APPELLATE PRACTICE FROM THE CORPORATE PERSPECTIVE

Roger D. Townsend
Alexander Dubose Jones & Townsend LLP
1844 Harvard Street
Houston, Texas 77008-4342
(713) 523-2358
(713) 522-4553 [fax]
rtownsend@adjtlaw.com

Roger D. Townsend is a partner in the Houston office of Alexander Dubose Jones & Townsend LLP, where he handles civil appeals and complex litigation. He is a Director of the American Academy of Appellate Lawyers, a past chair of the Appellate Practice Section of the State Bar of Texas, and the editor-in-chief of the *Texas Appellate Practice Manual* (2d ed. 1993). Roger also is the author of the chapter on brief writing for appellees in *A Defense Lawyer's Guide to Appellate Practice* (DRI 2004), and he has been selected to be the Senior Editor for the American Bar Association's treatise tentatively entitled, *Stay of Judgment: A National Compendium* (forthcoming 2006). A graduate of the Harvard Law School, he is listed in *The Best Lawyers in America*, and he is board certified in civil appellate law by the Texas Board of Legal Specialization. Early in his career, Roger tried 30 civil cases to a jury verdict.

I. Introduction: The many hats worn by appellate counsel today

From the corporate perspective, appellate practice in the 21st Century is changing rapidly. The old model had the trial lawyer handling any appeal. Then an occasional appellate lawyer, often a new associate who had clerked for a court of appeals, might assist with research and initially draft the brief. But the trial lawyer would present the oral argument. Next a few firms started hiring experienced appellate specialists to handle the firm's appeals. Some of these specialists were able to attract business and establish sections or practice groups within their firms.

Corporate clients took note of these developments. In the 1990s, they began requiring firms to use their appellate specialists. When trials were lost, corporate clients would sometimes switch to a different firm for the appeal. As one side hired a prominent appellate specialist, the other side felt pressured to do the same. Then sophisticated corporate counsel began checking into a firm's appellate capacity, before deciding to retain the firm for the discovery and trial aspects of the case. This led logically to corporate counsel creating teams of firms for different aspects of complex litigation. One firm might be hired for document discovery, another for deposition discovery and trial, a third for evaluation and settlement negotiations, and a fourth firm for any appeal.

This trend has continued as the expertise of appellate lawyers has become more and more apparent. Now it is the usual practice for appellate lawyers to prepare the post-verdict motions, and it is common for them to handle the charge conference. It is not uncommon to see appellate lawyers sit through the trial to preserve complaints for appeal. And it is becoming more frequent for firms to involve appellate lawyers before trial to conduct legal research and analysis about the claims and defenses, as well as to assist with discovery disputes and dispositive motions.

A cutting-edge trend is for appellate lawyers to manage complex litigation. While corporate counsel can be excellent at *monitoring* litigation, they usually lack the time and often lack the experience to *manage* complex litigation effectively. Most companies face complex litigation only episodically; there is little likelihood of experience on the part of in-house counsel in actually managing (as opposed to overseeing) a complex case. Most inside counsel also lack the time required: they usually have other tasks to perform for the company. Even if management directs them to concentrate on this one matter, their time may be better spent in keeping management informed and mobilizing internal resources. Also, some inside counsel may prefer not to have to confront certain trial lawyers when the going gets rough, or at least might prefer the buffer of an experienced case manager to help them resolve any problems.

II. Trying on the different hats

Let's now examine each of the roles appellate counsel can play in today's corporate legal environment. Because case management is relatively new, we'll study it more closely and suggest tips for any case manager.

A. Appeals

Most jurisdictions allow one appeal of right, followed by one or more of discretionary review. The skills required for the two different kinds of appeals overlap greatly, but their distinct differences are worth exploring.

1. Appeal of right

The appeal of right has two principal components – the brief and oral argument (if any).

a. Briefs

In the 21st Century, the importance of a good brief cannot be overstated. Fewer and fewer cases receive oral argument. Even when they do, oral argument is usually very short. The brief must carry the load of the client's position. And courts

have become more stingy with page or word limitations for briefs. Hence, the advocate who can analyze precisely, cull out irrelevant issues, and write both cogently and succinctly has a distinct advantage.

b. **Oral argument**

Oral arguments are shorter and more infrequent. They, usually, are "hotter," in the sense that the court is more prepared and more active with questions than in the past. This places a premium on the ability to think quickly, to respond directly, to comprehend legal issues in great depth, and to state matters forcefully with few wasted words. As a result, trial lawyers rarely are good choices for making oral arguments, since they tend to digress too much into the facts. And, from the corporate client's perspective, the lawyer who writes the brief may not always be the best lawyer to argue the case orally. The reason is that not every appellate lawyer is equally gifted in both writing and speaking.

