THE NATIONAL
LAW JOURNAL

Appellate Overload

Mark I. Levy

May 22, 2006

The first axiom of advocacy is: know your audience. For readers of this column, the usual audience is appellate courts. In the last 25 years, exponential increases in the size of their dockets have changed appellate courts in fundamental ways that too often have gone unrecognized by the practicing bar. Effective advocacy requires that lawyers be mindful of the circumstances confronting appellate courts today.

A crisis of volume in the appellate courts

The predominant fact of life in modern appellate courts is the congested and overcrowded state of their dockets. As a result, judges have precious little and ever decreasing time to consider and dispose of their cases.

In 1990, the Federal Courts Study Committee (FCSC), appointed by the chief justice of the United States to study the problems of the federal courts, issued a report that noted the "mounting public and professional concern with the federal courts' congestion [and] delay." FCSC Report at 3. Significantly, "[t]he most acute problems of overload are at the appellate rather than trial level." Id. at 10.

The committee rightly termed this a " 'crisis of volume' that has transformed [the federal appellate courts] from the institutions they were even a generation ago." Id. at 109. An American Bar Association report by the Appellate Judges Conference also reached the same conclusion: "[t]he impact [of the 'crisis in volume'] upon appellate practice and procedure has been so great that there is little relationship between the appellate process of today and that of only two decades ago." Appellate Judges Conference, Judicial

Administration Division, American Bar Association, Appellate Litigation Skills Training: The Role of the Law Schools 9 (June 1985).

Numbers tell much of the story. For example, as noted by the Federal Courts Study Committee, in 1965 each circuit judge participated, on average, in the termination of 136 appeals. By 1989, in comparison, the figure had almost tripled to 372 terminations per judge. And in the busiest circuit, the number was 525. FCSC Report at 110.

Taking a longer view, the committee observed that appellate filings had risen 15-fold since 1945, while the number of circuit judges had less than tripled, thus increasing the caseload per judge by nearly a factor of six. Interestingly, in 1945, approximately one in 40 terminations by district courts was appealed; in 1989, appeals were taken in about one out of eight cases.

These trends have continued unabated and even accelerated. In fiscal year 2005, filings in the regional circuits increased more than 9% from the year before and nearly 32% from 1996. This was the 10th consecutive record-breaking year for appellate filings. Administrative Office of the U.S. Courts, 2005 Annual Report on the Judicial Business of the United States Courts 13-14 ("2005 Judicial Business Report").

Furthermore, circuit courts have been falling ever further behind on their dockets: 13% more cases were pending in 2005 than in 2004, and 49% more than in 1996. Id. Nationwide, the median time from notice of appeal to final disposition rose from 10.5 months in 2004 to 11.8 months in 2005, an increase of more than 12%. Id. at 15. And in 2005 more than 180 appeals were pending under submission (that is, from oral argument to decision) for 12 months or longer. Id. at 44 (Table S-5).

By the same token, the average workload of federal appellate judges has dramatically increased. In 1974, the national average for the number of terminations on the merits (that is, excluding procedural terminations) per active judge was 87.

This rose to a high of 498 in 2001 and was 432 in 2004. Schiltz, "Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Decisions," 62 Wash. & Lee L. Rev. 1429, 1477 n.239 (2005).

Individual judges have attested to this development. In an online interview, Senior Judge Ruggero J. Aldisert stated that when he joined the 3d U.S. Circuit Court of Appeals in 1968, each active judge on the court was involved in the decision of 90 appeals annually, and the national average was 93. In 2002, the figures were 381 and 485 appeals, respectively-between one and two appeals for each and every working day of the year. How Appealing, http://appellateblog@blogspot.com (July 7, 2003, 00:00 EST), Question No. 9.

Likewise, Judge Diarmuid F. O'Scannlain of the 9th U.S. Circuit Court of Appeals has stated that on average in 2002, each of the judges on that court participated in 492 appeals and was responsible for 164 dispositions (which works out to 13 opinions or memorandum decisions per month, or more than three a week). This compares with 180

appeals and 60 decisions per judge in 1986 when O'Scannlain was appointed to the court. How Appealing, http://appellateblog@blogspot.com (March 3, 2003, 12:15 a.m. EST), Question No. 1.

