# Table of Contents

## Message from the Chair
by Mary Vasaly

## Editor's Notes
by Julia Pendery

## Announcements

## Committee Reports

- **Pro Bono/Pro Se**
  by Tom Boyd

- **Programs**
  by James Layton

- **How to Prepare and Deliver a Speech**
  by Roger Townsend

- **Federal Rule Update: Preserving Error under Amended Federal Rule of Civil Procedure 51**
  by Ben L. Mesches and Kendyl Hanks Darby

- **Defending Against Pro Se Appeals in the Second Circuit**
  by Michael P. Shea and Michael J. Parets

- **Getting Your Client's Foot in the Supreme Court Door (Ohio)**
  by Harold Rauzi

[View Entire Newsletter in Digest Form](#)
Message from the Chair
by Mary Vasaly

It has been a long winter in Minnesota. But the cold of winter has not slowed the activities of CAL's committees, which have been busily creating programming, expanding services to members and publishing newsletters and articles. One of the most dramatic accomplishments of the last six months will be evident to anyone reading this newsletter. The web site has been vastly improved through the effort, and great tenacity, of publications chair, Rachel Helyar, with the help of ABA staff, Paula Nessel and Meredith White. We hope you find the new web site more attractive and user-friendly. Rachel is continuing to make other improvements. Look for more detailed descriptions of CAL's committees and links to appellate sites of interest, coming soon.

Rachel and her committee have also been busy gathering information regarding the structure of each state's appellate courts. When this project is complete, it will serve as a terrific resource for those who have national appellate practices. A number of state reports have been completed and are available on the web site. If the state you are interested in, or are most knowledgeable about, has not been completed, please contact Julia Pendery, jpendery@godwingruber.com, and she will let you know how you can sponsor a report on that state's rules.

In the area of programming, this year marks the beginning of a new venture that will enhance CAL's mission of creating a dialogue between appellate lawyers and appellate judges. The Appellate Judges' Conference, which is CAL's parent, formed a 501(c)(3) nonprofit corporation, called the "Appellate Judge's Education Institute." This Institute's goal is to enhance appellate education programs. Under an agreement with the ABA, the AJEI will undertake fund-raising to finance all appellate education programs for appellate judges, and for CAL. The headquarters of the program is the Dedman School of Law at Southern Methodist University in Dallas.

The AJEI will sponsor its opening "Summit" to kick off the Institute's programs at an autumn date to be announced shortly.

CAL's energetic program chair, Jim Layton, and committee member Sheila Huddleston, have been planning a telephonic CLE on appeal bonds. Look for announcements for this program shortly. Jim, and committee member Debra Peterson, have also been planning CAL's annual meeting program agenda. The annual meeting will take place on June 12, 2004, in Chicago. The programming committee has planned some limited programming on such topics as electronic filing for appellate practitioners for those who will be attending the meeting.

The main event to take place at the annual meeting in Chicago will be the election of CAL's officers and executive committee members for the new 2004-05 year, which commences in August 2004 after the ABA convention. Nominations for new officers and executive committee members are currently under consideration by the Nominating Committee, chaired by Cindy Hofmann (Florida), immediate past president of CAL. Its members also include CAL's current chair-elect Chuck Cole (Washington, D.C.), and CAL members Curt Cutting (California), Bob Vort (New Jersey), and John Farley (Connecticut).

Before taking on the role of chair of the Nominating Committee, Cindy Hofmann chaired the...
newly formed Awards Committee. In that role, Cindy and her committee have proposed creating four possible awards: Distinguished Lifetime Achievement; Distinguished Appellate Jurist; Distinguished Appellate Advocate; and, Distinguished Service to CAL. Look for more information on the awards shortly. CAL hopes to give its first award at the AJEI Summit.

The Speakers Bureau has also been very active, under the direction of chair, Roger Townsend. Roger was able to secure the approval of the State Bar of Texas for CAL to offer the "Appellate Road Show" to CAL members. The Road Show is a program that has been used extensively in Texas to educate newer appellate lawyers about the problems and issues facing them. The program can be used as a template to put on similar programs across the nation. Those interested in discussing how to adapt the program for their own state should contact Roger at Alexander Dubose Jones & Townsend LLP, Houston, Texas, or by e-mailing him at rtownsend@adjtlaw.com. Anyone interested in creating speaking opportunities on appellate topics should also read the Speaker's Bureau article on "How to Be Asked to Speak About Appellate Topics," which is posted on CAL's web site. Their article, "How to prepare and Deliver a Speech," is included in this issue of the newsletter.

With all of these developments, and the promise of spring, CAL's future looks bright indeed. Thanks to all of CAL's officers, Executive Board, committee chairs and members and ABA staff who have worked so hard to accomplish so much in such a short time this year.

1Mary Vasaly: Maslon Edelman Borman & Brand, 3300 Wells Fargo Center, Minneapolis, MN 55402; 612-672-8321, Fax: 612 642-8321; mary.vasaly@maslon.com

2CAL has in the past, and intends in the future, to hold its annual meeting in conjunction with a major CLE that is sponsored jointly with the appellate judges. In future years, we anticipate that the appellate judges and CAL will resume their ordinary CLE activities, and CAL's annual meeting will once again be held in conjunction with a significant CLE event, such as the Appellate Practice Institute, a Spencer Grimes seminar or other high-quality appellate educational program.
Editor's Notes
by Julia Pendery

Thank you for all the excellent articles you have submitted. Several of them are included in this edition of the newsletter. Lengthy articles have been posted on the website with a separate link to them.

