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FOREWORD

APPELLATE LAW IN THE NEW MILLENNIUM: BRIDGING THEORETICAL FOUNDATION WITH PRACTICAL APPLICATION

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For the appellate lawyer, bridging the gap between theoretical foundation and practical application is an important challenge. An attorney who is unable to bring these two notions together is only partially effective as an advocate. Without a firm theoretical foundation that embraces both the law and policy that underlie the lawyer's argument, the substance of the appellate advocate's position will not persuade the court effectively. Similarly, without having mastered the practical side of appellate advocacy, the lawyer will be ineffective in communicating the substance of the argument altogether.

As part of bridging the gap between this theoretical foundation and practical application of appellate law, an advocate who ventures into this area of practice should be mindful both of the particulars of the case as they relate to the interests of the client as well

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as how a resolution of the controversy will affect the community. Bridging *this* gap helps the attorney advance the interests of the client in light of terms that reflect society's interests. In other words, an appellate practitioner does not operate in a vacuum with the judge and parties as the only principles involved in the decision. Indeed, in terms of the impact on society as a whole, appellate attorneys are perhaps the most important of all legal specialists, particularly in light of the importance our society places on the development of the common law and *stare decisis*.

After all, such "judge-made law" plays a vital role in the American legal system. This law is not the result of abstract rule making in a legislative setting; instead, such law is the result of court decisions resolving real disputes between real parties. To be sure, the very arguments appellate attorneys make on behalf of their clients become woven into the fabric of the common law, thus affecting all of society. Some of the most fundamental doctrines of our legal system—those we learned in the first year of law school from cases such as *Marbury v. Madison*,[1] *Brown v. Board of Education*,[2] *Palsgraf v. Long Island Railroad Co.*,[3] *Erie Railroad Co. v. Tompkins*,[4] and *Hadley v. Baxendale*[5]—are a direct result of an attorney's arguments to an appellate court. If not for attorneys who urged courts to extend the law in a certain manner to a particular set of facts, these cases—and the underlying precepts that they represent—would never have reached our law books.

Although the advocate often faces the difficult challenge of helping the court understand the client's interests in terms of society's interests, the appellate judge faces an even more formidable task. When deciding the outcome of a case on appeal, the judge does not simply interpret the law in question. Rather, the judge considers the decision's impact on existing precedent and society as a whole, as well as whether a particular result will render justice between the parties who are in conflict. The existence of these different—and possibly disparate—concerns does not facilitate simple resolution of cases at the appellate level. One need not search prior deci-

1. 5 U.S. (1 Cranch) 137 (1803).
2. 347 U.S. 483 (1954).
3. 162 N.E. 99 (N.Y. 1928).
4. 304 U.S. 64 (1938).
5. 156 Eng. Rep. 145 (1854).

sions for long before finding a case in which a person's side of a controversy seemed compelling or invoked great sympathy, but because of the potential adverse impact on society of a ruling based on equitable principles alone, the case was decided against that person.[6] One often finds that such decisions are based either on a judge's reluctance to establish a doctrine that, although beneficial to a party in one instance, would be detrimental to society as a whole, or on a judge's reluctance to disrupt a coherent body of established case law by injecting into it an anomalous holding.[7]

Another gap that attorneys must bridge lies primarily in the realm of lawyers who are *not* specialists in appellate law. In the age of legal specialization, many attorneys are becoming established in particular areas of the law. The unfortunate result of this specialization is that it serves to exclude these attorneys from other areas of law, including an awareness of the appellate process. Thus, the challenge to non-appellate lawyers emerges from the gap between their specialization and the broader practice of appellate law. Indeed, many attorneys wince at the thought of appearing before any judge, especially an appellate judge. Similarly, many who have established themselves as capable trial attorneys might attempt to isolate themselves from the intricacies of appellate law, either figuring that only a small portion of their practice will ever be spent in an appellate setting or resorting to an appellate specialist when actually faced with the need. Yet, attorneys who avoid an

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6. *See, e.g.*, T.R. v. Adoption Servs., 724 So. 2d 1235, 1236 (Fla. Dist. Ct. App. 1999) (holding that although the court was sympathetic to a mother who had petitioned to set aside the consent to her child's adoption, the court must overrule the motion absent evidence of fraud or duress); Solowy v. Oakwood Hosp. Corp., 561 N.W.2d 843, 848 (Mich. 1997) (noting that although the court is sympathetic to those whose claims become time barred by the arbitrariness of the statute of limitations, such arbitrariness is an essential element of that statute).

