



The Front Line

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The President's Column

By **Ted B. Lyon Jr.**

DTLA President

Writing is easy right? All you have to do, (to paraphrase a once great sports writer), is to open a vein, draw blood and then you start writing.

Having been elected President this year, it suddenly dawned on me that at least once a quarter I have to write this column. While some of our members seem to spend all day typing, e-mailing and writing, for me it is a task that I could do without. So every day for at least a week, I have been putting this column at the top of my "things to do" list and every day I have found

other more interesting things to do.

Today however, I have chained myself to my desk and resolved to do my duty and get it done. My hope for 2005 for the Dallas Trial Lawyers Association is to make our organization truly meaningful to each of you in your profession and ultimately to help your clients have a better chance of achieving justice for wrongs that they have suffered. To that end, I have secured the commitment of the best trial lawyers in Texas and the nation to speak to our organization and hope to have informative and valuable programs each month to help make you a better lawyer.

As your President, I want you to know that I am always looking for ways to improve our organization. I encourage you to call me at (972) 279-6571, email me at tblyon@tedlyon.com or write me at: Ted Lyon and Associates, 18601 LBJ Freeway, Suite 525, Mesquite, Texas 75150, with your suggestions.

One of my goals this year is to increase our membership, so if you know a young lawyer who would benefit from our organization, call me and I will personally give them a call. I look forward to working with all of you in 2005.

What Good is Appellate Counsel?

By **Kirk L. Pittard
and Leighton Durham**

Plaintiffs Generally Don't Fare Well on Appeal. The statistics are staggering: a judgment for a plaintiff in a personal injury or DTPA case is more likely to be reversed than affirmed on appeal. Between September 1, 2001 and Au-

gust 31, 2002, fifty-one percent of appeals from judgments favoring plaintiffs in these cases were reversed, while only 23% of appeals from judgments favoring defendants in these cases were reversed. To blame the present political environment for the disparity in appellate success rates is only a partial answer; the

real problem is much broader.

The heart of the difficulties experienced by trial lawyers on appeal are the very factors that make trial lawyers successful in front of a jury. Passion, confidence, and laser-like focus on developing and presenting the facts of each case are
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Appellate Counsel- cont'd.

necessary to win a case at trial, but can destroy a case on appeal. While these factors often swing wavering jurors and expose deceitful witnesses, they occasionally lead trial attorneys to assume the responsibility of researching and briefing complicated legal matters while attempting to balance the pressing demands of litigation in other cases.

One of the most fundamental reasons many trial attorneys are often out-lawyered on appeal is because defense attorneys regularly stack the deck against the plaintiff's attorney by using appellate counsel throughout the preparation of their case for trial. To level the playing field, plaintiff's attorneys should involve experienced, intelligent appellate counsel throughout litigation and at trial to guard against reversible error and to protect the judgment on appeal. Receiving a notice of appeal is not the time to realize you should have had appellate counsel by your side throughout litigation.

Other Than on Appeal, How Else Can Appellate Counsel Be of Assistance?

From a quick review of the Westlaw headnotes concerning waiver of error, it is readily apparent that many cases get reversed on appeal because error was not preserved at the trial level. It is unlikely that trial counsel intend to waive such error. More often, error is waived by accident.

While trial counsel approach a case with the fact finder in mind, appellate counsel generally view a case in terms of how the case will look on appeal. The focus of trial and appellate counsel is very different yet equally critical to the ultimate success of the case.

There is no doubt that preparing for trial takes time. With depositions, discovery, document review, and witnesses preparation consuming trial counsel's time and energy, it is often difficult for trial counsel to find the necessary uninterrupted time to research and brief complicated legal issues. The need to brief substantive legal issues can surface at any time throughout litigation. Substantive legal issues come in many forms and cover a broad range of topics such as: jurisdiction, venue,

forum non conveniens, federal removal, interlocutory appeals, mandamus, summary judgment, motions to dismiss, *Daubert/Robinson/Havner* expert challenges, charge, and post trial motions. Moreover, HB4 added new interlocutory appeals and a recent Texas Supreme Court decision significantly broadened the mandamus standard which no doubt will be cited by defendants in the future. By allowing appellate counsel to handle the substantive briefing of complicated legal issues that arise throughout litigation, trial counsel will have more time to fine tune their case for trial.

Value Added Litigation.

Some attorneys are often concerned about the cost of retaining appellate counsel. However, having appellate counsel by your side to make sure your case will be tight and defensible on appeal will add value to your case in the ultimate disposition on appeal and for purposes of settlement negotiations. Furthermore, most appellate counsel will work with trial counsel on the most appropriate arrangement for compensation including on an hourly basis, contingency fee, or mixed hourly/contingency fee.

Defense Counsel Is Doing It.

Defense counsel routinely rely upon appellate counsel to assist with complicated legal issues throughout litigation and on appeal, to preserve error, and seed the case for reversal. This is one of the defense bar's secret weapons in defending cases. Don't let yourself get out-lawyered by defendant's appellate counsel.

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