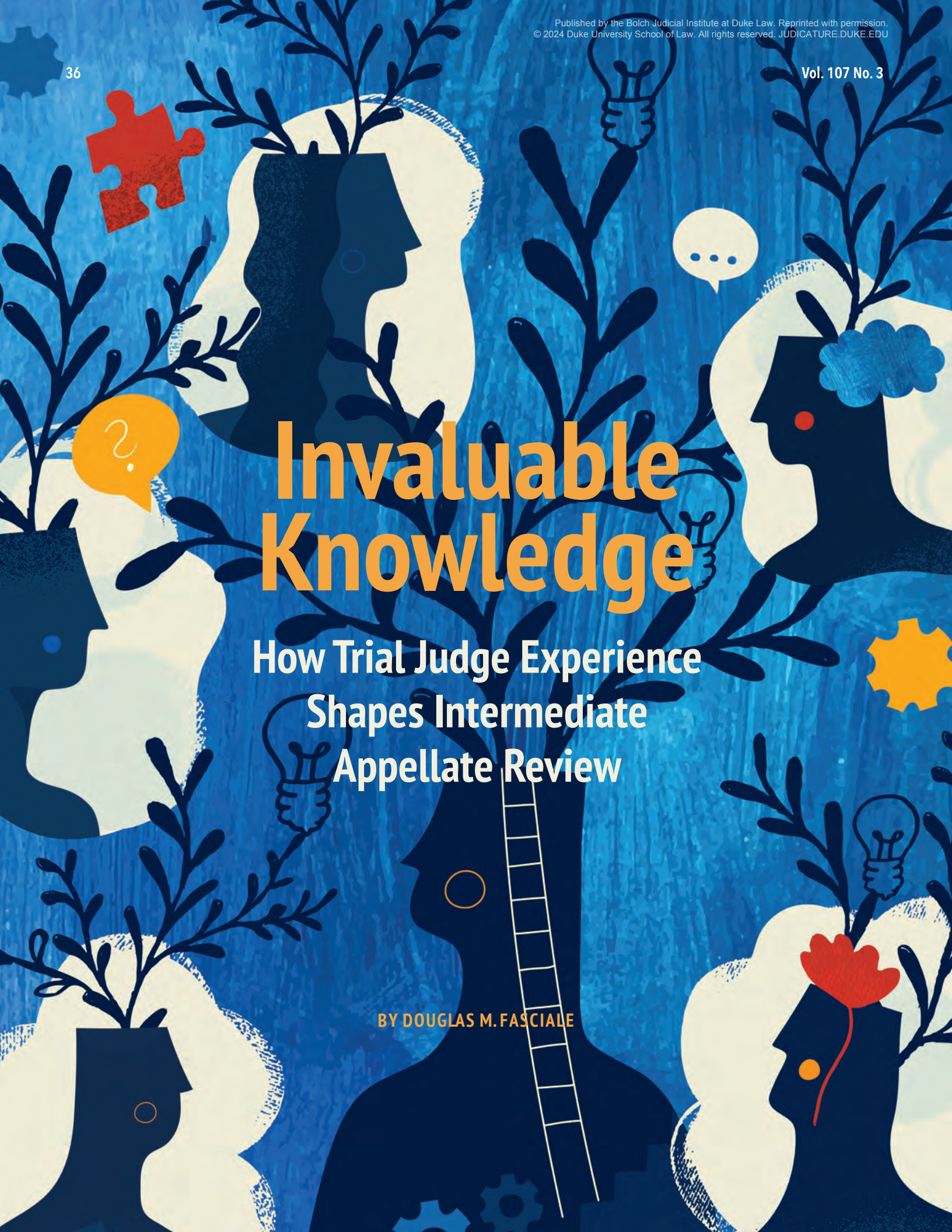

Invaluable Knowledge

How Trial Judge Experience Shapes Intermediate Appellate Review

BY DOUGLAS M. FASCIALE

Imagine that you (a former civil trial judge) and your colleague (a former tax court judge) are on an appellate panel assigned to adjudicate two appeals. One is an appeal from an order entered by a tax court judge dismissing a complaint.[1] The other is an appeal from a judgment entered following a jury trial in a car accident case.[2] All other things being equal, can you envision deferring to your colleague or being particularly solicitous of her views given her prior experience as a tax court judge? Wouldn't you want the same consideration in the car accident appeal?

