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This edition of *Appellate Issues* offers a sampling of the educational programs sponsored by the Council of Appellate Lawyers over the past year.

From the ABA 2005 annual meeting, CAL member Carrie Legas reports on the panel discussion "Struggling for Statutory Meaning."

From the AJEI/CAL meeting in San Francisco, another view on statutory construction: "Statutory Interpretation: Views and Approaches" by Chief Justice Clifford W. Taylor of the Michigan Supreme Court (originally distributed at the AJEI/CAL meeting).

Next up--again from the San Francisco meeting--John Bursch's report on Judge Ruggero J. Aldisert's presentation "Logic and the Art of Legal Reasoning."

Professor Tracey George's "Understanding the Decision to Grant En Banc Review" and CAL member Leane Medford's "Availability of En Banc Consideration and Rehearing in the Federal Courts of Appeal and State Courts" are reprinted for your edification.

Joseph Kuiper reports on Professor Richard Wydick's presentation "Editing Drafts Written by Associates or Law Clerks." Finally, a report on the session "Law and Its Relation to Religion, Technology, Science and Public Policy."
Struggling for Statutory Meaning
by Carrie Legus

Together with the MC, CAL sponsored a panel discussion at the ABA Annual Meeting last August addressing *Unplain Meaning, Cheap Talk, and Loose Canons: The Continuing Clash over Statutory Interpretation and Proposals for Resolving It*. The panel--comprised of judges, professors and an appellate practitioner--gathered authors of recently published articles engaged in the debate over proposals for establishing judicial coherency in construing statutes. Such proposals have included a Restatement of Statutory Interpretation, federal rules, or codified canons.

Espousing a view invected with pragmatism, but, nonetheless, joking he breaks out when he has to do anything practical, Professor Timothy P. Terrell, Emory University School of Law, regaled the audience initially with a cogent summary of textualism versus intentionalism, the context from which these proposals emerged. He went on to describe the matrix of interpretation set forth in his article, *Statutory Epistemology: Mapping the Interpretation Debate*, 53 Emory L.J. 523 (2004). With the matrix, he attempted to broker the divide between political and moral philosophy as well as ostensible dissonance between categorical and consequential reasoning. Terrell derived four approaches to statutory construction focused on the text, legislative intent or purpose, or dynamic interpretation. Ultimately, he privileged none of the four approaches because, while a judge may begin from a default position located within one approach, the pragmatic task of judging necessarily thaws from shades of each approach with shifting emphasis toward one or another depending on the case. Terrell spoke against efforts to codify statutory interpretation as it would privilege one of the four interpretive approaches. He was not so opposed to a restatement however. Similar to baseball, a restatement would demarcate where and how the game would take place but not what would happen during the game. Terrell then turned to the other panelists for their perspectives.

Gary O'Connor, an appellate attorney with the U.S. Department of Veterans Affairs and the first blogger on the topic (*Statutory Construction Zone*, http://www.statconblog.blogspot.com, where one may find his article *Restatement (First) of Statutory Interpretation*), noted that statutory interpretation, similar to common law, has evolved mostly from judge-made rules. Yet, unlike contract law, for instance, few recognized treatises exist on statutory interpretation. The most commonly referenced treatise, Sutherland Statutory Construction, was written more than a century ago. According to O'Connor, Sutherland's treatise has been updated four times by different authors, thereby resulting in less than coherent guidance. In reaction to Rosenkranz's well-known 2002 proposal for promulgating Federal Rules of Statutory Interpretation, O'Connor advocated instead undertaking a Restatement of Statutory Interpretation to provide the requisite comprehensive guidance.

Professor Saikrishna B. Prakash, University of San Diego School of Law, weighed in on the side of intentionalism with arguments reminiscent of speech-act theory. See his coauthored articles, "Is That English You're Speaking?" *Why Intention Free Interpretation Is an Impossibility*, 41 San Diego L. Rev. 967 (2004); *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 Const. Comment 97 (2003). In response to codification proposals, Prakash contended that the judiciary has no constitutional authority to create mandatory rules of statutory interpretation. He further pointed out constitutional issues
with Congress retroactively codifying interpretation or attempting to bind a future Legislature. Finally, he opined that the problem of statutory interpretation is overrated and that muddling along interpretively works fine.

Judge Abner M. Mikva, University of Chicago Law School and former Chief Judge of the D.C. Circuit and U.S. Representative, confirmed that legislative history is fraught with all the problems its critics claim. Thus, he commented that, where a statute is clear, judges should follow the text. Nonetheless, as demonstrated by Judge Mikva's article entitled, *The Muzak of Justice Scalia's Revolutionary Call to Read Unclear Statutes Narrowly*, 53 S.M.U. L. Rev. 121 (2000), he does not adhere to strict constructionism. Judge Mikva shared from his legislative experience that, legislatures may know how to write clear laws, but they cannot always pass clear laws. This leaves judges struggling to discern statutory meaning with any available tools. Just as he opposed judicial amendment of statutes by over construing amorphous legislative intent, so too he stood against such strict construction that it narrows the scope of the statute. Ironically, strict adherence to textualism may result in broader judicial discretion than occasional, judicious use of legislative history. Against this backdrop, Judge Mikva acknowledged that a Restatement of Statutory Interpretation may make some sense. On a light note, he added that a restatement would be good because it would mostly be ignored.

An avowed textualist, Justice Robert P. Young, Jr., Michigan Supreme Court, remarked that utilizing a searching definition of the term "ambiguous" avoids favoring a judge's policy preferences over those expressed by legislative choices. See *A Judicial Traditionalist Confronts the Common Law*, 8 Tex. Rev. L. & Pol'y 299 (2004). He declared the proposed legislative solution to statutory construction a nonstarter. By contrast, Judge Young observed, in an emerging but not urgent consensus, that a restatement, like chicken soup, may have doubtful healing properties but would not do any harm."
In interpreting constitutions, statutes, contracts, and legal instruments in general, I believed in the approach usually described as originalist or, textualist. I adhere to this approach because it is most fidelitous to the concept that the function of a judge is to carry out the intent of the authorized lawgivers. That is, in the case of constitutions the drafters and ratifiers; with statutes, the legislators; and with private legal instruments, the private contracting parties.

To be an originalist or textualist means that we search for the meaning of, as Justice Scalia describes, the "objectified" intent. It is, again in Scalia's words in his book *A Matter of Interpretation*, "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.”

To use this approach, which essentially is to accept that the lawgiver used words to convey meaning and we should not ignore that meaning, causes the judge to use certain obvious tools such as grammar, definitions either in the instrument or as widely understood at the time of drafting, context, and, of course, the common sense canons and presumptions of interpretation with which all lawyers are familiar and indeed are used by any careful reader, be they a judge or not of any document. The goal here is to be faithful to the meaning conveyed by the text so that the meaning is not distorted by the biases of the reader. It is the best was I know of to ensure that similar cases will have, as much as humanly possible, similar outcomes as opposed to different outcomes of the judge that decide it.

