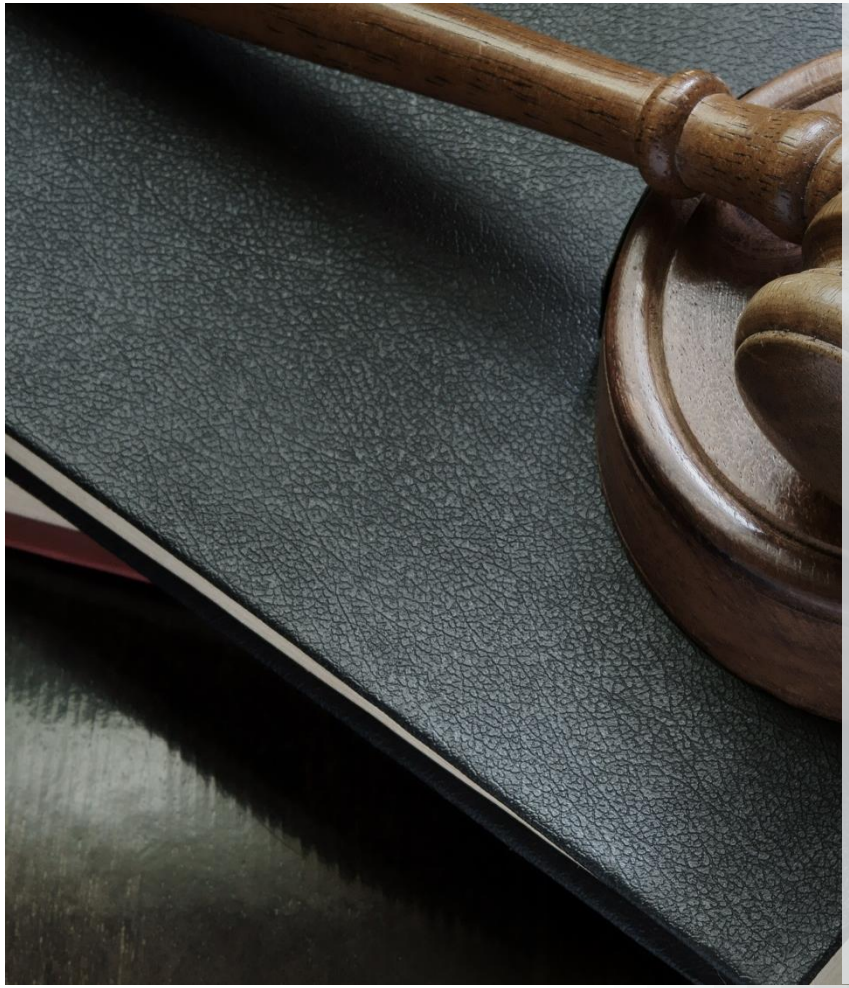

SPECIAL ISSUES FOR PUBLIC ENTITIES IN APPELLATE PRACTICE

Questions An Appellate Lawyer Would Ask, And A Public Entity Should Ask, **Before Taking An Appeal**

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THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
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OVERVIEW
WHAT DOES AN APPELLATE LAWYER DO?



FINISH OFF THE WOUNDED


REVIVE THE DEAD

WHY APPEALS ARE DIFFERENT

- Institutional bias towards a particular result—affirmance. 80% to 90% of judgments affirmed.
- Time and opportunity for reflection—long time period for processing appeal and input by three or more, not one judge.
- Different focus—trials are largely fact based, appeals are generally law based.

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DIFFERENT DYNAMICS

- Trials are fluid and unpredictable in scope—like poker, you don't know exactly what cards your opponent holds until played.

- Appeals are static with specific boundaries set by the record—like chess, all the pieces are in the open.

- Court is an active participant, i.e., will conduct its own independent review of the record and law, subject to minor restraints.

IS SPECIAL COUNSEL NEEDED TO ADDRESS THESE DIFFERENCES?

- Does the case need special expertise in appeals, i.e., would the rules of appeal be important?
- Does the case justify review by special counsel either because of the dollar amount or the political or policy issue involved?
- Does the case involve complex or novel legal issues that require greater depth of research?

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WHAT COURT ARE YOU IN?

