

Observations on the Rise of the Appellate Litigator

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I. INTRODUCTION

Over the last few decades, there has been a noticeable increase in the visibility and prominence of appellate litigators in the private bar. Most of the attention has focused on Supreme Court advocacy, where certain private law firms and lawyers have developed reputations for specialized expertise and experience in briefing and arguing cases before the Court,¹ but the phenomenon extends to other federal and state court appeals as well. The practice of law as a whole is becoming increasingly specialized, and the trend in appellate litigation is no exception, although it appears to be a more recent occurrence than the growth of substantive speciali-

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1. See, e.g., Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1503 (2008) (discussing reasons for the development of specialized appellate expertise by law firms and lawyers in the 1980s).

zation.² This paper seeks to document the growth in appellate litigation as a specialized area of practice, identify the reasons for its emergence, and assess the value that specialized appellate litigators can contribute to a matter. Taken together, these factors suggest that the specialized practice of appellate litigation is here to stay, and its role and significance are likely to continue to expand.

As will be discussed, the growth of the private appellate bar—especially before the U.S. Supreme Court—is well documented, but the reasons for its emergence are somewhat less clear. Given that the Solicitor General’s Office has coordinated appellate litigation on behalf of the federal government for many decades, with considerable and well-recognized benefits for both the government and the appellate courts, the tangible advantages that arise from the involvement of talented and expert appellate litigators in appellate litigation has been evident for some time. For the reasons set forth below, it is reasonable to conclude that more widespread recognition of these benefits—and hence the growth of the private appellate bar—has developed as a result of increased sophistication among private clients and large law firms regarding the value provided by appellate litigators. Perhaps contributing to this development is the fact that the magnitude of damage awards and liability risks has increased in civil liability cases, and that courts may be more receptive to challenges on appeal in such cases, thereby providing an even greater incentive for private clients to have highly skilled advocates handle significant appellate matters. But none of these considerations would sustain the existence of a specialized appellate bar if it did not provide real-world benefits to clients, so it is also relevant to identify and assess the special skills associated with being an effective appellate litigator.

II. THE EMERGENCE OF A PRIVATE APPELLATE BAR

The available data confirms the widespread impression that specialized appellate litigation has increased in its vibrancy and scope in recent decades. Because the U.S. Supreme Court has a relatively small and well-defined docket and comparative trends are

2. *Id.* at 1497–1501.

easier to decipher in that setting than with the more diffuse and numerous appeals handled by other federal and state courts, most of the available quantitative analyses pertain to the Supreme Court.³ Those studies uniformly confirm the trend towards increased specialization among the private Supreme Court bar, a trend that has developed notwithstanding the reality that the sheer number of opportunities to argue cases before the Court has declined. In the past two decades there has been a precipitous decline in the number of cases heard by the Supreme Court on the merits,⁴ from around 150 cases per term in the 1980s to just over half that number today.⁵

Despite the Court's smaller docket, the proportion of cases argued by a handful of highly experienced appellate lawyers has increased substantially over this same period of time.⁶ A comparison between the 1980 Term and 2002 Term that was performed by then-Judge (now Chief Justice) John G. Roberts, Jr., illustrates this very point.⁷ In examining oral arguments performed by non-federal government attorneys, Chief Justice Roberts found that in the 1980 Term "fewer than 20 percent of the advocates had ever appeared before the Supreme Court before. In 2002, that number had more than doubled, to over 44 percent."⁸ Analyzing the 2008 Term, we found that this number had again increased, to over 58 percent.⁹ Lawyers who had at least three previous arguments before the Court presented 10 percent of the non-Solicitor General arguments in 1980, a proportion that more than tripled to 33 percent in 2002.¹⁰ In 2008, this proportion climbed again to 44 percent.¹¹

3. See, e.g., *id.* at 1508 (discussing "possible causes of the [Supreme Court's] shrinking docket"); John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 75 (2005).

4. Lazarus, *supra* note 1, at 1508; Roberts, *supra* note 3, at 75.

5. In the October 2008 Term, the Court issued opinions in seventy-six argued cases. In the October 2007 Term, the Court issued opinions in just sixty-seven argued cases. Supreme Court of the United States, Opinions, *available at* <http://www.supremecourtus.gov/opinions/opinions.html> (last visited Feb. 8, 2010).

6. Lazarus, *supra* note 1, at 1520 tbl.3.

7. Roberts, *supra* note 3, at 75–76.

8. *Id.* at 75.

9. *Id.*

10. *Id.* at 76.

11. *Id.*

Further comparisons between the 2008 data set we scrutinized and that compiled by Chief Justice Roberts demonstrate the continued growth of specialized appellate practice at the Supreme Court level. Roberts indicates that only three lawyers outside of the Solicitor General's Office argued more than once before the Court in the 1980 Term, but by 2002 there were fourteen such repeat performers.¹² In 2008, there were sixteen repeat performers.¹³ Put in terms of the percentage of overall argument slots, repeat performers outside of the Solicitor General's Office took up only 2.5 percent of the non-federal government slots in 1980, but by 2002 took up 24 percent of them.¹⁴ By 2008 they had 31 percent of them.¹⁵ Roberts also notes that when federal government lawyers were included, the odds that an advocate approaching the lectern had previously argued before the Court increased from one in three in 1980 to over 50 percent in 2002.¹⁶ By 2008, this number had climbed to 68 percent, doubling the 1980 rate.¹⁷ By all these measures, appellate specialization has clearly grown at the Supreme Court since the early 1980s and continues to do so.

This trend is further underscored when the focus is turned to the universe of Supreme Court oral arguments that would most likely present opportunities for paid representations by law firms with well-established Supreme Court appellate practices—i.e., excluding pro bono representations, parties represented by law school clinics, and representations that such firms would generally not be in a position to undertake. Based on a review of such cases from the October 2007 and October 2008 Terms of the Supreme Court, we identified seventy-eight oral arguments in this category during that period of time. Firms with Supreme Court practices—construed somewhat broadly to include twenty law firms with recognized repeat-player Supreme Court advocates¹⁸—handled 74.4 percent of the total

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 78.