It is just this problem, outcomes dependent on who is the judge, that is the problem with the extra-textual standards so frequently seen in recent decades in the law. These are described variously as the well-being of our society and the ends of constitutional government, values that we hold to be fundamental in the operations of government, deeply embedded cultural values, values deeply embedded in the society, moral evolution, evolving concepts of human dignity, the living development of constitutional justice, autonomy and equal concern and respect enhanced by a moral theory, welfare rights, a fusion of constitutional law and moral theory, the national will, the dignity of full membership in society, our society's "distinctive public morality," the settled weight of responsible opinion, the judge's personal preferences, and substantive value judgments.

These extra-textual justifications really allow judges far more power to establish our society's rules and policies than our nation's founders ever intended. It moves us from being, in the memorable phrase at the founding, a government of law to being a government of men and, thus, runs contrary to our basic understanding of that to which American judges and courts should aspire.

This is not to suggest that determining the original meanings of instruments is always a simple task. It is not. It requires a good deal of effort, and reasonable people can differ. But that does not make this approach flawed. Indeed, its application is less troublesome than other approaches, as Justice Scalia has said on this topic:
The difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution changes--that the very act which it once prohibited, it now permits, and which it once permitted, it now forbids--and that the key to the change is unknown and unknowable. The originalist, if he does not have all the answers, has many of them.

Accordingly, what is to be understood is that this debate between originalists and extra-textualists is not really over just different techniques of reading and interpretation. Rather, it is about whether those who have authority to decide policy, be it by warrant of a constitution or statute or common law, will, in fact, have that power, or if the courts, in the guise of interpreting the documents, will seize this power from them.

This is, in short, a most important matter.

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16 William Ray Forrester, *Are We Ready for Truth in Judging?* 63 ABA J 1212, 1214-16 (1977)."
Logic and the Art of Legal Reasoning
by John J. Bursch*

Judge Ruggero J. Aldisert, Senior U.S. Circuit Judge of the U.S. Court of Appeals for the Third Circuit, is one of the most well-known and respected instructors of appellate practice in the nation. Attendees at the 2005 Council of Appellate Lawyers & Appellate Judges Summit in San Francisco were treated to a wide-ranging dissertation by Judge Aldisert on effective appellate advocacy, including the use of logic in constructing persuasive legal arguments.

Judge Aldisert began by referring to the research he did in 1991 for the first edition of his renowned book, *Winning on Appeal: Better Briefs and Oral Arguments*. He spoke with scores of state chief justices and chief judges of the various federal circuits about the quality of appellate briefs, and the feedback he received was uniform and pervasive: briefs are too long; they present too many issues; they lack a central theme or focus; and they fail to disclose the equitable and legal heart of the matter. Eleven years later, while performing research for the second edition of his book, Judge Aldisert conducted a similar survey and received the same dreary comments. Drawing from this research, he concluded that too many lawyers fail to recognize that the appellate environment is a "galaxy away" from practice in the trial court. Whereas a trial attorney presents exhibits and testimony to persuade the fact finder at a trial that may be measured in weeks or even months, an appellate attorney is limited to approximately 30 pages plus 15 minutes of oral arguments. Because of those limitations, "more is not better when you take an appeal."

Judge Aldisert also discussed the uphill battle attorneys face in trying to overturn an adverse result in the trial court. Last year, the federal circuits as a whole reversed in only 8.7% of their cases, and that figure drops to 5.0% in criminal cases. In the United States Court of Appeals for the Second Circuit, reversals bottom out at a 1.0% rate generally, 0.8% for criminal cases. These low reversal rates indicate that the written brief is absolutely critical.

The importance of the brief increases when one considers the likelihood of receiving oral argument. In 1990, 44% of cases pending in the federal circuits went to oral argument. By 2004, that figure had dropped to 30%, with a low of 17% in the United States Court of Appeals for the Fourth Circuit. The reason for this decrease is simple: docket size. In 1969, Judge Aldisert's first full year as a federal circuit judge, every judge on the circuit had to decide (not write) 90 cases, only slightly below the national average of 93 cases. Today, however, the average Third Circuit judge has to decide 379 cases per year, and in the Fifth and Eleventh Circuits, the number jumps to more than 700 cases per year. As Judge Aldisert stressed: "Improving your brief is no longer an academic exercise. Your brief is more important today than at any time in the history of appellate advocacy."

To start the appellate brief writing process, Judge Aldisert recommended that advocates first make a list of all possible issues that could be raised, without limitations. Then, weed out all issues that do not have a reasonable probability of prevailing in the appellate court. To determine the issues that will most stimulate the interest of the appellate judges, track cases within the jurisdiction to see what areas of the law are the recipients of lavish attention and which are ignored. Ultimately, the advocate should select very few issues to present, as most appellate judges make presumptions about the validity of legal arguments on the following scale:
<table>
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<tr>
<th>Number of issues</th>
<th>Presumption</th>
<th>Lawyer is . . .</th>
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<tr>
<td>3</td>
<td>Presumably arguable points</td>
<td>primo</td>
</tr>
<tr>
<td>4</td>
<td>Probably arguable points</td>
<td>primo minus</td>
</tr>
<tr>
<td>5</td>
<td>Perhaps arguable points</td>
<td>no longer primo</td>
</tr>
<tr>
<td>6</td>
<td>Probably no arguable points</td>
<td>not making a favorable impression</td>
</tr>
<tr>
<td>7</td>
<td>Presumably no arguable points</td>
<td>at an extreme disadvantage</td>
</tr>
<tr>
<td>8+</td>
<td>Strong presumption: no arguable points</td>
<td>playing Monopoly: &quot;do not pass Go&quot;</td>
</tr>
</tbody>
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The exception to the "fewer issues the better" rule is the criminal appellant, who must protect the record in state court to preserve issue for post-conviction (i.e., habeas corpus) relief in federal court.

In Judge Aldisert's words, the "summary of argument is critical." After reviewing the issues presented by both the appellant and appellee and digesting the trial court opinion, Judge Aldisert starts with the summary of argument in both briefs before he reads them cover to cover. Many other appellate judges do the same. Accordingly, the summary of argument will often create the first (and last) impression of the case's legal merits.

A conscientious appellate advocate will never sit down to write the facts until after deciding the issues to be presented. In the common law tradition, a judicial holding is a legal ruling attached to a detailed set of facts. There is no such thing as a statement of facts "in the nude." A renowned appellate attorney once commented that the preparation of the factual statement is a task that should not be entrusted to a junior litigator, because it is the portion of the brief where the biggest difference can be made. Judge Aldisert agrees wholeheartedly.

Judge Aldisert then turned his attention to the use of logic and reasoning in constructing persuasive legal arguments and briefs. This is a topic he knows well, as he has also authored *Logic for Lawyers: A Guide to Clear Legal Thinking* (3d ed. 1997). As Judge Aldisert describes it, reasoning is the process whereby a thinker passes from one proposition to another that depends on the first. Logic is the tool that allows the "passage."

Judge Aldisert moved on to deductive reason, that is, reasoning that starts with a premise and leads to a conclusion, such as the categorical syllogism that is at the heart of the persuasive process. Consider the following example: all men are mortal; Socrates is a man; therefore, Socrates is mortal. Unless the major premise (all men are mortal) or the minor premise (Socrates is a man) can be disproved, the conclusion (Socrates is mortal) must be accepted. This is an example of deductive reasoning, where the "passage" is from a general proposition to a particular one. In an appellate argument, the major premise (all men are mortal) is a rule of law, embodied in a constitution, statute, or common law decision. The minor premise (Socrates is a man) is a fact, either stipulated or proven in the lower court. Judge Aldisert gave several examples of the United States Supreme Court's use of categorical syllogisms, some valid, some not, either because the major premise or the minor premise was in question.

