

I. They have saved the best for last.

I am glad to see that so many people stayed to hear what I have to say.

I promise to make it worth your while.

II. SCOPE OF PAPER VS. SCOPE OF SPEECH

The brochures advertising this seminar said that I would be talking about appellate timetables and points of error.

I promise to make it more exciting than that.

If all you want to know is when to file your notice of appeal, look it up in the paper.

The paper should serve as a great starting place for calculating appellate deadlines and walking you through the appellate process.

For those of you who were brave enough to stay until the end of the seminar

I hope to give you some pointers that are not in the paper.

NEW RULES

The first thing you should know, if you do not already, is that the appellate rules changed drastically, effective September 1, 1997.

For instance, under the new rules, costs bonds and points of error have been replaced by notices of appeal and broader statements of the issues.

This talk will center on how the courts of appeals have applied the changes in the appellate rules, and of course, we will hit on certain ethical considerations that arise in the appellate arena.

PERFECTING APPEAL:

AS I said, you perfect appeal by filing a notice of appeal.

You do not need to file a cost bond.

FILING --

The act of filing the notice of appeal is a relatively simple process of filing a one page document
IN THE TRIAL COURT.

TRAP 25.1 identifies the contents of the notice.

The most important thing to remember about filing a notice of appeal is that If you represent more than one party on appeal or if you are appealing from more than one order, make clear exactly who is appealing and identify the orders appealed from, because each appealing party must timely file a notice of appeal.

TIMING –

Knowing when to file a notice of appeal is sometimes more complicated.

The notice must be filed within 30 days after a final judgment.

The first hurdle is knowing when a judgment is final.

A final judgment disposes of all claims and all parties.

Note that if an order or judgment contains a mother hubbard clause (all relief not expressly granted herein is denied)

you should absolutely assume that the judgment is FINAL, even if it does not seem to dispose of all claims and all parties.

Even if the judgment is clearly a partial summary judgment that was never intended to resolve all claims and all parties, if it contains a mother hubbard clause, assume that it is final.

As noted in the paper, the question of whether a mother hubbard clause makes a judgment final is a hot topic right now.

The Texas Supreme Court said that it does in *Mafrige*, but appellate courts find this result incredibly unfair and are coming up with creative ways to avoid its application.

Note also that the filing of a non-suit does not make a judgment final until the court enters an order actually dismissing the case. (*See In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997)).

I know about a case recently where the trial court granted partial summary judgment in favor of the Defendant.

The parties later non-suited all remaining claims but the trial court did not sign an order dismissing the case.

The case is not final and nine months later, the trial court is still considering a motion for reconsideration filed by the losing party.

POSTJUDGMENT MOTIONS AND TIMING

The second hurdle to determining when to file your notice of appeal is knowing whether any postjudgment motions extend the time for filing a notice of appeal.

As a general rule motions for new trial or motion to correct, modify or reform the judgment extends the deadline for filing the notice of appeal for 90 days from the date of judgment.

Other types of motions, such as motions for j.n.o.v. only extend the appellate timetable if the motion “assails the trial court’s judgment and is filed within 30 days after the judgment is signed.”

The effect of requests for findings of fact and conclusions of law on the appellate timetable depends on whether or not a case is disposed of after an evidentiary hearing.

A request for findings and conclusions extends the appellate timetable in a case tried without a jury where there is an evidentiary hearing,

but does NOT extend the appellate timetable where the case is resolved without an evidentiary hearing.

So, requests for findings and conclusions do not generally extend the appellate timetable in cases disposed of by summary judgment, cases dismissed for lack of jurisdiction, or cases tried on agreed facts.

The safest course is WHEN IN DOUBT, file your notice of appeal early.

REQUESTING THE RECORD AND OTHER DUTIES

The clerk is required to prepare the record upon the filing of the notice of appeal, but the record she compiles will be limited basically to the live pleadings, orders, docket sheet, bill of costs, jury charge and verdict, unless you specifically request additional items.

The Appellant has the obligation to request the reporter's record **ON OR BEFORE THE TIME FOR FILING THE NOTICE OF APPEAL.**

The requests should go directly to the clerk and the court reporter.

Once you make the request, however, it is no longer your responsibility to make sure that the record is timely filed.

That responsibility now falls on the clerk and the court reporter.

BUT YOU STILL HAVE THE RESPONSIBILITY TO TIMELY PAY FOR PREPARATION OF THE RECORD.

Under the new rules, failure to timely request the record will not automatically result in dismissal of the appeal,

BUT if the record is lost or destroyed and you have timely requested the record, you may be entitled to a new trial.

While if you fail to timely request the record, you may be stuck on appeal with an incomplete record.

From personal experience, I would caution you to carefully review the record as soon as you get it to make certain that it is complete and accurate.

The Darlene Routier story happens more often than you would like to believe.

