

# HELP US HELP YOU

## Top 10 appellate mistakes in the trial courts.

WRITTEN BY ELANA EINHORN, MELISSA LORBER, AMANDA G. TAYLOR,  
and MAITREYA TOMLINSON

This article outlines 10 common mistakes in the trial court that cause problems on appeal. We hope these questions can help you keep an appellate perspective in mind as your case moves forward.

### Pre-suit and Pleadings

#### 1. *Not identifying the legal standards early on.*

- Are any relevant cases pending at the Supreme Court of Texas? Can you anticipate changes in the law affecting your case, especially cases affecting the relevant evidence? The Supreme Court keeps an updated paper<sup>1</sup> on its website summarizing recent opinions and recently granted petitions for review.
- How will the jury be charged? Think about the charge as early as possible. It can guide discovery and provide a roadmap to the substantive issues.
- What will the standard of review be? Knowing which rulings are governed by which standards of review can help you focus on issues you have a better chance of sustaining or challenging on appeal.

#### 2. *Not anticipating Texas Citizens Participation Act (Texas Civil Practice & Remedies Code ch. 27) and Texas Rules of Civil Procedure Rule 91a motions to dismiss early in the pleading process.*

- Can you plead around the Texas Citizens Participation Act, or TCPA? Analyze if any claim for affirmative relief arguably falls within the TCPA's scope. If so, see if you can plead in terms of conduct not within the TCPA's purview. With multiple claims, can you start with pleading those less likely to trigger the TCPA?
- Do you have evidence ready to go? You want to have sufficient evidence of each element to establish a prima facie case under the TCPA. While not requiring evidence, Rule 91a requires showing legal and factual merit of claims on the face of the pleadings.
- Is pre-suit discovery available under Texas Rules of Civil Procedure 202? If not, seek discovery as soon as possible.
- Have you advised the clients appropriately? Advise clients in advance about these procedures and what they may face regarding fees, timing, interlocutory appeal, and mandamus.

### Evidentiary Hearings/Trials

#### 3. *Not getting excluded evidence into the record for appellate review.*

- How do I get excluded evidence into the record? Either by informal offer of proof under Texas Rules of Evidence 103 (summary from counsel or witness on voir dire) or by formal bill of exception under Texas Rules of Appellate Procedure, or TRAP, Rule 33.2 (no later than 30 days after notice of appeal, include the evidence, and state the ruling you're complaining about and your objection with sufficient specificity).
- Should I wait until after the trial? If at all possible, don't wait until after trial. Formal bills of exception can be expensive, are uncommon, and create confusion with lawyers and judges.
- Is it enough just to get the excluded evidence into the record? No. You must tell the trial court the reason for the evidence's admissibility (you can't wait until appeal) and sufficiently describe the testimony and state its relevance. More detail is usually better.

#### 4. *Not preserving error on objections.*

General rule: TRAP 33. Object in a timely manner, state a specific reason, get a ruling.

- Have you objected every time or made a running objection? Object as soon as the ground for objection becomes apparent. Continue to object when the same or similar evidence is offered. Running objections are acceptable but be sure they cover later offers.
- Is the objection specific enough to put the judge on notice of the substance of the problem? Identify the objectionable content and the rule its admission would violate. If you make a running objection, be clear you object to all testimony on a particular subject by any witness.
- Have you obtained a ruling? The court must rule or refuse to rule. If the latter, object to the refusal to rule to preserve error. An oral ruling suffices if the ruling is clear from the transcript.

#### 5. *Not preserving error on the jury charge.*

- Are you prepared for informal and formal charge conferences? The informal conference is when most of the work is done; your goal is to persuade the judge to adopt your charge and to make your complaints known. The formal conference is on the record, shortly before closing, and is used to preserve error by making your objections/requests. The goal is to create a complete and clear record because the judge has likely already decided on the charge.
- Do you need to object, request, or both? This depends on who has the burden of proof; if the problem is an existing defect or an omission; and whether the complaint is about a question, definition, or instruction. Generally, a request is when the charge omits a question you have the burden on or omits an instruction or definition you want. If there is any confusion, object and submit a written request.
- Is the law correctly stated? Remember it can become law of the case.
- Should the jury be charged on factors? Whether the jury requires instructions is an unsettled area, but generally, the strategy is the same as for broad form versus granulated questions.

6. *Not presenting sufficient evidence of appellate fees.*

- How can you provide enough specificity to recover conditional attorneys' fees before knowing what will happen on appeal? *Under Yowell v. Granite Operating*,<sup>2</sup> the lodestar method doesn't apply to appellate fees because the work hasn't been performed yet, but an expert can testify to services reasonably expected to be necessary and the reasonable rate. Walk through the steps of appeal and mimic the lodestar calculation and proof.
- Have you designated an expert on appellate fees? It can be the same expert testifying to trial fees or an appellate specialist.

