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Practice Spotlight

Increasingly, Appellate Lawyers Advise at Trials, Laying Appeals Groundwork

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As an appellate attorney, Robert Wright should be seeing the inside of a courtroom only about three times a year.

But the partner at Encino appellate boutique Horvitz & Levy said he finds himself attending trials more often these days. That's not, however, because he's doing double duty as a trial attorney.

"I'm not there to try the case, and I wouldn't know how to do it if anyone asked me to," he said.

Instead, Wright and some of his colleagues in the appellate bar increasingly are called on to advise trial attorneys on how to prepare cases for appeal before they've even finished trial.

The practice doesn't make sense for every case, attorneys say, but in suits that likely will be appealed, both clients and trial attorneys see value in having an appellate specialist present to lay the groundwork for a later appeal.

"I think that's something that our firm has been doing more of in recent years," Wright said.

"And I think it might stem from the fact that, as appellate counsel, sometimes we run into an issue that initially looks great on appeal but wasn't preserved at the trial stage," he said. "We often tell clients, 'It would be wonderful if you could [have] involved that [issue] earlier.'"

At the same time, Wright said, the trial attorney has a full-time job to do: presenting the facts of the case in a way that will convince the jury.

"On a macro level, I think what we provide is someone in the courtroom who's thinking about how this case will look to the Court of Appeal," Wright said.

Trial attorney Lawrence P. Riff, managing partner of the Los Angeles office of Steptoe & Johnson and a toxic torts defense expert, agreed.

"An appeal is only going to be as good as the record that's developed in the trial court," Riff said. "If you think you're going up on appeal on some key issue, it makes good sense to get with your appellate counsel in advance to make sure you have the record you need."

In practice, appellate attorneys say, preserving

the record means figuring out what legal issues might help the case on appeal and advising the trial attorney on how to raise them in motions and other proceedings that will leave a paper trail for the appeals court to follow later.

That can mean advising trial counsel on whether and how to make motions, researching and writing briefs or preparing jury instructions.

It's all with an eye toward preserving legal issues at the trial stage so that the appellate court won't, as appellate attorney Donald Falk of Mayer Brown Rowe & Maw's Palo Alto office put it, "blow it off in a footnote."

Preparing jury instructions is especially important in California right now, said Wright's partner, M. C. Sungaila of Horvitz & Levy.

Since the State Bar introduced a new standard called California Civil Instructions in 2003, preparing jury instructions "is more daunting than it used to be."

"Trial judges feel more familiar with BAJI," said Sungaila, referring to the retired Book of Approved Jury Instructions. "We've analyzed the CACI instructions internally, so we have our own shorthand on those."

Where Wright is often called on to sit in on a trial, Sungaila said her involvement in cases at trial is to focus on behind-the-scenes research.

Even when appellate counsel hasn't been involved from the beginning, Sungaila said, they can help trial counsel out with what she called "lunch-hour research": queries that come up when a judge does something unexpected.

Because bringing in an appellate attorney adds significantly to a client's expenses and because predicting whether most cases will be appealed is difficult, attorneys say that, in practice, an appellate attorney likely will get called in on only two kinds of cases.

By far the rarer of the two types of cases is one that turns on a point of law that's novel or not well-established. Riff cited the evolving law on privacy as it relates to data encryption technology. In such cases, an appeal is far more likely, he

said, because the law isn't clear.

More often, appellate attorneys are used for cases in which the stakes are so high that, for the client, the extra expense of an appellate attorney is seen as insurance for a stronger appeal.

"The bigger the case and the more at stake, the more likely a litigant is to then bring in appellate counsel early, because it's expensive to do that," Riff said.

Richard Carter of Shea, Stokes & Carter's Los Angeles office defends insurance companies at trial. For his clients, a situation that justifies the addition of an appellate attorney is one that presents "a significant exposure" to liability.

"[That's] every case where they figure it's going to impact the way they do business," Carter said. "The downside is so significant they want to make sure they've got it right, or if they don't, they want to know now before it gets to [appeal]."

For Riff, more proof of the value of appellate consultants at trial came in the 2002 verdict in *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888 (2002).

In that case, he said, a Horvitz & Levy team including of-counsel Jon Eisenberg of the firm's Oakland office stepped in during the post-trial, pre-appeal phase to preserve the issue of res judicata, the rule saying a party cannot sue twice for the same offense.

Eisenberg said Riff's recognition that the trial judge made a mistake on that issue allowed his team to lay the groundwork for a reversal in the 4th District Court of Appeal that netted its client, Monsanto, \$174.9 million. That reversal was upheld by the state Supreme Court.

"We made sure that every single argument on res judicata was presented to this trial judge in the post-trial motions," Eisenberg said. "We were able to stand up before judges on oral argument and say, 'First of all, there's an error here. Second of all, we're not just making this argument for the first time.'"

And that, he said, prevented the case from being "every appellate lawyer's nightmare": getting a case whose strongest arguments were inadvertently waived at trial.