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A GC's Auditor? How to Use Appellate Counsel to Add Value

Litigation and Dispute Resolution





CHEAT SHEET

- **Further examination.** Hiring appellate counsel early in a case alerts trial judges that each of the decisions they make will be closely examined and potentially brought to a higher court for review. As such, the presence of appellate counsel tends to cause judges to think carefully about legal and evidentiary rulings.
- **Appellate value.** General counsel can benefit from employing appellate counsel because of their invaluable insights into recent legislative changes and related rulings in appellate courts. Appellate counsel can assist the company by navigating through potential risk areas to avoid future legal liability.
- **Long-term strategy.** To maximize the value of an appellate lawyer, define the scope of the overall litigation strategy engagement to reduce costs and ensure expectations are met. A thorough audit of past litigation successes and failures will help frame future goals.
- **Lines of communication.** When engaging with different sets of outside counsel, establish clear areas of responsibility and lines of communication for all members of the team. Communicating the company's expectations can help reduce the possibility of friction and increase collaboration with those working together to serve the company.

Every legal matter is a story with characters, conflicts, and resolutions. Each case has a beginning, middle, and end. Too often, trial lawyers find themselves focused on the all-consuming day-to-day contest of a trial. Understanding the full story, with a keen eye on the endgame and final resolution, is vital to success, particularly in high-stakes litigation. So, it's surprising that the general counsel or the in-house legal department heads responsible for managing expensive and risk-laden litigation are quick to call trial counsel in the middle of the story (i.e., the moment a pleading is filed or a decision is made to file one as a plaintiff) but won't hire appellate counsel until the bitter end. And that end could truly be bitter if an anticipatory risk management advisor (aka your appellate counsel) is not part of your original team to maximize the likelihood of prevailing in the trial court and on appeal and, more broadly, to help craft a long-term legal strategy that views appellate proceedings as an integral part of the path to success.

The nature of specialized appellate practice

Throughout history, especially within the United States, lawyers were generalists who handled the cases that came to them. If the case went to trial, the lawyer would handle the trial, and if the case then went on appeal, the same lawyer handled that as well. When a company needed a lawyer, the company hired one for the specific task at hand. Companies did not typically employ full-time lawyers.

In the second half of the 20th century, the legal profession experienced dramatic changes with the development of specialized areas of practice. These changes included the designation of the appellate specialist, who regularly handles appeals, and the designation of the trial lawyer, who regularly handles tries cases. Around this same time, private companies began to recognize the wisdom of hiring their own in-house lawyers to provide legal advice within the company on a day-to-day basis, rather than relying solely on outside counsel. These trends have accelerated as we head

further into the 21st century.

Much has been written about each of these legal developments. However, the intersection of these trends has been less discussed and begs the question: How can companies and their in-house legal teams best employ appellate lawyers to craft long-term legal strategies to obtain optimum results, reduce costs, and maximize value?

Appellate specialists are different

Appellate lawyers spend their days deeply immersed in the development of the law as established by the federal and state appellate courts (both intermediate and Supreme). Often, former law clerks for appellate judges, appellate lawyers must be keen observers of emergent trends in the constantly evolving legal landscape. Unlike trial work, where oral advocacy skills are essential in persuading judges and juries, the heart and soul of appellate advocacy is the written appellate brief. While appellate oral arguments often occur, by the time of argument, most appellate judges have already decided the appeal based on the parties' briefs.

In this new era of legal specialization, it has become accepted wisdom that the skills of trial lawyers are different than those of appellate lawyers. Appellate lawyers have a different training — seeing the case through the same lens as the appellate judges — which is essential when briefing and arguing an appeal. This understanding of how appellate courts think and operate helps appellate lawyers identify issues that can be raised on appeal with a significant prospect of success.

The value of appellate lawyers

Sophisticated companies have recently been adding appellate lawyers to their trial teams. They recognize that the same understanding of how a completed case will look to an appellate court can and should be leveraged before and during proceedings in the trial court to preserve key legal issues for later appellate review.

This process can begin even before a lawsuit has been filed, as appellate counsel can identify and evaluate the liability issues that the company confronts before they give rise to particular litigation. This audit, of sorts, can help the GC evaluate risks, as well as analyze the strengths and weaknesses of those issues, as they relate to cases on the horizon. Such an evaluation is founded upon a deep understanding of the current state of the substantive law in the particular area, as well as an informed assessment of where the appellate courts are likely to shift the law in the future. Such an analysis is instrumental to create an overarching litigation strategy and effective tactics for achieving favorable settlements, defending cases in trial, and then winning them on appeal, if necessary.

