

Should I Change Horses In Mid-Stream? Deciding Whether To Hire Appellate Counsel

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Carpenters and others in the skilled trades emphasize the importance of using the right tool for the job. Similar wisdom applies to choosing outside counsel for litigation. Just as you want a skilled trial attorney to present your case to a jury, you want experienced appellate counsel to handle your appeal.

Appellate practice is a specialty. It requires intimacy with appellate procedure and standards of review, excellent analytical and writing skills, and a comfortable familiarity with social policy and trends in the law.

Restrictive standards of appellate review create formidable barriers to reversal. As a loser, you dread them; as a winner, you invoke them. Therefore, you want counsel who understands them.

You also want appellate counsel who think and write at a sophisticated level because appeals are largely won on the briefs. Counsel must be able to cull strong arguments from weak and present them clearly, concisely and persuasively.

Not only should appellate counsel understand appellate procedure and think and write well, but they should also be familiar with social policy and legal trends because reviewing courts consider the impact their rulings may have in other situations.

Why Should I Retain New Counsel?

When you lose a case, you have to answer tough questions: Can anything be salvaged by post-trial motions? Do we have grounds for a successful appeal? What went wrong, and what is the best way to put it right? You need feedback quickly because time is short. Thus, you need counsel who can absorb and analyze a complex record from a standing start and focus sharply on the path to reversal.

But you may hesitate to bring in appellate attorneys for several reasons:

- You shudder at the thought of paying another firm to learn the case when trial counsel already knows the



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record;

- Someone at the company has a relationship with trial counsel;
- Trial counsel is perceived to have done a good job; or
- It is better to stick with the evil you know.

These concerns, to the extent they are valid, must be balanced against the benefit of hiring specialists and obtaining a fresh view. Trial counsel may be too close to the case, and experienced appellate counsel can supply an objective analysis of the record and provide insight into the appellate court's likely view of the decision below.

How Do I Choose Post-Trial/ Appellate Counsel?

If you are considering hiring appellate specialists for post-trial work, you may wish to meet them face-to-face. Many companies invite law firms to explain how they would handle a matter for which they wish to be retained. Finding candidates should not be difficult. Several applicants should be willing to review the case without charge or, possibly, with an agreement that if you ultimately retain them, you will pay for all or part of their initial review.

You probably have between 30 and 45 days from the date of judgment to lodge an appeal. If appellate issues must be set forth in a "case information statement" to be filed with the notice of appeal, you will want appellate counsel on board before you file. If you want appellate counsel to help with post-trial motions, you may need to begin the search for counsel even before judgment.

You can supply candidates for post-trial work with the judgment and any opinions, trial briefs, trial exhibits, jury instructions, available transcripts and possibly an outline of testimony. The more substance you provide, the more enlightened the analysis is likely to be, and the more confident you can be in your evaluation.

When you judge an applicant, pay less attention to how they measure your chances for success than to their strate-

gies. Those who attend the dog and pony show will be looking to sell. They will be upbeat and may tell you what you want to hear if they think it will get them the work. After a loss, you are particularly vulnerable to such pitches.

Below are questions to help you evaluate firms seeking to become post-trial/appellate counsel. Consider supplying the questions to counsel before you meet.

1. If the timing is appropriate, ask if they think post-trial motions are in order, such as a motion for a new trial or a motion to amend the judgment. The knee-jerk reaction is to make such motions, but that may give the trial court an opportunity to craft additional findings to insulate the judgment. On the other hand, post-trial motions may have a decent chance of success; at a minimum, they will begin the research and analysis necessary for the appeal; and they may help you determine if an appeal makes sense. Sometimes such a motion is necessary. For example, whether a verdict was against the weight of the evidence is normally not cognizable on appeal (except as plain error) unless a motion for a new trial was made on that ground in the trial court.

2. Ask if counsel thinks the case should be appealed. Most appeals are losers. On the other hand, not filing an appeal requires the nerves of a bull-fighter. Few have the courage to resist, even in the face of a discouraging cost benefit analysis. Filing an appeal, however, does give you time to reflect, and it may create leverage for settlement. The cost of the transcript – assuming it was not already obtained – is probably minimal compared to the amount of the judgment.

3. If you lost below, ask counsel what they think went wrong and how they would adjust strategy for the appeal. They may say, candidly, that you will probably lose. On the other hand, they may simply lack creativity. That will be your judgment.

4. Ask how they would work with trial counsel, if at all. Obviously, collaboration would help new counsel learn the record, but considerable tact may be required to soothe wounded feelings and to assuage trial counsel's fear of losing the client.

5. Ask about the role of the team leader. Will that person merely make a cameo early and then reappear to review the briefs and present oral argument?

6. Ask who will review the record, research the law and write the brief. For each task, you should know if you are hiring a senior or a junior lawyer. Are you willing to pay for partners rewriting what associates draft, or do you want editing time to be absorbed as overhead and not billed? The practice of most law firms is for associates to draft the brief and partners to edit

(rewrite) it.

7. Ask about the team's experience handling appeals in your kind of case. Experience is a great teacher.

8. Ask for a sample of an appellate brief written by the lawyer(s) who would write the brief in your case.

9. Ask how the firm reconciles the potentially conflicting goals of reducing costs yet providing expertise in reviewing the record and writing the brief. Will the person who reviews the record also write the brief? That approach is preferable.

10. If the firm expects to assign several lawyers to the appeal, ask how many will review the record. How will those who review the record communicate what they learn to persons doing the research?

11. Ask if the firm bills for computer research. Does the firm own copies of cases, statutes and rules on CD ROMs, and if so, would they bill for access to that resource? (They shouldn't, any more than they would charge for access to books in their library.) If they use Westlaw or Lexis, would they pass the charges through to you? Would they cap them?

12. Ask if their billing practices are flexible. Would they cap their fees or make them contingent on outcome, in whole or in part, perhaps with a bonus for a good result? If not, would they project a budget and commit to a good faith effort to work within it? The fee issue cuts two ways. You want thorough work, but you don't want to over-pay, and you certainly don't want a meter that never shuts off. Ask if the firm is willing to place daily limits on individuals' billable time. If you are willing to pay retroactively for the firm's learning curve, will they cap that time?

Conclusion

Post-trial motions and the appeal should be more than just another bite at the apple. If you use the same troops and strategies as at trial, you may be minimizing, not maximizing your chances of success. Cases often benefit from a fresh view and from post-trial expertise.

Choosing post-trial/appellate counsel is a "beauty contest" like any other, but the standards of beauty are appropriate to the task. You are not looking for nimble courtroom technique but for the ability to absorb a complex case and distill it into a clear, concise and powerful brief tailored to an appellate audience. At bottom, you need lawyers who will study the trial record carefully and evaluate it dispassionately, research the law thoroughly, formulate a powerful theme and write cogent briefs.

Let counsel show you their wares.¹ Then select your champion.

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¹ Counsel are bound by the attorney-client privilege to respect the confidentiality of what you give them. By having interviewed for the work, they will be barred from taking a position adverse to your client in that matter.

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