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Special Issues for Public Entities in Appellate Practice:

Questions An Appellate Lawyer Would Ask, And Every Municipality Should Ask, Before Prosecuting An Appeal

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INTRODUCTION

I'm an appellate lawyer. For the past 33 years, all I have done is appeals in federal and state courts. I have briefed and argued over 200 appellate cases, including several cases in the California Supreme Court, and five cases in the United States Supreme Court. About 70% of my practice has been devoted to representing public entities. As a result, I've had a good opportunity to encounter firsthand the way appellate courts deal with public entity cases, and the decision-making process municipalities undertake in deciding whether or not to appeal in a particular case.

The purpose of this article is to share the sort of advice that I provide to public entities when they consult me regarding an appeal. These are questions that, as the title indicates, an appellate lawyer would ask, and a municipal client should ask, when it comes to making a decision whether or not to take an appeal.

Appeals are often lengthy undertakings, with the attendant expense. More fundamentally, they are significant because they can literally change the law. For that reason, knowing whether and when to appeal is extremely important to public entities, since as institutions, they often confront the same issues year after year, and a bad appellate decision can have consequences well beyond a single case. This article is designed to assist in the decision-making process. Many of the things I discuss will be obvious to some experienced practitioners, but based on my experience I know that quite often many attorneys, even experienced litigators, may actually only have two or three appeals over the course of a career. Hopefully, this article will serve as a refresher course for those who frequently practice in the appellate courts, as well as an introduction to the appellate process for attorneys new to the field.

I. OVERVIEW

Why Appeals Are Different.

Although everyone pays attention when United States Supreme Court comes out with a significant decision, the image most people have of a court is a trial court. That is, the typical scene of a judge and a jury, and an attorney examining a witness on the stand. Appellate courts are very different. Trial court's generally focus on issues of fact. A judge or jury hears the testimony of a witness and makes a decision as to what the facts are, and then the law is applied to the facts.

In contrast, appellate courts focus almost solely on questions of law. As I will discuss later, appellate courts do not re-weigh evidence. Rather, to the extent there is any evidence in the record to support the decision of a judge or jury, the appellate court accepts it as true. Thus, the focus of argument in the appellate court is generally very different than the focus of argument in the trial court. Terrific arguments about whether a particular witness is credible or not credible are not useful on appeal. Instead, appeals invariably focus on law based questions, such as jury instructions, verdict forms, and questions of jurisdiction and immunity.

The nature of decision-making is also very different in the appellate court. Most trials are conducted in front of a jury, which, as noted, decides issues of fact. There is also typically only a single judge in a trial court proceeding, whereas virtually all appellate cases are decided by at least three judges with state Supreme Courts often consisting of panels of five or seven justices.

In addition, although some trial judges have law clerks to assist them in handling the legal research in a particular case, most appellate court justices have at least one or two research attorneys, sometimes more, to help them in reviewing

the briefs filed by the parties. The appellate court will independently and affirmatively analyze the positions of both sides (though that can vary with some appellate courts), including reviewing the record below, and reach a decision. In short, appellate courts are extremely active in making the ultimate determination of the case, in contrast to trial judges who, because most trials are fact-based, leave the significant determination of issues of fact to the jury.

The dynamics of trials and appeals are also very different. Trials are fluid and unpredictable in scope—like poker, you don't know exactly what cards your opponent holds until played. Appeals are more static, with specific boundaries set by the record. As noted, the appellate court will take the record as it finds it, almost frozen in amber. Whatever facts are in the record, well, that's all you have to work with. Like chess, all the pieces are in the open. As a result, in many respects it is easier to assess the strength of a case on appeal, than it is in the trial court, because there is a finite universe of facts and law to consider.

There is also an inherent institutional bias to a particular result in appellate courts that is not present in trial courts. The vast majority of all judgments on appeal are affirmed. As a general matter, appellate courts reverse in less than 20% of civil cases, and this includes appeals from some orders where the standard of review may be highly favorable to an appellant, for example an order dismissing a case on the pleadings. Appellate courts have been described as "affirmance machines," so in any appeal, no matter how strong an argument may be, both sides are aware that institutionally, the appellant is facing an uphill battle. Thus, unlike the trial court, where the parties generally have an even playing field, the appellate process is stacked against the appealing party.

Is Special Counsel Needed To Address These Differences?

I, and other appellate attorneys, are frequently asked: Why do I need special appellate counsel? And although my colleagues in the appellate bar may come after me with pitchforks for saying this, the short answer is you may not need special appellate counsel in a particular case. There are certainly routine, non-complicated legal issues, which accordingly give rise to ordinary, uncomplicated appeals. And many trial attorneys have excellent legal research and writing skills, and are fully capable of handling complex appeals in their particular area of expertise.

But what an appellate attorney brings to a case is an objective viewpoint that should closely approximate how and appellate court would evaluate the case. Thus, appellate counsel may well be appropriate in a case where understanding the particular rules on appeal will be important, for example the standard of review.

