Mr. King began by noting that historically, courts frowned on briefs and favored oral advocacy. That attitude has changed dramatically, to the point where the outcome in nearly all appeals today turns on the parties' briefs, highlighting the importance of effective briefing.

The panel members began by sharing their personal philosophies about effective appellate brief writing. Mr. Svetcov approached the topic from the appellant’s perspective. In his view, the key part of appellant brief writing is issue selection. Keep in mind that appellate courts affirm approximately 90% of the time, driven in large part by deferential standards of review. That makes it critical to frame appellate issues as legal questions subject to de novo review whenever possible. For example, an evidentiary ruling is subject to an abuse of discretion. But if you can turn the issue into a misapplication of an evidentiary rule, you have created a de novo legal issue. The outcome of many cases is affected solely by the standard of review.

Mr. Svetcov also stressed the importance of having an effective appellate theme. He starts his brief writing with the Table of Contents; sub-headings of the fact section string together the story of the case. That story is then linked, first to
the questions presented, then to the argument headings that answer those questions. So the theme is woven into every aspect and section of the brief. Headings are extremely useful tools of persuasion, especially when busy courts have little time to read more than the Table of Contents and the Summary of Argument.

Mr. Townsend then addressed brief writing from the appellee’s perspective. The key to a successful appellee’s brief, said Mr. Townsend, is to let the court know that this is just another routine case, i.e., one that easily falls within the 90% of cases that are affirmed. Several procedural questions can help you do that: Was the alleged error preserved? Did error actually occur? And if so, was the error reversible? To err is human, but to affirm is divine!

Well before the appellant’s brief is filed, the appellee’s attorney should create an abstract of the lower court record, frame the key legal issues on a preliminary basis, and draft an outline of the appellee’s brief. Ask the trial court counsel, why did you win? In almost every case, there will be some key development, for example, a witness who completely collapsed under cross examination. Then use that explanation as the basis of your affirmative theory of the case, explaining why, as a matter of justice, your client should win.

Think carefully about how to use the standard of review. For example, if there are bad facts in the trial court record, raise them in your factual statement but explain why those facts cannot be considered on appeal because of the standard of review. Weave the standard of review into every legal argument presented.

Finally, Mr. Townsend explained that he prefers to defer conducting legal research until after he has analyzed the case and determined what narrow, reasonable rule should apply to determine the outcome. Only after developing such a rule does he look for case law and statutes to support it. Support will nearly always be available, because if the rule is sensible and practical, it is likely that the case law will have developed to include it. The focus of the appeal then becomes whether this sound rule makes sense, which is a winning proposition.

Judge Livingston articulated five principles of effective brief writing, based on her experience as a Second Circuit judge. First, budget adequate time to write and think about the brief. It shows when you do not. Wholly aside from typos and
misstatements of the record or the law, it takes considerable time to develop the type of integrated brief that Mr. Svetcov was describing. That time is well spent. Second, appellate judges are generalists. Treat them that way. If specialized knowledge is important to a dispute’s resolution, it is the advocate’s responsibility to explain that specialized knowledge, whether factual (e.g., a new technology) or a legal doctrine. Part of appellate practice is translating specialized knowledge for the court. Third, judges are busy. Your brief should be helpful. For example, tables of authority should include specific page references where the cases can be found in the brief, and the text of the relevant statute or regulation should be in the brief, if pertinent. Fourth, make all sections of the brief work for your client. Take the issues presented. When reading a brief, Judge Livingston starts with the issues presented and will often type the issues verbatim into her bench notes. Use a “deep issue” question that provides all the necessary legal and factual context necessary for your client to win. Fifth, be accurate and be careful. Misuse of authority or the record is the quickest way to lose your credibility.

Justice Scotland reiterated how busy appellate judges are, particularly at the intermediate state appellate court level. If an advocate is dealing with a specialized or arcane case, it is critical to spell out everything for the court. Justice Scotland also emphasized the importance of having an effective theme of the case. He strongly encouraged advocates to use an Introduction (if allowed by the relevant rules) to frame the case and explain its importance. Justice Scotland expressed surprise at how frequently attorneys fail to pay attention to statutes. Master the many canons of statutory interpretation, particularly the plain meaning rule, and use those canons to your client’s advantage.

Justice Scotland expressed his admiration of Mr. Townsend’s effort to find the logical rule in every case. Find the common sense rule first, then develop the appellate brief around it. Justice Scotland noted that appellants’ briefs all too often fail to clarify the relief requested. Because the trial court will be bound by the scope of the remand order, the request for relief is of critical importance. Finally, Justice Scotland encouraged appellate attorneys to be civil to one another. Courts disfavor hyperbole in appellate briefing, and impugning the integrity of opposing counsel only makes an advocate look bad.
So, how do you make a brief helpful to a busy appellate court? First, every factual sentence should be followed by a record citation. Keep using record citations when referring to facts in the legal argument. Second, use pinpoint citations in every case you cite. Third, put every argument under a separate heading; if you don’t, the court may miss something. Fourth, never, ever, put all your citations in footnotes. A citation has significance, and Bryan Garner is completely wrong to encourage lawyers to do this. Just the opposite, advocates should avoid the use of footnotes at all, if possible.

