Professional Judgment on Appeal

Professional Judgment on Appeal

Bringing and Opposing Appeals

Second Edition

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Preface

This book is the product of 30 years of appellate litigation experience and 25 years of teaching appellate practice as a professor of law. In writing it, I draw encouragement from the words of Justice Ruth Bader Ginsburg, quoting her former D.C. Circuit colleague Judge Carl McGowan: "Law teaching and appellate judging are more alike than any other two ways of working at the law."[1]

The goal of teaching and writing about the law has been admirably captured by Yale Law School Dean Anthony Kronman—the development of "good judgment, a lawyer's most important and valuable trait."[2] A lawyer's good judgment depends upon

> the ability to distinguish between what is important and what is not and [to] sympathetically imagine how things look and feel from his adversary's point of view....[3]

Additionally, for the appellate advocate, good judgment requires the ability to sympathetically imagine "how things look and feel" to a panel of appellate judges. The good judgment of lawyers and judges is the focal point of this book.

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1. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567, 567 (1999).

2. Anthony Kronman, *Chapman University School of Law Groundbreaking Ceremony, Friday, November 21, 1997*, 1 Chap. L. Rev. 1, 5 (1998).

3. *Id*.

Preface to the Second Edition

The passage of time has brought me greater depth and breadth of experience in appellate practice since the 2002 publication of *Professional Judgment on Appeal*. I know a good deal more about litigation in high-stakes, multi-party appeals involving multiple law firms. I know a good deal more about the ethical concerns affecting the practice of law in an excellent law firm with an impressive roster of clients involved in litigation conducted at the highest level of the profession. I also learned that professional decisions may be influenced by business considerations. Certainly, there is more to successful appellate practice than excellence in briefing and oral argument.

This experience, however, does not change the substance of the thinking, research and insights that gave rise to the first edition of this book. Appellate judges remain busy men and women; it is often difficult to get their full attention in a particular case; and only a minority of cases receives plenary consideration, that is, briefing and oral argument, before decision. Nevertheless, the decisions of appellate judges remain driven by the fundamentals of appellate review: jurisdiction, preservation of error, standards of review and harmless error. The second edition of *Professional Judgment on Appeal* updates coverage and expands discussion of the cases, statutes and rules of procedure essential to counsel's exercise of good professional judgment on appeal.

Acknowledgments

I thank the Dean and Faculty of the Nova Southeastern University Law Center for awarding me the sabbatical leave that made starting this book possible.

I thank the N.S.U. law students who made important contributions to researching and editing this book: Alan Seagrave (2001), Michael Minardi (2002), Daniel Read (2003), Shahabudeen Khan (2003), Janine Garlitz (2007), Matthew Criscuolo (2008), Matthew Moore (2009) and Aaron Humphrey (2011).

I thank Bruce S. Rogow, a colleague at N.S.U. and an accomplished appellate advocate. For more than three decades he has shared with me his knowledge of the finer points of appellate practice and procedure.

Finally, I thank a man I have never met in person, Michael E. Tigar, keeper of the flame of the late Edward Bennet Williams, and a distinguished lawyer and law professor at American University. His books on trial and appellate advocacy have informed and inspired me.

Introduction

My first words of caution to lawyers contemplating an appeal: perhaps you shouldn't.

—Justice Ruth Bader Ginsburg

This book is intended to help lawyers and law students master the fundamentals of appellate practice. In this respect, lawyers and students are often similarly situated—inadequately prepared by the typical law school curriculum and by the ensuing experience derived from practicing law to make the sophisticated judgments required to succeed in appellate courts. It is largely because of this failure of knowledge and judgment that the overwhelming majority of appeals, civil and criminal, fail. Most lawyers (or their clients) apparently do not know or refuse to accept the truth of the matter: once a case is lost at trial, the vast majority of appeals will and should fail. Restricted appellate review—the preservation of error barrier, deferential standards of review on matters of fact or discretion, and the harmless error rule—combine to generate powerful momentum in favor of affirmance. But skilled appellate counsel, appraising the record in light of these factors, can estimate the prospects for success at "the level of a reasonable, sometimes a very good, business risk."[1] Having done so, counsel is then positioned to render sound client advice whether an appeal should be taken or, if taken by the adverse party, settled, and on what terms. This function is of increasing importance in the era of appellate mediation. Further, if an appeal is pursued, counsel can improve the odds of success by structuring the presentation of the case to take advantage of the institutional forces that work in favor of affirmance or reversal.

