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ARTICLES

Appealing Dismissal of Federal Claims upon Remand of State Law Claims

By Lawrence A. Kasten

Federal courts and scholars have extensively considered the question of whether orders remanding actions to state court are appealable. As is explained below, many questions in this area recently have been resolved by the Supreme Court. There has been relatively less discussion, however, about appellate procedure in cases in which a district court properly assumes jurisdiction over an action that includes both federal claims and state-law claims, dismisses the federal claims, and then remands the remaining state-law claims. Although proper procedure in this area appears relatively clear at this time, the matter is nevertheless appropriate for discussion for at least two reasons. First, it implicates important appellate timing issues, particularly for claimants who must understand the rules so that they do not forfeit an appeal. Second, it creates the possibility of splitting a case between federal and state courts even though the parties may not desire such a result.

Consider the following example. The plaintiff brings an action in state court, which the defendant removes because it includes a federal claim in addition to state law claims. As any first-year civil procedure student can recite, the district court’s jurisdiction over the federal claim also gives it subject matter jurisdiction over factually related state law claims under the doctrine previously known as “pendent” jurisdiction and now codified in the federal supplemental jurisdiction statute. 28 U.S.C. § 1367. Assume, however, that some time later, the district court grants a motion to dismiss the federal claim.

The district court must now decide what to do with the pending state law claims. Under the supplemental jurisdiction statute, the district court has discretion to remand the action back to state court, because only state law claims remain. 28 U.S.C. § 1367(c)(3). And appellate courts generally hold that once the federal claims are gone, district courts ordinarily should exercise that discretion to remand the state law claims unless retention of the action would serve judicial economy or other interests. *E.g.*, *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 56–57 (2d Cir. 2004); *see Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010) (“[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims.”) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)).

Assume, in this hypothetical example, the district court follows this law and, at the plaintiff’s urging, does indeed remand the state law claims. What happens now? This article addresses two

facets of this question. First, can the defendant appeal the remand order? Second, if the plaintiff wishes to appeal the dismissal of the federal claim, must it do so immediately?

For several years, the courts of appeals were in conflict about whether the defendant could appeal the district court's decision to remand the case. The controversy arose because the removal statutes provide that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). Some courts held this language was plain and precluded federal appellate courts from hearing appeals from remand orders; others held this language applies only when a remand order is based on lack of subject matter jurisdiction, which is not implicated by a discretionary remand under the supplemental jurisdiction statute. *See generally Carlsbad Tech., Inc. v. HIF BIO, Inc.*, 129 S. Ct. 1862 (2009). In 2009, the Supreme Court adopted the latter view and held that, assuming removal was proper in the first place, a district court's order remanding supplemental state law claims may be reviewed on appeal. *Id.*

It should be noted that several members of the Court expressed discomfort with this holding and would have preferred a plain-language reading, but felt constrained by the Court's prior decisions because no party before it was asking for reconsideration of that precedent. *Id.* at 1867 (Stevens, J., concurring); *id.* at 1868 (Scalia, J., concurring); *id.* at 1869 (Breyer, J., concurring). Justice Breyer suggested "expert" consideration of a statutory amendment may be in order. *Id.* at 1869–70. Justice Scalia indicated reconsideration might be appropriate in a future case. *Id.* at 1868. Accordingly, further developments in this area are possible and perhaps even likely and should be carefully monitored by federal practitioners.

The second issue considered in this article—whether the plaintiff must immediately appeal the district court's dismissal of the federal claims or may instead wait for final resolution of the state law claims—has received relatively less attention. If the district court, in the hypothetical example above, had elected to retain supplemental jurisdiction over the state law claims, the answer would be clear: The plaintiff could not appeal from an order dismissing only the federal claim but not the state law claims unless the district court entered a final judgment on the federal claim pursuant to Federal Rule of Civil Procedure 54(b), after making an "express[] determin[ation] that there is no just reason for delay." (This assumes that none of the special grounds for an interlocutory appeal under 28 U.S.C. § 1292 exist.) This is so, of course, because an order resolving some, but not all, claims in an action is not a "final" decision suitable for appeal under 28 U.S.C. § 1291 unless the district court makes an express Rule 54(b) determination. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1976); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956). This leaves the question of whether the rule is different if the district court remands the state law claims instead of retaining them. The answer to that question appears to be yes.

Courts looking at the question generally hold that, once the state law claims are dismissed, there is nothing left to be decided in the district court, rendering the dismissal of federal claims

appealable under section 1291. *Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 884 (10th Cir. 2011); *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1209 n.1 (10th Cir. 2000) (collecting cases). Although such cases challenge traditional notions of finality, because remand leaves the merits to be decided (albeit in a different venue), these courts appear to view a complete surrender of jurisdiction by a federal court to a state court to be enough to create finality.

This analysis is consistent with the Supreme Court's decision in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), that a remand from federal to state court on abstention grounds renders a case adequately final to allow appeal of the remand order pursuant to the "collateral order doctrine." Although the Court did not reanalyze this section 1291 issue until 12 years later in *Carlsbad Technology*, a recent decision from the Ninth Circuit holds that *Carlsbad Technology's* analysis necessarily implies that section 1367 remand orders are final decisions under section 1291. *Harmston v. City & Cnty. of S.F.*, 627 F.3d 1273, 1277 (9th Cir. 2010). If a remand of state law claims renders a case sufficiently final to permit an appeal from the remand order itself, it is reasonable to conclude that a fully resolved federal claim is similarly appealable after the remand of all other claims.

This also is a sound result from a pragmatic standpoint. Any other would run the risk of rendering the dismissal of the federal claim unreviewable, because a state court of appeals likely will not review a dismissal order by a different court. *See Hyde Park*, 226 F.3d at 1209 n.1 (citing 14C Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure* § 3740 (3d ed. 1998)). Yet, some important considerations remain.

First, be aware of the time for filing a notice of appeal. Because, under the authority above, the remand renders the case final notwithstanding the otherwise interlocutory nature of the order dismissing only the federal claim, the plaintiff should carefully adhere to Federal Rule of Appellate Procedure 4. In other words, plaintiffs in this position must understand that finality—and thus the beginning of the time for appeal—likely exists right away, not after resolution of the remanded state law claims in state court.

At this time, however, this issue does not appear to have received enough judicial attention for there to be clear rules about *exactly* when the time for appeal begins to run. The Tenth Circuit has suggested that an appeal is not ripe until the district court has entered both a remand order and a judgment pursuant to Federal Rule of Civil Procedure 58. *Coll*, 642 F.3d at 884. It would seem that, at a minimum, the appeal period should not start until the district court remands the state law claims, because until then there is no finality. The purpose of this article, however, is not necessarily to answer the question but to raise it, to remind thoughtful counsel to research and carefully consider the issue. The consequence for failing to do so can be severe. Recent Supreme Court decisions regarding the time for appeal are extremely rigid, notwithstanding potentially harsh consequences, counseling in favor of an abundance of caution wherever the law about the time for filing a notice of appeal may be developing or debatable. *See, e.g.*, Lawrence



A. Kasten, “Time Limits for Filing a Notice of Appeal Are Mandatory and Jurisdictional—Really,” *App. Prac. J.*, Fall 2010.

Second, the ultimate result may be that the case becomes split between state and federal courts. If the parties do not seek and obtain a stay, they may be required to litigate the merits of the state law claims in state court while the federal appeal runs its course. For example, in *People v. Bhakta*, 135 Cal. App. 4th 631, 636–37 (Cal. Ct. App. 2006), the court held that, absent a stay from the federal court of appeals, it was not required to refrain from considering and resolving the merits of remanded state law claims, even though the federal court could ultimately reverse a remand order. (The questions of whether a state court judgment on the merits would moot the appeal of a remand order or would be enforceable notwithstanding an inconsistent result in the federal appellate court are beyond the scope of this article.) Accordingly, inconsistent arguments or rulings may become a concern, especially considering that the claims in question will be factually related (because that would have been the basis to join them together in federal court in the first place).

