CARLTON FIELDS

The Art of Evaluating an Appeal: 10 Hard-Learned Tips

August 23, 2016

Your client lost at trial and boy is it mad about that. So, your directions are to file an immediate appeal and get it fixed. Of course, you need to advise the client of any posttrial hoops that must be jumped through for preservation purposes before filing that appeal. Hopefully the issues were set up well at the trial level and the case was tried with an eye toward a potential appeal. But, good appellate counsel always should take a step back and provide the client with an objective evaluation of whether an appeal truly is a wise course of action. An appellate lawyer naturally wants to pursue the appeal and try to get a reversal. And the fact is, appeals often are successful and achieve meaningful relief from adverse trial results, especially if the appellant is careful in its selection of the issues for appeal. Many good articles have been written about effective appellate advocacy, and following such advice will strengthen the odds of winning on appeal. But that is not this article. This article is limited to one discrete proposition: not every adverse trial result should be the subject of an appeal. This article hopefully will provide practical guidance on evaluating whether an appeal should be pursued. The initial and most important step to that determination is an evaluation of the substantive merits of the arguments that could be advanced on appeal. Those arguments may be so strong that this evaluation alone answers the question whether to appeal. There usually are, however, additional, strategic considerations that all too often are ignored in the heat of the initial dismay over the trial result. Although there always are cases where there can be no question about the absolute need to appeal, some appeals unfortunately are simply a waste of the client's time and money. Here are 10 tips on how to determine when to make the tough recommendation that the client cut its losses and run, rather than appeal. Much of this may sound basic and obvious, but even the most experienced practitioner can benefit by going back to the basics, which are all too easy to forget while moving forward as an advocate. Indeed, these tips arise from hard lessons learned over the course of half a century of appellate practice. Although these tips are written for an evaluation by an appellant's counsel, it goes without saying that an appellee's counsel also should do such an evaluation in order to advise their client whether to seek to settle the case, despite the victory at trial, in order to avoid an appeal; just look at these tips from the other side of the possible outcomes and reasons for those outcomes. After all, it never—well, hardly ever—can be said an affirmance is an absolute slam dunk. Neither is a reversal. **1. Respect the Odds**

Start with the general percentage of reversals in the particular appellate forum, and tie that rate as

closely as possible to the nature of the appeal that would be taken—i.e., how many civil jury verdicts are reversed annually. In most appellate forums, the house—the trier of fact—usually wins. Recognize that brutal reality, and tell the client if it is simply throwing good money after bad by pursuing an appeal. **2. More Likely Than Not Simply Means 51 Percent, Not a Guaranteed Win**

Clients always want a specific percentage estimate as to the likelihood of success on appeal. And, notwithstanding all the caveats accompanying an estimate, any number given usually will be taken as gospel from on high. My former mentor, the late Alan Sundberg, who earlier served for many years on our state supreme court, always told clients, "I'm not good enough to give a number; I simply can say that a reversal is 'more likely,' or 'less likely,' than not." But, we often found that clients translated a "more likely than not" opinion into a certain win and were shocked when the anticipated appellate win did not occur. To help forestall that mindset, the client needs to be reminded of the general odds against reversal when any estimate of chances on appeal is given. In doing so, appellate counsel should scrupulously follow the next tip. **3. Acknowledge the Downside of a Loss on Appeal**

Sobering facts often flow from a loss on appeal, such as imposition of the other side's appellate fees, substantial interest on the judgment, bond premiums, and the like. The downside of a loss on appeal needs to be highlighted for the client during the posttrial clamor. Even apart from its own attorney fees to prosecute the appeal, it may have other financial exposure in the event of a loss on appeal. Painful as the loss may be in the first instance, those potential additional costs need to be assessed. The client needs to consider whether it is time to stop the bleeding. In addition, an appeal may draw a cross-appeal on issues such as the pretrial dismissal of certain claims, which could result in additional monetary liability for the client. Of course, if an appeal on that issue is taken first by the prevailing party, that usually will warrant the filing of a cross-appeal from the adverse judgment, regardless of the considerations discussed herein, if for no reason other than to give the appellate court the full picture of the case and an opportunity for that court to split the baby and leave the parties in the same position after the trial judgment. But if that has not occurred, the downside of a possible loss on any cross-appeal that might be filed if the client appeals needs to be evaluated and taken into account in determining whether to file an appeal in the first instance. The precedential implications of an adverse, published appellate decision on the issues in the case also need to be explained to the client. An adverse jury verdict, or even a trial court's summary judgment (which the client might be able to get vacated as part of a settlement in exchange for no appeal) is easier to deal with in future cases, and certainly is not as significant as an adverse decision on appeal, especially one that affirmatively rejects the position advanced for reversal and graphically explains why. Finally, there always is a risk on appeal that the court will carve out an exception to the doctrine at issue in the case, especially if the equities do not favor its application under the facts of the particular case. Or, that the court will change the law altogether. Is the record in this particular case the best possible record for presenting the arguments on issues that may be recurring issues for the client? If not, an appeal of such issues in this case may be dangerous. **4. Consider the Difficult Logistics of Persuasion as an Appellant**

