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**ADDING VALUE WITH APPELLATE COUNSEL  
BEFORE AND DURING TRIAL**

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## TABLE OF CONTENTS

I.	Introduction .....	1
II.	Summary .....	1
III.	The Rise of Appellate Specialists .....	2
	A. The modern model .....	2
	B. Appellate specialists and trial lawyers have different skills.....	3
IV.	Initial Case Strategy and a Guide to Discovery .....	5
V.	Avoiding Waiver .....	6
VI.	Certain Procedural Opportunities.....	8
	A. Removal .....	8
	B. Mediations and arbitrations .....	8
	C. Discovery fights and mandamus.....	9
VII.	Permissive Interlocutory Appeals .....	10
VIII.	Pretrial Motions.....	10
	A. Early preparation of the draft jury charge.....	11
	B. Motion for partial summary judgment.....	12
	C. Rule 166 pre-trial rulings on charge wording.....	13
	D. Motion for spoliation instruction. ....	14
	E. Summary judgment: the pre-trial appellate brief.....	15
	F. Developing expert testimony and cross-examining experts.....	16
IX.	At Trial .....	17
	A. Convincing the trial judge about the law .....	17
	B. Presenting the jury charge.....	18

X. Post-verdict.....21

    A. Post-verdict preservation of appellate complaints.....21

    B. Objective evaluation of appellate chances.....22

Conclusion .....22

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## **I. INTRODUCTION**

Litigation strategy has two components: facts and law. Many lawyers approach litigation by exploring the facts first through discovery and then developing a legal strategy, including the strategy for appeal. This approach needs to be rethought. To ensure the best chance of success at trial and on appeal, especially in a big or complex case, it is critical to incorporate a law strategy throughout the litigation process—not only in analyzing claims and defenses, but also in streamlining discovery by limiting rabbit trails.

This article explores how the use of appellate analysis—or the “law strategy”—in partnership with trial counsel before and during discovery and trial can (1) improve chances for a winning at trial, (2) help ensure an effective appeal, and (3) ultimately save costs. Having a legal-issues specialist well-versed in the case at trial permits trial counsel to focus on developing the evidence and jury presentation. It affords a second set of skilled, objective eyes and views to ensure that a position taken on one issues does not undermine another part of the case. And the appellate lawyer who is already familiar with the facts and key issues and present during development of the proof can help guide the often time-critical decisions that need to be made at trial or possibly see and avert a crisis before it happens. An appellate lawyer, focusing on legal issues and overall strategy, provides an entirely different but complementary perspective that can in some cases be outcome determinative in the final analysis.

## **II. SUMMARY**

With an effective law strategy, the pre-trial and trial work supports the appeal. But the appellate perspective can also support the trial result. Nothing demonstrates a party’s long-term commitment to the litigation like hiring an appellate specialist early. Opponents who hope for a quick victory and settlement may be persuaded by the appearance of an appellate lawyer to take a more reasonable position. More and more judges look for appellate counsel at trial so that they can focus on the technical parts, like the jury charge, without delaying witness preparation and jury argument by trial counsel.

Having a law lawyer well-versed in the case can provide some significant strategic advantages when critical decisions need to be made at the outset and during litigation. At trial, the appellate lawyer can provide support or even handle directed verdicts, charge conferences, and the like, freeing the trial lawyer to focus on evidence presentation and jury argument. Also, while the trial counsel is preparing witnesses in the evening, the appellate lawyer can be drafting trial briefs or researching arguments for the next day.

In this way, both the fact and law perspective improve the client's ultimate chance of a successful resolution of the case.

### **III. THE RISE OF APPELLATE SPECIALISTS**

The use of appellate specialists has grown primarily because litigants—particularly businesses and insurers—dislike litigation surprises and realize that the skill set for presenting facts at trial differs in significant respects from dealing with legal issues.

#### **A. The modern model**

The old model of litigation was that the trial lawyer would handle the case through trial. Then, with a verdict in hand, the trial lawyer would handle the appeal or, possibly, hand the case off to someone else—often a junior associate—to handle the appeal. But in the past 30 years, the American legal system has seen an enormous increase in the number of lawyers who specialize in appeals. It has become rare to see the same lawyer leading both the trial and the appeal, and it has become increasingly common to see appellate lawyers assisting the trial team throughout the litigation.

One reason is that in many American jurisdictions, appeals are much more likely to change the result of a trial now than 30 years ago. This has occurred because of changes in the law and because many appellate courts are now less likely to defer to jury verdicts. As a result, the real end game is likely to occur, not at trial, but in an appellate court.

But waiting to engage an appellate specialist until the appeal begins often ends up being too little too late. An effective appeal usually requires that the strategy for appeal be developed before the appeal begins—and in many cases before the trial. Engaging the appellate specialist early in the litigation ensures that the best appellate arguments can be made if the case is appealed. Thus,

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