Judge Aldisert then discussed two kinds of inductive reasoning: generalization and analogy. When using a generalization, one attempts to draw a general conclusion from specific examples: Caesar was mortal; Napoleon was mortal; the Pope was mortal; therefore, all men are mortal. Slightly different is the analogy, where one compares one situation to a like situation. For example, if a particular legal consequence attached to a set of facts, the same legal consequence should apply to a new set of facts that resembles or is similar to the first.
Lawyers use this type of inductive reasoning in nearly every common law case, and it is the degree of similarity or resemblance that is crucial.

Next, Judge Aldisert categorized logical fallacies, arguments that are of no persuasive value. These fallacies include: an appeal to pity; an appeal to prestige; *ad hominem* attacks; an appeal to the masses; an appeal to tradition; the threat of fearsome consequences; the attempt to apply a general rule where an exception exists; the drawing of a general rule from an inadequate sample of instances (i.e., hasty generalization); the attempt to draw a conclusion in a conjunctive situation, where it is not possible to determine which of two events was the cause; the *non sequitur*; begging the question; making a circular argument; and criticizing of conduct in which you engage (i.e., hypocritical).

Judge Aldisert concluded by fielding questions regarding his appellate preferences. He prefers a simple, declarative statement rather than a "deep issue" paragraph in the questions presented. He abhors the placement of citations in footnotes. ("A man who reads footnotes in an opinion would open his hotel door on his wedding night.") He prefers that an appellate brief begin with a jurisdictional statement (as most rules require) rather than an introduction or summary, since the court's jurisdiction is the *sine qua non* of the appeal process. And a summary of argument is better if shorter and should not exceed two pages. The summary should reflect how the advocate would explain the case to a friend or peer.

Following Judge Aldisert's helpful remarks, he was presented with the Council of Appellate Lawyers' first "Distinguished Jurist Award," in recognition of his judicial temperament, objectivity, and commitment to the continuing education of appellate lawyers. In his gracious acceptance speech, Judge Aldisert remarked that, at age 86, the honor was a crowning achievement of his career on the appellate bench.

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Understanding the Decision to Grand En Banc Review
by Tracey E. George, Professor of Law, Vanderbilt University
Prepared for the Council of Appellate Lawyers and Appellate Judges Summit

Introduction

The United States Courts of Appeals increasingly serve as the final arbiter in federal cases, but, in contrast to the U.S. Supreme Court, they decide nearly all of their cases in divisional sittings of three judges. The acceptance of the panel practice is in part a product of the availability of en banc review, that is review by the court's full membership of selected panel rulings. At the behest of a judge or a party and with the concurrence of a majority of the circuit's active membership, all active members of the court as well as any senior judge from the circuit who was a member of the original panel will sit to decide an appeal en banc. (28 U.S.C. § 46; Fed. R. App. P. 35.) The en banc court's ruling becomes the circuit's decision in the case, and the court vacates any earlier panel decision. The en banc procedure is rarely invoked - fewer than one percent of circuit cases are resolved by an en banc court of appeals - but en banc cases are the most significant cases decided by the courts of appeals.

The en banc case is considered more significant than the much more common panel case for a number of reasons. The most obvious is that the en banc hearing procedure limits the cases reviewed by the entire court to those selected by a majority of the court's members. This procedure creates the presumption that the cases are likely to involve difficult, complex, highly political, or at least important questions. The en banc case also looms larger because it expends greater judicial and litigant resources, exposes the parties and circuit to the possibility of a splintered ruling, and removes some of the standard constraints on judicial decisionmaking at the court of appeals level (such as circuit precedent or en banc review). Finally, the Supreme Court is more likely to grant certiorari to petitions filed from en banc decisions, perhaps because the justices view en banc cases as more momentous.

By granting rehearing en banc, a court may seek to speak in a single voice; however, the result is not without disharmony. While the court's ability to sit en banc may work to protect the integrity of circuit law and to shore up institutional legitimacy by ensuring consistency and conformity in decisionmaking, the appearance of the full court regularly reviewing and often reversing decisions by panels may undermine a basic tenet of our intermediate appellate system: three-judge panels representing and acting on behalf of the whole court. The procedure also has material costs, such as delay, judicial inefficiency, administrative expense, and attorneys' fees, as well as good-will costs in lost collegiality.

Understanding the decision to grant en banc review seems especially important. Surely it would reveal a great deal about the interactions and behavior of courts of appeals judges, inform debates about the value of the en banc procedure, and assist litigators in deciding whether to file a suggestion for rehearing en banc to overcome an unfavorable panel ruling. In the present paper, I offer a brief overview of en banc review. Part I provides a quick review of the development of en banc hearings in the federal judiciary. Part II relates existing empirical evidence on the factors that affect the decision to grant en banc rehearing. I end in part III with a consideration of possible implications for lawyers and judges.
I. The Development of En Banc Review

At their inception in 1891, U.S. Courts of Appeals, each of which had three or fewer circuit judges, continued the tradition of the circuit courts of deciding cases by way of three judge panels. But changing conditions on the courts after the Judiciary Act of 1925, specifically rapid growth and intracircuit conflict, prompted consideration of the possibility of en banc hearings. As membership and caseloads expanded, the circuit majority lost some control over the growing lawmaking authority it had only recently realized. Courts of appeals also faced a unique problem in their treatment of circuit precedent as a consequence of panel sittings, namely the right of a later panel to overturn an earlier panel. Even if a circuit concluded only the Supreme Court could overturn panel precedent, there still existed the potential for conflicts between panels as a consequence of either mistaken or intentional ignorance of a relevant circuit precedent. The growing number of panels and rulings sparked concern about the difficulty of maintaining a reasonable uniformity of legal doctrine. In addition, the increased size of the deliberative body lead to a decrease in the power of the individual judge. These forces prompted some judges to call for the right of a majority of a circuit's judges to vote for rehearing of a case by the entire circuit membership.

The Ninth Circuit was the first to address the issue of whether courts of appeals could sit en banc. In Bank of America v. Comm'r, 90 F.2d 981 (9th Cir. 1937), a divided Ninth Circuit panel ruled on a question regarding estate taxes. A year later, the Bank of America dissenter joined two other circuit judges in Lang's Estate v. Comm'r, 97 F.2d 867 (9th Cir.), certifying question to, 304 U.S. 264 (1938), and ruled contrary to the Bank of America holding on the exact question answered by the earlier panel. The Lang’s Estate panel concluded that there was "no method of hearing or rehearing by a larger number," 92 F.2d at 869-70, at the circuit level to resolve the conflict between the panels and asked the Supreme Court to give a definitive answer to the estate law question. The Supreme Court did so, agreeing with the second panel on the substantive question, but did not indicate whether it agreed with the Lang’s Estate panel that circuits could not sit en banc.

