WINNING THE APPEAL WHILE STILL AT TRIAL COURT

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Every trial lawyer knows an appeal is a critical part of a case. Regardless of the years spent litigating a case, the successes or failures, the money spent, the hours invested – it might all be reversed on appeal. For that reason, working through a case mindful of a future appeal is important.

While a case is active at the trial court level, there are a number of things to keep in mind from an appellate perspective. This article and discussion will not be comprehensive, but some key considerations will be addressed, primarily with regard to creating the record that will be needed on appeal. A trial lawyer needs to ensure the record is sufficient to either demonstrate error and prejudice on appeal after a loss, or dispute any error, or demonstrate it was harmless, after a win.

Evidence

One of the most fundamental parts of a case is to ensure you are providing, and admitting, admissible evidence to support a finding in your client's favor. Whether on summary judgment or at trial, be sure all material facts necessary to sustain a finding in your client's favor are in the record. For evidence submitted on the papers, be sure personal knowledge and a proper foundation is established for every fact or exhibit. At trial, be sure your exhibits are actually admitted by the trial court. This may include checking with the court clerk to confirm what his or her record shows in terms of what evidence has actually been admitted, as the court's version will become the official record of evidence.

You should also be mindful of ensuring the record includes or at least addresses demonstrative evidence, including any visual aids or presentations that may provide helpful context or additional information along with the testimony. For example, if an expert presents a PowerPoint deck or handwritten charts, you can seek to admit their work into evidence if possible, or at least be sure the testimony or follow up questions clarify what is being referred to, to avoid confusing the appellate court down the road.

Objections

To preserve your objection for an appeal, you must be sure you make the objection below – for example as part of your summary judgment papers, in a motion in limine, or while objectionable evidence is being offered during trial – and get the ruling on the record. To the extent possible, put your objections or responses in writing. Getting the reasoning for the ruling is often not required, but it can be useful to make clear what the judge did and why.

Being mindful of getting your objections in the record is especially important in cases where the judge prefers to engage in lengthy discussions off the record, in chambers, or at side bars. The trial lawyer needs to be sure that the party's objection and position are summarized on the record at the next opportunity.

Another pitfall can arise if a judge defers ruling on a motion in limine, or if a motion in limine is denied without prejudice, for example where the judge says he or she will consider objections one at a time during trial. In these instances, you must state your objection again when the

evidence is offered at trial.

Given the consequences of failing to object, many lawyers err on the side of making too many objections. Although the thinking behind this approach is not irrational, making too many objections can also have negative consequences. For example, if you bombard a judge with too many boilerplate objections on summary judgment papers, you can hurt your credibility and diminish the chance that the judge will focus on the best objections to the key evidence. At trial, too many objections can come across as obstructionist or careless, and can impact your effectiveness. For these reasons, you need to use your knowledge of the case and good judgment to be sure you make and preserve the right objections.

Jury instructions

An erroneous jury instruction is a strong issue on appeal because instructions are reviewed de novo. However, claimed errors are often waived if a party consents to, or even appears to consent to, an erroneous instruction. Preserving objections to final jury instructions or verdict forms can be difficult in courts where the trial judge conducts a lengthy jury instruction conference in chambers and many proposed drafts are exchanged.

To best preserve your arguments regarding jury instructions and the verdict form, you want to be sure to lodge your proposed instructions and verdict form with the court, so that it is clear on appeal which instructions your side proposed. You will want to carefully track your objections to the other side's instructions and put these in writing if possible, or if necessary summarize those objections on the record the next time the court reporter is present. If an appellate court cannot tell which side requested an instruction, you risk facing a presumption that your side requested or accepted the instruction, and therefore waived any error.

Orders and Statements of Decision

The order or judgment being appealed from is often the first thing the appellate court will review. For this reason, to the extent possible with your trial judge, you will want to help position that order or judgment as favorably as possible for your client's position on appeal.

For example, if you prevail on summary judgment, you will likely want a robust order that addresses the facts, findings, and conclusions, and resolves all material evidentiary objections. Although not all judges will accept or use your work, you can try to have a hand in crafting the ultimate order by submitting a proposed order with your reply brief, drafting a more formal order consistent with a tentative ruling in your favor to bring to the hearing, or at the hearing, offer to draft the order in light of the judge's discussion on the record.

If you prevail after a bench trial, you should request a statement of decision. If you believe there are missing facts, unaddressed arguments, ambiguities, or omissions, you should raise that with the trial court and give the trial court the opportunity to fix it.

Transcripts

The transcripts are the means by which the appellate court will review the evidence and objections discussed above. A clerk's transcript, appellant's appendix, or other similar compilation, will contain the pleadings, briefs, and other documents from the case; the reporter's transcript will contain the written transcription of hearings and trial. Keep these two critical compilations of "the record" in mind as you proceed in your case.