The GC and legal department can also employ appellate counsel at the early stages of litigation to signal that a company is serious about defending itself and that it is laying the groundwork to appeal, if necessary, in order to win the case. In other words, retaining appellate counsel sends plaintiffs' lawyers a message that the company is no easy mark. Sophisticated counsel on the opposing side will almost certainly take note of appellate counsel engaged in trial monitoring and ongoing consulting in the trial court. But it may be helpful to further raise the visibility of appellate counsel to ensure that all parties are aware of the arrangement (e.g., by including them in pretrial settlement conferences and copying them on correspondence with opposing counsel).

It is not only opposing lawyers who are likely to take note of a company's early engagement of appellate counsel, however. Hiring appellate counsel early in a case tends to place trial judges on notice that each of the myriad decisions they make will be closely scrutinized and potentially brought to a higher court for review and reversal. Experience has shown that trial judges almost always take early note of an appellate lawyer participating as part of the team at the counsel table or from the gallery. Most trial judges dislike being reversed, and thus the presence of appellate counsel in the courtroom tends to cause them to think more carefully about legal and evidentiary rulings that could have a dramatic or even dispositive impact on the case. And obviously, developing a coherent, long-term appellate strategy signals to investors and shareholders that the company's legal team is on the ball, carefully monitors potential exposure, and earnestly navigates the risk landscape.

The value added pretrial by enlisting appellate counsel's strategic expertise only increases once litigation actually commences. Before and during trial, appellate counsel can assist trial counsel with developing critical motions, including motions in *limine* to exclude damaging evidence, preparing proposed jury instructions that raise novel and cutting-edge issues of law, ensuring that all necessary objections are raised during trial in order to preserve them for appeal, and preparing and even arguing post-trial motions. In each of these roles, appellate counsel's involvement maximizes the prospects for success in the trial court but, just as importantly, it helps to ensure that the key legal issues are properly developed and preserved so they can be raised and argued persuasively on appeal.

In addition, appellate counsel can identify when it may be advantageous before trial to seek interlocutory appellate review of important legal questions via a writ petition or similar procedural device. Knowing when to seek early intervention by the appellate courts can be a litigation game-changer and, if successful, can save the company substantial time and money.

An appellate attorney in the trial courtroom also can act as the company's eyes and ears, providing an experienced and objective view of the progress of the trial to date. Reports by appellate counsel can tell a company's general counsel not only how the evidence is coming in, but how the jury is reacting to it and whether the trial court's rulings are materially impacting the company's prospects of success. But just as importantly, appellate counsel performing such a reporting function can give the company a constantly updated assessment of the company's likely prospects of success on appeal. Armed with such informed and objective reports, a company's GC is well-situated to know whether to fight or settle.

In short, the proper and essential role of an appellate attorney is not only to handle an appeal after a verdict has been rendered and judgment has been entered, but also to help ensure optimum results at all stages. When engaged in the trial court, appellate counsel can provide a critical support function that enhances the chances of success both at trial and on appeal. The assistance they provide in the trial court will help ensure a victory because improper evidence will be excluded, the jury will be properly and advantageously instructed on the law, and winning legal issues will be presented to the trial judge and thereby preserved for later appellate review.

It makes sense for the trial lawyer to have primary responsibility throughout the trial and, with that responsibility, to have the final say as to litigation and trial tactics. At that stage, the appellate lawyer should serve both a supporting and consulting function. But it may be advisable that responsibilities and final decision-making authority shift following a verdict, and that the appellate lawyer be in the driver's seat when preparing post-trial motions, given the critical importance of such motions to the preservation of issues for appeal. Likewise, the trial lawyer should play a valuable but subordinate consulting role when the appellate lawyer prepares the appellate briefs.

The cost

No discussion of the value added by appellate counsel would be complete without a discussion of the cost of hiring an additional firm. A proactive GC necessarily makes a bet when hiring appellate counsel to consult at trial that, on balance, they will save the company money. That may happen in the particular case because appellate counsel preserves an issue that results in reversal on appeal, or because they prepare a post-trial motion resulting in the reduction of a multimillion-dollar damages award.

But, taking the long view, many savvy GCs know that establishing a regular practice of retaining appellate counsel early in a case is almost certain to result in a net gain to the company over the long term. Also, because only one appellate lawyer needs to be present in court, the cost of engaging appellate counsel in the trial court is relatively modest, though it will vary somewhat depending on the length of the trial, the scope of the engagement, and whether the firm engaged is a large, national firm or a regional appellate boutique. To provide certainty and predictability for budgetary purposes, appellate counsel's relatively modest fees can be capped with the use of flat fees and other alternative billing arrangements.

