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Judge Kaye focuses her practice on appellate litigation and arbitration. Before joining Skadden, she served for 25 years on the New York State Court of Appeals, including 15 years as Chief Judge of the State of New York. She was the first woman to serve on New York's highest court and the first woman to occupy the State Judiciary's highest office. Prior to being appointed to the Court of Appeals, Judge Kaye was a litigator in private practice.

Effective Appellate Advocacy

Prepared, engaged and mutually respectful advocates and jurists, excellent written submissions, and a hearty, informed give and take at oral argument pave the way to an effective appeal.

The spirit that most litigators share, taking pleasure in preparing to encounter and overcome unforeseeable challenges, peaks at the appellate level. Appellate litigators generally face higher stakes, have greater impact on the law and attract more public visibility. For judges, an appeal offers the opportunity to endlessly search all the crevices of an issue and imagine the unimaginable of where the law can go. For unprepared attorneys, however, it can present the nightmarish risk of being unable confidently and authoritatively to answer the court's questions, most hauntingly the night after a less-than-satisfying oral argument.

Two recurring principles best encapsulate the formula for attorneys to reduce the risk inherent in appellate practice and enhance their prospects for success in litigation:

- Know your case.
- Know your audience.

While in one respect a trial court or other official body may have altered the landscape, as by finding facts or defining issues, even for appellate litigators these two fundamental principles remain the inseparable top priorities to promote the chance for a successful outcome.

This article provides guidance on how to be an effective appellate advocate, whether an attorney is new to appellate practice or a seasoned appellate litigator. It offers insights and practical tips on navigating the appellate process, from the moment the process begins through triumphant victory. An effective advocate understands and follows all applicable rules, embraces the narrative of the case, impresses the appellate panel with briefs and oral argument and, ultimately, establishes a great legal precedent. The successful appellate process represents the American justice system at its best.

FIRST STEPS

The path to an effective appeal begins with understanding the technical requirements of the appellate court and formulating the overarching narrative of the appeal. Both can be done before submitting anything to the court.

Search Initiating an Appeal for Practice Notes explaining the procedure for starting an appeal to the Federal Circuit, Ninth Circuit and Second Circuit.

UNDERSTAND THE RULES COMPLETELY

Counsel should start by learning everything possible about the court to which the appeal is headed, from its jurisdiction to its time-honored traditions. This means checking out all rules applicable to the destination appellate forum, all constitutional provisions, statutes, court regulations, websites and materials (like treatises and articles) written on the subject. In this case, familiarity breeds content. An effective appellate litigator understands the rules for getting to the court and the rules for being there.

For example, the lack of a final order is the kiss of death at the New York Court of Appeals, yet counsel often overlook this simple procedural prerequisite in favor of their broader legal position. Even the most persuasive legal argument, however, will fall on the sword of dismissal if the order of the court below leaves an open issue, such as counsel fees. Understanding the court's jurisdiction and scope of review is a crucial first step.

FOLLOW THE RULES METICULOUSLY

The more technical requirements, like type fonts and footnoting, may seem downright silly. Counsel should not waste time trying to circumvent court rules, but should instead just assiduously follow them. Otherwise, the appeal might not even get to the starting line. Counsel must be sure to include every required section in the brief based on the court's rules and understand all technical requirements for filing. Since attorneys have to piece together the various parts of their briefs into a cohesive package, they are well advised to spend the minimal extra time required to do it right.

Search Court and Judge Rules Update for weekly updated reports on significant changes to the local rules and procedures for all US federal district and appellate courts, as well as changes to the individual practice rules for judges in select district courts.

Following the rules includes superbly formatting, clearly articulating and quadruple checking everything that goes into court submissions. Counsel should not risk annoying the court staff or losing a judge's confidence by ignoring mechanical matters that are wholly knowable and doable. With careful organization and attention to detail, counsel can prevent what would be gifts to the opposition, such as:

- A sloppy looking, or sounding, submission.
- Gendered writing (for example, unnecessarily always using "he") that might irritate a reader.
- Reliance on an overruled, limited or disparaged case.

