



## Good Counsel

# Preserving Appellate Issues

BY NELSON BOYLE

Issues arise during discovery, in trial preparation, and at trial that could affect the outcome of an appeal. So you should always keep the appellate record in mind during the life cycle of a case. Here are some rules of thumb:

**1. Use precedential hierarchy to your advantage.** Know how your jurisdiction's intermediate appellate courts treat their own decisions.<sup>1</sup> Are they binding on later panels? Are they binding throughout the jurisdiction or only within their particular districts? If they are not broadly binding, then whenever possible, always cite your jurisdiction's highest court's rulings. This will help your appellate team by preserving the issue with binding authority and avoiding authorities that the appellate tribunal may not follow.

**2. Make alternative arguments.** Consider my law school professor's sage advice: "Wear a belt and suspenders. If one fails, the other keeps your pants up." You might think that attorney-client privilege protects your internal papers, but it's simple to also add a work product argument. If one argument fails to persuade the appellate court, the other may carry the day. If you don't argue in the alternative, you likely will waive or forfeit that avenue to victory on appeal, since appellate courts generally consider only preserved arguments.

**3. File early proactive motions.** Does your client's case include novel legal issues or questions of statutory construction? If so, move for partial summary judgment to address those central issues. Did the defense request signed releases to get your client's gynecological records in a rear-end crash involving a neck injury? Then seek a protective order to guard your client's irrelevant, private information. If you don't get it, you will have anchored your arguments for an interlocutory appeal since the release of private, irrelevant information cannot be undone on a direct appeal.

**4. File strategic pretrial motions and trial briefs.** Think beyond the basics for motions in limine. Consider all available evidence and your opposition to identify legal issues you'll face at trial. File strategic motions in limine on legal issues when it's likely the judge will definitively rule on an issue. For other issues that the judge likely will just "take under advisement," be prepared ahead of trial with one or more briefs

that you maintain in your files so you're ready if the issue arises. For instance, the court might preclude the admission of a 50-year-old plaintiff's college binge drinking habit if there's no evidence the plaintiff consumed alcohol before or during the incident. But the court should refuse to give a definitive pretrial ruling when a 30-year-old plaintiff with a history of college binge drinking has consumed alcohol just before the incident.

For trial briefs, be succinct. Only the evidence admitted at trial matters; what you thought might be in evidence does not. Do not include facts or arguments. Instead, using one page per issue, state each issue followed by controlling law. And leave white space to write notes about the trial evidence.

**5. Prepare pocket briefs.** Pocket briefs are trial briefs that you don't file pretrial but have ready if an issue arises. Do you expect to fight at trial over legal questions, jury instructions, or evidence at the core of your case? For example: Is that insurance adjuster's opinion lay or expert testimony? Is specific evidence inadmissible under Federal Rules of Evidence 401 through 404(b) (and state equivalents)? Or is it allowed for impeachment under Rules 607 and 608? If such issues may arise and could persuade jurors, pocket briefs are indispensable. If an issue doesn't merit a pocket brief, write notes to support or oppose foundation and admissibility on your copies of exhibits so you are prepared for objections.

**6. At trial, use pretrial motions, trial briefs, and pocket briefs to protect your appellate record.** Strategically file on-point pocket briefs before you plan to use them so they are in the record. Use them and your pretrial filings to support arguments to sustain or overrule objections and at the jury instruction conference. Argue these briefs and motions on the record in context with admitted evidence to get correct rulings.

**7. Make complete offers of proof.** Did the court strike or limit your expert's opinions? Did the court limit your questioning of a witness? Demand that the court allow you to examine the witness at trial, outside the jury's presence. Also offer the witness up for cross-examination. This gives the court a chance to reconsider its ruling in context with the admitted evidence. It also ensures an adequate record for appellate review.

What do you do if the judge won't allow you to call the witness for an offer of proof? First, make a record of the error and how it prejudices your client. Second, submit a complete written offer of proof before the close of evidence. Use

**Nelson Boyle** is of counsel at the 5280 Appellate Group, a division of The Paul Wilkinson Law Firm, in Denver and can be reached at [nelson@5280appeals.com](mailto:nelson@5280appeals.com).

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deposition transcripts and exhibits to show the precluded evidence. And use admitted trial evidence to support admissibility and prejudice arguments.


**8. Make a complete record on jury instructions.** When adequately preserved, jury instruction issues are fertile ground for appeal. To preserve them, submit written forms of all instructions you request. Always insist that the charge conference occur on the record. And never accept an offer to “make a record” after holding the charge conference off the record.

**9. Always preserve arguments about prejudice.** Appellate courts review errors of law de novo. They review the trial court’s factual findings for abuse of discretion. And harmless errors generally are not reversible. So always explain in concrete terms how and why a ruling will prejudice your client or will not prejudice the other side.

**10. File appropriate post-trial motions.** Some jurisdictions require you to file a motion for new trial (or JNOV motion) to preserve an issue for appeal. Consult with your appellate team about your post-trial strategy, including the issues to raise and arguments to make. If no motion is required and

you lost the issue, for instance, consider whether it’s wise to give the judge a chance to issue a stronger order against you.

It’s your job and professional responsibility to protect the record. If it’s objectionable, object. If you worry about annoying the judge, you risk waiving or forfeiting issues. No trial lawyer wants an appeal. But you’re more likely to prevail at trial if you actively preserve your appellate record, since you’ll be focused on potential land mines that could arise. Win or lose, if you appeal, your appellate team needs a strong record and the most favorable standard of review possible under the circumstances. It’s up to you to anchor your arguments during trial to preserve your client’s appeal.

You must think about the appellate record throughout a case. File strong strategic motions and trial briefs citing controlling authority. Always argue alternative avenues for relief. Make offers of proof. Get a complete record of all proceedings. And explain why a ruling could prejudice your client. These suggestions should help you prevail on appeal. 

**NOTE**

1. Some jurisdictions do not have intermediate appellate courts.