Consider the following situation: a regional sales manager resigns after his employer, a national manufacturing company, restructures its operations in a way that reduces his status. A few months later, the company is sued for predatory pricing and conspiracy to monopolize by a competitor that is also an occasional customer. Plaintiff's complaint is based on internal price lists apparently disclosed to plaintiff by the former sales manager.

BY GEORGE B. BRUNT AND LAURIE WEBB DANIEL

The case is assigned to a new federal judge in a rural district. After some preliminary discovery, litigation counsel advises that the case will most likely be lost at trial but won on appeal. This lawyer is promptly fired. The company then hires another lawyer, who tells the company what it wants to hear: that this suit is just a nuisance case trumped up by a disgruntled former employee. Although settlement is impossible because of the unreasonable demands of the plaintiff, the lawyer assures the company that the case carries no risk.

Five years later, after a seven-week jury trial has ended with a multimillion-dollar verdict that is trebled by the trial judge pursuant to antitrust laws, the company hires an appellate lawyer to try to turn this disaster around. The appellate court, however, rejects most of the arguments because they were not raised at trial and affirms the bulk of the award.

The lesson of this case is obvious: when it comes to litigation that could expose your company to substantial risk, your legal team should have an appellate specialist on board from day one. Although we have just described a hypothetical situation, the facts are based on real cases and the outcome is all too realistic. Obviously, hindsight affords us perfect clarity, but some things can always be predicted: the case exposed the company to an enormous damages award, so the general counsel should have taken the first attorney's advice and had an appellate specialist on board from the beginning.

Much of the litigation that global corporations face today involves major issues in rapidly changing areas of the law—such as the use of intellectual property, compliance, securities laws, commercial matters, regulations, and antitrust issues—that could affect shareholder earnings in a major way. In a high-stakes matter, therefore, your team of outside lawyers should include someone who is an expert at guiding a case through the appellate process.

An appellate lawyer is a safety net, a precaution that you want to have in place before you fall. No matter where the litigation takes place or who hears the case, the outcome will depend on how the case was handled from the start. As Stephen Covey says in *The 7 Habits of Highly Effective People,* "Begin with the End in Mind."[1]

APPELLATE COUNSEL:

Why Hiring Them Early Pays Off

George B. Brunt and Laurie Webb Daniel, "Appellate Counsel: Why Hiring Them Early Pays Off," *ACC Docket* 22, no. 1 (January 2004): 64–79.
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George B. Brunt has more than 25 years of in-house counsel experience. In 2003, he concluded a nine-year appointment as general counsel of Alcatel Americas (ALA) near Dallas. Before Alcatel, he served as general counsel for Digital Switch Corporation, Citicorp's Information Business Sector, and ITT's Business Systems Group. He is now pursuing an independent corporate governance project. He is available at gbbrunt@aol.com.

Laurie Webb Daniel leads the appellate practice team of Holland & Knight LLP. Her practice focuses on developing legal strategies for complex litigation. Based in Atlanta, she has appeared in trial and appellate courts nationwide, including the U.S. Supreme Court, and has served as a commentator for CNN on U.S. Supreme Court practice. She is available at ldaniel@hklaw.com.

This article gives you background on the origins of appellate advocacy, describes how to use appellate advocates, offers a cost/benefit approach, explains how appellate counsel can add value from beginning to end, suggests how to integrate appellate counsel into your team, and concludes that the evidence is overwhelmingly in favor of the early hiring of appellate counsel who can give experienced, practical, and strategic advice right from the start.

ORIGINS OF APPELLATE ADVOCACY

The Public Sector

The allocation of responsibilities between trial and appellate counsel is not a new concept: the federal government institutionalized this relationship more than a century ago. On June 22, 1870, President Grant signed into law a bill that created the Office of the Solicitor General of the United States.[2] The act provided that the Solicitor General would be "an officer learned in the law" who would assist the Attorney General in the performance of his duties.[3] In other words, more than 130 years ago, Congress recognized that the efficient handling of the government's law business required more than trial lawyers and that the government's legal team also needed someone who would be in the best position for advocating the government's position at the appellate level.[4]

