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# How to Choose and Hire an Appellate Attorney



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So the case that you lost—or won—at the trial court level is going to be appealed. What now? If you have not already

done so, you should select and engage an *appellate* attorney. Whom to choose and how to forge a successful relationship with that attorney often involves considerations that are specifically tailored to appellate practice—a litigation specialty that is built upon a distinct set of analytical, strategic, brief writing, and oral advocacy skills, as well as a particular base of procedural knowledge.

### **Selection of Appellate Counsel**

This article discusses some important factors that you should consider when choosing the attorney who will represent your company in an appeal. Since even a seemingly “run-of-the-mill” appeal can unexpectedly result in adverse precedent, we recommend that you take into account as many of these considerations as possible when deciding how to staff an appeal.

### **Hire an Appellate Specialist**

The first and most important step in the selection of appellate counsel is to look for an appellate attorney. This may seem redundant, but it is not. Do not assume that an experienced trial attorney—such as the lawyer who handled your case at the trial court level—is the most appropriate attorney to take the lead when the case is appealed. Jury trial lawyers are not usually also experts in appellate litigation, which involves a different type of judicial forum and a separate set of legal skills. In most cases, in-house counsel managing an appeal should seriously consider selecting an attorney whose primary practice area is appellate litigation, and then teaming trial counsel with that attorney.

The timing of when to look for appellate counsel varies. With increasing frequency, in-house counsel are retaining appellate attorneys to work with trial counsel while a case is still at the trial court level. In this way, appellate counsel can learn the facts of the case *before* it is appealed, identify

potential grounds for appeal, help to frame and preserve issues for possible appeal, and sometimes assist with key motions. More often than not, however, appellate counsel is not chosen until a case goes on appeal.

As a management issue, in-house counsel should consider what role trial counsel should play in the selection of appellate

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counsel. Trial counsel can be an excellent resource by providing recommendations, assisting with the interview process, and in other ways. At the least, in-house counsel should inform trial counsel as early as possible that appellate counsel will be handling the appeal.

### **Identify the Most Appropriate Qualifications for a Particular Appeal**

The nature of an appeal and the issues involved, the court in which the appeal is filed, and whether you are pursuing rather than defending the appeal may be important factors to consider when choosing appellate counsel. A company may be best served in a particular appeal by an appellate attorney who has prior experience with a particular type of legal issue or case, has represented your company or industry in the past, or appears frequently and is well regarded by the judges in that appellate court.

Strategic considerations also sometimes come into play. For example, if your company is the appellee defending a solid trial court victory, it may not be necessary, or

even strategically wise, to engage a big-name, heavy hitter appellate attorney to appear before the court, if an experienced, skilled, but less well-known appellate attorney can defend the appeal.

### **Decide Whether to Select an Appellate Attorney from a Different Firm**

You very well may be able to turn to your trial counsel to identify an appellate attorney in his or her own law firm to handle the appeal. Indeed, many law firms’ litigation departments include appellate litigators. For this reason, in-house counsel may face a difficult decision: whether to select an attorney from the trial counsel’s law firm or choose an attorney from a different firm. There is no one-size-fits-all answer.

There are advantages to each approach. Selecting an attorney from the trial counsel’s firm often helps to ensure uniformity or continuity in strategy, and a strong working relationship between trial and appellate counsel. A possible downside of hiring one of trial counsel’s colleagues, however, is that the appellate attorney—especially in a case that you lost in trial court—may unintentionally view the issues and record on appeal in a way that tends to ratify the trial team’s work, rather than providing a more independent, objective view. In other words, selecting an appellate attorney from a different firm is sometimes beneficial because he or she is more likely to provide a “fresh set of eyes.” The disadvantage is that it may take more effort for appellate counsel from a different firm to work together seamlessly with trial counsel.

Of course, these considerations usually are highly subjective. But regardless of whether in-house counsel decides to engage an appellate attorney from the same law firm as trial counsel or select an appellate attorney from a different law firm, it is important that the appellate attorney provide his or her own perspective on the case.

### **Conduct Due Diligence**

Choosing a name off of a list, or choosing someone by reputation alone, is rarely an effective way to select appellate counsel for a particular case. Instead, in-house counsel should conduct the search for appellate counsel like a real job interview and perform due diligence on the candidates.

If possible, you should meet in person with candidates seeking to handle an appeal. A candidate who appears outstanding on paper may not satisfy your particular requirements and expectations. For example, ask questions to understand the candidate's process for handling appeals. Do you want a "hands-on" appellate attorney who will *personally* review the record and take the lead in drafting petitions or briefs, or is it okay with you if the attorney delegates that work (and maybe even oral argument) to a more junior attorney? If the latter, then you should interview the more junior attorney(s) too. Also, if you expect appellate counsel to work closely with trial counsel, raise that subject with the candidates to gauge their willingness and ability to work as part of a team. An interview is a good way to identify and measure candidates' appellate litigation skills, experience, and achievements, and also may help you determine how well a candidate will fit into a team composed of appellate, trial, and in-house counsel.

Most candidates for an appellate representation will provide references (e.g., other clients, other appellate attorneys). In-house counsel should follow up and speak with those references. In addition, it is important to obtain and review samples of the appellate attorney's work, particularly appellate briefs that he or she has written. If available online, you also should review audio or video recordings of the candidate's oral arguments so that you can observe his or her performance in an actual appellate courtroom setting.

In conducting interviews, in-house counsel may also consider asking the candidates whether they believe the appeal provides opportunities for *amicus* support. If so, some appellate attorneys have relationships with organizations that could serve as potential *amici curiae*. Such contacts with potential *amici* is another factor to contemplate.

