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Preface

Senator Sam Ervin told about a young lawyer who attended a revival meeting and was unexpectedly called on to lead a prayer. His instinctive prayer on the spur of the moment was, "Stir up much strife amongst thy people, Lord, lest thy servant perish." This book is about the strife carried to appellate courts. While there are several general works available to guide practitioners through the appellate process, the premise of this book is that fundamental changes are taking place in appellate courts. These changes have been discussed in journals and bar meetings, but attention is usually focused on only one issue at a time, such as crowded appellate dockets or restrictions on oral argument. This book is intended to be a comprehensive restatement of appellate procedure, skills, and strategies in a modern context. Since the first edition was completed in 1984, the changes in appellate practice and procedure have accelerated. While many younger lawyers did not experience the relatively leisurely appellate process which existed until the 1970's in most parts of the country, they do need to be disabused of the notion that modern appellate practice resembles their recent law school moot court experience.

This book covers civil and criminal appeals in both state and federal courts. The Federal Rules of Appellate Procedure are the starting point for much of the discussion. Most of the principles in the Federal Rules are reflected in the state appellate systems. Where they differ, the major difference between state and federal appellate systems are outlined. Practice

before the various state supreme courts is described in broader terms. No appellate practice book can supplant the need to closely follow the appellate courts in your state. Continuing legal education and practice materials generated by state bar associations furnish the detail which is beyond the scope of any nationwide publication. However, this work prepares you to anticipate changes in appellate procedure and to adapt easily to appellate work in other jurisdictions.

This book treats appeals as just another type of litigation, rather than a distinct, mysterious discipline. It raises strategic decisions to be made at each step of the appellate process. Some suggestions will seem idiosyncratic or may not be permitted in your jurisdiction; it is impossible to declare that there is only one right way to approach a problem of procedure or strategy. However, a full exploration of the choices available to you and your client will furnish a more reliable basis for making a decision. Even reexamining old practices may lead, not to discarding them, but to a more confident reliance on them.

While appellate practice is often thought of as a rarefied, aloof environment, it continuously faces serious ethical questions. This book discusses common ethical problems in appellate practice under both the Model Rules of Professional Conduct and the Code of Professional Responsibility.

A pro se litigant using this book must be especially careful to understand the context of each step of the appellate process. While appellate courts are generally helpful to pro se litigants, a non-lawyer is much more likely to make mistakes fatal to an appeal. Pro se litigants need advice from someone familiar with appellate courts, in addition to this book and the primary sources of appellate procedure.

The experienced appellate attorney who will be less inclined to read the introductory material in Chapter 1 may have the greatest need to do so. The expectations of modern appellate judges are rarely set forth in opinions or discussed during oral argument of a case. Satisfying those expectations and complying with the increasingly complex procedural requirements of appeal will increase the change of winning on appeal, as well as making your practice in the appellate courts more pleasant.

While the book follows a roughly chronological path for appeals, it is not written in a linear fashion. There are numerous places where quick reference to another section will help explain the topic. The format lends itself to browsing.

This book does not address the different procedures and powers of specialized courts with appellate powers, such as the Tax Court, Courts of Military Justice, the Court of Veteran's Appeals, or the Temporary Emergency Court of Appeals. The same appellate skills and strategies translate directly into an effective practice before them. However, a lawyer new to one of those courts should carefully study its rules, rather than assume similarity with other appellate systems.

I wish to thank Dean Ronald F. Phillips of the Pepperdine University School of Law for his continuing support and encouragement. Nor would this Second Edition have been possible without the help of my crack research assistant, Liza Karsai.

I hope that your experience in the appellate courts will be exciting and challenging. Good luck!

Richardson R. Lynn
Malibu, California
July, 1992

Acknowledgments

I would like to thank Pepperdine University School of Law and Dean Ronald F. Phillips for the encouragement and help I received with this project. The example of civility and kindness set by my Nashville law partner, Clyde Paul Holland, is intended to be reflected in this book. The confidence that Dale Quillen and Price Nimmo had in my skills as a clerk and young lawyer led to the useful, early baptism by fire in state and federal appellate courts. Professor Harold G. Maier of Vanderbilt University School of Law deserves thanks for much good advice, including this rule for appellate advocates: "Take no prisoners."

