Understanding the Appellate Process

by Dale E. Console

Appellate practice can be a rewarding and intellectually challenging experience. It can also be a frustrating minefield for the unwary or inexperienced appellate practitioner. Understanding the function of the Appellate Division, how the court operates and what it expects, is crucial. Success may turn upon your ability to conform your arguments to the requirements and expectations of the court rather than the merits of the case.

The Appellate Process

Appeals are frequently lost because the appellant simply did not like the result in the trial court and wanted a second bite at the apple. Long ago the Appellate Division cautioned:

> More than a feeling of dissatisfaction is needed to fuel an appeal. It is a mistake for parties to seek satisfaction in this court simply because it has eluded them in the trial court. The advantage sought here is apt to be illusory. A sharp departure from reasonableness must be demonstrated before our intercession can be expected. Attorneys must exercise objectivity to calm the fighting blood of the parties and restrain their self-punishing, litigious impulses.[1]

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The Appellate Division is an intermediate appellate court. It is bound by standards of review that severely restrict the court's ability to intervene. Statistics compiled by the clerk's office indicate that the Appellate Division affirms 74 percent of the civil appeals that go to the panel. The affirmance rate in criminal appeals is 84 percent. The court is not a forum for a trial *de novo*. The court will not substitute their opinion on the merits for that of the trial judge. Understanding the appropriate standards of review, which are discussed at length in the comments to

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Rule 2:10-1, is critical. As a general rule, the court looks to whether the result could reasonably be reached on the evidence. Your arguments must be structured around the appropriate standard of review, whether plain error, sufficient credible evidence or abuse of discretion, and how the court will apply that standard to your case.

Time and cost are factors that are often overlooked by litigants and attorneys. Appeals are very expensive. The cost of the transcripts alone can be prohibitive. When faced with a multiple-day trial with voluminous documents, the attorney has to read that voluminous record and cite to it in the brief. This is slow and tedious work that carries a high price tag. In many cases, an appeal may not be cost effective. Although you may have flat-out reversible error, the cost of the appeal may outweigh the error.

It generally takes 12 to 14 months from the filing of the appeal to obtain a decision. Some cases may be decided sooner, while many take longer. The life of an appeal can be substantially extended by extensions on briefs, motion practice and diversion to the Civil Appeals Settlement Program. You need to consider the time factor in deciding whether to appeal. Also, in many cases, subsequent events may make the appeal moot. In others, you may lose an opportunity to review or revise an unjust or erroneous result in the trial court while the appeal is pending, since the trial court generally loses jurisdiction once an appeal is filed.

How the Court Operates

At present, there are 34 judges in the Appellate Division who are divided among eight panels. When all of the briefs are submitted, the case will be assigned and sent to a panel. Each panel has a presiding judge who allocates the caseload among the judges on that panel. A case is assigned to either two or three judges, at the discretion of the presiding judge. You will not know which panel has your case until you receive the notice of oral argument. If you did not request oral argument, you will not know what panel has the case until it is decided.

Generally two-judge panels are assigned to the easier cases. There is a popular belief that a two-judge panel means an affirmance. The statistics do show that there is a slightly higher affirmance rate on two-judge panels, but this is often because the cases are simple. A two-judge panel can just as easily mean a reversal if it is clear that such a result is warranted.

If your case is assigned to a two-judge panel, the only thing you can be sure of is that the decision will not be published: a three-judge panel is required for published opinions.

The Appellate Division authors 4,000 opinions a year. The court decides nearly 7,000 motions. The judges each review eight or nine sets of briefs in a week, and are assigned to write four opinions each week that they sit on cases. The court operates under an enormous workload, and it is naïve to believe that appellate judges have the time to read every voluminous record before them. The more difficult or voluminous cases are assigned to law clerks or staff attorneys at central research, who review the record and write memoranda for the court.

Prior to deciding cases, the assigned judges will review the file and exchange their initial impressions. These are written on pink paper and, not surprisingly, are referred to as pinks. Law clerks' memos are also written on pink paper. Central research memos are goldenrod. Drafts of opinions are written on green paper, and are exchanged between the judges for comments. The final opinion is issued on white paper.

