

Garden State CLE Presents:



Winning your case in the Appellate Division:
Strategy and tactics

Instructor:



Hon. Robert A. Fall, P.J.A.D. (ret)

WINNING YOUR CASE IN THE APPELLATE DIVISION: TACTICS AND STRATEGIES

I. Presenters

- A. Honorable Robert A. Fall, Presiding Judge, Appellate Division (ret.)
- B. Robert Ramsey

II. Structure of the Appellate Division

- A. One court with multiple panels.
- B. Eight four-judge parts for a total of 32 judges. (A 33rd judge is temporarily assigned to the Supreme Court when a vacancy has not been filled.)
 - 1. Senior judge is the presiding judge, followed by the second, third, and fourth tier judges
 - 2. The three senior judges have two law clerks each. The remaining judge has one law clerk.
- C. Thirty-nine week term from September to June.
- D. Each judge must sit for two weeks in the summer.
- E. Administrative Judges
 - 1. Presiding Judge for Administration (currently Judge Carmen Messano)
 - 2. Deputy Presiding Judge for Administration (currently Judge Jack M. Sabatino)

III. Initial Screening Process

- A. The Appellate Division has a huge administrative staff.
- B. Each part has an administrative team. Each team has a team leader.
- C. The teams make sure the submissions comport with the Rules of Court.
- D. Practitioners should avail themselves of the wealth of information on the New Jersey Judiciary website, www.njcourts.gov.
- E. The teams will cull out appeals that they believe are appropriate for diversion to a civil appeals settlement judge.
- F. After the team leader determines that the submissions are perfected, *i.e.*, technically correct in form, the case is sent to the Central Researching Bureau of the Appellate Division, which is made up of twenty-four fulltime attorneys, each operating within their own specialty. Initially, the head research attorney will determine if there is an issue of public importance or if the case is complex, and if so, will assign an attorney to write an

in-depth memorandum analyzing issues and making recommendations to the court. This occurs in approximately 10% of the cases reviewed by the head research attorney.

G. All remaining cases are assigned to the eight parts on a random basis by docket number. The law clerks will review the cases after they meet with the judges to see what they are looking for in the case memorandum.

H. While the law clerks are working on their memo, and before the judges even look at the central research memo, each judge is responsible for scouring the record, *i.e.*, reading the complete record/transcripts, and sending the other judges on the panel a preliminary memo three or four pages in length, called a “pink” simply because it is written on pink paper, containing the judge’s initial impressions of the case. Those impressions will include whether the judge is inclined to affirm, reverse, or is undecided, whether the decision will be subject to oral argument, the issues the panel should focus on, etc.

I. After the pinks have been circulated and the clerk’s memo reviewed, the judges will discuss the case.

J. Immediately after oral argument, which most judges encourage, the presiding judge of the panel determines which judge will write the opinion. Drafts of the opinions, called “greens” because they are written on green paper, are circulated among the panel members. After the judges review the greens and confer, the opinion is cleared, or further discussion is initiated, and a judge may decide to write a concurring or dissenting opinion.

IV. Criteria for Publication (R.1:36-2)

A. Must be a three-judge panel.

B. Case of first impression.

C. Unique case that will add to the body of law.

D. Case will aid practitioners or trial courts in interpreting or applying the law.

E. Case of public importance or concern.

F. Note: Author of the opinion may have volunteered or been assigned by the presiding judge of the panel.

V. Oral Argument (R. 2:11-1(b))

A. A request for oral argument must be made within 14 days after the respondent’s brief is served, or upon order of the court.