A call to the clerk's office is among the simple, risk-reducing options to assure that all technical prerequisites are meticulously met. If the rules, practice guides and other written sources do not sufficiently explain a requirement or answer a question, the professionals at the court can often fill in the gaps. Counsel should make the clerk's office an asset, not an impediment.

LEARN THE RECORD INSIDE OUT

Counsel should diligently read all filings in the lower court, not just the court's ruling and the papers that immediately led to it. The appellate court will be familiar with the record filed on appeal and may be interested in portions of the record not necessarily emphasized by the lower court. Even papers that are not part of the appendix or record on appeal may help develop a fuller picture of the narrative counsel will convey to the court.

CREATE THE NARRATIVE

A prime objective for appellate litigators is to understand the case thoroughly and best formulate a narrative that, within the framework of the law, will capture a sense of justice in the client's favor. Research and precedents are important, but so are the theme and story counsel will put before the court. Although *stare decisis* matters a lot to appellate courts, precedents are not mere rubber stamps. Society evolves and hopefully progresses. Judges, even on courts of law with no "interest of justice" jurisdiction, do not like simply affixing old citations to a result that seems blatantly wrong today.

Hopefully the most feared precedents or devastating evidence can be cornered off. Attorneys seeking an extension or modification of existing precedent must be sure they understand and can identify the outer boundaries of where their position would next take the law. They should craft their narrative in a way that provides comfort that the change they seek will not produce unpalatable results in the inevitable next cases on the horizon. Appellate litigators need to know their record, find their story and build on it.

In short, counsel should know the rules, the story, the objectives, the hurdles and the major legal points surrounding them. An effective brief is fully thought through before a word is set to paper.

SUBSTANCE OF THE BRIEF

Briefs matter. Since appellate tribunals, however high, are composed of human beings, it is hard to quantify precisely how much briefs matter to any particular judge or court. Do they matter more than oral argument? An unanswerable question. Because briefs indisputably do matter, they should be the best they can be. The chances for success can surely be influenced, perhaps ultimately even turned around, by oral argument, but a persuasive, credible, readable and authoritative brief should be the goal of every appellate litigator. Attorneys want to author the brief the judge turns to, and returns to, in crafting the court's writing.

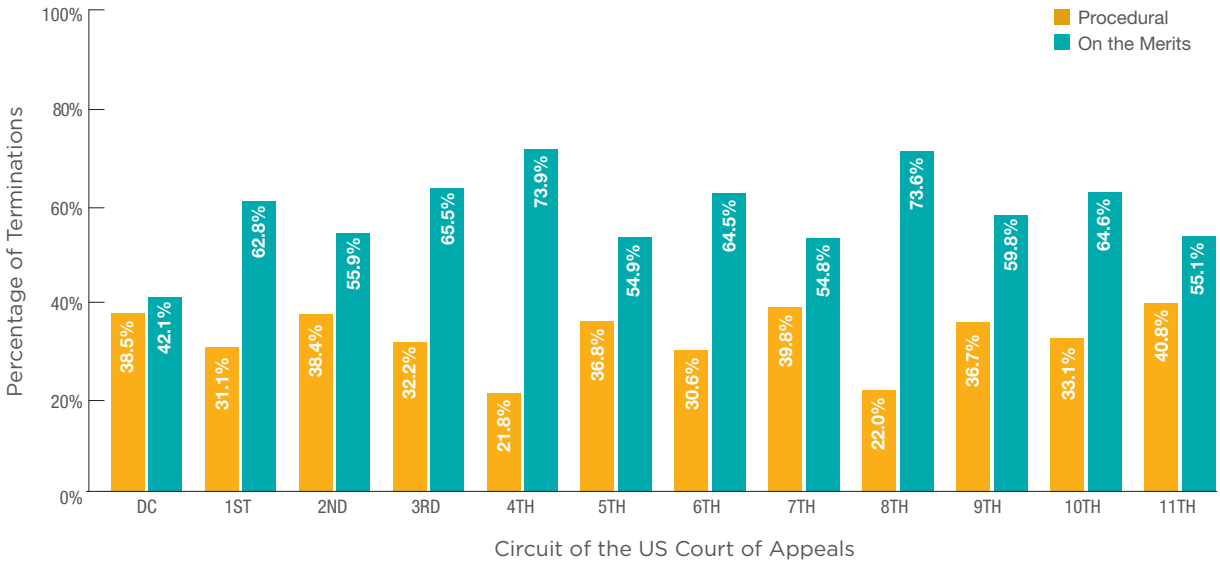
Search Appellant's Brief and Appellee's Brief for sample briefs, with explanatory notes and drafting tips, to be used in the Federal Circuit, Ninth Circuit and Second Circuit.

