

Introduction

- 0.1 Mayer Brown’s Pioneering Appellate Specialty
- 0.2 Methodology Used in Preparing the Treatise
- 0.3 The Authors and Their Chapters
- 0.4 An Overarching Theme: The Need for a Sense of Organization
- 0.5 A Caveat About the Importance of Consulting the Rules—
the *Current* Rules
- 0.6 The Clerk’s Office: A Valuable Resource

Introduction

In using this treatise, a practitioner should know some of the basic background facts about the authors and about the purpose, development, and format of the treatise.

0.1 Mayer Brown’s Pioneering Appellate Specialty

This treatise represents the collective experience and analysis of more than twenty partners at Mayer Brown LLP who have prepared the chapters that make up this book. Mayer Brown, one of the largest law firms in the world, created an appellate specialty more than 20 years ago. Mayer Brown was the first law firm to recognize that appellate practice is a distinct specialty that warrants full-time focus on this professional discipline. In the intervening years, other major firms have followed suit and created or denominated appellate practice groups, but Mayer Brown continues to be the largest such specialized practice group in the United States, with almost 60 appellate lawyers. These lawyers have a depth of experience in appellate litigation that is unparalleled. For example, Mayer Brown appellate lawyers have argued approximately 200 cases before the Supreme Court of the United States—including ten cases in the three most recent Terms—as well as hundreds more cases in every federal circuit court of appeals and in dozens of state appellate courts across the nation.

Mayer Brown is ranked as the top appellate practice in the country by both *Legal 500 United States* and *Chambers USA 2008*. Each publication rates hundreds of firms in dozens of practice areas, from Antitrust to Wealth Management. In only one practice area—appellate law—did the two publications place the same practice—Mayer Brown’s appellate practice—in a class by itself as the sole national leader.

- *Chambers USA 2008* observes: “For another year running, the appellate group at Mayer Brown stands head and shoulders above its competitors. The firm was one of the first to dedicate expertise to this area, and now has a specialist team comprising over 60 partners, counsel and associates. Fielding lawyers of the ‘highest caliber’ the team is truly national in scope with attorneys operating from offices across the country, including Washington, DC, New York, Chicago, Houston, Palo Alto and Los Angeles. Clients declare its lawyers to be ‘fantastic in providing support in previously uncharted territory.’”
- As *Chambers* notes: “the firm features in appellate cases in venues up and down the country.”
- *Legal 500* states that the firm’s appellate practice has “genuine national coverage and, in the words of one client, ‘a reputation for expertise in appeals.’ It is this depth of bench compared to its rivals that marks it out as a rock-solid top-tier player.”

Members of Mayer Brown’s Supreme Court and Appellate Practice Group are based in Chicago, Los Angeles, New York, Palo Alto, and Washington, D.C.. Lawyers from all of these offices participated in preparing this treatise.

Three of our current partners, Stephen Shapiro, Kenneth Geller, and Timothy Bishop, took up where retired partner Robert Stern left off, serving as authors of the latest edition of the definitive work on practice before the Supreme Court of the United States. See Eugene Gressman, Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, and Edward A. Hartnett, *SUPREME COURT PRACTICE: NINTH EDITION* (BNA 2007). That book should be regarded as the companion to this treatise. The purpose of this new treatise is to provide to the practicing bar the same sort of comprehensive, practical guidance for handling cases before the United States Courts of Appeals that the firm’s treatise on Supreme Court practice furnishes for lawyers responsible for matters before the High Court.

0.2 Methodology Used in Preparing the Treatise

In fashioning this treatise, we drew upon the hundreds of years of collective experience of Mayer Brown partners in handling cases in the federal appellate courts. The members of the Supreme Court and Appellate Practice Group collaborated to develop the list of topics that a federal appellate practitioner must address when handling an appeal. We identified the major procedural steps and themes that a practitioner confronts in handling a case in one of the circuits. We decided to arrange the chapters in a more or less chronological sequence, tracking the major steps in the appellate process in the order in which they occur.

Of course, in the real world the process is not so rigidly broken into discrete installments, each of which must be completed before the lawyer moves on to the next. Much of the work, both intellectual and practical, requires multi-tasking, since the appellate practitioner must be addressing several aspects of the appeal in overlapping installments.

Depending on the complexity of the topic, we designated one, two or three partners to take primary responsibility for drafting a chapter. Often they called upon associates in the Supreme Court and Appellate Practice Group to assist with any formal research, but the focus always remained a practical one. We had no interest in exhaustively collecting great masses of cases in an effort to prepare a learned treatise on, for example, federal jurisdiction and procedure. We cite cases primarily to illustrate and explain how one successfully handles a federal appeal.

Throughout the process, the authors consulted with one another so that the final product truly represents a collaborative effort reflecting the collective experience of more than two dozen experienced appellate specialists who form this nationwide practice group.

