

**THE TOP TEN MISTAKES THAT TRIAL
LAWYERS MAKE IN HANDLING AN APPEAL**

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—David W. Holman

For an appellate specialist to write a paper that identifies mistakes that trial lawyers make in handling an appeal appears to be a very presumptuous undertaking. In this paper, please do not think that I am trying to suggest that all trial lawyers make these mistakes, or even that a majority of trial lawyers make these mistakes. Indeed, I know many trial lawyers who are excellent appellate lawyers and who never make any of these mistakes. My purpose here is only to present a list of some of the worst mistakes that trial lawyers tend to make—mistakes that are not made by the appellate specialist.

For no other purpose, except perhaps for my own amusement, I have borrowed the style of Letterman's Top Ten Lists, and I have begun with number ten and worked down to one. And, so, without further adieu, from the home office in Cut 'n Shoot, here are the top ten mistakes that trial lawyers make in handling an appeal:

10. Hey, wait a minute! I thought the case was over . . .

Some trial lawyers believe that once the jury returns its verdict, the case is over. They are often exhausted and elated or disgusted and do not think to focus on the rest of the events that often determine ultimate victory. That is a mistake. The events that follow a verdict are sometimes more important than the verdict itself.

For example, not all trial lawyers realize that if they move for judgment on an adverse verdict, they may be waiving their right to contest the judgment. *See Litton Indus. Prod., Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex. 1984)(moving for judgment on adverse jury findings waives the right to challenge those findings on appeal); *but see First Nat'l Bank of Beeville v. Fojtik*, 775 S.W.2d 632, 635 (Tex. 1989)(no waiver found when plaintiffs made a specific disclaimer and reservation of rights to pursue an appeal).

Not all trial lawyers realize that if they do not request a complete record, they could be waiving their right to challenge an issue on appeal. For example, since a review of the entire record is necessary to determine whether an error is harmful, the failure to include the closing arguments in the record can be fatal on appeal. *See City of Wichita Falls v. Alvarado*, 802 S.W.2d 424, 427 (Tex. App.—Fort Worth 1991, writ denied)(court finds error but, since the record did not contain the closing arguments, court does not have a sufficient record to determine whether the error is reversible).

Not all trial lawyers understand the impact of enforcing the judgment on appeal. For example, if a party chooses to pay a judgment, instead of posting a supersedeas bond, the party has just given up the right to challenge any error in the judgment on appeal. *See Hanna v. Godwin*, 876 S.W.2d 454, 457 (Tex. App.—El Paso 1994, no writ)(if a defendant voluntarily pays the judgment, the issues on appeal are moot). Or, conversely, that if the

plaintiff voluntarily accepts the benefits of the judgment, the plaintiff may give up the right to challenge any error in the judgment on appeal. *See Newman v. Link*, 889 S.W.2d 288, 289 (Tex. 1994).

Although these are but examples, there are a host of things that can go wrong after verdict that can influence the right to challenge a judgment on appeal. Trial lawyers must be as cautious after verdict as they were before the verdict.

9. I thought appeal was a matter of right, but I was wrong . . .

Another critical error made by some trial lawyers is to appeal cases that should not be appealed. Often, an appeal fails not because the appeal was poorly argued, but because the lawyer made a bad decision about whether to appeal in the first place.

In order to be a successful appeal, the lawyer must be able to demonstrate that: (1) the trial court (2) committed error (3) that was preserved (4) and that was reversible (5) shown by a sufficient record. If any of the elements of this equation are missing, the appeal is doomed to failure. Cases are legion in which a lawyer argues a point on appeal that was not preserved or in which there is nothing to support the alleged error in the record. Lawyers can beat the drums about how the trial court erred in failing to admit a piece of evidence, but even if error occurred, if it is not evidence that the whole case would have turned on, who cares?

Some would say, “Well, appeal is a matter of right. I might get lucky. What can happen to me if I just go ahead and file an appeal anyway?” The answer is a lot can happen, and it’s bad. The new rules of appellate procedure give the appellate court more discretion than in the past to award costs when a party files a frivolous appeal. *See* TEX. R. APP. P. 45. In a recent case, an appeals court found that the party had argued untenable positions that were not supported in the record or by cited authority. *See Chapman v. Hootman*, 1999 WL 548306 (Tex. App.—Houston [14th Dist.] 1999, no pet. history). The appeals court fined the party \$5,000. The court said:

A party’s decision to appeal should be based on professional judgment made after careful review of the record for preserved error in light of the applicable standards of review. Here, it is obvious that Chapman was motivated by other factors in pursuing his appeal. No amount of wishful thinking could have led Chapman to a reasonable belief that this court would overrule the trial court’s judgment based on the issues he raised on appeal, especially given the inadequate briefing and meritless arguments. There is no room at the courthouse for frivolous litigation. When a party pursues an appeal that has no merit, it places an unnecessary burden on both the appellee and the courts. More importantly, it unfairly deprives those litigants who pursue legitimate appeals of valuable judicial resources.

