PRESERVATION OF ERROR BASICS

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If there is no preservation of error in the trial court, the appellate court cannot grant relief. Texas Rule of Appellate Procedure 33.1(a) provides the general requirement for preserving claims of error in the trial court so that a complaint can be brought forward on appeal. This rule requires that the complaint be made to the trial court by timely request, objection, or motion that states the grounds specifically and complies with applicable rules of evidence and appellate practice. Rule 33.1 also requires a ruling from the trial judge or an express indication that the trial court refused to rule. The rule seems simple enough, but below is a listing of problems areas that are often seen on appeal.

1. Generic objections. To be valid an objection must state specific grounds or the grounds must be apparent from the context of the objection. *See McDaniel v. Yarbrough,* 898 S.W.2d 251 (Tex. 1995). In striving to meet the specificity requirement, "attorneys should use objections as opportunities to persuade trial judges to change their mind. Viewing objections this way encourages parties to explain the logical and factual bases of their objections, and discourages rote objections that do not relate the facts or the law of the case." Polly J. Estes, *Preservation of Error: From the Filing of the Lawsuit Through Presentation of Evidence*, 30 ST. MARY'S L.J. 997, 1003 (1999). Including in the objection a brief explanation of the harm that will result from an adverse ruling can be beneficial because only harmful error will be corrected on appeal.

2. Different complaint on appeal. The complaint raised on appeal must be the same as the objection made in the trial court. *See Banda v. Garcia,* 955 S.W.2d 270 (Tex. 1997) (hearsay objection at trial does not preserve unfair prejudice claim on appeal). It is especially tempting to raise an entirely different argument on appeal once you have had the advantage of reviewing the record with hindsight of what might have been a better objection, but litigants have to live with the objections raised at trial — an appeal is a review, not a second bite at the apple.

3. Late objections. Objections that come several questions (or answers) too late, and objections to evidence that has previously been admitted through a different witness are too late and preserve nothing for appellate review. *See Cactus Utilities Co. v. Larson,* 709 S.W.2d 709 (Tex. App.—Corpus Christi 1986), *aff'd in part and rev'd in part on other grounds,* 730 S.W.2d 640 (Tex. 1987).

4. Subsequent waiver. Even when a party successfully objects to evidence and obtains a favorable ruling excluding the evidence, subsequent waiver of the objection can occur, resulting in admission of the evidence. For example: (1) a proper motion in limine can be filed and granted, but then waived if there is no objection at trial when the evidence is actually offered; (2) an objection can be sustained, but if the same evidence is later tendered and no objection is made, the admission of that evidence will not be error; (3) parties can waive objections to

evidence when, after they have successfully objected to evidence, they later introduce the same evidence themselves; and (4) running objections are not often clear in the record, and can result in a determination that the complaint was waived.

Caution: Running objections often apply to one witness such that a "running objection as to one witness will not preserve error over the same testimony when elicited from another witness without a new objection." Polly J. Estes, *Preservation of Error: From the Filing of the Lawsuit Through Presentation of Evidence*, 30 ST. MARY'S L.J. 997, 1003 (1999).

5. No rulings. In order for an objection to preserve error for appeal, the objection must be ruled upon. As a matter of good practice, you should get into the habit of clarifying with the judge what his or her ruling is; make sure you get a ruling. The ruling must be on the record, and if the objection is in writing, then persuade the trial court to make its ruling in writing as well.

Caution: Obtaining a ruling means continuing to object until an adverse ruling is obtained. For example, if an objection to certain testimony is sustained, the next step is to request an instruction to disregard the testimony and to strike the testimony. If the instruction is given, then the next step is to request a mistrial. If all of the steps are not followed, there is no adverse ruling preserved for appellate review.

6. No record. In simplest terms, without a record, the appellate court cannot reverse. If there is no record, the court must assume that all facts necessary to support the judgment were presented and considered by the trial court. Avoid off the record conferences like the plague, and always ask for a record.

7. Failure to plead affirmative defenses. The subject matter of an affirmative defense is waived at trial and on appeal if it is not plead in accordance with TEX. R. CIV. P. 94. The failure to verify a defense as required by TEX. R. CIV.P. 93 can also result in waiver if the plaintiff objects to the defendant's failure to verify the defense.

8. Special appearance/venue. Despite long-standing law requiring that a special appearance be filed in order to contest Texas jurisdiction, there are reported cases in which the special appearance is not filed before all other pleadings and in which all subsequent pleadings are not urged subject to the special appearance. *See* TEX. R. CIV. P. 120a. The same is true with motions to transfer venue. *See* TEX. R. CIV. P. 86. While the Supreme Court rulings seem to have retreated from requiring "subject to" language in all pleadings filed subsequent to a special appearance or venue motion, it is imperative that no affirmative relief be sought before a ruling on the special appearance. *See Dawson-Austin v. Austin*, 968 S.W.2d 319, 322-23 (Tex. 1998). Praying for a dismissal with prejudice in a special appearance motion, however, does not amount to waiver. *See Geo-Chevron Ortiz Ranch #2 v. Woodworth*, No. 04-06-00412-CV, 2007 WL 671340 (Tex. App.—San Antonio Mar. 7, 2007, pet. denied).

