Appellate Tips for Trial Lawyers

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Let's Be Clear: Trial Attorneys Need To Establish A Comprehensible Trial Record For Appellate Review

Trial attorneys must tailor their evidentiary presentations to two distinct audiences: The trier of fact and the potential appellate court. Since the appellate record largely consists of printed words in transcripts, exhibits and pleadings, testimony that may be crystal clear to the trier of fact can be ambiguous or wholly unintelligible on appeal.

Trial Ambiguities

Every appellate attorney tells "war stories" about incomprehensible transcript excerpts. Shown multiple documents, a witness refers to "that document." A witness asked to identify an item's size, or how far he was from an object, responds, "This big" or "This far," using his hands. A doctor pointing at a graphic testifies that she made the incision from "here to here" or that surgery was required because of "these spots" on the MRI. A design defect expert opines to the jury by pointing to various parts of a machine brought into the courtroom.

Similar confusion can arise with trial exhibit numbers. It's not easy to recall every exhibit number off the top of your head. Transcripts often contain confusing colloquy where an attorney states that he wants to show the witness a document he believes is exhibit number X. The court suggests it is actually Y, and opposing counsel suggests it is Z. Counsel then finds the document he wants and starts examining the witness, without clarification. Sometimes the correct exhibit number cannot be deciphered from the testimony, let alone with the certainty required for appellate review.

Clarify "for the Record"

These problems are easily avoided if counsel pays attention to what the appellate record will look like. Immediately clarify ambiguous testimony ("this far" or "that document") by identifying on the record what the witness is actually discussing or indicating. Clarify exhibit numbers. Have witnesses mark and initial the diagrams or graphics they are using, and use the most intelligible marking method, such as having a doctor explain that he made an incision "from point A, here, to point B, here." If you use fancy graphics, poster-boards or videos, consider presenting your evidence in two different forms-one geared to the trier of fact, the other to the appellate court. For example, your witness can utilize a model or large graphic for the trier of fact's benefit and also mark and authenticate letter-sized copies or photographs that can be included in an appellate appendix or more easily delivered to the court of appeal.

The need for a comprehensible record also includes court rulings. In the press of trials, judges often defer rulings and some issues later get lost in the shuffle. You must get a definitive ruling to avoid appellate waiver, especially for discretionary matters such as evidentiary objections. And make sure the ruling is on the record. Trials often jump back and forth between in-chamber discussions and the courtroom, and courtroom discussions often jump back and forth between open court, side-bars and "off the record" commentary. Know whether a court reporter is present and actually transcribing. If there was no transcription, put the ruling on the record yourself at the first opportunity or ask the court to sign an order.

An unclear record is more than an inconvenience-it can defeat an appeal. Appellate courts construe record ambiguities in favor of affirmance, including the absence of a transcript, because appealed judgments and orders are presumed correct. *(Denham v. Superior Court (1970)* 2 Cal.3d 557, 564; *Gee v. American Realty & Construction, Inc.*(2002) 99 Cal.App.4th 1412, 1416.) So, create a record that will be clear to both the trier of fact and the appellate court. Both your client and your appellate attorney will thank you.

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