The Editor interviews the Hon. William A. Dreier and the Hon. Jack L. Lintner, Norris, McLaughlin & Marcus, PA.

Editor: Would each of you tell our readers something about your professional experience?

Lintner: I began my career in 1970, at a litigation firm engaged in insurance defense and corporate litigation. I was with the firm for 18 years, during the final six of which I was a senior managing partner. I had always wanted to be a judge, however, and when the opportunity to take that step came along I took it. For nine of the 11 years that I served at trial level I was assigned to the Law Division handling civil matters. I spent approximately one year each in the Family and Criminal parts. As a trial judge I eventually was appointed and served as the Presiding Judge of the Law Division, after which I was appointed to the Chancery Division, where I also served as the Presiding Judge before being named to the Appellate Court. I was appointed to the Appellate Court in 1999 and served as a Presiding Judge of the Appellate Division for the 2006-2007 and 2007-2008 terms. I joined Norris McLaughlin upon my retirement from the bench.

Dreier: My background is somewhat different from Jack’s. I was not primarily a trial lawyer. My firm was engaged in banking law – where there is not a great deal of trial work – and utility defense work. I was also politically active in my hometown of Plainfield, where I became city attorney. Like Jack, I had always wanted to be a judge. When I was appointed to the bench (at age 35), the Assignment Judge in Union County gave me a number of commercial cases, as well as municipal appeals, since much of what I had done in private practice was in these areas, and then later I received other heavy civil trials. Eventually, I was tapped for the Chancery Division in Trenton for a few years. In 1983, I went to the New Jersey Appellate Division, where I spent the next 15 years, four of which I served as Presiding Judge.

I should also mention that prior to law school I was at MIT, a background which gave me an interest in products liability. I was asked to teach the products liability course at the Judges’ College, and eventually my notes became the basis for a book on the subject that is now in its 20th edition. I also wrote books on the Uniform Commercial Code and on Chancery practice. In my present practice, I am engaged in a significant volume of ADR work.

Editor: What prompted Norris McLaughlin to organize a distinct practice group to offer appellate services to its clients?

Lintner: With the passage of time, there has been increasing interest in the retention of retired judges with appellate experience. They serve in two ways: first, in a consultative capacity, particularly with respect to the strategies involved in the writing of appellate briefs and the arguments to be made before an appellate panel. Second, the retired judges can actively write or direct the writing of the brief, and at least in the federal courts, argue the appeal. Appellate judges bring focus and direction to the appeal process. Trial lawyers are apt to raise every single thing that they assert went wrong at trial. Appellate judges, however, are aware that oftentimes only one or two issues are deemed important by the appeals court, and that it is essential for appellate attorneys to focus on those issues if they expect to have a chance to be persuasive before an appellate panel and win on appeal.

Dreier: If you can picture the process, the appellate judge is being asked to look at what is essentially a stale record. There is a great deal to wade through in terms of briefs and transcripts, and the record is almost certain to contain mistakes. That does not mean, however, that an error automatically makes the trial unfair and the decision subject to reversal. As one of my mentors said during my days as an Appellate Division clerk, litigants are entitled to a fair trial, not a perfect one.

What an experienced appellate judge brings to a practice like this is a sense of what the appellate tribunal is going to look for in the record from below, and, more importantly, what it is going to ignore. We are also in a position to take our attorneys through the process, which, even for an experienced trial lawyer, can be daunting.

Lintner: Excellent point. Even trial lawyers with a great deal of experience can feel a certain lack of comfort in the appellate courts. Trial lawyers argue factual issues whereas appellate counsel concentrate more on the legal issues as applied to the facts. They focus on what might have happened at trial level that
created substantial unfairness under the law. For this reason, we often find trial lawyers and firms with strong trial practices retaining firms with appellate practices – and including former appellate judges – to consult in the handling of appeals.

Editor: Based upon your experience, what qualities do successful appellate attorneys have?

Lintner: There are a number of skills necessary for success in an appellate practice. First of all, a practitioner must write well and have the ability to put a coherent and persuasive appellate brief together. In this regard, Norris McLaughlin has considerable bench strength, including lawyers who have clerked in the Appellate Division. That is an exceptionally valuable resource for this kind of practice. Appellate Division clerks work very hard, and their responsibilities include the preparation of in-depth memoranda which identify and convey the essential points of an appeal.