17. *Id.*

18. The firms included in this category were: Akin Gump Strauss Hauer & Feld LLP; Bingham McCutchen LLP; Covington & Burling LLP; Farr & Taranto;

number of arguments in this category.¹⁹ Those findings further confirm the data analyzed by Chief Justice Roberts and updated above—the specialized appellate Supreme Court bar is very much on the ascendancy.²⁰

Nor is the increased appellate specialization at the Supreme Court limited to the presentation of oral argument before the Court; it extends to the petitioning and granting of certiorari as well. A study of data from the late 1970s and early 1980s suggests that even at that stage the Court was more apt to grant review to petitioners represented by experienced Supreme Court practitioners than by non-experienced practitioners.²¹ Not surprisingly, a more recent analysis suggests that the proportion of successful certiorari petitions that are filed by experienced Supreme Court practitioners has significantly increased in the last few decades.²² According to that study, law firms or organizations (other than the Office of the Solicitor General) with significant experience in Supreme Court advocacy—defined as an “attorney serving as counsel of record with at least five prior oral arguments or an affiliation with a legal organization with at least ten prior argued cases before the Court”—

Gibson, Dunn & Crutcher LLP; Heller Ehrman LLP; Hogan & Hartson LLP; Howe & Russell P.C.; Jenner & Block LLP; Jones Day; Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC; Kilpatrick Stockton LLP; Latham & Watkins LLP; Mayer Brown LLP; Morrison & Foerster LLP; O’Melveny & Myers LLP; Quinn Emanuel Urquhart Oliver & Hedges, LLP; Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP; Sidley Austin LLP; and Wilmer Cutler Pickering Hale & Dorr LLP.

19. In full disclosure, our firm—Gibson, Dunn & Crutcher LLP—was included among the twenty firms and handled nine of the arguments included in this category.

20. There is also an increasing number of pro bono and law school clinic cases that are being handled by law firms with Supreme Court practices. We estimate there were eighty-nine potential arguments in this category during the 2007 and 2008 Terms, and firms with Supreme Court practices presented oral argument in approximately 37 percent of those cases. 2007–2008 caseload study on file with authors.

21. KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* 181–82, 197–98 (1993) (finding in the study that experienced Supreme Court litigators were successful in obtaining review in 22 percent of cases, while non-experienced advocates were successful only 6 percent of the time).

22. Lazarus, *supra* note 1, at 1515–17.

dramatically increased their share from 5.7 percent of all petitions granted in the 1980 Term to 44 percent in the 2006 Term and 53.8 percent in the 2007 Term (as of January 28, 2008).²³ This result suggests that the increasing role of specialization among counsel appearing before the Supreme Court applies not only to merits review and argument before the Court, but to the petition stage as well.

As noted above, quantitative data on the increased role of appellate litigators is most readily available with respect to the Supreme Court. As yet, the same level of analytical scrutiny has not been given to the increase in specialization in appellate litigation before other federal and state courts. One study suggests, however, that litigators in product liability cases with no prior experience before a particular federal circuit court of appeal were less successful—controlling for other factors—in persuading the judges on the panel to rule in their favor.²⁴ In addition, the data suggest that the number of federal appeals has increased substantially from the levels that prevailed in the 1970s and 1980s.²⁵ Moreover, the increase in the federal system is only partially explained by the increase in the percentage of prisoner cases (both habeas corpus and civil rights).²⁶ Therefore, the analytical evidence, which shows that appeals are more prevalent than ever and that experienced appellate litigators may realize more success in litigating these cases, would suggest that the increased specialization in Supreme Court advocacy is likely evident in appeals to other federal and state courts as well—although perhaps to a lesser degree given the far larger dockets and relative geographical diversity of these courts.

23. *Id.* at 1516–17.

24. Susan Brodie Haire, Roger Hartley & Stefanie A. Lindquist, *Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals*, 33 *LAW & SOC'Y REV.* 667, 681 (1999).

25. Richard A. Posner, *Demand and Supply Trends in Federal and State Courts Over the Last Half Century*, 8 *J. APP. PRAC. & PROCESS* 133, 134 (2006).

26. *Id.*

III. THE REASONS BEHIND THE DEVELOPMENT OF A PRIVATE APPELLATE BAR

Thus, the evidence clearly establishes that appellate specialization in the private bar is on the rise. Discerning the causes of that phenomenon is a more difficult question. As an initial matter, it is worth noting that several appellate judges themselves have recognized the value of appellate litigation as a specialized area of the law requiring a unique skill set. Judge Ruggero Aldisert of the United States Court of Appeals for the Third Circuit has stated that “[a]ppellate advocacy is specialized work. It draws upon talents and skills which are far different from those utilized in other facets of practicing law.”²⁷ Judge Laurence H. Silberman of the United States Court of Appeals for the District of Columbia Circuit shares those same views: “[T]he skills needed for effective appellate advocacy are not always found – indeed, perhaps, are rarely found – in good trial lawyers.”²⁸ Given that the judiciary itself has recognized the value of expertise in appellate advocacy, it is not surprising that many clients and law firms have increasingly come to share this view as well.

As with other markets, the market for legal services can be analyzed through the framework of supply and demand.²⁹ On the demand side, a common phenomenon is that corporate counsel hire law firms to handle their legal affairs, influencing the market for legal services.³⁰ On the supply side, sophisticated law firms have emerged that can provide an array of legal services and legal talent to handle almost any conceivable matter.³¹ Below, we identify four

27. RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT § 1.1, at 3 (Nat’l Inst. for Trial Advocacy rev. ed. 1996); *construed in* D. Franklin Arey, III, *Competent Appellate Advocacy and Continuing Legal Education: Fitting the Means to the End*, 2 J. APP. PRAC. & PROCESS 27, 29 (2000).

28. Laurence H. Silberman, *Plain Talk on Appellate Advocacy*, 20 LITIG. 3, 3 (1994).

29. Andrew Bruck & Andrew Canter, Note, *Supply, Demand, and the Changing Economics of Large Law Firms*, 60 STAN. L. REV. 2087, 2088–89 (2008).

30. *Id.* at 2089.

31. *Id.*

different factors that may account for the rise of appellate litigation as a practice specialty. One factor deals with the increase in supply; the others deal with the increasing demand for appellate specialists.

A. *Appellate Practices as a Response to Modern Law Firm Economics*

In some respects, the biggest puzzle is why the increasingly specialized appellate bar that has emerged in the last few decades was not as prevalent in prior decades. To be sure, there have been appellate specialists in the past. Early giants of the Supreme Court bar included such luminaries as Daniel Webster, who “effortlessly moved from debating political issues in the Senate to arguing in the Supreme Court,”³² and Walter Jones, Francis Scott Key, William Pinckney, and William Wirt.³³ But such early specialization may have been largely the product of geographical considerations. With poor roads and difficult travel in the early 19th century, it was unsurprising that most cases in the Supreme Court were argued by attorneys from Virginia, Maryland, Pennsylvania, or the District of Columbia.³⁴ Moving forward to the 20th century, some Supreme Court specialists—including John W. Davis, Charles Evans Hughes, Thurgood Marshall, and Archibald Cox—did argue significant numbers of cases before the Court in private practice.³⁵ But such practitioners were few and far between.

