



# Thinking About the Unthinkable: Appellate Preparation Before and During Trial

Timothy J. Droske  
Douglas S. Lang  
Steven J. Wells

© 2019 Dorsey & Whitney LLP. All rights reserved.

## TIMELINE OF A CASE-PLAN THROUGH APPEAL



PREPARING FOR APPEAL DURING TRIAL

## TIMELINE OF A CASE-PLAN THROUGH APPEAL



- **Facts.**
- **Law-claims and defenses.**
- **Jury/Trial Court Issues.**
- **Jurisdiction/Venue.**
- **Injunctions?**
- **Arbitration?**
- **Immunity?**
- **Evidence.**
- **Plot Discovery**
- **Anticipate Roadblocks-Discovery and Error Preservation**
- **Theory**
- **Plan B**
- **Error Preservation-How and When.**
- **Settlement?**



PREPARING FOR APPEAL DURING TRIAL

## TIMELINE OF A CASE-PLAN THROUGH APPEAL



- **Petition**
- **Answer**
- **Counterclaim**
- **Rule 26 Disclosures-At Outset and Continuing Obligation**
- **Motion to Dismiss-Rule 12-When? Grounds?**
- **Motion for Summary Judgment-When? Grounds?**
- **Mediation?**
- **Compel or Oppose Arbitration-Stay during arbitration?**
- **Discovery**



PREPARING FOR APPEAL DURING TRIAL

## TIMELINE OF A CASE-PLAN THROUGH APPEAL



- **Interlocutory Appeal**
- **Mandamus**



PREPARING FOR APPEAL DURING TRIAL

## TIMELINE OF A CASE-PLAN THROUGH APPEAL



- **Offer of Judgment (Rule 68).**
- **Pretrial Orders**
- **Trial Briefs**
- **Motion for Judgment as a Matter of Law.**
- **Proposed Jury Instructions and Questions-Submissions, Objections.**
- **Proposed Findings and Conclusions.**
- **Motion For New Trial, to Alter or Amend Judgment.**
- **Judgment-Motion for Entry**



PREPARING FOR APPEAL DURING TRIAL

## TIMELINE OF A CASE-PLAN THROUGH APPEAL



- File Notice of Appeal
- Appeal Bond or Stay
- Order Record
- Plot Time Line
- Determine Issues for Appeal
- Draft Briefs
- Submission.
- Appeal to Court of Last Resort



PREPARING FOR APPEAL DURING TRIAL

## The Problem with Waiting Until Final Judgment Before Starting to Think About the Appeal

- Failing to make, preserve, or properly frame compelling appellate arguments
- Failing to get key facts as part of the record on appeal
- Failing to focus on the right legal precedent
- Failing to get to the appellate courts earlier or in the right posture



PREPARING FOR APPEAL DURING TRIAL

8

## Why You Need an Appellate Perspective at Trial to Win on Appeal

- **At Trial Court**
  - Who wins on the **FACTS**
  - Winning the case **NOW**
  - Big emphasis on **DISCOVERY**
  - Appeals to **EMOTION**
  - The **THEATER** of the courtroom
  - Don't upset judge/jury with **ENDLESS INTERRUPTIONS**
  - Focus on the **SPECIFIC PARTIES**
  - A **GENERAL VERDICT** to Keep It Simple
  - What is the **RECORD** the **JURY** is going to see
- **On Appeal**
  - Who wins on the **LAW**
  - Winning the case **LATER ON**
  - Big emphasis on **STANDARDS OF REVIEW**
  - Appeals to **RULE of LAW**
  - Oral argument as **ACADEMIC DISSERTATION**
  - **PRESERVE** all issues with **OBJECTIONS**
  - Examination of broader **PUBLIC POLICY**
  - A **SPECIAL VERDICT** to isolate the issues
  - What is the full **RECORD** before the **COURT**



