WHEN TO HIRE APPELLATE COUNSEL AND HOW TO USE THEM

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I. INTRODUCTION.

The development of appellate work as a specialty separate from trial litigation has accelerated in recent years with the emergence of appellate boutiques, appellate board certification, and appellate practice bar organizations. Historically, most litigators viewed their practices as general, all-purpose litigation practices. But with the proliferation of substantive specialties has also come the specialization of the litigation practice itself and, increasingly, litigators are identified by an area of specialty, whether it be regulatory or administrative hearings, international arbitrations, trial work, or appeals.

Recognizing this trend, a trial litigator might reasonably question whether and when to seek the involvement of an appellate specialist. This presentation is intended to explore those questions.

II. WHY TRIAL LAWYERS SHOULD HIRE APPELLATE LAWYERS.

The reasons to hire appellate counsel derive largely from two differences between a trial and an appeal: the audience and the subject matter. In a trial, the object is to convince lay jurors that a certain operative set of facts did or did not occur. In an appeal, on the other hand, the primary object is to persuade professional judges that the law does or should require a favorable outcome for the client.

A. Appellate litigation is specialized work.

Judge Ruggero Aldisert of the Third Circuit Court of Appeals has said that "appellate advocacy is specialized work. It draws upon talents and skills which are far different from those utilized in other facets of practicing law. Being a good trial lawyer does not mean that you are also a qualified appellate advocate." Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* § 1.1, at 3 (Nat'l Inst. for Trial Advoc. rev. ed. 1999). Judge Silberman echoes Judge Aldisert, explaining that "the skills needed for effective appellate advocacy are not always found—indeed, perhaps, are rarely found—in good trial lawyers." Laurence H. Silberman, *Plain Talk on Appellate Advocacy, Litigation*, Spring 1994, at 3..

As Judge Aldisert recognizes, appellate lawyers focus on the law to an audience of judges, while trial lawyers focus on the facts to an audience of lay jurors. And Justice Scalia of the United States Supreme Court correctly advises that "trial judges are fundamentally different from appellate judges." Antonin Scalia and Bryan A. Garner, *Making Your Case: The Act of Persuading Judges 7* (2008). Trial judges are concerned with achieving the correct result in a single case, and they attempt to achieve that result within existing precedent. Appellate judges are more concerned with "crafting a rule of law that will do justice in the generality of cases." *Id.* *See* Aldisert, *Winning on Appeal* § 1.1 at 4-6. On appeal, the relevant facts are determined already (or assumed) and cannot be changed; the field of argument is narrowed almost exclusively to the question of how the law operates on those facts. Moreover, the judges deciding the appeal look for cogent and concise reasoned argument, rather than emotional appeals or the intricate development of factual stories that can take weeks in a trial court. As Judge Silberman of the District of Columbia Circuit has written, "[p]ersuading juries takes different forensic and analytical skills than persuading appellate judges." Laurence H. Silberman, *Plain Talk on Appellate Advocacy*, LITIGATION, Spring 1994, at 3.

Appellate judges are not coy in expressing their preferences for a certain content and style in appellate writing that is often different from oral advocacy to a trial court or written pleadings filed in the court of first instance. For example, take the lessons preached by appellate jurists concerning the need to respond. Among those counseling in favor of quick rebuttal arguments is Justice Scalia, who writes in his recent book: "If an opponent has said something that seems compelling, you must quickly demolish that position to make space for your own argument." ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE – THE ART OF PERSUADING JUDGES 17 (2008) (relying on Aristotle's advice to those who "speak second."). Judge Posner recommends that a party should "put a favorable spin on the weaknesses [of its case]—to pull their sting." Richard A. Posner, *Convincing a Federal Court of Appeals*, LITIG., Winter 1999 at 3, 62. Judge Miner of the Second Circuit advises parties to "[b]e truthful in exposing all the difficulties in your case. Tell us what they are and how you expect us to deal with them. Never dissemble." Roger J. Miner, *Twenty-Five "Dos" for Appellate Brief Writers*, 3 SCRIBES J. LEGAL WRITING 19, 24 (1992).

[1] This paper was co-authored by Jennifer Bruch Hogan and Greg Coleman, and presented by them at the State Bar of Texas Advanced Civil Trial Course in 2008. Since then, it has been updated and supplemented with new material Tragically, Greg Coleman was killed over the Thanksgiving holiday in 2010, when his private plane crashed on approach to Destin, Florida. Greg was a worthy and honorable adversary and co-counsel over the years, and his death was a great loss to the Texas appellate bar.

