

Appellate Practice for Young Lawyers

*Tips and Suggestions for
Spotting Pitfalls Before the
Appeal*



HOUSTON DUNN
ATTORNEYS AT LAW

Just a Few Helpful Hints

Summary Judgment Motions

- Clearly Articulate Summary Judgment Grounds - make it easy for the Court of Appeals.
- Identify the challenged elements in the no-evidence motion.
- Hybrid motions.
- Resulting Orders: General or specific?



Just a Few Helpful Hints

Summary Judgment Evidence

- This is *your* evidence!
- Affidavits must establish facts, not bare legal conclusions.
 - “The Defendant was negligent”
 - “The Defendant did not violate the standard of care.”
- The *de novo* standard of review often requires affidavits to stand on their own.
- Good appellate briefing cannot save your case from deficient proof.



Just a Few Helpful Hints

Mandamus

- An extraordinary remedy, not a method for interlocutory review of incidental rulings.
- Abuse of discretion - trial court could have reasonably reached only one decision.
- No adequate appellate remedy - increased expense or inconvenience of a second trial insufficient.
- Expensive - frankly discuss the likelihood of success with the client.
- Importance of timing.



Just a Few Helpful Hints

Motions in Limine, Pre-Trial Evidentiary Motions, and Running Objections

- Motions in limine do not preserve error for appeal.
- Most appellate courts agree that a pre-trial motion to exclude specific evidence preserves error for appeal without the necessity of objecting to the challenged evidence each time it is offered.
- Running objections should identify the source and subject matter of objectionable testimony and the ways the testimony would be brought before the court.



Just a Few Helpful Hints

Jury Charges

- When to prepare.
- Preparation for internal use vs. Preparation for the trial court pre-trial.
- Preservation - object or request?
- Alternative on appeal - argue *State Dept. of Highways & Pub. Transp. V. Payne*, 838 S.W.2d 235 (Tex. 1992): “There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.”



Just a Few Helpful Hints

Post-Verdict and Post-Judgment Motions

- If you are the losing party, don't *unconditionally* move for judgment on the verdict just to get the appellate ball rolling.
- The 30-day time period for filing a motion for new trial *cannot* be extended.
- Filing motions for new trial, any other post-trial motion, or a request for findings of fact and conclusions of law *will not* extend the time to perfect an accelerated appeal. TEX. R. APP. P. 28.1(b).
- Request for FOF/COL will not extend trial court's plenary power.



Just a Few Helpful Hints

Ensure a Complete Record

- Watch out for exhibits that never make it to the court reporter.
- Make sure the transcript is clear to the appellate court.
- Make sure trial court orders make their way to the district clerk for filing.



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Just a Few Helpful Hints

Hiring Appellate Counsel (or “Shameless Self-Promotion”)

- Timing
- Entire case vs. Discrete matters
- Give appellate counsel sufficient information so that they can effectively assist you.
- Be candid with appellate counsel regarding problems with your case.
- Keep appellate counsel apprised of developments.
- Take full advantage of appellate counsel’s unique expertise and perspective.

