

GETTING THE APPELLATE LAWYER INVOLVED EARLY IN LITIGATION

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GETTING THE APPELLATE LAWYER INVOLVED EARLY IN LITIGATION

One reason appellate lawyers are not used as much as they should be during the pretrial and trial phases of litigation is the public perception that trials and appeals are separate. That is, many people think the appeal starts once the trial ends. A successful appeal, however, is only as good as the trial record from which it arises. Any lawyer can appeal – but an appellate lawyer is specially trained to know when the client can *prevail* in an appeal.¹

The appellate lawyer can be the trial lawyer's secret weapon if used as a full-fledged member of the trial team. Although some cases may not financially warrant the addition of an appellate lawyer to the trial team, in high exposure and high dollar cases, the appellate lawyer is worth every penny.

Here's why: trial lawyers and appellate lawyers experience a trial differently.² Trial lawyers "keep score" with searing cross-examination, powerful closing argument, and jury reaction. Appellate lawyers "keep score" with the waived objection, the missing ruling on the objection, the unrecorded bench conference, or the critical exhibit that was discussed but never admitted.³

Even the most experienced and talented trial lawyer may not preserve error or establish the necessary record for appeal. This is not because of any lack of skill. Rather, it stems from the different expertise of trial lawyers and appellate lawyers: trial lawyers excel in convincing juries, while appellate lawyers excel in convincing courts.⁴ A trial lawyer may be outraged that a ruling is "wrong," while the appellate lawyer recognizes that the "wrong" ruling is

harmless and, thus, will not provide a basis for relief on appeal.⁵

Also, an appellate lawyer thinks about the case from the perspective of the appellate judge, rather than limiting the focus to the trial court judge. The appellate lawyer views the evidence at trial through the window of the various standards of review that will be applied by the appellate court (which tend to favor the party who received the favorable verdict and judgment). This can help the trial lawyer assess the strengths and weaknesses of the case before closing arguments to the jury.

This paper will examine ways by which the appellate lawyer can become a valuable asset to the trial team and the client. In the right case, the investment will always pay dividends.

A. Why Should You Add the Appellate Lawyer to the Trial Team?

1. Fresh Perspective

After living with a case for months or years, the trial lawyer often is entrenched in the facts, the arguments, and the theme of the case. In the factually intricate cases, sometimes the trial lawyer has difficulty seeing the forest for the trees (at least in the humble opinion of the appellate lawyer). The appellate lawyer often brings a fresh pair of eyes to the lawsuit and can provide a more detached evaluation of your client's case.

While the trial lawyer focuses on "working up" the case to develop testimony, evidence, and themes, the appellate lawyer should be able to see the bigger picture. The appellate lawyer can assist with formulating additional legal theories or defenses, adapting or distinguishing the law, identifying weaknesses in both your case and the opponent's case, and maximizing or minimizing the damage recovery (depending on whose side you're on).

2. Knowledge of the Law and Trends in the Law

Appellate lawyers spend a lot of time reading the latest opinions from courts of appeals, the Texas Supreme Court, and the federal courts. And they actually enjoy doing it! Therefore, they have at their fingertips the latest interpretations of a particular statute or rule, the latest restrictions or expansions of your

¹ Some ideas in this paper were expressed previously in an excellent article by Leann Capps Medford, *Preventive Medicine for Your Case: Using Appellate Lawyers in Trial*, which is available on the American Bar Association Judicial Division website in *Appellate Issues*, an official publication of the Council of Appellate Lawyers. See <http://www.abanet.org/jd/ajc/calnewsletters/200708/volume7issue2.html> (hereafter "Medford").

² Medford at 1.

³ *Id.*

⁴ *Id.*

⁵ *See id.*

claim or defense, and the latest information about tricks and traps for the wary litigator.

Trial lawyers with active dockets frequently do not have the time (or the inclination) to closely follow case law or judicial trends. Appellate lawyers, on the other hand, typically LIVE to evaluate trends in the law and to predict what might happen in future cases. With this tool, an appellate lawyer can help you lay the groundwork during trial for changes in the law that may occur while your case is in the appellate pipeline.

