What does it mean to be an Appellate Attorney

What is Appellate Practice?

In an appeal, a higher court—an appellate or supreme court—reviews the decision of a lower court—generally a trial court or an administrative agency. Lawyers specializing in appellate practice handle the process of appealing a final judgment. This may happen in a civil or criminal case after a trial before a judge or jury, or after dismissal of a case upon disposition of a motion (such as a motion for summary judgment, in which a party has argued that there is no genuine issue of material fact in a case and that he or she is entitled to prevail as a matter of law). An appeal is typically brought before an intermediate court of appeals and, if necessary, to a supreme court.

Both the state and federal courts have avenues of appeal for civil and criminal cases. Most states have an intermediate, or appellate, court that hears cases from lower courts in the same geographic district within the state. Appeals from the appellate courts are brought before a higher level court, typically called a supreme court. Appeals from decisions of federal district courts are brought in the court of appeals that has jurisdiction over the federal districts in one or more states. For example, appeals from federal courts in California proceed to the Ninth Circuit Court of Appeals, while appeals from the federal courts in Washington, D.C. proceed to the D.C. Court of Appeals.

A party generally has an appeal as a matter of legal right after a case has proceeded to conclusion at the trial court level and all avenues of review within that court have been exhausted. A criminal defendant who has exhausted appeals at the state trial court level is entitled to seek a review of his or her case through a request to a federal district court called a writ of habeas corpus. In the writ, the defendant claims that he or she is wrongfully imprisoned because he or she has been denied rights, such as due process, under the U.S. Constitution. In civil actions a plaintiff whose case is dismissed by grant of a motion to dismiss or a motion for summary judgment would proceed to an appeal after entry of a judgment.

Not all issues can be appealed as a matter of right. For many issues the appellate court needs to be convinced that there is a compelling reason to take the issue for consideration on appeal. Some issues or decisions of the trial court are within the discretion of the judge and thus are subject to appeal for the judge’s abuse of discretion. The appellate courts thus have standards of review, or different tests that are applied to determine whether the trial court erred in its decision. Few issues are considered de novo (completely new) at the appellate level. Rather, decisions of the trial court may be reversed only if, for example, legal error occurred.

In other words, cases are not retried by appellate courts. A manufacturer that loses a product liability trial, and is required to pay $800 million in punitive damages for their negligence, is not permitted a second trial of the case on appeal. Instead, the defendant must establish on appeal that no reasonable jury could have come to such a conclusion. A plaintiff that loses an antitrust case may argue that the jury instructions explaining the law to the jurors were erroneous, and thus appeal. However, the plaintiff must have properly objected to those instructions at trial and must demonstrate that the error was not insignificant (legally referred to as “harmless” error).

The appellate lawyer must carefully review the lower court record to determine the grounds on which the decision can be appealed, and she must draft detailed written briefs that set forth her party's position on appeal. In criminal cases lawyers may review the record to determine whether the evidence should have been excluded as a result of improper search and seizure or whether the jury was representative of the community. Seldom will the appellate court consider issues such as the credibility of witnesses, which is left for the trial court and jury to determine. Appellate attorneys may also present oral arguments in front of the appellate court or supreme court.

In a majority of cases, an appellate or supreme court affirms lower court decisions. However, the higher courts have a number of options on appeal—they can vacate (throw out) lower court decisions; reverse the decisions, deciding for the other party; or reverse or affirm some issues on appeal and remand (send back) other issues to the lower court.

Life as an Appellate Lawyer

Where do appellate lawyers work?

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Attorneys specializing in appellate work are generally employed by law firms or by state or federal government organizations. Large and mid-size law firms with trial practices often have departments dedicated to appellate work. Small firms that handle trial work, such as plaintiffs' personal injury law firms or criminal defense firms, may have attorneys who work on appeals, or they may turn for assistance to an outside practitioner who specializes in appeals.

