

# How to Take Your Appeal to the Next Level: Appeal Advocacy that Hits Home

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“[T]here is such a thing as a ‘good advocate’ without the adjectives ‘trial’ or ‘appellate.’ Michael Tigar.

- The best trial lawyers are also appellate lawyers.
- It is important to provide pro bono representation on appeal.
- We improve the law and make justice available to all by doing so.

Build as many umbrellas (appellate errors) into your case during trial, in case of a rainy day (when the jury comes back with a guilty verdict).



# Thus appellate advocacy begins at trial

- There is no better lesson than to see a great error on appeal that you personally failed to adequately preserve.
- You will not make that mistake again.
- Great trial lawyers are appellate lawyers and visa versa

# Motions to dismiss the indictment

- Must be filed before trial begins
- Perform and element by element analysis
- Examine the charging statute too. The offense may be unconstitutionally vague or may violate one's constitutional rights.
- Give the Texas Attorney General notice that you are challenging the constitutionality of a statute 402 .010(a) Texas Government Code.
- Check the statute of limitations

# Preserve Error

- “No topic of appellate review is more important than raising and preserving all meritorious contentions in the trial court and in the court of appeals.” Tigar, *Federal Appeals Jurisdiction and Practice*, 3rd Edition, p. 3.
- Object timely and specify the grounds
- And each time inadmissible evidence is offered
- Unless hearing out side of jury and ruling before it is offered
- Or the court has granted you a running objection
- Get ruling or have the record reflect the court will not rule and is thus denying you relief



# If your objection is sustained

- Ask for an instruction
- Move for a mistrial
- At the close of the prosecution case and the close of the case move for a directed verdict in your favor

# Make spaghetti objections

- Raise every basis to support your objection
- Prepare objections before trial and title them objection #1 and objection #2. Then you can refer to these during trial and will have a perfect objection that includes everything you want to say



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# Show what was excluded and explain how you were harmed

- Offer of proof
- Testimony outside presence of jury
- Explanation on the record
- Type it up a file what you would have shown and how it would have helped you
- File a written, sworn motion for continuance to get what you need or prepare what you want
- This is necessary to preserve some error

# Burden is on the prosecution concerning Constitutional error

- Rule 44.2 (a) Constitutional Error. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

# A great lawyer anticipates what the law will become

- Just be clear with the court that this is what you are doing
- “The law is not xxx in this appellate division, however there are other courts of appeal that say xxx is the law. I am, therefore, raising the issue to preserve it for later appellate review.”

# Make sure the record on appeal is complete and accurate

- Check that every hearing was transcribed and that it has been included in the record
- Make sure every pleading and document has been included in the record
- I have yet to have had a case where the record was complete the first time it was sent to the Court of Appeals
- Make sure the exhibits are sent up that you want the Court of Appeals to see
- Make sure that time spent completing the record is not counted against you

# Keep it professional

- A great lawyer keeps his or her cool, does not get hurt feelings, and does not fear preserving error
- Jurors understand your role, especially if you explain what you are doing. They would want the same.

# Cases that keep on giving

- *Roberts v. State*, 489 S.W.2d 893, 894 (Tex. Crim. App. 1972)

“[T]he failure of the State to call or explain why it does not call an available witness that would directly connect appellant to the offense, creates a presumption that the witness would be favorable to the Appellant. The rule is applicable only to cases [as here] in which the State is relying solely on circumstantial evidence.”

- Prosecutors still shoulder the burden on appeal concerning constitutional error. They must show, beyond a reasonable doubt, that the wrongfully admitted evidence had no impact on a conviction. *Chapman v. Cal.*, 386 U.S. 18 26 (1967).

- While fact finding is typically for the jury or trial court, video evidence is something the appellate court can review and consider to itself determine the facts. If a video shows something then the appellate court takes that as fact, regardless of what the jury found in regards to the video. This is the one time that the facts are not viewed in the light most favorable to the verdict, they are viewed by the court of appeals in light of the video. *Scatt v. Harris*, 550 U.S. 372 (2007).



# Tips

- Re-read and recheck cases and statutes cited in trial and appeal pleadings
  - Cases may become outdated due to changes in statute or different interpretations by subsequent courts.
  - Cases in different districts or circuits can also provide guidance on issues or concerning fact patterns similar to your case
  - Never go into an appeal, or trial, with outdated cases. Check every case in every pleading. Check them again. And look for new cases the evening and morning before you argue the issue.

# Be considerate of your reader

- Use long citation forms when you have room in your word count to do so.
- Make certain your citations and jump pages are absolutely correct.
- Cite subsequent history to assist the court. There is nothing more frustrating for the court then looking for authority cited in a brief and being unable to find it.
- And seeing a case is overruled, but on some other proposition, saves the court invaluable time in determining this on its own.

# Briefs should be brief

- Judges have limited time and may have to read many different briefs. The shorter and more concise you can make the brief the easier it will be for the judge to digest and be persuaded. An overly long brief, that is unnecessarily so, will not be persuasive and may not be read with discernment and understanding.

# Oral argument

- What it is all about-you want a hot appellate bench
- I re-read the record
- I read the cases and check for intervening authority. I also check for cases written by my panel
- Come up with good and simple analogies.
- Simplify your case
- If you do not have an answer, say so and follow through
- File a post submission letter with the answer

“ In crafting a brief or oral argument, therefore, the factual context of decision—the impact of decision on ordinary lives—must be the first consideration. You learn to “say your case” for an appeal as for a trial. You should say it in the introduction to your brief. And you should say it in oral argument.” Tigar, *Federal Appeals Jurisdiction and Practice*, 3rd Ed., p 10.