2024 | VOL. 29 | NO. 2

NYSBA

NYLitigator

A publication of the Commercial and Federal Litigation Section of the New York State Bar Association

The New York State Supreme Court Commercial Division – 30 Years of Empowering Women: Reflections by Hon. Elizabeth Emerson and Hon. Andrea Masley

The Unique Skills of the Appellate Litigator

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By Seth M. Rokosky

Early in their careers, many litigators learn to gather and prove "facts," acquiring invaluable experience in a broad array of cases. They draft complaints, review documents, take depositions, and more. As they become increasingly seasoned, they see how each task is critical to reaching a favorable resolution and, if necessary, to prevailing at trial. The very best of these lawyers eventually master the art of "trial advocacy" and become rightly prized for their ability to steer cases from beginning to end before a judge or jury.

There is, however, a "fundamental difference between trial advocacy and appellate advocacy."[1] Trial lawyers typically work within existing legal precepts to persuade the finder of fact to accept their client's version of events. Consummate trial lawyers ascertain the factual strengths and weaknesses of their cases; sift, evaluate, and select the evidence; and then work tirelessly to develop a compelling factual narrative. From "an amorphous mass of testimony and exhibits," they create "an aura of righteousness" around their client and cause.[2]

Trial attorneys strive to become more than mere "litigators" – they aim to "try cases" and work to sharpen their grit and storytelling abilities so they can become the "next generation of Clarence Darrows and Gerry Spences" and persuade others that credibility and the evidence are on their side.[3] The "psychology of persuasion" is "what fascinates true trial lawyers, and they spend a lifetime learning about, and learning how to apply, psychology in the courtroom."[4] So it is in the trial courtroom where these "great stars of the legal galaxy shine."[5] When they daydream, they are Gregory Peck delivering a jury summation in *To Kill a Mockingbird*, or Tom Cruise cross-examining Jack Nicholson in *A Few Good Men*.

By contrast, appellate lawyers deal primarily with the law. Arguments are typically before a panel of three or more highly experienced jurists who are interested in reviewing and analyzing every pertinent authority. Appellate judges generally defer to factual findings and consider only facts in the record. So appellate lawyers generally take the record as given and work tirelessly to persuade others to adopt their preferred interpretation of the law.

The skills and knowledge needed for effective appellate advocacy "are not always found – indeed, perhaps, are rarely found – in good trial lawyers."[6] True appellate lawyers become immersed in legal doctrine so they can become the next Walter Jones or Daniel Webster and shape legal principles through discourse and the academic exercises of legal research, analysis, and writing. They stay apprised of legal milestones, master the rules and preferences of appellate courts, and take the perspective of a legal generalist who comes new to a case, just as the judges and their clerks will be on appeal.[7] When they daydream, they are Abe Fortas delivering oral arguments in *Gideon's Trumpet*, or John Quincy Adams speaking to the Supreme Court in *Amistad*.

Recognizing these differences, judges are "emphatic that appellate litigation is a specialized field."[8] They report that specialized practitioners consistently do excellent work in appellate courts, while trial lawyers doing their own appeals often do not.[9] Judges note that those "who are frequently working at the appellate level understand" what constitutes good brief writing; where they see mistakes "are from trial lawyers who only do an appellate brief once in a great while."[10] The "consensus" among many judges is "that lawyers who regularly appear in appellate courts generally make better oral advocates" in appellate courts.[11] As one ABA Committee explained in 1984, "[a]ppellate litigation should be recognized . . . as a discrete and important area of litigation requiring knowledge and skills different than trial litigation."[12] Appellate advocacy is, as one D.C. Circuit judge put it, a "specialty all to itself."[13]

New York is starting to notice. "Historically, many lawyers, including litigators, were generalists – able to handle any matter that came their way. Over the past few decades, however, there has been a trend in the profession toward specialization. . . . Appellate lawyers have been part of this trend."[14] In recent years, we have seen blogs and academic clinics devoted to New York appellate practice;[15] the continued development of the New York State Solicitor General's Office – now led by Barbara Underwood, a former acting U.S. Solicitor General – into perhaps the nation's preeminent state appellate office; and the appointment of Judge Caitlin Halligan, the former New York Solicitor General, to the New York Court of Appeals bench. Yet there is still much work to do in this state.

