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Completing the Trial Court Team: The Role of Appellate Counsel

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The days of appellate lawyers coming into a case only after an adverse judgment has been entered, or a favorable one appealed, are long gone. Clients and trial lawyers have discovered the value of calling appellate counsel into a case much earlier to assist with dispositive motions, overarching legal strategy, and preserving issues at trial. In this brave new world of hybrid trial and appellate lawyer teams, there are a myriad of "best practices" for maximizing the impact of the appellate lawyer at the trial level, while eliminating duplication of the trial lawyer's role and managing costs. Here are seven key junctures or points of entry for appellate lawyers while a case is in the trial court – it is at these points that savvy clients and trial lawyers most often reach out to appellate lawyers to add value.

The case involves the application or interpretation of a new statute. When a new statute has been enacted, or a party seeks to apply an existing statute in a new or novel way, appellate lawyers are well equipped to fill in the gaps and provide legislative history and policy arguments for why a certain interpretation or application of the statute should prevail. Legal and policy based arguments like these are the bread and butter of appellate law.

Evolving, unstable, or developing areas of law are likely pivotal to the case's outcome. Some areas of the law are rapidly developing, or are subject to conflicting interpretations by intermediate appellate courts and will ultimately need to be resolved by the U.S. Supreme Court or a state supreme court. Right now, some of these areas include class actions, arbitration, and joint employer determinations. If a case involves developing issues like these, and therefore is likely to end up on appeal, it makes sense to involve an appellate lawyer at the trial court level. Appellate lawyers excel at keeping the "big picture" of the law and legal trends in California and across the country in mind, and can explain those trends and where a particular case fits into them to the trial court.

Complex areas of science, technology, or expert evidence are involved. Most trial judges, like appellate judges, are generalists; they do not specialize in one area of the law. And not all judges are scientifically or technologically savvy. Therefore, if a case involves complex expert testimony involving admissibility issues, or complex science or technology (such as intellectual property cases) which must be "translated" for a legal generalist, an appellate lawyer can help do that.

The case is high stakes, or high profile. Some cases are of institutional importance, involve the potential for a significant monetary judgment, are the subject of media scrutiny, or all three. An appeal is inevitable in these cases, and it makes sense to call an appellate lawyer in early. An appellate lawyer can add to case strategy at the outset by viewing the case through the lens of the law, rigorously scrutinize the complaint and evidence for potential dispositive motions and methods of paring down the legal claims at issue, and preserve issues for appeal throughout the life of the case.

Potentially dispositive legal arguments are about to be made, or an interlocutory appeal or writ may need to be filed. Another sweet spot for appellate lawyer involvement is at the stage of dispositive motions (e.g., motions to dismiss or for summary judgment), which rely on purely legal arguments rather than primarily factual arguments. In addition, whenever a key ruling subject to immediate appeal or writ review is made (this includes key discovery rulings concerning disclosure of information subject to the work product or attorney client privilege), it is appropriate to involve an appellate lawyer to evaluate the propriety and likelihood of success of such a writ or interlocutory appeal, and then to prepare the subsequent writ or appeal.

Special jury instructions may be required. In some cases, the pattern jury instructions may not cover all of the claims to be presented to the jury, or the pattern instructions may need to be substantially amended or revised to take into account the particular circumstances of the case. Whenever special or modified instructions like these are called for, an appellate lawyer can help by crafting these instructions with an eye toward any legal challenges on appeal.

Posttrial motions may be necessary. In order to preserve certain challenges for appeal, such as excessive or insufficient amounts of damages, posttrial motions may be necessary. Since posttrial motions are often the first step toward identifying and arguing likely issues for appeal, it is important to have appellate counsel involved in their preparation and strategy.

When any of the seven junctures above occur in a case, consider calling on appellate counsel to help maximize the presentation of the case.

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