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In Practice: A Dozen Tips to Save Your Appeal

Steps you take or omit during trial often impact your ability to challenge the verdict after, explains Ben Feuer of the California Appellate Law Group.

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Whether you're handling the appeal or bringing in an appellate specialist, the decisions you make in the trial court can't be undone — and whether you preserved your arguments for appeal and made the right procedural decisions can make all the difference in the world once the case goes "up." Just ask Microsoft, which suffered a $200 million loss in a Texas federal court a few years ago, only to be stung again on appeal when the court held it failed to preserve arguments it might have otherwise won.

Of course, most litigators know the golden rule of appellate law: you waive your arguments on appeal if you don't raise them in the trial court. Actually, the correct term is "forfeit," not "waive" — waiver requires the intentional relinquishment of a known right, while forfeiture occurs whenever a party fails to preserve an argument for appeal whether intentional or not. (Courts and litigators tend to use the terms interchangeably.)

California's appellate courts will consider forfeited arguments only if they raise questions of pure law on undisputed facts. And the U.S. Federal Appellate Court for the Ninth Circuit will consider forfeited arguments to determine if the trial court's decision constituted "plain error."

In our appellate practice, from time to time we've had the unhappy task of telling trial litigators and clients that arguments they want to make on appeal (or arguments we discovered post-judgment), do not appear in the record, or that another procedural choice has diminished their chances of success in the reviewing court. The risks from forfeiture or other procedural mistakes are so substantial that, in some high stakes motions and trials, parties bring in appellate practitioners to draft motions or even sit behind trial counsel to ensure all important issues are preserved for appeal on the best possible footing.

That kind of involvement from appellate specialists is unnecessary for most litigation, however. Below are 12 of the most common avoidable mistakes we have seen take place in the trial court. Keep these tips in mind when you're litigating and you'll avoid some nasty surprises in the California Courts of Appeal and at the Ninth Circuit.

1. Get a transcript, even when the courts don't provide a reporter. Federal courts still have the budget for reporters, but trial courts in many of California's counties don't. Attorneys who practice in those counties and have a case with sufficient stakes to justify the cost should always bring their own reporters to hearings. Indeed, there is currently a debate among California's appellate justices whether having some kind of transcript or agreed statement of the proceedings is a prerequisite to appellate review.

It goes without saying that you should never stipulate to any unreported proceedings if presented with that option, such as during jury instruction discussions. If you can't bring a reporter and the court won't provide one, ask if the court will summarize the parties' arguments, as well as its decision and reasoning, in the minutes or by signing such an order prepared by the parties.

2. Be careful when you amend your complaint. At common law, only the most recent amended complaint could form the basis for an appeal. Thus, when a plaintiff saw its complaint partly or wholly dismissed with leave to amend after losing a motion to dismiss, demurrer, or motion for judgment on the pleadings, and it chose to amend, its next pleading needed to reallege any dismissed

claims the party wished to preserve for appeal. If the party changed the theory of the cause of action or failed to reallege a set of allegations, it lost the right to claim error in the earlier dismissal. In 2012, the Ninth Circuit went *en banc* to change that rule and preserve arguments arising from superseded pleadings on appeal. California courts, however, still adhere to the common law doctrine.

3. Get background facts on the record. On appeal, you or your appellate specialist wants to tell a compelling story about why you should win, even if the topic of the appeal is technical or dry. Appellate judges are busy and you need to grab their attention. In some cases, trial court filings focus entirely on the details of the disagreement — who recorded which lien when, or what agency assigned which telecommunications spectrum to whom — without ever delving into the background of why the party recorded the lien, or what it means to have a certain band of frequency spectrum. Getting those facts in the record often helps make your case.

4. In an appeal arising from the grant of a summary judgment or adjudication order, if it's not in the separate statement of facts, it doesn't exist. In both state and federal courts, a party is entitled to summary judgment if it can show from discovery that no material disputed fact exists requiring a factfinder. If the trial court grants summary judgment or adjudication on a factual rather than legal basis, i.e., that discovery did not turn up disputed material facts, the appellate courts will look at the parties' separate statements to determine whether such a dispute exists. Likewise, evidentiary objections to the separate statement must be raised in the trial court or are forfeited on appeal. So even though it's a pain to prepare, take the separate statement, and any objections you have to your opponent's statement, seriously.

