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Membership Application
Three short years ago, the ABA's Appellate Judges Conference gave birth to the Council of Appellate Lawyers. Conceived in a spirit of collegiality, CAL's purpose was to introduce appellate lawyers to a new dialogue with appellate judges. Our hope, and the hope of the judges, was that this dialogue would enhance the practice of appellate law. Admittedly, we are engaged in an experiment, testing whether a bar organization that is founded on such an idea, can achieve its goals. We are proud, then, that even in our infancy, we have begun to fulfill our promise to bridge the gap between bench and bar for the purpose of improving appellate advocacy.

In July, we gathered with the appellate judges in Providence, Rhode Island, at a remarkable CLE program. This newsletter contains reports describing the sophisticated presentations by scholars and judges that attendees of the Spencer-Grimes conference enjoyed. We were not only introduced to new ideas at Providence; we were also introduced to appellate judges from state and federal courts, and from as far away as Australia, and to colleagues practicing appellate law all around the country. We met formally, during conference sessions and CAL meetings, and informally, over lunch and dinner. While we may not long remember what we said to one another at Providence, we will not forget that these introductions established the beginnings of professional relationships. These new relationships, springing though they did from brief encounters, form the foundation for future dialogues in keeping with CAL's purpose.

It is with this dialogue in mind that we, the members of CAL, can help CAL reach its full maturity. We hope that all of CAL's members will participate fully in CAL's committees and will introduce others to CAL. Through the commitment of its members, CAL will continue to develop the dialogue with appellate judges, and thereby move beyond introduction, and beyond infancy, to a partnership with appellate judges that will promote the highest ideals of our profession.
COMMITTEE REPORTS

Long-Range Planning Committee
Chuck Cole
Steptoe & Johnson, LLP; Washington, D.C.

The members of the committee from 2002-2003 were: Chuck Cole, Justice Craig Enoch, Chair Cindy Hofmann, Sheila Huddleston, Jim Layton, Mary Massaron Ross, George Patton, Shawn Stephens, and Mary Vasaly. The ABA staff members were Marcia Kladder and Melissa Sehstedt.

The Committee's first meeting was held on December 7, 2002 in Miami Beach, Florida. At that meeting the members brainstormed various issues concerning the future of CAL, including its mission, vision, goals, and objectives. Four areas were given specific attention: training and publications; marketing and networking; the good of the profession; and the empowerment of individual CAL members.

The second meeting was held on July 24, 2003 in Providence, R.I. At the July meeting, the committee considered what CAL’s objectives might be for the coming year and discussed how CAL's existing services might be improved. Also discussed were the development of new services and additional leadership opportunities for CAL members.
### Membership Committee

Curt Cutting  
Horvitz & Levy LLP; Encino, CA

The members of the membership committee for 2002-2003 were: Curt Cutting (co-chair), Mark Friedman (co-chair), Terry Bork, Gwen Samora, Robert Shaughnessy, Renee Snow, and George Patton.

The mission of the Membership Committee for 2003 is to continue to increase overall membership and continue to promote CAL in states where membership is disproportionately low.

Its accomplishments in 2003 were the promotion of CAL in selected states where CAL membership was disproportionately low; its promotion of CAL through state and local appellate bar organizations; and its increase of CAL membership from 515 members (October 2002) to 562 members (July 2003).
Program Committee

Mary Massaron Ross

Plunkett & Cooney; Detroit, MI

The members of the program committee for 2002-2003 were: Charles Cole, Thomas Dickinson, John Farley, Sharon Freytag, Sheila Huddleston, Marcia Kladder, Paul Lawrence, James Layton, David A. Lewis, Christopher McFadden, Dennis Owens, Debra Peterson, and Marie Tomassi. The ABA staff members were: Melissa Sehsted and Sandy Roos.

The CAL Program Committee is charged with planning its annual meeting and any seminars or programs in which CAL will participate. The Committee will work on identifying opportunities for another national seminar, and providing other programs, perhaps by teleconference or other manner.

The Cal Program Committee helped plan the Providence, Rhode Island seminar by reviewing feedback from past conferences, identifying topics and speakers of interest, coordinating their suggestions and ideas with those of the Appellate Judges Conference Education Committee, and agreeing on a schedule, format, and speakers for the conferences.

