

# Appellate Law

## Appellate Specialization and the Art of Appellate Advocacy

by Jennifer S. Carroll

**A**ppellate practice has developed over the years into a specialized area of the law. In Florida, appellate practice was officially recognized as a specialty in 1994, when The Florida Bar Board of Legal Specialization and Education approved appellate practice as a “certified” field.

What is “appellate practice,” and why is it considered a specialty? How does appellate practice differ from trial practice? Is there truly an “art” to appellate advocacy? This article attempts to address these questions and to highlight the unique skills involved in handling appeals.

### What Is Appellate Practice?

To best understand exactly what appellate practice is, one must first understand what it is not. Simply stated, appellate practice is *not* trial practice. At first glance, such a description appears obvious. However, appellate judges often express amazement at the number of practitioners who treat the appellate process as nothing more than a continuation of the trial. Many attorneys view an appeal as a “second chance” to argue their case before a second jury, and to present what they deem to be the crucial facts and equities which will make all the difference. These attorneys often become mired in the types of factual disputes that weigh so heavily at the trial level (*e.g.*, witness credibility issues, emotional pleas), but tend to distract the appellate court from significant legal

---

Appellate judges  
often express  
amazement at the  
number of  
practitioners who  
treat the appellate  
process as a  
continuation of  
the trial.

---

issues on appeal.

Appellate judges perceive a difference between the advocacy skills necessary to litigate a case in the appellate court, as opposed to the trial court. As explained by Justice Leander Shaw of the Florida Supreme Court:

[T]here is a difference between the skills needed in litigating a case before trial and appellate courts. Trial litigation—focusing on jury trials—requires jury arguments that are generally structured to lead ordinary people to decide something based on compelling emotional arguments. True, the individual juror needs to be informed of the law, the facts of the case, and how a certain result is called for in the particular circumstance. The trial attorney, however, will invest a substantial portion of any argument to the jury in a fact intensive emotional call to justice in order to obtain a favorable decision. Thus, the ability to evoke an emotional response is important in making jury arguments.

In appellate advocacy, however, the emphasis switches and the attorney must stress the application of law to facts—keeping in mind the appellate court’s concern for uniformity of the law and doing justice. Thus, the ability to present thoroughly researched legal arguments and to present them in a very orderly and logical manner becomes more important.

Letter to author dated March 17, 1999.

In fact, emotional pleas relied upon by the trial attorney to convince a jury are considered inappropriate at the appellate level. As Justice Shaw has observed:

The most common mistake in presenting oral argument to the Supreme Court is when an advocate makes a boisterous jury argument to the justices; this is very unimpressive. The advocate loses credibility immediately as he or she appears to be a novice who is familiar neither with the appellate process generally nor the Supreme Court in particular.

*Id.*

At trial, an attorney’s major objective is to persuade the factfinder—typically a panel of lay jurors—that credibility lies on the side of his or her client’s witnesses, and the evidence, although controverted, favors his or her client. Trial lawyers ascertain the factual strengths and weaknesses of both sides of their cases, and then sift, select, and evaluate the evidence to be presented. To be successful, the trial lawyer must build a convincing argument from an amorphous mass of testimony and create an aura of righteousness around client and cause.

The appellate lawyer, by contrast, deals primarily with the law,

not the facts; he or she argues to judges, not to lay juries. The focus of the appellate specialist is on *legal* argument, through written and oral advocacy. Broadly stated, appellate practice involves the practice of law before appellate courts. The function of appellate courts is, of course, to review the decisions of lower courts to determine if reversible error has been committed. Such review involves the interpretation and application of the law to a given set of facts.

At the appellate level, therefore, the aim of the appellate lawyer is to be persuasive and to effectively assist the appellate courts in accomplishing their review and decision-making objectives. In accomplishing this goal, the appellate practitioner must be proficient in several key areas, including, but not limited to: brief writing; oral argument; and rules of appellate procedure.