KNOW YOUR AUDIENCE: THE LEGAL ARGUMENT

As counsel begin to frame their writing, they should take into account both the rules of the tribunal that will be receiving the briefs and the judges they will face. It is important to understand not just the judges' views on the substantive and procedural issues (hopefully discernible from precedent, speeches, articles, continuing legal education presentations and the like), but also the context in which they consider cases.

APPEALS TERMINATED ON PROCEDURAL GROUNDS VS. ON THE MERITS

(for the 12-month period ending March 31, 2013)



Totals for procedural terminations include terminations due to jurisdictional defects, voluntary dismissal under FRAP 42, default, denial of grant of certificate of probable cause or certificate of appealability or other procedural grounds.

Cases disposed of by consolidation and cross appeals are counted as a subset of procedural and merit terminations to reflect the manner in which the appeal was disposed.

This graph does not include data for the US Court of Appeals for the Federal Circuit.

All figures were taken from Federal Court Management Statistics, *published by the Administrative Office of the United States Courts (available at* uscourts.gov*).*

Appellate courts are necessarily mindful of both the immediate impact of their decisions on the parties and the more general impact on the law. In the argument portion of the brief, counsel must therefore thoroughly satisfy the tribunal that the just result being urged fits comfortably within what the law is and should be.

For example, a tribunal such as the New York Court of Appeals is essentially limited to the review of questions of law, with little fact-finding jurisdiction, which for the most part stops at the intermediate appellate level. While the narrative counsel has evolved should evoke a sense of justice, the presentation to the Court of Appeals must be formulated as an issue of law, not merely based on "fairness."

Even more generally, for appellate tribunals the fairness or justice aspect of the narrative always should be crafted to posit law questions, with special attention paid to the precedents of the court in which counsel are appearing. The essence of the brief is why, based on the facts, existing precedential law should be upheld, overturned or modified, and the consequences that will flow from that decision.

Appellate courts are necessarily mindful of both the immediate impact of their decisions on the parties and the more general impact on the law. They know that even small tweaks in existing precedent can ripple into troubled waters in future cases. In the argument portion of the brief, counsel must therefore thoroughly satisfy the tribunal that the just result being urged fits comfortably within what the law is and should be.

KNOW YOUR CASE: THE FACTS AND PRELIMINARIES

Facing a stack of appellate briefs, some judges tend to reach first for the appellant's reply, for the most succinct introduction to the battle. Others prefer to start at the beginning, even with the table of contents. No matter the order in which briefs are read, the statement of facts is the meat of the brief. Each fact recited in a brief should advance the legal argument counsel plan to make, avoiding reference to extraneous facts that have no impact on that argument. In its totality, the statement of facts should condition the reader to feel that both law and justice are on the author's side.

While the fact section is never neutral, it must appear scrupulously so. Facts must be accurate, correctly portraying the record. Obviously, facts and law must be fully documented by citations to the record. Overkill, such as misstating or overselling the facts, will likely be detected in the adversarial system, and can be suicidal for the brief as well as for counsel's credibility with the court.

