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ON-THE-JOB TRAINING IN APPELLATE LITIGATION SKILLS: A COMPARATIVE STUDY

By MICHAEL F. NOONE, JR.*

Introduction

Each year, hundreds of federal attorneys brief and argue criminal cases before courts of appeal, but the only federally-sponsored training programs in appellate advocacy are devoted primarily to civil appeals. Conversations with members of the staff of the Practicing Law Institute and the Federal and American Bar Associations established that short courses in appellate litigation skills are not routinely offered. Therefore, we can conclude that most government attorneys involved in criminal appeals learn or improve their appellate litigation skills on the job. This article is about their training. While there is a wealth of legal literature on appellate advocacy as a skill, none of it is designed to help training programs, I modified my approach by asking them first about the characteristics of the students attending their courses (experience level and probability that the student would be involved in appellate litigation after completion of the course) and then about the course content, as it related to appellate advocacy. In the balance of this article, I will first describe the characteristics of the offices contacted, then will summarize the comments of the ABA report and the interviewees' responses to the report. I will conclude with some observations, based on anecdote and impression, regarding the possibility of improving appellate litigation skills training.

Characteristics of the Offices Surveyed

Appellate litigation offices varied enormously in size, in appellate experience of their staffs, and in the degree of supervision afforded, yet the training programs were surprisingly similar. Because only one, or perhaps two, new attorneys entered an office at any given time, supervisors arranged individual training programs by assigning the new attorney to a more experienced mentor. None of the attorneys had been sent to a formal training program, nor were the various video tapes prepared for appellate advocacy training used. The training typically begins with a brief orientation period, varying from half a day to a week, in which the new attorney reviews office procedures and brief formats, and is then assigned a brief. The orientation period's duration was directly related to the extent of the attorney's prior appellate experience. Thus, nearly all the training took place as the attorney worked on particular briefs, and it was in this context that I matched the concerns of the ABA report with the practices of the various offices.

Content and Methodology of Appellate Skills Training

The Crampton Committee's 1979 report on the law schools' role in developing lawyer competency identified three

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components of lawyer competency: “(a) certain fundamental skills; (b) knowledge about the law and legal institutions; (c) ability and motivation to apply both knowledge and skills to the task undertaken with reasonable proficiency.” The ABA report used this taxonomy in classifying “the knowledge and skills essential for an effective appellate litigator” as aspects of knowledge about appellate courts as institutions7 knowing the rules of appellate procedure; skills in developing and working with the record on appeal to ensure that issues are preserved; (brief) writing and oral argumentation.18

I asked supervisors to comment on each category. Their responses are summarized in the next section.

Criticisms and Responses

The ABA Report on Appellate Litigation Skills Training asserted that:

a lawyer cannot be a competent litigator unless he possesses . . . basic knowledge about the appellate court and understands its relationship to successful litigation at both the trial and appellate level. Fundamental questions such as the functions of the appellate court (error correction and law development), the goal of the appellate judge (to do justice between the parties in accordance with the law), and the difference in function between an intermediate appellate court and a supreme court are ignored in the education of most law students.19

All the offices surveyed agreed with the premise, but none of them thought it necessary to address, in their training, these fundamental questions which are neglected in law school. Since most of the attorneys being trained had been lawyers for some years, the trainers might well have assumed that the attorneys already knew the answers to these questions. However, even those training programs for newly admitted lawyers did not include this component, nor did the military training schools for new judge advocates.20

Appellate Court Rules

All of the offices contacted assumed that newly assigned lawyers could read and understand the rules and that any misunderstandings would be identified and corrected by the supervisor as the brief was being developed.

Fundamental Skills

Developing and Working with the Record on Appeal: The ABA report assumed that most appeals would be brief and argued by the same attorneys who had handled the case at the trial level. Text writers make the same assumption but we have seen that many federal criminal appeals are handled by appellate specialists. Since the parameters of the appeal are determined by the adequacy of the trial record, I asked the appellate offices surveyed whether they had identified any noticeable deficiencies in this regard. There were no generalized complaints. The judge advocates’ schools said that their basic courses emphasized making and preserving the trial record. However, they did not cover the post-trial responsibility of defense counsel to identify appeals issues. When asked about this gap in their training, they said that lawyers in the basic programs for newly admitted lawyers did not include this component, nor did the training offices look on these “thin” cases as of minimal importance for the exercise of imagination or appellate skills, but do give counsel an opportunity to work with a record while minimizing the chance that inexperience could harm the accused. Non-military appellate defenders don’t have this opportunity, but are more experienced in record analysis. Government offices responsible for reply briefs simply relied on supervisors’ review of new lawyers’ work.

