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The Value Proposition of Including Appellate Counsel on the Trial Team

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Appellate lawyers are usually the lawyers you call to step in and take a case to the next level after an adverse judgment has been obtained or the opposing party challenges a favorable judgment. But over the last decade, clients and trial lawyers have increasingly recognized the value of calling in appellate counsel before a notice of appeal is filed, often hiring appellate counsel to assist with strategy and legal arguments during trial, or as soon as a complaint is filed or dispositive motions are at issue. Most often, these cases involve issues of institutional importance, potential precedent-setting law or large dollar amounts. But even in cases without these features, clients have found appellate lawyers add value.

To fully understand the value of calling appellate counsel into a case early on, a short primer on the appellate process is helpful. The trial courts are the fact-finding tribunals; their focus is on the introduction of evidence and resolving factual disputes. The intermediate appellate courts police the trial court proceedings for error; they do not retry cases or (with rare exceptions) take new evidence. The intermediate appellate courts' role is to examine the trial record for error and determine, if an error occurred, whether it was of such magnitude that it probably impacted the outcome of the case.

Appellate courts take a conservative approach to reviewing trial court decisions. A judgment or order of the trial court is presumed to be correct; a party seeking relief on appeal must overcome this presumption and affirmatively show error. Likewise, the appellate court will generally not review new legal theories on appeal that were not presented to the trial court for determination in the first instance, particularly where the factual record in the trial court was not developed on key points needed to decide the new legal theory. Nor will the appellate court review legal error that the appealing party "invited," or asked the trial court to make (such as where a party seeks to complain on appeal about a jury instruction it asked the trial court to give).

Finally, the appellate court will only reverse if it determines that there was a legal error that made a difference in the outcome of the case; the existence of legal error alone is not enough to warrant reversal. The search for prejudicial error is made within the four corners of the fixed trial court record. As our own court of appeal here in Orange County has put it: "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two."

Given the contours of the appellate process, an appellate lawyer most obviously can assist by helping to preserve the record for appeal. For example, appellate counsel can flag key junctures at which objections should be made, evidence proffered, rulings obtained or legal arguments presented.

Two recent appellate decisions from the Fourth Appellate District, Division Three, in Orange County, highlight the importance of preserving legal arguments in the trial court. In one case, trial counsel requested a modified version of the California form CACI jury instructions; the CACI instruction at the time had not yet been modified to reflect an intervening change in the law. Over the defendant's objections, the trial court gave the unmodified CACI instruction instead. The Court of Appeal reversed. Had there been no objection to the erroneous instruction, or had the defendant requested the unmodified CACI form instruction, the defendant would have forfeited the right to appeal the improper instruction.

Another Orange County appellant was not so fortunate. The Court of Appeal

rejected an exhaustion of remedies argument in an employment appeal because the defendants had waited until after the bench trial ended to raise the issue. Even though it was the plaintiff's burden to plead and prove timely exhaustion of administrative remedies for a FEHA claim, the defendants could not ignore the issue until after the claims were submitted to the factfinder for decision.

Appellate counsel plays other important roles in the trial court as well. An appellate lawyer tends to focus on the legal and procedural aspects of a case, whereas the trial lawyer focuses on the factual elements of the case. Appellate lawyers therefore can add to case strategy by providing independent suggestions and opinions concerning how a case may best be pursued or defended based on applicable legal and procedural issues, and provide advice on areas in which to develop the facts in light of these legal issues. This can add a new dimension to the case, and help maximize the chances of success in the trial court so that, if there is an appeal, the client will be the respondent rather than the appellant.

Appellate lawyers also keep up on the "big picture" development of the law and emerging legal trends in California and elsewhere, and may have already briefed an issue and be in a position to readily provide answers or arguments. An early assessment of the legal issues in a case and their likelihood of success on appeal can also help a client set reserves, or assess settlement value; in that sense, appellate counsel may serve as a general risk advisor for the litigation.

Having an appellate specialist on the trial team has a multitude of benefits for trial counsel as well. Appellate counsel can focus on the larger legal issues while trial counsel focuses on trial strategy and the evidence needed to drive that strategy. Appropriate legal arguments can be made at the outset to avoid claims of waiver. The specialist can help tighten legal arguments in dispositive motions, suggest post-trial motions, evaluate opportunities for interlocutory appellate intervention, protect the record for appeal, and prevent an adverse decision from the appellate court. And, to the extent the appellate lawyer takes the laboring oar in dispositive motions, motions in limine, jury instructions and verdict forms, the trial attorney is freed up to focus his or her energies on preparing witnesses and marshaling the evidence needed for trial.

In short, the role of appellate counsel has expanded. Appellate counsel are now part of the litigation or risk management team, and actively help position a case to achieve the maximum result from the time the first pleadings are filed.

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