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# FOREWARD: Appellate Advocacy and Practice in the Second Circuit

Hon. Fred I. Parker

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# FOREWORD

## APPELLATE ADVOCACY AND PRACTICE IN THE SECOND CIRCUIT*

*Hon. Fred I. Parker*†

### INTRODUCTION

While I am aware that the actual mechanics of appellate practice and advocacy, or at least some variation thereof, has been addressed by numerous other authors of much greater stature than myself,[1] I nonetheless believe that a judge's eye view of practice before his or her court is always useful, despite whatever repetition may inevitably occur.

With these thoughts in mind, I turn to the substance of this Article, namely discussing appellate practice in the Second Circuit and providing the practitioner with a brief refresher course in appellate advocacy or with one judge's point of view on what constitutes



† Judge, United States Court of Appeals for the Second Circuit.

[1] *See, e.g.*, John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895 (1940); John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L.Q. 6 (1955); William H. Rehnquist, *Oral Advocacy*, 27 S. TEX. L. REV. 289 (1986). A more lighthearted, but nonetheless enlightening, view of appellate practice can be found in Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325.

effective advocacy. By writing this Article I do not mean to imply that I believe the advocates who appear before the Second Circuit are in any way deficient or otherwise need improvement; quite the contrary, my colleagues and I are blessed with some of the finest advocacy in the country. The purpose of this Article is rather to reemphasize the basic issues, to make some minor technical suggestions that a practitioner may have overlooked while developing a successful practice, and to perhaps offer a few novel thoughts, hopefully in the end making good advocates better.

I have largely structured this Article to mimic the stages of an appellate case, focusing first on the decision to appeal and then on the briefing and the oral argument. Last, I provide some insight on the mechanics of the court's decision-making.

## I. THE DECISION TO APPEAL

The decision whether to appeal a particular case is perhaps the most important decision made during the course of an appeal, potential or realized, and while this decision is ultimately the decision of the client, this may well be the stage of the appellate process where advocates most often err. Advising a client to appeal as a matter of course is simply not the best way for an advocate to properly serve the client's interests, nor does it serve the interests of the justice system as a whole of which advocates, as officers of the court, are an integral part.[2] In advising the client on whether to appeal, the advocate should carefully consider all the client's legitimate interests and make a fundamental, though complex, determination of whether the value of the appeal to the client outweighs the costs of prosecuting the appeal.

In my view, if the advocate properly considers the client's legitimate interests and properly makes the value determination when advising the client, this process will insure, by its very nature as well as that of the justice system, that the interests of the justice

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[2] *See* Hon. Irving R. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 166 (1978) (noting that "lawyers must bear significant responsibility for keeping unworthy cases out of the appellate courts" and that such cases "serve as a roadblock to reaching and dealing in depth with cases of substance and are in no small measure responsible for appellate backlogs."); *see also* WHITMAN KNAPP, WHY ARGUE AN APPEAL? IF SO, HOW? at 4 (Assn. of the Bar of the City of New York 1959).

system as a whole will also be served. This process is primarily driven by the careful exercise of the advocate's judgement, which is largely what the client is paying for.

In exercising this judgment, the advocate must take into account a myriad of factors. These factors can roughly be broken down into two sub-groups: subjective ones that specifically relate to the client and objective ones that relate to the appeal itself. The value of the appeal, and hence the determination of whether a client should be advised to pursue the appeal, may be driven by either one of these sets of considerations. The advocate should focus first on providing the client with a complete analysis of the objective aspects of the value of the appeal. This analysis is at bottom a legal judgment; the advocate should provide the client with his or her judgment as to the merits of the appeal, including the likelihood of success on appeal, the value of any remedy the client may receive if successful and the costs of prosecuting the appeal.

The objective considerations alone may lead an advocate to advise the client that an appeal should be taken, i.e., if there is a large chance of success on the merits, together with a large potential recovery. However, if these considerations counsel against the filing of an appeal, the issue is not necessarily settled, and the advocate should turn to the analysis of the client-specific factors. These factors include the client's psychological condition and may in certain circumstances—most often in criminal cases—counsel toward advising a client to appeal, even where the objective considerations counsel against taking an appeal.

