



GOVERNMENT & REGULATIONS

ADJUSTING JUST FINE

Erik Goergen of Nixon Peabody LLP and other attorneys enjoy the intellectual challenges of appellate law. And new specifics for briefs and filing seem like a natural progression.

Erik Goergen, associate at Nixon Peabody LLP

BY PATRICK CONNELLY
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New rules that affect appellate practice in New York have rolled out continuously in recent years.

Attorneys needed to pay close attention to what changed where they are filing.

Aside from statewide uniform practice rules, there are specifics as to what documents must look like and how they must be filed in each of the four departments of the Appellate Division of state Supreme Court.

Even with new parameters, though, there is room for attorneys to distinguish one appeal from another in their briefs and none of the new rules restrict appellate lawyers from their true craft of forming arguments that change people's minds, said Erik Goergen, associate at Nixon Peabody LLP.

"(The rules) outline the contours of what the brief must look like but I think you still must allow for creativity and persuasiveness within those walls. And there are opportunities to do that," he said. "The rules are meant to circumscribe what you can and can't do."

"But they're not intended to create boring stories or promote unpersuasive arguments. I think the key is to always tell a story about your client, your case and obviously (do it) in the most persuasive way possible while being selective, too."

In the next wave of updates in the Fourth Department, it will become mandatory in 2020 that nearly all matters be electronically filed.

E-filing was implemented slowly and in phases for most categories of cases, including the commercial sector.

The Fourth Department, seated in Rochester, is comprised of all

counties in Western New York. It processes appeals for anything filed in Syracuse and places west.

Goergen and other local attorneys agreed that e-filing and the evolution to a more digital landscape is a natural progression.

"It's the way it's going. ... The (state) courts are keeping up with what's going on throughout the rest of the country," he said. "Once it's done and everyone has made the shift, it will be so much more efficient."

Other lawyers said the same. "I think it creates the type of efficiency that you want," said Bradley Hoppe, member at Bond Schoeneck & King PLLC.

The sector is a niche where focused attorneys can hit their stride, they said.

"It can be different from the regular litigation practice just in the sense that you are a little more isolated," said Meghan Brown, partner at Goldberg Segalla. "That can be good or bad."

In appeals cases, attorneys are limited to what's already been presented in the record of a proceeding, according to Amber Storr, associate at Hurwitz & Fine PC. Attorneys have a narrow scope to work in, not everything can be appealed and the courts have discretion for fact-finding and witness credentials, Storr said.

"You really need to focus on whether you have an appealable issue," she said.

Brown agreed. "You are sort of in a finite universe. ... There's nothing else to work with other than the facts," she said.

The limitations are one aspect that drew in Allison Fiut, partner at Harris Beach PLLC.

"I became interested in appellate practice partially due to the academic nature of the work," she said. "I had some really good

mentors when I first started out ... and I liked the process of identifying the most compelling issues on a limited record.

"The fact that the record is limited can sometimes be a bad thing because you're stuck with a record that may not be complete. But in other instances, it can be a good thing if you dislike certain aspects of litigation, such as discovery disputes and the back-and-forth that you may deal with on a day-to-day (basis). I like that the appellate work is separate from that and that it is an academic exercise."

Appellate practice is intellectually stimulating and one in which the written work of attorneys is valued, Hoppe said. And when presenting an oral argument, they often need to think spontaneously.

"If you have the better brief, you stand the best chance for success," he said. "I don't think anyone dislikes thinking on their feet."

Room to be creative

The issues attorneys choose to argue in an appeal are most important, Goergen said.

"A lot of attorneys just throw up everything and hope something sticks," he said. "I take the opposite approach, pick (my) best issues (worth arguing) and go from there."

Goergen had clerkships in the state Court of Appeals and federal circuit court where he helped judges read and outline arguments made by attorneys. It provided a view from the other side of the fence.

"Every judge is different (in how they think), but (having worked in the system) you see what the court's process is for deciding cases," he said. "It's like looking behind the curtain. ... It's human beings trying to come to the legally correct result in a given case."