The Committee helped market the seminar by working with ABA staff persons to develop and implement an aggressive marketing plan that included advertisements, announcements, articles in bar group newsletters and papers, mailings to extensive lists of appellate lawyers, and working through CAL liaisons to other state and local appellate bar groups. The Committee helped to implement the seminar by planning and undertaking on-site functions including hosting dinners for Thursday evening, serving as moderators for the Sunday breakfast, and other needed assistance.
### Publications Committee

Rachel Helyar  
Akin Gump Strauss Hauer & Feld LLP; Los Angeles, CA

The members of the publications committee for 2003 are: Rachel Helyar (chair), Julia Pendery (Newsletter Editor), Diane Bratvold, Kirsten Castaneda, Matthew Conigliaro, Michael Gross, Harold Rauzi.

The plan for this year is to publish the newsletter and articles submitted by CAL members and judges, work with the website committee (chaired by Michael Gross) to improve CAL's site, and create an index of state appellate systems. The index will cover the basics, e.g., court hierarchy, whether review is automatic or at the court's discretion, percent of cases published/unpublished, whether unpublished cases are online and or citable, whether judges are elected or appointed, and the precedent system within the state (i.e., are there districts? Do they set precedent for state or only for district?), and anything else along these lines that would be interesting or useful for someone unfamiliar with the system. This project, which is being headed by Harold Rauzi, is well under way.
Within the past year the Rules Committee has submitted a report to the Advisory Committee on Appellate Practice, recommending changes in the Federal Rules in the local circuit rules and in the Judicial Code. The Committee responded and stated that it would recommend one of our proposals and study others.

We now plan to monitor electronic filing. All federal appellate courts accept documents filed electronically. Some lower courts are beginning to mandate this. We want to see how these rules work in practice.

We also intend to see what the 50 states are doing with respect to electronic filing. If the answer is, as I suspect, nothing or little, we want to make recommendations. As before, we intend to offer the counsel as a resource to the Advisory Committee.
CAL web site committee report
October 21, 2003

The web site committee was formed to address concerns about the design and utility of the current CAL site. The issue of re-design has been placed on a back burner because the ABA wants all design work to be done in house and the programmer-designer who would be responsible for work on our site has taken another position. Very recent e-mail from headquarters reports that "hiring is imminent for the Judicial Division's staff position that is dedicated to web maintenance and improvement."

A second concern aired during committee conference calls is the near impossibility of finding a link to the CAL web site through Google or other search engines. Peter Boyd, an intellectual property lawyer in Florida who has developed a remarkable knack for the new science and art of "search engine optimization," has agreed to consult with us without charge. The object of his advice would be to cause the CAL site to appear prominently in the results for pertinent search engine inquiries. Peter has not offered unlimited free work, but he seems confident that he can solve our problem within an amount of time that he is prepared to donate. His own web site design and search engine optimization site can be found at www.paperstreet.com.

The members of the CAL web site committee are [Rachel: I find that I have what appears to be a good list of email addresses but not a good list of actual names. If you can email me the name of an ABA person who would have that information, I will contact that person and add the names to the report.]
A PRACTICAL APPROACH TO INTERPRETING STATE CONSTITUTIONS AS UNIQUE LEGAL DOCUMENTS

Reported by David Smyth

Steptoe & Johnson; Washington, D.C.

At the Council of Appellate Lawyers' Conference in Providence, Professor Robert F. Williams of Rutgers School of Law delivered a speech entitled "A Practical Approach to Interpreting State Constitutions as Unique Legal Documents." Professor Williams's work in this area has identified state constitutions as documents that differ from the federal Constitution for three primary reasons.

First, he argued, state constitutions are different as to origin. Whereas the United States Constitution was the product of scholarship and horse trading among the eighteenth century framers, state constitutions are much more products of popular sovereignty, characterized by state courts as the "voice of the people." This contention carries particular force with the constitutions of the original thirteen states, which did not have to seek admission to the union by having their constitutions approved by Congress and the president.

Professor Williams suggested that this unique origin lends itself to arguments based on textual analysis much more than does the federal Constitution. What would the ordinary voter have thought the provision meant? In answering this question, lawyers can use sources that would seem bizarre in the federal context. In many states, for example, the vote for a particular constitution was preceded by an "address to the people" that provides some context in divining why the voters were asked to approve the document. Also, state courts have sanctioned contemporaneous ballot pamphlets and newspaper reports as sources that suggest what the common understanding of a provision might have been at its adoption. Finally, constitutional convention records for state constitutions in many cases have been preserved much more carefully than those from Philadelphia in 1787. These arguments would be inapplicable or inappropriate in the federal context, but carry significant weight in some state courts. Scholars recently have made significant strides in compiling these materials into easily digestible forms, and time is becoming a weaker excuse for lawyers to ignore these documents.

