INSIDE: The Delaware Supreme Court on Appellate Advocacy, Arguing Before the U.S. Supreme Court, and More

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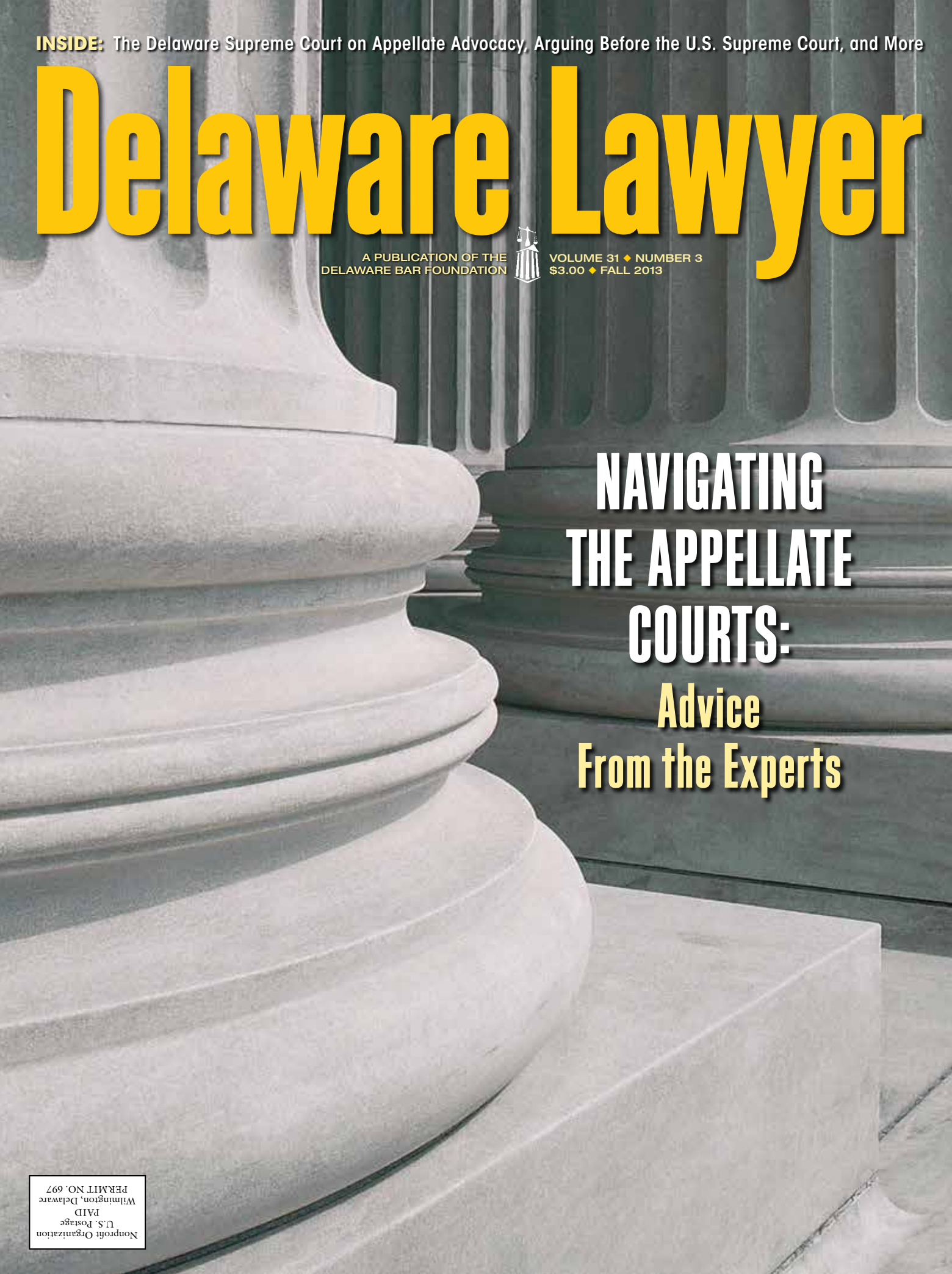

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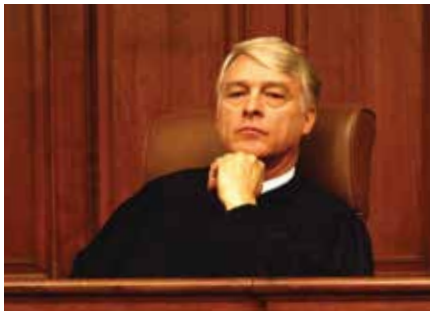

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EDITOR'S NOTE

James H. S. Levine

This issue focuses on an area that greatly impacts our practices, but one in which few Delaware lawyers routinely engage. From the U.S. Supreme Court to the U.S. Courts of Appeals, to state supreme and appeals courts across the country, the rulings of appellate courts establish precedents and define the contours of the law, regularly impacting the rights of all Americans.

Despite the prominence of these courts, many lawyers will have limited, if any, exposure to the intricacies of appellate practice over the course of their careers. In the hope of broadening the horizons of all our readers, we are pleased to share perspectives from several experienced appellate practitioners and judges on appellate advocacy and practice.

First, David Frederick shares his experience appearing regularly before the U.S. Supreme Court, and divulges some of his secrets for crafting effective arguments and preparing for oral argument.

Next, Nilam Sanghvi and Bruce Merenstein report on the evolving role of the appellate lawyer. No longer monastic brief writers scouring the record for reversible errors, appellate lawyers are playing increasingly substantive roles in trial preparation, even collaborating with trial counsel in anticipation of potential issues on appeal.

The Justices of the Delaware Supreme Court generously agreed to participate in a roundtable discussion on appellate advocacy, and offer sage advice to help lawyers appearing before the Court maximize their effectiveness. We also extend our appreciation to Kurt Fetzer of Wilcox & Fetzer Ltd. for transcribing this roundtable, a service which he has graciously provided to *Delaware Lawyer* many times. We are truly grateful for his service.

In our fourth article, Judge Paul Wallace recounts his prior experience as Delaware's Chief of Appeals, appearing regularly before the Delaware Supreme Court and federal appellate courts, and offers his perspective from the unique position of representing the State in criminal appeals.

Finally, Howard Bashman, whose *How Appealing* blog has accorded him nationwide acclaim as a foremost appellate blogger and advocate, gives us an insider's guide to practicing before the U.S. Court of Appeals for the Third Circuit, guiding practitioners through all the steps they need to make sure their appeal is in proper form.

With "high-stakes" cases becoming more common before our state and federal appellate courts, we hope this issue provides our readers with some additional insight into the ever-developing sphere of appellate practice.

James H. S. Levine

Howard J. Bashman
is a nationally known appellate attorney and legal commentator who operates his own appellate litigation boutique in Willow Grove, Pennsylvania. Mr. Bashman received his J.D. *with distinction* from Emory University School of Law and clerked for Judge William D. Hutchinson of the United States Court of Appeals for the Third Circuit. Since December 2000, Mr. Bashman has written a monthly column on appellate developments for *The Legal Intelligencer* and is a frequent contributor to Law.com. He can be reached by telephone at (215) 830-1458 and via email at hjb@hjbashman.com. His award-winning appellate web log can be accessed at http://howappealing.law.com and via Twitter @howappealing.

David C. Frederick
specializes in Supreme Court and appellate litigation with the Washington, D.C., law firm of Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. He has argued more than 40 cases in the Supreme Court involving a wide array of clients and subject matters. Mr. Frederick received his J.D. *with honors* from the University of Texas School of Law and clerked for Justice Byron R. White. Mr. Frederick is the author of *Supreme Court and Appellate Advocacy* (West 2d ed. 2010).

Bruce P. Merenstein
is a partner in Schnader Harrison Segal & Lewis LLP's Philadelphia office, where his practice focuses primarily on appellate litigation. Mr. Merenstein serves as the Vice-Chair of the Litigation Services department, Chair of the Pro Bono Committee, and previously was Co-Chair of the Appellate Practice Group. Mr. Merenstein also has extensive trial court experience, particularly in briefing and arguing pre- and post-trial motions. Mr. Merenstein is an adjunct professor at Drexel University's Earle Mack School of Law, where he has taught appellate advocacy since 2007. Mr. Merenstein received his J.D. *summa cum laude* from the University of Pennsylvania Law School and clerked for the Honorable Edward R. Becker of the United States Court of Appeals for the Third Circuit.

Nilam A. Sanghvi
is a staff attorney at the Pennsylvania Innocence Project. Previously, Ms. Sanghvi was a fellow in Georgetown University Law Center's Appellate Litigation Program, where she supervised students litigating appeals, taught appellate practice, and argued appeals. Before her fellowship, she was a partner in Schnader Harrison Segal & Lewis LLP's Philadelphia office, where her practice focused on complex commercial litigation. This fall, Ms. Sanghvi will be an adjunct professor teaching appellate advocacy at the University of Pennsylvania Law School. Ms. Sanghvi received her J.D. *cum laude* from Georgetown and clerked for the Honorable Thomas L. Ambro of the United States Court of Appeals for the Third Circuit and the Honorable William B. Shubb of the United States District Court for the Eastern District of California.

Hon. Paul R. Wallace
was appointed to the Superior Court of Delaware, beginning his term in January 2013. Previously, Judge Wallace served as the Delaware Department of Justice's Chief of Appeals from 2008 until his judicial appointment. In that role, he was the State's principal courtroom advocate before the Delaware Supreme Court and the federal appellate courts. Prior to taking up a full-time appellate practice, Judge Wallace served as the Chief Prosecutor for New Castle County and for close to two decades as a trial prosecutor handling a wide variety of criminal matters at every level, state and federal, trial and appellate. In 2012, Judge Wallace was awarded the National Appellate Advocacy Award by the Association of Government Attorneys in Capital Litigation.

