3 Advanced Appellate Tips Every In-House Litigation Counsel Should Know

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In-house litigation counsel have a lot on their plates these days. On top of managing budgets and risks, they have to devise strategic litigation approaches and supervise outside counsel. And they always need to be thinking about the endgame for each piece of litigation they oversee, whether settlement, arbitration or trial — including the appeal.

Sophisticated trial counsel generally know the basics of making objections and a record for appeal. Where litigation has particularly significant stakes, the stress of complex appellate strategy can (and usually should) be offloaded to outside appellate counsel. But that means in-house counsel must still determine what to do with tricky appellate issues before then.

Below are three tips in-house litigation counsel should try to keep in mind beyond the basics. This list is far from exhaustive, of course, so we urge in-house counsel to involve an appellate specialist as soon as the high-value nature of litigation, or likelihood of an appeal, becomes apparent.

1.Consider adding appellate rights to arbitration agreements.

Conventional wisdom holds that arbitration provides greater predictability and lower risk of a runaway judgment than a jury trial, along with a measure of finality that keeps costs down.

This wisdom holds up a fair bit of the time. Even so, according to a 2010 study, nearly 70 percent of businesses said arbitration did not meet their hopes for a speedier or less costly process. And things get even worse if an arbitrator makes a major legal error or issues a stunningly high judgment outside the bounds of law or reason. That's when the advantages of arbitration turn into risks, because the finality remains in place even when predictability and cost-savings fly out the window.

As anyone who has tried to vacate an arbitration award knows, it is a steep uphill battle — and an appeal of an order refusing to vacate an arbitration award is subject to abuse of discretion review, which coats that hill with oil. Although some courts have held that arbitrators' disregard of law or facts can be so "manifest" as to exceed their contractual jurisdiction, those courts are in the minority and the doctrine is risky to rely on.

One innovation to insure against the most egregious errors is to include a limited right of appeal in the arbitration agreement itself. Arbitration agreements under the Federal Arbitration Act and many state arbitration acts do not permit parties to build a right of judicial appellate review into their arbitration clauses, though notably some big states, like California, *do* permit parties to allow state courts to review arbitrator determinations made under the state's arbitration act for errors of law or fact as long as the right is explicitly spelled out in the agreement.

Another way to build in a measure of protection against runaway arbitrators is to invoke the internal appellate review procedures of the major arbitration agencies as an optional part of the contractual arbitration process. This is available to parties who include an appellate option in their contractual arbitration agreements or who separately agree after the commencement of arbitration.

Of the major arbitration agencies, CPR will permit parties to agree to a right of appeal to an arbitral panel made up only of former judges with power to review legal rulings for "material and prejudicial" error and factual rulings for "clear error." AAA follows a similar appellate framework, and promises a final decision within 30 days of submission. JAMS also offers a setup along the same lines (with a 21-day timeline), but goes a bit further by permitting its appellate panel to reopen the trial record to admit any additional evidence it concludes was improperly excluded below. This type of limited appellate review can help increase predictability with only a small sacrifice in terms of finality, and is worth careful consideration.

2.Identify issues with important appellate implications at the outset of litigation.

One of the costs of doing business for many large corporations is the likelihood of repeat litigation. For some companies, precedents from one case can affect other matters for decades down the road. Small reductions in potential damages over time can add up to a big reduction in the company's overall litigation risk profile. In-house litigation counsel should consider throughout trial court proceedings whether the case might present issues on which a favorable appellate ruling could make a long-term difference to their client, even when that issue might not be a priority for the specific litigation.

Sometimes, of course, the likely appellate issues in a case are obvious. Particularly where the law governing a basic issue of liability is unsettled, trial counsel will need to thoroughly brief that issue anyway, and in doing so will necessarily preserve that issue for appeal. But there are often lurking appellate issues that are less obvious, issues that on their own might not necessarily be enough to win the day or even yield a major advantage in the case but that could have long-term benefits for a repeat player. Trial counsel — focused on winning this *particular* case — may not be thinking about these long-term considerations, but teeing up these arguments for appeal could make a big difference to the client.

Such an issue might be a new theory of comparative fault that the case presents particularly well, or an argument that a certain type of expert evidence on punitive damages should not be admissible. Perhaps the case touches on the proper calculation of pre-judgment interest under a relevant statute, something that could add up to big bucks over time. These types of issues might not win the case outright, but could be important nonetheless because the client is a repeat player.

By the same token, there are often situations where the governing law is squarely against your client's interest. Don't let this limit your thinking about the case. Precedents change, even years or decades after they are first set, when the right case is presented in the right way at the right time. But the issue must be preserved below to be raised on appeal, and trial counsel may not think about raising arguments that are sure losers in the trial court. Carefully assess whether there is a chance of challenging the precedent at a higher court, or whether the law might be changed in another case before your case becomes final. If so, make sure trial counsel adequately preserves the arguments.

3.Think carefully about seeking interlocutory or writ review of non-final orders, because a weak effort could hurt your chances for the later appeal.

When a trial court issues a major ruling but the ruling is not an appealable final judgment, like an order disclosing privileged information or refusing to enforce a forum selection clause, an interlocutory appeal or petition for writ of mandate may be the only practical avenue for relief. This type of review is difficult to obtain, but can mean the difference between ultimate success and failure, in both the courts of law and public opinion.

But filing a mandate petition or seeking interlocutory review has risks more than the legal fees alone. That's because in most appellate courts, the court's general orders will give the same panel of three judges who review the petition or interlocutory appeal a right of first refusal to decide the post-judgment appeal or other filings. So if the panel concludes your writ petition gave too one-sided an account of the facts, or overstated the precedents supporting your arguments, that credibility taint could extend beyond the issue raised in the petition and infect the later appeal.

In-house litigation counsel should be especially careful when it comes to petitions (and indeed, any appellate arguments) that allege bias on the part of a trial judge. Many appellate judges are former trial judges, and may well be old pals with the judge you find too prejudiced to issue a fair ruling. Being remembered on

appeal as the lawyer who earlier brought a claim of bias against the appellate judge's law school buddy is not an ideal association to draw.

Ultimately, even though in-house counsel have lots on their plates already, the best thing they can do for their client short of winning at arbitration or trial is to ensure the case is optimally teed up for appeal. Making sure you *can* appeal, preparing a record for institutionally important appellate arguments and avoiding a credibility loss from an overstated writ petition or interlocutory challenge are a few ways to do that. Developing a relationship with a good appellate specialist is another.

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