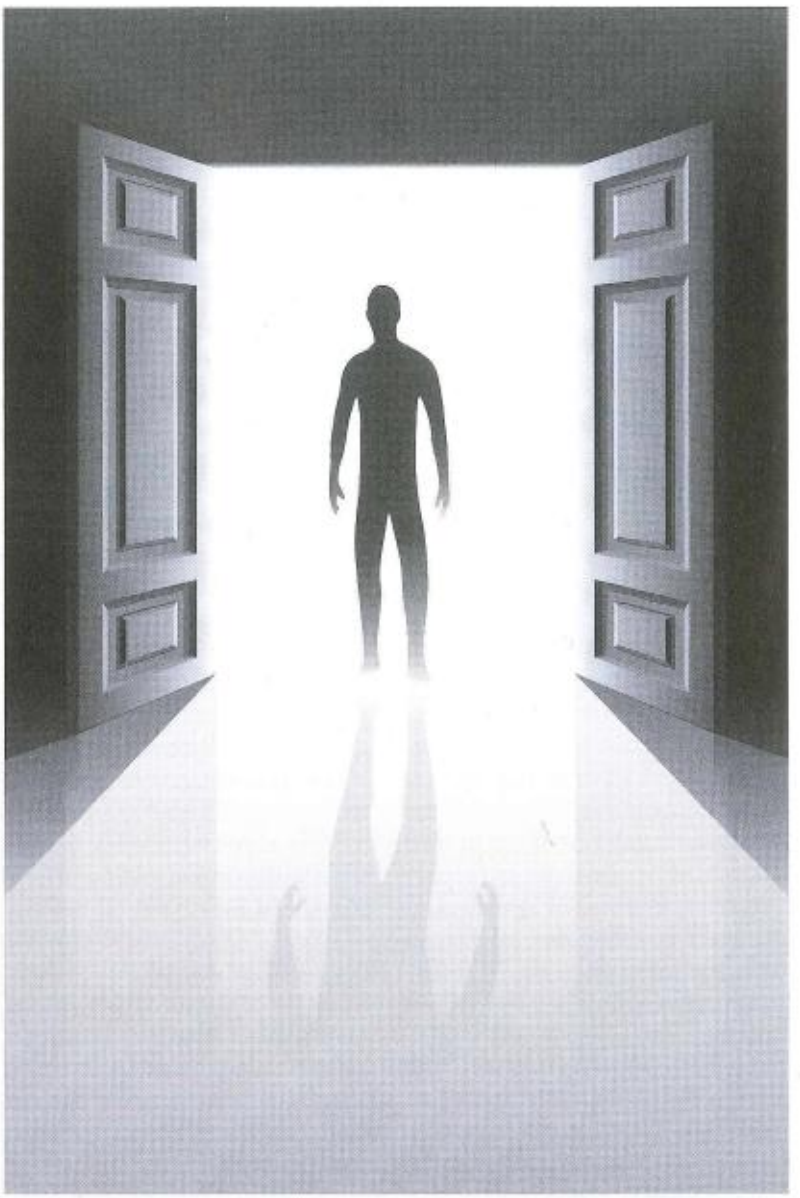
Decades of Development

By Irene Keyse-Walker

Debunking Myths About the Appellate Practice



During the 2012 election year, pundits repeatedly held up Ohio as a microcosm of the national electorate. Understand what makes Ohioans tick and you have the key to the American voter. The year also marked my 30th year in the private practice of law in Ohio, 25 of which I have spent in an appellate practice. With the conceit born of the first circumstance, and the experience gained with the second, I have begun to reflect on the development of the appellate practice. When I passed the bar in the early 1980s, appeals were an adjunct of the trial practice. Today, appellate boutique firms dot the country; appellate committees are a staple of local, state, and federal bar associations; several states offer appellate specialist certification; and the American Academy of Appellate Lawyers has grown from 12 fellows at its founding in 1990 to over 300. Even some corporate legal departments now have attorneys dedicated to a company's appeals. While I do not pretend to be able to speak for all appellate practitioners any more than Ohioans speak for all voters, I suspect that most of us have encountered the various myths that accompany this still-developing field of endeavor. With that, allow me to debunk a few of its most popular myths.