R.R.L.

Contents

Chapter I

An Introduction to Appellate Litigation

§ 1.1 The Changing Nature of Appellate Litigation

A gentleman who was rather prominent in his community attained his ninety-fifth birthday anniversary. On that day the newspaper reporters came around to interview him. And one of them asked how old he was. He said, "This is my ninety-fifth birthday anniversary."

And the reporter said, "Well, you have lived a long, long time and have seen many changes in your life."

And he said, "Yes, and I was against every one of them."[1]

Attorneys who have handled appeals continuously over the last 20 years may not be fully aware of the gradual changes in appellate practice during that time. But a lawyer who, like Rip Van Winkle, suddenly appeared today would notice dramatic differences in the way appeals are briefed, argued, and decided. Appellate judges and some practitioners are frequently annoyed and

frustrated by attorneys still practicing who have slept through these changes. Recent law school graduates may have been exposed to a more realistic view of appellate procedure because of a minor trend toward reliance in moot programs on real trial records instead of purely hypothetical problems.[2] In addition, law school clinical programs are increasingly involved in the preparation and argument of appeals.

The atmosphere in which appellate courts operate has changed. The public's frequently cynical view of the legal process has focused increasingly on the disposition of cases at the appellate level. With regard to criminal appeals where "criminals are set loose because of technicalities," appellate judges may be more cautious about deciding issues unnecessarily. Courts cannot be unaware, when deciding explosive social issues, of legislative efforts to divest them of jurisdiction over certain kinds of cases, such as busing or school prayer.[3] This use of congressional power to restrain the jurisdiction of the federal courts over certain subject areas, and the practical consequences of doing so,[4] is currently the subject of a major constitutional debate.

If the attorneys overlook a requirement having to do with filing the record or submitting the brief, the court may delay decision of a difficult issue. Cases may be remanded to trial courts on procedural or evidentiary grounds, rather than being decided by directly confronting the high-profile issue in the case. The lesson for practitioners is that, depending on which side of the case you represent, you should raise or avoid an issue that gives the appellate court such an option.

This is not to say that the judges are acting improperly. Indeed, the appellate courts, especially at the federal level, have often been the "thin black line between order and chaos."[5] The courage of the appellate courts has been most prominent in the civil rights field.[6] Nevertheless, the appellate process has arguably grown more conservative over the last 10 to 15 years. Even though standards of review, filing schedules, and even decisional techniques appear to be immutable, society's changing view of the proper role of appellate courts has a subtle, but powerful, influence on appellate outcomes. A lawyer who wins or loses on what was considered to be a subsidiary issue in the case, rather than the one on which both sides focused, may have felt that influence. A case decided on grounds that were given little space in the

briefs and no attention in oral argument may be the product of this more cautious environment.

Another change in appellate practice is the emphasis on communication skills. Appellate judges are leading the movement toward the use of simple, clear English in legal writing. While the principles of this movement are not yet evident in all appellate opinions, judges expect an effective use of language from lawyers. The plain English emphasis in fields such as contract and insurance law is also getting attention in the literature of appellate advocacy.[7] Any use of brief banks or other form briefs should be carefully reviewed to make sure that jargon and imprecision are not repeated.

No law requires that a well-written brief will win or that, if both briefs are clear and direct, the best one will virtually be adopted for the opinion. However, the advantages of clearly stating your position, while skillfully narrowing the argument and selectively using supporting authorities, are compelling. Although the effect of a well-written brief may be intangible, judges appreciate good writing; it makes their job easier and more enjoyable. Opponents are less likely to garble your position, either mistakenly or intentionally, and obscure the issue. The opinion writer is more likely to rely on your brief and adopt, perhaps subconsciously, some phrase or attitude that will improve your chances on retrial or enlarge your remedy.