In one of our cases, for instance, we were faced with a court reporter who failed to complete the reporter's record after he became very ill, and once a substitute court reporter completed the record, it was missing the charge conference and other crucial portions of the trial.

In another case, the court reporter included many exhibits that were never admitted and excluded exhibits that were admitted.

Perhaps the worst horror story, though, is when a court reporter mistranscribed one word in her daily copy and fixed it in her final transcript. So that we originally thought that the court said that he "heard" our objection, when in reality, he had said that he "affirmed" our objection. This one little word made the difference between whether the entire case was reversed or affirmed.

THE DOCKETING STATEMENT

The new rules also require you to file a docketing statement with the court of appeals.

Most appellate courts have created their own form for the docketing statement, which can be found on their websites.

Although all appellate courts do not yet have websites, those that do can be located through www.courts.state.tx.us.

Technology has made appellate practice (particularly monitoring the activity on each case) much easier. For instance, you may now receive opinions from the Dallas court of appeals by e-mail simply by subscribing to the service through their website: www.courtstuff.com.

The Dallas court also permits you to subscribe to a particular case so that you receive e-mails anytime something happens on that case. It is also very impressive to your clients to be able to notify them immediately when an opinion is released.

A NOTE ON SUPERSEDEAS

Just briefly, I wanted to touch on the issue of supersedeas. Although this is not in the paper, I believe that it marks an important change in the appellate rules.

Prior to the new rules, the Texas Supreme Court issued an opinion in *Isern*, in which the Court held that a party may post bond in an amount less than the judgment if posting a full bond

would: (1) irreparably harm the judgment debtor and (2) will not substantially impair the judgment creditor's ability to recover under the judgment.

This standard is now expressly in the rules of appellate procedure. (*See* TRAP 24.2(b)).

THE APPELLATE BRIEF AND ORAL ARGUMENT

Note that points of error are no longer required in an appellate brief.

Broader issues that cover topics generally is all that is required.

Despite the new rules, we have continued to err on the side of being overinclusive.

In fact, in a recent oral argument in the Dallas court of appeals one visiting justice chastised us for including too many issues in a brief under the new rules.

Since this is intended to be a procedural talk, I will not provide general pointers on brief writing or purport to tell you how to structure your brief, but I can give you some tips on how to avoid ethical issues in the appellate arena.

FAILING TO CITE CONTROLLING AUTHORITY:

The ethical rules apply on appeal just as they do in the trial court.

One of the most difficult issues for an appellate attorney is when to cite negative authority, especially where the Appellant has failed to include it in their brief.

Rule 3.03 of The Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from:

(4) failing to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing counsel.

In the case of *In re Colonial Pipeline Co.*, 960 S.W.2d 272, the Corpus Christi court of appeals ordered the relators in a mandamus proceeding to show cause why the court should not issue sanctions against them for failing to cite to a Texas Supreme Court decision that the court believed was controlling authority that rendered their mandamus petition groundless.

At the show cause hearing, the relators graciously apologized to the court for failing to cite to the Texas Supreme Court decision but went on to distinguish the case and explain why the case is not controlling.

The Corpus Christi court of appeals did not sanction the relators because it agreed that the case was ultimately distinguishable, but it warned:

The far better practice would have been for relators to distinguish the case rather than ignoring unfavorable authority.

The lesson from Colonial Pipeline seems to be that, even if you believe that a case is distinguishable, it is better to make that distinction in your initial briefing than to have to raise the issue in a show cause hearing.

FAILING TO SHOW RESPECT FOR THE LEGAL SYSTEM:

Paragraph 4 of the preamble to the Disciplinary Rules states:

a lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.”

In *Merrill Dow Pharmaceuticals, Inc. v. Havner*, the Texas Supreme Court found that it had the inherent authority to discipline an attorney for violating this rule and referred three of the respondents’ attorneys to the disciplinary authorities.

I am sure that many of you have heard about this case, where the motion for rehearing referred to the justices as the “nine nutty professors.”

The court determined that the statements made in the motion for rehearing went beyond advocacy and rose to the level of “judicial denigration” and “personal insult.”

Good advocacy and good legal ethics go hand in hand.

Regardless of whether the attorneys in the *Havner* case were ultimately disciplined for their conduct, which I understand they were not, they failed to be good advocates for their clients.

It is NEVER a good idea to insult the court.

In *Havner*, they were trying to get the Texas Supreme Court to grant a motion for rehearing, which is rarely done.

Insulting the Court did not increase their chances.

In a less egregious example, during an oral argument before the Dallas court of appeals, one of the Justices asked a factual question to Appellants' counsel that could have been answered very simply and quickly.

BUT, instead of answering the question, the relatively young counsel responded in a condescending tone:

“Well, your honor, I understand that this is a complicated case. . . .”

