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## The Future of Appellate Advocacy?: More Generalists, Fewer Appeals

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# The Future of Appellate Advocacy? More Generalists, Fewer Appeals

*Neal Katyal\* and Morgan Goodspeed\*\**

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## I. INTRODUCTION

Appellate law sits in an uneasy relationship to the rest of law today. Specialization is *au currant*—with subject matter experts in almost every field and law firms divvying up their lawyers into a variety of subject matter areas. Much ink has been spilled over what this means for clients, for lawyers, and for the industry as a whole.<sup>1</sup> The legal academy has not been immune to the specializa-

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1. See, e.g., Edward O. Laumann & John P. Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 2 AM. B. FOUND. RES. J. 155 (1977); John W. Reed, *Specialization, Certification, and Exclusion in the Law Profession*, 27 OKLA. L. REV. 456 (1974); Geoffrey C. Hazard, Jr., *Changing Structures in the Practice of Law*, 61 LA. L. REV. 167 (2000); William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373 (2010).

tion trend, either, with some commenters declaring that “[t]he twilight of the generalist law degree is here.”<sup>2</sup> The days of the generalist lawyer who answers all queries is waning, and it seems beyond debate that the future of much of the legal profession will be focused less on general proficiency and more on narrow expertise.

But appellate law is the last stalwart of the *ancien regime*. Indeed, appellate practice is uniquely resistant to specialization,<sup>3</sup> so much so that the future of appellate advocacy may be one of *increased* generalization—as appellate practitioners maintain their familiarity with a broad range of subject matters, while expanding their involvement into earlier and earlier stages of litigation. This article first explores why successful appellate lawyers quite simply must buck the legal industry’s trend toward specialization. It next discusses how appellate lawyers should take advantage of their generalist practices to advise clients long before any appeal is on the horizon. Finally, it offers a few thoughts about putting these prescriptions into practice.

## II. WHY THE BEST APPELLATE LAWYERS REMAIN GENERALISTS

To begin, a caveat: Appellate practitioners are often “repeat players” in certain substantive areas of law. On recent occasions, for example, Neal has argued multiple Supreme Court appeals involving intellectual property law,<sup>4</sup> Indian law,<sup>5</sup> and ERISA law.<sup>6</sup> In those areas and others, being a repeat player allows him to more quickly get up to speed, rather than spend time learning the basic statutes and precedents in the area. But he is not a specialist. Neal’s work spans all types of appeals, and that is a foundational

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2. Victor Fleischer, *The Shift Toward Law School Specialization*, N.Y. TIMES (Oct. 15, 2012), [http://dealbook.nytimes.com/2012/10/25/the-shift-toward-law-school-specialization/?\\_r=0](http://dealbook.nytimes.com/2012/10/25/the-shift-toward-law-school-specialization/?_r=0).

3. Of course, appellate law could itself be reasonably considered a specialization. And so it is—appellate practitioners develop a set of skills, including brief-writing and oral advocacy, that uniquely position them to persuade appellate courts. Much has been said of the specialization of the Supreme Court bar, for instance. Reuters recently published a special report describing what it viewed as a narrow group of Supreme Court practitioners with an “outsized influence” at the Supreme Court. Joan Biskupic et al., *The Echo Chamber*, REUTERS, (Dec. 8, 2014, 10:30 AM), <http://www.reuters.com/investigates/special-report/sco-tus/>. So as a typical matter, specialization in the appellate world often means specialization in the *appellate practice area*. Here, however, we are using the term in a different sense. The specialization we are discussing is *subject-matter specialization*.

4. See, e.g., *B&B Hardware, Inc. v. Hargis*, 134 S. Ct. 2899 (2014); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744 (2014).

5. See, e.g., *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014); *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, No. 13-1496 (2015)

6. See, e.g., *U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013); *Montanile v. Bd. of Trs. of the Nat’l Elevator Indus. Health Benefit Plan*, No. 14-723 (2015).

aspect of his practice. In the last four years in private practice, he has argued Supreme Court appeals involving class actions,<sup>7</sup> criminal defendants' constitutional rights,<sup>8</sup> bankruptcy,<sup>9</sup> preemption,<sup>10</sup> and other substantive areas. Maintaining a diverse docket, rather than concentrating too heavily on one particular substantive area, is what we mean when we use the term "generalist."