Second, state constitutions differ as to function from their federal counterpart. Whereas the federal Constitution delegates authority to the federal government, state constitutions generally place limits on what is otherwise plenary state power. Professor Williams conceded that the starkness of this contrast oversimplifies the truth, but highlights several interesting questions that arise from the difference. For example, why do state constitutions ever grant authority to states that purportedly have unlimited power in the first place? That answer lies partly in interest-group lobbying and amendments to give power that has been denied by the courts. Also, a grant of power in a state constitution can create a negative implication that a related grant does not exist. For instance, a constitutional authorization to exempt widows of military veterans from certain taxes might be read to preclude the legislature from exempting widowers of veterans from the same taxes. After all, the voters could have included widowers in the constitutional provision in the first place, and their absence negatively implies their exclusion from the favorable treatment. The contention is strange, though, in a situation
where the state has plenary power.

Finally, Professor Williams argued, state constitutions simply look different from the federal Constitution. The state documents often include very specific language (regarding tax structure and school boards, for example) and read more like statutes than their national counterpart does. This fact can appropriately lead lawyers to a more text-based analysis. The plain meaning of the words in the text will play a much larger role in state constitutions than the federal constitution (e.g., interpretation of "equal protection of the law"). Professor Williams suggested that to the extent that they do read this way, state constitutions have been transformed from frameworks of government into instruments of government. Regardless, the more technical provisions of state constitutions also provide opportunities for lawyers to urge technical readings in support of their clients' positions.
An award-winning law teacher at University of California at Berkeley, Professor Melvin Eisenberg has published treatises and casebooks on contracts and corporate law, as well as being the author of *The Nature of the Common Law*. In his presentation to the combined Spencer-Grimes Appellate Judges Seminar and Third Annual Conference of the Council of Appellate Lawyers, Professor Eisenberg concentrated on the "three workhorses" of common law adjudication: reasoning from precedent, distinguishing precedent, and reasoning by analogy.

These workhorses labor before a backdrop that Professor Eisenberg divides into: (1) doctrinal and social propositions, (2) forms of justification, and (3) consistency. Doctrinal propositions are found in sources that the legal profession regards as authoritative, *e.g.*, constitutional, statutory or decisional law, foreign law, or secondary sources (treatises, restatements, etc.). Social propositions include moral views, policy considerations (what is good for society as a whole), and experience (how people react to the law). Simply stated, doctrinal propositions are legal rules; social propositions are the reason for a given legal rule.

Justification, in this setting, takes two forms. One form is the justification for reaching a decision on the basis of an existing legal rule. This form of justification is based on doctrinal propositions. The second, very different, form is the justification for a doctrinal rule. This form of justification can ultimately be based only on social propositions, because doctrinal rules cannot justify themselves. Whether two different rules or outcomes are consistent depends almost entirely on whether the different treatment is supported by social propositions.

The basic principle of common law reasoning is as follows. Doctrinal rules can be stratified according to their degree of congruence with applicable social propositions. The "best" rule is the rule that a well-informed court, without any precedent, would formulate based on the relevant social propositions. A rule is reasonably good, although not the best, if it is substantially congruent with social propositions. A rule is bad if it is substantially incongruent with social propositions. Courts should -- and do -- apply the best rules consistently. They also should -- and do -- apply a reasonably good rule consistently, even if they view the rule as not the very best. But if a rule is bad, courts move toward the "best" rule by one of three mechanisms: reasoning from precedent, distinguishing precedent, or reasoning by analogy.

When a court reasons from precedent, its analysis is either rule-based or result-based. Rule-based analysis is the literal application of the announced rule of law, as stated by the court that enunciated the rule. Result-based analysis focuses on the rule necessary and the facts of the earlier case to reach the results of that case—only the narrowest portion of the decision,
the minimum "ratio decidendi," becomes a rule of law; the remainder is dictum. Applying the basic principle of common law reasoning, if a rule announced in a precedent is at least reasonably good, the courts will consistently apply the rule. If the rule is bad, the courts may avoid it by showing that on the facts of the precedent the rule was only dictum, or by transforming the rule entirely by reconstructing the precedent on the basis of its facts and result.

Distinguishing a case from presumably applicable precedent takes two forms. In "consistent distinguishing," a reasonably good rule, on its face applicable to the facts, is distinguished because the underlying social propositions do not fit the present case.