Yet an appellate lawyer hired only to argue orally must learn the case as well as the lawyer who wrote the brief. Thus, there can be an extra layer of expense. But when it is important to put the best foot forward each step of the way, it may be wise to use each person's skill to its maximum advantage.

2. **Discretionary review**

Courts of discretionary review, such as most state supreme courts and the United States Supreme Court, have an extra layer of complication: you must convince the court even to hear your case before you can worry about winning it. This, too, requires a different approach.

a. **Petitions for certiorari and briefs**

The petition for certiorari or discretionary review must convince the court that it should hear the case, regardless of which side should win. Far too many lawyers, and sometimes even appellate lawyers, remain too focused on advocating the justice of their client's cause rather than focusing on trying to get in the courthouse door. This can lead a corporate client to consider hiring another lawyer just for this stage of the appeal, in order to bring a fresh insight into what may motivate the court to hear the case.

If the court agrees to hear the case, then briefs on the merits are more similar to briefs in the lower courts – with one exception. The highest court in a jurisdiction has the ability to overrule its prior decisions, so cavalierly relying on precedent without arguing supporting policies is a risky tactic.

b. **Oral argument**

Oral argument in the courts of discretionary review requires all the skills of an oral advocate in a lower court, but also requires a broader understanding of how the case at bar fits into the framework of the law. It can help to have an advocate who is trusted by the court. Certainly lawyers who appear all the time in the court on the same side of certain issues become well-known, but they also run the risk of looking like hired guns who will argue any position for a fee. It's a balancing act.

B. **Posttrial motions**

For many years now, corporate clients have expected firms to involve their appellate lawyers in assisting with posttrial motions. Again, there are different considerations depending on whether one is writing or arguing the motions.

1. **Drafting the motions**

Appellate counsel and trial counsel usually must work as a team on these motions. Unless the corporation has retained appellate counsel to sit through the trial to preserve complaints, the appellate counsel will know few facts. Although a boilerplate motion can perhaps be filed without knowledge of the facts, it is rarely appropriate. By the same token, if the case is in a forum that is almost certain to deny any request for posttrial relief, detailed and lengthy motions may serve only to educate the other side about your ultimate appellate position. Yet, sometimes there may be countervailing reasons to do so anyway: perhaps the financial markets need reassuring, or public relations demand that you tell the corporation's side of the story at an early stage. Since media reporting of trial testimony is sketchy at best, the written papers filed in court will be much more meaningful in the court of public opinion.

Thus, it is important to communicate with the client about its end-game strategy. Then, the appellate lawyers can ensure that the proper points are preserved, and the trial lawyers can ensure that the facts are accurately reflected in the papers.

2. **Arguing the motions**

Usually the trial counsel is the best person to argue the posttrial motions, even when appellate counsel have primarily drafted them. One hopes that the trial lawyer will still have credibility with the court and can certainly recite testimony from memory that the appellate lawyer may not know unless she sat through trial.

On the other hand, sometimes the appellate lawyer is already known to the trial court or has gained credibility from sitting through the trial. Or, sometimes, the trial lawyer and trial judge have simply reached an impasse. In those situations, someone new must be brought in to have any chance of opening the court's mind.

C. **Preservation of complaints before and during trial**

The best appellate lawyer in the world cannot win a case on appeal if the complaint was not preserved during trial. As a result, it is imperative that all potentially reversible errors be properly preserved by the appropriate, timely complaint. This is often at odds with winning the case at trial. To preserve an appellate complaint, you must object, move, or request. But jurors don't like objections because it looks like you are trying to hide something from them – and it's usually something that hurts your case. To preserve a complaint for appeal, moreover, you must obtain a ruling from the judge. Thus, judges usually don't like objections, either, because rulings are how they err. The dilemma: Do you want to win at trial, or do you want to win on appeal?