As is true in many professions, experience matters. Specifically, prior experience as a trial judge can help intermediate appellate judges analyze trial rulings.[3] For this conclusion, I rely on a case study: my own experience — spanning more than 35 years — as an associate justice of the New Jersey Supreme Court, an intermediate appellate judge of the New Jersey Superior Court, a trial judge of the New Jersey Superior Court, and a certified civil trial attorney by the New Jersey Supreme Court. New Jersey's Appellate Division — which is one of three intermediate appellate courts in the nation composed only of former trial judges[4] — exemplifies the benefits of prior trial judge experience.

The experience of appellate judges as former trial judges is no accident but a result of constitutional design, with its roots in medieval England.[5] During colonial times, New Jersey common law courts generally mirrored the English system.[6] The system adopted from England and implemented until 1947 included a practice of appellate judges simultaneously performing duties in the trial courts.[7]

During ratification of a new state constitution in 1947, however, there was overwhelming support for separating the trial and appellate roles, and attention shifted to how dedicated appellate judges would be selected. Acknowledging problems associated with appellate judges simultaneously serving as trial judges, the drafters of our 1947 constitution nevertheless recognized the value of appellate judges having prior trial judge experience. They therefore eliminated dual judicial functions and created an intermediate appellate court composed only of former trial judges.

Prior Experience as a Trial Judge

From speaking with about 20 (which is nearly all) of my appellate judge colleagues — all former trial judges[8] — I extrapolated eight examples of how the experience can manifest itself. Trial judge experience can influence how the appellate judge: (1) evaluates the correctness of the trial court ruling; (2) considers whether the ruling was harmless; (3) perceives what was happening at the trial level; (4) writes more compassionately, sensitively, and ▸

with greater patience; (5) demonstrates confidence to write shorter unpublished opinions; (6) defers generally to credibility findings; (7) applies a heightened understanding of the life of the law; and (8) works as part of a broader appellate court institution with members who also benefit from prior trial judge experience. This nonexhaustive list represents how the experience can add tangible and practical benefits. I contend that collective prior judicial trial experience strengthens the administration of justice at the intermediate appellate level.

***First*, prior experience as a trial judge influences an appellate judge's evaluation of the correctness of a discretionary ruling by a trial judge but, *second* and more importantly, it informs consideration of whether the ruling was harmless.** Determining whether an abuse of discretion is reversible or harmless error involves an appreciation for trial nuances from the perspective of a trial judge.

For example, imagine that during voir dire, in a controversial employment discrimination case, a defendant remarks directly to the trial judge about his own counsel's exercise of a peremptory challenge, causing plaintiff's counsel to request a mistrial because a juror may have overheard the remark. Assume that the judge denies the motion after questioning the juror at sidebar. Any appellate judge who has sat with juries knows the proximity of the jury box to the counsel table, the subsequent questioning of the juror, and the atmosphere in the courtroom are relevant in determining whether the denial amounted to an abuse of discretion.[9] There is a certain "feel" of the case that a trial judge develops that cannot be discerned from the written appellate record. Having "been there, done that" prevents unreasonably second guessing what happens in the real world of trial advocacy.

> Understanding how the trial court works is likely relevant to determining whether the judge committed an abuse of discretion; and, if in no other way, practical experience impacts how that appellate judge addresses the mistake.

Or consider when the trial judge overrules a hearsay objection. Having previously made evidentiary rulings in trials, the appellate judge who applies an abuse of discretion standard understands that there might be nuances involving testimony, witnesses, or counsel that impact the ruling but cannot be discerned from the cold record. Testimony admitted into evidence over an assistant prosecutor's hearsay objection might address a subject matter fairly presented on rebuttal that might very well negate any potential prejudicial effect and render the argued error harmless.