Appellate lawyers as regular counselors

Today's GCs have many operational concerns, including managing a team responsible for multiple open and closed cases, scrutinizing ongoing labor and employment issues, navigating the specific regulatory environment relevant to the company's business, negotiating and monitoring contracts and purchase agreements, and, of course, worrying about legal spending against a budget developed last year that, due to unforeseen events, may prove to be more aspirational than realistic.

The chief financial officer (CFO) of a public company or large private corporation relies heavily on an outside, independent audit and accounting firm to develop internal controls, contain unexpected costs, mitigate risk, and bolster business strategy. An auditor who understands critical success factors, the threat of external circumstances, unforeseen events, and ongoing business risks can help identify potentially problematic issues early and can assist in accurately measuring performance against commitments. CFOs look to auditors to be a sounding board for business issues. A good auditor is able to offer broad insights into a particular industry and also provides clients with perspective on the future direction of the industry.

COST AND SELECTION CRITERIA OF APPELLATE COUNSEL FOR TRIAL CONSULTING

- Size, location, reputation of firm;
- Billing rates per level/alternative fee options;
- Partner involvement;
- Depth of expertise; and,
- Historical success rate.

Those wearing the GC hat require and deserve exactly the same kind of support. An experienced appellate attorney is attuned to impending legislative changes and related recent rulings of the appellate courts. They can provide invaluable perspectives. A seasoned appellate attorney can also help a company to shape the law by crafting briefs and honing arguments to maximize the likelihood that future appellate precedent will be favorable to the company's interests. Appellate counsel can further assist the company by identifying pending cases and causes — on important legal and public policy questions affecting the business — that the company should support as an *amicus curiae* (friend of the court), either directly or through an industry trade group. Today, leading companies' legal departments use appellate counsel in a similar fashion as the company's government affairs professionals to influence the law in a manner advantageous to the company's long-term interests and overall business strategy.

An appellate lawyer can also assist a company in making necessary business operations changes to avoid future legal liability. Though transactional lawyers or trial lawyers can have ideas about curbing legal costs, informed appellate counsel attuned to recent developments in the ever-evolving case law relating to such issues as wage and hour regulations, arbitration, and punitive damages may be more able to develop favorable long-term strategies. An appellate attorney can also help a busy legal operations group to establish quality controls and a "no surprises" year-end budget scorecard. For these reasons, the appellate counsel's role should expand beyond the individual case and instead encompass the development of an overall litigation strategy benefiting the entire company in all of its legal dealings.

While it may be less obvious how appellate lawyers can bring value to companies on a day-to-day basis as critical advisors helping to navigate a wide range of legal issues, forward-thinking companies should leverage the collective wisdom of their appellate counsel to provide such ongoing advice. Indeed, companies should consider hiring lawyers with appellate backgrounds to serve as in-house counsel and even as GC. An attorney in charge of legal operations with a background in appellate law brings a big picture approach to identifying the critical legal trends shaping the law governing the company's operations. A GC who understands the endgame and has been trained to write appellate briefs may well have a more sophisticated, more nuanced, and more detached take on trial methodology than the traditional litigator. An in-house lawyer with appellate experience can also provide valuable analytical tools to assist in deciding which cases should be settled, either because they pose a risk of creating bad institutional precedent or because they cannot be won given the the relevant appellate court and the current state of appellate decision-making in the jurisdiction.

In-house counsel familiar with the appellate process will see the long game, particularly at the trial court level. Understanding how cases are decided on appeal means they tend to be strategic. They resist being drawn into the emotions swirling around every litigation skirmish. This will tend to please CFOs by helping to ensure that litigation decisions are based on strictly business considerations of dollars and cents and probabilities of success. CFOs understand that, at the end of the day, litigation decisions are business decisions (i.e., math problems). To serve the company, they should never become personal. Knowing a trial verdict is not the end of the story but just the beginning of appellate proceedings enables an attorney to see events from an overall business standpoint. Developing a wise and calm culture where litigation decisions are seen strictly as business decisions will most likely appeal to worried CFOs.

Ultimately, all legal operations leaders have the same needs: better decisions, more wins, fewer damages, and all at lower, more predictable costs. Establishing an ongoing relationship with appellate counsel is a big step toward meeting all of these needs.

