

We are proud to present a “Guest Sidebar” in this issue, authored by our partner [Paul Esposito](#), a senior member of Clausen Miller’s Appellate Practice Group. Paul has been handling appeals for over 40 years. He has briefed and argued appeals in federal and state reviewing courts all over the country, including the U.S. Supreme Court.

Paul’s appellate practice is not limited to the appellate courts. He strongly believes in a hands-on approach to appeals, one that has him working closely with defense counsel, both before and at trial. Paul has worked alongside some of the nation’s best defense attorneys, against some of the nation’s best plaintiff attorneys, in cases involving many millions of dollars in claimed damages. His goal is always the same: to help the firm’s clients win at trial and on appeal.

In this “Guest Sidebar”, Paul discusses the wisdom of utilizing appellate counsel at trial—a subject he has instructed on numerous times in his career.

## SIDEBAR



**Melinda S. Kollross**

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## Lessons From The Foxhole: Esposito Writes On Trial Wars

by **Paul V. Esposito**

It was William Tecumseh Sherman who uttered those forever famous words, “[w]ar is hell.” Having left a path of destruction from Atlanta to Savannah, he certainly knew. But sooner or later, a trial lawyer would have said the same thing. For trial attorneys know that trial is war—and they are the warriors.

Their job may well be the toughest in the law. Consider the dynamics. Their opponent is usually prepared, hostile, and cagey – perhaps even unethical. The assigned judge, however well-intentioned, may lean towards an opponent.

Then there’s the jury, a group of people about which little is known. They have their sympathies and biases, and must fight both. They are told the applicable law, but may not really understand it. They often pass out other people’s money based on individual notions of how much is too much.

The trial attorney must constantly deal with shifting battle lines. Trial issues unexpectedly morph. An opponent’s witnesses may throw a curveball; an attorney’s own witnesses may stumble. Tricky issues of law suddenly surface, needing answers by the next morning—if not the next hour.

Understandably, their work is highly stressful. They must be ready to object to testimony within seconds. They must ask the right questions to opposing witnesses spring-loaded to inflict damage. They must keep a proper appearance before judge and jury. Their days start well before dawn and end well after nightfall. They eat and sleep poorly, often for weeks. What’s amazing is how they endure and function so well.

Sometimes, trial attorneys need reinforcements, and increasingly, that’s the role of an appellate attorney: to help them win. It’s critical, and not just because winning is better than

## SIDEBAR



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losing. On average, 70% of all appeals are won by the winner at trial. An appeal can be lost before it begins.

Years ago, appellate attorneys did not get involved until trials concluded. Their work was the ivory-tower stuff of writing briefs and arguing in reviewing courts. Too often, those efforts came too late. Wrong things were said or done at trial; right things weren't. It happens to even the best trial attorneys, who can't always deal with all things at all times.

But by working alongside trial counsel, appellate attorneys can be a big help. Because they don't prepare and examine witnesses, they can concentrate on a bigger picture. They are an extra set of eyes and ears at trial. From there, they can communicate to trial attorneys about what's working and what's not. It allows for real-time adjustments.

Appellate attorneys also help ensure that the issues are properly preserved. In the heat of battle, important details in trial proofs can be missed, and that can doom an appeal. With their

background in court rules and case law, appellate attorneys can see where gaps in evidence must be filled to preserve a point. It can make all the difference.

Appellate counsel can take up some of the workload during trial. Almost always, trials need immediate research regarding a surprise issue. Performing research is right up the appellate counsel's alley. And counsel can help with time-consuming work like preparing trial motions and jury instructions. This allows trial attorneys to concentrate on other pressing matters.

The presence of appellate counsel can send a message from the client: we take this case very seriously, and we're preparing for the next level. It can make an opponent view the case more realistically, and reasonably.

Ultimately, it comes down to this—when trial and appellate attorneys join forces in the foxhole, the whole is better than the sum of the parts. And that provides the best chance to win both at trial and on appeal.