***Third*, prior experience as a trial judge gives the appellate judge a practical perspective of what happened at the trial level.** In applying the abuse of discretion standard of review, it is important to understand the pressures trial judges face. One appellate colleague explained that trial judges play ping pong; appellate judges shoot pool. In certain dockets, trial judges must make decisions one after the next, but appellate judges have the luxury of slowing down the pace, without the same pressure of time. (Of course, trial judges routinely make well-reasoned decisions after careful deliberation, and therefore play pool, too.)

Take, for example, a typical day in a high-volume civil docket. A judge might have 75 small claims cases listed at 9 a.m. that must be resolved before 12:30 p.m., since the judge could have 100 landlord tenancy matters listed for 1:30 p.m. In addition, the judge might have hardship applications by tenants requesting stays of evictions, and several orders to show cause addressing multiple claims that tenants have been illegally locked out of their homes. In the middle of a complicated Uniform Commercial Code bench trial, the judge might be interrupted to rule on an adjournment request in a different case and summarily denies that request because the case had been previously listed four times. A party might appeal the order denying the adjournment. Prior experience facing such challenges provides an appellate judge invaluable practical perspective when deciding whether the trial judge abused his or her discretion by denying the adjournment.

Many of these examples involve appellate judges inspired by their own experience to defer to the trial judge. Of course, an appreciation for the real-life situation confronted by the judge

ought not to give the trial judge a pass if a mistake was made. And an appellate judge with substantial trial judge experience may have more sympathy for a trial judge's mistaken ruling and might shy away from finding an abuse of discretion when appropriate. But understanding how the trial court works is likely relevant to determining whether the judge committed an abuse of discretion; and, if in no other way, practical experience impacts how that appellate judge addresses the mistake, which brings me to the next point.

There may be times when prior trial judge experience pushes a judge more toward second-guessing than deference — such as an appellate judge tempted by prior experience to ignore the standard of review. Such an appellate judge might look at the discretionary trial ruling and say, "I would not have done it that way," rather than apply the abuse of discretion standard. Obviously, the question on appeal is not whether the appellate judge personally would have ruled as the trial judge did, but rather whether the trial judge abused discretion.

***Fourth*, prior experience as a judge in the trial trenches fosters more compassionate, sensitive, and patient writing.** I cannot overemphasize this point. Why should we care about compassion and sensitivity? Because we are dealing with people: judges, trial lawyers, and litigants. Trial judges and attorneys are under considerable stress. Everyone is usually trying to do the best they can. The last thing anyone wants is an appellate judge who has forgotten this reality. The tone of an appellate opinion matters, and prior trial judge experience reminds the appellate judge of the enormous pressures of being on the front lines and being the face of the judiciary for the public.[10]

Reversal of discretionary determinations (not errors of law) requires appellate judges to conclude that the trial judge exercised an abuse of discretion, which is harsh in and of itself. Such a conclusion may be reached respectfully by recognizing the enormous pressure trial judges face daily. With few rare exceptions, chastising trial judges is — in my view — treacherous, bad for goodwill, and does a disservice to the appellate administration of justice. We are professionals whose obligation is to the rule of law, and we can meet that obligation respectfully.

***Fifth*, prior experience as a trial judge can give the appellate judge confidence to write shorter opinions.** By shorter, I do not mean incomplete. Appellate judges are tasked with considering all the arguments on appeal. But someone who has done this knows what is relevant to the contentions.

For example, suppose the trial judge denied a defendant's motion to extend the discovery end date[11] in a medical malpractice case because a trial date had been set, and the defendant was unable to demonstrate exceptional circumstances for the extension. On appeal, the defendant doctor argues that the COVID-19 pandemic prevented him from completing discovery. The appellate judge who has ruled on discovery motions as a trial judge can confidently write a succinct yet thorough unpublished opinion highlighting the unique facts of the case, affirming the order denying the defendant's motion, and pointing out that the defendant spent the entire pretrial time without any COVID-19 difficulties attempting to settle the case rather than propound discovery.

I say prior experience is a confidence booster because the appellate judge with prior trial judge experience will not unduly fret over what happened in the trial court. Would a competitive weightlifter second guess how much to bench press? Of course not. Would an appellate judge with trial judge experience worry about elaborating on a ruling that that appellate judge had made many times before? No. Lawyers and judges do not want to read unnecessarily long opinions anyway.

