

Benefit from a Clear Goal and Game Plan

By Richard J. Montes

The classic image of appellate counsel has started to change from the solitary figure, working by a desk lamp, pouring over stacks of books or printed cases, and it may continue to evolve with the times.

Expanding the Role of Appellate Counsel

The classic image of an appellate attorney is of a solitary figure, working by a desk lamp, pouring over stacks of books or printed cases. Appellate attorneys are the legal eagles, scouring through the record on appeal, libraries,

and online databases, drafting and redrafting every word to make an argument carefully and persuasively. Today that classic image is changing. Appellate attorneys now often join counsel in the courtroom, sometimes at counsel's table. Appellate counsel may join trial counsel on a call with an expert to review whether the expert's opinions meet the necessary legal standards or to identify where the opposing expert's opinions have fallen short. Appellate counsel can have a seat at mediation and be involved in the drafting of discovery and preparing for depositions.

Increasingly, clients are asking appellate counsel to become engaged in cases earlier. This initially began with the frustration of sending a case to appellate counsel only to learn that all necessary arguments were not properly raised. Seeing a need to get the record correct initially, clients began asking their appellate counsel to participate earlier to ensure the strongest record possible in the event of an

appeal. But clients now see the appellate role as potentially even broader. As clients identify repeat and emerging issues that can affect their bottom line, they have asked appellate counsel to become a part of the process. They have asked appellate counsel to help coordinate local, state, or national strategies on these key issues. Appellate counsel now are tasked with developing a comprehensive approach for everything from pleadings, discovery, and deposition practice, to motions, and of course, appeals. The goal is to grow and develop the law and to respond to emerging challenges.

This article reviews some of the evolving roles of appellate counsel and provides an example of the usage of appellate counsel to coordinate strategy on significant legal issues under the appellate umbrella.

The Many Roles of Appellate Counsel

In addition to their traditional role, appellate counsel can fulfill other roles, such as



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monitoring trials, performing issue spotting and coordinating strategy on emerging legal issues, and assisting with early case resolution, all of which are discussed more below.

The Traditional Role of Appellate Counsel

For purposes of this article, the traditional role of appellate counsel includes not only working on appellate briefs and arguments but also assisting with trial motions. Many law firms have appellate counsel review or draft their dispositive or significant motions. They may also have appellate counsel appear for the oral argument on those trial motions. Under the traditional model, however, appellate counsel typically deals with the record as it already is and does not have an opportunity to contribute to or guide its development.

Proper appellate advocacy always begins with an evaluation of the chances of success, as well as the potential consequences of an adverse appellate decision. When guiding the decision of whether to appeal, or when forced to defend against an appeal, it is the responsibility of appellate counsel to provide a realistic assessment of whether the record presents the legal issue in the best possible light. The client must have a clear understanding of the challenges faced and the potential implications of an adverse decision for future litigation of that issue, particularly when the issue is important to the client or even an industry as a whole. Objectivity is paramount in this regard.

The art of traditional appellate advocacy focuses on three main areas: research, writing, and oral advocacy. Effective research requires far more than knowing which terms to search. It requires the keen ability to follow thoughts to their logical conclusion, recognize the significance of the search results (or lack thereof), and understand the policies behind legal principles. Effective written advocacy requires two things above all: (1) credibility, and (2) an ability to make the complex simple. Once credibility is lost, it is inevitable that your adversary's brief will form the basis for the court's decision. The same is true for a brief that is difficult for the reader to follow. Finally, effective oral advocacy requires persuasively framing the critical issues for the court, identifying all conceivable weak-

nesses in your arguments, and being prepared with logical and credible answers to the difficult questions stemming from those weaknesses.

Monitoring Appellate Counsel

Monitoring appellate counsel refers to the practice of having appellate counsel attend the trial. Monitoring can be passive or active. Passive trial monitoring primarily involves reporting to the client on the trial day's proceedings and overall impressions of the case and potential appellate issues as they arise. In contrast, active trial monitoring involves a more engaged role. Appellate counsel becomes a member of the trial team, identifying issues, drafting and sometimes arguing motions in limine, and otherwise preserving the record.

