REFLECTIONS OF A FIFTH WHEEL: THE APPELLATE LAWYER ON THE TRIAL TEAM

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Maybe the best thing about being the appellate lawyer assigned to work with a trial team is that you are constantly reminded of why you chose appellate advocacy in the first place. I get a "there but for the grace …" feeling when I observe colleagues preparing endless examination and cross-examination outlines, or digesting voluminous depositions, or massaging tertiary exhibits or trial graphics that the jury likely will never see but that are needed "just in case." It is often puzzling to watch trial lawyers tell the jury, in a pointlessly pointillist manner, a story that one senses will ultimately be recounted far more persuasively in an appellate brief's broad, fluid brushstrokes. And in jury trials, all that effort is made primarily to convince an audience of people who have never set foot in a law school, and who could not tell *res ipsa* from "race tipster."

Leaving aside any such smug self-satisfaction, there is much to be said about the benefits of having an appellate lawyer on the trial team. The benefits are usually discussed in terms of discrete projects like jury instructions or post-trial motions, or generic roles like "preserving error" or "setting up the appeal." Having done my time on several trial teams, the real advantage of bringing in the appellate lawyer is not so much having the appellate lawyer handle specific types of projects as it is adding a different perspective, skill set, or personality to the mix. Appellate lawyers are not just trial lawyers who hate discovery; they are an entirely different animal.

For this reason, it may be more helpful to discuss the advantages of having an appellate lawyer on hand from early in the case less in terms of the specific litigation steps in which we can outdo our trial colleagues (for those, anything involving written language would be a good start), and more in terms of the new personalities we bring to the table. These are five faces of the fifth wheel: the Coroner, the Scholar, the "Big Picture" Guy, the Extra Set of Hands, and Joe (or Jo) Cool.

The Coroner

Trial lawyers are like treating physicians: They all want to be the one who saves the life of the patient. They thrive on seeing gratitude and profound admiration in the client's teary eyes as the jury foreman reads the favorable verdict. Appellate lawyers are more like what Samuel Shem called "No Patient Care specialists" in his satirical novel *The House of God*.[1] We provide necessary services, but we don't need to meet or touch the client or the client's family. First and foremost, we are like pathologist or, when the going gets really tough, the coroner. We delight in standing back, examining the corpse, and diagnosing what killed it. We also excel at preserving the evidence of disease or foul play that will form the basis of the next phase of the legal proceedings: the post-trial motion or appeal that will free the innocent and reveal the true malefactor.

The appellate lawyer *qua* coroner classically performs the role of preservation of error by making sure that the sins of the opposing lawyer or client, trial judge, or jurors are well documented and objected to. This may be done through motions in limine to preserve arguments on the admissibility of evidence, or carefully making a record of objections to improper jury instructions, or preparing motions for a new trial or judgment as a matter of law, or reminding

[1] Samuel Shem, *The House of God* 343, 386 (1978) (identifying Rays, Gas, Path, Derm, Ophthalmology, and Psychiatry as "No Patient Care specialties").

the trial lawyers to make a critical offer of proof. But sometimes the appellate pathologist can play an obverse role by using his diagnostic abilities to *identify and prevent* error by his own side. Think of the appellate lawyer leaping from the courtroom table and tackling the trial lawyer before he can make a "Golden Rule" argument to the jury that will constitute per se reversible error in that jurisdiction and make even the best verdict a do-over.

The Scholar

Trial lawyers are story tellers; most of them dislike reading judicial opinions. It is not so much that they think "the law is a ass"[2]; it is simply a nuisance. The trial lawyer believes, perhaps rightfully, that jurors come to the courtroom like a dozen Sgt. Joe Fridays, with a preference for "just the facts, ma'am."[3] They may be completely correct that the jury will not read, or understand, or even care one whit about the instructions (other than the one about not tweeting about the trial, of course). When my law school hands out degrees, it reminds graduates that the law embodies "the wise restraints that make men free," and trial lawyers hate to let a bunch of antique "wise restraints" get in the way of a good yarn. And it is hard to remember Perry Mason ever arguing a JMOL motion.

The appellate lawyer, on the other hand, embraces the life of the law, even if it seems like a mere abstraction. While trial lawyers measure their cases against the benchmark of what will persuade the jurors, the appellate lawyer's standard is not rhetorical force but legal requirements. First, the appellate lawyer brings a focus on the elements of the claim or defense, and is constantly asking how well the evidence will match up against those elements, or the applicable

[2] Charles Dickens, *Oliver Twist* ch. 51 (1838).

