APPEALING

PROPOSITIONS:

APPELLATE ISSUES IN THE LAW

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APPEALING PROPOSITIONS: APPELLATE ISSUES IN THE LAW

Distinguishing Between Error and Reversible Error; Recognizing and Avoiding the "Bad Facts Make Bad Law" Problem; And Many (or At Least Several) Others

Right after the judge or the jury renders a "bad verdict" we all have undoubtedly heard, at least, one our clients say they want to appeal the case "all the way to the United States Court, if that's what it takes to get justice . . . ." Our clients actually probably mean what they're saying, but just don't realize what can take place in an appeal. They also sometimes say "don't worry, money is no object, this is a matter of principle . . . ." We all know they don't mean that since money is always an issue. Consequently, it is our job as the lawyer appealing the case to wait for "cooler heads to prevail" and to rationally discuss, if possible, the many ramifications of an appeal – including the costs, the length of time involved, and the possible outcomes.

An appeal is much like a forward pass in football – generally there is only ***one*** thing which can possibly go right and ***many other*** things that can go wrong. Therefore, while, at first blush, a case may seem to have had merit when it was first initiated in the trial court, the fully-developed record may not ultimately provide a either a genuine or good faith basis for an appeal. Moreover, as a purely practical matter for lawyers ourselves, we should understand it is axiomatic when we accept representation of a party we are under an obligation to see the case through its completion, including an appeal if

such is warranted.[1] Therefore, for strategic reasons such as client relations and/or settlement posturing by an insurer, we will have to appeal a case which we suspect may not necessarily be a winner. In such circumstances, it is imperative that the client, be it an insured, insurance company, corporate entity, or otherwise, fully understand the process and the possible outcomes inherent in an appeal.

Nevertheless, a lawyer appealing a case has both an ethical and legal duty to the judicial system and, indeed, to his or her client, to pursue only meritorious appeals. The appellate lawyer, whether handling an appeal for the first time or doing so as a practice emphasis, must refrain from pursuing appellate remedies that only seek to delay and/or frustrate the implementation of the trial court's ruling, cause the opposition to incur needless attorneys' fees or costs, and/or present previously well-settled legal issues to the appellate court without a good faith basis.

To Appeal Or Not To Appeal? That Is The Question

While it is the attorney's primary responsibility to prevent the destruction of his client's appellate rights,[2] the client, himself or herself, ultimately makes the final decision whether to exercise the right to appeal.[3] The filing of an appeal should ***never be*** an automatic reflex. An attorney who allows his or her own financial interests to influence his or her actions

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[1] *See generally* 2 Jerold Oshinsky and Theodore A. Howard, Practitioners Guide to Litigating Insurance Coverage Actions: Second Edition, §§ 9.01, *et. seq.* (Aspen Law and Business 2001)

[2] Muhammad v. DeRobertis, 788 F.2d 1268, 1269-1270 (7th Cir. 1986).

[3] *See* Marrow v. United States, 772 F.2d 525, 530 (9th Cir. 1985) (*citing* Jones v. Barnes, 463 U.S. 745, 751 (1983)). *See also* Don v. Nix, 886 F.2d 203, 207 (8th Cir. 1989) (*citing* Anders v. California, 386 U.S. 738, 744-745 (1967)). *See generally* Hawkeye-Security Insurance Co. v. Indemnity Insurance Co., 260 F.2d 361 (10 Cir. 1958); State v. Pence, 53 Hawaii 157, 488 P.2d 1177 (1971).

in advising a client whether to appeal clearly violates his or her ethical obligations to that client.[4] Lawyers must always keep in mind that the primary decision facing the appellate advocate is whether there are adequate and supportable grounds for filing the appeal. An appeal should not be used solely to preserve the client's right of appeal, especially when it is not clear whether the appeal is proper or advisable. Generally speaking, most appellate court rules permit an appeal within thirty (30) days after notice of the final trial level decision.[5] By signing a notice of appeal, counsel affirmatively certifies to the appellate court that the appeal is meritorious.

Moreover, just because the rules give you and your client the ability and/or the opportunity to appeal an adverse decision, that does not mean that "reason and prudence" demand that an appeal be filed.[6] In fact, "reason and prudence" will often indicate that an appeal should not be filed. The authorities note that "[o]n the average perhaps 70 percent of the civil case [*sic*] appealed as of right are affirmed."[7] Therefore,

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[4] Soliman v. EBASCO Services, Inc., 822 F.2d 320, 323 (2nd Cir. 1987). *See also* Benitez v. Collazo-Collazo, 888 F.2d 930, 933 (1st Cir. 1989); Brode v. Brode, 278 S.C. 457, 298 S.E.2d 443 (1982); Brumley v. Grimstead, 170 Va. 340, 196 S.E. 668, 675 (1938).

[5] *See* Rule 4(a) of the Federal Rules of Appellate Procedure; Rule 203(b)(1) of the South Carolina Appellate Court Rules. *See also* Arkansas (40 days); Florida (30 days); Idaho (42 days); North Dakota (60) days; Tennessee (30 days); West Virginia (4 months). *Contra* Michigan (21 days); Missouri (10 days); North Carolina (15 days); Rhode Island (20 days).

[6] *See generally* Robert L. Stern, Appellate Practice in the United States: Second Edition, § 3.2 (Bureau of National Affairs 1989).

[7] Appellate Practice in the United States, § 3.2, p.67 (noting that "[s]tatistics as to affirmances and reversals are not commonly published, and are then sometimes difficult to classify or interpret."). *See generally* Michael Pollack, *The Civil Appeal*, Counsel On Appeal 35 (1968); Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 Yale Law Journal 1191, 1198, 1209 (1978).

the lawyer and his or her client, who hold an adverse verdict, must first rationally and reasonably decide whether to appeal or not to appeal. Two of the most important factors which should be considered when making this decision are as follows:

- The ***likelihood*** of obtaining an outright reversal; and
- The ***importance*** of the issue involved in the case from the financial, political, emotional, or otherwise standpoint.[8]

The latter factor is, all-in-all, a matter for practical consideration which must be "hashed-out" with the client. This issue generally is decided on a case-by-case basis and involves all matters other than the simple legal doctrines in the case. There generally is no ability to predict and/or anticipate the outcome of this discussion. On the other hand, the former factor is an issue involving the applicable standards of review of the particular appellate court involved. Consequently, based on the lawyer's familiarity with the court of his/her ability to do legal research into the court's precedents, the "likelihood" of success is reasonably susceptible to some degree of prediction.