Some advocates give into a temptation to paint the case as completely one-sided, without any nuance. That temptation to broad-brush arguments should be avoided in appellate writing, according to Judge Posner. *See* Posner, LITIG., Winter 1999 at 62. Justice Robert Jackson, as long ago as 1951, wrote: "[t]he respondent should ask himself what doubts probably brought the case up and answer them. . . . To delay meeting these issues is improvident; to attempt evasion of them is fatal." Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 37 A.B.A.J. 801 (1951). Justice Ginsberg describes a good brief as one that "acknowledges and seeks fairly to account for unfavorable precedent." Ruth Bader Ginsberg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 568 (Spring 1999).

Like the judges they observe, appellate practitioners urge advocates to respond—rather than to repeat—in respondent's briefs. "Each point in the [responsive] argument should begin with a carefully crafted, one- or two-sentence rebuttal that underscores the correctness of the decision below." MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS, JURISDICTION AND PRACTICE § 9.16 at 468 (3d ed. 1999). Supreme Court practice demands that "[c]ounsel should not, of course, fail to meet the opponent's points." ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 643 (8th ed. 2002). Judge Kozinski once wrote a tongue-in-cheek article decrying overstatements in appellate writing: "A good way to improve your chances of losing is to overclaim the strength of your case . . . start off by explaining how miffed you are that this farce—this travesty of justice—has gone this far when it would have been clear to any dolt that your client's case is ironclad." Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325, 330 (1992). As Judge Hamilton notes, good briefs will address "head-on the opponent's best responsive argument, . . . and, if at issue, the opponent's listing of contrary evidence." Clyde H. Hamilton, *Effective Appellate Brief Writing*, 50 S.C.L. REV. 581, 587 (Spring 1999).

Texas judges have written about their dislike for needless repetition and over-emphasis in written arguments. As Justice Hecht and former Justice Reavley have taught, lawyers should not underscore their arguments in case they were missed, foisting on the courts the written equivalent of shouting at the court. *See, e.g.*, Thomas M. Reavley, *A Prediction: Better Briefs*, 6 SCRIBES J. LEGAL WRITING 159 (1997) (advising advocates, in a one-page article, that in times to come, "Briefs will have to be brief—without any unnecessary recitation of the record or case citations or argument."); Nathan L. Hecht, *Extra-Special Secrets of Appellate Brief Writing*, 3 SCRIBES J. LEGAL WRITING 26, 30 (1992) (recommending, with Hechtian sarcasm, that "[a]nything counsel wants the justices themselves to consider should be in all capital letters and underlined or boldfaced. Argument addressed to the law clerks should be in ordinary type without underlining.").

These underlying considerations about written advocacy and the differences between audiences lead to a simple conclusion: If you want to change twelve laymen's minds, you need a trial specialist. But if you need to change the law, you want an appellate specialist who can express arguments to judges in ways that they understand and expect.

B. The fox and the hedgehog.

The Greek poet Archilochus said, somewhat enigmatically: "The fox knows many things, but the hedgehog knows one big thing." The philosopher Isaiah Berlin drew on this quote to propose a distinction between two types of intellectuals:

> "those, on one side, who relate everything to a single central vision, one system less or more coherent or articulate, in terms of which they understand, think and feel . . . and, on the other side, those who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some *de facto* way."

One might look at the distinction between trial and appellate lawyers in a similar way. Trial lawyers have to know how to do lots of different things, and to do them *fast*, as the pace of trial litigation always demands. Appellate lawyers, on the other hand, do basically only one thing: argue legal points to appellate judges based on a fixed record, and on a fixed (and, from the trial lawyer's point of view, generous) schedule. As a result, the two groups have very different sets of skills.