Myth No. 1: The Origination Myth

This myth, perpetrated primarily by academics, holds that a separate appellate practice emerged, nearly wholly formed, when a retired solicitor general opened a U.S. Supreme Court boutique firm in the 1980s and large firms snapped up assistant solicitors general and U.S. Supreme Court law clerks to compete. Similar to many myths, there is a kernel of truth to this one. There is such a thing as a U.S. Supreme Court practice, it is centered in Washington, D.C., and it did become more defined in the 1980s and expanded to include the 13 federal circuit courts of

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appeal. But that practice was separate and apart from the appellate practice that was taking root in Florida, Texas, Illinois, California, Ohio, Michigan, Arizona, Minnesota, and other states at the same time. That practice formed from many rivulets.

I recall hearing a federal circuit judge observe during an appellate practice seminar, in the mid-1980s, that the judge's court generally preferred experienced appellate attorneys because they "know the rules and understand the appellate perspective." While "knowing the rules" seems to set the bar rather low, the comment reflected the emerging concept that a different dynamic enters the picture when a case moves from a trial court to a court of appeals. Some of the earliest appellate marketing efforts that crossed my desk did, in fact, offer to review briefs to ensure compliance with complex rules governing joint appendices and proper case citations. Useful, perhaps, but this hardly constitutes a sustainable practice.

Burgeoning appellate dockets likely produced this focus on appellate procedure, which also resulted in appellate courts' increased willingness to dismiss appeals based on technical rule violations or summarily to affirm decisions without oral arguments. As trial attorneys became less willing to devote substantial amounts of time to studying the intricacies of rules that they only had to follow about once a year at best, having someone available who knew about the potential land mines became a valuable resource. Many trial attorneys began to rely on former appellate clerks or attorneys with strong writing skills in firm trial departments to take the laboring oar on appeals. But procedure and writing skills alone left appellate work as a mere adjunct to a trial practice; an adjunct to some *other* attorney's trial practice.

What propelled specializing in appeals into a distinct field of practice was the second attribute voiced by that circuit judge many years ago that they "understand the appellate perspective." An appellate perspective brings a different skill set with an independent value to a litigated matter. A retired state appellate judge recently described his task as "engag[ing] in analysis to refine the questions in the case and apply[ing] the fruits of legal research, life, and professional experience to produce an opinion of what the law is and, by its application, to decide who wins the case." Judge Rudolph Kass (ret.), *Translation*, 56 Boston B.J. 34 (2012). Trial attorneys and their clients may well be dismayed to learn that after years of hard-fought litigation, a panel of three judges decides "what the law is" and how its application determines the ultimate victor. But it is that reality, in a society governed by an ever-increasing web of statutory and regulatory law intersecting with the common law, which provided the impetus for the development of an appellate practice. The distinct skill set needed for appeals, as with any other skill set, needs continuous exercise to remain effective: it needs its own "practice."

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It is not just a matter of knowing to focus on the law rather than facts that distinguishes an appellate practitioner from a specialist in a different area. It is that appellate judges *know* that an advocate standing before them will present a case through an appellate lens that distinguishes an appellate practitioner from other practitioners. Appellate courts have the responsibility to define and to apply the rules of law consistently in a wide variety of factual scenarios. The "appellate perspective" thus must see beyond a case at hand to future disputes that may have quite different equities. An appellate practitioner's frequent appearances in appellate courts and intimate familiarity with the purpose of hypothetical questions tend to create a comfort zone for judges charged with maintaining that consistency and uniformity of law. And because they likely will face the same appellate judges many times over the space of their careers, appellate practitioners are cognizant of the importance of maintaining candor and credibility regarding case records and the governing law. It is perhaps for that reason that the consensus of judicial panelists of state supreme court and federal appellate judges appearing at a recent seminar that I attended indicated that they generally preferred appellate specialists over specialists in the substantive law areas at issue, except, perhaps, sometimes in patent and ERISA appeals.