[3] The fastidious temperament of most appellate lawyers requires me to point out that despite popular legend, Sergeant Friday typically said, "All we want are the facts, ma'am," or "All we know are the facts, ma'am." Snopes.com, http://www.snopes.com/radiotv/tv/dragnet.asp (last visited Sept. 13, 2010).

burden of proof. Barring a post-verdict capitulation or settlement, the value of a jury verdict depends on whether the trial court or appellate panel will uphold it. Technical legal doctrines that are often lost on juries—such as the doctrine of loss causation in securities-fraud cases—may be case-dispositive in the arcane world of appellate lawyers.

Second, appellate lawyers excel at knowing what needs to be done and when under the statutes, rules, and case law of the particular jurisdiction. Trial lawyers may be focused on the directed-verdict argument that they believe may convince the trial judge to terminate the trial mid-course; the appellate lawyer recognizes (often from a sad post-mortem experience in a prior case) the necessity of moving for a directed verdict (okay, JMOL, if you want to be *au courant*) on all possible grounds at the close of the plaintiff's case or before submission to the jury, lest the grounds be waived. And when the earth-shattering verdict is returned, the appellate lawyer is more likely to remember the need to renew the directed-verdict motion in its entirety,[4] and not just make the most salient arguments that come to mind.

The appellate lawyer often brings to bear knowledge of rules that trial lawyers never worry about because they do not often see them being applied. For example, trial lawyers (or their back-in-the-office support team) usually show a preference for longer, and thereby fewer, jury instructions. Two-page-long compound beauties may capture all of the nuances of the claim in a single instruction, but they pose unnecessary risks on appeal in light of the common rule that a trial judge may properly reject a proposed instruction in its entirety if it is incorrect in any

[4] *See, e.g., Unitherm Food Sys., Inc. v. Swift-Eckrich*, 546 U.S. 394, 405 (2006) (failure to file a post-verdict Rule 50(b) motion waives the issues for appeal, even if they had been raised in a pre-verdict Rule 50(a) motion).

specific regard; the court has no obligation to correct partly erroneous instructions.[5] A series of short, snappy instructions may insulate each valid part from potential error elsewhere.

As another example, knowledge of how punitive damages are reviewed on appeal under *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), may give one better appreciation of how juries should be instructed. In one case, the plaintiffs proposed a seemingly innocuous instruction that suggested to the jury that punitive damages should be limited to a four-to-one or nine-to-one ratio to compensatory damages. At first glance, that seemed like it might be useful to the defense as a safeguard against a runaway verdict. But the appellate lawyer steeped in the law can point out that even those single-digit ratios may far exceed what due process would allow in that case, and the instruction would just give the jury a roadmap of how to increase the total sustainable award by shifting dollars from the punitive damages to the compensatory damages.

Even when it comes to evidentiary rules and rulings—the stuff trial lawyers are expected to know like the back of their hands— the appellate lawyer make have a more technical focus in making sure that the trial court rules the right way for the right reasons, i.e., reasons that will hold up on appeal. Trial lawyers can at times be more concerned about getting the evidence past the objection or getting the objection sustained, even if the grounds of success are a bit dubious.

Similarly, jurisdictions often differ in the rules for preserving evidentiary and other error. In some states, an unsuccessful motion in limine that the trial court denies on the merits will preserve the evidentiary objection for appeal. In other places, the party must repeat the objection

[5] As the Arizona Supreme Court has colorfully noted, "If a requested instruction is partly correct and partly incorrect, it is not the duty of the trial court to 'separate the sheep from the goats' and the entire instruction may be properly refused." *Pub. Serv. Co. of Okla. v. Bleak*, 656 P.2d 600, 608 (Ariz. 1982) (quoting *Powell v. Langford*, 119 P.2d 230, 233 (Ariz. 1941)), *cited in* 89 C.J.S. *Trial* § 716, at 343 n.10 (2001).

to the evidence at trial. The appellate lawyer may also have a keener appreciation for when an order of proof will be required in order to set up the issue for appellate review.

Finally, post-trial motions are often exceedingly rich in case law. They may be the short (or not-so-short) form of the arguments that will be made on appeal. It is frequently better, and ultimately more cost-effective, for the client to have the appellate lawyer handle them, as a matter of both overall efficiency and ensuring that the arguments are grounded and made properly and preserved for the next round.