0.3 The Authors and Their Chapters

This volume is a collegial effort, but someone had to produce a first draft of every chapter. We allocated primary drafting responsibilities to members of the group who manifested particular interest in a topic or who possess special expertise in an aspect of federal appellate practice, or both. Those principal drafters are identified in the Editor-in Chief and Contributing Authors (see p. v, *supra*). As part of the iterative process, the editor-in-chief reviewed each draft, submitted revisions for further review by the principal authors, and made the revised draft available to other members of the team. Meanwhile, we had our legal assistants' pulling together the applicable rules and procedures that we decided to include as a research and reference aid for practitioners. Finally, with the assistance of our editor at BNA, we pulled this material together to form what we hope will be a useful and user-friendly guide to federal appellate practice.

We trust that this volume will be useful not only for practitioners handling a case in a federal appellate court in a rare instance but also for advocates who find themselves appearing more frequently in those courts. Although all of the authors who contributed to this volume have ample appellate experience, we found in compiling the material that we still had much to learn from each other.

0.4 An Overarching Theme: The Need for a Sense of Organization

This volume covers a comprehensive array of the issues that a federal appellate practitioner must confront. Several points recur in more than one chapter. We do not see this as redundancy, because we understand that a practitioner is unlikely to sit down to read this treatise like a novel, starting at the beginning and going straight through to the last chapter and the appendices. Therefore, each chapter provides an essentially self-contained discussion of the topic the practitioner chooses to consult.

One recurring theme, though bears special emphasis. It is the theme of *organization*. This theme strings together the chapters that address preparing the appendix, selecting the appellate issues, writing briefs effectively, crafting the various kinds of briefs, and preparing for and presenting oral argument. Often the practitioner has little choice about the organizing principle for a task. For example, the governing rules dictate the sequence of events in the appeal itself. The rules also superimpose the sequence for putting together some (although not all) the contents of the appendix, and other rules define the order of the different types of sections of the briefs.

There remain, however, vast amounts of discretion about how to organize the most “artistic” elements of the appeal, especially in the statement of facts and in the legal arguments in the brief as well as in preparing the points for oral argument. As the pertinent chapters explain, there is no single rule that defines the *best* organizing principle. What is crucial, though, is that the practitioner must consciously select *some* kind of organizing principle. That principle must satisfy two requirements. First, it must advance the lawyer’s strategic goals by improving the chances that the client’s position will come across intelligibly and convincingly. Second, it must enable the “consumers”—the judges to whom the lawyer’s work product is being submitted—to recognize the organization and find that it simplifies the task of discerning the lawyer’s position.

As one elegant courtroom lawyer has put it, “All fails if the presentation of the case is not *orderly*.”¹ The point is driven home by quoting the exasperated plea of an English judge provoked by the “confused and blundering way” in which an advocate was presenting his case:

Mr. Smith, do you not think that by introducing a little order into your narrative you might possibly render yourself a trifle more intelligible? It may be my fault that I cannot follow you – I know that my brain is getting a little dilapidated; but I should like to stipulate for some sort of order. There are plenty of them. There is the chronological, the botanical, the metaphysical, the geographical. Why even the alphabetical order would be better than no order at all.

0.5 A Caveat About the Importance of Consulting the Rules—the *Current* Rules

Appellate practice is both an art and a science. In this volume, we strive to provide some helpful guidance on both. The art includes developing professional judgment about selecting issues, framing arguments, polishing the written product, and so forth. These points are, to a large degree, timeless. With more experience, the practitioner can hone these skills and make them part of the basic professional tool kit.

The science of appellate practice consists of the set of rules that govern the process. Throughout the chapters that follow, we constantly refer to specific provisions of the Federal Rules of Appellate Procedure (FRAP) and

¹Jacob A. Stein, *Legal Spectator*, *Washington Lawyer*, p. 48 (November 2006).

sometimes to local rules. Like any other field, appellate practice requires a practitioner to master these rules—at least episodically, as federal appeals come along. In stressing the importance of consulting the rules, we note three important corollaries.

First, even the most experienced practitioner should check the pertinent rules *every* time the lawyer undertakes an appeal. Despite the temptation to assume that the lawyer correctly recalls what the rules require, it is dangerous to assume that recollection. Often the rules are arbitrary—not in the sense that they are unfair, but simply that they are not necessarily obvious as a matter of reasonable expectation or intuition. The consequences of mistake can be severe. Since the rules are readily accessible, there is no excuse for failing to take 20 minutes or so to refresh one’s understanding of the governing requirements. Of course, if the lawyer has not recently handled an appeal in that particular federal circuit, it is obviously imperative to learn the essential rules of the process.

Second, in addition to the relatively small number of statutes that bear on appellate jurisdiction and procedure, two different but supposedly complementary regulatory regimes govern every federal appeal. The Federal Rules of Appellate Procedure generally overlay the entire process. They are supposed to provide national uniformity across the federal appellate system. Nevertheless, Rule 47(a) of the FRAP allows each circuit to adopt “local rules” “governing practice before” that particular court of appeals. These local rules supplement and sometimes suspend provisions of the FRAP, especially on matters of form, timing, and process. The practitioner, therefore, cannot assume that complying with the FRAP will satisfy the demands of the court of appeals actually hearing the appeal.

