Why Use Appellate Counsel Before Trial?

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Authors:

Jeffrey L. Nagel

Griffin Terry Sumner

Is it ever appropriate to use appellate counsel before trial? Experience teaches that many clients, and probably most lawyers, do not even think about hiring or utilizing a firm's appellate group until after a judgment is obtained; and even then many lawyers who handled the trial choose to handle the appeal.

They "know the record" better than anyone, and they "lived through" the trial court's mistakes, so why aren't they perfectly qualified to raise and argue issues on appeal? Of course, many times they are–but don't underestimate the value of assistance from an appellate specialist even before trial gets underway. This is especially true in a jurisdiction like New York, where interlocutory appeals are permitted and can sometimes result in appellate rulings that greatly affect the outcome of an ultimate verdict.

Many sophisticated clients are embedding appellate lawyers within their trial teams from the outset — transforming them from post-trial damage control specialists into strategic partners who preserve winning arguments, strengthen the trial record, and provide objective advice throughout the litigation. This early collaboration allows appellate lawyers to become an indispensable asset for trial court teams, while signaling serious intent to opponents and courts alike.

For cases with high exposure, precedential value, legal issues of first-impression, or early adverse rulings that require interlocutory appeals, this pre-trial collaboration boosts the likelihood of favorable outcomes and often saves clients millions in adverse judgments.

What Appellate Counsel Can Do Early in the Process

Beyond the expertise for future appeals, appellate lawyers can amplify a trial counsel's effectiveness. Collaboration lets trial lawyers focus on what they do best: presenting facts in the best

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light to persuade juries and judges. Trial lawyers can engage with their adversary knowing that an objective partner is looking several steps down the strategic path, handling the meticulous record-keeping and preserving the important issues. This division of labor helps create better trial advocacy.

While trial counsel concentrates on witness preparation, courtroom arguments, and ultimately jury or judge persuasion, appellate counsel helps to safeguard the ability to challenge any adverse ruling. There are many tasks that appellate counsel can handle at the pre-trial stage.

- **Issue preservation:** The main duty of an embedded appellate lawyer is to safeguard the record for potential appeals. They're the guardians of the record, flagging key objections and procedural nuances. This allows trial counsel to focus on trial themes and presentation of evidence. Appellate lawyers can also help frame the issues to set up favorable appellate positions in motions and briefs throughout the litigation.
- **Legal strategy:** Appellate lawyers can also assist with strategizing several moves ahead for future appellate review. A set of fresh "objective" eyes can suggest additional arguments and strategic considerations.
- **Drafting and arguing motions:** Appellate lawyers excel in distilling complex legal arguments. Motions in limine before trial and directed verdict motions during trial are times when appellate counsel can aid the trial team.
- **Jury instructions and verdict forms:** One of the most technical yet crucial aspects of a trial — which is also ripe for errors — is crafting the jury instructions. Appellate lawyers are experienced with the application of jury instructions to the legal standards and can help preserve arguments in support of favorable instructions.
- **Interlocutory appeals and post-trial motions:** When involved before and during trial, appellate lawyers are in place and ready to handle any key interlocutory appellate issues or any post-trial motions. Their focus is always on setting the stage for a successful appeal. In some cases, the outcome of

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a key interlocutory appellate issue can change the outcome of a case, whether it be an evidentiary or privilege issue or an argument that the trial court dismissed. Post-trial motions also represent the crucial bridge between trial court proceedings and potential appellate review, requiring tactical decisions and long-term strategic thinking that appellate counsel can help provide.

- **Optics:** The involvement of appellate counsel in trial court litigation also sends a message to the court and the opposing party that you are taking the case seriously and are prepared to pursue all available legal remedies. This can lead to a more realistic settlement discussion earlier in the litigation, as parties realize you're prepared for a long appellate battle if necessary. In addition, the visible presence of appellate specialists in the courtroom reinforces the heightened significance of the case and may even influence how the court approaches key decisions and arguments throughout the litigation.

Cost of Waiting

Is it an added expense to engage appellate counsel early? In the short term, it will be. But cases with high exposure, precedential value, or first-impression issues, or likely repeated interlocutory appeal issues, the investment is warranted. Engaging with appellate counsel only after a verdict severely limits your options and ultimately increases costs. Once pre-trial hearings and the trial are over, many critical opportunities are lost forever. Motions never made, objections not preserved, jury instructions agreed to or not requested, and many other important procedural steps that may have been missed up to and through trial cannot be remedied on appeal.

Even the most skilled appellate attorney cannot resurrect arguments that were waived or create a record that was never properly developed. What seems like cost savings by avoiding early appellate involvement often becomes a false economy when a significant verdict cannot be overturned due to unpreserved issues.

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In addition, post-trial appellate counsel must work backwards through transcripts and pleadings to identify issues, often discovering that strong arguments were foreclosed by trial strategy decisions that were made without appellate considerations in mind. Meanwhile, any settlement leverage can evaporate once the trial concludes, as opponents recognize weaknesses in an appellate position.

How Early Is Too Early?

Depending on the case, appellate counsel may or may not be needed right away. When a case likely depends on resolving a legal issue of first-impression, consultation with appellate counsel is useful even before a complaint or answer is filed. These cases almost always involve later appellate review of the legal issue and appellate counsel can help to frame that issue favorably from the outset. Appellate counsel can also help insure all necessary affirmative defenses are preserved in the initial pleadings.

In other cases that are significant but perhaps do not raise issues of first impression, appellate counsel may enter the picture at the dispositive motion stage. In such cases, appellate counsel can assist by using their expert legal research and writing skills where appropriate to help frame pretrial issues in ways that will advance the client's position in any later appeal, as well as help the trial team file the most persuasive briefs.

Once a case gets to the stage of filing pretrial motions, an appellate lawyer is almost always a valuable resource. Because of the likelihood of appealable errors, effective litigation teams involve appellate counsel in evidentiary motions in limine and draft jury instructions. At a minimum, appellate counsel should join the team before trial — in time to get up to speed to help create and protect the record for appeal.

Key Takeaway

Involving appellate counsel early in your case can often add a valuable resource to your trial team and save your client money in the long run. Select an experienced appellate lawyer who knows the

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rules, the courts, and how to identify issues that will persuade appellate judges. The best appellate partners work collaboratively to enhance trial counsel's effectiveness. They help provide strategic oversight without undermining trial advocacy or confusing clients about authority. And they help you win your case.

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