In our judgment, the best appellate lawyers remain generalists, swimming upstream against a current of specialization. Specialization makes sense in many legal practice areas, and it can provide huge efficiency, expertise, and cost-saving benefits to clients. Yet it does not make sense in the appellate world, for two major reasons. First, appellate practitioners are all but guaranteed a generalist audience. Second, the major value-add for appellate practitioners is a mixture of strategic judgment and legal creativity, a combination that feeds off of a diverse knowledge base.

#### A. *Starting at the Start: Judges Are Generalists*

It may be stating the obvious, but the obvious merits stating here: Federal judges are generalists. With the exception of the Federal Circuit,<sup>11</sup> all Article III appellate courts hear a range of federal cases. In addition, there are no statutorily or constitutionally mandated qualifications for Article III judges. Indeed, they haven't always even graduated from law school—although that is a practical prerequisite in modern times.<sup>12</sup> The result is that most federal courts are composed of Article III judges with sharp legal minds, but rarely laser-focused specialties. As Justice Ruth Bader Ginsburg has explained, Article III judges "are drawn from all fields of

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7. See *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013).

8. See *Kan. v. Cheever*, 134 S. Ct. 596 (2013); *Kan. v. Carr*, 136 S. Ct. 633 (2015);

9. See *Law v. Siegel*, 134 S. Ct. 1188 (2014).

10. See *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015).

11. See 28 U.S.C. § 1295(a) (2012) (Federal Circuit "shall have exclusive jurisdiction" over civil actions arising under "any Act of Congress relating to patents," appeals from the U.S. Court of Federal Claims, appeals from the Patent Trial and Appeal Board of the U.S. Patent and Trademark Office, appeals from the U.S. Court of International Trade, and some other claims). Of course, the Federal Circuit may not be fully "specialized in the traditional sense," as "[i]ts docket includes areas outside the field of patent law." Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769, 770 (2004). But the Federal Circuit and the Court of International Trade are generally considered the two specialized Article III courts. See, e.g., Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1111 (1990).

12. For example, John Marshall and Robert H. Jackson, two of the most respected Justices in Supreme Court history, did not graduate from law school. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 512, 608 (Kermit L. Hall et al. eds., 2d ed. 2005).

legal endeavor—appointees may be practicing lawyers, law teachers, government officials, even members of Congress, and sometimes judges of state courts or lower federal courts.”<sup>13</sup>

There are, to be sure, many other venues in this country in which important legal questions are decided by specialists, including administrative tribunals. One estimate is that a full three-quarters of federal adjudications occur outside of the federal court system.<sup>14</sup> And in state judicial systems, there is significantly more variety than at the federal level, including with respect to specialization. Take, for example, the Delaware Chancery Court, which hears predominantly corporate matters and has had an outsized influence on corporate law, in part because of its focus.<sup>15</sup> Or consider other specialized business courts, including the New York Commercial Division, the Chicago Commercial Calendar, and the North Carolina Business Court.<sup>16</sup> In the end, most of these specialized lower courts feed into generalist state appellate courts anyway. Because states boast a wide variety of judicial systems, though, it is always risky to include them when speaking in generalities about the judges an appellate lawyer might appear before.

That being said, many appellate lawyers focus their practices on the federal court system, and there can be no question that most judges they appear before will have broad experience in a number of areas rather than deep experience in one particular area.<sup>17</sup> Generalist lawyers are best suited to persuade those generalist judges, in at least two senses. First, and most simply, good appellate lawyers know how to talk to judges and how to communicate complicated legal issues in straightforward terms.<sup>18</sup> Judge Diane Wood of the Seventh Circuit has noted that “[t]he need to explain even the

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13. Ruth Bader Ginsburg, *An Overview of Court Review for Constitutionality in the United States*, 57 LA. L. REV. 1019, 1020 (1997).

14. See Herbert Kritzer, *Where Are We Going? The Generalist vs. Specialist Challenge*, 47 TULSA L. REV. 51, 58 (2011).

15. See Lee Applebaum, *The Steady Growth of Business Courts*, in *FUTURE TRENDS IN STATE COURTS 2011*, 70–75 (Carol R. Flango et al. eds., 2011).