CORRECTIONS

In the Summer 2013 issue of Delaware Lawyer, *in the article "Chapter 11: The Bankruptcy Judges Speak," Kevin J. Carey was incorrectly identified as the Chief Judge of the Bankruptcy Court. Though he previously held that post, the gavel passed to the new and current Chief Judge, Kevin Gross, before our article was published. In the same article, Judge Sontchi's middle initial was incorrect; his correct name is Christopher S. Sontchi.* Delaware Lawyer *regrets these errors.*

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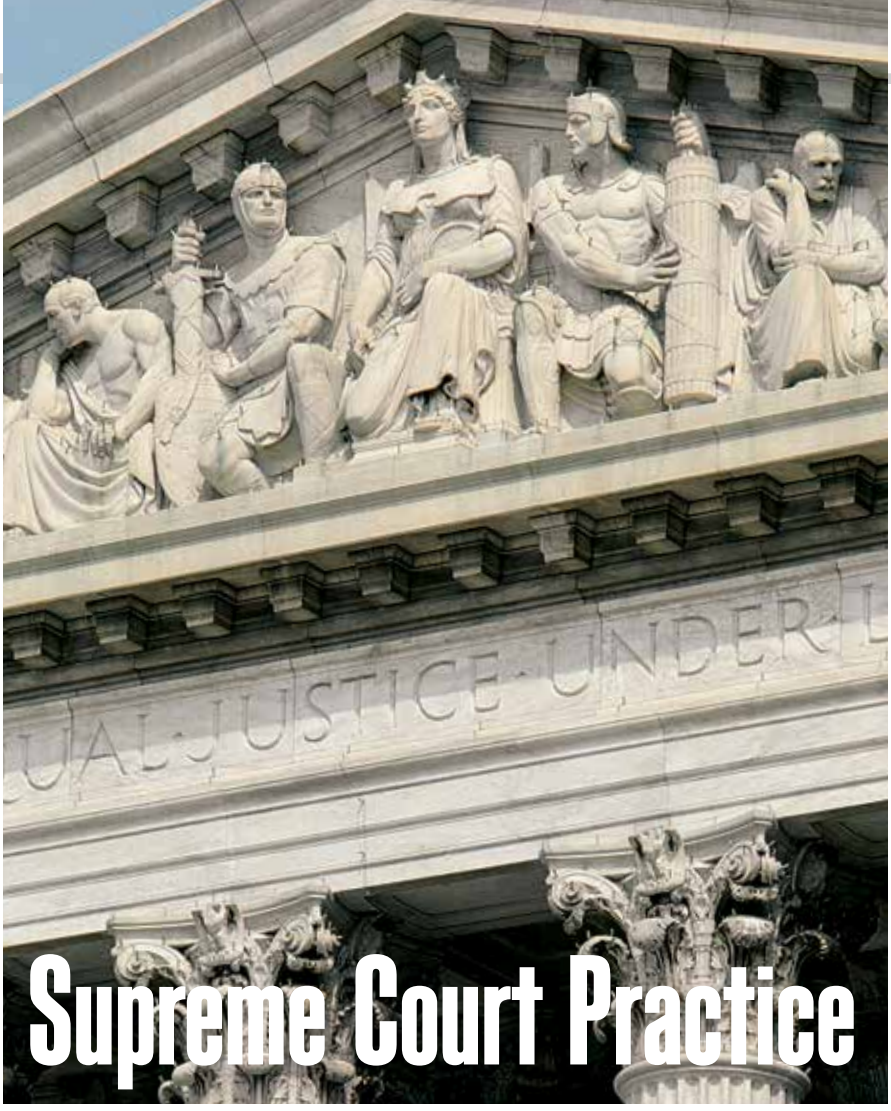
David C. Frederick



Essentials of Supreme Court Practice

Demystifying practice before the legal profession's most hallowed and intimidating chamber.

Back in the 1990s, while serving in the Solicitor General's Office, I became friends with a retired lawyer who had worked in that office in the 1950s. As we discussed changes in Supreme Court advocacy over the years, he smiled and said, "Arguing in that court is the ice cream of the legal profession."

I understood what he meant. After a long career of taking depositions, fighting discovery disputes, and negotiating settlements, he appreciated how memorable it is to argue a case in the Supreme Court. For him, ice cream was the ultimate treat. For me, the "ice cream" has been the opportunity to handle many complex and interesting cases in the Supreme Court, including representing Delaware in a boundary dispute with New Jersey.

As special as the experience might be, each Supreme Court case presents its own unique puzzle to solve. Navigating the legal and public policy components of a case and finding the right arguments to persuade a majority of justices is an endlessly interesting exercise in coalition building.

The tools of legal argumentation have not changed very much from cases decided a century or more ago. Nonetheless, the Court's precedents offer fresh insights into how the current justices are likely to react to the arguments presented by both sides.

Getting a Case Before the Supreme Court

As the majority will eventually establish, there is one "right" answer to each issue raised in a case, but most cases end up in the Supreme Court precisely because of profound disagreements among federal courts of appeals

or state supreme courts on federal legal questions.

It is a truism that, when petitioning for a writ of certiorari, the surest way to interest the Supreme Court is to show a conflict among lower courts on a federal issue. Federal circuit judges typically don't want the Supreme Court to review their judgments, so they may go to some lengths to avoid openly acknowledging a conflict with another court.

As an issue is litigated more frequently, acknowledged conflicts become more common, or at least demonstrable in a certiorari petition. But the justices themselves typically view the issue raised in a petition in concrete terms: would the *outcome* of the case have been different if the case had been decided in another federal circuit or state supreme court?

If the answer to that question is no, it generally is difficult to persuade the justices (and their law clerks who summarize petitions in the certiorari pool) that a conflict exists warranting Supreme Court review.

> A creative and agile mind for thinking of analogous areas of law is an important tool for the lawyer briefing a Supreme Court case.

Even with a circuit conflict, the question has to be important enough for the Court to justify using its scarce resources to resolve. Over the past 20 years or so, the Court has perceived the need to grant certiorari in only 80-100 cases out of the more than 8,000 petitions for a writ of certiorari filed each year, so the standards are brutally difficult to meet. Court-savvy lawyers, therefore, find numerous ways to argue for the "importance" of a case, chief among them lining up *amici curiae* to argue that the Court should take the case.

Crafting an Effective Argument

Once the Court agrees to hear a case on the merits, the briefing takes on an entirely different dimension from what occurred earlier in the litigation. The Court typically grants only a single question to resolve – only occasionally two or three – so the focus of the

written brief is unrelentingly on the issue the Court agreed to hear.

Briefing a case in the Court is unlike previous briefing because the challenge is to demonstrate, from a position of first principles, why the Court should decide the case in a particular way.

That approach differs fundamentally from the way most district courts and courts of appeals decide cases. In those lower courts, the principal challenge is to show how the facts apply to existing precedent. Once a federal court of appeals decides a particular legal issue, that decision becomes persuasive precedent for other courts to follow. In the Supreme Court, district and circuit opinions are largely irrelevant to the justices.

If the issue in the case entails statutory construction, contemporary justices will apply a much more rigorous textual approach than the Court did in earlier eras. Many cases turn on the meaning of a particular word in a statute, and cases have sometimes been resolved only after a debate over which dictionary is most appropriate for ascertaining congressional intent.

> The lawyer who presents a case in the Supreme Court speaks for every person, corporation, or governmental interest affected by that side of the case.

If the case raises a question of doctrine, the justices tend to be much more interested in how previous Supreme Court decisions have held on closely analogous questions than what lower federal and state courts have opined on the exact question presented.

In that sense, a creative and agile mind for thinking of analogous areas of law is an important tool for the lawyer briefing a Supreme Court case. Every word and citation in a brief will be closely scrutinized, so creativity in legal reasoning must be matched by a scrupulous adherence to accuracy and precision.

Running the Gauntlet: Supreme Court Oral Argument

The challenges of putting together a world-class brief, however, merely become the building blocks to a successful oral presentation. It is often noted

that a great oral argument in the Supreme Court rarely wins a case, but a poor argument can lose one.

Aside from the rarity of having the oral argument decide a case, the hearing presents the justices with an opportunity to test various hypotheses on counsel. Oral argument, therefore, serves a critical function in reassuring the justices about the limits of a particular principle or in exposing the logical flaws in a position containing surface appeal.

The most important question any advocate must answer at the hearing is, "What is the legal test you are proposing?" That question might entail hours of thought and many trial runs in moot court practice sessions. Expressing the test succinctly without variation can be especially challenging. And being able to defend that test in the face of numerous hypothetical questions is an art form, which is perhaps why only a small number of advocates regularly appear in the Court year after year.

When done well, an oral argument in the Supreme Court is one of the most satisfying professional accomplishments for a lawyer. That can be true even in the most difficult cases in which the advocate faces a low probability of winning.

The challenge of preparation is enormous: trying to anticipate every conceivable question, mastering an often-voluminous record, and distilling numerous Supreme Court precedents to their essence. The process requires great concentration and critical thinking. And to be tested live before the leaders of one of our three great branches of government on issues of great moment inspires me every time I get that opportunity.

The lawyer who presents a case in the Supreme Court speaks for every person, corporation, or governmental interest affected by that side of the case. Those who argue for the first time rarely feel that responsibility. But the lawyer who accepts that burden and prepares assiduously will find the justices to be highly attentive, well prepared, and eager to probe the depths of the advocate's position.

Unlike most cases, the coalitions that formed in the case did not reflect the normal conservative-liberal pattern.

Celebrating the Experience

My wife and I have a tradition of celebrating the night after I present oral argument in the Supreme Court. For me, the accomplishment is in arguing the best I can, in spite of the difficulties raised by the case. Once the argument is over, the case belongs to the justices, to resolve the way they deem most appropriate.

Even to the advocate completely immersed in the case, how the justices come to their decisions can be full of mystery and occasional surprises. But, in my view, rising to the challenge of arguing in the Supreme Court is always worth commemorating.

One of my most memorable experiences litigating in the Supreme Court involved the *New Jersey v. Delaware* boundary dispute case. Every time I take the train out of Wilmington heading north, I look out across the Delaware River before the train enters Pennsylvania and reflect on the complex array of interpretive problems and historical challenges the case presented, for that is the parcel of land directly implicated in the boundary dispute.

New Jersey filed the lawsuit in 2005 to resolve a border dispute over whether Delaware could veto construction of a liquefied natural gas facility that BP wanted to build at Crown Landing, New Jersey. The green landscape at the water's edge and the absence of supertankers sailing up the Delaware River past New Castle provide visual reminders to this day of Delaware's victory.

When I reach that point in the train trip, I also think of the warm friendships, great collegiality, and creative collaboration with the Delaware lawyers on our team.

To resolve that important dispute between the two States, the justices confronted arcane questions of textual interpretation, historical custom and practice, the application of Supreme Court precedent, and issues of pressing public policy. The Court addressed whether the riparian rights attached to the land at the Delaware River's edge in New Jersey allowed a New Jersey landowner to "wharf out" into the river and thereby cross into Delaware.

