

Incorporating the Appellate Practitioner into Your Litigation Team Early in the Litigation Process

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One of the key methods for building a successful litigation team is to incorporate a lawyer who devotes a significant part of his or her practice to appeals and litigation support. An appellate practitioner can offer a unique perspective on the litigation process by not only focusing upon winning the case, but by also focusing upon what happens after a win or loss. Therefore, when crafting a litigation strategy, litigants advancing or defending a claim can benefit from working with an appellate practitioner and including the appellate practitioner as a key member of a litigation team from the inception of litigation. This enables the appellate lawyer to provide critical support during the litigation process, at trial, and in connection with post-trial proceedings -- whether to challenge an adverse result or to sustain a victory. [The Traditional View of the Appellate Practitioner](#)

Many litigants and even lawyers hold a traditional view that an appellate lawyer only assumes a role in a case after a verdict is reached or an adverse order entered. Of course, handling an appeal from a final or non-final order, or advancing an original writ proceeding, is a key role fulfilled by appellate counsel. But if one chooses to wait until trial proceedings conclude or an adverse order is entered before seeking an appellate lawyer, timeliness is a crucial factor. Post-trial motions must be served very quickly after a jury returns a verdict, typically within ten days and without the right to obtain extensions of time. The failure to serve and file such motions can eliminate the ability to raise certain arguments. Similarly, the deadline for filing a notice of appeal is jurisdictional and, once a final judgment is rendered, the time to file a notice of appeal starts to run. Therefore, if one chooses to wait until after a verdict is returned or trial proceedings conclude to contact an appellate lawyer, time is of the essence. That said, many litigants are now moving beyond the traditional view and utilizing appellate lawyers early in the litigation process to take full advantage of the many services the appellate lawyer can provide. [Moving Beyond the Traditional View](#) Rather than waiting until the end of the case to consult or retain appellate counsel, litigants should consider involving an appellate lawyer at the inception of a case or early in the litigation process to provide litigation support. The

litigation process is dynamic and fluid – constantly changing and malleable. Thus, when an appellate lawyer participates in pre-trial and trial proceedings, he or she has an opportunity to work with trial counsel to create a record that may ultimately pave the road for appellate arguments. On the other hand, if appellate counsel appears solely at the conclusion of a case, he or she is bound by the closed record and limited to those arguments raised below. If trial counsel has failed to preserve certain issues for appeal, the appellate counsel may be barred from presenting the argument altogether. Indeed, there are multiple benefits derived from an appellate counsel's participation early in litigation, and these benefits can be broadly categorized as preservation, preparation and posturing, and economic realization.

Preservation One of the most important principles of appellate practice is preservation of error. For the losing party, unless fundamental error exists, the failure to preserve an argument before the lower tribunal will typically eliminate the ability to even raise the issue on appeal. Thus, a key element of an appellate argument begins well before an appeal because preservation of error spans across the entire litigation process. Allegations of a complaint and, for a defendant, affirmative defenses, lay the necessary foundation for the presentation of proof and define the universe of litigation. The failure to advance certain causes of action or defenses at the inception of litigation may result in a waiver and, concomitantly, the failure to preserve a theory of a case or defense. An appellate practitioner who is accustomed to analyzing case theories and defenses from the perspective of an ultimate appeal can work in tandem with a trial lawyer to ensure that those issues are preserved as litigation begins and progresses toward trial. The significance of the appellate lawyer's role increases as a case reaches its later stages. While trial counsel focuses upon deposing witnesses and addressing discovery issues, an appellate practitioner can provide necessary background research, analysis, and drafting of potentially dispositive motions and trial memoranda including, but not limited to, motions to dismiss or for summary judgment. At trial, an appellate lawyer continues to serve a vital role by handling motions in *limine*, advising trial counsel as to jury selection, crafting jury instructions, arguing at the charge conference, and standing ready to address unforeseen issues relating to evidence or any grounds for mistrial that may arise. Once trial concludes, the appellate lawyer can prepare post-trial motions or respond to post-trial motions filed by the opposing side, again ensuring that arguments are correctly postured for appellate review.

Preparation and Posturing Involving an appellate lawyer early in litigation can also play a vital role in the preparation and posturing of a litigation strategy. Specifically, the appellate lawyer can work with trial counsel to craft legal theories that fit within existing law or provide insight with deposition outlines to fit within an order of proof. Also, as a case nears trial, the trial lawyer can focus upon finalizing depositions, meeting with experts, preparing witness examinations, and outlining opening statements while the appellate lawyer handles drafting and responding to motions in *limine*, jury instructions and the verdict form, and researching evidentiary questions. If unforeseen issues arise during trial, the appellate lawyer can perform research and prepare memoranda while trial counsel continues to handle trial proceedings. In other words, the appellate lawyer's role is complementary to the trial counsel's and, by working as a unified team, a trial and appellate counsel can better prepare for and present at trial.

Economic Realization One of the likely deterrents to involving appellate counsel early in litigation is the added cost of an additional lawyer and the perception that this is not

a valuable use of resources. If a case is worth going to trial, however, it is likely worth using an appellate counsel, even if this creates some additional expense. In fact, involving appellate counsel early in litigation can save money in the long run because, as noted above, the appellate practitioner can assume certain responsibilities and supplement, rather than duplicate, the trial lawyer's function. Additionally, if an appellate lawyer participates during pre-trial or trial proceedings, that investment of time during trial will decrease the amount of time required post-trial to become familiar with the issues. Of course, ensuring that issues are properly preserved and allowing trial lawyers to focus on presenting the best possible case before a judge or jury can maximize efficiency and, more importantly, position a case for success in the short and long run. In other words, the investment will yield both an immediate and long-term realization. [The Carlton Fields Approach](#) Carlton Fields takes pride in its appellate team and its ability to provide appellate services across the entire range of litigation – from preliminary analysis and consultation, through pre-trial proceedings, trial and post-trial and of course preparing and presenting appellate briefs. The Appellate Practice and Litigation Support group at Carlton Fields is dedicated to working with trial counsel internally and externally at every level of State, Federal, and Administrative practice.

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