

This Will Calm
Your Nerves

By Scott Burnett Smith

EMBEDDING an appellate lawyer, especially early on, could improve your chances of winning at trial or on appeal.

When an Appellate Lawyer Joins the Trial Team

An appellate lawyer who joins the trial team is like a journalist who embeds with an Army platoon. Just as the journalist in the Humvee makes the sergeant wary, trial lawyers get nervous when an appellate lawyer joins the

team. And the situation unsettles the reporter as much as it does the appellate lawyer.

The following advice should help calm everyone's nerves when your trial team gets an embedded appellate lawyer. The article is organized according to the major steps in any piece of litigation. It concludes with some general questions and parting observations.

Early Litigation Discovery

Assuming the lawsuit justifies enlisting the help of an appellate lawyer, the first question is how early should she get involved? The short answer: it is never too early. Appellate lawyers are not just undertakers, helping out in bad times. They can also play a critical role in winning. From the outset—the filing of the complaint (or before, if you represent the plaintiff)—the appellate lawyer can help the trial lawyers formulate the legal theories and the client's factual story.

Some creative thinking about the law and the facts at the outset assures that dis-

covery is the means toward winning, not the end itself. An appellate lawyer can help guide this process. Researching the elements of the claims at issue or the requirements of the affirmative defenses in play will help everyone maintain proper focus throughout discovery. Similarly, collaborating on the best possible story to tell from the client's perspective will bring certain facts into sharper focus and push others to the background. Once the trial team focuses on the facts critical to both the legal theories and the client's story, they can be more effective in the discovery process.

Summary Judgment

The summary judgment stage is where the appellate lawyer can begin making real contributions. If during discovery the trial lawyers have developed the critical facts for the legal theories and the client's story, the appellate lawyer can use those materials to construct a convincing summary judgment brief. In many ways, briefing a summary judgment motion is more difficult



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than briefing an appeal. Summary judgment is the first time the facts are given any structure, which makes writing them all the more challenging.

Summary judgment is also the first opportunity you have to win the case (assuming you did not win dismissal). If the appellate lawyer writes a compelling brief that wins summary judgment, then she can then take over defense of the victory on appeal. Seen in this way, summary judgment is the appellate lawyer's first chance to present the facts, argue the law, and preserve the record. On the other hand, cases are often lost at summary judgment, which also gives the appellate lawyer control of the case at an early stage. Win or lose, the appellate lawyer will have an easier time handling a summary judgment appeal if she worked on the summary judgment submissions.

Pre-trial

If you want the appellate lawyer to be a true member of the team—not just an observer—she must be involved in all of the pretrial legal filings. That legal work will force the appellate lawyer to learn the case from shell to core before trial starts.

Motions in limine and Proffers

Before trial, the appellate lawyer can best learn the evidence in the case by researching and writing the motions in limine. Pretrial motions in limine are not always granted on the most contentious issues. Instead, their primary purpose is educational. They teach both the judge and the lawyers what principles of evidence will be at the forefront in the upcoming trial. Once the judge hears both sides of the issues, he will likely decide to reserve ruling on the evidence until it is offered at trial.

This does not mean, however, that filing motions in limine is futile. Rather, it is an opportunity before trial, when things are less hectic, to hit the books and take positions on significant pieces of evidence and witnesses. If the trial court chooses to have a pretrial hearing on motions in limine, it also gives the appellate lawyer a chance to argue those matters for the team, freeing up the trial lawyers to get on with their final preparations. This pretrial preparation will be invaluable once the trial gets underway.

Pretrial motions in limine have the added benefit of streamlining the trial. If the par-

ties and the judge have worked through the evidentiary issues before trial, then objections to evidence will go smoother at trial. Rather than distracting the jury with drawn-out objections and arguments, trial counsel can simply refer back to “the reasons stated in our motion in limine” when making an objection. The same tactic is effective for continuing objections.

Although pretrial motions in limine do not typically preserve evidentiary issues without a contemporaneous objection at trial (see FED. R. EVID. 103(a)), there is one notable exception. A recent amendment to the federal rules (followed in some states) now permits the trial judge to make a definitive ruling in limine. If the court makes such a definitive ruling, “a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” *Id.* So, if the trial judge tentatively decides to admit evidence over your pretrial objection, you can supplement your motion in limine with a motion for a definitive ruling and thus exhaust your legal argument against the evidence and avoid the necessity for objections at trial. The same goes for pretrial decisions excluding evidence. This permits you to make a written proffer of witness testimony by affidavit (or live, through pretrial *voir dire*) before the trial starts. If the trial judge makes his decision definitive, the record is preserved without having to renew your proffer at trial.