Because the encroachment into Delaware was significant, it implicated environmental laws that prohibited such facilities in Delaware. Because ultimately the reasonableness of Delaware's refusal to permit New Jersey's cross-boundary incursion was at issue, *New Jersey v. Delaware* had the same elements found in many great Supreme Court cases.

But, unlike most cases, the coalitions that formed in the case did not reflect the normal conservative-liberal pattern. The six-member majority consisted of Chief Justice Roberts, and Justices Stevens, Kennedy, Thomas, Ginsburg, and Souter.

As it turned out, the dissenters who favored New Jersey's position were the only two Justices with familial ties to that State: both Antonin Scalia and Samuel Alito were born in Trenton. ◆

Nilam A. Sanghvi
and Bruce P. Merenstein

Appellate Lawyers Learn to Play Well with Others

With the stakes higher than ever on appeal, appellate litigators are reconceptualizing their role.

The typical image of an appellate lawyer is someone who picks up a cold record once trial court proceedings have ended, analyzes it, researches the law, writes a brief, and delivers an oral argument – all as part of a relatively solitary enterprise. Indeed, when asked to think of one word that best describes an appellate lawyer, a second-year law student at Georgetown University Law Center answered, "monastic."

This notion that appeals are a wholly separate part of the litigation process begins early in law school, where first-year law students in legal research and writing classes are often handed a closed record from which they are required to draft an appellate brief and participate in a mock argument.[1] The solitary nature of appellate practice was reinforced in recent decades by the increasing view of appellate lawyering as a specialized field.

The Trend Toward Specialized Appellate Practices

Historically, many lawyers, including litigators, were generalists – able to handle any matter that came their way. Over the past few decades, however, there has been a trend in the profession towards specialization. Now, when asked the question, "What do you do?" an attorney is just as likely, if not more likely, to say, "I'm a securities litigator" or "I'm an antitrust attorney" as to offer the simple answer, "I'm a lawyer."

Indeed, one law professor recently wrote that, "[s]ometime in the mid-21st century, an event will pass almost unnoticed in the public eye, a short announcement in *The Global Lawyer*, successor to the present day publication *The American Lawyer*. It will read something like this[:] Last GP Closes Doors."[2]

Appellate lawyers have been part of this trend.[3] Indeed, in 2005, the American Academy of Appellate Lawyers called on appellate courts and the appellate bar to "intentionally nurtur[e] the market trend toward appellate specialization" in order to "enhance the judicial tools for reaching good dispute resolutions and writing good precedent."[4]

Thus, the past several years have seen: the emergence of blogs devoted entirely to appellate practice;[5] the formation of appellate practice boutiques, including small firms focused on Supreme Court litigation;[6] the formation of appellate and Supreme Court litigation clinics at law schools;[7] an increased focus on the role of appellate lawyers, particularly the office of the Solicitor General, in the federal government;[8] and the formation of solicitor general offices at the state level based on the theory that "a unit within the [state] Attorney General's Office should be devoted solely to appellate work involving the state's interests."[9]

These developments recognize that appellate lawyers bring unique skills to the table. As two practitioners have observed, general market forces toward specialized practices alone would not have been enough to bring about these changes.[10] Instead, this trend is the result of the conclusion by many that "the skills required to be a good appellate litigator differ significantly from those of a good trial lawyer."[11]

For example, "[i]n developing and presenting a case to the trial court, the advocate must be adept at creating the best possible factual record, a goal that requires skill and experience in effectively managing document discovery, issuing and responding to written interrogatories, conducting and defending against depositions, questioning and cross-examining witnesses, and formulating and presenting attractive factual themes that will persuade the finder of fact."[12]

For an appellate lawyer, by contrast, the most important skills "involve the exercises of legal judgment, research, analysis, and writing that go into crafting an effective appellate brief; the appellate lawyer takes the factual record as it was created in the trial court and must weed through it to glean the factual predicates most favorable to his or her legal arguments, subject to the constraints that may be imposed by the applicable standard of review."[13]

Appellate lawyers can be valuable additions to litigation teams long before an appeal is on the horizon, particularly for preserving issues for appeal.

In the private sector, increasing client sophistication and the increasingly high stakes in civil cases have led to greater recognition of the value of an appellate lawyer's skills.[14] In the public sector, the recognition that certain lawyers should focus on developing and maintaining coherent and cohesive litigation strategies has resulted in greater appreciation of appellate lawyering as a specialty field.

For example, the Florida Solicitor General's Office was created in 1999, and the position was "broadly envisioned as a supervising and coordinating role to ensure coherency and quality in the appellate efforts of the Attorney General's office around the state."[15]

Emerging Trends in Appellate Practice

Recently, however, there has been an increased recognition that, while appellate lawyers have unique skills, there is no reason to segregate those skills away from the trial process. For example, trial litigators and clients increasingly have recognized the value of adding appellate litigators to trial teams.[16]

Appellate lawyers can be valuable additions to litigation teams long before an appeal is on the horizon, particularly for preserving issues for appeal. One practitioner has observed that, "[o]ne of the most well-known benefits of adding an appellate lawyer to the trial team is preservation of error for appeal. In the heat of battle, trial lawyers sometimes forget to get a critical document admitted into evidence, fail to ask the court reporter to record a bench conference, or fail to get a ruling on an objection. The appellate lawyer – who is generally one step removed from the heat of the battle – can serve as 'insurance' for the trial lawyer, thereby cementing the trial record for the appeal."[17]

Putting appellate lawyers on a trial team has other benefits as well. If appellate lawyers are involved in litigation from the moment that a case is filed, they can help shape legal theories for a case from the outset and bring their brief writing and oral advocacy skills to bear on significant motions filed with the trial court.

This creates opportunities for early resolution of cases on dispositive motions and also allows trial lawyers to focus on other crucial aspects of the litigation, such as managing discovery and creating the factual record to support the legal theories developed by the team.[18]

Thus, many law firms have begun to tout the fact that their appellate lawyers are also comfortable litigating in trial courts, and many clients have begun to request that at least one appellate lawyer be staffed on all of their major litigation matters.[19]

While appellate litigators have started to assume a larger role in trial-level litigation, a parallel trend has emerged of appellate courts using mechanisms traditionally thought of as trial court tools

to resolve appeals. For example, many federal courts of appeals have developed mediation programs, engaging appellate lawyers in settlement processes similar to those mandated by many trial courts.[20]

Additionally, substantive motion practice, once thought to be the sole province of trial lawyers, is becoming an increasingly important part of appellate court litigation. The Department of Justice has even advised that "government attorneys can and should use case-dispositive motions as an efficient way to dispose of those appeals that should not actually be before the courts of appeals."[21]

Thus, while appellate litigation is still viewed as a specialized practice area, the skill set required of appellate lawyers is becoming broader, both in terms of an increased role in all stages of litigation and with regard to the new mechanisms used to resolve cases in the courts of appeals.

Implications for Appellate Lawyers and Practice Groups

So, the question becomes, what do these trends mean for those in appellate practice or who would like to become appellate lawyers? There are no simple answers.

There certainly are pros and cons to the new, more integrated appellate practice model. Perhaps the most obvious con is that the appellate lawyer does not come into the case "fresh" to give trial lawyers and clients, who have been immersed in the case, an independent perspective on the litigation.[22] However, the benefits of having an appellate lawyer on hand from the outset to shape big picture legal theories and ensure proper development of the record likely outweigh any drawbacks of this approach.

One thing is clear – appellate lawyers will need to be flexible in their practices. Although some cases will still come to appellate lawyers solely for briefing and argument based on a closed trial record, that model, once the norm, is becoming less common.

Rather than being handed a closed record, appellate lawyers must now be able to help shape that record. Appellate lawyers must also evolve to become proficient at mediation and motion practice at the appellate level, skills that were not traditionally part of an appellate lawyer's arsenal.

In this new world, appellate lawyers face a challenge of balancing their core expertise in brief writing and oral advocacy with a more flexible skill set.

This trend also has implications for private sector appellate practice groups, which must be able to successfully integrate themselves with law firm trial practices in order to be competitive.

It also has implications for the training of appellate lawyers. From the very beginning of law school, students should learn that brief writing and oral advocacy cannot be divorced from the rest of litigation practice.

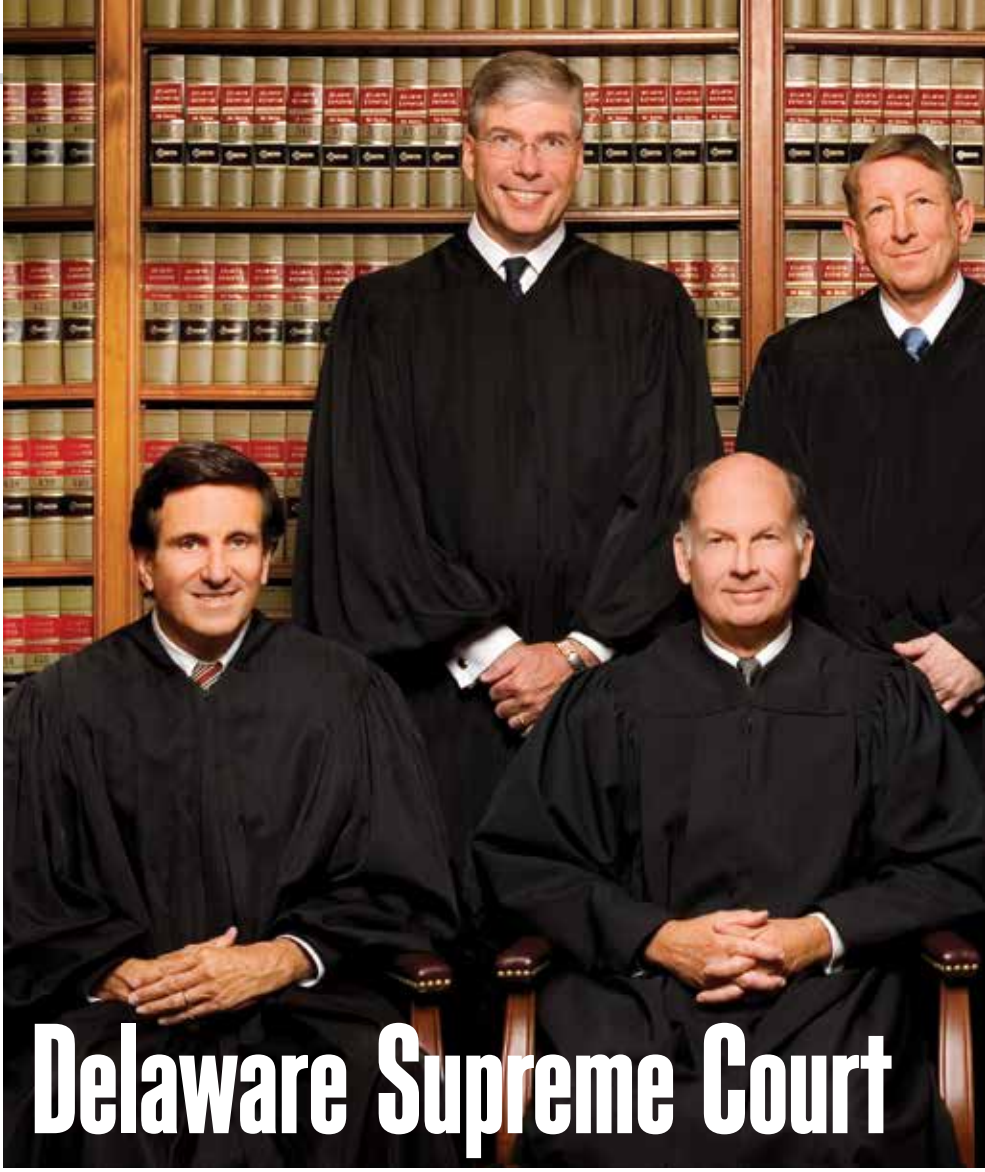
And aspiring appellate lawyers should be exposed, through practice skills classes, clinics, and on-the-job training, to the competencies required by this new marketplace – in particular, being able to think on their feet as part of a trial team, develop a legal theory at the start of litigation, engage in effective mediation, and adapt appellate brief writing styles to trial court audiences.