In addition to the two tiers of formal rules, Rule 47 (a) also recognizes that each court of appeals may have its own set of “internal operating procedures” or “standing orders” that determine how that court will process appeals. Although the Rule asserts that these mechanisms are not supposed to contain “direction to parties or lawyers regarding practice before” the court, a practitioner is well advised to become familiar with the so-called “I.O.P.’s,” because they often provide the real “meat-and-potatoes” guide to the court’s approach to processing and resolving appeals.

Third, while the courts wisely keep the rules relatively stable, they do change. Therefore, it is important to consult the *latest* version of the rules. Most lawyers who handle litigation keep at hand a paper-bound pamphlet that purports to contain the latest edition of the national rules, including the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. There is something comforting and reassuring about seeing the current calendar year on the spine of the pamphlet. This designation, however, can be misleading, because the rules may change during the year.

Under 28 U.S.C. §2074(a), the Supreme Court must give at least six-months’ notice of a proposed change in procedural rules, including the FRAP, but the statute provides that rules changes may take effect as early as December 1. Moreover, under the statute and by tradition, changes in rules not only apply to newly filed cases but also to *pending* appeals, unless it “would not be feasible or would work injustice” to apply the new rules to pending cases.

Therefore, when a case has been pending for a while, the careful practitioner must check periodically to see whether the rules of the game have changed in the *middle* of the process.

While changes to the FRAP should not sneak up on practitioners—because of the six-month interval between formal promulgation and effectiveness—the courts of appeals need not, and generally do not, give that much notice before they change their *local* rules. It is not uncommon to see local rule changes go into effect in 30 days or less.

In appendices to this volume, we have included the Federal Rules of Appellate Procedure along with charts illustrating some of the pertinent provisions of local rules or individual operating procedures (IOPs). (The local circuit rules themselves as well as the various sets of IOPs are simply too extensive to include here in full.) These materials were current as of January 1, 2008. In light of the caveats just discussed, however, it should be clear that these appendices are included only as a convenient *starting point* for understanding the process of pursuing an appeal before a federal court of appeals. They should provide a reasonably useful sense of the governing landscape. Although there is nothing to indicate that either the FRAP or the local rules of any individual circuit are likely to see wholesale revisions in the near future, we reiterate that the practitioner must check the latest version of the applicable rules to see whether anything has changed.

Fortunately, technology allows practitioners to obtain up-to-the-minute information about the status of the governing rules. Each circuit maintains a website that, among other valuable types of information, provides access to the current version of its local rules. Those sites often contain the IOPs as well. The websites also may contain useful narrative guides and charts to aid practitioners in navigating through the appellate process before the particular court.

One way to locate the sites is by Googling the court (e.g., “court of appeals Fifth Circuit”). As an alternative, the Administrative Office of the U.S. Courts maintains a master link to the websites of all the circuits (and their subordinate district courts) at <http://www.uscourts.gov/courtlinks>.

0.6 The Clerk’s Office: A Valuable Resource

We have tried to be comprehensive and practical in organizing and writing the chapters covering the major themes in federal appellate practice, but questions inevitably arise that we have not addressed. Indeed, even when a chapter covers an issue, we may have been tentative in offering our recommendations or (in rare instances, we trust) may not have been clear enough.

When in doubt, the practitioner should consider taking advantage of a readily available resource—the staff at the court house. They, after all, live with some of these issues every day. If there is any question about sound or preferred practice, therefore, a phone call may avoid the need for hours of costly research or emotional anguish.

In many federal appellate courts, a case manager or deputy clerk or similar official is automatically assigned responsibility for each case. In some courts, there is an office of “staff counsel” or similar function, which may have special

responsibility for addressing substantive matters that go beyond merely clerical processing. Emergency motions, for example, may fall within the bailiwick of a staff counsel. If you do not know if there is a particular court official assigned to your case, call the clerk's office to find out. That is the first person to contact with an inquiry about procedure.

In our experience, most clerical officials at most courts know what they are doing and want to be helpful. There are exceptions. As we note in some of the following chapters, a wise practitioner should treat these officials with courtesy and respect, not only because it is the decent thing to do, no matter how frustrated and harried the practitioner is, but because it is inevitably more productive. The surest way to guarantee that you will be stonewalled is to affect an air of condescension or self-righteousness, because you went to law school and the person on the other end of the telephone is "just a civil servant."

The most effective approach is humility: "I have a problem. I don't understand the (right) (best) way to handle this situation. I want to get it right. Can you suggest what I (am supposed to) (should) do?"

That is the best way to fill in the gaps that, inevitably, the practitioner will find in this one volume guidebook to federal appellate practice. But we have tried to share as many valuable lessons as we could and to provide as much useful guidance as we could compile in a single volume.

Philip Allen Lacovara
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