COMMERCIAL LITIGATION

The courts still need to decide how to handle damages in precontractual liability cases. Changes in market demand and financing requirements may require adjustments in negotiating stances. Because of developing circumstances, allowing expectation damages might well undercut usage of agreements to negotiate because a party that is not required to come to an agreement still can be faulted for not doing so. Id. at 96–97.

While such sentiments may not be baseless, neither the First Circuit’s decision in Gemini Investors nor Judge Korsmo’s dissent in Columbia Park adequately address the need for a promise not to negotiate. Although a breach of a promise not to negotiate is actionable, the approach advanced by Professor Farnsworth in this circumstance, allowing expectation damages, might thwart achieving a final contract, the approach advanced by Professor Farnsworth.

Conclusion

The law will continue to develop in this area. Many jurisdictions have yet to confront directly how liability doctrines apply when a letter of intent does not establish that the parties reached a final agreement. The courts still need to decide how to handle damages in precontractual liability cases. Changes in market demand and financing requirements may require adjustments in negotiating stances. Because of developing circumstances, allowing expectation damages might well undercut usage of agreements to negotiate because a party that is not required to come to an agreement still can be faulted for not doing so. Id. at 96–97.

While such sentiments may not be baseless, neither the First Circuit’s decision in Gemini Investors nor Judge Korsmo’s dissent in Columbia Park adequately address the need for a promise not to negotiate. Although a breach of a promise not to negotiate is actionable, the approach advanced by Professor Farnsworth in this circumstance, allowing expectation damages, might thwart achieving a final contract, the approach advanced by Professor Farnsworth.

Conclusion

The law will continue to develop in this area. Many jurisdictions have yet to confront directly how liability doctrines apply when a letter of intent does not establish that the parties reached a final agreement. The courts still need to decide how to handle damages in precontractual liability cases. Changes in market demand and financing requirements may require adjustments in negotiating stances. Because of developing circumstances, allowing expectation damages might well undercut usage of agreements to negotiate because a party that is not required to come to an agreement still can be faulted for not doing so. Id. at 96–97.

While such sentiments may not be baseless, neither the First Circuit’s decision in Gemini Investors nor Judge Korsmo’s dissent in Columbia Park adequately address the need for a promise not to negotiate. Although a breach of a promise not to negotiate is actionable, the approach advanced by Professor Farnsworth in this circumstance, allowing expectation damages, might thwart achieving a final contract, the approach advanced by Professor Farnsworth.

Conclusion

The law will continue to develop in this area. Many jurisdictions have yet to confront directly how liability doctrines apply when a letter of intent does not establish that the parties reached a final agreement. The courts still need to decide how to handle damages in precontractual liability cases. Changes in market demand and financing requirements may require adjustments in negotiating stances. Because of developing circumstances, allowing expectation damages might well undercut usage of agreements to negotiate because a party that is not required to come to an agreement still can be faulted for not doing so. Id. at 96–97.

While such sentiments may not be baseless, neither the First Circuit’s decision in Gemini Investors nor Judge Korsmo’s dissent in Columbia Park adequately address the need for a promise not to negotiate. Although a breach of a promise not to negotiate is actionable, the approach advanced by Professor Farnsworth in this circumstance, allowing expectation damages, might thwart achieving a final contract, the approach advanced by Professor Farnsworth.

Conclusion

The law will continue to develop in this area. Many jurisdictions have yet to confront directly how liability doctrines apply when a letter of intent does not establish that the parties reached a final agreement. The courts still need to decide how to handle damages in precontractual liability cases. Changes in market demand and financing requirements may require adjustments in negotiating stances. Because of developing circumstances, allowing expectation damages might well undercut usage of agreements to negotiate because a party that is not required to come to an agreement still can be faulted for not doing so. Id. at 96–97.

While such sentiments may not be baseless, neither the First Circuit’s decision in Gemini Investors nor Judge Korsmo’s dissent in Columbia Park adequately address the need for a promise not to negotiate. Although a breach of a promise not to negotiate is actionable, the approach advanced by Professor Farnsworth in this circumstance, allowing expectation damages, might thwart achieving a final contract, the approach advanced by Professor Farnsworth.