In short, appellate lawyers can no longer expect to thrive by adhering to the cloistered model of appellate practice. They must adapt to a broader set of circumstances in which they are likely to find themselves and learn to "play well with others," including trial lawyers and trial court judges.

If they do so, they will better serve their clients and be more likely to find success for their appellate practice groups and themselves. ◆

The footnotes accompanying this article are posted on the Delaware Bar Foundation's website, www.delawarebarfoundation.org/delaware-lawyer-publication.

James H. S. Levine



The Justices of the Delaware Supreme Court (from left to right): Justice Randy J. Holland, Justice Henry duPont Ridgely, Chief Justice Myron T. Steele, Justice Jack B. Jacobs, Justice Carolyn Berger.

Appellate Practice Roundtable with the Delaware Supreme Court

Insight from our Justices on how best to approach your next appeal.

On July 10, 2013, the members of the Delaware Supreme Court provided their time and experience to discuss appellate advocacy from their perspectives as jurists. As the highest court in the State of Delaware, Chief Justice Myron T. Steele and Justices Randy J. Holland, Carolyn Berger, Jack B. Jacobs and Henry duPont Ridgely are among our foremost authorities on appellate practice.

MR. LEVINE: Appellate practice is a vital aspect of the legal landscape, but despite its critical importance in crafting the law, it is an area that is still largely unfamiliar to many lawyers, in Delaware and elsewhere. While lawyers may become involved in an occasional appeal, a much smaller percentage appear before the Supreme Court on a regular basis. We hope that this discussion will be helpful to all practitioners who appear before the Court, however frequently, by providing them with some insight into the Court and appellate advocacy generally.

We appreciate you finding time in your busy schedules to join us today. Each of you has served on the Court for a number of years and can undoubtedly provide expert advice to attorneys on the relative strengths and weaknesses of their arguments. In your mind, what makes an appellate argument strong? Is there anything in a particular argument style that makes it more effective than another approach?

CHIEF JUSTICE STEELE: I think I can say some words with which my colleagues will agree. First, I think we all prefer a focused argument. Most of the records that support the arguments that we are going to hear are voluminous. So anyone who can tell us precisely what the issues are, where they allege that the trial judge erred and what we should do in light of that error in order to assure that there was a fair trial or a correct result, that's what we want to hear.

The second thing I think that is important, at least to me but I would again risk saying my colleagues agree, is that we need appellate advocates to understand the record and to be able to bring instantly to their command the facts that support the argument that they are making to us.

It is very disappointing when we will ask a question about the record and counsel will say, "I really am unsure," "I don't know, I wasn't the one who tried the case," "I'm not sure what the basis was for that in fact," "I don't know why that conference between the Court and counsel was off the record because I wasn't there, I know it should have been."

That is very disappointing, so focus and a command of the record are the two most important things to me.

JUSTICE BERGER: I would add that it is not uncommon for attorneys to get up and say, "I know you have read the briefs, but I'll go into it all over again." And that is kind of a waste of everybody's time.

There are always more significant issues and less significant issues and it makes the most sense, if you don't have a complicated set of facts, to either give an abbreviated statement of the facts or just start in on the first issue and weave the facts into it. All too frequently we see people who use up a good portion of their time telling us what we have already read in the briefs.

JUSTICE JACOBS: I agree with all of the above. I would just add two things. First, one of the elements of appellate advocacy which some lawyers are not sufficiently mindful is the standard of review. We pay careful attention to the standard of review, because there are only four arguments that any appellate attorney can make.

The first would be that the lower court erred by choosing and applying the incorrect rule of law. If that is the argument, then the standard of review is *de novo*, which means we decide the merits as if there were no trial court opinion. That is, we give no deference to the trial court opinion on that particular issue.

The second possible argument, which also includes *de novo* review, is that the trial court chose the correct rule but applied it incorrectly to the facts. That argument is made frequently in corporate fiduciary duty cases where the law is not really in dispute, only its proper application.

The last two potential arguments are more difficult for the appellant. The third possible argument would be that the trial court got the facts wrong. That is an uphill battle because the standard of review would be: Is there any evidence, or substantial evidence, to support the factual finding? If there is, then the appellant loses.

The fourth possible argument is equally, if not more, difficult – that the trial court abused its discretion. In simple terms, if the trial court had discretion to rule either way, the appellant must show that that discretion was abused. That is difficult, since it requires a showing that the trial court acted in some way arbitrarily. So that is my first point.

My second point is – and here I agree with Justice Berger entirely – is that you should tell the Court right off the bat what issues the Court needs to decide. We have all read the briefs. So the real question is specifically, what do you want us to decide? Tell us right off the bat and then give us the reasons why we should decide the way you advocate.

If you can do that and do it in the first two paragraphs of your presentation, we'll love you. Conversely, if it takes you forever to get there, we won't.

JUSTICE RIDGELY: And there is an important reason to do it early on. I would like to rephrase your question a little bit from what makes an argument strong to what makes the conversation strong. Because this is really a conversation with the Court. We are having oral argument because we have questions that we want answered.

And so soon after this introduction, the questions will start and the lawyer needs to have a full knowledge of the record. The best advocates will cite the record on the spot for a particular factual question that may be asked. Full knowledge and familiarity with the case

law that not only supports your position but also that your opponent is going to rely upon is essential.

JUSTICE HOLLAND: I agree with what everyone has said. And picking up on Justice Ridgely's analogy to a conversation, I think it is important to be familiar with the Court, whether you come to an argument on a week that is not your argument or you listen to our arguments online. You have to understand the dynamics of this Court, which is different than the Third Circuit and different than the Pennsylvania Supreme Court. And you shouldn't prepare a speech that you plan to read, because that is not going to happen, and you should welcome questions.

So I think the most effective advocates really have two approaches. They have a skeleton outline of what they would like to say if they are allowed to say a few things, and they have a list of the points they would like to make, no matter what, that support their thesis and they work those into their answers.

But you shouldn't come in thinking you are going to get to read a speech. You should welcome the questions of the Court and be prepared to be engaged in a discussion.

MR. LEVINE: Are there any common mistakes that you see attorneys make when they argue before you?

JUSTICE BERGER: I think it is a mistake not to concede a point that you ought to concede. I, for one, have always been most favorably impressed when an attorney, if they need to, agrees that yes, under these circumstances my argument would fail, or anything along those lines. Because then we have a level of honesty that is very good and we also have a border, if you will, of where we get to the end of this particular line of reasoning.

And yet over and over again attorneys will just say, "Well, that's not my case," or "That's hypothetical," or some evasive kind of answer because they just don't want to say, "Yes, under those circumstances we would have to lose."

One lesson new lawyers need to learn – perhaps best from more seasoned lawyers who practice more often before our Court – is: What is an appellate Court's role?

JUSTICE HOLLAND: And along with that, and you may not always have to lose, but that is something that you should acknowledge if it is the fact. But you can acknowledge that something was not done correctly, whether you are the appellant or appellee, and then proceed to explain why, notwithstanding that error, you should prevail anyway.

And it is particularly easy for the appellee to do that given the standard of review; in criminal cases we call it harmless error and we do it in civil cases also. But I think you enhance your credibility with the Court if you acknowledge something happened and it is not the way it should have gone and, notwithstanding that transgression, you can prevail anyway.

JUSTICE JACOBS: I think that one lesson new lawyers need to learn – perhaps best from more seasoned lawyers who practice more often before our Court – is: What is an appellate court's role? Once you grasp our function in the overall court system, you will appreciate the concerns that motivate the kinds of questions that lawyers get asked.

A classic example is Justice Holland's practice of asking – in cases where either the argument is that the law was either applied incorrectly or the incorrect rule was chosen – "If we rule your way, how will this case fit into the existing fabric of the law?"

You would be surprised to learn that some attorneys are not prepared to give a conceptually reasoned answer to that question. But we need an answer, to help us decide how our ruling in that case will affect the outcome of future cases. For our Court to write a reasoned opinion, the presenting attorney must articulate a rule that can be applied sensibly in future cases.

That is a genuine concern, particularly where an advocate seeks to push the envelope of a common law rule out further, to include a case that would otherwise fall outside. So be prepared to tell us how you articulate the law if we rule your way.

So it is that Justice Holland frequently asks: "If we agree with your position, what would be the rule of law that we must articulate in our opinion?" The lawyers that are properly prepared will be able to tell us. Those who have not thought their position through will not.

JUSTICE RIDGELY: Sometimes lawyers are so focused on speaking that they are not listening, and it is important to listen to the questions from the Justices.

Bear in mind that our protocol and practice is that we do not communicate in advance on cases that are going straight to oral argument, but we may be communicating at least concerns through the questions that are being asked of the lawyer.

The lawyer should listen carefully to those questions and formulate answers and get a sense of where the Court may be headed from those questions.

Sometimes lawyers will stumble and we are sympathetic to that. Everyone has argued a case in our days as lawyers and we may throw a life ring to

someone to help them out. And unfortunately a common mistake is to push that away and not make use of it. Anticipate that and also listen carefully to what may be a lifeline question.

