An Attorney's Guide to Bolstering a Trial Record Against Appeal

by Marie E. Lihotz

Trial attorneys prepare for issues they expect will arise. But too often, in the course of a trial, a plenary hearing or even a motion, the excitement of 'winning' a point may overshadow an opportunity to solidify a client's position. This oversight allows the proverbial camel's nose to enter the tent, and creates an issue seized upon by an adversary to frame an appeal. Pending appeal, a trial court loses jurisdiction, except for its enforcement power (including interlocutory appeals), consistent with Rule 2:9-1(a), stopping any forward motion. What's worse, a lost opportunity to clarify a ruling and to lock in a success may be the reason an appellate panel orders reversal and remand.

No one likes to do the same thing twice, so what can be done to bolster the record in the event an appeal is filed? In a word, plenty. Below are a few tips, directed to trial lawyers, designed to improve a client's position when facing an appeal.

Factual Findings

Every litigant has the right to seek appellate review. Importantly, however, review is limited to two areas. First, did the trial judge state findings of fact based on "adequate, substantial, credible evidence" in the record.[1] This responsibility of every trial judge is "fundamental to the fairness of the proceedings and serves as a necessary predicate to meaningful review…"[2] Supported findings by the trial court are binding on appeal.[3] Second, when raising legal challenges, importantly, the Appellate Division interprets the law and a trial judge's interpretation is not afforded deference.

In family matters, one of the most common reasons for reversal and remand is the trial judge's failure to comply with Rule 1:7-4(a). The rule mandates every judge "shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury [and] on every motion decided by a written order that is appealable as of right…."[4]

A trial judge must make "specific findings of fact so that the parties and the appellate court may be informed of the rationale underlying his [or her] conclusions."[5] Consequently, when a reviewing court concludes there is satisfactory evidential support for the trial court's findings, "its task is complete and it should not disturb the result, even though it has the feeling it might have reached a different conclusion were it the trial tribunal."[6]

On the other hand, a judge's failure to perform this necessary task on any ruling "constitutes a disservice to the litigants, the attorneys and the appellate court."[7] A judge who enters an order, but neglects to state critical findings, will face reversal and remand, because the Appellate Division cannot infer applicable facts underpinning the stated conclusion when the parties' submissions offer conflicting facts.[8]

Also, a judge's credibility findings are essential to reinforce the decision, as the Appellate Division gives heightened deference to the views of the trial judge "on intangibles not transmitted by the record such as witness credibility, demeanor, and the 'feel of the case.'"[9] Why? Because only a trial judge "hears the case, sees and observes the witnesses, [and] hears them testify," giving the judge "a better perspective than a reviewing court in evaluating the veracity of witnesses."[10]

Judges understand this responsibility, so why risk possible reversal by letting an incomplete record slide? Don't be afraid to request an explicit statement of important factual findings and, if applicable, necessary credibility findings.

There are many ways to do this, which will not be perceived as insolent or condescending. For example, one might frame a courteous request as: "Judge, for the benefit of my client, I assume the court's underlying factual findings supporting the stated conclusion include…." This inquiry is professional and provides the judge with the information necessary to complete the decision.

Or, if hesitant to make the request in open court, submit the request in writing immediately following the proceeding. Cite the rule and request the judge supplement the order to include more detailed findings, copying the adversary.

Some might suggest the matter should be left alone, as the chances an adversary decides to appeal are not high. While this may be statistically accurate, when wrong, an appeal—even one that results in an order requesting the judge's findings—is time consuming and expensive. Even worse, because time has passed and memories fade, the detail provided by the judge may not be as solid as that stated at the time of the proceeding.