In addition, certain cases simply by virtue of their magnitude may warrant bringing in a specialist, given a particular high damage award, or political or policy issues that may significantly impact a public entity over time. Moreover, if the case presents a complex or novel legal issue, an appellate lawyer may be able to provide a greater depth of research than an attorney who only occasionally handles appeals. Part of this is a function of time—all appellate attorneys do is research the law and draft briefs. However, it is also the result of expertise. If a substantial portion of your practice is devoted to legal research, you gain particular expertise in finding and interpreting case law.

II. WHAT COURT ARE YOU IN?

State Courts.

Talking with my colleagues who practice appellate law throughout the country, it is clear that state appellate courts vary widely. Some states have no intermediate appellate court; review is directly to the state Supreme Court. Some state appellate courts have law clerk staffs almost as extensive as those available to the federal appellate courts, with each appellate justice having one or two individual research attorneys to assist in the workload. Other state appellate courts are more spartan in approach, with very little internal support for the individual justices.

Workloads also vary widely among state appellate courts. In some states, appeals can be decided in as little as six months. In contrast, in some of the larger states, the appellate case system may be so backlogged that it is not uncommon for an appeal to take upwards of 18 months between the filing of a notice of appeal and final disposition of the case by opinion.

The benefit of state appellate courts is that generally there will be only a small pool of justices to whom the case will be assigned for decision. Because appellate justices are generally drawn from the local legal community, there is a strong chance that a litigant will have some insight into the leanings of the justices who might hear an appeal in a particular case. Knowing who will decide your case is extremely helpful in assessing the likelihood of success on appeal.

In addition, state appellate court justices tend to be, as one would think, very familiar with state law. In contrast, however, they may be less familiar with federal law, for example, a section 1983 claim. In some respects, state appellate courts may be more deferential to the interests of local public entities than their

federal colleagues, given their exposure to a broad range of government cases, and the fact that many of the justices themselves may have a public law background.

Federal Courts.

There is also a wide variation among the federal appellate courts as to how long it takes for an appeal to go through the system. The most recent statistics from the federal government indicate that the circuit courts on average take nine months to process an appeal. However, that number may be inaccurate with respect to disposition of civil appeals, as it takes into account criminal appeals which are processed on a priority basis. Anecdotal evidence suggests that most civil appeals take at least a year between the filing of the notice of appeal and disposition by opinion in the federal appellate courts. Indeed, in the Ninth Circuit, at one point court staff indicated that most civil appeals would not even be assigned to a panel for oral argument until between 14 and 16 months after the notice of appeal had been filed.

The composition of federal appellate panels is also typically more unpredictable than in a state court of appeal. That is because there are often a larger number of circuit court judges available to hear an appeal, and you may not know which three will even hear the case until shortly before oral argument. In addition, circuit court judges are drawn from various states within the circuit, so there may be less "local knowledge" among the judges who decide an appeal, as they may come from a state other than where the underlying case was heard. This can have an impact on resolution of issues of state law, and in some circumstances a municipality may want to avoid having a federal panel resolve a tricky issue of state law. This is because the judges who hear the case may not be all that familiar with state law, and more critically, the circuit court's disposition of the state law issue is almost unreviewable—the United States Supreme Court will not review a

case that turns on resolution of substantive state law, absence the existence of an underlying constitutional or federal question.

In some respects, federal appellate courts may also be less deferential to interests of local public entities than their state court counterparts. Part of this may stem from the fact that, as noted, federal appellate judges may hear cases arising from states in which they never practiced, and thus may not have close ties to local municipalities. In addition, the federal appellate courts hear many claims involving civil rights and other constitutional claims against public entities, and thus as an institutional matter may be more skeptical about government conduct, although this can vary widely from circuit to circuit.

III. WHAT ARE YOU APPEALING FROM?

Verdict After Bench Or Jury Trial.

As a general matter, probably the most difficult appeal is from a judgment following a bench or jury trial. The reason for this is that the standard of review is so favorable to affirming the judgment. As noted, an appellate court will not re-weigh evidence. To the extent there is any evidence in the record to support the judgment, the appellate court will presume that the trier of fact relied on that evidence, and will not disturb that factual finding on appeal. It may be that the defense had 20 terrific witnesses to testify on a particular point, and the plaintiff had only one, but if the jury finds for the plaintiff then the testimony of the 20 defense witnesses is unlikely to be very important on appeal.

On top of that, most of the important decisions a judge makes during the course of trial concerning admission of evidence, jury instructions, or form of the verdict or judgment, is subject to a highly deferential abuse of discretion standard. Although the circuit courts have slight variations in the exact formulation of what

constitutes an abuse of discretion, generally appellate courts will only reverse a trial court's decision as an abuse of discretion where the ruling is entirely illogical. Indeed, some appellate courts use the phrases "arbitrary," "whimsical," or "beyond the scope of reason," to describe an abuse of discretion.

