VINCE LOMBARDI, JOHNNY UNITAS, ABE LINCOLN, HENRY FORD, FEDERAL EXPRESS, AND “WE GET BY WITH A LITTLE HELP FROM OUR FRIENDS”: WHY IT MAKES ECONOMIC SENSE TO CONSULT WITH AN APPELLATE COACH OR OTHER SPECIALIZED COUNSEL IN HIGH-STAKES CASES OR WHEN CONFRONTED WITH NOVEL OR COMPLEX ISSUES

A panel discussion by David G. Wirtes, Jr.,* and Deborah Johnson Race,**—Co-Founders of the LCA’s American Institute of Appellate Practice (AIAP)—and Professor Neil Vidmar*** of the Duke University School of Law, moderated by Ned Miltenberg**** of the National Legal Scholars Law Firm, P.C., and a Fellow of the AIAP

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Three members of the panel (Ms. Race and Messrs. Wirtes and Miltenberg) practice appellate law. The fourth panel member (Professor Vidmar) teaches and works for lawyers on appeals and in other cases. In truth and titles notwithstanding, each is really a firefighter, not a brain surgeon, a firefighter called upon to extinguish blazes after they have erupted and—increasingly and more effectively—to work with trial lawyers before a case goes to a jury or a complaint or answer even is filed, to prevent fires from breaking out.

Collectively, the panel members will reveal the great secret of appellate law: there are no secrets. To the extent they have been successful, it is because they have mastered the discipline shared by all great trial lawyers: intense focus on what they do best and 10,000 hours of practice and repetition.

Individually, each panel member will discuss the unique aspects of their practices and explain why it often makes economic sense to retain appellate counsel or, at minimum, to consult with an appellate coach or other specialized counsel, especially in high-stakes cases or when confronted with novel or complex issues.
INTRODUCTION, by Ned Miltenberg

My sons played baseball and football.

When they started out in grade school they played every position. Just like everyone else. No one specialized. Some specialization came in middle school. Some baseball players focused on pitching; some football players gravitated to the line. By the time they reached college, players became even more specialized, pitching in relief, only, or playing defensive tackle, only.

In law and in life, as in sports, we’ve come to specialize. John Adams’ father was a very small and highly independent farmer. Abe Lincoln’s father was the same. If something needed to be done on the farm, from clearing land and fixing plows to splitting logs to birthing calves, they did it by themselves.

As lawyers, Adams and Lincoln followed their fathers’ model of independence and self-sufficiency. They handled all types of cases, from torts to contracts to trusts and estates. No case was too big, too novel, or complex to handle alone and they handled their cases from pre-trial consultation, through jury selection and trial, to appeals in their colony’s (or state’s) highest court. And they largely handled them alone.

Agriculture and industry changed, dramatically, in the 19th and 20th centuries. Specialization increased efficiency and productivity, especially when harnessed in centralized assembly lines such as Henry Ford’s River Rouge Complex outside Detroit, where Ford employees not only assembled cars but melted the steel for their frames and glass for their windows (and even milled paper for glove-box instruction manuals).

Law firms largely followed suit. Where Lincoln practiced in a two-man firm, his son helped found a firm than was 100 times as large before it was swallowed by still larger fish 25 years ago. Today, some LCA members practice in firms that have dozens of offices in a score of nations. Many of these firms are a thousand times larger than Lincoln & Herndon, if not bigger still. And these lawyers are highly specialized.

One aspect of legal practice has remained largely unchanged for more than two centuries, however: most lawyers—whether in big firms or small and regardless of whether they specialize in torts, or tax law or mergers and acquisitions or constitutional law—still handle their own
appeals. And they rarely, if ever, consult with specialists in a field before filing suit, answering a complaint, picking a jury, heading to arbitration, or going to trial.

These lawyers—most lawyers—are proud of their abilities and don’t think they need to consult with appellate lawyers or any other kind of specialist. The panel before you agrees with Proverbs (16:18) that “pride goeth before the fall.”

We think these lawyers could do better for their clients, their firms, and themselves if they retained appellate counsel or, at minimum, consulted with an appellate coach or other specialized counsel, especially in high-stakes cases or when confronted with novel or complex issues.

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ranging from large corporations to individuals, including in cases not tried by her firm. She will provide an outside appellate lawyer’s view on the issues Mr. Wirtes has addressed.

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“I GET BY WITH A LITTLE HELP FROM MY FRIENDS”: 1

WHY IT MAKES ECONOMIC SENSE TO CONSULT WITH AN APPELLATE COACH OR OTHER SPECIALIZED COUNSEL IN HIGH-STAKES CASES OR WHEN CONFRONTED WITH NOVEL OR COMPLEX ISSUES

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Imagine that you are a football player. An MVP quarterback, one of the best of all time. You pick your hero: Peyton Manning, Tom Brady, Joe Montana, Warren Moon. Johnny Unitas. Playing in your first Super Bowl. A unique situation. In a game with very stakes.

