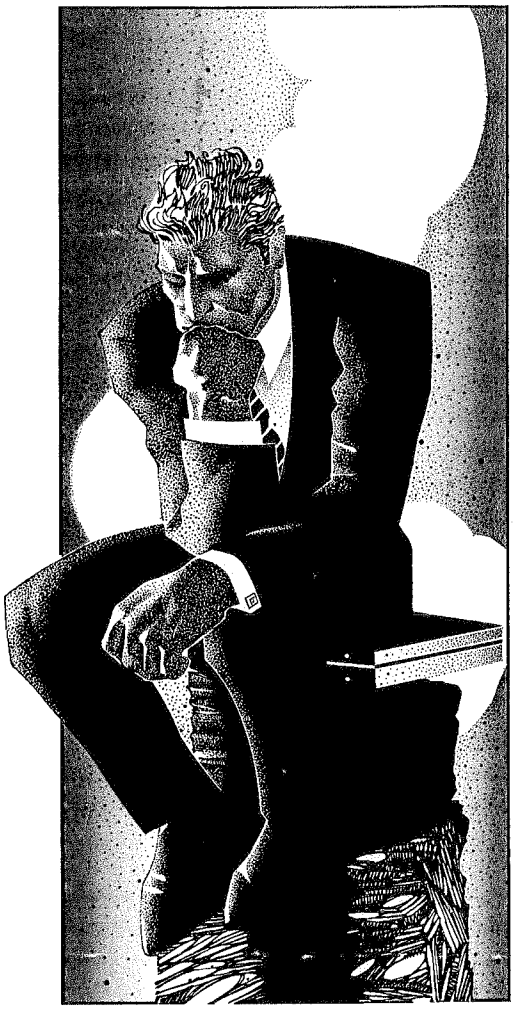
Should This Case Be Appealed?

By Forrest S. Latta



. . . there is no such thing as a perfect trial, *and the law does not guarantee one.*

It was an important trial. The jury's verdict was like a kick in the head. Your client went home devastated. You kept your composure until you returned to the office. You are wrung out and depressed. A few days later you pick up the file again, but it represents a bad memory and you would rather not think about the case at all. Anger is mixed with wounded ego. Now comes the hard question, "***Should this case be appealed and, if so, what are the best issues***?"

Obviously your client feels the justice system failed, and you personally want vindication for your vanquished pride. You immediately think of five "errors" that you believe are obvious and which caused the unhappy outcome. All signals point to appeal, right? Not necessarily.

The matter now calls for clear-eyed objective analysis, free of anger and predilection. You must somehow disconnect from your emotions and/or seek counsel from a colleague who is more detached from the case. Even counsel for the *appellee* must overcome the euphoria of victory and consider whether circumstances dictate heading off an appeal by settlement. These tasks require a level of objectivity that is extremely difficult in the wake of a hard-fought trial. This is no time for snap decisions. Trusting one's own cloudy judgment (or shooting from the hip) can be costly.

One must first recognize that there is absolutely no vested right or due process right to an appeal, and none existed at common law. Does that surprise you? The remedy of appeal is given solely by statute. It may further surprise you that there is no such thing as a perfect trial, and the law does not guarantee one. It guarantees only that the proceedings shall be reasonably fair and free of any substantial prejudice. This came as a surprise to me, because somewhere along the way I had developed the notion that a perfect trial, and a fair appeal, were every litigant's constitutional right. Not so. In fact, the American Bar Association has distilled the role of the appellate court into the following statement:

> **Scope of Appellate Review.** In reviewing a determination by a trial court, an appellate court should determine whether the court below relied on properly applicable and correctly interpreted rules of law, conducted the proceeding fairly and deliberately so that there was ***no substantial prejudice to the parties***, and rested its determination on factual conclusions reasonably supported by the evidence. It should consider an issue that was not raised in the court below only where necessary to prevent manifest injustice or where it concerns the court's jurisdiction or that of the court below. ***It should reverse only when there has been a denial of substantial justice or a serious departure from established procedure.*** Recognition should be given to the trial court's opportunity to assess conflicting testimony, to resolve conflicting inferences that might be drawn from the evidence, and to apply general legal standards to the particular circumstances at issue. Appropriate respect should be given the trial court's exercise of discretionary authority.