This month we continue our survey of the appellate courts of all the states. Charts with the information for a number of states are now posted on the website (or will appear shortly). If you are licensed in a state not listed, and would like to supply the information to be posted on the website, please email me. I will send you the form.

If you have links to weblogs and websites of interest to appellate lawyers, please email me those, along with any announcements that are relevant to our audience. Of course, continued articles are welcomed.

I look forward to seeing you in Dallas on October 15, for the opening of the Appellate Judges Education Institute at Southern Methodist University's Dedman School of Law.

1Julia Pendery: Chair Appellate Section, Godwin Gruber, LLP, 1201 Elm Street, Suite 1700, Dallas, Texas 75270; 214-939-4400; jpendery@godwingruber.com
Announcements


CAL Annual Meeting - June 12, 2004, at the Hilton Garden Inn, in Chicago. The program will begin with the CAL Annual Meeting at 9 a.m., a CLE program from 10:00 - 12:00, and a reception from 12:00 - 1:00. A Long-Term Planning Committee meeting is scheduled for Thursday, June 11, 2004, from 2:00 - 6:00 p.m., and an executive board meeting will take place on Friday, June 12, 2004, at 8 a.m. The cost of the Annual Meeting and CLE will be $65.00.
Pro Bono/Pro Se Committee Report
by Tom Boyd, Chair

Tell us about your pro se and pro bono civil appellate programs. We are putting together a comprehensive guide to these programs in every state. The Committee hopes that, by collecting and showcasing information about all of these programs, we can facilitate cross-fertilization of ideas.

Please contact Tom Boyd to let him know who runs your state's pro se and pro bono civil appellate programs, how many appeals they refer or handle each year, what kinds of cases are involved, etc. This is a good chance to recognize the work that you and others in your state do to promote justice by serving the civil appellate legal needs of all citizens. It also lets other state appellate systems know what types of efforts are innovative and successful. The Committee thanks you for your time.

1Tom Boyd, Winthrop Weinstine, 225 South Sixth Street, Suite 3500, Minneapolis, MN 55402-4629, (612) 604-6505; Tboyd@winthrop.com
Programs Committee Report
by James Layton, Chair

The Programs Committee organizes meetings and educational programs for the Council. Currently those include an annual educational program (planned and held in conjunction with the ABA's Appellate Judges Conference and the Appellate Judges Education Institute); in some years, a separate annual business meeting with a legal education component; a teleconference; and a group swearing-in before the United States Supreme Court solely for Council members. Members of the committee identify and arrange for speakers, panels, and presentations, with an emphasis on events that permit appellate attorneys to interact directly with the judges who participate in the Conference and the Institute.

The Committee is currently working on four events:

- A teleconference addressing problems that arise with appeal bonds, to be held during the second half of 2004.
- The CAL Annual Meeting, to be held in Chicago on June 12, 2004.
- A group swearing-in at the U.S. Supreme Court on January 10, 2005.
- The AJEI Summit Meeting at a date to be announced.

HELPFUL LINKS

Weblog and newsletter by Tom Mighell of Cowles & Thompson, P.C., Dallas, Texas:

www.inter-alia.net
http://appellateblog.blogspot.com

---

1James R. Layton: State Solicitor, Office of the Attorney General, Supreme Court Building, P.O. Box 899, Jefferson City, MO 65102; 573-751-3321; james.layton@ago.mo.gov
How to Prepare and Deliver a Speech
by Roger Townsend

This paper discusses how to prepare and deliver a speech at a seminar, presumably on a topic relating to appeals. The keys to a successful speech are those two components -- preparation and delivery. Consequently, this paper treats each one in some depth.

Preparation

Proper preparation includes diligent research, planning, and rehearsal. These not only improve the content of the speech, but also provide greater comfort in delivering the speech. A comfortable speaker receives a better reception from the audience.

Assuming a paper has preceded the speech, it may be necessary to update your research to ensure that the speech is not out of date by the time it is given. Often, seminar papers are submitted several weeks before the actual speech is delivered. Intervening court decisions or statutory (or rule) amendments may require a new focus for the speech.

Your plans must also consider the audience: are they predominately complete novices to your topic, generalists with some knowledge, or experts? Most likely they will be a mix, though usually one characteristic predominates. Awareness of your audience's familiarity with your topic is critical to planning the content of your speech.

You must put yourself in the place of the listeners. They may have opinions that differ from those you are professing and they may have different rational and emotional reactions to the speech, often based on their preconceived notions of the subject matter. Persuasion therefore requires credibility that can be achieved by providing sufficient information to support your claims, as well as professionalism and confidence in the delivery of the speech itself.

The content of your speech should generally follow the structure of your paper. Of course, the ear cannot follow as much as the eye, so many details will have to be left to the paper. Usually a good method is to speak in topic sentences from your written paragraphs, elaborating with details only for the key points. Because natural speaking often differs from formal writing, however, you probably will want to change some of the wording from what you have written. Moreover, your time may not be what you anticipated. Other developments, such as a long-winded prior speaker, may have left you with less time. In that event, be prepared to omit some material, rather than try to solve the problem by talking faster.