Jury Instructions and Verdict Forms

The appellate lawyer can also be used to draft proposed jury instructions and verdict forms. Most trial judges require the parties to file proposed instructions and verdict forms before trial starts. As with motions in limine, this is a chance to research pattern charges and tailor specific instructions to the issues of the case. If the appellate lawyer researches and drafts your proposals, she will be prepared to lead your presentation at the charge conference during trial.

Trial

A trial lawyer is at his best when he can be a trial lawyer. Adding an appellate lawyer to the trial team allows this to happen. The trial lawyer can spend his days (and nights) during trial focused on witnesses and the evidence to be presented through them—

confident that the appellate lawyer will handle any legal issues that come up.

Preserving the Record

The appellate lawyer's focus is legal, not factual. During the day at trial, the appellate lawyer should focus on the record. Her most important role is preserving the record and making legal arguments, free-

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ing the trial lawyers to focus on the evidence to be presented to the jury.

Preserving the record is multi-faceted. It requires the appellate lawyer to watch out for objections or opportunities to object. It requires keeping an eye on exhibits on both sides, seeing which ones have been offered, which were excluded or admitted, and which were identified but never offered. It requires passing notes to the counsel table or consulting the trial lawyers during a break to make a point. It requires on-the-spot research on questions of evidence and procedure. It requires an ear for the transcript to assure that the written transcript will record everything that occurs in the courtroom. And it requires creative thinking to respond to the unexpected.

In addition to preserving error, the appellate lawyer also should try to prevent error. After all, some trials go well for the home team. And when things are going well, the trial judge often risks committing error for the other team. The appellate lawyer can help identify such error and, on the fly, advise the trial lawyers to suggest a middle ground or offer a concession to avoid the problem.

Night Work

If days at trial are dedicated to preserving the record, the appellate lawyer's night work should be consumed by legal research and writing. Trials are full of surprises. The ones that destroy trial preparation are the



legal surprises—motions your opponent drops at the end of the day, issues the judge wants researched overnight, and the like. If the appellate lawyer takes responsibility for this legal work, it frees up the trial lawyers to prepare for the next day's witnesses.

Legal Arguments

In some cases, the appellate lawyer becomes

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the lawyer in charge of the law. Thus, she researches, writes, and argues all critical motions, such as motions for judgment as a matter of law and motions for mistrial. This provides some consistency with the trial judge, knowing whom to ask the tough legal questions. This, too, allows the trial lawyers to be trial lawyers.

Charge Conference

The jury charge conference is the point where many potential appellate issues arise. It is also the hardest part to capture in the transcript. Often there are at least three sets of jury instructions circulating—the plaintiff's, the defendant's, and the court's—and everyone speaks in shorthand—"our willfulness charge." The appellate lawyer should keep an ear cocked toward the court reporter to make sure the transcript is as clear as possible. Also, she should be sure everything gets filed with the clerk, including any proposed instructions that come in last minute, the court's red-lined copy of each side's proposed instructions, or any other papers that are discussed.

In addition, the appellate lawyer should be prepared to argue all issues concerning the jury instructions. At this point in the trial, the trial lawyers often have their minds on their closing argument. They might prefer that someone else handle the charge conference. If the appellate lawyer

researched and drafted your proposed jury instructions, she is in a perfect position to take over. At the charge conference, the appellate lawyer should advocate for your side's proposed instructions and object if the court refuses your proposals. She should object to the other side's instructions, point out any legal errors in the court's proposed charge, and reiterate those points after the court gives the jury its charge.

Post-trial

Post-trial is where an appellate lawyer typically joins the trial team. But if you have had the appellate lawyer on board up until this point, it should ease the post-trial tension.

Post-trial Motions

The appellate lawyer can file your renewed motion for judgment as a matter of law, your motion for new trial, and your motion for remittitur. Or, better yet, if you win at trial, the appellate lawyer can lead the response to your opponent's post-trial motions. Regardless, all of the appellate lawyer's legal work—from summary judgment through trial—will funnel into the post-trial motions. Also, if the appellate lawyer participated in trial, her trial notes will be extensive and she will be able to review the trial transcript quicker than if it were cold. Post-trial deadlines are short. The appellate lawyer's deep knowledge of your case will assure your filings are not only timely but also thorough.