While the decision to appeal ultimately lies with the client,[9] an appellate attorney should be able to provide thoughtful insight and guidance to aid the client in making the correct and appropriate decision. The United States Court of Appeals for the Tenth Circuit, in *Hawkeye Security Insurance Co*., addressing the issue of the client's prerogative to appeal stated

> We think the [District] Court's conclusion that Hawkeye[-Security Insurance Company] was required to take its counsel's advice to take an appeal is erroneous. An attorney employed to defend litigation is, of course, in complete charge of the litigation, with full

[8] Appellate Practice in the United States, §3.2, p.68.

[9] *See* Hawkeye-Security Insurance Co., 260 F.2d 361.

> powers to conduct it and carry it to a conclusion, but the fact that he has authority to represent his client in the trial and conduct the litigation gives him no right to prosecute an appeal. That is so because his employment has come to an end. Of course, his recommendations with respect to an appeal are entitled to consideration, but whether an appeal shall be taken is a question to be determined by the [client].[10]

Whether to appeal is a question based upon many considerations. An appeal should not be taken "simply because the rules allow [an] appeal."[11] The lawyer should evaluate the appeal in terms of obtaining optimal results for the client. This evaluation involves the relative chances of a successful appeal, the satisfaction of the client's objectives, the monetary and emotional costs of an appeal, and the effect of a delayed final outcome on all parties concerned.[12]

The reasoned appellate advocate knows and, moreover, understands, the client's objectives and seeks to satisfy those desires as completely and as soon as possible. A client's ultimate satisfaction does not necessarily require that an appeal be filed since that is, of course, only one of the many outcome possibilities. Studies have indicated that over 70% percent of civil appeals are affirmed by the appellate court. This is especially true when the appeal may be viewed to revolve around factual, rather than legal, issues. Determining the chances of success will be a combination of legal knowledge, skill, and foresight, together with a little luck.

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10 Hawkeye-Security Insurance Co., 260 F.2d 361, 363.

11 Limerick, 749 F.2d 97, 101.

12 *See generally* Callaghan, Appellate Advocacy Manual, § 4:02.

Once it has been determined that an appeal is both warranted and valid, the lawyer should consider whether the appeal is actually in the client's best interests, either emotionally or economically. What will the client be able to gain if the appeal is successful or, more importantly, what will the client lose if the trial court is affirmed? Consideration should also be given to the possibility that an ill-conceived appeal may elicit a potentially devastating cross-appeal.

Even in the face of logic, some clients will demand that an appeal be initiated simply based upon "principle" alone. A good appellate lawyer "should be prepared to advise [the] client . . . of the . . . practical [negative] consequences of pursuing an appeal where the original . . . objectives [are no longer paramount]."[13] Practitioners should be particularly aware of appeals which seek only to harass the opposition or to delay the inevitable legal result.[14] Such actions run afoul of the normal court rules, as well as, disciplinary rules and, in fact, common civility. When the applicable law is clear, try to avoid wasting the client's money and the appellate court's time on a needless and unnecessary appeal. Both the legal profession, as a whole, and appellate courts will benefit from thoughtful and careful screening of appeals.

It is axiomatic that no lawyer, whether a seasoned appellate practitioner or an experienced trial advocate, can predict, with any reasonable degree of certainty, what an appellate court will do. Certainly, one is sometimes able to predict "trends", but even a "trend" is no guarantee of what the appellate court may ultimately do.

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[13] Callaghan, Appellate Advocacy Manual, § 4:02.

[14] Slane v. Rio Grande Water Conservation District, 115 F.R.D. 61, 63 (D.Colo. 1987).

Consequently, when a practitioner is discussing with his or her client whether to appeal, one of the most important considerations at issue is what effect will a negative opinion have on the state of the law. As mentioned previously the vast majority of appealed cases are affirmed and, therefore, the odds in obtaining a reversal are against you from the start. In fact, given the array of "bad things" that might happen, sometimes the best you can hope for is an unpublished affirmance.[15]

General Standards of Appellate Review

There are several "standards of review" applicable to appellate matters. The authorities note that "[t]he idea of using standards to guide appellate review of [the] decisions of tribunals below has existed from the beginning of American jurisprudence, but the articulation of those standards is a fairly recent and still not always clear development."[16] Nevertheless, "[a] standard of review[, by its very name,] indicates to the reviewing court the degree of deference that it is to give to the actions and decisions under review."[17]

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15 Generally speaking, the federal and most state appellate rules permit an unpublished opinion to have little if any and precedential value except for the case from which it arises. Nevertheless, with the widespread use of on-line legal databases (either free or pay), unpublished cases are still often accessible by the practitioner. Consequently, even if a decision is unpublished, you may well see it used against you at some time in the future.

16 Professor Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, The Journal of Appellate Practice and Process, 47 (Vol. 2, No. 1, Winter 2000) (*citing* Steven A. Childress and Martha S. Davis, Standards of Review (Wiley 1986)).

17 Davis, 47 (citing Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 South Dakota Law Review 468, 469 (1988)).

In virtually all appeals, the appellate court will (a) review the facts, (b) review the law, and (c) review the "trial court's" exercise of discretion.[18] When an appellate court reviews factual decisions, the court generally "displays a high level of deference to the trial court under a [plain or somewhat modified] `clearly erroneous' standard . . . ."[19] For example, the South Carolina Court of Appeals, in *Barnacle Broadcasting, Inc. v. Baker Broadcasting, Inc.*,[20] recently stated that "[i]n an action at law, tried without a jury, our scope of review extends merely to the correction of errors of law[and thus] the trial court's factual findings ***will not be disturbed*** on appeal unless a review of the record discloses that there is ***no evidence which reasonably supports*** the judge's findings."

In probably one of the most famous and most cited appellate cases in South Carolina, the South Carolina Supreme Court took the opportunity to actually set out, pretty much in ***black-letter law*** detail, the applicable appellate standards of review which generally run true throughout other appellate court across the United States.[21]

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18 Davis 48 (*citing* Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173 (1978)).