16. *Id.*

17. *But see* Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 519 (2008). Professor Cheng argues that opinion specialization is a regular occurrence in the federal courts of appeals. *Id.* at 527. In other words, even on a generalist court, opinion assignments may be distributed based on the panel members’ expertise or interests. *See id.* The distribution of opinions suggests to Professor Cheng that “specialization is alive and well in the federal appellate judiciary.” *Id.* at 540. It is an important point, but not one that undermines the well-accepted premise here that most judges are generalists who *hear* and *decide* the full gamut of cases—even if they might *prefer* some over others.

18. See Ginsburg, *supra* note 13, at 1021 (noting that “our all-purpose bar” maps onto our “all-purpose judiciary”).

most complex area to a generalist judge . . . forces the bar to demystify legal doctrine and to make the law comprehensible.”<sup>19</sup> Similarly, Judge Jed Rakoff of the Southern District of New York has commented that a generalist judge “requires the lawyers to explain to him, in language he can understand.”<sup>20</sup> Identifying just which arguments are readily comprehensible may be a difficult task for a specialist too steeped in the doctrine, terminology, and policy to place herself in the shoes of an industry novice—which most judges are.

Even the Court of Appeals for the D.C. Circuit, which might reasonably be considered a semi-specialist court in light of its exclusive jurisdiction over certain administrative law cases, prefers the language of generalists to the industry-speak of technocrats. In 2010 it issued a stern notice, warning that the Court “strongly urges parties to limit the use of acronyms.”<sup>21</sup> As Judge Lawrence Silberman explained, “the practice constitutes lousy brief-writing,” and “we never see that in a brief filed by well-skilled appellate specialists.”<sup>22</sup> The same admonition undoubtedly applies to other aspects of the jargon-filled writing that persists in that Court, like the pervasive use of industry-specific terminology or the unexplained application of long-accepted principles or practices.

The second way in which an effective appellate advocate must be conscious of generalist judges is in the substance of a brief, not just its style. In particular, generalist judges may be less susceptible than specialist judges to policy arguments relating to how a particular industry functions, or to arguments about how “this is just the way it’s always been done.” Judge Richard Posner of the Seventh Circuit has suggested as much, asserting that “the generalist is likely to be more faithful to the original spirit of an enactment,” and the specialist to “the current legislative and executive will.”<sup>23</sup> That is perhaps because a generalist is less likely “to identify with the

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19. Diane Wood, *Generalist Judges in a Specialist World*, 50 SMU L. REV. 1755, 1767 (1997).

20. Jed Rakoff, *Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise*, 17 FORDHAM J. CORP. & FIN. L. 1, 13 (2012).

21. Notice, U.S. Court of Appeals for the District of Columbia Circuit (Jan. 26, 2010). The D.C. Circuit takes the issue quite seriously; lawyers who have not taken the acronym notice to heart have faced embarrassing consequences. See Jonathan H. Adler, *BADCC (Beware of Acronyms in the D.C. Circuit)*, THE VOLOKH CONSPIRACY, (June 6, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/06/badcc-beware-of-acronyms-in-the-d-c-circuit/>.

22. *Del. Riverkeeper Network v. Fed. Energy Regulatory Comm’n*, 753 F.3d 1304, 1321 (D.C. Cir. 2014).

23. Richard A. Posner, *THE FEDERAL COURTS: CHALLENGE & REFORM* 256 (1996).

goals of a government program.”<sup>24</sup> Or it is perhaps because a specialist becomes too engrossed in current policy niceties and loses sight of more fundamental legal debates.

Along similar lines, generalist judges may be relatively unlikely to defer to experts in a given field. Although certain measures of deference are baked into various legal doctrines—like deferential review of agencies’ statutory interpretations under *Chevron*<sup>25</sup>—and may be rigorously applied there, generic claims of deference based on the parties’ own expertise may fall on deaf ears.<sup>26</sup> Some generalist judges will chafe at the suggestion that they should not delve into the details of a specific decision or rule; they prefer to “ask the experts to explain their reasons” and to trust their own ability to “decide whether the rule ma[kes] sense.”<sup>27</sup>

In this substantive way, too, a generalist judge and a generalist appellate advocate are more likely to approach complex issues in the same way: They apply familiar tools of statutory and constitutional interpretation and employ traditional common law reasoning, in order to find a solid doctrinal foothold. Only then do they emphasize policy arguments, judiciously using them as a backdrop or as a persuasive gloss rather than relying on unadorned appeals to authority.