5. Make use of motions ***in limine*****, but get a definite answer.** If you know you're going to lose an argument, or the trial court previously rejected one of your arguments off the record or without sufficient briefing (at a sidebar, for example), a motion *in limine* can be a great way to preserve your arguments and the background evidence supporting them in a clear way for appeal. But be sure either to get a definitive ruling on your motion from the trial court or to re-raise your evidentiary objection during trial, lest the appellate court find you forfeited your argument by failing to get a ruling.

6. During trial, don't forget to object, request admonishments, and make offers of proof. Failure to object to testimony or evidence at trial (or in a motion *in limine*) forfeits the right to appeal on the basis of the admissibility of that evidence. In California, you also forfeit an objection to testimony that already took place if you don't ask the court to admonish the jury to disregard the testimony, or request a mistrial. Finally, you'll never be able to show the exclusion of evidence or testimony was prejudicial (a necessary prerequisite to reversal) if you don't present an offer of proof for the record that explains in sufficient detail the evidence you are offering.

7. Pay special care to deposition testimony used at trial. If you or your opponent uses deposition testimony at trial, reporters will sometimes stop typing when the video is played or transcript is read. Don't let them — you might have a hard time later figuring out exactly what came into the record. Instead, ask the reporter to transcribe any testimony played on videotape, and either transcribe or at least identify exact pages and lines of admitted deposition transcripts.

8. Think carefully about your verdict form. Both California and federal trial courts permit three types of verdict forms. A general verdict form asks the jurors for their answers on each claim; a special verdict form asks the jury for discrete factual findings and the court applies those findings to law; and a general verdict form with special interrogatories is a hybrid of the two, asking juries for both legal conclusions and specific findings. For many reasons, trial lawyers agonize over which form to use in any given case — but purely for appellate purposes, for the most part, the more general the form, the harder it is to challenge. That's because special verdict forms and special interrogatories on general verdict forms can contain easily missed prejudicial errors, such as failing to require the jury to make findings on all necessary elements of a cause of action.

9. Don't invite error with your jury instructions. Experienced trial lawyers know that jury instructions can win or lose a case, and jury instructions can play the same role on appeal. Arguments meticulously preserved during litigation can be forfeited by proposing a single instruction that runs against those arguments. A party that wishes to preserve a challenge to a court's prior ruling, but still propose the best instructions possible within the limits of that ruling should offer both an "ideal" set of instructions based on how the court should have ruled and a "second-best" set of instructions based on what the court actually ruled, carefully differentiating the two.

10. File written objections to jury instructions. In California courts, the law presumes an objection to any legally incorrect instruction proposed by the other side. You should file written objections anyway because that rule does not apply to technically correct but incomplete or poorly worded instructions. In the Ninth Circuit, there is no similar presumption and written objections are necessary to preserve an instructional challenge. While plain error review is always available, it is a high bar to meet, requiring the error not only be "plain," but also affect "substantial rights."

11. In the Ninth Circuit, you have to do the Rule 50 dance to challenge the sufficiency of the evidence. The federal courts make it tough to challenge the sufficiency of the evidence supporting a decision. The only way to bring a sufficiency of the evidence challenge is to raise your arguments in a post-trial motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). But you can't bring a Rule 50(b) motion on any issue that you didn't raise during trial in a motion for judgment as a matter of

law under Rule 50(a), so make sure to file a Rule 50(a) motion at the close of evidence as well.

12. Don't forget a post-trial motion if you think damages are excessive or inadequate. A purely legal challenge to damages awarded by a trial court, such as whether a statute allows for punitive damages, is subsumed into the final judgment and preserved for review. However, a fact-based argument that damages awarded were excessive or inadequate requires a post-trial motion in both the Ninth Circuit and California. In the Ninth Circuit, a fact-based damages argument can be preserved by a Rule 59 motion for a new trial or a Rule 50 motion for judgment as a matter of law. In California, a motion for new trial is the only vehicle by which a party can preserve a fact-based argument that damages were excessive or inadequate.

Unfortunately, there are many other ways to kill your chances in the appellate courts before you even get there. For example, you must file a timely notice of appeal in the trial court from the final judgment or an appealable order, or you'll be jurisdictionally barred from taking the appeal at all. But if you keep these tips in mind, you'll avoid some of the problems that vexed mighty Microsoft.

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