

ATTRIBUTES OF AN EFFECTIVE APPELLATE ADVOCATE

There is no higher calling as a lawyer than to be an appellate advocate. It demands exacting adherence to complex rules of procedure; the study of nearly every conceivable area of law; a desire and ability to sift through a tangled thicket of statutes, regulations, case law, and other sources; use of writing techniques that make a brief instructive, logical — even interesting; and a knack for thinking quickly and precisely in response to questions from seasoned, aggressive judges. Above all, appellate advocacy requires an unflagging devotion to the art of persuasion. A good appellate lawyer is at once a counselor at law, scholar, writer, teacher, and competitor.

— CLIENT FOCUSED —

Before beginning the hard work of an appeal, the appellate lawyer needs to understand two interrelated things: (1) the client's goals and (2) how the lawyer can help the client achieve those goals. Usually, and not surprisingly, the client's goal is to win. But at what cost? Sensible, pragmatic clients are usually willing to spend only a finite amount of resources on any given case. That's understandable: litigation is costly and can be a drain on the bottom line. Besides, putting together a high quality appeal usually does not require a client to bet its business. Whatever the goal, the appellate lawyer should want to fully understand it and help the client attempt to achieve it in the most ethical, efficient, and cost-effective manner.

— FLEXIBILITY —

Taking the time to understand the client's goals allows an appellate lawyer to do several critical things. First, the lawyer can establish a billing arrangement with the client that makes sense. Appellate work, like most legal work, is usually billed by the hour. It doesn't have to be, though. In some cases the lawyer and client may be able to agree on a fixed price for the case. Or, depending on the matter, a contingent-fee arrangement may work. Second, if the billing arrangement is hourly, the lawyer can create a budget for the client. This assists the client in planning the expense of litigation before it is actually incurred. And third, the lawyer can give the client a better idea of what to expect as the appellate process plays out. During this period of negotiation, budgeting, and counseling, the client's goals often change. Good appellate lawyers are attuned to that fact and encourage clients to openly discuss their thoughts as a case progresses.

— DEVOTION —

The appellate process is complicated. It takes knowledge, skill, experience, hard work, and devotion to master it. Here is what the appellate advocate should strive to bring at each stage of an appeal:

Knowledge Of Appellate Procedure. Appellate rules leave little room for error, and they can be ruthlessly enforced. Many trial lawyers, however, do not regularly handle enough appeals to have a working knowledge of the applicable rules, and so naturally feel uncomfortable prosecuting an appeal without an appellate lawyer's assistance. Concentrating one's practice on appellate work gives a lawyer the opportunity to learn the rules inside out. Having this kind of knowledge is crucial to ensuring that an appeal gets heard on its merits. Occasionally, it can translate into an important strategic advantage as well; in rare circumstances, into victory.

A Jeweler's Eye For Spotting Issues. Even the best trial lawyers lose objectivity after spending months (often years) with a case. A top-flight appellate lawyer can offer a fresh, objective perspective and assist in selecting those issues that hold the best chance for a favorable result. The appellate lawyer can also help rethink the way in which those issues are argued. This is a subtle craft. Courts of appeal are very sensitive to the potential for waiver; they want assurance that the lower court or administrative body has had a chance to consider each argument for itself. If they find that the argument was not made below, it's considered waived. Thus while an appellate lawyer can and should assist in reconceptualizing the issues, any "new" arguments cannot be too new. A seasoned appellate lawyer knows where this line is and can offer counsel on staying creatively within this line.

Access To Authorities On The Substantive Law. One of the advantages of hiring an appellate lawyer who works in a large firm is that big firm lawyers have ready access to people who work in just about every area of the law. Attorneys who dedicate their practice to appellate advocacy will often handle cases of all kinds, which makes them generalists by nature. In contrast, most lawyers focus on specific areas of the law: environmental, construction, insurance, tax, bond, products liability, drug and device, and so on. Effective appellate lawyers (even if they don't work in a large firm) will collaborate with their colleagues and take advantage of their substantive knowledge. Their perspective is invaluable, and they make the appellate advocate's work more efficient.

A Facility For Research. A good brief starts with good research. Through constant practice, effort, and experimentation, appellate lawyers can develop techniques for finding valuable, often obscure, information. Good appellate lawyers also make it a point to read “around” a problem if at all possible. For example, if an appeal involves the law of federal preemption, that is, whether federal law trumps state law, the appellate lawyer should not only want to understand the particular federal law involved but the general law of preemption and its historical development as well. This sort of deep research allows an appellate lawyer to gain a better understanding of a case, and present solutions that make sense not just for the case before the court but in future cases to come. This can be persuasive to courts concerned about whether their decisions will stand up over time, as courts of appeal certainly are.

Dedication To The Written Word. Most appeals are decided on the briefs. A strong brief therefore is essential to a successful appeal. Experience teaches that the best briefs are simple and to the point. Appellate judges are terribly overworked: they may read several hundred briefs in a year’s time. To make a point successfully, then, a brief must be instantly understandable. Anything that gets in the way of immediate comprehension must be excised or fixed. As a consequence, even (and sometimes, especially) the best appellate lawyer’s briefs go through a number of revisions before being filed. It’s optimal to have at least one person who is unfamiliar with the case scrutinize each brief. The perspective of the uninitiated is similar to that of an appellate judge who, until a case is fully briefed, probably doesn’t know the first thing about the case. Through this review process, a process that necessarily entails trimming, sculpting, molding, and whittling, a brief should be reduced to its persuasive essence.

A Court-Centric Attitude Toward Oral Argument. The key to oral argument is understanding its purpose. If a court decides to go to the trouble of holding an argument, it doesn’t want to hear a speech — it wants to get answers to its questions. The key to successfully fulfilling this purpose is preparation. Effective appellate lawyers have an intuitive sense of the issues that are likely to interest a court, and they will prepare themselves accordingly. In doing so, they read the record from front to back, learn every key case, internalize the points they want to make with the court, and moot the argument with their colleagues — all with an eye toward the issues that are likely to be pivotal. Simplicity is paramount. Twenty-minute arguments (10 minutes per side) are not uncommon at the Seventh Circuit Court of Appeals. An appellate attorney must use this time wisely, emphasizing the two, maybe three, critical points to the client’s case. Still, the appellate advocate should welcome questions from judges because they offer clues into the court’s thinking. Appellate attorneys should strive to adjust their presentation to

these clues: whatever the court wants to discuss, they should want to discuss.

— **RESPONSIVENESS** —

The last, but perhaps most important, attribute of any good lawyer is responsiveness. Clients appreciate it when their lawyer personally answers the telephone and promptly returns messages. Being responsive in this way (what most people would call simple courtesy) gives clients the service they deserve.

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