

Lost at Trial in Maryland? What NOT to do on Appeal!

By Trish Weaver

So, you thought you had a good case going into trial, but things did not go quite the way you anticipated. Rest assured that the trial court's decision need not be the end of the line. The appellate courts exist because the trial courts do not always get it right.

You do, however, want to make sure you go into the appeal with your eyes open. That means avoiding some basic pitfalls that can lead to more disappointment.

Here are five (5) mistakes you should NOT make on appeal:

MISTAKE #1: "DON'T WORRY ABOUT THE NUANCES WHEN FILING YOUR NOTICE OF APPEAL."

After all, the rule is pretty simple, right? After the trial court enters its final judgment, all you really need to do is file the Notice of Appeal within 30 days. Yet, determining when a "final" judgment has been rendered and entered can be tricky, so make sure you are being advised by someone familiar with the Maryland law that governs appellate procedure. If you do not file the notice in timely fashion, the appellate courts have no jurisdiction and cannot review or alter the trial court's decision. I have had my opponents' appeals dismissed this way on more than one occasion (which is the easiest way for the prevailing party to make the trial judgment stick). In addition to filing the Notice of Appeal, you must also follow Maryland requirements on the ordering of the transcript, filing an Information Report and finally, the brief itself.

MISTAKE #2: "ALWAYS STICK WITH YOUR TRIAL COUNSEL ON APPEAL." Your trial counsel may have done a brilliant job, but still you ended up losing; it happens. Regardless of what you thought of your attorney's performance at trial, you must realize that appellate advocacy requires a unique and different skill set. The appellate process is not about having another chance for a second trial of your case. I have heard appellate judges repeatedly bemoan the frequency with which they hear arguments designed more for the trial court and not the appellate court. You would not have your dermatologist assess your risk of heart attack, right? Make sure you have an attorney who has a depth of experience in, and focuses on, appellate litigation.

MISTAKE #3: "COMPLAIN ABOUT FACTS FOUND BY THE TRIAL COURT OR JURY." The surest way to doom your appeal is to focus your arguments on facts that the trial court got wrong. Regardless of whether a judge or jury was the trier of facts, the chance of having the appellate court change factual findings from the trial are between slim and none. While it has happened once in a blue moon, the odds are overwhelmingly against you. If any attorney advising you about appeals does not tell you loudly and clearly that such arguments are almost always losers, run – do not walk – to the nearest exit.

MISTAKE #4: "COMPLAIN ABOUT THE TRIAL COURT'S EXERCISE OF DISCRETION." While not as abysmal as reversing findings of fact, your chances of overturning a trial court's exercise of discretion is also a long shot. The appellate courts will reverse a trial court's exercise of discretion *only* if no reasonable person would take the view adopted by the trial court. Typically, the appellate courts give the trial court's broad discretion and are hesitant to conclude that the trial court's ruling is clearly untenable. While facts and circumstances can sometimes lead an appellate court to conclude that the trial court abused its discretion, you must understand that the odds are heavily stacked against it.

MISTAKE #5: "TRY THE SCATTERGUN APPROACH." Some litigants believe that the more issues and arguments they advance before the appellate courts, the greater their chances of winning. Not so. Careful consideration should be given to all of the issues and arguments that *could* be raised, and then narrowed to those few likely to create the greatest chance for success. I have too frequently seen litigants have their strongest arguments lost in the weeds because of the myriad of facts and arguments thrown at the appellate court.

The appellate court's standard of review of your case is the single most significant indicator of likelihood of success on appeal. To increase your chances of winning the appeal, appellate counsel should strive to identify and isolate errors of law committed by the trial court.

While the appellate process involves many more complexities and nuances, these are some simple mistakes you need to avoid right out of the gate. Sometimes not doing the *wrong* thing is equivalent to doing what's *right*.