One solution to this dilemma is to preserve only reversible error, though that can be determined with certainty only by hindsight. Yet an appellate lawyer may have a clearer view of whether the action by the court will constitute error in light of the applicable standard of review. Likewise, an appellate lawyer may be more objective in sizing up whether a particular error is likely to affect the case as a whole. And an appellate lawyer can concentrate on preserving complaints while the trial lawyer concentrates on winning the case by examining the witnesses and persuading the judge or jury. Moreover, delegating preservation of complaints to an appellate lawyer whenever possible will likely deflect any ill will the judge or jury has toward the objecting party onto the appellate lawyer, rather than the trial lawyer. Of course, to the extent possible, serious objections should be made outside the presence of the jury, though on the record.

Sometimes a possible appellate complaint may be deliberately waived in order to win at trial. Usually, the waiver involves an insubstantial point that probably would never make it into an appellate brief. In those instances, deferring to the trial lawyer's judgment is essential. But if, whether through fatigue or just a different view, a trial lawyer recommends waiving a potentially critical point, there needs to be a candid discussion among the trial lawyer, the appellate lawyer, and the client.

Consequently, more and more corporate counsel are insisting that an appellate lawyer be added to the trial team to assist with error preservation. The cost can pay for itself when the same appellate lawyer handles the appeal, since sitting through the trial will greatly accelerate the factual learning curve, which always represents the greatest part of the appellate expenses.

D. **Dispositive motions**

Trial counsel or the litigation team should play a huge role in preparing and responding to dispositive motions, such as motions for summary judgment, whenever those motions turn on the facts. Even then, however, it is useful to have an appellate lawyer review the draft to ensure that all procedural prerequisites have been met.

When the motions turn on purely legal issues, having the appellate lawyers take the lead is both more efficient and more effective. The trial lawyers, however, should review the draft to prevent any omissions or improper admissions.

E. **Discovery motions**

Appellate lawyers are ideally suited to help with motions involving privileges, sanctions, and challenges to expert witnesses. While they will require assistance from trial counsel with the facts, the appellate lawyers should have the relevant law at the tips of their fingers. By dividing responsibilities, moreover, the defense team sometimes can overpower a smaller plaintiff's team.

F. **Legal research and analysis**

Corporate clients today realize that turning young lawyers loose in the library to generate comprehensive memoranda about all cases on a legal issue is a money-maker for the law firm, but a money-loser for the client. Research can be much more tailored to the specific case when it is preceded by careful thinking about what is the sensible, fair rule. As a result, the research becomes much more effective and efficient. Often a more experienced lawyer who will take the time to engage in preliminary analysis can short-circuit the research process by articulating the correct rule, before asking others to locate supporting authority.

For instance, few precedents are ever directly on point; almost every legal argument relies on analogies. Some cases are followed by the courts, and some are not. In other words, some distinctions make a difference and some don't. The reason is that some outcomes comport with the courts' sense of justice and some do not. This suggests that most lawyers perform legal research backwards by collecting holdings and then trying to match them to the case at bar. Instead, once a lawyer has some basic familiarity with the area of the law at issue, the research should stop and thinking should begin about what rule makes sense in this situation. Think about what is fair to these parties and to most parties in similar situations in the future. Consider what rule is workable in the real world. When these have been considered, it is time to resume research. Almost always, the researcher will then find a case supporting that rule. In the rare instance when there is no authority, a court is likely to adopt the rule anyway, because it is the best rule. And a court is likely to adopt

that rule, even if there are some adverse authorities, because those are the cases that will be distinguished.

This approach, however, requires thinking and thinking takes time, preferably time without distractions. Few litigators or trial lawyers have that luxury. Therefore, corporate counsel are becoming increasingly interested in ensuring that the appellate lawyers are brought in early enough to advise the group regarding the claims and defenses in the pleadings. And, for the reasons already mentioned, it is both more effective and efficient to have experienced lawyers conducting the key analyses.

G. **Managing complex litigation**

Corporate counsel recently have begun using appellate lawyers to manage complex litigation. For complex litigation, a case manager is necessary because one of the keys to successfully managing complex litigation is the initial organization of responsibilities to ensure quality without needless duplication of effort. Someone must be put in charge of the *structure* of the effort. Because case management by an appellate lawyer is relatively new, let's examine it in more detail.

1. **The ideal case manager**

The ideal case manager should have not only organizational and planning skills, but also some degree of charisma to reduce friction during the handling of the litigation. The best case managers are sticklers for details, but can see big pictures. They focus on deadlines, but remain flexible as circumstances change. They are resourceful and creative, as well as analytical. Appellate lawyers fit the bill perfectly. Because of the nature of their practice, lawyers specializing in appeals become familiar with a systems approach to handling cases. They also often are adept at delegating matters to the appropriate level of responsibility to ensure efficient handling, while demanding quality.