Similarly, if the federal court of appeals, after many months, or even years, reverses the dismissal of the federal claim and remands it back to the district court, the parties may be left with no procedural device to reunite that claim with the state claims. A quote from a recent Ninth Circuit case exemplifies the issue and also the absence of any easy solution:

[B]ecause we reverse the district court’s dismissal of some of Plaintiffs’ federal claims, the district court should reconsider on remand whether it should exercise supplemental jurisdiction over the state-law claims. We realize, of course, that pursuant to the district court’s remand, the parties are currently litigating the state law issues in Arizona court.

Lacey v. Arpaio, No. 09-15703, No. 09-15806, 2011 WL 2276198, at *14 (9th Cir. June 9, 2011).

Indeed, depending on how long it takes the federal court to resolve the appeal, the state law claims may no longer even be pending or they may themselves be subject to an appeal in state court. The ironic consequence is that the very judicial economy considerations that underlie liberal joinder, supplemental jurisdiction, and the final judgment rule might end up being undermined by the remand. Accordingly, when deciding whether to urge or oppose remand after the dismissal of federal claims, counsel should give thoughtful consideration to what the case might later look like if the dismissal of the federal claim is reversed.

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Advice to Young Lawyers: Oral Argument for My Adversaries

By Brian J. Paul

Nearly two years ago in this newsletter, I offered some advice to you, my adversaries, on brief writing. See “Advice to Young Lawyers: Legal Writing for My Adversaries,” *App. Prac. J.*, Spring 2010. That advice was so well received that I thought I should round things out with some advice on oral argument. Love your enemies and do good unto them that oppose you—that’s what I was taught. Just because you may be on the wrong side of things, while I fight for all that is good and just, doesn’t mean we can’t learn from each other. So I offer the following words of wisdom to you, my esteemed opposing counsel, sincerely and in good faith. No, really, I do.

The first thing to remember is that you need to have the proper frame of mind as you begin to think about your upcoming oral argument. Make no attempt to view your position with doubt or skepticism, as an appellate court judge might, particularly if you’re the appellant. That way of thinking will only undermine your confidence. Ignore the difficulties of your case. You must believe the court will accept your arguments hook, line, and sinker; indeed, you can never have too much confidence in your position. This will prepare you for the moment in oral argument when you realize the court doesn’t necessarily see things your way. With the proper frame of mind, not only will you be able to deal with this adversity, but also you’ll be outraged! And this is exactly how you want to appear at oral argument. That way the court will know that whatever doubts it ever had about your case were clearly mistaken.

While you should obviously prepare for an oral argument, you shouldn’t *over*-prepare. Re-reading the record and the cases cited in the briefs is a waste of time, even counterproductive. You need to leave yourself a certain amount of (how shall I put it?) “flexibility” in answering questions at oral argument. The facts and the law will only weigh you down. If you can’t answer a question off the top of your head about something that happened in the trial court, it probably wasn’t important anyway. Just confidently answer the question the best you can, preferably with something you think the judges want to hear, and move on. Better to do this than to tell the court you don’t know the answer. You’ll look like a dunce if you admit your ignorance, and, besides, if the court catches you in a half-truth, you can just turn the situation to your advantage by admitting you must be “mistaken.” This gives you the appearance of forthrightness. As Mark Twain said, “A man is never more truthful than when he acknowledges himself a liar.”

One thing in particular that you shouldn’t worry about as you prepare for an argument in federal court is subject matter jurisdiction. If the case has gone as far as oral argument, you can assume jurisdiction exists. Federal appellate judges could care less about this procedural nuance.

Nor should you attempt to anticipate the questions you'll get at oral argument, but if you do engage in this fruitless thought experiment, you should concern yourself with the answers you might give in response to those questions. Rarely will you get a hot bench. This is for two reasons. The first is that the judges want to give you plenty of time to talk about what *you* want to talk about. Oral argument is not about giving the court the opportunity to engage you in dialogue about the case or about having the chance to test the limits of a proposed rule or holding or even about clarifying certain facts and legal arguments. Oral argument is about giving you, the advocate, the opportunity to recap, rehash, and repeat what you wrote in your briefs.

Therefore, if you're inclined to practice your argument at all, don't bother mooting it. Simply script your argument, making liberal use of excerpts from your briefs, and practice reading it in a stentorian voice. Learn to use grandiose hand gestures. And purchase some reading glasses even if you don't need them. This little affectation gives lawyers, especially young lawyers, a look of erudition and experience.

In the interest of full disclosure, I should point out that some lawyers do think it is a good idea to moot cases with other lawyers, particularly those who do not specialize in the area of law at issue. Appellate judges are by and large generalists, and they may not necessarily be expert in, say, the law governing reinsurance contracts. And so, the theory is that you need to be prepared to plainly communicate your ideas and thoughts to an intelligent but non-specialist court. Balderdash! The court will think you don't know what you're talking about if you don't speak the lingo. So, lard your script with all of the specialist jargon you can muster, as you no doubt have done already in your briefs.

Which brings me to the second reason appellate court judges are typically so reserved at oral arguments: They never read the briefs beforehand. Judges believe doing so would only bias them. It would be like reading a movie review that gives away the ending. This makes appellate judges naturally more inclined to give you ample uninterrupted time to talk about your case. An extended recitation of the facts with pinpoint citations to the record is thus always advisable. Do not just jump in and get to the point. Start with the complaint or indictment and chronologically retrace the background of the case, both factual and procedural. I have never seen an appellate court judge get impatient when a lawyer has tried to do this in the past.

But before getting into the facts, you've got to start with a big, bold introduction. The introduction is your opportunity to shine, to show off your oratorical skills. So, begin with something sensational—over the top, even. Think Ringling Brothers and the Royal Shakespeare Company all rolled up into one. I once heard an oral argument in a sexual harassment case where the plaintiff's counsel started off by quoting what purported to be the alleged harasser's own words: "What color is your bra? Does it match your panties?" At which point Judge Rover asked counsel, "Are you speaking to Judge Posner?" (If you didn't know, Judge Posner happens to be a man.) The courtroom erupted in laughter, which is not exactly the reaction plaintiff's counsel had

probably hoped to elicit, but so be it. The gimmick got the court's attention, and that's really all that matters.

Now, let's pause here and take a moment to discuss some of the more mundane aspects of oral argument. What, for example, should you bring with you to the podium? Some lawyers tote a neatly organized three-ring binder or a manila folder with one sheet of bulleted notes on either side. I guess that's all right. I learned in high school debate to use three-by-five-inch index cards. Thumbing through a stack of note cards like David Letterman doing the Top Ten is far more professional, in my opinion. Or, better yet, you might just carry a sheaf of loose-leaf papers. I once saw a very nervous lawyer drop what appeared to have been a ream of paper on his way to the podium. The paper scattered in every direction—upside down, right side up, all over, and out of order. The judges just stared at him in horror as he fumbled around trying to scrape his notes (and his dignity) off of the floor. The gallery murmured. The clerks smirked. But while others may have viewed this fine lawyer with bemusement, I knew better; whether he knew it or not, he was on to something. If you look incompetent, you improve your chances of success. Judges pity bumbling lawyers.