Government attorneys often work on criminal appeals, working for state appellate defenders’ offices (which handle appeals for cases handled by public defenders), federal appellate defenders’ offices, or U.S. Attorneys’ offices. Appellate lawyers also work as staff attorneys for federal appeals judges. In addition, federal and state commissions sometimes employ attorneys to work on appellate matters.

Who are their clients and what types of cases do they work on?

Law firm attorneys who work in appellate practice have the opportunity to work with a wide range of clients. Eamon Marx is an attorney at Stoel Rives LLP, of Portland, Oregon. "Stoel Rives is the largest firm in Oregon, and we have offices in Seattle, Boise, and Salt Lake City, so we practice in a wide variety of fields," he explains. "Our appellate practice is similarly varied: products liability, securities fraud, breach of contract, libel, election law, construction and design, environmental law, public records, even an occasional domestic relations matter. We also do a significant amount of appellate work in public interest fields; recently I argued a case in the Oregon Supreme Court attempting to stop the first execution in Oregon since the state reinstated the death penalty in 1984. Most of our clients are institutional, although we have a large estate planning practice that serves individual clients.” He adds, “Our clients include public utilities, retailers, high tech companies, manufacturers, newspapers, colleges, brokerage houses, hospitals, and municipal corporations.”

Phoebe (Phoebe) Fenton works as an Assistant State Public Defender for the Minnesota State Public Defender's Office in Minneapolis, Minnesota. Phoebe's office handles the appeals for criminal defendants in the state. "My clients are all indigent criminal defendants. They must be indigent to qualify for the assistance of a public defender. Most of my clients have already been convicted of state crimes, ranging from first degree murder to driving under the influence of alcohol. They are appealing to the Minnesota Court of Appeals and the Minnesota Supreme Court. In Minnesota, every convicted defendant is automatically, by statute, entitled to appeal their case," explains Phoebe.

Charles Lerner and Charles M. (Rick) Greenberg, who work for the Office of the Appellate Defender in New York City, also handle criminal appeals. The Office of the Appellate Defender is a not-for-profit public interest organization with 16 attorneys—five supervising attorneys and 11 staff attorneys. Besides working with staff attorneys, two of the supervising attorneys work with pro bono volunteers from law firms in New York.

"My clients are low-income criminal defendants who are appealing their convictions. Most of my clients are incarcerated, unless they have been paroled. Our office handles appeals of anything from a single mugging to buy-and-bust drug cases to multiple homicides," says Richard. Adds Rick, "Our office represents only indigent defendants, and we are appointed as their appellate counsel. All of our clients are people who have been convicted in state court of serious felonies. A large percentage of our cases are homicides, but we also handle matters such as rape, robbery, burglary, and occasionally kidnapping. Most of our clients are incarcerated, because they have been convicted of serious crimes. They are in state prisons throughout the state of New York.”

Lawyers who work as staff attorneys for federal appellate courts assist judges with appellate matters. Stephanie Fineman is the Senior Staff Attorney for the U.S. Court of Appeals for the Seventh Circuit in Chicago, Illinois. "My clients are the judges of the Seventh Circuit Court of Appeals. We have 11 active judges and several senior judges. I supervise 20 staff attorneys who assist the judges with research and the drafting of proposed orders." Stephanie and the staff attorneys work on the large number of cases on appeal to the Seventh Circuit. The cases include direct criminal appeals, habeas corpus petitions, and prisoner civil rights cases, as well as employment discrimination, Social Security, bankruptcy, and immigration cases.

What daily activities are involved in appellate practice?

Large firm lawyer Eamon Marx succinctly describes the role of the appellate lawyer in a law firm practice. "The job of the appellate lawyer is to make sense of what went on in the trial, and to give it structure and coherence, and to show why the facts fit the legal theories that you want to present on appeal. It is rare that I spend any time with a client when I am involved in the appellate aspect of the case. The record has already been made in the court or agency below, and the client has had the opportunity to say whatever..."
she had to say. Thus most of my time is spent at my desk, reviewing the transcripts and exhibits, and placing the facts in the context of the law." Legal research is an important part of the job. "I used to spend more time in the library than I do now, but with legal research resources available on the desktop computer, there is less need to hit the books," he explains.