I once heard Federal Circuit Judge Michael Boudin speak about the three things that most surprised him as a new judge. The first was how overwhelmed appellate judges are with briefs. As a result, they

never—well, almost never—can know the case as well as counsel does. Consequently, the appellant's lawyers need to consider whether they can win a reversal if the appellate court does not know the case as well as counsel does. Appellate counsel also must think about how many issues they have to raise and prevail on to get meaningful relief by an appeal in the case. How many pages of briefing will that require? Can it be done concisely? What will happen on the short oral argument, if any, that will be afforded? Can the necessary points be made persuasively in short order? If not, the odds of a reversal on appeal go down ever more. Counsel also must factor in the reality that appellate judges inevitably become jaded. No matter how terrible the client believes the error and result was in its case, the judges have heard this before in case after case. That is especially the case in today's appellate world, where strident hyperbole and over-statement seem to be the new norm. Judges constantly are hearing the most extreme and pejorative statements, and they tend to get a deaf ear to them. As a result, counsel must carefully and objectively consider whether a proper statement of the case in a nutshell—as it most likely would appear in the court's opinion—would lead to a decision reversing the judgment below. In this regard, the client needs to understand and appreciate that the facts must be taken in the light most favorable to the other side as the prevailing party at any trial. If, on the other hand, the appeal is from an adverse summary judgment, so that the facts can be stated in the light most favorable to the client, that almost certainly should make the burden of persuasion on appeal easier. This tip leads to the next tip. **5. State the "Case in a Nutshell" and Test It with Someone Cold to the Case**

Preparing a statement of the "case in a nutshell" and running it by some folks cold to the case can provide the splash of cold water necessary to arrive at a proper view of the actual strength of an appeal. Listening to what they are saying, however nicely they do it, is the key. They may well be seeing the case in the same way busy appellate judges, with stacks of briefs they must read, will view it. Remember once again, the appellate judges will not know this case as well as appellate counsel and the client know it, and that necessarily impacts the chances of success on appeal. This is why, of course, it is important to do this exercise early. Not only can it help in deciding what issues to raise, it may also lead to the realization that a settlement of the case may be better than an appeal. Finding out at a moot court for oral argument that the mock judges do not like the arguments they are hearing as to why they should reverse is not the best time to learn that. Running it by folks earlier, rather than just working with other believers in the arguments, can be helpful on numerous levels, including evaluating whether seeking a settlement, or even simply accepting the adverse result at trial, may be the lesser of multiple evils, however distasteful that option may be to the client. **6. Don't Forget or Ignore the Standard of Review**

A second thing Judge Boudin was surprised to realize upon going on the bench was the critical importance to appellate judges of the standard of review. An appellant's counsel need to be mindful of this and not simply assume that strong substantive legal arguments with good facts will carry the day on appeal. The point is, appellate courts are error-correcting courts, and their charge is not to ensure that the "right" result is reached in the case. Clients often cannot believe that, and an appellant's counsel must do their utmost to bring this truth home to their client up front. That is why being self-disciplined in selecting the issues for the appeal, with the best possible standard of

review, is so essential. By the same token, once on appeal, that standard of review must be satisfied. The client needs to appreciate how difficult it usually is to establish that a trial court abused its discretion, especially as to matters it saw or heard firsthand at trial. The client also needs to understand that even if error is in fact demonstrated, that is not enough—it must be demonstrated that the error was not harmless. Harmless error often is in the eye of the beholder and may be impossible to predict for some as yet unknown panel of judges, which leads to the next tip. **7. Never Discount the "Inertia" Effect**

There is a natural, whether overtly admitted or not, reluctance of appellate courts to require a do-over, with all the labor and cost that would entail. If the appellate court feels at some visceral level that the result will be the same after a reversal, it likely will find a way to conclude reversal is not necessary. Why force the parties and the court to do it all over again if the result seems to be the natural result in the case 90 times out of 100? All the more so if the court believes that is the right result on the facts of the case, especially if the other side has established it was injured, requiring relief. The whole decision-making process of an appellate court is designed to balance the need for finality against the need for quality and a fair trial in the trial court. "Inertia" is merely a shorthand way of saying appellate judges intuitively feel that merely concluding a dispute often has great value. Beating that "inertia" is a matter of convincing the court that the "quality" of the judgment is so low that the importance of quality trumps the importance of finality. That is why showing "harmful error" is so critical. The more the judgment error seems harmful, the more quality wins in the balance. Counsel for an appellant accordingly must take a hard look at whether they can tilt the balance of "finality" in favor of correcting a poor-quality judgment. This squarely implicates the next tip.

