PRESENTED AT
42nd Annual Page Keeton Civil Litigation Conference

November 8-9, 2018
Houston, TX

WINNING AT PRETRIAL: Effective Use of Appellate Counsel Before Trial

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INTRODUCTION

Many, if not most, trial lawyers approach litigation with one goal in mind: win the case at trial. But winning at trial does not guarantee success on appeal. In fact, as most appellate lawyers can attest, a trial win may guarantee an appellate loss if it is the wrong kind of win.

This article explores how the use of appellate analysis—or the "law strategy"—before trial, in collaboration with the trial lawyer's "fact strategy," can improve chances for both winning the case at trial and upholding that win on appeal.

Litigation strategy has two components: facts and law. Many lawyers approach litigation by exploring the facts first through discovery and then developing a legal strategy, including the strategy for appeal.

Similarly, the old model of litigation was that the trial lawyer would handle the case through trial. Then, with a verdict in hand, the trial lawyer would hand the case off to someone else to handle the appeal.

This model needs to be rethought. To ensure the best chance of success at trial and on appeal, especially in a big or complex case, it is critical to incorporate a law strategy throughout the litigation process.

The purpose of this paper is to explore the stages of the pretrial process where it is helpful to consider the legal and appellate strategy. This has become increasingly important as a practical matter given the fact that an ever-increasing number of cases spend much of their pretrial life in the appellate courts.

I. Identifying law issues early as a template for discovery and presentation of evidence.

Winning the case at trial and upholding that win on appeal require the right evidence. From the authors' perspective, too often we see trial lawyers approach a case with too optimistic a view of how the courts will apply the law, only to find on appeal that the appellate court applies a different legal standard that the evidence presented fails to meet. Exploring the appellate possibilities early can help the trial team discover, develop, and present the best evidence to support the case in the appellate courts. Below are just a few examples.

A. Evidence to support legal rulings.

A "law lawyer" can help the trial team predict potential legal rulings (good or bad) and identify the type of evidence that will be necessary to obtain or defeat such a ruling.

One example is partial summary judgment. The law lawyer can help identify what evidence is necessary to defeat a claim or defense in a traditional motion for summary judgment. And the law lawyer can help identify what evidence is necessary to create a fact issue to defeat a "no evidence" motion for summary judgment.

The law lawyer also can help identify the evidence necessary to support other pretrial rulings, such as a special appearance to contest personal jurisdiction, a venue motion, or a motion for spoliation sanctions.

B. Removal.

In certain venues, the difference between federal and state court can be case-dispositive. Differences between the federal and state forums can lead to very different results on similarly situated issues, such as dispositive motion practice, evidentiary issues, and important procedural matters. Removal can be both substantively complex—especially when federal questions are implicated—and logistically fraught with risk of error and attendant loss of the federal forum. In particular, removal and remand practice under the Class Action Fairness Act of 2005 is complicated by both the statute and the legions of reported decisions from various federal courts in different circuits who have interpreted the statute differently. Appellate lawyers familiar with CAFA and a host of other federal statutes can assist in developing theories that may support removal in a proper case. This expertise can be particularly useful, considering that removal decisions are typically time-sensitive and there is rarely much time to engage in extensive research. The appellate lawyer can also assist in drafting the removal papers to navigate the removal/remand landmines.

Another issue to consider in determining whether to remove is the potential application of the Texas Citizens Participation Act. The TCPA is a broadly worded statute that creates a powerful dismissal mechanism. TEX. CIV. PRAC. & REM. CODE § 27.001 et seq. The TCPA provides for a discovery stay while the motion is pending (except for limited discovery relevant to the motion on a showing of good cause), and mandatory attorney fees if the movant prevails. The applicability of state anti-SLAPP statutes in federal court is an important and unresolved issue in the Fifth Circuit. *Block v. Tanenhaus*, 867 F.3d 585, 589 (5th Cir. 2017) (per curiam). A law lawyer can advise on TCPA considerations in determining whether to remove to federal court.

C. Developing expert testimony, cross-examining experts, and *Daubert* motions.

Another example is one of the hottest appellate issues over the past few decades—the legal review of expert testimony for reliability, particularly when the testimony concerns scientific causation. Usually on grounds of legal sufficiency and expert reliability, Texas appellate courts have engaged in the exacting review of expert testimony to determine whether opinions have sufficient scientific support. *See, e.g., Whirlpool Corp. v. Camacho*, 298 S.W.3d 631 (Tex. 2009); *Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004).

Developing effective scientific expert testimony requires not only knowledge of science, but also knowledge of the law. When developing a case that relies on scientific expert testimony, it is important to consult a lawyer who keeps up with recent appellate developments in order to solicit expert testimony that meets the legal requirements of reliability jurisprudence. For instance, the law lawyer who has studied the reliability cases can help provide a roadmap for what type of scientific studies and support might be necessary to meet the legal standard. This is true not only for plaintiffs, but also defendants because courts conducting reliability review often consider the testimony of the defense experts in determining whether the plaintiff's expert testimony was reliable. *See Whirlpool*, 298 S.W.3d at 640-42 (reasoning that expert testimony about causation cannot disregard undisputed testing by opposing experts).

Similarly, when cross-examining experts, it helps to know the bases on which courts of appeals have

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2018 Page Keeton Civil Litigation eConference

First appeared as part of the conference materials for the
42nd Annual Page Keeton Civil Litigation Conference session
"Winning at Pretrial"