CHIEF JUSTICE STEELE: You may be surprised how many drowning men and women have pushed away the life raft.

MR. LEVINE: Perhaps for fear of an anchor attached to it?

JUSTICE BERGER: I think that is what's going on.

JUSTICE HOLLAND: They are overanalyzing where the Court is coming from just because they are not listening; they are trying to anticipate where the Court is going and they miss the point that the Court is trying to help them relax because you are more effective if you relax.

I heard a very seasoned practitioner before the U.S. Supreme Court characterize it as don't shoot the lifeboats.

JUSTICE JACOBS: All of us have read the briefs before we walk into the courtroom, but we will not have conversed about the case and we will not discuss it until after the oral argument is over.

So, at the beginning of oral argument, each Justice will have at least a tentative idea of the way the case should come out, based solely on the briefs. The reason for the questions is that we're trying to find out whether there is a clear pathway to reach the result that the presenting lawyer is arguing for.

Rarely is the pathway smooth. If it were the case would have probably been settled. In most cases that reach our Court, there is some kind of a bump in the road.

The bump may be factual, that is, the legal theory may be sound but the record may have a fact that inconveniently doesn't support it. Or the bump might be that there is a problem with the legal theory.

We look forward to oral argument... So it is a moment that an attorney should fully understand is an opportunity, not an obligation.

And so the questions are designed to uncover any bumps and test if the lawyer can help us deal sensibly with those bumps. As the presenting lawyer you may think that our questions signal that we are hostile to your position.

But in many cases, quite the opposite is true: probing questions are often designed to throw out that lifeline. The point is that you must be prepared to address the bumps in your own case.

JUSTICE BERGER: There is another mistake that for me is a pet peeve, so I want to air it. And that is when the Court asks a question and the attorney responds by saying, "I'm going to get to that, but that was later on in my argument," and then proceeds to go on with whatever he or she was planning on talking about, and I'm sitting here with a question that hasn't been answered. That's a pretty basic, I think, rule, that you answer the question and don't put it off to some other time.

JUSTICE RIDGELY: And if you don't know the answer to the question, say so and look for it and indicate that you will get it to us.

JUSTICE HOLLAND: I think the well-prepared advocate is able to retrieve information, as the Chief Justice said, either the facts or the law. It seems having a notebook is a good way to prepare, but it enables you to respond effectively to Justice Berger's concern because when the Court asks the question you're there; whether you planned to be there later or not, you're there once the question is asked.

So if you have your notebook organized and we have moved to argument three and you can move to argument three, you just turn the page in your notebook or in your mind, but you have to be immersed in the facts and the law and be able to respond directly even if it is not in accordance with your prepared presentation.

CHIEF JUSTICE STEELE: I think it is fair to say that your audience would be interested to know or be reminded that while you have a right to appeal, there is no right to oral argument. There is a very small percentage of our cases where we automatically go to oral argument *en banc*.

So the message should be every time you have an opportunity for oral argument, you should recognize the Court has serious questions about what the outcome ought to be and we genuinely believe that oral argument is helpful. We look forward to oral argument. I have never been with people that enjoy oral argument as much as my four colleagues do. So it is a moment that an attorney should fully understand is an opportunity, not an obligation.

I was asked after talking to some summer interns, "Do you make up your mind before you go into oral argument?" The answer from my 13 years' experience with my colleagues is no one has their mind firmly made up or we wouldn't be having oral argument. So it is very significant that the attorneys that come before us be focused and prepared because it will affect the outcome.

JUSTICE JACOBS: If I could just add one thing? We were talking about pet peeves.

CHIEF JUSTICE STEELE: I released a monster.

JUSTICE JACOBS: I agree. "I'll get back to that" is not a good way to answer.

JUSTICE HOLLAND: As long as it's not questions from the other Justices.

JUSTICE JACOBS: For me another no-no is not to answer the question responsively. Often the questions are framed as leading questions that call for a response of "yes" or "no." If you are asked a question framed that way, your answer ought to be "yes" or "no," or "I don't know," or "yes, but" or "no, but." That way the answer will be responsive and communicate precisely what the Justice needs to know.

I think it was Justice Ridgely who said some lawyers are not listening; they are too focused on speaking. But you do need to listen because the questions that are asked again are designed (and here I repeat myself) to see if there are any bumps in the road that preclude this specific Justice from ruling a particular way.

If, however, you talk around the question and don't answer it responsively, then, in my case at least, I will typically repeat the question in an effort to elicit an answer that will get me over the bump that is bothering me.

CHIEF JUSTICE STEELE: One thing you should know is that Justice Jacobs will repeat the question but only after he says to the attorney, "You are not answering my question." He has done that as recently as today and they should just expect that. He wants his question to be answered.

MR. LEVINE: These days perhaps no one component of litigation practice is as oft debated and written about as legal writing, specifically brief writing. Over the course of your careers on the bench I'm sure that you have seen some excellent briefs. What elevates a brief from good to great? Do great briefs have common features?

The perfect brief is one that I can take, strike out the advocacy, and then write the opinion using the brief as a first draft.

JUSTICE HOLLAND: Well, like the argument, the brief should be focused and you need to start out with a theory of the case. And then when you have a theory of your case, you need to select the issues in a manner that is consistent with the theory of your case and you shouldn't have extraneous issues because they dilute the effectiveness of the strong issues.

But all briefs should tell a story and when you write the factual part of the brief, you need to write the story with the good points and the points that are weaknesses in your case. But if you are the appellant, as you are telling the story, the reader should come away with the conclusion the story had the wrong ending.

And then you are going to go in and read the legal arguments, and I think effective legal arguments are focused. You want a lot of paragraphs. You don't want long sentences. You don't want string citations because what you are really saying to the reader is, "I want you to read this case."

What we want to know is: Is it the majority rule, the minority rule? Is there a leading case on point?

But if you stick with the theory of your case and you marshal your facts to tell a story, you are more likely to be focused and keep the Court's attention.

JUSTICE RIDGELY: The brief is a reflection of each lawyer's integrity, professionalism, and civility. You should not write anything in the brief that you wouldn't say to someone in person. It is not a license to attack anyone and it would be a mistake to do so.

JUSTICE JACOBS: Two quick points. To answer your question metaphorically from a judge's point of view, I would ask what is the perfect brief. For me, the perfect brief is one that I can take, strike out the advocacy, and then write the opinion using the brief as a first draft. That is the perfect brief.

Obviously, it takes a lawyer of great skill to know how to do that, and that gets to the points that have been alluded to here. Whether you are on the appellant side or the appellee side, you should order and color the facts in a way that, once the judge has read the facts and before he or she even gets to the argument section, is persuaded that your client deserves to win.

A well-written statement of facts should make it self-evident the kind of ruling that justice requires.

Then, when you draft the argument, as Justice Holland said, the argument should be tightly focused on your theory of the case. It should state clearly and succinctly why the trial court came out the wrong way legally. And the argument should avoid verbosity. There is far more power in sentences and words that are short than those which are strung out and long. The great brief writers are able to reduce to one page that which lesser advocates require five pages to express.

CHIEF JUSTICE STEELE: One thing I would encourage brief writers to keep in mind is the briefs are limited in pages so treasure every word. I am most annoyed when I see people constantly repeating the standard for summary judgment as if we don't understand it or don't know what it is. It is the equivalent of saying at oral argu-

ment "I suspect Your Honors have read the brief" and then go on.

We also know certain bedrock principles of law. You don't need to repeat them to us. Sometimes I think they are preprinted pages where the standard for summary judgment is set forth. There is no need to waste your time. Get to what you need to say and do it within the page limitations that are available, but don't state the obvious.

JUSTICE RIDGELY: And the page limitations are just that. They are limitations. They are not a goal. So it is alright to end the brief earlier than 35 pages if you have made your points effectively.

JUSTICE BERGER: I remember that when I was being taught how to write a brief there was great emphasis on the quality of the headnotes in the table of contents. And at the time I thought that was the most ridiculous thing I had ever heard.

As it happens, when I read a brief I look at those headnotes and when they are good I have got the whole picture right there on one page. So I have to admit that what I was taught long ago is true.

JUSTICE JACOBS: It is part of telling the story.

JUSTICE HOLLAND: It is. I think Justice Berger makes a good point. I often have said no part of a brief is unimportant. So a custom has evolved over the years to not only have the points you want to make in bold with Roman numerals, but they have subheadings and then the good brief writer brings those back into the table of contents.

And it is amazing when they do that you can read in the table of contents the subheadings and the main headings and understand exactly what is going on in the case.

JUSTICE JACOBS: Inexperienced lawyers may not know this, but the first thing that I read is the opinion from which the appeal is being taken. We require, by Court Rule, that the opinion be attached to the opening brief itself, as distinguished from the appendix to the brief.

The appellant's lawyer needs to address in his or her brief all of the reasons articulated by the trial court for reaching the result it did.

Well-written trial court opinions will not only reach the result, but also will marshal persuasively all the reasons why that result is the right one. In a very real sense, the trial court opinion is a brief to the Supreme Court.

The appellant's lawyer needs to address in his or her brief all of the reasons articulated by the trial court for reaching the result it did. The appellant must show why those reasons are wrong, legally or factually.

Unfortunately, we sometimes encounter briefs that go off into the wild blue yonder. The brief talks about what the law should be, or it talks about the facts of this case but does not focus on what is really important – the opinion that is the subject of the appeal.

MR. LEVINE: Justice Berger segued very nicely into our next question, which is whether you each have your own approach to reading a brief.

JUSTICE BERGER: Actually, like Justice Jacobs, I will read the lower court opinion first, but then I will go to the first page, the table of contents.

JUSTICE HOLLAND: The only thing I do differently is I read the summary of argument in the appellant's brief first because I know that at the trial level you might have raised seven points but on appeal you have narrowed it to three. So I just orient my reading of the trial court's opinion by looking at what issues have been brought up on appeal.

JUSTICE BERGER: Actually, that is a good idea.

JUSTICE JACOBS: Especially if they are long trial court opinions.

MR. LEVINE: Some judges have expressed a preference for starting by reading the reply brief once briefing has been completed in an effort to begin their review by reading the most succinct presentation of the disputed issues.

JUSTICE BERGER: That doesn't make a lot of sense to me.

JUSTICE RIDGELY: Me either.