We recommend initially preparing an outline of the speech. This can be quickly drafted from the table of contents for the paper, with suitable modifications. You can then add topic sentences or sentence fragments under the headings as necessary. We next suggest preparing a complete written text of the speech. This will force you to check the logic of your thinking and the comprehensibility of your planned remarks to potential listeners who may not have read your paper. Also necessary is planning based on the length of time allotted for the speech. A twenty-minute speech will be much different from a sixty-minute speech. It also will allow you to gauge the length of your speech, though the actual delivery usually will take longer than it does to read your text aloud.
The other benefit of a written text is for rehearsal of the speech. Reading a written text both silently and out loud helps you to learn the material until it becomes second nature. An extra method of preparation is to read the text into a recorder, so that you can play back the speech. This also will allow you to catch and correct gaps in the speech that only a listener will notice.

After planning your speech and its content, practice and perhaps have a practice audience of a spouse or friends critique your performance. You can then revise the content or the delivery method to improve it.

Final rehearsal should include planning what to wear, any particular gestures for dramatic effect, props, technology, and podium materials. Dress should be suitable for the occasion, usually slightly more conservative than your audience. The old advice about white shirts for men probably still holds true, unless television is involved. And an outfit that doesn't clash or compete for attention is usually the best decision. Dramatic gestures should rarely be planned, since spontaneity conveys sincerity. Nevertheless, occasionally a speech may lend itself to a particular gesture or expression that you may wish to practice. But remember Dr. Samuel Johnson's advice to "murder your darlings" by excising any written phrase of which you are particularly proud. The same advice is good for gestures-if there is a particular gesture of which you are especially fond, drop it. In other words, err on the side of under-inclusion. The same may be said of props. One may advance your speech; more will likely prove a nuisance.

You also should consider technology. Most studies suggest that learning occurs better visually than audibly. Do you wish to use visual aids displays, particularly those now available from computers? If you will use them, you need to prepare them from your outline and text. Also, if you decide to use visual aids, become familiar and rehearse with the equipment to avoid any technical problems that might during your speech.

Podium materials usually consist of notes. For reasons we elaborated upon above, we suggest using at most note cards or a topic outline-or best no notes at all. If you are using notes, now is the time to prepare them and practice from them. If you are using no notes, practice without them at least once to gain confidence that you can deliver the speech without them. The final rehearsal should occur at least two hours before the speech, and preferably earlier. Rehearsing any closer to actual delivery risks depleting your energy and leaving your best speech in the office.

**Delivery**

For many speakers, delivery is the most intimidating aspect of public speaking. There is no known cure, although preparation and methodology in delivery can make a considerable difference in the success or failure of a speaking engagement. You can make yourself much more comfortable by considering a few basic delivery guidelines.

Remember that your first impression upon the audience begins the moment you are visible to them. Approach the podium with confidence. If an introduction was made on your behalf, respond appropriately and succinctly. Take a moment to survey your audience and begin your presentation. Maintain your composure and your posture; avoid leaning on the podium.

Any speech is designed to educate or persuade the listener. The speaker desires certain effects upon the audience. In order to have a persuasive speech, the speaker must first establish a rapport with the audience. Thus, before you can persuade your audience, you must capture and hold their attention. Effective introductions often include relevant quotations, unfamiliar facts or opinions, or humorous stories.

To establish rapport with the audience, you must make eye contact with individual members.
By addressing individuals, you feel and appear more natural in the delivery of your speech. Give your attention to individuals as long as it feels comfortable, usually no more than a few seconds.

Your rate of speech should be easy and relaxed. Because audience members are trying to absorb the information you are providing, you may need to repeat certain terms or even to paraphrase something you've just said. Re-emphasize those points that you feel are crucial for the audience to retain. Guide them through your presentation methodically instead of rushing to the finish.

Consider your volume. If you have the benefit of having other speakers before you, make mental notes about their volume and clarity. Notice the distance they put between themselves and the microphone. Avoid monotony in your tone of voice by using a little variety in your inflection and use clear articulation. Speak to your audience just as you do in a conversation with an individual you respect or a professional peer. Exercise confidence and conviction in your speech with an intent to persuade. The audience will then be less concerned with you and more concerned with the content of your speech.

There are various styles of delivery such as reading, memorization, impromptu, extemporaneous and combinations of them all. When choosing the style of delivery, consider not only what works best with your personal strengths, but also whether the given speech lends itself to a particular style.

One method of delivery is reading. Reading is poor, because it is impossible to establish a rapport with the audience. There will be no eye contact with audience members and essentially, no communication. Reading may guarantee that you fully cover all those areas you wish to talk about and save you from memorization, but the price is an inattentive audience. Focus will shift away from your presentation, audience thoughts will wander, and you will find yourself competing with your environment. Moreover, reading presents the appearance of unpreparedness and even a lack of caring enough about the speech to prepare. Furthermore, a bad presentation blocks spontaneity — the inspired moment.