The panel then began a free-flowing discussion of appellate brief advocacy. Mr. Svetcov noted that appellate courts like to move in baby steps. It is better to frame your case as a misapplication of existing law, or to encourage the development of the law in these small steps.

Justice Scotland addressed how to show reversible error. As an appellant in a criminal case, argue that a different ruling below might have changed the mind of a single juror, and that would have resulted in a hung jury. As appellee, show how an evidentiary ruling only addressed the quantity of evidence, not the quality of it. As Mr. Townsend explained it, the question of reversible error should be a theme that underlies the entire brief. In subtle ways, this theme can even include the reputation of the trial court judge (be careful not to overdo it.) Mr. Svetcov added that recurring legal error is a proper subject of mandamus, providing an alternative way to make a point about the trial court judge.

Preservation of error in the trial court is obviously of critical importance. Use the brief to detail how preservation did or did not occur, and think about alternative ways to persuade the appellate court to decide an issue that your client failed to preserve in the trial court. Encourage your trial court colleagues to not only make appropriate objections, but to secure the trial court’s ruling on the objections.

What if preservation is uncertain? Mr. Townsend uses a sliding scale. If he has a strong position on the merits, he will probably not argue failure to preserve. Conversely, if he has a weak merits position, he will give much more consideration to a preservation argument. Justice Scotland said that was great advice, particularly when it results in eliminating an additional issue for the Court to analyze in a case the advocate is already likely to win.
Justice Scotland and Judge Livingston encouraged advocates to strip extraneous facts from an appeal brief. For example, if a brief references a key date, the judges will focus on that date before they know its relative importance (which may be none). It is much more helpful to include only those facts important to your client’s perspective of the case, presented in a story format. Mr. Svetcov added that an advocate cannot ignore the “hard facts.” The other side and the court will find them. So be the first party to present those bad facts and do so in a context that renders them less significant.

Justice Scotland observed that the law is not always fair. For example, an unlicensed contractor is not entitled to payment, even for work performed. If that is your situation, explain why unfairness is the right result in the context of the case.

Mr. Svetcov would never pass on the opportunity to file a reply brief. But it should be a true “reply,” punchy and short, preferably well below the maximum page limit permitted. The reply brief is an especially good opportunity to point out which arguments the appellee could not answer. Failure to file a reply brief may signal to the court that the advocate is not serious about the appeal. Judge Livingston and Justice Scotland strongly disagreed that an appellant should file a reply in every case. If you have already said it all, a reply brief just adds extra pages for a busy court to read. Again, brevity is the hallmark of a forceful appellate brief.

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Effective Appellate Oral Argument by John J. Bursch

On May 29, 2009, a panel of appellate judges and appellate advocates presented their views on effective appellate oral advocacy, one of the feature programs at the 14th Appellate Practice Institute Program held at the Northwestern Law School. Sharon Freytag moderated a panel composed of the
Hon. Harris Hartz of the United States Court of Appeals for the Tenth Circuit, the Hon. Elizabeth Lacy of the Virginia Supreme Court, and distinguished appellate practitioners Mary Massaron Ross, Jerry Ganzfried, and Matt Lembke.

Ms. Freytag began by noting that oral argument is the only time when the appellate advocate and the appellate court are all discussing the same issues at the same time. It is a tremendous opportunity to influence the court. Ms. Freytag quoted from Judge Aldisert, whose admonition is to “prepare, prepare, prepare.” She then posed a series of practical questions for the panel to answer.

*Where do you begin when preparing for oral argument?*

Mr. Lembke said that, given the amount of time that passes from the filing of the appeal briefs to presentation of the oral argument, it is necessary to immerse yourself all over again in the briefs and the cases. He prepares one-page summaries, issue by issue, of the key arguments and rebuttal framed by the briefing. Mr. Ganzfried not only begins but ends his preparation process with the appeal briefs. He winnows his notes down to a single, handwritten page. Ms. Massaron Ross starts by reviewing the appellate record without referring to the briefs, so she has an opportunity to see everything with fresh eyes. She compiles a timeline, a factual chronology, and key argument points, all of which are placed in an argument notebook. Justice Lacy encouraged advocates to tape practice arguments, particularly for work on smooth transitions.

*How can you anticipate the panel’s questions?*

Ms. Massaron Ross noted that anticipation of argument questions depends on the court. In an intermediate court, she will focus on the best points presented in the opponent’s brief and consider the big-picture implications of those points. In a court of last resort, the range of potential questions is potentially much broader. She looks at the questions presented in David Frederick’s book, *Supreme Court and Appellate Advocacy*, and tries to apply them to her own case. Mr. Lembke observed that the broader the rule at issue, the broader the potential questions. He prefers to hold at least two mock arguments, 7-10 days before the actual argument, and he includes mock panelists who have had no involvement with the case. Those sessions lead to questions that he may not have thought about, giving him time to prepare an effective response. He also
asks colleagues who have worked on the case for a list of the questions that they would ask. Mr. Ganzfried holds brainstorming sessions on potential panel questions, and he seconded the idea of seeking input from individuals who have not been involved in the case and with no expertise in the subject matter. Justice Lacy cautioned advocates to update the case law cited in the briefs to make sure that the court has not issued new opinions and holdings that may affect the appeal.

