Always Appealing: Damned Fools

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By Valerie Villacin

"Always Appealing" is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, PS, a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

Elihu Root said, "About half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop."1 As an appellate lawyer, much of my practice when dealing with any "would-be client" is, while not necessarily telling them "they are damned fools and should stop," but determining whether they are, and if so, helping them reach that conclusion for themselves.

Appellate lawyers can usually determine whether a would-be client is a "damned fool and should stop" earlier in the process than trial lawyers. For a trial lawyer first meeting a would-be client, the case is usually a blank slate — a slate that will be filled in as evidence is gathered, witnesses interviewed, discovery answered and legal arguments made. Assessing whether the client is a damned fool may take a trial lawyer some time because the case will continue to evolve as more information is obtained.

Appellate lawyers however usually meet a would-be client at the point where their case in Superior Court is usually at or nearing an end. By the time it reaches us, the case is no longer a blank slate — the facts, as found by either jury or judge, have been established, the credibility of

witnesses determined, and the legal arguments made.

On appeal, the parties are bound by the record in Superior Court, which except in unusual circumstances cannot be added to or changed. And in most cases, appellants are limited to the legal arguments made in Superior Court, and cannot make new ones. With the facts and law of the case essentially established, appellate lawyers can usually determine early in an engagement whether the would-be client is a "damned fool and should stop," and not appeal the adverse ruling.

A decent appellate lawyer does not simply tell the would-be client that they are a "damned fool and should stop," we educate them so they come to that conclusion on their own, or at a minimum, understand the risks if they decide to proceed to the appellate courts. We must educate the client about the nature of the appellate process, the effect of the standard of review, and the limited relief available in the appellate courts. We must disabuse the client of the notion that the appeal process is simply a second chance to prove their case to another court.

Appellate lawyers must explain to the would-be client that not all errors are created equal. The trial court may have committed an error, but if it was harmless, then the appellate court may not reverse. If the error is not preserved because an objection was not made below, the appellate court may not reverse. Even if the trial court made its decision for the wrong reason, if there was a right reason for its decision, the appellate court may not reverse.

Appellate lawyers must also explain to the would-be client that substantial evidence — as in "the trial court's findings must be supported by substantial evidence" — actually means "any evidence." Clients will often want the appellate lawyer to prove their case by showing that everyone else lied or their evidence was more persuasive. Our job is to explain to them that issues of credibility and the weight of evidence are not going to be effective issues on appeal.

Clients must understand the different standards of review. The appellate court reviews issues of law de novo. However, many trial court decisions are discretionary. While the test for abuse of discretion is no longer whether "no reasonable man would take the view adopted by the trial court" and is now "whether discretion is exercised on untenable grounds or for untenable reasons," in practice there is often little difference. The appellate court generally defers to the trial court's exercise of discretion and will more often than not affirm a discretionary decision.

This is not to say that every appeal results in affirmance, but a would-be client must understand what can and cannot be accomplished in the appellate court. Winning an appeal is difficult, and a decent appellate lawyer will make that fact plain to the client and help them make the decision that is right for them.

Clients must also understand that in many cases, "winning an appeal" is not always the happy ending they seek. Certainly there are some instances where prevailing on appeal may result in dismissal of the action in Superior Court, or vacating an adverse judgment. Often, however, victory for an appellant means returning to the Superior Court for another hearing or trial.

Appellate courts, recognizing the courts' distinct roles, often avoid telling the trial judge what to do on remand, and instead remand "for further proceedings consistent with this opinion." This directive can mean different things to the parties, the attorneys and the trial court. Prevailing on appeal may just mean that the would-be client bought themselves another round of expensive litigation with no certainty that the result will be any different.

Appellate lawyers are not only educators, we are counselors. The cost-benefit analysis of an appeal is not solely economic, as there is an emotional toll in allowing litigation to continue. The cost of not appealing may be that the would-be client is forced to abide by a ruling they find unfair, but the benefit is closure and moving on with their lives.

Obviously this simplistic analysis does not work in every case. For instance, the would-be client may be an institution and the adverse ruling will have an impact that goes beyond the parties involved in a particular case. However, when the would-be client is an individual, the job of a decent appellant lawyer is to ensure that they understand all the consequences of moving forward with an appeal. If we have done our job, the would-be client can reach a reasoned decision whether to appeal, and hopefully we don't have to tell them they are a "damned fool and should stop."

Finally, once the decision is made to pursue the appeal, and that would-be client, damned fool or not, is now our client, it becomes the appellate lawyer's job to frame the issues in a way that takes into account all of the idiosyncrasies of the appellate process, and to separate the wheat from the chaff.

It is here where decent appellate lawyers earn their keep. We do that not by ignoring the standard of review or by trying to convince the appellate court of our client's view of the facts. Instead, we focus on those facts that are not in dispute, and on persuading the appellate court that the law and the policies underlying the law compel a different result than the one reached in Superior Court.

In the end, appeals are hard, but they can be won, even on behalf of a would-be "damned fool."

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1 Watson v. Maier, 64 Wn. App. 889, 891, 827 P.2d 311 (1992).