CORPORATE COUNSEL
An ALM Website
corpcounsel.com | June 12, 2015

10 Things Appellate Specialists Should Tell Trial Counsel

From the Experts

Robert J. Stumpf Jr., Karin Vogel and Guylyn Cummins

Appellate specialists focus on the courts of appeal. But they also can help their colleagues get ready to present their cases in the trial courts. In-house counsel who manage their companies' litigation would be wise to establish and facilitate communication between their lead trial counsel and appellate specialists. Toward that end, here are 10 things appellate specialists should make sure they advise trial counsel.

1. Get the Evidence Into the Record, and Make Sure It's Authenticated

Evidence that is not in the record, properly authenticated, does not exist on appeal. Nor are arguments and objections preserved for appeal unless they, too, are in the record. This means you should avoid things like: colloquy in chambers on key issues with no court reporter present; sidebar discussions with the judge that are not memorialized at the time or at the next break; offers of proof made orally but not made on the record; and trial exhibits that were introduced—but not admitted—at trial.

If someone is trying the case with you, you might ask them to keep track of these things, just to make sure. Before resting your case, you should also ask the trial court to confirm that all exhibits you offered have been admitted or, if not, that the trial court's rulings are in the record.

And don't forget in limine motions. Win, lose or draw, make sure there's a record of the trial court's rulings. When in doubt, reoffer the same evidence at trial.

2. Make Your Objections, Even if They're Obvious and the Court Is Sure to Overrule Them

This heading says it all—except you also need to make sure your objections are on the record. Otherwise, you likely will have waived them. If necessary, make your record at a court break before a court reporter. Set forth your objection and the judge's ruling and rationale. You can't make the judge rule on an objection, but you do have to make it.

3. Prepare Jury Instructions Early, and Make Sure They Are Preserved for Appeal

One helpful thing you can do at the beginning of a case is to study the key jury instructions. After all, at the end of the day, the law is presented to the jury in the form of instructions. If you know the endgame at the beginning, it's much easier to take meaningful discovery, map out effective strategy and tailor your arguments at trial.

In many cases, the instructions will not be controversial. Other times, they may become the crux of the dispute. The earlier you identify the key issues, the better. It goes without saying that you should make sure you make a record of the instructions you propose and the trial court's rulings. This includes having a court reporter transcribe the colloquy among counsel and the court on all instructions, including your objections to the other side's instructions.

4. Do the Right Thing by Statements of Decision

When it comes to statements of decision in court trials, two rules are especially important:

1. If you are the losing party, you almost always will want to request one.
2. Even if you win, you likely will want to object to one that is deficient.

In a nonjury trial, the court is required, upon request, to provide a statement explaining the factual and legal basis for its decision. But you must request one, and state the principal controverted issues for which it is requested. If you waive it, either by failing to request it or requesting it too late, the court of appeal will presume the trial court made all factual findings necessary to support the judgment. This means the necessary findings of "ultimate

facts" will be implied, and the only issue on appeal is whether the "implied" findings are supported by substantial evidence.

5. Don't Give Short Shrift to Drafting a Special Verdict Form

Whether to use a general or special verdict form requires careful thought. On appeal, a jury's general verdict is presumed to mean the jury found in favor of the prevailing party on each cause of action, and the court of appeal will affirm the judgment so long as *any* cause of action is sustained on appeal. A special verdict, however, focuses the jury on every contested ultimate fact issue required to prevail—for example, was the defendant negligent?—so that nothing remains for the court to do but to draw conclusions of law and render judgment.

Special verdict questions must be simple, requiring only a "yes" or "no" answer, or a percentage or a sum. And damage components should be separate. If questions are unclear and a jury reaches inconsistent answers, or if the form is incomplete, these constitute reversible error on appeal.

6. Make Sure to Appeal On Time

In federal court, there is some leeway to file a "late" notice of appeal. See Rule 4(a)(5) and (6) of the Federal Rules of Appellate Procedure. Not so in California State Court. If a party does not file its notice of appeal on time, the court of appeal has no jurisdiction. See *Dwayne P. v. Super. Ct.* (2002).

As to judgments, the rules are usually pretty clear. But even then, the timing can get complicated when parties file post-trial motions, seek reconsideration or fail to give proper notice of entry of judgment.