*How do appellate judges prepare their questions for oral argument?*

Judge Hartz says that he may have 2-3 important questions beforehand, but most arise during the course of the argument, either in response to the advocates or questions posed by other judges. (On the 10th Circuit, the judges rarely discuss the case beforehand and do not share bench memoranda.) Justice Lacy noted that the Virginia Supreme Court Justices tend to ask questions involving procedure and jurisdiction that advocates may not carefully consider beforehand. Judge Hartz seconded that advice; be prepared to demonstrate issue preservation, jurisdiction, and other threshold questions. He also thought that talking to family members could be a helpful way to prepare, and that talking to your client about the case’s significance to the client can be an extremely effective way of discerning the consequences of what the court’s decision may be.

*Does panel composition matter?*

Ms. Massaron Ross carefully reviews opinions that panel members have issued in related cases. Those opinions give insight into the judge’s thinking and judicial philosophy. Justice Lacy does not appreciate it when an advocate singles her out for authoring an opinion when multiple Justices signed or joined that opinion.

*How do you end an argument?*

Mr. Lembke identifies 1-3 critical points and tries to figure out how he can state them succinctly if running out of time at the argument. Practice those points aloud, because you need to convey them in a very efficient manner.

*How important is it for advocates to focus on policy arguments?*
Judge Hartz says policy does not play a role in most cases in an intermediate appellate court, but it does come up from time to time. Advocates need to be prepared to say how far they want the court to go, with fallback positions if the court is not ready to go there. Mr. Ganzfried agreed that some cases do not lend themselves to policy arguments, though it is important in every case to explain why your position makes sense.

*Additional thoughts about mooting an oral argument?*

Ms. Massaron Ross thinks a formal moot court with appellate lawyers or former appellate judges is a must in every significant case.

*How do appellate judges prepare for oral argument?*

Judge Hartz said that most appellate judges read all the briefs. He flags items of special interest and may read key exhibits, testimony, or cases. He also asks his clerks for what he might be missing. Despite the preparation, he acknowledges that given the passage of time and the large number of arguments heard in a short time, there can be some slippage, and advocates need to anticipate that. Appellate judges also have assumptions that must be overcome, e.g., the 90% affirmance rate, the difficulty of proving insufficiency of the evidence, etc. There may even be assumptions based on the reputation of a particular trial court judge.

*Do appellate judges ever grant oral argument to amici?*

Judge Hartz said that his Court will occasionally allow an amicus party to argue for 5 minutes, particularly in support of a pro se litigant ineligible for appointed counsel. He is generally disappointed about the amici briefs he reviews, though such briefs have the potential to be very important in the right case. Ms. Massaron Ross said that the best amici briefs focus on the specialty of the amicus party or the big picture.

*It’s the day of the argument; what do you take to counsel table and to the podium? Do you introduce yourself?*
Mr. Ganzfried tries to take as little as possible to the podium, though the volume of materials will depend in large part on the courtroom (e.g., whether counsel table is close to the podium). He uses a notebook with his one page of notes containing important affirmative and rebuttal points, plus the text of a relevant statute and key record references. Ms. Massaron Ross also likes to use a binder with her introductory sentence, key points, rebuttal points behind marked tabs, and important cases. Mr. Lembke has written out his “big point,” and he immediately launches into it rather than introducing himself or his clients to the court. E.g., “The crux of this case is . . .” Justice Lacy likes advocates to introduce themselves, because her docket sheet does not say who is arguing that day. In contrast, Judge Hartz has that information, so advocate introductions are a waste of time in his court, particularly if you want to express your key points before the court interrupts. In the Ninth Circuit, if advocates fail to introduce themselves, the court will insist on it. The bottom line is to know your court and its preferences.

*If the first question is “Wouldn’t you concede that . . .” what do you say?*

Ms. Massaron Ross observed that it requires a great deal of thought beforehand as to what points you can concede. It depends in large part on the breadth of the ruling you require.

*What if you don’t know the answer to the question asked?*

Mr. Lembke suggested that as the appellant, you can always say you’ll address it in rebuttal. Otherwise, just acknowledge that you don’t know and move on. Justice Lacy added that the advocate’s response can vary with the nature of the question, e.g., record, case citation, or policy.

*How can an advocate answer a hostile question and quickly transition back to the important argument points?*

Judge Hartz recommended that advocates simply explain why the court is wrong and move on quickly. Mr. Lembke added that an important part of preparation is working on transitions from hostile questions to the important argument points.

*What are the characteristics of an effective advocate?*
Justice Lacy said organization and confidence. These features will shine through in the presentation and in answering questions. Judge Hartz identified mastery of the record and an extremely basic understanding of what the case is about at its essence. Stylistically, advocates who are simple and unemotional are the most effective. Be conversational and try to help the court understand. Confidence is helpful, provided it does not cross over to arrogance.

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Elevating Your Advocacy: Understanding the Differences Between Litigating in Trial and Appellate Courts by John J. Bursch

At the ABA Midyear meeting in Boston, a distinguished panel of appellate judges and practitioners addressed the important differences in advocacy when litigating on appeal. This program was the first of what we hope will be many opportunities for CAL to collaborate with the ABA’s Young Lawyers Division. Moderated by CAL’s A. Vincent Buzard, the participants included the Honorable Sandra L. Lynch, United States Court of Appeals for the First Circuit, the Honorable Judith A. Cowin, Supreme Judicial Court of Massachusetts, and Rory FitzPatrick of K & L Gates.