***Sixth*, prior experience as a trial judge may increase deference as to credibility findings.** Appellate judges who served as trial judges know how credibility findings are made because they have made them. A trial judge should not simply find that the witness is or is not credible in a conclusory fashion but should provide reasons for that finding, and an appellate judge with prior trial judge experience will appreciate which proffered reasons make sense.[12]

For example, the trial judge might say something like, "I find the witness credible because I have had the chance to watch the witness testify, hear the way the witness answered questions on cross-examination, and see how the witness made eye contact with the court and counsel during her testimony." Deference to such a detailed trial finding is likely.

***Seventh*, prior experience as a trial judge enhances an appellate judge's understanding of the life of the law.** At the appellate level, experience as a former trial judge increases broad knowledge of the law, having applied it firsthand to real-world problems unfolding in courtrooms every day. Of course, other experiences, especially for a state's highest court, are relevant to the administration of justice. But as a former trial judge, I have seen the life of the law play out in the litigants' lives. I know what it is like to look into the eyes of a parent and terminate parental rights, despite knowing that ▸

parent made efforts to reconcile with the child. And I know what it is like to revoke probation and impose a prison term after a probationer fails to meet the conditions of a recovery court sentence. The balance of real lives rests in the hands of trial judges, and appellate review of rulings can reflect this reality. Appellate records are no substitute. Trial judge experience provides an appellate judge with a practical frame of reference to understand the ordinary life problems of litigants and trial judges more sensibly.[13] Justice Oliver Wendell Holmes — who previously tried hundreds of cases during his service as an associate justice of the Massachusetts Supreme Court — remarked that "[t]he life of the law has not been logic: it has been experience."[14] I argue, like Justice Holmes, that trial judge experience is invaluable to appellate work.

***Eighth*, there are institutional benefits for an intermediate appellate court composed of former trial judges.** Of course, collective experience as trial judges does not undervalue nonjudicial experience, such as in academia, or as a trial attorney, public defender, prosecutor, or public servant. Life experiences impact appellate thinking. But the appeals court inherently administers justice embodying the seven benefits mentioned above, which enables a robust adjudication of issues on appeal, particularly as it relates to reviewing discretionary determinations. A byproduct of that background is a more collegial judicial body. Should parties seek further review of the appellate judgment by the state's highest court, that court's consideration of the contentions on appeal will be more fully informed by opinions of an intermediary court of appeals reflecting experience in the trial trenches.

The balance of real lives rests in the hands of trial judges, and appellate review of rulings can reflect this reality. Trial judge experience provides an appellate judge with a practical frame of reference to understand the ordinary life problems of litigants and trial judges more sensibly.

I emphasize that substantial experience as a trial judge cannot be viewed in a vacuum, and I do not mean to undervalue the contribution one makes as an appellate judge who is without prior experience as a trial judge. Take our hypothetical appellate judge with ten years of experience as a trial judge. Ten years on the trial court means the judge has ten fewer years' experience on the other side of the bench — for example, as a public defender, prosecutor, and so on. Nonjudicial experience is important, too.

Indeed, intermediate appellate courts in many states are composed of judges with no prior experience as a trial judge. As members of those other intermediate appellate courts, the judges possess unique individual professional experience and commonly write thoughtful opinions adjudicating discretionary trial court determinations. But, based on my prior experience as a trial judge and looking at the judicial evolution in New Jersey, the benefits realized from prior experience as a trial judge manifest in meaningfully different ways in appellate decision-making. One obvious way is in the tangible and practical "feel" for the case as a trial judge.

Fully Realizing Benefits of Prior Experience as a Trial Judge

The New Jersey practice that an intermediate appellate judge first sits as a trial judge has been beneficial overall. But the further away an appellate judge gets from prior experience as a trial judge, the less impact that trial judging has when reviewing discretionary rulings. To keep an appellate judge's experience as a trial judge current and useful, I offer five recommendations, understanding that my impressions are by no means exhaustive. In general, in addition to (1) encouraging trial judges to seek rotation in different trial divisions, I commend appellate courts to (2) invite trial judges to participate, (3) offer writing courses to trial judges, (4) promote appellate court members to share stories of prior trial judge experience, and (5) allow appellate judges to return to the trial court.