GENERAL COUNSEL'S APPELLATE SUPPORT SHOPPING LIST:

- Co-develop, with me and my team, a sophisticated, comprehensive, and forward-looking litigation and appellate strategy that will maximize the prospects of success at the trial and appellate level, while also shaping the law over the long term in ways favorable to my company.
- Assist me in mitigating risk and containing costs while the company increases revenues and stays mindful of shareholders' concerns.
- Understand my industry and operations, and the particular legal challenges facing my industry.
- Remain up-to-date on the latest appellate rulings in jurisdictions that impact my company as well as pending and newly enacted legislation.
- Deliver fresh perspectives on how I can improve legal operations and build first-rate quality controls and best practices.

THE CFO'S AUDITOR SHOPPING LIST:

- Co-develop, with me and my team, a sophisticated, forward-looking audit roadmap.
- Assist me in mitigating risk and containing costs while the company increases revenues and stays mindful of shareholders' value.
- Understand my industry and operations, and can quickly provide specific technical guidance on complex issues before they become major problems.
- Remain up-to-date on the latest regulations and pending legislation.
- Bring fresh perspectives on how I can improve operations and build first-rate quality controls and best practices.

Best practices for collaborating with appellate counsel

To maximize the value of an appellate lawyer, both the GC and appellate counsel need to define the scope of the overall litigation strategy engagement and how it will reduce costs in the long run. Some components that might be included in such an engagement include the following:

- Co-develop expectations at the start of the advisory engagement to ensure transparency and timely communication.
- Define goals and review past performance and statistics regarding the company's history of litigation successes and failures.
- Calendar meaningful milestones regarding any pending litigation.
- Infuse continuous improvement into the litigation process through regular training and CLE support for the in-house team.
- In particular cases, analyze risk exposure and render opinions on likelihood of success early on in case strategy.

A thorough audit of past litigation successes and failures will help create a forward-looking roadmap.

For example, a consumer products company may have a track record of successful appeals in the area of labor and employment, but a higher than expected loss rate in the area of product liability. Gathering data and analyzing where risk is high is essential to success. This data not only helps identify risks in the handling of present cases but also can be used proactively to modify internal company policies so as to avoid such litigation in the future.

Appellate counsel also are well-suited to know which cases and issues to pursue in which jurisdictions. Like trial judges, appellate jurists have their known characteristics, proclivities, and biases. Because appellate lawyers practice before the appellate courts all the time, the leanings of particular appellate judges and courts as to particular issues are well-known to them. Even if they cannot say with certainty how a particular judge will rule on a specific issue, they know the judge's judicial philosophy, temperament, and track record. As a result, they can provide a company with invaluable guidance regarding whether it is in the right court to pursue a favorable change in the law.

Consulting with appellate counsel also reaches beyond handling litigation issues, as it can be useful to obtain forward-looking advice on transactional matters, perhaps thwarting a breach of contract case in the future by ensuring that the negotiated contract does not run into potential litigation landmines given the relevant jurisdiction's ever-changing rules governing particular contracts. In short, when negotiating a contract, it is useful to have on speed-dial an appellate lawyer who is familiar with the current state of the law relating to such matters as arbitration clauses, liquidated damages clauses, and attorneys' fee provisions.

As with any advisory engagement, all parties involved must work together collaboratively for optimum results. Central to achieving this goal is the establishment of clear areas of responsibility and lines of communication for all members of the team. Appellate counsel should work closely with the company's outside litigation counsel to understand the day-to-day litigation threats the company faces, including the arguments typically advanced by opposing counsel and the strategies and tactics they employ. Appellate counsel also must work closely with GCs to identify the company's chief litigation concerns and thereby focus appellate counsel's strategic analysis and recommendations. It is critical that GCs communicate in advance to all counsel involved the company's need for effective collaboration among its outside counsel, and to set expectations and deadlines for resulting work product. Communicating the company's expectations early on can help reduce the possibility of friction among different sets of outside counsel tasked with working together to serve the company. Friction should also be kept to a minimum by the understanding that full-time appellate lawyers do not seek to supplant the company's litigation counsel.

Putting your strategy in place

Legal operations professionals have become significant change agents for fast-growing companies. Understanding how developing a long-term relationship with appellate counsel offers far-reaching benefits will assist these professionals in fashioning overall legal strategies that achieve optimum results. The entire C-suite has a stake in promoting consistent legal strategy, co-designed with appellate counsel, in all areas of legal operations. Every legal matter has a story, with a beginning, middle, and end — the appeal. Keeping all three phases top-of-mind throughout the process is the best route to a happy ending.

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