Moreover, even where a court has committed legal error and the review is de novo by the appellate court, i.e., with no deference to the trial court, there can be no reversal unless the legal error prejudicially impacted the judgment. And, generally, a trial court's determination of whether a particular error it made may have impacted the judgment is reviewed under an abuse of discretion standard, with the appellate court deferring to the trial court's firsthand knowledge of what transpired, and its assessment of whether the error affected the decision in the case.

An appeal from a judgment in a bench trial may be even more difficult than an appeal from a jury trial, because there are fewer moving parts so to speak, i.e., no jury instructions or special verdict forms, and the trial judge is generally viewed by an appellate court as being able to distinguish between admissible and inadmissible evidence in rendering a decision. On the other hand, in some states, a trial judge sitting as a trier of fact may be required to make written findings which are governed by strict procedural rules, and violation of those rules may be a fruitful avenue for appellate review.

Order Dismissing A Case On The Pleadings.

Appeals from orders dismissing a case on the pleadings probably have the highest degree of success in terms of reversal. This is a function of the standard of review. First, a trial court's ruling on the sufficiency of a pleading is generally subject to de novo review as a question of law, i.e., taking the facts as plead in the complaint, has the plaintiff stated a cause of action? Second, although there is some variation among the states on pleading rules, and the federal courts have been

somewhat inconsistent in their interpretation of the "stricter" pleadings standards set by the Supreme Court in *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), generally, a plaintiff is allowed to proceed so long as there is any conceivable set of facts that may be alleged to support a cause of action. Moreover, it is almost a uniform rule throughout the country, that leave to amend should be generously granted, although a trial court's decision whether or not to do so is typically reviewed for abuse of discretion.

Despite these favorable principles governing appeals from an order dismissing a case on the pleadings, nonetheless there is still the inherent institutional bias in favor of affirmance of a judgment. Particularly where a trial court has granted leave to amend numerous times, an appellate court may be unwilling to allow a plaintiff yet another chance to plead his or her case. The likelihood of success still remains less than 50%, although it will necessarily vary depending upon the circumstances of a particular case.

These favorable pleading rules also have a significant impact on when and how to litigate particular defenses. Qualified immunity is a good example of this. The Supreme Court has held that qualified immunity is an immunity from suit, not just liability, and hence should be raised and decided at the earliest opportunity. Thus, it can be asserted on a motion to dismiss under FRCP 12(b)(6), and if the motion is denied, that order (unlike a typical order denying a motion to dismiss) is immediately appealable. (*Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).) However, an appeal at the pleading stage puts the case in a posture where the qualified immunity claim is being evaluated against a background of the most favorable facts that can be imagined for the plaintiff, even if ultimately they will not be proven in the underlying case. The result can be an appellate opinion rejecting qualified immunity under a general principle of law that will ultimately

have little relevance to the particular case, but might create unfavorable precedent for other cases.

For this reason, many defense attorneys avoid raising qualified immunity at the motion to dismiss stage, and instead pursue the issue on summary judgment, where some evidentiary support can be presented and the issue decided on concrete facts. Assertion of an immunity defense by way of a motion attacking the pleading is generally reserved for those cases where there is a clear entitlement to relief and the defendant is particularly vulnerable to entanglement in litigation, for example absolute immunity claims by prosecutors for purely prosecutorial conduct, and legislators for core legislative activity.

Summary Judgment Orders.

An order granting summary judgment is also generally subject to a very favorable standard of review for an appellant. Like an order dismissing a claim on the pleadings, it is typically subject to de novo review by the appellate court, with no deference given to the trial court's decision, save for evidentiary rulings which may be reviewed for an abuse of discretion. Moreover, the underlying standards for granting summary judgment are extremely stringent, i.e., it is only proper where there is no genuine issue of material fact that would support a judgment in the opposing party's favor. Thus, while motions for summary judgment are no longer "disfavored" in most courts, nonetheless orders granting judgment short of trial are generally subject to very careful scrutiny by the appellate courts.

The rules governing review of summary judgment orders also have an impact on raising a particular defense and pursuing it on appeal. As noted, qualified immunity may be raised at any time in a case, and it is frequently raised by way of summary judgment, particularly in the federal courts. And, as with orders denying a motion to dismiss based upon qualified immunity, an order

denying summary judgment on qualified immunity is immediately appealable, in so far as it is based upon the district court's determination of an issue of law. (*Mitchell*, *supra*, 472 U.S. at 530; *Johnson v. Jones*, 515 U.S. 304, 319 (1995).) Thus, a defendant pursuing an appeal of the denial of summary judgment based upon qualified immunity has the benefit of a favorable standard of review in that the district court's decision on the law will be reviewed de novo, but will still face an uphill battle based upon the general "material issue of fact" standard governing summary judgments.

IV. WHAT IS THE GROUND FOR REVERSAL?

The Longshots.

Exclusion or Admission of Evidence.

As noted, most trial court decisions concerning whether to admit particular evidence are subject to the highly deferential abuse of discretion standard of review. To be sure, some evidentiary questions may turn upon interpretation of the law, in which case an appellate court will review the trial court's decision de novo, with no deference. A good example of that is whether or not particular testimony constitutes hearsay, or falls within a particular privilege. But generally, if the trial court correctly identifies the applicable legal rule, an appellate court will not disturb the application of that rule absent an abuse of discretion.