"Inconsistent distinguishing" relies on distinctions that are not consistent with the social propositions underlying the rule, but which, nevertheless, yield a good result. Inconsistent distinguishing may serve as an ad hoc means of avoiding the application of a bad rule. Inconsistent distinguishing may also be a precursor to overruling an outmoded rule or a rule that was wrongly adopted in the first instance.

Reasoning by analogy may be seen as the mirror-image of distinguishing precedent. That is, distinguishing starts with an applicable rule of law, then finds a good social reason not to apply it to a particular case. Conversely, reasoning by analogy begins with a rule, which, at first blush, is inapplicable, but determines that there is no good reason to treat the cases differently. Stated otherwise, a broad rule may be narrowed in its application by distinguishing, whereas a narrow rule may find broader application by analogy.

Again, whether a court reasons by analogy or not depends on the basic principle of legal reasoning. If a rule is at least reasonably good, the court will reason by analogy to extend the rule consistently to like cases. If a rule is bad, the court will decline to reason by analogy, and instead state that the relevant precedent "should be confined to its own facts."

Professor Eisenberg’s three workhorses contribute to stability in the common law by permitting good rules to be improved by broadening application and by creating exceptions to occasional bad rules. Bad rules may, however, be incrementally narrowed to nothingness over time. The radical step of outright overruling a bad rule is generally avoided.

Finally, Professor Eisenberg pointed out that most cases can be decided by applying the doctrinal rules; only in the minority of cases will a conflict between doctrinal and social propositions require that the workhorses be called to duty.
Professor Dan Coquilette teaches ethics at Boston College and Harvard Law School. He drafted the 1998 Massachusetts Rules of Professional Conduct. He also serves as a reporter to the Committee on Rules and Procedures of Judicial Practice of the United States, the committee that is responsible for preparing and amending the federal rules.

Professor Coquilette primarily addressed current issues pertaining to lawyers generally. He sees challenges to professionalism for lawyers in the areas of corporate fraud; class actions; the Department of Justice and the U.S. Patriot Act; genetic engineering; and electronic filing.

He sees an abuse of class actions and said that congress is reviewing class actions to resolve this problem. He anticipates a change to Rule 23(g), which may put all class actions into federal court by eliminating the requirement of minimum diversity for class actions.

Concerning the Department of Justice and the U.S. Patriot Act, particularly since 9/11, he sees a conflict between the rules of professional responsibility (in particular, those duties an attorney owes to his client) and the disclosure requirements under the McDade amendment. He said Rules 3.8, 4.2, and 8.4 particularly come into conflict with the present McDade amendment in requiring an attorney to disclose acts of deceitful conduct in direct contravention of the duty of confidentiality an attorney owes his client. The case of Stearn v. United States, pending in the District Court of Massachusetts, raises those issues. Attorneys should expect modifications of the Federal Rules of Attorney Conduct to accommodate these changes.

Professor Coquilette said that certain congressional legislation is adopting rules concerning attorney-client conduct within its purview. For example, the Sarbanes-Oxley amendment empowered the SEC to adopt rules concerning the relationship between attorney and client toward the goal of disclosures of improper conduct. The IRS is seeking the client list of the firm of Jenkens and Gilchrist in Dallas, alleging a tax deduction scheme and claiming that the firm therefore must disclose its clients’ records, even though when it does so, the client is likely to sue for malpractice and the attorney’s defense will be that the rules required him to do so.

Electronic filing is raising some ethical concerns, particularly because information which may have been thought to have been confidential will be much more available to the general public. Attorneys should consider more carefully documents that are attached to pleadings and information contained within pleadings in view of its potential disclosure through electronic filing.

He noted, for example, that Arizona has a rule that makes it more difficult to file documents under seal. South Carolina will not enter a protective order. The media will argue that the First Amendment protections allow them to search documents and prohibit filing documents under seal.
He raised the question of a conflict between an attorney’s public roles and private roles and the ethical codes to apply to each. He sees a conflict between the duty to defend a client’s interest "zealously" and the Sarbanes-Oxley amendment and notes that in some states, that requirement has been changed to "honorably." Professor Coquilette questioned whether that was a trend and advised attorneys to consider the difference between zealous representation and honorable representation, if there is any.

As to ethics in the appellate practice, he saw two problems. First, there is the failure to reveal authority directly contrary to your position and not noted or cited by the other side. Second, there is a problem with competence in meeting deadlines, dates, and standards for briefs.