ABA Commission on Standards of Judicial Administration, Standards Relating to Appellate Courts, § 3.11 at 19 (1977). (emphasis added) A party must have been deprived of a substantial right or prejudiced by the decision of the lower court for the matter to be reversed on appeal. Perfect trials cannot be had, and due recognition is accorded to the difficulty of conducting an error-free trial. Thus, some error is permitted in order to favor final and effective deci-

sions at the trial court level. Determining "appeal-worthiness" is a process of finding an issue that involves reversible error.

Finding An Appeal-Worthy Issue

The process of deciding whether to appeal requires honest, objective and informed analysis. ***It is principally a process of issue selection***, which is not simply identifying all the possible errors you believe were committed. Issue *identification* is only the starting point for deciding whether a case is appeal-worthy. Once an appeal-worthy issue is found, it is unnecessary, even counterproductive, to assert all of the other issues. It is far more effective to distill the issues to two or three–a maximum of five–and perhaps use the others as "color." Remember the advice to use the "rifle shot" rather than "shotgun" approach.

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In my view, *issue selection is one of the essential skills of the appellate lawyer's craft. It is the laying of the cornerstone.* Without skill and care in the selection of issues, your chance of success diminishes greatly. Issue selection therefore should be an integral part of your decision whether to appeal. Omit this step and you are vulnerable to the aphorism, "Ready, fire, aim!!"

The process of issue selection involves an analysis of each issue with a view of where the court has been, and where it is going. It involves critically examining the record for preservation of the issue, knowing the standards of review on that issue, knowing the reversal rate on that issue, and other practical considerations that are discussed below.

Your goal ideally is to find an issue that involves all of the following factors:

(1) a well-preserved objection,

(2) a strict standard of review,

(3) equitable appeal,

(4) a proposition that is consistent with recent prior decisions or trends,

(5) a higher than average reversal rate, and

(6) a worthwhile outcome. The fewer of these factors, the more problematic your appeal. Keep in mind that the best appealable issue may not be the most glamorous, or the one that bothers you most. Remember you are looking for a winner–not a salve for wounded pride.

Determining appeal-worthiness is a process of evaluating your likelihood of success on your best issues. Once you select the best issues, you then must weigh the likelihood of success against other practical considerations that may or may not dictate an appeal. At this point your client does not need your advocacy or writing skills, or your research talent, but your common sense judgment.

Ten Factors for Assessing Appeal-Worthiness

1. Consider the possible issues

Begin by listing every possible issue, no matter how minor they are. This gets you in the mode of brainstorming to create a 'shopping list' of potential errors. At this point, you should leave nothing out. Think of both the novel and mundane. Be willing to challenge established precedent. If an issue was not adequately raised, and the record isn't closed, think of ways to raise it while the record is still open.

At this point your list of possible appealable issues may be quite lengthy. Sometimes it helps to group them by categories, such as pretrial, evidence, directed verdict, and so on. As you list the issues, it is not too early to start trying to state them in terms of how they might appear in a brief or argument. Your goal is to develop a tightly worded statement of the issue, a "grabber." Keep coming back to the list, allowing other people to review it, especially persons familiar with the proceedings.

2. Consider preservation of the issue(s)

Now begin honestly analyzing whether each issue was adequately preserved. It is best to confront this now, rather than risk being embarrassed later by an opinion that disposes of your argument for not being adequately raised. Ask how the record on this particular issue will look to the appellate court. It is important to view issue preservation from the court's perspective, not yours. Generally speaking, issues that are not adequately preserved in the trial court have little chance of being reviewed on appeal.

This process of analyzing issue preservation can sometimes be uncomfortable, but it requires total objectivity and candor. This is no time for trial counsel to be unduly sensitive. The willingness to be candid about whether an issue was adequately preserved is a mark of professionalism. Glossing over a record problem may only prove expensive and embarrassing, and damage the credibility of your appeal. Why should the court trust you on anything else, if you are not candid about the record? If you should choose to assert an issue on a weak record, then openly telling the court what happened, warts and all, may actually win you some credibility points. There is something powerful and persuasive about being candid about your weaknesses, but many lawyers find this difficult. It is best to acknowledge problems at the outset and show the court why you still are entitled to relief.

