WINNING YOUR APPEAL AT TRIAL

A litigator, who waits until a notice of appeal is filed to think about the appellate issues in a case will likely lose the appeal. It is important to be conscious of the potential of an appeal throughout the case, starting from the beginning. It does not help the lawyer, or the client, to win at trial, only to have victory snatched away by an appellate court.

Often, the issues that will decide an eventual appeal can be identified early on and a trial strategy designed to best position those issues for appellate review. The problem for many trial attorneys, even very good ones, is that they single-mindedly focus on winning before the jury. They fail to realize how their actions – or inactions – will look and sound to an appellate panel. Attorneys must work to break out of this mind set. Only by consciously preparing during the pre-trial and trial stages can one expect to win on appeal.

Begin At The Beginning

Preparation for appeal begins at the outset. An initial client meeting understandably may focus on getting the facts straight. Those facts, however, only become viable claims or defenses when combined with a successful legal theory. The first expression of that theory is the complaint or the answer. Decisions made in formulating the initial pleading can reverberate all the way to the appellate court.

Such basic questions as what are the elements of a claim, or what defenses may be available, establish the framework within which not only the trial but also the appeal will proceed. Cutting corners by simply reusing boilerplate language from prior cases – or colleagues – without thinking through how this case is unique can result in serious problems down the line. Views of the issues may evolve as more facts are learned through investigation and discovery. Time spent at the beginning, however, will pay off later in avoiding problems, and potential motions to amend or correct pleadings.

A major impediment to the thoughtful, well-researched approach to initial pleadings – as it is throughout the trial proceedings – is cost. Lawyers in today's economic climate rarely have unlimited resources with which to prepare for and conduct a trial. Few clients will allow that, and few cases have enough at stake to justify such extravagant conduct. At each stage of the trial then, tension exists between doing everything the lawyer would like and having the funds to pay for it. A reasonable investment early on, however, can reduce costs later, paying large dividends.

One place where this arises is the selection of the trial team. Based on the complexity of the issues, or the amounts in dispute, the likelihood of an appeal frequently can be identified early. In such cases, there is a value to including on the team an appellate specialist, who views the issues and procedures differently from even an experienced trial attorney. The question is whether the budget will allow involving an appellate specialist right away. Even if cost – or client resistance – does not permit assigning an appellate lawyer to the team initially, it is helpful to consult with one throughout the process. Some dangers will be avoided and, when an appeal is ultimately filed, the appellate lawyer will have a knowledge and understanding of the case that cannot be duplicated merely by reading the transcript.

Discovery And Motions Are Not Only For Trial

Discovery consumes much of an attorney's time and attention in modern litigation. Disputes over discovery, however, are distinctly disfavored by judges. They simply hate

spending time on discovery. Judges would prefer that the parties "just get along" and give each other whatever is requested, so the judge can focus on his or her "real" work. When the parties bring a discovery dispute before the court, judges frequently seek to have the parties "work it out." Although such mutual agreements may placate the judge and expedite trial, they also foreclose any appellate review. If a legitimate discovery issue exists, make sure to get a ruling, even at the risk of irritating the judge. In discovery, as at any stage in the trial, without a specific ruling there can be no appeal.

Motions constitute the other major source of appellate issues pre-trial. Here, again, questions of cost and focus combine to create pitfalls for the lawyer not considering a subsequent appeal. The stress of present demands may lead a lawyer to shortchange the uncertain and seemingly remote appeal. Lead trial attorneys often place a premium on developing the facts and arguments aimed at convincing the jury. Preparation of pre-trial motions then falls to more junior lawyers, who may not have the experience or expertise to recognize a potential appellate issue. Even for these lawyers, motions compete with other more immediate needs. It is not unusual after trial for the appellate lawyer to find the record on a vital legal issue consists of only a short two- or three-page motion, citing one or two cases. Such a filing may have failed to adequately advise the judge of the law, or worse, have missed a viable alternative argument that could win the appeal. Remember, if a motion is worth doing, it is worth doing well.

Moreover, appellate courts are reticent to overturn their fellow judges. They have sympathy for the time demands placed on trial courts (often feeling overburdened themselves). An attorney first must convince the appellate court that an issue was clearly presented to the trial court to avoid charges of "ambushing" the judge. In raising an issue, ask yourself, did I do enough, say enough, so that the trial judge really understands the issues? Are the issues – and the judge's resolution of them – clear enough so that the appellate court can see a mistake was made? If the answer to either of these is No, an attorney risks losing the appeal before the trial has even begun.

As motions can arise at any time during the pre-trial or trial stage, they require particular attention to ensure an appealable record. For example, if the trial judge rules orally from the bench, make sure there is a court reporter present and the ruling is transcribed. Laying the ground work for a legal issue by motion does no good on appeal if the appellate court does not know why the movant won or lost. Even if it takes a request for reconsideration, make sure there is a sufficient record.

Some motions raise distinct problems on appeal. For example, a motion *in limine* may, depending on the court rules, need to be renewed at trial to ensure preservation of the issue. With the explosion of motions to preclude experts under *Daubert*,[1] attorneys must pay special attention to the standard of review and the need to create an evidentiary record for these.

