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LITIGATION SUPPORT

The New Meaning of Litigation Support: Redesigning the Perception of the Appellate Practitioner

by Jack R. Reiter

The term litigation support may give rise to the image of individuals preparing PowerPoint slides and other visual aids, however, litigation support can also include an appellate practitioner who works as part of a trial team in preparing for trial and during the trial process.

Litigation support, sometimes referred to as trial or legal issue support, is a bit of a misnomer because the appellate lawyer's role is not always readily identifiable. A threshold component of appellate review requires litigants to preserve an issue by advancing it before the trial court and obtaining a ruling. Because appellate courts serve as courts of review, an issue or objection must be presented to a lower court specifically and timely; and must be expressly ruled upon in order to assert it as a basis for an appeal from an adverse decision. Absent extraordinary circumstances, an unpreserved issue cannot be advanced on appeal and the argument is lost before the appeal even leaves the ground. It is for this reason that preserving error at the trial level is a pivotal component of the appellate process and is one of the first things an appellate lawyer must assess in evaluating the likelihood of a successful or unsuccessful appeal.

Arguments that may ultimately become part of an appeal necessarily arise be-

fore the lower court, so the appellate process should be viewed as moving across a continuum that starts at the inception of litigation, builds momentum as cases approach trial, and then culminates in the actual process of seeking review before the higher court. For this reason, an appellate practitioner's participation during litigation can pave the way for proper preservation and strategic presentation of targeted issues. For example, litigation support includes preparing and arguing — or defending against — dispositive motions, such as motions to dismiss or for summary judgment. Because these motions can potentially end litigation and give rise to an appeal from a final order, enlisting an appellate practitioner to participate in preparing or arguing such motions can assist in framing the issues that will likely be part of an appellate argument. In addition to dispositive motions, the litigation support role may include the advancing of narrow issues that may change the landscape early in litigation, including but not limited to, matters of jurisdiction, choice of law or significant discovery issues.

Full Perspective

The litigation support role becomes more defined as trial approaches. While trial counsel prepares for trial, the appellate attorney can craft and refine jury

instructions, a verdict form and motions in limine. This allows the appellate lawyer to complement and support the trial team and also empowers the trial lawyer to focus specifically on his or her trial strategy while appellate counsel focuses on broad or narrow legal issues that, among other things, impact the admissibility of certain documents or witness testimony.

Once trial begins, an appellate counsel can appear at trial to address both expected — and unexpected — issues. For example, the appellate lawyer can research issues or advance and preserve arguments relating to evidentiary matters or address those events that may support a motion for mistrial. The appellate counsel who observes or actively participates during trial is also well-prepared to argue a directed verdict motion.

At the charge conference, the appellate practitioner can address jury instructions. Because jury instructions guide the jury's application of law to reach findings of fact, this is an essential and potentially dispositive component of case presentation. Moreover, jury instructions present fertile ground for potential appellate review. Thus, preserving arguments relating to jury instructions is of paramount importance.

When a verdict or, in a nonjury proceeding, an order is returned, litigation



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support blends quickly into the role often perceived as an appellate lawyer's starting point. An appellate attorney who participated at trial will already have exposure to the issues and, as a result, can immediately tackle the preparation of post-trial motions or respond to motions advanced by the other side quickly and efficiently.

Ultimately, when a case is ready for appeal, the attorney who served in a litigation or trial support role already has a perspective on trial proceedings. This, in turn, may give litigants the opportunity to better appreciate the likelihood of a successful appeal, which is useful in contemplating the appropriate course of action. At that moment, the litigation support and pure appellate role come full circle and provide the highest possible value-added to the litigation landscape.

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