

July 21, 2019  
ARTICLE

# Determining What Issues to Raise on Appeal

Knowing where to look for potential appellate issues and how to manage client expectations makes you a more efficient and competent appellate attorney.

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The most important decision an attorney makes when bringing an appeal is determining what issues to raise. Generally, an attorney faced with this decision is representing a client who recently lost at trial or lost a dispositive motion and whose expectations for relief on appeal may be high. An appellate attorney must properly manage these expectations while determining the best issues to bring.

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## You're an Appellate Attorney

Whether you handled the case in the trial court and are now handling the appeal, or you have been brought on after judgment for the appeal—you are now an appellate attorney tasked with bringing the best appellate issues for your client.

If you were the trial attorney, you already have a firm grasp of the case and rulings that were made and probably have a good idea of the potential appellate issues. But you may have an emotional connection to these issues (e.g., you researched, briefed, and argued valiantly to keep an important exhibit out only to have the judge overrule your objection), and thus must consider whether rulings you feel were wrong should actually be challenged on appeal. Not every error is a proper appellate issue.

If you are new to the case on appeal, you may not have an emotional connection to the trial court's rulings and thus are in a good position to view issues objectively. But you do not yet fully understand the case, the context of rulings, and how the rulings may have affected the outcome. You will gain knowledge of these factors by reviewing the record and researching the law. It is also important for you to discuss potential issues with the trial attorney to assess where reversible error may exist.

## Where Reversible Error Exists

Understanding appellate issues requires understanding the dichotomy of (1) whether a ruling was erroneous, and if so, (2) whether that ruling was harmful and reversible. During the course of a case, the court will make dozens of rulings, some of which are probably erroneous. But for appellate purposes, error matters only if it caused harm such as affecting a party's substantial rights, unfairly influencing the jury, or otherwise causing an improper judgment.

For example, it may be true that the trial court erred by allowing a patently hearsay document into evidence, a ruling that flabbergasted you and your client. But if the hearsay is cumulative of other evidence in the case, or played a very small role at trial, it probably did not affect the outcome of trial and will not be held to be reversible error. It is important for an appellate lawyer to understand what errors are more likely to result in reversal.

The following is a non-comprehensive list of areas where reversible error is more likely and less likely to be found. A general description of these areas is provided and there are different rules and standards of review that apply depending on the circumstances and your jurisdiction. But these general descriptions give a good idea of where appellate attorneys should focus their review. Also, whether an error was preserved for appeal, such as by a timely objection or motion, is a critical consideration for the appellate attorney to assess.

**Jury charge:** The trial court's charge must properly instruct the jury on the law, including applicable questions, definitions, and instructions that are supported by the pleadings and evidence. If the evidence supported a claim or defense you requested, but the court refused to submit it, there may be reversible error. Even seemingly minor rulings, such as a trial court refusing to include the term "reasonable" in a damages question about the reasonable costs of medical expenses, can lead to reversal of a large damages award. Thus, the charge is frequently a fertile area for appellate issues.

But preserving charge error can be thorny. A trial attorney may be well-served bringing in an experienced appellate attorney to assist with the jury charge during trial because, once the charge is submitted, any charge errors are waived if not preserved.

**Trial court's evidentiary rulings:** A trial court's evidentiary rulings are a frequent source for appellate issues but must be considered in light of the whole record. As noted above, even obviously erroneous rulings on evidentiary issues will not lead to reversal unless they had a significant impact on the outcome. But evidentiary rulings which substantially impacted a party's ability to present its claims or defenses may lead to reversal.

A potentially fruitful area for appellate issues is a trial court's rulings on the admissibility of expert opinions. A jury may give considerable weight to an expert's opinions, meaning a trial court's ruling erroneously excluding your expert's opinions or erroneously allowing the opposing expert's opinions may have substantially impacted the outcome of the case.

**Reviewing the sufficiency of the evidence:** Challenging the legal or factual sufficiency of the evidence supporting adverse findings is a common appellate issue. But keep in mind the hefty standard of review you must overcome to prevail on these issues. The court of appeals will view all evidence and inferences in the light most favorable to the adverse verdict, including assuming the jury resolved all factual disputes and witness-credibility issues in favor of their verdict. Even if you and your client believe the evidence strongly favors your case, if there is some evidence that reasonably could be construed to support the verdict, you will lose on appeal. Nonetheless, courts of appeals regularly hold that there is no evidence, or the evidence is too speculative, to support a jury's verdict, so this issue should be thoroughly vetted.

Conversely, when appealing a trial court's order granting the opposing party's motion for summary judgment, the standard of review requires that all facts and reasonable inferences be construed in favor of your client. All you need to do is show the court of appeals that the evidence creates a genuine fact issue such that the opposing party did not prove its claim or defense conclusively. Hence, courts of appeals will construe the evidence against the losing party on an appeal from a jury verdict but in the losing party's favor on an appeal from a summary judgment.

**Opening statements and closing arguments:** What opposing counsel says during opening statements and closing arguments is not usually reversible error. While your client may be angry that opposing counsel made what your client perceives to be inflammatory or inaccurate statements to the jury, opposing counsel has significant leeway to make statements so long as they have some connection to the facts or issues of the case. Moreover, it is unlikely that error was preserved in these situations because attorneys are hesitant to make objections during arguments for fear that doing so annoys the jury or will be met with objections during the attorney's own argument.

**Trial court's docket-management rulings:** Rulings that are uniquely within the trial court's discretion are not likely to lead to reversal. A trial court is allowed to manage its own docket and has broad discretion to make rulings on items such as motions for continuance and motions for leave to amend pleadings. The court of appeals will be reluctant to second-guess these decisions unless the trial court clearly acted arbitrarily and contrary to guiding legal principles.

## Presenting Your Issues

As you review the record to consider what issues to bring on appeal, keep a document open where you list all potential issues spot, even issues that may not seem strong. Not all potential issues will or should make it into your final brief, but not infrequently you will find issues that did not seem strong become meritorious after you review the record and conduct research. Keep your options open.

Discuss the potential issues' pros and cons with your client. Explain that, if sustained, some issues will result in rendition of judgment in favor of your client, while some issues will require a new trial or other relief. Keep costs in mind, too. An issue may be meritorious, but if it results in only a small reduction in the judgment, it may not be economical to bring. You may also need to counsel your client against bringing issues that your client believes are strong, but you know are not. Bringing patently weak issues may detract from your meritorious issues and from the overall credibility of your position.

Avoid exaggerating the chances of success on appeal. Even when you believe an issue is very strong, informing a client that the issue "will definitely win" or has a "100 percent chance of success" is imprudent. Instead, explain why you believe an issue is strong and should be raised, provide a realistic estimate for the likelihood for success, but also advise that it is impossible to predict exactly how the court of appeals will view the issue and the circumstances of the case.

## Conclusion

Knowing where to look for potential appellate issues and how to manage client expectations makes you a more efficient and competent appellate attorney. Be a zealous advocate on appeal who brings the best issues possible and whose client is confident but grounded.



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