How to be Your Own Appellate Counsel at Trial

Appellate lawyers will tell you that many cases justify the extra cost of having an appellate lawyer involved long before a notice of appeal is filed.

And they are right. But trial lawyers have been trying cases without appellate lawyers for a long time, and it remains true that many cases *don't* justify the extra cost. Having said that, it is equally true that any case worth taking to trial that justifies a little forethought about a possible appeal. What follows is a list of commonly overlooked trial matters that can make or break an appeal.

- The pretrial order: Most federal pretrial orders contain a recitation that the pleadings are amended "to conform with" the pretrial order. This is not mere boilerplate. Any claim or defense omitted from the pretrial order is no longer a part of the case, regardless of how often, or well, it was pled. Conversely, any claim or defense in the pretrial order is now in the case, regardless of whether it was ever previously pled. If the pretrial order's statement of issues is unsatisfactory to you, you need to make a record of that fact, preferably in the order itself.

- Jury selection: Trial counsel needs to have at least a passing familiarity with *Batson,* which addresses the frequently-encountered issue of peremptory strikes that are, or are alleged to be, racially motivated. An excellent article is S. Overland's "The Shrinking Strike Zone: Avoiding Problems During Jury Selection in the Age of Batson," on the web at http://www.thejuryexpert.com/2010/05/the-shrinking-strike-zone-avoiding-problems-during-jury-selection-in-the-age-of-batson/. At an absolute minimum, trial counsel should keep notes on, and be prepared to explain, the thinking and motivation behind each of her peremptory challenges.

- Jury selection (continued): In order to challenge on appeal a trial court's refusal to strike a juror for cause, you should, in addition to objecting: (1) use a peremptory challenge on that juror; (2) use up all of your other peremptory challenges; and (3) identify for the record the other juror on whom you would have used that peremptory, and why. This excellent point is just one of many in an excellent article, T. Crooks, "Preserving Error in Federal Court: Making Sure You Get Your Second Chance on Appeal," on the web at http://www.1215.org/lawnotes/lawnotes/preserv2.htm

- *In limine* motions: An *in limine* motion may not be sufficient by itself to preserve error. If your motion is denied, you should renew your objection to the evidence or argument that was the subject of that motion at the time that the evidence is offered, or the argument made.

"Let the record reflect": There are all sorts of things that go on at trial, which might be grounds for appeal, that your Court Reporter is not obliged to take down. Discussions in chambers; and, in some courtrooms, bench conferences,

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voir dire, opening statement, the charge to the jury, and/or closing argument. If anything is said during the course of a trial that you may want to mention on appeal, you must, when back on the record, describe for the record what was said. You don't have to use the pompous-sounding phrase "Let the record reflect," but you do have to get it in the record. Likewise, when a deposition is read to the Jury, many Court Reporters will simply record "Deposition of Smith read to the Jury." The best course here is to offer the transcript of the Smith deposition; unless you do so, the appellate court will have no idea what the Jury heard from witness Smith.

"Let the record reflect" (continued): The same is true of things other than words: the fact that one juror is sleeping, and another is texting; the fact that construction next door is making it difficult for some of the jurors to hear the witness; the fact that a member of the audience appears to be signaling one of the jurors; the possibilities are endless. You must ask the Judge for appropriate relief, and, when doing so, describe the problem for the record in reasonable detail.

- Opening statement: Everyone knows that, ordinarily, you must make a contemporaneous objection to anything – argument, evidence, procedure, or anything else – if you want to be able to complain about it on appeal. Yet there are countless appellate decisions refusing to reverse for improper argument on the simple ground that no contemporaneous objection was made. Either appellate lawyers are complaining, on appeal, about arguments that really weren't objectionable, or trial lawyers are overly reluctant to interrupt opening statements and closing arguments. If the fear is that the Judge will be displeased, find a couple of cases in advance, one on what kind of argument is improper, and one in which lack of objection doomed the appellate point, have them handy, and use them to show the Judge, politely, that your objection was well-founded and necessary.

Trial by consent: There are often good strategic reasons to refrain from objecting to irrelevant evidence. Be aware, however, that if the other side offers irrelevant evidence, and you don't object, the Judge may later find that the irrelevant evidence had the effect of placing a new issue before the jury, and that your failure to object amounted to trial of the new issue by consent."