Appellate defenders spend their time "reading the record, researching issues, and writing briefs," says Charles Lerner. Rick Greenberg provides a more in-depth description of the daily activities of an appellate practitioner. "In a nutshell," he says, "when we are assigned a case, we get the entire record from the lower courts—the trial transcript, the indictment—all the papers involved. Our job is to read and analyze all of that information and try to determine the most promising issues to use to obtain relief upon appeal. We are working generally for a reversal or a sentence reduction. The case documents can be literally thousands of pages long. We read, digest, and analyze everything that happened in the case, list potential appellate issues, research those issues, then narrow down the list based upon the research to focus on strategic issues for the appeal. We then write a brief containing all of the facts of the case and explaining why the particular issues we’ve focused on are grounds for reversal. The prosecutors then file a response and we write a reply to that response. Finally we proceed to oral arguments. Sometimes a case might require additional investigation, for example in light of newly discovered evidence.

"I think our office is somewhat unique in that we always double-team our cases," Rick adds. "We have a staff attorney and a supervising attorney working together for every case so that there is another set of eyes to spot potential appellate issues."

"A good part of my day is spent working on my appeals," says Phoebe Fenton. "I have to look at a case and see the issues, see how it's appealable. My cases are all in different stages of appeal. We have our own caseload—we handle the appeal from the beginning, when you file a notice of appeal, to the end. You stay with the client all the way through the process. You have the chance to get really familiar with the case. You start by reviewing the court transcript and doing a 'digest' in which you chart out each page of the transcript. Sometimes the transcripts are up to 6000 pages long. Digesting the transcript helps you think about what legal issues exist." Phoebe explains that the next stage of the appeals process involves writing on the substantive legal issues faced by the court. She says the court generally issues opinions three months after the oral argument or the date on which it considers the appeal. "When the opinion is issued, I notify the client right away." If clients lose the appeal, they can petition the Minnesota Supreme Court. "The Minnesota Supreme Court is generally looking at novel cases, in which there's a new and distinct legal issue to be addressed. I carefully explain this to my clients. But most of my clients who lose their appeals decide they want to petition the Supreme Court. They tell me, 'I need something to hope and wait for again, something to look forward to,' even if they don't succeed."

Phoebe determines whether the appeals she works on merit oral arguments. "It's discretionary—our call—whether we want to argue the case in front of the appellate judges of the Court of Appeals (oral arguments are not discretionary for the Minnesota Supreme Court)." She says the court generally issues opinions three months after the oral argument or the date on which it considers the appeal. "When the opinion is issued, I notify the client right away." If clients lose the appeal, they can petition the Minnesota Supreme Court. "The Minnesota Supreme Court is generally looking at novel cases, in which there's a new and distinct legal issue to be addressed. I carefully explain this to my clients. But most of my clients who lose their appeals decide they want to petition the Supreme Court. They tell me, 'I need something to hope and wait for again, something to look forward to,' even if they don't succeed."

Both Phoebe and Charles Lerner report that they spend a significant amount of their time communicating with their clients. "Most of my communication with my clients is by letter," says Richard. Phoebe agrees. But she reports that once she is assigned a new case, she tries to meet with the client in person. "I write a letter introducing myself and explaining the appellate process. Then I drive out to the prison to meet with them. I am very straightforward with my clients. I tell them about the appellate process, how lengthy it is, and their probable chances of success." Rick Greenberg adds, "Because some of the prisons are great distances from our office, we are not always able to meet with our clients face to face. We encourage face to face meetings whenever they are possible, but sometimes that's just not feasible. If we cannot meet our client in person, we are diligent about corresponding with them, and we accept collect calls from prisons throughout the state. We work hard to involve our clients as much as possible in the process and in the decisions."