JUSTICE HOLLAND: But that is why in reading the summary of argument – once again, every part of the brief is important and somebody that has a one-sentence summary of argument has lost an opportunity. A good summary of argument under each point may be three or four sentences and in those three or four sentences you identify the nature of the error and you identify the standard of review and you explain why it is error and it is amazing how you can do that in three or four sentences.

So when I read the summary of argument, if I see that there are three issues and the standard is all abuse of discretion, I'm going to be looking at those three issues when I read the opinion, but I'm also going to be saying to myself this person has an uphill battle because abuse of discretion is such a hard standard to meet.

MR. LEVINE: Earlier, Justice Jacobs provided some advice for less-experienced lawyers. Is there any specific advice that you would provide to these lawyers to help them stay on the right path?

CHIEF JUSTICE STEELE: Well, one thing again I think we will all agree on is understand our Court Rules before you take the appeal. Understand that if you are trial counsel, be focused not only on the trial and the outcome of the trial but making a record that you understand and will support you if you have to take an appeal.

And in conjunction with the two of those, one of the most important rules which we look at very closely is whether or not you have preserved the issue on appeal at trial. You can't raise issues for the first time in this Court in a reply brief and you can't raise issues that weren't first presented to the trial judge.

So they should be very conscious of that. I think there is some indication that younger lawyers are not aware of that and if they are taking their first appeal or even their third appeal, they are not necessarily aware of that, but it is very critical to us.

We don't like to take issues that the trial judge has not had an opportunity to address in the first instance. It is a very rare occasion when we will. And they should be focused on that.

JUSTICE RIDGELY: I would emphasize that less experienced lawyers should look to a mentor for advice. Justice Holland referred earlier to perhaps attending oral arguments. If you cannot attend, they are also available online. Audio recordings of all of our oral arguments are available online, so you can pick a comparable case and listen to how other lawyers have done their arguments.

And hopefully we are going to have the ability to have video someday as well and you can then observe it.

JUSTICE BERGER: I would give advice to new attorneys with respect to their clients, and that is that they should probably let their clients know that there is a very limited chance that the appeal will change the result. The number of cases that are reversed is a very small percentage of the number of cases that are appealed.

You can't raise issues for the first time in this court in a reply brief and you can't raise issues that weren't first presented to the trial judge.

JUSTICE JACOBS: I would just add that sometimes the best appeals are the ones that you don't take. Getting back to Justice Berger's comment about reading the table of contents. After your client gets an adverse decision by the trial court, before you file anything in this Court or any appellate court, you need to sit down and be able to articulate in a page why there was error and what kind of error there was.

If you can't do that, if you can't articulate an argument of error, you have got a problem. Even if you can, you must still go back and do what the Chief Justice emphasized, which is to ascertain that what you are arguing was properly preserved in the lower court. Because if the argument that you are articulating now was not made below, then you have a problem.

MR. LEVINE: Advances in technology have brought about tremendous innovation in law practice over the last 10 to 15 years. At the trial court level we see an increasing volume of discovery disputes over electronic document preservation and collection, but also enhanced presentations and demonstrations before the court. Are there ways that technological advancements have changed appellate practice from your perspectives?

JUSTICE RIDGELY: Definitely. Our Court was the first appellate court in the country to have electronic filing, which means the parties can file their briefs and access the docket from anywhere with Internet access. We do the same. The technology has allowed us, for instance, to monitor a Chancery case where we know there is going to be an appeal so we can decide in 24 hours if necessary by being able to access the Chancery docket electronically. The advantages have been tremendous.

JUSTICE JACOBS: Another example, thanks to Justice Ridgely, is that we now have iPads. And at least in my case my secretary uploads all the briefs that I will have to read for the next week on the iPad so that I don't have to be in my office or physically carry around the paperwork. I think that new technology has made a difference.

CHIEF JUSTICE STEELE: Are you going to disclose whether you are or are not an Apple stockholder after making that comment?

JUSTICE JACOBS: I will disclose it, yes. I am not. But not long ago we took a vacation for two weeks and I was able to prepare for the oral argument that would occur only days later by reading the briefs on the iPad while I was away.

MR. LEVINE: As Delaware lawyers, we often speak fondly of the nuances that make practicing here different than practicing in other jurisdictions. Among those distinctions is the Court's practice, now codified in Supreme Court Rule 4, of eschewing two-to-one panel decisions in favor of a rehearing *en banc*. That is a fairly uncommon practice among appellate courts. Could you explain the origin and historical basis of that practice?

See **Roundtable**
(continued on page 28)

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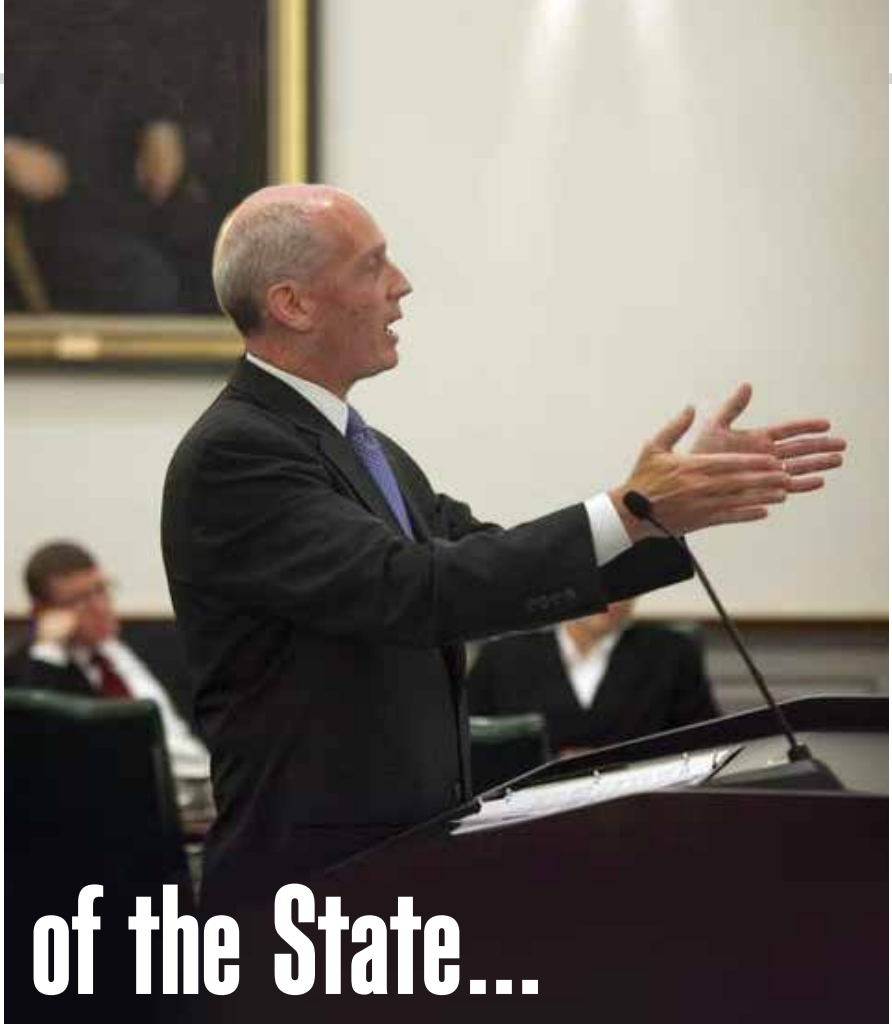


...on Behalf of the State...

Representing the State of Delaware presents both unique challenges and special opportunities.

Each oral argument for more than 20 years began exactly the same way: "May it please the Court. Mr. Chief Justice, Justices, good [morning/afternoon]. Paul Wallace on behalf of the State, the [appellee/appellant] in this matter."[1]

I spent the last five years of my practice with the Delaware Department of Justice ("DelDOJ") in the Appeals Section, arguing approximately 75 cases in that span. During that time, my seemingly rote introduction became a source of amusement for several of the justices. I'd be ribbed: "Why do you still do that? We know who you are by now."

Respect and ritual were the obvious answers. But there was another. With those words, I was reminding myself that I was about to speak as "a representative not of an ordinary party to a controversy"[2] but rather for the State and its entire citizenry.

The Evolution of Appellate State Attorneys

There are indeed significant differences between the day-to-day practice and role of an appellate attorney for the State and those of other attorneys who engage in appellate advocacy for "ordinary" parties. These differences stem from both how our State has elected to perform its role within the appellate process and, more generally, the prosecuting attorney's peculiar duties within the American appellate system.

On the criminal side, the Delaware Attorney General's Office has long functioned in a manner that other states are now mirroring. Over the past 30 years the office has had a Chief of Appeals who: (1) specializes almost exclusively in state and federal appeals; (2) argues many cases in the Delaware Supreme Court; (3) supervises a small, trained corps of attorneys who are appellate

practice experts; and (4) has developed a strong reputation with the Court as a reliable counselor on difficult issues.

Annual compilations of statistical information related to the Delaware judiciary demonstrate that year after year, more than one-half of our Supreme Court's caseload derives from its criminal docket. DelDOJ's small, trained corps of appellate counsel, led by the Chief of Appeals, must represent the State in every one of those matters.

In concrete terms, that means that 10 or fewer Delaware attorneys, aided primarily by just one full-time administrative assistant and one paralegal, are appearing in more than 400 (or more than 50%) of the Court's cases. Consequently, it is not at all unusual to see an individual Appeals deputy conduct back-to-back arguments on a normal Wednesday calendar.

And that does not even begin to account for other trial and federal habeas cases for which those attorneys are responsible.

As we have all seen recently, the cases handled by State appellate attorneys are neither low-stakes nor low-pressure. The work that tends to gain the most attention is performed, of course, in high-profile criminal cases and at the end stages of capital litigation.

It is then, literally with a life in the balance, that DelDOJ appellate attorneys are on any given day – filing multiple briefs condensing years of litigation into a few, short well-crafted pages; conducting oral argument before one or several courts in Dover, Wilmington or Philadelphia; attempting to coordinate the logistics of the imminent execution with other state agencies; and, all the while, also acting in many respects as "counsel" and support for a murder victim's family.

To my knowledge, the Department of Justice and Public Defender's Office are the only "firms" in Delaware with dedicated appellate sections. It is a good model and one very different from those seen in Delaware private practice, and even from those seen in many other states' government law offices (DelDOJ's other divisions included), where the privilege of arguing a case in the state supreme court is left to the trial attorney who handled the case below.

That which defines a successful trial attorney doesn't necessarily make for a successful appellate advocate. The trial is a search for truth; an appeal is a search for error.