The purpose underlying the complex subjective considerations is to determine whether the objective determination of the value of the appeal fails to properly recognize the true value of the appeal to the client, not in strictly financial terms but rather in terms of the classical concept of utility. Regardless of the likelihood of success on the merits of an appeal, the client may have strong psychological interests in pursing the appeal, which may include a simple desire to be heard, as well as a need for closure and vindication, all of which counsel toward advising the client to file an appeal. Even in these circumstances, however, the client should be fully advised as to the objective factors.

## II. THE BRIEF

Once the decision to appeal has been made, briefing is by far the most important stage in the ensuing proceedings. From a judge's point of view, the brief is always the starting point, and often the ending point, of the appeal. The importance of the brief, which cannot be overestimated, is further highlighted by the fact that the Second Circuit necessarily affords each litigant with very short argument time—this issue will be discussed *infra*. Because of this fact, advocates should spend the maximum possible time and effort in making the brief the best possible presentation of his or her client's case. The brief is the only time for an advocate to fully present the argument that he or she wishes to make, and to do so largely without outside interference.

The obvious starting point in the drafting of the brief is deciding which issues to raise. This decision may be either very easy or very difficult depending on the proceedings below. It has often been said that there has never been an error-free trial, and I tend to agree with this sentiment. However, although it may seem obvious, when deciding which issues to appeal, the advocate should focus not simply on errors by the district court but rather on substantial errors by the district court which might justify an appellate court in providing some relief to the client.

The huge variety of possible considerations affecting the determination of what issues to raise prevents me from providing any truly specific advice. I will, however, make one simple point. You may believe that the district court committed twenty errors, all of which entitle your client to some relief, and you may well be right (though this is probably not likely with the district judges in this Circuit). However, if in trying to convince me that the district court committed these twenty errors by giving them all equal—and, therefore, short—shrift, you fail to convince me that the district court committed one error which justifies some relief for your client, then you have done your client a tremendous disservice. While there may be situations in which asserting a large number of claims on appeal may be the proper thing to do, in the vast majority of cases, no more than three or four issues should be raised. In my view, this is probably the maximum number of claims which an advocate can clearly and completely argue in the limited space of

the brief,[3] as well as the approximate maximum number of claims I can give full consideration to in one case before I begin to lose both my mind and track of the other claims.

With regard to the actual drafting of the brief, I want to stress that in doing so, you should always remember your audience, namely, myself and my colleagues on the bench. This audience principle leads to a number of more specific considerations. The fact is that appellate judges largely read briefs for a living, and while we do not profess to know everything, we have a good working knowledge of many different aspects of the law and have been around long enough to quickly spot distortion and obfuscation. Therefore, keep the following points in mind:

First, clearly and honestly state the issue on appeal. A clear statement allows for easy absorption of the case by me and my colleagues—a very important thing given that I generally sit for one week out of every five or six, during which time I see thirty-one cases and probably 2,500-3,000 pages of briefing, together with voluminous appendices. Do not phrase the issue on appeal in so slanted a manner as to necessarily imply the answer for which you are pressing. Issue statements such as "Did the district court err in ignoring the plain language and clear mandate of the statute?" serve no meaningful purpose. If that is actually the issue in the case, then, of course, the district court erred. However, after reading such a statement, my natural instinct is to believe the actual issue probably involves a matter of statutory construction, which the writer of the brief was not nice enough to clearly state for me and has instead left me to figure out on my own. I am, therefore, immediately less than sanguine about the brief and, consequently, the advocate and his or her client. Further, in failing to quickly be able to ascertain what the issues are, I may resort to the other brief for help.

Keep in mind, especially with the statement of the issues and the statement of the case, that while *you* are writing the brief to persuade, *I* am first reading the brief to understand the case and the issues presented in it. Clear, concise statements of the issues and the case get me to this necessary level of understanding much more quickly.

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[3] *See* FED. R. APP. P. 28(g) (limiting principal briefs to 50 pages and reply briefs to 25 pages).

The appellant's brief bears a particularly heavy burden. It must get the judge to start thinking "reverse." The great advantage an appellant has, however, is that in the natural order of things, the appellant's brief is read first. Advocates should be very careful not to destroy that advantage. If I read an appellant's brief which, clearly and accurately, sets out the facts, tells me what the district court did, explains why the district court found in appellee's favor and then goes on to explain why that decision was in error, I get engaged in a case and stay with that brief. Such a brief is a joy to read because it allows me to understand the entire case without wasting any time. If the brief has also made me think that the equities or the law suggest reversal, then it has been truly successful. On the other hand, if it leaves me wondering what happened other than that the district court ruled in a way that upset the appellant, it has accomplished nothing.