Right from the start, one of the most important functions of the Solicitor General was to develop and harmonize the government's position in the appellate courts across the county.[5] The first Solicitor General, Benjamin Bristow, "began the practice of reviewing each case in which the government received an adverse decision in the lower court to determine whether the case was deserving of appeal. 'If his decision was to appeal . . . it was his job to decide how best to defend the cause of the Government.'"[6] The Solicitor General also quickly assumed responsibility for the government's U.S. Supreme Court docket, which accounted for much of the appellate litigation of the day.[7]

Today, the Solicitor General still supervises the nation's appeals, and his office handles all of the government's appellate work in the U.S. Supreme Court. In addition, the Office of Solicitor General actively participates in amicus curiae filings in many other cases before the U.S. Supreme Court and the Courts of Appeals.[8] As a result, the government's position on appeal is coordinated nationwide by lawyers whose professional expertise is in appellate advocacy.[9]

At the 2003 annual meeting of the American Bar Association, the current Solicitor General, Ted Olson, joined most of his predecessors for a frank discussion of the tough issues that each has faced as the nation's top appellate lawyer.[10] The panel members agreed that an important function of the Office of the Solicitor General was to monitor the government's position in cases before they reach the U.S. Supreme Court. Otherwise, the Solicitor General might be in the undesirable position of having to "confess error." In an informal conversation after the panel had disbanded, Solicitor General Olson told us that, with respect to selected, significant issues, his office gets involved in the trial court to make sure that the trial lawyers (1) adequately shape the record and (2) develop a sound legal position that is consistent with the government's approach in other cases.

The Private Sector

Appellate advocacy also flourishes in the private sector. In both criminal and civil contexts, appellate advocacy is now recognized as an established practice area. Appellate bar associations and sections of established bar associations devoted to appellate advocacy have been created on the federal, state, and local levels.[11] Where board certification is available,

appellate practitioners can earn this distinction by passing a rigorous examination.[12] Some law firms have organized appellate practice groups consisting of lawyers whose full-time focus is on appellate matters.

The same rationale for involving an appellate expert from the Office of the Solicitor General in the trial court in government cases applies to corporate litigation. Appellate counsel can help shape the record and develop a thorough analysis of the issues in the case that can help your company avoid embarrassing concessions and adverse rulings at the appellate level. In addition, when a corporation faces litigation of the same or related issues in different trial courts across the country, a designated appellate lawyer provides consistency and efficiency to the cases.

Increasingly, companies are including appellate counsel on the litigation team in the trial court or before litigation to assist with risk analysis of a major transaction. Because of their expertise, special appellate counsel are often hired by big companies to handle significant appeals. At Alcatel, where one of the authors of this article used to work, for example, it is common practice to bring in an appellate specialist as a consultant to the trial lawyers and to have the appellate lawyer argue the case on appeal.

Some companies even have in-house appellate departments. DuPont, for example, handles 85–90 percent of its appellate work internally. DuPont's in-house appellate lawyers conduct the research, prepare the briefs, and present arguments in appellate courts. DuPont's in-house appellate specialists have briefed and argued cases in the U.S. Supreme Court, in almost all of the federal circuits, and in the appellate courts of at least 16 states and Washington, DC. Using full-time appellate specialists for the bulk of its appeals enables DuPont to maintain consistency of position, quality of work product, and cost savings.

USING APPELLATE ADVOCATES

You can use appellate advocates in a variety of ways. In some situations, trial lawyers turn over the entire file to an appellate lawyer as soon as an adverse verdict is delivered in the trial court. In other cases, the appellate specialists act as experts and consultants to the trial lawyers, editing their briefs and preparing them for oral argument through moot court exercises. Some appellate lawyers specialize even further, concentrating on, for example, amicus curiae briefs or U.S. Supreme Court pleadings.

Lawyers who focus on appellate practice bring a distinct perspective to a case. If confronted with adverse evidence, they tend to look for a creative legal analysis that will yield a favorable result regardless of bad facts. Appellate lawyers are more familiar with the types of issues that will interest an appellate court—and the arguments that will be unpersuasive to the judges. Appellate lawyers put a high value on clear writing and thinking because of the importance of written advocacy in the appellate process. Their familiarity with appellate procedure is a significant asset because appellate lawyers know the traps and tricky jurisdictional rules that can cause the uninformed to lose an appeal.