Trial lawyers multitask. They must develop and then master the case's facts through witness interviews, document discovery, and depositions, each of which is a specialized skill unto itself. They have to do all this, moreover, while defending against the other side's depositions and discovery requests—related, but different, skills. (The comparison might be a bit like what was once said about Ginger Rogers, "remember that she did everything Fred Astaire did, only backwards and in high heels."). They must edit those facts into a story that is faithful to the evidence, but also likely to persuade a jury to rule in their favor. They must write pithy and convincing summary judgment papers and trial briefs, and quickly perform basic research to support their arguments. They must

present legal argument on their feet, responding to questions from the judge and engaging in back-and-forth with opposing counsel, based on familiarity with the ground rules of procedure, evidence, and substantive law (and sometimes a short course of research, when fortuitously there is advance notice of an issue). They must build personal rapport with members of a jury, but also weed out problem jurors during voir dire. They must craft a jury charge asking questions that reflect the law yet still produce the preferred answer. They must learn to examine without leading, and cross without leaving an opening; to open, and to close. And they must do all of this while managing the expectations (and witnesses) of the client. In short, a good trial lawyer is a good investigator, inquisitor, brief-writer, storyteller, debater, manager, and orator, all at once.

Appellate lawyers, on the other hand, have one basic skill, which is to slowly and carefully research the law, apply it to settled facts, and develop a convincing argument in the client's favor—initially a written argument, but also (though, most would agree, less importantly) an oral argument. Since they only do that one thing, they tend to do it better than trial lawyers. That is why hiring an appellate lawyer makes sense. This is especially true on appeal, because the one thing appellate lawyers do is, on appeal, the only thing there is to be done. But appellate lawyers' mastery of formulating legal arguments also means they are well-suited to draft dispositive motions when the facts are uncontested, like motions to dismiss and summary judgment motions, or to handle drafting and arguing jury charges, when disputes about charge language often turn on questions of pure law. Appellate lawyers can also more broadly serve as useful advisors to the trial lawyer about how decisions taken during the trial will affect a possible appeal, after the pragmatic, intangible, and emotional aspects are stripped away, and only legal questions remain—the appellate lawyer tends to naturally view all issues through that filter, because that is his main, highly developed skill. The trial lawyer, whose skills include gauging the intangibles and weighing the risks in the case, must ultimately decide whether to accept the advice, but it is almost always very useful to have.

The comparison, of course, can be exaggerated. (As Berlin said: "Of course, like all over-simple classifications of this type, the dichotomy becomes, if pressed, artificial, scholastic, and ultimately absurd.") A good trial lawyer will know lots of law, and know how to find more quickly. Complex cases will require serious analysis of difficult legal questions in order to formulate (or defend) a theory of recovery, and push the case through motions practice and to a jury verdict. A good appellate lawyer, on the other hand, will develop some facility with storytelling, since a good story makes a better brief—even if the storytelling is to judges, and not normal people. Writing an appellate brief requires extracting the facts from the completed record, a skill distantly related to discovering the facts through document review. And, emergency mandamus and injunctions proceedings certainly contradict the general perception that appellate practice is sedate and slow.

Still, at a basic level, the allusion to Archilochus (and Berlin) makes a useful point. Trial lawyers are foxes, who have to know how to do many different things, and do them all pretty well. Appellate lawyers are hedgehogs, who know how to do one thing, and do it *really* well. And, for that reason, the especially crafty fox will be sure to have a hedgehog on speed dial.

III. WHAT APPELLATE LAWYERS CAN DO FOR YOU.

A. Provide an appellate assessment.

As they should, good trial lawyers focus on winning their cases at trial. Good appellate lawyers focus on winning on appeal. Sometimes, the arguments that are important to victory in the trial court are the same arguments that are important to victory in the appellate courts—but often that is not the case. With few exceptions, an argument must be raised in the trial court in order to be raised on appeal. But an argument that might be very persuasive to an appellate court might get very little attention in a trial court.

Good appellate lawyers are knowledgeable about trends and changes in the law that might affect a case. Good appellate lawyers know the appellate courts and are familiar with their decisions. Appellate lawyers can offer advice about which issues might be persuasive on appeal, and they can offer advice about which issues might pose problems on appeal.

Good trial lawyers do not spend a lot of time thinking about losing their cases at trial. It is hard to find a good trial lawyer who takes off her advocate's hat and puts on another one. Appellate lawyers can think about losing at trial and evaluate the prospects for victory on appeal, including the prospect of winning or losing on appeal based on potential changes in the law. If consulted early in the case, appellate lawyers can help both plaintiffs and defendants posture their cases for appeal—and hopefully sometime avoid the need for an appeal through early recognition and resolution of potential appellate issues.

