

Preventive medicine for your case: see your appellate lawyer long before trial.

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Litigation is just like the human body. If you wait too long to get treatment, even the best doctor may not be able to cure you. Too often, trial lawyers bring their cases to appellate lawyers late in the litigation process. By then, the pleadings and positions may be set in stone, a legal issue may have been waived, or an important privilege may be gone.

I am a staunch advocate of involving appellate lawyers from the very beginning of the litigation process—as a form of preventive medicine for the case and any future appeal. My firm—a commercial trial boutique—adopted this philosophy from its inception and it has produced incredible and consistent results.

Time and again, we have seen that the active involvement of appellate lawyers from the beginning of a case not only helps avoid a bad result, it can also make the case “healthier” by identifying additional causes of action, damages and factual and legal weaknesses in our—or our opponent’s—case.

Our “appellate lawyers” get involved years before the jury is seated, supporting our trial lawyers and clients by developing legal strategies, identifying issues, helping formulate discovery plans and writing critical motions. By adopting this philosophy, any trial lawyer or firm can achieve similar results.

Appellate lawyers have special skills that should be tapped before trial, which also reduce the overall costs of the case.

Unfortunately, many trial lawyers and firms are hesitant to embrace this philosophy, usually because they are highly compartmentalized or internally competitive. Understanding the special skills that appellate lawyers can bring to a case before trial is crucial to overcoming this prejudice.

Whereas trial lawyers excel in “building” cases by developing testimony, evidence and themes, appellate lawyers specialize in finding the factual weaknesses of a case, distinguishing the law and crafting arguments that will be successful at the appellate court. It is not that we see the glass as “half empty” whereas the trial lawyer sees it as “half full;” we are simply wired this way—which is exactly why we became appellate lawyers. We excel at looking at cases under a microscope.

We love to look for missing evidence and legal elements and, depending on the assignment, to exploit them or fix them. Appellate lawyers also have an insatiable interest in following legislative and rule changes and following appellate court opinions looking for emerging and changing areas in the law.

It is not a question of intellect. Although many trial lawyers undoubtedly possess these same skills, the majority of their time is spent on matters that do not require their use or development. They spend their time waging discovery battles, preparing witnesses, developing examinations and getting ready for trial. A cardiologist and an anesthesiologist both went to medical school, but you would never see them as interchangeable. Trial and appellate lawyers are no different. Although we obtained the same law license, our craft is not the same.

Despite these truths, many firms, trial lawyers and their clients also believe that the involvement of an appellate lawyer from the beginning of the case is either unnecessary or a luxury to only be used in the biggest cases.

My firm’s philosophy, however, has demonstrated time and again that the most efficient way to achieve the best result, save money, preserve error and avoid a costly (and possibly unsuccessful) appeal is to utilize appellate counsel throughout the entire case.

There are so many benefits to involving an appellate lawyer early in the process that they cannot all be discussed in this brief article, but there are a few generalizations that can be made.

Use an appellate lawyer to analyze your claims and damages.

Every trial lawyer should involve an appellate lawyer in analyzing potential claims, defenses and recoverable damages. Because the typical appellate lawyer spends numerous hours every week simply reading the latest opinions from the Supreme Court and the state and federal courts in which she practices, she is not only aware of new causes of action, but ones that have recently been restricted or damages that are being expanded or limited by the courts. Utilizing this resource insures not only that you maximize your claims, defense and damages, but that your pleadings take into account what may happen over the coming years.

Use an appellate lawyer to identify legal trends that could impact the case.

Not only can an appellate lawyer guide a trial lawyer's pleadings in the right direction, she can identify emerging legal trends that may affect the case or recommend arguments for the adoption, change or expansion of the law.

Few trial lawyers with active trial dockets have the time or the inclination to follow judicial trends. On the other hand, not only do appellate lawyers devote substantial time to these endeavors—they actually enjoy it! Most appellate lawyers analyze and follow national trends, emerging causes of action and the restriction of prior precedent. We also attend seminars where trial and appellate judges share their views on these same issues.

For example, an appellate lawyer knows if a justice who wrote a dissenting opinion ten years ago—that could possibly benefit or hurt your case—now has more like minded colleagues on the court that would be willing to adopt the dissent's position. Utilizing their knowledge from the beginning of the case adds value by identifying the legal trends that can positively affect a case and those that could leave the case in an undesirable position on appeal.

Use an appellate lawyer to help focus your discovery efforts.