Mr. FitzPatrick began by noting that in developing a case for trial, you need to cast your net wide and then gradually narrow your focus to a case’s key facts and themes. Even by the time of trial, however, the matters and issues presented to the jury for decision can be quite broad. In contrast, appeals are extremely focused. To begin, an appellate advocate is limited to facts in the record and issues raised below. Moreover, the appeal must be litigated with a “rifle shot” approach, honing in on the few central themes that will persuade the appellate court to rule in your favor.
Judge Lynch reiterated that an appellate court will almost never relieve a party from the failure to include a fact in the lower court record. It is critical, therefore, that trial court lawyers think about the facts and issues that must be preserved for a successful appeal. Judge Lynch also stressed the importance of the standard of review. There is a tremendous difference between an appellate court’s de novo review of a summary judgment decision and its very deferential review following a trial. A party will “live or die” based on the standard of review. As a result, it is crucial for advocates to understand the difference between issues of law and issues of fact.

Justice Cowin urged advocates not to argue witness credibility on appeal; this is not a subject that appellate courts can or should review. Justice Cowin also emphasized how ineffective the “scattershot” approach to appellate practice is, and seconded Mr. FitzPatrick’s view that appeal strategy demands a laser-like focus on the few issues that can result in a favorable opinion. Finally, Justice Cowin noted that members of her court will frequently inquire about the standard of review at oral argument, so advocates must be prepared to defend how that standard was characterized in the briefing.

Justice Cowin next observed that there is a tremendous difference between trial and appellate courts when it comes to factors that influence a court’s decision. Trial courts are influenced by facts and precedent; appellate courts are influenced by the policy that underlies legal rules, rules which can be changed on appeal. Judge Lynch noted that state court decisions make up the vast majority of judicial opinions in this country, making state courts the laboratory of the common law. As a result, it is easier to argue policy and to advocate for change in the law when arguing before a state supreme court than a federal circuit. Mr. Buzard noted that policy arguments can sometimes be taken too far; in New York appellate courts, for example, policy arguments are usually subservient to law and precedent, demonstrating the importance of balancing these approaches in preparing an appeal.

One of Judge Lynch’s pet peeves is advocates who simply say “that’s not my case” when judges pose hypothetical questions that apply a rule to facts different from those presented. Because appellate rulings will bind litigants in all future cases, the ramifications of a potential rule on different facts is crucial. Justice Cowin seconded the importance of hypothetical questions and expressed her
frustration that so many advocates fail to anticipate and prepare appropriate answers.

Turning to the benefit of amicus curiae briefs, Judge Lynch appreciates briefs that do not necessarily take a position in the litigation but rather advocate for a rule and leave it to the court to apply that rule. Justice Cowin noted that it is also helpful for amici parties to address background information, including how a rule will affect an industry or its members. In that respect, Judge Lynch raised the thorny question of whether amici even parties should be allowed to use the Internet as a non-record source of factual information to provide that context.

The panel next turned to the subject of appellate briefs. Mr. FitzPatrick noted that while trial court briefs are generally free form, appellate briefs are controlled by detailed rules. It is crucial to read and understand those rules before submitting an appellate brief. The brief is also the time for narrowing the issues presented. Mr. FitzPatrick emphasized that appellate briefs must be extremely record intensive; nearly every sentence in a factual statement should be supported with a cite to the trial court record. It is also important not to forget to ask for the precise relief requested. Many appellate advocates forget to do that. The fundamental goals of an appellate brief are to (1) identify error, (2) demonstrate prejudice, and (3) tell the court what it should do.

Judge Lynch asked appellate advocates to be concise and focused in their briefing. Summarize testimony, don’t quote it verbatim. A strong appellate brief will outline what an opinion in favor of that party would look like, including a statement of the winning issues and a rebuttal of the key issues the other side has raised. Again, do not underestimate the importance of addressing the impact of a ruling on future cases.

Justice Cowin noted that members of her court read approximately 50 briefs at a time when preparing for an oral argument session; many of those briefs take the maximum number of pages. Given this problem, advocates must make points quickly and succinctly. Do not repeat, and do not forget to include a strong summary of argument. Although it seems obvious, advocates sometimes forget to explain words or phrases that are customary and well known in an industry but may not be familiar to the court. Justice Cowin encouraged advocates to tell a story with the facts, the same way a trial attorney would present an opening
statement to the jury, except with frequent citations to the record, of course. Do not waste time with string cites nor waste pages with unnecessarily lengthy recitations of basic legal principles. Any time taken to make the brief shorter is time well spent.

Finally, the panel turned to principles of oral argument. Mr. Buzard urged advocates to forget the maxim that oral argument does not matter. Prepare for oral argument as if it is critical, because it is.

Judge Lynch said that the judges know the facts and the basic law. The most important part of preparing for oral argument is to anticipate the hard questions. In addition, advocates should not be afraid of the appellate judges. They are there to reach the right result and frequently will ask questions that are helpful to the advocate’s case, not hostile to it.