Two years later, the Third Circuit became the first circuit court to sit en banc when its five judges heard arguments in Comm'r v. Textile Mills Securities Corp., expressly disagreeing with the Ninth Circuit's dicta in Lang's Estate that a circuit could not act as a full court. 117 F.2d 62 (3d Cir. 1940) (en banc). The Supreme Court agreed to hear Textile Mills to address the circuit split. 314 U.S. 326 (1941). A unanimous Court agreed with the Third Circuit that the "court" was all judges, not merely three, and hence the larger group had the inherent power to sit to decide cases, though a three-judge panel was also permissible. "[T]he result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the Circuit Courts of Appeal will be promoted," Justice Douglas explained. He went on to point out that ":those considerations are especially important in view of the fact that in our judicial system these courts are the courts of last resort in the run of ordinary cases."

At the time of the Supreme Court's Textile Mills decision, the House of Representatives had passed, and the Senate was considering, a bill authorizing circuits "to sit in bane., when in their opinion such action is advisable." H.R. 3390, S. 1053, 77th Cong., 1st Sess. Congress dropped the bill after the Supreme Court's ruling. But in the next major act governing the judicial branch, the Judicial Code of 1948, Congress explicitly recognized the practice:

Cases and controversies shall be heard and determined by a court of division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active judges of the circuit. 28 U.S.C.
Although codifying the practice of en banc review, the legislation did not resolve the question left unanswered by the Supreme Court's *Textile Mills* decision, namely the standards by which the courts were to determine whether to rehear or hear initially an appeal en banc.

Four years later, the Supreme Court had an opportunity to develop explicit guidelines for the en banc process. In *Western Pac. R.R Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247 (1953), a losing party challenged the circuit court's refusal to reconsider its ease en banc. The Supreme Court concluded that Congress did not intend to create a statutory right to en banc review, but rather to legislatively ratify the Textile Mills decision and recognize the power of courts of appeals to sit en banc. The Court deferred as a matter of deliberate policy to the lower courts' discretion in weighing what factors supported the grant of full court review: "[T]he court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing." Thus, the Court concluded, a party could not challenge the circuit court's decision to grant or deny a request for en banc hearing as long as the court published the procedure for requesting an en banc hearing. The decision itself was beyond review.

While the *Western Pacific* majority refused to provide any guidance to the courts of appeals, Justice Frankfurter in concurrence sought to distinguish the function as primarily one for resolving intracircuit conflict and cautioned against its use in other cases unless they were "extraordinary in scale--either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit." Even at this early stage, Justice Jackson voiced concern over the risk of the en banc rehearing creating a "hybrid intermediate court" between the three-judge panel and the Supreme Court resulting in "[d]elay, cost, and uncertainty" for litigants.

Following Frankfurter's lead, Congress ratified a Federal Rule of Appellate Procedure implementing the existing judicial and statutory grants of power. Fed. R. App. P. 35. The rule warns that en banc review is "not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."

The most recent evolution in the en banc procedure occurred in 1978 when Congress authorized circuit courts consisting of more than fifteen judges to delegate en banc authority to a subset of the full court - a mini en banc hearing. Congress did not order large appellate courts to do so, but again granted them considerable leeway in controlling the en banc process. Three circuits presently have more than fifteen judges, but only the Ninth Circuit, by far the largest circuit with 28 active judges, has exercised the mini en banc option. The original Fifth Circuit refused to adopt this practice, and its division may have been hastened by the unwieldiness of a twenty-four-judge deliberative body.

While Congress has ordered the courts of appeals to hear en banc challenges to the constitutionality of certain statutes, Congress and the Supreme Court have generally vested the courts of appeals with almost unfettered discretion to decide how and when to exercise their en banc power. Indeed, the courts of appeals have more discretion over en banc rehearing than most other court procedure or action. Despite the en banc option, the long-time norm continues to be for almost all cases to be decided by three-judge panels.

While the number of en banc decisions appears to have increased, keep that number in
perspective. Circuit courts decide more cases en banc, but they also decide many more cases by way of panels. Hence, the relative number of en banc decisions has declined since 1974, the first year for which relevant data is available. [Figure omitted.]

Parties filed over 4,000 suggestions for rehearing en banc in each of the last ten years, according to data released by the Administrative Office. In other words, circuits received en banc suggestions in approximately 15 percent of the cases terminated on the merits. Circuit judges granted only two percent of those requests; by comparison, the Supreme Court granted four percent of paid petitions for certiorari.

II. The Decision to Grant En Banc Review

Why does a majority of a circuit's judge decide to rule on a case en banc? The formal legal criteria are relatively unilluminating. Federal Rule of Appellate Procedure 35(a) states that en banc rehearings are "not favored," but will be ordered when "necessary to secure or maintain uniformity" in the circuit's decisions, or when the case "involves a question of exceptional importance." In my research, I have examined the two factors explicitly mentioned in the rule, intracircuit conflict and exceptional importance, and six additional factors that might be influential.

A. Theoretical Reasons for Granting En Banc Review

1. To resolve an intracircuit conflict

Intracircuit conflict arises whenever two panels reach inconsistent legal holdings in two factually and legally indistinguishable cases. The Supreme Court ruled that courts of appeals have the power to convene themselves en banc primarily to allow them to resolve conflict within the circuit. In 1957, the Supreme Court adopted the position that it would no longer accept certification of an intracircuit conflict, reasoning that the courts of appeals, now armed with the power of en banc reconsideration, had institutional responsibility for resolving their own internal conflicts and for harmonizing circuit law. As noted earlier, Federal Rule of Appellate Procedure 35, adopted in 1967, explicitly provides that decisional harmony is one of the special circumstances justifying en banc rehearing.

2. To consider an issue of great importance: intercircuit conflict

Federal Rule of Appellate Procedure 35 expressly acknowledges one other situation supporting en banc review: "question[s] of exceptional importance." But, if the intention of the drafters was to limit the use of en banc review, the very wording of the rule frustrates that purpose. In fact, any competent legal advocate can argue that her case involves such a question, so a litigant's, or even a dissenting judge's, claim that a case should be reheard en banc because it presents a significant legal issue would not alone be enough to distinguish between panel decisions.

Judges and scholars, however, have posited that cases centering on legal issues that are the subject of express intercircuit conflicts can be considered to involve such doctrinal import.³ Justices have suggested in their opinions that a circuit split may justify en banc rehearing,⁴ and the Court in the past has proposed, on the suggestion of the U.S. Judicial Conference, amending the language of Rule 35 to provide explicitly that an intercircuit dispute would be grounds for en banc reconsideration. The local rules of the Seventh, Ninth, District of Columbia, and Federal circuits already list intercircuit conflict as one Criterion for granting en banc rehearing.⁵
3. To question ideological direction of a case

Numerous studies have demonstrated a relationship between a judge's decisions and the judge's party (or party of the judge's appointing president), particularly on highly salient issues. For reasons discussed above, the decision to grant en banc review is typically a notable one. Thus, I hypothesized that a judge will be more likely to vote for en banc rehearing of a panel decision with an ideological direction inconsistent with her own than a decision with which she agrees and need not disturb. Thus, a court dominated by Republican appointees will be more likely to grant rehearing to a liberal panel ruling than a conservative ruling.

