

# 7 Tips on Whether to Appeal, How to Write Better Briefs

BY CYNTHIA FEATHERS

**T**raining and literature on appeals give much attention to a long list of written rules. They are important, but the unwritten rules are more interesting. Experience from appellate practice for the State Attorney General, together with work as an institutional criminal defense provider and as a solo practitioner, has provided lessons in everyday considerations in handling appeals.

The seven suggestions here grew out of recent mentoring of *pro bono* attorneys and are illustrated with specific appeals. What makes appeals a unique and challenging stage of litigation is the primary focus. Why to seek a second opinion about whether to appeal and to be wary about settlement are the next topics. Finally, some ideas are offered for research, writing and oral argument.

## 1. Consider Not Appealing

If your client is a potential appellant, the threshold issue is whether to appeal. To make that decision, it is important to realize that an appeal is not a chance to retry the case; it is more like a new case. You are in a different court with different rules. The purpose of the appeal is not to determine what the fairest outcome might have been in the opinion of the reviewing court, but whether, based on the cold record and relevant law, the challenged ruling should be sustained. Justice sometimes is found not so much in the right result at the end of the appellate process, but in the fairness and integrity of the process itself.

The forces favoring affirmance are fierce. One Appellate Division judge said to departing clerks, "May you always be respondent." The appellant's chances of prevailing upon appeal depend in part upon the applicable standard of review. The lens through which the appellate court will view the record and the law can be dispositive. For example, is the relevant standard whether an administrative determination was supported by substantial evidence? As Article 78 litigants will attest, what is deemed substantial evidence may seem quite insubstantial. Is the governing standard whether the court below abused its discretion? The deference inhering in such standard is great.

If the appeal follows a jury trial and you contend that the verdict should be set aside as against the weight of evidence, convincing an intermediate appellate court, as you must, that no fair interpretation of the evidence could have yielded the challenged outcome will be an enormous task. The cause of a grievously injured client comes to mind. Before the subject car accident, he had few symptoms from a pre-existing injury and was thriving in his business and his family life. After the accident, he suffered years of agonizing pain and lost his business, his home and his marriage. The defendant won at trial. The reviewing court upheld the verdict. The Court of Appeals reversed because the proper standard had not been applied. Upon remand, however, the Appellate Division again sustained the verdict; the justices were able to discern a way the jury could have interpreted the evidence as to the pre-existing injury to produce the challenged result.

The point is not to abandon a palpably meritorious case in the face of a daunting standard of review. It is that counsel and client should make a careful assessment before embarking on any appeal and should proceed knowingly. If detached review reveals a weak position on appeal, then perhaps you should guide the client toward a decision that will save him much money and months of angst pending appeal. (Obviously, different considerations apply when you are assigned to represent an indigent criminal defendant whose liberty is at stake.) In hindsight, the vehemence of early clients in bitter matrimonial and estate disputes propelled two appeals that might have been better left unprosecuted. Years later, trial counsel in another case sought assis-



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tance in pursuing what appeared to be a frivolous federal appeal from an inviolable order dismissing a malicious prosecution claim. When turned away by appellate counsel, trial counsel went forward alone and suffered a huge Rule 11 sanction.

A familiar mantra of intermediate appellate courts is that they will defer to credibility findings, because the trier of fact was in a superior position to discern if witnesses were believable. Representing appellants when the central controversy concerns factual determinations is an unenviable position. The converse is true, too. Even if there is adverse legal authority, a respondent may survive a challenge if the appeal is framed or viewed essentially as a credibility contest. In one memorable case, the father disclaimed paternity and child support obligations. Unlike the usual scenario, equitable estoppel precluding such disclaimer was not applied to prevent HLA testing, but instead *after* such testing conclusively disproved paternity. The trial court believed the client mother's testimony about the bond between the father and the toddler. The reviewing court detailed such credibility findings and deferred to them.

Appeals involving pure legal questions may be more likely than distinctly factual inquiries to present opportunities for reversal. Challenges of orders rendered upon defense motions for summary judgment dismissing the complaint often present neat, discrete appeals and a realistic opportunity to preserve or win a day in court for plaintiffs. Where there was a trial, if you can focus on an erroneous ruling, evidentiary or otherwise, you will often do better than by relying on a straight weight of evidence approach. There are hurdles to overcome, however. For one thing, you must generally detail the evidence to show that the error was not harmless.

