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# **Post-Verdict Pitfalls and Proposed Remedies**

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Lynne Liberato has argued before the United States Supreme Court, met with the president in the Oval Office regarding judicial appointments, and lobbied Congress for funding of legal services for the poor. Whether before the highest levels of the three branches of government or at home in Houston, she dedicates herself to her clients, her profession, and her community.

Ms. Liberato has led teams in some of the most significant appeals and trials in Texas. Most recently, she handled pivotal legal issues for a major oil company in federal district court, represented a pipeline in one of the most significant energy cases before the Texas Supreme Court, and obtained a reversal of a \$25.5 million judgment in the 5th Circuit.

She includes among her proudest achievements her selection as “Volunteer of the Year” for the United Way of Greater Houston, winning the Karen H. Susman ADL Jurisprudence Award, her election as president of the State Bar of Texas, and her selection as a participant in the 59th Annual Security Forum of the Air Force War College.

A prolific speaker and legal writer, she co-authored “Summary Judgments in Texas,” often called the “bible” of summary judgments. Versions of this article have appeared in five law reviews since 1989, and it has been recognized as one of the 10 most-cited articles by appellate courts nationwide. She also is a member of the board of directors for the law firm.

### **Professional Recognition**

- Recognized by *Chambers USA* 2009-2014 as one of the leading practitioners in the United States for Appellate
- Karen H. Susman Jurisprudence Award (2013), given by the Anti-Defamation League to honor a lawyer who exhibits an exceptional commitment to equality, justice, fairness and community service
- Civilian participant, 59th Annual National Security Forum, Air Force War College (2012)
- JA Hall of Achievement Laureate (2012), Junior Achievement of Southeast Texas
- Leon Jaworski Award (2010), first woman to win community service award named for the famed Watergate special prosecutor
- Robert Kneebone Award for Volunteer of the Year (2008) and Woman of the Year (2004), United Way of Greater Houston
- Award for Outstanding Law Review Article (two-time winner) for “Summary Judgments in Texas” (2007) and for “Reasons for Reversal in Texas Courts of Appeals” (2004), awarded by the Texas Bar Foundation
- Exemplary Article Award, Texas Center for the Judiciary (2005-2006) (“for contribution to judicial excellence”)
- Gene Cavin Award, State Bar of Texas (2006) (highest award for excellence in continuing legal education)
- Top 100 Texas Super Lawyer, Top 50 Female Lawyer, Top 100 Houston Super Lawyer, and Appellate Super Lawyer, *Texas Monthly* magazine (2003-2014)
- Top Notch Appellate Lawyer, *Texas Lawyer* (2002 and 2007 - two of the three years the recognition was given) (recognized as one of the top five appellate lawyers in Texas)
- Named one of the Best Lawyers in America for Appellate Practice and Commercial Litigation, 2005-2015, Litigation - Intellectual Property, 2012-2015
- Martindale Hubbell® Law Directory with a Peer Review Rating of AV® Preeminent™
- Member, American Law Institute
- Board Certified in Civil Appellate Law, Texas Board of Legal Specialization

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For almost four decades, Nina Cortell has represented corporations, public entities and individuals in cases that have put her at the forefront of Texas litigation practice. Chambers USA Guide ranks her as one of the top appellate lawyers in Texas, and Benchmark Litigation notes her expertise “as it relates to trial, appellate, and crisis management,” quoting a competitor who calls her “one of the top two or three in the state.” She has also been named several times as one of the top ten lawyers in Texas by Texas Super Lawyers, and by Texas Lawyer as one of twenty “Winning Women” across Texas who “have achieved significant recent victories as well as a track record of wins in which they prevailed in high-stakes cases.”

Nina’s record includes significant victories in both state and federal appellate courts, as well as in trial courts. Recent examples include the voiding of a \$29 million liquidated damage provision in the Texas Supreme Court, affirmance of \$3.6 billion plan of reorganization in the Fifth Circuit Court of Appeals, reversal of a highly contested venue order in the Dallas Court of Appeals, and dismissal of a shareholder derivative suit in the trial court.

Nina also places a high priority on community service. She is proud of her role as a co-founder of the Center for Women in Law at the University of Texas School of Law, which is devoted to enhancing the success of women in law and serves as a national resource to convene leaders, generate ideas, and lead change. Nina also works actively with the judiciary to improve the judicial process. Her current work includes her service on the prestigious Texas Supreme Court Advisory Committee, which is comprised of judges and attorneys from across the state and advises the Court in connection with its rule-making authority.