4. To examine decisions of panels composed of minority party members Circuit judges have increasingly heavy caseloads, and thus have limited time to review the decisions of panels on which they did not sit. Judges may adopt a short-hand method for determining whether they agree with a by looking to the panel's composition. Judges may consider their colleagues to be partisan, particularly those with whom they disagree. Consequently, judges may assume that any panel majority comprised of judges with whom they disagree is reaching an ideologically-motivated outcome with which they also disagree. Judges then would be more likely to vote for en banc rehearing of decisions by panels composed entirely or primarily by judges from the opposite ideological perspective. En banc rehearing requires a majority of the court's active members vote in favor of review. Since a court's majority controls the grant of en banc review, a circuit would be more likely to review a panel controlled by minority members.

5. To reevaluate reversals

Circuit courts of appeals do not share the Supreme Court's prerogative to select cases for review. Thus, most appeals courts decisions involve routine examinations of lower court outcomes, primarily using highly deferential standards of review, such as abuse of discretion or plain error. Courts of appeals reverse only about twenty percent of the cases they review, compared to a reversal rate of sixty to sixty-five percent for the Supreme Court. Hence reversals are truly exceptional as well as easy to detect. A court majority may pay closer attention to panels that disagree with the lower court judge.

6. To respond to a dissenting judge

Under principal-agent theory, a circuit court will grant en banc rehearing whenever it learns of a violation of the terms of its implicit agreement with a panel. But it is costly for a circuit court to monitor the decisions of individual panels in order to learn if any of the panels have breached. The circuit is more likely to learn of a breach when there is a dissenting panelist because that judge has access to greater information and incentive to educate the other members of the court. Moreover, the mere fact of a dissent signals to a nonpanelist that she may be justified in expending personal resources to rehear the case (or at least investigate it further).

7. To limit the influence of designated and/or senior judges

Three-judge panels are composed not only of active circuit judges but also of retired members from the circuit as well as temporarily-designated members from other federal courts. As caseloads have grown, so has the reliance on judges who are not active members of the circuit. For various reasons, the active membership may choose to review decisions by panels comprised in part of designated and/or senior judges. Active judges may suspect that non-active judges will not feel the same respect for and deference to circuit precedent (or
simply not have the same knowledge of it given their itinerant status). Or they may not approve of non-active judges establishing the law of the circuit. Hence they would be more likely to grant en banc rehearing to panels with one or more senior and/or designated judges.

B. Empirical Analysis

In testing the factors above, I am seeking to explain the decision to rehear a panel decision en banc. This is the dependent variable. The independent variables (or explanatory variables) are the factors I believe cause variation in the dependent variable. I am seeking to test whether there is a relationship between the dependent variable and the independent variables and, if so, to estimate the strength of that relationship. The data included every panel reheard en banc in three circuits (Second, Fourth, and Eighth) between 1940 and 1996 and a random sample of panels not reheard.

1. Circuits reviewed all true intracircuit conflicts but were less attentive to intercircuit conflict.

An intracircuit conflict is highly unusual in the Second, Fourth and Eighth Circuits, and in each instance, the en banc court granted review. The evidence supports the hypothesis that a majority of circuit judges will vote for en banc review whenever such a clear conflict has been expressed in an opinion by one of the panelists. If en banc rehearings were limited to such circumstances, however, they would practically vanish.

A majority of circuit judges did not display the same willingness to rehear en banc cases involving a legal question that is the subject of a clear and direct intercircuit conflict. Panels reheard en banc were nearly six times more likely to involve an intercircuit dispute than panels not reheard en banc. After controlling for other variables, however, the presence of an intercircuit conflict does not have a statistically significant impact on a court's decision to rehear a panel ruling en banc.

2. Ideology, on Its own, does not play an obvious role.

I considered the ideological direction of the panel's ruling and the ideological composition of the panel itself as compared to the ideological direction of the court's majority. The circuit courts were more likely to vote to rehear en banc panel rulings adopting the outlier ideological position; however, the influence is relatively small. And, the ideological composition of the panel has no independent effect. However, the ideology of a divided panel's decision is relevant: a circuit is much more likely to rehear a case when a panelist dissents from a liberal ruling (regardless of the composition of the court).

3. Circuits were more likely to review cases where judicial decisionmakers disagreed.

Circuit majorities in my study demonstrated a propensity to rehear cases where judges disagreed: either a three-judge panel with a district judge or members of the panel. The two factors -- reversal of a lower court and a dissenting panelist -- were both statistically significant explanations for the decision to grant en banc review. Controlling for all other variables, the odds that a panel ruling will be reheard en banc are estimated to be 3.52 times higher when the panel reverses than when it affirms. The odds that a divided panel will be reheard en banc are 38.85 times higher than the odds for a unanimous panel.

4. Active judges are more likely to reexamine decisions by non-active judges.

Circuit courts increasingly rely on non-active judges -- senior and designated judges -- to assist with their work. But, the majority of active judges reveal some concern about that
delegation in their vote on rehearing en banc. Panels with non-active judges are somewhat more likely to be reviewed en banc.

III. Implications

A. Practical Implications for Litigators

In a market where clients are seeking to contain litigation expenses and in a legal setting where cowls are discouraging en banc suggestions, lawyers should think carefully before filing a request for en banc consideration. Lawyers, of course, should continue to argue when appropriate that an intracircuit or intercircuit conflict necessitates en banc rehearing, but they should not anticipate that such an argument will succeed on its own. They should instead look to panel characteristics found to be relevant here.

For a lawyer seeking an en banc rehearing, the single most helpful factor is a dissenting panelist. Three-quarters of the en banc rehearings in this study (229 out of 305 cases) followed a divided panel decision; in contrast, fewer than one in twelve panel decisions not reheard en banc were divided. In all of the model configurations, the dissent variable was the leading determinant of the grant of en banc rehearing. The odds of a panel decision being reheard en banc are nearly forty times higher when a panelist dissents than when the panel is unanimous. Two other factors combine with reversal to produce a similarly powerful prediction: the predicted probability of a circuit rehearing a divided panel that issues a liberal reversal is nearly ninety percent.

Conventional wisdom among appellate lawyers is that a panel's composition is also a significant determinant of whether the full court will grant rehearing en banc. For example, a lawyer handed a defeat by a panel with two Republican appointees will look at the circuit's composition in evaluating whether a suggestion for en banc rehearing may succeed. The lawyer may assume that her odds are much more favorable if the circuit is dominated by Democratic appointees rather than Republican appointees. The intuition behind this conclusion is appealing. Litigators typically reason that colleagues with similar ideological positions will defer to each other's panel decisions, but do not feel the same deference (and may in fact feel some suspicion) toward colleagues with whom they disagree. The evidence, however, does not support this belief.

B. Normative Implications for the Judiciary

Courts of appeals appear to be conservative and passive institutions that affirm the status quo and act as a whole only when a dissenting panel member signals them to do so. Courts of appeals may be coping with burgeoning caseloads by allowing panels to act essentially unreviewed. The notion, expressed by the Supreme Court in Textile Mills, that the "court of appeals" was the entire body of circuit judges appears to be an artifact of an era of fewer cases and judges. Yet, that notion has been central to the delegation of substantial lawmaking authority to the circuit cowl level. The courts of appeals will lose their legitimacy if they do not appear to control the integrity of circuit law. The results of this study could be used to argue that courts must introduce more active methods of monitoring the decisions of panels to ensure consistency and uniformity of the law and to maintain meaningful authority as the final word in the run of federal cases.