For another thing, the error had better be properly preserved. Otherwise, the appellate court will generally not consider it. In one murder case, the facts about the crime and about juror misconduct were shocking. The client was charged with murder in the death of her child, who had been severely burned by a boyfriend for taking forbidden food and had died from complications after months of suffering. There was compelling evidence that a deliberating juror had discussed the verdict with an alternate and then lied about her actions, an extraordinary example of disqualifying misconduct. Defense counsel made a motion, but did not fully and artfully explain the most viable basis for the discharge of the subject jurors, which would have necessitated a mis-

trial in the circumstances. The mother was convicted. On appeal, the misconduct arguments were rejected as unpreserved, and the court declined to review the issue in the interest of justice. Whether the rules of preservation are applied tautly or with elasticity may depend in part on how sympathetic the underlying facts are.

## 2. Seek a Fresh Eye

Knowing the case can be a drawback. The trial lawyer may know too much. He knows many matters that are not in the record and therefore irrelevant upon appeal. He may have strong views on the merits that color his assessment of the chances of success upon appeal. The investment in the case that made him so effective at the trial level may be a deficit upon appeal.

In one dramatic example of this common phenomenon, the surviving spouse of an inmate brought a successful civil rights action against the client agency for showing deliberate indifference to his medical needs. It was hard for zealous trial counsel to accept appellate

counsel's concern that the reviewing court might not get past the inflammatory facts: the inmate had slit his own throat to get medical attention and died from cancer after being treated for an ulcer. The Second Circuit affirmed in a summary order.

It may help to have the record reviewed by someone unfamiliar with the case, but familiar with appeals. Such an attorney can learn the case just as the appellate court will – based exclusively on the record, reviewed with dispassion. This vantage point can be of great value in evaluating what issues to advance on appeal or whether to appeal at all. You may still want to handle the appeal yourself. Many versatile attorneys do both trials and appeals, thus drawing upon their knowledge of salient facts and law and sustaining their relationship with the client. They also sharpen trial skills, such as how to best preserve issues for appellate review. Appeals provide great rewards: not only a chance to right a wrong or sustain a right result, but to leave a lasting legacy; the decision in your case and its progeny may help subtly shape the contours of the common law.

If you lack the time or inclination to do the appeal, take your time to find the right appellate counsel. Some may know state court appeals, but not federal court appeals. Some may know civil appeals or a subset thereof, but not criminal appeals. Some may have been in the Appellate Division often, but in the state Court of Appeals rarely. Retain someone with whom you can comfortably collaborate. Do not worry that appellate coun-

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sel will second-guess the moves you made. He will recognize the demands you faced versus the luxury he has: time to ponder his every move.

In appellate practice, there are various levels of expertise and specialization. For example, some attorneys have vast expertise in U.S. Supreme Court practice and can guide other appellate counsel lacking such experience. In one appeal, the Second Circuit affirmed dismissal of a habeas corpus petition involving an intriguing issue of first impression: whether a statutory exemption from prosecution as a felon in possession of a firearm, which applied to defendants who had their civil rights *restored*, should be extended to felons whose civil rights were *never taken away*. The client wished to petition for *certiorari* and relied on appointed counsel to do so. Guidance from a generous professional with expertise in U.S. Supreme Court practice was indispensable. (*Certiorari* was denied.)

### 3. Settle With Care

A number of appellate courts mandate attendance at settlement conferences for selected appeals. While such programs can facilitate a favorable ending to some cases, they present dangers to the unwary. In any case, carefully assess your chances of success on appeal before the conference.

In one case, a student had been speared through the middle by a shard of glass from a window that broke when he leaned on it, and the assigned judge induced him to settle with the client agency for significantly less than he had won in the trial court and might well have kept on appeal. The negotiations were aided in part by the long pendency of appeals and respondent's desire for quick resolution.

In another case, a wife sought to set aside a separation agreement that favored the client. The trial court had rejected her claim. Although the record and controlling authority seemed to indicate her chances of reversal were remote, the settlement judge scared the client husband into making an offer. The wife rejected the offer. The Appellate Division unanimously affirmed.