B. Preserve error for appeal.

As a prerequisite to presenting a complaint for appellate review, the record must show that the complaint was presented to the trial court and that the trial court refused the requested relief. *See* TEX. R. APP. P. 33.1. While that sounds simple, specific preservation rules for particular appellate complaints can present difficult traps for the unwary—as appellate courts remind lawyers in several opinions every year. *See, e.g., Ogletree v. Glen Rose Ind. School Dist*., 226 S.W.3d 629, 633 (Tex. App.—Waco 2007, no pet.) ("Failure to timely file past due notices under Rule 297 waives [the] right to findings of fact and conclusions of law."); *Bayer Corp. v. DX Terminals, Ltd.*, 214 S.W.3d 586, 602-03 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (party waived its complaint regarding supplemental jury instruction by failing to timely request supplemental instruction in the trial court); *Pierce v. Texas Racing Com'n*, 212 S.W.3d 745, 760 (Tex. App.—Austin 2006, pet. denied) (party waived its complaint regarding allocation of burden of proof by failing to object). Some potential appellate complaints can preserved before trial, some can be preserved only during trial, and some potential appellate complaints can be preserved only after trial. Procedural traps abound, and appellate courts are very often happy to write that an appellate complaint has been waived. Waiver is not a word any lawyer wants to read in an appellate opinion.

Appellate lawyers have experience with error preservation and can assist trial lawyers in determining the best way to preserve potential issues for appeal.

C. Prepare and object to the jury charge.

Few trial lawyers would identify jury charge preparation as a highlight of their practice. For one thing, preparation of the charge culminates at an awkward time—after the close of the evidence and immediately before closing argument. It is difficult for even the best lawyer to focus her attention on two very demanding tasks at the same time, so it is difficult to devote all the attention that is needed to charge preparation and to argument preparation at the same time. Even a good appellate lawyer is not likely to be able to offer tremendous assistance in preparing your final argument. But a good appellate lawyer can assist in preparing the charge.

Charge error provides fertile ground for appeal, but as the Texas Supreme Court has acknowledged, the "rules governing charge procedures are difficult enough; the caselaw applying them has made compliance a labyrinth daunting to the most experienced trial lawyer." *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 240 (Tex. 1992). In the decade-plus since *Payne* was decided, it seems fair to say that the situation has not improved. "[T]he process of telling the jury the applicable law and inquiring of them their verdict [remains] a risky gambit in which counsel has less reason to know that he or she has protected a client's rights than at any other time in the trial." *Id.* at 240. Given the Texas Supreme Court's retreat from broad-form submission and the Legislature's entry into charge practice with the passage of House Bill 4 in 2003, "the process is becoming worse, not better." *Id.* at 241.

Good appellate lawyers have the experience and expertise to assist in charge preparation and preservation of appellate complaints regarding the charge.

A trial team that is anticipating a jury trial, especially a complex one, should consider engaging appellate counsel early enough to prepare an initial draft of the proposed jury charge long before trial begins. That important document can help shape the entire litigation strategy of a case, maximizing the probability of a favorable outcome, and the shape taken by the final charge can have an important influence on whether a favorable verdict is retained or an unfavorable one reversed on appeal.

A trial team should begin thinking about the jury charge as soon as litigation is seriously contemplated. Actually drafting an initial version of the proposed jury charge requires no more information than drafting the petition or answer, and simultaneous preparation of a pleading and jury charge can usefully inform the structure and content of both. Knowing how an ideal charge looks—and forming an idea of the facts on which the case will turn—will provide an idea of the evidence that must be presented by the party with the burden of proof on each issue and assist in developing a discovery plan accordingly. Thus, preparing a proposed jury charge at the earliest possible stage can improve both the substance of the trial presentation and the efficiency of trial preparation.

Putting the questions for the jury down on paper will focus the team's attention on the narrative of the case and ways to make it more intelligible for the jury. And early identification of the legal weaknesses of the case is critical to generating strong arguments for the motion to dismiss and summary judgment stages (stages at which an appellate litigator can also bring valuable expertise to the team).

It has been said that there are three types of positive outcome for a jury charge. In declining order of preference: (1) best case scenario—the charge is favorable to one's client but not infected with error, minimizing the risk of having a favorable verdict reversed on appeal; (2) next best—a balanced charge, giving one's client a decent chance to win; and (3) a

charge weighted in the opponent's favor that at least contains reversible error that was not invited.