With regard to the factual recitation and the description of the disposition below, I occasionally come across statements that are so incredible that they strike me as likely being material distortions of the record. Distortions will actually make me stop reading the brief and go to the district court's opinion, or even the opposing brief. Obviously, advocates should seek to prevent this from happening and to keep my attention directed toward their brief. I realize that in some cases it may be tempting to distort the record slightly in favor of your client. I believe that this temptation is greatest in advocates who either individually, or as a firm, do not appear often in our court and thus perceive that they have less to lose if they lose some credibility. The "repeat players" in our court, including the various Unites States Attorney's offices and the Federal Defender Unit of the Legal Aid Society, are, I believe, less subject to this temptation because the institutional credibility of these offices with the court is largely their stock in trade.

Whatever the temptation may be, remember that in addition to your adversary, there are three of us on a panel, and we each have talented clerks. Accordingly, the chances of slipping some distortion by us all are fairly slim, and there is a price to be paid for getting caught distorting the facts. Initially, this price may be said to only affect the credibility of the advocate, which for the above reasons some may find worth the risk; however, ultimately the total price is paid by the client because it inhibits that advocate's ability to persuade.

A discreet subsection of the factual recitation, the "proceedings below" section, is a place where distortion is completely unacceptable and very damaging. I first want to emphasize that my colleagues and I know the district court judges in this Circuit very well, and hold these judges in very high regard. This fact, combined with the fact that many of us, including myself, were district court judges earlier in our careers, makes *ad hominem* attacks on the district court judge or his or her handling of the case unlikely to benefit, and likely to become a detriment to, your client. I occasionally find that I simply have a difficult time believing that a district court behaved in the outrageous manner the advocate says it has. When such behavior is asserted by an advocate, I am likely to go directly to the appendix to see what actually happened. If the statement is accurate, fine. If not, not only has the advocate lost credibility, but now I have (at least temporarily) abandoned the brief in favor of reading the district court's decision or other portions of the record. There is simply no quicker way to lose credibility than to distort or mischaracterize the actions of the district court. There is almost no chance that an advocate will be able to slip such a distortion by me because I will almost always read the district court's decision, and I instruct my clerks to do so when preparing a memorandum on a case for me.

The presentation of the legal argument in the case should also be guided by the principles of clarity and accuracy. These principles apply to the drafting of the legal argument in the following ways: First and foremost, cite cases accurately. Misleadingly cropped quotations and other misstatements of holdings will be caught, either by your adversary or by the court. While I certainly do not know the vast expanse of the law off of the top of my head, I do possess a good sense of what the law is not, and I am, therefore, able to quickly spot distortions of precedent. Even if neither I nor one of my colleagues spots a misstatement in our review of the brief or during argument, any misstatements will be caught when a member of the bench sits down to write the opinion, leaving a judge who is somewhat upset with you to write the disposition of your case. Needless to say, having this happen is not in the best interests of your client.

I would also like to recommend that all advocates distinguish contrary authority, even in their opening brief. If there is bad precedent out there for your case, you can assume your adversary will cite it to us, or we will independently find it. If the first time I see

an adverse case is in the answering brief, then my initial reaction is that the appellant does not have a good explanation as to why that case is inapposite. While a response in the reply brief may dispel this initial impression, it may not. Therefore, by failing to mention contrary precedent in the opening brief, the advocate makes that precedent more weighty than it perhaps should be.

In sum, the guiding principles in brief writing should be clarity, conciseness and honesty. I realize that I am not breaking new ground here, but I will state that I do not believe that I have ever found that an advocate has lost a case because his or her brief was too short or because his or her sentence structure was too simple. A simple argument stated simply is far more effective than a convoluted argument stated loquaciously.

## III. ORAL ARGUMENT

The Second Circuit is the last circuit to afford all litigants, including *pro se* litigants (although not incarcerated *pro se* litigants and petitioners for mandamus and other motions) oral argument time.[4] Because of this fact and the size of our docket, the amount of time that can be afforded to any single case is quite small, usually no more than ten to fifteen minutes or less per side. Advocates rarely, if ever, get the amount of time they ask for and may have questions about how such time is allotted. The answer to that question is relatively simple: Time is allotted by the presiding judge, namely, the judge in the middle of the bench, who is the senior active judge on the panel. Different judges have different philosophies on allotting argument time; therefore, my own view may be of limited practical use. Regardless, I will share below a bit of my own philosophy concerning allotting argument time.