To restate the point, approximately 85–90% of all federal appeals are affirmed. Figures for state courts are similar. "In practice nationwide approximately ten to fifteen percent of appeals result in a reversal of the

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1. Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 4 (1960).

judgment below."[2] No doubt, many of the cases appealed were hopeless from the start. But it may well be true that greater skill in the presentation may have transformed a case that was hopeless as presented into a potential winner. Too often, affirmance results from the failure of appellant's counsel to appreciate and to apply the fundamentals of appellate practice—the need to preserve error for appellate review, to defer to the presumed correctness of a discretionary ruling or factual finding under review, and to recognize that all but a few errors will be deemed harmless.

There is arguably a professional paradox at work: on the one hand, as Eleventh Circuit Judge Godbold tells his law clerks, "the dispositive issues in appeals are highly predictable."[3] On the other hand, most appeals fail, and as Judge Paul R. Michel of the Federal Circuit observes, "much of the advocacy we see, even by senior lawyers, is surprisingly inept."[4] Why is this so?

Appellate practice requires both technical knowledge and a well rounded appreciation of the adversary system. Comprehensive understanding is necessary because every phase of pretrial, trial and post-trial proceedings is grist for the appellate mill. This big picture perspective should logically form the core of studying litigation in law school, especially as the first year is based on reading appellate decisions,[5] and later learning in practice.

But learning the big picture is the exception rather than the rule—both in law school and in practice. For law students, failure to learn the big picture is partly the result of the professorial temperament and inexperience in litigation. Both tend to produce over-emphasis on abstract legal doctrine, without adequate procedural context, at the expense of developing practical professional judgment focused on efficient problem solving. This is true even in advocacy classes. "[I]t is

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2. Daniel J. Meador & Jordana S. Bernstein, Appellate Courts in the United States 4 (1994). In 2006, the reversal rate for federal courts was about 9% overall and about 13% in private civil appeals. James C. Duff, Judicial Business of the United States Courts: 2006 Annual Report of the Director 15 (2007).

3. John Godbold, *Twenty Pages and Twenty Minutes Revisited*, 2 The Rec. J. of the Fla. B. Sec. of Appellate Prac. and Advocacy 801 (March 1994).

4. Judge Paul R. Michel, *Effective Appellate Advocacy*, 24 No. 4 Litig. 19, 19 (1998).

5. Ninth Circuit Judge Alex Kozinski notes that the law school world comes closest to the world of practice precisely in the realm of appellate litigation. Alex Kozinski, *In Praise of Moot Court—Not!*, 97 Colum. L. Rev. 178 (1997).

clear that the traditional appellate advocacy program provides almost none of the fundamental or specialized knowledge or skills that are essential to an appellate litigator."[6] In law practice, failure to learn the big picture has several causes. One is the result of subject matter specialization and the narrow field of vision that often characterizes it. Another is the fact that litigating lawyers seem to spend much of their time wrestling with micro-issues, such as scheduling, interviewing, discovery disputes and proof of facts. The fundamentals of appellate practice are not automatically learned in the role of student or in the role of practitioner.

Despite the proliferation of books and articles on brief writing, oral argument and other aspects of appellate practice, no one source has presented a comprehensive and integrated treatment of the fundamental predictors of the success or failure of appeals. While several fine books on appellate practice are on the market, none approaches the subject from the perspective of a practicing lawyer confronted with the need to make important concrete case decisions such as issue selection and, most especially, the decision whether or not to appeal at all:

> Whether an appeal should be taken is an unexplored frontier of litigation. Texts abound about how to prepare and try a case and about how to handle an appeal. No text that I have seen devotes more than passing interest to whether a party dissatisfied with the result of trial should appeal.[7]

Although Judge Godbold wrote in 1976, Judge Frank M. Coffin (of the First Circuit) reaffirmed the point in 1994, writing that the decision whether or not to appeal remained "largely virgin territory."[8] The gap has remained unfilled.