Knowledge and experience in the appellate process are central to attaining such proficiency, as they would be with respect to any other field of law.

### The “Art” of Appellate Advocacy

• *“The pen is mightier than the sword.”*

There can be little dispute that communication through the written word is an art, and appellate brief writing is no exception. In composing a brief, the appellate practitioner must know which questions to raise, which arguments to pursue, and which facts to stress. He or she must determine the most significant legal issues worth pursuing on appeal and present only the strongest arguments.

The technique of writing is equally significant. Arguments, no matter how strong from a substantive perspective, lose their force if not expressed cogently. To write a convincing brief, counsel should adopt a simple style consisting of short sentences, active verbs, and concise paragraphs. The words must be chosen carefully, and should be clear and direct. As all lawyers (both trial and appellate) know, simplic-

Many judges deem the brief to be the key part of the appeal, and oftentimes the court has made up its mind on the issues before the oral argument.

ity can be difficult to achieve. The writing of a brief is an arduous task; and the writing of a simple, yet compelling, brief is even more arduous.

Recognizing the most common mistake made by attorneys when writing appellate briefs for his court, Judge Joseph Nesbitt of Florida’s Third District Court of Appeal advises:

Briefs are too complex. Use short declaratory statements that are completely understood on first reading. If you do not make your client’s position “simple” you can’t expect the judges to do it for you. Most of your time should be spent in reading, evaluating, and comprehending your own case. Outline, at least in your mind, the matter about which you must convince the jury or the judge. If you do this, brevity will naturally flow.

Letter to author dated March 4, 1999.

The art of appellate brief writing is further illustrated by the statement of facts, which to many appellate practitioners is the most important and challenging part of the brief. The statement of facts must be forceful; it should not, however, be one-sided or argumentative. If it is, the credibility of the brief is undermined. There is, indeed, an art to portraying one’s case in a sympathetic light without disregarding the adverse facts or appearing argumentative. Writing a statement of facts that is necessarily neutral in form but persuasive in effect takes considerable skill; it is a delicate, and difficult, task for even the most experienced brief writer.

Many judges deem the brief to be the key part of the appeal, and oftentimes the court has made up its mind on the issues before the oral argument—based solely on the parties’ briefs. Today, in an effort to handle their burgeoning caseloads, appellate courts are restricting oral argument, and most courts no longer allow oral argument merely upon request. As a result, the written brief assumes even more significance, in that it is often the “only shot” counsel gets at the appellate court. As Justice Shaw has noted:

The brief is the most critical element of an appeal; therefore, brief writing skills are extremely important. In 1998, approximately six percent of all cases disposed of by this Court had oral argument, therefore, ninety-four percent of the cases are disposed of on the briefs alone. Furthermore, in the same year, it is clear that less than half of the cases that warranted a written opinion had an oral argument. The written brief, therefore, is critical to a litigant’s presentation to the Court.

Letter to author dated March 17, 1999.

• *Every second counts.*

Likewise, there is an art to effective oral advocacy. Appellate oral advocacy differs considerably from argument at the trial level. What will often work with a jury will antagonize appellate judges; as a general rule, appellate litigation is about legal—not factual—argument.

Apart from the substantive differences between argument at trial and on appeal, the technique of argument in each instance also differs. Time restraints in the appellate court are, of course, much stricter than in the trial court. A trial lawyer may take days or weeks to persuade a judge or jury. In a typical oral argument, counsel is limited to only 15-20 minutes. Thus, the effective appellate advocate must reduce the case to its bare essentials, *i.e.*, those few core points which will determine the outcome of the case and can be presented in just a few minutes.

Without question, appellate courts appreciate simplicity. In the words of Judge Nesbitt:

Make your oral argument simple.

Reinitiate the reason why reversal is warranted and relate it to the record in your case.

\*\*\*

Oral presentation should neither be stilted nor formalistic. Present it at a level of comprehension that you would in telling your neighbor who is intelligent and has finished the sophomore year in college.

Letter to author dated March 4, 1999.