Clear, concise oral argument is the other communication skill which is becoming more important in an era of crowded appellate dockets and restricted time limits for oral presentation.[8] The argument in a modern appeal is likely to be a 15-minute question-and-answer period, rather than an hour of uninterrupted oratory. In the California Court of Appeals in Los Angeles, one or two minute arguments are the norm. If a lawyer asks for fifteen minutes, the judge looks at him or her as if to say, "Who do you think you are, Daniel Webster?" Preparation for oral argument and the precise statement of facts and legal issues is critical in such a pressure-cooker situation. The influence on the court of a well-written brief and clear, concise oral argument can make a victory more complete and a defeat more bearable.

The emphasis on communication skills will increase if appellate courtrooms are opened to cameras and public audio taping. There is a clear trend in the states to fully open appellate argument to the media. Twelve

states allow cameras in the appellate courts on at least an experimental basis.[9]

The increased complexity and delay in appeals emphasizes the need for clients to be fully informed about the economic consequences of the appeal. The client should be told about the costs, direct and indirect, of possible appeals. Such information may be the basis for initial settlement efforts or a settlement after judgment, during the early stages of the appellate work. Economic considerations govern strategies on appeal as much as they did at trial. Appellate counsel should look for ways to reduce expenses. For example, modern rules permitting abridgment of a record can save enormous fees for court reporter transcripts.[10] Greater selectivity in the choice of issues on appeal is increasingly required by appellate rules, is consistent with better communication principles, and will also reduce the attorney's fees for research and writing the brief. Even when appointed lawyers are paid by the state, the hourly rate allowed will be far below a normal fee, so that they too must make the most of any time spent on the appeal.

The costs or benefits of delay caused by an appeal may influence the client's decision about whether to pursue an appeal.[11] It is not wise to give clients a firm forecast of the probability of success on appeal, even though they all want to know. ("Do I have a 50 percent chance of winning? 62 percent?") However, the lawyer's ethical duty,[12] as well as the desire to keep a satisfied client, requires a candid discussion of the expense of appeal, which can be weighed against a more general discussion about the strength of the case on the merits.

It is important to say that, while this chapter focuses on change in appellate litigation, most of the theoretical foundations of appellate review and the adversary system on appeal remain the same. For neophytes, as well as seasoned appellate lawyers and judges, the starting point for a study of appellate courts is Karl Llewellyn's book, The Common Law Tradition: Deciding Appeals, especially his discussion of "The Major Steadying Factors in Our Appellate Courts."[13] Further interest in the attitudes and practices of appellate judges and lawyers will lead you to Thomas Marvell's 1978 work, Appellate Courts and Lawyers, the best-documented explanation of how we act.

§ 1.2 Modern Pressures on Traditional Appellate Practice

Caseload pressures on appellate courts are not a new phenomenon. In 1989, the Nebraska Supreme Court was six years behind in its work.[14] In Virginia, the average delay between trial and state supreme court decision is over three years.[15] We continue to see a steady increase in the number of appeals filed and by the number of appeals from longer, more complex trials. During the 1970s, the caseload of appellate courts grew by an average of 9 percent a year, a doubling of caseloads every eight years.[16] The overload on the United States Supreme Court has received the most attention.[17] During the 1990 term, 6,316 cases were on the Supreme Court docket, with 125 cases argued and decided.[18] Chief Justice Burger found that in one term of the Court, as many as one-third of the cases argued were based on new subjects for legislation or new causes of action that had not existed 10 years earlier.[19] Congress continues to add to the jurisdiction of the federal courts, without subtracting anything and usually without increasing judicial resources.[20] Chief Justice Burger has suggested that Congress draft Judicial Impact Statements for each piece of proposed legislation, as has been done in New York.[21] The appellate court system has been another casualty of the "War on Drugs." Between 1986 and 1990, federal criminal appeals rose 85% and appeals in drug cases rose 165%.[22] In 1991, appeals filed in the federal circuit courts of appeal rose to a record of more than 42,000, in addition to a pending caseload of 33,000.[23] Appeals of drug cases rose more than 75% from 1980 to 1990.[24] The Fifth Circuit declared a judicial emergency because only 13 judges were serving, although 17 judgeships were authorized. The order stated, "Retirements, a resignation, and the failure of the President to nominate persons to fill vacancies in the court have caused the present increase in the number of vacancies. From all indications, such executive inaction may continue for an indefinite time in the future. Pleas for help have gone unanswered."[25] The effect of declaring a judicial emergency is to free the court from the request that at least two of the three judges on a panel be Fifth Circuit judges, leading to an increased reliance on other district court, retired or visiting appellate judges sitting by designation.