PREPARING FOR APPEAL DURING TRIAL

9

## Preparing for Appeal Before the First Pleading is Filed

- **Analyzing State and Federal district and appellate courts for where to file (if plaintiff), whether to remove (if defendant), and settlement considerations**
- **Cleanest legal basis for winning on appeal**
- **Biggest potential appellate landmine**
- **Issues to preserve because of uncertainty at the Supreme Court**
- **Mapping out appeal-proof strategy early**
  - Elements for each claim or defense
  - Key law for each
  - Key facts for each



PREPARING FOR APPEAL DURING TRIAL

10

## Identifying Proceedings Fast-Tracked for Appeal

- **Injunctions**
  - 28 U.S.C. 1292(a)(1)
  - Immediate right to appeal from order granting, continuing, modifying, refusing or dissolving injunction, or refusing to dissolve or modify injunction; includes preliminary injunctions
  - Record on preliminary injunction could be full record on appeal;
  - “Likelihood of success on the merits” can equal “the merits” on pure legal issues
- **Immunity**
  - Immunity of a foreign state under the Foreign Sovereign Immunities Act
  - Qualified immunity in Sec. 1983 cases
  - If immunity granted, immediately appealable from final judgment
  - If immunity denied, immediately appealable under collateral order doctrine
  - Record created at outset becomes critical record on appeal

## Preparing for Appeal on Dispositive Motions

- **Rule 12 Motions and Motions for Summary Judgment;**
- **Dispositive legal issues reviewed de novo often arise early**
  - Jurisdiction/Justiciability
  - Choice of law
  - Preemption
  - Statutory Interpretation
  - “Legislative Standing”
  - Contract Interpretation

## Preparing for Appeal on Dispositive Motions

- **Raising issues in Rule 12 motion if necessary to preserve**
  - E.g., Personal jurisdiction; immunity
- **Identify alternative grounds for affirmance**
- **Identifying and setting up issues for potential fast-track interlocutory appeal:**
  - 28 U.S.C. 1292(b) certification;
  - Petition for writ of mandamus; or
  - Immediate appeal under FRCP 54(b)

## Preparing for Appeal on Class Certification

- **Laying groundwork for Rule 23(f) discretionary petition**
  - Court of appeals may permit appeal from order granting or denying class certification if petition for permission to appeal filed, generally within 14 days
- **Identifying “hot” appellate issues related to class actions**
  - Spokeo-related standing issues
  - Nationwide class actions under different state law
  - Personal jurisdiction requirements
  - The predominance requirement

## Preparing for Appeal in Settlement

- **Court of Appeals or Supreme Court composition could affect early settlement strategy**
- **Class action settlements need to be approved by court and can be challenged on appeal, where circuit courts and Supreme Court are examining the following:**
  - **Cy pres settlements**
  - **Claims made settlements**
  - **Satisfying the Rule 23 requirements**

## Preparing for Appeal in Discovery

- **Generally discovery disputes are not the focus of appeals**
- **But certain discovery-related issues can be ripe for potential interlocutory appeal under 28 U.S.C. 1292(b), a writ of mandamus, or other interlocutory relief**
- **Examples:**
  - **Privileged communications**
  - **Physical examinations**



## Preparing for Appeal in Arbitration

- Federal Arbitration Act, 9 U.S.C. § 1 *et. seq.*
- File a motion to compel. 9 U.S.C. § 3, 4. If granted, stay.
- Appeal denial of motion to arbitrate. 9 U.S.C. § 16. No appeal from grant, but possible mandamus.
- The U.S. Supreme Court has explained that there are three types of disagreements in the arbitration context: (1) the merits of the dispute; (2) whether the merits are arbitrable; and (3) who decides the second question. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).



