Five Things I Wish Law School Had Taught Me About Appellate Practice

Posted on: Dec 1, 2024
Bar Bulletin Blog: General

Five Things I Wish Law School Had Taught Me About Appellate Practice

By Nicholas Bartels

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

As a recent law school grad almost everything I learned about the world of appeals in law school came from Legal Writing II: Written and Oral Advocacy, which is taken by Seattle U students in their 2L year. Without a shadow of a doubt, Legal Writing II set me up for success by teaching me what I needed to know to write an appellate brief; but appellate practice, as I have been finding out, was still an open question. So, I write to you today with newfound answers about the ins and outs of appellate practice.

1. The Court of Appeals plays by its own set of rules.

Courts are vehicles for due process and that process is governed by procedural rules. While a course on civil procedure is required by the ABA, my class was largely limited to the regular civil rules that apply in the trial court and delt with things like the filing of a complaint, summary judgment, and the discovery process. I had no idea that courts of appeal had even more specific rules that governed the appellate process.

In Washington these rules are called the Rules of Appellate Procedure or “RAPs.” The federal equivalent to the RAPs are the Federal Rules of Appellate Procedure, commonly abbreviated as “Fed. R. App. P.” While there was a chapter in our textbook discussing appellate practice generally,1 I was surprised to learn that there is an entirely different set of rules to “govern proceedings in the Supreme Court and the Court of Appeals”2 rather than just the regular civil rules.

Practitioners should be aware that an additional set of rules governs litigating a case on appeal, and not presume that the rules governing trial proceedings apply on appeal.

2. You literally have to make your own record for an appeal.

When we did our mock appeal in Legal Writing II, we were given a file that contained a transcript from a hearing on a motion in limine, a trial summary with relevant transcript excerpts, and a set of documents that contained the briefing and order from the motion hearing, jury instructions and final orders. This was the complete, relevant record for the case. This left me with the impression that the appellate court just automatically had the record by virtue of the notice of appeal being filed. However, I quickly discovered that this is not the case.

To get the record to the appellate court, the trial court clerk transmits the clerk’s papers to the appropriate appellate court upon the filing of a “designation of clerk’s papers.”3 A certified transcriptionist is responsible for preparing the “report of proceedings,” and the party must file a “statement of arrangements” that provides the appellate court and other parties with notice of who the transcriptionist(s) are and which hearings will be transcribed, among other things.4

Given that the appellate court may only need a certain portion of the record for effective review rather than the entire thing, practitioners should be conscientious of what may have already been designated to avoid duplication.5 Often times, the appellant will do a designate enough of the record that the respondent may not need to even do an additional designation or have additional transcripts ordered. However, practitioners should also designate enough of the record for the appellate court to adequately review the case as failure to do so may result in the court of appeals declining to review a claimed error.6

3. Jurisdiction is everything!

Unlike these other practice pointers, jurisdiction is something I was aware of, but I didn't fully appreciate the importance of jurisdiction until I started working in appellate law.

The court of appeals only has jurisdiction in one of two instances.7 The more common route is for an unsatisfied party to appeal a final order or some other decision that has the effect of resolving all of the rights and liabilities in the action; this is review as a matter of right and is called an "appeal."8 The less common route is review by permission of the reviewing court, called "discretionary review,"9 which allows for a review of an order that would not otherwise be appealable.10

I cannot overemphasize how important jurisdiction is on appeal. Failure to timely file a notice of appeal will result in the court of appeals not having jurisdiction as "[t]he notice of appeal is jurisdictional."11 Additionally, appealing from a proper order is imperative, because failure to do so will result in dismissal of the appeal.12

When considering an appeal, practitioners should be aware of how narrow appellate jurisdiction is and ensure that their case has the proper posture for an appeal.

4. Appeals are public.
Like, really public.

I vividly remember my torts professor going on a tangent about advising a client whether it is a good idea to litigate a case. One of the considerations that she wanted us to be aware of when we started counseling clients was that litigation brings a private dispute into a public forum. Because I was in law school during the Johnny Depp/Amber Heard trial, 13 I learned just how public litigation can become. But because that case dealt with a celebrity divorce, I thought that any reputational harm that could come from litigation was limited to celebrities.

Under GR 31 most court records are publicly accessible.14 However, an inquiring individual generally must go directly to a courthouse and request specific records, often with a specific case number in hand.

