, be sure those are also filed. Second, include boxes at the bottom of each instruction to check whether the instruction was "given" or "refused." This will help everyone keep track of the instructions during the charge conference. Ideally, one consolidated copy of all the instructions discussed at the charge conference, with the given or refused boxes checked, should be filed with the court at the end of the charge conference. *See* ALA. R. CIV. P. 51 ("The judge shall write 'given' or 'refused' as the case may be, on the request which thereby becomes a part of the record."). You may forget this in the heat of trial, so assign this task in advance to your paralegal or second-chair attorney. Third, be sure to voice your objections at the charge conference and reiterate those objections after the trial judge instructs the jury. Remember to include your objections both to the instructions given and those refused. Fourth, keep an ear toward the transcript and make sure it will make sense later to an uninformed reader. Rather than refer to instructions in vague terms such as "that instruction" or "our contributory negligence instruction," cite the specific numbered paragraph of your proposed instructions like "our proposed instruction number 17 on contributory negligence." If you use these tricks, you will make the jury instructions much easier to understand on appeal.

9 Keep an ear tuned to the transcript.

My favorite trial lawyers are those who always have an ear tuned to the transcript. When something happens in the courtroom that will not appear in the words typed by the court reporter, the best ones always think to describe it in words. The best way to train yourself to be such a trial lawyer is to imagine one of the jurors is blind. Be sure everything that goes on in the courtroom comes out in words somewhere in the transcript.

Now that jury trials have become multimedia affairs, keeping track of everything in the transcript is even more difficult. This seems counterintuitive. Computers, trial software, bar-coded exhibits and video monitors are supposed to make things easier, right? For those sitting in the courtroom, it does. But for those of us who have to review paper

transcripts of trials for a living, the high-tech trials are often the most difficult to understand. Why? Because so much of what happens in the courtroom happens on screen, without the necessity of explanation.

Beware of this problem by keeping an eye out for those things that appear on screen in the courtroom that may not be heard by the court reporter and, thus, cannot be read later. For instance, if your opponent puts an inflammatory slide on the screen during closing argument, you should both object and ask the court to require opposing counsel to print the slide, making it a court exhibit. The same goes for depositions played at trial. Be conscious that court reporters often stop typing shorthand when you start playing a video clip on screen. If that happens, you may find "[deposition excerpt played]" appears at the place in the transcript where you hoped to find the most egregious error. Many trial software programs now include written transcripts alongside video deposition clips, which the court reporter can use in lieu of transcribing the testimony again. Even better, the parties can agree to put all the video clips shown at trial on one CD and submit the CD as a court exhibit at the end of trial. These are just a couple of examples of what I call evaporating evidence. If you do not preserve such evidence in some form other than video at the time, it will literally evaporate on appeal.

10 Don't worry.

Finally, don't sweat the small stuff. Although appellate lawyers like to nitpick every decision made in the course of a jury trial, there is no need to worry. Only those decisions that affect your client's substantive rights can be reversible error. *See* FED. R. CIV. P. 61; ALA. R. CIV. P. 61. So, just relax and try your case with an eye to preserving the most obvious harmful issues. Once the case is over, your appellate lawyer is going to find something to gripe about. That's what we do. But if you can try your case so that your appellate lawyer only has harmless error to gripe about, then you will have done your job.

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