

# Appellate Issues

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## Yours, Mine and Ours: The Evolving Relationship Between Appellate Counsel and Trial Counsel

by Deena Jo Schneider\*

I had the pleasure of moderating the program at the 2011 AJEI Summit entitled “Yours, Mine and Ours: The Evolving Relationship Between Appellate Counsel and Trial Counsel.” The members of the panel (which I organized with Dan Brannen, another member of the Council of Appellate Lawyers) were Jerry Ganzfried, a partner in Holland & Knight’s D.C. office who is a member of that firm’s appellate and litigation practice groups; Tom Nolan, a partner in Skadden’s Los Angeles office who is primarily a trial lawyer but has often worked with appellate lawyers in preparing and trying cases; and Kaiper Wilson, Chief Litigation Counsel at MetLife, who has both trial and appellate experience and is responsible for staffing her company’s litigation matters at both levels.

I myself have worked primarily on appellate matters during the majority of my time at the Philadelphia office of Schnader Harrison Segal & Lewis but also have litigated numerous legal issues at the trial level. As a result, I also have often dealt with the role of appellate counsel at the trial court level and the role of trial counsel once a matter has entered the appellate realm. To me, one of the most interesting points that arose from the interchanges Dan and I had with our speakers, including during the actual program, is the consensus among people with different perspectives that the key to a successful relationship (and a good litigation result) is cooperation among all the players: the client and

in-house, trial, and appellate counsel. Strikingly, during the panel discussion, it was difficult to distinguish trial from appellate lawyers.

### **Involving appellate counsel when litigation is first filed**

Kaiper began the program with a discussion of the factors that come into play in determining whether to involve appellate counsel in a case’s initial phases. The main considerations for in-house counsel evaluating a new matter are (1) the factual and legal allegations raised, (2) the potential impact on the client’s business, (3) the people affiliated with the client who need to know about the litigation, and (4) the resources that will be needed to resolve it. An action that presents complex or important issues, is one of first impression, or may have a significant impact on how the company conducts business or on its reputation will command more attention and resources than a routine one.

Kaiper explained that the road map developed to handle more substantial litigation depends on the nature

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of the issues and when they are expected to arise. When a matter involves significant legal questions, appellate lawyers' skill in thinking through a case can be useful in the early stages in preparing or defending motions that may cut the action off or educate the court or parties on the issues, and possibly in teeing up certain points for interlocutory appeal. It is particularly useful to involve an appellate lawyer early when part of the case is expected to be appealed while the remainder is actively proceeding through discovery. This reassures the client that both aspects of the litigation will receive proper attention.

Jerry noted that a motion to dismiss can be very beneficial even if it does not dispose of the entire litigation because it may result in dismissal of a portion of the case or its narrowing in important respects. Defense counsel should make sure they understand the client's objectives and what range of results would constitute success from its point of view. Kaiper added that the company's primary goal will be to remove "hot button" issues that go to the heart of its business operations. While trial and appellate counsel may focus on how to simplify a case, in-house counsel will generally be trying to reduce the significance of the issues. Jerry emphasized that the assessment of a case is an ongoing process that should be revisited at each stage to avoid having a matter snowball or negatively impact a company's business or its perception by the public or the press.

### **Effective use of appellate counsel in a case's initial stages**

The discussion then transitioned to how to use appellate counsel most effectively at the beginning of litigation. Jerry noted that an appellate lawyer may help to provide the broad vision of where a case is going. Additionally, most cases that are not resolved before trial will be appealed; having appellate counsel involved early may better position the litigation for that inevita-

ble appeal. This is particularly true for certain pretrial proceedings that may end up being appealed, such as preliminary injunctions, which are often litigated on a very fast track. Appellate counsel's focus on the documentation and admission into the record of the various elements needed to prevail on appeal can be very valuable in these matters.

Jerry noted that another way appellate counsel can assist in framing a case deals with terminology. For example, whether a medical condition is called bovine spongiform encephalopathy, BSE, or mad cow disease is likely to have an impact on both the jury and the court. Deciding which impact is preferable early on not only maximizes that impact but avoids the confusion that can result from changing terminology on appeal. It may also save words, which is useful given the length limits on appellate briefs.

