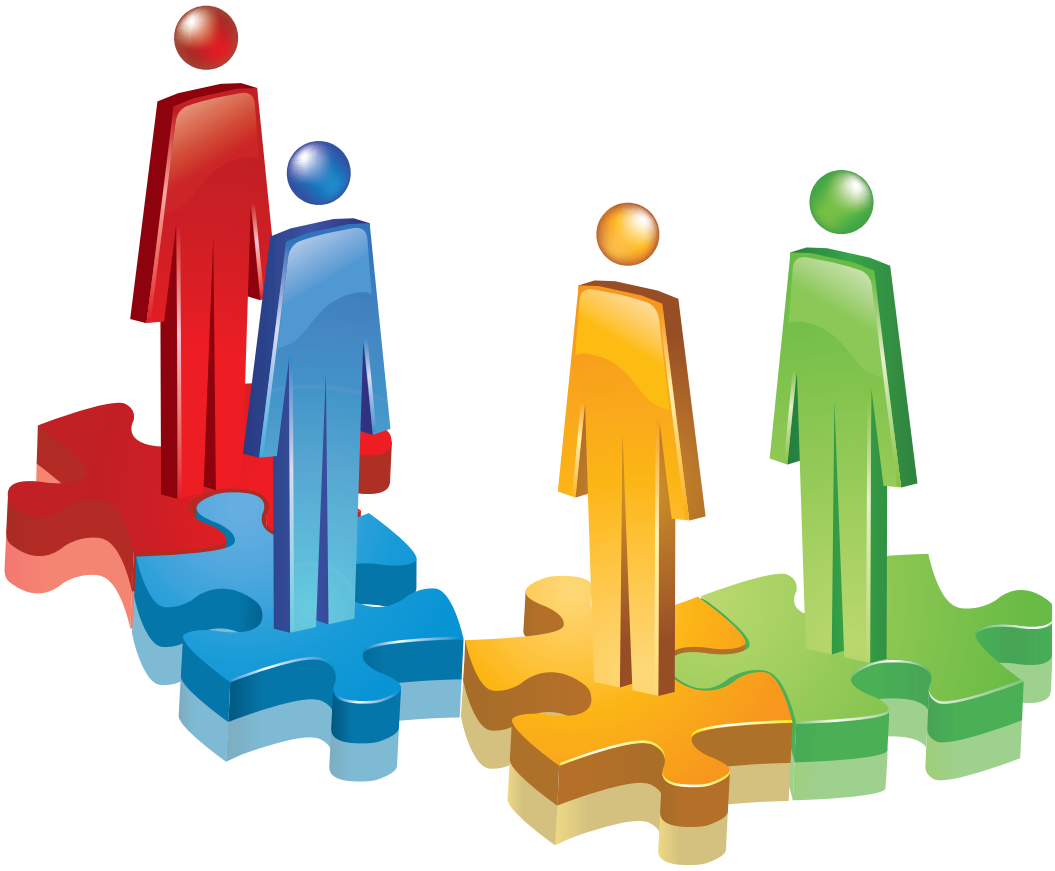
By Curt Cutting and Richard J. Montes

An Appellate Perspective on Litigation Management



By definition appellate lawyers are the folks you call to handle an appeal—to step in and take the case to the next level after the trial has ended and judgment has been entered. But many savvy trial lawyers and litigants increasingly recognize the value of calling in appellate counsel *before* it is time to file a notice of appeal. Appellate counsel's input during pretrial and trial proceedings, serving in a complementary role alongside trial counsel, can make the difference between winning and losing, or at least help to limit the amount of an adverse judgment or settlement. In this article we will discuss (1) how appellate counsel can play a role earlier in the litigation; (2) how to maximize the relationship between trial counsel and appellate counsel; and (3) how retaining appellate counsel early can actually reduce costs.