Memorization has potential for success, but an equal potential for failure. If the words are forgotten, moreover, there is no place to look for help. Because of the complete reliance on memory, stress increases and makes a failure more likely. If you manage to salvage your presentation, you still will have lost confidence and become worried that it could happen again, further compromising your presentation. This is certainly the worst case scenario, but even if you manage to make it through your speech without an obvious memory loss, you still will have achieved only limited rapport with the audience. Strict memorization confines the speaker to the parameters of the written script and limits flexibility for audience participation. Furthermore, memorization appears stiff and regimented. Memorization varies from the reading method by allowing for greater rapport with the audience through increased eye contact. But the speaker's mind is focusing on the "script," a string of words in a particular order that compose the presentation rather than responding to the audience's reaction. Without some spontaneity, the audience will become disinterested and the power of persuasion will be lost.

Another method for delivery is the impromptu method. Unlike the preparation required for reading a carefully crafted speech or memorization of the same, the impromptu method uses no preparation. While improvisation works wonderfully for Carlos Santana on guitar, it rarely works well for any speaker. The muse does not always appear on command. Even if a speech can be given this way, it almost always will lack structure and miss some significant content. Often an impromptu speaker will be repetitive and ramble, and the audience may resent the speaker's lack of preparation.
When used properly, notes or a topic outline can work well. The best notes are those in a brief, topical outline or "key word" format, so that they are used only as an occasional guide. Unfortunately, many speakers rely too heavily on notes. Even when the speaker may be familiar enough with the material without the need to refer to the notes, their eyes may become drawn to the notes instead of the audience. The situation worsens when a speaker, in order to continue, stumbles to find his place in the notes. Relying too heavily on notes also can interfere with flexibility and spontaneity.

The best form for the delivery of a speech probably is the extemporaneous method. This method requires both preparation and confidence. With enough rehearsal, you should become familiar enough with the content of the speech that you do not require notes or strict memorization. Essentially, you become so familiar with the contents of the speech that its presentation appears spontaneous. This level of comfort with the material allows you to speak with confidence and make eye contact with individual members of the audience, thus establishing rapport with the listeners. The audience, in turn, will be more receptive to your speech. Because you are so familiar with the material, an extemporaneous speech allows for extreme flexibility. You will be able to handle any question posed to you at any point in the speech. This flexibility will also allow you to change the direction of the speech according to the reactions of the audience or adjust to any surprises, such as a sudden time constraint. You may also find room for inspiration as it strikes or think of new ideas while delivering the speech. While it may take confidence to try this method, the more you do it the more confidence you will gain that you can do it.

The opportunity to give a speech is just that-an opportunity. Rather than feel fear, concentrate on how fortunate you are to have been asked to speak and feel gratitude for having knowledge to share with others. Accordingly, don't forget to thank the host before you leave the podium.

---

1 Roger Townsend: Alexander Dubose Jones & Townsend LLP, 1844 Harvard Street. Houston, Texas 77008, 713-523-2358; rtownsend@adjtlaw.com
Federal Rule Update:
Preserving Error under Amended Federal Rule of Civil Procedure 51
by Ben L. Mesches and Kendyl Hanks Darby

On December 1, 2003, Federal Rule of Civil Procedure 51 was repealed and Amended Rule 51 became effective. This article addresses the changes in the Amended Rule with an eye toward an ever-present issue for appellate practitioners: error preservation.

Purpose of Amendment

According to the Advisory Committee, the purpose of these amendments is to "capture many of the interpretations that have emerged in practice" and "make uniform the conclusions reached by a majority of decisions on each point." Fed. R. Civ. P. 51 advisory committee's notes. The Committee also advised that "additions are made to cover some practices that cannot now be anchored in the text of Rule 51." Id. That is, amended Rule 51 brings the procedural rules into line with established and accepted practices.

Under Amended Rule 51, preserving error takes several forms: (1) submitting a proposed jury charge; (2) the timing and substance of instruction requests and objections to the court's charge; and (3) assigning error to an instruction actually given or the failure to give an instruction.

(1) Submitting the Proposed Charge

Amended Rule 51(a) widens a party's opportunities to request jury instructions by creating two "phases" in which a requesting party may file requests for jury instructions; and expressly grants district courts the authority to direct the parties to furnish a proposed jury charge before trial (which was already the practice in many courts).

Under the new rule, at the close of evidence or an earlier reasonable time (as directed by the trial court), a party may "file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests." Fed. R. Civ. P. 51(a)(1) The Committee recognized that setting a pretrial request deadline may prevent consideration of evolving legal and evidentiary issues. See Fed. R. Civ. P. 51 advisory committee's notes. Accordingly, under the new rule, a party may also request jury instructions after the close of evidence in two circumstances: (1) if instructions on a particular issue "could not have been reasonably anticipated" when the party requested instructions under Rule 51(a), or (2) with leave of court. Fed. R. Civ. P. 51(a)(2).

(2) Instructions and Objections

The amended rule ties the court's obligations to inform the parties of the instructions and give them an opportunity to object together with the timeliness of an objection. Under Rule 51(b)(1), the district court "must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final arguments" and must "give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered." Fed. R. Civ. P. 51(b)(1), (2) (emphasis added). The standard for specificity under the new rule is
unchanged: the complaining party must state "distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51(c)(1). The new rule "carries forward the opportunity to object" but "makes explicit the opportunity to object on the record". Fed. R. Civ. P. 51 advisory committee's notes.