### *B. Generalist Advocates Are Better Positioned to Make Creative Arguments*

Aside from sharing the perspective of a generalist judge, a generalist advocate has inherent value because of the flexibility to think broadly and creatively. Exposure to multiple areas of the law

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24. *Id.*

25. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

26. For example, the court in *McConnell v. Howard University* stated:

We do not understand why university affairs are more deserving of judicial deference than the affairs of any other business or profession. Arguably, there might be matters unique to education on which courts are relatively ill equipped to pass judgment. However, this is true in many areas of the law, including, for example, technical, scientific and medical issues. Yet, this lack of expertise does not compel courts to defer to the view of one of the parties in such cases. The parties can supply such specialized knowledge through the use of expert testimony.

818 F.2d 58, 69 (D.C. Cir. 1987).

27. Guido Calabresi, *The Current, Subtle—and Not So Subtle—Rejection of an Independent Judiciary*, 4 U. PA. J. CONST. L. 637, 640 (2002). Judge Calabresi’s colleague on the Second Circuit, Judge John Walker, Jr., appears to agree:

Judges should be able to deal with all kinds of cases as we must do under the federal system. We ought to be able to handle different cases with equal skill. We ought to have the judgment to discern when good arguments are being made and when bad arguments are being made.

John M. Walker, Jr., *Comments on Professionalism*, 2 J. INST. FOR STUDY LEGAL ETHICS 111, 114 (1999).

means that insights from those diverse fields can be brought to bear, often with powerful results. Put more colloquially, generalist advocates are familiar with the frequent, and sometimes elusive, intuition that “this reminds me of something.” And for oral advocates, it is not surprising when judges express that same intuition, and ask the lawyer to connect the dots for them (or, conversely, to explain why the dots should be left unconnected).<sup>28</sup> That “peripheral vision” aspect of lawyering is often deeply powerful. Indeed, in Neal’s experience working alongside Deputy Solicitor General Ed Kneedler, who has argued more than 125 different Supreme Court cases, he was constantly amazed with the diverse connections Mr. Kneedler would draw between different fields of law to serve his client, the United States Government.

Looking at recent Supreme Court decisions, there are a number of cases in which the Court has plucked a mode of analysis from one area of law and transplanted it into another, seemingly disparate one. For example, in one patent case involving the level of knowledge required to show induced infringement, the Court borrowed a “willful blindness” standard that it called “well established in criminal law.”<sup>29</sup> Similarly, in a criminal case involving causation under the Controlled Substances Act, the Court both relied on employment discrimination cases and distinguished tort law cases.<sup>30</sup> Supreme Court Justices are often receptive to persuasive arguments-by-analogy, and a generalist without tunnel vision is better equipped to look to other subject areas for inspiration—perhaps for that perfect analogy that will carry the day.

Importantly, though, a generalist advocate can do more than simply poach arguments from *outside* the substantive legal area at issue. She can also bring a fresh set of eyes to spot arguments available *within* that substantive legal area. There are many agency practices, interpretations of statutes, or applications of key judicial decisions that become second-hand to the lawyers who interact with them every single day. It may be difficult, for example, for someone who has applied an agency regulation a thousand times to step back and wonder, “Is this regulation permissible under *Chevron*?” That can be a huge advantage of hiring generalist advocates, who are not

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28. See, e.g., Wood, *supra* note 19, at 1767 (“I have looked at cases from one field and have realized how an earlier decision in which I participated from a different field may suggest a creative answer to the problem. We still use the common law methodology of reasoning by analogy to a striking degree.”).

29. Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2068 (2011).

30. *Burrage v. U.S.*, 134 S. Ct. 881 (2014).



tainted by familiarity bias and who have no intuition that something is unassailable because *that is how things work*. Ours, in short, is to reason why.<sup>31</sup>

Such perspective (or, perhaps, lack of it) allows the best appellate advocates to challenge legal rules that are long-established but may not be well-reasoned. Recent Supreme Court cases illustrate the success that creative—often meaning “outsider” or generalist—appellate lawyers might have. A few examples: After more than a century of intra-session recess appointments by Presidents, advocates challenged the constitutional legitimacy of the practice.<sup>32</sup> They met with considerable success, although they did not ultimately persuade a majority of the Supreme Court.<sup>33</sup> In less headline-grabbing fashion, a Freedom of Information Act requester convinced the Supreme Court that lower courts had, for decades, been applying a FOIA exemption in a way that was flatly at odds with the text of the statute.<sup>34</sup> Clever lawyers in the federal government have also spotted longstanding errors, and successfully worked to overturn a decades-old constraint on agency action that could not be justified by the Administrative Procedure Act’s text.<sup>35</sup>