19 Davis, 48 (*citing* Rule 52 of the Federal Rules of Appellate Procedure; Anderson v. Bessemer City, North Carolina, 470 U.S. 546, 573-575 (1985); United States v, Unites States Gypsum Co., 333 U.S. 264, 395 (1948)).

20 Barnacle Broadcasting, Inc. v. Baker Broadcasting, Inc., ___ S.C. ___, ___ S.E.2d ___ (Ct.App. 2000) (*citing* Crary v. Djebelli, 329 S.C. 385, 496 S.E.2d 21 (1998); Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976)).

21 *See generally* Rock v. Hiatt, 103 N.C.App. 578, 406 S.E.2d 638 (1991); Whelan v. Moore, 242 Ga.App.795, 531 S.E.2d 727 (2000); Gainsco County Mutual Insurance Company v. Martinez, 27 S.W.3d 97 Tex.App. – San Antonio 2000); Wood v. Groh, 269 Kan. 420, 7 P.3d 1163 (2000); Lakin v. Senco Products, Inc., 144 Or.App. 52, 925 P.2d 107 (1996); Stratton v. Miller, 32 A.D.2d 687, 299 N.Y.S.2d 869 (1969); White v. Inbound Aviation, 69 Cal.App.4th 910, 82 Cal.App.2d 91 (1999).

In *Townes Associates, Ltd. v. City of Greenville*, the South Carolina Supreme Court stated the following:

> 1. In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings.[**22**]
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> 2. In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. The rule is the same whether the judge's findings are made with or without, a reference. The judge's findings are equivalent to a jury's findings in a law action.[**23**]
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> 3. In an action in equity, tried by the judge alone, without a reference, on appeal the Supreme Court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence.[**24**]

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22 Townes Associates, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (*citing* Odom v. Weathersbee, 225 S.C. 253, 81 S.E.2d 788 (1954)). *See also generally* Rock v. Hiatt, 103 N.C.App. 578, 406 S.E.2d 638 (1991); Whelan v. Moore, 242 Ga.App.795, 531 S.E.2d 727 (2000); Gainsco County Mutual Insurance Company v. Martinez, 27 S.W.3d 97 Tex.App. – San Antonio 2000); Wood v. Groh, 269 Kan. 420, 7 P.3d 1163 (2000); Lakin v. Senco Products, Inc., 144 Or.App. 52, 925 P.2d 107 (1996); Stratton v. Miller, 32 A.D.2d 687, 299 N.Y.S.2d 869 (1969); White v. Inbound Aviation, 69 Cal.App.4th 910, 82 Cal.App.2d 91 (1999).

23 Townes Associates, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (*citing* Chapman v. Allstate Insurance Co., 263 S.C. 565, 211 S.E.2d 876 (1974)). *See also generally* McGahn Medical Corporation v. Superior Court, 11 Cal.App.4th 804, 14 Cal.Rptr.2d 264 (1993); The Cadle Company v. Regency Homes, Inc., 21 S.E.3d 670 (Tex.App. – Austin 2000); In *re* Steven N., 57 Conn.App. 629, 749 A.2d 678 (2000); Strategic Staff Management, Inc. v. Roseland, 260 Neb. 682, 619 N.W.2d 230 (2000).

24 Townes Associates, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (*citing* Crowder v. Crowder, 246 S.C. 299, 143 S.E.2d 580 (1965)). *See also generally* Weltzin v. Nail, 618 N.W.2d 293 (Iowa 2000); Tritten v. Kinsey, 988 P.2d 353 (Ok.App. 1999); Arrowhead Mutual Service Company v. Faust, 260 Cal.App.2d 567, 67 Cal.Rptr. 325 (1968); Lilly v. Markvan, 763 A.2d 370 Pa. 2000).

4. In an action in equity, tried first by the master or a special referee and concurred in by the judge, the judge, the findings of fact will not be disturbed on appeal unless found to be without evidentiary support or against the clear preponderance of the evidence. [**25**]

5. In an action in equity where the master, or the special referee, is in disagreement with the judge on a factual finding, this Court may make findings in accordance with its own views of the preponderance or the greater weight of the evidence, the same as if the case had been tried by the judge without reference to the master or a referee.[**26**]

Of course the most difficult standard of review to overcome is the "abuse of discretion" standard." The authorities note that

> Discretion is one of the most exercised and least understood of trial court or [administrative] agency activities – a very basic activity that must be understood in all areas of decision making and administrative . . . and civil appeals, and one of the most difficult to address rationally. The need for discretion arises because there are areas in which the trial court or [administrative] agency must exercise a certain measure of judgment in reaction to "on the scene presence" at trial of because Congress[, the various State Legislatures,] and the courts have given no guidelines for deciding an issue, or because the issue is one that is so novel or vague that there is no way to measure the "correctness" of the trial court's decision. Major among such areas are ***trial supervision***, ***conduct of the parties***, and [the] ***admission (or rejection) of evidence***.**27**

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25 Townes Associates, 266 S.C. 81, 86, 221 S.E.2d 773, 775-776 (*citing* Ex Parte, Guaranty Bank & Trust Co., 255 S.C. 106, 177 S.E.2d 358 (1970)). *See also generally* Littlefield v. Gorton, 65 R.I. 390, 14 A.2d 682 (1940); People *ex rel* Luce v. Lewis, 257 A.D. 724, 15 N.Y.S.2d 180 (1939); Rodesney v. Hall, 307 P.2d 130 (Ok.1957); Walker v. Moore, 745 S.W.2d 292 (Tenn.App. 1988); Supreme Court of California v. Eldred, 73 Cal. 394, 15 P. 16 (1887).

26 Townes Associates, 266 S.C. 81, 86, 221 S.E.2d 773, 776 (*citing* Price v. Derrick, 262 S.C. 341, 204 S.E.2d 389 (1974)). *See also generally* Estate of Bassi v. Zappaterra, 234 Cal.App.2d 529, 44 Cal.Rptr. 541 (1965); Ferguson v. Ferguson, 271 A.D. 976, 67 N.Y.S.2d 906 (1947); Schultz v. Dillow, 254 S.W.2d 930 (Ky.App. 1953); Sloan v. Jefferson, 758 P.2d 81 (Alaska 1988).

