NUTS & BOLTS

Appeals in the Federal Courts: From Protecting the Record to Oral Argument

By Edward S. Harmening and Craig M. Sandberg

Although most practitioners have experience drafting pleadings in trial courts, not many have extensive experience drafting appellate pleadings. Still fewer have had an opportunity to file and argue an appeal in federal court. The nature of litigation is such that most of our collective time as attorneys is spent in the lower courts. It is likely that issues concerning appellate practice, however, come front and center when you lose in the trial court (or where your opponent believes your win in the lower court is tenuous).

Possibly due in part to our law school training, which is more heavily focused on litigation and core legal analysis, trial lawyers sometimes fail to appreciate that appellate practice requires unique preparation, superior brief writing, and trained appellate advocacy. Many attorneys seem to believe that no special talent or training is needed to write a good brief on appeal. Unfortunately for such lawyers, what worked before the jury or the busy trial judge is not adequate or, in many cases, not appropriate before the appellate court.[1]

Advocacy in the appellate court requires a unique approach. In addition to familiarity with the Federal Rules of Appellate Procedure (FRAP) and any applicable local appellate rules, the practitioner must seize the opportunities available in presenting an appellate brief and arguing to an appellate panel. The written submissions cannot be formulaic;[2] rather, attorneys should take advantage of the flexibility that an appellate brief writer has in packaging arguments to meet the needs of a particular case. Additionally, while thorough preparation is a prerequisite to delivering a winning oral argument, the practitioner must appreciate that the framework of an appellate argument requires flexibility, not rigid adherence to a prepared outline. The oral presentation to the panel is the opportunity to address issues significant to that panel.

This article discusses the issues that the practitioner faces with regard to appellate practice and procedure. Considerations addressed include protecting the record in the lower court (thereby preserving issues for appeal), deciding when to appeal, drafting the brief, preparing for argument, and presenting the case to the panel.

Whether the appellant will succeed on appeal is directly related to the record below. Consequently, the appeal process starts in the trial court. In this regard, trial counsel needs to ensure that all rulings (pretrial and otherwise) are on the record, that timely objections are made, offers of proof are presented, and objections to improper instructions are properly stated.

When It Matters, Put It on the Record

The trial starts at or even before the pretrial motions. In many instances, the court will invite the attorneys into chambers to address any pretrial motions. For whatever reason, a court reporter is sometimes not present. Even though the pretrial motions have been filed with the court and are part of the record, it is still advisable to have the court reporter present for argument and ruling. In many cases, the court's oral ruling and stated basis for the ruling will be significant in the reviewing court. Additionally, the appellant will almost always be hampered in pursuing an appeal where the record is silent. The trial attorney has the opportunity and obligation to preserve the record. As a practical matter, it may be difficult to ensure that every ruling, comment, or basis stated by the court is on the record, and it would be unwise to continually badger the court about every off-the-record statement. Consequently, where it matters, counsel should politely advise the court of the need to put the court's ruling on the record.[3] In most cases, the court will understand and appreciate counsel's need to preserve the record.

Object at Trial Despite the Denial of a Motion in Limine

Although some courts disfavor motions in limine and prefer to deal with questions of admissibility of evidence as they arise during the course of trial, in those courts that do permit them, a motion in limine can be a very useful tool for the trial lawyer. The purpose of the motion is to ask the court to address the admissibility of perceived objectionable evidence before that evidence is introduced at trial. After presentation of the issue, the court will enter an order with respect to the contemplated

As noted in the article by Thomas L. Hudson & Keith Swisher, a rule change will likely take effect on December 1, 2006, that removes the requirement under Rule 50 that a party renew at the close of the evidence a motion for judgment as a matter of law. The text of the new rule is available at http://www.uscourts.gov/rules/newrules6.html (Civil Rule 50).

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evidence. "An *in limine* order protects the moving party from any prejudicial impact that might result simply from asking questions and making objections before the jury."[4] A motion in limine is a preliminary ruling that the court may change as the evidence is presented and developed during the trial.[5]

Attorneys present their motions in limine in writing prior to the presentation of evidence. In this manner, the court has the opportunity to contemplate an evidentiary issue and the supporting legal analysis without the pressure of making a quick ruling from the bench during trial.