Conclusion

The law will continue to develop in this area. Many jurisdictions have yet to confront directly how liability doctrines apply when a letter of intent does not establish that the parties reached a final agreement. The courts still need to decide how to handle damages in precontractual liability cases. Changes in market demand and financing requirements may require adjustments in negotiating stances. Because of developing circumstances, allowing expectation damages might well undercut usage of agreements to negotiate because a party that is not required to come to an agreement still can be faulted for not doing so. Id. at 96–97.

While such sentiments may not be baseless, neither the First Circuit’s decision in Gemini Investors nor Judge Korsmo’s dissent in Columbia Park adequately address the need for a promise not to negotiate. Although a breach of a promise not to negotiate is actionable, the approach advanced by Professor Farnsworth in this circumstance, allowing expectation damages, might thwart achieving a final contract, the approach advanced by Professor Farnsworth.

Conclusion

The law will continue to develop in this area. Many jurisdictions have yet to confront directly how liability doctrines apply when a letter of intent does not establish that the parties reached a final agreement. The courts still need to decide how to handle damages in precontractual liability cases. Changes in market demand and financing requirements may require adjustments in negotiating stances. Because of developing circumstances, allowing expectation damages might well undercut usage of agreements to negotiate because a party that is not required to come to an agreement still can be faulted for not doing so. Id. at 96–97.

While such sentiments may not be baseless, neither the First Circuit’s decision in Gemini Investors nor Judge Korsmo’s dissent in Columbia Park adequately address the need for a promise not to negotiate. Although a breach of a promise not to negotiate is actionable, the approach advanced by Professor Farnsworth in this circumstance, allowing expectation damages, might thwart achieving a final contract, the approach advanced by Professor Farnsworth.

Conclusion

The law will continue to develop in this area. Many jurisdictions have yet to confront directly how liability doctrines apply when a letter of intent does not establish that the parties reached a final agreement. The courts still need to decide how to handle damages in precontractual liability cases. Changes in market demand and financing requirements may require adjustments in negotiating stances. Because of developing circumstances, allowing expectation damages might well undercut usage of agreements to negotiate because a party that is not required to come to an agreement still can be faulted for not doing so. Id. at 96–97.

While such sentiments may not be baseless, neither the First Circuit’s decision in Gemini Investors nor Judge Korsmo’s dissent in Columbia Park adequately address the need for a promise not to negotiate. Although a breach of a promise not to negotiate is actionable, the approach advanced by Professor Farnsworth in this circumstance, allowing expectation damages, might thwart achieving a final contract, the approach advanced by Professor Farnsworth.

Conclusion

The law will continue to develop in this area. Many jurisdictions have yet to confront directly how liability doctrines apply when a letter of intent does not establish that the parties reached a final agreement. The courts still need to decide how to handle damages in precontractual liability cases. Changes in market demand and financing requirements may require adjustments in negotiating stances. Because of developing circumstances, allowing expectation damages might well undercut usage of agreements to negotiate because a party that is not required to come to an agreement still can be faulted for not doing so. Id. at 96–97.

While such sentiments may not be baseless, neither the First Circuit’s decision in Gemini Investors nor Judge Korsmo’s dissent in Columbia Park adequately address the need for a promise not to negotiate. Although a breach of a promise not to negotiate is actionable, the approach advanced by Professor Farnsworth in this circumstance, allowing expectation damages, might thwart achieving a final contract, the approach advanced by Professor Farnsworth.

Conclusion

The law will continue to develop in this area. Many jurisdictions have yet to confront directly how liability doctrines apply when a letter of intent does not establish that the parties reached a final agreement. The courts still need to decide how to handle damages in precontractual liability cases. Changes in market demand and financing requirements may require adjustments in negotiating stances. Because of developing circumstances, allowing expectation damages might well undercut usage of agreements to negotiate because a party that is not required to come to an agreement still can be faulted for not doing so. Id. at 96–97.

