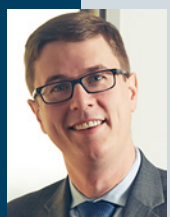
Teaming Up

Appellate and Trial Counsel Partnering to Win

By Stephanie A. Douglas, Derek J. Linkous, and Michael R. Williams

Appellate counsel are no longer cloistered away in their offices writing briefs and arguing to appellate courts. Allowed to roam the hallways of trial courts and to team with trial counsel, an appellate counsel can provide value in the most vexing cases long before appeal.





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For a long time, trial counsel and appellate counsel were thought to live in largely separate worlds. Trial counsel waged the fight on the ground, wrestling with nitty-gritty facts and on-the-fly issues.

Appellate counsel arrived only after the record was closed to sort out any legal issues that the fight below might have created. Trial counsel might have ventured up to the appellate courts to defend a win or attack a loss in their own case. But an appellate lawyer in the trial court was a rarer sight.

More and more, sophisticated clients are realizing the benefits of dispensing with this forum-focused separation of responsibility. The distinct skill set that appellate counsel can bring has led them to appear more often in trial courts—and to get deeper into the fight.

Perhaps most often, appellate counsel are expected to serve as specialists on preserving potential error for later review. In this role, appellate counsel have an obvious role to play in drafting jury instructions, shaping verdict forms, filing motions for directed verdicts, and lodging critical objections. But appellate lawyers are more than error-catchers. Backstopping against appellate reversal is important, but appellate counsel can also provide substantial assistance well before trial. Motions in limine, summary-judgment motions, and more can all often benefit from the perspective and assistance of appellate counsel. Indeed, sometimes appellate counsel can help clients—especially those who are repeat players in litigation—in addressing recurring problems as early as discovery and even the pleading stage.

With the right attitude from all involved—clients, appellate counsel, and trial counsel alike—the wins should follow.

Keeping Appellate Issues Alive

Issue preservation is the bread-and-butter job of appellate counsel. Though every trial lawyer surely knows how to stand up and object to improper evidence, not every issue is so simply preserved. And whether through well-crafted jury instructions, a mid-trial motion, or a gentle nudge of trial counsel's elbow, many opportunities exist for appellate counsel to ensure that issues are properly preserved. We can't catalog them all here, but we offer a few examples of preservation intricacies that can trip up even an experienced trial counsel—and benefit from some help from appellate counsel.

Where a trial judge is disinclined to permit the preservation steps an appellate court requires, appellate counsel can have a useful role to play as, to put it bluntly, the fall guy.

Reasserting Issues

Often the first thing an appellate counsel does upon being attached to a case is to review the filings that predate his or her involvement. Parties may believe that fully briefing an issue and getting a court's ruling on a motion is sufficient to preserve that issue for later appeal. Unfortunately, that is not always the case—even when it comes to putatively dispositive motions, and even when those motions are based on purely legal issues.

Consider personal jurisdiction. Everyone likely knows that Federal Rule of Civil Procedure 12(h)(1) discusses what is necessary to preserve a personal-jurisdiction defense. So, most counsel seeking to preserve a personal-jurisdiction defense will file an early motion to dismiss and oppose active participation pending a ruling. But everyone may not know that the courts of appeal differ on whether an early motion is sufficient to preserve a personal-jurisdiction defense for appeal, or whether a party must re-raise its defense at trial. *Compare, e.g.*, *Dakota Indus., Inc. v. Ever Best Ltd.*, 28 F.3d 910, 914-15 (8th Cir. 1994) (re-raising not required), *with, e.g.*, *Beagles & Elliott Enters., LLC v. Fla. Aircraft Exch., Inc.*, 70 F. App'x 185, 187 (5th Cir. 2003) (need to re-raise to preserve). In other words, in the wrong court at the wrong time, doing what the Civil Rules expressly say to do to avoid waiver may not be enough to preserve an issue for appeal. Appellate counsel can advise trial counsel on whether they need to do more.