The "Big-Picture" Guy

The appellate lawyer can provide an appreciation for the "big picture" that may be invaluable in many different phases of the case. Trial lawyers are often so obsessed with the details that they can get lost in the weeds. The appellate lawyer, who did not spends weeks or months taking depositions or sifting through boxes of records (yes, I am being old-school here), can use his blissful ignorance of detail to avoid the quagmire of minor facts, to separate the wheat from the chaff, and, to complete this miasma of mixed metaphors, see the forest rather than the trees or, worse yet, the underbrush beneath the arboreal canopy.

The "big picture" guy may achieve more by using a blunter instrument. Armed with precedent, the appellate lawyer may seek through well-researched motions in limine to exclude opposing evidence on a wholesale basis. This is something that trial judges like (it avoids a lot of in camera review) but can be wary of unless there is case law and cogent argument from which they can take comfort. For example, when the other side is putting a law professor on the stand to testify as an expert, why bother rebutting her substantive opinions when her testimony on legal principles or the narrative facts can be excluded in its entirety as improperly invading the

province of the court or the jury?[6] Appellate lawyers can ably assist, for example, with *Daubert* motions and hearings, which are often collateral proceedings to the trial itself.

In a couple of ways, having this broader view may facilitate the preparation of post-trial motions. Having not been involved in the discovery phase, the appellate lawyer may not suffer from the trial lawyer's burden of knowing too much—particularly too much that did not ultimately make its way into the record. The appellate lawyer's credo is, "If It's Not in the Record, It Didn't Happen." He is therefore better able to operate with the necessarily blindered view of the facts. Moreover, the appellate team member approaches the case in a big-picture, gestalt-focused manner that anticipates the appellate judges' own time-limited take on the case after they spend a couple of hours reviewing the briefs and the appendix. This offers the best chance of excluding all of the niggling details and pet arguments (and peeves) of the trial lawyers that simply obscure the broad view.

Indeed, the appellate lawyer may be a valuable aide even in what is the quintessentially trial-lawyerish task of preparing the closing argument. Particularly if daily transcripts are available, the appellate lawyer may have the time and distance necessary to track what evidence has come in and, if he actually spends time in the courtroom, observe how it registers on the jury. The unavailability of contemporaneous transcripts can be a significant hindrance, but the

[6] *See, e.g., Kidder, Peabody & Co. v. IAG Int'l Acceptance Group, N.V.*, 14 F. Supp. 2d 391, 392, 398, 404 (S.D.N.Y. 1998) (excluding in limine expert testimony from Harvard Law Professor Arthur R. Miller, whom the court described as a "noted authority on Federal civil practice," as to the reasonableness of the party's conduct in initiating suit because Miller "could not testify as to what … people did, or what they said to each other," or the corporate party's "then-existing state of mind," or "whether an individual acted knowingly, or willfully, or maliciously, or with specific intent, or with any other relevant state of mind," as "these are the sort of questions that lay jurors have been answering without expert assistance from time immemorial"); *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 620 (Tex. 1999) (affirming holding that it was error in trial of claim for intentional infliction of emotional distress to admit expert testimony on whether a supervisor's "assaults and humiliation" were "extreme and outrageous").

appellate lawyer can still help in the task of editing: making closing arguments shorter, punchier, and more effective for an audience raised on Sam Waterston's *Law and Order* style.

The Extra Set of Hands

Sometimes the need for a good appellate lawyer is simply practical: The team is desperate for another warm body who is somewhat familiar with the issues, to prepare written work product on the eve of and during the trial. Trial-team members can be so completely absorbed with the factual preparation that they do not have the ability during crunch time to do legal research and drafting for mid-trial submissions, such as bench memoranda, motions and responses, and jury instructions and objections to them. They also may not have the time or focus to research random legal issues that may pop up when no one else can field them. Appellate lawyers are able to research well, write persuasively, and operate with little supervision by senior trial lawyers who cannot spare even a moment to edit. The appellate lawyer's particular skill set may help plug the gap.

Joe (or Jo) Cool

An appellate lawyer's most singular contribution may be emotional distance—from the facts, the parties, the court, the jury, and the rest of the trial team. As discussed above, the appellate lawyer has not been knee-deep in the facts, and he may have a sense of perspective that is not distorted by all of the struggles that have gone in the case, from the early motions to dismiss that may have shaped the case, to the bitter discovery disputes that may have led the trial lawyers to overvalue the fruits of motions to compel or left rather sizeable chips on people's shoulders. Moreover, appellate counsel may not have the long history with the client that can leave the trial lawyer as part counselor, part therapist, and near family to the client; the appellate

counsel may therefore be considerably freer to question the client's wishes or whims as to what is important.