An appellate litigator can bring to bear specialized skills relevant to these outcomes. In drafting an initial, idealized charge, the appellate litigator can draw upon research, knowledge of jurisprudential trends, and knowledge of what constitutes reversible error to craft a charge that sets forth the requisite elements in the light most favorable to the client within the bounds of the law and without inviting error. If, as the case evolves, it is clear that the third type of charge—weighted in favor of the opponent but containing uninvited error—is the best that can be hoped for, the appellate litigator can identify for the rest of the trial team the errors infecting the charge that offer hope for reversal.

Having the appellate litigator draft the proposed charge early helps ensure that the trial team has set out the elements of its case and considered the evidence to be presented in support of each, minimizing the risk of omitting proof of an element of a claim or affirmative defense or even proving up the wrong case. Additionally, because appellate lawyers are skilled at writing and presenting complex ideas in ways that they can be easily understood, having the appellate lawyer draft the jury charge will help achieve the goal of a charge that is readable and understandable by the jurors.

Aside from the relevant specialized skills the appellate lawyer brings to the task, having that lawyer focus on the jury charge at an early stage frees the rest of the trial team to focus on other critical matters like interviewing witnesses, scheduling depositions, and the myriad other substantive and logistical tasks preceding a successful trial. Similarly, appellate counsel can handle the informal charge conference, which is likely to be held on an evening during trial. Delegating that task to the appellate lawyer frees lead trial counsel to focus on preparing the closing argument. And appellate lawyers are adept at coming up with the case citations and other authority that can persuade a court to accept that a proposed charge must be adopted or the opponent's rejected.

D. Prepare and respond to significant pretrial and post-trial motions.

The appellate lawyer's skill set can also be usefully employed in drafting and responding to significant motions, including *Daubert/Robinson* challenges, motions for summary judgment, motions to dismiss, JMOL motions, and various post-verdict motions. These motions often involve legal issues rather than factual disputes and thus are suited to the appellate lawyer's research and writing capabilities. Moreover, these motions often play a significant, if not dispositive, role in any appeal, so it makes sense to consult with an appellate specialist in crafting or responding to the motion.

For example, in state court Rule 324 of the Texas Rules of Civil Procedure provides that a motion for new trial is a prerequisite to raising five specific kinds of complaints on appeal. The supreme court has enforced these requirements, holding that a point in a motion for new trial is a prerequisite to complain on appeal about factual insufficiency of the evidence. *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex. 1991). The five specific complaints required in a new trial motion are: 1) a complaint on which evidence must be heard, such as jury misconduct, newly discovered evidence, or failure to set aside a default judgment; 2) a complaint of factual insufficiency of the evidence to support a jury finding; 3) a complaint that a jury finding is against the overwhelming weight of the evidence; 4) a complaint of inadequacy or excessiveness of the damages; and 5) a complaint of incurable jury argument if not otherwise ruled upon by the court. TEX. R. CIV. P. 324. Any complaint raised by way of a motion for new trial must be specifically identified. TEX. R. CIV. P. 321, 322. Potential appellate complaints also can be waived by filing a post-verdict motion. Filing a motion for entry of judgment on the jury's verdict waives the requesting party's right to challenge any of the jury's unfavorable findings on appeal. *See Litton Indus. Products, Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex. 1984).

In federal court "a party who fails to present a Rule 50(a) [JML] motion on an issue at the close of evidence waives both its right to present a Rule 50(b) motion after judgment and its right to challenge the sufficiency of the evidence on appeal." *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 288 (5th Cir. 2007). But even a party who challenges the sufficiency of the evidence in a pre-verdict JML motion under the Federal Rule of Civil Procedure 50(a) is precluded from challenging the sufficiency of the evidence on appeal if the party does not file either a Rule 50(b) post-verdict motion or a Rule 59 motion for new trial. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 US 394, 400-01, 403-04 (2006). Moreover, "a party is not entitled to pursue a new trial on appeal unless that party makes an appropriate post-verdict motion in the district court." *Id.* at 404.

Appellate lawyers understand the crucial role that significant pretrial and post-trial motions play on appeal. They know how to preserve arguments in these motions, and by involving appellate counsel before these motions are filed, good appellate lawyers can help assure that every potential appellate complaint is preserved for appellate consideration. It is often

hard for a trial lawyer to shift gears into the post-verdict mode or to objectively evaluate the changed role of post-trial advocacy.