What in the world can an appellate lawyer offer a trial lawyer with regards to discovery? Surprisingly, a lot.

One of the key benefits that an appellate lawyer can provide *before discovery begins* is to distill the key legal elements of a case. Identifying the elements helps further define the scope of discovery and insures the discovery effort will develop the proof needed for summary judgment or trial.

The involvement of an appellate lawyer also saves time and money because the written discovery and depositions will be focused on the key facts needed to win the case. At my firm, before a single deposition is taken, an appellate lawyer drafts the questions, instructions and definitions the jury will be given at the end of the trial, which provides the roadmap for all future discovery. If the case will be tried to the bench, the appellate lawyer will draft the findings of fact and conclusions of law that the client would want entered by the court.

Of course, appellate lawyers can also be instrumental if the trial court has ordered the production of privileged information. An appellate lawyer can help analyze the likelihood of obtaining emergency relief in the appellate court. If an emergency petition will be filed, it is critical that an appellate lawyer be involved because emergency petitions are rarely granted. An appellate lawyer can identify and persuade the appellate court why the emergency is different and why the petition should be granted.

Use an appellate lawyer to create better trial motions and briefs.

It is almost universally true that our already overburdened courts are granting fewer hearings and determining the majority of motions based solely on written motions and briefs. This is particularly true with summary judgments in federal courts. Coupled with the fact that trial court judges never have all the resources they need, filing a lengthy, confusing or unfocused motion or brief will rarely achieve the desired result or gain the favor of the court. You better have a short, clear, well-written motion.

As a result, any important motion or brief—particularly motions for summary judgment—should never be filed until an appellate lawyer has read it. Too often I have defended a summary judgment on appeal that was correctly granted, but could be overturned simply because either: (a) a weakness exists in its evidentiary support that could have been corrected; or (b) or a trial lawyer inadvertently created a fact issue in an affidavit that previously did not exist. Involving an appellate lawyer before filing or opposing a summary judgment can avoid these pitfalls and any risk on appeal.

In addition, involving an appellate lawyer in motion practice provides a better understanding of the motion's chances for success. Appellate lawyers have the ability to examine motions through the same disinterested eyes as the court. As a result, if a motion convinces us you should prevail, it is more likely to convince the court.

Bring an appellate lawyer to critical hearings before trial to build credibility and assist the court.

Why would a trial lawyer need an appellate lawyer at hearings that occur long before trial? A number of reasons. One of the most obvious is preservation of error. But the least obvious one is the most compelling—to build credibility for your side's position and to assist the court.

Cases can take years to get to trial. Along the way, many important legal battles can be won and lost that set the stage for success or failure at trial. In my experience, the trial court is continually evaluating the credibility of the attorneys and their legal arguments throughout the litigation process. Judges, like lawyers, simply cannot know all the law. They rely on lawyers to provide them with the correct law that applies to the facts of the case.

Bringing an appellate lawyer to critical hearings helps build this type of legal credibility throughout the case. Hopefully, the court will recognize that the appellate lawyers know the law, and the trial lawyer knows the facts, and that together they endeavor to bring them both to the court so that it can fairly decide the issues.

Once the court reaches this conclusion, it will rely more and more on the appellate lawyer for guidance. It will also be more difficult for the opposition that brings an appellate lawyer to the courthouse for the first time on the day of trial. If an appellate lawyer has done her job, she has built credibility for a side's legal arguments before trial begins, the court views her as an assistant to the court.

This does not mean that a trial lawyer should bring an appellate lawyer to critical hearings just to let the court know his client might appeal an adverse ruling. Unfortunately, I have seen this tactic more than once. I assume it is believed to somehow influence the trial court's decision. This ill-advised strategy has resulted in too many clients paying for an appellate lawyer to simply warm a seat at counsel table.

In my experience, judges are not influenced—or impressed—by appellate lawyers who do not participate in some way in the hearing. Judges know which of their decisions can be appealed before trial. What the trial court needs are trial and appellate lawyers that bring the court the law and the facts necessary for its decision in a timely, effective and concise manner.

Of course, appellate lawyers are also a critical part of any successful trial team, but the skills they offer during trial are beyond the scope of this article.

In sum, I urge every appellate lawyer, trial lawyer and firm to create an active partnership *before* trial between trial and appellate lawyers. My firm has found that it leads to incredible results, cost savings for our clients and the favor of the courts in which we practice.