This could provide an enormous future benefit for your client, as long as it has been argued and preserved. Nothing feels worse for an appellate lawyer than when a higher court makes law or changes the law, but the trial team in your case did not anticipate the change and did not preserve the issue for the eventual appeal.

3. Preserving the Record for Appeal

One of the most well-known benefits of adding an appellate lawyer to the trial team is preservation of error for appeal. In the heat of battle, trial lawyers sometimes forget to get a critical document admitted into evidence, fail to ask the court reporter to record a bench conference, or fail to get a ruling on an objection. The appellate lawyer – who is generally one step removed from the heat of the battle – can serve as “insurance” for the trial lawyer, thereby cementing the trial record for the appeal. Preserving error during trial also avoids having to make embarrassing concessions in the appellate brief or oral argument (“no, we did not object to that exhibit”) or suffering a finding of waiver of an argument by the appellate court in a reported opinion.⁶

As part of their expertise, appellate lawyers also know the civil procedure and appellate procedure rules backward and forward. They know what must be done on a wide range of trial issues to ensure a proper record for appeal.

If the case warrants the expense, the appellate lawyer can use daily copy – which is daily transcriptions of the trial testimony from the court reporter – to the trial team’s advantage.⁷ The appellate lawyer can review daily copy to ensure that all relevant elements of a claim or defense were

covered or refuted in testimony, objections were ruled upon, exhibits were admitted, and other issues were preserved on the record.

One issue that arises occasionally is the proper transcription by the court reporter of videotaped depositions that are played during the trial. The appellate lawyer knows to request that the court reporter transcribe the testimony while it is being played so that it is included in the record for appeal.

Daily copy also helps the appellate lawyer prepare in advance to draft or respond to any motions for directed verdict, motions to exclude experts, or other trial motions that may be filed. It is much more effective to show the trial judge the actual testimony than to ask the court to recall it from memory.

Preservation of error for appeal is essential with respect to the jury charge, and this is one of the appellate lawyer’s specialty areas. Texas’s civil procedure rules are complicated when it comes to preserving charge error; thus, it is extremely important to have an appellate lawyer research the charge issues, analyze the opponent’s charge, prepare the objections and requested submissions, and make the presentation to the trial court to preserve everything in case of an eventual appeal. Jury charge error is one of the more frequent bases for reversal on appeal, so the trial team should work closely with the appellate lawyer on the jury charge.

Also, using an appellate lawyer for the charge conference frees up the trial lawyer to prepare for closing arguments. Trial lawyers frequently are consumed with the closing arguments – their last chance to persuade the jury – and may not take the time necessary to make all the arguments, objections, and requests necessary to preserve potential charge error for the appeal. And, the trial lawyer’s time probably is better spent preparing for closing.

4. Support for the Team in the Trenches

Which leads to the next reason – an appellate lawyer also provides good old-fashioned relief to the trial lawyer, who is generally focused during trial on the documentary evidence, examining the witnesses, and arguing objections to the trial court. The appellate lawyer can be used to handle the legal issues that arise before and during trial, such as complex limine issues, trial briefs, admission or exclusion of evidence, admission or exclusion of expert witness testimony (*Daubert/Robinson* motions), motions for directed verdict, the jury charge, and any potential mistrial

⁶ See George B. Brunt and Laurie Webb Daniel, *Appellate Counsel: Why Hiring Them Early Pays Off*, ACC DOCKET 64, 68 (Jan. 2004) (hereafter “Brunt”).

⁷ See Medford at 2.

issues.⁸ The appellate lawyer will not only handle the law aspects of these various issues but also will be prepared to preserve the issues, objections, evidence, arguments, and court rulings for any potential appeal. This leaves the trial lawyers free to prepare for the next day of trial.

Also, having the appellate lawyer involved during the trial will make the transition from trial to post-verdict and post-judgment motions (*e.g.*, motion for judgment on the verdict or response, motion for judgment notwithstanding the verdict or response, motion for new trial or response, motion to modify the judgment or response) that much smoother and more cost-effective. It avoids duplication of effort. The appellate lawyer will already be familiar with the issues and with the testimony (if daily copy is available or if the appellate lawyer attends the trial), and he or she can already have a checklist of potential errors to be raised on appeal from any adverse verdict.