Stays and Bonds

If you are not careful, your opponent may start collecting an adverse judgment before you can get your appeal started. In federal court, for instance, the automatic stay on a judgment only lasts 10 days. *See* FED. R. CIV. P. 62(a). To stay any collection efforts, you will need two separate stays secured by two separate bonds: one under Rule 62(b) while the court rules on post-trial motions and one under Rule 62(d) pending the appeal. The appellate lawyer on your team should have experience with such esoterica.

Record on Appeal

The record on appeal will determine what errors you can and cannot talk about on appeal. If your appellate lawyer made friends with the court reporter and the courtroom deputy during trial, compiling

the record on appeal should be smooth. Having relationships with those people becomes critical if you need fast copies of the transcripts or exhibits. And they will be much more amenable if you need to double-check the evidence or correct something on the record. In short, having an appellate lawyer on the trial team can help assure that everything from the trial court is in order before the appeal begins.

Parting Questions

Is an Appellate Lawyer Cost-Effective?

If the case is significant enough to go to trial, yes. After all, the legal research and writing needed both before and during trial must be done by someone. If not by an appellate lawyer, then another lawyer back at the home office—most likely a young associate—will have to do the work. It is better to have the appellate lawyer on the trial team, who has experienced the immediate context the issues arose from, do the research and writing. This should outweigh the marginal increase in the fees involved. The appellate lawyer will also avoid having to learn the case cold once the trial ends.

What Do You Want out of an Appellate Lawyer at Trial?

Some trial lawyers only want an appellate lawyer who will stay behind the bar, out of the way. Others prefer the appellate lawyer to sit at counsel table where they can easily pass notes or go so far as to take a witness or two. This is a matter of preference. If you are trying to avoid the appearance of too many lawyers in the courtroom, you may choose to keep the appellate lawyer in the gallery, allowing her to make comments and give advice to the trial team during breaks. Sometimes, however, circumstances are so dire that you will be trying the case more for purposes of the appeal. In that case, you may need the appellate lawyer's input on a more immediate basis, and having her at counsel table will make more sense.

With an Appellate Lawyer Embedded with the Trial Team, Does She Risk Losing Objectivity?

One of the strengths the appellate lawyer brings to the team is objectivity. If the appellate lawyer becomes too involved in the trial—taking half the witnesses, say—you run the risk of losing her objectivity.

Ideally the appellate lawyer should remain somewhat detached from, not become captured by, the action of trial.

How Do You Make the Appellate Lawyer a Team Player?

On the flip-side, how do you make sure the trial lawyers embrace the appellate lawyer's role? In today's legal market, many clients use virtual law firms, drawing attorneys from two or more firms to handle important cases. This model puts a premium on *esprit de corps*. If all the lawyers on the team have not worked together before, you need to have one or two team-building meetings before trial, to define everyone's role and build interpersonal relationships. That way, once the jury is in the box, they will see your team as one group, undivided.

What Are the Other Benefits of an Appellate Lawyer on the Trial Team?

The appellate lawyer can bring unexpected

strengths to the trial team. If your trial judge is hostile, the appellate lawyer can argue the contentious legal issues and thus shield the trial lawyers while they try their case to the jury. Also, having an appellate lawyer on the team can send a powerful message to the other side—that you are serious about taking this case through trial and an appeal if necessary. It can also have a similar impact on the judge. Trial judges hate to be reversed, and having an appellate lawyer arguing all of your legal issues might provide some insulation.

Is There a Larger Role for the Appellate Lawyer?

It depends. Sometimes a client has an isolated case in a backwater forum, so it retains an appellate lawyer on a one-time basis to join the trial team. Other clients have institutional litigation spread across the country, each piece of which raises similar legal issues. Under those circum-

stances, an appellate lawyer may be able to coordinate legal issues across the litigation. The appellate lawyer in this institutional role can identify which cases provide the best factual vehicles for specific legal issues and can provide efficiencies in presenting those legal issues in motions and briefs. If the client wants to change the law or push it in a specific direction, the appellate lawyer can oversee the process across several different jurisdictions.

The answers to these questions foreshadow the future of appellate lawyers in trial litigation. Whether you have a bet-the-company case or one that presents an unsettled legal issue, embedding an appellate lawyer with the trial team could improve your chances of winning at trial—or on appeal. 