None of this is to say that specialists focused on a particular industry or substantive area of law will overlook winning legal arguments because they automatically accept entrenched practices or interpretations. Of course not. Nevertheless, there is serious value in maintaining a generalist practice and in nurturing an instinct to ask, “Why do we do things this way?” If the answer is tradition-focused rather than law-focused, there may be room for a successful challenge to the status quo.

### III. WHY THE BEST APPELLATE LAWYERS ARE NOT CONFINED TO APPEALS

Although it is important to emphasize that budding appellate advocates should fight the powerful trend toward specialization in the legal industry, it is not a revolutionary point. Debates about specialization and generalization have long raged, with treatments far more comprehensive than the one provided here.<sup>36</sup> There is a corollary trend, though, that has received somewhat less attention and that may be equally important. The best appellate practitioners are

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31. Cf. Alfred, Lord Tennyson, *The Charge of the Light Brigade* (1854).

32. See *N.L.R.B. v. Canning*, 134 S. Ct. 2550 (2014).

33. See *id.*

34. See *Milner v. Dep’t of the Navy*, 562 U.S. 562 (2011).

35. See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015).

36. See *supra* note 1.

not merely resisting the *narrowing* of their practices; they are, in fact, *broadening* their practices. Given that we have just argued that the most effective appellate advocates should be able to litigate any subject matter, broadening their practices may seem like an impossible task. But subject matter is not the only available axis here.

The other important axis is *time*—or, more precisely, the stage of the litigation. The most effective appellate lawyers no longer confine themselves to formal appeals, but are becoming involved earlier and earlier in litigation, or even becoming involved before litigation begins.<sup>37</sup> And savvy clients with important legal issues are recognizing the advantage of consulting appellate lawyers at the start of the process, rather than asking them to swoop in at the back end only. Those clients recognize that they may save significant amounts of time and money through an early investment in creative, big-picture thinking.

#### A. *Appellate Lawyers at Trial*

Perhaps the most obvious move for appellate lawyers to make is to inch backward from appellate-stage litigation to trial-stage litigation. It is not uncommon, for example, for appellate practitioners to work on dispositive legal matters in the trial court, as well as on the actual appeal itself.<sup>38</sup> That cooperation is likely to become even more common as time goes on, in part because of growing concerns about waiver<sup>39</sup> and about developing a strong record.

The waiver doctrine is fairly straightforward: “[A]rguments not raised before the district court are waived on appeal.”<sup>40</sup> There are, of course, nuances to the doctrine, as any other. For example, an argument must be raised in a clear enough fashion that a district court has the practical opportunity to rule on it.<sup>41</sup> But the gist is simple enough—give the district court a fair chance to decide an

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37. For example, about one-third of the phone calls that Neal receives from clients and potential clients are not about a pending appeal; rather, they are about some earlier stage in litigation.

38. For this reason, one major appellate practice dubs itself “Issues & Appeals” rather than adopting the more traditional “Appellate” label. See, e.g., JONES DAY, *Issues & Appeals*, [http://www.jonesday.com/issues\\_appeals/](http://www.jonesday.com/issues_appeals/). It is likely an apt name for most such practices.

39. We could more accurately use the term “forfeiture” instead of “waiver” to refer to the failure to preserve an issue or argument in the trial court. See *U.S. v. Olano*, 507 U.S. 725, 733 (1993) (“Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.”) (internal quotation marks omitted). Nevertheless, because “waiver” is used more often in common parlance, and because the distinction is unimportant for present purposes, we will use “waiver” here.

40. *Hicks v. Midwest Transit, Inc.*, 500 F.3d 647, 652 (7th Cir. 2007).

41. *In re Babcock and Wilcox Co.*, 250 F.3d 955, 961 (5th Cir. 2001).

issue with the benefit of your most compelling arguments, or you will not be able to raise that issue or those arguments before the appellate court.

