How appealing

The trial lawyer and appellate lawyer's delicate *pas de deux*


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By Miles B. Cooper

The lawyer smiled inside as the clerk finished reading the verdict. Substantially more than the defense's last offer. The lawyer buzzed a bit while taking down the jury polling and as the judge said a final "thank you" to the jury. Then the lawyer went outside to get feedback from the jury, and take one of many necessary steps to protect the verdict…

Plan for the appellate fight early

So you're headed off to trial soon. On the trial checklist – an appellate strategy. Getting a great verdict is wonderful. But keeping it through appeal – well, that's where some forethought comes in. Appellate lawyers take a different approach than trial lawyers. Trial lawyers sometimes push the envelope. They get tired at the end of the day and might forget to make a record of some sidebar conversation that, post-verdict, all of a sudden becomes crucial.

A trial rule of thumb: the key issue on appeal will be whatever did not make it into the record. Appellate lawyers are procedural mavens, and they expect better records than trial lawyers typically provide. So, check in with your friendly neighborhood appellate lawyer to make sure you are delivering what that lawyer wants post-verdict. And if there are any significant evidentiary issues or motions in limine, consider talking to an appellate specialist before the briefing is due.

Win the war, not the battle

In many cases, there are evidentiary issues that become hard-fought battles. Take a step back during these fights. Do you need to win the battle to win the case? John McGuinn, an accomplished trial lawyer, has a simple three-part maxim. 1. What are you trying to prove? 2. Why are you trying to prove it? 3. What are you proving it with?

If there's another way to prove the issue, or if you realize you're fighting just to fight, consider letting it go. While certain evidence is sometimes critical, many times there are other ways to get that proof. If there's another path, backing off the issue removes an appellate issue.

Objection!

Objections are a dilemma. We want the jury to feel like they received all the information they needed. Objections run contrary to this position. They sound like you are trying to keep something from the jury. Make every effort to highlight objectionable material in ways where you don't have to object in front of the jury. Motions in limine, for example. In some cases, one can thread this needle. Then, in closing, one can say, "You didn't hear us object. Not once. The defense? They objected all over the place. They didn't want you to see [this key evidence] or [that key evidence]. We wanted you to have all the information. They did not."

But. There's always a but. Failing to object, in many situations, waives your right to appeal that issue. Your appellate colleague will point this out if you missed what the appellate lawyer feels was an important objection. So consider your objection strategy wisely.

Handling the appeal

A bar card is a bar card, right? Why spend money on an appellate specialist when you were the one at trial and you know the case better than anyone else? *Because appellate practice is a completely different ballgame.* If the case was important enough to try, it is important enough to have appellate help. Appellate help does not mean handing off the reporter's transcript, the clerk's transcript, and waiting a couple years for a favorable opinion. The trial team has granular knowledge of the case. In some situations, the trial team might even do the initial draft of the statement of facts and procedural background. The appellate lawyer then re-works the information so that it reads well to a justice (and the justice's research attorneys).

If the finances truly cannot justify an appellate lawyer to handle the appeal, consider a hybrid approach. Buy a specialist's time to help edit the brief and critique a practice oral argument. Whatever the approach, make sure the roles and responsibilities are clearly defined. I've heard of more than one case where the appeals opportunity was lost because one lawyer thought the other was filing the notice of appeal.

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Back to our lawyer and the verdict. The lawyer spoke with the jurors in the hall, and with some the following day. The lawyer had an opportunity to let the jurors know that the defense would likely take steps to try to reverse the verdict, that the defense may try to question the jurors to get grist for an appeal, and that the jurors had an absolute right not to discuss the case with the defense. Two years later, one gadfly juror notwithstanding, a favorable appellate opinion arrived. Not too long after, so did a check for the verdict, costs, and two years' of 10 percent interest. Not a bad rate of return these days, if one can get it.

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