FIVE TIPS FOR HANDLING AN APPEAL IN THE ALABAMA SUPREME COURT

Many lawyers simply do not handle an appeal very often and are unaccustomed with details of the appellate process. This lack of familiarity with the procedural paperwork and the process of drafting appellate briefs, which are truly a "different animal" from trial court briefs, can greatly decrease the chances of a favorable outcome. The following is list of tips for handling an appeal that will hopefully aid the inexperienced (and perhaps even the experienced) appellate lawyer.

Michael C. Skotnicki is Of Counsel with Haskell Slaughter Young & Rediker, LLC, where he is principally involved in appellate litigation. He holds two degrees from Auburn University and graduated magna cum laude from the Cumberland School of Law of Samford University. He served as a law clerk for the Honorable Chief Justice Sonny Hornsby of the Alabama Supreme Court and then as a staff attorney to, in succession, Justices Henry Steagall, Terry Butts, and Champ Lyons. He has been in the private practice of law since 1998.

1) The Appellate Process Begins in the Trial Court Before an Appeal is Ever Filed.

An appellate lawyer is only as good as the "record" he has to work with. However, the record is set in stone by the time of the trial court ruling that is being appealed. Because of this, a "trial lawyer" must think like an appellate lawyer long before an appeal is ever filed and prepare the record in opposite to a summary judgment motion or during trial that he will want to use should the case be lost.

This may mean filing discovery-related correspondence between counsel as an attachment to a motion to compel production or to a Rule 56(f) motion and affidavit opposing a motion for summary judgment. While those letters or e-mails where the opposing attorney took a ridiculous position may be in your case file, they are not in the record and are thus frustratingly useless to you on appeal arguing that you should have gotten more discovery, unless they were filed in court and became part of the record. Thus, it is important to find a legitimate way to file every meaningful document with the court as an attachment to some pleading. Although it is common practice to attach excerpts of deposition transcripts to pleadings, the better practice is to attach a complete transcript in "miniscript" form because little in the practice of law is as frustrating is to have in a deposition transcript the answer of a witness that can decide an issue raised on appeal, only to find that the page on which that answer is located was not filed with the court and thus is not in the record simply because it was not believed to be important at the time.

Similarly, a judge's errors in ruling on certain evidentiary matters at trial are similarly useless in your appeal if objections were not made in every instance necessary with sufficient specificity, and the judge's overruling of that motion was not clearly expressed on the record. Having to attend to such details during the frantic pace of trial are what make trial work so demanding; yet, in order to be able to win an appeal based on the argument that the rulings were erroneous, a trial lawyer must attend to such details.

1a) Make Sure to Properly Designate What Parts of the Court's Case File will Compose the Record.

Under Rule 10(b), Ala. R. App. P., the appellant must affirmatively designate what part of the case file will compose the record on appeal. The Notice of Appeal form provides an opportunity to do so by checking one of a number of boxes. Rule 10(a) provides an option that unless expressly requested the record will not contain such things as summons and motion for continuances. However, unless the case file is exceptionally large and cost is an issue, or the only issue on appeal can possibly involve just a few pleadings, the safest approach is to designate the "entire" case file be made the record on appeal so that nothing is left out.

If you represent the appellee, be sure to review what the appellant has designated as the record on appeal. In one case, where I happened to represent a plaintiff/appellee who had succeeded in defeating the defendant/appellant's arbitration motion, opposing counsel appealed and designated a specific list of pleadings which failed to include those I had filed opposing the arbitration motion. In

FIVE TIPS FOR HANDLING AN APPEAL IN THE ALABAMA SUPREME COURT

that instance, I moved the trial court within the seven days allotted by Rule 10(b), Ala. R. App. P. to include within the Record the additional pleadings on the arbitration issue.