Appellate lawyers are used to fielding multiple questions from multiple judges under strict time limits whereas a trial lawyer usually has to answer to only one judge at a time. A lawyer specializing in appellate practice tends to appear before the same judges over and over and inevitably develops a comprehensive understanding of the various judges' feelings about various cases; additionally, lawyers who argue in front of the same judges become known to the judges and enjoy a familiarity, rapport, and credibility with the judges that a lawyer who argues appeals only occasionally couldn't hope to have.

COST/BENEFIT ANALYSIS

A cost/benefit analysis may help you justify hiring appellate counsel early in many cases. You might be thinking, "Sure, this sounds good in theory, but my company isn't the size of the federal government or DuPont, and managing litigation costs is a priority for me. Why should I spend today's dollars on appellate counsel in a case that hasn't even been tried yet?" The answer is that it makes good sense to hire appellate counsel early in the case to help analyze the legal issues in a particularly contentious transaction or risky case.

Involving an appellate lawyer in trial court proceedings avoids duplication of effort, and more importantly, involving an appellate lawyer early means that a specialist is already laying the foundation for the appeal and can hit the ground running when the time comes to appeal the case. In certain types of

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- American Academy of Appellate Lawyers, newsletter with articles on laying the foundation for appeals in the trial court, at www.appellateacademy.org.

- John W. Borg and David F. Herr, "Handling Appeals: Beyond Litigation as Usual," *ACCA Docket* 16, no. 6 (November/December 1998): 34–40, available on ACCA Online[SM] at www.acca.com/protected/pubs/docket/nd98/appeals.html.

- Federal Judicial Center, Federal Judicial History, www.fjc.gov/home.nsf/page/ca_bdy.

- Holland & Knight Appellate Team, practical information regarding appellate practice, at www.appellatesource.com/.

- JOURNAL OF APPELLATE PRACTICE AND PROCESS, articles on the influence of appellate practice on the development of the law, at www.ualr.edu/~appj/.

- "Litigation Management," *ACCA Docket* 14, no. 5 (September/October 1996): 60–64, available on ACCA Online[SM] at www.acca.com/protected/pubs/docket/so96/litigation.html.

- Megalaw.com, time-saving links to many other useful appellate websites, at www.megalaw.com/top/appellate.php.

ON PAPER:

- STEPHEN R. COVEY, THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE, (Simon & Schuster 1989).

- Section of Litigation, American Bar Association, THE LITIGATION MANUAL: SPECIAL PROBLEMS AND APPEALS (ABA, 3d ed., 1999).

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cases, particularly those in which the stakes are high or the legal theories are complex or novel, you can practically guarantee that the decision of the trial court will be appealed. In such a situation, it is cost-efficient to hire an appellate lawyer early.

For example, almost every intellectual property case that the authors have been involved in as a plaintiff includes an antitrust counterclaim by the defendant. Discovery issues must be carefully viewed from both an intellectual property and an antitrust perspective, which often means asking a court to apply and sometimes extend the law to new situations—precisely the kind of work done by an appellate court, not a trial court. Because the scope of the appellate arguments is limited to the testimony contained in the trial record, companies—particularly those in the high technology business like Alcatel—have found that involving an appellate lawyer early to help shape the trial record for the inevitable appeal is especially important.

Sometimes, the real goal of hiring an appellate lawyer is not to prepare for appeal but to avoid an appeal. Appellate lawyers are experts at distilling complex facts and legal theories down to their essence in a limited number of pages to persuade a court that has no previous knowledge of the case to

rule in favor of their clients. Appellate lawyers, therefore, are particularly well qualified for handling summary judgment motions because they can make a complex case simple, a "must" if you want to convince a trial judge to enter judgment in your favor without holding a trial.

The cost of hiring an appellate lawyer need not be prohibitive. You can use alternative billing arrangements when hiring an appellate specialist to perform certain tasks, such as preparing a motion to dismiss or a motion for summary judgment. Like an appeal, these motions involve an established and finite record and are more suitable for fixed-fee arrangements than the open-ended discovery or trial stages of litigation. Of course, the price needs to reflect the complexity of the matter, but you can negotiate a fair fee to cover this type of work in the trial court, thereby controlling costs and gaining high-quality work.