For her community service, Nina is honored to have received the 2013 Jack Pope Professionalism Award from the Texas Center for Legal Ethics (given annually to one lawyer who personifies the highest standards of professionalism and integrity in the field of law), the 2012 University of Texas School of Law Distinguished Alumnus Award for Community Service, and the 1999 Louise B. Raggio Award for significant contributions toward the advancement of women in the legal profession..

### **Professional Recognition**

- Selected by Lawdragon as a member of the Lawdragon 500 Leading Lawyers in America, 2014-2015
- Named by *Texas Lawyer* as one of twenty “Winning Women” in the state (2014)
- Chosen by the Texas Center for Legal Ethics (TCLE) to receive one of two 2013 Jack Pope Professionalism Awards, which annually recognize one lawyer and one judge who personify the highest standards of professionalism and integrity in the field of law
- Best Lawyers’ 2015 Dallas Appellate Lawyer of the Year and 2013 Dallas Bet-the-Company Litigation Lawyer of the Year, with other recognitions in both categories 2006-2015.
- Recognized in *Chambers USA Guide – America’s Leading Lawyers for Business* (Appellate, Band 1) (2008-2014)
- Top 10 “Texas Super Lawyers” (2010-2014) and Top 100 “Texas Super Lawyers,” Top 100 “Super Lawyers in the Dallas/Fort Worth Region,” and “Top 50 Female Texas Super Lawyers” (2003-2014)
- Named “Top Notch Appellate Lawyer” in *Texas Lawyer’s Go-To Guide* (2012)
- Recognized as one of the Top 250 Women in Litigation, *Benchmark Litigation*, Legal Media Group, Euromoney Institutional Investor (2012-2014)
- Selected by Dallas Bar Association as “Outstanding Lawyer of the Year” (2009)
- One of the top appellate lawyers in Dallas, *D Magazine* (every year list published, 2003-2015)
- University of Texas School of Law Distinguished Alumnus Award for Community Service (2012)
- Higginbotham Inn of Court’s 2012 selection to Honorary Serjeant’s Inn, in recognition of significant contributions to the profession and community
- State Bar of Texas Presidential Citation for leadership in furthering the Bar’s diversity initiatives (2007)
- Louise B. Raggio Award for significant contributions toward the advancement of women in the legal profession (1999)
- Martindale Hubbell® Law Directory with a Peer Review Rating of AV® Preeminent™

### Post-Verdict Pitfalls and Proposed Remedies

#### I. Introduction.

This paper provides a guide for handling the intense period between verdict and the expiration of jurisdiction in the trial court, primarily from the perspective of the losing defendant. Different practitioners will have different approaches; this paper represents conclusions drawn by two attorneys based on many years of experience. The main point is this: although preservation of points for appeal is a critical piece, that should not be your only goal. You should also be attentive to ways to address all of your client's needs (e.g., protection of assets and/or public relations) and you should focus upon ways to obtain relief (even if partial) in the trial court. This is the first stage of the appeal and some of your best appellate work should be done at this point, both in terms of obtaining relief and in setting the stage for your approach to the appellate court.

#### II. Threshold Issues.

##### A. Create Order Out of Chaos.

The appellate lawyer who is hired in the aftermath of a verdict is much like an emergency room doctor who is called upon to quickly analyze the situation, prioritize the tasks ahead, and take swift action. After your initial conferences with your client and trial counsel, here's your task list:

1) Call the trial court. You want to ensure that a judgment will not be signed until you have the opportunity to prepare for the motion for judgment and present (a) objections to the form of judgment and (b) a motion for judgment notwithstanding the verdict and/or to disregard jury findings ("the jnov motion") stating your position as to why the proposed judgment should not be entered against your client. You will want to have the hearing date set at a time that allows you sufficient time to get up to speed and prepare your objections and motions.

2) Call the court reporter. You will want to request key portions of the trial. Typically, the first items to request are the charge conference and closing argument. The second-wave request will be fashioned by the issues you deem most important; this wave often includes key witnesses and key hearings.

3) Meet with your trial counsel. You want to debrief trial counsel to learn about the trial and other history of the case. It is best to create a rough trial

summary at this point and begin preparing a list of potential appellate points. You also want to make clear that you are part of the trial lawyer's team and not there to second-guess. You should create a joint task list and determine who should take the lead as to the various tasks, with internal deadlines.

