

The Complete Appellate Advocate: Beyond Brief Writing

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Overview and summary

Appellate lawyers are often thought of as brief writers and oral advocates who only become involved in a case after it is won or lost at the trial court level. (They may be especially likely to be retained after a case has been lost.) While appellate briefs and oral arguments may epitomize what appellate lawyers traditionally do, clients and other lawyers are coming to recognize that appellate attorneys' skill sets and training can add significant value at many stages of litigation starting as early as case development.

Although generalizations are always subject to exceptions, appellate lawyers tend to operate a bit differently from general litigators. Rather than working primarily to develop the most persuasive factual case, they usually focus more on legal issues and how to convince the court that their side should prevail as a matter of law. This type of approach typically requires significant research and understanding of both substantive legal principles and the legal process, combined with a winnowing of the facts to those critical to the legal analysis and the development of an overall theme. Ideally, the end result is a series of persuasive logical arguments that lead to the desired outcome.

Combining this style of litigation with trial lawyers' emphasis on fact-based storytelling results in a more compelling presentation overall. Although it may seem somewhat counter-intuitive, involving an appellate lawyer when a case is first conceived, prepared for trial, and tried can pay very substantial dividends. As statistics in many appellate courts across the country show, the key to winning an appeal is to win below. Putting together the strongest legal team possible at the outset is the best way to obtain a favorable result – which is occasionally not a judicial decision but a settlement limiting the client's exposure or a decision to pursue a different strategy instead of proceeding with a case that presents significant vulnerabilities.

Just as appellate lawyers are likely to improve the presentation and resolution of a case at the trial court level, they also can make positive contributions on appeal even in matters they are not handling. Appellate attorneys' objectivity, understanding of the appellate process, and familiarity with the court or judges who will hear a particular appeal make those attorneys valuable consultants in appeals being handled by others. A prime example of this is the involvement of appellate counsel in moot courts designed to help prepare the lawyer who will present the oral argument. Appellate consulting can also be helpful when assessing an appeal's likelihood of success, determining overall strategy, identifying the best issues to pursue and arguments to make, recruiting amicus support, and finalizing the briefs. This article will highlight the different ways throughout the life of a case in which appellate lawyers can contribute to better advocacy and decision-making by other lawyers, the parties, and the courts.

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