This alone, however, does not necessarily protect the record for appeal. A potential problem may arise in those instances where the court denies a motion in limine and the attorney fails to object later at trial when the contemplated evidence is presented to the jury. "Some appellate courts have adopted a strict rule that, notwithstanding a district court's categorical denial of a motion *in limine*, evidentiary error is not preserved absent a contemporaneous objection."[6] Know the rule in your jurisdiction.

Many practitioners fail to timely object to trial testimony or evidence that is inconsistent with any ruling in limine entered in their favor. Although Rule 103 of the Federal Rules of Evidence (FRE) does not specifically require that an objection be interposed to preserve the issue for appeal, a timely objection during the trial would prevent any misunderstandings. The objection must be made contemporaneously with the proffered evidence; otherwise, courts of appeals may consider the failure to timely object a missed opportunity and, therefore, a forfeiture of that right.

In understanding this principle, it is necessary to consider the difference between waiver and forfeiture. The Seventh Circuit has explained it this way:

> Waiver is the intentional relinquishment or abandonment of a known right. It differs from forfeiture, which is simply the failure to make a timely assertion of a right. Waiver extinguishes the error and precludes appellate review. Forfeiture permits plain error review. A common distinction we draw between waiver and forfeiture is that waiver comes about intentionally whereas forfeiture occurs through neglect.[7]

More succinctly, the court has said that "[w]aiver occurs where either a defendant or his attorney expressly declines to press a right or to make an objection."[8]

Seek Judgment as a Matter of Law

Rule 50 of the Federal Rules of Civil Procedure (FRCP) allows the court to take a case from the jury and enter judgment for a party where there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.[9] Be mindful of the importance of the record: "A motion for judgment as a matter of law may be made orally or in writing, but must be made on the record."[10]

To preserve an issue for appeal as to the sufficiency of the evidence, one must "seek a judgment as a matter of law pursuant to FRCP 50(a) before submission of the case to the jury [i.e., a motion for directed verdict], and then (if the Rule 50(a) motion is not granted and the jury subsequently decides against that party) a motion pursuant to Rule 50(b)."[11] Indeed, as pointed out by one commentator, "several courts have taken the strict view that post-trial motions for judgment are limited to the grounds urged at the close of evidence."[12] However, Justice Stevens, in a recent dissenting opinion, stated that "[a]rguments raised for the first time on appeal may be entertained, for example, if their consideration would prevent manifest injustice."[13]

Object to Jury Instructions

All trial lawyers recognize the importance of jury instructions and those instructions often form the basis of appeals. Some judges have made the task of preparing jury instructions easier by posting the preferred instructions on their individual web pages. The problem from an appeal standpoint will likely involve nonpattern instructions. Counsel objecting to such improper nonpattern instructions must object and, where appropriate, offer a substitute instruction. "To preserve a challenge for the failure to instruct on a particular principle, counsel must both tender a proposed instruction that accurately states the principle and object when the judge fails to give it."[14] In all cases, objecting counsel should place the objection and its basis on the record.[15]

The rule of thumb should be that if the proffered evidence or statement is not proper and is likely to be prejudicial, counsel must object to allow the trial court to cure the problem. Where the evidence or statement is so prejudicial that a curative instruction by the court would be insufficient, it may be appropriate and in certain cases necessary to seek a mistrial. The failure to object will almost always result in forfeiture for purposes of the appeal.

Deciding to Take an Appeal

The decision to take an appeal should be contemplated immediately following ruling on any unsuccessful post-trial motions. In those cases where the client, after consulting with counsel, has decided to take an appeal, the first order of business is to act in a timely manner. The party seeking review of the district court decision perfects the right to appeal by filing a notice of appeal in the district court. Pursuant to FRAP 4(1)(A), except in those cases where the United States or its officer or agent is a party, the notice of appeal must be filed with the district court within 30 days after the date of judgment or the date on which the order appealed from is entered. Importantly, the court may not extend the time to file a notice of appeal.[16]

Attorneys contemplating an appeal must review the rulings made in the lower court to determine whether there is a basis to proceed. The record made by the trial attorney and the court will be determinative and the potential areas of appeal should be thoroughly researched to evaluate the likelihood of success. Regardless of the decision to appeal, the client must understand your recommendation and, in particular, the ramifications and alternatives flowing from any recommendation not to take an appeal.