■ Curt Cutting is a partner in Horvitz & Levy LLP, a 30-lawyer appellate boutique based in Los Angeles. He has been lead counsel in appeals involving business torts, contract disputes, insurance bad faith, inverse condemnation and eminent domain, product liability, and toxic torts. Richard J. Montes is a partner in Mauro Lilling Naparty LLP, the largest boutique appellate practice in New York. He has litigated appeals in areas including medical and other professional malpractice, construction, insurance coverage, toxic tort, and commercial litigation. Mr. Montes is a member of the DRI Appellate Advocacy Committee.

The Expanded Role of Appellate Counsel

Appellate Counsel as Risk Adviser

Increasingly, in complex cases or cases with potential excess insurance exposure, defendants retain appellate counsel early—sometimes even before a plaintiff files a lawsuit—to analyze and evaluate the potential exposure. Appellate counsel can independently and objectively review the strengths and weaknesses of the liability arguments, both in the trial court and with a view towards an appeal. They also can review the potential range of damages and accurately assess the potential sustainable value after an appeal, taking into account the applicable standards of review and the amounts that have been upheld in other cases. Their evaluations, therefore, can not only serve as a guide to settlement negotiations, but can help guide in-house counsel or claims representatives in setting reserves.

The Appellate Lawyer's Role in Pretrial Proceedings

Although trial counsel are adept at legal research and analysis, even the most skilled trial lawyers may find it helpful to have input from an appellate lawyer during the preparation of pretrial motions, to frame the legal issues and ensure that the eventual appellate record is complete. Indeed, adding an appellate lawyer to the pretrial team will often be more efficient because appellate counsel may have already researched and perhaps even briefed the issue and can often readily provide answers. Moreover, due to the nature of their work, appellate lawyers are often aware of recent developments and emerging trends in the case law, splits in authority, and issues that are currently pending on appeal. This knowledge can be invaluable to trial preparation and strategy.

By taking the laboring oar on certain pretrial motions, an appellate lawyer can bring value to the defense team by freeing up the trial attorney to focus his or her energies on preparing witnesses and marshaling the evidence needed for trial. For example, in one recent case handled by one of the authors of this article, the plaintiff began the trial believing that a jury would be free to award damages not only for pain and suffering, but also for lost earnings. The defendant retained appellate counsel, who prepared a motion in limine to bar the plaintiff's lost earnings claim based on New York cases that require plaintiffs to prove economic damages with reasonable certainty (in contrast to noneconomic damages, which plaintiffs can prove by a preponderance of the evidence.) *See Ellis v. Emerson*, 870 N.Y.S.2d 190, 191 (N.Y. App. Div. 2008); *Firmes v. Chase Manhattan Automotive Finance Corp.*, 852 N.Y.S.2d 148, 160 (N.Y. App. Div. 2008). The trial court granted the motion and precluded the plaintiff's noneconomic damages claim, resulting in a much more reasonable demand from the plaintiff.

> Appellate counsel can… provide guidance on the steps necessary to preserve objections to trial court rulings or misconduct of opposing counsel.

An appellate lawyer's involvement can also be particularly useful when drafting jury instructions and a verdict form. Too often these tasks become afterthoughts, lost in the smoke of the litigation battle. A client's interests are not best served when the trial attorney must devote precious evenings and weekends to agonizing over the appropriate jury instructions and interrogatories in the midst of trial. Assigning these tasks to an appellate lawyer during the early stages of trial allows for a more orderly and thoughtful crafting of these critical documents, which the trial attorney then can use as an outline to guide the development and preservation of issues during trial.

The Appellate Lawyer's Role at Trial

During trial, an appellate lawyer's advice can be critical to preserving issues for an appeal. A trial attorney should focus on persuading the trier of fact. Appellate counsel may view a case through a different prism, with an eye toward making a trial victory unassailable, preserving errors for appellate review, or both.