In truth, until about 1980, the only substantial concentration of appellate expertise was in the Solicitor General’s office.³⁶ Indeed, of the aforementioned 20th century specialists, Davis, Marshall, and Cox were all former Solicitors General.³⁷ In the federal government, the Solicitor General’s office has existed since 1870 to serve as a specialized office to coordinate Supreme Court and other appellate

32. John G. Roberts, Jr., Chief Justice, Supreme Court of the United States, 2008 Dwight D. Opperman Lecture at Drake University Law School (Oct. 2, 2008), in 57 DRAKE L. REV. 1, 5 (2008).

33. *Id.*; Lazarus, *supra* note 1, at 1489.

34. MCGUIRE, *supra* note 21, at 13.

35. Lazarus, *supra* note 1, at 1492.

36. *Id.*

37. *Id.*

matters on behalf of the federal government.³⁸ There are obvious benefits to having this degree of familiarity with the appellate courts and their nuances, such as “becom[ing] completely familiar with the Justices and their precedent, including their latest concerns and the inevitable cross-currents between otherwise seemingly unrelated cases that would be largely invisible to those who focus on just one case at a time.”³⁹ The data illustrate that the Solicitor General’s office has a remarkably good track record of success before the Supreme Court, successfully petitioning for a writ of certiorari about 70 percent of the time, and consistently prevailing on the merits, either as a party or as an amicus curiae, in considerably higher percentages than other parties.⁴⁰ Of course, the comparisons are not perfect because of the unique role of the federal government and the ability of the Solicitor General’s office to exercise discretion in certain cases in deciding whether (and on which side) to participate as an amicus curiae, but the degree of success consistently achieved by the office does tend to support the view that there is considerable value in this method of operation.

It is only natural that other parties would seek to mimic the federal government’s success by retaining their own experienced appellate counsel to handle their own appellate matters, particularly at the Supreme Court but also in the lower federal and state appellate courts. As noted by Chief Justice Roberts, “[i]f one side hires a Supreme Court specialist to present a case, it may cause the client on the other side to think that they ought to consider doing that as well.”⁴¹ Indeed, “[t]his is just a variant on the old adage that one lawyer in town will starve, but two will prosper.”⁴² We suspect that the Chief Justice is correct and that part of the impetus for the development of the specialized private appellate bar is the high regard for the Solicitor General’s approach and the recognition in the

38. REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 11 (1992); Roberts, *supra* note 3, at 77.

39. Lazarus, *supra* note 1, at 1497.

40. *Id.* at 1493–94.

41. Roberts, *supra* note 3, at 77.

42. *Id.*

marketplace that similar expertise may be similarly valuable in the representation of private interests on appeal.⁴³

The question, then, is why law firms—with such a successful model available—did not form dedicated appellate practices before the mid-1980s. Professor Richard Lazarus traces modern big firm appellate practice to Sidley Austin’s establishment of an appellate practice around former Solicitor General Rex Lee.⁴⁴ According to Lazarus, after Lee’s practice proved profitable, firms nationwide responded by engaging in an arms race to recruit former Solicitors General, Deputy Solicitors General, and Supreme Court clerks to build vibrant Supreme Court practices.⁴⁵

But while Lazarus’s “arms race” has some appeal, it is not a full explanation for the trend. For one thing, while Lazarus is correct that Supreme Court and appellate practice groups provide significant cachet for a law firm, such groups are rarely as profitable as other more traditional types of litigation practices, particularly those that generate large fees from time-consuming discovery and maximize opportunities for leveraging the time of large numbers of law firm associates.

More importantly, the timeline simply does not show a law firm “arms race” so much as a gradual process of growth and development. John W. Davis, for instance, argued numerous cases before the Court in his private practice at what would become Davis, Polk & Wardwell in the mid-20th century.⁴⁶ E. Barrett Prettyman ran a well-established appellate practice at Hogan & Hartson for years starting in the 1950s.⁴⁷ Thurgood Marshall, during his twenty-

43. Some circumstantial evidence for this is the more recent scramble by law firms to draw top talent from the Solicitor General’s office into private practice. See Lazarus, *supra* note 1, at 1498–1501.

44. *Id.* at 1498.

45. *Id.* at 1498–1500.

46. In total, Davis argued 140 cases orally before the Supreme Court. WILLIAM H. HARBAUGH, *LAWYER’S LAWYER: THE LIFE OF JOHN W. DAVIS* 531 (1973). Davis argued sixty-seven cases orally before the Court as Solicitor General. *Id.* at 127. This leaves seventy-three cases that he argued while in private practice. At the time of his death, Davis’s 140 cases were surpassed only by Walter Jones, who argued 317 cases, and Daniel Webster, who argued between 185 and 200 cases. *Id.* at 531.

47. Lazarus, *supra* note 1, at 1499.

three year tenure as chief counsel at the NAACP, oversaw a thriving appellate practice at the NAACP Legal Defense and Education Fund.⁴⁸ Even the appellate boutique firms that Lazarus cites are not a new concept: Horvitz & Levy, a California appellate boutique, opened its doors in 1957.⁴⁹

What is new, however, is the widespread establishment of appellate practice groups in large law firms. This phenomenon cannot be attributed to one successful experiment at a single law firm. Rather, a more complete historical timeline shows that a number of major firms contemporaneously developed Supreme Court and appellate practices in the 1980s. The appellate practice group at Gibson, Dunn & Crutcher, for instance, was established by former head of the Office of Legal Counsel at the Department of Justice (and later Solicitor General) Theodore B. Olson in the mid-1980s.⁵⁰ Similarly, Mayer Brown formed its appellate group in 1983 with the return of Stephen M. Shapiro from the Solicitor General's office.⁵¹ Many of these appellate court veterans simultaneously conceived the idea of a "private Solicitor General's office."⁵² This suggests that some external factor made appellate practices appealing and practical.