While such sentiments may not be baseless, neither the First Circuit’s decision in Gemini Investors nor Judge Korsmo’s dissent in Columbia Park adequately address the need for a promise not to negotiate. Although a breach of a promise not to negotiate is actionable, the approach advanced by Professor Farnsworth in this circumstance, allowing expectation damages, might thwart achieving a final contract, the approach advanced by Professor Farnsworth.

Conclusion

The law will continue to develop in this area. Many jurisdictions have yet to confront directly how liability doctrines apply when a letter of intent does not establish that the parties reached a final agreement. The courts still need to decide how to handle damages in precontractual liability cases. Changes in market demand and financing requirements may require adjustments in negotiating stances. Because of developing circumstances, allowing expectation damages might well undercut usage of agreements to negotiate because a party that is not required to come to an agreement still can be faulted for not doing so. Id. at 96–97.

While such sentiments may not be baseless, neither the First Circuit’s decision in Gemini Investors nor Judge Korsmo’s dissent in Columbia Park adequately address the need for a promise not to negotiate. Although a breach of a promise not to negotiate is actionable, the approach advanced by Professor Farnsworth in this circumstance, allowing expectation damages, might thwart achieving a final contract, the approach advanced by Professor Farnsworth.

Conclusion

The law will continue to develop in this area. Many jurisdictions have yet to confront directly how liability doctrines apply when a letter of intent does not establish that the parties reached a final agreement. The courts still need to decide how to handle damages in precontractual liability cases. Changes in market demand and financing requirements may require adjustments in negotiating stances. Because of developing circumstances, allowing expectation damages might well undercut usage of agreements to negotiate because a party that is not required to come to an agreement still can be faulted for not doing so. Id. at 96–97.

While such sentiments may not be baseless, neither the First Circuit’s decision in Gemini Investors nor Judge Korsmo’s dissent in Columbia Park adequately address the need for a promise not to negotiate. Although a breach of a promise not to negotiate is actionable, the approach advanced by Professor Farnsworth in this circumstance, allowing expectation damages, might thwart achieving a final contract, the approach advanced by Professor Farnsworth.

Conclusion

The law will continue to develop in this area. Many jurisdictions have yet to confront directly how liability doctrines apply when a letter of intent does not establish that the parties reached a final agreement. The courts still need to decide how to handle damages in precontractual liability cases. Changes in market demand and financing requirements may require adjustments in negotiating stances. Because of developing circumstances, allowing expectation damages might well undercut usage of agreements to negotiate because a party that is not required to come to an agreement still can be faulted for not doing so. Id. at 96–97.

While such sentiments may not be baseless, neither the First Circuit’s decision in Gemini Investors nor Judge Korsmo’s dissent in Columbia Park adequately address the need for a promise not to negotiate. Although a breach of a promise not to negotiate is actionable, the approach advanced by Professor Farnsworth in this circumstance, allowing expectation damages, might thwart achieving a final contract, the approach advanced by Professor Farnsworth.

Conclusion

The law will continue to develop in this area. Many jurisdictions have yet to confront directly how liability doctrines apply when a letter of intent does not establish that the parties reached a final agreement. The courts still need to decide how to handle damages in precontractual liability cases. Changes in market demand and financing requirements may require adjustments in negotiating stances. Because of developing circumstances, allowing expectation damages might well undercut usage of agreements to negotiate because a party that is not required to come to an agreement still can be faulted for not doing so. Id. at 96–97.

While such sentiments may not be baseless, neither the First Circuit’s decision in Gemini Investors nor Judge Korsmo’s dissent in Columbia Park adequately address the need for a promise not to negotiate. Although a breach of a promise not to negotiate is actionable, the approach advanced by Professor Farnsworth in this circumstance, allowing expectation damages, might thwart achieving a final contract, the approach advanced by Professor Farnsworth.
appeal. But that practice was separate and was aimed at getting their own cases taking root in Florida, Texas, Illinois, Cal-
ifornia, Ohio, Michigan, Arizona, Minne-
sota, and other states at the same time. That practice
formed from many rivulets.