1 I owe many thanks, for their great coaching and invaluable comments, to Erwin Chemerinsky; Charles M. Cork, III; Jody Hoffman; Peter Hardin-Levine; Jonathan S. Massey; Stuart Ollanik; Deborah Race; Anthony Z. (“Tony”) Roisman; Stephen A. Saltzburg; Brent M. Rosenthal; Jan O. Vargo; John F. Vargo; Neil Vidmar; Robert F. Williams; Michaelle B. (“Micki”) Wilson; David G. Wirtes, Jr.; and Yale Kamisar. I could not get by without a lot of help from many friends.

2 Ned Miltenberg — Cornell University, B.A. (1973); University of Michigan Law School, J.D. (1984) — is the Co-Managing Partner of the National Legal Scholars Law Firm, P.C. (“NLSLF”) of Washington DC, where he has been practicing for thirty years and has worked on more than a dozen cases in the Supreme Court of the United States. The NLSLF is a nationwide law firm composed of 24 law professors and other non-partner affiliated scholars, who teach more than 100 subjects and write the treatises and articles that courts cite in their opinions. The NLSLF provides assistance at any stage of litigation: from pre-filing case strategy, pre-trial discovery, pre-trial motions, the admissibility of expert opinion testimony, jury selection, and dispositive trial motions, to post-trial motions and appeals in all federal and state courts (including cert petitions, merits briefs, and amicus briefs to—and oral arguments in—the Supreme Court of the United States. He is an LCA Fellow and has been certified as an Appellate Specialist by the American Institute of Appellate Practice (“AIAP”).
How do you prepare before the game when the defense you're playing is one of the best of all time? You pick your favorite: the '85 Bears; '76 Steelers; 2000 Ravens; '13 Seahawks; '66 Packers.

What do you do at halftime when they've stifled your offense and you're only 7 for 20 (and only 88 yards), and have thrown two interceptions, one a “pick 6”?

And what do you if you're up by 24 points at the half but learn that—contrary to all of the NFL's exquisitely devised and rigorously enforced rules—that your opponent is bringing in half-a-dozen Hall-of-Fame wringers to play D in the second half? You pick ‘em: Lawrence Taylor; Dick Butkus; “Mean Joe” Greene; Reggie White; Ronnie Lott; Richard Sherman; Deacon Jones; Jack Ham.

While you're indulging in this fantasy, consider another one.

Imagine you're a doctor, a medical doctor. Competent. Respected. Successful. Although you took courses in medical school in everything from genetics and psychology to hematology and general surgery, you haven't practiced in those fields since your residency. You now specialize as an orthopedist.

One day you get a headache. You first try over-the-counter drugs, then prescribe stronger medicine for yourself. Nothing works. You consult a neurologist, who schedules an MRI and asks a radiologist to help interpret the results.

The bad news is you have a tumor; the good news is it’s operable. Now you face a choice: (1) turn your fate over to the best neurosurgeon you can find; (2) put your life in the hands of another orthopedist from your own office (perhaps the new medical school grad, who has few patients of his own); or (3) start reading books on do-it-yourself brain surgery. What should you do?

Finally, ponder a third scenario—one much closer to the reality most of us face at least once or twice a year.

Imagine that you're the good doctor's twin. Another doctor, but this time a Juris Doctor. Competent. Respected. Successful. Although
you took courses in law school in everything from property and contracts to taxes and appellate advocacy, you haven’t kept up in those areas since you took the bar exam. Instead, like your twin, you’re a specialist; the difference is you’re a legal specialist—a trial lawyer.

Like your twin, you’ve also got a headache. Yours, however, is a massive legal headache. You recently won substantial damages for three of your clients following a long trial against a Fortune 500 company. The defendant has now appealed, asserting that the judgment should be reversed because the trial court erroneously refused to

- dismiss your clients’ claims as preempted by federal law;
- dismiss those claims as res judicata under the terms of a recently entered class action settlement;
- bar your “junk scientists” from testifying;
- uphold a state “tort reform” statute that capped damages; and
- reduce the jury’s “grossly excessive and therefore unconstitutional” award of punitive damages.

You’ve just received the defendant’s opening brief. Thick. Polished. Scholarly. Although the names of the defendant’s trial lawyers remain prominent on the brief’s cover, rumor has it that the defendant hired one appellate specialist to write the brief and may even have another waiting in the wings just to handle the oral argument.

You have a full trial calendar and relatively scant appellate experience. Your dilemma is the same as your twin’s: (1) turn your fate over to the best appellate specialist you can find; (2) put your case in the hands of another lawyer from your firm (perhaps that new
grad, who has few clients of his own); or (3) start reading tomes on do-it-yourself appellate advocacy.

What should you do? For busy lawyers with minimal appellate experience and little time to master that trade, the answer would seem to be the same “no-brainer” that it was for the good orthopedist: You should turn your case over to—or, at least, consult with—the best specialist you can find.

Paradoxically, though, many trial lawyers are loathe to pursue this course—regardless of whether the legal issues on appeal are simple and routine or novel and complex, whether the financial stakes are low or high, whether the case was won or lost at trial, or whether the case is on an interlocutory appeal to an intermediate state or federal appellate court or being argued in the Supreme Court of the United States.