Our contention is that the external factor that drove all of these pioneers to start private appellate practices at essentially the same time was the changing economics of large-firm law practice in the 1980s. During that period, with a newly competitive market for legal services, law firms scrambled to find ways to distinguish

48. See Ralph S. Spritzer, *Thurgood Marshall: A Dedicated Career*, 26 ARIZ. ST. L.J. 353, 355–56 (1994) ("In all, [during his time at the NAACP,] Marshall would appear before the High Court in thirty-two cases. In twenty-seven of these, his cause prevailed."); see generally JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 93–298 (1998) (describing Marshall's tenure at the NAACP Legal Defense and Education Fund).

49. Horvitz & Levy LLP, About Horvitz & Levy LLP, available at <http://www.horvitzlevy.com/about/> (last visited Feb. 12, 2010).

50. Interview by David R. Chiang with Theodore Olson, Partner, Gibson, Dunn & Crutcher LLP, in Washington, D.C. (June 19, 2009).

51. Jeffrey Cole, *An Interview with Steve Shapiro: The Art of Appellate Advocacy*, THE CIRCUIT RIDER, available at <http://www.mayerbrown.com/publications/article.asp?id=3151> (last visited Feb. 12, 2010).

52. See, e.g., Lazarus, *supra* note 1, at 1497–98 (pointing to Sidley Austin's Rex Lee); Cole, *supra* note 51, at 3 (pointing to Mayer Brown's Stephen Shapiro).

themselves from their peers. One way in which they did this was by establishing appellate practice groups.

Prior to about 1960, relatively little public information about law firms was readily available.⁵³ Corporate counsel typically relied primarily on a long-standing relationship with a single outside law firm.⁵⁴ But beginning around 1960, demand for legal services began to grow rapidly.⁵⁵ The number of large corporate law firms exploded and the legal industry gradually became more competitive.⁵⁶ Corporate counsel began to abandon their long-standing relations with a single firm and shop for the best value in legal services.⁵⁷ This competitiveness reached new heights after the Supreme Court struck down the bar on law firm advertising in 1977.⁵⁸ Publications like *The American Lawyer* and the *National Law Journal* began ranking law firms.⁵⁹ For the first time, law firms knew what their peer firms were charging, who their clients were, what their partners

53. MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 20 (1991). The big-firm model traces its roots as far back as the turn of the 20th century. In New York City, for example, beginning in about 1910, Paul D. Cravath (of the eponymous Cravath, Swaine & Moore) began hiring talented young lawyers directly out of law school, training them for a period of years, and then either making them partners or pushing them out to begin their own practices. *Id.* at 9–10. Other large modern law firms trace their roots back as far as the 19th century. In these earlier years, these law firms relied on a steady stream of business, usually from a corporate client. *Id.* at 11. Ultimately, this led to an intimate relationship between law firms and corporate clients, and a shift from pure litigation to an advisory role. *Id.* at 32.

54. *Id.* at 34.

55. Bruck & Canter, *supra* note 29, at 2093.

56. *See id.* at 2094–95 (noting law firms' responses to the increased demand for legal services, including implementation of an hourly billing system and increased transparency within elite law firms).

57. GALANTER & PALAY, *supra* note 53, at 50.

58. *Id.* (citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

59. *See* Bruck & Canter, *supra* note 29, at 2093 (“The magazines reported on subjects previously considered taboo, including the size, starting salaries, total revenue, and client lists of elite firms. The publications ranked firms on a variety of metrics, providing an endless source of bragging rights or shaming tools for status-conscious attorneys. *American Lawyer*'s ‘profits per partner’ calculations soon became one of the legal profession's most salient measurements of a firm's success.”).

were making, and how they stood relative to one another.⁶⁰ Faced with such heightened competition, law firms in the 1980s sought new ways to distinguish themselves and compete for clients and legal business.⁶¹

Starting an appellate practice—particularly one centered on well-known Supreme Court advocates—was one way firms could distinguish themselves. The prestige associated with Supreme Court litigation offered a significant marketing opportunity for firms.⁶² Moreover, firms could often bill top dollar to clients for the high-caliber and big-name legal expertise required for Supreme Court practice. Finally, appellate practice attracted the finest legal talent in what—at times—was a seller’s market for top graduates of the nation’s elite law schools.⁶³

The change in law firm economics thus provides one explanation of the rise of the appellate litigator. Other reasons lie not on the supply side, but on the demand side of the market for legal services.

B. Increasing Sophistication Among Clients About the Need for High-Quality Appellate Representation

The rise of the private appellate bar also appears to be tied to an increasing sophistication among clients about the unique value provided by lawyers in their particular specialties. It has been noted that “[u]ntil the early to mid-1980s, most of the nation’s leading corporations did not possess their own significant in-house corporate counsel, but instead relied on outside counsel supplied largely by one major law firm.”⁶⁴ Because of various factors, including, perhaps, rising legal costs, large companies began to augment their own in-house legal counsel— “[t]he American Bar Association reported in the early 1980s that ‘80 percent of U.S. corporations had doubled,

60. *Id.*

61. *Id.*

62. Lazarus, *supra* note 1, at 1498.

63. See Bruck & Canter, *supra* note 29, at 2089 (discussing the economic environment for legal talent in terms of supply and demand).

64. Lazarus, *supra* note 1, at 1504.

tripled, or even quadrupled the size of their in-house legal staffs' since the early 1970s."⁶⁵

As corporate in-house counsel staffs increased in size and sophistication, they presumably began to handle matters internally that did not require a significant amount of specialized expertise. Concurrent with assuming greater responsibility for the routine legal matters, however, corporate in-house counsel no doubt also recognized that there were certain areas of the law, such as appellate litigation (particularly in complex cases or those of special importance to the company), that were most appropriately handled by experienced advocates in those fields.⁶⁶ Rather than rely on a single major law firm to handle the full panoply of legal issues, in-house legal staff increasingly began to allocate legal work to particular lawyers and law firms based on their perceived expertise in the specific area at issue.⁶⁷ Perhaps in light of the federal government's own successful reliance on appellate litigators for over a century, these companies—with their more sophisticated in-house counsel—came to realize that having specialists with skill sets and experience tailored to successful appellate litigation was a smart business decision that would benefit the company (and also serve to minimize the potential for *post hoc* finger-pointing in the event a significant appeal was handled unsuccessfully by inexperienced counsel who had been selected by an in-house lawyer).