Although litigators also can serve the role of case managers, appellate lawyers – particularly those with some trial experience – can fulfill the role and thus be up to speed on the case in the event of an appeal. Appellate lawyers have a distinct advantage as case managers whenever a case may ultimately turn on a legal issue, or when litigation in one case may set a precedent or constitute collateral estoppel in other litigation. Given the jury pools in America, the corporate defendant's ultimate protection may be the law on appeal. The easiest way to reverse a judgment on appeal is through a legal error, since the standard of review usually insulates fact findings. Although appellate courts are not perfect, no one doubts that they are much more predictable than the jury system. Even in jurisdictions where the appellate judges are thought to have a political agenda, it is at least predictable in advance. Accordingly, for those interested in predicting the ultimate outcome of litigation, legal issues that may loom on appeal are usually a better guide.

2. **Focus on results**

The case manager first assists the client in determining what *specific* results it desires. The initial goal is to uncover all possible results under the given facts – not just how bad can it get, but also how good. This process begins with simultaneous legal research and factual investigation.

A legal research team should uncover all potential claims and defenses, along with potential damage models, not just those that have been pleaded initially. This permits intelligent discovery, even if the pleadings are amended later. The availability of counterclaims, third-party claims, and insurance coverage should not be overlooked. Simultaneously, a team should investigate the facts by reviewing documents and talking to employees or witnesses. Initial sworn witness statements ultimately may be more valuable than depositions. As soon as facts are uncovered, they should be fed to the legal researchers so they can refine their analyses.

This last step is critical. Corporate clients crave certainty. They want to know that, at the end of the day, they will prevail. Otherwise, they will pay a lot of money to settle the case, since a settlement usually (not always) guarantees certainty. By contrast, trials are inherently unpredictable. Thus, the ultimate protection may be the law on appeal. Although appellate courts are not perfect, no one doubts that they are much more predictable than the jury system. Even in jurisdictions where the appellate judges are thought to have a political agenda, it is at least predictable in advance. Accordingly, for those interested in predicting the ultimate outcome of litigation, legal issues that may loom on appeal are usually a better guide, for the easiest way to reverse a judgment on appeal is through a legal error, since the standard of review usually insulates fact findings.

What this means for managing complex litigation is intriguing. Instead of concentrating at the very outset on discovery, it may be wiser and more productive to spend a lot of time up front on the law. And includes exploring nuances within the claims and defenses. Many times a case will turn on a certain fact. Most cases are decided on the application of the facts to the law, rather than a new legal principle. Therefore, a detailed look at trends in the law, factual subtleties behind decisions, and useful dicta may demonstrate avenues to explore in discovery that could later prove dispositive. Thus, substantial work at the outset on what may ultimately prove to be the charge of the court may focus discovery on the key facts. The "law lawyers" could then inform the "fact lawyers" about certain facts that would be useful to elicit during discovery. This not only results in better discovery, but more efficient discovery with a cost savings to the client.

When a realistic assessment can be made of all potential results, then the client can select and prioritize its desired results. Knowing the specific result desired by the client is the key to formulating a successful strategy. The desired result

should be more than some vague notion like "to win," or "to settle favorably." Instead, it should be a specific, detailed, concrete vision of what the client wants. How much money does the client want to receive or to pay as a result of the litigation? Is the goal to try the case and win a moral victory? Is the goal to win on appeal, so that a precedent is established? Does the client want a quick settlement, regardless of the cost? Is there a rational reason to have a fight to the death for vindication? Should there be a protracted discovery and appellate struggle to send a message and discourage future claims? Or is there something in between that is most desirable?

The case manager, however, should not stop with just a naked result that the client desires. The case manager should ask *why* the client wants that result. Sometimes a result pops up that, under scrutiny, turns out to be a knee-jerk reaction that does not serve a purpose of the client. Considering why the client wants a result is an effective way to uncover emotional responses that may lack rationality, or even worse be at cross-purposes. When the reasons for a result – the purposes – are considered, a different result may better fit what the client really needs at the end of the litigation.

