

Ten Appellate Commandments for Trial Lawyers

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1. If the case is important enough to try, it almost certainly will be important enough for the loser to appeal. Bring appellate counsel into the case before trial, sooner rather than later. 2. At a minimum, consult appellate counsel as soon as the verdict is returned or a bench order is issued. The short period that follows can be a critical time to assure a proper record for appeal and to preserve error. 3. Always make a record. Never handle an important issue off the record, and if you must do so, put it on the record later. Making a record includes filing materials discussed in court, such as all requested jury instructions and all demonstrative aids, and, especially when objectionable conduct occurs, explaining on the record what is taking place. 4. Always make a complete proffer of any evidence or testimony excluded by the court. 5. Always require court reporters to continue reporting while depositions are read as evidence. After trial or a hearing, review all transcripts to see if there are errors or omissions, and, if so, promptly correct them. 6. Never fail to raise an issue with the trial court, to seek a new trial after an adverse verdict, or to move for reconsideration merely because you believe the trial court will deny the request. Appellate grounds are often made when your argument is clearly made and rejected. 7. Always let your appellate lawyer know if there are other cases or appeals pending with the same legal issue. Coordination may be necessary to ensure proper evidence is presented or issues are raised in all cases, and amicus curiae participation may be appropriate. 8. Always consult appellate counsel before seeking interlocutory appellate review. 9. Always consult appellate counsel before addressing any sanctions motions against you or the client. 10. Always consider appellate counsel a resource and a team member. Appellate attorneys do not wish to try cases and are not there to compete with you or hinder your efforts to win. They want to win the trial too.

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