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ADVICE AND INSIGHT INTO THE PRACTICE OF LAW®

Successfully Managing the Unforeseen Risks of Appellate Work[1]

APPELLATE WORK AND CLAIMS

Appellate work is traditionally regarded as a risk-free area of practice. As a percentage of all legal malpractice claims, those claims involving appeals have remained at, or below, 3% since 1985.[2] Unlike other areas of legal practice, appellate practice is a much narrower field of law, with relatively few specialists. While appellate activities do not generate a significant number of legal malpractice claims, lawyers performing appellate work bear a greater risk of becoming the subject of a malpractice claim than the claim data suggests. The discrepancy between the seemingly low percentage of legal malpractice claims brought against appellate practitioners, and the actual risk posed by such a practice, may be explained by the following factors:

- In order for a matter to involve an appeal, it must have been litigated. Not all matters handled by attorneys involve litigation. Many matters handled by attorneys are purely transactional and, therefore, would never involve an appeal.
- Typically, a necessary prerequisite to an appeal is a trial or final judgment. Fewer than 2% of all cases go to trial, or proceed to final judgment.[3] The majority of litigated cases are settled, mediated or arbitrated without incurring the expense and uncertainty of trial.[4]
- Most cases resulting in a verdict or final judgment are not appealed, which further limits the number of possible appeals and, thus, the number of potential malpractice claims, against appellate practitioners. In 1998, only 17.2% of all federal district court cases were appealed.[5] By 2007, the number of cases appealed had risen to only 17.8%.[6]

THE RISKS PRESENTED BY APPELLATE WORK

Despite the seemingly low percentage of malpractice claims brought against appellate practitioners, appellate practitioners should not be lulled into a sense of complacency. Appellate work presents risk to practitioners for several reasons.

- *Last Chance for Success.* The appeal often represents the last attempt to win a case for a client, and the odds of winning an appeal are not substantial. The rates of civil cases reversed on appeal range from 0% to 20%.[7]
- *Deadline-Intensive.* Appellate practice involves many deadlines. A missed deadline may be fatal to an appeal and quickly lead to a legal malpractice claim.
- *Document-Intensive.* Appellate work is document-intensive and requires significant research, writing and oral advocacy skills. The practitioner must obtain and scrupulously review the comprehensive underlying trial record, including all exhibits and testimony transcripts. The practitioner must then evaluate whether or not to pursue an appeal, the best appellate strategies and issues to pursue, and judiciously advise the client of the options. The practitioner also may be confronted with a choice of different venues to pursue the appeal. The client will rely on the attorney's experience and guidance as to which strategy to pursue.
- *Brief Preparation.* Preparing briefs is extremely time-consuming. The practitioner must allow sufficient time to comply with all deadlines. In addition, the practitioner must be able to convincingly articulate the theories and rationale for seeking a different decision on the case both in written and oral formats to appellate judges.

1 Continental Casualty Company wishes to acknowledge the contributions to this article by Karen K. DeGrand, partner at Donohue, Brown, Mathewson & Smyth LLC. In addition to handling legal malpractice matters at the trial level, Ms. DeGrand leads the firm's appellate practice group. She has briefed and/or argued cases in a wide array of substantive matters before the appellate and supreme courts of Illinois, as well as in the Seventh Circuit Court of Appeals and in the Wisconsin and Indiana appellate and supreme courts.
2 See "ABA Profile of Legal Malpractice Claims," 2004-2007, pp.7-8.
3 See "My Solo and Small Firm Point of View," For the Defense, November 2010; Ramos, Jr., Francisco "Lessons in Settlement Negotiation and Mediation," The Florida Bar, 2007.
4 See "My Solo and Small Firm Point of View," For the Defense, November 2010.
5 See "The Rise of Appellate Litigators and State Solicitors General," Review of Litigation Symposium 2010, 29 Rev. Litig. 545, 574.
6 Id.
7 Id.

All of the details associated with the practice of appellate law can lead to malpractice claims if mistakes are made, possible avenues and issues ignored, or miscommunicated. Targeted risk control measures can help appellate practitioners manage such risks and minimize the possibility of a claim.

MANAGING THE RISK ASSOCIATED WITH APPELLATE PRACTICE

The risks confronting appellate practitioners may vary depending upon the procedural posture of the case which is the subject of the appeal.