Another way to invoke pity is by proper handling of exhibits, as this same lawyer demonstrated. It was an intellectual property case, and he wanted to show how the defendant had copied certain aspects of his client's product. So, he had pictures of the competing products blown up and placed side by side on a poster board. Good idea. The "problem" was that when he went to put the poster board on the easel, it tipped over. He tried to get the exhibit to stay put three or four times, but each time it flopped forward, until finally his associate got up to help. She got the exhibit to stick. You might think the lawyer should have had his associate handle the poster board from the start, particularly because he was so nervous. But his was the sounder strategy by far. Courts want to help the hopeless, and he looked hopeless indeed.

Once you get past your opening and have established the proper tone, slow down, let the court catch its breath, and then read your argument—deliberately, ploddingly, word for word. Do not engage the court in a discussion. Regard questions as interruptions. This is *your* show, *your* time. So, there is no need to make eye contact with the judges. Avoiding eye contact has the happy advantage of not only discouraging questions from the bench but also of signaling proper deference. Judges respect lawyers who are obsequious. So, reinforce your visible obsequiousness with verbal obsequiousness. Tell the court, for example, how wonderful it is to appear before it. Or, if you are lucky enough to have the author of a key decision on your panel, remind the judge of that fact and mention what an incisive, groundbreaking case it is.

If the court does ask questions (which, again, is unlikely), inform the court that you will be deferring your answers until the end of your presentation. It is far more important that you finish your prepared remarks than it is to satisfy the court's idle curiosity.



If you get a hypothetical question, preface your answer with the following words: “Those aren’t my facts.” Hypotheticals are often a sign of confusion borne out of a lack of knowledge. So, take hypotheticals as an opportunity to clarify the court’s obvious misperceptions about your case.

Then transition into a ponderous dissection of case law, discussing the facts and holdings of each key opinion. Quote liberally from precedent. And don’t forget to give the court a citation for each case that you discuss. Watch as the judges furiously record everything you say. You want their notepads to look like a table of authorities by the time argument is over.

Know that all questions are hostile. Never will a judge intentionally throw you a softball. Every question is a curveball. If you sense the question is friendly, you’re wrong. So, watch out.

I have seen some lawyers make the mistake of answering questions directly. One technique, odd though it may be, is to respond to a yes or no question with “yes” or “no,” and then, if necessary, to elaborate on the answer. That technique is for suckers. There’s no need to hurry. Let the answer unfold like a good novel. Keep the judges in suspense. The court will listen patiently as it wonders whether you are answering the question that was asked.

Sometimes questions are designed to elicit concessions. Never, ever concede anything. If you’ve come to the argument minimally prepared, as I have suggested you should, you likely won’t know enough about your case to discern whether something can be conceded or not. So, it’s just better not to concede anything at all. I recently observed an oral argument where the court had a question about some testimony in the trial court record. Counsel couldn’t remember the testimony, and so after some stumbling on his part, one of the judges flipped to where it was in the appendix and read it to the lawyer. “Isn’t that what your own client said?” the judge asked. The lawyer wisely refused to acknowledge straightforwardly that the judge was quoting from the actual language of the transcript. “Well, if that’s what you *say* my client said, then I guess I’ll have to take your word for it,” the lawyer responded with not a little skepticism. Attaboy! For all the lawyer knew, the judge could have been trying to pull a fast one on him. Concede nothing!

Finally, a word about rebuttal. The key here is to be exhaustive. Don’t limit yourself to two or three critical points. Rebut every one of your opponent’s arguments seriatim. And do so even if it’s clear the court is in your corner. If this takes more time than you have left, don’t sweat it: Ignore the red light and take all the time you need. The allotted time for argument is merely a suggestion. The court will appreciate your thoroughness.

I could go on, but you can learn only so much about oral argument by reading about it; you must actually put these principles into practice. That is why I offer private, one-on-one tutoring sessions. Mention this article the next time we are on opposite sides of an appeal and I will provide one complimentary lesson tailored to our case. What do you have to lose?

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Appellate Practice

FROM THE SECTION OF LITIGATION APPELLATE PRACTICE COMMITTEE

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Appellate Advocacy: A Young Attorney's Perspective

By Lara O'Donnell Grillo

Appellate practice is a specialty often viewed as favoring experienced attorneys and requiring an advanced skill set. As a young attorney, I have sought and considered much advice regarding how to pursue an appeal. Here, I share some of what I have learned through experience in several years of appellate advocacy comprising civil and criminal appellate practice, a federal appellate clerkship, and an appellate internship at the U.S. Attorney's Office. Throughout, I have found that the fundamentals of hard work and good writing have never steered me wrong, even against the subtle advantages of more experienced counsel.

Constructing the Brief

Value Substance over Strategy

As young attorneys, we often think, because we are essentially told, that a brief should be a masterpiece of rhetoric. Among other sage advice, we seek to employ that elusive craft of persuading while appearing neutral. A strategic and persuasive statement of facts, in particular, is considered essential to effective brief writing. The appellate advocate must be at once "a rhetorician, a semanticist, and a stylist." *Appellate Practice Manual* 188 (ABA Section of Litigation 1992).

Such qualities will unquestionably work to the advantage of an appellate practitioner who has them, but if they were a necessity, there would hardly be an attorney, least of all an inexperienced one, who could effectively pursue an appeal. The truth is you don't need to be that clever. At least, I'm not. And a bungled effort at artful persuasion is far less effective than a straightforward, even-keeled composition, even if it is a little dry. In my experience, guessing at this strategy is a risk with little reward. Few practitioners can undetectably manipulate the mind of the reader. Most attempts are transparent to judges and clerks, who are versed in this strategy. Moreover, I find that it detracts from the essential task of brief writing. I want to persuade the court that I am right, of course, but this can be achieved without subliminal messaging.

Instead, I like to take a page from my government experience. When writing briefs for the government, I was taught to state the facts as neutrally as possible because the court will likely rely on my statement. The approach was simple and effective. Perhaps it had something to do with the government's advantage as appellee in most criminal appeals or with the measure of credibility that came with the office, but this approach translates well to both private civil practice and criminal defense. It is also particularly suited to less experienced attorneys.

Attempting to give a fair presentation of events takes the guesswork and distraction out of brief writing. You should still tell the story from your client's perspective—that is, the way that shows

why the law and the record support your arguments. Focus, however, on what a successful brief *must* contain: a plain, usually chronological statement of facts; accurate and extensive citation to and reproduction of the record; thorough research and citation of legal authority; and a clear analysis that draws substantially from the facts and evidence.

Plain and thorough facts also present the young attorney as a serious and credible advocate. This, more than anything else in your control, will influence how the court approaches your arguments. The good and bad news for young attorneys is that your reputation does not precede you. A clean, well-crafted statement of facts encourages the court to rely on you as it does the government or any other practitioner who has established credibility with the court.

There is, however, no guarantee the statement of facts will shape the court's first impression of the case. How and in what order the court reads a brief is a matter of chance and personal preference. If you are the appellant, the court may still begin its review of the case with the appellee's brief or the district court's rulings. Even if the court reads your brief first, it is just as likely to start with the first argument heading, the statement of issues, or the summary of argument. Moreover, the court is likely wondering what opposing counsel has to say about the issues and keeping an open mind. The statement of facts should be well presented, as should all sections of a brief, but its most important function is informational. *See id.* at 199.

Even if your statement of facts, read alone, has managed to lead the reader stealthily to your corner, the argument section inevitably forces your hand. The argument properly contains your analysis of the issues and what you believe the court should do. If, after reading your argument, the court believes in retrospect that your statement of facts gave an overly skewed presentation of events, you may find your credibility in question and your arguments under scrutiny.