The thesis of this article is that just as it is wise for an MVP quarterback to consult with coaches before a game and at halftime, to switch game-plans to match what your opponent is doing, and even to bring in wringers if that’s what the other side is doing, it is wise for a lawyer to retain—or, at minimum, consult with—an appellate specialist or a specialist in one of the substantive areas at issue on appeal is generally a smart and cost-effective thing to do, unless the only issues on appeal are garden-variety ones, such as whether the trial court properly applied settled precedent to the facts. It is especially astute to work with a substantive or appellate specialist when the financial stakes are high or when the appeal (or case) involves multiple questions, matters of first impression, questions on which courts in the state, circuit, or nation are divided, or complex issues on such as questions regarding constitutional law, jurisdiction, admissibility of expert evidence, or statutory interpretation. In a nutshell, when brain surgery is called for, it is in everyone’s but your opponent’s best interests to forgo do-it-yourself surgery.
Anything You Can Do, They Might Do Better or More Efficiently

Although some trial lawyers might doubt that a specialist can write a better brief, deliver a more skillful oral argument, and, most important, produce better overall results on appeal, there is good reason to believe specialists can do so, or at least can produce equally good work more efficiently and more cost-effectively. Although this phenomenon is not limited to appeals, the most complete and most compelling evidence—including data on the comparative success rates of specialists and non-specialists on appeal and accounts of what your adversaries and competitors are doing, as well as testimony by judges who have sat on trial and appellate benches—comes from appellate cases and shows that these appellate specialists can do all three.

Scholars have concluded that “the outcome of cases” on appeal often is “directly related” to the appellate experience of the lawyers writing the brief and handling the oral argument, with veteran specialists increasing the odds of winning an appeal by 40% to 160%, depending on the court and the specialist. Even more compelling is the documented track record of appellate specialists in courts, such as the U.S. Supreme Court, where appellate review is granted as a matter of grace and not of right. For example, appellate specialists can dramatically boost the odds of convincing the Supreme Court to grant certiorari: from an intimidating 1 in 100 to an inviting 1 in 7.

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Even more convincing than dry statistics about what courts have done, *i.e.*, data about comparative success rates, are data about what other lawyers—both your adversaries and your competitors—are doing. Thus, “the evidence clearly establishes” that specialization in the law, especially “appellate specialization in the private bar, is on the rise.” Corporate defendants are hiring specialists, particularly appellate specialists, with ever-increasing frequency because they’ve become convinced that doing so pays off. For example, at the same time that most corporations are bringing more legal work in house and many corporate law firms are downsizing, appellate practices at corporate law firms are expanding and “appellate boutique firms are growing in size and number.” As a result, even twenty years ago, “there are new attorneys in one-third of the appeals,” even in civil cases. That trend has only increased in the last two decades.

In fact, legal practice, in general, “is becoming increasingly specialized, and the trend in appellate litigation is no exception, although it appears to be a more recent occurrence than the growth of substantive specialization.” The venerable economic doctrine of comparative advantage explains why it makes sense for people to pick plumbers over all-around handymen and to choose neurosurgeons over general practitioners: practice makes perfect and specialists

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7 Richardson R. Lynn, *APPELLATE LITIGATION* 83 (2d ed. 1993).

8 Id. at 511 (citing Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1497-1501 (2008)).

almost always do a better job, at comparatively less cost in the long run than jacks-of-all trades.\textsuperscript{10}

Appellate law has developed as a distinct specialty in the last 40 years, largely because of the “dramatic [changes] in the way appeals [have come to be] briefed, argued, and decided” during this period.\textsuperscript{11} These changes are primarily the product of the vast expansion of the caseloads borne by—and the pressures imposed on—appellate judges.

\textsuperscript{10} See David Ricardo, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 136 (3d ed. 1817). See also William J. Baumol and Alan S. Binder, ECONOMICS: PRINCIPLES AND POLICY, 50 (2009); Arthur O'Sullivan and Steven M. Sheffrin, ECONOMICS: PRINCIPLES IN ACTION (2003). Hence, Corporations out-source many jobs these days, electing to stick to what they do best, and leaving ancillary jobs, whether shipping their products or reading X-rays to firms across the country or across the globe. Thus, nowadays, few manufacturers retain their own freight and trucking departments (leaving deliveries to FedEx, UPS, or even more specialized carriers). Hospitals have X-rays read by radiologists in Ireland—and lawyers have trial transcriptions done in India—because they are always much cheaper and because they often are perceived as being just as good. And computer firms have their products designed in Silicon Valley, fabricated in China, and serviced by call centers in India. See Hungar, The Rise of the Appellate Litigator, 29 REV. LITIG. at 517 (“As corporate in-house counsel staffs increased in size and sophistication, they presumably began to handle matters internally that did not require a significant amount of specialized expertise. Concurrent with assuming greater responsibility for the routine legal matters, however, corporate in-house counsel no doubt also recognized that there were certain areas of the law, such as appellate litigation (particularly in complex cases or those of special importance to the company), that were most appropriately handled by experienced advocates in those fields. Rather than rely on a single major law firm to handle the full panoply of legal issues, in-house legal staff increasingly began to allocate legal work to particular lawyers and law firms based on their perceived expertise in the specific area at issue. Perhaps in light of the federal government's own successful reliance on appellate litigators for over a century, these companies—with their more sophisticated in-house counsel—came to realize that having specialists with skill sets and experience tailored to successful appellate litigation was a smart business decision that would benefit the company (and also serve to minimize the potential for post hoc finger-pointing in the event a significant appeal was handled unsuccessfully by inexperienced counsel who had been selected by an in-house lawyer”).

