APPELLATE PRACTICE

by Honorable Leah Ward Sears

Appellate practice is a distinct discipline – a "last chance" to undo an unfavorable judgment or to preserve a hard-fought victory. SGR represents clients in appeals before the United States Supreme Court and federal and state appellate courts across the country. We serve existing clients, clients who come to us for the first time to handle their appeal and clients seeking to participate in appeals as "friends of the court" in the filing of amicus curiae briefs.

Is trial advocacy different from appellate advocacy?

Yes, the skills needed in a trial court are different from those needed on appeal. A trial lawyer's talent in a jury trial is best utilized in selecting a jury, persuading that jury, raising timely objections, examining witnesses and maintaining an active presence for the fact finder, whether that happens to be the judge or jury. These skills don't often translate well into the appellate arena, especially as lawyers have become increasingly specialized.

The types of arguments that sway juries don't often persuade appellate judges. And writing an appellate brief is fundamentally different from writing a memorandum of law or trial brief to a trial court. A good appellate brief, for example, is not one that merely scoops all of the issues raised at trial into a brief on appeal without first undertaking additional analysis, research and reordering.

What makes a good appellate lawyer?

Good appellate lawyers know how appellate courts operate and the issues that are important to appellate judges. Good appellate lawyers also understand that appellate judges will always try to (1) apply the correct standard of review to the merits of a case; (2) develop the law in the jurisdiction in a way that makes sense; and (3) create precedent that is consistent and helpful. Appellate judges are also always thinking about whether the decisions they make will open the floodgates to frivolous litigation, create even more issues that will drain the resources of future litigants as well as the courts, or confuse an issue of law in a way that will inhibit parties from resolving disputes using alternative methods of dispute resolution.

You could say that an appeal is a postmortem of sorts, except you have the rare opportunity, if you win, to bring your case back to life. Appellate lawyers try to do this by diagnosing the problems at trial, presenting them clearly, creatively and intelligently to an appellate court by dissecting and, at times, reassembling, the facts and the applicable law to present a persuasive argument to the court. And just as most postmortems aren't performed by the treating physician, most appeals shouldn't be prosecuted without the sound advice and counsel of an appellate lawyer.

After receiving an unfavorable outcome at trial, how do I decide whether it makes sense to appeal?

Appealing a case is a costly decision. We provide our clients with the estimated cost of pursuing an appeal, the expected duration of the appellate process and a forecast of the likelihood of success of their appeal. We do this by selecting which issues should be the focus of an appeal to ensure the highest probability of success. This process requires a careful review of the record. Appealing weak issues and including bad arguments in a brief can damage a client both by reducing the credibility of counsel to appellate judges as well as by wasting precious words and pages in a brief that could be better spent on issues that can be won. We know from experience, for example, that the best appeals seek to overturn just two or three issues, at most.

Should I add an appellate lawyer to my trial team?

In more complex cases you should seriously consider adding an appellate lawyer to your trial team to spot potential appealable issues early and ensure that legal arguments aren't waived. Appellate counsel can also assist trial counsel present and preserve evidence in a manner that will help, should an appeal be necessary. An appellate lawyer can also assist with pleadings, dispositive pretrial motions, jury instructions and verdict forms. Moreover, by engaging an appellate lawyer at the trial level, you're sending a strong signal to opposing counsel, as well as the trial judge, that you're in this for the long haul and are serious about pursuing the case to the highest court if you have to.

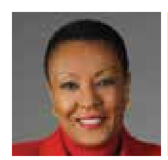
Are there reasons to hire an appellate attorney who was not trial counsel?

Yes, here are three good ones.

FIRST, an appellate lawyer will look at the case with "fresh eyes" and, in that respect, she's looking at it in the same way an appellate judge will. That perspective allows her to view the case more objectively than the trial lawyer who has lived and breathed it for a long time and who therefore may not be able to identify the more limited core issues that are winnable on appeal.

SECOND, an appellate lawyer understands what appellate judges care about. Of course, all judges, both at trial and on appeal, seek to apply the law consistently and correctly. But they confront issues before them from very different places. For instance, a trial judge is much more focused on the facts of the case at hand and, depending upon the stage of the case, has participated in its evolution. An appellate court, on the other hand, views the case for the first time when the judges start to read the briefs. On appeal, the parties have just one or two briefs, then an argument, to make an impression. That's it, in most cases. The lawyer on appeal has to have the experience and skills to best take advantage of these opportunities that are limited by space and time.

THIRD, an appellate lawyer generally doesn't have a personal stake in the arguments made and issues raised at trial, since he usually wasn't on the trial team. As a result, he is in a better position to take a more dispassionate view about which issues to discard and which ones to keep – a decision that is essential to presenting a strong appeal. There is a significant cost to every issue or argument that's briefed on appeal. Adding weak arguments to a brief can dilute the strong arguments and draw the court's attention away from them.



Honorable Leah Ward Sears is a partner in SGR's Litigation Practice. As a retired Georgia Supreme Court Chief Justice, she draws on her background to bring a unique combination of skills and outstanding value to her clients. Among her many roles, she is an appellate lawyer, oral advocate and strategist, in addition to often serving as a neutral in arbitration proceedings and mediations. **lsears@sgrlaw.com**.