This study also can support a very different view of the management strategy employed by circuit courts. The courts of appeals are most likely to grant en banc review if a panelist dissents or if the panel disagrees with the lower court or agency. If all of the judges (or decisionmakers) who have a heard a dispute agree as to its resolution (that is, a unanimous panel affirms), then the circuit court defers to their decision. The courts of appeals, then, are
choosing to use scarce resources to rehear cases en banc only when there is some express disagreement between the judges who have considered the case. Such a strategy is arguably a wise one given growing caseloads and limited judicial resources.

1 This paper draws on work previously published by the author. See. e.g., Supreme Court Monitoring of Courts of Appeals En Banc, 9 S. CT. ECON. REV. 171-204 (2001) (with Michael E. Solimine); The Dynamics and Determinants of the Decision to Grant En Banc Review, 74 WASH. L. REV. 213 (1999); Developing a Positive Theory of Decisionmaking on US. Courts of Appeals, 58 OH. SH. L.J. 1635 (1998).

2 For the period from 1940 through 1964, the numbers are those presented in Note, A. Lamar Alexander, Jr., En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part 1), 40 N.Y.U. L. Rev. 563 & Part II 726, Appendix VI (1965). For 1966 through 2004, the numbers are those reported in the Annual Reports of the Administrative Office of the U.S. Courts (Table 7 for 1975, 1977-78, 1981, 1984-85: Table 9 for 1983 1979-80; Table 8 for 1982; Table S-3 for 1986-1989; Table S-1 for 1990-2004).

3 See. e.g.. Ginsburg & Falk; Solimine; U.S. v. Ford, 17 F.3d 1271 (8th Cir. 1994) (Arnold, C.J., & Arnold, J., dissenting from denial of rehearing en banc); Air Line Pilots Ass'n v. Eastern Air Lines, 863 F.2d 891, 925 (D.C. Cir. 1988) (Edwards, J., dissenting from denial of rehearing en banc); Hartman Tobacco Co. v. United States, 471 F.2d 1327, 1330 (2d Cir. 1973) (en banc).


5 7TH CIR. R. 35(b); 9TH CIR. R. 35-1; D.C. CIR. R. 35(c); FED. CIR. IOP 13 (1-2)
Availability of En Banc Consideration and Rehearing in the Federal Circuit Courts of Appeal and State Courts

by Leane C. Medford, Rose Walker, L.L.P.¹

The procedural vehicles allowing en banc hearings or rehearings, both in state and federal appellate courts, reflect a strong disfavor for such rehearings, which are perceived as taxing an entire appellate court's judicial staff. In federal appellate courts, a uniform rule of appellate procedure specifically addresses rehearings en banc and discourages an en banc rehearing unless it is needed to secure uniformity of the court's decisions or involves a question of exceptional importance. Fed. R. App. P. 35. Many circuits' internal operating procedures also require the certification of counsel and warn appellate practitioners about the possibility of sanctions. In state appellate courts, en banc hearings and rehearings are also often discouraged through a lack of procedural rules or instruction. On a whole, the states that have adopted en banc procedures also disfavor the procedures as a drain on judicial resources, and many apply the same 'uniformity of decision" and "exceptional importance" standards of Federal Rule 35.

Attached are federal and state guides to en banc rules and procedures. The following is a brief summary of those procedures under federal and state law.

Circuit Courts of Appeal

It is well established that the Circuit Courts of Appeal have the power to order the hearing of an appeal en banc. Western Pac. R. Corp. v. Western Pac. R. Co., 345 U.S. 247, 73 S. Ct. 656, 97 L. Ed. 986 (1953); Textile Mills Sec. Corp. v. C.I.R., 314 U.S. 326, 62 S. Ct. 272, 86 L. Ed. 249 (1941); Schwengmann Bros. Giant Super Markets v. Hoffmann-La Roche, Inc., 221 F.2d 326 (5th Cir. 1955). Statutory provisions relating to hearings en banc merely grant power to the court of appeals and do not restrict the power of that court, which is free to devise its own procedures for en banc rehearings. Shenker v. Baltimore & 0. R. Co., 374 U.S. 1, 83 S. Ct. 1667, 10 L. Ed. 2d 709 (1963). Litigants can merely suggest, but cannot compel, that any particular case be heard en banc. Western Pac. R. Corp. v. Western Pac. R. Co., 345 U.S. 247, 73 S. Ct. 656, 97 L. Ed. 986 (1953).

Although Federal Rule of Appellate Procedure 35 governs en banc proceedings in the Circuit Courts of Appeal, each circuit has its own procedural requirements for initiating en banc review. En banc hearings are not favored and ordinarily will not be ordered unless en banc consideration is necessary to secure or maintain uniformity of the court's decisions, or the proceeding involves a question of exceptional importance. Rule 35 allows a majority of the circuit judges who are in regular active service to order that an appeal be heard or reheard by the court of appeals en banc. Fed. R. App. P. 35(a).

As illustrated by several internal operating procedures and Circuit rules, the majority of the Circuit Courts deter litigants from seeking en banc review. For example, the Third Circuit requires counsel to include a statement in the petition for en banc rehearing that the panel decision is contrary to the decisions of the Third Circuit or U.S. Supreme Court and that en banc consideration is necessary to maintain uniformity, or that the appeal involves a question of exceptional importance.
Similarly, several Circuits have promulgated rules warning counsel that frivolous petitions for rehearing en banc may draw court-imposed sanctions. The Fifth Circuit emphasizes that, "given the extraordinary nature of the petitions for en banc consideration, it is fully justified in imposing sanctions on its own initiative under Fed. R. App. P. 38 and 28 U.S.C. § 1927, upon the person who signed the petitions, the represented party, or both, for manifest abuse of procedure."

*See* 5th Cir. R 35.

Such admonitory provisions coupled with the "extraordinary nature' of obtaining relief through an en banc rehearing are illustrative of the limited liability of en banc review.

**State Rules**

Obviously, there is no uniform rule among the states governing en banc procedures. In fact, only 13 states even have rules addressing en banc hearings and rehearings. It should be noted, however, that some states' appellate courts hear all appeals en banc (Alaska and Hawaii are two such examples) and therefore they do not have en banc rules.

Similarly, although a given state does not have a formal en banc rehearing rule, appellate districts within that state may address en banc consideration through local rules or operating procedures. As such, practitioners in states where no formal en banc rehearing rule exists are encouraged to consult the local rules of the appellate district in which they may be appearing.

With respect to the 13 states that have en banc rehearing rules, although strict uniformity among those states rules is lacking, a few similarities are evident. For example, three states expressly note in their rules that en banc rehearing is disfavored (Nevada, South Carolina, and Texas). Three states' rules contain formal procedures for judges to vote on whether to rehear or reconsider a case en banc (Georgia, Mississippi, and South Carolina). Six states require that en banc rehearing or reconsideration not be granted unless necessary to maintain uniformity of decisions or because a particular case involves some issue of exceptional importance (Connecticut, Florida, Missouri, Nevada, South Carolina, and Texas).

Michigan is the easy winner when it comes to the most complex procedure for en banc rehearing or reconsideration—its rule details an intricate procedure in which a special panel may be convened to consider outcome-determinative questions in a case in which the court of appeals indicates in the text of an opinion that it followed a prior published opinion only because it was required to do so under Michigan rules. On the other end of the spectrum is Virginia, whose rule simply states that any party aggrieved by a decision of the Supreme Court or a panel of the court of appeals may file a petition for en banc review.