\textsuperscript{11} Lynn, APPELLATE LITIGATION at 83.
Although the “litigation explosion” is largely myth, not reality (at least as far as personal injury tort cases are concerned), the reality is that over the last three decades federal and state appellate courts have been inundated by an “avalanche of appeals” in criminal and in non-tort civil cases, with the average caseload per judge doubling nearly every decade.\textsuperscript{12}

As a result, “in order to reduce their workload,” appellate judges frequently take every opportunity—and often command their clerks to research every device—to dismiss appeals without reaching the merits.\textsuperscript{13} For example, “judges and their staffs comb briefs and appellate records to find a basis . . . to decline decision due to procedural default or to shunt the case onto a summary track to a decision rendered without oral argument. . . .”\textsuperscript{14}

Moreover, the urgency spawned by increased caseloads, combined with “the increasing complexity of cases, . . . has removed much of the contemplative nature of appellate judging,”\textsuperscript{15} and has caused courts to place restrictions on the oral presentation of appeals. Rules limiting argument to 15 or 20 minutes are common, and many appeals are now decided with no oral argument at all. Whereas a “trial lawyer may take days or even weeks to persuade a trial judge or jury,” a lawyer arguing an appeal “has time dribbled out to the minute,” with much of the time allotted to argument expended “answering questions from members of the bench.”\textsuperscript{16} So, “the burden

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\textsuperscript{12} Aldisert, WINNING ON APPEAL at 3. See Robert J. Stern, APPELLATE PRACTICE 20-21 (2d ed. 1989).

\textsuperscript{13} Michael E. Tigar and Jane B. Tigar, FEDERAL APPEALS: JURISDICTION AND PRACTICE 3 (3d ed.1999 & 2010-11 Supp.).

\textsuperscript{14} Id. See Ursala Bentele, APPELLATE ADVOCACY: PRINCIPLES AND PRACTICE 1 (4th ed. 2004).

\textsuperscript{15} Lynn, APPELLATE LITIGATION at 6.

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of persuading the court rests more heavily on the brief than it ever has.”

Plaintiffs’ lawyers are especially affected by—and increasingly targets of—these developments. “Tort reformers” and savvy defense counsel persistently blame the “litigation explosion” on “greedy” plaintiffs and their “unscrupulous” lawyers and take advantage of the pressures of increased caseloads to urge appellate courts to dismiss appeals on a number of grounds, including that the court lacks jurisdiction or that the state tort common law claims are preempted. From the perspective of corporate tort defendants, the supposedly rising tide of tort, securities, employment rights, and civil “damage awards and liability risks has . . . provid[ed] an even greater incentive for private clients to have highly skilled advocates handle significant appellate matters.”

For example, twenty-five years ago a leading member of the International Association of Defense Counsel advised that “preemption should be raised as soon and as often as possible. . . . Defendants should argue that both punitive and compensatory damages under any theory of liability . . . are preempted by the applicable federal regulations or statutes.” Corporate defendants have followed this advice with a vengeance.

In brief, plaintiffs’ lawyers should strongly consider retaining substantive and appellate specialists if only because your adversaries are doing so, i.e., because corporations and their in-house counsel “have increasingly made the business decision that the expense of hiring specialized appellate litigators is worthwhile given the increased burdens and risks of modern civil litigation,” and because

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17 Randall T. Bell, To Write a Brief in APPELLATE ADVOCACY SOURCE BOOK 3 (Paul Mark Sandler, ed. 1980).

18 Hungar & Jindal, The Appellate Litigator, 29 REV. LITIG. at 512. See id. at 525-29.


20 Hungar & Jindal, The Appellate Litigator, 29 REV. LITIG. at 525.
plaintiffs’ lawyers cannot afford to be out-gunned. Put differently, plaintiffs’ lawyers are in the midst of an arms race and corporate defendants are staffing up with more specialized and more effective weapons.

Some plaintiffs’ firms already are following the same trend—albeit much more slowly. Thus, a number of plaintiffs’ firms around the country have noticed that their adversaries are on to a good thing and have decided to emulate them, although on a reduced scale.21

Some smaller firms have designated a member to handle all appeals, while a few larger firms have inaugurated entire appellate departments, staffed by full-time specialists. Yet other plaintiffs’ firms, both large and small, regularly retain or consult with freelance specialists or moonlighting law professors on an as-needed basis. Indeed, a number of firms have found it makes sense to consult with appellate specialists before and during trials. These specialists provide strategic advice about the case, ghostwrite or edit briefs, and offer guidance on how best to preserve the record and guard against reversible error.