Caution: There are a variety of ways to get caught waiving a special appearance. In *Rod Mench Studios, L.L.C. v. Paciencia*, No. 04-06-00827-CV, 2007 WL 1540960 (Tex. App.—San Antonio May 30, 2007, no pet. h.), the trial court held a hearing on a special appearance filed by appellants and overruled the special appearance because it was not verified. On the same day of the trial court's ruling, the appellants filed an original answer that was not made subject to the special appearance. Fifteen days later, the appellants filed an amended special appearance that was verified. The trial court denied the special appearance. The San Antonio court affirmed because the appellants filed their answer before the amended special appearance was filed, and the answer was not made "subject to" the special appearance.

9. Evidentiary Rulings. Evidentiary rulings do not often provide grounds for reversal of a judgment. Texas Rule of Evidence 103 states that a "party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party" and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B)states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context. TEX. R. EVID. 103(A).

When the trial court excludes evidence, appellate courts cannot consider that evidence, and cannot consider whether the trial court erred in excluding the evidence, unless the evidence is properly offered in the trial court. *See* TEX. R. EVID. 103 (a)(2). That means that when evidence is excluded, the offering party must tender the evidence in an offer of proof in order to raise issues on appeal about the evidence. The failure to tender an offer of proof in the trial court precludes appellate review, because the basic rule of appellate review is that preservation must occur in the trial court. *Russell v. Ramirez,* 949 S.W.2d 480 (Tex. App.— Houston [14th Dist.] 1997, no writ).

10. Failure to file necessary post-trial motions. Certain complaints cannot be made on appeal unless specific post-trial motions are filed. Most notably these motions include motions to disregard a jury's answer to a question that has no support in the evidence, a motion for JNOV attacking the legal sufficiency of the evidence to support the jury's answer, and a motion for new trial following a jury trial when the factual sufficiency of the evidence is at issue or when additional evidence must be presented, such as juror misconduct. *See* TEX. R. CIV. P. 324(b). A challenge to the factual sufficiency of the evidence following a bench trial can be raised for the first time on appeal.

11. Affidavits and Summary Judgment Issues. Preservation issues with affidavits arise in various contexts, but perhaps most frequently in the summary judgment context. Specific grounds for summary judgment must be set forth explicitly in the motion for summary judgment or they are waived. TEX. R. CIV. P. 166a (c).

Similarly, issues the non-claimant contends would justify denial of the summary judgment must be included in the response to avoid waiver. *See Day Cruises Mar., L.L.C. v. Christus Spohn Health Sys.*, 267 S.W.3d 42, 58 n. 16 (Tex. App. –Corpus Christi 2008, pet. denied).

Defects in form must be objected to (and ruled upon) in the trial court, while defects in substance can be raised for the first time on appeal. *Coward v. H.E.B., Inc.*, 2014 WL 3512800, *2 (Tex. App.—Houston [1st Dist.] July 15, 2014, no pet.).

12. Multiple Parties.

A word of caution regarding multiple parties: an objection can be asserted on appeal only by the party who made the objection. When there are multiple parties, you should clearly on the record join in other parties' objections that you agree with.

13. Expert Witnesses.

An objection that an expert's testimony is conclusory is, in essence, a no evidence challenge that can be raised for the first time on appeal. *In re Dodson*, 434 S.W.3d. 742,750 (Tex. App.—Beaumont 2014, pet. denied). On the other hand, objections about the reliability of the expert's opinion or the expert's methodology must be asserted and ruled on in the trial court either before trial or when the testimony is offered. *Guadalupe-Blanco River Auth. V. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002).

PRACTICAL TIPS FOR THE NON-APPELLATE LAWYER

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I. INTRODUCTION

This paper is intended as an informal aid for trial litigators who handle an occasional appeal. The comments are more specifically addressed to practice in the Fourth Court of Appeals, although some issues are common to all appellate courts. Any trial attorney embarking on an occasional appeal should remember that there is no substitute for reviewing the Rules of Appellate Procedure.

II. OVERVIEW OF THE FOURTH COURT OF APPEALS

The Court of Appeals hears criminal and civil appeals from a thirty-two county district that encompasses Bexar County, Webb County, much of the Hill Country, and a large portion of South Texas. All appeals from the trial courts of the district, except criminal cases in which the death penalty has been assessed, are filed in the Fourth Court. Approximately 60% of the court's case load originates in Bexar County. Unlike most metropolitan courts of appeals, the Fourth Court's filings are almost evenly divided between criminal and civil appeals.