If the district court follows the Rule 561(b)(1) procedure, the objection is timely if the complaining party objects when the court provides the "opportunity" under Rule 51(b)(1). However, if a party does not learn of an instruction or an action on a request "before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1)," then the party must object "promptly after learning that the instruction or request will be, or has been, given or refused." Fed. R. Civ. P. 51(c)(2)(B). Thus, the rule provides a limited fall-back mechanism for parties to object when the court fails to advise the parties of its proposed action on the request for jury instructions.

(3) Assigning Error under the New Rule 51

Under former Rule 51, to assign charge error (for either giving a particular instruction or refusing to give a particular instruction), the complaining party was required to object to that instruction "before the jury retires to consider its verdict." Former Fed. R. Civ. P. 51 (repealed Dec. 1, 2003). The amended rule maintains the distinction between instructions "actually given" and those that the district court fails to give. But the rule also creates a new exception for instructions requested but not given. For instructions the district court actually gives, the complaining party must make a timely and sufficiently specific objection under Rule 51(c). Fed. R. Civ. P. 51(d)(1)(A).

On the other hand, for a failure to give an instruction, the safest course to preserve error is to (1) make a proper request under Rule 51(a), and to (2) make a timely and sufficiently specific objection under Rule 51(c). See Fed. R. Civ. P. 51(d)(1)(A),(B). Cases decided under former Rule 51 held that a request-by itself-is insufficient to preserve error. See Fed. R. Civ. P. 51 advisory committee's notes. The new rule maintains this practice but also creates an exception for this "dual" assignment-of-error procedure when the district court makes "a definitive ruling on the record rejecting the request." Fed. R. Civ. P. 51(d)(1)(B). That is, when a party properly requests an instruction under Rule 51(a) and the district court definitively rejects the request, a separate objection is not required.

Conclusion

While most of the practices codified in Amended Rule 51 should not be unfamiliar to those experienced with federal jury charges, do not assume the practice in your district has not changed. The new rule is notable for its codification of the majority rule on specific practices such as when, and how, to preserve error. To ensure error preservation when charging the jury in federal court, the best practice is to closely examine the language of the new rule-as well as any changes to the local rules-and ascertain how, if at all, the practice in your court has changed.

1Ben L.Mesches and Kendyl Hanks Darby, Haynes and Boone, L.L.P., 901 Main Street, Suite 3100, Dallas, Texas 75202; 214-651-5000, (Fax) 214-651-5940; meschesb@haynesboone.com; kendyldarby@haynesboone.com

2Former Rule 51 reads as follows: "At the close of evidence or at such earlier time during the trial as the court directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its
verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity
shall be given to make the objection out of the hearing of the jury." Former Fed. R. Civ. P. 51
(repealed December 1, 2003).

3 This article does not address the new plain-error provision, which expressly allows the
complaining party to ask the Court of Appeals to review unpreserved error. See Fed. R. Civ.
P. 51(d)(2). The authors' next installment of the Federal Rule Update will address Rule 51's
plain error rule and discuss the situations in which plain error is generally found.

4 The Committee recommends that courts use the plain-error standard set out in Rule 51(d)(2)
in determining whether the court should grant leave to file an untimely jury-instruction
Defending Against Pro Se Appeals In the Second Circuit
They Complicate Task of, and Pose Unique Challenges to, the Appellate Practitioner

BY MICHAEL P. SHEA
AND MICHAEL J. PARETS

IT IS SAID that anyone who acts as his own lawyer has a fool for a client. But it might also be said that any lawyer who banks on the ineptitude of his pro se adversary will end up wearing the fool’s cap too — especially in the Second Circuit. Defending pro se appeals poses unique challenges because pro se litigants are excused from the ordinary procedural rules, and the appellate practitioner cannot rely on the adversary process to flush out the issues that may interest the court. The Second Circuit is especially solicitous of pro se litigants and demands more of counsel when the other side is pro se, complicating the task of the appellate practitioner.

The Second Circuit has made clear that pro se litigants are not to be held to the same pleading and procedural rules as represented parties. Thus, pro se complaints are construed "liberally, applying a more flexible standard," and may not be dismissed unless it is "beyond doubt that the plaintiff can prove no set of facts ... which would entitle him [or her] to relief." Taylor v. Vt. Dept. of Education, 313 F.3d 768, 776 (2d Cir. 2002).

Michael P. Shea is a partner in the Appellate Practice Group of Day, Berry & Howard, resident in the Hartford, Ct. office, and Michael J. Paretis is an associate in the firm’s New York office.

(internal quotation marks and citation omitted.) In addition, pro se litigants may amend their pleadings “unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim.” Gomez v. USAA Fed. Savings Bank, 171 F.3d 794, 796 (2d Cir. 1999).

Similarly, a district court may not grant summary judgment against a pro se party who fails to comply with the rule requiring the filing of papers opposing a summary judgment motion unless either the court or opposing counsel has advised the pro se party of the rule. Ruotolo v. Internal Revenue Serv., 28 F.3d 6, 8 (2d Cir. 1994). In short, under the standards of procedural leniency adopted by the Second Circuit in pro se cases, “[o]nce a pro se litigant has done everything possible to bring his action, he should not be penalized by strict rules which might otherwise apply if he were represented by counsel.” Ortiz v. Cornetta, 867 F.2d 146, 148 (2d Cir. 1989).

