Winning Appeals Before the Verdict

# Embedding Appellate Counsel in the Trial Team


By Mark W. Wortham


**We should see an increase in early retention of appellate lawyers over the next decade as clients look for ways to make their wins stick and to reverse unreasonable jury verdicts successfully.**

Not long ago, only large law firms with Fortune 500 clients and the federal government saw the benefit of embedding appellate counsel in a trial team. While the evidence is largely anecdotal, that which was once the privilege of the sovereign and the wealthy is becoming a necessity for the many. Perhaps it is a lack of confidence in a jury system that seems to award seven, eight, or even 11-figure verdicts in cases that would merit far less a decade ago, for example as happened in the recent jury verdict awarding $23.6 billion in punitive damages against R.J. Reynolds in Florida. Or maybe it is related to the ever-growing trend of specialization in the legal profession. Whatever the case may be, parties on both side of the "V" are becoming increasingly aware of the benefits of embedding an attorney in a trial team—an attorney whose job is in part to avoid creating reversible error and preparing post-trial strategy, should things go wrong.

This article focuses on the experiences and musings of those familiar with embedded appellate counsel—appellate judges, trial judges, and lawyers. We asked more than a dozen judges and lawyers to share their experiences and perspectives. Some allowed us to quote them while others asked to remain anonymous. By no means do we intend to provide empirical evidence or to claim that our interviews are universally representative of judges and lawyers. Our goal is simply to add to the dialogue as the trend of embedded appellate counsel continues to grow.

## The Appellate Judges' Perspective

In a recent interview, Justice David Nahmias, one of seven justices on the Supreme Court of Georgia, recalled his experience with embedded appellate counsel. At one time in his career Justice Nahmias worked in various positions in the U.S. Department of Justice. One of his assignments was as deputy assistant attorney general in the U.S. Department of Justice Criminal Division, where he was responsible for supervision of the Appellate Section. His varied experience with the U.S. Department of Justice, and later as a U.S. attorney, gives him a unique perspective on this topic: he

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During our conversation with Justice Nahmias, he related that it was his experience in the Appellate Section of "Main Justice" that, for major cases, the government would often embed appellate counsel in the trial team. Having seen the success of this for "Main Justice," he noted this practice was also helpful in his role as the U.S. attorney for the Northern District of Georgia. His years of experience had proved to him that it was not a good idea to hand-off a case to an appellate lawyer who had no knowledge of a trial. In that situation, it would take precious and valuable time for the appellate attorney to get up to speed and become familiar with the record.

Rather than merely hand-off a case post-judgment, Justice Nahmias stated that the best system involved having an appellate lawyer on the trial team and the trial lawyer on the appellate team. This benefited both the trial attorney and the appellate attorney: the trial lawyer kept up with the changes in the law, and the appellate lawyer got the benefit of the trial lawyer's insights. Working together, rather than separately, complemented the process by bringing another set of eyes to a trial and an appeal. And it was a learning experience for the trial lawyers and the appellate lawyers that benefited the client. The trial lawyers understood the appellate process better, and the appellate lawyers understood the dynamics of a trial better.

Along these lines, Justice Nahmias told us that in his conversation with both state and federal appellate judges, "appellate judges, by far, love to have appellate lawyers involved in appeals." Not surprisingly, he noted that one benefit of having appellate lawyers involved is that they generally write in a style that is different from how trial lawyers write, one that is more conducive to the appellate world. And he stated that appellate lawyers' specialized experience often helped them frame the issues and arguments on appeal better.

Former Georgia Supreme Court Justice Leah Sears concurs. She also notes that not only was it beneficial to have appellate lawyers involved in appeals, but that "in my many years on the Georgia Supreme Court, I found that appeals can be deathtraps for lawyers." Justice Sears is now in private practice as chair of the Appellate Practice group of Schiff Hardin. In an article on her firm's website entitled, "Specialized Appellate Counsel: An Invaluable Asset," she quotes D.C. Circuit Court of Appeals Judge Laurence Silberman as stating, "Appellate advocacy… is, in essence, a business for legal intellectuals… [and] a specialty all to itself." That same article notes the remark of Judge Kenneth Yeagan of the California Courts of Appeals that trial counsel often experience "tunnel vision" that causes them to lose sight of the big picture.

Justice Sears also believes that because of their experience, "in big cases, it just makes good sense to bring in an appellate lawyer." She sees this trend in her national practice and predicts that within the next five years embedding appellate counsel in complex civil cases will be the norm.

Another appellate judge noted that lawyers who focus on appellate work are generally better writers than trial lawyers. This judge noted that the importance of good writing is that "legal issues are decided by the writing." Appellate lawyers also study court opinions and have argued before the particular court judges writing and deciding the opinions, and therefore they know how to count the votes needed to make successful arguments. Using the legal "odd couple" of David Boies and Ted Olson, as examples, this judge stated, "Knowing the way the judges think takes years and years. And lawyers at these levels have figured out a different way to look at things."