As a senior staff attorney for the Seventh Circuit Court of Appeals, Stephanie Fineman's days are spent in person to person meetings with the judges and with staff attorneys she supervises. "When my two-and-a-half year old asks what I do at work, I tell her, 'I talk to people.' And that's an apt description of what I do. I meet with the judges to make sure their legal staffing needs are satisfied and that their research needs are met. I supervise, train, and hire new staff attorneys for the appellate court. I do my own research and writing on the substantive legal issues faced by the court. I also write policy proposals for the judges concerning the administrative aspects of our office's operations."

What do appellate lawyers find rewarding about their practice?
Both Charles Lerner and Phoebe Fenton report that they find a special reward in working with their indigent clients. "Winning an appeal is certainly satisfying. But apart from winning," says Richard, "I find it rewarding to treat my clients with respect and dignity, and I receive the same in return from them, because most of them have rarely been treated that way. I am glad I can do so, if only for a short time, during my representation of them." Phoebe adds, "I always wanted to do public defense. I enjoy being a defender of the Constitution; I enjoy being the underdog. My clients may have committed horrendous acts, but I get a chance to know them and to see beyond those acts. They have generally lived in poverty. They have little formal education. It's easy for me to look beyond the criminal act and look beyond the facts to the legal issues. I feel sympathy and empathy toward my clients."

Rick Greenberg agrees that client representation brings the greatest reward. "Really it's all about the clients," he comments. "Indigent clients in particular need to know that they are receiving the highest quality representation even though they're not paying for it. We try to give clients the same level of representation that they would pay for. I really enjoy developing the relationship with the client, reaching that level of understanding and trust. In reality you're going to lose 80-90% of your cases. The reward is not necessarily in winning, but in representing the client to the best of your ability, providing the highest quality counsel, leaving no stone unturned as far as your investigation and research and avenues for appeal."

Other lawyers find their reward in the effect their appellate arguments have on the law. Eamon Marx explains that he finds it satisfying to write briefs and prepare oral arguments "with the aim of influencing the future direction of the law." He adds, "The question of whether initiative petitioners have a constitutional right to gather signatures on private property has been the subject of litigation in Oregon for more than 10 years, and the Oregon Supreme Court has yet to issue a definitive opinion as to whether such a right exists, or the scope of it if it does exist. We are in the middle of that issue, and our cases in the appellate courts will determine how that law develops. It is very satisfying to be able to research constitutional and political history and to write a brief that will influence the court as it considers these cases."

Charles also enjoys the challenge of working on appellate issues that arise in the context of real emergencies. "Such an appeal can arise in a death penalty case, when we have just a few days to try to prevent the execution from being carried out, or a prior restraint case, when we are attempting to get the appellate court to act immediately to overturn an unconstitutional order. In these situations the pressure is intense, and there is never enough time to be as thorough as one would like to be in researching the issues and crafting the arguments. Such cases are exciting and exhausting."

"I love my job," says Stephanie Fineman. "I look forward to going to work in the morning." Julie's job as senior staff attorney for the Seventh Circuit Court of Appeals allows her to pursue her academic interest in the law as well as her interest in mentoring young lawyers. "For me, this job is the perfect combination of appellate legal work—which is the core of what I like about the law—and teaching and managing. I love mentoring, and I have a mentoring job. I work with staff attorneys—most of them recent law school graduates—who are outstanding lawyers. It's an unbelievable privilege to be allowed to be part of how the judges decide cases—to learn how they think and talk through the issues. I have the inclination to be a permanent student. My work with the judges means that I'm a student of some of the greatest legal lights in the country." Stephanie adds that she enjoys keeping up with legal opinions as they're issued daily by the court, and she encourages her staff attorneys to do the same. "I also encourage my staff members to go to any oral arguments they would like to hear. It's exciting to see the judges in action," she says.

The Training and Skills Important to Appellate Practice

How do people enter the field of appellate practice?