I pointed out that appellate lawyers also can add benefit in the trial court because they are always thinking about the need to record substantive discussions that occur in chambers or at side bar. Jerry agreed that this is an increasingly important point, and Tom noted that it has been expanding to discovery and other pretrial proceedings. In an effort to make litigation more efficient and less costly, trial judges now often encourage resolution of issues through informal exchanges among lawyers or telephone conferences or discussions in chambers. Because most of these interchanges are not transcribed by a court reporter, for appellate purposes they basically do not exist. A careful lawyer will seek permission to file a motion to document the denial of discovery on a particular issue or record the resolution of a significant dispute in some other way, such as in the pretrial memorandum. A trial lawyer who regularly appears in a particular court may not want to be the person always requesting that a record be created and may prefer to have an appellate lawyer play that role.

The panel then segued into a discussion of whether and

when appellate counsel should enter an appearance in the trial court. The consensus was that there is no bright line rule; rather, the appropriate balance needs to be determined in each case. Tom stated that having appellate counsel appear early on sends a message that a case is important and likely headed for a higher court. This may be appropriate in some high stakes litigation, but also may undermine the effectiveness of trial counsel. Jerry agreed that introducing appellate counsel or a large team to the jury may not be desirable. Kaiper added that it is important not to create either the impression that counsel are fungible or confusion as to different lawyers' roles.

#### **Pre-trial division of labor**

In discussing the role of appellate counsel in the pre-trial stages of litigation, Tom underscored the importance of not letting egos drive the assignment process. Every good team needs a leader who will be primarily responsible for staffing, among other things. If the leader responsible for staffing a case decides to engage appellate counsel early, the trial counsel chosen should be someone who recognizes the value of working with a lawyer designated to develop the legal framework, take the lead in preparing motions, and handle any appeals. In Tom's experience, the themes that trial lawyers develop at the outset tell their clients' factual stories powerfully and in a common sense way, but do not always adequately consider the law. Having learned from experience, he now asks legal analysts to prepare likely jury instructions and then has trial lawyers develop their themes against that backdrop. When the jury instructions raise key areas of law that might benefit from clarification through motions, the legal analysts also focus on preparing those motions. This has the side benefit of freeing up the trial lawyers to devote more time to preparing direct testimony and cross-examination.

Tom does not always identify the people he terms legal

analysts as "appellate lawyers" because that occasionally impedes their integration into the trial team. Sometimes he chooses to refer to these legal specialists as the motion practice group. Whatever their designation, he relies on them not only to provide the governing law for the case but to educate him on how it is trending, including undecided issues and larger philosophical implications.

Tom made a helpful analogy comparing a trial team to a team of sports broadcasters. The trial lawyers serve the role of the play-by-play announcers who describe the action as it occurs. The appellate lawyers function more like the color commentators who provide analysis and insight into how the game is proceeding and why. In each situation, the team becomes more effective by the inclusion of the different performers.

#### **Appellate counsel's role during trial**

A critical part of creating an integrated trial team is to respect the division of labor and make the relationship collaborative rather than destructive. Tom noted that trial counsel may understandably want to argue some of the motions, especially motions in limine, to gain respect from the court and resulting credibility in the eyes of the jury. At the same time, it is important for the judge to know that behind the trial lawyer is a legal guru who is keeping track of all the issues. The lawyers should work together to make the overall process as efficient and seamless as possible and also keep the client informed on cost. If the client takes the position that separate appellate counsel is a luxury that cannot be afforded, the trial team in a significant case should still designate a good thinker and writer to focus on the law rather than persuasion of the jury. That lawyer will look and sound much like appellate counsel even if he or she does not officially wear that hat.

Jerry underscored that team unity should be the goal of appellate as well as trial counsel. There are two reasons

for this: (1) the desire to provide the best possible advocacy for the client consistent with counsel's responsibilities as officers of the court and (2) the statistical fact that the single best indicator of success on appeal is winning at trial. The result in most appeals is an affirmation, so the best focus for all lawyers on the trial team is obtaining a victory below. The appellate lawyer's natural desire to make objections to protect the record should be tempered by the need to develop the optimal strategy to prevail before the jury and trial judge. It is not critical that appellate counsel argue all motions at the trial level. The argument decision should be made on a case-by-case and even a motion-by-motion basis. More important than who stands up is the attitude of all the players in preparing the presentation and working together towards the common goal of winning.