In a similar vein, courts are split as to whether and in what circumstances review of a motion for summary judgment after a merits trial is permissible. Some federal courts of appeal permit appeal of summary-judgment decisions after trial if the question is a purely legal one, while others forbid review of any summary judgment motion after trial. *Hanover Am. Ins. Co. v. Tattooed Millionaire Entm't, LLC*, 974 F.3d 767, 786 n.10 (6th Cir. 2020) (noting split; collecting cases). Here, too, parties must be vigilant in assuring that, where necessary, counsel continues to press legal arguments that have been firmly rejected in a pretrial order. The complications further compound when adding the varied procedural regimes of the state courts. In our home state of Michigan, for example, a party can raise both a posttrial challenge to a summary-judgment ruling on the law, and also raise a posttrial challenge to factual sufficiency based on the record that existed at the time of summary judgment (or in the parlance of the Michigan Court Rules: summary disposition). *Doster v. Covenant Med. Ctr.*, Nos. 349560, 350941, 2020 WL 5581713, at *6 (Mich. Ct. App. Sept. 17, 2020). Appellate counsel can help trial counsel take full advantage of this extra shot.

Similar preservation nuances exist with motions in limine. Many jurisdictions treat decisions on these motions as mere advisory opinions. To preserve an objection, the objected-to evidence must still be offered, or the objection must still be renewed, sometimes repeatedly. Without awareness of that rule, a winning pretrial motion might become nothing but a sad footnote on appeal.

Having an appellate counsel who is familiar with preservation intricacies can be immensely valuable, especially because having to re-raise issues can frustrate a trial judge. Judges sometimes don't appreciate "violations" of their pretrial orders, even when they are compelled by preservation requirements. At the same time, failing to preserve error can create real problems. For example, the Sixth Circuit recently joined its sister circuits in holding, even among "mixed signals" from the trial judge, that a party's failure to make a mid-trial motion for judgment under Federal Rule of Civil Procedure 50(a) forfeited that party's ability to move posttrial for judgment as a matter of law under Rule 50(b), thereby reinstating the jury's verdict. *Hanover*, 974 F.3d at 789–90. Where a trial judge is disinclined to permit the preservation steps an appellate court requires, appellate counsel can have a useful role to play as, to put it bluntly, the fall guy.

Litigating and Preserving Jury Instructions

Jury instructions are often the foundation of a successful appeal. But different courts treat these instructions differently, and appellate counsel can help trial counsel figure out exactly what approach to take. For instance, some courts will hold a charging conference to discuss instructions. This conference might be on the record and making an objection at the conference might preserve a complaint about a particular jury instruction. Yet many charging conferences are not on the record, so objections certainly aren't preserved. In other places, an objection at the charging conference (even if the conference is on the record) won't be enough—counsel will need to object immediately before or immediately after, or sometimes both!

And did you remember to provide an alternative instruction? In some jurisdictions, the failure to provide one might be fatal to your instructional objection. Still other places—particularly those that lean heavily on standard instructions—won't provide any obvious opportunity to make

objections to instructions or to propose special ones. In that case, appellate counsel might assist in preparing a motion to have the instructions issue resolved before or during trial. In all these cases, appellate counsel can help draft the instructions that will generate arguments on appeal. Because remember: a mis-instructed jury might increase your burden of proof.

Appeals of Multiple-Issue General Verdicts

Verdict forms are another place where trial and appellate counsel work hand-in-hand. Good trial lawyers know that a well-crafted form can guide the jury to the "right" decision, while good appellate lawyers know that a poorly written form can doom a case. One verdict-form issue that seems to appear over and over again is appellate courts' review of multiple issues underlying a general jury verdict (or in some cases, a single question on a special-verdict form). The basic divide is: where two issues underlie a verdict response and reversible error is present as to only one of the two issues, must the appellate court reverse the entire verdict, or can it sustain the verdict on the issue unaffected by error?

Appellate counsel should be ready to tell trial counsel how that question might play out in a particular jurisdiction in a particular case. Of course, ensuring that questions only touch a single issue is one surefire way to avoid any issue with this, but that is often easier said than done. And in multi-claim cases, good strategy mandates that counsel try to streamline the verdict form for the jury. Knowing which set of appellate-reversal principles control can help the trial team make the best strategic decisions on a general versus a special-verdict form, and best structure any special interrogatories.

Avoid Jury Inconsistencies and Compromises

Sometimes a jury's verdict makes no logical sense or reflects an impermissible compromise. If a jury finds, for example, that a product's design is not defective, that jury should not be permitted to find the product's manufacturer liable for alleged negligence in testing it. Preventing inconsistencies in a verdict starts with a well-crafted verdict form, but it doesn't stop there. Juries often disregard the instructions on the forms. Sometimes juries even write in their own instructions on how to interpret their responses in the verdict form's margins.

