

## The Changing Business of Appellate Practice

By Virginia Hinrichs McMichael

“Appellate practice isn’t what it used to be.” That was a common refrain when I conducted an informal survey of fellow appellate practitioners. Although opinions differed on how appellate practice has changed over the last decade, there were some common themes.

### The Role of Technology

Not surprisingly, technology is the big game-changer for appellate lawyers. Access to online legal research, virtual paralegals, grammar-checking software, electronic filing, case management software – the appellate lawyer’s toolkit keeps expanding.

Electronic filing and service has been the biggest change over the last decade. The arduous process of photocopying and mailing briefs, and the panic-inducing experience of running to the courthouse at the last minute to get something time-stamped – both are largely a distant memory.

Legal research, writing, and formatting briefs all keep improving with technological advances. Most appellate lawyers can now run opposing counsel’s brief through a program that pulls up all the cites, with Shepherd’s notes, along with

direct links to the authorities. Even keyboards have improved. I recently started using Legal-Board, a keyboard with built-in shortcuts to common legal symbols and abbreviations.

Technology has also changed the formatting of appellate briefs. After learning that many appellate judges read briefs on their iPads or other mobile devices, I now make briefs more mobile-friendly by cutting footnotes, widening margins, and shortening paragraphs to accommodate a tablet’s shorter line length. (For an in-depth examination of electronic briefing, see CAL’s 2017 whitepaper titled “The Leap from E-Filing to E-Briefing – Recommendations and Options for Appellate Courts to Improve the Functionality and Readability of E-Briefs.”)<sup>1</sup> The increased use of hyperlinks in briefs enables judges to quickly check a brief’s cited authority.

Technology has also lowered the barriers to appellate practice. What was once the province of large law firms is now open to smaller firms and appellate boutiques.

### Increased specialization

Charles (“Chip”) Becker, chair of appellate practice at Kline & Specter in Philadelphia, has no-

ticed a trend among insurance companies and large corporate defendants to turn cases over to “truly specialized appellate lawyers” once a notice of appeal is filed. Appellate lawyers are also hired for interlocutory appeals: “they drop in, handle the appeal, and then turn the case back over to trial counsel.” As a result, Becker believes that “the quality of appellate lawyering has improved over the last decade.”

Becker’s experience may also reflect an apparent increase in the number of lawyers who classify themselves as appellate specialists. Texas is one of a handful of states that certifies lawyers in areas of specialization. The Texas Board of Legal Specialization currently identifies 7,225 Texas board-certified attorneys.<sup>2</sup> The number of Texas attorneys who are board certified in appellate law has increased over the past decade. In 2007 there were 327 board-certified civil appeals specialists in Texas; by 2012 there were 371.<sup>3</sup> Today there are 429 Texas attorneys who are board-certified specialists in civil appellate law.<sup>4</sup> The Texas Board didn’t start certifying criminal appellate law specialists until 2011, when there were 95 criminal appellate law specialists.<sup>5</sup> In 2017, there are 127.<sup>6</sup>

Although the number of lawyers who are either certified or self-identify as “appellate specialists” appears to have increased, it is impossible to know whether there are, in fact, more appellate lawyers, or if they are just better at branding themselves for marketing purposes.

### **Appellate filings trending downward**

Is there enough appellate work to keep all these specialists busy? In 2014, an article in an online

newsletter quoted one appellate lawyer as saying “The Great Recession killed my appellate practice. Six years ago, lawyers at small firms would come to me for help. I handle appeals; they don’t; it was worth paying me to be sure the appeal was handled intelligently. The recession killed that. Now, no one has enough work, and everyone’s hanging on to every billable hour they can find.”<sup>7</sup> Another well-regarded appellate lawyer confided that she too is handling more general litigation and fewer appeals than she did a decade ago.

The statistics support the observation that there are fewer appeals than there were ten – or even five – years ago. The Administrative Office of the United States Courts provides an annual report of statistical information on the caseload of the federal courts. According to the AOUSC, total federal appeals court filings are down 5.25% since 2012 and 11.57% since 2007.<sup>8</sup> That downward trend continues. In 2016, there were 53,649 appeals filed in the 12 regional courts of appeals, a 1% decrease from 2015.<sup>9</sup>

### **Managing costs and client expectations**

Appellate lawyers have had to learn to manage client’s changing expectations. With more competition for business, appellate lawyers must be prepared to provide budgets and offer flat-fee alternatives to hourly billing.