With active trial monitoring, appellate counsel act as a complement to the defense team. They are not there to take over a case or step on trial counsel's toes. Their goal is to protect and enhance the record. They will confer with trial counsel and may split up responsibilities. Often appellate counsel will take the lead on critical motions, jury instructions, and the verdict sheet. This allows appellate counsel to focus on the significant legal issues and frees up trial counsel to focus on presenting the best and most persuasive case to the jury. It is often said that a trial attorney must present three cases: one for the jury, one for the judge, and one for the appellate court. When appellate counsel are brought in early, some of this burden is lifted and each member of the team can focus on trying the case for the audience that they know best.

Issue Spotting and Coordination

A number of companies have begun using appellate counsel to guide their defense strategies on critical or emerging issues. Appellate counsel, alone or as part of a team, will be tasked with developing a comprehensive strategy to develop the law on a given issue. In this role, appellate counsel must start at the end. What needs to be established to prevail on the issue? What are the necessary legal elements? What evidence is needed to prevail on the claim? What missing evidence would ensure that a claim could not be sustained?

Appellate counsel must then assess the jurisdiction. Counsel must understand the nuances and precedent in that jurisdiction, as well as identify which venues and judges may be more or less receptive to certain arguments. As part of the team, appellate counsel can gauge the chances of success and which cases might be better to take to trial even in the event of an adverse trial-level decision.

Proper appellate

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Appellate counsel then works with the trial team to use all the tools necessary to create the optimal record to litigate the issue. Appellate counsel will work with the trial team to make sure that all affirmative defenses are properly pleaded. In some jurisdictions, if certain affirmative defenses are not raised in the answer, then they are considered waived. Appellate counsel may draft or review discovery requests to make sure that all necessary documentation is obtained. Appellate counsel will also work with trial counsel on deposition preparation. By identifying early the key elements to make a claim or to establish a defense, counsel can then tailor questions to develop those points. The answers can provide further foundation for later motion practice.

It is important to recognize that one adverse trial-level decision does not doom a program, but it can provide a significant setback. Appellate counsel must look for opportunities to update, revise, and tweak the overall strategy. Taking a bigger picture approach, you can look to incorporate and mold successful arguments from other jurisdictions to meet the requirements within the subject venue.

Early Case Resolution

Another role for appellate counsel is to identify case-turning issues early to spotlight at mediation. For example, if there is a choice of law issue that could result in a more favorable comparative fault statute being applicable, that can have a substantial effect on settlement discussions. Appellate counsel can not only review those

Taking a bigger picture

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issues, but also make the presentation on those issues at mediation and be a resource for answering questions from the mediator and opposing counsel. Having an experienced appellate attorney assist in this way often can provide credibility to the arguments being made at the mediation and also sends a signal to opposing counsel that the client is prepared to litigate those issues through a lengthy discovery, trial, and appeal process, if necessary.

Appellate Counsel as Issue Coordinator: An Example

After the passage of the Patient Protection and Affordable Care Act (ACA), a number of industry leaders began to look into whether the ACA changed the way that future damages in tort cases should be tried. Did the ACA present a new challenge to the common law collateral source rule and established concepts about the reasonable value of medical goods and services? In particular, one group of attorneys, including appellate counsel, was formed to develop a national strategy to address the issue. Appellate counsel reviewed the origins of the common law collateral source rule, its purpose, and the rules in all 50

states. Appellate counsel reviewed statutes modifying the common law rule, rulings limiting the scope of evidence, and exceptions to the rule. Appellate counsel also researched the intricacies of the ACA and government programs such as Medicaid and Medicare, as well as state rules and insurance policies that predated the ACA. After gathering that data, appellate counsel then began the task of developing, with the trial team, a comprehensive strategy, from pleadings to motions to appeals, that sought to advance the law in this area.

In the early stages, a key ruling was issued in an unpublished decision from the California Court of Appeals. See *Leung v. Verdugo Hills Hosp.*, 2013 WL 221654 (Cal. Ct. App. Jan. 22, 2013). In that case, without any expert testimony, defense counsel simply tried to assert the ACA as a basis for a reduction of future medical damages. Other than merely mentioning the ACA, however, there was no additional testimony or evidence to buttress the assertion. The court held that the mere mention of the ACA was insufficient to meet the defendant's burden. The court then, however, set forth three criteria that would need to be met for such testimony to be admissible. *Id.* at *11. Those criteria then became the roadmap that appellate counsel used for the further development of the legal strategy. They guided the type of evidence that would be necessary and the development of experts. Appellate counsel oversaw the development of those experts and drafted sample discovery requests based on the requirements of the ACA and public health insurance programs and deposition questions all related to establishing the three *Leung* elements.