Responding to verdict issues is a trap for the unwary. *See* Stephanie A. Douglas et al., "Verdict Vigilance: Preventing, Spotting, And Preserving Verdict-Related Issues," *Certworthy* (June 29, 2018). In many jurisdictions, an inconsistency must be raised before a jury is dismissed to allow the jury the chance to correct the verdict. But depending on the verdict, raising the inconsistency may not be in the client's best interests. An inconsistent verdict should not be confused with a compromise verdict. Most places, a jury compromise mandates a new trial on all issues. But conflating an inconsistency argument with a compromise argument can wind up forfeiting both. Framing these issues the wrong way can also result in highly prejudicial partial retrial. Some courts, for example, have upheld jury verdicts of liability with no damages award as perfectly consistent, while others have held them inconsistent or a jury compromise. But the worst outcome may be the courts that uphold a liability verdict but find the damages award unsupported by evidence and order a new trial on damages (or even punitive damages) only. The jury is instructed that the defendant is liable, and the defendant has no opportunity to present the mitigating evidence that caused the first jury's low-damages verdict in the first place. An experienced appellate counsel can help a trial team anticipate and respond to these possibilities.

Getting in Early

Appellate counsel can do more than preserve issues, though, especially when they are added to the case early. Most often, clients bring in appellate counsel when a case is certainly headed for trial—and likely to present thorny legal issues that could warrant appellate relief. But timing is everything. Appellate counsel are often skilled analysts and brief writers, and they frequently have a way of looking at the record from a "higher altitude" than others on the trial team. Those skills can prove useful even before it becomes clear that a case is a trial candidate.

At the outset, appellate counsel can help shape theories or identify favorable jurisdictions in which to file (or transfer) an action. Discovery can present opportunities for appellate counsel's involvement, too. Especially if an opponent is "sanctions happy" in a jurisdiction where such motions aren't dismissed out-of-hand, appellate counsel's involvement can help avoid nasty discovery fights from damaging one's case. At the same time, appellate counsel might be able to advise on offensive discovery. With an eye towards what will need to be proved up in the appellate record, appellate counsel can help steer the evidence-gathering that you might need down the line for legal sufficiency (and not just good storytelling).

There are other useful, early spots for appellate counsel. Mediation briefs are a bit like appellate briefs—they try to capture all the considerations of a single case in a tidy (often, page-limited) package. Appellate counsel can work with trial counsel to get a great brief together. Dispositive motions frequently tee up exactly the sort of pure legal issues that appellate counsel are so well equipped to address. Getting appellate counsel in at the summary-judgment stage, or even the motion-to-dismiss stage, can help in shaping the narrative and building an early record. They might also be able to use their *amici* contacts to get *amici* involved at the trial court—something that, while not frequently seen, can nevertheless be powerfully persuasive. Strong briefing on these early issues can signal to the other side that the wins won't come easy, and the client is in it for the long haul. That not only strengthens your case at trial and on appeal, it also drives up the likelihood of settlement.

Getting appellate counsel in early can also help clients play the long game. Appellate counsel often may be more familiar with the broader trends and legal developments in a given field. If they get involved in a case or two and see these trends playing out in real time, they may be positioned to help the client head these issues off at the pass. Or appellate counsel might see an opportunity for good facts to help make good law. In this cross-case role, an appellate counsel can help triage cases for a client to identify a test case that might produce stronger precedent to solve a recurrent

problem. But this type of trend spotting is admittedly harder to do when appellate counsel is brought in just before trial, when the pace and pressure force trial counsel and appellate counsel alike to focus principally on merely the facts in front of them.

A final practical consideration recommends early involvement from appellate counsel: the earlier appellate counsel is involved, the better that lawyer will know the case when the appeal rolls around. Some appellate records are enormous; bankers boxes stacked to the rafters (or the electronic equivalent) are not unheard of in a complex, months-long trial. The task of reviewing that record in the abbreviated timeframes required for appeals can often be too much. Trial counsel is an appellate lawyer's best resource in those circumstances. But all the better if appellate counsel can rely on their own recollection because they lived and breathed the record as it developed—and catalogued and prioritized appellate issues along the way.

For objections that are not tied to any specific witness, appellate counsel might even be able to handle the objection him- or herself, as he or she would not then be violating the one-lawyer, one-witness rule that is usually imposed in trial courts.