On the other hand, a strong argument section following a clean statement of facts is always persuasive. In addition to thorough research and legal analysis, an effective argument will draw heavily on the facts and the record. It is therefore critical that the court find your facts reliable.

Finally, even a strong case will not necessarily lend itself to a show-stopping brief. Judges understand this. When reviewing the dry facts of your mortgage priority issue, the court is not expecting the final installment of *Lord of the Rings*. Your main task is to provide the court with the substance it needs to rule in your favor. A clear, thorough, and fairly presented case will make it easy for the court to do so.

Appeal to Reason over Emotion

Led by the observation that at times judges, like all of us, are influenced by emotion, the temptation arises to target those emotions in the brief. I tend to avoid this approach. Particularly as a young attorney whose strengths and weaknesses in the art of appellate advocacy are still being sorted out, I appeal as strictly as possible to reason.

The primary concern with appealing to emotion is not that it precludes a reasoned analysis but that emotional elements can make it appear as if you are trying to compensate for weaknesses in your argument or in the record. It will not ultimately undermine sound reasoning, but it will raise skepticism. To the extent your logic is debatable, you have made your case appear weaker, and your credibility is now threatened.

In my experience, appellate judges rarely make emotional decisions. I have seen judges genuinely sympathize with victims of obvious child abuse or expend significant time and emotion on cases that would separate families, but rule against their sympathies because the litigant sued the wrong party, clearly broke the law, or otherwise failed to meet the standard for reversal.

In a criminal appeal in which a U.S. court of appeals reversed my client's conviction, I was told in no uncertain terms by a judge on the panel that he hesitated to call my client innocent. Aware that some evidence suggested my client might have known of some illegal purpose, but apparently acknowledging that the evidence was insufficient to support his conviction under the law of the circuit, that judge still ruled in my favor.

Even with politically charged issues, it is generally ill advised to target a judge's emotion through the brief. A judge whose philosophies align with your arguments is predisposed to consider them favorably, and a judge who is hostile to them probably will be won over only by reasoning because the judge's emotions already incline him or her against you.

When selecting a theme for my case, therefore, I avoid having it center around sympathy or admiration for my client or cause. The court will determine from the facts in what light it should fairly cast the parties. To suggest something other than what the facts plainly show only avoids the hard questions you need to address to be able to prevail. Thus, I try to focus my brief on the known quantities rather than the perceived passions, prejudices, politics, or philosophies of the judges I am trying to convince. Having some insight into how particular judges think can be an advantage, but it does not necessarily strengthen the brief. Most judges' analysis of your case will ultimately transcend these considerations.

Conducting the Argument

Oral argument is a forum in which lack of experience can really show. You may be uncomfortable with the process. You may not feel as confident in your abilities as you do in legal writing. You are not as skilled as experienced counsel in anticipating questions or weaknesses in your case. Your brain is essentially filled to capacity. What experienced practitioners do naturally may require constant thinking on your part, particularly regarding the mechanics of the argument and customs of the court. And no matter how many arguments you have observed, observation is no substitute for actually participating in one.



In my first argument before a federal court of appeals, I did not know something as simple as when to advance to the podium—an omission in preparation that caused me great stress for probably a full three or four minutes prior to argument. I knew the record cold. I had outlined my argument countless times. I had mooted the issues to exhaustion. I had watched numerous arguments that had taken place before that very court, and not once did it occur to me to note the precise time and manner in which the first person speaking for the day should rise to begin his or her argument.

There are all sorts of little obstacles to be considered even before you open your mouth, such as whether and when to make use of the attorney lounge, when to set up shop at counsel table, what notes and parts of the record to take with you, and, yes, which side to sit on. Ultimately, I resolved my podium predicament by not-so-gracefully turning to ask a supervising partner, who sat in the first row of a packed courthouse. Had the partner not been there, at that point I probably would have asked anyone in the first row willing to offer a suggestion.

Fortunately, young attorneys can compensate for most of these disadvantages with thorough preparation. With that in mind, I offer the following advice on arguing your case:

Know the Record

Judges have different methods of reviewing a case. Some will have extensive knowledge of the briefs and the record, and some prefer to hear argument before delving further into the case. You should and will be expected to know the record better than the panel, and to answer questions about its content. This includes testimony, evidence, dates, and even the location of specific items. Knowing the record allows you to assist the judges where they need it most and to show them where to find support for your arguments. Complete knowledge of the record gives you confidence that no surprise of fact or evidence will arise, and that if it does, you have a strong point of reference for addressing the issue.

Know the Law

You will also be expected to have complete knowledge of the cases cited by you, co-counsel, and opposing counsel. Have fresh in your mind the facts of these cases and the grounds for distinguishing negative authority. Do not assume that the court will not ask about specific cases. I have been asked about specific cases and, on rebuttal, had to correct opposing counsel's characterization of the facts in applicable cases.

Also, in an appellate argument, you may be asked about the standard of review or the jurisdictional basis for your appeal, even if your opponent has not contested jurisdiction. The court can question its subject matter jurisdiction at any time, and it is not at all unusual for the court to inquire how and why the case has come before it.

Finally, something that may not be on your mind right before argument but that should always be done is to Shepardize key cases as close to argument as possible, preferably within 24 hours of it.



You do not want to spend half your argument relying on a case that was overturned, distinguished, or called into question the day before, without having an adequate response. You also do not want to miss the opportunity to point out recent negative authority for a case on which opposing counsel relies.

Heed the Panel

It is not enough simply to survive an oral argument or to get through your points. The court sets argument for a reason, and you want to answer any questions weighing on the judges before leaving the courtroom. To that end, you should welcome difficult questions. Often, you may want to raise the difficult questions yourself to learn the judges' impressions of the issues and to address any doubts they have regarding your position. Otherwise, the panel will sit behind closed doors, considering those difficult questions anyway, and you will have missed the opportunity to give your point of view. Answer questions as directly as possible and focus carefully on the question you were actually asked, not the one you want to answer. Learn to recognize friendly questions, if you are so fortunate, and use these as a starting point to build support for your argument. A good way to bridge the gap created by inexperience is to ask for advice from more experienced attorneys and moot the argument with them. This will help you to be more attuned to the panel and to anticipate questions.

Maintain Composure

It is essential at any level of experience to conduct your argument in a professional manner and not get roped into a defensive stance with the panel or opposing counsel. However passionate you may feel about your argument, however low you feel opposing counsel has stooped in presenting the case, or however wrong you feel the court may be in the direction it is taking the argument, it never pays to respond with anything other than a clear, concise presentation of the facts and the law. This is particularly important for less experienced attorneys, because maintaining a professional demeanor shows maturity and objectivity, as well as confidence in your case. Such an approach encourages the court to focus on the substance of your arguments and, as is true of a professional brief, will present the most effective case.

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Keywords: litigation, appellate practice, oral argument, young lawyer, brief writing

Evolution and Revolution at the Supreme Court: How the Court Became "Supreme"

By Robert S. Peck

When, in his 2010 State of the Union address, President Barack Obama criticized the Supreme Court's recent decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), for "open[ing] the floodgates for special interests," including foreign corporations, to spend without limit in our elections, he indirectly acknowledged both the vast authority we as a nation place in the rule of law and the uncontested authority of the Supreme Court as the arbiter of law's meaning.

Like many other decisions before it, the *Citizens United* decision exemplified the Court's power to change our nation in both profound and subtle ways. As a result of the decision, new sources of money—corporate and labor union funds—will flow into our electoral contests in potentially overwhelming ways with yet-unknowable consequences for elections, political parties, and public policy.