To be sure, trial lawyers can be integral to success in an appeal. Their intimate familiarity with the case and record may be enormously valuable in an appellate court. By the same token, appellate lawyers can add great value in trial courts, analyzing claims and defenses, drafting motions and briefs, and preserving issues for appeal. Some law firms brand

themselves as trial boutiques; others have dedicated practice groups for appeals. Still other law firms and lawyers continue to consider themselves to be general practitioners, equally equipped to meet the demands of any case. But even "[t]hose lawyers who perform as both trial and appellate advocates must learn to adjust their techniques to match the demands of each court."[16]

The New York State Bar Association includes entire sections devoted to antitrust law, employment law, tort law, and more. It also includes a Trial Lawyers Section, with bylaws stating that the section is devoted to the trial lawyer and the law relating to trial practice and procedure. But appellate lawyers too have specialized skills. And "clients have increasingly made the business decision that the expense of hiring specialized appellate litigators is worthwhile given the increased burdens and risks of modern civil litigation."[17] Especially in complex commercial cases, sophisticated clients understand that "specialization leads to reduced expense, realistic evaluation, and the potential for better results."[18]

Litigators of all stripes should understand, and account for, the fundamental differences between trial advocacy and appellate advocacy. A trial is nothing like an appeal, which requires unique skills that must be honed through hard work and cultivated through dedicated experience. By recognizing these differences, litigators and their firms can grow in their ability to advocate in appellate courts and ensure that they will be best placed to meet the needs of their clients.

Brief Writing

The most fundamental difference between trial and appellate advocacy involves brief writing. When lawyers are in trial court, they make numerous written motions and other submissions on a wide variety of issues, often with short deadlines of mere weeks or even days. As a result, lawyers in trial court typically concentrate on making and preserving all plausible arguments within the time allotted, expecting to focus and expand upon their most forceful and compelling points when speaking to a judge or jury at a lengthy hearing or trial.

Just as trial advocacy "requires oral persuasion," however, "appellate advocacy requires written persuasion" in its most critical stages.[19] Those who practice regularly in appellate courts know from experience that "the very heart of successful appellate advocacy is superb brief writing."[20] "Appellate judges across the country maintain that an ability to write clearly has become the most important prerequisite for an appellate lawyer."[21]

Appellate lawyers, unlike trial lawyers, typically have only one or two briefs to make all of their points. And as oral argument time "is increasingly whittled away, the significance of [each] brief becomes even more apparent."[22] Oral arguments in an appellate court last mere minutes (if they are held at all), and a single brief or two may be the only chance to persuade the judges. In the United States Court of Appeals for the Second Circuit, for example, parties typically receive about 10 minutes per side. In the New York Court of Appeals, parties can get up to 30 minutes, but typically receive far fewer than that. And in the Appellate Division, parties generally receive no more than 15 minutes, with attorneys in the First and Second Departments expected to limit themselves to fewer minutes whenever possible – a practice that itself can raise strategic and tactical considerations for an appellate advocate weighing the importance of the briefs.

Appellate litigators must exercise "discretion and objective detachment in deciding which . . . issues will be raised on appeal."[23] Accounting for the merits and the applicable standard of review, issues that consumed trial counsel may be of marginal significance; issues that seemed trivial during trial may become critical on appeal. Judges have stressed that lead trial counsel oftentimes do "not have enough time or enough experience to know what issues to lay out correctly" and, having contested every inch in the trial court, are "often unable to discern the appellate forest from the trial trees."[24] An appellate practitioner who understands which points are most likely to persuade appellate judges is well placed to navigate that process effectively.

Moreover, appellate litigators are keenly aware, from judicial clerkships and other relevant experience, what sort of writing has proven to be most effective in appellate courts. An appellate brief must be cogent, informative, honest, and convincing. Its drafting requires a delicate balance of accuracy and persuasion. "Writing a statement of facts that is necessarily neutral in form but persuasive in effect takes considerable skill; it is a delicate, and difficult, task for even the most experienced brief writer."[25] Appellate counsel must otherwise carefully prune legal theories, choose words precisely, cite cases thoroughly, and edit and revise repeatedly.