Hope is not entirely lost for a litigant that has lost its appeal. Following a defeat in the court of appeals, a litigant may request rehearing or rehearing en banc before the appellate court, or further review in the U.S. Supreme Court by seeking a writ of certiorari. Petitions for rehearing should be limited to situations in which the appellate panel has overlooked or misunderstood a fact or legal precedent.[17] Rehearing en banc is for dealing with situations in which the appellate panel's decision has created a conflict within the circuit or with Supreme Court precedent, or otherwise presents an "issue of exceptional importance," such as an inter-circuit split.[18] Attorneys considering this route should under-

stand that "[a] petitioner for certiorari bears a heavy burden to persuade the Court to select its case for review out of the many thousands of petitions filed. Understanding the nature of that burden is crucial to writing a successful brief urging denial of certiorari (called a 'brief in opposition')."[19] It is widely recognized that, "[i]n practice, only a small handful of the many thousands of requests for Supreme Court review are granted each year."[20] The considerations in granting certiorari include whether there is a conflict on an important matter among the federal circuits, whether there is a conflict between the federal court of appeals and the highest court of the state on an important federal question, whether a ruling has so far departed from the accepted and usual course of judicial proceedings that the Supreme Court's supervisory power is called for, whether a ruling by the highest court of a state conflicts with another state's highest court, or whether a ruling by a state court or federal court of appeals decides an important question of federal law that has not been settled by the Supreme Court.[21]

Writing a Good Appellate Brief

"The virtues of a good brief, in [our] opinion, are clarity, selectivity, and simplicity of writing, including the headings of the arguments,"[22] a commentator notes. It is recommended that counsel "use short sentences, use active verbs, use short paragraphs and avoid footnotes. Briefs that are written in this fashion are clear, simple and direct, and are not dull because the verbs are active and the words are carefully chosen."[23] A brief should be straightforward and concise, leaving out unnecessary verbiage; nonetheless, "[t]here is certainly room for good metaphors, for references that are colorful, and epigrams that convey important truths."[24] Attorneys should never lose track of the fact that they are presenting an argument: "As the briefs get shorter, it is all the more important to convey to the reader the reason 'why' your side should prevail. Recitations of case law without explanation why a particular result is consistent with statutory purpose, consistent with the needs of the judicial system, and consistent with the needs of society is going to be a dry and unimpressive presentation."[25]

Good advice to bear in mind is that the statement of facts is of critical importance:

> Except for those cases that turn on an abstract point of law, the statement of facts is generally the most important and challenging part of a brief. The facts are the one thing that the appellate judges know nothing about. It is very important that the factual statement be forceful, but that it not be a one-sided or argumentative presentation. Statements of facts of that kind turn off appellate judges and undermine the credibility of the brief. The same point applies to discussion of legal authorities.[26]

The summary of argument section is also very important:

> It serves several purposes. If a case is complicated and there is a lengthy statement of facts and a complex set of arguments to follow, understanding the significance of particular parts of the argument can be difficult unless the reader sees the big picture first. The reader will find the details of the argument much easier to follow if the reader has an overview of where the argument is headed. Also, some judges may need that summary of argument as a refresher before the oral argument.[27]

Attorneys are cautioned that "[i]nvective directed at the opponent and epithets characterizing the arguments as frivolous are largely wasted."[28] Such language might be construed by the court of appeals as a signal that the brief's author is in trouble and, therefore, its use is counterproductive.[29]

Despite the occasional sentiment expressed by trial lawyers that "no special talent or training is needed to write a good brief on appeal,"[30] many appeals are lost, or at least made harder to win, because of ineffective briefs. Part of this problem is the result of the infrequency with which many lawyers write appellate briefs. Also, many practitioners fail to appreciate that the job of preparing an effective brief is different from much other lawyering as it pertains to advocacy.

It has been observed that "[t]he most common mistake made by trial lawyers is using the same strategy in appellate court as they would use in the trial court."[31] An appellate brief is not a closing argument to a jury; nor is it an exercise in "irrelevant detail and empty rhetoric."[32]

An effective brief requires practice within the Rules of the Supreme Court of the United States, Federal Rules of Appellate Procedure, and any applicable local circuit rules. Those rules will provide guidance for everything from brief length (word count versus page count) to formatting the brief.

