This article taken from the Columbus Bar Lawyers Quarterly, Fall 2010 and reprinted with permission of the Columbus Bar Association

APPELLATE ADVOCACY AT TRIAL

By Glen R. Pritchard

When litigation justifies the involvement of two lawyers, the "lead trial attorney" often enlists a "second chair" to help. The role of the second chair, usually a less experienced attorney, is to assist the trial attorney with whatever is needed to prepare and try the case. The second chair's duties might include any aspect of trial practice, including research, brief writing, and examination of less crucial witnesses. In many cases, the second chair simply does what the lead lawyer does not have time to do.

Let us consider a more formal division of labor between two lawyers on the same trial team. One that envisions success not only at trial, but on appeal as well. A division of labor between the trial attorney and the appellate advocate.

The role of the appellate advocate on the trial team should be of particular interest to the plaintiff's attorney. A recent study of state court appeals showed that plaintiff's win reversal on appeal only 21.5 percent of the time, drastically less than their defense colleagues who win reversal at a rate of 41.5 percent.[1] The reasons for this disparity are not altogether clear. But litigation is a process, and trial is not the end of it.

Let us pause to recognize that the skills needed to win at trial are different than those needed to succeed in the court of appeals. The trial attorney focuses, as he or she must, on the development of facts necessary to prove or disprove each element of the cause of action alleged in the complaint and the presentation of those facts to a jury. The trial attorney deposes witnesses, culls documents, and cultivates the expert opinions needed to build a persuasive factual presentation that will compel a favorable result by the finder of fact.

In the court of appeals, on the other hand, the facts are fixed in the trial record, and the legal issues take center stage. The shift in focus from the facts at trial to the law on appeal entails that the trial lawyer and the appellate advocate rely on different skills. Appellate litigation . . . calls for special skills that are substantially different from those of the trial litigator and, in fact, have no duplicate in any area of law practice. The skill that is perhaps the most important and unique to the appellate litigator is that of developing and working with the record on appeal. Everything that happens in the appellate court is premised on what happened in the trial court, and what happened in the trial court is determined by what is shown in the record. It is crucial, consequently, that the litigator know how to ensure that essential items become part of the record in the trial court, and are included in the appeal record. It is also important that the appellate litigator know how to review a record to determine the issues that can be raised on appeal and that he be able to distinguish between the issues that can be raised and those that should be raised. Once the issues are selected, the attorney must be able to develop them into meaningful arguments, always tying those arguments to the facts as shown by the record.[2]

Given the difference between trial and appellate advocacy, adding an appellate advocate to the trial team to handle specific aspects of the trial, as outlined below, may be more effective than two trial lawyers sharing responsibility for all aspect of the trial.

The Roll of the Appellate Advocate Before Trial

The motion for summary judgment stage of the litigation is often an opportune time to involve an appellate advocate in a case. Preparing a motion for summary judgment, or defending against an opposing one, will give the appellate advocate the opportunity to become familiar with the legal issues as they apply to the facts of the case. This effort will not be wasted as the issues presented on summary judgment will likely reappear at trial and again on appeal.

In the days immediately before trial, the trial attorney will want to coordinate witness examination, prepare exhibits, and implement a consistent trial theme. As the trial date approaches, however, a number of distractions will inevitably arise. The appellate advocate can help.

The appellate advocate should be responsible for challenges to the admissibility of expert testimony which is now common, especially in federal court, under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[3] Pursuant to Daubert, the federal trial judge acts as "gatekeeper" in determining not only whether an expert is qualified, but also whether the expert's methodology is sufficiently reliable to allow the expert's opinions to be considered by the jury. The appellate advocate will have a thorough understanding of the applicable Daubert reliability standards and the tools used by judges to determine whether those standards have been met.[4] The decision to admit or exclude expert testimony will frequently be the subject of appellate review. The appellate advocate should be prepared to challenge the admissibility of expert testimony offered by the opposing party as well as respond to the opposing party's Daubert challenges.

Likewise, the appellate advocate should prepare motions in limine seeking exclusion of damaging evidence and respond to motions in limine filed by the opposing party.

If proposed jury instructions must be filed before trial begins, appellate counsel can draft instructions that are both advantageous and legally defensible on appeal.

Appellate counsel should anticipate legal arguments the opposing party will raise at trial. The opposing party must make choices about what evidence to use, what arguments to make, what document to introduce, and what objections to raise. To the extent possible, the litigation team must be prepared to respond to anything. Appellate counsel should prepare short bench memoranda to help the judge rule favorably on evidentiary and procedural issues that could arise depending upon how the opposing party chooses to try its case. Appellate counsel should also be prepared to argue those points at trial when the time comes.

Of course, the extent to which the trial attorney will stay involved with these pre-trial tasks is a matter of preference. But, involving an appellate advocate will allow the trial attorney to spend more time preparing a compelling factual presentation than would otherwise be available.

