

## COURT OF APPEALS PANEL

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# **Texas Rules of Appellate Procedure:**

## **Practice Tips for the Occasional Appellate Lawyer**

**by**

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## **I. Introduction**

The purpose of this paper is not to provide a thorough review of the Texas Rules of Appellate Procedure. Rather, by focusing on certain aspects of an appeal and the pertinent rules, the purpose is to provide some practical tips on presenting a criminal appeal more effectively in the intermediate courts of appeals in Texas.

There are several areas in which an advocate can, by mastering the rules and understanding their purpose, make significant improvements in the presentation of an appeal. I focus on four: (1) error preservation, (2) briefing, (3) oral argument, and (4) motions for rehearing, with a strong emphasis on rehearings.

## **II. Error Preservation**

### **A. Generally**

Obviously, an advocate cannot effectively present an appeal if error has been “waived.” All too often, good lawyers lose on appeal, not based on the merits of their case, but because trial counsel failed to properly preserve error for appellate review. There is nothing more frustrating than for a lawyer (or, more importantly, a client) to read an appellate opinion stating that a significant issue has been waived.

Error preservation is not the only concern of the criminal trial lawyer. A lawyer may often have a strategic motivation in not preserving error, e.g., in not objecting to inadmissible evidence. In what may well be considered the authority on trial advocacy, *The Art of Cross-Examination*, Francis L. Wellman noted that “it may be said that the truly great trial lawyer is he who, while knowing perfectly well the established rules of his art, appreciates when they should be broken.” FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION*, 132-33 (4th ed. 1986).

However, the trial advocate should always be mindful of the consequences of such strategic decisions. The harsh reality is that if an issue has been waived, or an error has otherwise not been properly preserved, an appellate court simply may not address the issue.

Preservation mistakes are not just made by mediocre lawyers; even the best lawyers are capable of committing error (as are the best judges). Nevertheless, it must be emphasized that preservation points can be highly technical and the results of a mistake unforgiving.

### **B. Common and Fatal Preservation Mistakes**

Five common and fatal preservation mistakes center on the basics:

1. Failure to make and/or provide an adequate record.
2. Failure to give the trial court an opportunity to address or rectify the complaint.
3. Failure to give the trial court the opportunity to make an informed ruling.
4. Failure to obtain a ruling (often, in the form of a written order).
5. Failure to familiarize oneself with the pertinent rules in a given situation.

### **C. The Basics: General Error Preservation**

In order to avoid preservation mistakes and make sound strategic decisions, an advocate should know and understand the basic rules.

Although it does not address all the requirements to preserve error in every situation, Texas Rule of Appellate Procedure 33.1(a) spells out the general requirements of error preservation.

#### **1. Rule 33.1(a) provides:**

(a) *In General.* As a prerequisite to presenting a complaint for appellate review, *the record must show* that:

(1) the complaint was made to the trial court by a *timely request, objection, or motion* that:

(A) *stated the grounds* for the ruling that the complaining party sought from the trial court *with sufficient specificity to make the trial court aware of the complaint*, unless the specific grounds were apparent from the context; and

(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) *the trial court:*

(A) *ruled* on the request, objection, or motion, either *expressly or implicitly*; or

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

TEX. R. APP. P. 33.1(a) (emphasis added).

#### **2. Basic Requirements**

**Record.** Texas appellate courts are confined to the record and they may not consider matters outside of the record.

The record on appeal consists of the clerk's record (pleadings, motions, orders, charge, docket sheet, etc.) and the reporter's record (court reporter's transcription of the proceedings and designated exhibits). TEX. R. APP. P. 34.1, 34.5, 34.6.

The matter complained of must be contained in the record. Consequently, for example, appellate courts will not consider documents attached to briefs unless the documents were before the trial court and are a part of the record. *Laney v. State*, 223 S.W.3d656, 659 n.3 (Tex. App.—

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