Id.

8. Too many points of error, dammit!

In crafting an appeal, the experienced appellate lawyer understands that the more points of error (or issues presented, under the new rules), the less likely any one of them will get granted. In the appellate arena, more is not always better.

This concept is sometimes hard for some trial lawyers to grasp. They feel that the more error that one shows to the appellate court, the more prone the appellate court will be to believe that something went wrong in the trial court so the judgment should be changed. Wrong. An appellate court only has a finite time to analyze issues. When stronger points are mixed in with weaker points, the greater the chance that the stronger points will be under-analyzed or overlooked. On the other hand, the lawyer on appeal only has finite space in which to argue. If the lawyer argues a lot of issues, the lawyer has to sacrifice space that could be used to better analyze his best issues.

The point is that a lawyer must decide which are his two or three strongest points of error and go with those. If they do not win, there is not much chance that the weaker points would have carried the day. Remember, it only takes one good point to win an appeal.

7. Just the facts, ma'am.

Another mistake trial lawyers make is to fail to focus the appellate court on the facts that really matter. Because the trial lawyer is so close to the facts, the trial lawyer may believe that all the facts, being interrelated, are important on appeal. But, if I am an appellate judge who needs to determine whether a particular piece of evidence was improperly excluded, I do not need to know that on the day of the accident, Aunt Ruth was giving a birthday party to a group of underprivileged children from the local orphanage. To successfully argue an appeal, a lawyer must view the facts as objectively as possible and only include those facts that are important to the issue to be decided.

On the other hand, some trial lawyers try to shift the focus on appeal away from the facts that harm them. It is not unusual for an appellate court to read two opposing briefs from the same case and wonder if they are about the same case. In discussing the facts, a lawyer should never avoid those facts that harm him, lest it appear that he or she is hiding the ball. Rather, a lawyer should discuss the good and bad facts through your client's point of view, with a focus on those facts that show why you should win.

Finally, a critical error made by some trial lawyers in handling an appeal is to fail to cite to the record. If you are going to discuss facts, you must cite to the record where such facts are found. Otherwise, the appeals court will not believe that the facts you recite are really the facts at all, particularly when the other side supports their positions entirely with record citations.

6. Analysis, schmalysis.

Although lawyers are continually told to be brief and concise in writing a “brief,” one should not skimp on the analysis of an issue. Some trial lawyers make the mistake of believing that if they just state the issue and cite a bunch of cases, the appellate court will sort it out. Wrong.

In writing a brief, one must assume that the appellate court knows nothing about the facts or the law in your case. If one states a conclusion without giving the reasoned basis for that conclusion, the court does not have enough information with which to reach that conclusion with you. You must take the time and the space to thoroughly explain to the court why the record and the case law support giving your client the relief your client seeks.

A common example of this mistake is a brief that states merely that the evidence is insufficient to support a finding. Without more, this brief cannot persuade. An appellate court will not peruse the record to make the argument for you. You must explain *why* the evidence is insufficient. It is helpful to approach the argument like a journalist and give the who, what, where, why and how of the argument.

5. Remember your foreign leaders.

A common error made by some trial lawyers is to forget to argue policy. Appellate judges are like the rest of us. They want to go home every night thinking they have done the right thing, not because it is technically correct under the law, but because it was the right decision to make under the circumstances.

Too many trial lawyers forget to argue why the ruling they seek is not only the correct decision under the law, but also it is the right decision. Those lawyers merely argue the law and do not discuss why the particular rule of law they espouse is a good rule not only for this, but also for other cases—not only for the litigants presently before the court, but for future litigants. To convince an appellate court to reverse a judgment, the lawyer must convince the court that to do so will be both correct under the law and proper.

On the other hand, the lawyer who represents the appellee should not forget to argue policy either. The appellee must be prepared to argue not only that the rule that the appellant espouses is not supported by the case law, but also that it would be a terrible rule of law for future courts and litigants.

4. You are a pathetic excuse for a human being, and I mean that in the nicest way. . .

Trial lawyers are filled with emotion when they lose. It’s the nature of the beast. We would not be human if we did not feel that the loss was somehow caused by forces over which we have no control. Often, the trial lawyer believes that the loss was caused by the trial judge. They feel resentment, betrayal, injustice, anger at perceived incompetence or

bias, disgust. But, trial lawyers make a tremendous mistake when they carry these emotions to the appellate court.