When a party appeals, the entire appellate record becomes easily accessible on the court's website unless the case is sealed or the case is one of the few types that is not made public as a matter of policy such as a dependency case or juvenile case.15 Searching a party name on Google can also take you directly to the opinion on the court's website or to a third party service like Leagle or Fastcase.

Practitioners should counsel clients about how public their case may become when an appeal is filed. For example, our engagement letter includes the following language warning clients about the public nature of an appeal: "All appellate briefs are public and will be available on the court's website when filed. As with the briefs, the Court's written decision is public and will be available on the court's website when filed."

Because once an opinion has been entered and the mandate has issued, it becomes nearly impossible to seal a case, let alone get a decision containing allegations of abuse or the painful details of an acrimonious firing, off the court website, after the fact. Clients should be made aware of the fact that a win at the court of appeals may result in a major loss in the court of public opinion.

5. Deadlines are slightly more flexible than law school would have one believe.

In law school, we were taught that deadlines were of the upmost importance and should be strictly adhered to. While this is true—and I can't underscore the importance of being aware of deadlines, particularly for filing a notice of appeal—extensions of deadlines are much more common than law school would have made me believe.

Under RAP 18.8(a) "[t]he appellate court may, on its own initiative or on motion of a party, waive or alter the provisions of any of these rules and enlarge or shorten the time within which an act must be done in a particular case in order to serve the ends of justice." Similarly, in the Ninth Circuit, a party can seek a single automatic thirty-day extension of time to file their brief.16

Our engagement letter language warns the client that extensions may be necessary for their case: "Because we cannot completely control when briefs will be due and other aspects of our workload in the office, we may find it necessary

to request an extension of time to file your brief. We will do our best to get the brief done as soon as possible." I have yet to work on a case where an extension has not been requested by at least one party.

While practitioners should be aware of, and adhere to, deadlines; they should also be aware of the ability to get an extension of time from the court to ensure that their client gets adequate briefing before the court.

Nicholas Bartels is an associate at Smith Goodfriend and a 2024 graduate of the Seattle University School of Law. Before being admitted to the bar Nicholas worked as a law clerk at Smith Goodfriend P.S. He can be reached at nicholas@washingtonappeals.com.

1 See Laurel Currie Oates et. al., The Legal Writing Handbook: Analysis, Research, and Writing 413–17 (8th Ed. 2021).

2 RAP 1.1(a); see also Fed. R. App. P. 1(a).

3 RAP 9.5.

4 RAP 9.2(a).

5 RAP 9.1(d).

6 Tacoma S. Hosp., LLC v. Nat'l Gen. Ins. Co., 19 Wn. App. 2d 210, 222, ¶30, 494 P.3d 450 (2021) ("[T]he failure to provide an adequate record in this instance wholly forecloses our ability to evaluate the complained error.").

7 RAP 2.1(a). Federal appellate jurisdiction offers a slightly different flavor of appellate jurisdiction as there are appeals from bankruptcy courts and district courts may certify certain questions for review. See 18 U.S.C. §§ 1291, 1292.

8 RAP 2.1(a)(1). RAP 2.2 provides a list of orders that may be appealed as a matter of right.

9 RAP 2.1(a)(2). Discretionary review will only be granted if the requirements of RAP 2.3 are satisfied.

10 RAP 2.3(a).

11 Kelly v. Schorzman, 3 Wn. App. 908, 911, 478 P.2d 769 (1970).

12 See e.g., Sterling & Wilson Solar Sols., Inc. v. Fid. & Deposit Co. of Maryland, No. 23-35558, 2024 WL 3934539 (9th Cir. Aug. 26, 2024) (dismissing appeal for

lack of jurisdiction because order appealed from was not listed under Sec. 16 of the Federal Arbitration Act). Sterling & Wilson was one of the first cases that I worked on while I was still a law clerk which really underscored for me the importance of appellate jurisdiction.

13 See generally Constance Grady, Johnny Depp, Amber Heard, and their $50 million defamation suit, explained, (updated Nov. 3, 2022, 1:46 pm), https://www.vox.com/culture/23043519/johnny-depp-amber-heard-defamation-trial-fairfax-county-domestic-abuse-violence-me-too (last visited Oct.30, 2024).

14 There are provisions to redact sensitive information in publicly available documents, and to prevent public disclosure in certain cases such as juvenile proceedings.

15 Washington Courts, https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.display_divs&folderID=div1&fileID=documentsearchportal (last visited Oct. 30, 2024).

16 9th Cir. R. 32-2.2(a).