It should be no surprise that judicial decisions can have a broad impact on society. Supreme Court decisions have played a central role in race relations, elections, personal autonomy, and other issues that go to the heart of who we are as a people. As we have seen in the recent nominations of Chief Justice John Roberts and Justices Samuel Alito, Sonia Sotomayor, and, most recently, Elena Kagan, the Court's capacious authority explains why the nomination of a new justice generates controversy. Regardless of a nominee's objective qualifications, the individual selected becomes controversial simply because various interests fear how the nominee will line up on a particular set of issues—issues that may or may not ever come before the Court.

The Court's current stature within the pantheon of governmental power was not a given at its inception. Unlike the detail found in the Constitution's first two articles establishing the Congress and the presidency, Article III provides only the most skeletal description of a federal judiciary. Although revolutionary Americans aspired to the rights of Englishmen and made their case for independence in decidedly legal terms, the judicial branch was almost an afterthought, sold to the public by Alexander Hamilton in *Federalist No. 78* as the "least dangerous branch," essentially powerless to abridge rights as compared with an executive branch that wields the sword and a legislative branch that commands the purse and writes the laws.

Early experience with the Supreme Court suggested a largely powerless institution. Despite attracting enormous press coverage by the standards of that day, the first session of the Court proved particularly inauspicious. Only three of the Court's six justices attended the opening session: Chief Justice John Jay and Justices James Wilson and William Cushing. Without either a quorum or any real business to perform, the assemblage quickly adjourned.

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A day later, Justice John Blair joined the group, and the Court reached critical mass, but the Court's first session lasted only 10 days and its second only 2. After all, the new tribunal had no cases to hear. Its only business consisted of admitting lawyers to its bar.

Two of the original appointees never joined the Court. Robert Harrison resigned just five days after his appointment to become chancellor of Maryland. John Rutledge, who lusted over the office of chief justice and was later nominated for that post, quit because he regarded the office of associate justice to have significantly lesser status than another he was offered: chief justice of the South Carolina Court of Common Pleas.

Despite the arduous obligation to ride the circuits, the Court's early work seemed to require little heavy lifting. Jay spent a full year of his six-year tenure as chief justice in London as a special minister. He resigned to become governor of New York. A successor, Oliver Ellsworth, similarly spent a year as a diplomat in France. When health issues forced Ellsworth to leave office, President Adams submitted Jay's name to Congress, obtained his confirmation, and happily wrote Jay that he had appointed him to his old office. Jay declined the appointment, because, he said, the Court was "so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of a nation, it should possess."

That gravity was soon supplied through the leadership of John Marshall, who became chief justice only because Jay had refused the post. Marshall transformed the Court, not just through landmark rulings that provide the foundation of our constitutional law but also through the way the Court issued its opinions. Before Marshall, the justices expressed their views on a case seriatim, through separate opinions, as was the practice in Europe. Under Marshall's leadership, a single "Opinion of the Court" became the decision in the case, with the chief justice as author in nearly all important cases.

Marshall's stature, as the leader and voice of the Court, grew along with the Court's own authority, so much so that that Professor David Currie has referred to the Court of that era as "John Marshall and the Six Dwarfs." Of course, Marshall's magisterial opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), secured the concept of judicial review with an exercise of political deftness that also served to establish the Court's status as the arbiter of the Constitution's meaning. The power of judicial review confirmed in *Marbury* provides the foundation upon which all modern battles in the Court develop.

The Marshall Court also served as the main instrument for securing the status of the national government against a philosophy of Jeffersonian localism. To President Jefferson, who saw his own election and those of his supporters in Congress to be "as real a revolution in the principles of our government as that of 1776 was in its form," the Marshall Court was a counter-revolutionary force, attempting to defeat Americans' democratic voice by giving permanence to

the staid policy preferences of the Federalist Party, which Jefferson called the “Anglican monarchical aristocratical party.”

The Marshall Court’s more muscular image as an institution of government that could withstand prevailing political winds was not a permanent transformation or even a guarantee that the Court had truly achieved co-equal status in more than word. President Andrew Jackson proved more confrontational with the Court than Jefferson was and prevailed in demonstrating the limits of judicial power. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Marshall Court ruled that the Cherokee Indian nation was an independent sovereign not subject to the laws of Georgia, the state in which it was located. Legend has it that Jackson reacted to the decision by declaring, “John Marshall has made his decision; now let him enforce it!” The comment, whether apocryphal or not, underscores that the Court’s power derives from acceptance of its decisions, rather than any ability to engage compelling force. While Georgia conformed to the Court’s decision, Jackson’s government refused to recognize the Cherokees’ sovereignty, using federal troops to expel the Cherokees and two other tribes from their lands, which were supposedly secured by treaty. Seventeen thousand Cherokees were sent on a forced march to relocate in the West to a part of what became Oklahoma. Four thousand perished in the course of that journey, a trek that became known as the “Trail of Tears.”

Marshall may have outmaneuvered and outlasted the Jefferson administration, but he despaired over what Jackson had brought. He told Justice Joseph Story that “the present is gloomy enough; and the future presents no cheery prospects.” He feared that the secure nation he had helped create through his decisions would come undone under Jacksonian democracy, which became the prism through which the Court viewed all issues under his successor, Roger B. Taney. The appointment of Taney, who as attorney general had questioned the authority of the Court to supersede decisions of the other two branches, caused Daniel Webster to write that Marshall ally “Judge [Joseph] Story . . . thinks the Supreme Court is gone and I think so too.”

Yet, despite his previously expressed misgivings over the exercise of judicial review and his fervent devotion to Jacksonian principles, Taney is remembered primarily for what was only the second time the Court invalidated a congressional enactment, in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), a decision that proved to be one of the percussion caps that set off the Civil War. The decision’s broader import proves again the vast impact that Supreme Court decisions can have. *Dred Scott*, as Chief Justice Charles Evans Hughes later wrote, was the first of a series of “self-inflicted wounds” from which the Court suffered a tremendous loss of prestige. Even so, the Taney Court’s many other decisions demonstrate a far more populist approach to decision making and a reaction to the nationalist aspirations of the Marshall Court.

At the end of his tenure, Taney tangled with President Abraham Lincoln. The chief justice’s patent enmity for the president and the oppositionist stances it took to Lincoln’s policies caused the president to remark that the judiciary “seemed as if it had been designed not to sustain the government but to embarrass and betray it.”

Unquestionably, the Marshall and Taney Courts reflected the ascendant political values of their times and then remained tethered to those values as new ones displaced them. In both instances, the Court got ahead of the nation, the population embraced the values animating the Court's decisions, and then the nation moved on in a new direction, leaving the Court behind for a time. While the country set off on a new path, the Court stubbornly remained entrenched in precedents based on values that may have seemed out of sync with the popular political outlook.

For a Court that values its counter-majoritarian exposition of the rule of law, the disconnect between political popularity and timeless constitutional values seems appropriate. Still, when a new Court is constituted, it inevitably explores new issues and inexorably moves into the foreground of the nation's political life once again. Thus, it is not too much to describe the repeating pattern we experience as a judicial adventure, journeying into territory, of necessity, where precedent provides little guidance, followed by a period of relative complacency where Court and popular will seem in tune and the Court's pronouncements appear less momentous. Finally, the Court's back-bench role in the polity yields to a role in which the public may view it as an obstacle to what now is regarded as progress, where public policy has moved aggressively in a new direction and the Court's importance is measured in negative terms. It is a pattern that has repeated itself.

Following the Marshall and Taney eras, the Civil War brought nothing if not a revolution that permanently altered the relationship of the "sovereign" states to the federal government. Powerful political forces reacted strongly to the war's radical aftermath, seeking to win back some of what had been lost. The Court, though still held in low esteem, became an instrument of that retrenchment, while demonstrating a new and more voracious appetite for the exercise of judicial review. After having invalidated only 2 congressional acts as unconstitutional, the new Court struck some 10 laws in an 8-year period, while engaging in a reflexively narrow reading of the Fourteenth Amendment and its promises of privileges and immunities and due process in *The Slaughterhouse Cases*, 83 U.S. 36 (1872).