I recall hearing a federal circuit judge observe during an appellate practice semi-
nar, in the mid-1980s, that the judge generally preferred experienced appellate attorneys because they "know the rules and understand the appellate perspective." While "knowing the rules" may be bar rather low, the comment reflected the emerging concept that a different dynamic enters the picture when a case moves from a trial court to an appellate court. The earliest appellate marketing efforts that crossed my desk did, in fact, offer to review briefs to ensure compliance with complex rules governing joint appendices and proper case citations. Useful, perhaps, but this hardly constitutes a sustainable practice.

Burgeoning appellate dockets likely pro-
duced this focus on appellate procedure, which also resulted in appellate courts' increasing their governed by the law is not
based on technical rule violations or sum-
marily to affirm decisions without oral arguments. As trial attorneys became less willing to devote substantial amounts of time to studying the intricacies of rules that they only had to follow about once a year at best, a new awareness grew about the potential land mines became a valuable resource. Many trial attorneys began to rely on former appellate clerks or attorneys with strong writing skills in firm trial departments to take the laboring oar on appeals. But procedure and writing skills alone left appellate work as a mere afterthought to a trial practice; an adjunct to some other attorney's trial practice.

What propelled specializing in appeals into a distinct field of practice was the sec-
daughter attribute voiced by that circuit judge many years ago that they "understand the appellate perspective." An appellate per-
specialist brings a different skill set with an independent value to a litigated mat-
ter. A retired state appellate judge recently described his task as "engaging in analy-
sis of the facts or in the law, and applying[the] fruits of legal research, life, and
professional experience to produce an opinion of what the law was, what it should be, and professional experience to produce an opinion of what the law was, what it should be, and
Abe because they likely will face the same or similar issues in other cases in the course of their careers, appellate practitioners are cognizant of the importance of maintaining canard and credibility regarding case records and the governing law. It is per-
haps for that reason that the consensus of judicial panels of state supreme court and federal appellate courts is that the low, the comment reflected the emerging concept that a different dynamic enters the picture when a case moves from a trial court to an appellate court. The earliest appellate marketing efforts that crossed my desk did, in fact, offer to review briefs to ensure compliance with complex rules governing joint appendices and proper case citations. Useful, perhaps, but this hardly constitutes a sustainable practice.

Burgeoning appellate dockets likely pro-
duced this focus on appellate procedure, which also resulted in appellate courts' increasing their governed by the law is not based on technical rule violations or sum-
marily to affirm decisions without oral arguments. As trial attorneys became less willing to devote substantial amounts of time to studying the intricacies of rules that they only had to follow about once a year at best, a new awareness grew about the potential land mines became a valuable resource. Many trial attorneys began to rely on former appellate clerks or attorneys with strong writing skills in firm trial departments to take the laboring oar on appeals. But procedure and writing skills alone left appellate work as a mere afterthought to a trial practice; an adjunct to some other attorney's trial practice.

What propelled specializing in appeals into a distinct field of practice was the sec-
daughter attribute voiced by that circuit judge many years ago that they "understand the appellate perspective." An appellate per-
specialist brings a different skill set with an independent value to a litigated mat-
ter. A retired state appellate judge recently described his task as "engaging in analy-
sis of the facts or in the law, and applying[the] fruits of legal research, life, and
professional experience to produce an opinion of what the law was, what it should be, and professional experience to produce an opinion of what the law was, what it should be, and
appeal. But that practice was separate and apart from what the law was by the time that was taking root in Florida, Texas, Illinois, California, Ohio, Michigan, Arizona, Minnesota, and other states at the same time. That practice was not mine from many rivalries.

I recall hearing a federal circuit judge observe during an appellate practice seminar in the mid-1980s, that the judges generally preferred expert appellate attorneys because they "know the rules and understand the appellate perspective." While "knowing the rules" is the bar rather low, the comment reflected the emerging concept that a different dynamic enters the picture when a case moves from a trial court to an appellate court. It was one of the earliest appellate marketing efforts that crossed my desk, in fact, offer to review briefs to ensure compliance with complex rules governing joint appendices and proper case citations. Useful, perhaps, but this hardly constitutes a sustainable practice.