Perhaps most important is the brief's first taste, often a preliminary statement or statement of issues. Counsel should consider leaving that drafting task for last, to formulate the opening paragraphs only after writing up the facts and the law. Once the narrative and argument are in place, counsel should use the opening section of the brief to establish the frame through which the judges will hopefully view the rest of the appeal, explaining succinctly the result counsel wants and the reasons the court should reach that result.

CLEAR AND CONCISE WRITING

Appellate judges tend to bring briefs with them wherever they go, which heightens the importance of clear, cogent and readable writing. Attorneys do not know where judges will be reading their briefs, whether at a desk in chambers, on a sundeck at the beach, or on a train or an airplane. A good advocate understands that, whether or not there are prescribed page limitations, short and crisp is better than long and flat. Plain English is the preferred language. Flaming rhetoric, arcane jargon and endless sentences are better saved for another day, and another audience. A giant stack of paper is better saved for doorstops.

Know your case and know your audience (particularly the precedents and materials actually authored by the intended

readers) are the constant background themes that should be echoing in the attorneys' minds as they compose their briefs. They should take full advantage of this opportunity that is within their control. Counsel should use their briefs to:

- Tell the reader simply and clearly what they want.
- Embroider the story with the facts and law.
- Succinctly drive it all home.

There are no demerits for artful repetition.

ORAL ARGUMENT

The concept of oral argument in appellate advocacy has changed over the years. Unimaginable that in a bygone era, an appellate advocate might have a full day before the court. Today, precious minutes are doled out, with lighting systems to warn of approaching deadlines (if not yet to administer a small electrical shock to violators).

The purpose of oral argument is largely to answer the court's questions, perhaps outing issues not sufficiently explored in briefs, perhaps enabling the judges to test and exchange their own theories about the case through questions to counsel. Indeed, for judges who have spent solitary days reading briefs and conferencing with clerks, facing counsel at oral argument is "showtime." Oral argument has therefore become less "give" by the advocate than "give and take" among all the participants.

Although oral argument may take place during a relatively short period of time, it is nonetheless the summit of the appeal, and can seem to span an eternity for counsel standing at the podium. It is imperative to be prepared for this presentation to the judges, having uppermost in mind both the message and the limited time (not an eternity) that has been allowed.

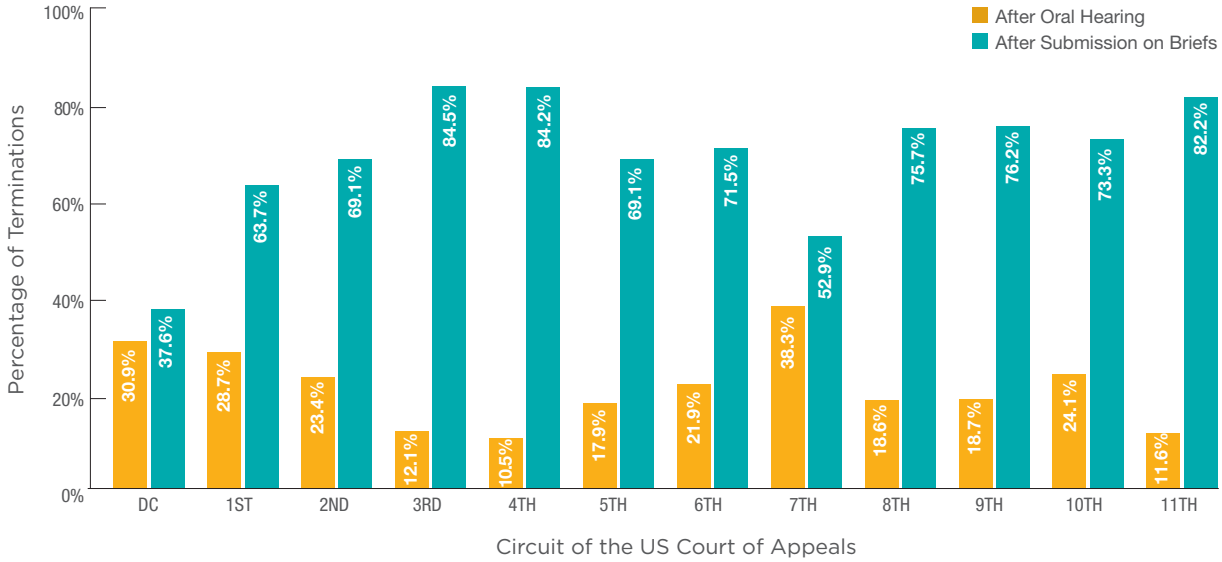
Search Oral Argument, Disposition and Rehearing for Practice Notes explaining the availability, scheduling and conduct of oral argument in the Federal Circuit, Ninth Circuit and Second Circuit.