Tom's last point on collaboration was that law firms should stop categorizing certain people as "trial," "appellate," "antitrust," etc. lawyers. The challenge for all counsel is to bridge these divisions early on to develop the best strategy to win at trial with as few mistakes as possible while preserving important issues for appeal.

Tom elaborated by noting that trial counsel can often be as effective in making key points at trial as appellate counsel – and can also serve an important role during the appeal by pointing out where points were preserved in the record, having lived through the trial more personally. This is a good reason for collaboration to continue even when a case shifts to the appellate arena.

Jerry agreed that cooperation between trial and appellate counsel is important throughout a litigation. Good trial lawyers who appear regularly in a particular court will know the basic rules of issue preservation in that jurisdiction (if not the more esoteric points). Trial lawyers are also often well-positioned to take the lead in establishing prejudice from a ruling, which is as critical

as preserving the fact of the ruling. For example, the objection to a sudden curtailment of a trial should not be limited to surprise but should include how the client's legal position will suffer, such as by the inability to obtain the testimony of a key witness currently out of the country. Trial counsel may be in a better position to document this than appellate counsel. Establishing prejudice can be valuable even if the client prevails below, because that record can be used on appeal to counter an argument by the other side that it also objected to the ruling.

Similarly, a strategy that seems likely to be effective at trial but might create a vulnerability on appeal may not be worth the candle. An alternative strategy that lacks the same promise at the trial level but will be easier to defend later may be preferable in the long run. It is important for trial and appellate counsel to have a dialog about the pros and cons of each approach and involve the client in the final decision on how to proceed. Appellate counsel like Jerry and me who are involved in a case going to trial often end up serving in this strategic counseling role.

I commented that I have heard occasional stories of a trial judge reacting negatively to a lawyer who is specifically designated as appellate counsel and asked if the panel members had ever experienced this. One panelist has been involved in a case where a very established appellate lawyer was not accorded the expected respect and courtesy when he was brought in to seek a mistrial. Another panelist had not personally seen this phenomenon but has been concerned about the possibility.

#### **Post-trial division of labor**

The discussion then moved to the topic of what to do after a verdict and how the roles of trial and appellate counsel may shift at this stage. Kaiper noted that, while it is always difficult to read the tea leaves during trial,

in-house counsel needs to consider as a case proceeds how to protect or attack the eventual verdict. If none of the lawyers involved in the trial has been thinking about what is, should be, and could be in the record, that consideration should become a priority once the jury renders a decision. Appellate counsel is often the best choice at this point to consider how the record might be improved or the issues clarified to enhance the prospects on appeal.

Jerry underscored that one of the main items requiring attention as a case is being positioned for appeal is the transcript. Counsel should carefully review the record of all proceedings to make sure that it is both complete and correct. Addressing issues preventively before the record is finalized is much easier than trying to cure mistakes after the fact before an appellate court. Post-trial motions may also be appropriate to pull certain points together in a slightly different way to emphasize their significance to the trial judge. The time frame for these tasks is generally quite short. Trial counsel are often exhausted at the conclusion of a case and may not be as objective or able to jump into post-trial practice as appellate counsel who assisted in the proceedings below. New counsel can be brought in, especially on post-trial motions, but a

complete and well-coordinated trial team probably includes a legal analyst who is in a good position to assist and may already have the basic framework at hand.

### Concluding remarks

The objectives of this program were to identify when and why it might be desirable to engage appellate counsel early in litigation; to understand clients' concern to avoid unnecessary or duplicative effort and figure out a game plan to achieve the desired result quickly and cost-effectively; to explain strategies for maintaining an appropriate balance between trial and appellate counsel as a case proceeds; and to emphasize that the client and in-house, trial, and appellate counsel will all be able to perform better when they work as a cohesive team. While I may be somewhat prejudiced, I think the discussion more than met these goals.

The panelists' overall theme was the importance of checking egos at the door and respecting the different skills and perspectives each player brings to the table. My response to that is a resounding Amen – or, perhaps more appropriately, I concur.

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### Editors Notes

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