**A Cost-Effective Investment**

Appellate specialists have been flourishing precisely because they are better at meeting the increasing demands—and altogether different criteria—of appellate courts. As one experienced federal appellate judge has stressed, “[a]ppellate advocacy is specialized work. It draws upon talents and skills that are far different from

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21 *Id.* at 524-25 (“And it is not just corporate legal departments that have recognized an increasing need for specialized appellate representation. As appellate representation has evolved as a specialty practice area, even general litigators find that it is good practice to enlist experienced appellate specialists, or at the very least experienced appellate co-counsel, when a case is appealed (if not before). There is an increasingly widespread recognition on the bar, including among trial lawyers, that the skills required to be an effective appellate advocate are meaningfully different from those required for other types of litigation.” (Footnotes omitted)).
those utilized in other facets of practicing law.”22 Another federal judge echoes those views: “The skills needed for effective appellate advocacy are not always found—indeed, perhaps, are rarely found—in good trial lawyers.”23

Indeed, the general market forces discussed cannot explain “the rise of appellate litigation as a specialized practice in the absence of meaningful and particularized skills possessed by appellate specialists that increase the prospects for success on appeal.”24 Instead, retaining an appellate specialist is economically sound because appellate advocacy is a different beast than trial court advocacy and because appellate lawyers use a significant different set of skills than trial lawyers do.25 They also are versed in the different procedures used on appeal compared with trial court procedure.

The reason why appellate specialists are more adept at these tasks—and are better at winning cases on appeal—is not because they are innately better lawyers.26 Far from it. Rather, they obtain better results in their trade for the same reason and in the same way that trial specialists are better at their craft: these lawyers practice their skills over and over and over again. “Repetition and experience are great teachers. A lawyer who concentrates on handling appellate


24 Id. at 529-30.


26 Id. at 517 (“Being a good trial lawyer does not mean that you are also a qualified appellate advocate.”).
cases simply knows the waters in which he or she is about to sail and can chart the most direct course.”

Good trial lawyers are adept at ferreting out information through discovery, examining witnesses, and making spontaneous tactical decisions in court. Good trial lawyers also are uniquely skilled at discovering and presenting “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.”

By contrast, when a case is on appeal the focus shifts from developing facts to weeding through the trial court record “to glean the factual predicates most favorable to his or her legal arguments,” framing these in the context of the applicable standard[s] of review,” researching legal principles, considering subtle distinctions and trends within the relevant body of law, understanding the underlying policy considerations and doctrinal factors that motivate judges, and then distilling each of these into a concise, persuasively written brief.

Unlike trial court briefs that lay out existing law but frequently take a back seat to the compelling oral arguments to judge and jury, the appellate brief is the cornerstone of a successful appeal. Appellate brief writing requires not a mere rehash of the arguments made at trial, but clearly crystallized legal arguments that precisely advocate the client’s position and interests. Sifting the wheat from the chaff, both in terms of examining the factual record and studying every relevant aspect of the law to write a persuasive brief requires


28 Id. (citing Paul Bergman, TRIAL ADVOCACY IN A NUTSHELL 3-4 (3d ed. 1997)).

29 Id. (citation omitted).

30 Id. at 534.
infinite pains and large blocks of undistracted time, luxuries busy trial lawyers rarely have.

Although many trial lawyers readily concede that appellate specialists are more conversant with appellate rules and procedures, they nevertheless maintain that that advantage is offset by the trial lawyers’ trump card—their mastery of the case. Thus, they believe that “the facts are everything” in a lawsuit and that, no one knows (or can hope to learn) the facts as well as they do.

Significantly, however, this “strength” is almost universally regarded by appellate judges as a trial lawyer’s greatest weakness. As one former state supreme court justice has complained (in remarks often echoed by other judges), “All too often, attorneys who are not regular customers in the appellate courts treat their appeals as nothing but” an opportunity to reargue the facts and to explain why the trial court simply failed to appreciate the equities of the case.

Accordingly, although trial lawyers may suppose that they have an edge over appellate lawyers because they’ve “lived with a case” for months, the irony is they may have lived with the case too closely and for too long. Familiarity with a case prepared and tried months ago can be more foe than friend, as it can make it difficult to distinguish exactly what evidence actually made it into the official record. Furthermore, being too close to the trees can cause you to lose sight of the forest, blinding you to the real strengths and true weaknesses of your appeal.

By contrast, what looks like an appellate specialist’s fatal weakness—the fact that the specialist sees the case and the issues “cold”—almost always turns out to be a blessing in disguise. This is so

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31 Aldisert, WINNING ON APPEAL at 5.
33 Lynn, APPELLATE LITIGATION at 59.
34 Herbert M. Levy, HOW TO HANDLE AN APPEAL 18 (1990).
because the appellate specialist “views [the case and the issues] precisely as does the appellate court, through the little square window of the [official] record . . . .” Moreover, because appellate specialists make their bread and butter by monitoring the way different appellate courts (and even different appellate judges) treat unfolding jurisprudential trends, they are far more able to grasp which issues will be most enticing, which arguments will be most persuasive (and which ones to avoid), and which facts will be most likely to win a reversal or gain an affirmance from the court. Thus,

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35 Stern, APPELLATE PRACTICE at 71 (citation omitted).