The situation can be graphically encapsulated in one telling statistic. Judge Alex Kozinski of the 9th Circuit has estimated that in addition to all of his other work on the bench, he reads some 3,500 pages of briefs a month-an average of more than 100 pages of briefs for every calendar day in the month. Kozinski, "The Wrong Stuff," 1992 B.Y.U. L. Rev. 325, 327.

The appellate overload has manifested itself in a number of evident ways. For instance, circuit courts now hear oral arguments in a much smaller proportion of cases.

Across the country in 2005, oral arguments were held in only 30% of the decided appeals. In the two circuits that heard the fewest (the 4th and 11th), a mere 15% of appeals had oral argument, and no circuit held argument in much more than 50% of its cases. 2005 Judicial Business Report at 40 (Table S-1). In 1984, the circuit courts heard oral argument in 63% of their cases. Schiltz, 62 Wash. & Lee L. Rev. at 1476 n.236.

Similarly, in those cases that are orally argued, the time allowed for argument has consistently been declining. These days 15 or even 10 minutes for argument is typical in most circuits.

In addition, senior circuit judges and visiting judges are playing an increasingly significant role in the courts of appeals.

In 2005, senior circuit and visiting judges participated in nearly a quarter of the appeals terminated nationwide and in more than 41% in the 6th Circuit (where, in fairness, unfilled vacancies posed particular problems). 2005 Judicial Business Report at 41 (Table S-2).

Moreover, so-called "unpublished" or nonprecedential opinions accounted for the vast majority (and a growing share) of dispositions as the federal appellate courts struggled to keep up.

Circuitwide, such decisions represented some 82% of all dispositions, with the 4th Circuit having the highest proportion at 92%, and no circuit being below 57%. Id. at 42 (Table S-3). By contrast, in 1977 unpublished decisions constituted 37% of all dispositions. McMenamin, "Justice in the Dark," Forbes, Oct. 30, 2000, at 72.

Appellate overload also has had other effects that are less demonstrable but no less real or important.

Chief among these is the common view of practitioners and academics-and even informally acknowledged by some judges-that law clerks and staff attorneys have assumed a variety of responsibilities that judges used to undertake personally. In general, as the demands of the docket have increased, federal judges simply have less time to

devote to what traditionally has been regarded as the central task of "judging."

This consequence is well illustrated by comments submitted to the Advisory Committee on the Federal Rules of Appellate Procedure in connection with a proposed amendment (recently approved by the U.S. Supreme Court) to allow citations to "unpublished" or nonprecedential opinions in briefs on appeal.

As Kozinski of the 9th Circuit candidly admitted in his written submission, unpublished dispositions "appear to have been written (but most likely were not) by three circuit judges . . . .[Rather, they] are often drafted entirely by law clerks and staff attorneys."

Appellate panels often consider 50 such drafts a day, "with an average of only five or ten minutes devoted to each case." While the panel strives "to ensure that the *result* [it] reach[es] in every case is right . . . there simply is no time or opportunity for the judges to fine-tune the language of the disposition" (emphasis in original). Public Comment 03-AP-169, Proposed Federal Rule of Appellate Procedure 32.1 (rec'd Jan. 20, 2004), at 2, 4-5.

Effective appellate advocacy before busy judges

All of this has important implications for appellate judges and, in turn, appellate advocates. Judges today are busier than ever before. By their own acknowledgment, they read briefs and even write opinions while traveling on airplanes or commuting by train or bus.

This means that lawyers must learn to present their positions in an effective and persuasive way to such busy judges. Briefs must be easily grasped and readily understood on a first reading.

But even that is not enough; they must be written not only so that they can be understood but, more to the point, so that they cannot be misunderstood.

Likewise, at oral argument, advocates must reduce complex legal contentions to their essentials that can be discussed (and defended against questions) in 10 or 15 minutes.

Advocates need to keep in mind that, from the judges' perspective, their case is only one of as many as two or three dozen cases that the panel might be hearing at that sitting.

The consequences of this judicial overload for effective appellate advocacy will be further explored in a future column.

Mark I. Levy is the chairman of the Supreme Court and appellate advocacy practice in the Washington office of Atlanta’s Kilpatrick Stockton.