And it is not just corporate legal departments that have recognized an increasing need for specialized appellate representation. As appellate representation has evolved as a specialty practice area, even general litigators find that it is good practice to enlist experienced appellate specialists, or at the very least experienced appellate co-counsel, when a case is appealed (if not before).⁶⁸ There is an increasingly widespread recognition on the

65. *Id.* (citing Robert Lamb, *New Twists in Corporate Legal Strategy*, J. BUS. STRATEGY, Winter 1982, at 78).

66. Lazarus, *supra* note 1, at 1505.

67. GALANTER & PALAY, *supra* note 53, at 50.

68. *See, e.g.*, Roberta G. Mandel, *Understanding the Art of Appellate Advocacy: Why Trial Counsel Should Engage Experienced Appellate Counsel as a Matter of Professional Responsibility and Legal Strategy*, 81 FLA. B.J. 45, 45 (2007) (explaining the special skills that experienced appellate counsel bring to the table); David Cardone, *The Art of Cathedral Building: Why Appellate Advocacy is*

bar, including among trial lawyers, that the skills required to be an effective appellate advocate are meaningfully different from those required for other types of litigation.⁶⁹

C. *The Increasing Stakes of Civil Litigation*

Another potential contributing factor in the development of a private appellate bar has likely been the increase in magnitude and importance of civil litigation generally. The last few decades have been marked by a significant increase in large damage awards issued by juries and state and federal judges, including large awards of punitive damages, and a concomitant increase in the potential downside risk posed by many types of litigation. Faced with the prospect of having to pay huge judgments, clients may have been prompted to retain appellate specialists in hopes of reducing the judgment amounts or having them set aside altogether, as well as influencing the future development of the law in ways consistent with their interests. In other words, 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.

These changes in the tort system are not mere speculation; the increased burden that has been placed on the business community is well-documented. It has been noted that “[i]n the 1960s and 1970s, the tort system experienced a dramatic increase in class action litigation over widespread instances of social injury, as distinguished from individual injury.”⁷⁰ Indeed, “creative lawyers crafted tort lawsuits to bring to trial those who were allegedly responsible, and to force billions of dollars of payments to millions of victims.”⁷¹ Nor has this increase in liability exposure been limited to certain

Different, PA. LAWYER, Mar.–Apr. 2006, at 24, 29 (“[T]here is indeed an advantage to engaging a seasoned appellate attorney.”).

69. See Cardone, *supra* note 68, at 29–30 (discussing the distinct writing and oratorical skills required in appellate advocacy); Jennifer S. Carroll, *Appellate Specialization and the Art of Appellate Advocacy*, 74 FLA. B.J. 107, 107 (2000); Mandel, *supra* note 68, at 45.

70. John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1037 (2005).

71. *Id.* at 1038.

industries or types of claims; rather, it appears to be fairly widespread. It has encompassed industry-specific claims such as litigation involving asbestos and tobacco but also broader categories of litigation such as product liability, medical malpractice, securities fraud, employment discrimination, and consumer class actions.

Under several different metrics, the empirical data also suggest that liability exposure has increased over the last few decades. According to one estimate, the civil liability system consumed 0.6% of the U.S. Gross Domestic Product (GDP) in 1950, and this amount grew to 2% of GDP in 2002.⁷² Part of this increase is almost certainly attributable to the increase in damage awards for non-economic injuries. For example, the average award for pain and suffering experienced before death increased—adjusted for inflation—from \$48,000 between 1960 and 1969 to \$147,000 between 1980 and 1987.⁷³ Overall, jury damage awards appear to have been on the upswing in the late 1980s and early 1990s; a study by the RAND Institute of Civil Justice of different counties during this time period found that the median and mean jury awards increased in thirteen of the fifteen counties studied.⁷⁴ When also taking into account the prospect of unpredictable and potentially massive punitive damage awards, it is reasonable to infer that the regime of civil liability that has evolved over the last few decades has played a significant role in the increased demand for private appellate specialists.

A logical outgrowth of this substantial increase in damage awards would be an uptick in efforts by defendants to challenge adverse jury verdicts at the post-trial and appellate stages, and the evidence suggests that large damage awards, including punitive damage awards, are frequently subject to modification upon further

72. Anthony J. Sebok, *Translating the Immeasurable: Thinking About Pain and Suffering Comparatively*, 55 DEPAUL L. REV. 379, 381 (2006) (citing Ruth Gastel, *The Liability System*, ILL. INS. ISSUES UPDATE, Apr. 2001).

73. *Id.* at 385 (citing David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 345 (1989)).

74. ERIK MOLLER, RAND INST. FOR CIVIL JUSTICE, TRENDS IN CIVIL JURY VERDICTS SINCE 1985 48 tbl.A.6 (1996).

judicial review.⁷⁵ Moreover, given the function of this review and the large amounts at stake, it stands to reason that clients would have ample incentive to retain skilled and experienced appellate litigators to handle these appeals. As for the importance of the review, “[a] study of verdicts of \$1 million and above returned in 1984 and 1985 found that seventy-four percent of them were reduced and only forty-three percent of the money originally awarded was paid to plaintiffs.”⁷⁶ Similarly, a study by the General Accounting Office that reviewed product liability cases in five states between 1983 and 1985 found that the damage awards were reduced in fifty percent of the cases.⁷⁷ These statistics lend support to the notion that appeals following the initial award of damages in civil liability cases have increasing importance.

D. *A Changing Supreme Court*

A final factor that may be driving the increased demand for big firm appellate litigators is the perception among some observers that (at least until recently) the Supreme Court has become a relatively receptive forum for the claims of business interests.⁷⁸ The Supreme Court’s composition is much changed from the days of the Warren Court, when, as one writer put it, “progressive and consumer groups petitioning the court could count on favorable majority opinions written by justices who viewed big business with skepticism.”⁷⁹ In recent Terms the Roberts Court has sometimes been described as the most business-friendly in decades, although

75. Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1115 (1996) (citing Ivy E. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 JUST. SYS. J. 349, 353 (1986)).

76. *Id.*

77. Galanter, *supra* note 75, at 1115 (citing U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HRD-89-99, *PRODUCT LIABILITY: VERDICTS AND CASE RESOLUTION IN FIVE STATES* 45 tbl.3.5 (1989)).

78. See Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES, Mar. 16, 2008, § MM, at 38 (“The Supreme Court term that ended last June [October Term 2006] was, by all measures, exceptionally good for American business.”).