7. *See, e.g.*, Downie v. Kent Prods., Inc., 362 N.W.2d 605, 613 (Mich. 1984) (holding that despite the persuasive arguments to incorporate notions of comparative negligence in the workers' compensation arena, to which the court was sympathetic, accepting those arguments would not be prudent because they would disrupt the stability and simplicity of existing law); *Adoption Servs.*, 724 So. 2d at 1237 (stating that despite the appellant's sympathetic position in her motion to set aside the consent to her child's adoption, "if consents to adoption were freely made voidable, the stability of adoptive families and the institution of adoption itself would be threatened"); Trovillion v. Countrywide Funding Corp., 910 S.W.2d 822, 824 (Mo. Ct. App. 1995) (stating that were the court considering the issue presented as a case of first impression, it might well agree with the plaintiff's sympathetic position; however, because established precedent holds otherwise, "it is . . . prudent to follow other long established appellate precedent").

awareness of the appellate implications that their client's issues present actually ignore the importance that appellate law plays in the entire litigation process. After all, appellate courts are the final arbiters of legal disputes in our society, and anyone familiar with the appellate process recognizes how quickly one's fate can change once their dispute reaches the appellate level. Most importantly, however, is that the appeals process is entirely dependent upon the earlier phases of litigation: for example, was error preserved at trial?[8]

Mindful of the many phases of client representation that can span years, or even decades, the analogy of a large-scale construction project is helpful. In erecting any structure, several different tradesmen are employed; different specialists are involved in preparing the site, laying the foundation, and erecting the frame, for example. Other subcontractors install a structure's vital electrical, plumbing, and cooling systems. In the end, finishing touches render the structure complete and ready for occupation. Representing a client can be viewed in a similar manner. When a client seeks the advice of an attorney to partake in some endeavor, such as forming a business, the client will often seek a specialist in that area, such as a corporate attorney. With the burgeoning business underway, the client might seek advice in matters related to the business, perhaps by consulting attorneys who specialize in labor, immigration, or tax. If a dispute arises, the client may seek help in mediating the problem. Ultimately, the client may need help from litigation counsel in proceeding to trial. Either party might choose to appeal the trial court's judgment, thus requiring assistance at the appellate stage.

In our construction analogy, the project would not have succeeded if each specialist viewed himself in isolation. Rather, the undertaking was successful because each subcontractor was mindful of his role as an integral part of a cooperative undertaking. For instance, the tradesmen engaged in the final stages of the project would have experienced difficulty in completing their tasks if mistakes occurred at earlier phases. If the masons had laid a poor

8. *See* TEX. R. APP. P. 33.1(a) (providing that for a complaint to be reviewed at the appellate level, the record must reflect that the complaint was brought to the trial court's attention by a timely and specific motion or objection and that the court ruled on the motion).

foundation, then the structural tradesmen would have failed in completing their tasks. Likewise, those responsible for installing the drywall would have encountered difficulty if a poor structure existed.

The appellate advocate experiences similar challenges. An advocate can only be effective if the proper groundwork was laid in the preceding stages. Hence, *all* attorneys—not just appellate specialists—should view themselves not merely as advocates of their clients' interests in one isolated stage of the representation, but as part of a cooperative effort in the entire representation of their clients. Accordingly, all attorneys, regardless of what stage they represent the client, must focus not only on the immediate task at hand, but also on the end result of their clients' endeavors. In short, attorneys must have a sufficient understanding of the appellate process and the intricacies of appellate law before they can effectively advocate for their clients' interests.

The most obvious example of the importance of this understanding is the attorney who handles the case both before and during trial. The attorney who represents a client in the early stages of litigation must be familiar with appellate law in order to properly plead the case, conduct discovery, and properly use the pretrial disposition techniques, such as summary judgment. Likewise, counsel at trial faces a two-pronged task: striving to be persuasive in the immediate setting and remembering that an effective appeal depends upon proper preservation of error. Unless the litigator has familiarized herself with the intricacies of appellate law, she may inadvertently waive any error the appellate lawyer could complain of, and thus, leave the client without meaningful grounds for undertaking an appeal.

The point of this discussion is that all attorneys should seek to bridge the gaps that exist in their practices in order to be the best advocates possible. When each of us began our legal career in the first year of law school, we were exposed to the fruit of the appeals process in virtually every class. By reading appellate opinions, we slowly learned the doctrines that serve as the underpinnings to our legal system. In doing so, we learned that there was much more to a case than its holding. Our professors urged us to dig deeper into the opinion and challenged us to inquire whether such a holding was the correct result. We learned to ask whether we would be satisfied in extending the court's decision to hypothetical situa-

tions. Whether as a seasoned appellate advocate, or as an attorney who practices outside the realm of appellate law, perhaps every attorney could benefit by revisiting the first year of law school in a metaphorical sense. In doing so, an attorney will begin to fill the gaps that exist not only in her practice, but in her client's case as well.

This Symposium provides the appellate specialist and non-appellate attorney alike with a groundwork to begin bridging these gaps by discerning fundamental issues that are central to each client's case. The Symposium addresses not only the art of appellate advocacy, but the groundwork that must be laid months—perhaps years—before an appeal. Contained herein, and in the materials that accompanied the conference component of this Symposium, are materials prepared by some of the leading appellate practitioners and judges in the State of Texas. Those who have contributed to this Symposium—the students, attorneys, and judges who have helped bridge the gap today—intend for all participants to benefit from these materials and hope that all attorneys will continue to appreciate the importance of the appellate process in our legal system's dispute resolution process.