In assigning argument time, I generally make no judgment as to the merits of the appeal; there are appeals which are very simple but still result in reversals. Rather, I focus primarily on the sheer volume and complexity of the issues in the case. Moreover, I always tend to err on the side of affording advocates too little time because such errors are easily remedied. If I find that during argument, there are many more issues to cover than I initially realized, or that the issues are more complicated than I thought, I will extend

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[4] *See* Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 303-07 (1986).

the advocates' allotted time, regardless of whether or not there has been extensive questioning. However, if I afford too much time, such time is often wasted.

Advocates can learn two important lessons from these considerations. First, although I emphasize that advocates should always be conscious of their time and not simply continue on when they are out of time as if they are not, and as if the panel will not notice, if an advocate really believes that he or she has a lot to say, he or she should simply ask for additional time to make a few more brief points. I am very likely to grant such polite requests. Second, advocates should not be afraid to rest on the brief, which as noted above should be the best possible presentation of the argument, if that is appropriate.

The last word of advice I will give relating to the use of argument time is simple, though often overlooked. In presenting an argument, the advocate should always remember that the bench knows the case before the advocate opens his or her mouth. While it is always good for the appellant's advocate to start his or her argument by stating, "This case concerns . . . ," it is almost never necessary to give a long factual recitation because we already know the facts. Instead, dive right into your substance. Argument time is precious and should not be wasted advising the bench of facts we already know.

With regard to the substance of the argument, many of the same considerations which apply to the drafting of the brief apply with equal, and sometimes greater, force. In particular, the limitation of issues raised comes to mind. If the decision was made to raise three or four issues in the brief, it does not necessarily follow that all of those issues also need to be raised in the argument. Focus instead on the one, or perhaps two, best arguments that you have. As limited as the brief is, argument time is even more so. If you choose to so limit your argument, simply conclude by stating that with regard to the issue(s) you have not discussed, you will rest on your brief.

Moreover, if you have raised a number of issues in the brief and decide to only argue one of them which you consider to be most important, that does not necessarily mean that you will only argue that one point at argument because a member of the panel may disagree with you as to what is the most important issue to be addressed. Various reasons exist for questioning from the bench, but it is primarily to help us understand the case and, specifically, your

client's position on certain issues. It is, however, also to raise issues that we think should be brought to the attention of the other members of the panel; we are in essence, as I once heard one of the current justices of the Supreme Court say, speaking to each other through the advocate. Questioning can also be designed to focus the discussion to an issue of particular importance and difficulty in the case. Accordingly, do not be worried if you have an active panel; we are not trying to cross-examine you and trick you into giving away the store. Instead, be happy that the panel has taken enough of an interest in your case to participate because generating such interest is an important first step towards success.

The following specific guidelines may be of use when responding to questioning from the bench: First, and most obviously, always be respectful. It is somewhat surprising how excited some advocates can become during the course of the argument, but remember that cutting off the questions of a judge is never a good way to win points with the panel. However, being respectful does not mean that you should not be forceful. Simply because a member of the panel is trying to make a specific point from the bench does not necessarily imply that the questioner is correct. If you disagree, simply state for instance: "I understand your point, your Honor, however, as I read *Jones v. Smith* . . . ." Second, just like in brief writing, confront the negative precedent. Recently, there was an advocate who was asked, "Doesn't *Jones v. Smith* bar your client's claim?" The advocate responded, "Your Honor, as I've noted in my brief, not as I read it. However, to the extent you may think it does, I think *Jones v. Smith* is wrongly decided and this panel should overrule it." Honesty and clarity always win points with the panel. Third, always answer the question that was asked. The best practice is to always begin your answer with a "yes" or "no," and then continue on with an explanation, a qualifier or whatever else you may want to add.

Finally, I would like to reemphasize one simple point regarding the style of the argument—remember your audience. Many a trial lawyer appears before the court and forgets that his or her audience is no longer a jury but rather a panel of judges. These trial lawyers often seem caged behind the podium, yearning to pace the courtroom as they would during summation before a jury and engage in exaggerated gesturing with their hands and arms. These actions are, from my point of view, somewhat distracting and take away from the overall effectiveness of the argument.