However, there are certainly some decisions on admitting particular evidence that are more closely scrutinized by appellate courts than others. For example, in recent years both federal and state appellate courts have been taking a closer look at expert testimony in making inroads against admission what is often termed "junk science." Thus, in many cases, appellate courts have been willing to carefully scrutinize the foundation for expert opinion, with the federal appellate

courts particularly focusing on the issue following the Supreme Court's decision in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

On the other hand, most appeals based on a trial court having admitted evidence that was unduly prejudicial, or insufficiently probative, i.e., admitted under FRE 402, are generally dead on arrival. Appellate courts are loath to second-guess a trial court's decision as to whether particular evidence will have an improper impact on a jury. The only area in which appellate courts generally apply close scrutiny is where the evidence in question is inherently, indeed intuitively, prejudicial, for example gang affiliation, drug use or prior criminal conduct by a party.

Moreover, with the exception of improper admission of expert testimony, most evidentiary errors need to occur on multiple occasions in order to provide a solid basis for appellate reversal. In sum, a strong case has to be made for cumulative error, as it is a very rare case where a single evidentiary ruling outside the context of expert testimony could be said to have necessarily affected the judgment.

Substantial Evidence, I.e., No Evidence To Support The Judgment.

As noted, appeals based upon the absence of evidence to support a judgment are rarely successful, given the standard of review—so long as there is any evidence to support the judgment, it will be affirmed. This is not to say that such appeals are impossible. However, most successful appeals along these lines involve purely legal questions, such as immunities, where the basic contention is that even on the facts as found by the jury, nonetheless the defendant is entitled to judgment.

Misconduct of Counsel.

Though all too often made as an argument, it is extremely rare for a judgment in a civil case to be reversed on appeal based upon the misconduct of counsel. This again is a function of the standard of review. A trial judge's decision whether to allow particular conduct by an attorney, and any subsequent ruling on whether that conduct improperly affected the jury for purposes of granting a motion for new trial, will be reviewed for abuse of discretion. Once again, the appellate court will defer to the trial judge, who was in the best position to observe the alleged misconduct and its impact, or lack thereof, on the jury.

The few instances where attorney misconduct arguments are successful on appeal, generally involve highly outrageous conduct, occurring on multiple occasions. Even an appellate court might not be blind to the cumulative effect that beyond the pale conduct may have on a jury in deciding a case, particularly if the party's case is otherwise weak. The rise of the "reptile theory" in the plaintiff's bar, with highly calculated, often inflammatory exhortation to a jury to "send a message" or make a determination of damages based upon the "golden rule," will likely see a corresponding increase in appellate cases raising the issue of attorney misconduct.

Grant Or Denial Of New Trial.

An order granting a new trial will seldom be reversed on appeal. This is another instance where the standard of review dictates the ultimate outcome, as a trial court's decision that a new trial is warranted will generally be reviewed for abuse of discretion. The same is true of a trial court's order denying a new trial, although in some instances to the extent based upon interpretation of the law, an appellate court will review that legal determination de novo. However, the trial court's decision as to whether the particular legal error may have impacted the

judgment will generally be reviewed for an abuse of discretion, although some legal errors, for example, defective jury instructions, may in some jurisdiction carry with them a presumption of prejudice.

It should be noted that many jurisdictions have very stringent limitations on the power of a court to grant a motion for new trial. Most states have time limits on bringing a motion for new trial, and some states impose specific requirements on the trial court in granting the motion, for example, requiring a specification of reasons for particular grounds. In some circumstances failure to meet these procedural requirements can lead to automatic reversal.

Issues with A Better Chance of Reversal.

Jury Instructions.

Defective jury instructions are one of the strongest grounds for an appeal. Although trial courts are given some latitude in how to phrase jury instructions, nonetheless the legal substance of instructions is a question of law and as a result is reviewed de novo by an appellate court, with no deference to the trial court's ruling. Moreover, as noted above, in many jurisdictions, an erroneous jury instruction concerning a fundamental claim or defense carries with it a presumption of prejudice. Standards vary from finding that reversal is required if it is reasonably probable that a different verdict might have resulted, to finding that a new trial is warranted if it is reasonably possible that the result would have been different.

The caveat when it comes to an appeal based upon defective jury instructions is that the instructions must concern key elements of a claim or a defense. A trial court's failure to give instructions on ancillary issues, for example limiting the extent to which particular evidence can be considered by the jury, or

defining terms used in other instructions, are generally reviewed under an abuse of discretion standard. In addition, instructions on such tangential issues typically do not carry with them a presumption of prejudice, and appellate courts will again defer to a trial court's determination that even assuming there was error in the instructions, that the error did not impact the jury's decision.

Moreover, as discussed below, it is particularly important that any objection to a jury instruction or failure to instruct be properly preserved on the record. This is an area in which error is often inadvertently waived.

Special Verdict Forms.