Meanwhile, on the federal level, the whole judicial branch of government receives about one-tenth of one percent of the federal budget.[26] When appellate judicial resources more closely matched the workload, courts

had the luxury of overlooking informal compliance with rules and could conduct court business in unbusinesslike ways. This chapter is an overview of appellate courts' reactions to modern pressures on the appellate system.

These pressures also exist in state appellate courts. Five states have appellate caseloads of more than 8,000 cases, with California and Florida struggling with more than 13,000.[27] One study showed that the average elapsed time from entry of a judgment until issuance of the mandate following the appellate decision ranged from 240 days in the Oregon Court of Appeals to 649 days in the First District of the Illinois Appellate Court.[28] The A.B.A. Standards relating to federal and state appellate courts envision a maximum time for case processing of less than 240 days.[29] At some point, probably expressed in years, appellate delay of criminal appeals violates due process.[30]

The pressures are not just numbers of filings, but also the increasing complexity of the cases, with multiple issues and huge records. This combination of forces has removed much of the contemplative nature of appellate judging.

> When I came on the court [in 1961], I had time to not only read all of the briefs in every case I heard myself, which I still do, and all the motion papers ..., which I still do, but I could also go back to the record and I could take the time as I went along to pull books off the shelves and look at them. And then I had time, when I was assigned a case, to write. And occasionally I could do what I call "thinking," which was to put my feet on the desk and look at the ceiling and scratch my head and say, "How should this thing be handled?"[31]

The response to the current backlog and delay may change major features of appellate practice in the future. Suggested changes fall into two groups: structural and procedural.[32] One of the various legislative proposals that may be enacted is to establish a court to which the Supreme Court could refer cases.[33] Each new idea for a national court of appeals has faced heavy criticism.[34] Proposals for such courts by two commissions which studied the United States Supreme Court's caseload were treated as "derelicts on the sea of judicial reform."[35] After years of debate, the Supreme Court's mandatory jurisdiction was abolished in 1988.[36] While that does not address the number of unresolved conflicts among the circuit court of appeals, it reduces the

Supreme Court's burden somewhat. Justice Stevens has proposed that the votes of more than four justices be required for the grant of certiorari, the exercise of discretionary review.[37] There will be growing pressure for a national en banc court or reorganization of the federal circuit courts of appeals to minimize conflicts among the circuits.[38] Some proposals call for creating national courts of appeals for specialized subject matter.[39] The abolition of diversity jurisdiction would certainly ease the pressure on federal trial and appellate courts,[40] but would have no net effect on the system since it would cause more overcrowding in state courts.

Even more innovative structural changes may be able to deal with the serious caseload pressure. It has been suggested that the basic "one trial, one review " concept be rethought, perhaps not permitting any appeal in small civil or less serious criminal cases.[41] It has been suggested that the California Supreme Court be split into a criminal and a civil division, like the Texas and the Oklahoma high courts, in order to cope with caseload pressures.[42] Perhaps the federal and state intermediate appellate courts might be given the power to grant discretionary review to quickly eliminate from the appellate process those cases which are frivolous or where the trial courts opinion appears to be correct.[43] Experiments with appellate settlement conferences in California and New York suggest that they can be a useful tool in quickly disposing of appeals.[44] At least three circuit courts of appeals (Second, Seventh, and Sixth) are experimenting with settlement programs.[45] A program of expedited appeals in a California Court of Appeals cut total disposition time from fourteen to eight months.[46]

