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THE SECRET WEAPON: USING THE APPELLATE LAWYER AT TRIAL TO PRIME YOUR CASE FOR APPEAL

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. Reasons to 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).


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

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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/aic/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. Solidify 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, so 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 so that everything is preserved for an
eventual appeal. Jury charge error is one of the
most frequent bases for reversal on appeal, so the trial team
should defer to the appellate lawyer on the 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 do 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

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6 See George B. Brunt and Laurie Webb Daniel,
  Appellate Counsel: Why Hiring Them Early Pays Off, ACC

7 See Medford at 2.
issues. 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 court that your side knows the law. Some (but not all) judges defer to the side with an active and respected appellate lawyer when important issues arise during trial.

Moreover, 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 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.

B. Timing of the Appellate Lawyer’s Entrance into the Litigation

Depending on your litigation budget, the appellate lawyer’s most beneficial date of entrance into the case is at the time of the initial pleading. However, involving the appellate lawyer for important and complex pretrial motions or even waiting until pretrial motions and trial still provides considerable benefits.

1. Analyzing the Pleading and Answer

If your case involves certain parties or issues – such as a governmental 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.

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.

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
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specific elements, too. And, it helps to ensure there will be no surprises or gaps in evidence at the time of trial.

3. Litigating Discovery Disputes

If the trial lawyers get into complex discovery disputes – particularly involving privileged documents – the appellate lawyer should be engaged. 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 make the record necessary to seek mandamus relief if the trial court judge rules against you.

4. Handling Pre-Trial Dispositive Motions

The nature of these pre-trial motions – “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 and motions to dismiss under a statute (as in a medical malpractice case).

If nothing else, the appellate lawyer should at least review the motion, the brief, and the evidence to ensure everything is argued, supported, and preserved 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.

An even better practice (for the more complex dispositive motions) 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. Trial judges do not have time to know all the law on all subjects; rather, 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.

Another area where appellate lawyers can be a critical player is the punitive damages phase of a trial. If you have suffered a jury finding of malice or gross negligence, your case will head to a separate punitive damages phase. The appellate lawyer will know the procedural 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.

The easy rule of thumb is to get the appellate lawyer involved in issues and 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” and include an appellate lawyer as a welcome member of the trial team.

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