

Appellate Counsel Part of the Litigation Team

EARLY INVOLVEMENT OF APPELLATE ATTORNEYS MAY AID IN TRIAL AND IMPROVE THE CHANCES OF A SUCCESSFUL APPEAL

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Many trial lawyers and their clients do not consider retaining special appellate counsel until after an adverse verdict is returned or a judgment is entered following trial. However, sophisticated trial attorneys and litigants increasingly recognize that appellate counsel can provide invaluable assistance well before it is time to file a notice of appeal, and that their advice can make the difference between winning or losing a case, or at least help to limit the amount of any adverse judgment.

A FRESH PERSPECTIVE

Ordinarily, over the course of years of discovery, trial counsel will develop a particular theory or approach to a case heading into trial. Appellate counsel, unburdened by knowledge of case history, can often bring a fresh perspective to bear on the facts, issues and strategy. This can help trial counsel focus the case on the key issues and narrow the evidence so as to eliminate anything that has become extraneous as the case progressed.

Trial counsel and the client can also benefit from a frank evaluation of the potential outcome of a trial and possible appeal — free from the personal involvement that trial attorneys naturally develop over the life of a case. Viewing the case from this fresh perspective, appellate counsel can also provide advice and guidance with respect to settlement strategy, timing and options.

IDENTIFYING AND ANALYZING ISSUES

An appellate attorney can help identify, analyze and research important legal issues that may arise before or during a trial. Indeed, it is not uncommon for trial counsel to find that appellate counsel have already researched and perhaps even briefed many of the questions that arise during trial and can readily provide answers. Moreover, because their work centers on appellate cases, appellate lawyers are often aware of recent developments in the law, subjects on which there is a dispute among the courts of appeal, and legal issues that are currently pending in the California Supreme Court. This knowledge can be useful in trial preparation and strategy. For example, appellate counsel may recommend filing a motion *in limine* to preserve an issue which might later be raised on appeal, depending upon how a pending appellate case is resolved.

PRESERVING ISSUES FOR APPEAL

One of the areas in which appellate advice can be critical during trial is the preservation of issues for appeal. A trial attorney's primary focus during trial is to win a favorable jury verdict or trial court decision. Appellate counsel may view the case through a different prism, with an eye toward making a trial victory unassailable and/or preserving for appellate review any errors committed by the trial judge.

Once a case is on appeal, if something is not reflected in the superior court record, it cannot form the basis for any appellate relief. The court of appeal will not consider evidence that was not presented or words that were not recorded in the trial transcripts. Given the often hectic pace of a trial, it can be difficult for a trial lawyer to keep in mind the need to memorialize events such as unreported sidebars, in-chambers conferences, visual presentation of demonstrative evidence by expert witnesses, and excerpts of videotaped deposition testimony. Appellate counsel can give valuable advice on how to handle these issues, as well as provide guidance concerning objections to trial court rulings, offers of proof to be made after adverse evidentiary rulings, objections to jury

instructions and the verdict form, and problems concerning a jury verdict that must be raised before a jury is discharged.

ASSISTANCE IN DRAFTING DOCUMENTS

At times, when trial counsel need to focus on preparing their witnesses, examination and closing argument, appellate counsel may be well-poised to assist in drafting trial-related documents such as motions *in limine* , special jury instructions, verdict forms, nonsuit motions, motions for directed verdict, and motions for mistrial.

PRESENCE AT TRIAL

An extra pair of eyes and ears and another legal mind present "in the trenches" during the trial can be useful. Appellate counsel can conduct on-the-spot electronic research and e-mail it to the trial lawyers sitting a few feet away at counsel table. Furthermore, detailed, written daily reports outlining the day's events, analyzing how the trial is progressing, and identifying any appellate issues that have arisen can be beneficial to trial counsel and the client. This can be particularly helpful if a client is assessing settlement options during trial.

POST-TRIAL MOTIONS AND STAYING ENFORCEMENT OF THE JUDGMENT

After the jury returns a verdict or the trial court issues a decision, appellate counsel can help trial counsel navigate their way through the post-trial motion process in the case of a jury trial and the statement of decision procedure in the case of a bench trial. Appellate counsel, for example, can identify issues that will be waived on appeal if not raised in post-trial motions. Moreover, appellate attorneys usually have expertise in the steps necessary to seek a temporary stay of enforcement of an adverse judgment and obtain a bond to stay the judgment on appeal.

WORK TAILORED TO MEET THE CLIENT'S NEEDS AND BUDGET

It may not always be economical to retain appellate counsel as a full-time member of a trial team who attends every day of trial. Fortunately, appellate attorneys can usually tailor the level of their assistance to suit the client's needs and budget. Their involvement can be limited to reviewing key documents and providing tips for preserving issues for appeal. They can also be available, as the client wishes, to conduct legal research requested by trial counsel during the course of a trial. Or, if the client would

like an appellate attorney to be involved in trial without spending entire days in the courtroom, trial counsel can order daily trial transcripts for the appellate attorney to review, identify issues and offer suggestions as appropriate. The work of appellate counsel during trial can be as broad or as limited as the client wants.

CONCLUSION

Some trial counsel may feel apprehensive about the potential involvement of an appellate attorney during trial. However, an appellate lawyer's role is not to second-guess the trial lawyer's decisions, but rather to work as part of the trial team to obtain the best possible outcome for the client. Working together, trial and appellate attorneys can effectively represent their clients and significantly increase the odds of achieving favorable results for those clients.

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