All is not lost. If an appeal is filed and the record needs to be enhanced, suggest the judge supplement the decision pursuant to Rule 2:5-1(b). The rule permits a judge to "file and transmit to the Clerk of the Appellate Division and the parties a written opinion stating findings of fact and conclusions of law," within 15 days of the filing of a notice of appeal. Moreover, any statement of reasons previously made may be amplified.[11] This practice, subject to a shortened 10-day time frame, also applies to interlocutory orders subject of a motion for leave to appeal.[12]

Legal Slips

At times, a judge might provide reasons, but misstate the precise legal standard applicable to that decision. Although the Appellate Division defers to supported factual findings and discretionary decisions made by the Family Part, no special deference attaches to the trial judge's interpretation of the law and the legal consequences that flow from the established facts.[13]

An easily understood example is the judge's recitation of the standard of proof. "The New Jersey Rules of Evidence set forth three standards of proof: a preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt."[14] Although the preponderance of the evidence standard is most often applicable in civil matters, the clear and convincing standard applies to issues such as paternity,[15] termination of parental rights,[16] oral agreements to sell real estate,[17] and common law fraud.[18]

Using burden of proof as an example, were a judge to mistakenly state his or her decision relied upon an erroneous standard, one must follow up. Frame the inquiry as: "Your honor, understanding you found plaintiff satisfied her burden under the preponderance of the credible evidence standard, did you also find that same evidence was clear and convincing?" Such a simple question may save a client the aggravation of redoing the entire case before another judge once the Appellate Division reverses and remands.

Always know whether the issue before the court is a legal one (*e.g.*, interpretation of a marital settlement or prenuptial agreement) or one that turns on applicable facts or judicial discretion.[19] Know what factors satisfy the legal standard and be sure the judge articulates each one. If not, speak up.

Preserving Documents

When filing trial court motions, do not attach important documents to briefs. Except in very specific circumstances, trial court briefs are not to be included in an appellate appendix.[20] If the document only appears as an exhibit to a brief, the practitioner will be required to file a motion to supplement the record seeking its inclusion on appeal. Success on that motion depends on a clear demonstration the document was considered and relied upon by the trial judge to reach the resultant determination. If one cannot connect the dots, the document may be excluded completely, weakening a position on appeal. The best course is to only attach documents to a certification or affidavit of the party with personal knowledge.[21]

Discretionary Determinations

The appellate court reverses only when an error is "clearly capable of producing an unjust result."[22] Many family rulings involve the exercise of discretion, including the amount of alimony, the number of overnight visits, the percentage of an interest in a marital asset and the amount of awarded attorney's fees. Evidentiary and discovery rulings are also reviewed under the abuse of discretion standard.

A discretionary determination must recognize what is fair and equitable under applicable law and specific circumstances presented in the matter under review. This requires making a decision in the absence of a fixed standard established by statute or case law. Generally, the court does not second guess the exercise of sound discretion—the choice between two or more legally valid solutions.[23] Thus, "[j]udicial discretion connotes conscientious judgment, not arbitrary action."[24]

Despite this limited standard of review, the exercise of judicial discretion "is not unbounded and it is not the personal predilection of the particular judge."[25] When a trial judge's discretionary determination is shown to rise to be an abuse of discretion, the decision will be reversed on appeal.[26]

An abuse of discretion results "when a decision is 'made without a rational explanation, inexplicably departe[s] from established policies, or rest[s] on an impermissible basis.'"[27] Moreover, the exercise of judicial discretion must be factually supported and legally based.[28] Thus, the exercise of discretion must be "guided by law so as to accomplish substantial justice and equity...."[29]

When a judge interjects a personal viewpoint as the basis for an order, he or she has deviated from the required standard, and relied upon facts outside the

record. An expression of opinion does not fall under the umbrella of acceptable areas for a court to take "judicial notice."[30] This misstep could serve as the basis for appeal. Further, prejudicial error in the admission or exclusion of evidence is reversible.[31] Finally, when "a judge misconceives or misapplies the law, his [or her] discretion lacks a foundation and becomes an arbitrary act. When that occurs, the reviewing court should adjudicate the matter in light of the applicable law to avoid a manifest denial of justice."[32]

Indeed, it is important to seek clarification of discretional rulings, especially those denying the admission of evidence. How does one preserve a record? When voicing an objection, frame the issue specifically and, as necessary, seek additional explanation, particularly on adverse rulings. When evidence is excluded, absolutely be certain to identify the marked exhibit number and state an objection to its exclusion on the record. This allows inclusion of the evidence in the appellate record and preserves the challenge for appeal. Regarding other discretionary determinations, be sure the basis for the decision is stated, rather than the judge merely expressing a conclusion. Again, an inquiry might frame the answer for the judge, thus cementing the appropriate facts as support for the stated conclusions. Using the techniques described above for supplementation of the record aids a client's position.