This observation is consistent with a statement made in a University of Mississippi Law Review article authored by the Honorable Ruggere J. Aldisert, Senior United States Circuit Court Judge for the Third Circuit. Judge Aldisert is the author of the popular book, "Winning on Appeal: Better Briefs and Oral Argument." In the law review article, Judge Aldisert opines that "too many trial lawyers appear before the appellate courts without recognizing that the environment on appeal is a galaxy away…." Thus, the strategy of embedding experienced attorneys who know this galaxy makes for better appeals. And apparently appellate judges like this strategy.

## The Trial Judges' Perspective

Most of the trial court judges that we spoke with did not have any experience with appellate lawyers in their courtrooms. These judges had varying reactions, from not liking the idea, to those who thought that it made them more comfortable with their rulings. One judge with a negative reaction commented to the effect of, "Why do they need another lawyer at the table?" And as an example of a negative reaction at trial, one appellate lawyer recounted an older trial judge who before trial struck the defendant's answer. Later this judge refused to recuse himself from the case after making extra-judicial remarks about the case. This lawyer stated that at trial the judge was rude to the other defense lawyers but singled her out for a particular slight. The judge glared at appellate counsel and asked one of the defense lawyers, "Is she your amen corner?"

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Generally, the trial judges with more experience with embedded counsel honestly noted their initial response was defensive. But later they tended to appreciate the presence of appellate lawyers, finding them better suited to arguing motions *in limine*, challenging the venire, making objections, arguing directed verdict motions, handling the jury charge conference, and discussing the verdict form. The more experienced judges unanimously agreed that they felt more comfortable with their rulings because the appellate lawyers provided cases throughout proceedings that were more helpful. One judge noted that the appellate lawyers had a more nuanced understanding of the case law. Another judge, who tried a product liability case with high exposure, remarked,

> Obviously the lawyer didn't have to prepare witnesses, opening statements, etc.

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and do all the logistical stuff. She had time to really study the issues in an academic way, had good arguments about what I thought were inconsistencies in some case law and was really helpful. This made me more comfortable that my rulings were right, even when I ruled against her.

### The Lawyers' Perspective

Not surprisingly, lawyers were also interested in talking to us. We gathered stories from our committee members and others, but sought to winnow comments to one lawyer on either side of the "V."

Deborah Smith, practicing with Christian & Small in Birmingham, Alabama, and one of the DRI Appellate Advocacy Committee leaders, was most helpful when sharing her insights and experiences. She is presently the firm's managing partner. As the appellate practice group's leader, she has been involved in many high-profile appellate cases in Alabama and the Eleventh Circuit.

Similar to Justice Sears, Ms. Smith sees the firm's clients as more readily accepting of appellate counsel's input earlier in a case. She has noticed a trend over the last 10 years among the firm's clients in that clients not only have become willing to bring in appellate counsel before judgments, but they also have over time involved them earlier. As she told us, "Early is better than later. But later is better than never."

In support of her "earlier is better" advice, Ms. Smith notes that becoming involved before a trial allows her to present an objective view of the case to trial counsel and to assist with motions, charges, and other relevant steps. It also creates the opportunity to lessen the potential for reversible error and prepares her for appeal issues—giving her better insight than someone could have from a cold record, a feel for the trial dynamics, and a head start on post-trial motions and appellate briefs.

From the other side of the "V" we spoke to Darren Summerville, of Summerville Moore in Atlanta, Georgia. Mr. Summerville handles appeals for plaintiffs' lawyers involving large exposure cases in Georgia and other states. From his perspective, the plaintiffs' bar is far ahead of the defense bar. He is consulted well in advance of trial. At trial, he works with lawyers on issues such as voir dire, jury charges, and verdict irregularities. Mr. Summerville has been involved in a number of high-profile and seminal cases in Georgia, including the case that found Georgia's statutory cap on noneconomic damages unconstitutional and one affirming the largest paid verdict in the state. In fact, his practice is so busy that his firm's primary business is appellate work.

Mr. Summerville agrees that it is far better for appellate counsel to become involved early, to reduce the likelihood of an appeal in the first place. It is one thing for trial counsel to procure a favorable verdict, but it is an altogether different thing to have a case appealed and retain that result. The traditional plaintiff's view of "just get the verdict, and then negotiate," is simply no longer sustainable. Instead, from the plaintiffs' side, it is extremely important not to create reversible error that is easily prevented. He stated, "This is also true for the defense, though it hurts more to lose a seven-figure verdict to a bad jury charge or improper verdict." And he agrees with the idea that appellate judges prefer to read briefs written by appellate lawyers, but he emphasized that there are some trial lawyers who can write and orally argue a case as well as any appellate lawyer.

### Conclusion

Generally, the lawyers and judges that we talked to noticed a trend favoring the retention of appellate counsel early in the litigation process. Some were retained as early as the filing of an answer, or just after the first discovery dispute. Most were retained just before trial. We also heard that appellate lawyers are favored by appellate judges and some trial judges. Our conclusion is that we will see growth over the next decade as clients look for ways to make their wins stick and to reverse unreasonable jury verdicts successfully. Hopefully, the trend for early retention will continue to grow because most importantly, it benefits our clients. FD