

**THE TOP TEN REASONS FOR HIRING
AN APPELLATE SPECIALIST IN THE TRIAL COURT**

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The Top Ten Reasons for Hiring an Appellate Specialist in the Trial Court

I. Overview

With increasing frequency over the last few years, defendants and plaintiffs have chosen to add an appellate specialist to their trial team. For clients or trial lawyers who have never had an appellate lawyer actively involved at trial, the obvious question is “Why should I take on the additional expense?” Certainly, if the potential verdict range is less than a few hundred thousand dollars, the additional expense may not be justified. On the other hand, if there is a real chance for a substantial judgment which will have to be appealed, the additional expense may be a necessity. In those cases, the question becomes “What specific advantages does the appellate specialist bring to my trial team?” Although there are dozens of potential advantages that an appellate lawyer may bring to a trial team depending on the circumstances of the case, identifying the ten best reasons seems like a good place to start.

1. An appellate specialist will better preserve the record and waive less error, which improves your prospects for success on appeal.

On appeal, only those matters that are properly preserved in the record at trial may be urged as grounds for reversal. Appellate rules for preserving error are fairly demanding, often confusing, and very unforgiving. As a result, if the trial court’s error is not properly preserved at trial, it is waived and will not be considered on appeal. For example, there are different rules for preserving error concerning the exclusion of evidence as opposed to the admission of evidence. Under the rules of appellate procedure and evidence, in order to complain on appeal concerning the wrongful admission of evidence, the record at trial must contain (1) a proper, specific objection, (2) an express ruling by the court on the objection, (3) a motion to strike, (4) an instruction to disregard, and (5) a motion for mistrial. If the court does not rule on the objection, the lawyer must also make a record that the court has refused an express request for a ruling on the objection. If the proper procedure is not followed, any error in the wrongful admission of the evidence is waived for appeal. Preserving error during voir dire and preserving error in connection with the jury are two additional areas in which courts of appeal often hold that the trial court’s error was not properly preserved at trial and was waived for appeal.

2. By assisting the appellate specialist with responsibility for error preservation and for raising points of law, the trial lawyer is freed to give more attention to the demands of persuading the jury and judge on the facts of the case.

There are two sides to the trial coin: the fact side and the law side. The trial lawyer’s primary focus during trial is the fact side--persuading the jury on the facts by direct and cross examination of witnesses, opening and closing arguments, and voir dire. This is a full time job in a normal case, but it is even more important in a high exposure case. The appellate specialist’s primary focus during trial is the law side of the trial coin--to make sure that the trial record is as complete as possible for appeal, properly preserving evidence objections, directed verdict motions,

jury charge matters, and voir dire strikes for cause. While some trial error can be anticipated, briefed ahead of time, and fully argued on the record, other error is unanticipated and must be handled correctly on a real time basis. Critical portions of the appellate record may be made early in the morning before the jury arrives, during breaks, over the lunch hour, and after the jury has been discharged at the end of the day. An appellate specialist can be tasked with the primary responsibility for fleshing out the record during such opportunities in order to make sure that the record contains everything that is required for appeal. By off loading a large part of those responsibilities to the appellate specialist, the trial lawyers can concentrate on winning the case at trial.

3. Appellate specialist can deflect the wrath of juries and judges who often dislike the interruptions of objections and other actions that are often necessary to preserve error during trial.

There are very few subtle ways to adequately preserve trial court error for appeal. Objecting to every offer of the same objectionable testimony quickly becomes irksome to the judge and jury. Having the judge routinely deny objections inevitably makes the trial lawyer look “wrong” in the eyes of the jury. Pursuing overruled objections to the admission of evidence with the required motions to strike, to disregard, and for mistrial may be actively discouraged by trial judges. However, when the appellate specialist is able to take on some of those responsibilities, the disdain of the judge and jury is directed to the otherwise low-profile appellate lawyer. Not being the personification of the client in the eyes of the jury, the appellate lawyer can better fade that heat. If big stakes are riding on the jury’s positive regard for the lead trial lawyer, minimizing the occasions in which the jury dislikes him or her can be very important.

4. An appellate specialist is more capable of keeping a “hostile” judge in check by making an appellate record instead of a mere trial record.