E. Evaluate the potential appeal.

If the trial results in an unfavorable outcome, having appellate counsel on hand can be extremely valuable for the next step in the case: deciding whether and what to appeal. Taking an appeal is a potentially costly decision, and clients are best served by seeking experienced appellate counsel who can provide reasonably accurate forecasts of issues such as the likelihood of success, the duration of the appeals process, and the cost of pursuing an appeal to its conclusion. Even more important, however, is the appellate litigator's function in separating the wheat from the chaff among the issues presented in the case, selecting which issues should be the focus of appeal to ensure the highest probability of success. This requires a skillful review of the record on appeal to determine the universe of appealable issues, as well as good judgment as to which of these issues are most useful in engineering a reversal of an unfavorable trial court ruling or jury finding. Appealing weak issues, no less than including bad arguments in a brief, will damage the client both by reducing the credibility of counsel in the eyes of appellate judges and by wasting precious column inches in a brief that could be better spent on issues providing a higher probability of success. Thus, one crucial aspect of the appellate litigator's craft, often unappreciated by trial counsel and clients, is the upfront effort spent on focusing the appeal to a winnable set of issues.

F. Write the best possible brief for the client.

A particularly pointed example of the difference between appellate and trial specialists occasionally arises when a lawyer, inexperienced in the appellate courts but entirely comfortable winning points with a jury in a courtroom, makes the mistake of emphasizing a stunning oral presentation to the appellate court over solid and convincing written briefing of the issues. It is a dirty little secret among appellate lawyers that appeals are rarely won at oral argument, though they most certainly can be lost there. "For that reason" the late Chief Justice William Rehnquist has said, "an ability to write clearly has become the most important prerequisite for an American appellate lawyer." William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 3 (1999).

In reality, most appeals are won before a lawyer from either side sets foot in the courtroom, by the briefs that most clearly present the issues, provide a sophisticated analysis of the applicable law, and subtly suggest that the path of least resistance for a swift and final resolution of the appeal is the application of that law that results in a favorable outcome for the client. Chief Justice Rehnquist described brief writing as "a combination of art and science." *Id.* at 4. He explained: "When a case first lands on an appellate lawyer's desk, it more often than not is a confusing and complicated jumble of facts, lower court rulings, procedural questions, and rules of law. The brief writer must immerse himself in this chaos of detail and bring order to it by organizing—and I cannot stress that term enough—by organizing, organizing, and organizing, so that the brief is a coherent presentation of the arguments in favor of the writer's client. *Id.* Briefs that do not clearly and quickly tee up the issues, that waste the judges' valuable time rehashing factual or other issues not directly relevant to the issues appealed or engaging in hyperbole, or that are not crystalline clear in their legal analysis are regularly given short shrift by busy appellate judges and their clerks. On the other hand, briefs that do not thoroughly address all the issues necessary to a proper resolution of the case fail in their educational mission just as significantly. Erring in any of these fashions when writing an appellate brief is a good way to sacrifice counsel's credibility with the court, and it is a crucial skill of the appellate specialist to intuit the proper balance in a brief among conciseness, informativeness, persuasiveness, and thoroughness, while maintaining the highest standards of accuracy throughout. This is a rare skill, and not one often fostered by the faster-paced demands of a trial practice.

As the California Court of Appeals has written: "Appellate work is most assuredly not the recycling of trial level points and authorities." *In re Marriage of Shaban*, 88 Cal.App. 4th 398, 408 (Cal. Ct. App. 2001). The court notes that "appellate briefs receive greater judicial scrutiny than trial level points and authorities"—because appellate briefs are read by three (or more) judges rather than just one, appellate judges generally work under less time pressure than trial court judges, and appellate judges generally have more staff to assist them. *Id.* at 409. As a result of this added scrutiny, "appellate counsel must necessarily be more acutely aware of how a given case fits within the overall framework of a given area of law, so as to be able to anticipate whether any resulting opinion will be published, and what effect counsel's position will have on the common law as it is continuously developed." *Id.* Moreover, "the appellate practitioner is on occasion likely to stumble into areas implicating some of the great ideas of jurisprudence, with the concomitant need for additional research and analysis that takes a broader view of the relevant legal

authorities." *Id.* at 409-410. "The upshot of these considerations is that appellate practice entails rigorous original work in its own right. The appellate practitioner who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them into an appellate brief, is producing a substandard product." *Id.* at 410.