The Second Circuit is not shy about enforcing these standards, reversing merit-based rulings by district judges who make the mistake of holding pro se litigants to the niceties of federal practice. See Weixel v. Bd. Of Education, 287 F.3d 138 (2d Cir. 2002) (reversing dismissal where district court failed to construe pro se plaintiffs’ complaint liberally); Sherrer v. Sears, Roebuck & Co., 1998 U.S. App. LEXIS 28269 (Nov. 6, 1998) (abuse of discretion for district court to dismiss pro se’s complaint because of her failure to appear at settlement conference).

In In re New York City Transit Auth’y, 262 F.3d 412, 413 (2d Cir. 2001), the court announced its intention to vacate any summary judgment ruling against a pro se litigant, “no matter how meritorious,” in the event of a “failure to provide the pro se party with notice of the requirements of Rule 56 of the Federal Rules of Civil Procedure, and the consequences of noncompliance therewith, … unless the movant shows (or it is obvious to the court) that the pro se was aware of this rule’s requirements.”

The Second Circuit’s solicitude for pro se parties is on public display during argument of the appeal. As the court’s
handbook notes, the Second Circuit is the only federal appeals courts in the nation that routinely entertains oral argument in pro se cases. And these arguments can be a riveting spectacle.

Three black-robed judges, who have attained some of the loftiest perches in our judiciary, peer down from the dais in the Foley Square courtroom to hear the grievances of ordinary citizens unschooled in the fine points of legal advocacy. The pro se litigants themselves run the gamut from the well-educated to those without formal education, and from the articulate to the incoherent.

Typically, the court listens silently to the pro se litigant, who is usually given five minutes to speak. But let the lawyer beware. It would be a mistake to read the court’s silence as a sign of disinterest in the appeal, or to count on an easy victory after a weak presentation by the pro se. For in many cases, the lawyer defending the appeal rises following an uninterrupted presentation by the pro se only to face a barrage of probing questions from an active bench.

The Attorney’s Best Approach

So how best to defend the appeal when the other side is pro se? The usual formulas do not apply. You cannot rely on your adversary to articulate the issues for appeal. You cannot expect that the court will limit its inquiry to the issues raised by your adversary. You cannot be sure that your adversary will be held to positions he or she took in the district court or in his/her brief. You can, however, effectively protect your client’s interest by serving, in essence, as the district court’s lawyer.

Your first task in this capacity is to aid the district court in observing the above-mentioned standards of procedural leniency towards pro se litigants. For example, you should give the pro se litigant clear notice of the requirements of Rule 56 when you move for summary judgment — even if the district court already provided such notice when the complaint was filed.

See ibid., 262 F.3d at 413. In addition, at least if your case is strong, you should resist the instinct to exploit technical defects, particularly when doing so would prevent the district court from reaching the merits.

Once judgment enters in your client’s favor, watch for issues that might defeat appellate jurisdiction: Was the notice of appeal timely filed? Does the notice mention only the denial of a post-judgment motion or does it challenge the underlying judgment as well? These sorts of issues go to the court’s appellate jurisdiction and constitute an exception to the general rule of procedural leniency towards pro se litigants. See Goode v. Winkler, 252 F.3d 242, 245 (2d Cir. 2001) (district court abused discretion in granting pro se’s untimely motion for extension to file late notice of appeal: “The power of the federal courts to extend the time limits on the invocation of appellate jurisdiction is severely circumscribed.”); Fitzgerald v. Feinberg, 2000 U.S. App. LEXIS 12486 (2d Cir. June 6, 2000) (dismissing appeal where pro se filed notice of appeal following non-final order and then failed to do so after judgment entered: “The possibility that [the pro se litigant] was misled does not give this panel the power to hear an appeal over which it lacks jurisdiction.”).

Although the court may condone technical defects in a pro se’s notice of appeal, see Marrone v. United States, 196 F.3d 377 (2d Cir. 1999), it will have no choice but to dismiss the case if the papers required to invoke its jurisdiction are not timely filed.

As for briefing, unless your pro se adversary identifies genuine appellate issues and writes a coherent brief, your brief should focus on defending the judgment of the district court rather than responding in detail to your opponent’s arguments. If the district court’s ruling was based on procedural grounds, your brief should show not only that it was legally correct but also that any error was harmless and/or that your pro se adversary suffered no prejudice because he/she had no case on the merits.

Finally, in preparing for oral argument, you should spend extra time reviewing the record, i.e., the pleadings and transcripts of proceedings in the district court. In a pro se case, the court will not confine itself to the briefs, and will be more inclined to test counsel on aspects of the record that the parties may have ignored. Prior to the hearing, the judges will likely have scrutinized the record to ensure that the pro se litigant’s claims, even if poorly articulated, received due consideration and procedurally lenient treatment in the district court. So when you rise to speak in the Foley Square courtroom, you should be prepared to defend the district court record and to show that your pro se adversary has had his day in court.

