

The Trial Team's New Secret Weapon? An Appellate Pro

By Erin Coe

Law360 (June 10, 2019, 6:00 PM EDT) -- When attorneys are living and breathing a case day after day, it can be hard for even the best trial teams to know whether their litigation strategies are as fail proof as they think they are. That's why Rick Runkel, general counsel at software company Synopsys Inc., sees value in retaining appellate counsel early on in critical cases.

"I do think trial teams can get dug in on issues — and they have to, in order to effectively advocate at trial," he said. "It is useful to have a fresh set of eyes on the tough questions."

Synopsys retained an Orrick Herrington & Sutcliffe LLP appellate partner a few years ago after Orrick attorneys had filed a piracy case on the company's behalf that raised several novel intellectual property and jurisdictional issues that were almost certain to be appealed, Runkel said.

The attorney, Andrew Silverman, researched one of the toughest issues and presented his findings to the Orrick trial team during a strategy session. The company was so impressed by the analysis that it had Silverman brief the issue and argue it at the summary judgment hearing. After Synopsys received a favorable tentative ruling, the case settled.

"There are a lot of cases where the situations are really a close call," Runkel said. "It's really helpful for someone to come in and marshal the breadth of authority, apply the facts and come up with what they think is the best analysis."

Synopsys is among a growing group of companies staffing appellate lawyers on high-stakes cases long before an appeal is filed and sometimes as a way to prevent the need for one altogether.

This approach is used mainly by large clients for bet-the-company matters, class actions and other large cases where an appeal is often inevitable. It's not uncommon for appellate lawyers to come in to help trial teams after a verdict or key ruling, but they are increasingly being asked to do work that has traditionally been considered trial lawyers' domain — overseeing litigation strategies, writing dispositive motions and presenting evidence and arguments at trial.

While a few attorneys say they've made a long career out of it, many sources say clients have become much more interested within the last five years in having appellate lawyers play more active — or "embedded" — roles at the trial court level.

Growing Uncertainty

In a global marketplace, companies are facing greater risks than they did during the financial crisis, mainly due to the unpredictability of politics, international trade conflicts and the U.S. economy, and when legal problems do occur, they can quickly multiply, said Michael Rynowecer of The BTI Consulting Group Inc.

“The exposure of a general counsel on a big, important matter has gone up 30 to 40% over the past three years,” he said. “When companies have big enough matters, regulators are showing up, class action lawyers are alleging fraud, and securities lawyers are alleging there should have been disclosures made to shareholders. Now a company is facing five lawsuits instead of one.”

Because of the bigger risks, companies are under more pressure to dispose of litigation quickly, according to Rynowecer. That’s where bringing appellate lawyers earlier into litigation can help. Companies are looking to gain insight into the long-term implications of their litigation strategies so that they can prevail at the lower court, and if they lose or the case is appealed, they are looking to be in a better position for the next round.

“The cost of having [appellate attorneys] involved is relatively small compared to the exposure,” Rynowecer said. “It’s seen as a risk management tool.”

As clients look to assemble the best legal team to improve their decision-making throughout litigation, appellate attorneys are searching for new opportunities to be profitable for their firms.

“There has been a realization that if you want to make money [in the appeals practice], you’ve got to expand the pot of work,” said Deena Jo Schneider of Schnader Harrison Segal & Lewis LLP, who’s served as an appeals and issues consultant in cases at the trial level for decades.

“You can’t just handle cert petitions and major appeals if you need to keep a big team of people busy,” she said. “The Supreme Court doesn’t take that many cases, and clients aren’t going to pay a ton of money for cert petitions.”

Because top-tier Supreme Court work is limited, many firms have to compete for it, as signaled by recent lateral moves by appellate lawyers. Earlier this month, two Supreme Court advocates, Paul Hughes and Michael Kimberly, left Mayer Brown LLP to lead McDermott Will & Emery LLP’s appellate practice. And in January, high court veteran Lisa Blatt left Arnold & Porter to join Williams & Connolly LLP, soon after it was announced that Williams & Connolly’s former appellate practice leader, Kannon Shanmugam, would move to Paul Weiss Rifkind Wharton & Garrison LLP to create an appellate practice there. Blatt and Shanmugam each have given dozens of Supreme Court arguments.

Seeing Advantages

Appellate attorneys can elevate a trial team on numerous fronts. They are often strong brief writers who can boil down the essentials of a case and hone the legal arguments. They also can use their long-term perspective to help shape discovery proceedings.

Hogan Lovells had defended Solvay Pharmaceuticals through a government investigation in a whistleblower’s False Claims Act case in Texas when, after the case was unsealed, appellate partner

Jessica Ellsworth came in to write the motion to dismiss in 2010. The company was accused of inducing false Medicaid claims through alleged off-label marketing and kickback schemes for three of its drugs.