Justice Cowin agreed that oral argument is much more important than attorneys think. Justices on her court often comment that their initial leaning has changed based on oral argument. Bear in mind, however, that you will not be able to make all of the points you have prepared. So answer the questions asked and try to work in your affirmative points in giving the answer. The best preparation is practice.

Mr. FitzPatrick said the cardinal rule of appellate argument is to answer the question. But first, make sure you understand the question. Your answer could make the difference in the result.

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Panel:
Professor Richard Sherwin, New York Law School (moderator)
Judge Michael Daly Hawkins, U.S. Court of Appeals, Ninth Circuit
Justice Mary Noble, Kentucky Supreme Court
Taye Sanford, Staff Attorney, U.S. Court of Appeals, Tenth Circuit

Professor Sherwin led a thought-provoking discussion on the impact of technology on Appellate decision making, from the view of an academician, two appellate judges, an appellate practitioner, and an appellate staff attorney.

Professor Sherwin began by observing that thinking with words is very different from thinking with pictures. Visual expressions tend to be more meaningful. Pictures are generally more vivid and are more likely to be “taken in” and remembered by the viewer. When we observe images visually, our subconscious takes over—beneath the radar of awareness. Pictures and visual images often invoke “implicit meanings,” i.e., meanings that our conscious self may not fully realize are being conveyed.

Professor Sherwin presented as a visual example a video used at the Timothy McVeigh Oklahoma City bombing trial. The prosecution in that case played an audio tape of a hearing that was being held across the street from where the bombing occurred. In the lower right corner of the video, there was a clock counting down the minutes until the bomb explosion could be heard on the tape. The clock heightened the suspense because the jurors knew exactly what to expect when the video clock hit 9:02 a.m.

A second example was a video of a car chase in Scott v. Harris, a United States Supreme Court case that involved defendant (Harris) who, after being chased by a police officer (Scott), crashed his car and was rendered a quadriplegic. Harris argued that Officer Scott's car chase was an unconstitutional use of deadly force since Harris claimed he remained in control of his vehicle at all times and the roads were relatively empty. Justice Scalia’s opinion relied heavily on a videotape of the car chase, holding that “it is clear from the videotape that
[Harris] posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." As one of the other justices observed at oral argument, “who should I believe, you or my own eyes?”

Appellate attorney John Bursch discussed the effect the internet has had on appellate briefs and opinions. In 1996, the total number of appellate decisions citing to “http:” or “https:” was one (1). In 2006, that number was 3,500. Similarly, figures for reported appellate briefs are: for 1996--zero (0); for 2006--more than 5,000. In 2007, there were 84 federal or state appellate decisions cited to Wikipedia.

ABA Model Code of Judicial Conduct 2.9(c), prohibits a judge from investigating facts in an independent manner. Presumably, this express prohibition also includes electronic medium investigations.

Mr. Bursch discussed the appellate electronic filing system in the Sixth Circuit, which is further along than most appellate courts in the country. The Sixth Circuit requires all briefs to be filed electronically, and they have software that automatically links the record cites in the briefs to the PACER filing system used by the district courts.

He also posed a question for discussion: should appellate courts continue to defer to fact finders (in light of electronic evidence)? Bursch contrasted the competing interests of efficiency, finality, and accuracy, and the evolving effects of technology on the presentation and consideration evidence before, during, and after trials.

Taye Sanford, a staff attorney at the Tenth Circuit, addressed the evolving use of video conferencing by trial courts, particularly in criminal cases--as examples, taking pleas and first appearances. One question that remains unresolved, however is: does remote testimony satisfy the confrontation clause? To quote Justice Scalia: “Virtual testimony may be sufficient to satisfy virtual constitutional rights, but I doubt it satisfies real ones.”

Technology is not neutral. Communication comes 7% from the words used, 38% from the tone of voice, and 55% from body language.
So, for example, when a defendant at a video conference hearing is looking at a screen and not making eye contact with the judge, he could be viewed as less credible. These changes affect judges in other ways that cannot be easily detected. For example, when a defendant appears in a detention center (rather than in a courtroom), he is in a very different, and less formal, environment. The judge cannot see who else is in the room. When a defendant has a right to counsel, the attorney must choose a location—with the defendant or in the courtroom. Neither one completely protects the defendant.

Statistics show that, in immigration proceedings, video conferencing doubles the chance that a petition will be denied.

The Tenth Circuit uses video conferencing for appellate oral arguments. Although this form of argument is not popular with appellate advocates, it is becoming an economic reality. The biggest technological problem: delay in the delivery of the sound, which is often compared to listening to a law school lecture on-line. Appellate advocates are denied the non-verbal cues that you get when you argue in person.

Judge Hawkins commended to the group the decision in *Lorraine v. Markel*, 241 F.R.D. 534 (D. Md. 2007), which, in about 50 pages, steps the reader through the evidentiary and other issues that arise from the use of various forms of electronically-stored information in lawsuits.

Judge Hawkins observed that it is difficult to find an appellate decision that overturns a trial court’s decision regarding the admissibility of electronic information evidence. If the information was produced by the opponent, it is probably deemed to be authenticated. One reason why the admissibility of electronic information is so important to litigants—people tend to put in e-mails statements they would never put in a letter.