Similarly, as judges we are not especially susceptible to distracting hyperbole, either in briefs or in argument. A good example of this occurred recently when an advocate began his argument by stating, "In my twenty-five years of practice, I have never," at which point the advocate was cut off by the presiding judge, in this instance not myself. The presiding judge, who sensed where the advocate was going with this opening (that the advocate had never seen such egregious errors committed by a district court), told the advocate that the panel did not really care how long the advocate had been practicing and to move onto his argument. By warning against hyperbole, I do not mean to imply that advocates should not alert the court to the equities of the case. The equities of the case may be very important, and they may cause a judge to take a particular interest in a case. Such interest can only help your client as it may cause the judge to look deeper into the law to determine if there is a way to accommodate the equities. In fact, interesting a member of the panel in a particular case may be the most important thing that an advocate can achieve at oral argument.

## IV. THE DECISION-MAKING PROCESS

While the primary focus of this Article is to provide some commentary on appellate advocacy and practice, in doing so, it is also appropriate to give advocates a better view of how judges of the Second Circuit generally decide cases. Usually, I have a clear indication of which way I am inclined to rule prior to argument based on the briefs. However, in some cases my initial inclination will change in argument or based on the comments of my colleagues, and in others I may be on the fence until well after argument.[5]

While I believe that the process of decision making should remain somewhat of a mystery to the advocate, the basics are as follows: Each day following argument, the panel discusses the morning's cases and preliminarily votes on the disposition, method of disposition and assignment. In difficult cases, such a vote may not occur until later, and in cases where there is either a disagreement as to outcome or as to reasoning, we will often circulate so-

[5] For an interesting view on the importance of oral argument in determining the outcome of cases, see Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 40 n.32-33 (1986) (noting that in a limited study of three appellate judges, oral arguments changed their views in 31%, 17% and 13% of cases heard).

called "voting memoranda" to each other. This process is well-described in an article written by Chief Judge Wilfred Feinberg a number of years ago, although the practice has diminished to a certain extent since the writing of that article due to the increased size of our docket.[6]

The various methods of disposition are as follows: The summary order is a short, unpublished order which disposes of the case and has no precedential value. Summary orders are issued in cases where there is direct controlling precedent from either the Supreme Court or the Second Circuit. Summary orders neither contain full factual recitations (because they are intended only for the consumption of the parties rather than the general public) nor a full legal analysis of all the issues presented. Rather, they merely contain a brief explanation as to why a particular precedent or precedents are controlling. I should also note that just because a case is disposed of by summary order does not mean that it receives summary treatment. The briefs are fully read and digested, and the arguments are fully considered. The brevity of the resulting order simply allows for the relatively quick disposition of the matter.

The per curiam opinion is usually a short opinion which covers a very specific and discrete issue on which there is no direct controlling authority from either the Supreme Court or the Second Circuit. A per curiam opinion often incorporates by reference the reasoning of a published disposition by some other court, such as adopting the reasoning of one of our sister circuits in a similar case or adopting the district court's reasoning in the disposition below. The per curiam opinion is published and constitutes binding precedent. As such, it will contain, either directly or by reference, a sufficiently complete recitation of the facts to make its precedential value clear.

The last method of disposition is the signed opinion, and the signed opinion is the primary manner in which the common law evolves. The most difficult cases involving the most interesting issues are disposed of in this manner. The process of preparing an opinion differs widely among chambers, and I think that this process, at least as it operates in my chambers, is best kept a mystery. I will, however, tell you that once a proposed opinion is drafted, it is circulated to the other members of the panel for comments and suggestions. The other members of the panel may ultimately decide

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[6] *See* Feinberg, *supra* note 4, at 298-303.

to join in the proposed opinion or in the idiom of the Second Circuit, authorize the author "to sign a tab" on their behalf,[7] or concur or dissent. The level of interaction between panel members on a proposed opinion varies widely from case to case and from panel to panel. No meaningful generalizations can really therefore be made on this aspect of the decision making process. Suffice it to say that each member of the panel is fully satisfied with the draft before it is filed.

## CONCLUSION

In concluding, I would like to note that I am honored to have been asked to contribute this piece, and hope that in it I have perhaps given practitioners a useful view of practice before the Second Circuit.

[7] *See* Feinberg, *supra* note 4, at 314-15 (discussing the use of the "tab" in the Second Circuit).