During Trial and Before the Entry of Judgment

Ideally, appellate counsel should be retained as early as possible. If possible, appellate counsel should work along with trial counsel, during the trial, to help bolster the trial record and place the case in the best posture in the event an appeal must be pursued. In some situations, the trial counsel may pursue the appeal on behalf of the client. Cost considerations, however, may influence the decision as to when appellate counsel is retained. Earlier involvement of appellate counsel, even prior to the commencement of litigation in certain circumstances, will help ensure appellate counsel guidance to trial counsel regarding the issues to be pursued and the development of the record.

- *Consider the Trial Court Record.* Attorneys should not wait until the trial court enters a final judgment to consider a possible appeal. Rather, as the trial record is created, the attorney should consider how a reviewing court may view the record. For example, attorneys should attach to any court filing containing reference to exhibits, a copy of the complete exhibit rather than an excerpt of the underlying document. This creates a more complete trial record and also may assist the trial court judge's understanding of the case.
- *Preserving the Record.* At trial, attorneys should consider what steps must be taken to preserve the record in the event that the trial is lost and an appeal must be filed.
  - Attorneys should file copies of all motions *in limine*, with full exhibits attached, in the clerk's office. If the trial judge rules against a motion *in limine*, the attorney must remember to renew the objection to the testimony when it is offered during the trial. When the opponent's motion *in limine* is granted, attorneys should make an offer of proof with the proper foundation for the barred testimony.
  - If the attorney represents a defendant, the attorney should move for a directed verdict at the close of the plaintiff's case, as well as at the close of the evidence to preserve all post-trial and appellate objections to the sufficiency of the evidence.
  - Attorneys should make a sufficient record of all jury instruction disputes. The record should clearly reflect instructions that are refused or modified, and whether given instructions were the subject of an objection. Even when an attorney is certain that the judge will refuse an instruction, to which the attorney believes he or she is arguably entitled, the attorney must tender the instruction to preserve appellate review.
  - Attorneys should also consider proposing a modified version of an instruction to which the attorney has objected. However, the attorney should make it clear that the modification represents an alternative position.
- *Client Discussions.* Attorneys should discuss the relevant appellate issues with the client (and/or the client's trial attorney) during trial, including the risks and costs associated with appeal. To the extent that appellate counsel is involved in settlement negotiations, the client should be fully, and timely, informed regarding the effect that appellate counsel's involvement may have on those negotiations. All discussions held with the client should be documented in writing.
- *Motions to Reconsider.* After an adverse ruling, if a motion to reconsider is filed, counsel should consider bolstering the record by attaching complete copies of any relevant exhibits to the motion.
- *Interlocutory Appeals.* Attorneys should be knowledgeable regarding the applicable jurisdictional rules for pursuing interlocutory appeals. For example, in jurisdictions where injunctive relief is broadly defined, filing an interlocutory appeal may be advantageous, and an attorney might overlook the possibility of filing the appeal. In addition, in some situations, an interlocutory review may represent the only avenue of appeal for certain issues.
  - Attorneys should make appropriate motions to strike and for a mistrial.

Post-Trial

Certain risks arise, and must be managed by the practitioner, after the conclusion of the trial and/or entry of a judgment.