PREPARING FOR APPEAL DURING TRIAL

17

## Preparing for Appeal in Trial – Issue Preservation

- **General Principles:**
  - Need to object to preserve issue on appeal
  - Need to object early and often (at each stage)
  - Detailed objection
  - Specify relief sought
  - On the record
- **Things to object to:**
  - Dispositive legal issues (de novo)
  - Evidentiary rulings (abuse of discretion)
  - Experts (abuse of discretion)
  - Attorney/jury misconduct (abuse of discretion)
  - Jury instructions (de novo)
  - Special verdict form
  - Sufficiency of the Evidence



PREPARING FOR APPEAL DURING TRIAL

18

## Preparing for Appeal in Trial – Experts

- **Pitfalls**
  - Depending on jurisdiction, not renewing motion in limine objections at trial
  - Not looking to what the law requires to bolster future JMOL motion
- **Thinking about appeal**
  - Renew motion in limine objections at trial and post-trial
  - Alternatively, what does the law require the expert to show – show they haven't done it – this is subject to de novo review on appeal
  - Is an expert required as a matter of law



PREPARING FOR APPEAL DURING TRIAL

19

## Preparing for Appeal in Trial – Attorney Misconduct

- **Pitfalls**
  - Failure to object at trial
  - Not asking for mistrial/curative instruction
  - Objection not on the record
  - Failure to raise in new trial motion
- **Thinking about appeal**
  - If new trial granted b/c of attorney misconduct, that is nearly appeal-proof
    - Abuse of discretion
    - Generally no immediate appeal from new trial order as a matter of right
  - Atmospherics on appeal if close call and new trial ultimately denied



PREPARING FOR APPEAL DURING TRIAL

20

## Preparing for Appeal in Trial – Jury Instructions

- **Pitfalls**
  - Straying too far from JIGs
  - Not memorializing objections on the record
  - “Suggesting” alternative language without formally “objecting”
  - Not raising before jury is charged
- **Thinking about appeal**
  - Reviewed de novo
  - Do the necessary legal legwork in advance of jury instructions
  - Don’t undercut a jury win by bad instructions or getting too cute with the law

## Preparing for Appeal in Trial – The Verdict Form

- **General Verdict Forms or Limiting the Questions to the Jury**
  - Minimizes jury confusion
  - Simplifies the case
  - Wiggle room at trial and on appeal
- **Special Verdict Form**
  - Focuses the jury
  - Isolates issues for appeal
  - From D perspective, can be viewed as giving jury too many opportunities to find D liable

## Preparing for Appeal in Post-Trial Motions

- **Considerations for appeal**
  - Issue preservation is critical – valuable to have appellate set of eyes identifying issues for appeal
  - Considering standard of review on appeal critical
  - Kitchen sink issue preservation must be balanced with an attempt to make best argument for reversal NOW, especially on issues subject to abuse of discretion – a hard hurdle to overcome on appeal
- **Key Functions**
  - Give DISTRICT COURT opportunity to think, process, and correct mistakes at trial
  - Issue preservation for APPEAL – Appeal is generally from the Court's orders on the post-trial motions (State & Federal Practice May Vary)



PREPARING FOR APPEAL DURING TRIAL

23

## Preparing for Appeal in Post-Trial Motions

- **Types of Motions**
  - Renewed JMOL
  - Amended or Additional Findings (bench trial)
  - New Trial
    - Misconduct
    - Excessive or inadequate damages
    - Against weight of evidence
    - Errors of law
  - Alter or Amend a Judgment
  - Relief from Judgment or Order
- **Procedural quirks**
  - Different schedule than other motions with jurisdictional significance
  - Tolls time to file notice of appeal
  - Potential second round of new trial motions after JMOL



PREPARING FOR APPEAL DURING TRIAL

24

## Preparing for Appeal on Appeal

- **Timely filing the notice of appeal and any cross-appeal**
- **Identifying and framing the right issue(s)**
- **Succinctly explaining the case and issues to judges completely unfamiliar with the case and years of litigation**
- **Direct the court to the result compelled by the law and supported by sound policy**
- **Confront the hard questions**
- **Make the case easy for the court – what is the key dispositive issue?**



PREPARING FOR APPEAL DURING TRIAL

25



## Conclusion



© 2019 Dorsey & Whitney LLP. All rights reserved.