***First*, trial judges interested in serving as an appellate judge should make the most of their time as judges**

in the trial court and intentionally seek rotation in different trial divisions, regardless of how much time they spend there. Each trial judge is unique, and the ideal time in any division should be tailored to that person's background. The more diverse the trial judge experience, the more impactful it will be on that individual's appellate decision-making on trial discretionary rulings.

It is the quality of the experience as a trial judge that matters, not necessarily the length of time in that role. A trial judge assigned to a high-volume docket can obtain substantial experience in less than six months because that judge will see thousands of cases during that period. Not every trial assignment is the same, and there is no magic formula. That said, depending on the appellate judge's professional experience before joining the bench and the nature of the experience obtained while sitting as a trial judge, it is my view that at least two to five years of prior trial judge experience is ideal before becoming an appellate judge.

***Second*, appellate courts should invite trial judges to participate in an appeal.** In New Jersey, appellate judges read merits briefs, digest appendices, prepare for argument by exchanging preliminary written views with other judges on the panel, and attend pre- and post-argument conferences. A trial judge interested in appellate judging will benefit from learning this process firsthand. Doing so will provide a stronger foundation before joining the appellate court.

***Third*, appellate courts should offer courses on writing opinions to trial judges.** Once a year, all New Jersey justices and judges attend a judicial educational gathering to satisfy continuing legal education requirements. The courses are taught mainly by judges, but lawyers, visiting speakers, and professors also teach. Opinion writing is covered. At such a conference, assigning a retired appellate judge to help the trial judge write more like an appellate judge would be beneficial. This would give the trial judge preliminary, practical, hands-on experience with the applicable manuals on style and captions, the Bluebook, and application of standards of review.

***Fourth*, appellate courts ought to encourage annual retreats at which appellate judges can share perspectives as former trial judges.** A newly assigned appellate judge with trial experience will likely contribute differently than one who has been on the court for 15 years. Constant communication among appellate judges builds collegiality. Importantly, it forces the experienced appellate judge to appreciate the job of trial judging, which goes a long way when reviewing trial discretionary rulings.

***Fifth*, appellate courts should provide opportunities for their judges to return to the trial court to reacquaint themselves with the trenches by at least observing the work of trial judges.** If possible, permit the appellate judge to try a criminal, family, or civil case; handle a high-volume docket, such as small claims cases or a family court nondissolution calendar; or conduct plea hearings at a pre-indictment calendar. Appellate judges will benefit by returning to the trial court periodically and reacquainting themselves with that work. Such opportunities ensure enormous benefits, including educational rewards. A state judiciary can follow the same example of the federal courts — special designations — in this regard.

Additional Thoughts: Trial Attorneys and High Courts

The Relevance of Experience as a Trial Attorney. Particularly outside New Jersey, many more candidates for appellate judge will have experience as a trial *attorney* than as a trial *judge*. What should be made of this background and its relevance to quality appellate judging?

As someone with experience as both a trial attorney and trial judge, I can attest that the advantages of those backgrounds manifest in different ways in appellate decision-making. Contrast the advocate's persuasive role with the trial judge's neutral decision-making role.

Immediately after becoming a trial judge, I resisted the temptation to participate in the witnesses' questioning, to object to a question during a witness examination, or to perform cross-examination myself. I had to let the lawyers try their own cases.

However, a trial judge may sometimes have to intervene, even in the absence of an objection. That was the case in *Szczecina v. PV Holding Corp.* when, without objection, plaintiff's counsel made derisive comments in his opening and closing statements about the defendant, defendant's counsel, and defendant's expert.[15] So, although it is important for lawyers to try their own cases,[16] the trial judge has an obligation to act sua sponte before an unjust result becomes likely.

In either case, it is the conduct or the decision of the trial judge that the appellate judge evaluates. Therefore, it is trial judge experience that more directly prepares a judge for appellate review of a trial judge's decision. What the lawyers do creates context for the appeal, but it is the trial judge's decision — not the lawyers' conduct — that is directly under review. ▸

Nevertheless, experience as a trial attorney does add value. It enhances appreciation for the practical costs and benefits trial judges and litigants face when allocating resources in court, and it gives the appellate judge a real-world grasp of important challenges that trial judges encounter. For the appellate judge, this does not replace serving as a trial judge but makes for a well-rounded jurist. My experience generally shows, however, that prior trial judge experience is often more beneficial than prior advocacy experience as it relates to appellate review of discretionary rulings.

