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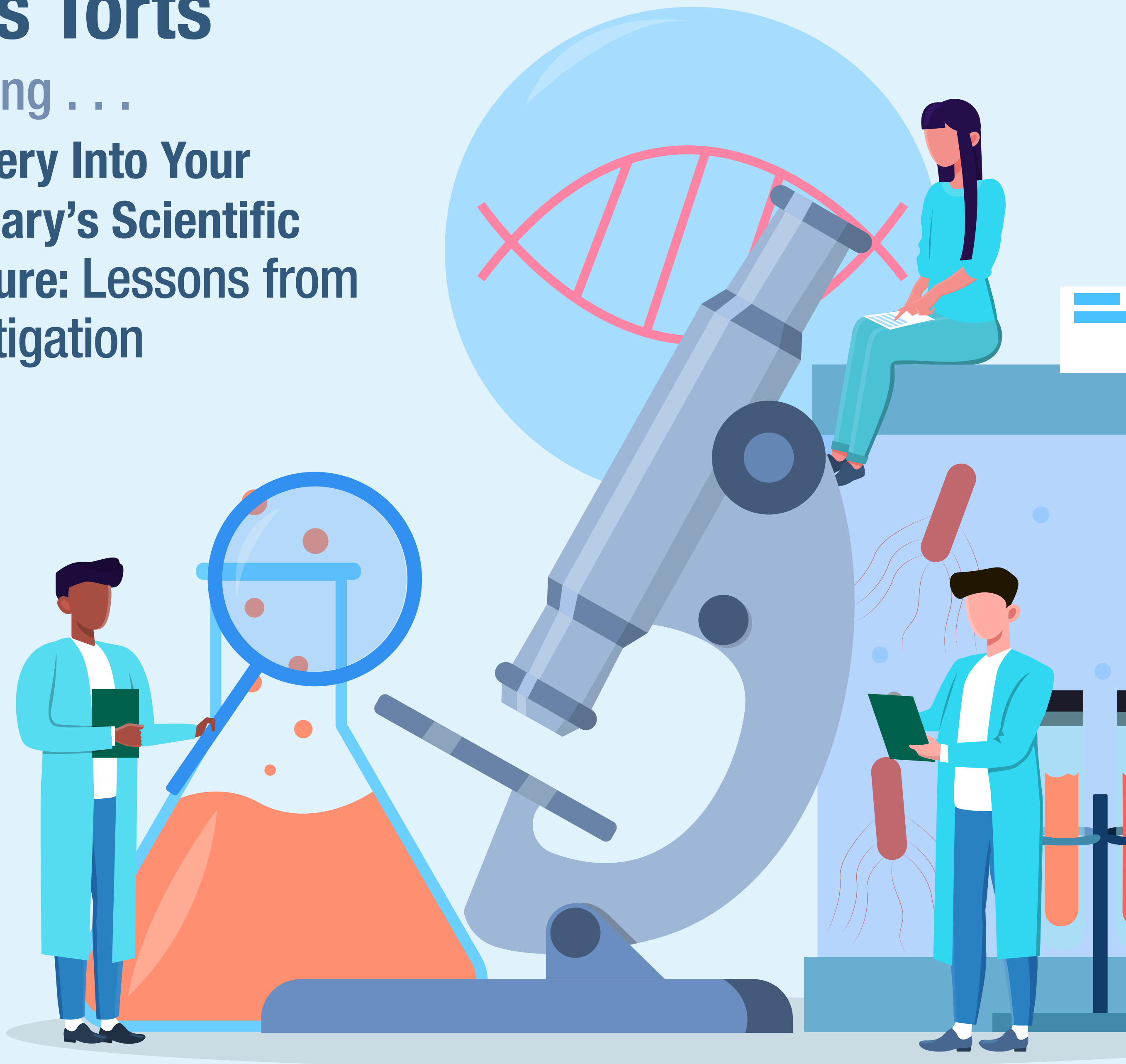


Also in This Issue . . .

Five Myths About Appellate Lawyers

And More!

Five Myths About Appellate Lawyers

By Lawrence S. Ebner

This article identifies and attempts to debunk what I believe are several of the common myths about appellate lawyers and the services that we provide.

Appellate practice has become increasingly popular, especially among younger attorneys, and even law students, who relish the challenge of writing persuasive appellate briefs on complex legal issues and presenting oral arguments before federal and state appellate courts. But I continue to be surprised about some lingering misconceptions concerning what we appellate lawyers do, when, where, and how we interact with trial counsel, and the economics of engaging us.

