

## Tips for building a solid appellate record

The goal is to win your case at trial. If you can win on the facts, win on the facts. But if you can't win on the facts – either because the facts aren't favorable or the court won't let your favorable facts in – then you must try to win on the law. You must always have both objectives in mind, so that even while you are trying the hell out of your case before a jury you are at the same time maximizing your ability the need to win on appeal.

What can you do to ensure the best possible case on appeal?

- I. Start building a record as soon as you get the case.
  - Remember that the trial court is the Supreme Court's eyes and ears. No matter how compelling your issue, the high court will know nothing about it unless you get in on the record
  - When in doubt, object. Put every objection on the record – even if it is clear that the court is going to rule against you.
    - Remember that objections to testimony and to exhibits are always fodder for appeal.
  - If the court rules against you, ask to make an offer of proof.
  - File motions and briefs in support of your objections
  - Eliminate or limit off the record discussions.
  - Where they do occur, summarize for the record any off the record decisions, if the judge does not do so.
  - Be mindful of the court's calendaring concerns, but request continuances if it appears that you can't get the record sufficiently documented within the time allocated
  - Make sure the district court record contains that all your motions and all the briefs you filed in support of those motions.
  - When objecting to an exhibit or testimony (or to the court's refusal to admit your own exhibit or testimony):
    - Be as descriptive as possible in your objection.

- Make references to movements and directions and ensure that the witness is doing so as well.
  - Reiterate what exhibit the witness is describing.
  - Do so although tedious and time consuming.
- II. Educate the Client about the difference between trial and appeal and the importance of getting everything into the record
  - Trial is the time when you must get all facts and evidence into the record.
  - The appeals court is going to examine the facts and evidence in the trial record – but only those facts and evidence.
  - The appeals court will not reopen the record if you fail to get facts and evidence in.
- III. Think like a prosecutor and learn to think how the Attorney General thinks, which is . . .
  1. The trial court doesn't make mistakes.
  2. Even if it looks like the trial court made a mistake the appellate court can accomplish the same result by employing different reasoning.
  3. If the trial court actually did make a mistake, the error was harmless.
- IV. Pay particular attention during voir dire and jury selection
  - One of the most fertile areas for success on appeal is structural error in jury selection. To secure the best record for issues in that field:
    - Develop biases if a prospective juror hesitates on answers.
    - Work aggressively to develop challenges for cause.
- V. Make sure your record contains support for the jury instructions you submit (and your grounds for objection for the instructions you oppose).
  - Always argue for the specific preliminary jury instructions you want, and for those at the close of trial.

- Always submit a brief in support of any proposed jury instruction that you believe the court may balk at accepting.
- Always consult experienced appellate counsel in advance regarding any non jury instruction or other trial issues you anticipate arising at trial.

VI. When arguing issues always leave a wedge in your argument for an appeal.

- For example: a suppression argument based on evidence gathered in violation of your client's *Miranda* rights may also suggest investigatory stop issues.

VII. Make sure the court understands that you want everything that happens placed on the record. Don't be intimidated into submission by the court. If the court shuts you down before you have a chance to articulate the clearest grounds for your argument, or before you have an opportunity to clarify the record, respectfully, but clearly, remind the court of the importance of making a clear and unambiguous record.

- To the extent possible, have the district court go through each with argument on each and a decision on each. If a decision is made lumping several motions together, clarify the decisions on the record for the judge.