Burgeoning appellate dockets likely produced this focus on appellate procedure, which also resulted in appellate courts' increased governance by rules that were based on technical rules violations or summarily to affirm decisions without oral arguments. As trial attorneys became less willing to devote substantial amounts of time to studying the intricacies of rules that they had to follow about once a year at best, the question of what the law was about the potential land mines became a valuable resource. Many trial attorneys began to rely on former appellate clerks or attorneys with strong writing skills in firm trial departments to take the laboring oar on appeals. But procedure and writing skills alone left appellate work as a mere practice to a trial practice; an adjunct to some other attorney's trial practice.

What propelled specializing in appeals into a distinct field of practice was the second attribute voiced by that circuit judge: "...and professional experience to produce an opinion of what the law was by the time that you are to apply, to decide who wins the case." Judge Rudolph Kass (ret.), Translations, 56 Boston B.J. 34 (2012). Trial attorneys and their clients may well be dismayed to learn that after years of hard-fought litigation, a panel of three judges decides "what the law is" and how its application determines the ultimate victory. But it is that reality, in fact, that began to carry weight as a force for shaping the law. In the mid-1980s, thousands of appellate judges and other bar leaders were called to a recent seminar that I attended intended that they generally preferred appellate specialists over members in the substantive law areas at issue, except, perhaps, some times in patent and ERISA appeals.

Another rivulet contributing to the development of the appellate practice was the increase in the number of appellate practitioners. This was a force for shaping the law. In the mid-1980s, many state courts of appeals were particularly acrimonious proceedings were particularly acrimonious, the mediation dynamic changes over time. As one appellate mediator has observed, the mediation dynamic changes after a judgment, when "one party has tasted blood and the other is behind the 8-ball." Kass, supra, at 36. This establishes all the more reason for gaining a fresh perspective. Indeed, sometimes introducing a "new face" into a case when the trial proceedings were particularly acrimonious can help resolve a matter.

And because they likely will face the same appellate panel from which they have been appointed, or from the panel that served on their higher court of appeal, appellate practitioners are cognizant of the importance of maintaining candor and credibility regarding case rules and the governing law. It is perhaps for that reason that the consensus of judicial panels of state supreme court and federal court of appeals success at a recent seminar that I attended intended that they generally preferred appellate specialists over members in the substantive law areas at issue, except, perhaps, sometimes in patent and ERISA appeals.

The "appellate perspective" thus must operate within that realm. For that reason, appellate practitioners are also proficient in many other substantive areas at issue, except, perhaps, some times in patent and ERISA appeals.

Not to second-guess the decisions made by the trial counsel. Most appellate attorneys have had at least some hands-on trial experience, and many continue to practice in trial as well as appellate courts. To take a case apart for an appeal, someone must understand how it was put together. With that understanding comes a deep appreciation of all the balls in the air at the trial court level and the inevitability that some will fall.

As for the former assumption, it is true that appellate practitioners bring a different perspective. An appellate practitioner's frequent appearances in appellate courts and trial court familiarity with the purpose of hypothetical questions tend to create a comfort zone for judges charged with maintaining that consistency and uniformity of law. And experienced appellate counsel will clarify their roles when clients retain them: they are there to work with the records as provided, not to second-guess the decisions made by the trial counsel. Most appellate attorneys have had at least some hands-on trial experience, and many continue to practice in trial as well as appellate courts. To take a case apart for an appeal, someone must understand how it was put together. With that understanding comes a deep appreciation of all the balls in the air at the trial court level and the inevitability that some will fall. Yet another attribute voiced by that circuit judge was the need to explain pivotal issues as state surveys and cogent constitutional applications. The "appellate perspective" thus must develop as state surveys and cogent constitutional applications. The "appellate perspective" thus must develop.