79. *Id.*

there are also indications that this trend (if indeed it was a trend at all) may be shifting.⁸⁰

There are several examples that can be cited in support of the claim that business litigants have seen increased success before the Court in some recent Terms. The United States Chamber of Commerce, the most visible business-advocacy and litigation organization, was on the winning side in thirteen out of fifteen cases in which it filed amicus briefs in October Term 2007.⁸¹ Business interests have prevailed in other ways, including, among other things, making progress in their decades-long battle to restrain excessive punitive damage awards.⁸² All told, this circumstantial evidence may lend credence to the notion that the business community believes that the Supreme Court has become, on balance, more receptive to their arguments.

To the extent that such a perception (accurate or not) exists, it is unsurprising that corporate clients would increasingly demand high quality appellate representation. Skilled Supreme Court and appellate advocates can win victories for corporate clients at the appellate level that will have favorable, lasting impacts on both the client's business and the business community as a whole. Thus, retaining high quality appellate advocates is likely to be a prudent strategy for businesses.

80. Compare, e.g., *id.*; Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943, 943 (2009) ("It did not take long for the Roberts Court to earn its reputation as a 'pro-business' court."); and Jeffrey Rosen, Professor of Law, George Washington University Law School, Keynote Address at the Santa Clara Law Review Symposium: Big Business and the Roberts Court (Jan. 23, 2009), in 49 SANTA CLARA L. REV. 929, 929 (2009) (speaking about the "generally pro-business orientation" of the Roberts Court), with Robin S. Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 SANTA CLARA L. REV. 997, 997 (2009) (describing and analyzing the "myth" that the Roberts Court is biased in favor of business interests and arguing that the recent business victories are instead a result of the Court's and business community's preference for uniformity and predictability in laws and regulations), and Kenneth W. Starr, *The Roberts Court Gets Down to Business: The Business Cases*, 34 PEPP. L. REV. 599, 602 (2007) ("The first theme is that the Roberts Court . . . cannot be characterized as pro-business.").

81. Rosen, *supra* note 78, at 38.

82. *Id.*

There is also a broader sense in which the Warren Court aided the rise of the appellate litigator. The major civil rights victories of the 1950s and 1960s left many litigants with the belief that the Supreme Court was a forum for policy change.⁸³ These victories almost certainly inspired Lewis Powell's famous 1971 memorandum to the Chamber of Commerce, in which Powell suggests an aggressive litigation strategy to defend the American economic system.⁸⁴ That memorandum has had significant influence on the Chamber's litigation strategy.⁸⁵

Accordingly, it seems reasonable to postulate that the emergence and growth of the private appellate bar that has occurred over the past several decades is at least in part the result of the factors discussed above: the remarkable success of the Solicitor General's Office, which serves as a paradigm for private parties to emulate; the increased sophistication of corporate in-house counsel and large law firms and their recognition of the value provided by specialized appellate counsel; the increasing stakes of civil litigation, including at the post-trial and appellate levels; and the perception on the part of some observers that the Supreme Court has become more receptive to appellate challenges advanced by business interests.

IV. SKILLS OF AN EFFECTIVE APPELLATE LAWYER

The market forces identified above would not be sufficient on their own to explain the rise of appellate litigation as a specialized

83. Linda C. McClain & James E. Fleming, Book Review, *Constitutionalism, Judicial Review, and Progressive Change*, 84 TEX. L. REV. 433, 445 (2005) (reviewing RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004)).

84. Rosen, *supra* note 78, at 936 (citing Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce (Aug. 23, 1971), *available at* http://www.reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html).

85. *See Lazarus, supra* note 1, at 1505–06 (stating that “Powell . . . wrote a memorandum to the Chamber of Commerce that set forth the very blueprint for Supreme Court litigation that the Chamber has since followed.”); Rosen, *supra* note 78, at 936 (discussing how the memorandum has caused the Chamber to “file [] briefs on behalf of business interests.”).

practice in the absence of meaningful and particularized skills possessed by appellate specialists that increase the prospects for success on appeal. Specialization in appellate litigation practice indeed offers such unique value because, as many observers have concluded, the skills required to be a good appellate litigator differ significantly from those of a good trial lawyer.⁸⁶ In developing and presenting a case to the trial court, the advocate must be adept at creating the best possible factual record, a goal that requires skill and experience in effectively managing document discovery, issuing and responding to written interrogatories, conducting and defending against depositions, questioning and cross-examining witnesses, and formulating and presenting⁸⁷ attractive factual themes that will persuade the finder of fact.⁸⁷ In contrast, the most important aspects of the appellate lawyer's role involve the exercises of legal judgment, research, analysis, and writing that go into crafting an effective appellate brief; the appellate lawyer takes the factual record as it was created in the trial court and must weed through it to glean the factual predicates most favorable to his or her legal arguments, subject to the constraints that may be imposed by the applicable standard of review.⁸⁸ In a trial, a jury of laypersons is often the final decision-maker on disputed factual issues. As such, the trial lawyer's manner, style, arguments, and strategies must be aimed at developing and maintaining credibility and good rapport with, and ultimately persuading, that lay audience.⁸⁹ The dynamic is far different for an advocate before an appellate court, who typically presents oral argument before a panel of highly-educated and

86. RUGGERO J. ALDISERT, NAT'L INST. FOR TRIAL ADVOC., WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT § 1.1, at 3 (1996); D. Franklin Arey, III, *Competent Appellate Advocacy and Continuing Legal Education: Fitting the Means to the End*, 2 J. APP. PRAC. & PROCESS 27, 29 (2000) (citing Laurence H. Silberman, *Plain Talk on Appellate Advocacy*, 20 LITIG. 3 (1994)).

87. See PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 3–4 (3d ed. 1997) (describing the skills necessary to be an effective trial advocate).

88. See ALDISERT, *supra* note 86, § 1.1, at 5–6 (describing the difference between skills needed for trial and appellate advocacy).

89. *Id.* at 4; THOMAS A. MAUET, TRIALS: STRATEGY, SKILLS, AND THE NEW POWER OF PERSUASION 1 (2005) (“Jury research has convincingly demonstrated that most jurors do not think like most lawyers; therefore, trial lawyers cannot become persuasive advocates until they understand and accept how jurors think and make decisions.”).

experienced judges who have keen interest in probing the intricacies of the law, and who expect to receive polished and thoroughly researched and analyzed briefs that carefully set forth all pertinent authorities and arguments regarding the issue(s) on appeal.⁹⁰ Unlike many trial court litigators, moreover, the appellate lawyer typically spends very little time in direct contact with the judges handling the case, who will instead derive most of their impression of the lawyer and his or her arguments and credibility from the written briefs.⁹¹ And while many appellate judges have heavy workloads, trial judges tend to have less time and resources to devote to analyzing and resolving difficult legal issues than do their appellate brethren, a basic reality that a wise trial lawyer must keep in mind.⁹² These and other pertinent differences between appellate and trial court litigation explain why each is a specialized field requiring markedly different competencies.