Most law firms that hire appellate lawyers look for law school graduates who have clerked for judges upon graduation from law school. Judicial clerkships allow recent graduates to see firsthand how appellate judges approach legal issues. Once hired by a law firm, former clerks can put their knowledge to work preparing appeals for the firm's clients.

Rick Greenberg reports that he entered an appellate defender office directly out of law school. He adds, however, that if students attempt to take this path, "Whatever office they work for ought to have extensive training and the attorney should work under close supervision by someone with more experience. The key is to select the appropriate issues for the appeal, and someone without that experience might miss very significant issues."
There’s a great deal of competition for appellate defender jobs. “People in this field like their jobs,” says Phoebe. “No one leaves their job. There are few positions open. Get as much experience as you can before you apply. Work as a law clerk for an appeals judge after law school. I worked for an appellate judge for six months before finding this job.” Adds Charles Lerner, “Demonstrate a commitment to public interest law in general, and criminal defense in particular.” Working for public interest organizations during law school can make it clear to a prospective employer that you’re serious about doing public interest work.

Staff attorney positions for federal judges can be highly competitive, as well. “Appellate courts are very selective when hiring staff attorneys,” explains Stephanie Fineman. “We tend to look for the same credentials that large law firms look for—rank in the top 10% of the law school class, law review, moot court, and extremely strong writing skills.” Each federal circuit is structured differently. Some staff attorneys have two year terms; others are hired on a permanent basis. Stephanie strongly recommends that students interested in federal judicial clerkships also consider applying for staff attorney positions.

What skills are most important to appellate lawyers?

- The lawyers we talked to emphasized the importance of outstanding writing skills. “You need a clear, rigorous, systematic way of thinking and writing,” says Charles Lerner. “Clear writing is of primary importance,” agrees Phoebe Fenton. Adds Rick Greenberg, “Appellate lawyers have to be able to craft their arguments in writing, as opposed to cross-examining a witness, so writing and analytical skills are very important. At the same time, there are also oral arguments in appellate practice, so oral advocacy skills are also important.”

- The other attorneys we spoke with agree that oral advocacy skills are important. “You need the instincts of an advocate,” says Charles Lerner. Eamon Marx attended seminary before going to law school. “Oral advocacy and writing skills are equally important for appellate practice. Public speaking experience of all kinds is helpful. I am a minister in the United Church of Christ and have had a lot of experience speaking from the pulpit, as well as in speaking to civic groups of all kinds on constitutional and civil liberties issues,” he explains. Phoebe Fenton confides, “I like the thrill of oral argument; I like the tension. Oral arguments are one of the most enjoyable things I do.”

- Excellent legal research skills are critical in appellate practice. “All of my research is in the area of criminal law, and it’s fascinating,” says Phoebe Fenton. Eamon Marx is equally enthusiastic about legal research. “I enjoy legal research and writing. After 25 years in practice, I still like going to the library and reading the cases,” he says. Stephanie Fineman’s experience with staff attorneys, judicial law clerks, and law students (she was previously an assistant dean at a Chicago law school) allows her to offer this advice: “Students who genuinely enjoy researching and writing tend to enjoy appellate practice and find it exciting. Working as a staff attorney allows you to continue to be a student of the law.”

- Interpersonal communication skills are important to those specializing in appellate practice. “As a staff attorney,” says Stephanie Fineman, “you need to have poise. You have to field the judges’ questions and make recommendations to them.” Stephanie adds that in her job as a supervising staff attorney, her interpersonal skills are critical. “I lead a team charged with an important task—getting work for the judges accomplished. As a supervisor I find that leadership and team-building skills help me motivate staff members to work together effectively.”

- Those working in appellate practice need the ability to act as an advocate. Explains Charles Lerner, “This means you need to learn to think like an advocate, not a law student or a judge.” Adds Stephanie Fineman, “You have to have a certain amount of assertiveness and self-confidence in dealing with the appellate judges. They don’t like shrinking violets.”