Appeals are time-intensive activities. An appeal can take 100 hours or more of attorney time. Complex cases, of course, are even more time-intensive. When an appellate attorney is retained after trial, reviewing the trial transcripts can take days. The challenge for appellate law-

yers is to demonstrate to potential clients that they bring to the table expertise that justifies the expense.

Clients' cost-sensitivity can also present challenges to appellate attorneys who appear frequently before the same judges. It takes a long time to build a reputation for submitting high-quality appellate briefs. It is not worth jeopardizing that reputation because one client wasn't willing to pay for you to do your best work.

Appellate law is widely recognized as an intellectual practice that requires a high degree of skill and experience. In 2017, however, information abundance means that clients are frequently better informed than they once were. Some clients read appellate rules and cases and ask pointed questions, challenging the lawyer's authority and expertise. "The Web MD effect" is starting to spill over to appellate practice.

### **Marketing**

Increased competition for clients has increased the pressure on appellate lawyers to market their practices. Large firms with litigation practices that once generated a steady supply of appeals may find it hard to justify the expense of a "service partner" who handles appeals but doesn't generate business.

The pressure to market can be particularly challenging for appellate lawyers. Many appellate lawyers are naturally introverted. If given a choice, they would rather be in the library researching and writing than glad-handing at cocktail parties or chatting up CEOs on the golf course.

Some appellate lawyers have solved the marketing dilemma by blogging. Howard Bashman, a Pennsylvania-based appellate lawyer and the author of the "How Appealing" blog, spends a considerable chunk of his day posting updates on his blog. Similarly, Tom Goldstein, a partner at Goldstein & Russell in Washington, DC, is the founder and publisher of the oft-quoted SCOTUSblog. The newest social media entry, #appellatetwitter, has become an addiction of sorts for some appellate lawyers.

### **Diversity**

Appellate practice has long been an attractive specialty for lawyers who enjoy research and writing and are looking for a family-friendly practice. In Philadelphia, where I practice, many of the heads of law firm appellate departments are women. But men also appreciate the more predictable schedule of an appellate practice. One appellate lawyer, whose wife is a physician with a busy practice, told me he appreciates the predictable schedule of appellate work.

Although some progress has been made, both women and minority lawyers remain underrepresented in the appellate bar. The most prestigious appellate representations are still dominated by white men. In the 2015-16 Term, one study found that women presented 23 percent of SCOTUS arguments.<sup>10</sup> According to another study, between 2000 and 2012, non-white attorneys made up only about 10 percent of the lawyers who argued in the Supreme Court.<sup>11</sup>

The percentages of women and other minorities are particularly low among Supreme Court lawyers representing amici. A 2016 study by Ben-

jamin Cardozo School of Law reviewed 59 lawyers who were invited to argue as amicus curiae before the Supreme Court. Of those, approximately 10 percent were women and 5 percent were black or Hispanic.<sup>12</sup>

## Conclusion

Appellate practice, like other legal specialties, has experienced rapid changes over the last decade. As the number of civil trials continues to decline, the number of appeals will likely also decline. An increased emphasis on attorney specialization, however, will help those appellate lawyers who can differentiate themselves from the competition and bring real value to a case. Going forward, an appellate lawyer's ability to adapt to change will be the key to a successful practice.

<sup>10</sup> Id., citing T. Maura, "Supreme Court Specialists, Mostly Male, Dominated Arguments This Term," Supreme Court Brief, May 11, 2016.

<sup>11</sup> Id. citing K.S. Bhatia, "Top Supreme Court Advocates of the Twenty-First Century," Journal of Legal Metrics, Vol. 1, No. 3 (2012)

<sup>12</sup> A. Liptak, "When Appointing Friends of court, Justices Are Friendliest Toward White Men," The New York Times, Sidebar, May 16, 2016.

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<sup>1</sup> [https://www.americanbar.org/content/dam/aba/administrative/appellate\\_lawyers/2017\\_cal\\_ebrief\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/appellate_lawyers/2017_cal_ebrief_report.authcheckdam.pdf)

<sup>2</sup> Texas Board of Legal Specialization, [www.tbls.org/FAQs/FAQ.aspx?id=1](http://www.tbls.org/FAQs/FAQ.aspx?id=1).

<sup>3</sup> Per conversations with staff at the Texas Board of Legal Specialization.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Herrmann, Mark, "Appellate Practices: Big, Small, and Dangerous," Above the Law, Sept. 22, 2014.

<sup>8</sup> <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2016>.

<sup>9</sup> Id.

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