Brief Writing Skills: All of the offices contacted assumed that newly assigned lawyers were basically proficient in legal writing skills and that training in those skills would occur as an incident to the supervising attorneys’ review of the work product. Typically, the novice would be assigned a case to brief and would be expected to discuss drafting problems as they arose. In any event, the mentor would be approving the final product.25 Supervisors also assumed that any experienced appellate litigator was qualified to comment on—and presumably improve—the brief-writing skills of an inexperienced litigator. Supervisors saw themselves as performing two functions: as editors, reviewing the product for legal and expository errors, and, as policy reviewers, ensuring that the arguments advanced were consistent with those advanced in other cases. The supervisors had no special training in legal writing, but considered themselves well grounded in substantive law.26 All agreed that if a brief had to be corrected, changes should be done by the drafter and not by the supervisor, in order to maintain the drafter’s morale. Some supervisors had clearly articulated views on the best method to achieve the goal of an effective brief, which the ABA report described as: “Satisfying the judge that justice demands a decision in favor of [the] client but that the decision can be made in conformity with applicable law or, in the rare case, that the applicable law should be changed.”27 All agreed on the importance of the Statement of Facts, and many appellate government supervisors insisted that the drafters of reply briefs resist the temptation to accept the appellant’s Statement. Like “good art,” good Statements were only known after they were seen; there was no consensus on what made a good Statement. The report’s criterion was that the Statement be “a compelling narrative.”28

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None of the offices contacted offered formal training in record review and analysis. The specialized offices trained their new attorneys by making them responsible for active cases, and assigning an experienced appellate litigator to review the new lawyer’s work.24 The military appellate defense offices use the records of trial in simple guilty plea cases which, by virtue of the sentence, are recorded automatic review. The Navy calls these records “thins” because of their length. All of the armed services provide counsel with a standardized appellate review check list. I got the impression that the services look on these “thin” cases as necessary evils that offer little opportunity for the exercise of imagination or appellate skills.
be developed with years of practice. In summary, none of the offices surveyed saw the need for any formal training of new lawyers or supervisors, in brief-writing skills, nor was there general agreement on what constitutes a persuasive brief.

Oral Advocacy Skills: The ABA report observed that the only remotely-analogous experience is in the oral defense of a doctoral dissertation, where there is no live opponent waiting to challenge the candidate’s main thesis. When I asked my informants how they trained their attorneys to make effective oral arguments, the responses were relatively uniform. Everyone mooted their new lawyers a few days before the court appearance; they agreed that the moot should not be the day before the appearance because the advocate needed time to absorb the lessons learned. Most offices continued to moot their attorneys no matter how many times they had argued previously. All described the tension between the advocate, who simply wanted a disinterested and informal discussion of the argument, and supervisors, who wanted formality. When the moot took place, there were always two or three judges; usually one of them was the head of the office. In the civilian offices the other judges were drawn from a rota; military supervisors usually selected the other judges. The judges would have read the arguer’s brief and, usually, the opponent’s brief. The “court” was convened in a conference room in order to establish a formal atmosphere. I was favorably impressed by the offices that insisted on formality, requiring the advocate to stand and deliver the argument, and refusing to go “out of role” for the time allotted for the argument. Most said they gave as much time as needed for subsequent discussion, and one division chief guarantees that they won’t leave the room until the advocate is satisfied with the argument outline. All agreed that lack of flexibility was the mark of the inexperienced advocate and emphasized the dominant role played by the facts of the case. Few of the government offices remarked on the difficult role of the appellate advocate, who, arguing second, presumably should focus on those issues in which the court showed interest, rather than the issues emphasized in the reply brief. None of the offices used video cameras in their oral training sessions, although some senior counsel who had argued before the Supreme Court had done so. The military lawyers did not often orally argue cases before the Courts of Military Review (where oral argument is optional). Only one military supervisor encouraged counsel to use the courts as a forum to sharpen advocacy skills. Typically, oral advocacy training consisted solely of the moot, treating it as a sort of sparring match, preparing the advocate for interruptions and correcting gross errors in delivery.