Even if the Record is properly designated, the Circuit Court Clerk may still inadvertently omit a document from the Record when certified complete and forwarded to the Alabama Supreme Court. If that occurs, the trial court must be moved pursuant to Rule 19(f) to supplement the record on appeal with a pleading that was designated but that the Clerk omitted. It should be remembered that when a Rule 10(f) motion is filed in the trial court, it is deemed denied by operation of law if not ruled upon within 14 days. If such a motion is denied by the trial court or by operation of law, and the request should be renewed in the Alabama Supreme Court by filing a similar motion with that Court within seven days.

2) The Starting Place for Writing the Brief is the Standard of Review(s).

While having a favorable or unfavorable standard of review applicable to the issue(s) on appeal will obviously affect the outcome, the fact that should not be lost is that you must know the Standard of Review(s) applicable to your appellate issue(s) before you begin writing any other portion of the brief. The standard of review determines where you should focus the Statement of Facts and Argument sections of the brief.

For example, if the issue is the size of a jury's compensatory damages award you want to have upheld, the focus of the appeal must be on showing that the verdict was not the product of passion, bias, or prejudice against the defendant. However, if the jury verdict is likely composed principally of emotional distress damages to a plaintiff who suffered no physical injury, then your brief must heavily emphasize the facts supporting the award because the Standard of Review requires that, in such a circumstance, the Court review the award with strict scrutiny. However, if the appeal involves strictly an issue of law, then the primary focus of the appeal must be on the applicable case law rather than the facts.

3) The Statement of Facts is Generally the Most Important Part of an Appeal Brief.

Many lawyers believe that the Argument section of an appellate brief is obviously the most important and that the appeal will be won by finding the right issues to raise, or the perfect case to cite. While it may be true in some instances that an appeal will be decided solely by a key procedural issue or by finding a key appellate opinion to cite as controlling precedent, appeals are actually most often won – or at least not lost – by the Statement of Facts and the discussion of those facts in the Argument section. The goal in drafting the Statement of Facts is to lay the facts out clearly and support them with pinpoint record citations, and yet at the same time tell a compelling human-interest story that will engage the appellate judges and staff attorneys or law clerks who read the brief. The Statement of Facts must not contain "argument," but that prohibition does not prevent you from telling the story of the case in a similar fashion to how you would describe it to a non-lawyer neighbor. The worst thing a Statement of Facts could ever do is bore the reader.

3a) Don't Assume the Appellate Court will Read the Record on Appeal Cover to Cover to Learn All the Facts; It Must Be Told.

While a Statement of Facts will generally be much shorter in length than the Argument portion of the brief, it should not be assumed that the Statement of Facts should be short and concise. Where the facts are complex, or a long history of events must be explained, do not set an artificial page limit. In one appeal, I used almost half the brief's page limit to set out the facts of the case, which involved a lengthy history of fraud perpetrated upon an elderly widow by a termite exterminating company. That defendant attempted to hide the egregious facts of the case from the Alabama Supreme court by providing in its brief only a concise summary of facts it found were favorable. Because the Justices of the Alabama Supreme Court have no duty to read a voluminous trial transcript and exhibits in detail to learn the complete factual story of such a case on their own, I set the facts out in great detail in more than thirty pages of the appellee's brief as well as highlighted key facts in a timeline. In the eventual opinion of the Supreme Court, Justice Houston wrote in a concurring opinion that the case involved the worst example of corporate conduct that he had seen in any case in all his years on the Court. That is an example of what a thorough and compelling Statement of Facts can bring to your appeal.

4) The Argument Should Have a Theme.

While the Statement of Facts section of a brief should tell a human interest story, the Argument section should have a theme that you should consider again and again as you put the brief together. The theme need not be necessarily closely tied to the Statement of Facts but should instead be derived from the applicable Standard of Review. For example, where the standard of review is de novo and you would like the Court to follow existing precedent, the theme might be:

> This appeal involves a pure question of law and is controlled by this Court's precedent, as it

> was established in several cases decided over many years. This Honorable Court is due to follow such wise and longstanding precedent that has withstood the test of time. The doctrine of stare decisis is the foundation of our legal system, providing stability and predictability to the law.