Given the often hectic pace of a trial, trial counsel may not be focused on the need to ensure that the record contains an accurate account of events, such as unreported sidebars, conferences in the judge's chambers, visual presentation of demonstrative evidence by expert witnesses, and excerpts of deposition testimony played to the jury by videotape. Appellate counsel can provide valuable advice on how to handle these issues. Appellate counsel can also provide guidance on the steps necessary to preserve objections to trial court rulings or misconduct of opposing counsel. In California, for example, a party should not only raise an objection to misconduct during an opponent's closing argument, but the party should also request an admonition to the jury and move for a mistrial. *See Garcia v. ConMed Corp.*, 204 Cal. App. 4th 144, 148, 138 Cal. Rptr. 3d 665, 668 (Cal. Ct. App. 2012). Appellate counsel can also provide advice regarding offers of proof that a trial attorney may want to make after adverse evidentiary rulings, objections to opposing counsel's jury instructions and verdict form, and problems concerning a jury verdict that the trial attorney must raise before the court discharges the jury. For example, in New York, failing to object to an inconsistent verdict before the jury is discharged results in a waiver of the argument on appeal. *See Steginsky v. Gross*, 847 N.Y.S.2d 593 (N.Y. App. Div. 2007).

Having appellate counsel attend a trial can also help during those awkward situations when a defendant must object to a judge's ruling to preserve an issue for appeal, while simultaneously trying to remain in the judge's good graces. In those situations, appellate counsel can serve as a buffer between trial counsel and the judge. To ease the tension between error preservation and positioning a case for victory, appellate counsel can make certain objections or arguments to the court, or trial counsel can make those arguments while telling the court, "my appellate lawyer made me do it."

Aside from these specific issues, it is often useful to have an extra set of eyes and ears and another legal mind "in the

trenches" during trial. Many clients find it useful to have detailed, written reports outlining a day's events, analyzing how a trial is progressing, and identifying appellate issues that have arisen. These types of reports can help a client assess settlement options during trial. It is simply not possible for trial counsel to provide that type of reporting and analysis while simultaneously conducting a trial.

Appellate Counsel's Relationship with Trial Counsel

Ideally, appellate counsel will become a fully integrated part of the litigation team, and trial counsel will not view the appellate counsel as a threat or simply somebody who is looking over his or her shoulder. Although some trial attorneys who have not partnered with appellate counsel before may feel wary at first, it usually does not take long for trial counsel to understand the value added and appreciate the support. At the same time, appellate counsel must take care not to step on trial counsel's toes or overstep their role. Their primary purpose is to preserve issues, not to micro manage the presentation of evidence or questioning of witnesses. Moreover, it is not necessary or often advisable for appellate counsel to "second chair" the trial. That second-seating arrangement can actually become a distraction, and trial counsel may look for reassurance when normally they would act on instinct or experience. Appellate counsel should function more as a safety net to ensure that nothing slips through the cracks. They can achieve this easily from the back of a courtroom, taking notes and conducting legal research on a laptop, and discussing developments if necessary during breaks. Once trial counsel and appellate counsel establish rapport—which usually occurs within hours—trial counsel will quickly come to appreciate having a second set of hands that frees them up to focus entirely on preparing witnesses, reviewing testimony and evidence, and thinking about their closing statements.

Posttrial Motions and Staying Enforcement of the Judgment

After the jury returns a verdict or the trial court issues a decision, appellate counsel can assist trial counsel in navigating the procedural landmines of the posttrial process. Appellate counsel, for example, can identify issues that trial attorneys must raise in a posttrial motion to preserve them for appeal. They can also help to focus on the arguments that have the best chances of succeeding. Crafting a targeted, focused posttrial motion is always better than taking a "throw everything at the wall and see what sticks" approach.

> Having appellate counsel attend a trial can… help during those awkward situations when a defendant must object to a judge's ruling to preserve an issue for appeal.

