Top Ten Tips for Trial Counsel (Part Two)

September 1, 2021 | in General

SEPTEMBER 2021 BAR BULLETIN

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This column is the second of two providing 10 practice tips to trial counsel that will make a decision on the merits more likely on appeal. The first column, published last month, discussed the need to put everything on the record, to file every document or communication considered in the trial court (eschewing email-only exchanges), to give the trial court a chance to change its mind about an adverse ruling before final judgment, to get a ruling on the record on evidentiary decisions, and to make an offer of proof when proferred evidence is excluded. The "top ten tips" continue here:

(6) Make Every Conceivable Exception to Jury Instructions on the Record. An instruction to which no exception is taken is the law of the case, and will establish the legal principles that govern a claim or defense on appeal. It is therefore important to take exception to every instruction that may be an erroneous statement of law, and to do so on every possible ground. Don't assume that your arguments are preserved because they have been included in briefing, argued in your Rule 50 motion, or previously discussed at length with the court.

No matter how thoroughly briefed and argued, counsel must take formal exception to any challenged jury instruction by stating the grounds upon which the instruction is erroneous. If the judge wants to hurry you along, politely refuse or get the judge to state on the record that they

are aware of the parties' positions on instructions based on previous off-the-record discussions and will consider separate written exceptions as formal exceptions to the court's instructions. File them as soon as time allows.

In addition, counsel must propose an instruction that correctly states the law. State why your proposed instruction is correct, and the one the trial court intends to give is not. Refer to instructions by number, or if they have no numbers, read the instruction into the record.

There is no substitute for taking formal exception and proposing a correct instruction on the record. Regardless of how much time has previously been spent on the record discussing instructions, make your formal exceptions thorough and specific.

(7) Challenge the Sufficiency of Your Opponent's Evidence, Before and After the Case Goes to the Jury. An appellate court will not review the sufficiency of the evidence unless the trial court has had the opportunity to do so. Under CR 50, a party challenging the sufficiency of the evidence to support a claim or defense must make a motion before the case goes to the jury. Under the comparable Federal Rule of Civil Procedure, counsel must also renew that motion after the jury returns an adverse verdict.

It is not enough simply to cite Rule 50 at the conclusion of your opponent's case. Tell the trial court that you are challenging each element of your opponent's claim or defense, and recite those elements. If you file a memorandum in support of your motion, refer to it on the record.

A failure to give the trial court the opportunity to rule on the legal sufficiency of a claim or defense will waive the issue on appeal.

(8) Ask for a Mistrial. Some evidence or argument cannot be cured by an objection and motion to strike. Examples include a direct violation of an order excluding evidence, or a closing argument that appeals to racial bias. In order to preserve the argument that no admonition or evidentiary ruling could cure the resulting prejudice, counsel must ask the court for a mistrial.

You may not wish to make a mistrial motion in front of the jury or in the middle of closing argument. It is usually sufficient to inform the court when making a contemporaneous objection that you wish to address the court outside of the presence of the jury at the earliest opportunity.

(9) Draft Proposed Orders or Findings with Care. Trial judges frequently ask counsel to prepare proposed orders or findings of fact and conclusions of law. Sometimes proposed findings must be filed pre-trial. Sometimes courts ask the prevailing party to prepare an order to conform to the court's oral decision.

Take extra care in drafting a proposed order, particularly one that includes findings. Inform yourself of the law that governs appellate review of the order you are drafting and attempt to conform the order to the requirements of the law. For instance, if the court is striking a defense or a complaint as a discovery sanction, the order should contain findings that the discovery violation was material, that it prejudiced your client's ability to present or defend the case, and that less severe sanctions, such as monetary sanctions or a continuance, would be insufficient to cure the prejudice.

Don't simply rely on the judge's oral decision or draft your findings to mimic that decision. The judge may have overlooked each of the required elements necessary to support the decision, or failed to address each of those elements in an oral decision. But if the trial judge agrees with the findings and conclusions that you submit and signs them, the appellate court will be reviewing that document, rather than a more abbreviated or less coherent oral decision. Give the trial judge the chance to protect their decision and avoid a remand.

Similarly, don't overreach in submitting proposed findings of fact and conclusions of law. If the pleadings you proposed at the beginning of the case establish as findings "facts" that have little resemblance to the evidence that was actually considered by the court, offer to submit a new set of findings of fact and conclusions of law at the conclusion of the case, when the judge has the case under advisement but before a decision.

Similarly, don't get carried away in the flush of victory just because the trial court agreed with everything you said in closing argument. It never hurts to ask another lawyer — either an appellate lawyer, or someone who is familiar with the area of the law — whether the findings support the trial court's legal conclusions. Make sure that the order you are asking the judge to sign will be one that you are proud to defend on appeal — that its findings are based on the evidence, that the legal conclusions flow naturally from those findings and are supported by the law.

(10) Document Your Fee Requests Using the Lodestar Method. Appellate judges hate reviewing attorney fee awards, but spend an awful amount of time and effort at it. You can make their job much easier by familiarizing yourself with the lodestar method and documenting your fee request using that method.

Keep contemporaneous time records. If you are working on separate matters for the same client, keep separate time records. Similarly, if you are pursuing multiple claims, some of which entitle your client to fees, and others that do not, try to segregate your time between those claims. Record detailed descriptions of your time in order to facilitate post-trial segregation. If you can't segregate the time, your detailed records will provide a solid basis for that decision.

Don't just file a copy of your time records or billing statements without a detailed affidavit. Identify all timekeepers and explain their backgrounds, experience and services. Summarize the total time both by timekeeper and nature of the task; e.g., investigation and evaluation of claim, legal research regarding claim, drafting complaint, discovery, summary judgment, etc. Explain how you segregated the time, or why the time spent on recoverable and non-recoverable claims is incapable of segregation.

Establish a reasonable hourly rate for your services. Provide information on your historical hourly rates, along with a declaration from a colleague practicing in the particular geographical location and area of practice that the hourly rate is reasonable and is the prevailing market rate for similar services provided by lawyers with comparable experience and expertise.

Provide a detailed explanation regarding any enhancement you are seeking to the lodestar. Some jurisdictions allow enhancements for the contingent nature of representation; others require that the uncertainty in payment be reflected in the reasonable hourly rate. Explain how the result you obtained for your client was significant and describe the hurdles that you were forced to overcome along the way to achieve it.

Finally, make sure the fee award entered by the court is sufficiently supported by findings reflecting the facts that you had documented, as well as by the law in your jurisdiction. (See Tip 9, above.)

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