THE INCREMENTAL COST OF INCLUDING AN APPELLATE SPECIALIST ON THE TRIAL TEAM IS MINIMAL COMPARED TO THE AMOUNT OF MONEY THAT A COMPANY CAN LOSE WHEN A COMPLEX COMMERCIAL CASE OR PERSONAL INJURY ACTION GOES AWRY.

This alternative fee approach recently was used successfully for a summary judgment motion in a convoluted piece of litigation handled by Holland & Knight. In that case, Metrotrans Corporation, a bus manufacturer, sued its largest stockholder, the Mayflower Corporation PLC, for more than $70 million for destruction of business under various lender liability theories, including breach of contract, fraud, promissory estoppel, and breach of fiduciary duty. Mayflower, the British company known for its red double-decker buses, counterclaimed for securities fraud and asked for the return of the $24 million that the company had paid for its Metrotrans stock.

To complicate matters, the CEO of Metrotrans jumped into the fray, claiming that the loss of his company had caused him to suffer a mental disability that had accelerated a put/call option under which Mayflower allegedly owed him $12 million. Discovery yielded more than 80 depositions, rooms full of documents, and expert reports supporting both the damages claim by Metrotrans and the securities fraud counterclaim by Mayflower. There was even psychiatric testimony that the CEO of Metrotrans had suffered from a serious mental disorder with psychotic elements.

For a fixed fee, an appellate lawyer handled the entire summary judgment phase of the case for Mayflower, including briefing the defense motion and opposing the cross-motions brought by Metrotrans and its CEO. Although the fee was substantial, it was locked in and was no more than the company would have paid in fees if the matter had been handled on an hourly rate basis.

In the end, the fee turned out to be money well spent because the appellate lawyer's work resulted in a global settlement that avoided the need for a trial and an appeal. In ruling on the summary judgment motions, the trial judge threw out the core claims by Metrotrans but let Mayflower's securities fraud counterclaim go forward.[13] Shortly afterward, Mayflower received an unsolicited offer from Metrotrans and its CEO to settle the case for an amount that was less than the projected cost of trial.

The risk of losing big provides the most compelling reason for hiring appellate counsel early on. The incremental cost of including an appellate specialist on the trial team is minimal compared to the amount of money that a company can lose when a complex commercial case or personal injury action goes awry. If the hypothetical that we described at the beginning of this article doesn't convince you that you should hire appellate counsel early, consider a few real-life cases in which an appeal was lost or dismissed as untimely because the trial team had failed to preserve an argument or observe appellate rules that apply even in the trial court.

For example, in *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.,* the trial court entered a $5 million judgment on a jury finding that the defendant, CAPECO, had engaged in illegal price discrimination and monopolization in violation of the federal antitrust statutes and Puerto Rico's tort law. On appeal, CAPECO argued that the plaintiff's status as both a competitor and a

purchaser defeated the price discrimination claim under a "primary line" analysis. Unfortunately for CAPECO, the First Circuit said that it would not "consider the argument that this is a primary-line case, because CAPECO has chosen to make this argument for the first time on appeal."[14]

The appeals court went on to reject the argument that the antitrust violations were not actionable under the law of Puerto Rico because CAPECO had "waived them by failing to object to the jury instructions."[15] Regarding a challenge to the sufficiency of the evidence, the court found that CAPECO had "waived review here of this argument too by failing to move at any time for a judgment as a matter of law on this ground under Fed. R. Civ. P. 50(a)."[16] The appeals court thus concluded: "CAPECO's failure to make the points below that it now argues on appeal hamstrung its attempt to obtain reversal of the price discrimination and tort claims."[17] Although CAPECO was able to get a reversal of the monopolization count, its relief was limited to a new trial on damages with no guarantee that the second verdict would be smaller than the first.[18]

ALTHOUGH CAPECO WAS ABLE TO GET A REVERSAL OF THE MONOPOLIZATION COUNT, ITS RELIEF WAS LIMITED TO A NEW TRIAL ON DAMAGES WITH NO GUARANTEE THAT THE SECOND VERDICT WOULD BE SMALLER THAN THE FIRST.