Although the district court largely denied the motion, Ellsworth worked closely with the trial team to set up discovery to try to show the relators lacked the evidence to prove liability under several legal theories. After about six years of discovery and eight partial summary judgment rulings, Solvay prevailed at the district court.

“We built up credibility with the judge, whose decisions consistently recognized that there was overreaching with what was promised in the complaint and what the relators were able to generate in discovery,” Ellsworth said.

The Fifth Circuit affirmed the ruling for Solvay in 2017, and the U.S. Supreme Court rejected a bid to review the case in May 2018.

“When the other side appealed to the Fifth Circuit, the record was nearly 100,000 pages long,” Ellsworth recalled. “If someone was coming in as the appellate lawyer to review the prior eight years ... it would have been a daunting task. Because I had had a finger on the pulse of the dispositive motions along the way, it was seamless to argue the appeal, and we were affirmed across the board.”

Appellate attorneys also tend to have a laser-like focus on preservation concerns and are able to tee up arguments so that clients are in a more optimal position on appeal.

Paul Hastings LLP appellate partner Igor Timofeyev and his colleagues put this skill set to work when they were called in ahead of trial to help defend Kolon Industries Inc. in a suit in Virginia federal court alleging that the company stole DuPont Co.’s trade secrets related to Kevlar body armor. By that point, there was a serious possibility that Kolon could lose at the lower court level.

After the district court excluded evidence suggesting DuPont disclosed many of the trade secrets in prior litigation as Kolon claimed, Timofeyev and other appellate attorneys filed a “proffer” with the district court containing the evidence Kolon would have offered at trial, as part of an effort to preserve the argument that the evidence was improperly excluded.

“We really wanted to make absolutely certain our argument was properly preserved, and we had all supporting evidence in the record,” he said.

Kolon was hit with an adverse jury verdict at the district court of nearly \$920 million in 2011, but on appeal, the excluded evidence became a central issue that led the Fourth Circuit in 2014 to vacate the verdict and order a new trial, he said. Kolon later pled guilty to related criminal charges, agreed to pay DuPont \$275 million in restitution and the government \$85 million in criminal fines and reached a separate civil settlement with DuPont on confidential financial terms.

“The company was facing a near billion-dollar verdict, massive restitution and fine demands from the Department of Justice and a 20-year injunction on its main product,” Timofeyev said. “The viability of the company was on the line, and we helped the company to remain a profitable company.”

The presence of appellate attorneys on lower court cases also sends a strong message to the other side.

“It signals to our adversary that we’re in it for the long haul,” Silverman said. “It says we think this issue is important. It also can send signals that are helpful for settlement purposes.”

After clients have brought in appellate lawyers at the trial court level, they tend to repeat the practice, Ellsworth said. She added that Hogan Lovells’ appellate team generally works on about 20 cases a year in the trial courts.

“Some clients and trial teams balk at the idea of adding a person to the trial team who doesn’t have trial experience, but once a client has seen how much value appellate attorneys can bring, I’ve never seen a client not want to do it again,” she said.

Having A Presence Early On

If clients engage appellate attorneys after a verdict is in, they may have missed important opportunities to preserve arguments.

“It’s about identifying the appellate issues at every stage in the case so the client is in the best posture at all stages,” said Sherry Rozell, a trial and appellate shareholder at McAfee & Taft.

WilmerHale appellate attorneys tend to be called in to a lower court case when it’s clearly heading to trial, but they will sometimes consult during the discovery stage to make sure clients have the evidence they need to defend or attack an issue on appeal and other times craft summary judgment arguments, according to partner Felicia Ellsworth, who is of no relation to Jessica Ellsworth. Discussions about their appellate expertise and potential strategies for a client can come up as early as a client pitch meeting.

“We bake it in from the beginning,” Felicia Ellsworth said.

Appellate attorneys also told Law360 that they are increasingly being asked to come in to help at the trial court level not just when their own firm is handling the case, but when another firm is.

“The first time I did it three years ago, it felt unheard of ... to bring in a couple of people from an appellate team who were completely embedded with a trial team from another firm,” Silverman said. “It all starts with the client setting the right tone. The appellate lawyers are not here to look over anyone’s shoulder, but because they add value and can help the team.”

Erin Murphy, a Kirkland & Ellis LLP partner, said the greater frequency of appellate attorneys assisting trial teams from different firms is part of the broader trend of increased client interest in involving appellate counsel much earlier in the litigation process — and that bigger trend isn’t going away anytime soon.

“It’s becoming relatively common in bigger stakes cases, class actions and bet-the-company litigation, and even more so over the next five to 10 years, clients are really going to want an appellate perspective in place pretty much as early on as possible,” she said.

--Editing by Pamela Wilkinson and Alyssa Miller.