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What Appellate Lawyers Wish Trial Lawyers Knew About Appeals

By Virginia Hinrichs McMichael

As an appellate lawyer, my first contact with a case is often after the notice of appeal is filed. The appeal then becomes like a game of poker. I am stuck with the cards that were dealt – the trial court record – and all I can do is play those cards to the best of my ability.

A savvy trial lawyer will improve the odds of dealing appellate counsel a winning hand by bringing counsel into the case early. Appellate counsel will then be able to assist trial counsel in framing and preserving the issues at the earliest possible opportunity.

Whether working with an appellate lawyer or going it alone, there are several things a trial lawyer should keep in mind to help secure a win on appeal.

Following the rules

Many appellate errors can be avoided by reading and following the rules of civil procedure, rules of evidence, and rules of appellate procedure. Be sure to consult not just the rules, and the notes that follow, but also the court's internal operating procedures and notices. Appellate practice is filled with traps for the unwary. Avoid the traps by reading and following the rules.

Researching legal issues

Appeals are decided based on the law. An effective appellate brief clearly sets forth the legal issues and applies the facts to the law. It is very frustrating for an appellate lawyer to discover that a winning issue wasn't raised below, an important element of a claim was not pleaded, an affirmative defense was overlooked, or a key fact was not established at trial.

A trial lawyer can avoid errors on appeal by taking the time to do legal research before filing a complaint or answer and updating the research as the case develops. Avoid assumptions. Carefully analyze jurisdiction, venue, standing, indispensable parties, elements of the claims, and affirmative defenses. Use that knowledge to draft better pleadings and motions. An early and thorough understanding of the legal issues will serve you well on appeal. With a good understanding of the legal issues, a trial lawyer can create a record that will hold up on appeal.

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Preserving issues for appeal

Issues not raised in the lower court are waived and cannot be raised for the first time on appeal. Pa.R.A.P. 302(a). Issues can't just be raised, they must also be preserved for appellate review.

At trial, be sure to timely object and introduce documents into evidence. See Pa.R.E. 103. Conferences or side bar discussions that are not transcribed will not be part of the record. File written motions to ensure that issues are preserved. Issues that are not raised in pre-trial proceedings or at trial are waived and will not be grounds for post-trial relief or appeal. See Pa.R.C.P. 227.1(b)(1). For example, the Pennsylvania Supreme Court recently ruled that the submission of a proposed jury

charge is insufficient to preserve the issue absent a trial court ruling on the record that the requested instruction was rejected. *Jones v. Ott*, 191 A.3d 782 (Pa. 2018). And after the trial is over, order the transcript and make sure it is filed with the clerk and included in the record on appeal. Pa.R.A.P. 1911, 1922.

The filing of post-trial motions under Pa.R.C.P. 227.1 is essential to preserve issues for appellate review. Post-trial motions must be filed within 10 days. In the case of a jury trial, the 10 days begins to run from when the verdict is announced in court. For a bench trial, post-trial motions must be filed within 10 days of the notice of nonsuit or the filing of the decision. Issues not raised in post-trial motions are waived and can-not be raised on appeal. See Pa.R.C.P. 227.1(c).

When representing multiple corpo-rate entities, post-trial motions must be filed by each entity against whom the jury entered the verdict.

The filing of post-trial motions suspends the time for filing the notice of appeal until after the trial court disposes of the post-trial motions. Post-trial motions that are not ruled on within 120 days are deemed denied. Pa.R.C.P. 227.4(1)(b).

Understanding nal vs. interlocutory orders

The general rule is that an appeal as of right may only be taken from a final order. Pa.R.A.P. 341(a). A final order is one that "disposes of all claims and of all parties" or one that the trial court has designated as final under Appellate Rule 341(c). In most cases, an order is not appealable until it is reduced to a judgment and entered on the docket. Pa.R.A.P. 301(d), Note. In a divorce action, the notice of appeal is filed from the entry of the divorce decree, not from the entry of the equitable distribution order.

Any order that does not meet the final order test is an interlocutory order. Some interlocutory orders, including orders granting or denying injunctions, awarding a new trial, or refusing to open a judgment, are appealable as of right. Pa.R.A.P. 311. A subset of orders appealable as of right, including orders changing venue, transferring to another jurisdiction, and refusing to compel arbitration, must be appealed immediately or the objection is waived. Pa.R.A.P. 311(g)(1).

Collateral orders are also appealable as of right. Pa.R.A.P. 313. Never just assume that an order is an appealable collateral order. The definition of a collateral order is much narrower than many lawyers appreciate.

Appeals may also be taken by permission from any interlocutory order of a lower court. See Pa.R.A.P. 312, 1311-1323, 42 Pa.C.S. § 702(b). Interlocutory appeals by permission can be useful tools for securing early appellate review of a dispositive legal issue.

Filing the notice of appeal

The general rule is that a notice of appeal must be filed in the trial court within 30 days of the entry of the order on the docket. Pa.R.A.P. 902, 903; see also Pa.R.A.P. 108(b). The notice must clearly designate whether the appeal is to the Superior Court or the Commonwealth Court. Pa.R.A.P. 904. The filing deadline is jurisdictional and cannot be extended.

Dra ing the concise statement of issues

After an appeal is taken, the trial court may require the appellant to file and serve a Rule 1925(b) concise statement of issues on appeal. The issues are limited to those raised at trial. Issues not included in the concise statement are waived and cannot be raised on appeal. Pa.R.A.P. 1925(b)(4)(vii). Here again, legal research and/or consultation with appellate counsel will help ensure that important issues are not waived. Failure to serve the trial judge with a copy of the Rule 1925(b) state-ment will also result in a waiver.

Compiling the reproduced record

There is an important distinction between the record on appeal and the reproduced record. The record on appeal includes all the pleadings, motions, briefs, and notes of testimony in the lower court. Pa.R.A.P. 1921. It is the appellant's responsibility to ensure that the complete record is transmitted to the appellate court. The Reproduced Record includes only those portions of the record that the appellant copies and submits with the brief.

Thirty days before the filing of the brief of the appellant, the appellant must file and serve on the other parties a designation of the parts of the record that will be included in the reproduced record. Pa.R.A.P. 2154. Because the rule requires counting backwards from the due date of the brief of appellant, it is easy to miss the filing deadline, so be sure to calendar the filing date after receiving the briefing schedule.

Choosing and framing the issues on appeal

The appellate lawyer's rule of thumb is that an appellant's brief should include no more than three issues. Avoid briefing a laundry list of issues. When appellate judges see five or more issues, they are inclined to assume that none of them have any merit.

Choose issues wisely. Selecting the right issues to brief is critical to success on appeal. Appellate courts apply two different standards of review — the de novo standard of review that applies to legal issues, and the abuse of discretion standard that applies to factual issues. The likelihood of reversal on appeal is much greater if the issue on appeal is a legal issue rather than a factual one. Understanding the standard of review will help you select and brief the issues that have the best chance of securing a reversal.

The phrasing of the issues is also important. When framing issues for the brief of appellant, the question should suggest the answer. Ideally, when someone unfamiliar with the case reads the issue, the answer should appear obvious. As in life, first impressions matter. If the reader's first impression of your brief is that you are correct, the rest of the brief just needs to confirm that first impression. Use that knowledge to your advantage when framing the issues on appeal.

Appeals, like poker, involve a combination of art and skill. Play the cards well and you will greatly improve the odds of a win.

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