One of the most important functions that a skilled appellate litigator serves is to provide an independent perspective on the relative merits of the case and the potential issues for appeal. By the time a case has reached the appellate level, the client and/or the trial counsel will often have developed strong views on the merits and justness of their cause and the validity or invalidity of the trial court's and/or the jury's decisions, and the "heat of battle" at trial, combined with their intricate knowledge of the details of the case (which will not always be reflected in the record), may sometimes cause them to lose a measure of objectivity or develop blind spots with respect to flaws and weaknesses in particular arguments or

90. *See, e.g.*, MICHAEL E. TIGAR & JANE B. TIGAR, *FEDERAL APPEALS: JURISDICTION AND PRACTICE* §§ 1.04–1.05, at 11–17 (3d ed. 1999) (describing how appellate judges make decisions).

91. *See* BRADLEY G. CLARY, SHARON REICH PAULSEN & MICHAEL J. VANSELOW, *ADVOCACY ON APPEAL* 30 (2d ed. 2004) (“[In an appeal,] the brief is not only your first, but often your last, opportunity to persuade the court.”).

92. *See* TIGAR & TIGAR, *supra* note 90, at 8 (“[C]ounting motions for stay, emergency applications, and other procedural rulings in addition to decisions on entire cases, a federal appellate judge makes five or six appellate decisions per day.”); *See* ALDISERT, *supra* note 86, § 1.1, at 5 (“The trial advocate is not limited to reasoned argument and may speak of many things, including irrelevant, somewhat irrational or shamelessly emotional matters [B]ut don’t carry these ploys upstairs to the appellate court.”).

positions.⁹³ That understandable reality is part of the reason why the Department of Justice requires appeals brought by the federal government to be reviewed and approved by the Solicitor General's office before they can proceed, in order to benefit from the dispassionate, objective perspective and analysis of appellate specialists with no personal investment in the case.⁹⁴ That process can be exhaustive and time-consuming, but in the end, both the Executive Branch and the Judicial Branch benefit from this "second look," which helps winnow out issues and cases that are not worthy of appeal.⁹⁵ Similarly, private appellate litigators can provide an objective analysis of the advisability of proceeding with an appeal—which likely will include an assessment of the prospects for success and the duration and expense of bringing the appeal. An effective appellate advocate is one whose judgment, expertise, and experience permit him or her to provide wise, accurate advice to clients regarding these crucial decisions in the life of an appeal.

In addition to assessing the merits of an appeal, the appellate litigator also utilizes a unique skill-set in actually litigating the appeal. The appellate litigator must exercise judgment in determining which issues to raise on appeal based on a careful review of the trial court record and thorough research and analysis of the relevant precedents.⁹⁶ It may very well be that issues that were the subject of extensive scrutiny at the trial level do not present the best opportunity for success at the appellate level, and arguments that were raised and thus preserved for appeal, but were not the primary focus of the litigation below, may be more compelling on

93. See, e.g., TIGAR & TIGAR, *supra* note 90, § 9.08, at 445 ("If the lawyers discussing the appeal are those who tried the case, it will be more difficult to gain the needed distance from the trial process and evaluate the merits and importance of issues on appeal."); Cardone, *supra* note 68, at 29 ("Distance from the case is helpful because it provides the necessary perspective to identify the strongest issues for appeal.").

94. See SALOKAR, *supra* note 38, at 110–14 (describing the case screening process used by the Office of the Solicitor General); Lazarus, *supra* note 1, at 1495 (discussing the Solicitor General's oversight role).

95. Lazarus, *supra* note 1, at 1495–96.

96. See, e.g., MYRON MOSKOVITZ, WINNING AN APPEAL 7–10 (1985) (describing the process of selecting issues for appeal).

appeal.⁹⁷ Appellate litigators do not have the luxury of treating all arguments equally and must give some short shrift or toss them aside entirely in order to focus their own and the appellate court's attention on the arguments that stand the best chance of prevailing.⁹⁸ Those judgments in turn are often dependent on the appellate litigator's experience with and understanding of the role played by appellate review, including but not limited to the applicable standards of review.

After determining which arguments to raise on appeal, the appellate litigator must artfully craft the brief in order to frame and present the legal arguments in their best light.⁹⁹ In contrast to the trial court level, where hearings and oral argument before the judge (and jury if applicable) may have relatively more importance,¹⁰⁰ the very heart of successful appellate advocacy is superb brief writing.¹⁰¹ The brief itself requires a delicate balance. At all times, the appellate litigator must maintain credibility with the court by not mischaracterizing the record in the case or relevant precedent, while

97. See *id.* at 8 (“Quite often, an issue to raise on appeal will stand out clearly because trial counsel argued the issue extensively. But just because an issue was not argued extensively at trial does not necessarily mean it should be ignored on appeal.”).

98. TIGAR & TIGAR, *supra* note 90, at 444 (“Lawyers are afraid of cutting down the number of issues presented on an appeal. They are afraid of ‘missing something.’ This is a valid fear, but lawyers are trained—and paid—to make judgments An advocate does not enhance the chances of winning by throwing in marginal issues.”).

99. See CLARY ET AL., *supra* note 91, at 31 (“Because the central goal of the brief is to persuade, you should try to advance this goal throughout your brief and not just in your argument section.”); TIGAR & TIGAR, *supra* note 90, at 422 (noting the importance of briefs on appeal).

100. MOSKOVITZ, *supra* note 96, at 17 (“In trial court practice, it is common for a lawyer to submit a rather sketchy memorandum of law on a motion, expecting to make his most powerful arguments orally at the hearing on the motion.”).

101. CLARY ET AL., *supra* note 91, at 290 (“The most important part of an appeal is the appellate brief.”); TIGAR & TIGAR, *supra* note 90, at 422 (“The appellate brief is the most important element of success on appeal.”); MOSKOVITZ, *supra* note 96, at 17 (“[T]he brief is much more important than oral argument in affecting the outcome of the case.”).

at the same time persuasively arguing the client's position.¹⁰² Unlike the trial level—where the court may gain extensive familiarity with a case over time through a series of motions, hearings, testimony, and exhibits—at the appellate level, the brief represents a unique opportunity for the appellate litigator to frame the case.¹⁰³ In so doing, the appellate litigator must be mindful that an important part of the brief's function is to inform the appellate court of the nature of the case, given the court's presumptive unfamiliarity with it.¹⁰⁴ Briefs that are well-researched and informative, yet persuasive in their treatment of the issues, lay an important foundation that may ultimately lead to a successful outcome on appeal.