Different courts treat other types of electronic information differently—regarding admissibility and/or reliability. Most courts consider postings on government websites to be self-authenticating. The reliability of other website postings may vary—from having a reduced evidentiary standard to being found unreliable. Chat room postings are deemed to be the least reliable. Generally, a very high standard must be overcome for using this kind of evidence against a criminal.
defendant.

Judge Hawkins observed that it used to be a photo was a photo, and could be treated as reliable. But with the advent of photo shop programs, it is now possible (indeed quite simple) to manipulate photos. As an example, the Judge cited to State v. Swinson, 847 A.2d 921 (Conn. 2004), a case involving charges of sexual assault and murder. The prosecution offered into evidence photos of a bite-mark on the victim’s shoulder and super-imposed a picture of the defendant’s dental records. The witness who authenticated the evidence was a bite-mark expert, but knew nothing about photos or photo shop programs. The evidence was excluded by the Connecticut Supreme Court.

Finally, Justice Mary Noble discussed various issues her court has addressed in the use of technology. The Kentucky court system has one server that manages technology for all courts–2 trial courts and two appellate courts. They video record all trials; however, from an appellate standpoint, it takes a long time to view a video of a trial.

Kentucky is now streaming its oral arguments at the supreme court. They began their investigative process in July 2007, with the planning and installation phases occurring in August to October 2007. They began broadcasting live arguments in October 2007.

Justice Noble discussed some of the practical issues that arose as part of this process: a) concerns by appellate litigants (and judges) for how they looked (worries about nodding off or scratching, for example); b) legal considerations, and c) cost (the system installation and maintenance are costly). The court also had significant initial concerns regarding installation of a system of this magnitude and complexity in a historic building.

In terms of equipment, the court has 8 cameras: 7 on the justices and 1 on the podium. They also have 8-voice-activate microphones and one media streamer. (Justice Noble gave special thanks to Kit Walden, the court’s Appellate Technology Coordinator, for overseeing the system and for assisting in the preparation of her presentation.)
In August 2008, on recommendation of the Advisory Committee on Appellate Rules, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published for comment four proposed amendments to the Federal Rules of Appellate Procedure. Three are technical amendments. The fourth would require amicus curiae briefs to disclose authorship “in whole or in part” by a party to the appeal and any outside financial support for preparation of the amicus brief. The deadline for submitting comments on the proposed amendments is February 17, 2009.

**Definition of “state”**

A new Rule 1(b) would define the term “state” to include the District of Columbia and federal territories, commonwealths, and possessions. Correspondingly, Rule 29(a), which now provides, “The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court,” would be amended to delete “Territory, Commonwealth, or the District of Columbia” as redundant based on the new definition.

**Form 4**

Section 205(c)(3)(A) of the E-Government Act of 2002 required the Supreme Court to “prescribe rules … to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically or converted to electronic form.” In August 2005, the Committee on Rules of Practice and Procedure published for comment a package of rules amendments to comply with this mandate. It included the addition Fed. R. App. P. 25(a)(5), which incorporated the privacy provisions of Fed. R. Bankr. P. 9037, Fed. R. Civ. P. 5.2, and Fed. R. Crim. P. 49.1 that were proposed at the same time. Final versions of these amendments became effective on December 1, 2007.

Those amendments did not revise Fed. R. App. P. Form 4, the affidavit to accompany a motion for permission to appeal in forma pauperis. Form 4 requires
information that Rule 25(a)(5) forbids: the applicant’s Social Security Number (only the last 4 digits are permitted), the full names of minors (only a minor’s initials are allowed), and street addresses (only city and state are permitted).

Two rounds of amendments later, on recommendation of the Advisory Committee on Appellate Practice, the current package of proposed amendments revises Form 4 to comply with the privacy requirements of the 2002 Act. In the interim, Administrative Office of the United States Courts revised the form of in forma pauperis affidavit that it has available for download on the federal courts’ web site to conform to these requirements. However, the official Form 4 should be amended to comply with the E-Government Act of 2002, as now proposed.

New disclosures in briefs amicus curiae

The most significant of the proposed amendments to the appellate rules is the addition of new disclosure requirements in briefs filed by amici curiae other than those listed in the first sentence of Rule 29(a), that is, the United States, a federal officer or agency, or a state as defined in the proposed Rule 1(b).

A new subdivision (6) to Rule 29(c) would require an amicus curiae that is a corporation to include “a disclosure statement like that required of parties by Rule 26.1.”

A new subdivision (7) to Rule 29(c) would require the amicus brief to contain a statement that, in the first footnote on the first page:

(A) indicates whether a party’s counsel authored the brief in whole or in part;

(B) indicates whether a party or a party’s counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) identifies every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief.

The rule would require every brief filed by a non-exempt amicus to contain the prescribed footnote, thereby preventing an amicus who has something to disclose from omitting the required footnote in ignorance of the new rule.
The new disclosure rule is very closely modeled on Sup. Ct. R. 37.6, which was enacted in 1997 and amended in 2007. According to the Committee Note to the amendment to Rule 29, the “new disclosure requirement … serves to deter [a party’s] counsel from using an amicus brief to circumvent page limits on the parties’ briefs,” citing an observation by one court “that amicus briefs are often used as a means of evading the page limitations on a party’s briefs.” The Committee Note further states that the new rule also “may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.”

