



It's a whole new case.

Appeal, v.t. — In law, to put the dice into the box for another throw.

— AMBROSE BIERCE, THE DEVIL'S DICTIONARY

Another throw of the dice isn't quite what an appeal actually is, but it does suggest what at least a losing party wishes it could be. Appeals are very important to success in many cases and should be treated more as an entirely new case than just another step along the way.

How should the inevitable appeal be handled in high-stakes litigation? The question is present in every case to some degree, but comes into increasingly sharp focus as the stakes increase. Every appeal would benefit from some level of involvement by dedicated appellate counsel; that role necessarily should vary from case to case.

And it is not just this appellate lawyer who thinks so. The California Court of Appeals has observed that “trial attorneys who prosecute their own appeals, such as appellant, may have tunnel vision.” Indeed they may.

Why involve a specialist?

There are several good reasons to involve an appellate specialist, all related to the special nature of the appellate process. The rules are different, the judges are different, and the skills needed for success are certainly different. It is hard to think of an appeal where some appellate expertise wouldn't improve the ability to evaluate the appeal's prospects.

An appellate specialist brings a fresh look. The importance of this cannot be overstated. An appellate lawyer typically approaches an appeal the same way the appellate court does — having never heard of it before — and won't just recycle the arguments made and briefs filed in the trial court. An appellate specialist

will submit briefs that are specifically calculated to reach the appellate judge, not the jury or trial court judge.

Appellate courts view cases through a lens not used in the trial court — the “Standard of Review.” Appellate lawyers possess a similar ability to view cases in this way, and it is immensely valuable. In some cases, the court reviews only for “abuse of discretion,” deferring almost completely to the trial court; in other cases, the court approaches the issue “*de novo*,” really giving no deference to the trial court decision.

Appellate specialists bring special skills. They write well, and this is so important where one or two written briefs, limited in length, are the main tool of advocacy. More importantly, they know how to write for their particular audience: appellate court judges and staff lawyers. They also know the intricacies of the appellate process — how the rules work and how the court wants things done. The lawbooks are filled with appellate decisions dismissing appeals where the lawyers have failed to take steps required by the rules. An appellate specialist will help avoid the traps that are often encountered in appeal.

When to call for appellate reinforcements

There is no single answer to this, but the latest this should happen is when the trial court result is obtained. The result on appeal may be predestined by how post-trial motions are raised in the trial court. Thus, appellate advice and counsel can be immensely valuable at this critical juncture. In some cases, strategically astute clients involve an appellate lawyer as part of the trial team, to monitor the making of the record and to begin the process of preparing for appeal.

It is not uncommon for the call to come after the trial court proceedings are over, and the time to appeal is running. That may work fine, and is better than after the appeal has been served and filed.

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How to use appellate expertise

The ideal appellate team is a seamless collaboration of client, trial and appellate counsel. That ideal can often be attained, with the appellate lawyer playing a greater role as the appeal progresses. For example, we rarely recommend that the appellate lawyer appear in the trial court on post-trial motions, even if they were significantly involved with developing the post-trial motion strategy. Occasionally, it makes sense to have the trial lawyer actually present the oral argument on appeal, though more often this squanders the appellate resources. Sometimes a client may want the appellate lawyer to take over for the vanquished trial counsel. A trial lawyer may want consulting services to assess a potential appeal.

Finally, appellate specialists are also often called to help line up friends of the court — *amici curiae* — to present issues in a context likely to earn the court’s fullest attention. Simply said, if you are considering “putting the dice into the box for another throw,” an appellate specialist can significantly impact your outcome.



By David Herr |

David Herr is a highly regarded appellate lawyer and complex case litigator, regularly arguing cases in the Minnesota appellate courts and the 8th Circuit Court of Appeals. david.herr@maslon.com