Another rivulet contributing to the development of the appellate practice was the increased use of the amicus brief as a force for shaping the law. In the mid- to late-1980s, numerous trade groups and defense-based organizations helped draft and lobby for tort reform only to see the hard-earned fruits of their labor struck down by state supreme courts. Amicus briefs from those same organizations helped turn the tide, presenting the economic reasons behind the legislative findings accompanying the statutes, as well as state surveys and cogent constitutional analyses. The ability of amicus authors to identify and to explain pivotal issues within a broader context gained favor with state supreme courts, many of which loosened or eliminated rules that previously had required counsel to obtain leave of a court before filing an amicus brief.

Sometimes a specific event contributes to the growth of an appellate practice within a particular state. In Ohio, that event was a 1999 state supreme court decision that interpreted commercial auto policies too broadly, allowing an auto accident victim to seek uninsured and underinsured insurance coverage under a spouse's employer's policy. That case single-handedly vaulted Ohio's appellate practice into prominence as attorneys developed new legal theories to work around a rule of contract interpretation that made the resolution of the simplest auto accident case all but impossible. The statewide cooperation of appellate attorneys swapping theories and trial court decisions over e-mail until the decision was finally overturned established a network that continues today. Warning courts of the potential unintended consequences of a

particular statutory interpretation or a rule of law has also become a staple of the appellate practice within the state.

As these varied origins suggest, a self-sustaining appellate practice often spans trial as well as appellate courts and requires understanding not just the law, but how the application of the law affects the day-to-day operation and continuing success of large and small enterprises, industry, insurance, and government. It is that reality that debunks the number one myth of an appellate practice: that appellate attorneys live in a rarefied world of legal theory.

Myth No. 2: Appellate Attorneys Live in Ivory Towers

I have dashed the hopes of many a law student who believes that an "appellate lawyer" spends his or her career researching and carefully crafting briefs on complex and abstract legal issues. But this myth is not held simply by students. Many in-house counsel assume that appellate attorneys know nothing about their businesses or industries, and they harbor no expectation of hearing strategies focused on the bottom line from their appellate counsel. And trial attorneys may assume that these appellate attorneys do not appreciate the sausage-making nature of the pretrial and trial proceedings and will flyspeck their trial records.

Contrary to the latter assumption, experienced appellate counsel will clarify their roles when clients retain them: they are there to work with the records as provided, not to second-guess the decisions made by the trial counsel. Most appellate attorneys have had at least some hands-on trial experience, and many continue to practice in trial as well as appellate courts. To take a case apart for an appeal, someone must understand how it was put together. With that understanding comes a deep appreciation of all the balls in the air at the trial court level and the inevitability that some will fall.

As for the former assumption, it is true that an appellate specialist may have a lot to learn about a particular business, but the nature of appellate practice—representing a wide variety of clients in a wide variety of legal fields—tends to produce quick studies. And an appellate attorney knows that the more that he or she learns about a client's business or industry, the more effective he or she will be in presenting a persuasive argument to an appellate court. Appellate attorneys understand that appellate judges and their clerks are likely to be familiar with the law and the procedural rules that apply to a case but not know how a particular trade or business operates within that realm. For that reason, appellate counsel will not want to discuss the nuances of sufficient contacts for personal jurisdiction with you; they will want to elicit the facts of your business that drive such an analysis.