In *DeRance, Inc. v. PaineWebber, Inc.,* a charitable foundation sued PaineWebber and a broker for breach of fiduciary duty in connection with a

gold futures account. The case was tried to a jury, which awarded the plaintiff $7.7 million in compensatory damages plus punitive damages. One of PaineWebber's primary points on appeal was that the trial court had erred by having failed to give the jury instructions requested by PaineWebber regarding contractual limits on fiduciary liability.

The Seventh Circuit held that PaineWebber had waived this point because there was no record of an objection to the instructions that had been given. The trial team had failed to ask the court reporter to take down and transcribe the charging conference in which they had discussed the proposed instructions with the judge.[19] Although the appellate court did reduce the amount of the punitive damages, it approved a judgment against PaineWebber of more than $14 million. An appellate lawyer involved in the case as a consultant for the trial team would presumably have saved PaineWebber from this mistake.

In *Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Authority,* the defendant promptly filed its notice of appeal after having been hit with a $41 million judgment on an antitrust claim. The Fifth Circuit, however, dismissed the appeal because, under the Federal Rules of Appellate Procedure in effect at the time, the notice of appeal was premature and nullified by a pending motion for prejudgment interest. The defendant, whose lawyers were not familiar with the rules of appellate procedure, did not file a subsequent notice of appeal after the trial court had denied the motion and thereby lost its opportunity to appeal the $41 million judgment.

Compare these cases with some others in which an appellate lawyer had counseled a trial team on the presentation of evidence and postjudgment procedure in the trial court. A case involving the nation's leading marine anchor manufacturers is a good example. U.S. Anchor Mfg., Inc., was started by the former president of its chief competitor, Tie Down Engineering. After a price war had broken out between the companies, U.S. Anchor filed a predatory pricing conspiracy action against Tie Down and Tie Down's exclusive marine anchor distributor, Rule Industries. A seven-week jury trial ended with a $5 million judgment in U.S. Anchor's favor, based largely on an exhibit that U.S. Anchor had characterized as a "smoking gun."[20] The exhibit was a memorandum to Rule from Tie Down's CEO, Charles MacKarvich, describing the pricing levels that would be needed to inflict the most losses on U.S. Anchor during its first year of business.[21]

Recognizing that any jury seeing this document would sympathize with U.S. Anchor, the defense team presented its case in trial court but kept its eye on the appellate court and, specifically, the requisite legal standards prevailing in the appellate court. U.S. Anchor won at trial, but the defendant's strategy paid off when the Eleventh Circuit reversed, holding that U.S. Anchor had failed to meet its burden of proving an antitrust conspiracy.[22]

In fact, after having noted that the exhibit did not suggest below-cost pricing, the appellate court's reasoning tracked the testimony of Tie Down's witnesses: "The MacKarvich market report . . . merely shows the prices at which it would be possible to inflict losses on the newcomer. . . . Tie Down's experts and MacKarvich himself testified that such studies are common in competitive industries and consistent with legitimate competition based on price. MacKarvich's recommendation to set prices low enough to inflict losses on U.S. Anchor merely shows a desire to win on the basis of efficiently producing a product and selling it at a lower price than less efficient rivals. It is not unlawful to slash prices in an attempt to obtain more sales, even if the result is that a competitor happens to be driven out of business."[23]

Appellate counsel provided similar support in a suit by Alcatel against DGI Technologies, Inc., in which DGI filed a counterclaim for antitrust violations. The trial court found liability on the counterclaim, but the finding was successfully overturned on appeal.[24] In that case, Alcatel's trial team had the services of an appeals specialist who reviewed the documents and strategy from the very beginning of the case.

HOW APPELLATE COUNSEL CAN ADD VALUE FROM BEGINNING TO END

By now, you should be convinced that hiring appellate counsel early makes sense, but you might be wondering when you should select an appellate lawyer for your team. In other words, what does early mean? Should you wait until after discovery has produced the factual framework for the legal analysis? Or should you develop the legal analysis

first so that you know what facts to seek out during discovery?