Why a State's Highest Court Is Different. Although New Jersey's adoption of the 1947 constitution resulted in the practice that intermediate appellate judges first serve as trial judges, the same cannot be said for justices of the New Jersey Supreme Court. In New Jersey, the appellate division and supreme court, which have been operating effectively for roughly 75 years, are entirely different. And for good reason.

The appellate division is primarily a court of corrections in which litigants have an absolute right to appeal from final judgments or orders. Unlike the appellate division, the supreme court's docket is not consumed with thousands of nuts-and-bolts appeals requiring adjudication of discretionary rulings made at the trial level. Therefore, prior experience with such discretionary rulings is arguably less relevant. And although the appellate division adjudicates many complex cases, justices of the United States Supreme Court, like the New Jersey Supreme Court, hear only "hard" cases involving legal issues of great public importance. Therefore, instead of being comprised of only former trial judges,[17] a high court may benefit more from varied experience on the bench, which offers a better chance at a balanced consideration of issues presented on appeal, especially given the collaborative potential of a larger high court.[18]

The institutional prior judicial experience of each intermediate appellate judge diversifies and strengthens the appellate court and its administration of justice.

Conclusion

Let's return to our imaginary judicial friends in the tax court and car accident appeals. You likely deferred to your colleague, whose experience as a tax court judge made her more comfortable applying the relevant doctrine. In turn, your previous experience as a civil trial judge helps you more easily determine whether counsel's statements were harmless in the car accident case.

I believe there is no substitute for this prior practical experience. Of course, legal research is critical and must be conducted to fully adjudicate the dispute, but grasping the "feel" of an appellate case may very well require prior trial judge experience.

I have tremendous respect for all judges and justices. In my view, in the context of reviewing discretionary determinations by trial judges, previous trial judge experience can shape how an appellate judge engages in a host of ways. The insight gained from prior experience as a trial judge is helpful, practical, and impactful when reviewing discretionary rulings by trial judges. The institutional prior judicial experience of each intermediate appellate judge diversifies and strengthens the appellate court and its administration of justice.

Judging is a tough job. I hope this essay has illuminated the ways previous experience as a trial judge can enhance intermediate appellate decision-making when an appellate judge reviews discretionary determinations made at the trial level. And, to whatever extent I may have contributed to the conversation on appellate administration of justice nationally, doing so has been a satisfying endeavor.

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1 *See, e.g.*, *Gen. Motors Acceptance Corp. v. Dir., Div. of Tax'n*, 26 N.J. Tax 93, 95 (N.J. Super. Ct. App. Div. 2011) (affirming the Tax Court's dismissal of the complaint), *cert. denied*, 27 A.3d 950 (N.J. 2011).

2 *See, e.g.*, *Szczecina v. PV Holding Corp.*, 997 A.2d 1079, 1087 (N.J. Super. Ct. App. Div. 2010) (reversing and remanding a jury verdict due to counsel's repeated inappropriate statements in opening and summation).

3 This piece draws on an earlier article I wrote on this topic: Douglas M. Fasciale, *A Case Study Analyzing How Trial Judge Experience Shapes Intermediate Appellate Review of Discretionary Determinations*, 53 Seton Hall L. Rev. 1043 (2023). Available at: https://scholarship.shu.edu/shlr/vol53/iss4/1.

4 *Id.* at 1046, 1101–17. *See also* Diane M. Johnsen, *Picking Judges: How Judicial-Selection Methods Affect Diversity in State Appellate Courts*, 101 Judicature 29, 31 (2017) (noting as of that time that across the nation, 64 percent of the 1,285 state appellate judges had prior judicial experience). Diane M. Johnsen, an Arizona Court of Appeals judge, explained that "appellate judges in merit-confirmation states are most likely to have prior judicial experience, at nearly 75 percent, and judges in nonpartisan election states are least likely to have prior judicial experience, at 58 percent." *Id.* at 33.