Another issue that Professor Coquilette touched upon is when a whistle blower statute applies. What issues must be reported to the State Board of Ethics and when is it mandatory?
Judge Wolfson’s talk highlighted a number of areas where the accepted legal wisdom varies from the results of social science research, particularly by forensic psychologists. The current legal framework in many areas of law is based on assumptions that make legal decision-making easier, but not necessarily more accurate. Occasionally, the cynics are wrong and factfinders operate as the courts expect them to. By acknowledging the assumptions, verifying them, and dealing accurately with the results, judges and juries can make better decisions.

Judge Wolfson acknowledged that the results of the social science research are more likely to be introduced in the trial courtroom than the appellate courtroom. Nevertheless, procedural reform efforts will eventually work their way to the attention of appellate judges, in part through their role in adopting procedural and evidentiary rules.

Judge Wolfson identified six principal areas where legal rules clash with the results of social science: limiting instructions, jury decisionmaking behavior, jury evaluation of expert testimony, demeanor evidence and witness credibility, reliability of confessions, and identification procedures.

For example, research confirms many trial practitioners’ intuition that juries often fail to understand or outright ignore limiting instructions. In fact, a limiting instruction often focuses jury attention on the item that the judge instructs them to ignore. One study found that when mock jurors in a simulated automobile accident trial heard no evidence about insurance, they awarded the injured party $33,000 and when they heard impermissible evidence about the existence of insurance with no limiting instruction, they awarded the injured party $37,000. When the mock jurors heard about the insurance and were instructed to disregard the evidence, however, they awarded the injured party even more: $46,000. Practitioners may then have good practical reasons not to request jury instructions to ignore evidence or consider evidence only for particular purposes, but may chance losing an appeal on waiver grounds if they fail to request a limiting instruction. A partial response may be to request a limiting instruction with an explanation of the reasons underlying the relevant legal rule. Studies show that jurors are much more likely to follow instructions if they are given the rationale.

In regard to jury decision making behavior, jurors traditionally are treated as passive receivers of information during the trial. In reality, they bring their prior knowledge base to the trial and try to reconstruct the relevant events based, in part, on their practical experiences. Jurors’ thought patterns are consistent with those of other decision makers. For example, jurors are likely to disregard evidence that is inconsistent with their expectations. Jurors also have
difficulty understanding complex jargon-laden instructions. Trial lawyers are well advised (1) to introduce evidence in a manner that produces a consistent and credible story and (2) to make sure that jury instructions use easily understandable plain English. Judges may want to consider non-traditional devices to increase juror attention and interest during trial, such as permitting jurors to ask questions to witnesses and allowing jurors to discuss the case before completion of the evidence.

One of the most difficult types of evidence for jurors to understand is highly technical evidence, particularly evidence involving statistics. Jurors may choose to ignore expert testimony that they have difficulty understanding. Trial practitioners should have their experts explain in detail and in an approachable, basic manner the grounds for their opinions. If the trial judge excludes this background, the studies about how juries treat expert testimony may provide a basis for appeal.

Studies raise a number of concerns involving juror evaluation of witness demeanor, an issue that the law treats as one of the jury’s principal roles. Studies show that people generally are very poor judges of demeanor. For example, one study showed that accuracy rates in judging witness truthfulness are close to random. College students had a 52.8% accuracy rate; polygraph examiners a 55.7% rate, police detectives a 55.8% rate, trial judges a 56.7% rate, and psychiatrists a 57.6% rate. Only Secret Service personnel had an accuracy rate significantly better than random, at 64%. Moreover, studies show no correlation between confidence and accuracy in judging witness truthfulness. Often signs that most people would treat as indicative of lying (twitching, hemming and hawing) are actually signs of nervousness relating to the trial setting. Historically, judges have encouraged jurors to rely on such folkloric indicia of truthfulness. In truth, appearances are often deceiving. Reliable clues as to witness lying may include higher than normal voice pitch, dilated pupils, and, in particular, a disjointed story. For this last reason, studies show that accuracy in determining witness truthfulness is highest among those reading a transcript of a situation. Intermediate accuracy occurs among those hearing an audiotape, and lowest accuracy occurs among those watching a videotape, who are most likely to be distracted by false visual clues.

For similar reasons, jurors have difficulty judging false confessions. The common perception is that an innocent person will not confess unless physically coerced. In fact, studies show that innocents may confess falsely for a variety of reasons, particularly if they are of low intelligence. Studies have shown that forms of trickery that courts have approved in extracting confessions (such as planting ideas in the head of the accused or assuring the suspect of easy treatment upon confession) may lead to false confessions. Videotaped confessions, a strategy often used to address concerns about misleading interrogations, often add an additional element of inaccuracy because of the focus of the video. When study subjects saw a video of the same confession, their impression of coercion varied considerably depending on the camera angle. When the camera focused on the suspect, the study subjects placed the likelihood of coercion at 3.13 on a 9 point scale; when the focus was equally on the suspect and the detective, the rated likelihood of coercion was 4.75; and when the focus was on the detective, the rated likelihood of coercion was 6.75.

