

Best Practices

By Nancy Winkelman

Everyone on the team shares responsibility for these best practices: in-house counsel, trial attorney, appellate attorney.

# The Relationship Between Trial and Appellate Counsel

Clients engage appellate counsel at different stages of litigation (pre-trial, trial, post-trial, appeal) and through a variety of processes. They then manage the relationship between trial and appellate counsel in various ways.

In turn, trial and appellate counsel manage their relationships both with each other and with their clients in various ways.

In some cases, trial and appellate counsel have little to do with each other: the appellate lawyer is engaged solely for the appeal, the trial lawyer turns over the file, and that's that. But in many cases—and increasingly so—trial and appellate counsel are expected to, and do, work together. This may be because the appellate lawyer is engaged to be involved during the pre-trial or trial stage, with an eye toward the appeal. Or it may be because the case is fact intensive or highly technical and so having the continued involvement of the fact and subject matter expert, the trial lawyer, is important at the appellate level. Or it may be because the appellate lawyer is engaged to serve in a consulting role for the appeal, with the trial lawyer serving as the lead counsel, and the appellate lawyer providing a heavy assist in terms of briefing, oral argument preparation, or both. Or it may be for some other reason particular to the case.

Regardless of when and however in the process the trial and appellate lawyers team up, many dynamics come into play. Both trial and appellate counsel have a common goal: providing the client with the best possible representation. But sometimes negative dynamics come into the room: ego, resentment, defensiveness, lawyers trying to look good (and maybe even make others look bad) in a client's eyes, lawyers protecting their own territory. When this happens, the client's interests can suffer.

This article will offer some recommendations for best practices in the relationship between trial and appellate counsel. The goal is simple: to help make the relationship between trial and appellate counsel as positive and productive as possible so the client's interests are best served.

Three scenarios bring these best practices into focus.

Scenario 1: three people die in a house fire. Their executors sue numerous defendants in the Philadelphia Court of Common Pleas, including the Pennsylvania-based manufacturer of the home's wall-to-wall carpeting, alleging that the carpet was defective because it was not sufficiently fireproof. The carpet manufacturer and its trial lawyer and the trial lawyer's firm have a long-standing relationship; the firm has



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handled most of the carpet manufacturer's Pennsylvania product liability work for years.

Because of the large monetary exposure, the carpet manufacturer's in-house counsel decides to engage appellate counsel prior to the trial to assist with pre-trial motions and strategy; to identify and handle any interlocutory appeals; to attend the trial and present argument on some of the dispositive motions; to draft and handle the argument on jury instructions; to ensure that the record is developed and the issues are best positioned and preserved for appeal; and, of course, to handle the appeal in the Pennsylvania Superior Court. The in-house lawyer discusses her decision to engage appellate counsel with the trial lawyer, explaining that it is based on the large exposure and near certainty of an appeal.

The in-house lawyer then asks the trial lawyer to identify Pennsylvania's leading appellate lawyers. The trial counsel provides the in-house lawyer with five recommendations. The in-house lawyer conducts her own due diligence and narrows the field to three. The in-house lawyer and trial counsel meet in person with each of the three and together select the one whom they believe is the best fit. The three discuss the case and how to divide the work between the trial and appellate lawyers, with the in-house lawyer providing clear guidance about her expectations for the roles that each will play before, during, and after the trial. The in-house lawyer provides this guidance in general terms, not in a way that micromanages the case.

Scenario 2: a truck driver is seriously injured when his truck rolls over rounding a curve on a New Jersey highway and falls down an embankment. The driver sues the truck's New Jersey-based manufacturer in the New Jersey Superior Court under a product liability theory, alleging that the truck was defective because it was not sufficiently crashworthy. The manufacturer has a long-standing relationship with the lawyer and the law firm representing the manufacturer in this case.

The case proceeds to trial. The trial takes two weeks and is heavily fact intensive. The jury returns a verdict of \$20 million in compensatory damages and \$40 million in punitive damages.

As soon as the verdict is rendered, the truck manufacturer's in-house counsel asks her in-house colleagues for names of New Jersey appellate lawyers. She conducts due diligence on the recommendations that she receives and has telephone interviews with three of them. She then calls the trial lawyer and tells him that she has engaged appellate attorney Jones to "handle the appeal" in the New Jersey Appellate Division and expects the trial lawyer to "work and fully cooperate with" Jones. She does not offer any further guidance. The trial lawyer does not know Jones, but knows of Jones's firm and knows that the firm has a large product liability trial practice.