Time for Trial

All is not lost when appellate counsel are not brought in early. Appellate counsel can certainly provide beneficial "fresh eyes," especially when trial counsel have spent years deep in the weeds. Appellate counsel can act as a useful sounding board for case theories before they end up before a jury. Or they might flag a new way to streamline issues in an otherwise overwhelming case. These objectives sometimes see appellate counsel stepping outside their perceived domain of issue preservation.

Extensive appellate counsel involvement in trial has many salutary benefits. Certain tasks benefit from the appellate counsel's unique expertise. And shifting some responsibility from the appellate counsel to the trial counsel allows the trial counsel to focus further on things like building a powerful narrative. In some of our most successful engagements as embedded appellate counsel, for example, we have worked directly with witnesses (and trial counsel) in their testimony preparation. The "value add" in those circumstances comes chiefly from hearing the witness's anticipated testimony with a different perspective, including how an appellate court may read it. Appellate involvement in pretrial proceedings can also drive up the chance of settlement.

Consider a couple of cases in which our firm was recently involved: *Little v. Ford Motor Company*, No. 16-cv-931 (N.D. Ga.) and *Thomas v. Ford Motor Company*, No. 17-cv-888 (E.D. Wis.). In *Little*, the plaintiffs sought to admit other allegedly similar incidents involving the alleged "park-to-reverse defect," as well as testimony from an earlier lawsuit arising out of one such incident. Our team helped trial counsel craft persuasive motions in limine that kept this evidence out and severely undercut any argument for punitive damages. Indeed, the court held the plaintiff's chances of proving punitive damages was so low that his counsel could not reference punitive damages in his voir dire or opening statement. The parties reached a settlement just days later. *Thomas* involved a claim of an allegedly defective seatback, where the plaintiff sought to exclude evidence of his pre-existing spinal condition. The court denied that request, 2019 WL 1923605, and the pre-existing condition was set to become a big issue at trial. Here, too, the case soon settled. Negotiating positions can often quickly change from dead set on trial to racing for the settlement table when key experts are lost, damaging evidence comes in, or entire theories are barred.

Some anticipated trial issues may also be previewed in pretrial briefs. Here, appellate counsel must consult closely with trial counsel to determine what should go in the brief; many trial counsel do not like forecasting their case, even obliquely, by filing comprehensive trial briefs (unless they're compelled to). But even in those circumstances, trial briefs that lay out the basic law and a few key admissibility standards can help prime the judge to rule in your favor when the contested issues arise. Indeed, if the judge reads and digests your trial brief, there might not even be the need for an objection—the trial judge might just take care of it him- or herself. If a full-blown trial brief is not the right choice, appellate counsel might prepare a series of short bench briefs that can be handed up as issues arise.

Objections are an obvious place for appellate counsel to help. Passing notes to trial counsel is not always the best way to do it. (And the blocking and tackling of where to sit can create issues of its own: one of us has been forced to sit at counsel's table throughout one trial but has been barred from the well entirely in another trial. Usually sitting in the gallery is a fair compromise.) Appellate counsel should try to anticipate what objections might arise. If trial counsel is amenable, appellate counsel could then prepare scripts for trial counsel's use when issues arise. For objections that are not tied to any specific witness, appellate counsel might even be able to handle the objection him- or herself, as he or she would not then be violating the one-lawyer, one-witness rule that is usually imposed in trial courts. If an objection is likely to be especially complicated, bench memos with attached cases—highlighted for a busy trial court—might be particularly useful.

Relatedly, motions to strike might be helpful ammunition for the trial team. Hopefully, many of the most obvious grounds for motions to strike will have already been dealt with in pretrial motions in limine. But there are good reasons not to file on everything—if for no other reason than no trial judge relishes reading twenty different motions in limine. A short, pre-prepared motion to strike

can give you the same well-substantiated, weighty arguments for deployment in the moment. A motion to strike an expert may also be warranted. Pretrial *Daubert* and *Frye* motions are based on what an expert promises to testify to, which in many cases diverges from the expert's actual testimony. If an expert fails to meet the standards for proof at trial, trial counsel can prepare for the next witness, while appellate counsel prepares and argues a motion to strike.

Appellate counsel can also play a valuable role at trial when an objection does not go your way, or when the judge is leaning one way but wants to know more. These situations might be a good opportunity for a proffer or offer of proof. The appellate lawyer can work closely with the trial lawyer to identify any contested evidence and place it in the record. This type of evidentiary proffer can often be done in different ways and at different times, depending on jurisdiction. Sometimes, it might be a simple written submission filed before the jury deliberates. Other times, it might require full, live presentation of the evidence before the judge—and right in the midst of the objection being litigated. An appellate lawyer can help discern when and what the best way is to make these offers.