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STATE COURTS

- Unique rules for preserving error or prosecuting appeal, varying from state to state.
- Predictable panels—the pool of justices who will hear the appeal is generally small and known at the outset of appeal.
- Often faster in processing than federal appellate courts, but depends on the state and circuit.

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STATE COURTS, CONTINUED

- Local knowledge and familiarity with state law.
- May not be as familiar with federal law.
- Possibly more deferential to interests of public entities given exposure to broad range of government cases and public law background of many justices.

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FEDERAL APPELLATE COURTS

- Vary widely in processing time –between 8 to 14 months from filing of notice of appeal to disposition, but statistics include criminal cases with priority.
- Panel Assignment may not be as predictable, depending on size of circuit.
- Possibly less familiar with state law.
- Possibly less deferential to interests of public entities given exposure to high volume of civil rights cases.

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WHAT ARE YOU APPEALING?

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VERDICT AFTER BENCH OR JURY TRIAL

- In general, full trials are difficult appeals—factual issues reviewed for "substantial evidence," i.e., any evidence to support the judgment and most court rulings during trial reviewed for abuse of discretion, i.e., any reasonable basis for decision.

- If a bench trial, do state rules require a statement of decision, and if so did the trial court comply – could have major impact on appeal.

ORDER DISMISSING CASE AT PLEADING STAGE

- Good standard of review, i.e., de novo—the court looks at it with a clean slate.
- Liberal standard for granting leave to amend.
- Generally good chance of reversal, though still below 50% in most cases.
- Because of favorable pleading standard, i.e. any conceivable set of facts to support claim, can be poor vehicle to test immunity claims.

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SUMMARY JUDGMENT

- Good standard of review—de novo.
- While no longer “disfavored,” subject to greater scrutiny than other rulings.
- Often a good vehicle for presenting immunity claims, as factual background is more fleshed out, in contrast to pleading based arguments.

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WHAT IS THE GROUND FOR REVERSAL?

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THE LONGSHOTS: EXCLUSION OR ADMISSION OF EVIDENCE.

- Issues concerning expert testimony—fairly good. Federal courts Post-Daubert and state courts getting tougher on “junk science” and questionable foundation.
- Issues concerning admission of evidence under FRE 403, i.e., probative vs. prejudicial—not so good.
- In general, if trial court gets legal standard right, evidentiary ruling will be upheld.
- Nonexpert evidentiary errors generally need to occur on multiple occasions, i.e., cumulative error, otherwise not prejudicial.

SUBSTANTIAL EVIDENCE—I.E., NO EVIDENCE TO SUPPORT THE JUDGMENT

- Very rarely successful given the standard of review, i.e., any evidence that can be believed by the jury can support the judgment.
- Appellate courts will not re-weigh the evidence.
- Despite difficult standard of review, many immunity arguments arise in the context of substantial evidence challenges, i.e. even if facts are as stated, defendant is entitled to judgment.

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GRANT OR DENIAL OF NEW TRIAL

- Abuse of discretion standard of review –presumption that trial judge in best position to understand if error impacted verdict.
- Occasionally de novo, if based on particular type of legal ruling.
- Grant of new trial particularly difficult to overturn.
- Exception – procedurally deficient grant of new trial may be almost automatic reversal.

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BETTER ODDS: JURY INSTRUCTIONS

- Needs to be with regard to fundamental element of case.
- Needs to be properly preserved (see below).

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DEFECTIVE SPECIAL VERDICT FORM OR JUDGMENT

- Special verdicts and special interrogatories often fruitful ground for appeal.
- Multiple claims and defendants create potential for conflicting, inconsistent findings.
- Not a good "11th hour" task – special care must be taken in drafting.

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JURISDICTIONAL ERROR

- Complete preemption, such as ERISA
- Improper service or claims presentation defect.

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IMMUNITIES

- Tend to be questions of law, not fact, and generally have strong public policy underpinnings.

- Includes qualified and absolute immunity in federal civil rights cases.

IS THE ERROR IN THE RECORD?

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ADMISSION OR EXCLUSION OF EVIDENCE

- Objection made on the record?
- Objection made on a proper ground?
- If evidence not admitted, need for an offer of proof on the record.
- Obtain final ruling -- Caveat with respect to motions in limine, courts often take a “wait and see attitude” prior to trial, and reserve ruling until testimony actually presented.