Judge Wolfson’s final topic was witness identification procedures. Trial courts typically place significant weight on visual witness identifications, but they are often inaccurate. Many eyewitness-evidence-based convictions have been proven wrong by subsequent DNA testing. Again, witness confidence about an identification was irrelevant to the accuracy of the identification. Confirmatory feedback (perhaps subconscious) by the administrator of an identification procedure leads witnesses to unwarranted confidence in their identifications. Studies showed several means of improving the accuracy of eyewitness identifications from photographs and lineups. Double-blind testing, when the administrator of the test does not know which individual in the line-up is the suspect, improves accuracy. An instruction that
the actual culprit may not be in the line-up similarly improves accuracy, as does a line-up containing "fillers" who are similar to the witness’s description of the perpetrator. Finally, studies obtained more accurate results with a sequential photospread, when photographs are dealt out one at a time and not retained for comparisons, as opposed to the more typical simultaneous photospread, when the witness views a number of photographs simultaneously. One recent study showed 49% correct identifications and 49% inaccurate identifications with simultaneous photospreads, and 45% correct identifications and 29% inaccurate identifications with sequential photospreads.

Judge Wolfson’s talk was highly instructive. It familiarized judges and lawyers with common perceptions about trial-related procedures that are often inaccurate. The talk gave audience members the tools to question their underlying predispositions and arrive at more accurate trial decisions. Ultimately, the social science studies that Judge Wolfson relied on provide the basis for appellate lawyers and judges to move the law in the direction of ever more accurate factfinding.

*Michael E. Malamut is a senior attorney with New England Legal Foundation, a not-for-profit public interest foundation whose mission is to promote public discourse on the proper role of free enterprise in our society and to advance free enterprise principles in the courtroom.*
HOW APPELLATE JUDGES USE PRECEDENT

Reported by Robert E. Biasotti

Carlton Fields, PA, St. Petersburg, Florida

Dean Lauren Robel, from Indiana University School of Law-Bloomington, as moderator, posed several questions to a distinguished panel of judges. The Honorable Bruce M. Selya, from the United States Court of Appeals First Circuit, was appointed by Ronald Reagan in 1986. Before that, he was a state probate court judge, a federal district court judge, and in private practice. The Honorable Martha Browning Sussman, an Associate Justice of the Supreme Judicial Court of Massachusetts, was appointed to that position in September 2000. Prior to that, she was an Associate Justice of the Superior Court Department, Chief of the Civil Division in the United States Attorney’s Office in Boston, and was in private practice. The Honorable Christopher Armstrong, was appointed Chief Judge of the Massachusetts Appeals Court in 1972. Prior to his appointment, he served as Executive Clerk of the Massachusetts Superior Court, Assistant Legal Counsel to Governor John A. Volpe, and as a Massachusetts Assistant Attorney General.

A summary of the panel members’ responses to Dean Robel’s questions follows:

1. **What Is Precedent?**

   Precedents are prior judicial decisions issued by a court. If an earlier judicial decision is issued by the same or a higher court, then that precedent is "binding"—which means the court must follow, distinguish, or accommodate the earlier decision in some fashion. What has been done before in some other court is not as important as what has been done before in the same court.

   Precedent places requirements and constraints on both judges and lawyers. Notably, all precedents are not created equal. In the First Circuit, for example, if there is a prior decision on the same issue from the United States Supreme Court or the First Circuit, then the panel is bound to follow that decision. The First Circuit is not technically bound to follow decisions from other circuit courts, but will generally discuss such cases in its decisions. It would be unusual for the First Circuit to dismiss a Third Circuit precedent by simply saying that court’s decisions are not binding. Instead, the court will generally either follow the other circuit’s decision, or explain precisely why the decision is not being followed.

   Precedents only include court decisions; they do not include statements by scholars, commentators, other legal writings, etc. Non-judicial decisions and opinions are interesting and thought provoking… but they were not decided under the same constraints as a decision by another court. Courts writing judicial decisions are deciding actual cases and are bound by statutes and by decisions of higher courts. However, the author of a law review article, for example, is free to disagree with a prior decision of the United States Supreme Court. An appellate judge cannot do that.
The judges observed that there is probably some dicta, statements by the court that are not part of the holding in the case, in every judicial decision. Judges are not bound by prior dicta, yet dicta can give context to an opinion. It is difficult to reject such dicta without rejecting the underlying basis for why the court reached a certain result. Most appellate judges give great deference to any statements published by a colleague in a written decision and signed off on by two other judges in the court.