On the other hand, a theme the opposite side of the same appeal could be:

> While it is important for courts to follow precedent, such opinions are merely a guide for reaching a just determination and are not the sole means to that end. The law cannot be wholly divorced from the facts, and the facts of this case distinguish it from the cases which established the general rule of law the opposing party wishes to be applied. Rather than the opinions based on facts much different from the case now on appeal, this Court should look to the case law of other jurisdictions where exceptions to the general rule have been created to reach a just result where the facts demand the general rule be set aside.

Whatever the theme appropriate to your appeal, every argument made should advance that theme. Moreover, to advance the theme you may need to discuss matters that were not involved in the trial court, such as the proper role of stare decisis or how jury awards of punitive damages safeguard society.

4a) Argument Should be Subtle, Not Heavy-Handed.

In resolving an appeal, an appellate court generally lives by two basic rules: following precedent and doing justice. However, precedent is not controlling if factually distinguishable and justice is in the eye of a beholder. Thus, it must be remembered that appellate courts cannot be bullied into a certain ruling by statements that the court "must" rule a certain way, or that precedent "demands" a certain result. Instead, the Court should be instead swayed to rule according to precedent because of the need for consistency and predictability in the law, and the Justices' better nature should be appealed to in a request to seek justice. Moreover, it shouldn't be argued that some horrendous calamity will befall society should the Court rule against your client in the appeal. Benjamin Franklin's advice is still as sound as it was in the 1740's: "Tart words make no friends. A spoonful of honey will catch more flies than a gallon of vinegar."

5. Don't be Afraid To Request an Extension on the Briefing Date or a Briefing Page Extension, if Truly Needed.

Under the former version of the Alabama Rules of Appellate Procedure, an appellant was allotted 50 pages of Argument in his principal appeal brief, as was the appellee. There was no page limitation in relation to the other portions of the principal brief such as the Statement of the Facts. However, because some parties abused the Appellate Rules by making undue argument in the Statement of Facts and thereby circumventing the 50-page limitation, the Alabama Supreme Court changed the rule to allow only 70 total briefing pages.

The 70-page briefing limitation is quite strict and may be difficult to meet if the appeal involves extensive facts and several complex legal issues. However, in such "extraordinary" circumstances it may be appropriate to file a motion with the Court pursuant to Rule 28(j)(3), Ala. R. App. P., seeking to obtain permission to file a brief of ten or twenty additional pages in length. This motion must be filed "at least seven days before the date on which the brief is due." Such a motion is likely to stand a greater chance of success if the appeal involves one or more issues where one can justify arguing that the opportunity for a fair and just appeal would be placed at risk if additional briefing pages were not allowed. Such circumstances could include one or more issues of first impression of Alabama law, a federal statute in which there is a split in interpretation among federal courts of appeal, or where a large or unusual jury verdict is at issue and it can be argued that the party seeking the page limit extension deserves every opportunity to make all relevant arguments to the Court.

Although Rule 31, Ala. R. App. P. allows a party to an appeal to receive a one-time one-week (7-day) extension on the due date of a brief by making a request of the same from the Supreme Court Clerk's office, a further extension of the due date may possibly be obtained pursuant to Rule 26, Ala. R. App. P. Such a motion should be filed as far in advance of the existing due date for the brief, and the grounds for such a motion should be exceptional, such as a personal illness, unexpected computer malfunctions, or the like.

Conclusion.

In order to win an appeal you first must <u>not</u> lose it. An appellate attorney only gets to tell his story on paper, and so great care must be taken to ensure the highest chance of success in an appeal to the Alabama Supreme Court. That is achieved by submitting to the Court a brief that contains a compellingly-told Statement of Facts (supported with pinpoint record citations) and raises issues in the Argument section that are supported with facts and legal authority that consistently drive the theme as to why your client should win the appeal.