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Waging war in the trial court and at the court of appeal

A loss at trial is not necessarily a lost war. Sometimes it just means a prolonged campaign

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War is "an organized, armed, and, often, a prolonged conflict that is carried on between…parties typified by extreme aggression, social disruption, and usually high mortality." (*http://en.wikipedia.org/wiki/War*) We trial attorneys believe we fight our best battles in the courtroom. We must keep in mind, however, that sometimes the war is won later, through the decision-making process of a dispassionate panel of three or eleven jurists, and not by twelve people from the community who are involved in the day-to-day drama of trial. What follows is advice to broaden your plan of attack to include the whole campaign, and not just the single battle of trial.

Have a plan

Your most basic case plan should contain a written outline of each legal theory in your case. Use your jury instructions and include the elements of each cause of action and each defense. As to each issue, know who has the burden of proof and what the standard is. Use your plan early on. Do not wait until the eve of trial to outline or review your appellate plan. Remember that most appeals take place after the entire case has run its course. Discovery, pretrial hearings, and pretrial rulings are all potential early skirmishes that can set the stage for your appellate records months or years later.

What is appealable?

Know what is subject to appeal. Just because a trial court ruling seems unfair does not mean it is subject to appeal. The Code of Civil Procedure section 904.1 contains a list of appealable judgments and orders in unlimited civil cases. Section 904.2 covers limited civil cases.

On the record

Like the proverbial tree falling in the forest, from an appellate court's perspective, if it is not on the record, it never happened. You can build a strong foundation for your appellate record by filing trial briefs and motions in limine that address potential appellate issues. Consider that factual issues are typically subject to a lenient discretionary standard, while constitutional issues are typically subject to de novo review. Frame your trial briefs and motions in limine to cover as many constitutional issues as possible within the context of your case.

One example of such a pleading is a trial brief on the standard the judge should use in ruling on challenges for cause in jury selection. Not only is this trial brief a useful reference for the judge and something she can keep handy as you conduct voir dire, but it also clearly lays out the legal standard for actual bias: "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party" (Code Civ. Proc., § 225(b)(1)(C) It includes a reminder, with California legal authority, that once bias is shown, nether the judge nor opposing counsel can rehabilitate that potential juror. (*Lombardi v. California Street Ry. Co*. (1899) 124 Cal. 311, 314.) This pleading is filed with the court and becomes part of the appellate record, thus increasing the likelihood your appellate court will have the opportunity to consider this issue should an appeal be necessary.

Once trial begins in earnest, you are naturally focused on the courtroom drama as it unfolds in real time. This is where the shortened court day, the judge's desire to keep the trial moving, and your single-minded focus on the jury and the evidence can combine to create a combination lethal to your appellate record. This is also where the doctrines of *estoppel* and *waiver* are most dangerous. There are few issues that can be raised for the first time on appeal. This means that if you fail to raise an issue with the trial court, or if you raise the issue but do not pursue it, you are likely to have waived it as an appellate issue.

Thus, it is crucial you keep a separate system for keeping track of "recordable" or potential appellate issues. Check regularly at breaks to see if you need to request a moment of the court's time, outside the presence of the jury, to make a record. If the judge refuses, repeat your request at the next break. Ask to adjourn five minutes early. Ask to start five minutes early. Decide what you need to preserve, and do so quickly and efficiently. Once the judge knows you will not abuse the privilege of the court's time, you will likely find the judge being more permissive with your request to make a record.

When you go off the record for discussions and "sidebars," request to go back on the record at the soonest available opportunity. Memorialize any off-the-record requests and rulings as soon as you can go back on the record. And make

sure you are in fact on the record! This means you must look to make sure the court reporter's fingers are moving when you are speaking.

Objections

When you make an objection, get a ruling on the record. To preserve an issue for appeal, you must (1) object, (2) request a cure, and (3) secure a ruling. The trial record should reflect timely, meaningful objections, made on clearly stated grounds and followed by a ruling by the court (or a clear request to rule). The timing of your objection is important. Generally, the objection must be made as soon as the objectionable situation arises. A premature or late objection is practically the same thing as no objection and does not preserve error. When in doubt, object. Be aware that you invite error – and lose the appeal – if you rely upon evidence that you objected to at trial.

Jury instructions

Craft flawless jury instructions and object to flawed jury instructions. Error in instructing the jury is one of the more fruitful areas for finding reversible error. If you do not object to the instructions proposed by opposing counsel or the court, it is likely a higher court will find you consented to any error. If you do not request a particular instruction, it will be an uphill battle to claim error in the court's failure to give a particular instruction. If a particular instruction is too general, incomplete or confusing, it is incumbent upon you to request a clarifying instruction or submit a superior instruction.

Discussions about jury instruction are often conducted in chambers or off the record. Stay alert to make all objections about jury instruction on the record, even if they have been discussed at length in an off-the-record conference. Object before the instructions are read to the jury. Be specific about which portion is objectionable and be clear about the grounds for your objection. Make sure to get a ruling on each and every objectionable instruction. Be aware that you invite error – and lose the appeal – if you request a jury instruction and then later complain to an appellate court that the same jury instruction was erroneous.

Craft a clear verdict form. A special verdict's form is analyzed as a matter of law and therefore subject to de novo review. Legal issues that are reviewed de novo have a better chance for reversal than issues of fact, which are reviewed using a more deferential standard. If there is a claim that the verdict is "hopelessly ambiguous" and the jury has been discharged, the judgment must be reversed. (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083)

Remember that a lost battle at trial is not necessarily a lost war. Sometimes it just means a prolonged campaign. We trial lawyers love our war stories. As Thomas Hardy put it, "War" – after all – "makes rattling good history."

Leary

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