IN ADVANCE OF THE ARGUMENT

It is especially important for counsel to focus on the mainstay principle, know your audience, in preparing for oral argument. This includes knowing the courtroom layout and traditions, and how to pronounce the judges' names (when in doubt, simply use "Your Honor"). A visit before argument day is highly recommended, to get a sense of courtroom atmospherics, physical and human, and to help each attorney find his or her own comfort zone.

APPEALS TERMINATED ON THE MERITS AFTER ORAL HEARINGS VS. AFTER SUBMISSION ON BRIEFS

(for the 12-month period ending September 30, 2012)



Cases disposed of through consolidation and cross appeals are not included in this graph. This graph does not include data for the US Court of Appeals for the Federal Circuit.

All figures were taken from Judicial Business of the United States Courts, *published by the Administrative Office of the United States Courts (available at* uscourts.gov*).*

TOOLKITS

The following related Toolkits can be found on practicallaw.com

>> Simply search the resource title

Federal Circuit Appeals Toolkit
Ninth Circuit Civil Appeals Toolkit
Second Circuit Civil Appeals Toolkit

If a visit is not feasible, counsel should check the court's website for video or audio recordings. While these recordings cannot fully replicate the experience of seeing the actual courtroom set-up and witnessing oral argument, they can give attorneys at least some sense of what to expect and be useful learning tools.

The other fundamental principle, know your case, is also particularly important at this point. Appellate litigators must practice, practice, practice, hopefully with challenging colleagues. Attorneys can never have too many moots with both new and experienced colleagues who also know the case and the audience.

Having colleagues assume the role of judges and ask questions provides an invaluable opportunity to learn the strengths and weaknesses of a case and prepare to discuss both effectively. By trying multiple variations of an answer to a likely question, practice moots enable counsel to formulate the answer that works best. This exercise can also help attorneys identify and eliminate seemingly minor verbal or physical mannerisms that become distracting during the argument.

AT THE ARGUMENT

In contrast to learning the rules and writing briefs, which are both within counsel's control, the ebb and flow of oral argument is largely unpredictable. But this is what makes oral argument so exciting. Counsel should do their best to anticipate the general mood of the day and, in particular:

- How best to use the time allowed.
- Whether a request for additional time to complete an argument would be favorably received.
- Whether or not it will be a hot bench.
- What other cases are being argued that day (they can check the court's docket for other cases and determine whether there are any with similar issues).

Even then, however, it is truly impossible to know with certainty how any particular oral argument will proceed. Even the tribunal cannot know.

Map Out Key Points

Given the uncertainty of the ebb and flow of oral argument, and utter certainty of time limitations, next to practice, practice, practice, it is best for counsel to sketch out their major points on a sheet or two of paper — a roadmap. Counsel can place this on the lectern as they rise to speak and return to it, however far the court's questions may take them, to insure that they have indeed fully conveyed all of their important points. Keeping close at hand a tabbed copy of the record, a notebook or index cards summarizing key authorities, can be reassuring too. Counsel should always appear calm and credible, speak slowly and clearly and project precisely the right amount of nervousness, never over-confidence.