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INSTRUCTIONAL ISSUES

- Was an objection made?
- Did we offer our own instruction on the same issue?
- Was our instruction correct? (Danger of invited error.)
- Are the objections and rulings to the instructions and settlement of the instructions on the record? (Settling instructions “in chambers,” documenting which party submitted which instruction.).

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DAMAGES ISSUES

- Strength of argument on damages will vary depending on whether fact-based or law-based.

- Depending on jurisdiction, may be required to move for new trial in order to preserve arguments concerning amount of damages, i.e. excessive or inadequate.

LEGAL ISSUES BASED ON ABSENCE OF EVIDENCE TO SUPPORT THE JUDGMENT

- Check your state court rules –some courts require that a directed verdict motion be made followed by a JNOV, in order to preserve right to appeal.
- Federal court—rule 50 motion must be made at close of evidence **and** end of trial to preserve right to ask for judgment as a matter of law.
- Somewhat open question on whether Rule 50 motion required on pure issue of law, say “clearly established law” for qualified immunity.

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HOW STRONG AN ARGUMENT DO WE HAVE?

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WHAT IS THE STATE OF THE LAW?

- Is the law clear, i.e., clear statutory language or multiple decisions supporting the position?
- Is there a split of authority?
- Is it a new issue of law? (Don't shy away from breaking new ground –that is what appellate courts are for.)

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IS OUR POSITION EQUITABLE I.E., CAN WE SELL IT?

- Was the result unfair? (Note the fine line between arguing unfairness and “whining” and the danger of “demonizing” an opponent.)

- Policy considerations—result may be difficult to sell from an equitable standpoint but judgment for public entity compelled for public policy reasons. (Statute of limitations, claim statutes, and various immunities.)

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CAN WE GET OTHERS TO HELP SELL IT, I.E. AMICUS SUPPORT?

- Often critical in cases where the record is under developed -- Amici can broaden the discussion so court can appreciate the significance of an issue.

- IMLA, League Of Cities, Like-minded public entity associations.

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WHAT IS THIS GOING TO COST?

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FINANCIAL COST

- Interest on judgment – varies widely from state to state; federal rate low, set by cd auction rates.
- Bond cost – some states exempt public entities from bonding judgment; federal courts follow state law unless judgment not a lien on the debtor, in which case free to set appropriate bond (generally what state rules require for non-public entity defendants.)
- Given historically low federal interest rate on judgments, worth asking for minimal bond above judgment amount, as so little interest will accrue.

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THE RECORD

- Clerk's transcript, i.e. documents in case, free to local public entities in many states, but preparation of a joint appendix in some state courts or an excerpt of record in some federal courts requires expenditure of attorney time.

- States vary on exempting public entities from paying for reporter's transcript; federal courts require payment like any other party.

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ATTORNEY'S FEES IN PROSECUTING OR DEFENDING THE APPEAL

- Often difficult to predict because scope of work determined by what opposing party does, i.e., how good a brief they file, though fixed tasks like reviewing the record and legal research may be more predictable.

- Risk of paying opponents' attorney's fees on appeal—federal civil rights claims, or where applicable state private attorney general, or contract fees.

POLITICAL COST/BENEFIT

- Concern about reinforcing failure.
- Keeping a controversial case in the spot light.
- Maintaining reputation for strong defense, i.e., reluctance to “rollover” in the face of an improper judgment, which might encourage future suits.
- Could we end up worse?
  - If a successful appeal results in a retrial, will there be a greater exposure to damages, or possible recovery on additional theories?
  - Could we make bad law appealing a marginal value case on a less than ideal record that will hurt us in future, high value cases?

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WHO IS ON THE OTHER SIDE?

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TRIAL COUNSEL EXPERIENCED IN THE SUBJECT MATTER OF THE SUIT

- Likely knows the law in the area, but may be too close to the subject and not objective about potential flaws in an argument—the "true believer" problem.

- May not be experienced in appeals and fail to pick up on or appreciate issues concerning application of appellate standards and rules.