5. Additional Credibility

Every experienced trial lawyer brings his reputation to the courtroom. Adding an experienced appellate lawyer bolsters that credibility and shows the trial court that your side knows the law. Some (but not all) judges may defer to the side with an active and respected appellate lawyer when important issues arise during trial. Trial judges have stated during continuing education seminars that they appreciate having an appellate lawyer present during the trial; but, they prefer that the appellate lawyer participate from the beginning, rather than storming in just for the charge conference and proving to be unfamiliar with the testimony, various trial issues, and the overall course of the trial.

In addition, judges tend to appreciate having the latest opinions on a particular issue or a well-written trial brief or motion, which the appellate lawyer can handle while the trial lawyer handles the actual trial. Judges recognize that a law firm is even more serious about its claim or defense when it is willing to send an appellate lawyer to the trial to handle the “law side” of the case and to preserve issues for appeal.

6. Avoiding an Appeal Altogether.

The greatest benefit of adding an appellate lawyer to the trial team may be avoiding an adverse judgment and appeal, period. Depending on the issues presented, the appellate lawyer’s participation in the legal aspects of the case, assessing and refining the “big picture” or theme of the case, and tailoring the jury charge can sometimes result in a favorable verdict for you. Appellate lawyers typically are masters at making a complex case simple. Use their expertise both before trial (*e.g.*, motions for summary judgment) and during trial (*e.g.*, motions to strike evidence and experts, motions for directed verdict) to achieve a positive result.

Nonetheless, the benefits provided by the appellate lawyer exist even if you win at trial and the other side appeals. The appellate lawyer is just as important to sustaining a victory during appeal as the appellate lawyer trying to reverse an adverse judgment.⁹

B. When Should the Appellate Lawyer Enter into the Litigation?

Depending on your litigation budget, the appellate lawyer’s most beneficial date of entrance into the case can be at the time of the initial pleading if jurisdictional issues exist. While this staffing decision may add to the litigation expense, the cost is almost always offset by the planning, legal strategy, time-saving, error preservation, and other benefits that the appellate lawyer provides.¹⁰ Even if you wait to involve the appellate lawyer until the time of complex pretrial motions, or even wait until trial, adding the appellate lawyer to the team still reaps considerable benefits.

1. Analyzing the Pleading and Answer

If your case involves certain parties or jurisdictional issues – such as a government defendant or an out-of-state defendant – it can be helpful to consult an appellate attorney at the earliest pleading phase of the case. The appellate attorney can help with briefing, evidence, and preserving error on the earliest pleadings, such as a plea to the jurisdiction (asserting immunity from suit on behalf of a governmental defendant) or a special appearance (asserting lack of personal jurisdiction over an out-of-state defendant). These pleadings typically require evidentiary hearings and can lead to interlocutory appeals. Therefore, it is smart and economically efficient to get the appellate lawyer involved at the start.

⁸ See *The Value of Involving an Appellate Lawyer Early in Litigation*, 17 Metro. Corp. Couns. 10:42 (Oct. 1, 2009) (interview with Jack R. Reiter) (available in West Newsroom at 2009 WLNR 21534320) (hereafter “Reiter”).

⁹ See Reiter at 42.

¹⁰ *Id.*

Likewise, if your case is in federal court, rule 12 of the Federal Rules of Civil Procedure authorizes defendants to file a number of potentially dispositive motions before or contemporaneously with the answer. Because these types of motions can result in dismissal and an eventual appeal, it is wise to get the appellate lawyer involved for appropriate briefing and preservation of error. If these are successful, the investment in the appellate lawyer pays off by ending the litigation early.

2. Narrowing Discovery Focus

Although you might think discovery is the trial lawyer's bailiwick, the appellate lawyer can help with discovery by defining and distilling the legal elements of the case soon after it is filed. Many litigators have good intentions of formulating the jury charge as soon as they receive a petition or complaint; but, many times this noble intent gets lost in the shuffle. Asking the appellate lawyer to sift through the claims and defenses and provide the trial team with the elements of proof that will be needed at trial – a “road map” for the litigation – can save considerable time and money in the long run.

