TIPS AND TOOLS FOR SERVING AS THE APPELLATE ATTORNEY ON YOUR TRIAL TEAM

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THE APPELLATE ATTORNEY ON THE TRIAL TEAM.

While appellate attorneys may feel most "at home" briefing and arguing in the appellate courts, it is not uncommon for a trial team to retain the services of an appellate attorney to assist throughout litigation and at trial. The point in the litigation process when the appellate attorney is retained will often determine the scope of the responsibilities. For instance, an appellate attorney may be retained before the initial pleadings are filed to assist the trial attorney in navigating legal issues and to wordsmith pleadings concerning such things as jurisdiction, venue, and the appropriate claims and defenses. Or an appellate attorney may be retained to outline the law regarding the claims or defenses to assist the trial attorney with a discovery plan. Sometimes appellate counsel will be retained to handle dispositive, expert, and evidentiary motions. Appellate counsel may also sit as second or third chair at trial to assist with error and record preservation, to brief and argue evidentiary issues, and to prepare and argue the jury charge. Finally, trial attorneys often hire appellate attorneys to assist with the briefing and argument of post-trial motions and to initiate an appeal.

This paper will focus on the progressive stages of litigation to provide tips and tools for the appellate attorney so they can most effectively assist their trial counsel. While this paper will touch on certain junctures throughout litigation that are more critical to the preservation of error, this is not a preservation of error paper.

A. DETERMINE HOW YOUR TRIAL COUNSEL WANTS YOU INVOLVED.

The needs of the trial counsel and the litigation budget will often dictate an appellate attorney's level of involvement at the trial level. Some trial attorneys simply want a ghost writer on call for various motions or legal issues, but they want to be the one appearing and arguing before the court. Other attorneys may turn motion practice and substantive legal issues over to you for briefing and argument. At trial, some trial attorneys will want you by their side to assist with objections and to consult regarding the examination of witnesses. Others will ask you to be on call from your office to research, brief, or consult on issues over the phone. Because it can be costly to bring on another attorney for substantive involvement in litigation, sometimes the budget may dictate more of a consulting role by the appellate attorney.

It is also important to know how active your trial counsel will want you to be during hearings and at trial. For instance, some trial counsel will want you to be the lead voice before the court on certain legal issues or they will prefer for you to serve more as an unspoken observer to take note of various legal issues that arise in trial in order to consult with at the end of the day. Therefore, make sure when you are retained to have a clear understanding of your role and, to the extent it is possible, memorialize it in your fee agreement.

B. PRE-SUIT.

1. Pleadings.

If you are retained by a trial attorney to assist with drafting pleadings, here are some things to keep in mind. The pleading requirements under state and federal law are different. In federal court, claims or defenses must satisfy the pleading requirements of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The notice pleading requirements in state court are more lenient than federal court. However, in many circumstances when a case is removed to federal court, federal judges will review the sufficiency of the state court pleadings under federal pleading standards without allowing for an opportunity to replead, or at least not without a motion for leave to amend. Therefore, if there is a chance a state court case could be removed to federal court, make sure the claims and defenses pled in the state court pleadings meet the federal pleading standards.

When you are assisting your trial counsel with the drafting of the pleadings, you will want to draft them with an eye towards withstanding a motion to dismiss under Federal Rule of Civil Procedure 12(b) or Texas Rule of Civil Procedure 91a. In preparing pleadings, materials to consult include, among other things:

- O'Connor's Causes of Action;
- Relevant state and federal statutes;
- Pleadings online involving your particular claims or defenses that have withstood federal or state motions to dismiss;
- Pattern jury charges;

It is also advisable to review the pleading rules particularly related to affirmative defenses, verified denials, and rules related to due order of pleadings so that certain defensive motions (i.e., special appearances, motions to transfer venue) are not waived by the filing of an unqualified answer.

2. Jury charge. Wait, what?

My Practice Court Professor at Baylor Law School, Louis Muldrow, taught us that the best time to prepare the jury charge is before the case is filed. While this is not always practical, if it is possible, preparing the jury charge early in the case can be extremely helpful. The drafted jury charge will outline the claims or defenses to be asserted in the pleadings and will serve as a roadmap for the trial counsel's discovery plan. As the case progresses through litigation, the draft jury charge can be revised as evidence is developed and claims and defenses are added or dropped.