- *Discussions with the Client Regarding the Issues.* Attorneys should discuss the potential appellate issues with the client immediately after the trial is concluded, or judgment entered. This discussion should include the need to file post-trial motions to preserve the right to appeal, if applicable, and the relevant risks and costs associated with an appeal. If the trial result was unsatisfactory, explain why, and be realistic in explaining recommendations regarding an appeal, including the effect on post-trial settlement negotiations. All discussions with the client should be documented in writing.
- *Calculate Deadlines.* Calculate jurisdictional deadlines to preserve the right to appeal, and recheck the calculation. Consider having a second attorney or paralegal perform this independently, to confirm the relevant deadlines.
- *Document Review.* Review all documents and other evidence that must be filed to preserve the right to appeal, and determine where any filing must be made.
- *Consider Whether a Post-Trial Motion Required.* In some jurisdictions, filing a post-trial motion is required to preserve the right to appeal. The notice of appeal and the post-trial motion may both have jurisdictional deadlines.
- *Consider Whether an Extension of Time is Needed.* Attorneys may need an extension of time to fully prepare and support the post-trial motion. As such, attorneys may be required not only to file a motion asking for an extension of time before the deadline expires, but also to obtain the court order allowing the motion before the deadline expires.
- *Is the Judgment Enforceable?* If the client faces a pecuniary judgment and seeks to appeal, immediately determine when the judgment becomes enforceable and the steps that must be taken to stay the enforcement. The plaintiff may not have to give notice prior to instituting a citation to discover assets or other collection-related proceedings. Determine how to secure the judgment pending appeal, including whether it is necessary to purchase a bond. Discuss these matters in detail with the client, and document the discussion in writing.
- *Unresponsive Clients.* In the event the client has not responded to, or has objected to, a recommendation to file a notice of appeal or post-trial motion, a follow-up written communication should be directed to the client, clearly indicating the jurisdictional deadlines and requesting that the client respond by a date which allows sufficient time to prepare and file the notice of appeal or motion.
- *Missed Deadlines.* If an attorney misses the deadline for filing a notice of appeal, other avenues may remain for pursuing the appeal. Some jurisdictions have a short grace period after the original deadline within which the attorney can ask the appellate court for leave to file the notice of appeal.
- *Responsibility for Preparing the Trial Court Record.* If an attorney represents the appellant, the attorney may have a role in working with the clerk's office in preparing both the trial court record and any relevant transcripts of proceedings. The attorney should get started on this process as soon as possible to review the record for accuracy and completeness, and pay any required fee.

After Perfecting the Appeal

Certain risks may confront the appellate practitioner after the perfection of the appeal. Such risks may arise in connection with brief preparation, oral argument, or during the timeframe after the appellate court issues its decision.

Brief Preparation Requires Attention to Detail

- *Calculate Deadlines.* Do not wait for a scheduling order from the appellate court to begin to prepare the brief. The court may not send a scheduling order. Instead, the schedule may be automatic, pursuant to a statute or court rule. Calculate the applicable deadlines and call the appellate clerk's office in the relevant jurisdiction to confirm the calculated deadlines.
- *Allow Sufficient Time to Draft the Brief.* Writing a brief is extremely time consuming. The appellate practitioner should allow sufficient time to meet all deadlines.
- *Understand the Court's "Unwritten" Rules.* If possible, become familiar with any "unwritten" rules of the appellate court, such as the court's tolerance for motions for extensions.
- *Confirm that the Trial Court Record is Complete.* As soon as the record is available, review it for completeness. If a critical document that was filed by the attorney or opposing counsel, or provided to the trial judge, is missing from the record, seek to supplement the record as soon as possible. The court may set deadlines for supplementing the record.
- *The Table of Contents.* As counsel for the appellant, an attorney may have to prepare a table of contents of the record. If possible, prepare a draft as soon as the record is available.

- *The Statement of Facts.* Draft an honest statement of the facts with frequent and accurate citations to the record and a full description of the facts to support the position being set forth. Avoid exaggerating the case law and evidence, attacking the opponent, or insulting the trial judge. Always lead with the strongest issue, and do not bury arguments with boilerplate discussions that do not directly advance the points or issues that are part of the argument on appeal. Do not dilute the good arguments with weak ones. Keep the brief short, use active verbs, and avoid unnecessary adjectives and adverbs.

Preparation is Key for Oral Argument

- *Update Research.* Immediately update the research regarding important cases that were cited in all of the briefs. Consider filing a motion for leave to cite additional authority, but only if the additional authority will assist the court in resolving the issue.
- *Know Your Case and the Law.* Know the record and the case law. Consider, in advance, all questions that the appellate panel may ask during oral arguments. Attorneys may wish to conduct several mock oral arguments for practice.
- *Handling Questions at Oral Argument.* At oral argument, do not avoid a question, tell the judge that he or she will address that question later in the presentation, or interrupt the judge.

After the Appellate Court Issues its Decision

- *Subsequent Appeals.* Even after an appellate court issues its ruling or decision, the case may not be completed without another avenue of appeal. There may be possible petitions for rehearing or for leave to appeal to a higher court, rehearing *en banc* or writs of *habeas corpus*. Attorneys should be knowledgeable regarding any applicable deadlines. Once again, discuss the results with the client, and follow up in writing documenting the discussion, any applicable deadlines, and the risks and costs associated with pursuing rehearing or leaves to appeal.

CONCLUSION

By employing the risk control techniques discussed above, at both the trial and appellate level, appellate attorneys will have taken a preliminary step at managing the risks associated with their practice, and reducing the potential of receiving a legal malpractice claim.

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com.