This article is reprinted with permission from the October 14, 2003 edition of the NEW YORK LAW JOURNAL. © 2003 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact American Lawyer Media, Reprint Department at 800-888-8300 x6111. #070-10-03-0022

---

Day, Berry & Howard LLP
COUNSELLORS AT LAW
www.dbh.com
Getting your client's foot in the Supreme Court's door

by Harold R. Rauzi

If the civil case you are handling is not one that the Supreme Court of Ohio must hear, how does your client get to be the "lucky" one in 10 who is granted discretionary review? The answer is deceptively simple: Your client will be heard if, and only if, you can persuade a majority of the Court that your client's appeal involves "a question of public or great general interest."

The odds are long. In one recent year, the Court disposed of 700 cases on the merits. The majority were cases that the Court was required to hear, i.e., original actions, appeals of right, etc. Only one in five of the cases decided on the merits were matters where the Court had discretion to accept or reject the case. Yet, of the 2,284 appeals filed that same year, two-thirds were seeking discretionary review. The statistical category that includes most civil appeals (discretionary appeals, nonfelony) reflected 1,028 new appeals; of those, the Court agreed to hear 107.

So, what is "a question of public or great general interest"? Eighty-five years ago, one Ohio attorney lamented: "There is no reported case, and no sentence in any reported decision, which even attempts to define these words, or indicate their scope or their limitations." Three decades later, then-Justice (later Chief Justice) Kingsley A. Taft conceded that "the opinions and decisions of the Supreme Court of Ohio have not even hinted at an answer to that question." Frankly, I am almost as much in the dark as to the answer to the question as before I became a member of the court.

Even today, there is still no blackletter authority on what constitutes a question of public or great general interest. The commentary is also sparse. And, what commentary is available quickly brings to mind Justice Potter Stewart's famous comment on defining pornography: "I know it when I see it."

The development of discretionary review

Until 1913, Ohio litigants had an absolute right of appeal from the circuit courts to the Supreme Court. In 1912, an amendment to the Ohio Constitution, effective the following year, replaced the circuit courts with the present court of appeals; instituted a policy of "one trial, one review"; and narrowed the Supreme Court's jurisdiction to essentially its present limits. These changes were intended to make the court of appeals the "court of last resort for the great bulk of litigation," freeing the Supreme Court to spend less time deciding specific controversies among parties and "devote its attention to the general supervision of the development of a coherent, uniform and consistent system of law."

---

Harold R. Rauzi is a lawyer with Buckley King in Cleveland.
The Supreme Court of Ohio today has original jurisdiction to hear the so-called extraordinary writs, and in matters relating to the practice of law. It has mandatory appellate jurisdiction in cases that originate in the court of appeals, cases involving constitutional issues under either the Ohio Constitution or U.S. Constitution, appeals from the Board of Tax Appeals or Public Utilities Commission, and death penalty cases. The Court has discretionary appellate jurisdiction in felony cases, and in nonfelony matters raising questions of public or great general interest. Early on, the Court announced in City of Akron v. Roth that it would exercise discretionary review only on a showing that “(a) the case is of public or great general interest, and (b) that error has probably intervened.”

In search of a definition
The most thorough discussion of what constitutes a question of public or great general interest that my research has found is drawn from a speech given by Justice Louis J. Schneider in 1966. Justice Schneider related the meaning of “public interest” to the phrase, Chief Justice Carrington T. Marshall replied, “The Supreme Court of Ohio has never placed any limitations on that.” As previously seen, a later Chief Justice candidly admitted that he was simply “in the dark” as to its meaning. The closest the Supreme Court of Ohio has come to any official definition is to note, without expansion, that great general interest is “as distinguished from questions of interest primarily to the parties.”

Justice Schneider was able, anecdotally, to cast some light on the issue, identifying six categories of cases the Court is “apt” to review:

- Cases presenting issues of major controversy in the law;
- Cases involving statutory construction;
- Cases that clarify or explain recent policy changes;
- Appeals in which there is a split of opinion in the lower courts;
- Decisions of the court of appeals that appear contrary to prior Supreme Court decisions, and
- Cases of “real, substantial, prejudicial error.”

Several of Justice Schneider’s observations find support in the public comments of present members of the Court. Chief Justice Thomas J. Moyer has observed that, where a justice “feels strongly

Continued on page 8
that this is an issue that the court should decide," that justice will urge the others to grant full review. Justice Alice Robie Resnick's criterion for review is whether the proposition(s) of law reflect(s) "something the court should be looking at." Justice Francis E. Sweeney sometimes reads jurisdictional memoranda with an eye for issues he believes the Court should explore. These statements parallel Justice Schneider's penchant to look out for controversial issues of law that the Court should resolve.

In discussing the Court's tendency to review cases in which there is a split of opinion, Justice Schneider was not referring to cases certified due to conflicts between appellate districts.

He was indicating that the Court was more likely to grant review where the court of appeals had reversed the trial court than where the lower court had been upheld. Likewise, Justice Schneider noted a greater tendency by the Court to review cases where the appellate panel was split. More recently, now-retired Justice Andrew Douglas spoke of this same criterion, saying that whether the court of appeals was unanimous or split was "one of the first things he examine[d]."

An admittedly unscientific study suggests empirical support for Justice Schneider's observation that efforts to clarify or explain policy changes may lead to a series of cases being accepted for review. A review of Sheppard's Citations reveals that, in the five years following the Court's decision of

Van Fosen v. Babcock & Wilcox Co. (explaining the law of intentional tort by employer), the justices "followed," "distinguished" or "explained" Van Fosen 29 times. Presumably, many of those cases were accepted for review, at least in part because they offered the Court the opportunity to address the Van Fosen issues in different settings.