It is difficult to argue with the proposition that a court is entitled to know whether a brief is submitted by a “friend of the court [or] friend of a party.” To that end, knowing who is paying the piper or writing the tune is essential.

The proposed amendment requires only disclosure by the amicus of a party’s participation in authorship of the amicus brief and outside funding of the brief. However, the likely effect of the disclosure requirement, and perhaps its intent, will be to deter the filing of amicus curiae briefs that are written or funded by a party. In modern practice, courts expect that an amicus curiae brief will support one side or the other. Even so, an appellate court is unlikely to give serious weight to a so-called amicus curiae brief that is written or paid for by a party. One distinguished appellate advocate, commenting on the proposed amendment, would go further than disclosure, and ban amicus briefs that are written or funded by a party.

1. One obvious question about the proposed text is what it means to author an amicus brief “in part.” According to the Committee Note, the rule does not reach coordination between an amicus and a party, including “sharing drafts of briefs.” However, proposing specific language is a normal part of coordination between lawyers. If a party’s counsel sends amicus’ counsel a proposed point of 10 pages for inclusion in the amicus brief and the amicus includes it, either verbatim or with editorial revisions, did the party “author” the amicus brief “in part” within the meaning of the proposed rule? If not, then the rule will be toothless. By contrast, what about proposing one paragraph? Or a sentence?
The interpretation of Sup. Ct. R. 37.6 should be instructive in interpreting the proposed amendment to Fed. R. App. P. 29. However, that interpretation will not be found in reported decisions. Rather, it will be in a combination of self-policing by the Supreme Court Bar and conversations with the Clerk of the Supreme Court.

According to the leading treatise on Supreme Court practice, authoring an amicus brief “in part” should be interpreted to apply where a party’s “counsel takes an active role writing or in rewriting a substantial or important ‘part’ of the amicus brief, … something more substantial than editing a few sentences.” The Rules Committee also has some technical draftsmanship comments on the proposed amendments to Rule 29. These are stated in the attached letter of comment.

By Steven Finell, Chair
Council of Appellate Lawyers
Rules Committee

February 12, 2009

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Comments on Proposed Amendment of Fed. R. App. P. 29(c)
The Council of Appellate Lawyers offers these comments on the proposed amendment of Rule 29(c) of the Federal Rules of Appellate Procedure, which prescribes the content of briefs by amici curiae. Our comments are technical, concerning the language and structure of the proposed amendment. We do not question the objectives that the proposed disclosure requirements are intended to achieve.

Rule 29(c)(6)
Unlike Rule 28(a)–(b), which govern the contents of the parties’ main briefs, Rule 29(c) as now in force does not specify the order of the required or optional contents of a brief amicus curiae. As a result, neither the present Rule 29(c) nor the proposed new subdivision (c)(6) specifies where the “disclosure statement like that required of parties by Rule 26.1” should appear in the brief of an amicus curiae that is a corporation. The proposed Committee Note advises that the corporate disclosure statement “should be placed before the table of contents.”

We believe that the placement of the corporate disclosure statement is too important to be left to a Committee Note, which is not always read with the same care as the rules themselves. Indeed, some published editions of the rules do not include the Committee Notes. Therefore, we suggest that the proposed subdivision (c)(6) prescribe the same location for this disclosure, and in substantially the same language, as Rule 28(a)(1) does for a party. The Advisory Committee on Appellate Rules (the “Advisory Committee”) may wish to consider amending Rule 26.1 to apply to any person filing or moving for permission to file a brief as amicus curiae. Otherwise, a judge may consider a motion for permission to file a brief as amicus curiae without being aware of facts that might cause the judge to consider recusal.

If Rule 26.1 is amended as to include amici curiae, we suggest revising the proposed subdivision (c)(6) to require inclusion of the “same disclosure statement that is required of parties by Rule 26.1,” or alternatively, the “same disclosure statement that Rule 26.1 requires of parties.” The word “like” in the present proposal is ambiguous as to whether some degree of difference may be permissible.

**Rule 29(c)(7)**

While we respect the precedent of Sup. Ct. R. 37.6, we believe that there are technical improvements in draftsmanship that can be made to the proposed new subdivision (c)(7).

First, we suggest that the a more logical placement of the new disclosure statement is immediately following the statement of the amicus’s identity and interest, under a prescribed heading such as “Disclosure by Amicus Curiae.” We see no reason why this disclosure, unlike all other specified elements of the brief, should be a footnote. To give the disclosure a prominent, well defined location, we suggest amending subdivision (c)(3) to require that statement of the amicus’s
identity and interest to be at the top of the first page following the table of authorities, with the new disclosure statement immediately following. While we understand the Advisory Committee's desire not to disturb the numbering of the present subdivisions, subdivision (c) as now in force presents the required elements of the amicus brief in the order in which they typically appear, even though it does not prescribe the order. The proposed subdivision (c)(7) could be added to subdivision (c)(3), which would preserve the logical ordering of the brief's contents without disturbing the existing numbering of the subdivisions.

Second, we believe that "states" is clearer than "indicates" in subdivisions (c)(7)(A) and (B).

