

Appellate Counsel at Trial

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Wouldn't it be nice if you could exercise 20/20 hindsight at trial in real time? This is the idea behind involving appellate counsel at trial. Free from the responsibility of trying the case, appellate counsel can anticipate the consequences of every step taken with an eye on appeal. No, it's not 20/20, but it's as close as one can get. But while this is the primary role of appellate counsel at trial, it is not the only role. An appellate lawyer who learns the applicable law, can, while preserving error, contribute in other ways, too. Here's how.

The Verdict Form. I begin here because, especially in complex cases, there is often confusion as to what exactly the jury will be asked to decide. Having an appellate lawyer focus on the verdict form not only helps to preserve error but also can be helpful in shaping trial strategy. It is hard to persuade the jury to adopt a particular answer if you don't first know the question.

Jury Charges. These play an outsized role for the appellant because of the desire to argue legal error under the *de novo* standard of review. Having an appellate lawyer focus on jury charges frees the trial team and often comes at a time when the trial counsel's time is most divided. Also, as is true for the verdict form, preparing the jury charges far in advance can help inform trial strategy.

Motion practice. An appellate lawyer who is focused on the law and retained early enough may see an opening for a dispositive motion that trial counsel will not. An appellate lawyer can focus on legal arguments that may significantly narrow, or even win, a case. And if there is no such motion to file before trial, the appellate lawyer may see the opening for a motion for judgment as a matter of law during trial.

The elements of the causes of action and affirmative defenses. We all know these. But it can be easy for trial counsel to miss one in the heat of battle. I have seen one case where excellent trial counsel tragically failed to introduce the insurance policy. Appellate counsel can chart the elements—sometimes called proof charts—and help make sure these are met during the trial.

Evidentiary issues. Appellate counsel can help to anticipate key evidentiary issues, drafting and opposing motions in limine. Just as important, appellate counsel can prepare scripts for making and responding to key objections. I recall one trial in which we knew the plaintiff would ask for an enormous award of punitive damages. My biggest contribution as appellate counsel was preparing a "cheat sheet" setting forth the available due process protections. For example, punitive damages may not be used to punish lawful conduct, to punish out-of-state conduct, to punish conduct that has no nexus to the harm suffered by plaintiff, to punish harm to nonparties, etc. Keyed into these protections, trial counsel used the cheat sheet to keep out the most inflammatory testimony.

Preserving error. This is a key part of serving as appellate counsel at trial. Doing it right means putting in the work to know how. For example, how are objections to the selection of jurors, jury charges, an inconsistent jury verdict, etc. preserved? Experienced trial counsel know the answers, but they welcome a pair of fresh eyes focused on this critical task so they can focus on winning the case at trial.