36 See Dennis J.C. Owens, New Counsel on Appeal, in ABA PRACTICE MANUAL 61 (1992). “The appellate litigator must exercise judgment in determining which issues to raise on appeal based on a careful review of the trial court record and thorough research and analysis of the relevant precedents. It may very well be that issues that were the subject of extensive scrutiny at the trial level do not present the best opportunity for success at the appellate level, and arguments that were raised and thus preserved for appeal, but were not the primary focus of the litigation below, may be more compelling on appeal. Appellate litigators do not have the luxury of treating all arguments equally and must give some short shrift or toss them aside entirely in order to focus their own and the appellate court’s attention on the arguments that stand the best chance of prevailing. Those judgments in turn are often dependent on the appellate specialist’s experience with and understanding of the role played by appellate review, including but not limited to the applicable standards of review.” Hungar & Jindal, The Appellate Litigator, 29 REV. LITIG. at 532-33 (footnotes omitted). Knowing what facts to downplay, what issues to abandon, and what arguments to minimize or ignore altogether is a vitally important skill, the exercise of which that requires considerable courage and discipline. “Both the appellant who seeks to overturn an adverse decision, and the appellee who seeks to sustain it, must resist the temptation to replay the trial.” Tigar & Tigar, FEDERAL APPEALS at 17. Appellate lawyers therefore must undertake two essential tasks: “first, rethink the case from the beginning, without prejudice based on theories and points already raised; second, dare to focus on a few strong points and jettison all the others.” Id. at 17-18 (footnote omitted). “Lawyers are afraid of cutting down the number of issues presented on an appeal. They are afraid of ‘missing something.’ This is a valid fear, but lawyers are trained—and paid—to make judgments . . . . An advocate does not enhance the chances of winning by throwing in marginal issues.” Tigar & Tigar, FEDERAL APPEALS at 444. Abraham Lincoln, no mean lawyer (both trial and appellate), perhaps said it best, albeit in the midst of a vastly different trial: “The dogmas of the quiet past, are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise — with the occasion. As
although a trial lawyer might “be tempted to raise a multitude of issues on appeal, an experienced appellate attorney will select only the strongest arguments. The ‘kitchen sink’ approach only serves to clutter a brief and obscure meritorious issues. Less is more in the appellate context.”

As detailed below, scholars conclude appellate specialists bring six other equally important skills to a case. They tend to be much better at:

1. writing the type of briefs prized by appellate courts;
2. presenting the type of oral argument prized by appellate courts;
3. navigating around the often recondite procedural rules of these courts;
4. minimizing the risk that sanctions will be imposed by the courts or that malpractice claims will be filed by disgruntled clients;
5. handling appeals efficiently and cost-effectively; and
6. consulting on cases before and during trial both to improve the chance of success in the lower court is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country.” Second Annual Message to Congress (Dec. 1, 1862), in 2 ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 393, 415 (Don E. Fehrenbacher, ed. 1974). Lastly, drafting the brief “requires a delicate balance. At all times, the appellate litigator must maintain credibility with the court by not mischaracterizing the record in the case or relevant precedent, while at the same time persuasively arguing the client’s position.” Hungar & Jindal, The Appellate Litigator, 29 REV. LITIG. at 533-34 (footnote omitted).

court and to posture the case in the best possible way if one party or the other appeals.

First, burgeoning judicial caseloads require that briefs be written for maximum effectiveness, especially because, as noted above, written appellate briefs are increasingly becoming “the only shot counsel gets at the appellate court.”

Chief Justice William H. Rehnquist and Justice Thurgood Marshall agreed on very few things, but both opined that good briefs are the difference between winning and losing an appeal. Justice Marshall was unequivocal: “it is the brief that does the final job, if for no other reason than that the opinions are often written several weeks and sometimes months after the argument. The arguments, great as they may have been, are forgotten. In the seclusion of his chambers, the judge has only his briefs and his law books. At that time your brief is your only spokesman.” Chief Justice Rehnquist agreed, noting that even the best oral advocacy is insufficient “to overcome . . . a poorly written brief.”

And good appellate briefs are more likely to be written by people who specialize in writing appellate briefs and who recognize that these briefs are quite different from trial briefs because they are written for very different types of judges who employ very different standards. Consequently, although no rule ordains

that a well-written brief will win . . . the advantages of clearly stating your position, while skillfully narrowing the argument and selectively using supporting authorities, are compelling. Although the


effect of a well-written brief may be intangible, judges appreciate good writing; it makes their job easier and more enjoyable. Opponents are less likely to garble your position, either mistakenly or intentionally, and obscure the issue. The opinion writer is more likely to rely on your brief and adopt . . . some phrase or attitude that will improve your chances on retrial or enlarge your remedy.\textsuperscript{41}

Specialists are particularly adept at rethinking the case from the beginning, without prejudice based on the theories and points raised at trial; they dare to focus on a few strong points and discard all the others.\textsuperscript{42} They also are exceptional at winnowing out the “two or three worthwhile issues” in each case,\textsuperscript{43} at drafting those “questions presented” in a way that leads the court to provide the answers they desire, and at writing a statement of facts that is necessarily neutral in form but persuasive in effect.\textsuperscript{44}

Second, appellate specialists are typically better at handling oral argument in appellate courts. The fact-laden and occasionally dramatic style of argument that many trial lawyers use so effectively before lay juries and trial judges often is ineffective in appellate courts comprised of extremely skeptical appellate courts. Indeed, what works in front of juries may antagonize appellate judges.\textsuperscript{45}

One scholar summarized the feeling of many judges: “Often the trial lawyers . . . think their silver tongues will reduce appellate

\textsuperscript{41} Lynn, APPELLATE LITIGATION at 4.
\textsuperscript{42} See Hungar & Jindal, The Appellate Litigator, 29 REV. LITIG. at 533-34.
\textsuperscript{43} Magnuson, Achieving Efficiencies, in APPELLATE PRACTICE at 3.
\textsuperscript{44} Levy, HOW TO HANDLE AN APPEAL, at 133-34.
\textsuperscript{45} Stern, APPELLATE PRACTICE at 72; Owens, New Counsel, in ABA PRACTICE MANUAL at 62.
judges to putty.” Appellate judges actually prefer the much more direct and “objective approach of the appellate advocate. . . . Their ability to answer effectively the questions propounded during oral argument often spells the difference between [victory and defeat].”