If one forgot to challenge an error at trial, forget about attempting to discuss it on appeal. Absent clear proof of plain error, a very high threshold requiring a showing of manifest injustice, the appellate court defers to the exercised discretion.[33]

Finally, keep in mind, not every error will result in reversal. Rulings that, although erroneous, do not affect the final determination are viewed as harmless error. Such missteps are "disregarded by the appellate court."[34]

Be Sure the Order is Final

Nothing is more frustrating than receiving the long awaited Appellate Division decision only to learn the appeal was dismissed as interlocutory. Remember, the right to appeal attaches only to final judgments and orders, not interlocutory orders.[35] Interlocutory review must be ordered by the court.

"[I]t is well settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion."[36] To be eligible for appeal, a judgment or decision must be final regarding all parties and all issues, including counterclaims, crossclaims, third-party claims and applications for counsel fees.[37]

Further, substantive provisions of a consent order are not appealable, and a default judgment is not subject to direct appeal.[38] Finally, a trial judge's certification stating an order is final is not binding on the appellate court.[39]

Often, there is an inclination to seek review of every adverse ruling, from discovery requests to requests to limit expert testimony. But, interlocutory orders are appealable only when the Appellate Division grants leave to appeal.[40]

The decision to grant leave to appeal is sparingly exercised and highly discretionary.[41] Review is undertaken when a party demonstrates the need for review in the interest of justice."[42] This stringent standard is based on the 'general policy' to avoid piecemeal review and a desire to avoid disrupting trial proceedings.

If an appeal is heard by the Appellate Division on leave granted, the matter is expedited.[43] Any disposition remains interlocutory, unless the judgment of the Appellate Division is dispositive of the action.[44] Thus, disposition of an interlocutory order under review by the Appellate Division remains interlocutory for purposes of further review by the Supreme Court.[45]

Clearly examine all orders identified in a notice of appeal when filed. Are all matters concluded? For example, did the judge include executory provisions, or list a basis for further consideration? Has a provision for the filing of counsel fee requests been included? Even if other issues were concluded, the inclusion of these types of provisions could make the order interlocutory. If the matter is interlocutory, but leave to appeal was not sought, immediately move before the Appellate Division to dismiss the appeal.

Requests for Stay

Filing an appeal does not stay a final order and the trial court retains jurisdiction to enforce its ruling.[46] If a stay is needed, the first stop must be the trial judge. Remember, to secure appellate jurisdiction there must be an order to review. A motion for stay filed to the Appellate Division will not be entertained until and unless a trial court order denying a stay request is entered.[47] When a trial judge declines to entertain a stay request absent a formal motion, but demonstrated irreparable harm could result before the matter is heard, an emergent motion to the Appellate Division may be filed.[48]

If trial counsel follows these basic steps the path on appeal will be smoother, with the record clarified and the issues crystalized. ⚖