27 Davis, pp.49-50 (Emphasis added).

Generally speaking, when an appellate court reviews a case on the "abuse of discretion" standard, the chances of a reversal are significantly less than normal. There are many "definitions" used by courts to describe an "abuse of discretion" and no one definition fits all cases. Nevertheless, in *Kennedy v. South Carolina Retirement System*,[28] the South Carolina Supreme Court noted that "[a] abuse of discretion arises in cases where the judge issuing the order was controlled by some error of law."[29] This is a fairly widespread held proposition is many other jurisdictions in this country.[30] Probably the most widely utilized categories of issues at trial which come within the penumbra of "abuse of discretion" involves either the admission and/or exclusion of evidence (qualification of experts, *etc*.) and the court's procedural rulings (bifurcation of liability and damages issues, permit offensive collateral estoppel, trial consolidation, venue change, give certain jury instructions or decline to do so, *etc*).

Harmless Error

It seems like the classic oxymoron – harmless error. On the one hand the victor sees every "error" as harmless since justice was served by his or her victory. On the other hand, the vanquished cannot under the concept of "harmless error" since if it was an error then it certainly could not be harmless as it must have had some negative effect on the case or

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28 Kennedy v. South Carolina Retirement System, ___ S.C. ___, ___ S.E.2d ___ (2000) (2000 WL674844).

29 Kennedy, ___ S.C. ___, ___, ___ S.E.2d ___, ___ (*citing* Elliott v. Richland County, 327 S.C. 175, 489 S.E.2d 195 (1997)).

30 *See generally* Joffrion v. Commonwealth of Virginia, ___ Va.App. ___, ___ S.E.2d ___ (2000) (2000 WL 1780226); King v. Olympic Pipeline Company, ___ Wash.App. ___, ___ P.3d ___ (2001) (2001 WL 1873277); Mobile Oil Company v. City of Syracuse Industrial development Agency, 224 A.D.2d 15, 646 N.Y.S.2d 741 (1996); Meyer v. Meyer, 239Wis.2d 731, 620 N.W.2d 382 2000).

he/she would have certainly won. Unfortunately, there are harmless errors which occur and which really do not have any meaningful effect on the trial's final outcome. Consequently, "[a]ppellate courts recognize--or at least they should recognize--an overriding rule of civil procedure which says: ***whatever doesn't make any difference, doesn't matter***."[31]

The term "harmless error" is variously defined. For example, *Black's Law Dictionary*, has defined it as "[t]he doctrine that minor or harmless errors during a trial do not require reversal of the judgment by an appellate court. An error which is trivial or formal or merely academic and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case."[32] In fact, the *Federal Rules of Civil Procedure* specifically provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, ***unless refusal to take such action appears to the court inconsistent with substantial justice***. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. [33]

This rule is generally the same for state courts in jurisdictions which have adopted rules of civil procedure containing either the same or a similar version of Rule 61, *FRCP*.[34]

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31 McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct.App. 1987) (*citing* Cox v. Cox, 290 S.C. 245, 349 S.E.2d 92 (Ct.App.1986) (appellant has the burden of showing that an error was prejudicial)) (Emphasis added).

32 Black's Law Dictionary, 718 (6th Edition West 1990) (*citing* State v. Johnson, 1 Wash.App. 553, 463 P.2d 205, 206 (1994)).

33 Rule 61, FRCP.

34 *See generally* Standard Federal Savings and Loan Association v. Mungo, 306 S.C. 22, 25-26, 410 S.E.2d 18, 20 (Ct.App. 1991) (Rule 61, SCRCP); Benton v. Hillcrest Foods, Inc., 136 N.C.App. 42, 524 S.E.2d 53 (1999) (Rule 61, NCRCP); Hayden v. Elam, 739 So.2d 1088 Ala. 1999)

The United States Supreme Court has stated that these harmless error rules adopted by it and by Congress embody the principles that courts should exercise judgment in preference to automatic reversal for "error" and should ignore errors that do not affect essential fairness of trials.**35** Moreover, various appellate courts have noted that although Rule 61, *FRCP*, is intended to guide the actions of a United States District Court, the rule should also be heeded by the various Federal Courts of Appeals in order to make it effective.**36** The federal courts have defined "harmless error" as an error which is not inconsistent with substantial justice or does not affect the substantial rights of the parties.**37**

"Harmful" Error

As the counterpart to "harmless error", there are some errors which are so "harmful" and offensive that an appellate court simply cannot ignore them because, by their very nature, they **must be presumed** to have negatively affected the outcome of the trial. There are many types of "harmful error" and they may exist as a single major error or multiple major errors, or, in some instances, several small errors with a cumulative prejudicial effect.

(Rule 61, Ala.R.Civ.P.); Gowin v. Transgrud, 571 N.W.2d 824 (N.D. 1997) (Rule 61, NDRCP); Pittman v. Pittman, 999 P.2d 638 (Wyo. 2000) (Rule 61, WRCP).

35 McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984).

36 *See generally* Gillis v. Keystone Mutual Casualty Co., 172 F.2d 826 (6th Cir. 1949); Blum v. Cottrell, 276 F.2d 689 (4th Cir. 1960); Illinois Terminal Railway Co. v. Friedman, 208 F.2d 675 (8th Cir. 1950); De Santa v. Nehi Corp., 171 F.2d 696 (2nd Cir. 1948); University City v. Home Fire & Marine Insurance Co., 114 F.2d 288 (8th Cir. 1940).

37 Skogen v. Dow Chemical Co., 375 F.2d 692 (8th Cir. 1967); Citron v. Aro Corp., 377 F.2d 750 (3rd Cir. 1967); Mayer v. Illinois Northern Railway, 324 F.2d 154 (6th Cir. 1967); Delaney v. International Harvester Co., 261 F.2d 150 (6th Cir. 1958); Duff v. Page, 249 F.2d 137 (9th Cir. 1957); Atlantic Coast Line Railway Co. v. Burkett, 192 F.2d 941 (5th Cir. 1951).