Even if the issue wasn't perfectly preserved, don't eliminate it from the list yet. The "not raised below" rule serves many valid purposes (promoting finality of judgments; avoiding second-guessing trial judges on issues that were never presented; using

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the trial court to sharpen the issue). However, there are certain exceptions that sometimes allow the appellate court to review issues first raised on appeal. There also are examples of cases that were decided on issues not fully raised in the trial court. Bear in mind such cases as *Armstrong v. Roger's Outdoor Sports*, wherein the Alabama Supreme Court ordered a "remand for cure" to allow the appellant to raise an important constitutional issue that was not adequately preserved in the trial court.

If the record is not closed, think of ways to adequately raise the issue before filing the appeal. Otherwise, keep the issue on your list for now (noting the record problem) and analyze it with all the others. In the end, however, a problem with the record generally suggests the issue has a low probability of success on appeal and is not appeal-worthy.

3. Consider the Standard of Review

In the author's opinion, this is the single most important and most overlooked aspect of deciding whether to appeal. *Determining whether a case is appeal-worthy is fundamentally a process of issue selection*, and you cannot fully evaluate the merits of an issue without considering the standard of review. The standard of review is the formula that determines what power the appellate court has to rule in your favor. Thus, the review standard will have as great a bearing on the disposition of the appeal as the merits themselves, if not more so.

> The standard of review is the formula that defines the power of the appellate court to rule in your favor.

By determining what review standard will apply, you will be able to better evaluate the likelihood of that issue's success. The process of issue selection will be more informed, and your briefs and arguments will be more tightly focused and more persuasive.

Equally as important, your credibility will be enhanced by a demonstrated awareness of the court's constraints, which can be influential in shaping the final decision. For example, if the standard requires viewing the evidence from the opponent's perspective, and you keep insisting upon reciting facts favorable to your client, then your client may be impressed with your advocacy but the court will not.

The standard of review is what shapes your argument. It defines the playing field. What a pity to be playing by football rules, only to discover you were on a basketball court.

Bear in mind you sometimes can shape the standard of review, and hence the court's final decision, by how you define the issue. Every good lawyer for the appellant will try to present the issue in such a way as to climb the ladder of review to obtain the strictest standard possible–preferably the *de novo* standard. By "climbing the ladder" on standard of review, you increase your chance of success dramatically because the court has more power to grant relief.

An example is the "abuse of discretion" standard involving an evidence ruling. Recognize that some trial court decisions are entitled to broader discretionary review than others. The decision whether to permit an expert to testify is almost never

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reversed, whereas the admissibility of certain opinion testimony by that expert may be contrary to certain legal guidelines in recent court decisions. The court has wider latitude in the first instance than the second. By demonstrating that the trial court's ruling involved pure legal error, you can essentially convert the "abuse of discretion" standard to a *de novo* standard. The chance of reversal goes up.

Another example: Appeal from the trial court's refusal to grant a remittitur. Does that trigger the traditional "abuse of discretion" standard? Not if you can show that the trial court misapplied the *Green Oil* or *BMW* factors. Ironically, the *Green Oil* system has essentially converted remittitur issues from "abuse of discretion" to pure legal error (*de novo* review) despite the striking down in *Armstrong* of the statutory *de novo* appeal standard, because the trial court's discretion now is constrained by various legal standards–at least 12 "factors" that must be considered. The scope of discretion is therefore somewhat more limited.

Many courts require that the parties set forth the applicable standards of review at the beginning of one's brief. The federal rules require this. If you are in such a court, do not simply recite a rote standard from a recent case without first carefully analyzing whether there is some nuance of the issue that entitles you to "climb the ladder" to a stricter standard. The Alabama Rules of Appellate Procedure presently do not require a statement of the review standard. Most good briefs nonetheless include a discussion of the review standard in their argument.