An appellate practitioner's frequent appearances in appellate courts and trial court familiarity with the purpose of hypothetical questions tend to create a comfort zone for judges charged with maintaining that consistency and uniformity of law. And experienced appellate counsel will clarify their roles when clients retain them: they are there to work with the records as provided, not to second-guess the decisions made by the trial counsel. Most appellate attorneys have had at least some hands-on trial experience, and many continue to practice in trial as well as appellate courts. To take a case apart for an appeal, someone must understand how it was put together. With that understanding comes a deep appreciation of all the balls in the air at the trial court level and the inevitability that some will fall. Yet another attribute voiced by that circuit judge was the need to explain pivotal issues as state surveys and cogent constitutional applications. The "appellate perspective" thus must develop.

Experienced appellate counsel will clarify their roles when clients retain them: they are there to work with the records as provided, not to second-guess the decisions made by the trial counsel.

know how a particular trade or business operates within that realm. For that reason, appellate counsel will not want to discuss the nuances of the case with personal jurisdiction with you; they will want to understand the facts of the case but drive such an analysis. Experienced appellate practitioners are also proficient at "bottom line" cost-benefit analyses. The first issue that an appellate attorney likely will put on the table, after ensuring that post-trial motions are properly filed and any necessary stays of execution in place, is whether to appeal a decision at all. An experienced counsel will provide an objective, real life assessment of an appeal and the court where it will be heard, not an ivory tower assessment of each. While preliminary evaluations will not lead to precise percentages of success on the merits of cases, they serve two valuable functions. First, an assessment provides the "gist reaction" of an attorney who has handled many appeals before the court that will hear this appeal. If those prospects appear dim, efforts may switch to developing a settlement strategy. Second, a preliminary review can focus on the nature of the most likely outcome. Is the alleged adverse effect sufficiently significant as a matter of law if the appeal succeeds, a new trial, or a new trial on damages only? If the best anticipated result is a new trial on damages only, an appellate attorney likely would recommend shifting the focus to a settlement strategy.

Appellate practitioners are also conversant in those posttrial and appellate settlement strategies. Today every federal circuit has some form of a court-sponsored mediation program ranging from 30 to 55 percent. See Marin K. Levy, The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts, 29 Stan. L. Rev. 443 (2011). Many state appellate courts have similar programs with similar settlement rates. With that kind of track record, it just makes sense to rely on counsel with familiarity with the different procedures, dynamics, and personnel of the appellate mediation program.

Appellate attorneys know the "windows of opportunity" during the life of an appeal when a settlement would or would not most likely occur—not, for example, immediately after your opponent files its brief—the variety of appellate relief available for potential use as leverage, including interest calculations and potential for costs and attorney fees, among other things, and the different approach needed for appellate mediation. As one appellate mediator has observed, the mediation dynamic changes after a judgment, when "one party has tasted blood and the other is behind the 8-ball." Kass, supra, at 36. This establishes all the more reason for gaining a fresh perspective. Indeed, sometimes introducing a "new face" into a case when the trial proceedings were particularly acrimonious can help resolve a matter.

Several practical advantages of the immediate case to be appealed, an experienced appellate practitioner can advise you of arising issues that will likely affect your company. Whether to pursue an appeal and how to present that appeal may depend upon arguments peculiar to a particular business or industry, such as the mechanics of litigation, the nature of a particular statutory interpretation or a rule of law, the particular statutory interpretation or a rule of law that is involved, the economy's influence on the case, the time to studying the intricacies of rules that provided the impetus for the development of an appellate practice. The distinct skill set needed for appeals, as with any other skill set, needs continuous exercise to remain effective: it needs its own "practice." It is not just a matter of knowing to focus on the law rather than facts that distinguishes an appellate attorney from a specialist in a different area.

The "appellate perspective" thus must develop as state surveys and cogent constitutional applications. The "appellate perspective" thus must develop.