Improving Skills Training

Without exception, the supervisors with whom I spoke were true professionals: enthusiastic about their jobs and their subordinates’ performance, devoting their time and energies to improving their work product and deeply interested in anything which might help them do their jobs better. The civilian supervisors believed that their staffs’ briefs were better written and better argued than most of their opponents. Military supervisors were similarly proud and confident, many remarking that their lawyers’ performance was superior to that evidenced by most attorneys appearing before the Supreme Court. I have no reason to challenge these beliefs and the following suggestions are, at best, an effort to take the best of each program and suggest that others use it:

- The Appellate Court as an Institution: As an academic, I agree with the ABA Report’s recommendation that this topic be a subject of study in law schools. It would be offensive to give experienced lawyers any formal training on the subject. Since military lawyers are generally unaware of the development of their appellate system, some effort should be made to integrate that knowledge in their basic judge advocates’ training program, at least for reasons of expediency.
- Appellate Court Rules: There does not seem to be a need for any improved training in this area. Unlike rules relating to trial practice, the appellate rules do not seem to offer any particular advantage to the knowledgeable litigator. I got the impression that problems, e.g., of record augmentation and correction, which might require a thorough knowledge of the rules, rarely arose.
- Developing the Record on Appeal: I am troubled by the services’ apparent failure to train and encourage their trial defense counsels to isolate and brief issues worthy of appellate consideration. The failure may be more apparent than real, and presumably has little effect on the convicted accused. However, if trial defense counsel routinely identified and briefed errors, prosecutors would feel obliged to respond by submitting reply briefs, and the general level of military criminal practice would be improved.
- Working with the Record on Appeal: My comments again relate primarily to the military, since most of their civilian counterparts are familiar with trial records. Present military training is based on whatever records happen to cross the inexperienced lawyer’s desk. It would seem preferable to present them with records (previously briefed and argued) which contain known pitfalls and problems. Although there is a lack of realism in any simulation exercise, both the instructor and the student benefit from the former’s ability to control the desired learning objectives.
- BriefWriting Skills: We have seen that training in these skills is a concomitant of the review and editorial process, and is supplemented by informal discussions with other lawyers in the office who have had similar issues. The process assumes that the writer already has a grasp of the major issues and of the most persuasive line of argument. One appellate supervisor takes a different approach, by requiring an inexperienced attorney to read the record as soon as it is assigned, and then to discuss the key issues in the case with him before doing any research or writing. He thinks this approach minimizes false starts and unnecessary research, while giving him the opportunity to shape the structure of the argument before it is developed. If a division chief is confident of his or her own skills, and lacks confidence in a subordinate, this approach seems preferable to waiting until the first draft is written and then revising it substantially. Problems will still arise at the first level of revision.
Supervisors are unaware of recent literature regarding the revision and editing functions, and their editorial comments tend to be too general or are elliptical. They could improve their editing skills, and the writer's skills in revision, with a minimal investment of time. One cannot, of course, write clearly unless they train their new lawyers to think more critically. They could improve their editing skills, and the writer's skills in revision, with terms appropriate to legal reasoning. If supervisors could avoid phrases like "your reasoning is hazy here" and could instead say, for example, "your analogy fails because it is static [i.e., simply totals up similarities], rather than dynamic [in which the author selects a characteristic to be demonstrated and disregards irrelevant characteristics]," the quality of legal discourse must improve.

"Protocol Methodology" is a useful technique which does not require a specialized vocabulary; the reviewer simply reads the work aloud to the writer, interjecting observations that come to mind on the first reading.

9. Oral advocacy skills: These skills can be improved in a number of ways. Few offices send their new attorneys to hear others make oral arguments, assuming that, since each lawyer must find his or her own style, they wouldn't benefit by attempting to copy someone else's. They fail to see that the attorneys may benefit from observing the mistakes of others: mistakes relating to mannerisms; in organizing and presenting the facts of the case persuasively; in arguing what they want, rather than what the court wants to hear; and in failing to respond to questions. The attorneys in civilian offices usually observed many arguments before they were hired; the military attorneys had not. Military attorneys could also gain experience by exercising their right to make oral arguments before their Courts of Military Review.

It is surprising that none of the offices contacted used VCR's to tape the moot presentations. Two of the supervisors I spoke with had videotaped before arguing in the United States Supreme Court and reported that viewing (and reviewing) the tapes had led to substantial improvements in their arguments. Although none of the offices contacted had VCR equipment, most lawyers have VCR's at home, some have cameras, and all could rent a camera at a small personal expense. If they are willing to undertake this kind of self-analysis, their performance must improve.