Preparing and Delivering Oral Argument

To represent clients properly, appellate practitioners must understand the goals of oral argument from both sides of the bench. They can then tailor their arguments to meet these goals.

Successful appellate practitioners spend time considering the judges' purpose(s) in approaching the oral argument. Judges use oral argument to accomplish one or more of the following goals: (1) to clarify issues; (2) to clarify factual or procedural points; (3) to clarify the scope of claims; (4) to examine the logic of claims; (5) to examine the practical impact of claims; and (6) to lobby for or against particular positions.[33]

Equally important to successful oral appellate advocacy is having a clear sense of purpose in oral argument. Lawyers should use oral argument to: (1) ensure that the judges understand and focus upon the claims; (2) correct misimpressions of fact or law that the judges may have about the case; (3) demonstrate the soundness of the position; (4) assuage the judges' concerns; or (5) impress the judges positively and memorably.[34]

The most important aspect of an effective appellate argument is thorough preparation so that all the information about the case and legal authorities is at the front of one's mind, or at least one's fingertips. After all, the main purpose of participating in the argument is to answer the court's questions. The second aspect is condensation and simplification of the case so that the critical considerations that are needed to decide the case correctly can be presented in a few minutes if the questioning is intensive. The third aspect is the display of flexibility in responding to the court's questions and giving the court a full answer, but then using each question as a stepping stone to return to the critical points in the case. One problem that often arises in oral argument is that questions cause counsel to lose their sense of direction. Effective argument means providing direct answers to the court's questions and

The mechanics of proper oral argument technique are well described in Andrew Frey's article on this subject:

- Maintain eye contact and talk to the judges, not at them.
- Have an outline or some list of important points to keep you from rambling and overlooking pivotal points.
- Do not unnecessarily delay getting to the argument. Simply walk to the lectern, set down any papers, wait for the presiding judge to recognize you, and begin.
- Stand upright and still, but don't be rigid.
- Control nonverbal communication.
- Be courteous and respectful.
- Enunciate clearly.
- Control volume.
- Keep cadence.
- Address the judges correctly.
- Do not simply read a prepared statement to the judges.
- Avoid long sentences, numbers, and citations.
- Limit reliance on help from others at the counsel table.
- Remember the forum.
- Be prepared to modify the argument.
- Use the written format that works best for you.
- Be well armed with the material you need.
- Tab important parts of the transcript and the appendix for quick reference.
- Don't use distracting exhibits or physical evidence.
- Manage your time effectively.[35]

using the answers as transitions to return to the winning ideas.

What should the substance of an oral argument be? Every moment granted to counsel to address the panel must be used effectively, and wise appellate practitioners will begin positioning themselves immediately. The introduction should tell the judges in a couple of sentences how the case reached them, the type of case it is, the position, and what points the oral argument will cover. Limit time addressing the facts unless there is specific tactical goal in doing so. Limit oral recitation of the straightforward statement of the brief to the three or four most critical points to prevent judges from missing subtle or rhetorical comments. When discussing cases, the oral argument should be used to convey the logic and common sense of counsel's position. Know the record on appeal. Be prepared to answer questions about relevant parts of the record.

If appellate argument did not involve answering questions from the panel, it would just be persuasive speech. So do not dread receiving questions from the bench—embrace them. As noted above, judges may have multiple purposes in interrogating counsel. Listen carefully to the question asked to discern its purpose. Answer the question directly without evasion. The court is looking for credible responses to its questions. The panel reasonably expects the attorney to be prepared to answer any question posed. Therefore, do not postpone the answer because the case may suffer. Do not attempt to bluff about authorities. If a case mentioned by the court is unfamiliar, the best course may include making an offer to the court to provide a supplemental response on that limited citation and its applicability. Be both nimble and flexible in successfully navigating oral argument. Avoid a regimented format of critical points.