**Following Entry of Order/Judgment**

7. *Confusion regarding new trial motions and orders.*

- Can I get rendition by complaining about legally insufficient evidence in a motion for new trial? No, you can only get a new trial. For rendition, you must move for a directed verdict, complain about legal sufficiency during the charge conference, or move for judgment notwithstanding the verdict or to disregard jury findings.
- What must an order granting a new trial contain to survive appellate review? (1) specific reasons for granting new trial; and (2) the reasons must be legally appropriate and demonstrate the court based those reasons on the specific evidence and circumstances of the case.
- Do the same requirements apply after bench trials? No. The concern in jury trials is that the court will substitute its judgment for the jury's. That's not a concern in a bench trial.

8. *Confusion regarding findings of fact and conclusions of law.*

- Do you know the unique deadlines? Request: 20 days after judgment/order. Past-due notice (needed to preserve error): 30 days after request. Trial court must issue: 40 days from original request. Request for additional/amended findings: 10 days after initial findings.
- Are findings required or appropriate? Required when requested following a bench trial and by some statutes; appropriate if they "could properly be considered by the appellate court."<sup>3</sup> Review caselaw for examples of when appropriate, such as following a default judgment on unliquidated damages, but not following summary judgment.
- Does a request extend the deadline to appeal? If required or appropriate, yes. Not for interlocutory appeals.
- What is the best strategy in drafting proposed findings and conclusions? Start with the conclusions and fill in with findings to support them. Cover all grounds of recovery and defense. Include the burden of proof. Be sure to include credibility findings for witnesses. Omitted elements are deemed in support of the judgment if not requested.

9. *Confusion regarding finality of judgments.*

- Do you need a final judgment or is an immediate appeal available? For interlocutory appeals, review Texas Civil Practice and Remedies Code § 51.014 and remember other statutes also authorize interlocutory appeals. For mandamus relief, you must meet the abuse-of-discretion standard when there is no adequate remedy on appeal. The interlocutory appeal statutes and the mandamus standard have evolved and continue to evolve—stay informed.

- What makes a judgment final for purposes of appeal (i.e., what starts the appellate deadlines)? A judgment is final when it disposes of all pending claims and parties. No magic words are needed but look for clear and unequivocal language of finality (e.g., this judgment is final, it disposes of all parties and claims). If the language is not clear and unequivocal, look at the record for evidence of the trial court's intent regarding finality. When in doubt, appeal.

10. *Confusion regarding supersedeas (TRAP 24).*

- How do I calculate the supersedeas amount? For monetary damages, include compensatory damages, recoverable court costs, and post-judgment interest for the estimated duration of appeal; not sanctions, attorneys' fees, exemplary damages, or prejudgment interest. See TRAP 24.2(a)(1) for cap on the amount.
- What are the procedures for a bond? Calculate the amount. Call the clerk to find out what documents are required or preferred (typically a letter or short pleading to explain the calculation). The bond must be approved by the clerk to be effective.
- How do I find a "sufficient surety"? The surety must be capable of covering the debt. Research bond agencies (e.g., Commercial Surety Bond Agency, or CSBA) and financial institutions.
- What about non-monetary judgments? The trial court sets the amount. Try to reach an agreement with your opponent. **TBJ**

**NOTES**

1. A link to the PDF of the updated paper is the last item under the "Practice Before the Court" tab on the left-hand navigation menu: <https://www.txcourts.gov/supreme/practice-before-the-court/>.
2. 620 S.W.3d 335 (Tex. 2020).
3. Tex. R. App. P. 26.1(a)(4).



**ELANA EINHORN**

practices appellate law at Enoch Keever. She is an adjunct professor at the University of Texas School of Law and a former Supreme Court of Texas staff attorney. Einhorn is certified in civil appellate law by the Texas Board of Legal Specialization.



**MELISSA LORBER**

is a founding member of Enoch Keever and is certified in civil appellate law by the Texas Board of Legal Specialization. She is a frequent speaker and presenter on appellate topics statewide.



**AMANDA G. TAYLOR**

serves as the Appellate Practice Group leader for Butler Snow in Austin. She is certified in civil appellate law by the Texas Board of Legal Specialization. Taylor is also a frequent author and presenter on Texas appellate law topics.



**MAITREYA TOMLINSON**

is certified in civil appellate law by the Texas Board of Legal Specialization and a founding member of the Tomlinson Firm. He previously clerked at the Supreme Court of Texas and is currently the treasurer of the Austin Bar Association.