Scenario 3: employees of a large national supermarket chain sue the supermarket in the U.S. District Court for the Eastern District of Pennsylvania, alleging that an unnamed third party stole confidential personal information, including their names, addresses, birthdates, tax information, and Social Security numbers, from the supermarket's computer systems. Pennsylvania law will apply.

The complaint alleges that the supermarket has a legal duty to its employees to exercise reasonable care to protect the security of its computer systems and that the supermarket was negligent in failing to do so. The legal issues whether an employer has a duty of care to its employees to prevent data breaches and whether employees have a private right of action in negligence against their employers for data breaches are issues of first impression under Pennsylvania law; resolving those legal issues will be the key to the case.

The employees are represented by union lawyer Smith, who represented them in their collective bargaining negotiations. Discovery is nearly complete, and cross-motions for summary judgment are anticipated. Union lawyer Smith advises the most active group of the employees that they would be wise to engage an appellate lawyer to assist in the preparation of the summary judgment papers, given that the central issue is one of law and the case likely will ultimately be decided by an appellate court. The group of employees agrees. Union lawyer Smith calls one of his law school classmates who, while not an appellate specialist, has handled a handful of appeals in the Third Circuit Court of

Appeals. The employees then engage the law school classmate without ever either speaking with or meeting her.

Which of these scenarios will result in the best working relationship between trial and appellate counsel and so the best representation of the client? This article could stop here because the "facts speak for themselves" to a large extent. With that said, let's

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consider the key ingredients involved, from the perspective of each of the players—the client and its in-house lawyer, the trial lawyer, and the appellate lawyer.

### **To Clients and In-House Counsel: Take Charge**

The primary factor in the relationship between trial and appellate counsel concerns neither of them, but rather the client and its in-house counsel. When, as in scenario 1, the client's in-house counsel takes charge and after ascertaining that the case warrants hiring appellate counsel, proactively engages that counsel, brings appellate counsel into the case early in the process, involves the trial counsel in the selection of appellate counsel, and makes clear his or her expectations about who will do what, the relationship between trial and appellate counsel will be off to a good start. Resentment and defensiveness are diffused. Egos are more naturally checked. Both the trial lawyer and the appellate lawyer will know their roles. The opportunity for a collaborative, positive, and productive partnership is enhanced. The client can then leverage the differing skill sets of both the trial and the appellate lawyer to the maximum extent.

Scenario 2 shows how a different approach by an in-house lawyer can create problems down the road. Although sce-

nario 2's in-house lawyer is understandably concerned about the size of the verdict, by simply announcing to trial counsel that appellate counsel will now "handle the appeal" and that she expects trial counsel to "work and fully cooperate with" appellate counsel, she has set up the potential for a tense and difficult relationship between trial and appellate counsel.

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**When an appellate lawyer joins a legal team, a trial lawyer has a partner with whom to share the case, through good times and bad, taking some of the pressure off the trial lawyer.**

The trial attorney, after all, probably is still reeling from nature of the verdict. He may well react to the in-house lawyer's announcement *qua* pronouncement with defensiveness and resentment. He may be concerned that the appellate lawyer may be unduly, even unfairly, critical of his work. The appellate lawyer's firm's product liability trial practice looms large in the background. Will the appellate lawyer try to muscle in and use the bad result as leverage to try to take over the product liability business generated by the client? Will the appellate lawyer try to make the trial lawyer look bad in the client's eyes?

Further, the in-house lawyer's general direction in scenario 2 that the appellate lawyer "handle the appeal" and that the trial lawyer "work and fully cooperate with" the appellate lawyer is not particularly helpful to either one. Neither knows where his or her role begins or ends. The two lawyers may hold back to avoid stepping on toes, or they may jump too far—and over—each other. Without clear direction from the in-house lawyer about which attorney should do what, they may duplicate each other's work, causing inefficiencies and more tension. The client is

best served by a collaborative relationship between trial and appellate counsel, but the way that scenario 2's in-house counsel has handled the situation will pull them in the opposite direction.

And what about scenario 3? Here, the clients, the supermarket employees, are hardly even involved in the decision whether to engage appellate counsel, and not at all involved in deciding who that counsel will be. The trial lawyer has called all the shots.

In fact, in practice, it is often the trial lawyer who initiates retaining appellate counsel, and that is not a bad thing. In scenario 3, the trial lawyer knows that the outcome of the case at the trial level will hinge on the court's resolution of legal issues, recognizes that the case inevitably will go up on appeal, and appreciates his own strengths and limitations. Having appellate counsel on board early in the process not only makes good sense in this situation, it also takes some of the pressure off trial counsel. Still, even when trial counsel initiates the discussion about engaging appellate counsel, the client should be involved both in both making that decision and in selecting appellate counsel.