### Check for Conflicts

Before appellate counsel is engaged, actual or potential conflicts of interest must be identified. This is not a controversial point. In-house counsel also should determine, however, whether appellate attorney candidates (or their law firm colleagues) have any

*positional* conflicts (e.g., a previous appeal where the attorney argued the other side of an issue). If it appears that prospective appellate counsel would be materially limited in his or her ability to provide your company with representation based on a positional conflict, then he or she may be ethically forbidden from taking on the representation.

### Engagement of Appellate Counsel

Once an appellate attorney has been selected, you may think that the hard part is over. While the process of selecting an appropriate appellate counsel can be time-consuming, there still are particular precautions and steps that in-house counsel should take in connection with the engagement of that attorney.

### Provide Guidance to the Team

Working with both appellate and trial counsel requires some balancing. At the outset of the engagement of appellate counsel, in-house counsel should set the tone for the engagement and the working relationship that you expect to be achieved among all involved attorneys. A strong working relationship among in-house counsel, trial counsel, and appellate counsel is paramount. It requires cooperation and communication.

You should emphasize that trial counsel was the captain for the trial, but appellate counsel is the captain for the appeal. Defining the scope of each attorney's responsibilities for the appeal may help avoid unnecessary clashes or duplication of effort.

This is also an opportunity for in-house counsel to define the team dynamic. The team can help shape the strategy on appeal, including whether the appeal will be a continuation of the trial strategy or whether it will depart from that strategy. In your role as the client and litigation manager for both trial and appellate counsel, you can help focus all outside attorneys' energy on a common goal: success on appeal.

In addition to setting the tone, in-house counsel should take steps at the outset of the representation to define the expectations for the conduct of the appeal. What will be the nature and degree of trial counsel's involvement in the appeal as a resource to appellate counsel? How often do you wish to receive communications from appellate counsel, and in what form

(e.g., frequent emails or phone calls; periodic status reports)? How far in advance of a filing deadline would you like to review draft petitions, briefs, or motions? What will be your level of involvement in the day-to-day management of the case? What you want may depend both on the nature of the appeal and your own workload.

In-house counsel also can address other expectations, such as the extent to which appellate counsel should read the entire record on appeal in order to address the specific and typically limited set of issues on appeal, or whether and when to have a moot court prior to the oral argument.

### Use an Engagement Letter

Many in-house counsel overlook the need to obtain an engagement letter from appellate counsel, particularly if appellate counsel is from the same firm as trial counsel. This is a step that never should be skipped. An engagement letter (or supplement to an earlier engagement letter) should reflect the terms of the appellate representation, from scope of representation to payment of fees. An engagement letter is the best and most reliable indicator of the mutual understanding of the in-house counsel and appellate counsel.

The engagement letter may be supplemental to an existing agreement between the law firm and the in-house counsel, or it may stand on its own. Regardless of its title, it should be a separate document setting forth the terms governing the appellate engagement and representation. In addition, to the extent your company tracks specific representations by court docket number, it is desirable to open a new docket for the appeal.

Although in-house counsel can and should define the working relationship among the attorneys at the outset, the engagement letter also can provide some general parameters for that relationship. In-house counsel should also ensure that the engagement letter covers the fee and cost arrangement reached by the parties (whether by billable hour or alternative fee arrangement).

### Engaging Amicus Counsel

Many of the same considerations apply when a company or organization wishes to

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file an *amicus curiae* brief in an appeal that raises issues affecting their interests. Appellate courts and appellate attorneys recognize that there is a certain art to drafting effective *amicus* briefs in terms of their approach, content, and style. (For more information on this topic, see Lawrence S. Ebner, “*Amicus* Brief FAQs,” *In-House Defense Quarterly* (Summer 2013).) Writing skills, and specific experience writing highly quality *amicus* briefs, is a factor that in-house counsel should weigh heavily in hiring *amicus* counsel.

### Alternative Fee Arrangements

Alternative fee arrangements (also known as “AFAs”) are an evolving field in the management of litigation. AFAs are any financial arrangements for legal services other than the traditional billable hour. Although there are many types of AFAs, an AFA often takes the form of a flat-fee for performance of a specific or limited task. For example, an attorney might charge clients a flat-fee AFA for drafting an *amicus* brief.

More so than trial court proceedings, appeals lend themselves to AFAs. This is because appellate proceedings usually involve a relatively limited set of discrete and predictable tasks (*e.g.*, reviewing the record on appeal; drafting petitions and/or briefs; assembling the appendix; preparing for and conducting oral argument). An experienced appellate attorney should be able to reasonably estimate the time and effort for these tasks. Thus, in-house counsel engaging appellate counsel should consider whether a flat-fee arrangement meets their needs.

A succession of agreed-upon flat fees may be especially attractive in cases where appellate review is discretionary. For example, if your company wants to pursue an interlocutory appeal under 28 U.S.C. §1292(b) in a federal district court case, you could agree on a flat fee AFA for the preparation of the §1292(b) motion filed in the district court, another flat fee for the petition for permission to appeal filed under Fed. R. App. P. 5 in the circuit court of appeals if the district court certifies the order for interlocutory appeal, and a third flat fee for pursuing the appeal if the court of appeals grants the review petition.

### Conclusion

The circumstances underlying every appellate representation are unique. But when choosing and hiring appellate counsel, consideration of the types of factors discussed in this article should help in-house counsel ensure that an appeal is being handled in the best possible way. 