It is a model that certainly has increased the professionalism and quality of the State's appellate work. This is no slight to trial lawyers who handle appeals – I was one for close to 20 years. But that which defines a successful trial attorney doesn't necessarily make for a successful appellate advocate. The trial is a search for truth; an appeal is a search for error.

The development of DelDOJ's Appeals Section, and its policies and procedures, are based on more than the theory that having a unit within the Attorney General's Office devoted solely to appellate work will enhance the quality of the State's appellate practice. The decision to have a dedicated appeals section also reflects the Attorney General's commitment to fostering the State's true goals. For through careful analysis of the interests and legal questions at issue in the matters he handles, the State's appellate counsel provides coordination of both legal and policy implications in the State's most important cases.

In 1940, then-United States Attorney General, and later United States Supreme Court Justice, Robert H. Jackson said, "The prosecutor has more control over life, liberty, and reputation than any other person in America."[3]

The prosecutrix cannot be concerned with just the case before her. Instead she must understand that the positions she takes will have a very real and lasting impact far beyond that case. She must understand that what she argues will affect the behavior of those in her community, will be used to interpret criminal statutes applicable to all citizens, and will help dictate which cases are brought and which are rejected thereafter.

The Dichotomy of Prosecutor and Appellate Advocate

To understand the unique experience of a prosecutor as an appellate advocate in an individual case, however, one must first understand the unique role of a prosecutor in our system of justice. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice . . . ."[4]

The broad extent of this duty was set forth by the United States Supreme Court in *Berger v. United States*:

"The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer."[5]

Our own high court further explained long ago that "[a] prosecuting attorney represents all the people, *including the defendant who was being tried*. It is his duty to see that the State's case is presented with earnestness and vigor, but it is equally his duty to see that justice be done."[6] And that duty endures in

the appeals stage during which there is "a continuing need [by prosecutors] to internally review cases to ensure that justice is done."[7]

Thus, the appellate prosecutor has a duty singular among attorneys. She not only puts forth her best efforts to defend a just verdict; she must scour the record to ensure the verdict and judgment truly are just. When they are not, she must alert both the Court and the opposing party and tell them precisely why.

The Stakes are Greater When the State is a Party

This is because, at all times, the appellate prosecutor's client is not a victim, a police officer or any other specific individual, but society itself. The interests of society and the interests of a particular victim or officer, while oft-times the same, are not always identical.

With no identifiable client, the prosecutor must make decisions a client would ordinarily make.[8] That burden is simultaneously demanding and liberating. The prosecutor must ensure just results that are within the bounds of applicable law and consistent with the community needs.

And she must always be mindful that the manner in which an appellate prosecutor makes decisions not only impacts individual offenders but shapes the perception of victims and the community regarding the effectiveness of the criminal justice system as a whole.

Lest one read this as a lamentation over how hard a job, how demanding a job it is to be appellate counsel in State service, know that I am convinced that I had the best job in the Delaware Bar. Representing the people of Delaware afforded me a varied, rich and fulfilling practice that few attorneys have had or will ever be fortunate enough to have.

Former Associate United States Attorney General Stephen Trott said it far better than I ever could:

"I can't think of a better job than to be a prosecutor. It's an absolutely amazing opportunity. It's a luxury of a lifetime to be able to pursue only those things that are right. You are unencumbered by the bad ideas of a client who is paying you money. You are only encumbered by your own desire to do the right thing and to make sure that justice is done."[9] ◆

FOOTNOTES

1. While I had the opportunity to argue before every Delaware state and federal appellate level court – save the United States Supreme Court (where none of my cases were ever called for argument) – more than 90% of my appellate practice was before the Delaware Supreme Court.

2. *Berger v. United States*, 295 U.S. 78, 88 (1935).

3. Robert H. Jackson, U.S. Att'y Gen., The Federal Prosecutor, Address to the Second Annual Conference of the United States Attorneys (Apr. 1, 1940), *in* 24 J. Am. Jud. Soc'y 18 (1940) and 31 J. Crim. L. & Criminology 3, 6 (1940).

4. Delaware Lawyers' Rules of Professional Conduct, Rule 3.8, Commentary; *In re Doe*, 801 F. Supp. 478, 480 (D.N.M. 1992) ("Recognizing a [prosecutor's] role as a shepherd of justice . . . .").

5. 295 U.S. at 88.

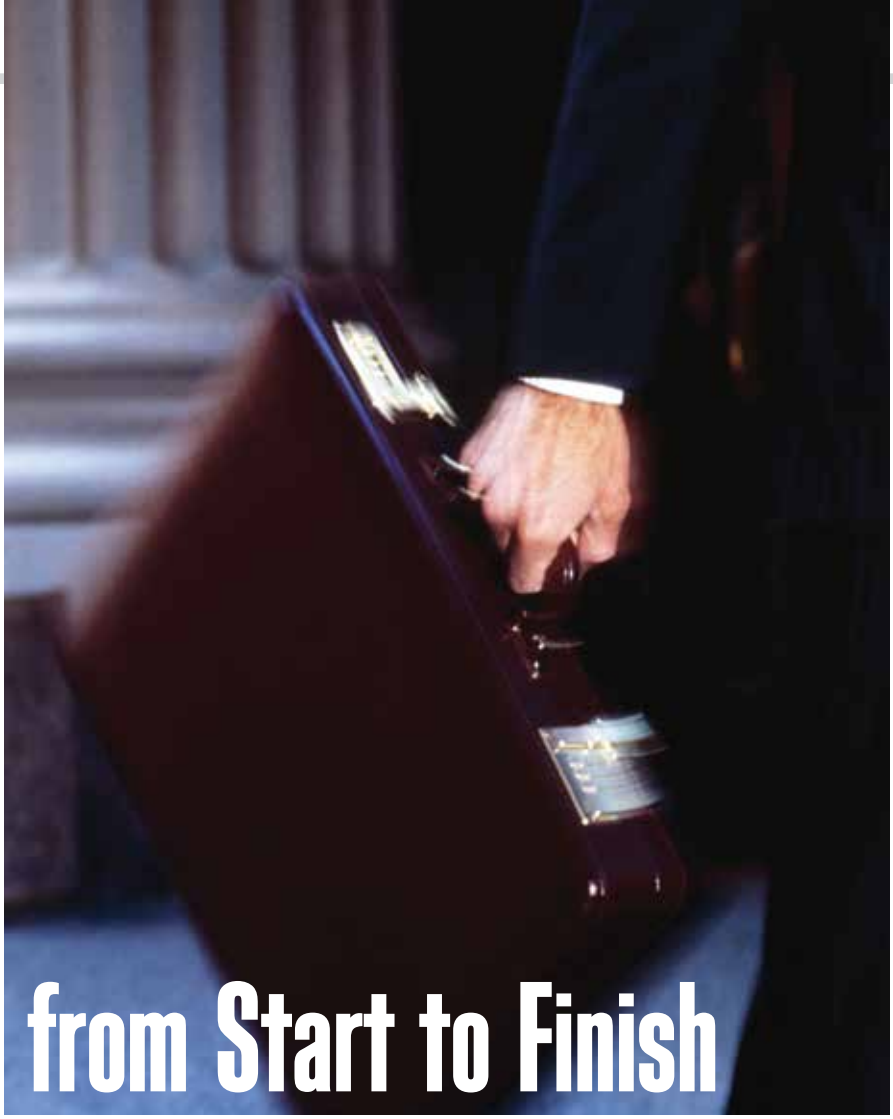
6. *Bennett v. State*, 164 A.2d 442, 446 (Del. 1960) (emphasis in original). *See also* American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function*, Standard for Prosecution Function 3-1.2(c)(1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); National District Attorneys Association, *National Prosecution Standards*, § 1.1 (2d ed. 1991) ("The primary responsibility of prosecution is to see that justice is accomplished.").

7. *Weddington v. State*, 545 A.2d 607, 612 (Del. 1988).

8. Kenneth J. Melilli, *Professional Discretion in an Adversary System*, 1992 BYU L. Rev. 669 n.5 (1992)(citing John S. Edwards, *Professional Responsibilities of the Federal Prosecutor*, 17 U. Rich. L. Rev. 511, 513 (1983)).

9. Stephen S. Trott, U.S. Assoc. Att'y Gen, Address to J. Frank Coakley National Symposium on Crime (May 1987), *in* John J. Douglass, Ethical Issues in Prosecution 31 (NCDA 1988).

Howard J. Bashman



Your Third Circuit Appeal from Start to Finish

An insider's guide to Third Circuit practice.

Lawyers who do not regularly practice before the U.S. Court of Appeals for the Third Circuit may wonder what is going to happen next in their pending or soon-to-be-filed appeal to that court. Although perhaps not as familiar as trial court practice (in state or federal courts), the progression of a Third Circuit appeal is not complicated, and the Third Circuit handles appeals in an efficient, consistent manner. From beginning to end, this process can be described in a series of steps.

Docketing the Case

After a notice of appeal to the Third Circuit is filed in a U.S. District Court located in Delaware, New Jersey or Pennsylvania (or in the District Court for the U.S. Virgin Islands), the district court's clerk's office dockets the appeal and forwards a copy of the notice and the district court's docket sheet to the Third Circuit.

When the Third Circuit receives those documents from the district court, the Third Circuit dockets the appeal and assigns an appellate docket number.

The Third Circuit, in common with the district courts under its jurisdiction, is an electronic filing court. An attorney must be a member of the Third Circuit's Bar and have applied for electronic filing privileges in order to e-file documents at the Third Circuit.

Most documents that an attorney must file in a Third Circuit appeal will need to be e-filed, although paper copies of some documents (such as the ap-

pellate briefs and the appendix on appeal) still must be provided. A complete description of the Third Circuit's e-filing requirements can be accessed at the court's website.

Once a new appeal is docketed, the Third Circuit's clerk's office immediately sends a case opening notice to counsel for all parties and former parties in the district court. The case opening notice advises that the Third Circuit has docketed the appeal and sets forth deadlines by which counsel must file various forms in order to participate in the appeal.

The case opening notice also contains instructions on how to access (via the Third Circuit's website) an entry of appearance form, a corporate disclosure statement form, and (if the recipient is not admitted to practice in the Third Circuit) a bar admission application.

The case opening notice also sets forth deadlines by which counsel for the appealing party must file a transcript order form (even if no transcript exists), a civil or criminal information statement providing details about the case, and a concise statement of facts and issues in civil cases potentially subject to appellate mediation.