C. AFTER SUIT IS FILED.

If you are hired to serve as the appellate attorney on the trial team after the case has already been filed, the first things you will want to request from the trial counsel are all parties' live pleadings and any draft jury charges. You will also want a list of any pending motions, particularly ones that need immediate attention. Always keep in mind the response and submission deadlines for the motions you are reviewing, particularly in federal court which has automatic deadlines for responding to motions, as opposed to state court which generally requires notice of a hearing to trigger a response. Also be familiar with any relevant rules of civil procedure, local county or district rules, and specific judge rules (the "local local rules") related to requirements for filing deadlines, notices, page limits, tables of contents and tables of authorities, conference with opposing counsel, paper copies, proposed orders, pre-hearing notebooks, etc.

You will also want to obtain any applicable scheduling orders and note whether the litigation deadlines are dictated by the rules of civil procedure (i.e., Level 1 or 2 cases) or a docket control order and calendar the deadlines. Pay particular attention to deadlines for substantive motions and any pre-trial materials which you, as the appellate attorney, will be primarily responsible for briefing and filing.

1. Motion practice.

There is obviously a lot of motion practice throughout litigation. Certain types of motions are better handled by trial counsel. Discovery motions are very fact intensive and often relate to whether certain evidence will be produced or certain witnesses will be required to testify and when. These motions are generally dependent upon relevance determinations, communications between trial counsel, and discovery requests and responses that have been prepared by trial counsel. The trial attorney is usually in the best position to prepare and respond to discovery motions. However, if substantive legal issues are involved or the legal issues may warrant mandamus review, appellate counsel can be valuable in preparing or responding to discovery motions.

There are certain substantive motions which are more appropriate for appellate counsel to handle or assist with. This is particularly true if the substantive legal issue will define or shape an issue that may be raised on appeal. Such motions include, among others:

- 12(b) (federal) or 91a (state) motions to dismiss;
- Pleas to the jurisdiction;
- Motions for summary judgment;
- Special appearance;
- Texas Citizens Participation Act (Anti-Slapp) motions to dismiss;
- Chapter 74 motions to dismiss in medical malpractice cases;
- *Daubert*/*Robinson* motions to strike experts;
- Rule 166(g) motions regarding legal matters to be decided by the court;

2. Interlocutory appeals, permissive interlocutory appeals, and mandamuses.

Review of legal issues by appellate courts can happen throughout litigation, prior to a final judgment, but rarely during trial. Certain statutes expressly allow for interlocutory appeals. And even when an interlocutory appeal is not allowed by statute, the statutory procedure for seeking a permissive interlocutory appeal on a controlling issue of law provides another avenue for appellate review during litigation. Additionally, appellate review by mandamus is possible on a variety of issues. Although the legal lines defining what is a mandamusable issue are obscure such that it is difficult to define what issues may be subject to mandamus review, the bottom line is that if an appellate court or the Texas Supreme Court are interested in the issue, you may have a viable mandamus on your hands.

Any briefing and argument on an issue that might be reviewed by interlocutory appeal, permissive interlocutory appeal, or mandamus is an opportunity for the appellate attorney to assist trial counsel. After all, if you are likely to handle the matter in the appellate court, you should probably be the one briefing and arguing the issue in the trial court, or at least consulting with your trial counsel on these issues. Finally, once an appellate court has disposed of a case through one of these procedures, the appellate attorney must pay particular attention to reviewing the court of appeals'

judgment and mandate for any errors, which are not uncommon.

D. TRIAL.

1. Determine how your trial judge approaches the involvement of appellate counsel on the trial team.

During most trials, there is substantial dialogue between trial and appellate counsel. Sometimes that communication is instantaneous (i.e., reminding the trial attorney to assert specific and timely objections, or suggesting certain questions of witnesses for purposes of proving up claims or defenses). Other times the communication is more sporadic (i.e., during breaks, at the end of the day, etc.). Determine the most efficient way to communicate with your trial counsel so as not to be distracting in front of the judge or jury. Some communication takes place with whispers, on note pads or Post-It notes passed back and forth, and some by text message and email. Know how your judge will allow you to communicate. Some judges will not allow co-counsel to communicate at all. Obviously, such restrictions would burden the ability for instantaneous communications. Thus, before going to a hearing or trial, be sure you and trial counsel understand how you will effectively and efficiently communicate during proceedings.