B. Pointers

1. Request for oral argument should be based on reflection and tactical considerations.

2. Know the record. The court will know the facts and procedural history, so do not repeat any of it except to the extent necessary to argue a pivotal issue.
3. Never read to the court.
3. Know the names and reputations of the judges on the panel, and the decisions they have written that may bear on the case at bar.
4. Watch the judges in advance to learn their oral argument styles.
5. Make your strongest argument first. This will emphasize the righteousness of your client's position.
6. Tell the court if the trial judge never put findings of facts and conclusions of law on the record. This is cause for reversal.
7. Emphasize that the legal conclusions of the trial court are not entitled to deference; they must be determined *de novo* by the appellate court.
8. If it exists, hone in on any misapplication of the facts to the law.

C. Common Mistakes

1. Attorney does not listen to the question.
2. Attorney needs clarification, but is afraid to ask for it.
3. Attorney fails to respond to the judges' questions.
4. Demeaning the trial judge.
5. Failure to accept the factual findings and credibility determinations of the trial judge.

VI. How can a case initially declined for publication later be published?

A. *See* State v. Bendix, 396 N.J. Super. 91 (App. Div. 2007), State v. Sylvester, 437 N.J. Super 1 (App. Div. 2014), and Silver v. Silver, 387 N.J. Super 122 (App. Div. 2006), each of which was published after initially not being approved for publication.

B. This generally happens when an attorney, usually one of the litigants, writes a letter to the Appellate Division asking that the decision be published based upon the criteria in R.1:36-2.

C. If there were only two judges on the panel, a third must be added, and the case may need to be re-argued, in order to publish the decision.

VII. Appellate Division Motion Practice

A. Each week, two of the four judges on each panel are assigned to motions. Almost all are decided on the papers, but on rare occasions there is oral argument.

- B. Each year, approximately 7,000 motions are filed with the Appellate Division.
- C. The decision is generally a one-page order indicating that the motion was granted or denied.
- D. Emergent applications must be filed using a form that is on the judiciary website. The moving party must make a preliminary showing of a likelihood for success and that immediate irreparable damage will result if the emergent relief is not granted.

VIII. Interlocutory Appeals

- A. An appeal is interlocutory if it is not final as to all issues.
- B. Need to make a motion for leave to appeal and show likelihood of success and that something catastrophic will happen if leave is not granted.
- C. Approximately 20% are granted.

IX. Excessive or Illegal Sentence Panels

- A. Between 80 and 90 percent of excessive or illegal sentence applications are filed by the Office of the Public Defender.
- B. Oral arguments only, no briefs.

X. Appellate Division as Court of Last Resort for Vast Majority of Cases

- A. Only 7% of cases will be granted certification by the New Jersey Supreme Court.
- B. Accordingly, the appellate judges, who are chosen for their intelligence and ability to move cases expeditiously, take the appeals very seriously.

XI. Advice for Appellate Advocates/Secrets for Success

A. Oral Argument

1. If your case is very strong, do not request oral argument. Otherwise, you risk opening Pandora's box.
2. Be prepared to tell the judges exactly where important information is located in the record.
3. Know the judges on the panel and their decisions, even unpublished decisions. *See R. 1:36-3* for the prerequisites of citing an unpublished opinion.
4. Do not be arrogant.
5. Be prepared to jump around based on the judicial questioning.
6. Be prepared to counter your adversary's arguments.
7. Do not repeat facts and procedural history. Since they have already read it, it is insulting to the panel.

8. Always get back to your best argument at the end, the righteousness of your client's position.
9. Anticipate the judges' questions.
10. Know and be prepared to cite the law in your favor and to distinguish the opposing cases.
11. Do not be afraid to ask, in advance with notice to your adversary, to use maps, charts, and photographs if they will be helpful.
12. Keep in mind that the function of the Appellate Division judges is to interpret existing law, so do not ask them to create new law.
13. In very significant cases, consider hiring retired appellate judges to participate in a mock argument.

B. Brief

1. Always submit a preliminary statement because it is the first thing the judges read and it is your opportunity to direct them to the focal point of your position immediately.
2. Make sure the preliminary statement concisely articulates the issues and why they should be decided in your client's favor.

C. Go to the appellate section of the judiciary website and read the Standards for Appellate Review.