



The **Who, What, When,
Where, and Why**
of Appellate Specialists

By Jill M. Wheaton and
Lauren M. London

Litigators are used to thinking we can do it all. We can think, write, argue, negotiate, review documents, mediate, take depositions, make motions, cross-examine, object, and perform any number of other feats of advocacy that test the boundaries of experience. Our job provides us with such a breadth of knowledge that it is tempting to think, when our case heads for the appellate world, that we'll do just fine handling the appeal ourselves. While this strategy may work once in a while, it doesn't work all the time. And frighteningly, we may even do the case damage by taking this attitude. An appeal is not a "do-over" of the trial court proceeding. We rarely succeed on appeal by submitting the same briefs, on the same issues, that we argued in the trial court. As discussed below, complex appellate work involves skills different from those used at trial, and a different way of thinking. It is wise, therefore, to consider retaining an appellate specialist.

Fresh Eyes

First, and most important, appellate specialists have "fresh eyes." They haven't been enmeshed in the fights you've had with opposing counsel over discovery or other issues. They haven't participated in the arguments, made every point you've made, dug up the arcane exhibits, or deposed uncooperative witnesses. In short, they haven't been part of the fray below. This is actually an advantage because the appellate specialist comes to the case with the same perspective as the appellate court itself: a blank slate. With fresh eyes, an appellate attorney can look at the case again from the beginning, without preconceived notions, and determine what facts and arguments may succeed on appeal and what seems irrelevant.

This ability to narrow arguments is critical, because one of the most common mistakes trial attorneys make on appeal is to regurgitate their previous arguments and re-tread their lower court briefs. This technique can be disastrous on appeal. Just because something was considered, or perhaps was the subject

of contentious debate and copious briefing below, doesn't make it relevant on appeal. Too often we are married to these arguments. We assume that we have to bring up on appeal every point we made to the trial court, whether or not the court went for it. Or perhaps we have a pet argument that we're convinced the appellate court will like even though the trial court did not. More often than not, the appellate bench does not care to hear it. Fresh eyes on the case do not feel tied to these arguments. They can deftly strip a case to the core points that should be advocated on appeal.

Having distilled the case, fresh eyes also can fit the issues appropriately into the applicable standard of review. Appellate specialists are guided by these standards and are constrained by them in ways that trial attorneys are not. Frequently, and to their detriment, attorneys preparing an appeal write their briefs as though the standard on every point were *de novo*. This is an impassioned, though a rookie, mistake. An appeal is not a second chance to make all your arguments. To the contrary, on appeal you must either defend or attack the trial court's decision within the confines of the applicable standards of review.

Finally, the appellate specialist will write the brief from the same point of view as the appellate bench. An appellate judge once said that most appellate briefs written by trial lawyers make him feel as though he has walked into the middle of a cocktail party conversation, when nobody has introduced him or told him what they are talking about. Despite his ignorance, everyone immediately asks him his opinion. The appellate specialist is accustomed to providing the relevant factual and procedural background from the perspective of one new to the case, just as the appellate court will be. Similarly, appellate judges are generalists. You may have an intimate knowledge of a certain area of the law that you practice on a daily basis, but which the appellate court judges assigned to your case have experienced only a few times before, if ever. The appellate specialist will provide the court with the necessary background in that area of law and will not use shorthand terms or references that a trial attorney may be tempted to use, as they are commonplace in his or her niche area.

Fast Facts:

Don't:

- Re-tread your lower court brief.
- Argue as if it is a re-trial.
- Take a "kitchen sink" approach in your brief or argument.

Do:

- Review the rules each and every time.
- Seek out fresh eyes and input.
- Involve an appellate specialist as early as possible.

Knowledge of Rules and Procedures

Appellate specialists know the written and unwritten rules of the appellate courts. They know what the panels and the appellate court staff like and don't like, purely as a function of experience. Such knowledge, as any specialized knowledge, is an advantage not to be underestimated. Although all litigators are adept at looking up court rules, difficulty can come when even a seasoned lawyer attempts to follow the letter of the rules without knowing the court's attitude toward them. Perhaps the court feels particularly strongly about a certain rule, and not others. Or maybe there have been recent changes to a rule of which you are not yet aware because you don't routinely practice in the appellate system. An appellate specialist can help guide a team through these minefields.

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The Ability to Say No

The simple fact is that reversals are by far the exception and not the rule, and the odds are stacked against an appellant. Therefore, when considering whether to file an appeal, one of the appellate specialist's most valuable, though least appreciated, talents is the ability to see when an appeal has little to no chance of success, and to break this news to the client. To be able to stand back from a case after an adverse result and realize that it is not winnable on appeal requires a cool head, a command of the issues and the applicable standard of review, and a great deal of courage. An appellate specialist, unlike trial counsel, can make a more objective assessment in this situation.

The Ability to Fight Fire with Fire

It makes sense to retain an appellate specialist when it seems likely that the other side has one. Because specialists know the procedures, techniques, and shortcuts of moving within the appellate system, the other side could get a very one-sided boost if it is able to use the talents of a specialist and you are not. Perhaps it will phrase its arguments better on appeal than it did below. Its filings could look better and its communications more on-point. As in any litigation, you want to be able to talk the talk in appellate court to make sure the other side can't take advantage of your inexperience.

When Should I Hire the Specialist?

It's easy and common to think that an appellate specialist is irrelevant until the start of the appeal. Not so. Although waiting until an appeal looms is sometimes appropriate, you may put yourself at a disadvantage by not retaining a specialist earlier. The best time to retain appellate counsel is the moment you know there might be an issue for appeal. Frequently, this is before trial or before a dispositive motion that could form the basis for an appeal, because no matter which way the trial or motion plays out, you will feel more secure knowing that you've pre-

served and protected your issues properly for appeal. If the specialist is involved early, he or she has a chance to help you frame the issues in a way that looks best to an appellate bench. This is especially important while in trial, as the trial lawyer is, understandably, absorbed in the moment and not always thinking about the appeal down the road. Having an appellate specialist present to make sure points that need to appear on the record are there, and that documents that need to be filed to preserve an issue are filed, can make or break an appeal. The specialist also can help formulate your post-judgment motions or opposition to such motions so as to benefit your client's position if the case is appealed.

How Do I Find an Appellate Specialist?

Finding a great appellate specialist is similar to finding any great attorney. Word of mouth goes a long way. Perhaps your firm maintains an active appellate practice group, filled with resources. If not, a good place to start is the Appellate Practice Section of the State Bar of Michigan (www.michbar.org/appellate), which has a vibrant and growing membership. The section conducts seminars and public-service programs and publishes a regular newsletter. Larger periodical publications inside and outside Michigan (e.g., www.superlawyers.com) also contain lists of top appellate attorneys, as judged by their peers. As is often the case, however, the best way to find a great appellate specialist is to ask around.

No matter which avenue you take, finding a competent appellate specialist will prove a sound strategic decision. ■



Jill M. Wheaton is a graduate of the University of Michigan Law School and is the chairperson of Dykema's appellate practice group. Ms. Wheaton has extensive experience in appeals in numerous federal and state courts, and is a member of the State Bar of Michigan Appellate Practice Section Council.



Lauren M. London is an attorney in Dykema's litigation group, concentrating in appellate work and commercial litigation. She has experience in appeals to the Michigan Court of Appeals, the Michigan Supreme Court, and the United States Court of Appeals for the Sixth Circuit. She is also knowledgeable in matters of electronic discovery, and advises clients on the preservation of electronic evidence.

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