THE IMPORTANT ROLE OF APPELLATE COUNSEL IN LITIGATION

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Introduction

The role of appellate counsel at the pre-trial and trial stages of litigation is of increased interest to in-house counsel, appellate practitioners, and trial lawyers alike. Articles have been written about the subject, speeches have been given, CLEs have been offered. In this paper, we aim to explore some of the issues, perhaps by raising more questions than we answer, but we hope at least to provoke continued interest, thought, and debate on this increasingly important subject.

Who: Is Appellate Counsel?

Most appellate lawyers and firm appellate practice groups describe themselves as such – I am an “Appellate Lawyer”; we are an “Appellate Practice Group.” Even the title of this panel at DRI’s 2009 Appellate Advocacy Seminar, and, so, of this paper is, “The Important Role of Appellate Counsel in Litigation.” Let’s pause right there.

The fact of the matter is that so-called “appellate counsel” have critical roles to play at all stages of litigation. By calling ourselves “appellate counsel,” are we unduly – and unnecessarily – pigeon-holing ourselves? Should not our value and contribution be measured – and, so described – by the skill set, competencies, and expertise that we provide, as opposed to by the procedural stage of the litigation in which we always (but not exclusively) appear? Surely, our skills may be at the greatest premium at the appellate stage, but are they not necessary and valuable throughout the litigation process?
In short, if the question is framed in terms of, “When is appellate counsel needed?” the answer most likely will be “On appeal.” Let’s start by asking a different question. It’s all in a name. Let’s re-make ourselves. What is our name?

**What: Is The Value That Appellate Counsel Brings?**

Appellate counsel brings a unique skill set to any litigation. She is expert in legal research, writing, and analysis. She is also expert in issue spotting, which can facilitate risk analysis, risk avoidance, or early resolution assessment. Perhaps above all else, she is a master at written advocacy. The importance of that expertise cannot be underestimated at any stage of litigation.

Because her orientation is more legal than fact-specific, more overall jurisprudential than case-specific, she keeps her eye on developing trends in the law. She puts individual cases in their broader context and can influence the shaping of the law. Appellate counsel is instrumental in developing the legal issues at the early stages of litigation, to ensure that they are most effectively framed not only for appeal, but also for dispositive motion practice in the trial court, and even at the alternative resolution phase.

In addition, the appellate lawyer brings a unique perspective – she always has her eye on the next stage of the process. She lives what the noted author Stephen R. Covey teaches: “Begin With The End In Mind.” Stephen R. Covey, *The Seven Habits of Highly Effective People* (Simon & Schuster 1989). It is critical that every step taken in the trial court – every decision made, every motion
filed – is done with full awareness of the effect of that step on the next stage of
the process.

Further, appellate lawyers know appellate jurisdiction and so can identity
rulings (prior to the final ruling in the case) that may be reviewable on an
interlocutory basis. If the decision is made to file an interlocutory appeal, it is the
appellate lawyer who is best positioned to do that. And, given that in the majority
of situations, whether to take a case on interlocutory review is a matter of
discretion for the appellate court, it is the appellate lawyer who knows best how to
convince the appellate court to exercise its discretion in the client’s favor.

Appellate counsel also is well-versed in appellate standards of reviews –
the lens through which the appellate court views the case and so perhaps the most
important aspect of any appeal. She knows which issues will be of most interest
to the appellate court, which will present the best prospects of success on appeal,
and so she can assist trial counsel in most effectively positioning those issues in
the trial court, or giving the client a more realistic optic through which to judge
the strength or weakness of his case. From her more detached and objective
perch, she is singularly poised to weed through the clutter of the many issues,
rulings, and goings-on in the trial court and most clearly see the most important
issues, the legal issues, the issues that will capture the attention of the appellate
court.

The appellate lawyer brings an additional unique, and invaluable, skill in
her particular knowledge of the many landmines involved in preservation of
issues for appeal. The appellate lawyer can help navigate these landmines and so prevent that most devastating of dispositions from an appellate court – “The issue, while meritorious, is waived.”

In short, appellate and trial counsel bring different, yet complementary, skill sets to litigation. As Third Circuit Judge Thomas L. Ambro (paraphrasing from a recent presentation by a U.S. Attorney) put it, “Trial counsel is banzai (the Japanese word for battle cry). Appellate counsel is bonsai (the Japanese word for the deliberate and delicate pruning of trees.)” S. Lash, Chicago Daily Law Bulletin, “Add Appellate Lawyer to Trial Team,” Vol. 153, No. 228 (Nov. 20, 2007).

**When: Should Appellate Counsel Be Engaged?**

Notwithstanding the above, not all cases warrant the early involvement of appellate counsel. Cases that present routine or repetitive issues; cases that involve little financial exposure; cases that likely will end up being resolved through an alternative dispute resolution mechanism – these may not be the best candidates for engaging appellate counsel at an early stage.