Content is crucial, and good appellate lawyers are adept at developing and presenting the client's most compelling arguments in the most persuasive fashion. But there is a more mundane side to appellate brief-writing. The structure and content of appellate briefs is highly regulated by the courts, and briefs that fail to comply with the rules are routinely rejected with instructions to rebrief. While perhaps embarrassing and costly, being ordered to rebrief is certainly not the worst result for counsel or the client. Lawyers who fail to comply with briefing rules and requirements risk waiving an argument altogether. *See Arias v. Brookstone, L.P.*, 2007 WL 4465517, *6 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("Because SWG does not address each of the three damage elements that was submitted to the jury, we hold that SWG has waived its sufficiency challenge to question 24."); *Omaha Healthcare Center, L.L.C. v. Johnson*, 246 S.W.3d 278, 285 (Tex. App.—Texarkana 2008, pet. filed) (refusing to consider issue that was not supported by authorities and appropriate record citations, holding that "[a]n inadequately briefed issue may be waived on appeal").

Because they frequently practice in appellate courts, appellate lawyers are familiar with the procedural rules governing appellate briefs. Appellate lawyers know the structure and form a brief must take, and good appellate lawyers know how to write persuasively within the structure imposed by the specific court hearing the appeal.

G. Deliver an effective oral argument.

In his recent book with Bryan Garner, Justice Antonin Scalia identifies six objectives in oral argument:

1. To answer any questions and satisfy any doubts that have arisen in the judge's minds.
2. If you're counsel for the appellee, to answer new and telling points raised in the appellant's reply brief. Oral argument is your only chance.
3. To call to the judge's minds and reinforce the substantive points made in your brief.
4. To demonstrate to the court, by the substance and manner of your presentation, that you are trustworthy, open, and forthright.
5. To demonstrate to the court, by the substance and manner of your presentation, that you have thought long and hard about this case and are familiar with all its details.
6. To demonstrate to the court, mostly by the manner of your presentation, that you are likeable and not mean-spirited.

Antonin Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges*, 140-41 (2008). In light of these objections, Justice Scalia and Mr. Garner reiterate that "appellate advocacy and trial advocacy are different specialties" and conclude that "the lawyer who tried the case and who is, initially at least, the most knowledgeable on the facts, the proceeding below, and (perhaps) the law is not necessarily the best choice to argue." *Id.* at 147-48.

It takes enormous time to prepare for an oral argument. Preparation requires "thinking a lot about the case, turning it over in your mind, looking at it from various perspectives, racking your brain not only for the flaws in your adversary's case but also for the weaknesses of your own. It means preparing a defense for each of those weaknesses, even if it can be no more than a acknowledgement of its existence and the assertion that it's outweighed by other considerations. It means preparing for hundreds of different questions even though you may be asked only 20." *Id.* at 150. Trial lawyers often do not have the time it takes to adequately prepare for an oral argument. The problem goes back to the fox and the hedgehog. The schedules of multitasking trial lawyers do not easily accommodate large uninterrupted blocks of "thinking" time.

Moreover, as Chief Justice Rehnquist recognized, "there is a real danger that one who has played little part in the drafting of the brief will not do a good job of arguing the case." *From Webster to Word-Processing* 1 J. APP. PRAC. & PROCESS at 5. As he explained: "The questions you get in an oral argument are often ones that are not squarely covered in the brief—indeed that is probably the reason for the question from the bench. So an advocate who has not gone beneath the surface of the brief to understand how its parts fit together into a coherent argument will be at a considerable disadvantage. Even an advocate who has all but memorized the brief will be at this kind of disadvantage . . . . The brief may have been very good, but the advocate may actually detract from it by his presentation, or even contradict some part of it." *Id.*

An effective oral argument to an appellate court is very different from an effective closing argument to a jury. "It is often said that a 'jury argument' will not play well to [an appellate] judge. Indeed, it almost never will." *Making Your Case*, at 31. That is because appellate judges resent emotional appeals that can be very important and effective with a jury. *Id.* at 31-32. Additionally, oral argument times are short, usually less than 30 minutes, and unlike jurors, appellate judges get to interrupt and ask questions. "As never before, the ability to handle questions and to integrate answers into counsel's set presentation is an essential skill of the effective [appellate] advocate." *Making Your Case*, at 189.