Motions for directed verdict are another time for appellate counsel to shine. A strong written submission is not just necessary for preservation; it dissuades a judge from thinking that a motion is a perfunctory, throwaway task and more of a real argument. Defending those motions is just as important, and appellate counsel can handle those arguments, as well. Appellate counsel will then be ready to renew their motions—if need be—at the close of the case.

Of course, preparing a verdict form, drafting jury instructions, and otherwise making sure that the record on each relevant issue is fully developed are tasks that fall in the heartland of an appellate counsel's role. That last task is one that is sometimes overlooked, but that may be just as critical. Strong appellate counsel can come ready with checklists, charts, and lists to make sure that each element has had admissible evidence entered to address it. And once the jury does go back, appellate counsel should be ready to help when the jury has questions. In one of our cases, for example, a simple answer to a jury question (directing the jury to an instruction that appellate counsel had wrestled over for a long while) resulted in a favorable jury verdict about fifteen minutes later.

When the verdict comes down, appellate counsel should be ready to recognize whether there's more to do on an inconsistent or compromise verdict before the jury is dismissed. After that, attention will turn to working up posttrial motions. Despite the often-tight turnarounds on those, it is important not to overlook ministerial tasks like getting an appropriate judgment entered and ordering needed transcripts. And most crucially, do not overlook filing the notice of appeal.

Lastly, appellate counsel should be ready to step in to handle any other matters that might distract trial counsel from their central tasks. One of us, for example, spent three trial nights negotiating a stipulation that the trial judge held was necessary to avoid the admission of several boxes of prejudicial evidence. Clients also benefit from daily trial reports. Assuming appellate counsel are attending trial live, they are well positioned to help with that task: they have a good view of what happened, they are not focused on questioning the witness (and so might have a better memory of what is going on), and they might have more time during the busy evenings that define most trials. Even simple tasks like reading the daily transcripts to get a sense of key points could benefit from the experienced eye offered by the appellate lawyer. An appellate counsel willing to play cleanup will help trial counsel work more efficiently while building a better relationship with the trial team.

Partnering for Success

The relationship element of "teaming up" is incredibly important. All these strategies are rendered ineffective if trial and appellate counsel don't approach their relationship cooperatively. Trial and appellate counsel may not be from the same law firm, which can create a risk that the two sets of lawyers will approach each other with dismissiveness or even distrust. The client can assuage trial counsel's fear—stated or unstated—that an appellate lawyer's involvement will lead to business stealing by providing specific direction about who will do what and how decisions will be made. But the trial and appellate lawyers should also be able to find their own way to a productive partnership. In our experience, the best relationships between trial and appellate counsel often start from mutual humility, a refusal to stereotype, a trust that everyone is serving the same interests, and an open line of communication. Appellate lawyers are not nerds who want to kill a good case for the sake of appellate preservation. Trial lawyers are not ego-maniacal gunslingers with no respect for the rules or the law. And neither group is out to steal the other's business. For the strongest team, these basic principles should be understood and respected.

Especially once trial starts, good appellate counsel know trial counsel must run the show. And appellate counsel, especially later-arriving ones, should be wary of Monday-morning quarterbacking. Although it can be tempting to second guess matters handled differently than you would have, pointing out immaterial differences will only damage the relationship between the trial and appellate teams.

A good appellate counsel also knows that a win at trial is better than a strong appellate issue. Perfect appellate preservation must sometimes be sacrificed where it would do substantial harm to a case. Every trial lawyer knows, for example, that leaping to one's feet to object to some crucial piece of evidence serves to hang a flashing sign on the damaging evidence, and the jury *will* focus on it. If an objection cannot be raised outside the jury, the trial counsel may decide it is better to waive it than raise it. And where a pristine verdict form for purposes of appeal creates such a headache for the jury to complete, the trial counsel may choose to forego legal accuracy for jury simplicity. Finally, some successful arguments in the trial court turn into back-pocket appellate issues for the other side that can jeopardize a trial win. A good appellate counsel will advise a client and trial counsel not only of available arguments, but also the risks of losing *or winning* them. Just because an argument might win does not mean the best trial strategy is to win it. FD