Experienced appellate counsel will clarify their roles when clients retain them: they are there to work with the records as provided, not to second-guess the decisions made by the trial counsel.

know how a particular trade or business operates within that realm. For that reason, appellate counsel will not want to discuss the nuances of the case with personal jurisdiction with you; they will want to understand the facts of the case but drive such an analysis. Experienced appellate practitioners are also proficient at "bottom line" cost-benefit analyses. The first issue that an appellate attorney likely will put on the table, after ensuring that post-trial motions are properly filed and any necessary stays of execution in place, is whether to appeal a decision at all. An experienced counsel will provide an objective, real life assessment of an appeal and the court where it will be heard, not an ivory tower assessment of each. While preliminary evaluations will not lead to precise percentages of success on the merits of cases, they serve two valuable functions. First, an assessment provides the "gist reaction" of an attorney who has handled many appeals before the court that will hear this appeal. If those prospects appear dim, efforts may switch to developing a settlement strategy. Second, a preliminary review can focus on the nature of the most likely outcome. Is the alleged adverse effect sufficiently significant as a matter of law if the appeal succeeds, a new trial, or a new trial on damages only? If the best anticipated result is a new trial on damages only, an appellate attorney likely would recommend shifting the focus to a settlement strategy.

Appellate practitioners are also conversant in those posttrial and appellate settlement strategies. Today every federal circuit has some form of a court-sponsored mediation program ranging from 30 to 55 percent. See Marin K. Levy, The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts, 29 Stan. L. Rev. 443 (2011). Many state appellate courts have similar programs with similar settlement rates. With that kind of track record, it just makes sense to rely on counsel with familiarity with the different procedures, dynamics, and personnel of the appellate mediation program.

Appellate attorneys know the "windows of opportunity" during the life of an appeal when a settlement would or would not most likely occur—not, for example, immediately after your opponent files its brief—the variety of appellate relief available for potential use as leverage, including interest calculations and potential for costs and attorney fees, among other things, and the different approach needed for appellate mediation. As one appellate mediator has observed, the mediation dynamic changes after a judgment, when "one party has tasted blood and the other is behind the 8-ball." Kass, supra, at 36. This establishes all the more reason for gaining a fresh perspective. Indeed, sometimes introducing a "new face" into a case when the trial proceedings were particularly acrimonious can help resolve a matter.

Several practical advantages of the immediate case to be appealed, an experienced appellate practitioner can advise you of arising issues that will likely affect your company. Whether to pursue an appeal and how to present that appeal may depend upon arguments peculiar to a particular business or industry, such as the mechanics of litigation, the nature of a particular statutory interpretation or a rule of law, the particular statutory interpretation or a rule of law that is involved, the economy's influence on the case, the
Myth No. 3: The Trial Attorney Knows the Case; an appellate attorney knows the error.

A trial attorney knows the case; an appellate attorney knows the error.

Further, every trial attorney honestly and truly believes that he or she has preserved every erroneous ruling in the record thoroughly. But not every bench conference makes it into the record, and not every recorded colloquy contains the clarify of thought that was evident at the time. An appellate attorney reviews the same cold paper record that an appellate judge reviews with the same understanding, or incomprehension, and without assigning too much weight to the nuances of the language used by the trial counsel, or the clarifying tone.

Finally, knowing the "case," knowing the "issues," and even knowing the "errors," does not necessarily mean that a trial counsel knows the potential highly technical legal arguments that an appellate counsel can make in a given situation. An appellate counsel may have an advantage in making the arguments and knowing how to approach the trial counsel, but the trial judge may be as effective in making the arguments as the appellate counsel. It is hard to prove. Statistical evidence on the more general value of appellate expertise makes a difference. An appellate specialist can bring skills to bear on the clear and concise communication of the legal principles that will often suffice to fill in the gaps and to identify those portions of a trial transcript, exhibits, and the pretrial record containing reversible errors and bringing the errors to the appellate panel does not understand an argument. A particular judge may have a difficult time following a written argument, but that does not mean that a particular judge would not know how to respond to a particular argument.

Myth No. 4: Adding an Appellate Specialist Increases Costs Exponentially

This myth is most commonly propagated as "why should I have another attorney read the entire transcript, not to mention the thousands of pages of files produced during the discovery in the litigation?" The short answer is that whoever pursues an appeal needs to review the record of the case. This means the trial counsel must read the entire record of the case. The appellate advocate starts from scratch in a room filled with file cabinets representing years of proceedings. Keeping costs down while ensuring that an appellate advocate has the tools necessary to succeed means delicately balancing free flowing communication among the trial counsel, the appellate counsel and yourself.