This article identifies and attempts to debunk what I believe are several of the common myths about appellate lawyers and the services that we provide.

Myth # 1: Appellate lawyers are not really litigators.

Yes we are.

Many corporate clients, as well as an increasing number of state bar associations, recognize that appellate practice is a distinct litigation specialty. Like trial work, successfully handling an appeal requires its own unique set of litigation knowledge, skills, and experience. Presenting a closing argument to a jury, for example, is quite different in substance and tone than conversing with an appellate panel about a complex legal issue. And the process of drafting a comprehensive set of interrogatories bears little resemblance to authoring an appellate brief that complies with the applicable rules and is written in the elevated style that appellate judges expect.

"Appellate specialists typically exhibit increased competence, interest, and experience in legal research, knowledge of substantive law, in-depth analysis, and legal writing. They are useful in setting long-range strategy early in litigation. They are an important resource on legal issues at trial. And they are essential in the appellate courts where the culture is quite different from trial courts." American Academy of Appellate Lawyers, Appellate Lawyers Make A Difference, https://www.appellateacademy.org/find-an-appellate-lawyer.

There unquestionably is a difference regarding what an appellate specialist can bring to a case for the benefit of the litigation team and its clients. Unlike decades ago, appellate and trial lawyers no longer function in separate worlds. Indeed, appellate and trial attorneys' differing legal skills complement each other at both the trial court and appellate court levels.

Myth # 2: Trial lawyers should handle their own appeals because they know the record better than anyone.

Few truly outstanding trial lawyers are equally talented appellate advocates. This is why appellate specialists increasingly are being added to trial teams, often from the outset of a case. "Experienced trial counsel understand that adding an outstanding appellate advocate to the trial team can reap benefits before, during, and after trial." American Academy of Appellate Lawyers, *supra*.

Appellate specialists add value at the trial-court level by working with the trial team in many ways, such as planning overall litigation strategy; framing and preserving legal issues; researching, briefing, and arguing threshold and dispositive motions; identifying discovery, trial testimony, and exhibits needed to be admitted into evidence for possible appellate purposes; preparing jury instructions and objections; and assessing the chances for success in the event of an appeal.

Lawrence S. Ebner, a Fellow of the American Academy of Appellate Lawyers, is Founding Member of ***Capital Appellate Advocacy PLLC*** in Washington, D.C., and Executive Vice President & General Counsel of the ***Atlantic Legal Foundation***. He is immediate past chair of the ***DRI Center for Law and Public Policy*** and a member and past chair of the DRI Amicus Committee.

Embedded appellate counsel, therefore, have detailed, first-hand knowledge of the procedural and evidentiary record and are well positioned to take the lead if a case goes on appeal. Even if not involved at trial, appellate litigators routinely review and work with the record on appeal. One of their key functions is to help decide which issues (among many potential issues) should be pursued on appeal, how to frame those issues, and the best way to support them with evidence from the record, including by preparing the required Statement of the Case. *See, e.g.*, Fed. R. App. P. 28(a)(6) (requiring an appellant's brief to provide "a concise statement of the case setting out the facts relevant to the issues submitted for review... with appropriate references to the record").

Along the same lines, unless a client otherwise directs, trial lawyers continue to fulfill an important role when their case goes on appeal. They are an essential resource to appellate counsel during every phase of an appeal. Ideally, trial and appellate lawyers should be an integral part of a litigation team throughout the life of a case.

Myth # 3: The Supreme Court Bar is composed of a small number of appellate superstars.

When legal media publish articles about "the Supreme Court Bar," they usually are referring to less than 50 repeat or up-and-coming players—highly skilled attorneys (including from the Office of the Solicitor General), many of them former Supreme Court law clerks—who every term collectively handle a significant percentage of oral arguments held by the Court.

But there is a lot more to Supreme Court practice than oral arguments, especially since the Court in recent years has held hearings in only about 50 to 70 cases per term. In reality, the vast majority of Supreme Court practice is in written form, primarily certiorari petitions and responses, merits briefs in certiorari-granted cases, and amicus briefs. Several hundred appellate attorneys around the United States, virtually all of whom have been admitted to the Supreme Court Bar, devote a substantial part of their practices to researching and drafting these very important Supreme Court petitions and briefs.

