



A Post-Trial Triage Checklist

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So you just lost at trial and now you are in full-scale triage. Here are some thoughts from the Carlton Fields appellate group about what should be on your post-trial checklist.

1. Address the need for a supersedeas bond.

If a money judgment is going to be entered against your client, you should immediately determine (i) the date a supersedeas bond may have to be posted to prevent execution on the judgment, (ii) the full amount of that bond, and (iii) whether there are restrictions on the source of the bond. If the applicable rules of procedure do not provide short-term relief from execution, seek an agreement with opposing counsel (or a ruling by the court) that you will have a specified time certain to file a bond after post-trial motions are resolved. Always confirm who is working to obtain a bond that can be timely posted if necessary.

2. Determine deadlines for all other steps.

There will be many things to do after a bad result at trial. Immediately determine what deadlines exist with respect to future filings in the case, especially those filings that must be made to preserve issues for appeal. Have all potential deadlines calendared immediately, and identify a point person for each item.

3. Identify all grounds for post-trial motions.

Hopefully you have issues to raise in post-trial motions, including issues that were unsuccessfully raised before trial. In thinking about the motions, remember that they are your last opportunity to preserve issues for appeal and as such, the motions almost always need to be filed, even if they are not likely to be granted. Make sure that every potential issue for appeal has been preserved, including all issues arising from the trial and verdict

itself, and obtain rulings on them. Because of the importance of the preservation requirements, it is useful to involve appellate counsel in the drafting.

4. Complete the record.

Make sure the record is complete. In particular, confirm that documents used at trial – such as additional requested jury instructions provided to the judge at the charge conference, all exhibits (admitted and excluded), and all demonstrative aids shown to the jury (by either party) – were filed with the clerk. If not, the missing items should be filed promptly. And make sure your own files contain an accurate copy of all the court filings as well.

5. Determine whether there are more bad things that could happen in the case after the trial.

Sometimes an adverse money judgment is only the tip of the iceberg. Is there a fee-shifting

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statute or contractual provision in play? Are there any proposals for settlement or sanctions motions, for example, that could result in the imposition of attorneys' fees for the prevailing party? Could an injunction be entered based on fact-finding by the judge or jury?

Will pre-judgment interest be added by the judge based on the damages findings, such that the bond will need to include this? Remember that any judgment for attorneys' fees or costs also will need to be bonded to avoid execution.

You should consider such issues sooner rather than later in order to determine your options and next steps.

6. Evaluate potential appellate issues realistically to determine your next steps.

Consider as objectively and promptly as possible, in conjunction with appellate counsel, whether there is a realistic chance of reversing the adverse trial outcome. Specifically evaluate what form of relief is likely to be granted on the potential appellate issues. Is it significant relief? Could the result get even worse the next time around?

Always remember that an appeal can result in a published opinion that might be worse than one bad verdict since the precedential impact of an unfavorable appellate decision could negatively impact your client or its industry in the future. In addition, consider whether the other side has a viable cross-appeal presenting issues of concern and risk in the case.

Depending on the answers to these questions, perhaps now is the time to propose a possible settlement in exchange for foregoing an appeal. There may not be a better time post-trial to attempt settlement than while the other side faces the cost and delay resulting from an appeal.

7. The free press may be calling.

The client, trial counsel, and any appellate counsel need to be on the same page as to how to respond to press inquiries.

Some of this checklist may seem very basic. But in a post-verdict world, it is essential to remember the basics. This checklist will help you do so.

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