Appellate advocates understand that oral argument is "a discussion led by the judges." *Id.* at 154. They take the time to prepare extensively for a very short, and often very intensive, questioning of the arguments advanced in the briefs. A good trial lawyer connects with jurors in an emotional way and uses passion at least as well as reason to persuade lay jurors of the facts. Appellate lawyers require a different skill set for oral argument. Appeals to emotion are unpersuasive to judges who view themselves as dispassionate interpreters of the law. Appellate lawyers connect with appellate judges by demonstrating they have thought long and hard about the case, the legal principles involved, the policy questions at issue, and the impact the case will have on the overall development of the common law. Equally important, appellate lawyers understand that they must demonstrate their knowledge in a limited amount of time and in response to questions rather than through a prepared speech.

IV. GOOD APPELLATE LAWYERS WORK WITH TRIAL LAWYERS, NOT AGAINST THEM.

Trial counsel are often concerned that an appellate specialist is just someone who passes judgment on trial counsel after-the-fact. This concern reflects a surprisingly common misconception concerning the nature of the appellate specialist's role on the litigation team and, more specifically, a misconception about how a competent appellate lawyer goes about achieving a favorable result for the client. Unaddressed, these misconceptions can lead trial lawyers and litigants incorrectly to conclude that hiring an appellate specialist will be counterproductive because appellate counsel will just second-guess trial counsel's decisions and arguments, fostering a strained, if not overtly hostile, relationship between members of the litigation team. One simple fact about how appellate specialists win cases, however, resolves the misconceptions: Appellate lawyers achieve good results by making trial counsel look as good as possible in the eyes of the court.

That an appellate lawyer's focus is on making the trial lawyer look good is perhaps easiest to see in the case where a favorable trial court judgment or ruling must be defended. In that case, the aim of the appellate brief and argument is to bolster trial counsel's actions and the trial court's ruling, all in an effort to show why the lower-court ruling should not be disturbed on appeal. To do that, the appellate practitioner must present arguments demonstrating how trial counsel's actions and arguments support the judgment, and how trial counsel did everything necessary to support the judgment on appeal. Often, trial counsel plays a vital role in that process by serving as a resource for the appellate lawyer, answering questions about details in the factual record or the nuances of arguments advanced below. The appellate lawyer and trial lawyer work together on the same litigation team, each bringing a different set of skills and a different perspective to an appeal, but each pursuing the same goal of achieving success for the client on appeal. And because the appellate lawyer can only obtain a favorable result in the appellate court by bolstering trial counsel's actions and arguments, an appellate lawyer that draws attention to trial counsel's shortcomings or to what trial counsel should have done but did not do only undermines the case on appeal and disserves the client.

Working to make trial counsel look good does not change if appellate counsel is instead hired to seek reversal of an unfavorable trial-court judgment or ruling. Although, as counsel for the appellant, the focus of the argument and briefing shifts to showing the appellate court how the trial court got it wrong, the appellate lawyer can still only achieve succeed by explaining how trial counsel said and did everything necessary to earn a favorable judgment, and how the trial judge or jury reached an incorrect result notwithstanding all that trial counsel did to lead them to the correct conclusion.

The complementary relationship between trial and appellate counsel is also evident in situations involving an appellate specialist hired while trial-court proceedings are still underway. In that circumstance, the appellate practitioner is tasked with spotting and filling in any gaps in the factual and legal record that may escape the notice of a trial attorney otherwise engaged in the heat of battle. Working together as two members of the same team, performing different but complimentary functions, trial and appellate counsel can ensure the best possible result for the client, whether it be a favorable judgment with an iron-clad

record on appeal or a properly preserved record that will support an appeal of an unfavorable outcome. Often, it becomes impossible or impractical for one lawyer to fill both roles. Appellate specialists can complement, without replacing, the role of the trial and jury specialist.

While it is only natural for trial counsel to instinctively perceive the appellate specialist as nothing more than a second-guesser, that perception misapprehends the role of the appellate lawyer and the way appellate lawyers obtain favorable results for clients. An appellate lawyer wins cases on appeal by highlighting what the trial counsel did, not by bringing attention to or second-guessing what trial counsel did not do.