#### **To Trial Lawyers: Leave Ego, Resentment, and Defensiveness at the Door**

Although it is primarily the in-house lawyer's responsibility to set the tone for the relationship between trial and appellate counsel, this does not mean that the other players have no role or responsibility. No matter how a client brings appellate counsel into a case and how the client manages the relationship between trial and appellate counsel, both the trial and appellate attorneys have a responsibility to make the relationship—and the representation—as positive as possible. And that is true regardless whether the client or in-house lawyer is proactive, as in scenario 1, reactive, as in scenario 2, or largely invisible, as in scenario 3.

One of the most important challenges for the trial lawyer is to leave ego, resentment, and defensiveness at the door. Having a put-off and defensive trial counsel is not helpful to the cause. An appellate attorney needs the trial attorney; the trial attorney knows the case in a way that

no review of a cold record can match. A trial attorney may also know the law better than the appellate attorney—at least in the beginning. And if a case involves a technical area of the law, the trial attorney may be a subject-matter expert. In turn, trial counsel needs the appellate counsel so that the case is best positioned for success on appeal.

When, as in scenario 1, the client's in-house counsel clearly has set forth expectations of the roles of trial and appellate counsel will fill, it is essential that the trial lawyer understands and respects those roles. Although the trial lawyer understandably may continue to feel ownership of the case, if a case follows a scenario 1-like course, the case no longer will "belong" to the trial lawyer alone.

When in-house counsel has not clearly articulated his or her expectations, it is even more important that the trial and appellate lawyers work together. They need to sort out their respective roles and agree on which work will be performed by each. Of course, with less proactive in-house counsel, the trial and appellate counsel need to make sure that in-house counsel is both aware of and approves of how they intend to allocate work and responsibility. This is particularly important when trial and appellate counsel work together at the trial level, where the roles may be less readily defined.

A final thought for the trial lawyer: consider welcoming the appellate lawyer to the team. When an appellate lawyer joins a legal team, a trial lawyer has a partner with whom to share the case, through good times and bad, taking some of the pressure off the trial lawyer. Further, an appellate lawyer brings a uniquely helpful perspective to the representation—that of the appellate court.

#### **To Appellate Lawyers: Leave Your Ego at the Door and Have a Little Sensitivity, Too**

The appellate lawyer, too, must approach the case with the mindset that the trial and the appellate lawyers each have their own unique and important role to play. The appellate lawyer isn't there to let everyone know that he or she is the smartest person in the room, to point fingers, to blame, or to make the trial lawyer look bad in the

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client's eyes. Rather, the appellate lawyer is there to partner with the trial lawyer, who, at least at the outset, is the one who knows the case best.

Just as with the trial lawyer, it is imperative that the appellate lawyer leave his or her ego at the door. Yet an appellate lawyer has something else to consider. When there has been a bad result in the trial court, and especially if that result was unexpected, the trial lawyer understandably may be upset and concerned about how the result will affect his or her relationship with the client in the future. If waiver or preservation issues are in play, these issues could magnify the trial lawyer's concern a hundred-fold; it may well be joined by a worry about a malpractice claim.

It goes without saying that the appellate lawyer always must conduct him- or herself in a forthright and professional manner. If there is a waiver problem, the appellate lawyer must be candid about it. With that said, there are ways to address such delicate issues that will be more rather than less off-putting. Much of this depends on the particular personalities and relationships involved; the point here is only that by being sensitive to these issues, appellate counsel can better set the stage for a positive partnership with trial counsel and so the best representation of the client.

Another dynamic that may come into play when appellate counsel is brought into a case is the trial lawyer's fear that the appellate lawyer will try to "steal" the client. In scenario 2, the trial lawyer may wonder whether the appellate lawyer will pitch his firm's product liability group to the client on the side. When that dynamic exists, the potential for defensiveness and resentment increases.

To address this issue, the appellate lawyer should not take advantage of his engagement to handle the appeal to "cross-market" other practice groups in his firm. The appellate lawyer who "cross-markets" against a trial lawyer will sour the relationship with the trial lawyer, creating a dynamic that may not serve the client's interests well at all.

## Conclusion

The bottom line is this: no matter when or how appellate counsel is engaged, the cli-

ent's interests are best served when the client's in-house counsel takes charge and sets expectations for the respective roles of trial and appellate counsel from the start. Beyond that, both trial and appellate counsel independently have an obligation to work collaboratively with each other, each contributing his or her unique skill set to the common goal of providing the client with the best representation possible. **FD**