### 4. Research Doggedly

Do comprehensive research. Computer research using a well-formulated query or relevant key number is fine, but use it to supplement, rather than supplant, manual research, including consulting applicable statute annotations and practice commentaries and relevant treatises. When your research is done, sift through what you found to identify the gold nuggets: favorable controlling and persuasive authority. Distinguish troubling cases. Disregard other cases of secondary importance.

Doing thorough research can bring unexpected rewards. In an appeal involving dismissal of a complaint based upon lack of capacity, arising out of the filing of a bankruptcy petition that did not disclose the cause of action, research revealed a lone trial court decision that provided a blueprint for a strategy that brought success after two appeals.

Often treatises are a good entry point for finding relevant law. Occasionally, they are also decisive in your brief. In one appeal, trial counsel had pursued several arguments. The one issue that seemed very promising for appeal involved an unusual scenario: the respondent servient estate was arguably on constructive notice of the appellant dominant estate's right-of-way, even though the encumbrance was not recorded in respondent's chain of title. There was a dearth of case law. In ruling for the client, the reviewing court quoted at length the treatise relied upon in appellant's brief.

In the cases you find upon research and the results you achieve upon appeal, do not expect perfect consistency. Sometimes decisions from the same court seem inconsistent and irreconcilable. A pair of plea *vacatur* cases come to mind. One with more apparent merit brought defeat, while a similar one met success. Different panels, different results.

### 5. Keep It Simple

Simplicity is key. Not the simplicity of superficiality, but of deep analysis. Make it easy for the reviewing court to understand your position. When compiling the record, put the challenged judgment and decision up front. If the record contains a transcript, keep that numbering intact; for other pages, add a letter suffix. For massive, multi-thousand page records, devote plenty of time and thought to devising a strategy for managing the information and producing an appendix that will help the court find the key proof.

Decide what to call the parties at the outset and then be consistent. It is rarely appropriate to refer to opposing counsel by name. *Ad hominem* attacks are always poor form. The Statement of Facts section is just for facts, and the Argument is just for the argument. Therefore, avoid injecting argument in your facts, and in the argument, do not add new facts. Tell a vivid story. The factual presentation is critical. Craft it with care. Usually a chronological narrative works well. Before you begin, know your argument, since it may guide you to only lightly touch certain aspects of the record, but to delve deeply into others. Do not ignore damaging facts; deal with them. For every statement you make, cite a page in the record. Do not refer to anything that is not in the record, unless an exception to this rule applies.

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Often there are only a few strong issues worth briefing. Making weak arguments detracts from the strong ones. If your argument sounds complicated, untangle it and state it simply and clearly. The heaviest lifting comes not from handling thousand-page transcripts, but from struggling to distill arguments to their essence and striving to present them with the elegance of a flow chart, rather than the twists and turns of a Byzantine maze.

Do not grossly distort the strength of your case or disregard its weaknesses. Just lay out your law and logic. If you represent respondent, and appellant has not aptly framed the issues, reframe them.

Do not feel constrained to respond to appellant's brief point by point; that is rarely the most forceful course. Professionally printed briefs look nice and crisp, but crisply written prose is far more important.

## 6. Prepare Fully for Argument

Oral argument is a chance to make key points, answer questions and dispel misconceptions. Prepare fully. Review the record and mark key pages. Reread the briefs and vital cases. You may gain a new perspective on the appeal. Decide the few points you want to highlight and prepare an outline.

Anticipate questions and prepare answers. When you argue, dive into the heart of your argument. Keep in mind that you are before a panel of appellate judges, not a jury. Logic, not drama, is appropriate.

Do not regard questions as interruptions. They are the most important part of oral advocacy. Good arguments are like an interesting dialogue about the law and the case among well-informed participants. When you are appellant, consider saving time for rebuttal if allowed. If you are respondent, be prepared to put aside your planned remarks to respond directly to appellant's arguments.

Do not read too much into the court's questions. They are not always an accurate barometer of what is to come. In one argument, the court attacked the attorneys for the four respondents to the naive delight of appellant and counsel, who months later were stunned by a stinging defeat in a decision finding discovery misconduct and precluding the core proof in the case.

## 7. Be a Mentor

If you have appellate experience, offering your time and talent to a local assigned counsel or *pro bono* program is one way you could fulfill the duty set forth in EC 2-25 to render public interest and *pro bono* legal service. Mentoring a *pro bono* attorney can be an especially rewarding and effective way to share your expertise, while advancing the public good.