4. Consider the affirmance rate

Another aspect of determining whether a case is appeal-worthy involves trying to determine the reversal rate of cases which include the issues you propose, based upon the applicable standard of review. In some instances statistics are available from the Administrative Office of Courts. In others, you must draw upon your own base of experience in reviewing the court's decisions. Many experienced appellate lawyers already have an instinctive knowledge of the likelihood of success under various standards from a general familiarity with the court's decisions. For example, obtaining a reversal of an *ore tenus* finding that is supported by at least some evidence is virtually impossible. Obtaining a reversal of a discretionary action, standing alone, is almost as unlikely.

The data collection system of the Administrative Office of Courts now makes it possible to know the statistical chance of success in many situations that previously involved guesswork. This is a helpful service to litigants which, in theory, should reduce the number of appeals that are filed. The parties are more likely to resolve the case themselves where the outcome is more predictable. An experienced appellate lawyer can take the statistical figures and factor them upward or downward, based upon the assessment of other circumstances in the case. Sometimes it is possible to do your own statistical research by computer, such

as tailoring a query that includes, for example, the words "ore tenus" and "reversed" and "date (1996)." This kind of information will help you in advising your client whether to appeal.

5. Consider the court

Look at the trends of recent decisions from the appellate court and ask not only where the law is, but where it is going. Even if recent precedent is against you, consider the court composition, and how changes may have affected your issue. The process of "counting heads" may sound overly simplistic but it is realistic. Consider the following example. The United States Supreme Court issued an opinion in *Aetna Life Ins. Co. v. Lavoie* in 1985 that was the "clarion call" to file constitutional challenges against large punitive damage awards. The court gave every indication it was prepared to announce some standards for punitive damages in civil cases. Since then five justices have left the bench–Berger, Powell, Brennan, Marshall, and White–all of whom had written in favor of standards. It therefore is not the same court that first addressed that issue in 1985. It was more than a decade before the court finally addressed that issue. The point is, one must examine the changes in the court, and not merely rely upon yesterday's opinions, in determining the likelihood of success on a given issue.

Are you in a dog fight with Snoopy?
Or the Red Baron?

For these reasons it is important–even vital–to know the direction the court is leaning on the issue you would raise on appeal. There is nothing wrong with seeking to overrule a long line of precedent, but your chances of success are obviously minimal unless you have detected a trend in your direction or a receptivity on the court to your argument. If the precedent is supportive, but the court is trending *away* from your position, that should figure strongly against appealing a particular issue.

6. Consider the equities, parties, lawyers

Always consider the nature of the parties, the lawyers, and the "equitable appeal" of the facts. One example involves a mother who lost her daughter to cancer, and who sued an insurance company that denied a claim of $1,000 in cancer benefits. The jury awarded $750,000 in punitive damages, which the trial court set aside. The appeal was argued in front of a live audience at the University of North Alabama. Because of the equities, the insurer's action appeared callous and indifferent. The court, in a poetic opinion using the illustration of the "widow's mite," reinstated the full amount of the judgment. Although the insurer's legal arguments were extremely compelling, the equities too strongly favored the plaintiff.

Another case involved the oystermen of the Alabama gulf coast who sought protection of their right to tong for oysters in Heron Bay. The riparian land owners had powerful legal arguments for exclusive ownership title to the bottom lands in the bay. That particular bay, however, was the only foul weather refuge for the oystermen–their only means of livelihood during the winter months. The briefs and oral argument by the riparian landowners were outstanding, but the equities–and the *ore tenus* rule–were on the oystermen's side.

The process of evaluating attorneys may sound crass, but it is important to consider the quality of counsel on each side. This factor may not govern whether to appeal or not, but it is a factor to help evaluate the likelihood of success, just as in evaluating trials. Nobody would evaluate a trial without considering the attorneys, and the same is true in appeals. Are you in a dogfight with Snoopy, or the Red Baron? It should make no difference theoretically, but practically it does.