To which the Justice responded, “I think convoluted is more appropriate . . .”

The young attorney ultimately lost his case.

While I am sure that his condescending remark was not the reason he lost the case, it did not help him gain any favor (or perhaps more importantly, respect) with the Court.

FRIVOLOUS APPEALS AND SANCTIONS:

TRAP 45 permits the court to award damages to the prevailing party in a frivolous appeal.

Factors that may support a sanctions award include:

- (i) the failure to present a complete record
 - (ii) raising certain issues for the first time on appeal
 - (iii) failing to respond to a cross-point on or motion for sanctions
- and
- (iv) filing an inadequate appellate brief.

See Tate v. E.I. Du Pont de Nemours & Co., 954 S.W.2d 872 (Tex. App.–Houston [14th Dist.] 1997, no pet.).

The recent case of *Bridges v. Robinson*, out of the Houston Fourteenth Court of Appeals is perhaps the best recent example of what type of conduct will result in sanctions.

(2000 WL 330026, *11 (Tex. App.–Houston [14th Dist.] March 30, 2000).

You may have read about the *Bridges* case in the Texas Lawyer this month.

Bridges was a wrongful death action in which the deceased's spouse claimed that Dillard's Department Store, its off-duty police officers serving as security guards and Houston on-duty police officers hogtied and beat Mr. Robinson to death.

After the trial court denied the defendants' summary judgment motions on the defenses of derivative and official immunity, the parties all sought interlocutory appeal.

The interlocutory appeals were not well-received by the Houston court, which imposed \$10,000 in sanctions against the appealing parties because it found that the appeal was frivolous.

The important thing to take from the *Bridges* case is an understanding as to why the court believed the case was frivolous.

Specifically, the Court noted that the record was "replete" with contradictory proof that the Defendants ignored in their appellate briefing, although counsel admitted at oral argument that the unmentioned evidence "looked bad" for their client.

The Court was also offended by the fact that appellate counsel justified its failure to cite "bad facts" by citing to the dissenting opinion in a case.

The Court further chastised the City of Houston because it found that the City had a history of filing interlocutory appeals in the case or threatening to do so just before trial dates for the stated purpose of tying the case up on appeal into the new millenium.

In addition, the appellate rules specifically provide for sanctions in the mandamus context if a party:

- (1) files a petition that is clearly groundless
- (2) brings the petition solely for delay of the underlying proceeding
- (3) grossly misstates or omits an obviously important and material fact in the petition or response
or
- (4) files and appendix or record that is clearly misleading because of the omission of obviously important and material evidence or documents.

That's Rule 52.11.

Court's are taking this rule seriously.

In *In re Cotton*, 972 S.W.2d 768 for instance, the Corpus Christi court of appeals sanctioned the petitioner's counsel in the amount of \$5,000 for failing to advise the court of appeals that the parties reached a settlement and dismissed the case with prejudice only 10 days after the mandamus petition was filed.

TIPS ON ORAL ARGUMENT:

I wanted to give a few constructive suggestions for oral argument:

1. Avoid making jury argument in the court of appeals.

 Appellate courts are not persuaded by it and you waste valuable time that could be used to answer important questions.

2. Do not try to repeat the facts as you remember them from trial.

 Stick to the record and support your argument with record citations. It has been my experience that the courts of appeals are frequently looking for specific record references to support your position on appeal. If you cannot point them to the correct record cites, then it might as well have never happened.

3. Finally, have a presentation ready, but don't expect to give it. Listen to the judges and respond to their questions.

AND ONE LAST QUICK NOTE ON SUPREME COURT PRACTICE

In 1997, the application for writ of error was replaced by the petition for review process.

Under the petition process, you have 15 pages to convince the Court why they should hear your case.

The perceived benefit of the new system is that the Supreme Court Justices read the shorter petitions themselves instead of handing them off to a clerk or briefing attorney.

Also, if the petition is denied, the process is much faster.

In fact, the Court strongly encourages you to waive your response to the petition for review unless the Court asks you to file one.

The negative impact from the new system, though, is that certain types of technical error are less likely to be corrected by the Court.

For instance, we had a case a number of years ago that involved a juicy “intentional infliction of emotional distress” issue that squarely raised the question of what constitutes “outrageous conduct.”

The Court apparently did not want to address this “hot” issue, but reversed the case on a charge error issue instead.

Under the petition process, it is unlikely that the charge error point would have been raised in our fifteen page petition for review.

Because the topic is so broad, we have barely touched on many of the issues in the appellate practice.

Thank you for your time and attention and I hope that I have been able to provide you with some valuable insight into the appellate practice.

This topic was very broad and we obviously were not able to touch on every intricacy of the practice.

If you have specific questions, I would be happy to answer them at the end of the seminar, or feel free to call or e-mail me.