Prior to oral argument, the judges will meet and discuss the cases. In many cases, they already know what the decision is prior to the actual argument. At a minimum, they will have a clear idea of what the issues are and what they need to ask if they are not clear on a point, or disagree on the resolution.

As a general rule, if a judge's law clerk has written a memo on a case, that judge will write the opinion. Other cases are not assigned an author until the day of the argument. That judge, at least in theory, will read the entire record before the opinion is written. This often means that none of the judges have read it prior to the argument.

The Importance of Briefs

The purpose of the foregoing is to illustrate the importance of the appellate brief. In the vast majority of cases, the decision will rest upon the quality of your brief and your ability to persuade through the written word. It is a serious mistake to think you will be able to win the case on oral argument, if you did not draft the brief properly.

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any appellate practitioner to know Part II of the Rules of Court. This is a roadmap for appellate practice that tells you such elemental issues as how to cite to the transcript or the appendix and what font to use for your brief.

The rules now permit a preliminary statement in briefs. This statement can be no longer than three pages and should not contain legal argument. Its purpose is to provide the court with a brief overview or introduction to what the case is about. The fact that you are permitted three pages for this does not mean that you need fill that space. In most cases, one or two paragraphs is sufficient.

There are page limitations on briefs as well. Once again, just because you are entitled to the space does not mean you must use it. Brevity and clarity are always preferable; your goal is to persuade the court that your view of the case is the right one. Since you are dealing with judges who read dozens of briefs every week, you need to grab their attention and hold it. You will not help your cause by submitting rambling briefs that never get to the point or repeat the same point over and over. Appellate judges are quick to smell a billable event, and while this may impress your client, it will not win you points with the court.

Anything that annoys the court will divert attention from your cause. This includes incredibly minor issues. A judge who is stabbed on the staples of your brief every time he or she picks it up has his or her attention diverted. Briefs and appendices should always be bound. If a judge cannot navigate the appeal through your appendix, his or her attention is diverted. If he or she has to look up a Latin phrase in a dictionary, his or her attention is diverted. Also, judges are annoyed by incorrect transcript citations — the correct method is 2T24-3 to -5 (which refers to the second transcript), page 24, lines 3 to 5. They

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are annoyed by incorrect labels for parties — we do not have appellees in New Jersey. The parties are the appellant and the respondent, and they are referred to in a brief as plaintiff and defendant or by their proper names. This may seem picayune, but the manner in which your argument is presented is often as important as the argument itself.

Procedural History and Statement of the Facts

The required elements of every brief are the procedural history, statement of the facts, legal argument and conclusion. Each element has a structure and a purpose. The procedural history should be brief. The purpose is to acquaint the court with the history leading to the appeal. You need only include those events that are relevant to the appeal. You do not need to, and should not, include every single pleading and motion that transpired over the entire history of the case. Thus, if you are appealing from the decision following a trial, it is unnecessary to recite what was stated in the counterclaim or the amended complaint. This is only relevant if there is a question as to what was actually pleaded. You should include the date the appeal was filed and any relevant appellate history, such as the granting of a motion to supplement the record.

The statement of the facts is the most important part of your brief. When I was in law school, I worked for an Appellate Division judge who told me that my job was to tell him what the case was about. Don't worry about the law, he said, we can figure that part out. While many years of experience have taught me to temper this advice, it remains sound and sage. The factual statement is your opportunity to present your case. By the time the judge finishes reading the facts, he or she should have a clear impression that there is something wrong with this case. Do not wait for the argument to try and make that point.

The facts should be a narrative statement of the case that leads into the legal arguments. You should not cite law or make the legal arguments in the statement of the facts, but you should structure this portion of the brief to emphasize the factual issues that are the subject of the appeal. Never write a statement of the facts that merely recites the chronology of the trial (*i.e.,* the plaintiff said this and on cross-examination said that, and the next witness said something else and so on). This is not only boring (and therefore diverts attention), but not terribly helpful.

