

## HANDLING YOUR CLIENT'S APPEAL

**Understand the Rules.** Review the trial court's rules about appeals from its rulings as well as the rules of the appellate court, including local court rules.

**Ensure the necessary steps have been taken in trial court to preserve issues for appeal.** Some issues may be waived by failure to file written objections or otherwise lay the appropriate foundation in the trial court.

**Calculate and calendar the deadline for filing a Notice of Appeal.** In many jurisdictions, this deadline is jurisdictional and strictly enforced – make certain you know the date from which the deadline will be calculated.

**Ensure all possible appellate issues are encompassed by the Notice of Appeal.** A failure to identify certain issues in the Notice of Appeal may be construed as a waiver. For example, be sure to appeal adverse evidentiary issues as well as substantive rulings, and any discovery rulings that may have affected your ability to develop and present evidence.

**Review the necessary steps, and determine and calendar relevant deadlines, for perfecting record on appeal.** In some jurisdictions, the trial court clerk may be responsible for providing the appellate court with the official record in transcript – but don't simply assume it will be done. It's your obligation to ensure the record is complete.

**Determine and calendar deadlines, and review service and filing requirements for opening and responsive briefs.** Many courts require the filing of multiple copies of the briefs. You may need to allow additional time for mailing if the appellate court is out of town.

**If your case raises issues of broad interest to a particular industry or interest group, consider whether the filing of an amicus brief would be helpful.** Industry groups, public interest organizations, and trade associations are often willing to file amicus briefs that address the broader issues implicated by the resolution of a particular case, if the groups are made aware of the appeal.

**Coordinate carefully with counsel for parties with aligned interests.** In cases involving more than two parties, there may be a number of briefs filed. Depending on the degree of overlap between the interests of your clients and other parties, consider filing a joint brief. Alternatively, pursuant to a joint defense or similar agreement, exchange and discuss drafts of your briefs well in advance of the filing deadline to avoid contradicting or undermining each others' arguments.

**Review requirements for format of briefs and other submissions.** Don't assume you'll be able to just "dress up" your trial court brief and slap on a new cover. Appellate courts often have specific requirements – requirements that differ markedly from those in the trial court – for everything from the color of your brief's cover to the way you cite the evidentiary record.

## Handling Your Client's Appeal (*Continued*)

Carefully research the appropriate standard of review. Simply demonstrating that the trial court made an incorrect ruling may not be enough to obtain relief from an appellate court. Make sure you understand and articulate the applicable standard of review and the degree of prejudice, if any, that an appellant must establish.

Familiarize yourself with the rules and conventions for oral argument in your jurisdiction. These can vary widely from jurisdiction to jurisdiction. Do you need to request oral argument, or is it granted automatically? How much time is allotted, and how is that time allocated if there are more than two parties to the appeal?

Observe an oral argument in the court that will hear your appeal. Learn the layout of the courtroom. Observe how more experienced lawyers address the court. If the panel is the same one that will hear your appeal, try to get a sense of how active the judges are in questioning.

Educate yourself about the judges assigned to hear your case. Depending on the jurisdiction, you may not learn until a few days before argument which appellate judges will participate in your case. Research relevant prior opinions by those judges, but also survey more senior lawyers for information about the judges' demeanor and proclivity for asking questions during argument.

Prepare a single-page outline of points you want to address during oral argument. Try to focus on broad themes and critical cases rather than a detailed "script." Don't become so wedded to detailed notes or a scripted presentation that you can't respond to questions or issues posed by the court.

Ask a colleague to "moot" you before oral argument. You don't necessarily need to arrange a full-scale mock court, but do have someone else read the briefs and question you about them. A fresh eye and mind may identify questions or potential pitfalls you have overlooked while preparing the briefs.

Know what your "exit line" will be for oral argument. Identify and make note of the final thought or argument with which you would like to close your argument. That way, you'll have a comfortable way to "wrap up" your argument even if you've gotten off-track and are running out of time.

Simplify your pre-argument preparation. Pick out the suit you intend to wear ahead of time and set it aside in the closet. Make sure you get enough sleep the night before your argument, and eat a healthy breakfast or lunch the day of your appearance. Arrive at the courthouse early enough to get a drink of water, relax, and organize your thoughts.

Distributed by Eighth U.S. Circuit Court Judge Kermit Edward Bye  
at MSBA Antitrust Law Section Seminar  
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