The decision marked a turn, as the Court transformed equal protection and due process, enacted to ensure basic civil rights, into instruments for the protection of private enterprise. The decisions both anticipated and accommodated the Industrial Revolution, embodying the economic views that propelled the nation into the new century. Substantive law dealing with negotiable instruments and large-scale manufacturing had to be invented. At the same time, safety considerations and a new populism brought new demands for regulation to which the Court remained hostile. Regulation, in the Court's view, inhibited the engine of commerce that it found endorsed by the Constitution, as evidenced by Justice Oliver Wendell Holmes's memorable dissent in *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting), where he protested that this

case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.

The Court thus embraced the prevailing economic theory of the time to the issues before it, a laissez-faire approach in which the Court imagined a constitutional liberty of contract that was sufficient to defeat most forms of government regulation. Doggedly adhering to that approach even in the face of the Great Depression and the promise of a "New Deal" by President Franklin Delano Roosevelt, the Court reliably struck down one economic recovery statute after another. On one particular day, known as "Black Monday," the Court unanimously struck down as an unconstitutional taking a law that put a five-year moratorium on farm foreclosures as long as the debtor paid a reasonable rent. Another decision handed down the same day invalidated FDR's attempt to remove a dissident member of the Federal Trade Commission. And a third decision, popularly known as the "Sick-Chicken Case," declared the National Industrial Recovery Act unconstitutional as a delegation of legislative power to an administrative agency.

FDR reacted to "Black Monday" by declaring that the Court had relegated the nation to a "horse-and-buggy definition of interstate commerce." A Court that had been at the forefront of the nation's industrial growth was now badly out of tune with the felt necessities of the new era. The sharp clash between that long-lasting Court of "Nine Old Men" and the New Deal so infuriated President Franklin Delano Roosevelt that he gave in to a rare instance of tone-deafness by seeking public and congressional support to pack the Court. While his tactic of proposing extra help for the aged justices by adding new seats to the Court was so transparent that his power grab failed, FDR's own long tenure provided him with the opportunity to appoint justices supportive of the idea that the Commerce Clause power subordinated nearly all other constitutional concerns. Liberty of contract thus gave way to the growth of federal regulation and the administrative state.

When making his appointments to the Court, FDR looked for individuals likely to support the New Deal. With the new Court being of one mind on the validity of the New Deal, issues of governmental regulatory authority quickly faded from the Court's docket, only to be replaced with a new series of civil rights and personal liberty questions upon which his appointees had no singular perspective.

A change was in the offing. Perhaps no case marked the revolutionary role of the Court as a forerunner and shaper of public opinion as did the landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954). When the case was first argued, Fred Vinson, a Truman appointee, was chief justice. In conference, he made it clear that he was not prepared to overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896), which had established the prevailing "separate, but equal" rule. Not ready to see civil rights progress stymied by a reticent Court, Justice Felix Frankfurter convinced his brethren to put the case over for reargument on the question of the

intent behind the Fourteenth Amendment. Before the case could be reargued, Vinson died, causing Frankfurter, uncharitably, to declare that “Now, I know there is a God.”

The appointment of California Governor Earl Warren as chief justice and the exercise of his unique political skills led to the celebrated unanimous result in *Brown*. Still, Justice Hugo Black recognized that it produced a “storm over this Court.” *Brown* set off a long period of massive resistance in the South and previously unimagined confrontations as federal troops were called in to escort African American children to newly desegregated schools. The Court’s leadership on the issue dovetailed well with the developing broad-based movement for civil rights. The Warren Court, unbowed by the defiance its decision caused, also set out in a new direction, breathing life into inert phrases in the Constitution that had never been used, to strike state laws and practices quite as regularly. The Court unquestionably revolutionized our views of criminal procedure, free speech, religious freedom, political representation, and privacy. Not all students of the Supreme Court were pleased by these landmark developments. Professor Philip Kurland wryly declared, “if the road to hell is paved with good intentions, then the Warren Court is the greatest roadbuilder of all time.”

Still, despite subsequent presidents seeking justices who would not be as activist as the Warren Court was accused of being and who would reverse many of those decisions while restoring the Court to a more limited role on the political questions of the time, the expected retrenchment was limited and long in coming. Whereas Professor Alexander Bickel once described the Warren Court as “seized of a great vision,” then-justice William Rehnquist wondered aloud whether its successor, the Burger Court, had “any sense of mission at all.” Although the Burger Court cut back on some Warren Court trends, it extended others as it addressed sexual equality, access to court proceedings, abortion, and the right to counsel. Thus, it fell behind the public on some issues while forging ahead on others.

The Rehnquist Court that followed saw a reemergence of federalism as a basis for invalidating congressional actions and little hesitancy in exercising judicial review. The Court took on a far more conservative tilt, restricting congressional authority and recognizing a good-faith exception to the exclusionary rule. Still, the Rehnquist Court was not the counterrevolution that conservatives hoped for, as the *Miranda* warnings survived and other cases were decided with a liberality that even the Warren Court could not have imagined.

Today, the Roberts Court appears far more conservative than the Rehnquist Court. Dean Erwin Chemerinsky has called the Roberts Court the most conservative this nation has had since the “Nine Old Men” of the mid-1930s. Whether that is true or not, the Roberts Court is more willing to achieve a far-reaching result where the Court appears sharply divided than prior courts that gave greater value to consensus. The Roberts Court’s determination to right what it sees as earlier courts’ excesses may indeed reflect today’s advantage-oriented national legislative politics. Where politics was once associated with the art of compromise, those who cross party lines to work with their opponents are ostracized today. In nonjudicial politics, those who have

the votes on their side impose their will and seek no compromise to enlarge the tent. A similar approach characterizes a significant number of decisions today.

Thus, the Roberts Court has treated us to a large number of 5–4 decisions that rework or undo seemingly settled precedent. For instance, the case that set up this year’s gun control case, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), held by a 5–4 vote for the first time that the Second Amendment, a part of our Constitution since 1791, guaranteed an individualized right to bear arms and that federal laws that ban handguns in the home violate that right. The decision plainly departed from the Court’s view expressed in *United States v. Miller*, 307 U.S. 174, 178 (1939), and hundreds of decisions that relied on *Miller*, that the fulcrum of any Second Amendment decision depends on whether the right asserted “has some reasonable relationship to the preservation or efficiency of a well regulated militia.” Whether *Heller*’s approach or *Miller*’s is right, the willingness of the majority to change precedent on the basis of a single vote is noteworthy.

Similarly, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007), also by a 5–4 vote, invalidated a desegregation plan because the majority opined that the “way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” In dissent, Justice Stevens found irony in the majority’s invocation of *Brown v. Board of Education*, 349 U.S. 294 (1955), to support their result, and lamented that “no Member of the Court that I joined in 1975 would have agreed with today’s decision.” *Parents Involved*, 551 U.S. at 799, 803 (Stevens, J., dissenting).

The majority applied the same muscular approach to the right to remain silent in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), in which it held that an affirmative and vocal assertion of the right was necessary to assert that right. Speaking for the dissenters, Justice Sotomayor wrote that the majority’s reasoning marked “a substantial retreat from the protection against compelled self-incrimination that *Miranda v. Arizona*, 384 U.S. 436 (1966), has long provided during custodial interrogation.” *Berghuis*, 130 S. Ct. at 2266 (Sotomayor, J., dissenting).

