

Appellate Attorneys: A Valuable Part of the Litigation Team



Karen M. Daley

Appellate advocacy is a distinct and specialized area of practice that draws upon talents and skills very different from trial skills. Appeals tend to be research intensive and require different skills than a trial attorney. Trials typically take place before juries, who determine factual issues. In contrast, appeals require the appellate attorney to make intellectual legal arguments to a panel of judges solely

on the basis of the record created in the trial court and according to established or developing law. For additional differences between trial courts and appellate courts, please see page 3.

Most attorneys and clients do not think to involve an appellate attorney until after the case has been won or lost and an appeal is inevitable. In many cases, however, the case has already been damaged or it is too late to do anything about the error. Therefore, involving an appellate attorney in the early stages of a case is important and worthwhile for several reasons:

Fresh Perspective

After living with a case for months or even years, a trial attorney is often entrenched in the facts, the arguments, and the theme of the case. An appellate attorney brings a fresh pair of eyes to the lawsuit and can provide a more detached evaluation of the case. They can assist with formulating additional legal theories or defenses, adapting or distinguishing the law, and identifying weaknesses in your case as well as your opponent's case.

Knowledge of the Law and Trends in the Law

Trial attorneys with active dockets usually do not have the time to closely follow case law or judicial trends. Appellate attorneys, however, spend a great deal of time reading the latest opinions from both state and federal courts of appeals, and they actually enjoy doing it! Therefore, appellate attorneys have a compre-

hensive understanding of established precedent, patterns of appellate decisions, and developing issues in the appellate courts.

Preservation of the Record and Motion Practice

In reviewing an appeal, the appellate court is generally limited to the contents of the record below. Even the most experienced and talented trial attorneys may not preserve error or establish the necessary record for appeal. This is not because of any lack of skill. Rather, it stems from the different expertise of trial attorneys and appellate attorneys: trial attorneys excel in convincing juries, while appellate attorneys excel in convincing courts.

As a result, it is good practice to get an appellate attorney involved in the drafting of dispositive motions (those that can end the case prior to trial), as well as pre-trial and post-trial motions. Good, clear, persuasive writing takes skill and a lot of time – time that busy trial lawyers do not always have. In addition, serious errors can occur at this stage, and if it is turned over to an appellate attorney after the motion has been ruled on, it may be too late to pursue an effective appeal. Theories not raised before the lower court cannot be asserted for the first time on appeal. Therefore, if you fail to raise a theory below, you will have handicapped the appellate attorney, thus preventing him or her from raising what might have been strong grounds for the appeal.

Research

One of the greatest advantages an appellate attorney has is excellent research and writing skills, because they devote time to these skills on a daily basis. At the trial court and appellate levels, effective research skills are vitally important because finding the right precedent and using it effectively can mean the difference between winning and losing a case.

In addition, because of their extensive practice in researching

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legal issues, appellate attorneys are an invaluable resource to call upon for legal opinions on constitutional, statutory, and other issues to guide client conduct. Appellate attorneys can work with municipal, business, and individual clients to develop strategies for dealing with potential legal issues or avoiding litigation all together.

CMDA's Appellate Advocacy Group

Unlike many law firm appellate practices, which are made up of lawyers who only occasionally handle appeals, CMDA's appellate advocacy group encompasses full-time appellate practitioners who specialize in handling litigation in the appellate courts.

CMDA's appellate attorneys handle appeals before the United States Supreme Court, U.S. Court of Appeals for the Sixth Circuit, Michigan Supreme Court, and Michigan Court of Appeals. In addition, the Appellate Advocacy Group works closely with clients and trial counsel to devise cost-effective litigation strategies, conduct legal research, prepare and argue important pre-trial and post-trial motions, and ensure that issues are preserved for appeal.

Our appellate attorneys are also skilled at preparing and filing amicus (friend of the court) briefs on behalf of clients who are not parties to an appeal, but wish to be heard on an important legal issue. The preparation of these briefs requires not only a keen understanding of the pertinent legal issues, but a working knowledge of the client's business and the particular industry involved.

Working together, trial and appellate attorneys can effectively represent their clients and significantly increase the odds of achieving favorable results for those clients. Adding an appellate attorney to a litigation team is a good, and often more efficient, way for the client and the trial attorneys to get, and stay, ahead. This team approach to litigation provides the client with the best possible representation.