Providing a skeleton jury charge early in the case means that discovery can be centered upon the proof needed to win at trial. Each deposition can be tailored to specific elements of a claim or defense. Written discovery (particularly admissions) can be focused on specific elements, too. And, it helps to ensure the trial team faces no surprises or gaps in evidence at the time of trial.

3. Litigating Discovery Disputes

If the trial lawyers get into complex discovery disputes – which typically involve protection from disclosing various types of privileged documents – the appellate lawyer should be involved. These disputes often require legal research, briefing, and evidence (*e.g.*, affidavits), as well as evidentiary hearings before the trial court.

Rulings on these matters can lead to a mandamus proceeding if, for example, the trial court erroneously compels production of privileged documents or compels discovery that causes prejudicial burden or expense. The savvy appellate lawyer stays informed about the latest cases addressing pre-trial discovery matters and can help prepare and preserve the record needed to seek mandamus relief from an appellate court if the trial court judge rules against you.

4. Handling Pre-Trial Dispositive Motions

The fact that certain pre-trial motions can be “dispositive” is reason enough to get an appellate lawyer involved. Dispositive motions generally refer to those that can end the case prior to trial. They include motions for summary judgment but can also include motions to strike expert witnesses (which removes key evidence from the opponent's case) and motions to dismiss under a statute (such as in a construction case or a medical malpractice case).

The appellate lawyer should at least review the motion, the brief, and the evidence to ensure the trial team argued, supported, and preserved everything in case the ruling leads to an appeal. Also, the appellate lawyer can view the filing through more disinterested eyes, as it will be viewed by the trial court, and provide a realistic evaluation of the chances for its success.

For the more complex dispositive motions, an even better practice is to get the appellate lawyer involved in the preparation of the evidence and the drafting of the dispositive motion and brief. This is, of course, the heart of the appellate lawyer's craft: preparing concise and persuasive motions and briefs that can either win the case (summary judgment) or significantly undercut the opponent's ability to succeed (such as getting their expert's opinions excluded). And, these types of rulings often make the list of errors to be challenged in an eventual appeal; so, getting the appellate lawyer in the loop early saves time and expense later in the case.

Another reason to involve the appellate lawyer in the pre-trial phase with motions for summary judgment and motions to strike experts is to introduce him or her to the trial court judge and begin building credibility points that can later be cashed in at trial. Texas trial judges do not have briefing attorneys that can provide research support, and they do not have time to know all the law on all subjects. Instead, they depend on the attorneys to advise them as to what the law is and how it should be applied in the case. Thus, the better and simpler the presentation on complex motions, the more credibility your team will have with the trial court judge.

5. Assisting at Pre-Trial and Trial

We have discussed above how the appellate lawyer is an invaluable asset for pre-trial hearings and during the trial. The most obvious need for appellate expertise is preserving error, but the benefits of adding an appellate lawyer to the trial team can also include excellent research and briefing on difficult topics,

freeing up the trial lawyers to focus on the witnesses and evidence, and solidifying the record for appeal.¹¹

Another area where appellate lawyers can be a critical player is during the punitive damages phase of a trial. If you have suffered a jury finding of malice or gross negligence, it is likely your case will head to a separate punitive damages phase. The appellate lawyer will know the procedural, evidentiary, and substantive issues that can arise with punitive damage awards and can help to potentially limit your exposure. The appellate lawyer is also an expert at challenging a punitive damages award on appeal – both for excessiveness and constitutional violations.

In sum, the easy rule of thumb is to get the appellate lawyer involved in issues, hearings, and rulings that can become a subject of the appeal or of an original proceeding (*i.e.*, mandamus). On these matters, you should “begin with the end in mind”¹² and include an appellate lawyer as a welcome member of the trial team.

¹¹ See Reiter at 42.

¹² Brunt at 78 (citing Stephen R. Covey, *THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE* (Simon & Schuster 1989)).