Finally, to give one more example, in *Citizens United*, a 5–4 Court overturned *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and partially overruled *McConnell v. FEC*, 540 U.S. 93 (2003), to hold that no limits may be placed on independent electioneering communications by corporations consistent with the First Amendment’s free-speech guarantee. The dissenters complained that the decision went further than necessary to decide the case, violating a cardinal rule of constitutional decision making that advises that the Court should only decide as much as must be decided to dispose of the case. To the minority, the anti-Hillary Clinton movie at issue was not an “electioneering communication” and thus not subject to restriction under the regulation the Court invalidated. The majority countered that the chilling effect of the regulation required a constitutional decision.



It is still too early in the tenure of the Roberts Court to determine whether its approach to the key legal issues of our time will be evolutionary or revolutionary. Political scientist Robert Dahl may have been right to argue that the Supreme Court is “never out of line for very long with the views prevailing among the lawmaking majorities of the country.” Robert A. Dahl, *Democracy and Its Critics*, 190 (1989).

It is perhaps for that reason that as keen an observer of the 19th-century American scene as Alexis de Tocqueville could state a truism that remains an article of faith today: “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.” Regardless of new controversies that will undoubtedly arise, the Court’s status at the pinnacle of law’s empire in the United States is undeniable, whether it acts as a prod to move the electorate in a particular direction or an obstacle to policies supported by the people.

American politics will undoubtedly continue to take the Court into new territory. Traditional issues, such as the debate over when personal liberty must yield to the demands of national security, undoubtedly will confront the justices with increasing urgency and in new, unexpected forms. What the Court does to resolve those dilemmas, will not dispose of the issues nor settle them for all time, but will instead determine the contours of our constitutional debates well into the future. Such is the life cycle of evolution and revolution at the Court.

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When Colors Do Not Match: The Serious Business of Appellate Advocacy

By Alexander Rayskin

“It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins.”

– B. Cardozo, *The Nature of the Judicial Process* 21 (1922).

These words ring as true today as they did almost a hundred years ago when Justice Cardozo shared them with the world. But what can they mean for the appellate practitioner?

Disclosing Authority Contrary to the Position of the Client

One context in which this idea comes to life for appellate attorneys is the duty to disclose authority that is contrary to the position of their clients. It is well known that a lawyer has an affirmative duty to disclose legal authority in the controlling jurisdiction that is directly adverse to the position of the client if not disclosed by the opposing party. *See, e.g.*, N.Y. Disciplinary Rule (DR) 7-106 (B)(1). The question is: How adverse must the authority be to trigger disclosure under the applicable disciplinary rules? In other words, how do you know “when the colors do not match”? That question turns on whether the differences in the underlying facts or procedural posture of the authority in question are sufficiently significant so as to render the case reasonably distinguishable. The issue is one on which reasonable minds will differ. So what’s an appellate advocate to do?

If an attorney succeeds in maintaining a degree of objectivity about his or her case (admittedly, not always easy but always a necessary feat), it will be clear, at least in many instances, whether the authority in question should be disclosed. In cases of doubt, it is almost always the better practice to choose in favor of disclosure. This is not merely prudent because of the risk of sanctions and ethical violations. Overwhelming harm is done to your client’s case when the judges’ law clerks discover that you have omitted a case that they see, from their own research, you have likely come across in your research. If this happens, the law clerks and the judges on the panel will credit neither your version of the facts nor your application of the law to these facts. The loss of credibility that results is devastating to your mission as an appellate advocate, and your client will undoubtedly bear the consequences.

It would appear that inherent tension exists between zealous client advocacy and the ethical duty to disclose adverse authority. In reality, this conflict goes only so far. After all, if an attorney fails to disclose binding precedent that he or she should have reasonably disclosed, the attorney will not only be doing a disservice to his or her career but will also almost certainly harm his or her client’s case. But, some might wonder, where then is the room for advocacy?

It is true that under established ethical principles, counsel is required to cite to the court all binding authorities, not only the favorable ones. Model Rules of Prof'l Conduct R. 3.3(a)(3); Model Code of Prof'l Responsibility DR 7-106(B)(1). However, the same is not true of the facts: A lawyer need not bring up evidence that will weaken his or her client's case. Indeed, it may well be malpractice to do so. Model Rules of Prof'l Conduct R. 3.3(a)(3); Model Code of Prof'l Responsibility DR 7-106(B)(1). At the appellate level, however, it is certainly good practice to introduce these facts in any event so that they are presented in the least detrimental way possible, before your adversary commandeers these facts to propel his or her own arguments.

Presenting Arguments That Appear Not Warranted under Existing Law

Another context in which zealous client advocacy and the ethical duty to conform with disciplinary rules are at odds is the presentation of arguments that may appear unwarranted under existing law. This is yet another battleground on which reasonable minds will differ. Should we measure the efficacy of a particular appellate attorney by his or her willingness to push the envelope? Or would an effective appellate advocate steer clear of gray areas when, as Justice Cardozo puts it, "references in the index fail"?

It is well-settled that an attorney may not knowingly assert a position on behalf of a client unless "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." ABA Model Rules of Prof'l Conduct R. 3.1. There is often a fine line between an argument based on established law and an argument for extending existing law. The issue turns on whether an argument for the extension, modification, or reversal of existing law is made in good faith.

That issue of good faith, in turn, is in the eye of the beholder. The landscape of potential arguments for modification of existing law can be vast, depending on subtle distinctions of fact and procedural posture that may be drawn between two cases. In such situations, the question of whether counsel could be disciplined for attempting a particular argument is unclear. In the context of a motion for sanctions, it may be far-fetched to think that a court that has already held the law to be contrary to the position the attorney had put forth would agree that the attorney's position was warranted under existing law. An appellate counsel who takes a more aggressive stance on appeal, assuming the issue was preserved for review, may well risk not only losing the motion, if the court declines to follow his or her invitation to extend the existing law, but also losing his or her reputation.

The uncertainty may push a cautious advocate to avoid raising that argument altogether. This results in an unfortunate situation in which the interests of the client and counsel are not aligned and are, in fact, pointing in opposite directions. A prudent approach will then require a thorough reflection on the case at issue to achieve an optimal balancing of the interests of the attorney and the client. If you undertake it, you will become a better appellate advocate for your client as "the serious business of the judge begins."



Appellate Practice

FROM THE SECTION OF LITIGATION APPELLATE PRACTICE COMMITTEE

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Book Review: Ross Guberman's *Point Made*

By Sanford Hausler

Point Made: How to Write Like the Nation's Top Advocates

Ross Guberman

Oxford University Press 2011

As someone who not only engages in the practice of appellate advocacy but who also has a great love for the practice, I find that my shelves are replete with books relating to both written and oral advocacy. I buy those books in the hope that I will pick up a trick or two worth using in my practice—and, to a greater or lesser extent, I generally get my money's worth. Reading the advance press on *Point Made: How to Write Like the Nation's Top Advocates*, which promised to be a book full of such tricks, I rushed online to order a copy. It's one thing to pick up some tricks from a law professor who teaches legal writing; it's another to pick them up from Seth Waxman or Carter Phillips.

Of course, the “tricks” are filtered through an author. Ross Guberman is the president of Legal Writing Pro, a company that appears to be a competitor of Bryan Garner's Law Prose. Mr. Guberman has an impressive academic background, having studied at Yale, the Sorbonne, and the University of Chicago Law School. I certainly cannot argue with his selection of lawyers from whose works he illustrates his principles of legal writing—they are all truly among the nation's top advocates.