Most appellate judges readily admit the quality of representation does make a difference. Suppose your opponent is highly knowledgeable of the court's decisions, schooled in the legal issue, skilled in the art of appellate advocacy, and has a reputation for candor with the court. That opponent knows how to win appeals, and will make your task very difficult. If, on the other hand, the opponent has demonstrated total confusion on the legal issues and has no substantial experience in handling appeals, that may make a difference.

You, likewise, must honestly evaluate yourself by the same standards. Are you sufficiently detached from the case to be candid with the court? Are you sufficiently conversant about the *legal* issues that the court can look to you for guidance in resolving the case? Can you avoid lapsing into jury arguments? Are you disciplined enough to present your appeal within the proper standard of review? Do you have enough time in your busy schedule to prepare and present a quality appellate brief and argument?

7. Consider the expense

An obvious factor is the cost of an appeal. Your client needs and deserves to know this in deciding whether to file an appeal. There are several things to consider. First is the cost of the preliminaries–filing the notice, designating the record and so on–things that take a surprisingly large amount of time but often are forgotten in estimating the cost. While those functions often can be handled by a skilled legal assistant, it is rare that such details do not require some degree of the appellate lawyer's attention.

Second is the availability and cost of an appeal bond if you are appealing from a money judgment. Such bonds are becoming harder to obtain, as fewer insurance companies now offer them, and the premiums are higher. The bond surety commonly requires a financial statement, and sometimes requires collateral. It almost goes without saying that if the appeal is lost, your client will be obligated to pay the full judgment plus any interest and penalty from the date of judgment. And if there is any default, the bond surety will look to your client for indemnification and will remember you (the attorney) the next time you seek an appeal bond for a client. In some instances it is simpler and cheaper to simply post a cash bond with the clerk in an interest-bearing account, thereby forestalling execution and saving the cost of the appeal bond. Finally, there are times when your client cannot post an appeal bond of any kind, and you must face the reality of fighting execution of the judgment while prosecuting the appeal. Figure that cost as well.

Another important cost factor is the expense of preparing the record itself, including a transcript in some instances. Also consider the time and expense of reviewing and studying the

record, which is always time consuming if done properly. Of course, the largest expense typically will be the time devoted to research and preparation of the briefs and preparation for oral argument in some cases.

8. Consider the potential result

Never file an appeal without knowing what kind of relief the court is most likely to grant. Although this sounds obvious, it is surprising how many appellate parties apparently don't realize what relief they are likely to receive if they win, and the possibility of a "pyrrhic victory." It makes no sense to fight a battle that is meaningless.

9. Consider the client

This is sometimes the most difficult factor, especially where the client is unsophisticated in litigation. Sometimes the client truly cannot tolerate the result, because he cannot afford the judgment, or cannot survive without the relief sought. In those instances, there is no alternative to an appeal if the case cannot be settled.

The more difficult decisions come in two varieties. One is where the case is not appeal-worthy, but the client is insistent. He either is putting off the inevitable or trying to save face ("go down fighting") and the opposing party refuses to compromise. Those cases always challenge your professionalism. It seems many appeals could be avoided if the opposing parties would recognize the chance of reversal, and be a little less stingy, thereby allowing the loser to settle with dignity.

Another difficult decision involves the case that contains appeal-worthy issues but possesses other reasons that weigh against the risk of an unfavorable published opinion. There is a saying that "discretion is the better part of valor," and sometimes the risk of making bad law on a particular issue is worth buying your peace.

10. Consider the importance to society

We are, in many ways, public servants. As "officers of the court" we have a duty to consider the public nature of our job. It sometimes befalls us to make decisions on whether to raise an issue that will shape the law in some important way. There may be an issue that is repetitive in nature but does not often reach the appeal stage, or an issue that will establish an important legal precedent, thereby giving guidance to the bench and bar, and the public at large. Those things weigh in favor of appeal because you are helping develop the law for the benefit of all society, even if you don't ultimately prevail. Some clients are very receptive to this–they see the big picture–while others are not.

Conclusion

The decision whether to appeal a case should not be approached haphazardly, but as a craftsman would approach constructing a fine building, the cornerstone being the process of issue selection. Only in this way will you assure yourself of the best standard of review, and a more receptive audience. ■

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