BAR BULLETIN

Top Ten Tips for Trial Counsel (Part One)

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By Howard M. Goodfriend

We are taught early in law school through the casebook method that the law gets made in the appellate courts and that the trial courts find the facts. For clients and their counsel, trial remains the "main event," the culmination of months, if not years, of time and money. Trial is the main event for the appellate courts, as well.

The parties and their lawyers frequently overlook the fact that the trial drives the appellate court's ability to fulfill its core law and policy making functions, as much as it controls the resolution of issues of historical fact. The trial judge gets the first, and sometimes the only, crack at applying the correct law. While it has always been much easier for an appellate court to affirm than to reverse, faced with diminishing resources, increasing caseloads, and frozen salaries, appellate judges are increasingly loath to decide difficult issues of law that are unnecessary to resolve the case before them. Appellate judges have at their disposal a host of procedural rules and doctrines that allow them to affirm without ever addressing the issues raised on appeal.

This column is the first of two providing 10 practice tips designed to allow the appellate courts to do their job and to make a decision on the merits.

(1) Put Everything on the Record. Appellate courts are courts of review. Because the appellate court will only review the record from the trial court, counsel must ensure that a record exists for appeal. Trial lawyers frequently consent to excuse the court reporter from the burdensome task

of recording everything that occurs, in the mistaken belief that what transpires in the trial court will not be relevant to the anticipated issues on appeal. That is a mistake.

Counsel's closing argument may become key in arguing that an evidentiary or instructional error swayed the jury. An unreported colloquy over proposed instructions may become important when arguing on appeal that the trial court understood the full import of counsel's subsequent, and perhaps not as thoroughly explained, formal exceptions, or that the trial court was given the opportunity to correct an erroneous statement of law.

Trial judges can be extremely protective of their lower bench. Experienced trial counsel make it a point to respect court staff. Nonetheless, counsel's job is to make sure the record is complete, even by politely insisting that the court reporter not be excused, or that the court reporter accompany counsel into chambers for conferences with the judge. If the court reporter is nonetheless excused, counsel must summarize what happened in open court when the court is again on the record. You never know if what transpires in open court will be key to an argument on appeal.

(2) File Everything. Even in the digital age, trial remains a paper-intensive affair. Counsel will file trial briefs and proposed instructions well in advance of trial, when they have a view of the case that may look nothing like the case that actually gets tried. Counsel will frequently hand to the trial court proposed instructions, motions regarding evidentiary issues or legal memoranda in the midst of trial. With increasing frequency, documents are emailed in the middle of trial. In Washington courts, it is not uncommon for trial counsel and the court, or law clerk, to engage in an email exchange regarding proposed instructions.

Make sure someone in your office actually files all pleadings that are handed to the judge in the midst of trial. Print out all email communications with the judge or law clerk, put a cover sheet on them, and file the document with the clerk. File everything you give the judge to read and everything the judge gives to you.

(3) Give the Court a Chance to Change its Mind. What seemed to the trial judge to be a good idea at the time may look unwise as trial unfolds. It is not uncommon for a judge to change their mind on an evidentiary decision made in a pretrial ruling in limine after hearing some of the testimony. The trial judge could also revisit other rulings, including those that have the ring of finality to them, such as partial summary judgments, pretrial orders, or the denial of a motion to amend. Even if the judge has announced that his or her mind is made up, no ruling is final, in the appellate sense, until entry of a final and appealable judgment.

If you think you have grounds to get the trial judge to change their mind on a ruling made before trial, make your request on the record for the judge to exercise discretion and reconsider. Even if your request is denied, you will have made a better record for appeal by pointing out how, in the context of the case that is actually being tried, the court's pretrial ruling constitutes legal error and is causing real and tangible prejudice.

If you are opposing a request for the judge to change their mind, tell the court how you (and perhaps your experts) have relied on its previous rulings in preparing the case for trial. If the court insists on modifying a pretrial ruling, ask for a continuance. Give the court a chance to exercise its discretion soundly, rather than arbitrarily, and you will maximize your chances for establishing error on appeal.

(4) Get a Ruling on the Record Regarding Evidentiary Decisions. Preservation of error is particularly challenging when dealing with evidentiary decisions. It is not easy in the heat of trial to make the correct objection on the record, to cite with particularity the basis for the objection, and to get a ruling before the evidence comes in. Motions in limine and standing objections help alleviate the pressure of jumping up with the correct objection in the middle of trial. When dealing with the court's ruling on such motions or standing objections, make sure the judge has made his or her position clear on the record so that you may rely on it throughout trial.

Evidentiary rulings frequently apply to entire categories of testimony, covered by more than one witness. If the court has ruled that evidence is admissible over your objection, ask the court on the record if you may have a standing objection to the challenged evidence throughout the course of trial. Get the court to rule on the record that you need not object each and every time the subject (for instance, a dispute between the plaintiff and a previous employer) is mentioned.

If the trial court's ruling is ambiguous, ask for clarification. If it refuses to clarify its ruling, or says something like, "but we'll see how it plays out," renew your objection each time the evidence comes in. When you have a chance, outside the presence of the jury, ask again if you can have a continuing objection. Pretty soon, the judge will get the idea and make the definitive ruling you are seeking.

(5) Make an Offer of Proof. When your evidence is excluded, be it an exhibit, a witness or a line of questioning, make an offer of proof so that the record clearly shows what the witness will say. Offering an exhibit after explaining on the record the basis for its admissibility will be a sufficient offer of proof. With testimony, however, it is not enough to object to its exclusion by stating the grounds of admissibility with specificity. Counsel must also clearly identify what the witness would say by making an offer of proof.

An offer of proof may be through live testimony of the witness outside the presence of the jury. It may be in documentary form, such as the witness's deposition, or an expert's report. Finally, counsel may summarize the specific testimony that the witness would offer outside the presence of the jury. Again, the goal is to allow the trial court to make the correct decision and to give the appellate court a record of the proffered evidence and its importance to the case.

Howard Goodfriend is a principal in Smith Goodfriend and Immediate Past President of the American Academy of Appellate Lawyers. He can be reached at howard@washingtonappeals.com.