Third, we believe that the body of the rule should provide interpretive guidance on the language "a party's counsel authored the brief … in part." Read literally, contributing a sentence, or even a word, constitutes authorship of the brief in part. The Committee Note's reference to Supreme Court Practice shows that this is not the Advisory Committee's intent, but, again, prescribing the standard for when disclosure is required is too important to be left to a Committee Note. We appreciate the difficulty of defining authorship "in part." Perhaps the rule should include language based on the treatise's interpretation of the Supreme Court's rule, that authorship "in part" is where a party's "counsel takes an active role writing or in rewriting a substantial or important 'part' of the amicus brief, … something more substantial than editing a few sentences." Eugene Gressman et al., Supreme Court Practice 739 (9th ed. 2007).

Fourth, once the threshold of authorship required for disclosure is crossed, the proposed rule might be expanded to require disclosure of what part of the amicus curiae brief, or how much of it, the party's counsel authored. It should make a difference to the court, for example, whether the "part" that the party's counsel authored was everything except the introductory statement, or consisted of rewriting Point V(G)(4)(iii).

Fifth, subdivision (c)(7)(A) might be broadened to read, "whether a party's counsel or other representative authored the brief in whole or in part."

Sixth, subdivision (c)(7)(B) is embraced within subdivision (c)(7)(C). Therefore, the two subdivisions can be merged to require disclosure of whether there was
outside funding for the amicus curiae brief and, if so, to identify each person who
provided funding.

Committee Note
The Committee Note on subdivision (c)(7) cites Robert L. Stern et al., Supreme
Court Practice 662 (8th ed. 2002). The same subject is discussed and updated in
the current edition of this treatise: Eugene Gressman et al., Supreme Court
Practice 739 (9th ed. 2007).

Future Consideration of Rule 29(c)
At a future time, the Advisory Committee may wish to consider revising Rule
29(c) along the lines of Rule 28(b), and then specifying the placement of those
contents that are specific to briefs amicus curiae: the statement prescribed by the
present subdivision (c)(3) and the new disclosure requirement of subdivision
(c)(7).

About the Council
The Council of Appellate Lawyers is a part of the Appellate Judges Conference
of the American Bar Association’s Judicial Division. It is the only nationwide
Bench-Bar organization devoted to appellate practice. The views expressed here
are solely those of the Council, and have not been endorsed by the Appellate
Judges Conference, the Judicial Division, or the American Bar Association.
Respectfully submitted,

Bennett Evan Cooper
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Arbitration, Forum-Selection, and The Contractual Jury Waiver Clauses:
Why Differing Standards For Enforceability? By David F. Johnson

Differing standards exist for enforcing arbitration, forum-selection, and
contractual jury waiver clauses. Federal courts liberally enforce arbitration
clauses even though a party waives its constitutional right to a jury trial and has a very limited right to appeal an arbitrator's decision. Arbitration agreements are interpreted under general contract principles, and to enforce an arbitration clause, a party must merely prove the existence of an arbitration agreement and that the claims asserted fall within the scope of the agreement.

Courts have not limited arbitration precedent solely to arbitration. Courts also apply arbitration precedent to forum-selection clauses. Enforcement of forum-selection clauses is mandatory unless the party opposing enforcement clearly shows that enforcement would be unreasonable and unjust, or that the clause was invalid for reasons such as fraud or overreaching. Typically, the party opposing the clause's enforcement has the burden to prove the clause is invalid. Courts have not held that there has to be any showing of knowing or voluntary agreement to a forum-selection clause. Moreover, courts have applied estoppel so that non-signatories can enforce arbitration and forum-selection clauses.

However, Federal courts have not viewed contractual jury waiver clauses as favorably as arbitration and forum-selection clauses. Courts have crafted a requirement for enforceability that the parties must have voluntarily and knowingly entered into the agreement – a requirement that does not exist to enforce arbitration or forum-selection clauses. Few courts have discussed why the standards for contractual jury waivers are different from those for arbitration or forum-selection clauses. One reason that arbitration clauses are favorably viewed is because of a federal statute extolling arbitration's virtue, and no similar statute exists for jury waivers. Of course, a statute should not be able to trump a constitutional right. If the "knowing and voluntary" requirement is constitutional, it should apply to arbitration agreements notwithstanding statutory enactments. However, it does not.

Arbitration agreements are judged as contractual clauses, and there merely has to be a showing of mutual assent. Arbitration agreements are valid and enforceable without any showing of voluntary and knowing waiver and there is no conspicuousness requirement. Further, there are no statutes that extol the virtues of forum-selection clauses, yet those clauses are seemingly viewed as favorably as arbitration agreements.

Is there any reason to apply arbitration precedent and presumptions to forum-selection clauses and not to contractual jury waivers? Certainly, litigating in other
countries of the world has a huge impact on parties' constitutional rights. Few countries provide a right to a jury. Moreover, there are other rights that may be limited such as the examination of witnesses, presentation of evidence, and right to appellate relief. Why is there a lesser standard for enforcing these provisions than for jury waivers? There is no good reason. Arbitration, forum-selection, and jury waiver clauses should all be judged by the same standard. They all deprive a party of constitutional rights – however, as courts acknowledge, a party can waive those rights. They should all be judged either under the contract/mutual assent standard of arbitration agreements or by some higher "knowing and voluntary" standard. There is no logical difference between them.

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