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

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Presented By:

Cynthia Orr
GOLDSTEIN, & ORR
29TH FLOOR TOWER LIFE BUILDING
310 S. ST. MARY'S STREET
SAN ANTONIO, TEXAS 78205
(210) 226–1463
whitecollarlaw@gmail.com

I. When does the Appeal Process Actually Start?

"[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. And like we all take pro bono trial cases, it is equally important to provide pro bono representation on appeal. We improve the law and make justice available to all by doing so.

- Appellate advocacy begins at pretrial
    - Since pre-trial motions and their subsequent rulings can be used to grasp victory from the jaws of defeat, it is my philosophy that every trial lawyer worth their salt will understand appeals and preserving error and will seek to build in a safety net of error from the beginning of a case. Likewise, great appellate lawyers understand trials and have learned how to preserve error properly at trial by reading the appeal record of their own trial work and writing the appeal. 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.
- The Lost Art of Motions to Dismiss Indictments
    - Motions to Dismiss the Indictment can not only protect your client before trial even starts, but it can also provide grounds for an appeal if it is wrongfully denied. It may also force the prosecution to properly charge all of the elements it must prove so that it is properly saddled with its heavy burden.

- There can be many defects with an indictment. It may fail to properly lay out the elements of the offense. Also, the offense statute itself may also be fatally flawed. So many times on an appeal I will take out the charging document, compare it to the statute, and find a missing element that was not raised pretrial. These missed opportunities to preserve error are prevented just by slogging through the statutes, codes, and charging documents.
- If these challenges are not made below, there is a lost opportunity to win the case that is not won at trial.

II. The Importance of Trial Error Preservation-The Basics

Trial lawyers are appellate lawyers, and they should realize that. As Michael Tigar has said: "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.

- Make objections. If you do not make objections to evidence, statements, or other trial errors, then it is significantly harder to win the point on appeal. Plain error is not a mountain that you want to climb.

  If there is no contemporaneous objection, the strongest errors evaporate in the court of appeals. Only plain errors may be considered by the courts of appeals. To be considered plain and to be addressed by the courts, four things must be true of the error: it must be error, it must be plain, it must affect substantial rights, and it must seriously affect the fairness, integrity, or public reputation of judicial

proceedings. Johnson v. U.S., 520 U.S. 461, 117 S.Ct. 1544, 137 L.).Ed.2d 718 (1997

- If a judge fails to rule on an issue do not be afraid to press the judge for a ruling. The record must also show what the ruling was. If the judge never rules and do not establish this fact, your objection is of no consequence. If the judge refuses to rule, insist upon a ruling or note that the record should reflect that the court has refused to rule and is, therefore, denying you the relief sought.
- And make what I call "spaghetti objections." Raise every basis for your objection that sticks. I will file written trial objections that are very thorough and complete. Then during trial, I will refer to the written objection as Defense objection #1, or Defense Objection #2 based upon whatever my filed written objections are titled. I make a record of the fact that the Court and the prosecution are apprised of these objections, have copies of them, and make clear that the prosecutor and the court know what I am referring to when I use them to object fully and adequately in trial.
- Even if you are at a loss for the magic words at the time you object, describe the basis for the error. After all, so long as you put the Court on notice of the error of which you are complaining, the appeal court will find that you adequately preserved error from the context of what you described. See Rule 33.1(a)(1)(A) Texas Rules of Appellate Procedure.

Find every objection to support a finding of error, and then some, and make those objections. Make certain you clarify that the court is overruling each of your objection.

- Keep objecting until you get a ruling. It may annoy the judge, but you are protecting your client and providing more support for an appeal.
- Further, do not be afraid to color outside of the lines. A good lawyer will know the law. A great lawyer will anticipate what the law may become and preserve error for when the law changes in your client's favor. But also, be transparent and candid with the court. If the law is currently against your point in your jurisdiction, tell the court that you are preserving error for appellate purposes.

- Materials included in the record do not have to be added to the record under a formal rule or procedure.
  - Offers of proof and bills of exceptions can be utilized even though there may not be a formal rule allowing their submission to the court.
  - Discussion of how or why you were surprised and why what you will present is material and will likely cause a different result, are very important matters to establish as a matter of record. You may explain this to the court in the transcript or file a document with the trial court setting these matters out.
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III. Trial attorneys always need two things in their pockets, a written motion for continuance and $500.:

- A written and sworn motion for a continuance that has blanks and can be filed out on the go is necessary to preserve error. You will use it if you need additional time to accomplish something that preserves error, and sometimes the motion for continuance is necessary to preserve error.
- Never let evidence or testimony surprise you and do nothing to preserve the error. Explain that you are surprised. Explain in detail why you are surprised. Ask for a continuance and explain how long the continuance needs to be for you to respond to the surprise and provide effective assistance of counsel. File your sworn motion with the blanks filled in explaining the above. And have the clerk of court have you swear to the motion on the record.
- Ask for a continuance due surprise, for example, this will give you time to prepare to cross-examine a surprise witness, examine surprise evidence, prepare new objections, file new motions based on the surprise, obtain expert testimony, or prepare exhibits that meet, rebut, or defeat the surprise evidence. All of this is also preparation for the appeal.
- $500 is bail money if counsel is held in contempt of court. Sometimes a judge will intimidate lawyers. But counsel is not in a beauty contest or a popularity contest. And if counsel is not preserving the appellate record, then they are only using half the effort of an effective trial lawyer. So, be ready to do what it takes to preserve the record no matter how

inconvenient or annoying the court might find this. It is the right thing to do and is the proudest tradition of our profession. We speak for the voiceless and for the least among us. Have your bail money ready if necessary, and you will find that your brothers and sisters at the bar will defend you for doing your job properly, if you are held in contempt.

IV. Act during trial, explain your job to jurors, and try your case to win before the jury **and** the appeal courts.

- Fight for your client. Show the court, and later appellate court, that you did everything you could to protect your client and left nothing to chance.
- My partner has always told me that if a time every comes when he is comfortable going into a courtroom, it is time for him to hang up his boots. A comfortable lawyer is one who does not care enough about his charge.
- If you fail to act, than it will be treated as a waiver of the issue. Your client's future is in your expert hands. So have courage to preserve error. This is not comfortable or easy, but you must do so. Make an offer of proof to show what you would have offered if it is excluded. Ask to put on the testimony outside the presence of the jury that the court will not allow before them. And if the court will not allow you to do this in court, write up what you would have shown, what testimony you would have put on, what exhibit you would have admitted.; and file it. State why it is admissible, relevant, material, and would have likely made a difference in the outcome of the case. It is then all in the record.

V. Make sure the record on appeal is complete and accurate.

- At trial, if the court will not allow exhibits in evidence, ask that they be made a part of the record for appellate purposes and then stick around after trial to make sure each of these items are in the exhibits.
- In most cases, I find that the record I have ordered does not contain everything that happened at trial. So, I meticulously check in the record and make sure every hearing is transcribed and sent up. I order the exhibits to be made a part of the record. And I look for those exhibits that were not admitted, but that should be a part of the record for appellate purposes. Sometimes the missing item has to be provided by counsel and certified as correct by them when added to the record. I find that my colleagues on the prosecution are as interested in a complete record as I am. They have always been willing to assist when asked.
- Make sure objections, rulings, orders, or other actions are properly recorded and on the record. If they are not, you have an opportunity to make them a part of the record in your motion for new trial or by preparing and filing a bystander's bill.
- Make sure that you do not have a brief due date from the court of appeals until the complete and accurate record is actually on file. The time to perfect the record should not eat into your briefing time.

VI. Bring all evidence and witnesses you hope to use to trial.

- Even if the judge will not allow the witness's testimony or the admission of certain evidence, the judge may change his or her mind. Having the

individuals or evidence present will help you show harm. Don't be caught flat footed by not having the witness or evidence available to present should the court say, "on second thought I will admit that evidence/testimony."

- Do not be afraid to state that unless you get the witness or the evidence you will provide ineffective counsel, if that is the case. It is important to show the harm visited by a wrongful denial, and it's important to get this on the record. Sometimes, only you can provide this information. This is one of the times that a motion for continuance comes into play. Do not give up because you have overlooked something or failed to do something you should do at trial. Do everything you can to try the case effectively. If you need to pause proceedings to get it done, seek the pause by filing a sworn motion for continuance.

VII. Check jury instructions

- Make sure jury instructions are correct. By this time, counsel is exhausted and the rush to get the case to the jury is on. I prepare jury instructions before I ever think of trying a case. It helps me double check the elements that the prosecution must prove and how they must prove them. For example, do they need independent corroborating evidence? Correct jury instructions are important for the jurors to perform their jobs right and

they can be critical to an appeal as well. Word choices in the charge can alter the outcome of a case.

VIII. Do not be afraid to move for a mistrial

- This helps protect your client and indicates that you believe the court cannot cure error with an instruction. It is also necessary to preserve error for appeal. Simply objecting and getting an adverse ruling will not do it. Object, get a ruling, ask for an instruction to disregard/limit the use of the evidence/, and then explain that this instruction was not enough to cure the error so that you need a mistrial.
- Only when the judge denies the mistrial have you preserved error.

IX. A well-equipped attorney is someone who can try a case and then argue the appeal they have built as they tried the case.

- Having an attorney that specializes in appeals sitting in during a trial can be very helpful. But at the end of the day those specialists do not know what you are thinking in trial. In the heat of trial, you need to act from your own knowledge to object timely and sufficiently. There will always be a disconnection between lawyers' thoughts and timing of events in trial. A better trial lawyer is one who knows the appeal process and can preserve and build error, in case the jury does not see things their way.