In conclusion, I am convinced that government appellate advocates receive more effective and comprehensive training than their private sector counterparts. The training is superior because of their association with other, more experienced, lawyers in their offices not because of financial resources or sophisticated training programs. Their training programs, I suspect, bear a strong resemblance to those of a century ago, when young lawyers were trained by older lawyers in much the same fashion. If improvement is possible, and I think it is, it will come only when both groups recapture the critical vocabulary of a century ago (when, for example, a well educated attorney would have known the difference between allusion and parallel) and combine it with the technology and pedagogical insights of the 1980's. Both can be achieved with no appreciable expenditure of money, and to the great benefit of the profession and the clients whom it serves.

FOOTNOTES


2 See note 11 infra for a description of the programs.

3 In order to limit the scope of the study and to compare appellant and appellee functions, civil appeals are not included. There were 6,744 civil appeals involving the federal government filed between June 30, 1984, and June 30, 1985. Annual Report of the Director, supra note 1.

4 Although some law schools offer appellate skills training as part of a graduate degree program, these opportunities are relatively rare and were disregarded because there is no indication that a significant number of government attorneys have enrolled in such programs.

5 In 1982 the Committee on Appellate Advocacy of the American Bar Association's Appellate Judges Conference published a Teacher's Manual, intended to accompany four video tapes prepared by the Committee on Appellate Advocacy of the American Bar Association and the American Bar Association Section of Legal Education and Admissions to the Bar, What Experience Is Needed by New Associates, 14, 6 (1982) (Ques. and Ans.: In-house Continuing Legal Education, 13 id. 1 (June 1982); and in legal newspapers. CLE. Groups Can Play In-house Training Role; Administrative Support Provided, 8 Nat. L.J. 15 (October 7, 1985); Deciding a CLE Program for In-house Legal Staff: How Astro Does It, 7 id. 15 (May 20, 1985); In-house Training for Small Firms, 4 id. 17 (January 18, 1982); An On The Job Training Session: Firms Go In-house, Videotape New Lawyers, id. at 13 (September 28, 1981); Shipping the Rookies Off to Training Center, Employment Outpost for In-house CLE, id. at 19 (April 26, 1981); The Dramatic Demise of the Metamorphosis Theory: A Shift in Lawyer Training, 3 Legal Times of Washington 28; "Hands On" Approach Strengthens Non-Frial Skills, 3 id. 30 (September 8, 1980).


8 Of the offices surveyed, only that of the U.S. Attorney for Baltimore, and its Federal Public Defender counterpart, expected trial attorneys to argue their appeal. Supervisors in the Baltimore offices considered their approach far superior to those offices which assigned the record of trial to appellate specialists. The Baltimore offices believed that familiarity with the record of trial was most important to the role of a successful litigator and that their approach ensured absolute familiarity. The practice is encouraged by the judges of the Fourth Circuit, who expect criminal trial litigators to appear on appeal and to respond to inquiries regarding their trial tactics. The specialized offices paid a price to the Baltimore approach: attorneys involved in ongoing trial litigation would find it difficult to accommodate competing demands on their time; the attorney who tried the case would find it difficult to evaluate it on appeal, and, presumably, full-time appellate litigators had honed the requisite specialized skills and accompanying text, to a higher degree. In practice, the Baltimore offices trained their trial attorneys in appellate litigation skills in the same fashion as the specialized offices.

9 The smallest were those in the Coast Guard, with one attorney assigned to each function, appellate government and appellate defense. The largest was the Army, with 40 lawyers assigned to the defense and 25 assigned to the government. The Navy ratio

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was 24:20; the Air Force 9:6. Military defense offices were always larger than government offices. Because the Uniform Code of Military Justice mandates automatic review of serious cases, appellate defense lawyers are expected to comb the records of trial for error, while fewer government lawyers are needed to respond to assignments of error. Even when assignments are not automatic, the same ratio obtains. The Maryland (State) Public Defenders' Office had 16 appellate lawyers; there are nine lawyers in its prosecutorial counterpart. There are nine appellate advocates in the D.C. Federal Public Defenders' Office. Its counterpart, the District of Columbia's U.S. Attorney's appellate section, is sui generis: there are four senior attorneys assigned full-time; the balance is comprised of Assistant U.S. Attorneys who rotate through the office for six months.