Counsel would be ill-advised to rely on “canned” arguments in appellate oral argument. The true purpose of oral argument is to provide appellate judges with an opportunity to ask questions and address their concerns regarding the case. Herein lies one of the key distinctions between appellate and trial advocacy. In appellate oral argument, the practitioner has to make his or her argument by means of responding to judges’ questions; he or she must use those responses as a transition to presenting his or her position. Despite intensive questioning from the appellate bench, the appellate practitioner has to keep the argument on track and not lose any sense of direction.

This skill is far different from that required of an attorney in questioning witnesses at trial. At the trial level, counsel determines what questions to ask and what arguments to make. At the appellate level, judges exercise considerable control during oral argument, and it is the goal of the astute appellate practitioner to shape the argument nonetheless, through his or her answers to questions.

Expertise in brief writing and oral argument is all the more important

---

*Jennifer S. Carroll is a board-certified appellate lawyer concentrating her practice in state and federal civil appeals. She is admitted to practice before the Supreme Court of the United States and the United States Court of Appeals for the 11th Circuit. Before entering private practice, Ms. Carroll served as senior judicial law clerk to Judge Ralph W. Nimmons, Jr., First District Court of Appeal of Florida.*

*This column is submitted on behalf of the Appellate Practice Section, Lucinda A. Hofmann, chair, and Jacqueline E. Shapiro, editor.*

in today’s legal environment, given the increasing complexity of cases and the heavy appellate court caseload. Appellate judges have limited time to examine the record and cited authorities. Consequently, counsel’s skill in sorting out what is truly important in the case and in presenting appellate argument in a concise and convincing manner is crucial to prevailing on appeal.

• *Navigating procedural landmines.*

In the appellate arena, there exist several procedural “landmines” which, as a general rule, are more easily navigated by the experienced appellate practitioner. The answers to many procedural dilemmas that arise cannot always be found in the Florida Rules of Appellate Procedure; often, such answers may be derived only through experience in the workings of the state appellate process, as well as an understanding of the case law and the local rules of each court. Potential “landmine” issues that can cause serious problems for the average practitioner include the following:

- 1) What constitutes “rendition” of an order for purposes of taking an appeal?
- 2) What post-trial motions toll the time for taking an appeal?
- 3) Which interlocutory orders are appealable as “appealable nonfinal orders”?
- 4) Which interlocutory orders are proper subjects of petitions for writ of certiorari, petitions for prohibi-

tion, or other extraordinary writs?

5) Which “partial final judgments” can be appealed, and which must be appealed, within 30 days?

6) What is a final order subject to appellate review?

7) Does a motion for rehearing (or motion for reconsideration) ever toll the time for taking an appeal from an interlocutory order?

### **Appellate Attorney and Trial Attorney Essential Components of Process**

Both the appellate attorney and the trial attorney are essential components of the litigation process. The difference between the two lies not in ability, but rather in focus. The trial attorney’s focus is on gathering facts and presenting these facts, consistent with the law, to support his or her client’s position. The appellate attorney’s focus is on placing the relevant facts in the context of the appropriate law and overcoming legal hurdles faced at trial. At the appellate level, counsel must analyze the entire record and make the appropriate legal arguments in support of affirmance or reversal.

Appellate practice has evolved into a specialized area of the law, and justifiably so. The fundamentals of appellate advocacy—writing a simple, persuasive brief, making an effective oral argument, and having a command of the appellate procedural rules—necessarily reflect effort, skill and, at the highest level, art. □

Poverty. Homelessness. Hunger. Despair.

You can ignore the problems for just so long. Or you can be part of the solution. For more than 100 years, **Volunteers of America** has reached out to the nation’s most vulnerable individuals, offering them the help they need to rebuild their lives. Our programs serve children, families, the elderly, and those who have lost their way through addiction, crime, or illness.

Find out what you can do.

800/899-0089; [www.voa.org](http://www.voa.org)

**There are no limits to caring.**