2. **To what extent do courts consider the decisions of concurrent courts (Federal Courts considering State Court decisions and vice versa)?**

The answers varied depending on the court. The Massachusetts Supreme Court considers decisions by the First Circuit Court of Appeals to be "strongly persuasive." However, it is not bound by those decisions on matters involving state law.

The First Circuit is similarly respectful of the decisions of the state supreme courts within its circuit, but its consideration of state Supreme Court cases is more complicated because it must consider several different state supreme courts (ME, MA, VT). Sometimes the decisions of those courts are not consistent. The First Circuit is also reluctant to follow a state Supreme Court decision if doing so would create a split with another circuit court.

3. **How and when does an appellate court overrule one of its own decisions?**

Generally, one panel of a court cannot overrule a prior decision of a prior panel of that court. To do so, a party or the court itself must request *en banc* review. Sometimes, when precedent has become obsolete, a panel will seek *en banc* consideration. Such review, however, is rare at most courts.

For practitioners, the judges suggested that the best way to get *en banc* review is to try to show that something has changed. It is difficult (if not impossible) to get *en banc* review simply by arguing that the original decision was wrong.

Just because a decision is old does not mean it is wrong, but an older decision is more likely to have been based on underlying assumptions that may have changed--technology, lifestyles, etc. If you need to get around an old decision, convince the court why things are different today. Ask yourself--what do we know now that we did not know when the original case was decided?

Attorneys must recognize the need for collegiality of a court when making arguments to reject a prior decision of a court--even in a distant court. Such a request must be done in a tempered way. That is why it is so important to identify what has changed--the prior panel did not get it wrong; rather, circumstances have changed.

4. **What information is most helpful to the Court when arguing cases of first impression?**

There are 2 categories of cases of first impression –

a) first impression for *this* Court (but precedent from other courts);

b) no court *anywhere* has ever decided this issue.
For (a), decisions of other courts are persuasive and should be used. For (b), courts want everything that is available on the subject. If research is thorough, there is usually something out there that is close.

In all events, do not lose sight of the fact that the arguments must make sense. Simply because one or two courts have gone one way does not make those decisions binding here. A "trend" is not two courts; it is many courts. Appeal to the court’s general sense of consistency, logic and common sense. This is where the appellate lawyer shows his/her worth – synthesize the information out there and explain and summarize it for the Court.

5. **How do you feel about citing to unpublished opinions as precedent?**

An unpublished opinion, or a decision expressly labeled as non-precedential, is not binding on the Court. It may, nevertheless, be interesting to subsequent panels.

The panelists generally believed, however, that when a three-judge panel decides that a particular opinion should not be binding on subsequent panels of the court, that decision should be respected--by both the court and counsel. The decision not to publish is often made because the issue was not fleshed out by the attorneys, or because the case can be decided on some other basis--waiver or failure to preserve error. On the other hand, if an unpublished opinion gives a cogent answer to your question, it can be very useful in helping to draft a later opinion.

One judge pointed out that trial judges are put in a terrible quandary when asked to consider unpublished decisions. If an unpublished opinion was issued by a higher court, the trial court may feel that the higher court deemed the issues to be so obvious that a published opinion was not needed. In that instance, a trial judge may very well feel even more bound to follow that decision.

6. **Some litigants claim decisions are written by law clerks. Are law clerks an audience to be considered by appellate lawyers?**

Different judges use law clerks in different ways. Many judges prefer to write their own decisions. Some judges may have clerks fill in case cites or edit some parts of the opinions. At the end of the day, however, the end product in every case is from the judge, not the clerk. No judge signs off on a decision that he or she did not agree with.

7. **How do you decide a case when there is a tension between what seems "right" and what seems "fair"?**

If precedent is binding and not fairly distinguishable, courts are obligated to follow that precedent. Judges cannot ignore such precedent because the answer seems "unfair."

Often, however, when there is a tension between what is "right" and what is "fair," there are competing interests at issue. The answer will almost always be unfair to someone.

