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News Story

Working together

Second-chairing allows litigators and appellate attorneys to collaborate early, work for a favorable outcome

By Melissa P. Stewart, Esq.

Managing your practice

With the number of appeals on the rise, it seems that trial verdicts have begun to signal the intermission — rather than the grand finale — of a case.

Given the trend, one might assume that more and more appellate lawyers have begun to get involved even before the foreman renders the jury's decision.

But, if the consensus at the 2007 Michigan Appellate Bench Bar Conference is any indication, this doesn't seem to be the case. In fact, it is relatively rare that appellate attorneys and trial lawyers interact much at all during litigation.

Rather, the two stages of a case are often treated as wholly separate entities with very little interaction between the trial and appellate lawyers.

But Detroit attorney John P. Jacobs — an appellate specialist known to second chair trials before taking over as lead attorney on the appeal — is working to change this.

According Jacobs , the incongruity may be the result of the "antagonistic symbiosis" that he believes defines the relationship between the two types of lawyers.

Understandably, he said, "trial lawyers do not like anyone peering over their shoulders, and appellate lawyers are often seen as smug and omniscient 20/20-hindsighters who do not understand the rigors of heated battle that sometimes [defines] trial work."

Beyond that, he also suggested the complexity of the relationship stems from the fact that "appellate lawyers sometimes do not see trial work as it really is."

Conversely, "trial lawyers pay much less deference, unfortunately, to the legal issues than to the factual ones," he continued.

But, "in this respect trial lawyers are wrong."

Given that "a case is not final until the appeals are all done," Jacobs urged lawyers to remember that "the verdict below is *only* 'halftime,' so to speak."

As such, he believes it's imperative for both sets of lawyers to keep the big pictures in mind at all points throughout the case.

A "nit-picking book lawyer's" habit of "churlishly complaining after the fact about an uncrossed 't' or an undotted 'i' can be the source of some understandable hostility," he said.

But in actuality, "most of the tension relates back to the lack of preservation of important issues at trial."

That is, without proper preservation by the litigator, the appellate attorney simply cannot bring up even the most viable claim on appeal.

Navigating the relationship

So, given the conflicts that may arise between trial and appellate lawyers, how can the two work together to ensure the best possible outcome for the client?

For Detroit litigator Robert F. MacAlpine — who has worked closely with Jacobs over the years on several high profile cases — it all boils down to respect.

"The relationship between trial lawyers and appellate lawyers is quite complicated," MacAlpine told Lawyers Weekly. And, "like most successful relationships, each lawyer must have a healthy respect for the talent, counsel, and role of the other lawyer."

But, he warned, "when one of the attorneys does not respect the other's talents and contributions, there will be a lot of bickering."

What's more, MacAlpine explained, in order to foster the best possible ultimate outcome for the client, both lawyers must realize that "during trial, the captain of the ship is the trial attorney, [but] that attorney must be strong enough to listen to the advice of the appellate [advocate], for that person may become captain if an appeal becomes necessary."

Evaluating your case

Even under the most ideal working conditions — where the litigators and appellate attorneys respect the role of their counterparts and have the best interests of the client squarely in view — both Jacobs and MacAlpine caution that second-chairing is not always the best idea.

"Because of obvious expense considerations," a case is best suited for second chairing when it has "blockbuster verdict potential," Jacobs said.

But as MacAlpine noted, the verdict amount should really be just one consideration.

"In today's courtroom environment, $10 million cases and $100 million cases occur with some regularity," he explained. But, "there are five types of cases that are suited to an appellate second chair, all involving high dollar values:

- Cases with potential predictable error;
- Judges with a strong history of error or bias;
- Cases with attorneys who have a strong history or overreaching and/or appellate error;
- Cases where an appeal by one side or the other is certain, and there is a need or desire to ensure the record is properly preserved; and,
- Cases where issues have come up that are likely 'lightning rod' issues, issues of first impression or issues of extremely high value."

Jacobs suggested the conditions are most often met in high-stakes commercial cases.

"In my diminishing tort portfolio, I do not get called unless a really large [verdict] is expected," he explained. And, if he does get called to second-chair a tort, "more often than not, it is a very skinny liability case with huge exposure if the catastrophic damages are awarded."

Defining your role

Assuming a case meets the criteria set forth by Jacobs and MacAlpine, the procedure for seconding chairing can be varied to best suit the needs of the attorneys involved.

In fact, MacAlpine noted "there are many derivations of second chair, [but] for the right kind of case, I prefer an appellate attorney who participates according to a preplanned set of criteria."

For his part, it appears that Jacobs prefers a less structured plan for involvement.

"I have monitored about 20 trials ... as the appellate lawyer expected to later take the appeal," he began. And in his experience, Jacobs has found that often, "the client will assign me well in advance of the trial to work with trial counsel to make sure the law or directed verdict is adequately briefed, and that the motions in limine set up the questions or evidence, etc."

Moreover, he said, many times "I actually sit in on the trial — gavel-to-gavel — making certain that the important issues are preserved on a minute-to-minute basis."

In fact, he continued, "I call it 'kicking the chair' [because] I let the trial lawyers know how I want the issues preserved."

But, Jacobs ' involvement can extend beyond the realm of enthusiastic observer.

"I usually file an appearance and actually argue points of law with briefs produced by other members of the appellate team back at the office," he explained, even though "judges really dislike making a ruling, only to find a five-page brief sitting on their desks after lunch citing six cases that demonstrate a different view."

Though Jacobs believes wholeheartedly in the concept of second chairing, he also stressed that it can have its limits, explaining, "trial lawyers are sometimes appreciative of this direction, but given the considerable confidence required to do trial work, sometimes they are not."

And continuing in that vein, MacAlpine cautioned fellow litigators that the presence of an appellate second chair "does not" and "should not" affect the trial strategy.

Rather, he said, "the presence of an appellate second chair allows me greater flexibility to follow my intended strategy, [and] if the strategy is flawed, appellate counsel will help expose the flaw before we get [to trial]."

What's more, he concluded, "if an appellate second chair is working a trial, he has agreed to the strategy in advance, [because] overwhelmingly, the goal of both counsel is to serve the client's best interests."

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