A prime source of appellate issues is the motion for summary judgment. Such motions provide the best opportunity to focus the court on a core legal issue. Many trial attorneys, however, shy away from summary judgment because of a perception that judges are predisposed to deny such motions, rendering the significant costs unjustifiable. From an appellate viewpoint, however, summary judgment motions are an outstanding vehicle to present and preserve winning arguments. In considering summary judgment, and explaining the cost-benefit analysis to a client, too much focus on the likelihood of immediate success may fail to give proper weight to the motion's value on appeal.

[1] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Given this importance to a future appeal, attorneys must be sure that the issues raised on summary judgment are procedurally preserved. In some jurisdictions, for example, the issue must be renewed at trial or considered waived. In others, an immediate interlocutory appeal is possible but, without a stay, the issue can be mooted by a trial verdict. Having determined that the time and expense of a motion for summary judgment are justified, it would be a big mistake not to take every precaution to properly preserve the issue for appeal.

In The Stress Of The Big Moment, Do Not Forget What Comes Later

At trial itself, the tension between winning the verdict and winning the appeal builds in intensity. Time to reflect and research, which may have seemed not worth the effort in the early stages, now simply disappears. An understandable zeroing in on the witnesses and evidence, overlaid with the myriad logistical details of putting on a case, can consume the trial counsel. It is useful, therefore, to revisit the question of adding an appellate specialist (if one has not already been assigned). The different approach of the appellate attorney can be valuable during trial. Choices and compromises have to be made, within short timeframes. Bringing an appellate viewpoint to bear helps ensure that any choices, which may weaken, or even abandon, a potential appellate issue for appeal, are made deliberately. Matters and evidence that may seem secondary to convincing a jury may be far more important for appeal.

The best example is deciding whether to object to certain evidence or testimony. Experienced trial and appellate counsel know that well-founded objections are often not made for tactical reasons, reflecting concern for their potential impact on the jury. However, the decision not to object eliminates the issue for appeal. Sometimes an objection is justified for appellate purposes alone. What is important is making an informed decision, recognizing the risks of forgoing the objection. When an objection is made, again, be sure to get a clear ruling from the judge. Be careful that a discussion of an important objection does not turn into a protracted negotiation in which counsel agrees to admission or rejection of evidence without the judge actually deciding the question.

Further, do not simply accept an evidentiary ruling that seems wrong. The liberal standard of review of such questions places the loser in a decidedly unfavorable position later on appeal. Consider asking the court (preferably out of hearing of the jury) for an opportunity to reargue. Many years ago, I second-chaired an experienced county prosecutor at a rape trial. He offered the testimony of a second victim. The judge initially sustained the defendant's objection that testimony about the prior sexual assault was hearsay and simply too prejudicial. The prosecutor went back that night and had each woman repeat her story, making a list of every detail that was the same. The next morning, the prosecutor asked the judge to reconsider, listing a dozen facts to show a common scheme. The judge reversed his ruling, and the rapist was convicted. Reconsideration of a ruling may provide an attorney a better chance of getting the trial judge to change his or her mind than of convincing an appellate court that the trial judge's initial ruling was error.

The problem of insuring that the record accurately reflects the basis of a judge's ruling is exacerbated at trial, particularly in courts that favor sidebar discussions. Frequently, the effort to ensure that the jury does not overhear something means the court reporter cannot hear either. If it is an important point, make sure the issue, and its resolution, are reflected on the record. Otherwise, a potentially winning argument may not even be considered by the appellate court.

Jury instructions present another area of concern. Many judges prefer informal charging conferences in chambers where competing proposals can be hashed out. In the great majority of

these conferences, there is no record of the back-and-forth between counsel and the court. Even if written proposed instructions were submitted, on appeal a question can arise whether the lawyer abandoned a requested instruction during the conference. It is critical, therefore, to get any objections to the judge's final instructions on the record after the charging conference to demonstrate any error was preserved.[2]

One last point on instructions: listen when the judge reads them to the jury. The judge may make a mistake or have changed the wording. Thinking the trial is over and not paying attention to the judge could permit an erroneous instruction to be given without objection, leaving no remedy on appeal.

It's Not Over Till It's Over

After literally years of struggle, the jury finally returns a verdict. The attorneys are either elated or crushed. However, there is still more to do. Post-trial motions can be critical to preserving issues on appeal. For example, under Federal Rule of Civil Procedure 50(b), if the trial court failed to rule on a motion for judgment as a matter of law, the party must renew the motion within the time for filing a motion for a new trial. In other jurisdictions, even if such a motion was denied during trial, it must be renewed post-trial. Some courts have very short time limits for post-trial motions, or require very specific requests for relief. In the euphoria (or despair) following the jury's verdict, failure to remain alert to such matters can turn a potentially successful appeal into a simple order to dismiss the appeal.

Throughout a case – from initiation through trial and beyond – attorneys must be aware of each decision's potential impact on an appeal that seems a distant possibility. Lawyers who do not think about appeals both before and during trial, or only engage an appellate specialist when it is time for the notice of appeal, may receive a rude awakening. The key to winning an appeal is to plan for one from the outset of the case. Some appeals still may succeed in spite of lack of attention during the trial stage, but do not count on that. Let opposing counsel be the one surprised when the time to appeal arrives. Be the one who prepared from the very start and you will be well on the way to victory on appeal.

[2] *See* Fed. R. Civ. P. 51(c). In one state, in which I practice, counsel is presumed to have agreed to all instructions if received from the judge in writing before the charge to the jury, even when the lawyer had previously objected.