Related to waiver, yet conceptually distinct, is the need to develop a thorough and strategic trial record. The trial record is the only factual information that an appellate court has available to it, aside from certain circumstances allowing for judicial notice. Although a particular legal argument may be formally preserved, that argument cannot be presented in its strongest form on appeal unless key facts have been introduced into the formal record. Or, as the Seventh Circuit has bluntly explained, “arguments that depend on extra-record information have no prospect of success.”<sup>42</sup>

Good appellate lawyers always have at their fingertips the argument that their opponent waived some key issue in the case, and they are always rigorous about quashing their opponent’s attempts to rely on extra-record material. Even more so in recent years. We admittedly have not performed any rigorous empirical studies, but a few rough Westlaw searches suggest that court of appeals decisions cite the waiver doctrine significantly more often now than they did, say, 20 years ago.<sup>43</sup> If that is true, parties need to be increasingly wary at the trial stage. Especially in high-stakes litigation, it is critical that parties seek appellate counsel for advice on issue preservation and record preparation.

It is often not publicized that a party hired an appellate lawyer to sit in the back of a courtroom during trial, or to draft law-heavy documents in the trial court, or to review law-heavy documents drafted by trial counsel. Occasionally, though, this appellate-consultation role garners some attention. In fact, the *New York Times* recently ran a piece about the “law guys” working on the Sheldon Silver public corruption trial in New York.<sup>44</sup> It noted that “[t]he two lawyers had largely disappeared during Mr. Silver’s three-week trial” but had “master[ed] the legal aspects of the case . . .” and made an appearance to debate an important legal question about jury instructions.<sup>45</sup> Coincidentally or not, bringing appellate advisors on

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42. U.S. v. Acox, 595 F.3d 729, 731 (7th Cir. 2010).

43. On top of that, some of those citations have occurred in the context of relatively strict applications of the waiver doctrine. The Third Circuit, for example, recently explained that “raising an issue in the District Court is insufficient to preserve for appeal all arguments bearing on that issue.” *United States v. Joseph*, 730 F.3d 336, 341 (3d Cir. 2013). Instead, a particular argument “presented in the Court of Appeals must depend on both the same legal rule and the same facts as the argument presented in the District Court.” *Id.* at 342.

44. Benjamin Weiser, *At End of Sheldon Silver’s Corruption Trial, the ‘Law Guys’ Take Over*, N.Y. TIMES (Nov. 22, 2015), <http://www.nytimes.com/2015/11/23/nyregion/at-end-of-sheldon-silvers-corruption-trial-the-law-guys-take-over.html>.

45. *Id.*

board (in a public way) seems to be a trend among politicians: Facing corruption charges, former Virginia Governor Bob McDonnell hired a team of both trial and appellate litigators.<sup>46</sup> In addition, when Texas Governor Rick Perry was indicted, he assembled a “legal dream team,” again including both trial and appellate litigators.<sup>47</sup>

Our personal experience seems to corroborate the trend and to underscore its utility. As one example, Morgan recently played this appellate advisor role for a major financial institution facing a trial in federal district court. She reviewed and commented on pre-trial motions, attended each day of trial, and strategized with the trial team in the evenings. While the trial team was necessarily engaged in the nitty-gritty of trial (assembling documents, crafting cross-examination outlines, creating a presentation for closing arguments, and so on), she was able to remain somewhat removed from those details. Instead, she monitored how the evidence coming in each day, or the decisions being made by the judge each day, might affect the two or three major legal issues that seemed destined for appeal. She also, of course, reviewed any new decisions by the judge to assess whether those decisions might provide unexpected fodder for an appeal. Being present at the trial meant she could help ensure that the key legal issues were preserved and that the record was clean. It also better positioned her to ultimately draft the briefs on appeal, as she already understood the full context of the trial and the arguments that the parties had previously made.

To be sure, clients may not always want to pay for appellate counsel to sit in the courtroom during a lengthy trial, or to look over every filing in the trial court. In high-stakes cases or cases involving novel legal issues, though, appellate practitioners can add value by becoming involved during key stages in which critical legal arguments could otherwise be lost: motions to dismiss, motions for summary judgment, motions in limine, proposed jury instructions, Rule 50 motions, and the like.<sup>48</sup> Even in less significant cases, if

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46. See Zoe Tillman, *Round Two: Bob McDonnell Lawyer Previews Appeal*, LEGAL TIMES (Jan. 7, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/06/bad-cc-beware-of-acronyms-in-the-d-c-circuit/>.