3. **Levels of strategy**

The case manager's strategic thinking occurs on several levels: legal, factual, financial, public relations, and internal. Litigation is similar to warfare, though restrained (more or less, depending on your venue) by rules. Metaphors of battlefields, campaigns, supply lines, and attrition are all apt. Without a coherent strategy, your tactics may not serve your purposes. Indeed, they may be at cross-purposes. Thus, strategy needs to be considered as soon as the desired result is known. While it can shift if circumstances require, the sooner a strategy is decided upon, the better.

a. **Legal strategy**

Law strategy may begin with issues of personal and subject-matter jurisdiction, venue, choice of law, and counterclaims or third-party claims. Law strategy also can involve not only choosing which claims or defenses to assert, but also when to assert them. Delaying the assertion of certain legal issues until later in the litigation may support certain desired results established at the outset. Law strategy also considers filing different types of dispositive motions at different times. For instance, you could begin with special exceptions or a rule 12b(6) motion, followed later by a no-evidence motion for summary judgment, followed much later by a traditional motion for partial summary judgment. Or you could decide that no dispositive motion should be filed at all before trial, for fear of needlessly educating your opponent. The law strategy also will eventually consider trial briefing and post-trial motions.

b. **Factual strategy**

Much strategic thinking should go into a discovery plan. By a discovery plan, I do not mean an order fixing certain cut-off dates. I mean a detailed, confidential plan of what discovery is to be pursued in what order, with alternatives based on what is discovered. It also can include various discovery motions that may need to be filed, and the possibility of mandamus proceedings if the motions are denied. The discovery plan must take into account the available resources, but it can also be used as a detailed budget for financial planning by the client.

A factual strategy also should subsequently be developed for trial: evidentiary foundations and objections, motions in limine, offers of proof and the like. The strategic thinking for the presentation of evidence at trial is best left to the lead trial lawyer, though two (or more) heads often are better than one. A good rule of thumb is to make sure the client hires a top-notch trial lawyer, make sure the trial lawyer has a reason for what the trial lawyer is doing, and then defer to the trial lawyer's judgment – unless something is just too unacceptable to the client.

c. **Financial strategy**

In complex litigation, the adverse party is not the only problem. There may be repercussions in the financial markets, the court of public opinion (and thus sales), shareholder complaints or suits, government regulators, legislative committees, and spin-off or copy-cat litigation. Are there takeover threats? Does bankruptcy loom if the case is lost and a large judgment causes notes to be accelerated or property to have liens placed on it? Will too many assets have to be tied up to supersede the judgment? In the interim, will suppliers not want to renew contracts? Will deals to sell subsidiaries fall apart or be blocked? Will joint venturers demand indemnity? Can bank funds be garnished or attached? Can there eventually be a turnover order, so that a receiver friendly to the opposition is appointed to run the company? Strategic thinking at the financial level also includes making sure either insurance or reserves are in place to cover the litigation.

In short, the risks of an adverse judgment should be considered while there is still time to take precautions. The costs of litigation also should be budgeted in detail and monitored. And a settlement strategy also should be developed. This would include not only the amount, but also who is the best person to negotiate, when should overtures begin, who should initiate them, and whether mediation is the best route.

d. **Public-relations strategy**

The client should develop a consistent message invoking its theme about the litigation. It then should consider who should deliver the message, when, where, and

how. Usually one internal spokesperson is best, but the information should be coordinated with inside counsel and the case manager to keep the information accurate and consistent with the theme.

A good message can assuage financial concerns. It can also affect public opinion, which might have some spillover effect on the litigation. While it ethically may not be used intentionally to affect the tribunal or jury itself, it can sometimes be used to soften up the other side for settlement. Aside from affecting public opinion, the media's reporting of the event can permit continued sales, reduce punitive damages, and prevent financial panic by investors.

e. **Internal strategy**

The internal strategy includes who to keep informed within the client's organization, how often information should be provided, how detailed it should be, who provides the information, and what format (oral or written) is provided which time. Management will want to be kept informed to varying degrees, usually depending on the significance of the case and the management style. As much as possible, this should be left to inside counsel who are familiar with the management style and concerns. This also leaves outside counsel free to handle the case, as opposed to spending a lot of time in internal meetings. Obviously, management may occasionally want to meet with outside counsel and hear updates without filtration. But this should not become so frequent that it interferes with the handling of the case.

The internal strategy also needs to include a clear commitment from the client to assist the litigation with internal resources as required. This message may require occasional reinforcement as the years drag on.