Best points should always come first. Even if counsel encounter an aggressive bench, indeed, especially because counsel may encounter an aggressive bench, they must be sure to immediately get their message out and be mindful of their allotted time.

Search Appellate Oral Argument Outline for a sample outline that can be used by counsel during an appellate oral argument, with explanatory notes and drafting tips.

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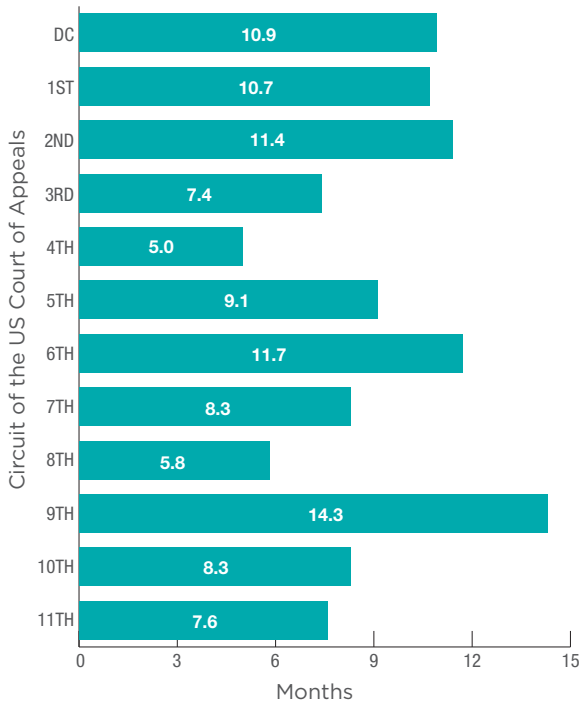
MEDIAN TIME FROM FILING NOTICE OF APPEAL TO DISPOSITION

(for the 12-month period ending March 31, 2013)



This graph does not include data for the US Court of Appeals for the Federal Circuit.

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Answer Swiftly and Decisively

Major objectives for counsel, of course, are decisively answering the court's questions (however irrelevant or annoying they might seem) and conveying that theirs is the better, and correct, outcome. This means fully directing attention to the questioner, without hesitation and with an air of commitment and sincerity. It also includes responding with legal authority or an answer to a posed hypothetical. If counsel do not believe in the position they are advocating, the judges ask themselves, why should we?

When two or more judges fire away simultaneously, counsel should take a moment to compose themselves and then be sure to answer everything. It is not a good idea to defer an answer to a question from the bench ("With your permission, Your Honor, I'll turn to that later in my argument"). This may insult the judge or be even worse if the attorney forgets to return to it.

And then there is the greatest gift of all: when the adversary has flubbed an answer and in response counsel get to hit the ball out of the park. In such a situation, an attorney offering response or rebuttal may wish to lead off the argument with the right answer to an important question that the other side botched.

Counsel should also avoid major wastes of time during oral argument, such as:

- Searching for record citations in response to a question (attorneys can leave the reference with the clerk after argument or request an opportunity to send the material to the court).
- Beginning argument by correcting minor errors in the brief.
- Asking, "Did that answer your question, Your Honor?" (if it did not, counsel would know soon enough).

When in doubt about an answer, it is better to squeeze the best advantage from the question while still appearing to answer it, and move briskly ahead.

Fully conveying the narrative and the law supporting it, satisfactorily answering all of the court's questions and uttering the words, "Thank you, Your Honors," just as the red light goes on, must rank among the world's greatest pleasures.

A Note to Fellow Travelers

Colleagues who join on the trip to the destination forum and sit alongside the arguing attorney at counsel table should maintain professionalism and composure. The bench notices their behavior too. No grimacing, frantic searches through the record or worried whisperings. They should just sit quietly and take notes (perhaps even slipping a note to counsel at the lectern where appropriate). Hopefully, the fellow travelers will make their greatest contribution offering compliments on the way back to the office.