Most books on appellate practice simply assume that the decision to appeal has already been (soundly) made, and concentrate on brief writing, oral argument and related aspects of appellate advocacy. This book attempts to present systematically a set of criteria for evaluating the

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6. JUDICIAL ADMINISTRATION DIVISION, AMERICAN BAR ASSOCIATION, APPELLATE LITIGATION SKILLS TRAINING: THE ROLE OF THE LAW SCHOOLS 13 (1985). One of the most serious deficiencies in the teaching of appellate litigation skills is the "lack [of] a realistic appeal record," a criticism made also by Judge Alex Kozinski, *supra* note 5.

7. John C. Godbold, *Twenty Pages and Twenty Minutes: Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 804 (1976).

8. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING (1994).

prospects for success for a case on appeal—*before* it is appealed. It does so by drawing on the views of more than two dozen prominent federal appellate judges regarding the decision making process. These insights should help to inform an appellate lawyer's decision whether to appeal, which issues should be argued and how they should be positioned and presented.

In short, this book presents a framework for developing and exercising a lawyer's professional judgment in practice before appellate courts, and it does so by paying close attention to what the judges themselves have said on this subject. More concretely, the goal is first to remind trial lawyers what needs to be done to protect the record on appeal; second to enable appellate counsel to make informed judgments about the cases that should be appealed and those that should not; and finally to help appellate lawyers find the margin of victory by maximizing the strengths of their case and the weaknesses of their opponent's case.

This book is also unique in presenting the law surrounding mistake and misconduct on appeal. Part Two develops the "dark side" of appellate practice in chapters on frivolous appeals, rules violation, and appellate malpractice. These chapters teach what not to do, on the premise that negative examples are powerful teaching tools.

A Note on Format and Federal Focus

This book is intended to be a practical guide, and I have adopted a format designed to make the book as easy to use as possible. To that end, I have kept it as short as possible consistent with its goal of covering the fundamentals of appellate practice. For the sake of readability, I have tried to write in a lively conversational style at an appropriate level of generalization, neither too abstract nor too specific, focusing on principles that apply generally to practice in appellate courts.

To avoid burdening the reader with the degree of "cititis" customarily found in law reviews and treatises, the text does the main work of informing and advising. Speaking footnotes are held to a minimum. Cases and statutes are parsed where necessary or proper, but no effort has been made to provide encyclopedic citations to the points under discussion. Footnotes to the main sources of law appear wherever appropriate to document a point in the text, but I have in most cases avoided string cites and the circuit-by-circuit tallies of positions. One case in a footnote is usually sufficient to document a point of law; and if

the cite is well chosen, it will take the lawyer who reads it to other authorities on the cited point.

Finally, I have referred mainly to the law of appellate practice in our federal courts of appeals, with the exception of two chapters where state law predominates: Chapter 13 on appellate malpractice and Chapter 15 on the ethics of appellate practice. Although state court jurisdiction is broader and involves many more cases, primary reference to the federal court system is justified on several grounds: the federal courts are national in scope and as such present the only unified appellate system to study and learn from; the federal courts serve as a model for state appellate courts, just as the Federal Rules of Civil Procedure by and large constitute the model for rules of procedure in the state courts; basic principles of appellate review are for the most part the same in both state and federal courts; and many important areas of legal practice, including employment discrimination and civil rights cases, tend to be concentrated in the federal courts. Finally, given federal jurisdiction based on diversity, even "ordinary" commercial litigation in big dollar cases often takes place in a federal forum.

It is appropriate to add that the federal system is in important respects more highly evolved than state court systems. This is a result, in part, of a comparative wealth of resources. Federal appellate judges also have better conditions of employment, including *de facto* life tenure, high compensation and high staffing levels. Seventh Circuit Judge Richard Posner asserts that the quality of the federal appellate judiciary is on the whole higher than the state court systems.[9] An important factor in that respect is the removal of electoral politics from the appointment process and the greater independence of the federal judiciary arising from *de facto* life tenure. The federal appellate system is not free of notable problems, but it remains the dominant institutional force in appellate litigation in the United States.

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9. RICHARD A. POSNER, THE FEDERAL COURTS 46–47 (1985).