4) Call opposing counsel. You want opposing counsel to know of your appearance and initiate a dialogue. You will immediately learn your opponent's views and gain a sense of your options, including whether settlement is a possibility.

##### B. Things your client needs to know.

###### 1) "The New Reality."

Your client needs to understand the sea-shift that occurs with a verdict. One often hears about promising things the trial judge said before verdict, but rarely do such sentiments survive the verdict. The "new reality" requires that your client understand:

- Standard of review.
- Reversal statistics. *See* Liberato and Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 Houston L. Rev. 993 (Winter 2012).
- Importance of legal vs. fact issues.
- Concept of reversible error—including preservation and showing of harm.

###### 2) Appellate process.

Explain to your client:

- What is likely to occur in the trial court.
- What a judgment might look like, including pre and post-judgment interest.
- Appellate timetable.
- Duration of the appeal.
- The appellate courts and the appellate judiciary.
- Reversal statistics relating to the trial judge.
- Costs of an appeal.
- Settlement options, including mediation and potential window before entry of judgment.

### 3) Issues relating to enforcement and entry of the judgment.

- Supersedeas bond. This discussion cannot start too soon. The earlier a bond is filed, the easier it is to avoid the fray that can follow entry of judgment. If the judgment is over the Rule 24 cap (\$25 million or one-half of net worth), then you may still have to deal with enforcement issues even though a bond has been filed and approved. *See infra* Section V.C. for recent cases addressing net worth in the supersedeas context.
- Property liens created by filing of abstracts of judgment. Clients do not like to be surprised by liens, so make sure they know of this possibility, which can occur immediately after judgment is signed.
- Garnishment/turnover/injunction. If the statutory prerequisites can be met, the creditor might seek these remedies before or after judgment
- Execution. If the judgment is not superseded, execution can commence once the judgment is final in the trial court.
- Bankruptcy. If the size of the verdict poses a bankruptcy risk, then bankruptcy planning must begin immediately.
- Insurance audit. All policies should be examined to determine whether there might be coverage, and all related notices to carriers should be given.
- Loan agreement audit. All loan agreements should be examined to determine whether a judgment might pose a problem with outstanding covenants.
- Disclosure obligations. If your client is a public company, then you should discuss any disclosure obligations.
- Public relations. Consider the public relations aspect of your case and prepare for any interactions with the media.
- Licensing boards/governing agencies. Consider whether your case involves a person or entity that is licensed or subject to agency oversight and consider whether any actions

are necessary to avoid complications with the board or agency.

### C. **Develop post-trial strategy.**

#### 1. Evaluate your venue.

Is there a likelihood of getting relief in the trial court or are you better off with a quick exit? In the great majority of cases, it pays to take your time, extend the appellate timetable, and push for all available relief in the trial court. But there are those rare instances where you simply want to preserve error, cut your losses, and “get out of Dodge!”

#### 2. Evaluate motion options.

Should you file your jnov and new trial motions together or separately? Reason for contemporaneous filing: you generally get just “one bite at the apple.” Reasons for two-pronged approach? (a) There is usually insufficient time to prepare a solid motion for new trial before entry of judgment. (b) There are other benefits to an extended appellate timetable, including gaining time to prepare for enforcement and to allow the parties a “cool-down” period.

#### 3. Things *not* to do.

- Do not move for judgment against your client. If you do, waiver can result. *See First National Bank of Beeville v. Fojtik*, 775 S.W.2d 632 (Tex. 1989); *Smith v. East*, 411 S.W.3d 519, 528-29 (Tex. App.—Austin, pet. denied) and related cases. You can usually accomplish the same objective through the filing of objections to the judgment.
- Do not rely exclusively upon the unofficial record: it may well be wrong.
- Do not forget to pay the filing fee for your motion for new trial. If you do, waiver can result. *Garza v. Garcia*, 137 S.W.3d 36 (Tex. 2004).<sup>1</sup>

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<sup>1</sup> In *Garza v. Garcia*, the Texas Supreme Court addressed two questions related to a motion for new trial filed without the required fee: (1) Does such a “conditional” motion extend the appellate timetables? (2) Does a fee-less motion for new trial preserve factual sufficiency points? 137 S.W.3d at 37-39. The court eliminated one potential landmine by holding that when a motion for new trial is conditionally filed without a fee—and that fee is never paid—the appellate deadlines are extended as in any other motion for new trial filing. *Id.* at 37; TEX. R. APP. P. 26.1(a)(1) (stating that a notice of appeal must be filed within 90 days

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