

# The Strategic Advantage of Having Appellate Support at Trial



By Matthew J. Conigliaro

I have had the good fortune of watching many skilled trial attorneys practice their craft before juries. Trial advocacy is part art, part skill – and sizeable portions of each. Precise attention must be paid to details without losing sight of overall themes and the big picture. Whether the case lasts just a couple of days or proceeds for weeks or even months, the jurors will ultimately be asked to select a winner, and the trial attorney is constantly focused on persuading the jury to choose his or her side.

In many jury trials, however, the persuasive presentation of facts and argument is only part of the event. To be sure, that is the largest part, and the reason why the proceeding is held in the first place, but a second significant dimension exists as well. That second dimension concerns the legal issues that frame the case. It governs what is needed to prove the elements of the matters being tried and what should be admitted as evidence. It concerns the instructions the jurors should be given and the questions they should be asked to answer. Oversimplified, the second dimension of a trial concerns the law, rather than the facts, and it is in this area that having an appellate specialist in the courtroom can impact the outcome of the trial and, ultimately, the case.

The appellate attorney sees a different trial than the trial attorney sees. Where a trial attorney hears troubling testimony about a misleading fact that should be countered, the appellate attorney hears a basis for an important jury instruction that will clarify the issues in the case, arming the trial attorney later to put that testimony in perspective before the jury. Where a trial attorney prudently moves on after the court erroneously overrules an objection, the appellate attorney considers how best to demonstrate the error later in the record and best preserve the issue for appeal. Where a trial attorney hears an opponent's witness give speculative testimony that can be crushed on cross-examination, the appellate attorney

hears evidence that will be deemed competent and substantial enough for the opponent's claims to survive directed verdict motions. Ideally, trial and appellate counsel will have talked about preserving possible objections to such testimony before it is presented.

At trial, appellate counsel can be passive or active, depending on the needs of the case and the working relationship between the attorneys. Some trial counsel prefer just to be advised on narrow issues, such as how best to preserve certain arguments for appeal. More likely, trial counsel may ask the appellate attorney to

**I am convinced the client receives better results in a trial when someone is there solely to provide the legal issues expertise that appellate counsel offers.**

research and argue issues that arise during the trial, or to craft and argue directed verdict motions, jury instructions, or the form of the jury verdict.

Those last areas are of particular importance. Jury instruction and verdict form issues typically arise near the end of a trial, when trial counsel's attention is focused on what has just happened and how best to wrap up the case. Perhaps drafts of instructions and a verdict were prepared prior to trial but before the evidence unfolded. With other matters needing immediate attention in the trial, one inclination might be to use the simplest verdict form and only standard instructions. Understandably, trial attorneys may rather use the time remaining before closing arguments to prepare for them, rather

than to argue case law and legal issues at a lengthy charge conference.

Yet the jury instructions embody the law in a case. The more clear and thorough they are, the better informed the jury will be about the issues to be decided, and the less likely the jury will be to resolve the case based on instinct and emotion. The verdict form is similar: the more specific it is, the more focused the jury will be on resolving the issues presented. The appellate attorney can focus on these legal areas, all the while making decisions about what issues might be appealed and what areas can go by the board, while trial counsel focuses on preparing a winning closing argument. Combining these efforts, a team of trial and appellate counsel can be a formidable one.

Based on my experiences in providing appellate trial support in numerous cases, I am convinced the client receives better results in a trial when someone is there solely to provide the legal issues expertise that appellate counsel offers. Better results in the trial court also lead to better results on appeal. After all, the appellee usually wins, and even if the client is to be the appellant, having had appellate counsel at trial helps ensure the record is preserved in a way that maximizes the chances of obtaining appellate relief.

The next time you find yourself preparing for trial, consider utilizing appellate counsel at the trial stage. You will not regret it.

---

*Matthew J. Conigliaro is a shareholder with Carlton Fields, P.A., in St. Petersburg. He is board certified by The Florida Bar as a specialist in appellate practice and is Chair of the St. Petersburg Bar Association's Appellate Practice Section.*