8. Recognize the "Bad Facts" Syndrome

It has long been an axiom that "bad facts make bad law." But it is all too easy for appellate counsel to shove the bad facts to the back of their mind and trust that strong law will result in a win on appeal. The "bad facts" maxim is as true today as ever, however, and often can lead to a result that seems to run counter to the applicable law. In jurisdictions like Florida, where its appellate courts can, and often do, affirm by a per curiam decision without opinion, it does not even make bad law, as the decision is deemed to be without precedential effect. The lesson here is for appellate counsel never to forget—or let the client forget—the "bad facts" of the case, no matter how strong the law may seem to be in the client's favor. Would the man on the street think the result sought on appeal is the right and proper result in the case? If not, the woman on the bench may not think so either and may look for a way to distinguish, or just ignore, the law cited on appeal; or, even change the law to avoid a harsh result under the particular facts of the appeal. Appellate counsel must factor this possibility into their evaluation and determine just how "bad" their facts are compared to just how "good" their law really is. **9. Guard Against the "Wishful Thinking" Danger**

In the same vein, it is essential that appellate counsel evaluating the potential of a reversal on appeal make sure they have not fallen in love with their own arguments. When writing as an advocate to persuade the court, lawyers inevitably tend to persuade themselves that they are absolutely right. That is only human. And the client reading it will be nodding his or her head in agreement at every step of the way and applauding counsel's advocacy on his or her behalf. In evaluating the case as it

will be presented on appeal then, it is critical that appellate counsel put the advocate's hat aside at that time and put on an "appellate judge's hat" instead. They need to think worst case and objectively evaluate the likelihood of success on appeal in light of everything, including all "bad facts." Can the appellate court find the error was not properly preserved? Can the appellate court make the dreaded holding that "even though we might not have ruled as the trial judge did, we cannot say that ruling was an abuse of discretion"? There is that pesky standard of review again! On the even more dreaded holding, "we agree it was error to so rule but find the error was harmless on this record." There are those bad facts again! Better to think in the first instance about all the potential ways the appellate court could affirm, rather than to have an affirmance come as a nasty surprise to the client in the end. Remember, the arguments that would be advanced on appeal have been rejected once (unless they are unpreserved, in which case there is an entirely different problem). It always is possible those arguments will be rejected again. Seeking a settlement, rather than pursuing an appeal, may be in the client's best interests. **10. Even a Blind Hog Sometimes Finds an Acorn in the Forest**

Appellate counsel must avoid the common mistake of assuming that a reversal is in the can because the trial judge is not well regarded and has a high rate of reversals. It likely is not a 100 percent rate of reversal, as every judge gets affirmed on occasion. This case could be the occasion where the appellate court thinks the trial court actually got it right for a change and is happy for the chance to affirm this judge. **Conclusion**

Some cases simply cannot be settled on any realistic terms or be allowed by the client to stand without challenge. Those cases are easy—the client has to appeal and appellate counsel has to do the best they possibly can to maximize the chances on appeal. After all, the appellate court exists precisely to cure prejudicial errors in the trial court, and reversals are obtained in many cases, sometimes even resolving the dispute with finality in the appellant's favor as a matter of law—the best possible result on appeal. Some cases, however, can and should be settled without an appeal, even if it dismays the client to even consider doing so. To this end, appellate counsel owes it to the client to help it understand the risks and downside of the appeal, the likelihood of success, and the likely nature and extent of relief resulting from the appeal. Returning to the basic realities of the appellate world is key to that exercise. Then, having worked through all these steps, it is important to return to the odds on appeal. They may tip the scales on seeking a settlement or not. It may be helpful to put a decision-making tree on paper—evaluating mathematically the probability of success on each issue and the costs of going forward with an appeal. It never can be precise but may provide a sobering indicator for the client. **Keywords:** litigation, appellate practice, likelihood of success, financial exposure, precedential implications, case in a nutshell, harmful error, settlement The article was originally published by the American Bar Association Section of Litigation.

Authored By

Sylvia H. Walbolt

Related Practices

Appellate & Trial Support