Appellate lawyers are also more adept at handling arguments briskly, which is becoming increasingly important. “A trial lawyer may take days or even weeks to persuade a trial judge or jury; [today] an appellate lawyer has his time dribbled out to the minute.”

Third, appellate specialists have an advantage over trial specialists because they are far “more familiar with the appellate rules and procedures.” Therefore, they are better able to take advantage of such useful arcana as the invited error doctrine, the intricacies of interlocutory review, and the collateral order doctrine, how to use a stay application to test whether to proceed with a motion for leave to appeal, and whether and how to take a cross-appeal.

Fourth, appellate specialists can help you avoid sanctions and malpractice claims. Although appellate practice carries no special ethical obligations, the notably different skills and knowledge required to handle a complex or novel case on appeal raise questions about a non-specialist’s ability to comply with the most elemental of professional rules: the duty to “provide competent representation to a client.” This requires “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

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47 Stern, APPELLATE PRACTICE at 72 (quoting U.S. District Court Judge Oliver Gasch).
48 Aldisert, WINNING ON APPEAL at 4-5 See Tigar & Tigar, FEDERAL APPEALS at 18.
49 Stern, APPELLATE PRACTICE at 72 (quoting Judge Gasch).
50 Lynn, APPELLATE LITIGATION at 147-57, 188-89.
Appellate judges express growing impatience with the “great deal of incompetence” that they see,\textsuperscript{52} particularly “with sloppiness, mistakes, and flouting of appellate procedure rules.”\textsuperscript{53} As a result, appellate courts are becoming ever more willing to use sanctions to punish noncompliance with rules, undue delay, and frivolous appeals.\textsuperscript{54} Experts in attorney malpractice likewise warn that incompetent representation on appeal, such as failure even to consult with a specialist, may increase the odds of being sued by a disgruntled client for malpractice.

Fifth, hiring appellate specialists often is cost-effective, both because the specialists’ unique skills and greater efficiency increase your chances of winning on appeal—and therefore collecting your fee)—and because their participation frees you to do what trial specialists do better than anyone else: prepare and try lawsuits before juries.

Sixth and finally, appellate counsel also may be able to help the trial team with many other aspects of a case that is going to trial, whether it is assisting in motion practice, discovery disputes, privilege questions, drafting trial briefs, addressing a Daubert challenge, or preparing challenges to the constitutionality of tort “reform” statutes. Using separate appellate counsel at this stage may supply a fresh perspective and allow the trial team to focus on discovery and trial preparation.

Appellate specialists can also help with pretrial mediation and arbitration—preparing the written statements, evaluating the odds of appellate success when the case is being valued, and simply

\textsuperscript{52} Lynn, APPELLATE LITIGATION at 69 (citation omitted).
\textsuperscript{53} Id. at 9 (citation omitted).
\textsuperscript{54} See generally id. at 14-17; Stern, APPELLATE PRACTICE.
demonstrating seriousness about pursuing all available legal options if the litigation continues.\textsuperscript{55}

Indeed, the services appellate specialists provide in a particular case can vary with your needs and skills and with the economics of the case. At one end of the spectrum, appellate specialists can assume full responsibility for the appeal; at the other, their role can be confined to providing guidance on such matters as whether you (or your opponent) have appealable issues, what the odds are of success given the court and current trends, and which issues, arguments, and facts to push and which to abandon.\textsuperscript{56}

Experienced trial lawyers are wise to retain appellate and other specialists during or even before the trial, particularly if the case “involves complicated matters or issues of first impression,” and can draft and argue dispositive motions as well as ensures that critical issues that have been properly raised and preserved for appellate review.\textsuperscript{57}

Even if you are unwilling to let another attorney ghostwrite the brief or handle the oral argument (or if the relatively low stakes of the case make it uneconomical to do so), it is still often advisable to employ a second attorney to play devil's advocate with your arguments, to moot court your oral advocacy style, and to troubleshoot and edit your brief.\textsuperscript{58}

\textsuperscript{55} Alex Wilson Albright and Susan Vance, \textit{Ten Practical Tips For Making Your Case Appealable (Or, How Not To Lose Your Appeal At Trial And When To Call In The Cavalry)}, 35 Litigation 41 (2009).