There are a number of practical reasons why a lawyer should not make an ad hominem attack on the trial judge in the appellate court. One reason, of course, is that ad hominem arguments do not persuade. A more subtle reason is that appellate judges are part of the fraternity of judges and they do not appreciate an attack on one of their own. However, the most significant reason is that to attack the qualifications or integrity of a judge is a violation of the rules of professional conduct. *See* TEX. R. PROF. CONDUCT 8.02.

The San Antonio court of appeals confronted one litigant who continually demeaned the competence and integrity of the trial judge, not only in briefs but also in oral argument. For example, the litigant's reply brief stated:

The trial court's pathetic determination to 'take from the rich and give to the poor,' regarding the entire Record of the matter of Richard's separate property, is a classic example of disregard for the law and the facts by a man incompetent to comprehend the case at hand.

Johnson v. Johnson, 949 S.W.2d 835, 840 n.1 (Tex. App.—San Antonio 1997, writ denied). The court pointed out that the object of this vitriol was Judge Barrow, a former Texas Supreme Court justice and former Dean of Baylor Law School, who was sitting as a senior judge by assignment. *Id.* The court fined the litigant \$500 for making the intemperate remarks.

3. Rehearing? You didn't hear me the first time . . .

While criticizing the integrity of the trial judge is a stupid mistake, an even dumber mistake is to criticize the integrity of the very court from whom you seeking relief. Rarely this occurs in the principal briefs, although it can happen if the lawyer is taking shots at an earlier panel opinion. Most often, this mistake occurs on rehearing.

Believe me, even the most experienced appellate lawyers have to fight the urge to condemn the stupidity of the appellate judges who ruled against you. I must confess that I once began a draft of a motion for rehearing with a quote from Machiavelli. (Fortunately, I wised up and did not submit that draft). And, we all remember the "nine nutty professors" line in the motion for rehearing in *Havner*, a line that got the lawyers referred to the grievance committee.

But, we must keep our eyes on the prize. If there is ever any hope of winning the case, you will dash that hope against the rocks if you criticize the integrity of those judges who will rule on your motion. Sure, we all like to vent, but we have to remember that appellate briefing is not to satisfy our egos, but to get the client the relief the client is seeking. If there is no hope that a motion for rehearing will be successful, do not file one. After all, under the new rules of appellate procedure, a motion for rehearing is no longer a prerequisite for a

petition for review. If there is some hope, albeit slim, that a motion for rehearing will be successful, then a lawyer has a duty to present his or her most persuasive argument, without unnecessary attacks on the integrity of the court.

2. Well, it worked with the jury, maybe it'll work here . . .

If one were to poll appellate judges and appellate practitioners, the most common criticism of trial lawyers who handle an appeal is that some trial lawyers make a jury argument to the appellate court.

The appellate court is a much different forum than the trial court. Where juries are concerned with facts, an appellate court is concerned with the law. Where juries may be swayed with appeals to sympathy and passion, an appellate court is swayed by an appeal to reason, supported by prior authority and the record. Where a jury may be concerned with whether the party got a fair shake, an appellate court is more concerned with whether alleged error has been preserved, whether there are other opinions that support one's position, and whether the alleged fact is contained in the record.

To be helpful to the appellate court, the lawyer must be conversant with the cases that have addressed the issues presented, familiar with where a proposition appears in the record, and able to explain why the legal error probably caused an improper judgment. By the time the case reaches the oral argument stage, the appellate judges have already reviewed the briefs and have certain specific questions about the legal propositions presented. A jury argument will not answer those questions.

Those who are not familiar with the differences between an appellate court and a trial court should sit in on several appellate arguments. The differences are readily apparent. An appellate judge is not concerned about whether the plaintiff suffered from the worst travesty ever foisted upon an unsuspecting citizen in the history of Texas jurisprudence, but whether the trial judge got the legal rulings right.

And the number one mistake that trial lawyers make in handling an appeal is . . .

1. Handling an appeal.

Yes, this will sound self serving from an appellate specialist. But, in this day of specialization, there is rarely a good reason why a trial lawyer should handle his or her own appeal.

There are a number of appellate specialists that can be brought in to lead the appellate effort. Those specialists handle appeals for a living. They are usually skilled enough to avoid most of the mistakes listed here. They are usually trusted by the appellate court to file a persuasive brief and make a helpful argument. And they can often help the trial lawyer avoid the traps that lay in the path of an appeal.