In years past the appellate process has been very slow. However, in recent years the time it takes to move a case through the Fourth Court has shortened. Once you file a notice of appeal — the ticket that grants entry into the Fourth Court and which starts the meter running for statistical purposes — you can expect to present oral argument or have the case considered on the briefs alone in approximately 6 months. You can expect to receive a written opinion about 4 months after submission. These numbers are averages, so that means it can take longer, or shorter. In some cases with very clear issues, the court may issue the written opinion within two weeks of oral argument.

This information on how long it takes a case to complete its appellate journey can be helpful when your clients are weighing the pros and cons of pursuing an appeal. Post-judgment interest, of course, continues to accrue while a case is pending on appeal, and can be a factor influencing the decision to appeal.

III. COMMON PITFALLS IN THE COURT OF APPEALS

For the occasional practitioner, practice in the appellate court can be intimidating. It is vastly different than practice in the trial court, although what you do — or fail to do — in the trial court determines the result of your appeal. Sometimes the best way to learn is to learn what *not* to do. With this in mind, a brief review of the mistakes most commonly committed in the court of appeals might prove helpful.

A. Perfection Errors

If there is no timely perfection of an appeal, the appellate court is without jurisdiction and the appeal must be dismissed.

1. Timetables. There are two basic timetables governing civil appeals: an **ordinary appeal** with no post-judgment activity, in which case the appeal must be perfected 30 days from date of judgment; and the **extended timetable** in which there is post-judgment activity, such as a motion for new trial, motion to modify, motion to reconsider, or request for findings of fact and conclusions of law. Under the extended timetable the appeal must be perfected 90 days from the date of judgment. A third timetable involves a restricted appeal, formerly known as an appeal by writ of error. These appeals must be brought within a 6 month deadline. *See* TEX. R. APP. P. 26.1. Criminal appeals likewise have ordinary and extended timetables, but the triggering date is the day sentence is imposed or suspended in open court. *See* TEX. R. APP. P. 26.2.

2. Appeal as indigent. An appeal by an indigent is governed by TEX. R. APP. P. 20.1(civil) and 20.2 (criminal), which have strict provisions governing the contents required in the affidavit of indigence and the time for filing the affidavit. The civil rule is lengthy, and both rules must be consulted immediately in the appellate process.

3. Request for Findings of Fact and Conclusions of Law. While TEX. R. APP. P. 26.1 speaks of an extended timetable for perfecting an appeal when findings of fact and conclusions of law are requested, such a request operates to extend the time period for perfecting an appeal only if findings and conclusions would be properly filed in a case. For example, findings of fact and conclusions of law are inappropriate after a summary judgment has been entered, so a request for findings and conclusions after the trial judge has entered a summary judgment does not extend the filing deadline for a notice of appeal to the 90th day; the notice of appeal would be due within 30 days. *See IKB Industries, Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440 (Tex. 1997).

4. Extension of Time to File Notice of Appeal. Under TEX. R.APP. P. 26.3 "[t]he appellate court may extend the time to file the notice of appeal if, within 15 days after the deadline for filing the notice of appeal the party: (a) files in the trial court the notice of appeal; and (b) files in the appellate court a motion complying with Rule 10.5(b)." In plain language translation at the Fourth Court, that means that if you want to file your notice of appeal late, you only have 15 days from the original due date to do so, and you should also file your motion for extension of time within that 15 day window. *See Verburgt v. Dorner,* 959 S.W.2d 615 (Tex. 1997).

5. No final judgment. Absent statutory exception, only final judgments can be appealed to the court of appeals. To be final and appealable, the judgment must be:

* written
* signed by judge
* dated
*dispose of all parties and claims

6. No supersedeas. The notice of appeal is the ticket that grants admission into the appellate court for review, but it does not supersede the judgment. In order to suspend collection efforts on the judgment while the appeal is pending, the appellant must follow the dictates of TEX. R. APP. P. 24. The rule has been liberalized, and it now provides for suspension of enforcement of a judgment pending appeal by (1) filing a letter agreement between the judgment creditor and the judgment debtor agreeing to suspension; (2) filing a good and sufficient bond; (3) making a cash deposit with the trial court clerk; or (4) providing alternate security ordered by the court.

B. Preservation Errors

If there is no preservation of error in the trial court, the appellate court cannot grant relief. The general requirement for preserving claims of error in the trial court so that a complaint can be brought forward on appeal is found in TEX. R. APP. P. 33.1(a). This rule requires that the complaint be made to the trial court by timely request, objection, or motion that states the grounds specifically and complies with applicable rules of evidence and appellate practice. Rule 33.1 also requires a ruling from the trial judge or an express indication that the trial court refused to rule. The rule seems simple enough, but below is a listing of problems areas that are often seen on appeal.