In other words, the real Supreme Court Bar not only consists of the small, elite, very talented group of attorneys who repeatedly appear before the Court to orally argue cases, but also hundreds of other attorneys who frequently write and file Supreme Court petitions and briefs.

On the other hand, tens of thousands of lawyers (some with only the minimum required 3 years of law practice) have submitted an application for membership in the Bar of the Supreme Court and received an impressive certificate to hang on their walls. The vast majority never have filed a petition or brief in the Supreme Court.

Myth # 4: Amicus briefs don't really matter.

Submission of amicus briefs has become a well-accepted part of practicing before the Supreme Court, federal courts of appeals, and many state appellate courts. Professional groups (such as DRI and its Center for Law and Public Policy), industry trade associations, nonprofit public interest law firms (such as the Atlantic Legal Foundation, where I conduct the amicus program),

and experts such as law professors, are frequent filers of private-party amicus briefs.

There is an art to drafting effective amicus briefs, which are quite different than party briefs. If an amicus brief follows the rules as to format and content—and offers something different than repetition of the supported party's or other amici curiae's legal arguments—they can be of considerable value to an appellate court. See Sup. Ct. R. 37.1 ("An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.").

In the Supreme Court amicus briefs filed in support of a pending certiorari petition can be particularly helpful, not only in terms of the number filed, but also if they add perspective on the importance of the question presented, such as the impact of the issue on an entire industry.

Merits-stage amicus briefs are similarly important. They not only can provide supplemental argument or other information that can influence, and sometimes is cited in, the Court's opinions, but also afford amici curiae a direct voice on issues that are important to their members and supporters.

The same is true in lower appellate courts. In fact, because fewer amicus briefs are filed in federal courts of appeals and state appellate courts, their influence on a decision can be even greater than in the Supreme Court.

Myth # 5: Appellate work is not profitable.

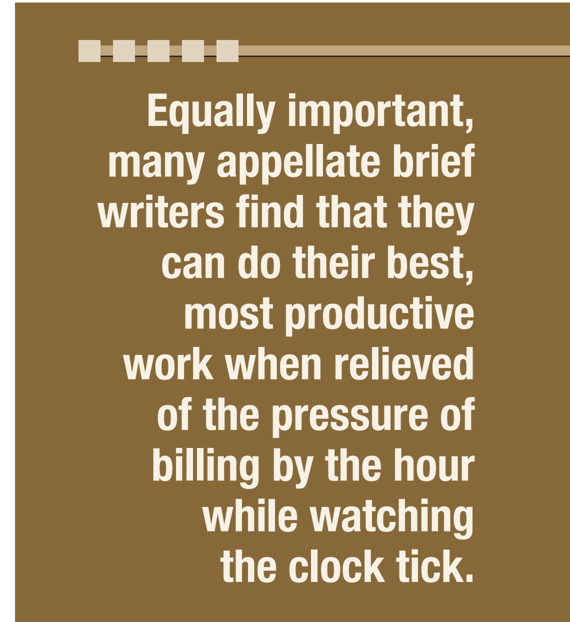
Some law firms still erroneously view handling appeals or writing amicus briefs as "loss leaders" for business development purposes. And in some firms egos get in the way of recruiting highly skilled and experienced appellate specialists.

Although appellate litigation activities usually involve fewer attorneys than trial work, they still can be profitable.

Like other practice areas, the key is efficient management of legal resources. Because the course of an appeal usually is well defined and involves a limited number of steps, and the record on appeal already exists, fee estimates for each phase of an appeal—for example, case evaluation and strategy, research and drafting of petitions and/or briefs, solicitation of amicus support, and preparation for and presentation of oral argument—can be more predictable than trial-court work.

For the same reason, flat-fee billing and appellate practice are especially compatible. An increasing number of clients and appellate lawyers find that phase-by-phase flat-fee billing (i.e., charging a predetermined flat fee for each successive phase of an appeal) is beneficial. Clients are better able to budget litigation expenses than when being billed by the hour. Along the same lines, as computerized legal research, coupled with prudent use of artificial intelligence, continues to improve efficiency, charging a flat fee for preparation of a brief may be more profitable than billing by the hour.

Equally important, many appellate brief writers find that they can do their best, most productive work when relieved of the pressure of billing by the hour while watching the clock tick.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Conclusion

There are many reasons to involve one or more appellate specialists from the outset of a case in trial court through its conclusion in the appellate courts. DRI is fortunate to have many appellate litigators among its members, some of whom actively participate in DRI's Appellate Advocacy Committee and Amicus Committee.