Many experienced appellate counsel have also litigated appeals in multiple jurisdictions. When necessary and appropriate this experience enables them to extrapolate successful concepts from different jurisdictions and to make the concepts compatible with other jurisdictions where they litigate. For example, in New York, appellate courts have the power to review jury awards to determine if they deviate materially from reasonable compensation. *See* N.Y. C.P.L.R. §5501(c); *Donlon v. City of New York*, 727 N.Y.S.2d 94 (N.Y. App. Div. 2001). This standard gives courts more flexibility to reduce verdicts based on a comparison of a jury's award to cases involving similarly situated plaintiffs and defendants. In contrast, states such as California and New Jersey use the "shocks the conscience" standard of review. *See Baxter v. Fairmont Food Co.*, 379 A.2d 225, 229 (N.J. 1977); *Buell-Wilson v. Ford Motor Co.*, 141 Cal. App. 4th 525, 547, 46 Cal. Rptr. 3d 147, 166 (Cal. Ct. App. 2006), *rev'd on other grounds*, 550 U.S. 931, 127 S. Ct. 2250, 167 L.Ed.2d 1087, (2007). This is a more subjective standard of review that seems to result in far fewer reductions by appellate courts than other standards. That does not mean, however, that a defendant should not make the argument that an award shocks the conscience because it deviates materially from awards in comparable cases. Indeed, if a defendant can show that a jury's award substantially exceeds the awards in comparable cases, that showing can support an argument that the jury was improperly swayed by passion or prejudice or that the verdict was the result of trial court error. *See*, *e.g.*, *Pellicer v. St. Barnabas Hospital*, 974 A.2d 1070, 1091 (N.J. 2009); *Buell-Wilson*, 141 Cal. App. 4th at 550–52, 46 Cal. Rptr. 3d at 168–70.

When more than one pending case raises a particular legal issue, appellate counsel can provide guidance about which case would be the best vehicle to litigate the issue. For example, one of the authors of this article confronted a situation in which an issue of critical importance to the client's business arose simultaneously in two cases. One case was decided in favor of the client, and the other was decided against the client. The author advised the client to proceed with the case that presented the best record for that issue and to settle the other. Ultimately, the case with the better record advanced to the state's highest court, and the issue was decided in the client's favor in a bare majority decision. Whether the outcome would have been different if the court decided the issue based on the record in the other case is unclear. Fortunately, though, this question will never need an answer.

Is Retaining Appellate Counsel Early Cost Effective?

By no means do the authors intend to suggest that it is necessary or even appropriate to retain appellate counsel early in all cases. Rather, this partnership between trial and appellate counsel is meant for those cases with complex legal issues, issues of significant business value to a client, and high exposure. In those cases, sometimes you have to spend money to save money, and retaining appellate counsel early can accomplish this.

Appellate › page 70

Appellate ❮ page 20

More often than not, when appellate counsel is first asked to assist with a case before trial, the plaintiff's demand is unrealistic, and the client has resigned to take the case to trial. Sometimes the mere involvement of appellate counsel can change the settlement landscape. Retaining appellate counsel sends a strong signal to plaintiff's counsel that a defendant will handle a case very seriously and that the litigation can continue well beyond trial. Plaintiff's counsel then faces the prospect of spending significant time and resources on litigating a case that will face the uncertainty of an appeal. Trial judges may also take notice, as most trial judges do not like to be reversed, and they will listen favorably to a credible presentation from appellate counsel on the possible outcomes on appeal.

The presence of appellate counsel and his or her fresh perspective on a case can, therefore, create more opportunities to reduce exposure and lower a plaintiff's demand. In addition, while reducing potential exposure and payouts, it can actually reduce litigation costs. In fact, the goal of appellate counsel when called in early is not to take on an appeal but to avoid one.

Conclusion

The role of appellate counsel has expanded in recent years beyond the traditional view. Defendants are now asking appellate counsel to do more than just research and write from the confines of their offices and to become actively involved earlier in litigation. Appellate counsel become part of the litigation or risk-management team, actively participate in developing the litigation strategy, and help position a case to achieve the maximum result. While counterintuitive, often this early involvement can change the landscape of a case and in the long run reduce overall exposure and litigation costs.