Just as you want to know where you are going and how you will get there when you start a trip, you should be similarly alert and curious at the beginning of any litigation. In all cases, you should consider where you want to go and how you plan to get there. But appellate lawyers are useful in matters besides litigation. The "look-ahead" perspective of an appellate lawyer can help pave the way for the commercial objectives in a potentially contentious deal. If you are facing a particularly thorny transaction, you might consider calling on appellate counsel to advise you regarding the legal arguments that can save the deal in the long run if the deal is challenged in court. In other words, use an appellate lawyer from the beginning to help you develop a road map for your significant transactions, as well as for any high-stakes litigation that comes up.

Often, the road map should be a document addressing all possible legal theories, applicable standards, and burdens of proof that can be used as a guide or a checklist for subsequent pleadings, discovery requests, motions to dismiss or for summary judgment, the pretrial order, witness outlines, exhibits, posttrial motions, and, if necessary, the appeal. The road map, of course, should be updated at each new stage of the litigation to include new developments of fact or law. Underlying the fluctuating procedural strategies, though, should be a well-grounded substantive analysis that compels an outcome in your favor.

Besides the initial road map stage, appellate lawyers can add value at many other stages of a matter before an appeal is actually filed. As mentioned earlier, appellate lawyers are a natural choice for the lead role on dispositive pretrial motions that likely will be the subject of an appeal. If you receive an adverse interlocutory ruling on an important issue, for example, you should alert appellate counsel so that he or she can determine whether you can pursue an immediate appeal. Involving an appellate lawyer early is particularly helpful in the class action context in which you must comply with short deadlines in order to seek review of a class certification ruling under Rule 23(f) of the Federal Rules of Civil Procedure.

You should involve an appellate lawyer at trial in a complex case to help shape the record for appeal by making sure that all necessary objections are made and that the legal theories are sufficiently developed in the trial court.[25] The appellate lawyer can keep track of the evidence that has been admitted to make sure that there is adequate support for every legal argument that you might want to make later on. The appellate lawyer knows to require the court reporter to transcribe all aspects of the proceeding, including sidebar discussions with the court and video depositions played to the jury, to preserve objections. Because many appellate issues arise from the court's instructions to the jury, an appellate lawyer should be involved in drafting your requested jury instructions and in noting the grounds for your objections to the instructions that are actually given. At the close of evidence, the appellate lawyer should be the one making the defendant's arguments in support of a judgment as a matter of law because, if these arguments are not fully developed in the trial court, they will not be considered on appeal.

IF YOU ARE FACING A PARTICULARLY THORNY TRANSACTION, YOU MIGHT CONSIDER CALLING ON APPELLATE COUNSEL TO ADVISE YOU REGARDING THE LEGAL ARGUMENTS THAT CAN SAVE THE DEAL IN THE LONG RUN IF THE DEAL IS CHALLENGED IN COURT.

Having a lawyer who can "look ahead" can also be extremely important in the punitive damages area, which has been evolving in recent years.[26] A consensus appears to be developing that the lead trial lawyer should not be the one to handle the punitive damages phase of a trial, which in many states will occur after a party has lost on liability and a jury has determined that punitive damages should be awarded.[27]

Companies facing punitive damages claims should have a specialty team lined up in advance

and ready to present evidence and handle legal issues relating to the punitive damages phase. A necessary member of the team is an appellate lawyer who knows how to preserve objections to the amount of punitive damages, as well as the procedural aspects of the punitive damages phase, and who can make sure that every possible legal argument for challenging the damages is included in the posttrial motions. Likewise, an appellate lawyer would know that any argument that rationally limits the scope of punitive damages and a state court's authority over them must be explored at trial in order to be considered on appeal.

IT IS CRITICAL FOR YOUR APPELLATE LAWYER, THEREFORE, TO REVIEW ALL POSTTRIAL MOTIONS TO MAKE SURE THAT THEY INCLUDE EVERY POSSIBLE THEORY THAT YOU MIGHT WANT TO RAISE IN THE APPELLATE COURT.