For example, in _Toyota of Florence, Inc. v. Lynch_,[38] the South Carolina Supreme Court reversed a $10,000,000.00 jury damages award on the basis that counsel for one of the successful parties, although a very minor player, had improperly appealed to the racial prejudice of the jury. The principle defendant, Southeast Toyota Distributors ("S.E.T."), was a southeastern regional Toyota motor vehicle distributor. During the closing arguments, the offending party's positions and claims were illustrated through hand-drawn posters. The Supreme Court noted that these posters caused the problems:

> Three posters depict men identified in the drawing with S.E.T. engaged in various acts: (1) paying off an S.E.T. witness and giving him answers to questions; (2) offering money to a blindfolded man; and (3) feeding documents into the S.E.T. shredder. The S.E.T. men all have black hair and vaguely Oriental features. The intent to identify the S.E.T. defendants with the Japanese is obvious when the drawings of the S.E.T. employees are compared with the poster depicting the "bad" American defendant. Another poster depicts a map of the Southeastern United States with the states served by S.E.T. colored in. A rather amorphous blob is drawn in each state; when viewed with counsel's contemporaneous argument, "This is the five-state area, and it's blown up all over the Southeast", it becomes clear that the blobs represent mushroom cloud explosions.[39]

The Court concluded that "[w]hen the issue was raised, [the offending party's] counsel defended the drawings saying the individuals were not intended to look Oriental, but rather were supposed to be Italian-looking."[40] The Court held it was "very telling that counsel defended the accusation he was evoking a racial prejudice by contending he was instead trying to imply an ethnic stereotype."[41]

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38 Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994).

39 Toyota of Florence, 314 S.C. 257, 260, 442 S.E.2d 611, 614-615.

40 Toyota of Florence, 314 S.C. 257, 260, 442 S.E.2d 611, 615.

41 Toyota of Florence, 314 S.C. 257, 260-261, 442 S.E.2d 611, 615.

The United States Court of Appeals for the Second Circuit, in *Malek v. Federal Insurance Company*,[42] reversed a jury verdict for two insurers in an arson case on the basis of, *inter alia*, cumulative errors. The Second Circuit noted:

> The Maleks contend . . . the [D]istrict [C]ourt erred in, *inter alia*, excluding the relevant testimony of a social worker who was prepared to testify on the basis of her personal knowledge and business records; sequestering the Maleks' expert during the testimony of the defendants' expert, where the presence of the Maleks' expert was essential to the Maleks' cross examination of the defendants' expert; and permitting defense counsel to cross examine a witness about his religious affiliation and the religious affiliation of his clients.[43]

The Second Circuit Court of Appeals, after reviewing the record concluded that "[a]lthough any one of the above evidentiary errors standing alone may have been harmless and would not mandate reversal, the cumulative effect of these errors substantially prejudiced the Maleks' case."[44] The Second Circuit further noted the "evidence excluded by the [D]istrict [C]ourt was related to the central issues of this case (motive and opportunity), was not cumulative in nature and did not relate to collateral matters. Given the quality of evidence introduced by the [insurers] and the heightened burden of proof [required to prove] their affirmative defenses, we cannot say with fair assurance that the jury's verdict was not substantially swayed by the exclusion of the Maleks' evidence."[45]

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42 Malek v. Federal Insurance Company, 994 F.2d 49 (2nd Cir. 1993).

43 Malek, 994 F.2d 49, 51.

44 Malek, 994 F.2d 49, 55.

45 Malek, 994 F.2d 49, 55.

In *Dynasty, Inc. v. Princeton Insurance Company*,**46** the Supreme Court of New Jersey, reversed a jury verdict for an insured nightclub owner based on the plain error rule in an arson case. The Court noted the circumstances of the loss:

> The fire that destroyed Hollywood Lights occurred in the late evening of Sunday, June 5, 1994. According to expert testimony, the fire was intentionally set. A witness in a neighboring building testified that he heard a "roar" and that the floor beneath him shook. When he walked outside, the witness observed an unidentified blue van coming from Hollywood Lights at a high rate of speed. When firefighters arrived, they entered the building by prying open a locked, undamaged front door. That arson was the cause of the blaze appeared obvious: firefighters found three five-gallon gasoline containers in the nightclub and noticed a strong smell of gasoline. The parties [agree] arson [w]as the cause of the fire.**47**

In this case, one of the insured's principle defenses to the arson charge was that the installed sprinkler system had been intentionally disabled by someone other than the insured and/or his agents.**48** During the trial the insurer requested the trial court to charge the jury that the disabled sprinkler system rendered the insured premises an "increased-hazard risk" and, therefore, not covered by the insurance policy.**49** The trial court refused and on appeal the court "conclude[d] that a sufficient basis existed to support [the insurer's] requested charge . . . ."**50**

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46 Dynasty, Inc. v. Princeton Insurance Company, 165 N.J. 1, 754 A.2d 1137 (2000).

47 Dynasty, 165 N.J. 1, 5-6, 754 A.2d 1137, 1139.

48 Dynasty, 165 N.J. 1, 5-6, 754 A.2d 1137, 1139-140.

49 Dynasty, 165 N.J. 1, 7-8, 754 A.2d 1140.

50 Dynasty, 165 N.J. 1, 15, 754 A.2d 1144.

The New Jersey Supreme Court stated

> . . . viewing the record in its entirety, th[e] [insurer's] theory at trial was that plaintiff or its agents participated in the arson and that [the insured] or someone on his behalf disengaged the sprinkler system, thereby increasing the risk of hazard. That was the insurer's theme throughout its presentation to the jury. [The insurer] opened its case by referring to the sprinkler system and called or questioned numerous witnesses who testified about that system. We have to assume that, but for the trial court's refusal to administer [the insurer's] proposed charge, defense counsel would have said more about the sprinkler system in his closing statement.
>
> Moreover, jurors heard testimony about precisely where the sprinkler system was located, how it operated, and the accessibility of the control valve to [the insured] and other employees of the business. The jury also heard that when the . . . Fire Department inspected the system the central valve was locked in the open position and then, at the time of the fire, the valve was locked in the off position. . . . we conclude that there was a sufficient basis in the record to present both questions to the jury. Thus, the trial court erred in instructing the jury solely on arson.[51]

The Court of Appeals of Georgia, in American Motorist Insurance Company v. Sutton,[52] reversed a jury verdict for the insured on an insurance claim for certain damaged heavy equipment on the basis of an inaccurate jury charge. The Court of Appeals set out the facts as follows:

> In October of 1974, while [the] policy was in force the back hoe was being operated by an agent of [the insured] along the banks of the Ocmulgee River and was maneuvered into a creek bed or slough area approximately 40 feet from the bank of the river when it began sinking into the ground. The operator failed in his attempts to extricate the back hoe after it sank a number of feet. He left the scene to report the incident although at that time the back hoe was still operable although he had been unable to extricate it. Two days later the rains came, the river rose, the

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[51] Dynasty, 165 N.J. 1, 17, 754 A.2d 1146.