With Scott-Pontzer v. Liberty Mutual Fire Insurance Co., the Court changed the landscape of uninsured/underinsured motorist insurance law in Ohio. Shepardizing Scott-Pontzer shows that in the ensuing four years, the Court has followed that case in four others. Moreover, as of May 6, 2003, there were 25 UM/ UIM cases on the Supreme Court's docket. The aftermath of Van Fosen and Scott-Pontzer lend credence to Justice Schneider's assertion that the Court is apt to take in cases that allow it to clarify or explain recent policy changes.

Although the Supreme Court is supposed to devote its energies to matters of policy and developing the law, rather than to the correction of errors, an egregious error by the intermediate court will often pique the Court's interest. Three-quarters of a century ago, Chief Justice Marshall opined, "if there is a case of real error whether it is very important or not, I think the court would correct it by letting in the case." Over the decades, Justices Schneider and Douglas would, in turn, echo that sentiment. Unfortunately for practitioners, the various commentaries do not tell us what an error sufficient to invoke the Court's discretionary jurisdiction looks like.

A question of great general interest will probably never be susceptible to a blackletter definition.

Practice pointers

"A question of great general interest will probably never be susceptible to a blackletter definition. Some of the anecdotal examples given by Justice Schneider and others are largely beyond the advocate's control, e.g., whether the case involves a controversial topic or falls into an area of law that the Court is in the midst of changing or explaining. Spotting these issues, and pointing them out to the Court, certainly is the lawyer's responsibility; however, whether these issues exist within a given case is largely happenstance.

When you do have a case that you believe presents a question of public or great general interest, there are a few suggestions that may be gleaned from the commentary on discretionary review, along with the literature on brief writing and appellate advocacy:

- Be brief.
- Be clear and readable.

Justices speaking 30 years apart have noted the sheer volume of cases that must be screened for discretionary

Continued on page 30
jurisdiction.26 The literature on brief writing emphasizes the preference of courts at all levels for brevity in legal writing.27 Although the Court allows up to 15 pages for jurisdictional memorandums, a shorter memorandum likely will be more thoroughly read.28 By rule, a jurisdictional memorandum should include "the proposition(s) of law stated in syllabus form."29 A syllabus is, by definition, a summary or condensation of a larger work.30 A random sampling of six recent Court decisions reveals that the syllabuses range from one to three paragraphs. The average paragraph contains 51 words. Syllabuses are, by their nature, succinct.

One legal writing expert proposes that every brief should make its primary point within the first 90 seconds of reading, and that this should be accomplished in 75 words or less.31 The syllabus-style propositions of law required by S.Ct.Prac.R. III (1)(B)(1) offer the Ohio advocate the opportunity to take advantage of that theory—to distill your client's question of public or great general interest and lay it before the Court sooner, rather than later. (For at least one justice, the appellant's proposition(s) of law is the first thing he reads.)32 Take advantage of this opportunity.

Clear writing is "easily understood, without obscurity or ambiguity."33 That which is readable is "pleasing, interesting, offering no great difficulty to the reader."34 Readability increases the likelihood that your memorandum will be read start-to-finish. Clarity increases the likelihood that your point will be understood. Brief writing gurus recommend these principles, and judges appreciate them.35

Summary
The Supreme Court of Ohio has discretionary jurisdiction in civil actions of public or great general interest. Cases of public interest include appeals from state agencies, workers' compensation matters and other cases affecting the public as an organized community.

General interest exists where the issues affect large numbers of people, but not government entities per se. This includes areas of unsettled or controversial law, where public policy is in flux, or where the Court sees "real, substantial, prejudicial error."

Given the large number of jurisdictional memorandums that the Court must consider, it behooves the advocate seeking discretionary review to create a well-crafted memorandum: succinct, clear and readable. ■

Endnotes
3 Prior to 1968, members of the Supreme Court of Ohio other than the Chief Justice were designated judges; however, I have used the post-1968 title Justice throughout. See Ohio Jurisprudence 3d, Deskbook 325 (1998).
4 Herbert at 38.
6 Ohio Rev. Code Ann., Section 2, Article IV, Ohio Constitution, Editor's Comments (West 1993); Herbert, supra, at 32-33.
7 Herbert, supra, at 34, 35.
8 Ohio St. 456 (1913), at paragraph three of the syllabus.
10 Herbert, supra, at 33.
11 Herbert, supra, at 37.
12 Id., at 38.
13 Williams v. Rubich (1960), 171 Ohio St. 253, 254.
14 Neff, supra, at 47, 60.
16 Id.
17 Id.
18 Neff, supra, at 60.
19 Murphy, supra.
20 Ohio St. 4d 100 (1968).
21 Ohio St. 3d 660 (1999).
23 Herbert, supra, at 34, 35.
24 Id., at 37.
25 Neff, supra, at 60; Murphy, supra.
26 Herbert, supra.
31 Garner, supra, at 48, 71.
32 Murphy, supra.
33 Webster's at 419.
34 Id., at 1889.
35 Garner, supra, at 383; and Michel, supra, at 23.