

So, You Lost at Trial, Now What?

**By
David F. Johnson**

So, you just lost your case in trial court, now what can you do? Simply, you can take steps to appeal that outcome to the court of appeals. However, the issue that very few parties contemplate is whether they should retain a new attorney to help them and their trial attorneys with the appeal.

Prosecuting or defending a case in a trial court is very different from doing so in the court of appeals. First, there are different sets of rules that govern practice in trial courts than in courts of appeals. Knowing the details of these rules, and the common law that interpret them, is very important to a successful outcome – in fact, it may be the determining factor.

Also, the trial court and appellate court are different because they have very different audiences. The trial court has a jury. There are three or more justices in a court of appeals. The factual issues that are important to a jury may be absolutely irrelevant in an appellate court. A trial lawyer has to be able to read a jury and have the common sense to know what issues are important to the jury. Verbally communicating ideas is the most important asset to a trial lawyer -- legal scholarship is secondary.

An appellate lawyer, however, has to be academic. The nature of an appellate case is that the parties do almost all communicating to the court in writing. Accordingly, writing and organizational skills are the most important asset to an appellate lawyer. How the parties phrase the issues and communicate those issues to the court of appeals will likely determine the outcome of the case. Therefore, there is a need for a party to retain new counsel to at least assist its trial attorney in the presentation of the case on appeal.

Now that a party needs to retain an appellate lawyer, how does it go about doing that? Well, the most obvious way is to obtain references from its trial attorney. But, a party should not stop there -- it should do its own research into competent appellate counsel. This is a lot easier than it might seem.

The party should keep certain factors in mind in selecting an appellate counsel. The first factor is to inquire whether the appellate counsel is board certified in civil appellate law by the Texas Board of Legal Specialization, which is obtained by attorneys through a difficult application and test procedure they voluntarily pursue. The attorney has to have proven experience in appellate law and has to pass a full-day test strictly on appellate law issues. In fact, the test for board certification in appellate law was the most difficult test of all of the board certification tests last year – less than 30 percent of those that took the test passed.

Parties can find out who the appellate board certified lawyers are in a particular area by going to the Board of Legal Specialization's website (www.tbls.org), going to the directory page, and searching by area of board certification and location. This search will produce a list of individuals in an area that are board certified in appellate law. Once a party has this list, it can do further research by looking those attorneys up on the internet or by calling them.

Another important factor is whether the attorney worked for a court of appeals out of law school. This is a good indicator that he or she has an understanding of how a court of appeals works and what is effective in communicating to the court. The year or two that the attorney spent working at a court of appeals provides invaluable experience and knowledge. The number of appellate courts that an attorney is licensed in is another indicator of his or her experience. Further, the fact that the attorney publishes articles in law reviews or continuing education courses is a good indicator that he or she is a good writer, effectively communicates his or her ideas, and has some reputation in the legal community as a legal scholar.

Lastly, the fact that the attorney is active in appellate lawyer associations, either national, state, or local, is a good indicator that he or she has experience in appellate law, is known by other appellate lawyers, and most importantly, is known by appellate justices.

In conclusion, a party should seriously consider retaining an appellate lawyer when its case ends up in a court of appeals. In addition to receiving a referral from a trusted trial attorney, the party should do its own research into other potential appellate lawyers in the area keeping in mind the various factors listed above.

###

David F. Johnson is an attorney in the Appellate Practice of Winstead Sechrest & Minick P.C., and is based in the firm's Fort Worth office. For more information concerning this topic please contact David at 817/420-8223, or via email at dfjohnson@winstead.com.