In cases involving multiple claims and multiple parties, special attention must be paid in drafting special verdict forms, or special interrogatories for the jury. This is because these documents present a minefield in terms of potential appellate issues, such as confusing or inconsistent findings as between the various claims and parties, or omitting a necessary finding. Again, although trial courts generally have considerable leeway in deciding whether to allow a special verdict form or interrogatories, once employed, they can often be a very productive area of inquiry for potential appellate issues.

Jurisdictional Error.

Arguments concerning the power of the court to adjudicate a particular case are another very strong ground for an appeal. Sometimes this takes the form of preemption, for example ERISA cases, or it can concern actual jurisdiction over a particular defendant. Many states have formal claim presentation requirements as a prerequisite to suing a public entity, and a failure to timely submit a claim acts as a jurisdictional bar to any lawsuit. Most jurisdictional issues concern application of the law to specific facts, and hence are reviewed de novo by an appellate court,

although if application of the law requires resolution of a particular factual issue, then the appellate court would apply the usual deference to the findings of the trial court or jury in support of the judgment.

Immunities.

Governmental immunity in its various forms is probably the issue public entities most frequently litigate in the appellate courts. First, most immunity issues boil down to questions of law as applied to specific facts, and hence lend themselves to the less deferential de novo standard of review in the appellate courts. Second, because immunities by their nature generally address a broad category of governmental conduct, it is often worth pursuing an appeal to clarify the scope of a particular immunity without regard to the verdict or judgment in a particular case. Governmental immunity is the sort of "institutional" issue that public entities need to evaluate from an appellate perspective because of the possibility that an adverse decision will affect many cases in the future.

Governmental immunities are also strong grounds for an appeal because most are supported by very clear public policy. Many statutory immunities in particular, strike a balance between protecting the public, and recognizing that under some circumstances the government will be unable to function and provide services to all, unless certain conduct is shielded from liability. Appellate court justices, like all judicial officers, want to make a "just" decision, and the strong public policy grounds underlying many immunities can often tip an appellate court towards resolution of a case in favor of a public entity, even if faced with an otherwise sympathetic plaintiff.

V. IS THE ERROR IN THE RECORD?

A fundamental axiom on appeal is: If it isn't in the record it didn't happen.

Many a potentially strong argument on appeal has fallen to the wayside because the argument was not properly preserved below. The danger of waiver arises frequently with respect to particular issues, with wide variation among state courts as to how particular issues need to be preserved in order to pursue an appeal.

Admission or Exclusion of Evidence.

In evaluating an appeal based upon a trial court's admission of, or failure to admit particular evidence, the threshold issue is whether the request or objection clearly appears on the face of the record. In most cases the objection or request will appear in the normal course of proceedings, i.e., a request will be made to introduce a particular exhibit, or call a particular witness, or there will be an objection to evidence offered by the other party. The pitfalls with respect to these sorts of "on the record" requests and objections, generally center on making sure that the correct grounds have been cited for admitting evidence, or that the correct basis for objection has been asserted. As noted, jurisdictions very widely with respect to preserving the right to appeal particular evidentiary rulings, with some states requiring that the attorney request a ruling, and then if rebuffed, calling for an "exception" which formally preserves the ruling as a ground for later appeal. Other jurisdictions are somewhat more casual, and some courts even allow "running" objections, to avoid constant interruption of the proceedings.

With respect to preserving the right to contest a trial court's refusal to admit evidence, one of the most common mistakes is failure to make an offer of proof as to precisely what the proffered evidence will show. In order to make a credible argument in an appellate court that particular evidence should have been admitted, it is essential that the appellate court have some understanding of what the evidence actually would have been.

Admission of exhibits can often be a problematic issue to pursue on appeal absent a clear record of precisely what exhibits have actually been accepted into evidence by the court. A common scenario that hamstrings chances for appellate review, is having an exhibit introduced for identification by a witness, but never formally moved into evidence. While some courts are very good about entering minute orders at the conclusion of each day's proceedings, or at conclusion of the entire case, documenting precisely which exhibits have been entered into evidence, others are less formal. As a result, particular attention must be paid to making certain that the court's specific rulings on admission of exhibits gets into the record.

It is also critical to make certain that the court actually makes a final ruling on the request or objection. Motions in limine can often create a trap for the unwary. It is common for judges to defer ruling on such motions concerning evidentiary issues in advance of trial, and instead reserve ruling until the disputed evidence comes up at trial. Unless the objection is renewed at the time the testimony is offered, and a ruling obtained, an appellate court might well conclude that a party waived its right to object to the testimony because no final ruling was sought or obtained on the objection.

Instructional Issues.

Another area where there is a wide variation among the states concerning the need to object, and manner of objection, is jury instructions. Some states deem the opposing party to have objected to any instruction submitted by the other side, without need to cite specific grounds. Other states require a party to make a specific objection as to each contested instruction, or in some instances to offer a substitute, "correct" instruction in order to preserve the right to further review. In the latter case, there can often be a danger of invited error, in that the instruction

offered by the objecting party may be just as deficient (albeit in a different way) as that submitted by an opponent.

