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Mass (Trial) Appeal: How Incorporating an Appellate Attorney Can Benefit a Trial Team

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The importance of watching for and properly preserving issues for appeal cannot be understated. This is especially true in high stakes cases involving significant exposure or those having significant precedential value where an appeal is likely. But attending to the details of building a complete and comprehensive record while juggling the multitude of other demands of a complex trial can be difficult for even the most skilled trial counsel. The solution? Add an appellate lawyer to your trial team.

Appellate lawyers are most often thought of as exceptional brief writers and skilled oral advocates brought into cases post-trial to preserve a challenged win or to overturn a loss on appeal. No matter their level of expertise, appellate success is reliant upon a supportive trial court record. For that reason, integrating an appellate specialist into your trial team long before entry of judgment can help ensure that the trial record is properly preserved and the case is in the best possible position should it be appealed.

Having appellate counsel identify, shape, and preserve critical legal and evidentiary issues in the courtroom as a case unfolds not only helps to ensure preservation of potential error, but it frees trial counsel to focus on what they do best – creating a seamless, persuasive story for the jury so that the client prevails.

This was evident to me when I recently served as appellate counsel during a complex, multi-week products liability trial. While the trial team worked tirelessly to coordinate and prepare witnesses, finalize exhibits and demonstratives, and to polish openings and closings, I focused solely on the pivotal legal and evidentiary issues. In that capacity, I undertook responsibility for many of the more "technical" aspects of trial such as:

- Reviewing witness outlines and demonstratives to identify additional questions needed to ensure all critical claim and defense elements were covered and to help avoid drawing objections by opposing counsel;
- Confirming all critical, proffered evidence was admitted and that a record copy was being maintained by the court;
- Tracking each element of proof for every claim and defense and recommending additional questioning of witnesses or proffers of evidence;
- Counseling trial counsel on presentation of evidence so that the record would permit the appellate court to consider demonstratives or videos used at trial;
- Advising of necessary objections, including when a continuing objection would suffice and when to press for a ruling on the record;
- Researching controlling law on the fly to assist counsel in responding to objections;
- Drafting written motions for directed verdict and prepping trial counsel for argument;
- Preparing and revising jury instructions and verdict forms to conform to the evidence;
- Formulating objections to the plaintiff's proffered jury instructions and verdict forms; and
- Assisting with the jury charge conference to ensure that the necessary objections and proffers were made to avoid procedural waivers.

An ounce of prevention is worth a pound of cure. Bringing in an appellate lawyer to be actively involved in trials is a good way to ensure you are set up for success at trial as well as any future appeals.