Veterans understand that excellent appellate briefs do not merely happen; they are the "product of painstaking craftsmanship," and counsel's "utmost care and thoughtfulness" must be devoted to every brief.[26] Many advocates and judges consider appellate brief writing to be a form of art. The process has been compared to "that of a sculptor, who starts with a lump of claim and continuously kneads it, prods it, and shapes it until eventually becomes – we hope – a thing of beauty that conveys something powerful to the viewer."[27]

After all, appellate judges largely read briefs for a living and are professional legal writers. In 2023, the Appellate Division alone ruled on the merits of nearly 6,000 appeals and resolved more than 21,000 motions after examining countless briefs, legal memoranda, and judicial opinions. Appellate

judges rightly expect those who appear in their court to devote themselves to good writing in the thousands of briefs the judges must read each year. As the Honorable Fred I. Parker, a former judge on the United States Court of Appeals for the Second Circuit, explained:

> If I read an appellant's brief which, clearly and accurately, sets out the facts, tells me what the district court did, explains why the district court found in appellee's favor and then goes on to explain why that decision was in error, I get engaged in a case and stay with that brief. Such a brief is a joy to read because it allows me to understand the entire case without wasting any time. If the brief has also made me think that the equities or the law suggest reversal, then it has been truly successful.[28]

By the same token, appellate litigators know the harm that can result from a brief that is poorly drafted. They know appellate judges can quickly spot distortion and obfuscation. They know a storm of arguments can signal a lack of merit. They know judges quickly lose "confidence in the substance if the writing is bad."[29] They emphasize brevity, seek simplicity, and eliminate hyperbole. They focus not simply on errors by the trial court, but on significant errors that an appellate court may conclude warrant providing some relief.

Finally, appellate counsel may be involved in drafting or coordinating amicus briefs, which are commonly regarded as helpful in appellate courts. Ideally, counsel for a party and counsel for amici will coordinate to present a united front, and that requires initial engagement of amici, discussion of potential arguments, mastery of applicable rules and procedure, and preparation of a compelling brief sufficiently in advance of argument for the court to consider the brief.[30] An excellent amicus brief goes beyond the arguments made by the parties to explain broader implications or practical effects of a particular ruling. The New York Court of Appeals recently made this process more difficult by significantly shortening the deadlines for filing amicus briefs, making experience and skill all the more important when seeking to submit briefs to the Court.

All litigators should take the time to develop and refine their writing skills. Most excellent writers become successful by working to master basic writing principles, analyzing the distinguished work of others, and holding themselves to the highest standard of excellence on every brief they write. Just as an examination of a witness can be done hastily, a brief can be drafted in a matter of days. But it can take years of persistence to devote oneself to that craft.

Oral Argument

Many of the same considerations that apply to brief writing apply to oral argument. In a trial court, advocates may deliver arguments on a variety of motions or other issues over an extended period, sometimes up to several hours per day. Those contentions may focus on the parties' factual and legal contentions, working methodically through each issue, with a typically busy judge permitting the parties to fill in any gaps of understanding with details about the case. Counsel become intimately familiar with the preferences and personality of their assigned judge, who works directly with the attorneys to move the case from complaint to final judgment.

These aspects of advocacy in a trial court eventually become heightened if the case reaches trial. The parties may expend considerable time and effort conducting analyses of prospective jurors from their community. "[M]ost jurors are affective decision makers," meaning they are "emotional and creative, and are more interested in people than problems. They see trials as human dramas, not legal disputes."[31] By contrast, most lawyers are cognitive decisionmakers, trained in legal reasoning and using logic to resolve disputes. Thus, lawyers who understand and meet the jurors' emotional needs will have an advantage. They work hard to build their own credibility while branding their adversaries as outrageous. In a bench trial, the judge's accumulated perceptions of the advocates, clients, and governing law become paramount.