5 John Bebout, *Introduction* to Proceedings of the New Jersey State Constitutional Convention of 1844, at xii (N.J. Writers' Project of the Work Projects Admin. ed., 1942). For a detailed analysis of New Jersey's judicial evolution, see my earlier article on the subject, *supra* note 3.

6 Edward Q. Keasbey, *Some Account of Their Origin and Jurisdiction*, *in* The Courts of New Jersey 75, 76 (1903); *see also* Erwin C. Surrency, *The Courts in the American Colonies*, 11 Am. J. Legal Hist. 253, 266–69 (1967) (noting that although courts in the colonies were patterned after those in England, they were not identical); *see also* Stephen B. Presser, *An Introduction to the Legal History of Colonial New Jersey*, 7 Rutgers Camden L.J. 262, 286 (1976) (indicating that the establishment of common law courts "was a conscious copying of the English local courts").

7 *See, e.g.*, Surrency, *supra* note 6, at 254, 261 (explaining generally that "colonial judges would hold sessions of their courts under a different title, such as chancery or exchequer, although the same judge would be presiding" and justices of the supreme courts obtained trial judge experience by going "on circuit to hear appeals and to try a limited number of cases under their general jurisdiction"). For a thorough discussion of modern Anglo-American judicial comparisons, see Patrick S. Atiyah, *Lawyers and Rules: Some Anglo-American Comparisons*, 37 Sw. L.J. 545, 556–62 (1983). Atiyah writes that "[a]lthough appellate judges are not required by statute to have some experience as trial judges, it is today quite exceptional for anyone to be appointed to an appellate court straight from the bar. It would be unusual for a trial judge to be appointed to the House of Lords unless [that person] has served some years in the Court of Appeal," and the "conventional requirement" is for appellate judges to have experience as a trial judge. *Id.* at 557, 560.

8 The research and ideas expressed in this essay should not be misconstrued to reflect any official policies of the New Jersey judiciary, nor should they be used to forecast how the author, or any other jurist, will rule on legal issues in any case.

9 *See* Stephen Budiansky, Oliver Wendell Holmes: A Life in War, Law, and Ideas 185–96 (2019); *see also* Frank v. Mangum, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting) (acknowledging his own experience as a trial judge and stating "[a]ny judge who has sat with juries knows that in spite of forms, they are extremely likely to be impregnated by the environing atmosphere").

10 *See* Judgment Calls, *Judge Jon O. Newman*, Bolch Jud. Inst., at 2:11–2:51 (Nov. 20, 2019), https://judicialstudies.duke.edu/2019/11/s1-ep2-judge-jon-o-newman (discussing the importance of the trial judge as the "face of justice").

11 A discovery end date sets the time before which a trial date is fixed. *See* N.J. Ct. R. 4:24-1(c).

12 *See State v. Locurto*, 724 A.2d 234, 241 (N.J. 1999).

13 *See generally* Hiller B. Zobel, *Oliver Wendell Holmes, Jr., Trial Judge*, 36 Bos. Bar J. 25 (1992) (commenting on how the range and variety of matters that came before the justice shaped his view of the life of the law). *See also* Budiansky, *supra* note 9, at 184–86 (explaining Holmes' experience as a trial judge was an "enormously important influence in shaping his understanding of human nature and the way the law actually bears upon life").

14 Oliver Wendell Holmes, The Common Law 1 (Boston: Little, Brown and Co. 1881).

15 *Szczecina v. PV Holding Corp.*, 997 A.2d 1079, 1087 (N.J. Super. Ct. App. Div. 2010).

16 *Id.* at 1087 n.5.

17 Fasciale, *supra* note 3, at 1046, 1085 n.149 (explaining that the impact of prior trial judge experience on a high court, rather than an intermediate appellate court, could be the subject of another study).

18 *Id.* at 1045–46, 1084–86 (further contrasting the work of New Jersey's appellate division and its highest court, and stating "Life and professional experiences obtained before joining the bench influence a justice's outlook in meaningful ways and should not be underappreciated when considering the collaborative work of justices on a state's highest court, or on the United States Supreme Court.").