Five Core Questions As You Consider Appeal

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Appeals carry risk, last a long time, and cost money – like all litigation. So clients need thoughtful recommendations on whether to pursue (or defend) an appeal. Similarly, they need advice on the settlement value of a case after entry of an appealable judgment or order. Many factors affect this advice, but here are five essentials for California state-court appeals.

1) DID THE TRIAL COURT ERR?

Probably somewhere. Maybe even several times in a full trial. But no party is entitled to perfect or even near-perfect trial court proceedings.

Instead, our system strives for *fair* proceedings – and ideally, one trip through the trial court per case. In practice this means appellate courts expect trial judges to get it *mostly* right, within the bounds of discretion afforded by the law and circumstances. As a justice once told me: "Most trials we see are B-minus trials, but I think I've reversed two verdicts in the last 10 years."

At the very least, a claimed error must be objectively clear and on the record. But then, see question 2.

2) DID THE ERROR REALLY HURT YOUR CLIENT?

In almost all cases, to secure reversal, an appellant must show that it suffered prejudice from a trial court error. Both the California Constitution and statutory law declare this. To reverse, the appellate court must be convinced – after review of the entire record – that there was a "miscarriage of justice." This requires the appellant to show "a reasonable probability that in the absence of the error, a result more favorable to [it] would have been reached." (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1161, internal quotation marks omitted.)

Prejudice can sometimes be fairly clear, such as where a key claim or defense ends in summary adjudication, or a trial judge mistakenly excludes the sole standard-of-care expert on the appellant's side (with an on-record proffer by trial counsel).

But often the required prejudice is harder to show. For example, would admission of that corroborating witness's testimony, or exclusion of that graphic photo, or supplementation of that basic jury instruction with your more detailed one, have made a more favorable result "reasonably probable?" Appellate courts say "yes" less readily than frustrated litigants and their counsel might.

3) IS THE ERROR PRESERVED FOR REVIEW?

Even prejudicial error that might otherwise have justified reversal must be preserved for review, or it will (with rare exception) be deemed waived. The reasons are systemic. To make our judicial system as efficient and fair as possible, litigants must (A) give the judge a genuine chance to avoid error in the first place – for example, by objecting on the correct basis to inadmissible evidence, or by pointing out material omissions in a Statement of Decision; and (B) give opposing counsel a chance to present whatever evidentiary backup or counter-proposal he or she has.

So: the record must reflect the timely assertion in the trial court of positions the losing party wants to take on appeal. (Two important exceptions that prove the rule: a purely legal argument can often be raised for the first time on appeal, where it doesn't depend on development of evidence below, and a lack of subject-matter jurisdiction can never be waived.)

Finally, the mother of all preservation issues: the appeal deadline. It's usually (but not always!) 60 days from the date a party or court clerk serves notice of entry of the appealable order or judgment. Missing that deadline is one of the few *irremediable* problems in all of law practice. It's jurisdictional and strictly enforced.

4) WOULD THE RESULT SEEM UNFAIR TO AN OBJECTIVE OUTSIDER?

Appellate justices and their clerks are human, and their sense of the overall fairness of a trial court result plays an important (if unofficial) role in driving the outcome. Technical arguments for

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President's Message

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organizing a tremendously successful law firm management program. We received insightful and thought provoking ideas from speakers and participants on how to improve our practices and law firms as leaders and innovators in the legal profession. Participants, including vendors, provided feedback that the Law Firm Management Conference was one of the finest programs they attended this past year. We look forward to gathering at the Resort at Squaw Creek again next year for a similar event. It is events like the Law Firm Management Conference that provide me with great satisfaction when I think about "what, just happened here?"

I am also slowing things down to thank those that have made the past year a success, including the general membership, my fellow officers, board members and our Executive Director, Jennifer Blevins, and her staff in Sacramento. A well-deserved acknowledgement is necessary for the *Defense Comment* editors-in-chief, David Levy and Ellen Arabian-Lee, for their continued excellent efforts in producing the best periodical for Northern California and Nevada civil defense practitioners. The ADC is committed to excellence in content so that our members have current information at their fingertips that is a pleasure to read. This is largely achieved through the tireless efforts of Dave and Ellen, and all our members who write insightful and thought-provoking articles for the magazine.

I know that being President of the ADC has made me a better attorney and most importantly a better person. As I finish my term, I will do my best to slow it down so that I can enjoy the moment and limit the "wait, what just happened here?" moments.

I look forward to seeing you all in December at the Annual Meeting. Thank you for making this past year a memorable one.

CDC Report

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Modern asbestos cases tend to name defendants from a variety of industries, and exposures often relate back for decades. Without adequate depositions, defendants could find themselves unable to ask the pertinent questions necessary to determine whether a particular defendant belongs in a case.

The opposition engaged in lengthy discussions and made several offers of compromise on SB 632. In the final weeks of session, representatives of the sponsoring organization behind SB 632, the Consumer Attorneys of California, offered to hold the bill over to 2018, for good-faith discussions about potential compromise. Those discussions will occur over the fall, but the bill most definitely remains alive for potential enactment in 2018.

Another issue which will carry over to next year relates to protective orders in discovery in products and environmental cases. CDC strongly opposed this measure, which we believe would make it difficult if not impossible to obtain a protective order in cases where the pleadings state facts relevant to the existence of a danger to public health or safety. A presumption is created that disclosure of information relating to the danger should not be restricted, which may be overcome only if the judge makes specified findings, which may not be based in whole or in part upon a stipulation by the parties.

AB 889 currently sits on the Assembly floor, and may be taken up for a vote upon the return of the legislature in January. To SB 632 and AB 889 will be added another 2000-2500 bills to be introduced in 2018; the legislative bill factory in Sacramento continues apace!

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error and prejudice rarely survive a strong impression that the case "came out right," especially for judgments entered after trial or long past the pleading stage. This can be one of the hardest factors for counsel entrenched in the trial-court fight to view objectively. If so, they should consider asking an uninvolved lawyer to weigh in.

5) WHAT IF YOU WIN?

What are the possible outcomes on appeal, and what is the maximum relief your client can obtain? The answer is rarely a favorable judgment without further proceedings in the trial court after remand. The winning appellant may well have to fight another day – for example, by trying (or re-trying) the case, or particular claims or defenses, in light of the appellate opinion.

Such a win may offer great value to some litigants, particularly if it reverses a large monetary judgment or an onerous injunction. Others may view such a win as a mere ticket to additional expense and uncertainty. It's therefore essential to consider whether the best-case scenario on appeal is good enough to justify the costs and risks inherent in seeking it.

Especially for parties subject to repeat litigation, additional factors will affect the decision whether to continue a dispute through appeal. But these five questions cover the core points for most cases.

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