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1 The author would like to thank Steven D. Sanfelippo and Kenneth McKay Cunningham for their assistance in preparing this summary.
Attendees at the 2005 Council of Appellate Lawyers' Summit in San Francisco enjoyed an excellent presentation by Professor Richard C. Wydick on the topic of editing work-product drafted by associates and judicial law clerks. The presentation was aimed at assisting attorneys and judges, many of whom may already be good writers, to be more adept at editing work product written by others.

Professor Wydick began by suggesting that editors start by identifying those who will be reading the work-product they are editing. In the case of judges and attorneys, the answer varies somewhat but is generally other attorneys and judges, members of the public, and clients. The editor should put himself in the place of those readers and ask what qualities they likely find valuable in his work product. Attorneys and judges in the audience indicated that their readers probably appreciate work that is correct, clear, persuasive, concise, and interesting, in that general order. The discussion then turned to how attorneys and judges can best perform the task of editing drafts to achieve the qualities their readers find most important.

In Professor Wydick's view, editing should be an interactive process where the editor and the author discuss the problems as specifically as possible and talk about ways to fix them. For example, rather than merely telling the author to "rework the intro" or "tighten up this paragraph," the editor should explain why he or she feels it needs improvement and what can be done to correct it. It is also important for the editor to avoid simply rewriting the draft in order to get it done. While this might result in a final draft that is more to the editor's liking, it is far less efficient and less likely to improve the author's writing on future assignments.

In order for an editor to correctly diagnose problems during the editing process, he or she must have a strong grasp of the rules of grammar and sentence structure that characterize good writing. Professor Wydick points out that English is primarily an "isolating" language, meaning it has rules about what components appear where in a sentence. Most of the sentences found in legal briefs, memoranda, and opinions are declarative sentences, meaning they make statements as opposed to asking questions, giving directions, or making exclamations. According to Professor Wydick, the reader of an English declarative sentence likes to find the subject, the verb, and the object in that order, close together, and preferably close to the front of the sentence. With that in mind, he offered tips on how to improve all aspects of the author's work through the editing process.

**Choosing and Placing Subjects**

The subject is the noun, noun phrase, or pronoun that performs the action or what is described in the predicate. As a general rule, the subject should be placed as close as possible to the front of the sentence. To illustrate the problem with placing the subject too deep into the sentence, consider the following: "Because counties have the power to regulate land use and to levy real property taxes, and because a tax-paying property owner has an interest in zoning decisions made by the county, the Petitioner has standing to pursue the action herein." The trouble is that it is not until almost the end of the sentence that the reader learns the subject. To correct the problem, the writer could move the subject closer to the beginning of the
sentence (The Petitioner has standing because....). However, this does not mean the subject must always be placed at the beginning of the sentence. In some cases, the author may have good reason for doing things differently. For instance, the sentence might be arranged for rhetorical effect (Four score and seven years ago,...), to give the reader directions about where the sentence is going (On the other hand,...), or to get a short condition or exception out of the way at the beginning (If you do not have a passport, then...). In these cases, the sentence is improved by waiting until later in the sentence to introduce the subject.

The effectiveness of a sentence can also be influenced by the writer's choice of subject. The writer can choose to make the subject a human being, another creature, a thing, a place, or an abstraction (e.g., estoppel or globalization). Professor Wydick maintains that where the writer's choice of subject is unconstrained, the first choice should usually be a human being. This is because the reader is human and can best relate to sentences involving other humans. For the same reason, the least desirable choice of subject is an abstraction. For example, the following sentence is greatly weakened by having an abstraction as its subject: "The regulation requires an accurate final accounting sheet to be provided to the poultry grower at the time of settlement. The responsibility for preparation and provision of the final accounting rests with the poultry dealer." To revise the passage and make the subject a human, one could write: "To comply with the regulation, a poultry dealer must provide an accurate final accounting to the poultry grower at the time of settlement."

As with other things, however, this is not an ironclad rule. In some cases, it may be necessary to make the subject an abstraction - for example, if using an abstraction will help a group of sentences function smoothly as a paragraph. To do this, the author might use a series of grammatical subjects that fit together in logic, language, or both, such as the following: "In our state courts, scientific evidence is admissible under the old Frye standard only if it is based on a scientific principle that is generally accepted in the field to which it relates. In the federal courts, scientific evidence must satisfy the reliability standard set out in F.R.E. 702, which grew out of the Daubert case. The testimony of appellant's scientific expert does not satisfy either standard." The limited use of abstractions in this passage allows the author to string the sentences together effectively.

Choosing and Placing Verbs

Professor Wydick next talked about the proper use of verbs in sentence structure. The general rule is that a verb should follow the subject as closely as possible. When the verb is too far away, the reader has to wait until late in the sentence to find out what the subject is doing. For example: "My dog, whose name is Greta and who is half German shepherd, a quarter husky, and a quarter wolf, chased the cat." Rearranging the sentence to place the verb (chased) closer to the subject (dog) would enable the reader to connect the verb to the subject as effortlessly as possible.

In many cases, the subject and the verb are too far apart because the author has attempted to cram too much information into one sentence. For example, consider the following: "The plain language of the statute tells us that the Commissioner of Public Works must, on application filed by a Vested Rights Water Holder, as defined in the statute, which application must be timely and must comply with the Rules of Practice of the Commission of Public Works, confer with the application and with all other Vested Rights Water Holders similarly situated." As the editor, one should begin by asking if all of the information in the sentence is necessary or if some of it could be left out. The sentence should then be reorganized and preferably split into two or more sentences, such as: "The statute's plain language tells us that a Vested Rights Water Holder (as defined in the statute) may file an application with the Commissioner of Public Works. The application must be timely, and it must comply with the Commission's Rules of Practice. The Commission must then confer
with the applicant and with all other Vested Rights Water Holders similarly situated." This allows the reader to take the information one piece at a time, and greatly improves the clarity and effectiveness of the passage.

A writer's use of verbs can also be improved by learning to express action with base verbs rather than nominalizations. A nominalization is a verb that has been turned into a noun. Common examples of nominalizations include the words postponement, deterrent, continuance, dependency, stimulation, and appraisal. Base verbs are usually preferable to nominalizations for expressing action because they require fewer words and are stronger. To illustrate, consider the following passage containing numerous nominalizations, which are identified with italics: "The sole remaining issue on this appeal is whether 3M willfully took action to effect the maintenance of its monopoly power in a manner that was in violation of Section 2 of the Sherman Act. A monopolist engages in willful acquisition or maintenance of monopoly power when it enters into competition on some basis other than the merits of its product or service." (63 words) To correct this sentence, the editor could convert the nominalizations back to verbs as follows: "The sole remaining issue on this appeal is whether 3M willfully maintained its monopoly power in a manner that violated Section 2 of the Sherman Act. A monopolist willfully acquires or maintains monopoly power when it competes on some basis other than the merits of its product or service." (49 words). This makes the sentence shorter, clearer, and more powerful.