Even though effective brief writing is of the utmost importance for an appellate litigator, oral argument also serves a key purpose.¹⁰⁵ As noted above, oral arguments at the appellate level may differ substantially from those at the trial level, as they usually involve a panel of judges, many of whom may be prone to ask any number of potentially wide-ranging questions about the case and the implications of the position being advanced by the advocate.¹⁰⁶ When preparing for oral argument, appellate litigators must try to anticipate the seemingly endless possibilities of questions that may

102. CLARY ET AL., *supra* note 91, at 31 (“Another goal of the brief is to maximize your personal credibility as counsel.”); ROBERT J. MARTINEAU, *MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS* § 11.18, at 177 (1983) (“[Effective briefing] can be achieved only if the judge has absolute confidence in the accuracy of every statement in the brief.”).

103. TIGAR & TIGAR, *supra* note 90, at 422 (“[The appellate brief] organizes the appellate litigation and the record.”).

104. *Id.*; ALDISERT, *supra* note 86, § 3.1, at 28 (“[T]he brief has been written by a specialist in a particular field of law . . . for presentation before a group of judicial generalists.”).

105. The truism that oral argument is largely irrelevant is clearly wrong. Oral argument is an essential part of an appeal. *See, e.g.*, Charles D. Breitel, *A Summing Up*, in *COUNSEL ON APPEAL: LECTURES ON APPELLATE ADVOCACY* 193, 197 (Arthur A. Charpentier ed., 1968) (“The second common element that appeared in each of the lectures, with a unanimity that was remarkable, was the essentiality of oral argument [J]ust about every man said, ‘I can’t understand a person offering in to submit in a case; I would always want to argue.’”).

106. *See* ALDISERT, *supra* note 86, § 3.2, at 29–30 (describing the objectives of judges at oral argument).

arise.¹⁰⁷ But in order to be ready for the possibility that few—if any—questions will be asked by the panel, the appellate litigator must also have a prepared argument ready to deliver.¹⁰⁸ Moreover, the appellate litigator must have a firm mastery of the record and the relevant precedents,¹⁰⁹ as well as an appreciation for the weaknesses in his or her case that may be a focus of the panel’s inquiries.¹¹⁰ The appellate litigator also should have rehearsed in advance the most effective methods of responding to questions about those weaknesses in a manner that advances the client’s position.¹¹¹ An effective appellate advocate will not merely be ready for the arguments made by the opposing side but will also endeavor to predict and prepare for any other potential lines of inquiry and hypotheticals that the court may raise.¹¹²

It is not uncommon for the appellate court’s line of questioning to expand beyond the case before it, as part of a larger effort to reconcile the case with prior precedents and to clarify or explore the implications for future cases yet to be litigated.¹¹³ The appellate litigator in this respect must answer directly all of the questions posed by the panel, while maintaining a logically coherent position that weaves existing precedent and potential future rulings together in a consistent and palatable pattern.¹¹⁴ While judges may have a preliminary view of the merits of the case before oral argument, they often have unanswered questions that they want addressed,¹¹⁵ and it is the role of appellate litigators to provide

107. *See id.* § 15.4.5, at 315–16 (describing how counsel should prepare for every anticipatable question); CLARY ET AL., *supra* note 91, at 111 (“[A]nticipating and outlining responses to possible questions and probable opposing arguments may be the most important part of your pre-argument preparation.”).

108. CLARY ET AL., *supra* note 91, at 108–10 (describing the process of writing a prepared argument).

109. *Id.* at 100–01.

110. *Id.* at 111 (“Think about and catalogue [*sic*] possible weaknesses in your argument and then outline responses to each.”).

111. *Id.* at 113–14; TIGAR & TIGAR, *supra* note 90, § 10.08, at 509–10 (describing methods of practicing oral arguments).

112. ALDISERT, *supra* note 86, § 15.4.3, at 312–14.

113. *Id.* § 3.2, at 29–30.

114. *Id.* § 16.4.1, at 328 (“Answer the question directly. Do not evade.”).

115. *Id.* § 3.2, at 29.

truthful answers in a manner that demonstrates the correctness of their client's cause.¹¹⁶ Doing so in an effective and straightforward manner may be the deciding factor in how the appellate court rules.¹¹⁷

As the foregoing discussion demonstrates, the skills associated with being an effective appellate advocate are in some respects unique, and many of them can be gained, or honed, only through extensive appellate experience.¹¹⁸ To be sure, there is an obvious commonality to brief writing and oral advocacy that is shared by nearly all litigators, but to be a truly effective appellate advocate, a lawyer must exercise and sharpen those skills in the context of federal and state appeals. A lawyer who possesses such experience and skills unquestionably brings added value to a client's appellate matters.

V. CONCLUSION

Recent decades have seen the emergence and growth of a specialized private appellate bar. In light of the continuing influence of the factors that have contributed to that phenomenon—including the success of the ultimate appellate specialists (the Solicitor General's Office), the sophistication of in-house counsel and law firms, the increased stakes of modern civil litigation, and the increased judicial receptiveness to challenges on appeal—together with the unique skill sets that appellate specialists bring to the table, there is every reason to believe that this trend will continue.

116. See CLARY ET AL., *supra* note 91, at 97–99.

117. Senior Judge Ruggero Aldisert, a veteran of the federal appellate bench, puts it thus: “Cases are not won at oral argument; they are only lost.” ALDISERT, *supra* note 86, § 15.1, at 293.

118. Frederick Bernays Wiener's landmark appellate advocacy treatise has this remark about appellate advocacy: “[Appellate advocacy] can . . . be taught—and learned; learned, too, more quickly and somewhat less painfully than simply through one's own mistakes. For in law, as in other fields of human endeavor, it is only the fool who needs to learn by experience: the wise man learns, and profits, from the experience of others.” FREDERICK BERNAYS WIENER, *EFFECTIVE APPELLATE ADVOCACY* § 3, at 4 (Christopher T. Lutz & William Pannill eds., rev. ed. 2004).