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Offering and proffering: Keep a list of your exhibits, and periodically check to be sure that you have seen to it that each one was marked and received by the Clerk; that each one was offered; and that each one was either admitted or refused by the Judge. Also, know, in advance, the law in your jurisdiction about proffers of

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testimony: must it be word for word, from the witness? Or will a summary of the anticipated testimony, given by the lawyer, suffice? If you rely on the latter, be certain that you describe the anticipated testimony fully and completely for the record.

Objections: Everyone knows that these must be contemporaneous, and specific. The appellate court will ordinarily not consider grounds for objection, however meritorious, that were not mentioned at trial. To this we add only: (a) make sure that the Judge *rules* (remarkably, some Judges avoid doing so when possible); and (b) better late than never. If you failed to make a contemporaneous objection, make one as soon as it occurs to you. The contemporaneous-objection rule is designed to give the trial judge a fair opportunity to do right, and there will be circumstances when she can do this after the fact.

Requests for curative instructions: Appellate courts, taken as a whole, seem to have great faith in the power of curative instructions – greater, at any rate, than most trial lawyers probably have. If you simply ask for "a curative instruction," or make some other similarly non-specific request, you may get an instruction, but it may be a mush-milk instruction. It won't do you any good at trial, but the appellate court may hold that it did. If you really need an instruction, you need a strong one. You need an instruction that *you* drafted. Ask the Judge for a short recess, if necessary, to hammer out the wording. And if the Judge doesn't give your suggested instruction, politely make a record of it.

"Opening the door": The cases on this subject are remarkably robust. That is to say, appellate courts routinely affirm trial judges who admitted evidence that would have been irrelevant but for the fact that the other side had previously "opened the door." So, for example, in *Crenshaw v. State*, 520 So. 2d 131 (Miss. 1988), a child molestation case, the defense "attempted to show that his actions toward [the victim] and her sisters were taken out of concern that they were becoming sexually advanced due to their parents lack of responsibility, and as a result the children needed psychiatric care." In support of this theory, his attorney questioned a witness "about [Defendant's] statements concerning the children's need for 'psychiatric care.'" Rather than object to relevance, the State waited for re-direct, and was able to elicit testimony suggesting that Defendant was guilty of molesting yet another child. Defendant complained on appeal, but the Court dismissed the point. The Defendant had, said the *Crenshaw* court, "opened the door," and the other side was entitled to explore the point. *Id.* at 133. Keep a copy of *Crenshaw* in your trial notebook, and use it to explain why the Judge should admit your otherwise-irrelevant rebuttal evidence.

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The charge to the Jury: You spent hours in the charge conference, specifically objecting to the other side's erroneous instructions, tendering your correct instructions, and getting rulings on all of your points. Well and good. But you can't relax during the actual reading of the charge. You should instead have, in hand, a copy of the instructions in precisely the form that the Judge has stated he plans to use. Silently read along with the Judge, word for word. If the Judge has added anything, or left anything out, and if you conclude that the variation is material, you must speak up before the Jury retires. In so doing, state for the record precisely how the as-given charge varied from the written version.

The form of the verdict: Be aware of the "two issue" problem. Briefly stated, how should an appellate court rule where the case went to the jury on two or more theories of liability; the jury returned a general verdict; and at least one, but not all, of the theories that went to the jury could not properly support a judgment? Reverse, because the verdict might have been on the defective theory? Or affirm, because the verdict just as easily might have been on the non-defective theory? If the law in your jurisdiction is the latter, and you are representing the defendant, you will almost certainly want to ask for special interrogatories. *See generally* T.R. Gunn & C. T. Cone, "The Two-Issue Rule and Itemized Verdicts," on the web at https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/71CFE3FD0F06364385256ADB005D6316. Special interrogatories are also required, in at least some jurisdictions, for the application of caps on non-economic damages, and perhaps in other instances as well. You may not get them, but you must at least ask for them, on the record, specifying exactly how you would have them worded.

When the big case comes along, by all means get an appellate lawyer on the team, the sooner the better. But for the other cases, a little advance thought about an appeal will be well worth your time. ■

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