[52] American Motorist Insurance Company v. Sutton, 148 Ga.App. 872, 253 S.E.2d 256 (1979).

> water came up and inundated the back hoe. All efforts to extricate had been to no avail before the heavy rains set in. Sutton then made a claim under the policy for the total purchase price of the back hoe. The insurer refused to pay, contending it was lost due to the sub-surface water and being covered by surface water which it contends it was not liable to pay due to exclusions in the policy.[53]

Even though affirming most to the trial court's decisions, the appellate court concluded "[t]he trial court committed harmful error by inaccurately charging the jury as to the contentions of the defendants."[54] The Court reversed, noting there was no support for the trial court's charge that the "defendants' contentions included, "that the machine was not operated according to the terms and specifications set forth in the insurance contract . . . that the machine was operated over territory which was excluded in the terms of the insurance policy . . . (a)nd therefore they claim that the improper use over the wrong terrain was the cause of the damage[s] . . . ."'[55]

In _Allstate Insurance Company v. Swann_,[56] the United States Court of Appeals for the Eleventh Circuit reversed a jury verdict of almost $400,000.00 for the insureds in an arson case due to the District Court's exclusion of relevant and material testimony by the insurer's underwriting manager. The insurer sought to introduce underwriting evidence "establishing that [it] would not have issued the policy to the [insureds] had [the insurer] known that [one of the insureds] earned his living[, at least in significant part,] from illegal

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[53] American Motorist Insurance Company, 148 Ga.App. 872, 872, 253 S.E.2d 256, 257.

[54] American Motorist Insurance Company, 148 Ga.App. 872, 877, 253 S.E.2d 256, 260.

[55] American Motorist Insurance Company, 148 Ga.App. 872, 877, 253 S.E.2d 256, 260.

[56] Allstate Insurance Company v. Swann, 27 F.3d 1539 (11th Cir. 1994).

gambling."[57] The District Court denied admission of the evidence, *sua sponte.* The Eleventh Circuit concluded that decision was not harmless error and reversed the verdict. The Court of Appeals stated:

> The [D]istrict [C]ourt excluded the only evidence [the insurer] offered to support its position that the company would not have insured the [insureds] but for the misrepresentation. Had that evidence been admitted, [the insured] would have made out a *prima facie* misrepresentation claim, requiring submission of that claim to the jury. Since the [D]istrict [J]udge's ruling precluded [the insurer] from establishing a *prima facie* claim, it cannot be characterized as harmless error.[58]

The Appellate "Advocate"

It is particularly important to remember the traditional perception of the sequential nature of trial and appellate attorneys has not, for all practical purposes, dramatically changed.[59] The contemporary litigation viewpoint recognizes the immediate importance of the appellate lawyer at the trial level (both during the trial and the post-trial proceedings) because:

- ♦ Appellate court decisions comprise most of the legal precedent in our [system] of government;
- ♦ The manner in which cases are presented and argued before an appellate court has a significant effect on the quality of the appellate court decisions and the durability of the legal precedent; [and]
- ♦ The manner in which cases are presented and argued in the trial court [establishes the] outer limitations on the presentations and arguments in the appellate court.[60]

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57 Allstate Insurance Company, 27 F.3d 1539, 1541.

58 Allstate Insurance Company, 27 F.3d 1539, 1544.

59 *See* 1 John Cooley, Callagahan's Appellate Advocacy Manual, § 1:04 (Lawyer's Ed. 1989).

60 Callagahan's Appellate Advocacy Manual, § 1:08.

Consequently, the job of the appellate lawyer, whether one who handles many or who handles few, is very important and the results can be far-reaching and long-felt by our fellow advocates. Consequently, the job of an appellate advocate often begins in the preparation for the trial and continues through trial, as opposed to first "getting the case" after the post-trial order has been issued.

Under our advocacy system, attorneys are unquestionably permitted to assert the positions of their clients to the fullest extent possible. In fact, our ethical and moral guidelines require us to do so. For example, in _State v. Wright_,[61] the South Carolina Supreme Court stated:

> Even if a [position] is not recognized at the time of trial [or during the appeal], an attorney [does] not violate [his or her ethical obligations] by asserting [the position] if his [or her] position `[can be supported] by a good faith argument. . . .'[62]

Moreover, even though an attorney may truthfully believe "a [position asserted] will fail, [that] is no[t] evidence of [an attorney's] bad faith [in rightfully asserting the position]. . . ."[63] This proposition is followed generally across the United Sates.

Limitations On An Advocate's Zealousness

There are limits, however, on the extent of an advocate's zealous representation. For example the *Model Rules* provide:

> A lawyer should _not_ bring or defend a proceeding or controvert an issue therein [including during an appellate procedure], _unless_ there is a _basis for doing so that is not frivolous_, which

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61 _State v. Wright_, 271 S.C. 534, 248 S.E.2d 490 (1978).

62 _Wright_, 271 S.C. 534, 537, 248 S.E.2d 490, 492 (*citing* DR7-102(A)(2)).

63 _Wright_, 271 S.C. 534, 538, 248 S.E.2d 490, 492.

> includes a good faith argument for an extension, modification, or reversal of existing law.[64]

Unquestionably, a lawyer "has a duty to use legal procedure for the fullest benefit of the client's cause, but [the lawyer] also has a duty not to abuse legal procedure."[65] Under our system "[t]he law . . . establishes the limits within which an advocate may proceed."[66] The *Comment* to Rule 3.1 defines a "frivolous action" as one

> taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of an action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.[67]

This definition constitutes, of course, the proverbial "giggle test" in which a lawyer is unable to argue their particular position to either another person or to a mirror and keep a straight face. Repeated groundless and vengeful suits constitute bad faith,[68] as does a deliberate and knowing misrepresentation of the state of the law.[69]

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[64] Model Rules, Section 3.1 (Emphasis supplied).