\textsuperscript{56} Levy, \textit{HOW TO HANDLE AN APPEAL} at 20-21; Lynn, \textit{APPELLATE LITIGATION} §§ 58.1-8.3; Magnuson, \textit{Achieving Efficiencies}, in \textit{APPELLATE PRACTICE} at 2 (“Often the most economical appeal is the one never taken. . . . The decision to appeal should not be a reflex action, and an appellate lawyer is in a good position to make a dispassionate and rational recommendation on the merits of an appeal.”).

\textsuperscript{57} Mandel, \textit{Appellate Practice}, 81 FLA. BAR J. at 45.

One expert described this last skill as particularly crucial to your chances of success:

Editing is probably the most neglected stage in the preparation of brief. No one would think of publishing an unedited law review article, book, or [news] story . . . but lawyers are surprisingly casual about filing unedited brief. . . . Editing should be regarded as an essential part of brief writing. . . . [T]he brief should be edited by someone other than the attorney who wrote it, preferably a lawyer who knows nothing about the case. This insures that the brief gets a fresh look during the edit.59

Simply put, “being a good trial lawyer does not mean that you are also a qualified appellate advocate.”60

In the end, just as it’s often wise for an MVP quarterback to consult with his coach or hand off the ball to a running back in a high stakes game or when confronted by a new or baffling defense, and often wise for an orthopedist to avoid do-it-yourself brain surgery, it’s often wise for a trial lawyer to consult with an appellate or other specialist when confronted with a novel or complex question or when the stakes are high.

59 Bell, To Write a Brief in APPELLATE ADVOCACY SOURCE BOOK at 21-22.
60 Aldisert, WINNING ON APPEAL at 4-5.
DAVID G. WIRTES

TYPICAL ACTIVITIES HANDLING AN APPEAL or ASSISTING TRIAL LAWYERS BEFORE AN APPEAL (OR EVEN A COMPLAINT) IS FILED

October 9, 2014

I. Prior to Filing the Complaint

A. Work with the trial team to evaluate whether to take the case in the first instance, i.e., identifying and evaluating insurmountable or problematic issues.

B. Working with the trial team to formulate legal strategy for ultimate victory, i.e., anticipating problematic procedural or evidentiary issues and plotting a strategy for their successful resolution.

C. Drafting the complaint and initial discovery requests.

D. Reviewing and challenging motions to dismiss and affirmative defenses in answers.

E. Drafting responses to motions for summary judgment and other dispositive motions, e.g., Daubert challenges to experts, motions challenging subject matter or personal jurisdiction.

F. Preparation of motions in limine and supporting briefs.

G. Responding to opponents’ motions in limine.

H. Assistance in preparation of joint pretrial orders.

I. Proposed jury instructions.

II. During Trial

A. Rapid response to typical trial issues.

B. Voir dire/Jury selection/Batson.

C. What we can or cannot do or say in opening statements.
1. Procedural issues, e.g., order of witnesses, use of demonstrative aids, trial notebooks, in-court demonstrations, site views.

2. Evidentiary issues.

3. Sufficiency of expert qualifications (Rule 702, Daubert, statutory expert witness requirements).

4. Hearsay and other trial objections.

5. Sufficiency of evidence.

6. Meet the elements?

7. Competency of evidence of damages.

D. Opposing motions for judgment as a matter of law at the close of plaintiff’s case and at the close of all the evidence.

E. Opposing defendant’s proposed jury instructions.

F. Formulating the verdict forms.

III. Post-Judgment – Responding to Post-Judgment Motions

A. For JML

B. New Trial

C. Remittitur

D. Attacks on jurors

E. Collection

F. Other post-trial motions, e.g., for reconsideration of or relief from judgment

IV. Interlocutory Appeals and Extraordinary Writs

A. Ensure compliance with final order rule.
B. Ensure compliance with interlocutory appeal rule.

C. Ensure compliance with extraordinary writ rules.

D. Strategic decisions regarding responses, if any.

E. Preliminary oppositions.

F. Answers and briefs on the merits.

G. Oral arguments.

V. Appeals

A. Review case to ensure compliance with statutory requirements for notices of appeal, docketing statement, supersedeas bonds, compilation of the record, transcript order forms, etc.

B. Summary of the record on appeal, distilling winning issues and arguments

C. Supervise preparation and submission of the record on appeal

D. Preparing and filing briefs on appeal.
   1. Ensure formatting compliance.
   2. Statement regarding oral argument.
   3. Table of contents.
   4. Statement of jurisdiction
   5. Statement of the case.
   7. Statement of the facts.
   8. Statement of the standard of review.
10. Argument.

11. Conclusion/Request for relief.

12. Oral argument request.

13. Statement of compliance with word/page limitations

E. Enlisting and coordinating amicus briefs or responses to opponents’ amici.

F. Oral argument.

G. Preparing or opposing petition for en banc review

VI. Considering and preparing for petition for non-discretionary discretionary review, e.g., a petition for a writ of certiorari, to the state’s highest court or to the Supreme Court of the United States

VII. Mediation/Arbitration on appeal

A. Assist in realistic evaluation of likelihood of success at trial, on appeal, and ultimate valuation.

B. Identifiable trends re: courts’ view of issues such as:

1. Sufficiency of evidence of fraud.

2. Competence of evidence of damages.

3. Punitive damages.

4. Problematic trial issues like jurisdiction, statutes of limitations, competence of expert witnesses, “good count/bad count,” and the like.