Karen M. Daley

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Litigation: How to be Better Prepared



Douglas J. Curlew

Under the American legal system, there is no realm of human activity that fails to spawn litigation. The financial cost of a potential judgment is easily recognized. Less understood is the cost of time, energy, and resources (financial and human) of the litigation process itself. Even the defendant who avoids judgment by "winning" his case will still have expended resources that the law

generally affords no avenue to recover.

The primary protection against both a potential judgment and the cost of litigation is insurance. Every individual, organization, and enterprise should obtain insurance coverage adequate to encompass both the scope of their activities and the potential dollar amount of liabilities that might arise from those activities. Be attentive to your policy terms and ask questions of your insurance agent. Ultimately, it is the responsibility of you as the insured, not your insurer, to choose the correct coverage.

Even with insurance, however, other preventative steps should be taken. Being attentive to avoid and remedy liability risks in advance is an obvious measure. When potential liability in-

cidents do occur, however, other steps will aid your defense counsel to protect your interests.

First, be alert to incidents that may result in legal claims against you or your enterprise. If these occur, do not wait for a claim to be filed. Notify your insurer and your attorney immediately.

Second, retaining complete information about any incident posing the potential for litigation is critical. This is true even for information that may impact your defense in a negative manner. There are legal penalties for destruction of evidence, even in civil cases. More importantly, your defense attorney needs to know as many facts about the incident as possible and as soon as possible, in order to best prepare your defense. Relevant records kept in the general course of business, together with any special reports of a particular incident, should be kept and provided to defense counsel as soon as possible. The same is true for any video, photographic, or audio records.

Any participants in an incident, together with non-participating witnesses, should be identified whenever possible. Documentation of their observations is best obtained early, given the frailties of human memory. This should be done even before any actual claim is filed against you. Again, these should be

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provided to defense counsel as quickly as possible.

Finally, recognize that your attorney will need continued communication and cooperation through the litigation process. The best defense is proactive, not reactive. The efforts of your attorney to develop a general strategy for your defense and to pursue specific tactics in support of that strategy are dependent upon your cooperation in promptly providing information and evidentiary materials. Moreover, the legal system imposes deadlines for certain activities required of parties to litigation. Prompt response to requests from your attorney for information is critical to meeting these deadlines. Lines of communi-

cation must be available and open at all times.

Litigation may prove unavoidable. It always entails unwelcome costs and burdens. These can be reduced, however, if you are prepared.

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Differences Between Trial and Appellate Courts

There are three major differences between trial courts and appellate courts: (1) witnesses and exhibits, (2) judges, and (3) juries.

Witnesses and Exhibits

A trial court is the court where a case starts. In the trial court, both sides present evidence to show their version of what happened. Most of the evidence presented in the trial court comes from witnesses and exhibits, which are items and documents connected to the case. However, in the appellate courts, there are no witnesses, and the only evidence that can be presented is that which was introduced in the trial court.

Judges

The second difference between the two courts is the judges. In trial courts, there is one judge in the courtroom. That judge decides what evidence can and cannot be used and often decides the outcome of the case. In Michigan, appeals are decided by more than one judge. In the Michigan Court of Appeals, three judges hear the case, while in the Michigan Supreme Court, there are nine judges (called justices) that hear each case.

Juries

The last major difference between the trial courts and the ap-

pellate courts is the role of the jury. A jury is sometimes used in trial courts to help decide the case. In a criminal trial, the jury decides whether a person is guilty or not guilty. In a civil trial, the jury decides whether a person is liable (legally responsible for damages) or not liable. However, there is no jury in the appellate courts. Appellate judges determine the outcome of all appeals.

A big misunderstanding about the appellate courts is that they simply rehear the case over again. The truth is that appellate courts do not rehear the facts of the case. Appellate courts focus on questions of law, not on questions of facts like the trial courts. The appellate judges want to know whether the law was applied accurately. An appellate court will overrule a trial court decision only if an important legal error was made in the trial court. In some cases, the appellate court judges might believe the outcome of the trial court should have been different, but if no legal errors were made, they will not overrule the lower court. The appellate judges make their decisions based only on legal arguments of how the law should be applied and interpreted.

Karen M. Daley



To commemorate CMDA's 50th Anniversary, every month throughout 2015 we are donating 50 (or more) items to a local charity. In May, we are collecting items for the Alternative for Girls Rise N' Shine summer camp. Alternatives For Girls provides a fun, free, and educational summer camp for at-risk girls in southwest Detroit. Please stop by our Livonia office if you are interested in donating. Thank you for your support.

MAY

Donation: art supplies (construction paper, markers, crayons, craft kits, journals); beach towels; and sunscreen
Recipient: Alternatives For Girls Rise N' Shine summer camp

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