

Foreword

The difference between trial practice and appellate advocacy has often been described as the distinction between a sword and a shield. As explained by Justice Rehnquist in *Ross v. Moffitt*, 417 U.S. 600 (1974), in criminal cases, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below. The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.

The sword analogy perfectly captures the essence of appellate advocacy. An appeal is an attack on what transpired at the trial court; it is a final opportunity to correct an injustice and secure what should have been the proper result in the first instance.

Beyond this, it is self-evident that the professional life of an attorney affords him the opportunity to help hundreds, if not thousands of individual clients over the course of his career. While these individual cases have enormous importance to the affected clients, they contribute little or nothing to the overall development of the law when resolved by way of agreement or other disposition at the trial level. By contrast, a case that goes through the appellate process has the potential to establish controlling legal principles that may well live on in perpetuity, affecting the actions of future generations of judges, litigants and lawyers. Once again, it is the appellate attorney in his capacity as a sword for his client that plays such a vital role in the development and advancement of the law.

With these precepts in mind, this volume of the New Jersey Practice Series is designed to be used by the attorney who only rarely is called upon to play the role of his client's sword. There is no question that for most lawyers, a trip to the Appellate Division or the Supreme Court is a rare occurrence. Yet when the situation arises and an appeal must be filed, even the most experienced trial attorney is suddenly confronted with an arcane system of pleadings, briefs and oral advocacy that is utterly distinct from trial work. Simply stated, successful appellate advocacy requires its own specialized skill set. This volume is intended to provide a pathway to acquiring those skills and to enable the novice appellate advocate to navigate this complex field of substantive and procedural law. It has been organized in a manner that will allow the user to research and quickly find key procedural and substantive topics. Although the discussion of the various subjects is comprehensive, the materials have been designed to be easy to understand and use for every step in the

appellate process.

One final thought about appellate advocacy is worth noting. The intellectual challenge of researching, structuring and writing a brief demands the best efforts of the appellate advocate. Additionally, after the brief has been filed, there are few experiences an attorney can have that are more exhilarating than arguing before an appellate panel. However, the best part of appellate practice is the sense of pride the advocate will feel after the court's decision has been published, knowing that it will indefinitely contribute to the evolving body of law on the subject he litigated before the appellate tribunal.

I invite you to explore these additional titles I have authored in the New Jersey Practice Series:

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June 12, 2025