



You Need Appellate Counsel Sooner Than You Think: Why Hire Appellate Counsel Before Trial vs. After Verdict

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For high-stakes litigation, waiting until after an adverse verdict to engage appellate counsel can be a costly mistake. Traditionally, clients didn't think about an investment in appellate counsel until after a final judgment. Faced with a large, adverse verdict, clients called an appellate specialist to scrutinize a trial's aftermath—poring over transcripts, identifying reversible errors, and crafting compelling briefs.

Now, the most sophisticated clients are embedding appellate lawyers within their trial teams from the outset—transforming them from post-trial damage control specialists into strategic partners who preserve winning arguments, strengthen the trial record, and provide objective advice throughout the litigation. Experienced clients—and their trial counsel—recognize that early collaboration allows appellate lawyers to become an indispensable asset for trial court teams, creating a powerful psychological advantage that signals serious intent to opponents and courts alike.

For cases with high exposure, precedential value, legal issues of first-impression, or a series of adverse rulings, this early collaboration boosts the likelihood of favorable outcomes and often saves clients millions in adverse judgments.

Why You Want Appellate Counsel Embedded with a Trial Court Team

Beyond the expected expertise in the future appellate process, appellate lawyers bring even more value to the trial court team by amplifying trial counsel's effectiveness. Collaboration with appellate counsel lets trial lawyers focus on what they do best: presenting facts in the best light to persuade juries and judges. Trial lawyers can engage in the heated litigation battles with the knowledge that an objective partner is always looking several steps down the strategic path, while handling the meticulous record-keeping and

issue preservation that can otherwise drain attention from immediate courtroom needs.

This division of labor creates better trial advocacy that is both more focused and more protected. While trial counsel concentrates on witness preparation, courtroom advocacy, and jury persuasion, appellate counsel safeguards the ability to challenge adverse rulings later. Trial lawyers can take calculated risks and pursue aggressive strategies with confidence, knowing their options are being preserved. The result is trial work that operates at peak effectiveness without the distraction of constantly monitoring for appellate issues.

Ultimately, it is the collaboration between trial counsel and appellate counsel that brings the value. The best results come from the joint efforts of two types of litigators with a different skill set and, importantly, a different focus. Is it an added expense? Of course. But cases with high exposure, precedential value, first-impression issues, or repeated adverse rulings warrant the investment. And having appellate counsel engaged early can save costs by streamlining the legal process and increasing the likelihood of a favorable outcome from the trial through any potential appeals.

Cost of Waiting: Why Post-Trial Appellate Counsel Comes Too Late

The traditional approach of hiring appellate counsel only after an adverse verdict can severely limit your options and increase costs. Once the trial is over, many critical opportunities are lost forever. Objections that weren't made, jury instructions that weren't requested, and procedural steps that weren't preserved cannot be remedied on appeal. Even the most skilled appellate attorney cannot resurrect arguments that were waived at trial or create a record that was never properly developed in the first place. What seems like cost savings by avoiding early appellate involvement often becomes a false economy when a \$25 million verdict cannot be overturned due to unpreserved issues.

Post-trial appellate counsel must work backwards through transcripts and pleadings to identify potential issues, often

discovering that the strongest arguments were foreclosed by trial strategy decisions made without appellate considerations in mind. The result is weaker appeals, lower success rates, and higher overall costs when the entire case must be reconstructed for appellate purposes. Meanwhile, settlement leverage evaporates once the trial concludes, as opponents recognize the weakened appellate position.

The implications are stark: while embedding appellate counsel may add to earlier litigation costs, it can prevent 100% losses from unappealable adverse verdicts. Cases with high exposure simply cannot afford to gamble on trial outcomes without proper appellate preparation. In complex commercial litigation, product liability cases, or insurance coverage disputes, the cost of waiting often exceeds the cost of early involvement by orders of magnitude. By the time you realize you need appellate help, the most valuable services appellate counsel provides—issue preservation, strategic planning, and settlement leverage—are no longer available.

What Does Appellate Counsel Do Before the Appeal?

Depending on the case and the existing litigation team, there is a wide range of tasks and roles that appellate counsel can handle. The case may be best served by having appellate counsel involved in framing issues, with monitoring or consultation through trial. Or the appellate counsel may be more involved—drafting and arguing pretrial and trial motions or handling jury instructions.

Issue preservation

The main duty of an embedded appellate lawyer is to safeguard the record for potential appeals. They're the guardians of the record, vigilantly flagging crucial objections and procedural nuances. This takes a burden off trial counsel and allows them to focus on trial themes and presentation of evidence. But together with ensuring that objections on evidentiary issues and trial conduct are properly made and recorded, appellate lawyers can help frame the issues to set up favorable appellate positions in motions and briefs

throughout the litigation.

Legal strategy

Trial lawyers are properly focused on presenting witnesses and evidence and the immediacy of the courtroom battle. Appellate lawyers, by comparison, focus on proactively strategizing several moves ahead for future appellate review. This set of fresh eyes can uncover nuanced arguments and strategic considerations. Collaboration between the two approaches can exponentially enhance a client's representation and prospects.

Optics

The involvement of appellate counsel in trial court litigation sends a message to the court and the opposing party. When opposing counsel sees appellate lawyers listed on pleadings and present at hearings, it signals that you are taking the case seriously and prepared to pursue all available legal remedies. This often leads to more realistic settlement discussions earlier in the litigation, as parties who would otherwise roll the dice at trial become more amenable to reasonable resolutions when they realize you're prepared for a long appellate battle.

Trial judges also understand that cases involving appellate counsel are being litigated with an eye toward appellate review, leading to more careful consideration of rulings and increased attention to procedural requirements. The visible presence of appellate specialists reinforces the heightened significance of the case and can influence how the court approaches key decisions throughout the litigation.