The military offices "turned over" every three to four years due to rotational requirements. Civilian attorneys' tenure was governed solely by contract or by the wishes of the attorney. Most of the civilian attorneys had prior appellate experience, as clerks for appellate judges or in the office for which they had been hired or in private practice, while few of the military attorneys had previously been assigned to appellate litigation offices.

11See note 24 infra.

12The Attorney General's Advocacy Institute, part of the Department of Justice, offers a course in Appellate Advocacy four times a year to selected Assistant U.S. Attorneys and members of the litigating divisions of the Department of Justice. The twenty participants are assigned the task of briefing and arguing an authentic transcript of either a civil or criminal case. The appellate's brief is reviewed by instructors and by a federal circuit court judge who will hear the argument at the end of the one week course. Appellants, volunteers from various government agencies and local schools, are provided with a brief, their opponent's brief, the transcript, a bench memo, and an oral argument "check list." They are expected to compose their own oral argument. When oral arguments are concluded, they are critiqued by the judges who participated in the training program. The Department of Justice Legal Education Institute has offered a similar course to agency attorneys. Forty attorneys from government offices throughout the United States are selected for participation in the three-day program, which involves assignments as either appellant or appellee. Of the federal offices contacted, only one agency outside the Department of Justice was aware of these opportunities.

13Tapes have been produced by the American Bar Association, Matthew Bender Company, and the National Practice Institute.

14A.B.A. REPORT, supra note 7, at 137.

15Id.

16Id. at 137-39.

17Id. at 137.

18Each of the three judge advocate generals maintains a school for resident training of their uniformed lawyers. The primary purpose of the school is to give basic training in military justice and service-specific legal problems to newly appointed judge advocates. All three schools reported that there was no block of instruction devoted to the military appellate system as an institution; a lecture or lectures was given on the hierarchical organization of the system, but no time was allocated to the system's history or goals. Since the schools' graduates are usually assigned to field offices, the focus of military justice training was on the trial phase. All three also give advanced trial courses, similar to those offered by the National Institute of Trial Advocacy, with no appellate procedure component, although time is devoted to current legal issues pending in the appeals system. The Army also offers a senior course which has a two-hour time block on post-trial procedures, emphasizing administrative review of cases, rather than appellate practice.

19See, e.g., J. M. Purver & L. E. Taylor, Handling Criminal Appeals (1980) (chapters 1-6 devoted to activities before the appeals court accepts the case).

20Note 9 supra.

21A.B.A. REPORT, supra note 7, at 139.

22None of the offices contacted had any training program for the experienced litigators assigned as mentors. It was assumed that they knew what was necessary to be passed on and that they could do so effectively.

23Because military lawyers were usually less experienced than their civilian counterparts, the military review process tended to be more formal than in the civilian offices, which usually allowed the briefing attorney to "sign off" the brief. Confessions of Error by government attorneys, military or civilian, required approval at a higher level and, in the civilian offices, might also require consultation with the trial prosecutor.

24Supervisors were expected to refer the notice to other lawyers in the office who had confronted the same issue and whose guidance would be helpful.

25Supra note 7, at 140.

26Id. at 139.

27Id. at 140.

28Note 19 supra and accompanying text.

29Standard military publications discuss the origins of the United States Court of Military Appeals and offer a list of articles tracing its history. None, to my knowledge, trace the history of the Courts of Military Review. There are only four articles on the latter subject. Ghent, Military Appellate Processes, 10 Am. Crim. L. Rev. 125 (1971); Karlen, Civilian and Military Justice at the Appellate Level, 1968 Wis. L. Rev. 786; Currier & Kent, The Boards of Review of the Armed Services, 6 Vand. L. Rev. 241 (1953); Fraicher, Appellate Review in American Military Law, 14 Mo. L. Rev. 15 (1949).

30The following works represent current approaches: L. Z. Bloom, Fact and Artifact: Writing Non-Fiction (1985) (particularly chapter 2, "Revising"); D. Murray, A Writer Teaches Writing (2d ed. 1985); Walford & Smith, Coaching the Writing Process, Teaching Writing in All Disciplines (C. W. Griffin ed. 1982); G. Block, Effective Legal Writing (3d ed. 1986).


32Each of the appellate offices of the three judge advocate generals appears before the U.S. Court of Military Appeals three to four times a month and, typically, appears as often before their Courts of Military Review, although the latter's workload is roughly three times that of the former's, note 1 supra. While many of the Court of Military Review cases may not offer any substantial legal issue, others do, and could be argued orally if attorneys and supervisors were committed to raising their experience level.