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APPELLATE COUNSEL

- Likely to pick up issues concerning application of appellate standards.
- Generally very strong legal research and writing skills.
- May not appreciate practical implications of an argument—too ivory tower.

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PRO PERS

- Courts will lend additional aid.
- Often cause greater expense due to lack of focus in presentation and disobedience of rules.

CAN THE CASE BE SETTLED?

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DYNAMICS OF SETTLEMENT ON APPEAL—VASTLY DISPARATE BARGAINING POWER

- One party has already “won.”
- Institutional bias towards affirmance means respondents are not likely to settle, conversely, appellants may be more willing to settle.
- Little economic incentive for prevailing party to settle.

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Settlement On Appeal
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APPELLATE COURT MEDIATION

- Many state courts have voluntary programs with mediators varying in expertise, or justices may mediate cases.

- Some federal circuits have formal mediation programs with trained mediators.

IS THERE A POSSIBILITY OF FURTHER REVIEW?

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MANDATORY V. DISCRETIONARY REVIEW

- Some state appellate courts have mandatory review by state Supreme Court; in others the Supreme Court may be the only appellate court.
- Discretionary review in many state Supreme Courts – generally need important issue, conflict in published decisions, etc., to get review.
- The United States Supreme Court—does the case involve a conflict among the circuits or is it flatly inconsistent with controlling Supreme Court precedent?

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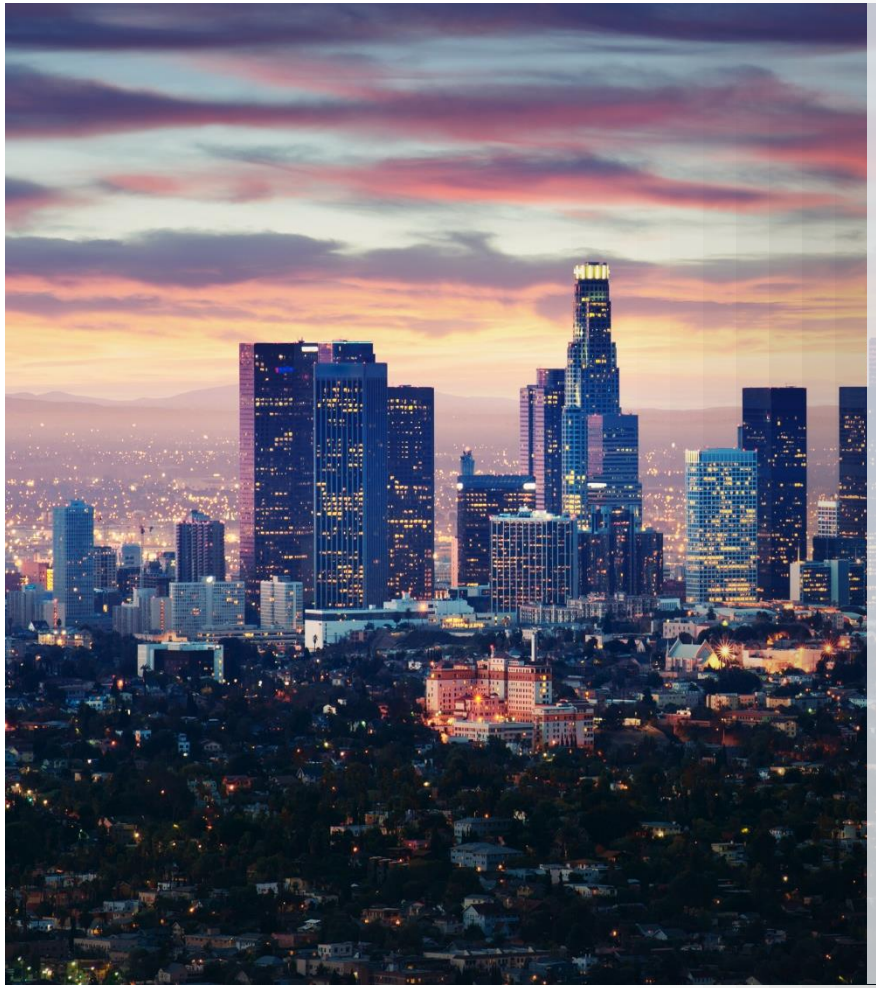

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