  - Do not concern yourself with getting your feelings hurt.
    - An attorney cannot be hurt by a ruling or angered by opposing counsel. They must remain composed at all times. Only then can errors in trial be

adequately preserved and pressed, harm shown, and rigorous efforts be made to win the trial; during trial or on appeal. Emotion will take your edge off and distract you.

- Always mark down issues for appeal when they happen.
  - It is better to be able to quickly reference error than to try and remember it long after a trial has concluded. Simply relying on memory can result in critical information being forgotten or misremembered. Having a written record of when error occurred allows for review, and citations to the record for later, without having to read the entire record from start to finish. This is not to say the reading the entire record is not important. It is crucial. Sometimes in an appeal I will find preservation of an issue in an arraignment, or in a prayer in a pretrial motion. Weaving the entire record together for a strong appeal is better after appellate counsel has full command of the record. If I have not tried the case, I always seek an overview and the views of my brothers and sisters who tried the case as to what the error is for appeal.

X. What to do when preparing for the appeal:

- Find and show the harm
  - In order to win an appeal harm must have been done. It is not enough to just say you disagree with a ruling. If that has not been done at trial, complete the record in this regard during the motion for new trial. See Rule 21.2 Texas Rules of Appellate Procedure.

- Check local rules and orders concerning how to process and preserve your appeal. The clerk is your friend and local expert. Get to know them and communicate with them.

XI. Cases that keep on giving.

- 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).
- The state's failure to call a witness in a case that relies on circumstantial evidence creates the presumption that that witness was favorable to the defendant.
    - "[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." *Roberts v. State*, 489 S.W.2d 893, 894 (Tex. Crim. App. 1972)
- 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.

- 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. And 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. Finally, it is a great aide to have the full cite of a case at the moment the court desires to read it for the proposition cited, instead of having to go back several pages to determine the full citation. While short citation form is fine, and you should use it when necessary, providing convenience and time saving assistance to the court is always a good idea.

XII. Preparing briefs

- Keep the brief to the point
  - 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.
- Make sure cases and statutes are up to date.
  - Caselaw and statutes can change on a moments notice. Even up to the day of submission of the brief. It is imperative that cases are accurate so as to not confuse the judges and to ensure that it is clear you have conducted research and are able to back up the claim of harm with facts from the case

and the caselaw/statute. One overruled case, authority superseded by statute, or misstated case facts or law will sink your ship. Nothing you say or do thereafter will have credibility.

- Do not stray from the record
  - Do not bring extrinsic facts from the case into the brief, or into oral argument. The record is what you can rely on. Appellate courts primarily exist to determine errors in trial or determine constitutional issues. They do not exist to determine facts of a case that are outside the record.
    - 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).
    - Remember that the appellate does not bear the burden of proof on appeal.
  - Make sure citations and pin cites are correct.
    - There is nothing more annoying for a law clerk for an adjuster than not being able to find the right keys.

XIII. Oral Argument

- How to prepare to argue

- Practice the oral argument. It is important to rehearse so you are familiar with the concepts and tests used to decide issues. While it is true that the appellate justices will ask questions make certain you have reviewed all the law in the briefs and checked for intervening authorities. Apprise the court of these and your opponent as well. Also be familiar with the opinions that your panel members have written on your issue.
- I re-read the record before the oral argument. But if there is some fact I do not recall or some question I cannot answer, I am honest about that and promise to provide the answer in short order.
- Come up with good and simple analogies. They can help illustrate a concept in a simple way and prove your point. One of the best analogies I used was to explain that hiding money in a car and crossing the border was not money laundering. I explained that it was like the boy who spilled grape juice on his mother's fine linens and then hiding them in the cupboard. This had not changed the character of the stained linens. The US Supreme Court held in that case that hiding money in a car compartment was not money laundering, so we prevailed. *Cuellar v. United States,* 553 U.S. 550 (2008). The Texas money laundering statute is not worded the same way as the federal statute. See Acosta v. State, 429 S.W.3d 621 (Tex. Crim. App. 2014).
- Simplify the complex
    - You have limited time to argue. It is best to prepare to make complicated concepts simple. The longer an explanation is, the

more difficult it can be to follow along. Putting concepts in their simplest terms will give the court confidence to rule in your favor. It will demonstrate that you fully understand the issues.

- Desire a "hot bench"
- In my mind, oral argument is for the benefit of the court. It is not designed for me to make a great speech. I am prepared to speak the entire time and to answer questions on any issue raised in my briefs. But I desire to hear what the justices want to know and to provide them that information. Listen to each justice's question and answer that question.
- Learn what the justices have written before and what opinions they have written concerning your issues. This will help you find the areas where the court is already persuaded that you are correct.
- Being able to cite to opinions or other articles written by individual justices helps to ground your argument in what they already believe. It is much easier to convince someone e if you show how your arguments are similar to the arguments, they themselves made or already supported.
- Finally, remember that your client's case presents his or her story. It includes the impact that a decision on the issues will have on people, businesses, lives and the community; including the legal community When you argue, remember to "say your case." Again, quoting Michael Tigar: " 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.