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Appellate practitioners are also proficient at "bottom line" cost-benefit analyses. The first issue that an appellate attorney likely will put on the table, after ensuring that post-trial motions are properly filed and any necessary stays of execution in place, is whether to appeal a decision at all. An experienced counsel will provide an objective, real-life assessment of an appeal and the court where it will be heard, not an ivory tower assessment of each. While preliminary evaluations will not lead to precise percentages of success on the merits of cases, they serve two valuable functions. First, an assessment provides the "gut reaction" of an attorney who has handled many appeals before the court that will hear this appeal. If those prospects appear dim, efforts may switch to developing a settlement strategy. Second, a preliminary review can focus on the nature of the most likely outcome. Is the alleged error one that would result in a judgment as a matter of law if the appeal succeeds, a new trial, or a new trial on damages only? If the best anticipated result is a new trial on damages only, an appellate attorney again would likely recommend shifting the focus to a settlement strategy.

Appellate practitioners are also conversant in those posttrial and appellate settlement strategies. Today every federal circuit has some form of a court-sponsored mediation program, with settlement rates ranging from 30 to 55 percent. *See* Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 Duke L.J. 315, 340-43 (2011). Many state appellate courts have similar programs with similar settlement rates. With that kind of track record, it just makes sense to rely on counsel with familiarity with the different procedures, dynamics, and personnel of the appellate mediation program.

Appellate attorneys know the "windows of opportunity" during the life of an appeal when a settlement would or would not most likely occur—*not*, for example, immediately after your opponent files its brief—the variety of appellate relief available for potential use as leverage, including interest calculations and potential for costs and attorney fees, among other things, and the different approach needed for appellate mediation as opposed to trial court mediation. As one appellate mediator has observed, the mediation dynamic changes after a judgment, when "one party has tasted blood and the other is behind the 8-ball." Kass, *supra*, at 36. This establishes all the more reason for gaining a fresh perspective. Indeed, sometimes introducing a "new face" into a case when the trial proceedings were particularly acrimonious can help resolve a matter.

In addition to analyzing the practical aspects of the immediate case to be appealed, an experienced appellate practitioner can advise you of arising issues that will likely recur for your company. Whether to pursue an appeal and how to present that appeal may depend upon arguments peculiar to a particular business or industry, such as how "insureds" are defined in an insurance policy, the application of the "compo-

nent part" defense to a particular product, or the mechanical application of a legislative damage cap to medical malpractice cases, for example. Or the arguments may even have implications that cross several industries, such as arguments regarding the preemptive effect of pervasive regulations on failure to warn claims. Being able to provide advice on whether a particular case is a good or a poor vehicle for advancing a company's long-term interest on a particular issue is not honed in an ivory tower but through working with clients and corporate law departments on a daily basis, year after year.

Myth No. 3: The Trial Attorney Knows the Case and Issues Intimately—Who Needs an Appellate Practitioner?

I know that someone holds this myth when the first call that I receive includes: "Trial counsel has already briefed the issues. You just need to give them an appellate 'gloss.'" Though tempted, I do not respond: "So that would be the briefing that lost?" Even if such a retort did not prematurely end a promising relationship, it would not move the ball forward; the potential client would patiently explain that the trial judge incredibly failed to understand the merits of the position and should be immediately reversed by the court of appeals.

The fact is that the trial attorney *does* "know the case" intimately. The problem is that after years of document review, witness prep, and trial strategies, certain perspectives become hardwired. It is a trial attorney's belief in the infallibility of a case, forged in the crucible of the courtroom, which makes the attorney an effective trial advocate. But the trial "issues" developed to convince a jury may not be the issues required to reverse a judgment.

Having worked tirelessly to develop the facts that will hopefully win the day, a trial counsel understandably tends to focus on the improper admission or exclusion of the evidence when it comes time to mount an appeal. But an appellate eye groups the product of that strategic factual development and resulting evidentiary rulings into a single category—judicial rulings subject to the high hurdle of an "abuse of discretion" standard of review. An appellate practitioner takes a case apart and puts it back together again, searching for core legal issues—insufficient evidence of an essential element of a claim, application of a statute of limitations, unambiguous contract language—issues that may have arisen months or even years before the trial, or issues that may not have ripened until a jury answered interrogatories.