Secondly, a good appellate lawyer must be able to argue an appeal, which means they must possess the ability to concentrate on the key issues – as opposed to arguing everything but the kitchen sink – and, as former appellate judges, Bill and I are in an excellent position to provide guidance to those who are going to argue before an appellate tribunal.

Former appellate judges are uniquely qualified by their experience to fine-tune an appellate brief and the arguments that accompany the brief. The presence of former appellate judges in an appellate practice is a very good measure of the strength of such a practice, even where, as in New Jersey, they are not permitted to appear themselves before a state appellate tribunal.

Editor: I gather that there are skills that make for a good appellate lawyer that differ from those of a good trial lawyer.

Dreier: We have found that a good appellate practitioner is almost invariably a good trial lawyer, although the reverse is not necessarily the case. In light of the fact that the firm has such a depth of experience in this area, we have been able to select for the group a number of senior practitioners with a strong appellate reputation and younger attorneys with clerkship qualifications. We expect that the 15 or so attorneys we have selected for the practice will continue to act as trial lawyers at the same time as they help us build an appellate practice. We believe that their trial work will serve to enhance their appellate work, and vice versa.

Lintner: What is being appealed in this process is what happened during a trial. My experience has taught me that a judge on an appellate panel with experience as a trial lawyer is, often times, the person influencing the rest of the panel on the disposition of the appeal. Many appellate judges come from an administrative or other governmental background – that is, they often possess little trial experience – and find themselves at a disadvantage in a closely argued civil case. Because a judge with a background as a trial attorney is in a position to persuade his colleagues on the practical result of trial error, it is not advisable to rely on attorneys who limit their practice to appellate work alone. It is not unusual for the most persuasive voice in an appellate proceeding – whether speaking from the bar or the bench – to be someone who has experience both as a trial attorney and an appellate advocate.

Dreier: I would add to this, however, in light of my own experiences as basically a commercial and municipal attorney who then became a judge, that in many cases an in-depth knowledge of an industry and the law governing it can be a powerful background to bring to an appellate brief and to argue a specialized case. Fortunately, we have both skill sets in our group.

We have been very careful in selecting the members of this group, and the range of subject matter expertise they possess is considerable. Dick Norris is one of the leading matrimonial lawyers in New Jersey. Ted Margolis has served as chief of appeals for the U.S. Attorney’s Office and he and Bryan Blaney are experienced in white-collar crime and major commercial litigation. Jim Shragr has a wealth of corporate litigation experience. Jim Laskey has a very strong utility law background. In the products liability area, Steve Karg has exceptional expertise.

Editor: When you are brought in for the appeal of a case that has been handled by another firm at trial, how do you deal with the obvious sensitivities?

Lintner: As appellate advocates we are seeking to advance the interests of the client. If that entails addressing missteps at the court of first instance, or even mistakes, on the part of the trial lawyers, we will do what is necessary to ensure that the interests of the client are not compromised in any way. Handling sensitive issues professionally – and both the appellate attorneys and those who handled the case at the trial level are professionals – is the only way to properly represent the client in an appellate proceeding.

Editor: As you know, our publication is directed to an audience composed of general counsel and the members of corporate legal departments. Would you give us your thoughts about the relationship between general counsel and outside counsel in connection with the development of litigation strategy?

Dreier: The Appellate Practice Group deals mostly with the commercial, corporate and related sectors, such as products liability defense, and we represent mid-sized and some very large corporations. There is no question but that the final strategic function vests exclusively with general counsel. We are there to do the best job we can for the company – and that includes making recommendations with respect to the appeal that are strategic in nature – but control is the province of general counsel. I know of appellate attorneys who insist on having a free hand – on having general counsel relinquish control over the appeal – but I do not think that this can be the foundation for any kind of lasting relationship.

We are engaged in some sensitive appellate work for a number of the major companies that are located in New Jersey. We cannot make an admission in an appeal we are handling here, which might make eminent good sense for the New Jersey proceeding but could have disastrous consequences for the company in Minnesota or Oregon. It is essential that general counsel, either directly or through national coordinating counsel (and we have served in this role), provide guidance in this situation. That is only one example of the ways in which general counsel provides the essential direction in the corporate counsel-outside counsel relationship.