In addition to posttrial motions seeking a reduction of excessive damages, an appellate lawyer can provide valuable services in connection with posttrial motions requesting judgment as a matter of law or a new trial. Although the posttrial motions for judgment as a matter of law must be based on arguments made during trial, these motions can provide an opportunity to "clean up" the record by elaborating on previous points. Appellate courts will not consider new arguments raised on appeal, but they will consider an argument made for the first time in a posttrial motion if the other side did not object to it at the time. It is critical for your appellate lawyer, therefore, to review all posttrial motions to make sure that they include every possible theory that you might want to raise in the appellate court.

This advice is not limited to domestic litigation. Appellate specialists can provide critical help on international cases, as well. There have been times when we were advised, by an appeals attorney familiar with the appeals tribunal, that we would lose an international case at the trial level but win on appeal in a certain court. Having that kind of advice in advance can be significant in deciding whether to file suit.

HOW TO INTEGRATE APPELLATE COUNSEL INTO YOUR TEAM

Involving counsel early in a transaction or litigated matter, however, is not yet the norm. Many commercial lawyers think of themselves as the experts in their particular area of practice and rarely think of asking for input from people who argue cases in appellate court. Many big-time trial lawyers seem to feel themselves capable of handling all phases of litigation and tend to resist hiring appellate counsel at all, let alone early in a litigation matter. Given this kind of resistance, how do you persuade a transactional or a trial lawyer that adding appellate counsel to the team at the beginning really does make sense?

Adding an appellate lawyer to your team of outside counsel won't be a problem, of course, if lead counsel comes up with this idea, as some do. An experienced trial lawyer might put an appellate lawyer who is an expert in a particular area of the law on the litigation team at the outset of a matter to advise on legal strategies that will be important throughout the case. For example, a business lawyer may want to add an appellate lawyer experienced in securities litigation who has the most up-to-date knowledge of disclosure requirements and the risk of liability for nondisclosure. As another example, a lawyer who has handled appeals involving Robinson-Patman Act claims often is qualified to advise a trial team on pricing issues.

On more than one particularly critical case, it became necessary to inform our trial team, for example, that we were involving additional counsel in a case at Alcatel. We came up with creative ways to develop teamwork. For example, once we took the entire trial team to an offsite location to work through the trial strategy. We hired Stephen Covey, the author of *The 7 Habits of Highly Effective People,* to spend several hours at the beginning of the meeting teaching principles to the

team that would lead to a successful result. We took breaks for activities that involved teamwork, like canoeing down the Snake River. Though this method might sound like an extreme strategy and it was expensive, the case was important, and the result was upheld on appeal, making the expense seem insignificant in contrast.

LIKE A FOOTBALL COACH WHO HAS A "SPECIAL TEAM" READY TO TAKE THE FIELD AT THE BEGINNING OF THE GAME, YOU SHOULD ASSEMBLE A TEAM OF OUTSIDE COUNSEL THAT, FROM THE START, HAS THE APPROPRIATE SPECIALISTS.

CONCLUSION

Like a football coach who has a "special team" ready to take the field at the beginning of the game, you should assemble a team of outside counsel that, from the start, has the appropriate specialists. Even at the transactional stage, appellate counsel can provide a valuable perspective that will help you look ahead and assess the risks and opportunities of the deal for the future. If a matter goes to litigation, you will need not only an expert cross-examiner but also a designated expert in the particular area of the law and procedure to develop creative legal theories, keep an eye out for the preservation of error, and make sure that the record is developed to the best extent possible.

Involving an appellate specialist makes sense in the areas that are most likely to be the subject of an appeal: dispositive pretrial motions, framing the legal theories contained in the pretrial order, jury instructions, motions for judgment as a matter of law, damage theories, and punitive damages. When dealing with a high-stakes matter, therefore, you should "begin with the end in mind" and include an appellate lawyer as a member of your team.