2. Preparation for trial (the pre-trial hearing).

Not all evidentiary rulings happen during trial. Many significant evidentiary rulings are made during the pre-trial hearing pursuant to motions to strike or limit evidence, motions to strike witness testimony, and motions in limine. And while motions in limine, alone, do not preserve issues for appeal, a trial court's ruling on limine motions can have a significant impact on how the case is presented to the jury and may sometimes forecast the trial court's ruling when the evidence is finally presented during the trial. Appellate counsel can be of significant assistance to the trial counsel with the research, briefing, and argument of these evidentiary issues.

3. Considerations during trial.

As a result of the global pandemic of 2020, "Zoom Trial" has now entered the legal vernacular. Trial by Zoom or other virtual application is a new concept which is becoming more common, but may become less common as the pandemic subsides. Nevertheless, many judges have indicated that hearings by Zoom are here to stay because of the efficiency and savings in cost and time. Therefore, comfort with presenting argument and evidence virtually is a necessity, which also includes being familiar with all the various functions of the virtual application for presenting case law, documents, and witnesses.

If your case is in person, the courtroom layout and seating can provide its own challenges for your role during trial. Determine whether you will be sitting at counsel table with your trial counsel, sitting behind trial counsel in front of the bar, or sitting behind the bar in the gallery. Adjust your "work space," materials, and means of communication with trial counsel accordingly so that it is efficient but not distracting to the court or the jury.

4. Jury charge . . . again.

With regard to the jury charge, be familiar with any differences between federal, state, and local judge rules regarding the preparation and submission of proposed jury charges. If you have not prepared the jury charge before now, make sure you have a jury charge drafted including all active claims and defenses before trial. The charge will certainly change throughout the trial, but you should use that as your working outline for the evidence that is offered. Throughout trial, use the jury charge to consult with your trial counsel regarding the sufficiency of the evidence to support all claims and defenses, advising when you may need more evidence in the record to support a claim or defense.

5. Trial briefing.

During trial, the appellate attorney has the opportunity to take a lot of burden and pressure off the trial attorney by taking on primary responsibility for the research, briefing, filing of briefs, and arguing substantive legal issues. Such issues may affect the presentation of the evidence, the admissibility and exclusion of evidence, and the issues that will ultimately be submitted in the jury charge.

Therefore, consult with trial counsel to identify legal issues that may arise during trial. To the extent you are able to identify such issues, you may want to prepare bench briefs and supporting legal authority ahead of time. Additionally, if you are able to anticipate certain objections and responses concerning evidentiary issues, you can prepare scripts with reference to relevant rules of evidence and case law. In the flurry of activity at trial, it can be very difficult to respond to an evidentiary objection on the fly, so doing this work ahead of time will put you and your trial counsel in a much better position to articulate an argument or response to the judge. Note, too, that these arguments often take place at the bench. If you want your argument and (especially) the judge's ruling to be in the record, be sure that the court reporter is able to

record bench conferences. Otherwise, consider asking that the jury be excused so you can make your argument in open court.

Also, keep in mind that while briefing and argument may ensure that the record accurately reflects your position concerning the admission or exclusion of evidence, an offer of proof is necessary to preserve error regarding the exclusion of evidence. Offers of proof occur outside the presence of the jury and they need to be made as soon as practicable and before the court reads the charge to the jury in order to preserve error. If evidence your trial counsel is attempting to offer is excluded, make note of the necessity for an offer of proof. At some point in the trial and outside the presence of the jury, remind and assist your trial attorney with the offer of proof. Oftentimes trial counsel's attention has moved on to the next question or the presentation of the next witness. Therefore, it is up to you to be persistent so that the necessary error and record preservation procedures do not fall through the cracks and are forgotten.