The statement of the facts should be straightforward and even-handed. Honesty and neutrality are necessary and effective. Never write a statement of the facts that only includes your client's side of the story. Never mislead the court about what happened. Do not state as an operative fact that the plaintiff testified the light was green if, on cross-examination, he testified that it was red. Aside from the ethics of such tactics, your adversary will certainly point out the discrepancy. This will surely annoy the court and divert their attention; it also impacts on the credibility of your entire case.

Deal with bad facts. The best defense is always a good offense. If you deal with the facts honestly, you have neutralized your adversary's attack.

Do not engage in attacks on the parties, the attorneys or the trial judge. If you are trying to make a point about credibility, this can be done by simply pointing out the inconsistencies in the testimony, in which case, the facts should speak for themselves.

. It is the manner in which you structure the factual statement that matters. This requires a clear understanding of the case and arguments you will make. The factual narrative should be structured so the legal arguments follow logically. Structuring the facts in a light favorable to your client without making it so one-sided that it lacks credibility can accomplish this. It takes considerable time and effort. You may need to rewrite entire portions of the facts after finishing the legal argument to create a more cohesive brief.

Appeals are based on the record before the trial judge. If a fact was not testified to or a document was not in evidence, it has no place in the brief. The rules require that you cite to the record in the statement of facts. This means that virtually every sentence in the statement of facts must have a citation to the transcript or the appendix or both. Occasionally you can put one citation at the end of two or more sentences if it pertains to the same page of testimony or document, but the better practice is to put the transcript reference of appendix page after each sentence. This is why appeals are so expensive. You can spend literally hours combing through the record looking for the exact testimony that supports one sentence in your brief. If, after an exhaustive search you cannot find the reference, the sentence should be taken out.

Do not assume that just because you cited to a portion of the record, the Appellate Division is going to turn to that testimony or document and read it. If there is a particular section of testimony or evidence that you want them to read, quote it verbatim in the brief.

Do not make factual statements that were never part of the record. It is dishonest and unprofessional, and it happens all the time. Even if you thought you had entered the testimony, or that the document was in evidence, the Appellate Division is not the place to correct your mistakes at trial. It is not the place to throw in some juicy fact that you discovered after the trial. This type of behavior means that your adversary must point out each and every deviation from the record, which leads to motions to strike, and impacts on your credibility with the court.

The statement of facts should include a recitation of the trial judge's findings and conclusions. The Appellate Division needs to know what the trial judge said and where to find it in the record. The judge's decision is the first thing they will read. Tell them what the judge said. Keep this relatively neutral — you can tell them what is wrong with the decision later.

Legal Arguments

The legal argument is broken down into points. Each point has a point heading. These should be informative but not overly long. Appellate judges often turn first to the table of contents, which lists each point heading. They read them to obtain a feel for the case. A point heading that simply states "The verdict was against the weight of the evidence" is not helpful. Since this is an argument that, absent compelling circumstances, is also a dead loser, you will lose the court's attention on the first page. You need to make your point succinctly, *i.e.* "The verdict was against the weight of evidence where such and such happened." Also, if you have filed a cross-appeal, point headings need to designate which portions of the brief pertain to the cross-appeal.

Legal arguments in the Appellate Division should follow the basic rules of argument we were taught in law school. State the legal proposition, relate the facts to the legal proposition and conclude with a result based on the application of the law to the facts. This should be done in a simple and straightforward fashion. Do not ramble, focus. Do not engage in unnecessary, lengthy diatribes on simple issues. If you are appealing from a summary judgment motion, you do not need to write a discourse on the history of the summary judgment rule. Appellate judges know what *Brill* says. If there is a case on point, cite it and move on. Avoid string cites, law Latin, obtuse language and complex sentences. Hone your point and do not repeat the same thing several different ways.

Put your best point first. This is a fairly elemental concept, but one that is often missed in appellate briefs. If your best argument is buried at the end of an otherwise boring and unremarkable brief, you may lose the court before they get to the best part. If you represent a cross-appellant, the arguments on the cross-appeal usually follow your response to the appellant's brief. This is not absolute. If the cross-appeal is the best argument, put it first. Structure the legal arguments to optimize your position in a logical, coherent fashion.