If the parties opposing the appeal are dissatisfied with the appellant's information statement or concise statement of facts and issues, they may opt to submit their own versions.

If a case is not subject to appellate mediation, the case opening notice may also include an order establishing a briefing schedule.

Finally, if the appeal appears to have been taken from a non-appealable order, or appears to have been taken after the time for appeal has expired, the initial notice may ask the parties to address promptly whether the Third Circuit possesses jurisdiction over the case.

Appellate Mediation

Appeals in civil cases that involve claims for money or that otherwise appear capable of settlement are ordinarily directed into the Third Circuit's appellate mediation program before a briefing schedule issues. If an appeal is selected for mediation, counsel will receive a notice that directs the filing of settlement position statements.

The mediation program's files are confidential and are not available for review by any of the judges who could be assigned to decide the appeal if mediation is unsuccessful.

The Third Circuit's mediation program can be very effective in helping to settle even especially difficult cases. If unsuccessful, however, mediation may cause an appeal's progress to be delayed for several months, because no briefing schedule issues while an appeal is in the mediation program.

A party that believes settlement is unlikely and does not wish to have an appeal's resolution delayed can send a letter to the Third Circuit's mediation office at the start of the mediation process asking that the appeal be removed from mediation and returned to the clerk's office for issuance of a briefing schedule.

The Appellate Briefing Schedule

Once the Third Circuit issues a briefing schedule, the appealing party (appellant) typically has 40 days from the date of the order to file its brief. The opposing party (appellee) then has 30 days to file its brief. If the appellant wishes, it can file a reply brief within two weeks of when the brief for appellee has been filed.

Many lawyers overlook that all parties to an appeal have a shared obligation to agree on the contents of the joint appendix, which is to be filed with the appellant's opening brief. The Third Circuit strongly disfavors appeals in which the opposing parties each seek to file a separate appendix.

It is important that the appendix include all portions of the trial court's record that the judges assigned to the appeal will need to see. If a document is not included in the appendix, it may never come to the attention of the appellate judges.

Motions

The period before appellate briefs are due tends to be when most motions are filed. If a party files a motion in a Third Circuit appeal, it will either be decided by the clerk's office, by a motions panel not assigned to decide the appeal on its merits, or by the panel that will decide the merits of the appeal.

The clerk's office usually decides procedural motions, such as motions that seek a short extension of the due date for a brief, motions that seek to increase the word count limit of a brief and motions to file a supplemental appendix.

A three-judge motions panel typically decides more significant motions, such as those seeking to dismiss an appeal for lack of appellate jurisdiction. Once an appeal is assigned to a three-judge panel for a decision on the merits, the merits panel will decide any motions filed thereafter.

Filing the Briefs and the Appendix

The Third Circuit provides to all parties helpful checklists of what the parties' briefs and the joint appendix must contain. If a brief omits a required element or if the paper copies fail to have the proper color cover or meet certain other procedural requirements, the clerk's office will ask counsel to correct the deficiency. As always, the best advice is to get it right the first time.

The Third Circuit has specific rules governing the composition and filing of the appendix on appeal. In particular, volume one of the appendix must contain certain items, such as the opinion in support of the decision under review.

Also, the Third Circuit gives the party filing the appendix the option whether to file the appendix electronically or only by paper copy. Where the appendix is not electronically filed, a special method of citing to the appendix in the appellate briefs must be used providing parallel citations to where the material being cited appears in the district court's electronic docket.

Assigning an Appeal to a Three-Judge Merits Panel

The Third Circuit's clerk's office late each year issues a calendar scheduling three-judge panel assignments and sitting dates for the upcoming year. This schedule is not made publicly available until each session's oral argument schedule is posted online several weeks before an argument sitting.

The court's active judges are randomly assigned to a panel for each sitting, and, for the individual judges involved, sittings are usually separated by at least six weeks.

Once the parties start the briefing process, the clerk's office forwards to an upcoming merits panel the corporate disclosure forms filed by the parties to the appeal. The judges on the panel will then review the forms to see whether they are conflicted or otherwise disqualified from any of the appeals.

If a disqualification is noted, the appeal will then be sent on for conflict screening to the judges assigned to the next available panel.

Scheduling Oral Arguments

Approximately six to eight weeks before a panel will hear oral arguments, the briefs in the cases assigned to the sitting will be sent to the three-judge panel. The judges assigned to that week's cases will then begin reviewing the briefs to decide whether to request oral argument.

This represents the first time that anyone at the court will look at the actual content of the briefs other than to ensure that the required elements are present. While reviewing the briefs and preparing for oral argument, the merits panel can have the clerk's office send letters to counsel asking the parties to address issues that were insufficiently addressed in the briefs.

If any one judge wants oral argument, the case will be scheduled for argument. Cases that are not selected for oral argument have a higher rate of affirmance, so oral argument is an encouraging sign for the party that lost in the trial court.

After the briefs have been filed, but in advance of oral argument, the Third Circuit's clerk's office will send at least three separate electronic notices to counsel for the parties. The first notice lists several weeks during which argument or submission on the briefs could occur and asks the lawyers to advise immediately of any potential scheduling conflicts.

> Once an appeal is assigned to a three-judge panel for a decision on the merits, the merits panel will decide any motions filed thereafter.

Thereafter, a second notice is sent advising the lawyers of the exact date on which the appeal is likely to be argued or submitted.

Finally, approximately 10 days before the date of oral argument, the clerk's office sends counsel a notice advising whether oral argument will occur and disclosing the identity of the three judges assigned to decide the merits of the appeal.

Conducting Oral Arguments

If a case is selected for oral argument, the notice counsel receives from the Third Circuit will provide details about where the argument will take place and when counsel must report to the courtroom.

The notice usually will not disclose the order in which cases will be argued, so counsel desiring that information should either contact the Third Circuit's clerk's office or consult the oral argument calendar for the assigned sitting once posted online.

Oral arguments are audiotaped, and the audio files are posted to the Third Circuit's website shortly after the oral argument has completed.

Once the briefs have been filed, counsel can bring supplemental authorities to the Third Circuit's attention via a Federal Rule of Appellate Procedure 28(j) letter. Such letters can be filed before or after oral argument, and they tend to be more effective when reporting newly issued decisions rather than older decisions that counsel somehow previously managed to overlook.

The Third Circuit's Ruling

The Third Circuit will advise counsel of its ruling on the appeal via a Notice of Docket Activity email that will contain links to access the opinion and the accompanying judgment.

Ordinarily, lawyers involved in the case who have registered for electronic filing and who have entered their appearances in the case will be notified of the decision and be able to access it online before the Third Circuit posts the decision at its website.

Post-Decision Proceedings

Once the Third Circuit decides an appeal, the court will issue its mandate seven days after the time for seeking rehearing or rehearing *en banc* has expired unless a party has filed a timely rehearing petition. If rehearing is sought, the mandate will issue seven days after rehearing is denied.

A motion for stay of the mandate pending the filing of a petition for writ of certiorari in the U.S. Supreme Court can be filed in the Third Circuit, but such a stay should only be sought where the mandate's issuance will work some specific hardship on the losing party (*e.g.*, imposition of the death penalty, deportation, destruction of unique property, payment of money that might not later be recoverable from the opposing party, etc.).

Once the Third Circuit's mandate has issued, the Third Circuit's involvement in the appeal has come to a close. ◆

Roundtable *(continued from page 20)*

JUSTICE HOLLAND: It goes back to 1978 when the Court expanded from three to five Justices. As you know, Delaware doesn't have an intermediate court of appeals and we have no discretionary jurisdiction.

So prior to '78 the Court had a backlog. The Court was expanded by two and they decided to sit in panels of three to catch up, but they decided at that time if the panel was divided two-to-one they would rehear it with the five of them. And that tradition simply continued and it has been very effective.

As you know, we have a self-imposed rule that we have to decide all matters within 90 days. Not only our Court, but the trial courts as well. But for the last five years, at least, our Court has averaged deciding cases in 42 days, not the full 90. And so I think it came about through practical necessity, but it has continued because we think it makes the law of Delaware more predictable and stable.

CHIEF JUSTICE STEELE: And one thing we have done in the last nine years is to cut down on the number of three-judge panels and more carefully scrutinize cases that we can fairly anticipate might result in two-to-one results, and therefore necessitate an *en banc* hearing and be more careful to go *en banc* in the first instance. That is really a result of several comments that were made nine years ago by the Bar saying neither their clients, nor they, enjoy arguing the same case twice.

So all of us have made a special effort to screen the cases carefully enough that we only go to the panels when we are fairly confident that we can reach a consensus and won't have a need for *en banc* and we will go directly to *en banc* more often than the decade before.

JUSTICE HOLLAND: And there is no mystery about what we are doing. It is in the Rules as you can see. If it is a death penalty case, we are *en banc*. A statutory issue of first impression and some types of other constitutional issues, they start *en banc*. And so I think there is a method to our approach that has worked out very well under the leadership of Chief Justice Steele.

The other thing that I think is worth commenting on is the fact that most of our opinions are unanimous. It is known as the Delaware unanimity norm. And Professor Skeel from Penn has written in the Virginia Law Review about how that promotes stability, especially in corporate cases. And I've written about this as well.

> When a decision is written by one of us, that simply designates that Justice as the primary architect. But everyone has been involved and generally we are unanimous.

Everyone who has ever been a member of our Court since 1950 has written separately. So we all know how to concur, we all know how to dissent, and we don't agree for the sake of agreeing. But what you find is that because we don't have discretion, we are not picking a case to advance the law. And by having to decide the case, we can be unanimous by narrowing the holding. And I have frequently said if you take any five people, they probably will agree on the result; they may not agree on the reasoning.

So we work really hard to – you are talking about what is unique about Delaware. We have a rule that we have to give each other's work a priority so when someone circulates a draft opinion, we comment on it promptly. But it really is a collegial effort and when a decision is written by one of us, that simply designates that Justice as the primary architect, but everyone has been involved and generally we are unanimous by narrowing the holding.

MR. LEVINE: Well, it has certainly worked very well thus far and I expect it will continue in the future.

JUSTICE RIDGELY: That's our plan.

MR. LEVINE: Before we conclude, is there anything additional that you would like our readers to know?

JUSTICE BERGER: Sure. Come on down. Seriously. Even non-lawyers. It's a nice experience to see a court in action, it doesn't take that long, we have a beautiful courthouse, and Dover is a beautiful city, so come here.

JUSTICE RIDGELY: Read the rest of the magazine. It's a great publication.

MR. LEVINE: Thank you very much, your Honors.◆

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