47. David Montgomery, *Rick Perry, Fighting Charges, Hires High-Profile Legal Team in Texas*, N.Y. TIMES (Aug. 19, 2014), <http://www.nytimes.com/2014/08/20/us/texas-gov-rick-perry-enlists-help-of-high-profile-lawyers.html>. In a case not involving politicians but no less high-profile, Barry Bonds hired a similar assortment of trial and appellate attorneys. See Juliet Macur, *All-Star Teams in Bonds Case: The Lawyers*, N.Y. TIMES (Mar. 20, 2011), <http://www.nytimes.com/2011/03/19/sports/baseball/21bonds.html> (describing trial attorneys joined by “a brilliant appellate lawyer and a whiz at legal theories”).

48. Of course, it is sometimes sufficient to challenge errors after a trial is over. For example, one of our former associates discovered a crucial error when reviewing the transcript

the parties anticipate an eventual appeal, it may be worth bringing in appellate counsel to consult on an especially key filing, in order to ensure preservation of major appealable issues. Appellate advocates should look for these opportunities to position a case for appeal as early in the process as possible.

### *B. Appellate Lawyers Before Trial*

Trial, of course, is not the only opportunity to shape the course of litigation. Indeed, the lessons that appellate lawyers and their clients have learned from appellate involvement at the trial level are not logically confined to that stage. The next frontier for appellate advocates, then, is the strategic decision point at the start of litigation, or even well before litigation begins. Appellate practitioners may be brought in to help frame the case, or to decide whether litigation is the right route for a client at all. Perhaps even earlier than that, they may be brought in to analyze design decisions for innovative products or services that will inevitably be the subject of litigation down the road. A very large percentage of Neal's work is in this space; roughly one-third of his practice is advising technology companies on products and their design before they have even been invented (let alone have become the subject of litigation and regulation).

It is difficult to provide examples of this sort of work, as clients may not be keen to advertise their attempts to better position themselves for anticipated, or feared, litigation. But it is not hard to imagine the types of cases in which an appellate generalist may be consulted for strategic advice well before trial. If there is a widespread product failure, a mass tort, or a significant change in the law, litigation may seem inevitable. And with a significant amount of money on the line, any such litigation (absent settlement) will ultimately be destined for appellate courts.

Beyond determining early in the process what claims or defenses may be available, the best appellate lawyers can provide insight into how to frame the debate, or in what terms to discuss novel products and industries.<sup>49</sup> When dealing with groundbreaking

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of a trial, which ultimately led to a criminal defendant being freed. See Ian Thomas, *How They Won It: Hogan Lovells Rescues Gen Re Exec*, Law360 (Sept. 16, 2011), <http://www.law360.com/articles/271980/how-they-won-it-hogan-lovells-rescues-gen-re-exec>. However, in circumstances where a challenge can be waived, even the most careful post hoc review may not be enough.

49. In one widely publicized recent example, the U.S. Government sought to compel Apple to create a program that would override security features on an Apple iPhone. See *In the Matter of the Search of an Apple iPhone*, No. 5:16-cv-00010 (C.D. Cal 2016). Although the matter was pending before a magistrate judge, a number of appellate attorneys (including

technologies in particular, there is often no clear legal framework to be applied. Major Silicon Valley firms (some of which we represent) have to grapple with these types of vexing questions all of the time. What is the right legal box in which to place the products or services of Snapchat, Uber, and Airbnb? What are the unforeseen liabilities? How should we be talking about new products or services? Can anything be changed to head off litigation before it starts? Can good legal advice at the front end help a company design better products and services that avoid litigation? These are monumental decisions that must be made by the time lawsuits are filed, but are best made far sooner than that. A huge slice of our practice today focuses on these questions.

#### IV. A FEW PRESCRIPTIVE NOTES

It is easy enough for us to opine that appellate lawyers should avoid too much subject matter specialization, and that they should in fact expand their practices beyond formal appeals. But how does one develop legal breadth? And how does one seek out new opportunities for multi-stage involvement?