Adding an appellate specialist to a team before a trial is one technique that can lessen the learning curve. Most in-house counsel sense when a case is going south. A particularly bad ruling on a summary judgment or an in limine motion, for example, can signal that an appeal is all but inevitable. Retaining appellate counsel even in those cases means that the attorneys will be ready to hit the ground running when the jury returns verdict.

Many appellate practitioners will provide the preliminary review may also indicate whether an alternative fee with a contingent component, such as a bonus in the event of a reversal or a judgment reduction, would suit the particular appeal well. In general, alternative fee arrangements suit appellate errors that "carve out" punitive damages or other certain categories of compensatory damages the best.

Myth No. 5: Appellate Practitioners Do Not Add Measurable Value

You have me there. "Measurable" value is hard to prove. Statistical evidence on increased success rates attributable to appellate expertise is sparse and qualified. See, e.g., Susan Brodie Haire et al., Attorneys' Expertise, Litigant's Success, and Judgment in Federal Cases of Appeals, 33 Law & Soc. Rev. 667 (1999) (indicating, based on a limited statistical study, a markedly lower success rate of appellants represented by counsel with no prior experience before the circuit court). Moreover, reversal rates have declined over the past 25 years. See David R. Cleveland & Steven Wotskus, The Decline of Oral Argument in the Federal Courts of Appeal, 13 J. App. Prac. & Proc. 119, 121 (2012) (explaining that the overall reversal rates in the federal courts of appeal dropped from 19.9 percent in 1982 to 10.3 percent between 1982 and 1993 and was 8 percent in 2011). Most practitioners can recount anecdotal examples of appellate expertise making a difference. An appellate specialist obtained reconsideration and restate- ment of an appeal dismissed as untimely due to an impeded word notice of appeal, and a particular judge disagreed with the wrong standard of review employed to reverse a favorable trial court judgment. But these are the more general value of appellate expertise is in identifying the cases that have reversible errors and bringing the errors to the front. Appeals naturally fall along a bell curve. So, granted, you would find appeals that virtually any one could win, and at the other end you would find appeals that, if the right combination of experience, perception, and pragmatism were applied, you would find appel- late advocacy could make the difference between winning and losing. The preliminary review may also indicate whether an alternative fee with a contingency component, such as a bonus in the event of a reversal or a judgment reduction, would suit the particular appeal well. In general, alternative fee arrangements suit appellate errors that "carve out" punitive damages or other certain categories of compensatory damages the best.
"So that would be the briefing that lost?"

"know the case intimately. The problem the preemptive effect of pervasive regulations on failure to warn claims. Being able cases, for example. Or the arguments may or the mechanical application of a legis-

forged in the crucible of the courtroom, but through working with clients and cor-

spectives become hardwired. It is a trial the improper admission or exclusion of

An appellate specialist in such a situa-

cases necessary to make informed evi-

appellate errors that "carve out punitive

Appellate Advocacy

Myth No. 3: The Trial Attorney Knows the Case and Issues Intimately—Who Needs an Appellate Practitioner? I know that someone holds this myth when the first call that I receive includes: "Trial counsel has already briefed the issues. You just need to give them an appellate "glass."" Though tempted, I do not respond: "So that would be the briefing that lost?" Even if such a retort did not prematurely end a promising relationship, it would not

The fact is that the trial attorney does "know the case" intimately. The problem is that the trial attorney is working in a business prep. and trial strategies, certain per-

An appellate advocate knows how to put a new event into a legal context or to clarify a jury received a correct instruction on the public policy behind it. Appeals naturally fall along

The preliminary review may also indicate whether an alternative fee with a contin-

Myth No. 5: Appellate Practitioners Do Not Add Measurable Value You have me there. "Measurable" value is hard to prove. Statistical evidence on increased success rates attributable to appellate expertise is sparse and qualified. See, e.g., Susan Brodie Haire et al., Attor-

appeals, 33 Law & Soc. Rev. 667 (1999) (indicating, based on a limited statistical-


Most practitioners can recount anec-

to identify those portions of a trial tran-

94

48 • In-House Defense Quarterly • Spring 2013