Other internal issues may be simmering. Is management to blame for the problem? Is someone else in the corporation likely to be a scapegoat? Are there disgruntled employees or whistle blowers who may testify adversely? Are trade secrets disappearing into the hands of the opposition or competitors? Is the litigation preventing the sale of subsidiaries or other assets? Is the time spent by employees in responding to discovery costing the company too much? These matters also should be considered in formulating an internal strategy.

4. **Allocating and structuring the deployment of resources**

Once the strategies are planned, it's time to decide how to implement them. The first step is to identify, organize, and allocate resources. This requires you to estimate likely needs, to predict a schedule based on when those needs will likely arise, and plan the timely allocation of resources to meet those needs. In other words, you should try to identify what skills will be needed, which lawyers have those skills, and when will those skills likely be required. This will enable proper budgeting, too.

Staff resources must be organized into teams with communication structures, so that information can be effectively shared both upstream and downstream. There also must be an effort to control friction among the teams, so that all members remember who is the real opponent.

The case manager must be adept at communication. The case manager must translate the client's decisions and relay them to the appropriate team member for efficient execution. The case manager must coordinate the different teams and keep the client informed of developments. The case manager must also provide recommendations to the client and independent directions to the teams.

This requires both communication and persuasion. And communication and persuasion is a two-way street. Team leaders should try to persuade the case manager to adopt their recommendations. In turn, the case manager should be able to persuade the client why the recommendations should be followed. When necessary, the case manager also should try to persuade the team leaders that there was a good reason for rejecting their recommendations.

Thorough communications require periodic meetings or conference calls, though limited in the number of participants. E-mail groups, extranets, and videoconferencing all have their place in handling a complex case and should be used liberally. Because travel takes time away from more important tasks, anything that allows communication short of spending several hours on an airplane should be encouraged. It's also usually cheaper.

Usually one conference per week is sufficient; a conference on Friday morning enables everyone to catch up with the week's developments, to decide on further steps, and to prepare for events scheduled for the next week. An agenda should be prepared and followed to the extent possible: without some structure, conferences can ramble because lawyers tend to talk too much. A good case manager will lead the group back on track without stifling good ideas or hurting feelings.

Regarding who should participate in the conference, usually communication through the team leaders should be sufficient. They can relay developments to and from their team members. Of course, the supervising inside counsel should be encouraged to attend these meetings, and the supervising inside counsel and the case manager will probably converse almost daily, sometimes several times a day.

5. Tactics focused on strategy: the utility of budgets

Once there is a strategy to reach the desired result, the case manager and team leaders should brainstorm every conceivable action toward achieving that result. Then consider alternatives based on anticipated countermoves by the opposition. Group those actions in chunks relevant to different parts of the case. Prioritize them; then decide what resources are necessary to achieve those tasks and when they should be scheduled. This, in turn, will permit much more accurate budgeting.

Many lawyers resent budgets, while more and more clients demand them. One problem with budgets has been their inherent unpredictability. Usually, however, surprises result from a failure to have thought through the case at the outset. Granted, litigation always has surprises, but a surprising number of surprises can be anticipated at least as possibilities. Thus, alternative budgets encompassing some surprises are possible to generate.

Furthermore, use budgets not just as a constraint, but as a structure for handling the case. The more a budget forces counsel to think of all the things that must be done, might need to be done, and could be done, the more the client can be confident that counsel has considered everything necessary to the efficient handling of the case. By focusing on a budget, it may become apparent that a deposition of a minor witness in Detroit can be handled by written questions or orally by a junior associate instead of a videotaped deposition by a partner. Likewise, a budget may reveal that legal research on an esoteric point may become relevant only if a certain fact is elicited during discovery. Instead of putting a pack of associates on a scorched-earth research mission early in the case, the issue can perhaps be reserved for a later date – by which time the case may have settled without the client ever incurring that expense. Examples abound once the requirement of a budget begins to structure the thinking about the case.

Likewise, timetables can be prepared in the alternative. Any timetable in litigation is at best an estimate, but likely points of delay can be anticipated. True, there will always be room for a surprise, but the realm of surprise can be reduced.

6. Monitoring the interim outcomes

As the tactics are implemented, the case manager must monitor the interim outcomes to ensure that they are progressing toward the desired result. When they are not, then adjustments must be made. Also, this monitoring ensures that there are

no surprises in the budget. Either the budget is adhered to, or adjustments are made before the increased costs become a problem.

Monitoring can take on a new life when a major factual, legal, or financial surprise occurs. In that rare instance, the purposeful results may have to be modified, as well as the organization, strategy, financial, and public relations strategies. Although the possibility of a new development in the law, unknown fact, or financial shock (for instance, 9/11) cannot be ignored, proper initial planning should minimize many of these, or at least allow them to be anticipated to a large degree.