Guberman does not give us the usual blather found in most books on legal writing. There is no major discussion of the passive voice, for instance. And while much of his material is not new, his presentation, replete with concrete examples, is both novel and helpful. Although it is sometimes difficult to ascertain whether Guberman is pulling examples from his experts' briefs to prove his points or whether his points arise organically from the briefs, it matters little: For the most part, the points made are worth taking to heart.

That is not to say that everything in the book is golden. There is the occasional slip. For instance, on page 44, Guberman says:

Take this opening sentence from the fact section of a Ted Wells motion to dismiss. . . . With little fanfare, Wells lets the court know that it's dealing with a commercial dispute between sophisticated parties, one of which apparently soured on a once-promising deal.

Ted Wells is a fabulous attorney, no doubt, but the line quoted falls far short of Guberman's buildup:

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This matter arises out of Terra Firm's purchase of EMI in May 2007.

The line says nothing about a dispute, let alone a commercial dispute; it provides no information about the sophistication of the parties and is silent on the soundness of the deal. It may well be that the Wells quotation might have conveyed more when read in context, but that is one of the failings of Guberman's book. All we get are short snippets from what we assume to be (and what likely are) masterful briefs. This failing might be cured—it's not too late, Ross!—by posting the full briefs on Law Writing Pro's website, so that students of the art of written advocacy can see the full work of Ted Wells and his compatriots.

Of course, Guberman's overstatement of the Wells quotation will not deter the reader from getting Guberman's point—that the fact section of a brief should start with a sentence that encapsulates the dispute. Guberman gives numerous other examples. Indeed, Guberman gives many examples for each of his propositions—sometimes too many. But, of course, the reader can just skip examples once he or she gets the point.

Guberman occasionally goes off on a seemingly pointless frolic. For example, he spends quite a bit of time debunking the controversy about parentheticals after case citations (pages 130–40). What controversy, you might ask, and rightfully so. Guberman does not enlighten us as to who is fighting this war—the controversy has escaped my attention. But even assuming that there is a controversy, much of the 10-page discussion relating to parentheticals is standard stuff taught in first-year law school classes. It is hardly a startling development that Morgan Chu and Ken Starr know that a parenthetical should begin with a gerund (an *-ing* form of a verb) or that Paul Clement puts full-sentence quotations in his parentheticals.

Similarly, Guberman's section on our friend the hyphen (in forming what I call a unit modifier) seems pointless. Is it really that important to know (as Guberman tells us on page 204) that Chief Justice Roberts did not use a hyphen (correctly) in phrases such as “critically important employer” and “potentially competing demands”? And it's not at all clear why he bothers with an oddball quotation from Justice Ginsburg (on page 184) to show us it's all right to write a brief in blank verse.

And sometimes Guberman's examples make me doubt his propositions. For example, in a section entitled “*Mince Their Words*: Merge pithy quoted phrases into a sentence about your own case,” he advocates inserting short phrases from cases into sentences about the client's case. But the quotation marks in the example taken from a brief by Miguel Estrada (on page 108) just look too clumsy: The example has too many quotation marks too close together:

Nor is there the slightest evidence that [Sanders] was a **“financially vulnerable”**
“target” of **“economic injury”** inflicted by Madison Square Garden.

Sometimes even a good idea can be misused, even by as talented an advocate as Mr. Estrada.

But enough carping. *Point Made* provides much food for thought for the experienced advocate. Even where Guberman makes points that are (or should be) well understood by appellate (and non-appellate) attorneys, his use of concrete examples by “the nation’s top advocates” shows us how those points can be used to advance a case in the most effective way. And, at times, he goes against the common wisdom, showing us a way to do something that others might advise us not to do. Let’s look at block quotes, routinely used by brief writers and just as routinely criticized by legal writing experts. Guberman knows that block quotes are not popular with some. He quotes five judges (on pages 141–42) who say as much. But he believes that block quotes can be properly used and so do his experts—Steven Shapiro, Walter Dellinger, Carter Phillips, and Virginia Seitz. And his experts show us how it is done.

Guberman also jumps into the controversy over the use of footnotes. Unlike the controversy over parentheticals, this is a true controversy. Some judges claim they don’t read footnotes. Some advocates feel that if this is true (and I’m not convinced it is; at any rate, I’ll bet the law clerks read them), even with respect to some judges, it is unwise to use them. Not Guberman. Although he tells us flat out (on pages 146–47) the situations in which footnotes are inappropriate—to stay within the page limit (a reason unlikely to have staying power now that courts are adopting word limits), to insert unnecessary citations, and to take a pot shot at your adversary—he provides us with a list of situations in which he feels that footnotes are appropriate (page 148):

- To show widespread adoption of a principle
- To buttress a point in the text
- To distinguish authorities not deemed worthy of discussion in the text
- To preempt a counterargument

And, of course, he shows examples of such footnotes written by preeminent advocates Andrew Frey, Mary Jo White, Theodore Olson, and Richard Taranto. It’s hard to argue with success.

Oh, and—joy of joys—Guberman disagrees (on pages 147–48) with the view of his competitor, Bryan Garner, that all citations should be dropped to footnotes. I have yet to meet an individual who agrees with, let alone abides by, Garner’s rule, but it’s nice to know that Guberman agrees with me.

Guberman brings to his readers’ attention principles that should be self-evident but that are often overlooked. For instance, Guberman, in a section entitled “*Peas in a Pod: Link your party with the party in the cited case*” (pages 104–07), tries to cure attorneys of what he considers a bad habit:

One of the other bad habits lawyers-to-be pick up in law school (and often keep for decades) is mentioning that a case is “on point,” only to rehash all the facts of



that case in an endless paragraph stuffed with citations and quotations. Then, in a new paragraph, the attorney starts with “that case is just like the present case,” only to rehash all the facts from the current dispute.

The best advocates do the opposite: They link the parties, old and new alike, as soon as they can.

The examples he cites all contain sentences in which the party is said to be in precisely the situation of a party in the cited case, saving space and strengthening the argument.

I was writing a brief at the time that I read this principle, and although I was not writing paragraphs like the lawyers-to-be whose bad writing habits he decries, I was able to strengthen certain paragraphs in my brief by using his advice and the examples he provides—I hope to the benefit of my client.

That is why I recommend this book to your attention. If the lessons contained therein gave me reasons to reexamine and improve my writing, there is no reason to believe that it cannot do the same for others. Although not every word is a gem, Guberman provides sound advice supported by the practice of the best in the business. If 10 people read this book, I imagine that each of them would find different sections of the book to be helpful. But I believe that they all would be helpful. What more can be asked of a book like *Point Made*?

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NEWS & DEVELOPMENTS

Oral Argument Heard in *Lafler v. Cooper*

On October 31, 2011, the U.S. Supreme Court [heard](#) oral argument in *Lafler v. Cooper*. That case raises the question of whether a state habeas petitioner is entitled to relief where the petitioner's counsel deficiently advises him or her to reject a favorable plea bargain and the petitioner is later convicted after a fair trial, and if so, to what relief would the petitioner would be entitled.

— [Sanford Hausler](#), *Cox Padmore Skolnik & Shakarchy, New York, NY*

Oral Argument Heard in *Missouri v. Frye*

On October 31, 2011, the U.S. Supreme Court [heard](#) oral argument in *Missouri v. Frye*. That case raises the question of whether a state habeas petitioner is entitled to relief (and to what relief he or she would be entitled) where the petitioner's counsel failed to advise the petitioner of a plea offer, which, had the petitioner known of it, he or she would have accepted rather than go to trial. The petitioner had been convicted after a fair trial and received a less favorable sentence than the plea offer.

— [Sanford Hausler](#), *Cox Padmore Skolnik & Shakarchy, New York, NY*

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