When it comes to orders other than judgments, the plot thickens. Most nonappealable orders can be reviewed only by filing a writ. The "usual rule" is a party must file a writ petition within 60 days after notice of entry of order. See *Cal West Nurseries Inc. v. Super. Ct.* (2005). Writs challenging some orders, for example, rulings on summary judgment, must be filed within the time periods prescribed by statue. The watchword is not to memorize all the rules but to stay alert and check which time periods apply to which orders before it's too late.

7. Give Good Advice About How to Stay Enforcement Pending Appeal

An appeal may be of no benefit to the losing party if the judgment or order appealed from is enforced while the appeal is pending. Some judgments are automatically stayed: for example, mandatory injunctions in state (but not federal) court. And some, like money judgments, are stayed only by posting a bond. (Obtaining a bond takes time.)

The key is to look ahead and be prepared. In a state court appeal in which a bond is required, the trial judge court has power to stay enforcement until 10 days after the last day to appeal. C.C.P. § 918. Ask the court to issue the temporary stay *before* the judgment is entered. In federal court, the judgment (except in an action for an injunction) is automatically stayed for 14 days after entry. Use these temporary stays to obtain the bond so there is no lapse after entry of judgment. Last resort? If the trial court refuses a stay or a party is unable to post a bond, seek a writ of supersedeas from the appellate court.

8. Be Aware of the Special Rules About Seeking Review in a State's Highest Court

By the time a case is a candidate for review in a state's highest court, trial counsel, with the assistance of in-house counsel, already should have sought advice from an appellate specialist. If not, here are three rules trial counsel need to keep in mind:

1. In most states review in the highest court is discretionary, not a matter of right. So, a big part of obtaining review is to convince a state's highest tribunal that your case is "worthy" of review. Usually, this is done either by showing that your case (1) involves an important and unsettled question of law; and/or (2) creates a "split" of authority among the intermediate courts of appeal. The fact that a court of appeal's opinion is wrong usually is not enough.
2. Trial counsel need to pay particularly careful attention to deadlines for seeking review. Specialized rules usually apply. And not following them could mean the high court lacks jurisdiction to hear your case.
3. In seeking review, it's often helpful to solicit amicus letters from third-party trade associations or other high-profile litigants urging the court to hear your case. The goal is to make your case stand out as one that deserves the court's attention.

9. Give Advice About the Standard of Review—and When to Settle

The standard of review is the lens through which the appellate judges will view your case. It is not the same thing as the burden of proof in the trial court. And it matters a lot. In many situations, e.g., on appeals from rulings on discovery or trial management issues, the court of appeal only will reverse if it finds the trial court abused its discretion—a difficult standard, indeed. Similarly, the court of appeal will reverse factual findings, whether made by the jury or the court, only if they are not supported by "substantial evidence," another tough thing to do. When it comes to legal questions or issues of contract interpretation, however, courts of appeal typically will apply the independent review or de novo standard, the most favorable level of review for an appellant.

The standard of review that applies also can affect settlement strategies. If the trial court's errors are reviewed only for abuse of discretion or substantial evidence, an appellant probably will have little settlement leverage. (Even if the court of appeal does reverse, it might well remand for a new trial, creating additional uncertainty and expense.) The moral is clear: the de novo standard is an appellant's best friend.

10. Tell Trial Counsel When to Consult an Appellate Specialist

And err on the side of doing so too soon. Appellate issues may arise at various points in the litigation. Sometimes those issues are trickier than issues that arise post-judgment and require advice from an attorney who knows all aspects of the appellate process. An hour with an appellate specialist early in the process may save a hundred hours down the road.

In sum, in-house counsel can and should play an important role in supervising litigation counsel in determining how and whether to seek review of an adverse decision in a state's highest court. The 10 topics discussed above may serve as a checklist for facilitating this discussion.

Robert J. Stumpf Jr., Karin Vogel and Guylyn Cummins are members of Sheppard Mullin's certified appellate specialist team and have handled more than 300 appeals and writs, including more than 85 published appellate opinions. Stumpf is a former chair of the Appellate Law Advisory Commission, which administers the appellate specialist certification program for the State Bar of California.