A final strategy for improving the use of verbs is to limit the use of the passive voice. In the passive voice, the subject of the sentence is being acted upon (The cat was chased by the dog.). This is in contrast to the active voice, where the subject of the sentence does the acting (The dog chased the cat.). As a general rule, writers should use the active voice unless there is a good reason to use the passive. The active voice requires fewer words and is often more powerful. Also, in some cases the passive voice can create ambiguity by omitting the actor (The house was painted.). Notwithstanding the general rule, Professor Wydick points out that there are at least four good excuses for using the passive voice in writing. The passive voice can be useful when one wishes to avoid drawing attention to the actor (The Senator's teeth were knocked out), when it is the action that is important and not the actor (Certiorari was granted May 14, 2005), when you don't know who did the acting (Plaintiff's fence was cut 13 times), or when you need the passive voice in order to make a sentence fit smoothly in a paragraph (The critical issue is when the defendant actually received the summons. The summons was not served on the defendant until July 27). With these uses, the passive voice can add to the effectiveness of a sentence rather than detract from it.

**Placing Objects**

Editors should also be familiar with the rules governing the use of direct and indirect objects. A direct object is a noun that receives the action (Tiger Woods chipped the ball), while the indirect object is the noun that receives the direct object (Tiger chipped the ball into the cup). Objects should follow as close behind the subject and verb as possible, and as close to the front of the sentence as possible. For example, in this sentence the object is incorrectly placed at the end of the sentence: "The trial judge then admitted, over vociferous and clearly articulated objections by defense counsel based on both the hearsay rule and the confrontation clause, the O'Lanahan affidavit." The sentence would be greatly improved if the object, the O'Lanahan affidavit, was placed after the word admitted at the beginning of the sentence.

**Conditions, Limitations, and Exceptions**

Legal writers also deal continuously with conditions, limitations, and exceptions. While the rules for these items are less clear, Professor Wydick suggests placing the items where they are easiest for the reader to handle. If a condition, limitation, or exception is short and the
main clause is long, the writer should consider putting the item at the beginning of the sentence (Except in a few old interstate commerce cases, this Court has never . . . ). However, if the condition, limitation, or exception is longer than the main clause, it should usually be placed at the end of the sentence (A lawyer must not enter into a business transaction with a client, unless the terms are fair to the client and fully disclosed to the client in understandable writing, and unless the client consents to the transaction in writing.).

In conclusion, adopting the strategies outlined in this article will make you a better editor of the work-product written by associates or law clerks. As Professor Wydick points out, it is worth the time it takes to become a better editor because it helps attract and develop strong writers and leads to increased success and personal satisfaction in your work.

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2 Richard C. Wydick is Emeritus Professor of Law at the University of California, Davis.
The closing session of the AJEI/CAL meeting at San Francisco featured Kathleen M. Sullivan, J.D., a professor at Stanford Law School; Miroslav Volf, D.Th., from Yale Divinity School; Philip J. Weiser, J.D., of the University of Colorado School of Law; and, Irving Weissman, M.D. who teaches at Stanford Medical School. The initial session was moderated by the Honorable Robert T. Henry of the U.S. Court of Appeals for the Tenth Circuit.

Each provided a brief overview of his/her topic before the group broke out into separate discussion groups.

Professor Miroslav's presentation on law and religion concentrated on two questions:

- What is the balance between justice/legality and mercy/forgiveness?
- What is the place of religion in public life?

He spoke of historical changes in the western view of these questions, and of the cultural differences on these issues. Among the "talking points" he proposed for the discussion:

- We live in an increasingly pluralistic society, which applies to religious views also.
- There is no generic agreement among cultures or faiths as to what makes life worth living.
- Is the proper approach not separation of church and state, but full neutrality or impartiality of government toward each faith, and those of no faith?

Professor Weiser spoke to law and technology, specifically information technology. Some posit that "IT" will re-shape the world we live in as much or more than did the Industrial Revolution. Weisner cited the statistic that in 1980 80% of a corporation's assets were typically tangible assets, e.g., buildings, machinery, etc.; in 2005 80% of a corporation's assets were likely to be intangible, i.e., intellectual property.

Professor Weisner pointed out that property law is a two-edged sword in relation to technology: sometimes encouraging growth and inventiveness, but often acting as a brake on development by tending to protect old technology.

Law and science--bioscience--was addressed by Dr. Weissman, who concentrated the discussion on stem cell technology. The potential gains are tremendous, at present, however, only limited types of stem cell tissue are available. The political and ethical debates over expanding stem cell use is loud and divisive. Dr. Weissman also referred to the similar debate over using DNA in the 1970s.

Professor Sullivan turned the focus to law and public policy. The questions of "who decides" and "who decides and who decides" (e.g. legislature v. courts) are basic issues of public policy. Other discussion questions posed were:
• Do some approaches to judging handle public policy questions better than others?
• What are the tensions between law and public policy?
• What is the role of the "Brandis brief" in presenting policy issues to the courts?

An informal and unscientific survey of those who attended the break-out sessions indicated that all were "very interesting," "sometimes heated," and "eye-opening."
We hope that these samplings from recent CAL educational programs have whetted your taste for more; such as:

- ABA Annual Meeting (August 2006):
  - Everyone Has an Opinion: Valuing Persuasive Authority from Outside the Jurisdiction.

- AJEI/CAL Annual Summit Conference (November 2006):
  - Amicus Briefs: Convincing Courts and Building Practices
  - The Effect of the Death Penalty on Civil Appeals
  - How to Learn an Appellate Record

(N.B. Topics tentative)
Join us for an upcoming program.
CAL Rules Committee Needs Your Insights
by Charles W. Craven,
CAL Rules Committee Chair
CAL's Rules Committee has begun four projects which aim to improve appellate practice and which need your input.

The first project is the compilation of "The (Previously) Unwritten Rules of Appellate Practice." This is a light-hearted, but useful compendium of tips and recommendations on various aspects of appellate practice which have not been published or given appropriate highlighting. For example, "Mirror, Mirror: Use a mirror to make sure that what should be tucked in is tucked in and nothing trails where there should be no trail. What's in a Name: One way to lose the attention of one or more judges on the panel is to mispronounce a judge's name. If you are not certain about the correct pronunciation, use 'Your Honor,' which covers all of the bases." Each of us has some personal experience or anecdote which could easily and quickly written as an item for this project.

The second project seeks articles to be published in our newsletter and on our web site. The articles will provide insights into the understanding and resolution of difficult or obscure aspects of the Federal Rules of Appellate Procedure.

The third project is the development and publication of a series of relatively short articles which highlight the best practices of appellate courts which are peculiar to a particular court or not wide spread, but which should be considered and perhaps implemented by other appellate courts. For example, the Pennsylvania Superior Court allows counsel for appellant to determine whether the case will be decided on the briefs with or without oral argument, and if with oral argument, whether the case will be placed on the expedited list (five minutes for each side) or on the standard list (fifteen minutes for each side).

The fourth project is the exploration of areas in which the Federal Rules of Appellate Procedure can be improved. Two examples emerged at a recent Rules Committee meeting: should the Rules be amended to establish whether the amicus' statement counts towards its brief's word and page limitations; and, should there be a wider range of interlocutory appeals? Proposals will be compiled and published in our newsletter and on our web site, and they will be circulated for comments via our "CAL Talk" listserv.

Please send your submissions for these projects via e-mail to Chuck Craven, CAL's Rules Committee Chair.