6. Trial box.

Although most legal resources can be accessed online with a sufficient internet connection in the courtroom, there are hard copies of certain things you may want at your fingertips. This is particularly true if the courtroom's internet connection is not reliable or nonexistent. Having hard copies will also facilitate sharing information with co-counsel, opposing counsel, and the judge. Below is a list of legal resources and supplies the appellate attorney may want to have readily available in their trial box:

- Texas Rules of Civil Procedure/Federal Rules of Civil Procedure.
- Texas Civil Practice and Remedies Code.
- Annotated book on the rules of evidence.
- Relevant volumes of the state or federal pattern jury charge.
- A recent CLE paper on preservation of error.
- Book of evidentiary objections and responses.
- Any relevant substantive law books.
- Highlighters, Post-It notes, binder clips, paper clips.
- Extension cord for your electronic devices.
- An internet hotspot if your courthouse does not have reliable wifi.
- Notebooks containing:
    - The live pleadings.
    - Motions in limine.
    - Both sides trial briefing on any legal or evidentiary issues to be argued at trial.
    - Working draft of the jury charge.
    - Relevant cases and statutes, highlighted and in triplicate (or more copies as necessary) to ensure the judge and each party's counsel has a copy of any authority upon which you rely.

7. Critical phases of trial.

One of the primary responsibilities for an appellate attorney during trial is to preserve error and preserve the record for appeal. While preservation of error and the record can come up anytime during trial, there are certain phases of trial that are more crucial than others, and more complicated. These are the times when your trial counsel may more heavily rely on your expertise and require more of your involvement.

a. <u>Voir dire.</u>

Preservation of error during jury selection is complicated. Compounding the error preservation complexity is the fact that jury selection often concludes at the end of a long day, sometimes late at night, when everyone (judge, counsel, venire members, jurors) all want to just go home. Yet, properly preserving error on strikes for cause, strike allotment, and improper use of peremptory strikes is technical and takes time. As the appellate attorney on the team, you cannot be rushed and you cannot let a trial judge rush you through it. If a trial judge rushes you through this complex juncture such that your error preservation efforts are potentially compromised, you need to object on the record to the trial judge's time constraints.

Because of the fast pace of error preservation at this stage of the trial, it is advisable to not only have thoroughly reviewed an error preservation CLE paper ahead of time to know exactly what needs to be done but also have a script written out that is sufficient to preserve the relevant error. Do not be concerned that a script is less artful that off-the-cuff prose. A script that is based on case law is your most assured way to make sure your error preservation efforts will withstand appellate scrutiny.

b. <u>Close of evidence.</u>

The close of evidence presents opportunities for preservation of error when there is a lack of evidence to support claims or defenses that can then be disposed of as a matter of law. In order to raise certain issues on appeal, at the close of the plaintiff's case in chief, or after the close of all the evidence when the parties rest, motion practice is required. Therefore, at these stages, be familiar with the requirements for a motion for directed verdict in state court or a motion

for judgment as a matter of law in federal court, and, if necessary, a motion to re-open the evidence.

c. Jury charge, again . . . again.

Preservation of error at the charge stage is also complex. Again, it is important for the appellate attorney to have reviewed a recent guide for preserving charge error. Each volume of the Texas Pattern Jury Charge contains an error preservation section towards the end. That, as well as an error preservation CLE paper, are good resources for preserving error at this stage. Also, keep in mind that usually the more lengthy informal charge conference in which most of the real charge work is done is not on the record and does not preserve anything for appellate review. It is the shorter, more rote formal charge conference in which charge error is preserved. Do not expect the trial judge to walk you through the error preservation procedure in the formal charge conference. It will be incumbent upon you to say what you need to say and to obtain the rulings you need to properly preserver charge error.

The pattern jury charges are a great resource for preparing and submitting questions and instructions, but they are not infallible nor are they a one-size-fits-all. Be aware that some deviations from a pattern jury charge are often warranted. To the extent you advocate that the trial court depart from the pattern jury charge, be prepared to provide the trial court and opposing counsel with any legal authority to support such deviations.