Sophisticated opponents must factor in not just the risk of an adverse trial verdict, but also the likelihood that judgment will survive post-trial challenges and appeals. The investment in specialized appellate counsel signals that significant interests are at stake—whether financial exposure, precedential value, or strategic business implications—thereby elevating the perceived importance of the case and creating substantial settlement leverage.

Drafting and arguing motions

Strong legal research and writing skills are the bare minimum for appellate work. Appellate counsel excel in distilling complex legal arguments into clear written work for busy judges. Motions in limine before trial—and directed verdict motions during trial—are times when appellate counsel can aid the trial team. Framing issues for future appellate review, coupled with expert legal research and writing skills, mean that appellate lawyers can help the trial court team file the most persuasive briefs.

Jury instructions and verdict forms

One of the most technical yet crucial aspects of a trial—and one that is often the most ripe for appealable error—is the jury instruction phase. Appellate lawyers are experienced with the application of jury instructions to controlling legal standards and can preserve all necessary arguments in support of favorable instructions.

Post-trial motions and procedures

When involved before and during trial, appellate lawyers are in place and ready to handle post-trial motion procedures. Their focus is on setting the stage for a successful appeal, should one be necessary, by identifying appealable errors. Post-trial motions represent the crucial bridge between trial court proceedings and potential appellate review, requiring both immediate tactical decisions and long-term strategic thinking that appellate counsel are uniquely positioned to provide. Appellate lawyers excel at crafting post-trial motions that serve dual purposes: seeking immediate relief in the trial court while also preserving and sharpening issues for appeal.

The technical requirements and tight deadlines of post-trial practice demand specialized expertise that appellate lawyers possess. From ensuring compliance with complex procedural rules to managing the intricate timing requirements for various post-trial motions, appellate counsel prevent the procedural missteps that can foreclose appellate options entirely. And when appellate

lawyers have been embedded throughout the trial, they're already familiar with the key rulings, evidentiary disputes, and jury instruction issues that form the foundation of effective post-trial motions, allowing them to act quickly and strategically in the critical post-verdict window.

When to Engage Appellate Counsel: Critical Decision Points

Depending on the type and size of litigation, several phases offer the right timing to have appellate counsel join the team.

Initial pleadings

For a case that depends on a legal issue of first impression, consultation with appellate counsel is useful before a complaint or answer is filed. These cases almost always involve later appellate review of the legal issue, and appellate counsel will frame that issue favorably from the outset. Appellate counsel can also help ensure all necessary affirmative defenses are preserved in the initial pleadings.

Dispositive motions

Dispositive motion briefing is another place where it becomes essential for appellate counsel to join the team. Using their expert legal research and writing skills, appellate counsel can help frame pretrial and in-trial motions in ways that will advance the client's position in a later appeal and help the trial court team file the most persuasive briefs.

Pretrial motions and filings

The value that an embedded counsel provides increases with earlier involvement. Because of the likelihood of appealable errors, effective litigation teams involve appellate counsel in evidentiary motions in limine and draft jury instructions.

Before the trial

At a minimum, appellate counsel should join the team before trial—in time to get up to speed to help create and protect the record for appeal.

Who Should Hire Appellate Counsel?

When you are facing high exposure, a precedential case, or series of adverse rulings, appellate counsel adds essential value and protection. Cases headed to trial with significant financial stakes, issues of first impression, or repeated judicial setbacks require the strategic oversight that only embedded appellate counsel provides. This protection benefits insured parties, primary carriers, and excess carriers alike, as appellate counsel mitigates trial risks and proactively prepares for the next litigation phase. The question isn't whether your case might benefit from appellate involvement—it's whether you can afford to proceed without it when substantial interests are at stake.

What Should You Look for in Appellate Counsel to Work with a Trial Team?

Essential qualifications

You need an experienced appellate lawyer who knows the rules, the courts, and how to identify issues that will persuade appellate judges. Look for counsel with a proven record in your jurisdiction's appellate courts and deep familiarity with the substantive law governing your case. The best appellate lawyers understand not just how to win appeals, but how to spot winning issues during trial.

Trial court expertise

Not every appellate lawyer has experience working with trial teams to create and protect the record. Choose an appellate lawyer experienced in preserving error and handling jury instruction nuances. They should understand trial rhythm, when to object and when to remain silent, and how to frame issues during trial to strengthen future appellate positions.

Collaborative approach

Embedded appellate counsel must understand their role and work seamlessly with the trial team toward effective representation. Avoid appellate lawyers who operate in isolation or view themselves as superior to trial counsel. The best appellate partners enhance trial counsel's effectiveness while providing strategic oversight without undermining trial advocacy or confusing clients about authority.

Take Action Now: Protect Your Case Before It's Too Late

The strategic advantage of early appellate involvement is clear, but it requires decisive action before litigation pressures mount and critical opportunities pass. Don't wait until an adverse verdict forces your hand—by then, the most valuable protections appellate counsel provides are no longer available. Whether you're facing a high-exposure case, novel legal issues, or a series of adverse rulings, it isn't a matter of whether you can afford to involve appellate counsel early, but whether you can afford *not* to. The legal landscape has evolved, and the most successful litigants are adapting their approach accordingly. Contact experienced appellate counsel today to discuss how early collaboration can strengthen your case, preserve your options, and maximize your chances of success at trial and beyond.

Frost Brown Todd's appellate advocates have a proven track record of success in appeals involving questions of first impression, bet-the-company judgments, and decisions that shape the rules under which our clients will operate well into the future. For more information, please contact [Griffin Terry Sumner](#) or any attorney with the firm's [Appellate Practice Group](#).

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