While the Appellate Division will figure out what the law is, this does not mean that you should assume they are familiar with the subject matter or particular area of the law. Lawyers tend to be specialists. The judges in the Appellate Division are generalists. You may well encounter judges in the Appellate Division that know more about your subject than you do, but you may also encounter judges who are less familiar with your area of the law. You need to explain enough about the law to be sure something is not overlooked. Your focus should be on convincing the court that the proper application of the law to your circumstances requires the result you want.

If you represent the respondent, your brief should begin with a statement of the standard of review. You should then hammer the court with the reasons why that standard applies in your case and why they cannot deviate from it. Do not bother to address your adversary's points until you have done this.

You need to tell the Appellate Division what you want them to do. This should be stated in each point, but should certainly be summarized in the conclusion. If the court cannot figure out what you want from them, you may not get it. You may also be stuck with remand instructions that are either not

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helpful or inconsistent with the goals you sought.

You have the right to file a reply brief. Do not feel that you have to do this. A reply brief should be limited to issues raised in the opponent's brief that require a response. The reply is not the time to fix the defects in your first brief, nor is it an opportunity to raise an entirely new argument. Judges do not spend a huge amount of time reading reply briefs, so you should not withhold an argument and think you can win on the basis of your reply brief.

The Appendix

The appendix contains all documents relevant to the appeal. You do not need to put in every piece of paper filed in the course of the proceeding, nor do you need to include every piece of evidence. You need to include those documents which are relevant. The exception to this is an appeal from a summary judgment motion in which you are required to put in every document that was before the trial court. You should never include documents that were not before the court, or were not admitted into evidence. The rules require that the index to the appendix contain reference to the evidence number and the transcript citation. This is to insure that the documents were actually part of the record. Each volume of the appendix should contain the index to the appendix, which should indicate which documents are in each volume.

Your appendix should be organized in a coherent fashion, generally in chronological order. A document that has been attached to numerous pleadings, such as an order, need only be reproduced once. The index should indicate each exhibit attached to a motion, and note which have been omitted. A written decision by a trial judge should be either at the beginning or end of the appendix, so the court can find it easily. Your goal is to make it easy for the court to find something.

Oral Argument

You have the right to request oral argument, but you must affirmatively do so in a separately captioned document. If you wish to have oral argument, do not rely upon your adversary's request. If your adversary withdraws the request, you will not be entitled to argue the case unless you have submitted your own request.

Oral argument is for the court. It is not an opportunity to grandstand for your client's benefit, nor is it a time to raise what you forgot to put in your brief. Your argument is to assist the court with any questions they have, or to correct something that they either did not understand (because you did not do a good enough job on your brief), or have concerns about. If you have oral argument, you must know the case. You should not go into oral argument with a prepared script. You will be lucky to get two sentences out before they start asking questions. Be prepared with one or two points that you want to make or highlight, but understand that you may not get to them.

You need to listen to the questions asked, and answer them directly. Few cases are won on oral argument, but many are lost there. The court may want to go in a direction you had not thought of, and if you are so wedded to your position that you cannot bend and do not listen to what you are being asked, you can lose the case. Do not be afraid to concede a point if necessary. Something may sound good when you are writing it, but when you look at it again many months later, it may not be the best argument. Be prepared with fallback positions. On the other hand, do not be afraid to argue your position. Many judges will play devil's advocate either because it is fun or because they are trying to clarify their own thoughts. They may also ask questions designed to convince another judge on the panel.

Good oral argument is really a dialogue with the court. It serves the same function as the brief. You want to explain why the court should apply the legal principles to your case which will achieve the result you seek. At its best, oral argument in the Appellate Division is an intellectual exchange that approaches the sublime.

Understanding the basic structure of appellate practice enables you to represent your clients more effectively. Moreover, the ability to function effectively within the appellate process elevates the practice and improves your chances of success.

Endnote

1. *Perkins v. Perkins*, 159 N.J. Super. 243, 248 (App. Div. 1978).

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