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Further, every trial attorney honestly and truly believes that he or she has preserved every erroneous ruling in the record thoroughly. But not every bench conference makes it into the record, and not every recorded colloquy contains the clarity of thought that was evident at the time. An appellate attorney reviews the same cold paper record that an appellate judge reviews with the same understanding, or incomprehension, and without assigning too much weight to the nuances of the language used by the trial counsel, or the clarifying tone.

Finally, knowing "the case," knowing the "issues," and even knowing "the errors," does not necessarily mean that a trial counsel knows the potential highly technical landmines of the appellate practice. Whether the need is to shore-up preserved error in posttrial motions, identify appealable orders, or know which orders a notice of appeal must specify, experience in the appellate arena can have an immediate and beneficial effect.

Myth No. 4: Adding an Appellate Specialist Increases Costs Exponentially

This myth is most commonly propagated as "why should I have another attorney read the entire transcript, not to mention the banker boxes of files produced during the litigation?" The short answer is that whoever pursues an appeal needs to review the transcript and file; memory is no substitute for the actual record when it comes time to prosecute an appeal. But it also makes little sense for an appellate attorney to start from scratch in a room filled with file cabinets representing years of proceedings. Keeping costs down while ensuring that an appellate attorney has all of the tools necessary to succeed means delicately balancing free flowing communication among the trial counsel, the appellate counsel and yourself.

Adding an appellate specialist to a team before a trial is one technique that can lessen the learning curve. Most in-house counsel sense when a case is going south. A particularly bad ruling on a summary judgment or an *in limine* motion, for example, can signal that an appeal is all but inevitable. Retaining appellate counsel early in those cases means that the attorneys will be ready to hit the ground running when the juries return verdicts.

Someone easily could write an entire article explaining an appellate specialist's role in a trial. Briefly, on the one hand, an appellate specialist must respect the trial counsel's strategy. The first rule of appellate practice, after all, is "win below." I once had a partner, for example, who would never present damages evidence or make damages arguments in closing in a defense case because doing so seemed to imply that a client could possibly be liable. He understood that these strategic decisions had consequences: it would be exceedingly difficult to argue in the appeals that the plaintiffs received excessive damages awards. The role of an appellate counsel in such a situation is simply to ensure that the trial counsel understands and balances the risks of a particular strategy with the benefits. Similarly, it rarely makes sense for an appellate counsel to take the lead on evidentiary objections during a trial. Appellate attorneys do not have the encyclopedic knowledge of the facts and discovery proceedings necessary to make informed evidentiary objections, and some will have less familiarity with the rules of evidence than trial attorneys who regularly take and defend depositions.

On the other hand, appellate counsel can provide in-house counsel with an objective view of how a case is going and how

jurors seem to react to various witnesses, as well as assist in or present directed verdict motions and take the lead in the jury charge conferences. They can assist in the arguments for the admission or exclusion of particularly crucial fact or expert opinion evidence or in the proffers and motions for a mistrial that defendants may need to preserve particular errors. The unexpected turn of events that inevitably occur during a trial often reveal the value of having appellate counsel on a trial team—the events that require an on-site shift in trial strategy. An appellate perspective comes in handy to put a new event into a legal context or to point out how a proposed strategy potentially can affect an appeal.

If you wait until after receiving a trial verdict to retain appellate counsel, the focus turns to identifying the most important information for the appellate attorney and communicating it as efficiently as possible. I have found that in-house counsel frequently have already asked a trial counsel to prepare a letter summarizing the order of trial witnesses and their testimony, which may include key judicial rulings or potential errors. Having that letter to review early allows me to ask questions that focus the discussion on the most likely areas of error. A trial attorney's pretrial evaluation letter or final pretrial statement can also be helpful because it may provide a snapshot of how issues changed or developed during a trial. And having the trial court decisions granting or denying a summary judgment helps, too, because they often discuss the legal principles that shaped a case. Once an appellate practitioner has had an opportunity to review that handful of documents, he or she can have a telephone conference with trial counsel that will often suffice to fill in the gaps and to identify those portions of a trial transcript, exhibits, and the pretrial record containing additional specific information needed to begin structuring an appeal.