Be careful with concessions. It is one thing to concede something to gain credibility with the court, but another one altogether to be led astray by a judge who may be lobbying the panel for a certain position. Also, be aware that a verbal admission made by counsel at oral argument is a binding judicial admission, the same as any formal concession made during the course of the proceedings.[36] When answering questions, always use the greatest care in answering those that test the principles underlying the argument. Finally, beware of the relentless judge.[37]

Although much of the aforementioned information is equally applicable to appellees' oral argument to the courts of appeals, there are some differences of note. First, appellee counsel should keep in mind that they prevailed in the lower court, and, therefore, it may be reasonable for them to feel differently about the appeal. Nevertheless, keep the following in mind: (1) Bring prepared notes that key the main points. Those points must make an affirmative case and give the judges the emotional and intellectual basis for affirming; (2) Draft an outline as the appellant speaks and note the main points to add that are responsive to the opponent's argument and the judges' comments; and (3) Correct only the opponent's critical misstatements.[38]

As the appellant, do not forget to save time for rebuttal. Because of the dynamic nature of oral argument, never attempt to prepare the rebuttal in advance. One cannot rebut what has not yet been argued. The sole advance preparation of rebuttal consists of an intimate knowledge of the relevant, dispositive authority. Consider waiving rebuttal if the court has no questions and it would add no value to your argument.[39]

Some courts enforce the time limitations stringently; others allow lawyers to keep speaking so long as they are answering the court's questions. Remember to manage time properly because poor clock management is one of the easiest mistakes to make.[40] "In the end, all the lists of all the rules in all the books on appellate advocacy can be distilled into one word: preparation."[41]♦

Endnotes

1. Andrew L. Frey & Roy T. Englert Jr., *How to Write a Good Appellate Brief*, 20 LITIG. No. 2, at 6 (Winter 1994).
2. *Id.*
3. Evan M. Tager, *Tips on Preserving Arguments for Appeal*, INS. L. WKLY. (Mealey) (Dec. 1, 1997).
4. 1 ROBERT S. HUNTER, TRIAL HANDBOOK FOR ILLINOIS LAWYERS § 4.4, 89 (7th ed. 1997).
5. *Id.*
6. Tager, *supra* note 3.
7. United States v. Sumner, 265 F.3d 532, 537 (7th Cir. 2001) (internal citations omitted).
8. United States v. Cooper, 243 F.3d 411, 416 (7th Cir. 2001).
9. FED. R. CIV. P. 50.
10. STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, FEDERAL CIVIL RULES HANDBOOK 761 (2003).
11. Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 126 S. Ct. 980, 983, 2006 U.S. LEXIS 916 (2006).
12. Tager, *supra* note 3.
13. *Unitherm*, 126 S. Ct. at 990 (Stevens, J., dissenting).
14. *Id.*
15. STEPHEN RACKOW KAYE & RONALD S. RAUCHBERG, BUSINESS AND

COMMERCIAL LITIGATION IN FEDERAL COURTS § 51:8 (2d ed. 2005).
16. FED. R. APP. P. 26(b).
17. FED. R. APP. P. 40.
18. FED. R. APP. P. 35.
19. Timothy S. Bishop, *Opposing Certiorari in the U.S. Supreme Court*, Mayer Brown Rowe & Maw, www.appellate.net/articles/oppcertinsc.asp (accessed June 5, 2006).
20. BAICKER-MCKEE, JANSSEN & CORR, *supra* note 10, at 1118.
21. *Id.* at 1119.
22. Jeffrey N. Cole, *An Interview with Steve Shapiro*, 23 LITIG. No. 2, at 23 (Winter 1997).
23. *Id.*
24. *Id.* at 24.
25. *Id.*
26. *Id.* (Steve Shapiro, responding to now-Judge Jeffrey Cole's suggestion that one of former Supreme Court Justice Benjamin N. Cardozo's greatest attributes as a judge was that "he could present facts so persuasively that the legal conclusions seemed inevitable").
27. *Id.*
28. *Id.*
29. *Id.*
30. Frey & Englert, *supra* note 1.
31. *Id.*
32. *Id.*
33. Andrew L. Frey, *Preparing and Delivering Oral Argument*, Mayer Brown Rowe & Maw, www.appellate.net/articles/prepdel799.asp (accessed June 5, 2006).
34. *Id.*
35. *Id.*
36. McCaskill v. SCI Mgmt. Corp., 298 F.3d 677, 680 (7th Cir. 2002).
37. Frey, *Oral Argument*, *supra* note 33.
38. *Id.*
39. *Id.*
40. Daniel C. Vock, *Appellate Lawyers' Version of High Wire Act: Oral Argument*, 15 CHI. DAILY L. BULL. No. 81 (April 24, 2004).
41. Christine Hogan, *May It Please the Court*, 27 LITIG. No 4, at 8 (Summer 2001).