Your preservation of error responsibilities concerning the jury charge do not end with the formal charge conference. Any errors concerning the jury charge have to be preserved before the jury is discharged to deliberate the case. Therefore, your last opportunity to preserve any potential error is while the trial court is reading the charge to the jury. While, generally, most all jury charge issues have been resolved and preserved before this point, occasionally a mistake in the charge becomes apparent while the trial judge is reading the charge to the jury. Therefore, listen closely and follow along word by word with your draft of the charge. At this stage of the proceedings hardly anyone else is paying attention. Your trial counsel will generally be focused on closing argument. So, it is up to you to detect any errors.

Listen for anything the judge says that deviates from the charge you are reviewing. During charge preparation, there are numerous drafts of the charge flying around the courtroom. If there is any deviation from what you are looking at and what the judge is reading, it could be that someone does not have the final version of the charge. Also be cognizant of any mistakes that were not caught during informal and formal charge conference, because occasionally a mistake will slip through. Therefore, do not assume the charge is correct just because it is now being read to the jury.

If you notice any problem (for instance an incorrect burden of proof—the word "not" or absence thereof or an instruction regarding "yes" or "no" answers can completely change this), you must stand up and ask to approach the bench so the issue can be addressed. As thorough as the charge conference is supposed to be, in my career, there have been approximately half a dozen times when I have had to interrupt the reading of the charge to address some issue. Sometimes it simply turned out to be a misreading by the judge. Sometimes it turned out to be a switched burden of proof. Occasionally, the trial judge will be annoyed about being interrupted during the reading of the charge. But your job is to preserve error. And most judges will appreciate that you are attempting to help them get the charge correct so as to avoid reversible error.

E. JURY DELIBERATIONS AND POST-VERDICT.

It is not uncommon for jurors to send questions to the judge during deliberations. In responding to these questions, the written response can be as significant to the case and error preservation as the jury charge itself. Therefore, do not check out from being actively involved simply because the jury has the case. Be available to assist your trial counsel and the judge in formulating appropriate responses to jury questions.

Prior to the jury reaching a verdict, be sure to have reviewed the necessary procedures for dealing with any problems with the verdict. The time to preserver error at this point or to correct any verdict problems is short—it must be done before the jury is discharged.

After the jury returns a verdict, carefully review it for any problems (i.e., conflicting jury answers, unanswered questions, discrepancies in signatures verifying the verdict, discrepancies with answers to questions that require unanimity). If you notice any problems, determine the appropriate remedy to seek from the court. Some discrepancies may require that the jury return to the jury room for further deliberations. Other issues may require a polling of the individual jurors to ascertain their specific answers to the jury questions. Whatever the issue, determine the appropriate procedure and request it before the jury is discharged.

F. POST-TRIAL.

After the jury returns a verdict or after final arguments are made in a bench trial, there are numerous post-trial motions in which appellate counsel can be of assistance to their trial counsel, some of which are necessary for error preservation for further appellate review. Typically such motions include:

- Motion for judgment notwithstanding the verdict;
- Motion for new trial;
- Motion for findings of fact and conclusions of law;
- Motion for judgment.

Additionally, to the extent a defendant intends to supersede a judgment to prevent execution during an appeal, proceedings concerning supersedeas bonds can involve extensive motion practice. Motion practice to determine the bond amount can be complex and substantial. This is particularly true when a defendant seeks a lower bond amount due to its alleged net worth. Discovery and motion practice involving net worth determinations can be extensive. Additionally, if a defendant seeks to put up alternate security (instead of cash) to supersede a judgment, determinations regarding appropriate and sufficient alternate security can involve substantial motion practice.

After the judgment has been entered, appellate counsel must be sure to calendar and comply with all prerequisites for initiating an appeal. These deadlines and prerequisites will be affected by whether post-judgment motions have been filed, whether you are in state or federal court, and whether the appeal is deemed accelerated or considered a regular appeal. Finally, appellate counsel can be of great assistance to trial counsel in preparing and filing the notice of appeal, preparing the docketing statement in the court of appeals, and requesting the clerk's record and the reporter's record for filing in the appellate court.

G. CONCLUSION

The appellate world is a wonderful world in which to practice law. But mixing up pure appellate practice with litigation and trial support for your trial counsel can also be rewarding and enjoyable. More importantly, however, your involvement at the litigation and trial support stage will make your life a lot easier when that case is finally on appeal.