The Role of the Appellate Advocate During Trial

Objections and Protecting the Record

While the trial attorney is embroiled in the heat of trial,

appellate counsel is in a better position to monitor the record as it is being created. Appellate counsel will remain mindful that:

Objections must be properly raised to avoid waiver on appeal;[5]

Excluded evidence must be proffered into the record;[6]

Answers to ambiguous questions, unclear answers to unambiguous questions, and non-verbal gestures must be clarified for the record;

Proposed jury instructions must be filed, and an objection must be made to the trial court's refusal to give a proper instruction, or to the giving of an improper instruction, before the jury retires to deliberate;[7]

The decision in *Van Scyoc v. Huba*[8] illustrates how a misstep in creating the record can result in a problem on appeal. The appellant in Van Scyoc assigned as error the trial court's failure to give a proposed jury instruction. Appellant's counsel filed the instruction and explained to the Court, on the record, why the instruction should be given. Counsel did not, however, formally object after the Court refused to give the instruction. Not wanting to elevate procedure over substance, the Van Scyoc court held that a formal objection before the jury retired for deliberations, pursuant to Civ. R. 51(A), was not necessary when "a party makes a position sufficiently clear such that the court has an opportunity to correct a mistake or defect in the instruction."[9]

One might then conclude that Appellant's counsel dodged the bullet and successfully preserved for appeal the issue of whether the trial court erred in failing to give the requested instruction. Wrong! As it turns out, after the jury retired to begin its deliberations, the trial court asked both counsel whether they wanted any additions, corrections or alterations to the jury charge, and whether they wanted to renew any objections. The Van Scyoc court concluded that, although Appellant's conduct in requesting the instruction was equivalent to an objection for the trial court's refusal to give it, the appellant effectively withdrew the objection by failing to renew it when given the opportunity to do so.

At trial, the appellate advocate will constantly monitor the proceedings from the perspective of how the record is going to look. This perspective may avoid waiving error which could limit the options available on appeal.

Research and Writing

The unexpected happens at trial. The opposing party will raise new arguments. The judge will want the parties to brief legal issues. At night, while the trial attorney is preparing for the next day's witnesses, the appellate advocate can attend to these research and writing duties.

Jury instructions and Interrogatories

After the evidence is submitted, the trial lawyer wants to hone the best possible closing argument. Very often, the trial lawyer instead finds herself engaged in a protracted conference with the court and opposing counsel to finalize the jury charge. Having drafted the proposed jury instructions, the appellate advocate will be in the best position to handle this conference, freeing the trial lawyer to focus on closing argument.

The appellate advocate must also craft jury interrogatories with care to preserve issues on appeal. If a jury returns a general verdict and its mental processes are not tested by special interrogatories to indicate which issue was determinative, the appellate court will presume that all issues were resolved in favor of the prevailing party. And, if any of the issues presented were free from error, error in presenting another issue will be disregarded.[10] The appellate advocate will create jury interrogatories designed to prevent such pitfalls.

The Role of the Appellate Advocate Post-Trial

Motions for new trial and for judgment notwithstanding the verdict are standard practice following a trial court judgment, if for no other reason than they extend the time for filing an appeal.[11] The issues raised by these motions will likely echo many of the issues raised on appeal. If the appellate advocate has been on the trial team from the start, he or she will be in an excellent position to seamlessly take the lead in filing, or defending against, post-trial motions as well as the appeal that follows. Even if appellate counsel was not actively involved at trial, the post-trial motions still provide the best platform for the appellate advocate to lead the case into the appellate court.

Final Thoughts

An appellate advocate can bring objectivity to an appeal in a way that the lawyer who tried the case cannot. Having concluded that the appeal before him was "dead on arrival", one appellate judge explained this advantage:

We . . . observe that trial attorneys who prosecute their own appeals, such as appellant, may have "tunnel vision." Having tried the case themselves, they become convinced of the merits of their cause. They may lose objectivity and would be well served by consulting and taking the advice of disinterested members of the bar, schooled in appellate practice. We suspect that had appellant done so they would have advised him not to pursue this appeal.

Ultimately, however, an appeal is won or lost based on the record created at trial. Involving the appellate advocate at trial, while the record is being created, can therefore help.

1. Theodore Eisenberg & Michael Heise, Plantiphobia in State Courts? An Empirical Study of State Court Trials on Appeal, 38 J. Leg. Stud. 121 (Jan. 2009), available at http://scholarship.law. cornell.edu/lsrp_papers/79.
2. Appellate Litigation Skills Training: The Role of the Law, 54 U. Cin. L. Rev. 129 (1985), 138-9.
3. 509 U.S. 579, 113 S.Ct. 2786.
4. For example, the Federal Judicial Center has produced the 638 page Reference Manual of Scientific Evidence, Second Edition (2000) to assist the federal bench in evaluating scientific methodology for purposes of determining admissibility of expert opinions. It is available at http://www.fjc.gov.
5. State v. Colon, 119 Ohio St. 3d 204, 2008-Ohio-3749.
6. Ohio Ev. R. 103(A)(1).
7. Ohio Civ. R. 51(A).
8. Van Scyoc v. Huba, 9th Dist. No. 22637, 2005-Ohio-6322.
9. Van Scyoc, at ¶16, citing Callahan v. Akron Gen. Med. Ctr., 9th Dist. No. 22387, 2005-Ohio-5103.
10. Centrello v. Basky (1955), 164 Ohio St. 41, 128 N.E. 2d 80
11. App. R. 4(B)(2).

gpritchard@clarkperdue.com

Glen R. Pritchard,
Clark Perdue & List