He parlayed that experience into private practice. At Nixon Peabody, he advises attorneys on appellate strategy and chances of success. Goergen writes briefs, too.

"You have to distinguish your case and almost make it interesting. It's about telling a story," he said.

Goergen made several oral arguments before justices in his work so far and hopes to present more.

Having the ability to let go of arguments which aren't that persuasive or which are no longer relevant can be difficult, Fiut said.

"(You want) to focus on the more compelling arguments so they don't get lost amid the (routine) arguments," she said.

Why appellate law?

Storr was a nontraditional law student, which led her to appellate practice. She started her career in mortgage banking, later owned a dance studio and then worked in other industries.

"I was trying to find something that would get me to another level so I could not hit a glass ceiling. Everything just kept pointing to law," Storr said.

At the University at Buffalo School of Law, she took appellate writing classes and enjoyed the process of working through the assignments.

"When I got into practice, I got to work on some appeals and found that I had a knack for it," she said. "I find that appellate work makes sense to me. I just have a knack for being able to identify the issues that should be argued."

For the others, what lured them was appellate law's predisposition to having lawyers perform careful research and pay close attention to details.

"I've always loved research and writing," Hoppe said. "When I was a young associate, those (areas) I always saw as my strength."

Appellate practice provides the medium where that's a main focus for him, as well as the others.

Learning process

Since she started trying appellate cases, Brown has learned to



Fiut said it's a good idea to rehearse your points well before presenting to judges on appeals cases.

calm her nerves and take her time with oral arguments.

It's crucial to know the record of a case inside and out so you aren't caught off guard by questions from the justices, she and Fiut said.

"The preparation can't be understated," Brown said.

Fiut said she sets time aside to rehearse.

"It shouldn't just be on the fly. ... If you're not well-versed on your case, the judges are probably going to be able to tell," she said.

It's good to know when not to talk, Storr said. Saying less is often as beneficial as saying more, she said.

"The more focused you are, the better off you are," she said.

Fiut said she enjoys the back-and-forth with justices.

"You do have to be ready to be peppered with questions," she said. "It's only a matter of time before they're going to ask one."

She learned to outline her three most important points to ensure concise presentation.

"(I've learned to) take a few days or weeks ... away from the draft after you put your first brief together," she said. "It's good to refocus, refresh and come at the issues with a clear mind."

"You may catch things that you didn't catch previously and you may realize that certain arguments belong at the front."

New rules and digital shift

New rules started to be implemented in 2017 that changed the e-filing process and aligned practice guidelines in the state's four departments. More rules sporadically came into effect in 2018, with the departments individually having some specific new wrinkles of their own.

"They all have (subtle) differences and you always have to double-check," Storr said.

She found services such as Counsel Press to be a good resource. Appellate counsel Robert Brucato from that entity educated attorneys locally on what was changing when, which Storr said was tremendously helpful.

"We have been able to stay on top of the rules from Day 1 and they don't seem too onerous," she said.

The aspects that are uniform statewide make the appellate process simpler to navigate while attorneys get accustomed to e-filing procedures, Brown said.

"I think everyone will get used to it," she said. "I think it makes filing a little easier, which is helpful."

Arduous legal area

Judges ruling one way or another is difficult in the majority of appeals cases, Goergen said.

"Many times there isn't a clear answer as to what the rule should be," he said. "Ultimately it's up to the (state) Court of Appeals to decide ... relying on its prior precedent, good public policy and what makes sense. And they're allowed to do that because it's the court of last resort."

Still, attorneys relish the practice area.

"Appellate work deals with issues of law and that's what I like most about it," Storr said. "It's a real intellectual challenge to get down to the nitty-gritty (aspects) and make sure you don't get lost in irrelevant detail."

Brown concurred, saying, "It's not for everyone but I love it."



Allison Fiut, partner at Harris Beach PLLC, enjoys appellate law's change of pace from litigation.



Erik Goergen's experience working inside the appeals court system led him to become an advisor in private practice on appeals strategy for fellow attorneys at Nixon Peabody LLP, in addition to his other work on commercial cases.