For the clerk's transcript, be sure you actually file or formally lodge any briefs, proposed jury instructions, or other papers or substantive responses you provide the trial court judge. If a trial judge asks for or allows responses or substantive discussions over email, for example, that may not be included as part of the formal record, so be sure to follow up by filing or lodging the necessary papers.

For the reporter's transcript, be sure you arrange for a court reporter to be present in state courts where a reporter is not provided. At all times, be sure you speak slowly and clearly so that an accurate transcript can be prepared (this is especially important where the transcript may be created later from a tape recording). And pay attention to when the reporter is transcribing or not. For example, reporters often stop transcribing when a video is played during trial. It is helpful to prepare and lodge a transcript of the portions of video that were played to be sure an appellate court has easy access to see what that video contained.

Prejudice

Litigants are entitled to a fair trial, not a perfect trial. On appeal, it is therefore not enough to demonstrate error; a successful appellant must also demonstrate prejudice. This means proving, for example, that an error resulted in a miscarriage of justice or that a different result would have been probable without the error. Therefore, if you believe an error has occurred, in addition to noting your objection, give the trial court a chance to fix it, ask for a remedy, make an offer of proof, and articulate the prejudice. This may include moving to strike testimony

or asking that the jury be admonished, or if evidence is excluded, make an offer of proof so the appellate court can consider the possible impact.

When to appeal?

Although most trial lawyers think about the appeal from the final judgment (and the "one final judgment" rule), appeals can actually come up throughout the life of a case. Appealability is generally controlled by statute. In many cases, if you fail to take an interlocutory appeal from an order that is immediately appealable, you waive your right to challenge the issue. Even if an adverse order is not immediately appealable, you also may petition the court for interlocutory review through a writ. Writs are rarely granted, but worth consideration for a significant and adverse order.

The art and science of post-trial motions and proceeding with an appeal or a writ once you find yourself before the appellate court are beyond the scope of this article, and worthy of their own discussion.

Finally, although all of these details are critically important, it is worth noting the single most important thing you can do at the trial court to improve your chances on appeal: WIN. Reversals in civil appeals are uncommon; in California well over two-thirds of civil cases are affirmed on appeal. With that in mind, a good trial lawyer will balance the long view of a case on appeal with his or her effectiveness, credibility, and rapport with the judge and jury.

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Carly O'Halloran Alameda represents clients in a variety of civil litigation and appellate matters with an emphasis on complex breach of contract claims, real property disputes, and California appeals. Her practice includes representing clients in California state and federal courts, as well as in alternative dispute resolution processes, including AAA, JAMS, and ICC arbitrations. Carly's strategic and practical approach to litigation is influenced by her experience as a corporate board member of Mammoth HR. Beyond simply litigating a case, she understands how a dispute fits into a client's business strategy so that she can effectively achieve the most favorable result.

Carly also previously served as clerk to the Hon. Mark B. Simons of the California Court of Appeal (First District). When handling a case on appeal, she understands the importance of selecting the right arguments and framing the issues in a way that will resonate and succeed with an appellate court.

Services

- Appellate Litigation
- Business Litigation
- Private Client
- Real Estate
- Real Estate Litigation

Experience

- Representing real estate developer through four week jury trial in San Francisco Superior Court, involving claims of rescission, breach of contract, and fraud.
- Successfully obtaining writ relief to overturn summary adjudication in a real estate dispute.
- Achieving award on behalf of manufacturer in six week ICC arbitration related to failure of components in a nuclear power plant, in which the contractual limitations of liability were successfully enforced, the opposing party's damages claims in excess of $7 billion were rejected, and our client was granted a fee and cost award as the "prevailing party" of over $58 million.
- Obtaining a multi-million dollar settlement on behalf of a solar company days before the AAA arbitration hearing began, in a breach of contract dispute.
- Winning an arbitration award as part of a trial team in a case involving disputed purchase options and a multimillion-dollar real property transaction.
- Successfully resolving a significant dispute regarding a party's right to indemnification that turned on a gross negligence exception.

Distinctions

- Benchmark Litigation "40 & Under Hotlist" (2017-2019)
- Northern California Rising Stars by Super Lawyers (2012-2019)
- The Best Lawyers in America in the area of Real Estate Law (2020)

Education

- University of California, Berkeley, School of Law (J.D., 2006) - Associate Editor, Ecology Law Quarterly; Best Oral Advocate, Moot Court; American Jurisprudence Awards - Real Estate and Trial Advocacy
- California Polytechnic State University (B.S., 2003) - Liberal Studies