To prevent overlap and duplicated effort as an appeal proceeds, it is important to define expectations about who will take the lead at each turn, and when the drafters will circulate the drafts for which they will take the lead. Also consider alternative fee arrangements to help manage costs. Many appellate practitioners will provide a "50,000-foot" evaluation of an appeal for a flat fee after reviewing key portions of a file and limited portions of the trial testimony. If you suspect that the trial counsel has urged that you appeal an error that has little chance of success, or it will not satisfy a cost-benefit analysis, you many need exactly this kind of preliminary review to decide whether to pursue an appeal at all. The preliminary review may also indicate whether an alternative fee with a contingency component, such as a bonus in the event of a reversal or a judgment reduction, would suit the particular appeal work. In general, alternative fee arrangements suit appellate errors that "carve out" punitive damages or certain categories of compensatory damages the best.

Myth No. 5: Appellate Practitioners Do Not Add *Measurable* Value

You have me there. "Measurable" value is hard to prove. Statistical evidence on increased success rates attributable to appellate expertise is sparse and qualified. *See, e.g.*, Susan Brodie Haire *et al.*, *Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals*, 33 Law & Soc. Rev. 667 (1999) (indicating, based on a limited statistical study, a markedly lower success rate of appellants represented by counsel with no prior experience before the circuit court). Moreover, reversal rates have declined generally, at least in the federal courts of appeal. *See* David R. Cleveland & Steven Witsotsky, *The Decline of Oral Argument in the Federal Courts of Appeal*, 13 J. App. Prac. & Proc. 119, 121 (2012) (explaining that the overall reversal rates in the federal courts of appeal dropped from 19.9 percent to 10.3 percent between 1982 and 1993 and was 8. percent in 2011).

Most practitioners can recount anecdotal examples of appellate expertise making a difference. An appellate specialist obtained reconsideration and reinstatement of an appeal dismissed as untimely due to an inaptly worded notice of appeal, for example, or he or she recognized that the wrong standard of review was employed to reverse a favorable trial court ruling. But the more general value of appellate expertise is in identifying the cases that have reversible errors and bringing the errors to the forefront. Appeals naturally fall along a bell curve. At one end of that bell curve you would find appeals that virtually anyone could win, and at the other end you would find appeals that no one could win. Along the largest graph section, you would find the appeals for which skilled appellate advocacy could make the difference between an affirmance and a reversal. An appellate practitioner brings two attributes to the table for these appeals.

First is a ready grasp of the issues that appellate judges will view as critical. Those issues may be fact-specific, such as whether a jury received a correct instruction on the standard of care, or concerned with the administration of justice generally, such as preventing "sandbagging" in discovery or condemning egregious counsel misconduct. In seeking to defend a judgment, appellate counsel will know how to target waiver, invited and induced error, as well as harmless error, in the context of a case as a whole. In cases involving statutory construction, an appellate advocate knows to focus on legislative history and intent and the public policy behind it.

Second, an appellate practitioner can bring skills to bear on the clear and concise communication of the legal principles and prejudicial trial court error that justify vacating a jury verdict and entering a different judgment. In oral advocacy, an appellate advocate knows how to find the phrasing and context that will cause an appellate judge to have that "ah ha" moment. Far more appeals are lost because an appellate panel does not understand an argument than are lost because an argument does not exist.

So, granted, this myth has some truth in it. There are simply too many factors involved in individual cases to measure added value with statistics. But one statistic is undisputed: the appellate practice has grown by leaps and bounds in the past 25 years. Indeed, the challenge now is not so much how to quantify the added value of appellate counsel, but how to identify appellate counsel with the right combination of experience, perception, and pragmatism to achieve the generally accepted and recognized added value. That, however, is a subject for a different article. IDQ