For maintaining a generalist practice, mindfulness is key. Appellate advocates often seek out cases in which they have experience, and parlay that experience into a successful pitch for business. That is prudent, but it is no reason to develop tunnel vision. While we acknowledge the reality of law-firm economics, one effective way to nonetheless diversify a practice is by committing to pro bono work. As an initial matter, pro bono work is an almost-mandatory step for appellate associates at law firms who are trying to gain oral argument experience. Outside of the government, many lawyers' first oral argument in the courts of appeals comes in an appointed case—usually a criminal or habeas case, or an immigration case. That certainly was Morgan's experience; her first oral argument was delivered as a court-appointed attorney working on behalf of a habeas petitioner. For obvious reasons, cases on behalf of litigants with little or no resources are not law firms' bread-and-butter. They therefore all but ensure some degree of generalization.

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the authors) represented either Apple or one of the amici curiae. See Mealey's Data Privacy, *Amicus Briefs Filed in Apple, FBI Dispute Over Locked Phone*, Lexis Legal News (Mar. 7, 2016), <http://www.lexislegalnews.com/articles/6593/amicus-briefs-filed-in-apple-fbi-dispute-over-locked-iphone>. Several briefs sought to explain not just what the government had requested but how that request should be conceptualized in light of modern technologies and realities. See *id.*

It is not, however, just newcomers who can take on meaningful pro bono work and can expand the scope of their practice as an important corollary benefit. Neal continues to argue pro bono criminal appeals,<sup>50</sup> both because he believes strongly that there is a real need for zealous pro bono defense work, and because he believes strongly that criminal constitutional cases make him a better advocate in other unrelated fields. If an appellate advocate's practice is veering dangerously toward specialization, a pro bono case in an entirely unrelated field may be the first step toward righting the ship.

As for developing an appellate practice that spreads beyond the appeal itself, there are no easy tricks. The business case for such diversification is clear: Appeals to the Supreme Court or even the courts of appeals represent a limited pie. In fact, it may even be a shrinking pie. The Supreme Court now decides roughly 80 cases per Term, compared to about twice that many for most of the twentieth century.<sup>51</sup> The Federal Judicial Center, meanwhile, reports that filings in the courts of appeals have fallen by about 15% over the last decade.<sup>52</sup> In short, appellate oversight at trial and appellate insight before trial are not just good investments for clients; they are good opportunities for appellate practitioners seeking to leverage their generalist skill set beyond the naturally limited sphere of federal appellate court dockets.

Appellate lawyers can take advantage of such opportunities by discussing future developments with existing clients, by connecting with trial or regulatory lawyers within the law firm, or by seeking business that might initially seem outside their core competence. The important first step is simply peeling back the "appellate" label and acknowledging that the same skill set developed for appeals may be equally suited to other, less obvious tasks.

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50. See, e.g., *Kan. v. Carr*, 136 S. Ct. 633 (2016); *Kan. v. Cheever*, 134 S. Ct. 596 (2013).

51. For a visual depiction of how the Supreme Court's caseload has changed over time, see Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225, 1229 (2012). That, of course, represents the number of cases decided by the Court after plenary review, not the number of cases that come to the Court. The actual number of cases on the Supreme Court's full docket has in fact increased, from about 2,300 cases in 1960 to about 10,000 cases now. See *The Justices' Caseload*, SUP. CT. U.S., available at <http://www.supremecourt.gov/about/justicecaseload.aspx>.

52. See *Federal Judicial Caseload Statistics 2014*, SUP. CT. U.S., available at <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014>.

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Justice Louis D. Brandeis once remarked that, as a practicing lawyer, he acted as “counsel for the situation.”<sup>53</sup> In the context in which he used the phrase—to suggest that he was an autonomous figure accounting for both parties’ interests rather than a pure client advocate—the formulation raised some eyebrows.<sup>54</sup> In the context here, though, it is an apt turn of phrase. Appellate lawyers should strive to become “counsel for the situation,” rather than merely counsel for one isolated appeal. And to fully grasp a client’s “situation” in all of its subtle nuances, appellate lawyers must nurture the unique peripheral vision that a generalist legal practice brings.

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53. THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATION OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916–1975, 287 (Roy M. Mersky & J. Myron Jacobstein eds., 2d. ed. 1977).

54. See, e.g., Katherine A. Helm, *What Justice Brandeis Taught Us About Conflicts of Interest*, 35 J. LEGAL PROF. 1, 18 (2010) (opining that the comment “could hardly be considered anything other than a blunder of epic proportions”).



