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Jessica Underwood of  
Schwartz, Sladkus, Reich,  
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COMMENTARY

## **How Integrating Appellate Counsel Adds Value to the Trial Team**

Retaining appellate counsel as part of the trial team during litigation can facilitate success at both the trial and appellate levels.

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Trial lawyers frequently turn to appellate counsel to overturn an unfavorable judgment or to preserve a win. However, retaining appellate counsel as part of the trial team during litigation can facilitate success at both the trial and appellate levels. This article reviews the benefits of integrating appellate counsel into the trial team.

## **Timing of Integration**

Whether engaged early in the litigation process or just prior to trial, appellate lawyers bring value to the trial team by serving in dynamic roles, identifying technicalities and leveling the playing field.

Engaging appellate counsel at the start of the litigation process positions a case for success early on. At the start, appellate counsel can assist in researching, drafting, and reviewing critical pretrial motions, such as motions to dismiss, motions for summary judgment, and motions in limine. Appellate counsel's early involvement can ensure prevention of procedural mistakes that could be detrimental down the road.

At the very least, trial counsel should consider integrating appellate counsel as the trial begins. In support of the trial team, an appellate attorney can join the trial table to focus on the pivotal legal issues and preservation of the record, while allowing trial counsel to focus on their presentation of the case to the jury. Integrating appellate counsel into the team frees trial counsel to focus on their presentation while knowing that an appellate attorney is standing by to identify and preserve legal issues as the case unfolds.

## **Leveling the Playing Field**

Retaining appellate counsel during the litigation process to assist at trial can help level the playing field. Parties may face large corporations or insurance companies with deep pockets and teams of trial and appellate attorneys at their disposal. When faced with such opponents with endless resources, involving an appellate attorney during the trial instead of post-trial helps to level the playing field.

Large companies involve their appellate counsel at the beginning stages of a case to support the trial counsel and take an active approach in securing a supportive record. Individual trial attorneys should consider integrating an appellate attorney into their team so that they too are positioned for success and have assistance at the front end to offer trial support. Involvement of appellate counsel removes the burden from trial counsel to manage both trial and appellate aspects and balances the playing field in the courtroom.

Where cost is a concern, trial counsel can control the extent of an appellate lawyer's involvement. As discussed further below, appellate counsel can serve dynamic roles on the trial team and tailoring the extent of counsel's involvement can lessen the cost. Appellate counsel may be retained simply to observe the trial and advise on apparent errors. Alternatively, appellate counsel can be utilized in a more active role such as preparing jury instructions, reviewing and objecting to an opposing party's motions and advocating specific legal issues to the court.

Consideration should be given to the front-end costs of retaining appellate counsel to create a supportive record versus the back-end costs of a reversal on appeal. While balancing the cost of hiring appellate counsel, trial counsel should consider the valuable impact of leveling the playing field.

## **Dynamic Roles**

From assisting in a technical capacity to preserve the record to preparing memorandums of law for pretrial motions, appellate counsel can serve in a variety of roles at the trial table.

Involvement of appellate counsel can help shape the case to be in a better position on appeal. Preservation of the record is key to success on appeal. Issues are often waived on appeal simply for lack of preservation of error. Involving appellate counsel during the trial can help prevent these errors from being overlooked and lessen trial counsel's burden during trial. It is impossible to identify all issues that may arise in a contentious, rapidly moving trial. An appellate attorney serves as a safeguard to prevent error and supports trial counsel so that they can remain focused on trial strategy and case presentation.

For example, errors frequently go unpreserved during the chaos of jury selection. The record can be left silent where counsel may not remember to name or identify jurors responding to questions because of the rapid-fire nature of the process. This can create a problem if the jurors' responses relate to an issue raised on appeal. Further, preserving error in relation to strikes for cause involves a technical procedure that must be strictly followed, or the issue is waived. In these instances, appellate counsel's presence helps ensure the record is not left silent and technical procedures are followed.

Trial counsel may also benefit from the assistance of appellate counsel in preparing motions in limine and memorandums of law in support thereof, especially where a case may involve a novel issue or conflict amongst the courts of appeals. Such issues and conflicts will likely be addressed on appeal, and appellate counsel can ensure that all appropriate arguments are raised in the trial court and preserved in the record.

Integrated appellate counsel can also add value to trial in other areas important on appeal, including but not limited to:

- researching case law on the spot;
- tracking the admission of key evidence;
- participating in the charge conference;
- identifying missing elements of a claim;
- assisting in making and renewing objections; and
- reminding counsel to secure rulings on motions and objections.

Appellate counsel as part of the trial team ensures that a set of eyes is focused on the formation and preservation of the record. With an appellate attorney on the team, trial counsel can remain focused on persuading the jury while knowing that appellate counsel is focused on preventing and preserving any error.

The integration of appellate and trial counsel during trial is a valuable tool to sustaining success at trial and on appeal.

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