The first significant breakthrough came in *Jones v. MetroHealth Medical Center*, 68 N.E.3d 281 (Ohio Ct. App. 2016). In *Jones*, the Ohio Court of Appeals affirmed the reduction of the plaintiff's future medical damages award, which had been based upon the coverage to which the plaintiff would be entitled by virtue of Medicare, Medicaid, and private health insurance made available through the ACA. The court rejected the plaintiff's argument that it was too speculative to assume that these programs and insurance would continue. The court reasoned that accepting the plaintiff's "argument at face value would effectively

bar all offsets because of the possibility that government programs might, someday, end." *Id.* at 297. While this ruling was subsequently modified to partially vacate the offset, the initial decision paved the way for continued challenges to the common law collateral source rule. See *Jones v. MetroHealth Med. Ctr.*, ___ N.E.3d ___, 2017 WL 3635466 (Ohio Ct. App. 8th Dist. 2017) (holding to the extent that part of the jury's economic award was for lost earnings, it should not have been offset and that there was insufficient evidence Medicare would cover the home-care costs contained in the life-care plan).

With this first major crack in the traditional common law armor, the goal then became to build on that success. The next major development came in *Stayton v. Delaware Health Corporation*, 117 A.3d 521 (Del. 2015). In *Stayton*, the plaintiff's medical bills totaled \$3,683,797.11, but they were fully satisfied through Medicare for just \$262,550.17, a difference of 92 percent. The defendants sought to limit the past damages amount to the Medicare payments. The Delaware Supreme Court agreed, holding that Medicare payments were not collateral sources, and the jury should only be permitted to hear evidence of the Medicare-paid rates. In doing so, the court refused to follow other states that allowed the jury to hear evidence of both the billed and paid amounts. Further significant, in a concurrence, Chief Justice Strine of the Supreme Court of Delaware became the first appellate-level judge to question the continuing viability of the common law collateral source rule. Justice Shrine stated,

the case before us calls into question the wisdom of applying the collateral source rule—itsself an exception to the general rule of damages that a plaintiff is entitled to be made whole and nothing more—in its current form, in an era where we are closer to achieving universal healthcare, and where rising healthcare costs are reducing access to care and harming our nation's economic health. *Id.* at 534–35.

Following the outlined plan, the number of favorable decisions continued to grow, culminating in the landmark decision in *Cuevas v. Contra Costa Cty.*, 11 Cal.

App. 5th 163 (Cal. Ct. App. 2017). *Cuevas* was a medical malpractice action in California involving claims that the alleged malpractice caused a birth-related brain injury. The plaintiff presented a \$258 million life-care plan with a present value of \$29 million. In 1975, California passed the Medical Injury Compensation Reform Act (MICRA) statute, which modified the common law collateral source rule in medical malpractice actions. The statute provides that a defendant in a medical malpractice action may introduce evidence of “any amount payable as a benefit to the plaintiff as a result of the personal injury,” including “any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services.” Before 2017, however, no appellate court had directly addressed whether MICRA applied to past and future medical expenses. And other than the unpublished decision in *Leung*, there were no other appellate-level decisions addressing the potential relevance of the ACA to plaintiffs’ damages claims for medical expenses. A number of trial-level courts, in particular federal courts, had held such evidence to be admissible. *See, e.g., Brewington v. United States*, No. CV 13-07672-DMG (CWx), 2015 WL 4511296, at *6 (C.D. Cal. July 24, 2015) (nonpub. opn.).

Appellate counsel was engaged late in the case, after most experts had already been disclosed. Appellate counsel recommended retaining an additional expert on health insurance to address the *Leung* factors and questions related to the continued viability of the ACA. After the hearing, the court granted the plaintiff’s motion, finding that future coverage under the ACA was too speculative to permit such evidence to go to a jury. The jury awarded \$9,577,000 for future medical expenses. The case then proceeded to an appeal on the future medical damage issue.