NOTES

1. STEPHEN R. COVEY, THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE (Simon & Schuster 1989).
2. Act of June 22, 1870, ch. 150, 16 Stat. 162.
3. *Id.* § 2, 16 Stat. at 162.
4. Seth P. Waxman, "Presenting the Case of the United States as It Should Be: The Solicitor General in Historical Context," address to the Supreme Court Historical Society (1998), at www.usdoj.gov/osg/aboutosg/sgarticle.html. Although the 1870 law created the new office of Solicitor General, it also had a retrenchment goal: to consolidate and eliminate unnecessary legal officers. *Id.* Pursuant to this measure, the government discharged Mr. Walt Whitman, who had held the position of "third-class clerk." *Id.* As General Waxman observed, "Thus was one of this country's great creative spirits unbound from the demands of government service." *Id.*
5. *Id.*
6. *Id.*
7. *Id.* At the time that the Office of the Solicitor General was created, there were no intermediate appellate courts. The circuit courts handled both trial work and some appellate work. The U.S. Supreme Court handled the lion's share of appellate work in this country until the creation of the United States Court of Appeals when Congress passed the Judiciary Act of 1891. *See* Federal Judicial Center, Federal Judicial History, www.fjc.gov/home.nsf/page/ca_bdy.
8. *See* Waxman, *supra* note 4. In the term before Solicitor General Waxman delivered this address in 1998, the Solicitor General decided whether to authorize appeal or to appear as an intervenor or amicus in more than 2,300 cases, and his office participated in approximately 75 percent of the oral arguments heard by the U.S. Supreme Court. Waxman, *supra* note 4.
9. With only about 20 lawyers, the Office of the Solicitor General is not able to prepare all of the government's briefs in the Courts of Appeals. Many of the local offices of the Department of Justice that prepare the briefs and present argument in the Courts of Appeals, however, have an appellate division or similarly designated Assistant United States Attorneys who specialize in appellate advocacy. In the state court systems, the offices of some district attorneys also have appellate divisions to handle their appeals. Thus, use of appellate specialists to develop and harmonize the government's position on appeal is well established in the different levels of government. *See* website of the Office of the Solicitor General, at www.usdoj.gov/osg/aboutosg/function.html; *see also, e.g.*, www.usdoj.gov/usao/dc/officeorg/appellate.html; www.usdoj.gov/usao/fls/orgstruct.html; www.usdoj.gov/usao/gan/appellate.htm.
10. This program was sponsored by the Section on Litigation of the American Bar Association.

11. National appellate bar associations include the Council of Appellate Lawyers and the American Academy of Appellate Lawyers. The American Bar Association Sections on Litigation and Tort and Insurance Practice have appellate practice or appellate advocacy committees.
12. For example, the bars of California, Florida, and Texas have board certification in appellate advocacy.
13. In re Mayflower Corporation, Civ. Action No. 3:01-CV-23-JTC (N.D. Ga. Nov. 15, 2002).
14. Coastal Fuels of Puerto Rico, Inc., v. Caribbean Petroleum Corp., 79 F.3d 182, 189 (1st Cir. 1996).
15. *Id.* at 199.
16. *Id.*
17. *Id.* at 204.
18. *Id.* at 199–200.
19. DeRance, Inc. v. PaineWebber, Inc., 872 F.2d 1312, 1322 (7th Cir. 1989).
20. U.S. Anchor Mfg., Inc. v. Rule Industries, Inc., 7 F.3d 986, 992 (11th Cir. 1993).
21. *Id.* at 990.
22. *Id.*. at 1001.
23. *Id.* at 1002.
24. Alcatel USA, Inc. v. DGI Technologies, Inc., 166 F.3d 772 (5th Cir. 1999).
25. *See* 50-Off Stores, Inc. v. Banques Paribas (Suisse), S.A, 180 F.3d 247, 258 (5th Cir. 1999) (in affirming a $10 million award for securities conversion, the court held that the defendant waived an affirmative defense of proportionate responsibility by not including it in the pretrial order and by failing to request a jury instruction on the issue).
26. In BMW of America, Inc. v. Gore, 517 U.S. 559 (1996), the U.S. Supreme Court established guideposts for determining whether a punitive damages award violates the substantive due process guaranteed by the Constitution. The U.S. Supreme Court elaborated on these factors in its recent decision reversing the $145 million punitive damages award in State Farm Mut. Aut. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003).
27. Strategies for litigating the punitive damages phase after the *State Farm v. Campbell* decision are discussed in the materials distributed in connection with the 2003 Spring Conference of the Product Liability Advisory Council ("PLAC"), at www.plac.com.