UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

The University of Texas School of Law
30th Annual Conference on State and Federal Appeals

June 4–5, 2020
Austin, Texas

Why I Lost: Lessons Learned from Losing Appeals

Sean M. Reagan

Sean M. Reagan
Leyh, Payne & Mallia, PLLC
9545 Katy Freeway, Suite 200
Houston, Texas 77024

sreagan@lpmfirm.com
713.785.0881

A. Introduction: There are innumerable lessons to be learned from losing appeals.

Every appellate opinion has a winner and a loser. And if you're the appellant, you are more likely to be the loser. In Texas, the reversal rate in civil cases is about 30%. *See* Kent Rutter and Natasha Breaux, *Reasons for Reversal in the Texas Courts of Appeals*, 57 HOUS. L. REV. 671, 675 (2020). Reversals from judgments following bench trials and jury trials are even lower—20% and 27%, respectively. *Id.* at 680. Even summary judgments are reversed only 25% of the time. *Id.* at 681. Thus, in the great majority of cases, the trial court's judgment will be affirmed.[1]

Putting the numbers aside, some winners earn their victories through exhaustive preparation and research, well–tailored briefing, and expert advocacy. Others win because, well, *someone* had to win. Usually, the victorious party does not reflect about *why* they won. Indeed, why would there be any need for reflection when the appellate court accepted your theory of the case and decided the case the way you asked or hoped. The real reflection is done by the loser. How could this result been avoided? How and what do I tell the client? What went wrong? What could have been done differently? More is often learned from defeat than through victory—at least in my experience.

A useful exercise I have used—whether it be a football game, a sale, a jury trial, or an appeal—is to sit down afterwards, either alone or with my team, and explore why we won or lost. Winning a game when the other team fumbles the ball away five times, or selling expensive bottles of cabernet to a pharmaceutical representative entertaining a thong of doctors, or convincing a jury that a drunk driver who rear–ends a family at a stop light was negligent, or convincing an appellate court that the admission of a hearsay statement during a jury trial isn't reversible error should be celebrated, but with the understanding that you should have won. Even in victory, there is always room for improvement.

---

[1] The late Rusty McMains said there are "four pillars of affirmance." Russell McMains, *Strategies of an Appellee*, 13th Annual Advanced Civil Appellate Practice Course (1999). In other words, an appellee has four general ways to lose an appeal. These include: (1) error preservation and waiver ("no sandbagging allowed"); (2) the standard of review ("the essence of system inertia"); (3) harmless error ("let'er slide"); and (4) stare decisis ("don't rock the boat"). These "pillars of affirmance" support the realization "that the thrust of the entire appellate system is to ratify decisions that have already been made." *Id.*

On the other hand, sitting down and analyzing why you lost stops you from driving yourself crazy—especially if you are the team that hosted Alabama on the gridiron that weekend, or if you're the one still selling newspaper subscriptions door–to–door, or if you are the appellant in a sovereign immunity case. But more important, asking why you lost (or won), as opposed to simply moving on to the next file on your desk, helps you understand what are winning arguments for your next case. Without an understanding of why you won or lost, I don't believe that you can grow as an attorney in a meaningful way. Having tried 100 cases or having handled 100 appeals doesn't mean much if you do every trial or appeal the same as your first.

So, I want to share the lessons I've learned from "losing." There are plenty of papers out there written by excellent lawyers that tell you how to win an appeal. This paper will explore why cases are lost, and how to avoid this unfortunate fate in your next appeal. By learning from losing, we learn to win. Of course, you will almost assuredly not win every appeal. But employing a sound process will give you the best chance to win even when the facts and the law suggest that you and your client should not.

B. A good way to lose an appeal is through shoddy and ineffective briefing.

To begin, the quality of the parties' brief writing has a significant impact on who wins. In short, the better the briefing, the better the arguments, and thus, the better the chances of winning.

Texas Rule of Appellate Procedure 38.1 sets forth the minimum requirements for a brief. TEX. R. APP. P. 38.1. Among these basic requirements is that "the brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i); TEX. R. APP. P. 38.2. When appellate issues are unsupported by argument or lack citation to the record or legal authority, nothing is presented for review. *Republic Underwriters Ins. Co. v. Mex–Tex, Inc.*, 150 S.W.3d 423, 427 (Tex. 2004). An appellate court has no duty—or even right—to perform an independent review of the record and applicable law to determine whether there was error, except perhaps to determine whether the court has jurisdiction over the appeal. Nor is an appellate court required to sift through the record in search of facts supporting a party's position. TEX. R. APP. P. 38.1(f), (h); *Nawas v. R & S Vending*, 920 S.W.2d 734, 737 (Tex. App.—Houston [1st Dist.] 1996, no writ) (an appellate brief must include a fair, condensed statement of facts pertinent to the points of error raised with references to pages in record where facts may be found, and appellate court is not required to search record without guidance to determine

Title search: Why I Lost: Lessons Learned from Losing Appeals

Also available as part of the eCourse
2020 eConference on State and Federal Appeals

First appeared as part of the conference materials for the
30th Annual Conference on State and Federal Appeals session
"Why I Lost"