"Unfair" does not mean the result was either wrong or arbitrary. It simply articulates the relative strength of a competing interest. For example, a statute of limitations deprives a litigant of his rights, but law has identified that imposing time limits for civil remedies is an important competing interest.
An engaging and animated speaker, Dean Cass began with his bottom line: "The system ain’t broke, but it needs fixing." He pointed out that the phrase "rule of law" resonates throughout the world but has no clear definition. Strong tensions exist between the belief that the "rule of law" is a tautology and the belief that there is no "law" without rules and underlying principles of fairness. Dean Cass believes, however, that viewing the United States’ legal system as "law bounded," a system under which written rules are valuable but not controlling, is more useful than concentrating on either end of the spectrum.

Quoting David Hume’s phrase adopted by John Adams, "a government of laws, not of men," Dean Cass described four principles of the "rule of law:"

Fidelity by rules calls for faithfulness, but not blind obedience;

The rules must have "principled predictability" of the outcome, without knowing who will apply them;

The rules must be adopted through a legitimate process and be grounded on background rules based on reasonableness; and

The rules must not change, no matter who applies them.

Dean Cass explained that the "rule of law" under the four principles allows one to know in advance whether a reasonably predictable conclusion will follow from a particular act. The answer should be unambiguous, but Dean Cass noted that authority is obtuse where power is divided, as it is in the United States’ legal system. Yet, while answers are not perfectly knowable, he finds that "with a fair certainty, the rules are very clear."

Dean Cass cited applications of the "rule of law" by a unanimous Supreme Court in *Nixon v. United States*, ruling on public access to the President’s confidential tapes, and in *Jones v. Clinton*, where the issue was whether a sitting President could be sued. In each case, the Supreme Court held that the rules apply to everyone and that the law binds even the President.

But, Dean Cass asked, do judges operate under the "rule of law?" Or do they make up the law as they rule? For the audience of appellate judges and appellate lawyers, he pointed out that appellate cases address areas where the law is most in doubt. He noted that the Supreme Court decides only one one-thousandth of 1% of cases presented to it and that it chooses
cases precisely because the law is unsettled. Its cases are in the "least law-bound" areas of law.

Dean Cass commented that even when law and politics overlap, appellate judges make decisions within the "rule of law" framework. He said that *Bush v. Gore*, which decided the 2000 Presidential election, and *Lawrence v. Texas*, which held unconstitutional a state statute criminalizing homosexual sex, show a pragmatic discipline, not a rules-bound system. He noted that the cases are difficult because the problems are difficult. He also discussed the problems of our legal system as perceived by non-Americans. In his opinion, Europeans find that three American rulings define the American legal system’s failings that result from too little common sense and too much money — *Bush v. Gore*, "the OJ case," and the McDonald’s coffee case.

Dean Cass listed the problems perceived by lawyers. They include bad legal rules, such as the Americans with Disabilities Act (ADA), which are well-intentioned but costly and command solutions that are not sensible. Another problem is ambiguous rules. Another is a surfeit of rules, including old ones that take no account of new bodies of law, such as the Employee Retirement Income Security Act (ERISA) and the Occupational Safety and Health Act (OSHA). According to Dean Cass, the problem is that a simple rule will get things wrong, but in the long run, it may be wrong in a better way than an overly complicated rule. Dean Cass characterized the last problem, punitive damages, as "a sinkhole."

Dean Cass explained that lawyers like his explanations of legal system problems, but that ordinary people do not understand the legal system in the same way. Saying that many people believe lawyers cheat their clients, Dean Cass repeated the joke that "there are only three lawyer jokes; the rest are true." He said that some people think lawyers are too close to their clients, citing Vinson & Elkins’ relationship with Enron as an example. While others think lawyers are too far from their clients and have only their own interests at heart, he noted that one cannot have it both ways and that there are strong sanctions for excesses in either direction.

Taking questions from the audience, Dean Cass was asked if the Supreme Court changed after President Franklin D. Roosevelt tried to pack it. He referred to a recent *Supreme Court Review* article on the subject and said that the Supreme Court’s view of the New Deal changed on its own over time. While the older, hard-core Justices did not change their views, he noted that new precedents slowly allowed change. Asked to comment on the differences between elected and appointed judges, Dean Cass said that there were some examples of differences, but no dramatic systematic differences.

The last questioner asked about *Bush v. Gore*’s seeming inconsistency with the Justices’ earlier votes in cases involving federal law and states’ rights. Dean Cass said that while political influence could not be ruled out, votes in Bush line up with the individual Justices’ deference to other Justices. He agreed with the questioner that the Supreme Court’s pragmatism, noted in his discussion of the Supreme Court’s application of the "rule of law," resulted in tensions between Bush and earlier decisions.

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