[65] *See* Model Rules, Comment No. 1 to Rule 3.1. (Emphasis supplied). Becoming too zealous at trial often has haunting results at the appellate level. *See, e.g.;* Toyota of Florence, 314 S.C. 257, 442 S.E.2d 611) ($10,000,000.00 verdict reversed and case remanded due to improper jury arguments and closing statements); Dial v. Niggell Associates, 326 S.C. 329, 476 S.E.2d 700 (Ct. App. 1996) (prejudicial comments in closing argument warranted reversal of verdict for defendant), *reversed on other grounds*, 333 S.C. 253, 509 S.E.2d 269 (1998).

[66] *See* Model Rules, Comment No. 1 to Rule 3.1 (Emphasis supplied).

[67] *See* Model Rules, Comment No. 2 to Rule 3.1 (Emphasis supplied).

[68] *See* In re Sarelas, 50 Ill.2d 87, 277 N.E.2d 313 (1971).

[69] *See* In re Clark, 96 Idaho 889, 539 P.2d 242 (1975). *See also* Matter of Davis, 276 S.C. 532, 280 S.E.2d 644 (1981) (*per curiam*) (knowingly making a false statement of law or fact); Matter of Barrow, 278 S.C. 276, 294 S.E.2d 785 (1982) (*per curiam*) (intentionally altering evidence without revealing alterations to either the court or to opposing counsel).

Frivolous Appeals

In *Polk County v. Dodson*,70 the United States Supreme Court stated:

> Although [an] . . . attorney has a duty to advance all colorable claims and defenses, the canons of professional ethics impose limits on permissible advocacy. It is the obligation of any lawyer -- whether privately retained or publicly appointed -- not to clog the courts with frivolous . . . appeals.[71]

The applicable procedural rules provide that sanctions can be imposed for frivolous appeals.[72] If the prospective appeal is without merit or advanced only to cause inconvenience and delay, it likely should not be brought unless to do so would be to substantially injure the client. For example, in *Limerick v. Greenwald*, the United States Court of Appeals for the First Circuit held that

> Lawsuits are expensive and time consuming to courts and litigants alike. When an attorney fails to take an objective look at his case and appeals simply because the rules allow him to appeal, he commits a wrong against the courts and against the parties who must respond to the appeal.73

In any case, it is a test of competing interests which must be carefully balanced by the advocate.

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70 Polk County v. Dodson, 454 U.S. 312 (1981).

71 Polk, 454 U.S. 312, 323.

72 *See* Rules 36, 38, FRAP; 28 U.S.C. §§ 1912, 1927 (West 1998); Rule 240 of the South Carolina Appellate Court Rules. *See also* McCoy v. Court of Appeals of Wisconsin, Dist. 1, 486 U.S. 429, 436 (1988); Limerick v. Greenwald, 749 F.2d 97, 101-102 (1st Cir. 1984).

73 Limerick, 749 F.2d 97, 101 (*citing* DR7-102 and Canon 7). *See also* Jones v. Continental Corp., 789 F.2d 1225, (6th Cir. 1986); Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987); Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). *See generally*, Robert Martineau, "Frivolous Appeals; the Uncertain Federal Response," 1984 Duke Law Journal 845; 10 Charles A. Wright, Arthur R. Miller, & Mary K. Kane, Federal Practice and Procedure, § 2670 (West 1998).

Additionally, the *Federal Rules of Appellate Procedure* contain an effective method of sanctioning attorneys who file frivolous appeals.[74] The commentators noted that "[w]hile Rule 46 may be used to impose a monetary penalty . . . it also permits a court of appeals to order the suspension or disbarment of the offending lawyer from practice before the court."[75] This is particularly true when courts are "disciplin[ing] lawyers who have pursued frivolous appeals."[76] The *Model Rules* provide an objective good faith test in determining whether or not an appeal is meritorious,[77] concluding that an appeal which is frivolous or without merit is never undertaken lightly. Many commentators have discussed the inherent potential conflict between the obligation of an attorney to represent his or her client diligently and the ethical obligation of the lawyer to present the courts with only meritorious claims.[78]

Courts are understandably hesitant to deem an appeal as being frivolous. Interpreting the rules in such a manner may be viewed as an attempt to chill the advancement of novel legal theories or the modification of existing jurisprudence. As the Arizona Court of Appeals correctly noted, in *Price v. Price*,[79] "the line between a frivolous appeal and one which simply has no merit is [a very] fine [line]."[80]

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74 *See* Rule 46, FRAP.

75 ABA/BNA Lawyer's Manual on Professional Conduct, § 61-104 (ABA/BNA 2000) (*citing* United States v. Stilwell, 801 F.2d 135 (7th Cir. 1987); United States v. Smith, 436 F.2d 1130 (9th Cir. 1979); In re Grimes, 364 F.2d 654 (10th Cir. 1966)).

76 ABA/BNA Lawyer's Manual on Professional Conduct, § 61-104 (ABA/BNA 2000) (*citing* In re Kelly, 808 F.2d 549 (7th Cir. 1986)).

77 Mode Rule 3.1; Kale v. Combine Insurance Co., 861 F.2d 746, 750 (1st Cir. 1988).

78 *See e.g.,* Charles Pengilly, *Never Say Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal*, 9 Criminal Justice Journal 45 (1986); David Davis, "The Frivolous Appeal Reconsidered," 26 Criminal Law Bulletin 305 (1990).

79 Price v. Price, 134 Ariz. 112, 114, 654 P.2d 46, 47 (Ct. App. 1982).

80 Price, 134 Ariz. 112, 114, 654 P.2d 46, 47.

Various jurisdictions have adopted their own standard with regard to determining whether or not an appeal is frivolous. While some courts consider an appeal frivolous when it is "utterly without merit" or without "colorable arguments raised in support,"[81] other jurisdictions require attorneys to research the law and determine if the claim falls within these parameters.[82] Failing to satisfy this requirement can prove costly.[83] While the United States Supreme Court has held that Rule 11 of the *Federal Rules of Civil Procedure* does not apply to appeal proceedings,[84] Rule 38, *inter alia*, of the *Federal Rules of Appellate Procedure* does authorize awards of appellate expenses for frivolous appeals. Moreover, the courts have interpreted Rule 38, *FRAP*, and other similar rules, to require the monetary sanctions imposed may be paid by "the lawyer, the client, or both."[85]

The determination of whether an appeal is frivolous is a completely separate inquiry from the determination of whether the underlying action was well founded. As the United States Court of Appeals for the Seventh Circuit in *Clark v. Maurer*[86]

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81 *See* Sun Ship, Inc. v. Matson Navigation Co., 785 F.2d 59, 64 (3rd Cir. 1986); In Re: Hall's Motor Transit Company, 889 F.2d 520, 523 (3rd Cir. 1989).