Although some state and federal courts have very clear guidelines for submitting jury instructions, others take a much more casual approach, with instructions often submitted and settled "on the fly," as a case rushes towards conclusion. As a result, it can sometimes be difficult to determine exactly which party offered a particular version of an instruction, or whether in fact a proper objection to the instruction has been made. This is particularly true where much of the discussion of jury instructions occurs informally "in chambers," so that the only document that appears on the record is the packet of final instructions eventually given to the jury. Even in circumstances where a court wants to resolve jury instruction issues in chambers, it is important to make certain that the final record reflects exactly who proffered which instruction, and what, if any objections were made.

Damages Issues.

Aside from making a record with respect to requesting admission of, or objecting to, evidence pertinent to damages issues, preserving the right to pursue a damages issue on appeal may also hinge on whether the particular jurisdiction requires a specific ruling by a trial court on the question. This typically comes up in the context of claims that damages are either in adequate or excessive. Many states will not allow an appellate challenge on the ground that damages are either inadequate or excessive, unless a motion for new trial or additur or remittitur was made in, and ruled on, in the trial court.

Issues Based On The Absence of Evidence To Support the Judgment.

Some states allow an appeal based upon the absence of evidence to support the judgment without requiring the appellant to have first moved for a directed verdict at the close of the other party's case, or moved for judgment notwithstanding the verdict (JNOV) after the verdict. Other states will not allow such an appeal unless a party filed a motion for directed verdict specifying the evidentiary failings in the opponent's case, and then filed a post judgment motion for JNOV, while others take the middle ground of requiring a motion for directed verdict, but not a motion for JNOV.

In federal cases a party must make a rule 50 motion for judgment *at the close of evidence, as well as a post-trial motion for judgment* on the same grounds, in order to preserve the right to appeal the judgment based upon the absence of evidence. (*Unitherm Food Systems Inc. v. Wift-Eckrich,Inc,* 546 U.S. 394 (2006).)

VI. HOW STRONG AN ARGUMENT DO WE HAVE?

A. What is the State of the Law?

One of the first things to assess in any appeal is how strong the law is with respect to the client's position. Is there clear statutory language, or multiple decisions that can be cited in support of the argument? Is there a split of authority so that the case will be important in order to resolve the law for future cases? Is this a case that involves a novel issue of first impression, and if so, is this case the proper vehicle to push the position in the appellate court? With respect to the latter inquiry, does the case provide a strong factual basis for asserting the argument, or is it possible that future cases might have a stronger record?

B. Is Our Position Equitable—Can We Sell It?

As noted, appellate courts want to reach the "correct" result in any case—to do justice. You can have an extremely strong, technical argument on the law but however focused appellate courts are on the law, nonetheless the strongest argument is one that has a compelling equitable component. Courts are concerned with fairness, so a case where the result seems intuitively unfair may be a ripe candidate for appeal, even if the law is somewhat uncertain. Conversely, where plaintiff has suffered a grievous injury, the appellant may have a very strong legal argument, but in a close case an appellate court would most likely side with the plaintiff. In such circumstances, the strongest appellate argument for a public entity is one that can be tied to public policy considerations, which by their nature transcend the result in any individual case.

Along these lines, it can be extremely helpful to obtain amicus assistance from other public entities, or organizations such as IMLA or the League of Cities, to underscore the importance of a particular issue, or address policy concerns that may not be fully fleshed out in your particular case. Friend of the court briefs can invite the appellate court to focus not so much on the outcome of the particular case before it (which may have an extremely sympathetic plaintiff) but instead contemplate the wider implications of any decision.

VII. WHAT IS THIS GOING TO COST?

A. Financial Costs.

Interest On The Judgment.

For most public entities, the cost of paying interest on a judgment pending disposition of an appeal is a relatively minor consideration. This is because many states limit the rate of interest running on a judgment against a public entity (for

example, in California judgments against a public entity bear a 7% rate of interest, as opposed to 10% against private parties), or the general rate of interest on a judgment is minuscule. The latter is true of federal judgments, where the interest rate is set by the T-bill auction rate at the time the judgment is entered. (28 U.S.C. §1961.) Given current interest rates over the last several years, judgments in federal cases have been accruing interest at less than 1% a year.

Bond Expenses.

The expense of posting a bond pending appeal is also rarely a consideration for public entities in deciding whether or not to appeal. This is because many states exempt public entities from having to post a bond to secure a judgment. And, where the judgment constitutes a lien on the property of the judgment creditor, federal courts will follow state law in terms of posting a bond to secure a stay pending appeal. (FRCP 62(f).) Where the judgment does not create a lien, the federal court must set an amount of bond, but courts can often be convinced to effectively waive the bond, or set it at an extremely low amount, given the fact that most public entities have little difficulty in establishing that they will be able to pay any judgment. Unlike private companies, public entities rarely go out of business. Moreover, if a bond is required, public entities can often obtain one at very low rates, given the fact that they are unlikely to default on any obligation.