7. **Review of the experience and litigation**

The last type of thinking is really just a review of the experience. What went wrong, but also what went right? This includes not only the events leading to the litigation, but also the handling of the litigation itself. If a case is lost, and invariably one someday will be, at least it can have the positive effect of teaching everyone involved – both inside and outside – a valuable lesson, so that particular painful history does not have to be repeated. The case manager can be invaluable in helping the client through this process.

Complex litigation is costly both internally and externally. It would be particularly foolish not to learn from the experience. On one level, the client should explore internally what led to the litigation. Do safety controls need to be better? Is there a better design? Was a construction project managed poorly? Did someone miss warning signs about the value of the transaction? Did communications breakdown before the problem could be resolved outside of court? The list varies according to the problem.

The handling of the litigation itself should be reviewed – even if successful. Was the strategy correct, but the implementation poor? Which tactics worked better than others? Were budgets met, and if not, why? What surprises occurred that could perhaps next time be foreseen? How did the case manager perform? Was the case manager really cost-effective? Which other firms would be rehired in another case, and which would not?

In short, after the dust settles on a loss, or after a celebration for a victory, someone should be assigned the task of reviewing the entire course of events, so that if there is a next time, it will go even better. An appellate lawyer as case manager is an excellent position to assist corporate counsel in doing just that.

II. **Selection of appellate counsel**

Many in the audience will want to know how corporate counsel select and retain appellate counsel. The first step in retaining counsel is identifying who to contact. How do today's corporate counsel do that?

Everyone by now knows that branding is the "in-thing" in marketing. Corporate clients, however, are caught in a bind. If they use a "brand name," in other words a mega-firm that has been around for 80 years, they may not be second-guessed by management if all goes wrong at the end of the day. But they also will incur enormous legal expenses due to the overhead those firms have. And corporate counsel, as they have grown more sophisticated, want to hire the best lawyer for a particular complex matter, rather than simply hire a firm. That, in fact, has led to the growth in boutique firms. Why should partners who can bring in clients share the money with those who can't?

The other problem faced by corporate clients is who will actually do the work? It's one thing to have the biggest name on the brief, but if all the work is being done by an unknown second-year associate, has the client really obtained what it wanted? This is one reason that Requests for Proposals have become popular. Corporate clients want to see a game plan for how the case will be staffed. Is there too much delegation? Are there too few players on the team for what is required? Are there too many?

Once the field has been narrowed to a few potential candidates, corporate counsel must decide. Although qualifications and experience are important, particularly in the forum involved, perhaps the most important criteria are (1) the commitment to service, and (2) chemistry and teamwork.

Interviews are important, because it gives corporate counsel a way to gauge whether the appellate lawyer and she will enjoy a comfortable working relationship. This does not mean that there may not be occasional disagreements. It means that both parties will be at least honest and preferably also comfortable in working through any disagreements.

If the appellate lawyer under consideration is from a large firm, it is particularly important to obtain a clear understanding of that particular lawyer's commitment to personally be involved in the case. The financial pressures on large firms to delegate downward to young associates must be countered by the corporation's desire to hire the lawyer, not the firm. Unless both sides are comfortable and truthful about the degree of involvement, the corporation will not be getting the quality of service for which it is paying.

In a large case, it is likely that not everyone will always get along with everyone else. First, everyone is under a lot of pressure. There is a lot at stake, and deadlines are everywhere. Second, superb lawyers are likely to have large egos. It would be denying human nature to expect there to be no personality clashes. And the clashes can be exacerbated by stereotypes, which often have a grain of truth about them. Corporate counsel may occasionally feel like Dr. Phil.

The key, of course, is for everyone to have some tolerance for different personalities. The goal is the same, and life will be easier if everyone presumes that everyone else is trying hard to reach the same goal, even if the other's methods occasionally seem bewildering. Choosing a good team may be the most realistic approach. After that, urge tolerance and preach patience.

As mentioned, experience, commitment, chemistry and teamwork all add up to some intangible attraction making one lawyer appear to be the best choice for a particular case. Occasionally costs also enter into the equation.

III. **Controlling costs through fee arrangements**

The main step in controlling costs is the fee arrangement. Complex litigation is almost always costly – that's one of the factors making it complex. But, if properly managed, it should not ruin the company financially.

