

**American Bar Association
Young Lawyers Division**

101 Practice Series: Breaking Down the Basics

Trying the Case: An Appellate Perspective

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A trial may seem like the culmination of months (if not years) of discovery and motion practice, but do not forget about the appeal that may follow. When trying your case, here are five tips to keep in mind in preparation for a possible appeal.

1. ***It's all about the record.*** When the appellate court considers your appeal, all it has before it is the record below, which includes the transcripts of the proceedings and the motions, documents, exhibits, and other materials that have been presented to the trial court. If something is not a part of the record below, the appellate court will not see it, and you will not be able to use it in support of your arguments on appeal. If anything of importance occurs off the record, such as, for example, a jury charge conference in the trial judge's chambers, make sure that someone (preferably the trial judge) accurately describes on the record what had transpired. If there is testimony or an exhibit that you want to present to the jury, but the court excludes it, make a proffer on the record and have the document marked as a court exhibit.

2. ***Make and preserve your objections.*** While you do not want to antagonize the judge or the jury with a constant stream of objections, make sure that your objections and disagreements with the trial court's rulings are noted on the record. And, do not neglect to make an objection or motion merely because you assume that the trial court will rule against you – get a ruling on the record. (In certain courts, it may even be necessary to get a written order.) Some appellate courts will refuse outright to review an issue that was not preserved below. Even if an appellate court exercises its discretion to review the issue, it may apply a more rigorous standard of review or may view your failure to raise the issue below as evidence that the challenged ruling was not prejudicial.

3. ***Move for judgment.*** During trial, you will generally have several opportunities to move for judgment in your client's favor -- at the end of plaintiff's case, prior to the jury's deliberations, and following the jury's verdict. Make use of these opportunities. Failure to make appropriate motions during the proceedings may preclude you from challenging the verdict, or discrete issues, on appeal.

4. ***Keep a diary of the proceedings.*** When you write your appellate brief several months after the conclusion of the trial, it may be difficult to recall what happened when. A diary entry at the end of each day of trial, briefly summarizing that day's proceedings – witnesses, documents, arguments, and rulings – can help you locate key parts of the record more easily and can assist any new appellate counsel in getting up to speed. It also will help you determine whether each portion of the proceedings that occurred on the record has, in fact, been accurately transcribed.

5. ***Be professional.*** The professionalism (or lack thereof) of counsel is usually apparent from the transcript. Be courteous -- even if your opponent is not, and even if the trial court seems to be treating you unfairly. Even at the trial level, you should be aware of the impression you are giving to an appellate court that may someday review the matter.

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