In addition, given the minuscule federal interest rate on judgments, many federal judges are willing to set a very low bond amount—only slightly more than the amount of the judgment—to reflect the fact that so little interest will accrue during the pendency of an appeal.

The Record On Appeal.

The record on appeal generally consists of two components, the written documents filed in the trial court—often referred to as the clerk's transcript or clerk's record—and a transcription of the oral proceedings before the trial court, generally referred to as a reporter's transcript. In some states, the clerk's record is essentially the entire lower court file, which may be transmitted to the appellate court for purposes of the appeal. In others states, the parties may designate which documents from the trial court they want collected and submitted to the appellate court, with the appellant paying the initial charge to prepare the documents, although some states exempt public entities from such costs. In other states, and some of the federal circuits, the parties themselves submit an excerpt of record or appendix containing the documents they believe are necessary for proper review of the issues on appeal.

The expense of preparing the written record can vary widely depending upon how large the lower court record is. In cases where the party prepares an excerpt of record or an appendix, there is also the added cost of attorney or paralegal time incurred in preparing the documents for submission to the appellate court.

Preparation of a reporter's transcript for an appeal can be costly. A trial lasting several weeks may result in a reporter's transcript cost of several thousand dollars, depending upon local court reporter rates.

Attorneys' fees.

As with any litigation, the largest potential expense on appeal is attorneys' fees. In many respects, it may be easier to provide an estimate of potential attorneys' fees incurred in prosecuting or defending an appeal than it would be for trial proceedings, because, as noted, the appellate record is fixed. You know how

long the trial was, as well as how many documents were submitted to the court, and most experienced appellate attorneys should be able to estimate how much time it will take to review a transcript of a particular length, or go through the necessary documents in preparing arguments for appeal. Similarly, an experienced appellate attorney should be able to estimate how much legal research will need to be done and how long it will take to draft a brief.

There may be somewhat more uncertainty with respect to accurately estimating the attorneys' fees that will be incurred in responding to an appeal. This is because those costs are dependent on the size and effectiveness of the appellant's opening brief. An extensive, thorough brief, will obviously require the expenditure of more time in preparing a response, than a cursory brief that raises a few arguments.

In many cases a public entity must consider not simply what it will pay its attorneys for prosecuting or defending an appeal, but the possibility that it might end up having to pay an opponent's fees on appeal as well. Many claims against public entities have fee shifting statutes, and it is not uncommon in some cases to have the liability for attorneys' fees outstrip the actual damage award.

B. Political Cost/Benefit.

Concern About Reinforcing Failure.

Since appeals often come at the end of a case, after a very unhappy result, a common question before pursuing an appeal is whether the public entity is simply throwing good money after bad. Having spent hundreds of thousands, and even in some cases, millions of dollars to prosecute or defend the case through trial, there is always a serious question about whether it is worth continuing to fight.

Keeping A Controversial Case In The Spotlight.

As noted, many appeals follow years of litigation between the parties, and often involve highly contentious, political issues. Since very few appeals are resolved within a short timeframe, the reality is that a case may remain pending for many months, even years after judgment in the trial court. Moreover, when the appellate court renders a decision, the case may become "news" again, and depending upon the result, start a cycle of controversy all over again.

Maintaining A Reputation For Strong Defense Or Prosecution.

Many a weak, if not frivolous appeal, has been pursued in the name of maintaining a reputation for strongly defending or prosecuting a public entity's position. "We don't rollover," or "we stand behind our officers," are phrases that often accompany the filing of an insubstantial, albeit not entirely meritless appeal. Although in my experience, few opportunistic plaintiffs appear to be deterred from filing questionable suits based upon a reputation for strong defense, nonetheless, there are certainly circumstances in which a public entity must appeal an improper judgment even where the amount at issue may be relatively small. As previously noted, this is generally in situations where the case involves an issue of law that is likely to recur, and a case presents a particularly good vehicle for having an appellate court resolve the issue.

Could We End up Worse?

Although it is always difficult to accept an adverse judgment, nonetheless, even in the face of defeat, sometimes you just have to "declare victory and go home." For example, a public entity might have been hit with a rather meager judgment in a case where liability was questionable, and there is a solid basis, at least from a legal standpoint, for seeking a new trial on appeal. In such

circumstances, it is important that the public entity evaluate its potential exposure to a larger damage award on remand in the event of a reversal on appeal. I know of one case that was tried three times, following multiple appeals and reversals, with the damages award increasing with each new trial.

In addition, it is important to remember the axiom "bad cases make bad law." A public entity always needs to assess the risk that it might make bad law by appealing a marginal value case on a problematic record that will adversely affect future cases.

VIII. WHO IS ON THE OTHER SIDE?

A. Trial Counsel Experienced In The Subject Matter of the Suit.

If the opposing party is represented on appeal by their trial counsel who has experience in the particular subject matter of the suit, it is likely that they will know the law in the area, particularly highly specific areas such as civil rights or employment law. On the other hand, if counsel is too immersed in the subject matter of the lawsuit, i.e., a "true believer," they may be too committed to a particular position, and unable to objectively perceive flaws in an argument or to present an argument in a way that someone unfamiliar with the subject area (for example, many appellate justices) will easily understand.