A. **The hourly rate**

Although the tradition has been to base fees on hours billed, the economic incentive for inefficiency this breeds is self-evident. Of course, if the sole goal of litigation is to allow the corporate client to say that it expended all efforts that were humanly possible but still did not prevail, billing by the hour may make sense. That goal, however, usually turns into a self-fulfilling prophecy.

B. **Fixed fees**

Another possible fee arrangement is the fixed fee. Its economic incentive, however, is the reverse of the hourly arrangement. With the fixed fee, the purely economic incentive (I'm not talking about integrity or professionalism) is to do as little as possible. That is hardly desirable in complex litigation when results are most important.

C. **The contingent fee**

A purely contingent (or for defendants, a reverse-contingent) fee is possible, but may result in a huge payout at the end of the day, which management may later

resent. On the other hand, a law firm may be reluctant to devote enormous resources if it faces a substantial risk of walking away with nothing several years later.

D. **Mixed fees**

The most fair arrangement is a fixed fee with incentive compensation attached. Under this arrangement, the client can budget its costs by paying the fixed fee in monthly installments. It can reserve the incentive over time. The law firm's only economic incentive is to do as much as it takes to secure the incentive – no more and no less. The law firm, furthermore, receives a monthly fixed fee, which enables it to budget its own resources and not risk financial ruin if the case is ultimately lost. Variations can be negotiated, such as increasing the monthly installment in exchange for crediting some or all of it against the bonus if earned.

Despite the crisis atmosphere that frequently attends the onset of complex litigation, the failure to take substantial time to control costs at the outset will be regretted later. If the case is truly in a crisis mode, the client can agree to pay a law firm by the hour for one month, while a different fee arrangement is being negotiated. In fact, this typically may be the fairest way to treat lawyers at the beginning of their involvement, since it will take a few weeks to assess the case to determine what an appropriate fixed fee and incentive would be.

IV. **The purposes served by an appeal**

Like everything else, the decision actually to pursue an appeal is no longer so simple as it used to be. In the old days, the goal was simply to reverse the judgment, or – if you had won below – to affirm it. Now other factors have expanded the corporate perspective.

A. **Save the day**

Obviously, a major reason to appeal is to save the corporation big bucks or even its very existence. Texaco, Philip Morris, and Merck can tell you all you need to know about that one. These appeals implicate concerns not only on the legal issues, but also with regard to financial, public-relations, and internal-management issues.

B. **Establish precedent to win other battles**

Sometimes a corporation expects to lose at trial, but expects to win eventually on appeal. Because setting an appellate precedent might dispose of other litigation, the corporation might decline to settle the case before the goal is achieved.

C. **To encourage a settlement**

By contrast, perfecting an appeal and filing a good brief can encourage a settlement. Plaintiffs' lawyers usually work on a contingent-fee basis. If they want to match the appellate firepower, they will have to yield a percentage of their contingent fee, or pay by the hour out of their pocket. Both are distasteful to plaintiffs' lawyers, and the latter is viable only for the most successful. They may decide to settle after the appellant's brief is filed before having to engage their own appellate lawyers.

D. **Attrition**

Small-firm trial lawyers and solo appellate lawyers for plaintiffs can be overwhelmed by good briefing from a great appellate firm. The inability to match the quality of the briefs may force a settlement or increase the odds of victory.

E. **Influencing financial markets**

When a large verdict is returned, the financial markets often perk up their ears and the price of shares can decrease. An appeal may be necessary to provide the corporation with time to adjust to the changing economic conditions. (Although if properly managed, a great deal of this trouble should have been anticipated and dealt with earlier.)

F. **Public relations**

A large verdict or judgment can hurt a company's image among the public. This can affect consumers, customers, distributors, suppliers, joint venturers, and others. Politicians may decide to jump on the bandwagon with some good old-fashioned corporation bashing – especially in the year leading up to an election. Therefore, a corporation may decide to pursue an appeal to tell its side of the story to assuage its bad image. Again, there are ways to manage this fallout by planning in advance.

V. **Conclusion**

From the corporate perspective, appellate specialists are now the routine rather than the exception. Furthermore, the role of the appellate lawyer has expanded to embrace anything in the litigation process involving more than purely factual issues. Rather than the old dichotomy between trial lawyers and appellate lawyers, the new dichotomy is between fact lawyers and law lawyers. Today, appellate lawyers really have become "the lawyers' lawyers."