But in contrast, where the monetary exposure is high; where the case involves an important, perhaps recurring, legal issue for the client; where the case will involve significant motion practice at the trial level – these are the types of cases where engaging appellate counsel at an early stage is at its premium – even at the alternative dispute resolution stage.
In addition, some companies are increasingly using appellate counsel for her particular subject matter expertise in a certain area, such as punitive damages (where the exposure can be quite high) or antitrust. Clients also tend to engage appellate counsel in class actions, multi-districted, and other such aggregate litigation both because of the potential high-stakes nature of such litigation, and because of its national import.

**How: Much Will It Cost?**

Some clients rightfully ask, “But won’t engaging appellate counsel early on in litigation only increase our costs?” One in-house counsel who uses appellate counsel regularly in appropriate cases answered that question succinctly: “Pay now so you don’t have to pay more later.”

But even apart from that practical advice, there are efficiencies that appellate counsel brings to the trial team. For one thing, the trial briefing needs to be done regardless of who is doing it. If appellate counsel brings her own special touch to the briefing, it likely will be done more effectively than if trial counsel – who, after all, is (and should be) fully engaged managing discovery, taking and defending depositions, developing the factual side of the case – does it himself.

Further, where a client faces similar issues in litigation throughout the country, having designated appellate counsel master-minding and coordinating the defense will result not only in consistency, but also in efficiency, and so in a better chance for a successful outcome.
Moreover, engaging appellate counsel early on in the litigation process conserves resources because not only does it avoid duplication of effort, but also it ensures a smooth, and so, more effective, transition to the appellate court. If engaged from the outset of the litigation, the appellate lawyer will not have to learn the entire trial court record from scratch – she will have been an instrumental part in having created it!

**Why: Can Appellate Counsel Play An Important Role At Trial?**

The role that appellate counsel plays at trial varies, depending on the needs and dynamics of the particular case. But one overriding principle is that the story that the trial counsel needs to tell to the jury differs from the story that appellate counsel needs to tell to the appellate court – and both stories need to be told in a manner that benefits the client.

Appellate counsel can actively participate (even take the lead) in such matters as engaging in side-bars with the court on objections, crafting and arguing motions *in limine*, crafting and arguing motions for judgment as a matter of law (or their state court equivalent), and, of course, handling post-trial motions and any stay or bond issues that arise. In these and other ways, she can free trial counsel to take care of what trial counsel needs to take care of at trial, enabling the case to be tried most effectively to the jury.

In addition, appellate counsel can (and in many cases should) have primary responsibility for the proposed jury charges and the charging conference. This is of critical importance because many appellate issues arise from errors in
the charge; it is, after all, far more difficult to have an appellate court reverse an adverse jury verdict rendered by a properly-charged jury than one by an erroneously-charged jury.

Moreover, just as she does at the pre-trial stage, appellate counsel can ensure that every issue is properly preserved at trial. This includes making sure that everything – *everything*, including non-verbal communications – appears on the record.

Consider the following vignette, based on a true story (as set forth in A. Albright and S. Vance, “Ten Practical Tips for Making Your Case Appealable,” Litigation, Winter 2009). In an emotionally-charged case, the trial judge weeps during plaintiff’s counsel’s closing argument. The jury, of course, sees how moved and upset the trial judge is by plaintiff’s plight – to the defense’s tremendous prejudice. The jury finds for the plaintiff, and of course this is a strong appellate issue. Yet it would not appear on the record – unless counsel creates that record by setting forth the judge’s non-verbal communication and making sure it is part of the trial transcript. Would trial counsel know to make that record? Probably. Would appellate counsel? Absolutely.

Appellate counsel can have an intangible impact at trial as well. She may keep opposing counsel just a tad more in check. Her presence may even have a subtle effect on the trial judge. According to Delaware Supreme Court Justice Henry duPont Ridgely (as reported by the Chicago Daily Law Bulletin), when he was a trial judge, he noticed when an appellate lawyer was in the courtroom.
Being reminded that an appellate court will likely review the trial judge’s rulings makes the trial judge “sit up and pay attention,” Chicago Daily Law Bulletin, “Add Appellate Lawyer to Trial Team,” No 153, No. 228 (Nov. 20, 2007).
TOP TEN REASONS FOR IN-HOUSE COUNSEL TO CONSIDER INCLUDING APPELLATE COUNSEL ON THE TRIAL TEAM

In deciding whether appellate counsel would be an essential and cost-effective member of the pre-trial and trial (and even alternative dispute resolution) team, consider the following questions:

1. Are you facing legal issues where the law is developing quickly?

2. Does your client want to make law in an area that routinely affects its business?

3. Do you have legal issues that can affect the industry as a whole or how you conduct business?

4. Do you see trends affecting other industries that may move into your industry?

5. Do you want to control the pace or scope of the litigation or the sequence of issues that are presented on appeal? Do you need to slow down or speed up the litigation to allow other trends to develop?

6. Do you have choice of jurisdictions or conflict of laws questions that require analysis of the appellate bench in various jurisdictions?

7. Do you have multiple issues that interrelate so that the dynamics of one argument may affect the advocacy on another issue?

8. Do you have cases in multiple jurisdictions that require an understanding of how various states may view an issue and how an argument in one state may impact the arguments available in another state?

9. Are legislative changes in the wind?

10. Does the case involve complex or compelling facts that requires a careful development of the record at discovery and trial phases?