While judges strive to be truly impartial in conducting trials, there are certainly some instances in which trial judges may appear to the parties as being less than dispassionate toward one side or the other. The trial judge may be perceived as making rulings that are calculated to cause an improper judgment or may avoid making rulings on the record in order to evade being reversed. Experience suggests, however, that trial judges generally take special notice when an appellate specialist is an active member of the trial team. The judges normally understand that the appellate specialist was hired for the specific purpose of making an appellate record that is as complete and productive as possible. While trial judges don’t necessarily encourage that, judges that might otherwise appear “hostile” may instead appear to temper their “hostility” when they know that an appellate specialist is shaping the record to be reviewed by the appellate courts. Thus, some of the most egregious errors may be deterred by actively focusing on appeal during trial.

5. An appellate specialist presents a more credible chance of reversing a trial judge.

Trial judges generally appreciate that an appellate specialist is more likely to be successful on appeal than a non-appellate specialist. Two separate surveys of appellate judges that I have conducted support this notion. Just as many parties believe, rightly or wrongly, that trial judges have higher regard for some trial lawyers than for others, trial judges may expect that appellate judges will also have high regard for some members of the appellate bar. Being much more familiar with appellate procedure and substantive appellate law, the appellate specialist presents a much more credible potential for reversing an errant trial judge.

6. Staffing a trial team with an appellate specialist tells your opponent that you are in this case “for the long haul.”

By incurring the additional expense of an appellate specialist and demonstrating a real commitment to maximizing your prospects on appeal, a party can send a signal to your opponent that will sober them from any mistaken belief that they can run rough shod over you during or after trial. By preparing to fully appeal the case and to retry it if necessary, you create a substantial financial disincentive for the opposing side.

7. Appellate specialists are better at handling the jury charge.

No aspect of trial procedure is as daunting or as easily mishandled as the jury charge. Most trial lawyers will admit that they dislike handling the jury charge because the pertinent rules of procedure and the case law are very difficult to parse, and the opportunity for significant mistakes is great. For example, in order to preserve error on some jury charge matters, a proper objection will suffice. On other issues, however, tendering a written request for a substantially correct charge item may be required in addition to an objection. If the particular aspect of the charge is not correct and the objections are not specific and proper, then the error is waived for appeal. For these reasons, the jury charge is one area in which some trial lawyers have previously utilized an appellate specialist.

8. An appellate specialist is more familiar with substantive appellate law and the trends occurring in the appellate courts.

When the appellate courts change the law in a particular opinion or when a particular legal doctrine is subtly evolving in a new direction, appellate specialist are more likely to appreciate those changes. For example, over the last few years, Texas law has changed significantly. A combination of statutory tort reform and a much more conservative Texas Supreme Court has changed some areas of the law dramatically and some other areas very subtly. Moreover, the process of change is continuing. While trial lawyers attempt to stay on top of some particular changes in substantive law, day to day trial practice necessarily focuses on developing the facts of cases. The appellate specialist’s focus on the development of substantive and procedural appellate law may generally make them better able to utilize those changes when the need arises during trial.

9. Appellate specialists are best suited to handle mandamus actions.

In situations where the court is viewed by a party as having abused its discretion, the possibility of mandamus to the appellate court for interlocutory relief is often considered. Unfortunately, the procedural requisites of mandamus are many and extremely difficult. For example, it has been reported that the Dallas court of appeals rejects approximately nine out of 10 mandamus motions strictly for procedural defects in the mandamus papers, without any consideration of the substance of the issues presented. While mandamus actions are difficult enough prior to trial, they are even more difficult for a trial lawyer to handle during trial. During trial, even an appellate specialist will have to devote full time to a mandamus action. While many trial lawyers are miracle workers, an in-trial mandamus presents a very real challenge.

10. An appellate specialist can help the judge avoid reversible error.

While the previous nine points focus on dealing with a bad trial situation, appellate lawyers can be of real assistance in trials you reasonably expect to win. Given the axiom that trial judges are mindful of being reversed, they will usually appreciate and listen carefully to an appellate specialist who is hired to help make a record that will sustain their judgment on appeal. For a number of years, plaintiffs' trial lawyers have been hiring appellate specialists to assist them in big cases for this very reason. Trial judges generally appreciate receiving the participation of an appellate lawyer who wants to help sustain a favorable judgment on appeal.

II. CONCLUSION

There are a variety of circumstances that warrant adding an appellate specialist to a trial team. A number of factors need to be considered, but there is no doubt that an appellate specialist can bring real advantages to a trial team.