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Endnotes

1. *Cesare v. Cesare*, 154 N.J. 394, 411-12

(1998).
2. *R.M. v. Supreme Court of N.J.*, 190 N.J. 1, 12 (2007).
3. *Ibid.*
4. R. 1:7-4(a).
5. *Esposito v. Esposito*, 158 N.J. Super. 285, 291 (App. Div. 1978).
6. *Beck v. Beck*, 86 N.J. 480, 496 (1981) (*quoting State v. Johnson*, 42 N.J. 146, 162 (1964)).
7. *Curtis v. Finneran*, 83 N.J. 563, 569-70 (1980) (*quoting Kenwood Assocs. v. Bd. of Adjustment Englewood*, 141 N.J. Super. 1, 4 (App. Div. 1976).
8. *See Slutsky v. Slutsky,* 451 N.J. Super. 332, 358 (App. Div. 2017).
9. *Rolnick v. Rolnick*, 262 N.J. Super. 343, 359 (App. Div. 1993) (*quoting Dolson v. Anastasia*, 55 N.J. 2, 7 (1969)).
10. *Pascale v. Pascale*, 113 N.J. 20, 33 (1988) (*quoting Gallo v. Gallo*, 66 N.J. Super. 1, 5 (App. Div. 1961)).
11. *Ibid.*
12. R. 2:5-6(c).
13. *Barr v. Barr*, 418 N.J. Super. 18, 31 (App. Div. 2011).
14. *Liberty Mut. Ins. Co. v. Land*, 186 N.J. 163, 168-69 (2006) (*citing* N.J.R.E. 101(b)(1)).
15. *Sarte v. Pidoto*, 129 N.J. Super. 405, 412 (1974).
16. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982).
17. *Morton v. 4 Orchard Land Trust*, 180 N.J. 118, 129-30 (2004) (*citing* N.J.S.A. 25:1-13).
18. *Liberty Mut. Ins. Co.*, *supra* 186 N.J. at 174.
19. *See Pacifico v. Pacifico*, 190 N.J. 258, 265 (2007).
20. *See R.* 2:6-1; *see also Celino v. Gen. Acc. Ins.*, 211 N.J. Super. 538, 544 (App. Div. 1986) (stating appending relevant documents to motion brief fails to satisfy requirements of Rule 1:6-6, mandating inclusion of admissible facts to support a motion).
21. R. 1:6-6.
22. R. 2:10-2.
23. *See Milne v. Goldenberg*, 428 N.J. Super. 184, 197 (App. Div. 2012) (stating the Appellate Division affords "great deference to discretionary decisions of Family Part judges").
24. *Hand v. Hand*, 391 N.J. Super. 102, 111 (App. Div. 2007) (*quoting Higgins v. Polk,* 14 N.J. 490, 493, (1954)).
25. *State v. Madan*, 366 N.J. Super. 98, 109 (App. Div. 2004).
26. *In re Estate of Hope*, 390 N.J. Super. 533, 541 (App. Div.), *certif. denied*, 191 N.J. 316 (2007).
27. *Milne*, *supra* 428 N.J. Super. at 197 (*quoting Flagg v. Essex Cnty. Prosecutor*, 171 N.J. 561, 571 (2002)).
28. *Madan*, *supra* 366 N.J. Super. at 110.
29. *Cosme v. E. Newark Twp. Comm.*, 304 N.J. Super. 191, 202 (App. Div. 1997) (*quoting In re Presentment of Bergen Cnty. Grand Jury*, 193 N.J. Super. 2, 9 (App. Div. 1984)), *certif. denied*, 156 N.J. 381 (1998).
30. *See* N.J.R.E. 201(b).
31. *R.G. v. R.G,* 449 N.J. Super. 208, 220-23 (App. Div. 2017).
32. *Cosme, supra,* 304 N.J. Super. at 202.
33. R. 2:10-2. *See also Gillman v. Bally's Mfg. Corp.*, 286 N.J. Super. 523, 528 (App. Div.), *certif. denied*, 144 N.J. 174 (1996).
34. R. 2:10-2.
35. *See* R. 2:2-3(a) (stating those matters allowing a party to appeal as of right).
36. *Do-Wop Corp. v. City of Rahway*, 168 N.J. 191, 199 (2001).
37. R. 2:2-3 and 2:5-1; *In re Donohue*, 329 N.J. Super. 488, 494 (App. Div. 2000). *See also* Pressler & Verniero, *Current N.J. Court Rules*, cmts. 2 and 3 to R. 2:2-3 (2017) (discussing appealability of particular decisions).
38. *Winberry v. Salisbury*, 5 N.J. 240, 255, *cert. denied*, 340 U.S. 877 (1950); *Haber v. Haber*, 253 N.J. Super. 413, 416 (App. Div. 1992). *See also* Pressler & Verniero, *supra*, cmt. 2.2.3 to *R.* 2:2-3.
39. S*ee* R. 4:42-2, *D'Oliviera v. Micol*, 321 N.J. Super. 637 (App. Div. 1999).
40. R. 2:2-4.
41. *Vitanza v. James*, 397 N.J. Super. 516, 517 (App. Div. 2008).
42. R. 2:2-4.
43. R. 2:11-2.
44. R. 2:2-4.
45. R. 2:2-5.
46. R. 2:9-5(b).
47. *Ibid.*
48. R. 2:8.