- Attorneys working in the public interest sector mention the ability to empathize with the client. “You have to be comfortable working with your clients,” says Phoebe Fenton. “You have to have a certain comfort level talking to people who may have been convicted of terribly violent crimes.” She adds, “This work also requires patience in working with clients. Many clients are completely unfamiliar with the system. It’s easy to explain things in legal terms, but not everyone understands legal terms. Your clients are very dependent on you. Sometimes a client seems overly persistent, wanting too much contact, making too many calls, asking too many questions. You have to remember that this is because the client isn’t familiar with the appellate process. You have to demystify the process for them.”

What classes and law school experiences do appellate lawyers recommend?

- The appellate lawyers we talked to recommend taking law school classes that will sharpen your writing skills, such as advanced legal writing classes and seminar classes. Stephanie Fineman, who hires staff
attorneys for the Seventh Circuit Court of Appeals (and who is familiar with the requirements for hiring judicial law clerks), recommends civil procedure and advanced civil procedure, federal courts, criminal law and criminal procedure, employment discrimination, and constitutional law. Charles Lerner says that any class that "hones your ability to read, think, research, write, and argue as an advocate" can be helpful. Rick Greenberg agrees, commenting, "Not all writing is going to be the same—writing a brief is going to be different than writing a law review article or writing you might do in a clerkship—but any writing and analytical experience will be helpful." Adds Eamon Marx, "Students interested in appellate practice should never turn away from the opportunity to research and write a paper or brief on some legal issue."

- Participating in your school's law review provides an excellent chance to sharpen your research, writing, and editing skills. If your grades aren't high enough to secure a position on your school's law review, find out whether your school has a writing competition through which you can "write onto" the law review. If you become part of your school's law review, make every effort to publish an article. If you are not on your school's law review, consider writing an article to submit to your school's other law journals or a writing competition. A published article makes an excellent writing sample for interviews with legal employers.

- Moot court gives students an opportunity to exercise their writing and oral advocacy skills. "Participating in moot court provides excellent training in oral advocacy," says Stephanie Fineman. The oral arguments presented before a panel of judges in moot court competitions are great practice for thinking and speaking under pressure. Rick Greenberg notes that appellate advocacy classes or clinics can provide excellent practical experience. He adds, "I've done trial work and I've done appellate work and I don't think they are mutually exclusive. I think someone with trial experience will be a better appellate attorney because they understand the process and will know how to read the transcripts. And by the same token, someone with appellate experience will be a better trial lawyer."

- Judicial clerkships and judicial externships are two of the best ways to prepare for a career in appellate practice. Students can apply for judicial clerkships in their second year of law school. Students who are selected for a judicial clerkship generally work for a judge for one to two years after graduation from law school. Law firms with appellate practice groups are most interested in candidates who have judicial clerkship experience. Students who participate in judicial externships have the opportunity to earn academic credit for working for a judge while in law school. Successful externships can also result in an excellent recommendation (from the judge and judicial clerk with whom you work) for a judicial clerkship following graduation.

- Conducting informational interviews with appellate lawyers can help you plan a career in the field. Eamon Marx says, "Talking with appellate lawyers (and judges, if you can) is the best way to find out about the practice. Every city has a certain number of lawyers who are well known to the bench and bar for their expertise in appellate law. Many bar associations now have an appellate law section, and that is a good place to find the names of lawyers who do a lot of appellate work."

- If you're interested in working as an appellate defender, consider doing an internship at a public defender's office. Charles Lerner also recommends looking into law school clinical programs related to criminal and public interest law. Charles notes that experiences like these can be good ways to demonstrate your public interest law commitment to prospective employers. Rick Greenberg reiterates the importance of this commitment by saying, "When I hire someone for our office, more than experience, I'm looking for someone who is committed to representing clients, representing the indigent. Not everyone is cut out to be a criminal defense attorney, and I'm looking for the people who are."