- Generic objections
- Different complaint on appeal
- Late objections
- Subsequent waiver
- No rulings
- No record
- Failure to plead affirmative defenses
- Special appearance/venue
- Tender of excluded evidence
- Failure to file necessary post-trial motions

C. Presentment Errors

The requirements for written briefs are found in TEX. R. APP. P. 38. An appendix must be filed with the appellant's brief. Generally, the appendix must contain the judgment or order appealed from, the jury charge and verdict or the findings of fact and conclusions of law, and the text of any rule, regulation, ordinance, statute, constitutional provision at issue, and the text of any contract at issue. There are also word count limitations and typeface specifications found in Rule 38. All documents must be efiled.

1. Sloppy briefs. A sloppy brief greatly detracts from the arguments advanced by the brief writer. Sometimes the errors are funny: "After an exchange of facial slurs, a fight broke out." or "The Court held a hearing on appellant's motion to vacation." More often than not, however, the errors are distracting and embarrassing. "The appellants is bringing this appeal" just doesn't generate much hope that the judges will be reading eloquent arguments or lofty ideas on the justice system in America. At the very least, use spell check on your computer and have one person proof-read the brief before it is signed.

2. No record references. The rules provide that references to the record must be made when factual matters are recited. *See* TEX. R. APP. P. 38.1(f). If statements appear in a brief without references to the record, the judges may suspect that the party is actually arguing outside of the record, which is a definite mistake in appellate practice. This raises the related problem of advocates expanding upon the record, and fudging just a little bit to make matters sound better than they actually appear in the written record. This type of brief writing (or oral argument) greatly diminishes the credibility of the advocate.

3. Writing a law review article. This is at first blush the opposite of a sloppy brief, but in a few unfortunate cases, the brief writer actually writes a sloppy brief that is a long as a legal treatise. Citing hundreds of cases in string citations, dropping numerous footnotes to discuss nuances of minimal relevance, and citing foreign authority do not help win appeals. Of course, there may be rare instances where authority from other states is appropriate, but those are rare instances indeed.

4. Failing to state the proper standard of review. The standard of review provides the court with its focus in each appeal. Misstating or failing to state the standard of review can adversely affect an appeal, and can make for a very uncomfortable oral argument.

5. Engaging in jury argument. This is kind of the flip side of writing a law review article instead of a legal brief. Jury arguments need to be presented to the jury, not the court of appeals. When I was a young lawyer I was told that if I didn't have the law on my side, then I had to argue the facts. That is typical advise for a young trial lawyer, but given somewhat tongue in cheek. It is really never good advice for an appellate lawyer. Since jury arguments involve a certain amount of theatrics, this gives rise to an additional tidbit for good practice — leave your theatrics at the office. Rolling your eyes while counsel stands at the podium, shaking your head vigorously in agreement or disagreement, and jumping up and shouting "Objection, your honor!" will not serve you well in the court of appeals. Likewise, the Rambo lawyer tactics that trial lawyers sometimes exhibit is not good practice in appellate courts. A personal attack on opposing counsel in a brief or in oral argument, is likely to generate an admonishment from the court.

6. Lack of familiarity of the law and the record. A good advocate — whether in written briefs or in oral argument, knows the facts and procedural history of the case cold. Likewise, the advocate knows all relevant case law in detail. We are most appreciative, and impressed, when the advocate addresses contrary cases head on rather than hoping that the cases won't be mentioned.

D. Working with the Clerk's office

The clerk's office at the Fourth Court is extremely professional, and each person there is truly concerned about doing their job well and helping the attorneys to work through the appellate maze as painlessly as possible. If questions arise, you may call the clerk of the court< Keith Hottle, for technical guidance.

E. Pointers for Smooth Sailing

1. List all parties by full name — don't use the shortcuts of "et. ux." or "et. al."

2. File self-sufficient motions — court below and date of judgment, trial court name and number, date of filing post-trial motions, etc.

3. File a complete certificate of service with full names and addresses of persons served.

4. Don't combine more than one motion into a single document.

5. Recite in the body of the motion whether it is agreed or contested.

6. Recite in the title and body of the motion if emergency relief is requested.

7. Send the appellate clerk a vacation letter when you send it out to the trial court clerk.

8. Know what you are asking for when you settle a case on appeal. Dismissal of the appeal can vacate the underlying trial court judgment, so you may want to reverse and remand for entry of the settlement agreement.

9. Remain open-minded about mediation, which can occur (and is encouraged) even while the appeal is pending. There is a mediation program at the Fourth Court.

10. Carefully check the judgment and mandate once an opinion is issued to ensure that the relief recited is actually what was granted in the opinion.