Experienced trial lawyers deliver carefully crafted, sometimes lengthy opening and closing arguments and systematically seek to prove their contentions through a compelling presentation of evidence. They take care to rebut arguments and evidence presented by the other side. The judge and jury (and sometimes a viewing public) watch and listen, rarely interrupting, leaving counsel to direct the ebb and flow of events. A trial becomes a form of legal performance, designed to lead the factfinder to a conclusion based on a disputed evidentiary record. Many people recall Johnnie Cochran quipping that if the glove "doesn't fit, you must acquit," but he made those closing remarks after nearly eight months of the jury silently observing the O.J. Simpson trial.

Oral argument in an appellate court is entirely different from a trial presentation to a judge or jury. A few minutes of oral argument may be the only occasion on which counsel can speak directly with the appellate judges to understand and address their concerns. "A competent appellate advocate will . . . regard oral argument as a conversation with the court in what is, in effect, a beginning of its conference" about how the court will resolve the entire appeal.[32] "Opposing counsel" are simply "a necessary evil in this process, to be treated fairly and courteously and otherwise ignored."[33] Furthermore, appellate advocates are faced with at least three judges simultaneously asking questions from the bench. An appellate argu-

ment can be as much of a conversation *among* judges as a back-and-forth with the advocates, and questions can range from softballs and lifelines to spears directed at the heart of an advocate's case, so it can be difficult to determine the motivations behind each question and how to address them.

The tenor of appellate argument also is entirely different from presentations in a trial court. "Appellate arguments are generally more low-key and cerebral, and the frequent tendency of effective trial lawyers to want to dominate the courtroom or appeal to the emotions of the listeners (witnesses, jurors, and spectators) can backfire in the context of an appellate argument."[34] The courtroom can often be empty, except for listeners who are familiar with the legal arguments in the parties' briefs. The best tone is one of respect, honesty, knowledge, and assistance, in which the advocate strives to educate the court in a calm and dignified manner.

Arguments that work with a jury or trial judge may antagonize appellate judges. Unlike in a trial court, where argument may focus on hotly contested points about the case, oral argument before an appellate court is likely to focus on how affirmance or reversal, on minimal or more sweeping grounds, would impact other or future cases. This is usually explored through an agreement about facts and the posing of hypotheticals to test application of a legal principle to different scenarios. Appellate judges typically have studied and absorbed the briefs, and one may risk annoying them by belaboring a recitation of facts or issues. The New York Court of Appeals, for example, expressly directs counsel in its rules to presume the Court's familiarity with the facts, procedural history and legal issues the appeal presents. And judges in the First and Second Departments commonly begin oral arguments with admonishments to counsel to the same effect.

Furthermore, unlike in a trial court, where advocates may spend days or weeks meticulously presenting their case, appellate practitioners have only minutes to deliver their entire argument and cannot make use of demonstratives or a fully scripted presentation. Instead, they must advance their presentation by responding to the court's questions, no matter how far they may range, while maintaining a coherent position that boils down the case to its essence and weaves in both precedent and policy. At the same time, they must be ready for a cold bench with a short presentation that walks through the key points. Meeting these demands "requires a set of skills wholly distinct from those valuable in cross-examining witnesses at trial or making a closing argument to a jury."[35] The advocate must be able to address legal issues cooly without reference to irrelevant facts. He must be able to advance principal points while simultaneously being peppered with questions, all with an eye toward placing policy implications in their broader legal context.

Doing so requires extensive preparation. The advocate must conduct a thorough review of the briefs and record, master the relevant case law, and develop an argument that focuses on the crux of the case. He must be ready for the arguments of opposing counsel but also prepare for any other potential lines of inquiry that may arise on any topic. Moot arguments are particularly critical in an appeal because they provide not only an opportunity to become comfortable with multiple questioners but also to test what works. At a moot, colleagues and other experienced practitioners (often appellate lawyers enlisted for specific reasons) can pepper the advocate with hundreds of questions on virtually any issue, probing for potential weaknesses or endeavoring to provide an honest assessment of the advocate's likely reception in an appellate court.

