

Preface

About four years ago, I mentioned to my friend, Larry Rosenberg, who by then was in private practice and chairman of the ABA's Appellate Practice Committee, that our committee should put together a book on appellate advocacy; after all, we were the Appellate Practice Committee. He told me that he had been thinking that our committee should work on a special project and that he, too, was thinking along the lines of a book about appellate advocacy and practice. At about this time, Larry introduced me to Ted Hirt, a veteran U.S. Department of Justice trial and appellate advocate, who joined our endeavor. After several brainstorming sessions, the three of us determined that we wanted a book that did the following:

- assembled the collective wisdom of some of the best appellate advocates in the country;
- brought together a diversity of viewpoints—those from private practice, government, and academia;
- would be accessible to law students, including 1Ls, upperclassmen who were taking an advanced appellate advocacy course, and moot court contestants;
- would be accessible to practitioners with little or no appellate experience regardless of the amount of years those attorneys had been practicing law;
- would be useful to even the most seasoned appellate advocates;
- blended writing advice with substantive content; and
- focused on appellate advocacy in the federal courts of appeals.

About halfway through the project, we asked David Krech, the director of appellate advocacy at the West Virginia University College of Law, to join our senior editorial staff.

The result is this 18-chapter book, *A Practitioner's Guide to Appellate Advocacy*, the collaborative work of experienced appellate

advocates, all of whom have served as appellate advocates in private practice, the United States government, or both, and many of whom have taught appellate advocacy.

Chapter One, “The Appellate Court’s Role in the Federal Judiciary,” starts with an overview of the role of the courts of appeals in the federal judicial system. The chapter introduces the reader to the hierarchical nature of the federal court structure and explains the difference between the appellate courts’ error-correcting function and their role in developing legal precedent.

Chapter Two, “Professionalism and Ethics in Appellate Advocacy,” discusses the appellate advocate’s role as a professional and the advocate’s ethical duties in the appellate context. Drawing on the Model Rules of Professional Conduct, and borrowing from Aristotle’s idea of *ethos*, the chapter communicates the importance of professionalism and ethics to being a persuasive advocate.

The next three chapters discuss some substantive issues that must be considered prior to drafting an appellate brief. Chapter Three, “Preserving Issues for Appeal,” addresses the mechanics of preserving issues to avoid waiving the client’s rights on appeal. Chapter Four, “Jurisdiction,” discusses the appellate court’s obligation to ensure that it has both subject-matter and appellate jurisdiction over the appeal, and focuses on reviewability, finality, and timeliness. And Chapter Five, “Standard of Review,” examines the various standards under which the courts of appeal may review questions of law, questions of fact, and mixed questions, in the context of appeals both from the district court and from administrative agencies.

The next two chapters discuss some of the preliminary filings with the courts of appeal. Chapter Six, “Electronic Filing,” alerts the reader to the fact that some courts of appeal now require electronic filing and more will soon require it. Chapter Seven, “Initial Filings,” focuses on the actual preliminary filings, such as notices of appeal and their administrative agency counterparts, docketing statements, preliminary motions, and stays or injunctions pending appeal.

Chapter Eight, “Settlement of Cases on Appeal,” walks the reader through the settlement process of the various federal circuits.

Chapters Nine through Thirteen focus on the appellate brief itself. Chapter Nine, “Record on Appeal and the Joint Appendix,” educates the reader about the difference between the record and the joint ap-

pendix and some of the mechanics of filing those documents. Chapter Ten, “The Appellate Brief,” delves into writing the appellate brief, with particular emphasis on the argument section. The next three chapters—Chapter Eleven, “The Introduction and Statement of the Issues,” Chapter Twelve, “Substantive Statements and Summary of Argument,” and Chapter Thirteen, “Other Requirements of an Appellate Brief”—highlight some of the finer points about these sections of the brief.

Chapter Fourteen, “Interjurisdictional Certification,” discusses the process by which federal appellate courts can certify questions of state law to a state court of last resort. The chapter further discusses the conditions under which the state court is likely to answer a certified question.

Chapter Fifteen, “Oral Argument,” instructs the reader on how to present outstanding oral argument. This chapter relies upon Aristotle’s rhetorical structure of *ethos*, *pathos*, and *logos*, and how an advocate can employ those concepts in delivering a compelling oral argument.

Chapter Sixteen, “Post-briefing, Post-argument, and Post-decision Filings,” discusses several documents that the appellate advocate often files after he or she has filed the brief or presented oral argument, or after the court has issued its decision. The chapter focuses on Rule 28(j) letters, petitions for rehearing en banc, petitions for certiorari, and related documents or filings.

Chapter Seventeen, “Significant Variations Among the Circuits,” discusses variations among the circuits, with reliance on the circuits’ local rules. This chapter, which is the longest in the book, focuses on each circuit’s geographic jurisdiction; its local rules governing motions, mediation, briefs, oral argument, and appendices; and the publication of its decisions.

Last, Chapter Eighteen, “Appeals from Agency Decisions,” discusses the differences between an appeal from a district court decision and an appeal from a final decision and order of an administrative agency.