82 *See* Hilmon Co. v. Hyatt Inernational, 899 F.2d 250 (3rd Cir. 1990).

83 Hilmon Co. v. Hyatt International, 899 F.2d 250 (3rd Cir. 1990); Pillsbury Co. v. Midland Enterprises, Inc., 904 F.2d 317, 318 (5th Cir. 1990); Smith v. Commonwealth, Pennsylvania Board of Probation and Parole, 524 Pa. 500, 574 A.2d 558 (1990) (attorney sanctioned for filing appeal not permitted under appellate court rules); Foret v. Southern Farm Bureau Life Insurance Co., 918 F.2d 534 (5th Cir. 1990) (*sua sponte* award of attorney's fees in frivolous appeal); Hersch v. Citizens Savings & Loan Association., 146 Cal. App. 3d 1002, 194 Cal. Rptr. 628 (Ct.App. 1983) (appellate court fined appellant $125,000 for filing appeal solely for the purpose of delay).

84 Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405-407 (1990).

85 ABA/BNA Lawyer's Manual on Professional Conduct, § 61-114 (ABA/BNA 1995) (*citing* Good Hope Refineries, Inc. v. Brashear, 588 F.2d 846 (1st Cir. 1978); Bankers Trust Co. v. Publicker Industries, Inc., 641 F.2d 1361 (2nd Cir. 1981)).

86 Clark v. Maurer, 824 F.2d 565 (7th Cir. 1987).

> The facts as known to a plaintiff and his counsel by reasonable investigation, and the law as known to them by reasonable research, might make a suit colorable when filed; but when the district court dismisses the suit, the plaintiff and his lawyer must reassess its merits. If, having done so, they are unable to identify any respect in which the court erred but nevertheless appeal, the appeal is groundless and sanctions may be appropriate.[87]

Continuous filing of frivolous appeals may result in the court "closing the door on the appellant."[88]

Appealing Propositions: Making The Appellate Record At Trial

Much as in the same way a case is prepared in anticipation of actually trying the case, every matter tried should be tried as if it was going to be appealed to a higher court. Generally speaking, judges understand an attorney needs to and, indeed, is required to object, proffer evidence, or make certain motions in order to "protect the record" just in case there is an appeal. Moreover, we all generally know from the outset of a matter whether the "losing" party to a particular case will appeal after the decision is made. Consequently, as mentioned previously, the services of appellate lawyers (or at least their knowledge) are being used today at a much earlier stage. From pre-trial discovery disputes to summary judgment arguments to pre-trial *in limine* motions to the trial itself – the trial attorney and the appellate attorney walk side-by-side. Each needs the other to make sure the record is safe. As the authorities note:

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[87] Clark, 824 F.2d 565, 566-567.

[88] *See* Deutsch v. Tippy, ___ F.3d ___ (2nd Cir. 1996) (1996 WL 18630) (court threatened to refuse further filings of appeals by appellant if another frivolous appeal was docketed).

> From the earliest stage at which counsel becomes involved in [a case, whether it involves insurance coverage or otherwise], it is imperative that he or she have in mind the likelihood that at some point an appeal will ensue in which he or she will need to be able to reply on particular pieces of evidence or points of law as the basis for appellate argument. It is a fundamental obligation of counsel to make certain to the greatest practicable extent – no matter how the case is resolved at the trial-court level – that those critical items of factual evidence and legal contention that are necessary to the successful advocacy of his or her client's position on appeal have been: (i) specifically placed before the trial judge and/or other trier of fact, (ii) made the subject of a specific ruling either admitting (accepting) or excluding (rejecting) the evidence or argument; and (iii) where the evidence has been excluded or the argument rejected, that an objection or exception to the ruling is clearly preserved on the trial court record.[89]

Any and all appeals are only as good as the evidentiary documents and testimony upon which they are based. The lack of a "sufficient" appellate record generally dooms the "possibility" of success in a state court appeal.[90]

CONCLUSION

It is axiomatic that no lawyer, whether a seasoned appellate practitioner or an experienced trial advocate, can predict, with any reasonable degree of certainty, what an appellate court will do. Certainly, one is sometimes able to predict "trends", but even a "trend" is no guarantee of what the appellate court may ultimately do. Therefore, when a

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89 2 Jerold Oshinsky and Theodore AS. Howard, Practitioner's Guide to Litigating Insurance Coverage Actions: Second Edition, § 9.02[A] (Aspen Law & Business 2001).

90 In South Carolina the appellate rules provide that "the appellate court will not consider any fact which does not appear in the Record on Appeal." *See* Rule 210(h), SCACR. *See also generally* Wells v. Halyard, 341 S.C. 234, 237, 533 S.E.2d 341, 344 (Ct.App. 2000) (jury charge at issue not included in the record); Prescott v. Farmers telephone Co-op, Inc., 335 S.C. 330, 332, n.1, 516 S.E.2d 923, 924, n.1 (1999) (effect of employee handbook could not be considered as it was not in record). Fortunately, the Federal Courts of Appeals have the full trial court record available to them even if not set out specifically in the parties' Joint Appendix. See generally Rule 30((a)(2), FRAP. Consequently, nothing is "left out" of the appellate record.

practitioner is discussing with his or her client whether to appeal, one of the most important considerations at issue is what effect will a negative opinion have on the client, as well as, the general state of the law. Since the vast majority of appealed cases are affirmed, the odds of your client obtaining a reversal are limited from the start. In fact, given the array of "bad things" that might happen, sometimes the best your client can hope for is an unpublished affirmance.[91]

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[91] Generally speaking, the federal and most state appellate rules permit an unpublished opinion to have little if any and precedential value except for the case from which it arises. Nevertheless, with the widespread use of on-line legal databases (either free or pay), unpublished cases are still often accessible by the practitioner. Consequently, even if a decision is unpublished, you may well see it used against you at some time in the future.