Appellate Counseling and Motion Practice

The work of an appellate advocate can be critical in numerous other ways throughout the life of an appeal. Those skills are similarly developed and honed through experience, and they can have real-world impacts even as proceedings continue in the trial court.

One of the most important functions of an appellate lawyer is to provide an independent perspective on the relative merits of an appeal. The decision whether to appeal "is perhaps the most important decision made during the course of an appeal," but it "may well be the stage of the appellate process where advocates most often err."[36] Because trial counsel may develop strong views and potential blind spots after hotly contesting every inch of the case, counsel who focus on a potential appeal may be best positioned to provide objective analyses of the prospects for success and likely duration and expense of continuing to pursue the matter in a higher court.

In some cases, the most challenging issues concern whether the appellant has a right to be in an appellate court at all. The law of appellate procedure in both federal and state court is filled with traps for the unwary, and the consequences of a misstep can be enormous. For example, federal courts of appeals have jurisdiction from all final decisions of the district courts, but the meaning of "final" is not always clear, and the law provides considerable nuance and exceptions. Parties generally can appeal as of right any interlocutory order to the Appellate Division, but only a final order to the New York Court of Appeals, and there is no airtight conception of what constitutes a "final" order. On the other hand, counsel in New York courts must consider whether to appeal nonfinal orders as well because they are brought up for review by the final judgment only when they "necessarily affect" the judgment, and counsel must be sure to perfect any such appeal before entry of judgment, which would terminate the appeal as a matter of law.

Aside from jurisdiction, appellate litigators regularly encounter a host of complex issues relating to arcane issues in appellate procedure. Questions can arise, for example, regarding when the time to appeal begins to run, whether that time is tolled by one or more post-judgment motions, whether counsel can or should file a cross-appeal, and the adequacy of appeal papers. "Just as a litigator must know the basic steps in trial procedure from the filing of the complaint through posttrial and post-judgment motions, including personal and subject matter jurisdiction and venue, so also must the litigator be familiar with statutes, rules of procedure, and judicial doctrines that govern what and when a litigator must do to represent a client effectively in the appellate process."[37] The answers to these questions often cannot be found in the applicable rules or reported decisions. Although a diligent litigator can attempt to research them when they arise, there is no substitute for the wisdom that comes from grappling with them on a regular basis.

Counsel must also consider myriad practical factors when advising clients about a prospective appeal, including the possibility of success, the appeal's likely duration, the value of the remedy, and any financial or other costs involved. Thoroughly evaluating these factors requires understanding not only the applicable rules, but also how cases actually get litigated in appellate courts and how courts go about correcting errors or not. When considering whether to appeal, one of counsel's most valuable talents is the ability to see when an appeal has little chance of success, and to break this news to the client. This "requires a cool head, a command of the issues and the applicable standard of review, and a great deal of courage."[38]

Even beyond taking, briefing, and arguing appeals, appellate litigators work to develop the skills necessary to prevail for their clients, just as trial lawyers do outside of trials. For example, appellate practitioners may be required to file one or more motions during the course of an appeal. Unlike motions in a trial court, appellate motions tend to be procedural rather than substantive. Typical motions seek an extension of time, leave to file an overlength brief, or permission to supplement the record. These motions can have a material impact on the substance of a brief or oral argument and can therefore directly affect an appeal's outcome.

Some appellate motions can be substantive and of vast importance for clients, such as a motion to stay trial proceedings or enforcement of the order challenged on appeal. Navigating these processes requires familiarity with local customs and practices and, typically, briefing on an expedited basis. Furthermore, such motions are often decided without oral argument and at least in part by an official in the clerk's office, rather than a judge, making familiarity with the clerk's office and that experience extremely valuable when litigating such applications for clients.

Conclusion

Effective appellate advocacy is more than simply reading cases, writing briefs, and answering questions. It takes far more to persuade a panel of distinguished judges to rule in a particular way that will shape the governing law. Litigators should recognize and seek to develop the special experience and skills that are required to master the art of appellate advocacy. In doing so, they will grow as attorneys and be able to provide the best possible service for their clients.

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