Distance from the trial court can also be helpful. Trial lawyers who have spent months or years in court on the road to the trial may have built a personal rapport with the trial judge that they are loathe to endanger with some vigorous advocacy. A new lawyer who is openly identified as appellate counsel may be at greater liberty to play the dark part in a game of "good cop, bad cop." He may be more willing to take the hit in annoying the trial judge with issues that need to be addressed, thereby deflecting any blame from trial counsel. For example, after a lengthy off-the-record instructions conference, the trial lawyer may hesitate to take up the court's time in restating in detail the prior objections to instructions given and refused *on the record*. The trial judge may more easily accept that appellate counsel, in making a record for the next round, is just doing his job, however tedious.

Likewise, the appellate lawyer may stiffen colleagues' resolve to take appropriate tactical risks. The trial lawyer who is willing to allow improper evidence or argument to go unchallenged in order to avoid any chance of antagonizing the court or the jury may be counterbalanced by an independent voice who is immune to those pressures, who knows what error needs to be preserved, and who can make sure that is done.

The appellate lawyer may also offer emotional distance from the jury. Trial lawyers who have spent weeks or months in a courtroom staring at every twitch of the jurors may have an inverse "Stockholm syndrome," which causes them to become the captive of how a particular tactic will affect the third juror from the left in the second row. Such intimacy across a crowded room is not necessarily accurate. I have seen jury consultants' predictions belied by the results (e.g., the Japanese-born juror, who the consultant believed for cultural reasons would go along

with the crowd, turns out to be the hold-out), and watching the Fox News Channel's body-language expect suggests how inexact the science of kinesics is. The appellate lawyer who never sees the jury is not tempted or even able to engage in any psychoanalysis on the cheap; an objective reading of the evidence free of the courtroom ambience can be a valuable check.

Of course, there are downsides in this respect to bringing in appellate counsel early on. Particularly during lengthy trials, the appellate lawyer may get too close to the proceedings and the participants and lose that signature objectivity. But that risk may be justified by the benefits. For example, the appellate lawyer may be able to learn the record faster and more thoroughly on a rolling basis in the trial court than by trying to get a hold of it, read it, digest it, and remember it *en masse* in a short period after the fact.

Finally, when the results come in—the jury returns a huge verdict against the client, or the judge delivers a thrillingly unexpected victory to your side—the appellate lawyer can provide an emotional counterweight. In the best of cases, the trial team can be exhausted at the end of the trial, and hardly in form to handle post-trial motions from any direction. Moments of elation can be distracting and deceiving and, as the Good Book warns, "pride goeth before destruction, and a haughty spirit before a fall." (Proverbs 16:18.) Being focused on the next round, appellate lawyers have a natural tendency to worry about defending good results as much as overturning bad ones. They may be more attuned to making sure that good rulings are properly tweaked in the form of order or judgment, or ensuring that other spade work is done to make the victories impervious to assault. This may entail throwing some cold water on the partiers, but they will be thankful when the appellate court's order comes in with "Affirmed" as the concluding line.

The emotional counterbalance may be even more valuable if the initial result is adverse. When, after months of intense trial preparation and the trial itself, the jury comes back with an

enormous verdict against the client, the trial team often limps back to the office emotionally and physically exhausted, depressed, enervated, and doubting whether the right to a jury trial is such a good idea after all. In this "heads slumped in hands, bodies slumped in chairs" moment, the appellate lawyer finds his calling. Appellate advocates may be wired differently, but just like everyone else we secretly wish to be the hero who saves the day, and we live for the chance to undo a disaster. In moments of despair, it is good to have someone around whose adrenaline is pumping.

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Appellate attorneys like to think of themselves as—and many other attorneys actually do consider them to be—"lawyers' lawyers." They have a refined skill set, an often academic focus on the nuances of the law and the precedent, and a preference for cool and collected analysis that remains "above it all." These attributes are often critical to success at trial, whether or not the appeal ever actually happens. Adding the appellate practitioner to the trial team is a good and often more efficient way for the client and the trial lawyers to get, and stay, ahead. Unfortunately, at the beginning, some trial lawyers may not welcome the appellate practitioner to the team, and may view "fifth wheel" as a charitable description. But if the appellate lawyer does his job, that will not be true of those trial lawyers in the next case.

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