

From the Chair


By Scott Burnett Smith

Our committee is devoted to promoting appellate practice and educating the lawyers who spend all or part of their professional lives briefing and arguing appeals.



■ Scott Burnett Smith is a partner in the Huntsville, Alabama, office of Bradley Arant Boult Cummings and the founder of the firm's Appellate Litigation Group. Mr. Smith has been involved in 10 cases (two on the merits) before the U.S. Supreme Court. He has also been involved in over 110 appeals to the U.S. Courts of Appeals for the Fourth, Fifth, Sixth, Ninth, Eleventh, and D.C. Circuits, the Alabama Supreme Court, and the Alabama Court of Civil Appeals. He has presented oral argument 18 times before federal courts of appeals.





It's an exciting time to be an appellate lawyer. More than a decade ago when I started practicing law, most trial lawyers handled their own appeals. When I said I wanted to be an appellate lawyer, the trial lawyers would smirk and say, "You'll never make a living doing that." Boy were they wrong.

Today, appellate practice is widely recognized as an area of unique expertise. Three states, California, Florida, and Texas, have state certification for appellate specialists. In Washington, D.C., the United State Supreme Court bar is filled with experienced appellate litigators who spend nearly all their time practicing before the High Court. In the offices of corporate America, general counsels routinely hire appellate counsel to handle significant appeals before state and federal appellate courts. Whether we are hired to formulate strategy for institutional litigation nationwide, preserve the record during a high-stakes trial, assist trial counsel in overturning a terrible trial loss, or preserve an important win for the client, appellate lawyers are now an indispensable part of the litigation team.

The DRI Appellate Advocacy Committee has helped shape appellate litigation into a distinct area of practice. With nearly 500 committee members nationwide, our committee is devoted to promoting appellate practice and educating those lawyers who spend part or all of their professional lives briefing and arguing appeals. We accomplish these goals in several ways. First and foremost, we host one of the most respected appellate practice seminars in the country. This year's seminar in San Diego was the best yet, featuring three State Chief Justices and four Federal Circuit Judges in addition to famous legal reporters, law professors, and appellate lawyers. Throughout the year we also sponsor webinars on interesting legal developments, such as pleading standards under *Bell Atlantic v. Twombly* or judicial recusal in the wake of *Caperton v. A.T. Massey Coal Co.* We also contribute to the program at the Annual Meeting. This year in Chicago, for example, we organized an exciting panel discus-

sion among five former United States Solicitors General: Paul Clement, Drew Days, Charles Fried, Ted Olson, and Ken Starr. We also publish a respected appellate newsletter, *Certworthy*, which is routinely filled with articles addressing the hottest topics in appellate practice. Finally, we publish an issue of *For The Defense* dedicated to appellate practice.

As the new chair of DRI's Appellate Advocacy Committee, I am honored to introduce this year's appellate issue of *For The Defense*. The seven articles that follow were written by some of the leading appellate lawyers practicing today. The first article, "A Conversation on the Appellate Process" by David Axelrad, presents a dialogue with a corporate client who has just been hit with a \$5 million jury verdict. In this conversation, the reader gains a deeper understanding of the appellate process along with the imaginary client, who learns the importance of retaining an appellate specialist. Tony Russo's "The Evaluation of Judgments for Appeal" also helps clients assess the likelihood of success (or failure) on appeal. This article contains useful pre-appeal checklists, plus insights on the statistical chances of winning and the precedential costs of losing an appeal.

The next two articles focus on topics that arise in appeals that are not routine. J.H. Huebert's article, "How to Raise New Issues on Appeal," contains sage advice for counsel who take over on appeal and discover that the winning issue was not preserved at trial. Those who follow Huebert's strategy and the case law that he discusses may find a new way to get the appellate court's attention. Similarly, Mary Masaron Ross's "Tips on Advocacy at the Petition Stage" provides advice for persuading a certiorari court to select your case for discretionary review out of the

hundreds (or thousands) of certiorari petitions filed each year.

Picking up on the theme of Supreme Court practice, Michael Shea and Erick Sandler's article asks a thought-provoking question: "Is It Time to Change Certiorari Process at the Supreme Court?" Shea and Sandler address a controversial proposal by a group of legal scholars who want Congress to create a new Certiorari Division at the United States Supreme Court made up of circuit judges, not law clerks. This article explains what could be gained and lost by changing the Supreme Court's jurisdiction; it also demystifies the Supreme Court's current certiorari process.

The last two articles touch on broader practical themes of appellate practice. In "Appellate Advocacy: Whose World Is It?," Roger Townsend, Amy Warr and Anna Baker discuss the tensions that often arise between the court and the client in a competitive legal environment. Appeasing both the client's expectation of zealous advocacy and the appellate judge's preference for measured briefs and oral argument is tricky. This article reveals how an appellate lawyer, with practice, can make both sides happy. Finally, David Tenant and Lauren Michael's "The Duty to Report Malpractice by Trial Counsel" addresses an even tougher conflict—that between appellate counsel and trial counsel. In this honest article, they answer the most dreaded ethical question in appellate practice: When must an appellate lawyer tell the client about actual or perceived malpractice committed by trial counsel?

In sum, there is something in this appellate issue of *For The Defense* for every practitioner. The members of the Appellate Advocacy Committee believe you will learn something new from these articles. We also hope to see you at one of our future appellate events or seminars.