A trial attorney who does not have substantial appellate experience may fail to discern or fully appreciate issues concerning application of appellate standards of review or other rules that undermine his or her position. One of the greatest complaints you hear from appellate court judges, is that they often see briefs that read more like arguments for a jury, than presentation of legal issues for a court.

B. Experienced Appellate Counsel.

If the opposing counsel on appeal has substantial experience in the appellate courts, then they are likely to be familiar with the governing standards of review and other rules applicable to the appellate courts. On the other hand, many appellate lawyers suffer from an "ivory tower" problem in that they may become enamored of highly technical legal arguments without regard to the practical implications of the position they are asserting. This is why even in a case where a public entity retains special appellate counsel, it is advisable that trial counsel be involved in preparation of the briefing, because they will often be in a better position than the appellate attorney to recognize the practical applications of a particular rule, or the consequences of a reversal on a particular ground in the event of a retrial.

Pro Per Litigants.

As in the trial court, litigating against a Pro per party in the appellate court can be very time-consuming, and disproportionately expensive to the importance of the particular case. Moreover, while appellate courts as a matter of course independently review the record and the law in determining whether the lower court judgment is correct, by rule and by practice, courts are particularly scrupulous with respect to cases involving Pro per litigants.

IX. CAN THE CASE BE SETTLED?

A. Settlement Dynamics On Appeal.

It is extremely difficult to settle a case on appeal. In the trial court, the highly uncertain nature of trial drives settlement because neither party can be confident in the ultimate result. Once judgment has been entered, and one party has won and the other lost, that uncertainty evaporates. On appeal, the parties have

vastly disparate bargaining power. Even if an appellant has a strong argument to present on appeal, as noted, given the institutional bias of appellate courts in favor of affirmance, few parties responding to an appeal are willing to compromise much in order to resolve the case short of disposition by the appellate court.

Generally, a case will not settle on appeal unless both sides perceive some jeopardy in the case being resolved by the appellate court. For example, a successful plaintiff facing an immunity argument on appeal may agree to a lower amount, in order to avoid being out of court entirely. On the other hand, a plaintiff with a substantial judgment facing an argument on appeal that would result in nothing more than a new trial, may well elect to "roll the dice," figuring that there will always be a chance to engage in settlement negotiations again if the matter ends up returning to the trial court. In addition, the long delay in many appellate courts may prompt a plaintiff to accept a compromise amount simply in order to assure immediate payment of some sort.

B. Appellate Mediation.

The backlog in many appellate courts has prompted some courts to create mediation programs. Sometimes the mediators are local attorneys, other times they may even be appellate court justices, and some federal circuits employ full-time trained mediators in an effort to resolve cases on appeal. As in the trial court, a strong mediator may be very helpful in resolving a case before the parties incur the substantial cost of further prosecuting or defending the action. An appellate mediator who understands the rules and standards governing appeals, may be able to more strongly present reasons why, for example, a responding party should feel some jeopardy on appeal, or why an appellant might be overly optimistic about the chances of success on appeal.

X. IS THERE A POSSIBILITY OF FURTHER REVIEW?

A. State Supreme Courts.

State court systems vary widely in the extent to which review by the state Supreme Court may be available. As previously noted, some states do not have an intermediate state appellate court at all, and all appeals are to the state Supreme Court. In other states, the state Supreme Court may automatically review some decisions, or even all decisions by an intermediate appellate court. And in still other states, review by the state Supreme Court may be purely discretionary, and reserved for cases that present novel and important issue of law, or require the court to resolve a conflict among the lower appellate courts within the state. As a result, the extent to which further review may be available in a given case is fully dependent on the state court system, with some states routinely affording high court review to all decisions, and other states making further review an extreme long shot proposition.

B. The United States Supreme Court.

In an era in which the United States Supreme Court issues fewer than 80 opinions per term, the chances of having review granted in a particular case are extremely remote. That said, each term a substantial portion of the Supreme Court's docket consists of cases involving public entities, which is a function of the ubiquity with which public entities appear in the federal courts and the significant impact local government has on the daily lives of millions of Americans. While Supreme Court review is always an extreme long shot, nonetheless, appropriate cases for review are accepted on a consistent basis.

The strongest candidate for United States Supreme Court review is a case involving a conflict among the circuit courts concerning an important issue,

although certain issues unique to public entities seem to resonate with the Supreme Court on a regular basis, for example, qualified immunity in civil rights cases. Moreover, many claims against public entities are based on the Constitution, and hence by their nature involve highly important, although often uncertain issues.

The considerations that go into evaluating whether a particular case is a good candidate for review by the United States Supreme Court, and how to craft a successful petition for writ of certiorari, are beyond the scope of this paper, and indeed volumes have been written about those subjects. However, given the special expertise required in drafting a petition, this is one of those areas in which an experienced appellate practitioner, indeed a Supreme Court practitioner, may be essential.