On April 27, 2017, the California Court of Appeals, First District, held that the MICRA statute applied to past and future damages. *Cuevas*, 11 Cal. App. 5th at 178. In reaching that conclusion, the court reviewed the legislative history, of which appellate counsel had requested the court take judicial notice. The court also held

that evidence of future benefits under the ACA was not too speculative. Notably, the decision was issued after the 2016 presidential election, at a time when Congress was pursuing efforts to repeal and replace the ACA. The court of appeals acknowledged the legislative climate but held that the ACA remained the law of the land and that the defendant’s experts had sufficiently demonstrated that insurance coverage was likely to continue into the future. The appellate strategy had been carefully crafted to anticipate potential changes or challenges to the ACA. Appellate counsel constructed the strategy to rely on key provisions of the ACA and not the ACA as a whole. By focusing on key provisions that would endure potential legislative changes and went to the heart of previous barriers to admission of collateral source evidence, counsel constructed an argument to account for the changing political landscape, including the recent repeal of the tax for failing to have health insurance.

The court of appeals also addressed the disparity between billed and paid amounts. As many know, there is often a large disparity between what is listed in a doctor’s bill and what is paid. A number of courts have recognized that billed amounts represent fictions and are not a proper measure of reasonable value. *See Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal. 4th 541, 561 (Cal. 2011); *Daughters of Charity Health Servs. of Waco v. Linnstaedle*, 226 S.W.3d 409, 410 n.1 (Tex. 2007); *Vencor, Inc. v. Nat’l States Ins. Co.*, 303 F.3d 1024, 1029 n.9 (9th Cir. 2002). Rather, reasonable value is the amount that goods and services are bought and exchanged for in the marketplace, *i.e.*, what people pay. *See Children’s Hosp. Cent. California v. Blue Cross of California*, 226 Cal. App. 4th 1260, 1274 (Cal. Ct. App. 2014); *Temple Univ. Hosp. v. Healthcare Mgmt. Alternatives, Inc.*, 832 A.2d 501 (Pa. Sup. Ct. 2003). *Cuevas* extended that rationale to future damages. *Cuevas*, 11 Cal. App. 5th at 180.

Since the *Cuevas* decision, there have been further advances on the reasonable value front. Appellate counsel has worked to develop arguments that will allow evidence of paid rates without running afoul of the collateral source rule. And courts

increasingly are beginning to recognize that such arguments do not violate the collateral source rule. *See, e.g., Gaddy v. Terex Corporation*, 2017 WL 3473872, at *3 (N.D. Ga. July 21, 2017).

Conclusion

The original goal was to develop a strategy to raise the issues discussed here despite the previous barriers to such evidence. By beginning at the end, and identifying the key elements that would need to be established, along with understanding the nuances of the collateral source rules in each jurisdiction, a program was developed to achieve incremental success through which each subsequent success built off the previous one. The strategy also recognized that there would be some failures, but that even within the failures, there could be potential progress. In fact, in addition to several favorable decisions, after two adverse court decisions on the billed versus paid issues, Michigan and Missouri passed legislation to limit past damages to the amounts paid.

This damages program is just one example of how clients can benefit by integrating appellate counsel early into cases and as part of a comprehensive legal strategy. There are many other examples across a wide array of industries and areas of practice. *See, e.g., Andrew Strickler*, Appellate Group of the Year: Gibson Dunn, Law 360 (Jan. 16, 2018), *available at* <https://www.law360.com>. Thus, the era of the quiet, contemplative sanctuary of research and writing for appellate counsel may be slowly evolving. Appellate counsel or practice groups may now also need to hone their trial and strategy skills, along with rolling up their sleeves for the trial arena. They can become an integral part of the trial team in not only shaping the law, but also shaping the case from its early stages. Appellate counsel should begin with the end in mind; be aware of jurisdiction-specific rules, precedent, and nuances; seek to incorporate successful concepts from other jurisdictions; develop a durable strategy; and be persistent. Success breeds success, but setbacks do not spell doom. There are always opportunities if there is a clear goal and game plan in mind.