Certain trends are evident now which attempt to cope with fast-growing dockets. State supreme courts are being given more control over their dockets by restricting mandatory jurisdiction, permitting them to exercise discretionary review much like the Supreme Court.[47] Better coordination between the trial and appellate courts is needed because the first several months of the appellate process consist of post-trial record assembly under the control of the trial courts.[48] Appellate courts rely more on law clerks and staff attorneys for case screening. There is a challenge for appellate lawyers in the more bureaucratized system where they have been used to writing for only one audience, the appellate judge.[49] More judges and clerks are able to use computerized legal research facilities, as do the attorneys who practice before

them.[50] The Judicial Conference of the United States serves as a clearinghouse for statistics, studies, and innovative ideas about judicial management.[51] Judicial councils and judicial conferences in each circuit court of appeal are designed to disseminate new ideas, provide a forum for the exchange of views among judges and lawyers, and institute procedures for the circuit.[52]

Courts are experimenting with computers in managing court business and with electronic mail to circulate draft opinions. The Appellate Information Management System (AIMS), a computerized method of keeping track of the docket, is in use in several federal circuits.[53] Even more mundane mechanization, such as greater use of word-processing equipment, speeds up judicial reaction time. Modest technological advances often seem breathtaking in an appellate system typified by the absence of a photocopier at the United States Supreme Court until 1969.[54]

Often the first response to the avalanche of appeals is to increase the number of judges. The political reality is that authorization for more judges never keeps up with demand. Even when more judgeships are authorized, there are delays in the appointment and confirmation process that exacerbate the backlog. Use of senior judges who continue to accept assignments partially alleviates a lack of judicial resources. In 1983, senior judges participated in more than 6,000 cases.[55]

Furthermore, increasing the number of appellate judges increases the number of conflicting opinions which must be resolved en banc or by a supreme court. Enlarging appellate resources by dividing existing intermediate courts of appeals into new circuits (e.g., the United States Court of Appeals for the Fifth Circuit into the Fifth and Eleventh) or creating new appellate divisions, as done in California, tends to increase fragmentation and conflict about the law on important national or state issues.[56] The intra-circuit or intra-division conflict can be minimized by an effective, streamlined en banc procedure.[57]

From the viewpoint of most appellate lawyers, certain other responses by the courts themselves are even less welcome. Increasing use of summary disposition, one-sentence affirmance or reversals, and other techniques as shortcuts to opinion writing leaves attorneys and parties unsure about the

reasons for decisions.[58] The severe restriction on meaningful oral argument in some jurisdiction is seen as a time-saver by some courts.[59] In addition, although unquantifiable, some feel that the quality of opinions in cases of plenary briefing and argument is suffering because of the crush of other cases.

In this environment, attorneys should try even harder to make their points on appeal clear and simple. Appellate rules which impose lower maximum page limits on briefs are an appropriate way to save court time, in addition to creating some economies for lawyers and clients. Few briefs could not benefit from severe editing.[60] There is an irresistible impulse to write close to or over whatever page limit is set.

Finally, appellate courts should praise attorneys who act expeditiously and with restraint, thereby helping the system run more smoothly. While it is true that those attorneys are only doing their job, encouragement is always appreciated.

§ 1.3 Increasing Use of Sanctions to Enforce Appellate Court Rules

The recent experience of appellate courts suggests that they are growing less patient with sloppiness, mistakes, and flouting of appellate procedure rules. The power to punish attorneys and parties in order to ensure compliance with court rules springs from the inherent power of a court to administer its proceedings. However, the rules themselves usually describe the violations about which the court is most concerned, as well as possible sanctions.[61]

Operating under increasing caseload pressures, appellate courts do not have the luxury of doing counsel's work. In an appeal which was dismissed for failure to comply with the rules relating to the contents of briefs and the appendix, the Third Circuit said:

> Expressed in terms of the caseload per judge, in 1968 each active judge on this court was assigned 90 fully briefed appeals and original proceedings for disposition on the merits. This year each active judge has been assigned 275 fully briefed cases on the merits. This does not include consideration of an increasingly burdensome volume of motions and petitions for rehearing. If the court is not supplied with the proper tools to decide cases, then extremely valuable time, already severely