Chair’s Column

This is the final edition of Appellate Issues for 2009. This particular issue is one of the finest we have ever assembled with nine articles on appellate practice and advocacy topics. This edition highlights some of the most noteworthy pending and recently-issued United States Supreme Court cases and several of the outstanding presentations from the annual AJEI Summit that took place in November in Orlando, Florida.

I would also like to extend a special thanks to the members of the Publication Committee, in particular the new editor of Appellate Issues, Crystal Rowe, who has done a masterful job of assembling, editing, and finalizing this issue.

If you are interested in getting involved with CAL, there is no better way than becoming a member of the Publications Committee. If you are interested, contact Crystal Rowe (Appellate Issues Editor), Kim Demarchi (Website Coordinator), or Ben Mesches (Committee Chair).

Ben L. Mesches
Chair of the Publications Committee

Supreme Court to Examine Proper Determination of Corporation’s “Principal Place of Business” under Diversity Statute: Hertz v. Friend, 297 F. App’x 690, 691 (9th Cir. 2008), cert. granted 129 S. Ct. 2766 (2009)
by Layne S. Keele

I. Introduction

Federal courts are vested with original jurisdiction in all cases between “citizens of different states” in which the amount in controversy exceeds $75,000. 28 U.S.C. § 1332. In 1958, Congress amended Section 1332 to create the current dual-citizenship scheme for corporations: a corporation is a citizen of the state in which it is incorporated and of the state where it has its “principal place of
business.” Id. § 1332(c). In *Hertz v. Friend*, 297 F. App’x 690, 691 (9th Cir. 2008), *cert. granted* 129 S. Ct. 2766 (2009), the Supreme Court will address the proper test for determining a corporation’s principal place of business for purposes of the diversity statute, 28 U.S.C. § 1332.

**II. Facts**

California plaintiffs filed a proposed class action in California state court against The Hertz Corporation. Hertz removed the case on diversity grounds under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), and the plaintiffs moved to remand. Under the diversity statute and the Class Action Fairness Act, removal was proper only if Hertz was not a “citizen” of California. There was no dispute that Hertz was incorporated in Delaware and, therefore, the district court’s jurisdiction depended upon the location of Hertz’s “principal place of business” under Section 1332.

The parties did not dispute that Hertz’s headquarters were in New Jersey. In the Ninth Circuit, however, a corporation’s principal place of business is not determined by its headquarters. Instead, the district court applied the Ninth Circuit’s “place of operations” test to determine Hertz’s citizenship. It examined Hertz’s operations in California (such as sales, expenditures, employees, and offices) and compared them with Hertz’s operations in other states. The district court concluded that “the plurality of [Hertz’s] activity occurs in California.” Because Hertz’s California activities predominated over those in any other state, the district court concluded that Hertz’s “principal place of business” was in California. Accordingly, the district court granted the plaintiff’s motion to remand.

**III. Appellate Review: The Ninth Circuit’s Decision**

On appeal, the Ninth Circuit affirmed the remand order. In a one-page unpublished opinion, the court held that the district court correctly applied the “place of operations” test. Hertz argued on appeal for a “per capita” analysis of the “place of operations” test—that is, the test should consider the relative population of the states. According to Hertz, when California’s population was factored into the analysis, its activities in Florida were more substantial than its California activities. The Ninth Circuit rejected Hertz’s argument for a per capita analysis of the place of operations test, finding that—given Hertz’s extensive activities in California—Hertz was in no danger of being mistreated in California state court.
IV. Arguments In The United States Supreme Court

In the Supreme Court, Hertz argues that the Ninth Circuit’s “place of operations” test cannot be harmonized with the text of Section 1332. Specifically, the text provides that a corporation is a citizen “of the state where it has its principal place of business.” The proper inquiry, according to Hertz, looks to the state where a corporation has its single most important “place” (singular) of business—that is, its headquarters. This interpretation is bolstered by the definition of “principal:” “most important, consequential, or influential.” Hertz complains that the Ninth Circuit’s test searches for the state of a corporation’s principal “places” (plural) of business, which contradicts the text of Section 332. Hertz bolsters its argument for a “headquarters test” by reminding the Court that jurisdictional rules are meant to be clear and straightforward. In the alternative, Hertz maintains that any test that turns upon a consideration of the corporation’s total activities should be applied on a per capita basis. Otherwise, California (the state with the largest population) is likely to be the “principal place of business” of almost all truly national corporations.

The respondents by contrast, argue that the Ninth Circuit got it right. They contend that Congress’s use of the word “principal” indicates that it intended courts to compare two or more places of business—a comparison that is hollow if “principal place of business” means “headquarters.” Moreover, Congress could have simply used the word “headquarters” if that was what it intended. Instead, Congress’s deliberate use of the phrase “principal place of business” suggests that there is more to the analysis. The respondents also argue that the “headquarters” test is ripe for abuse by a corporation who incorporates in one state, puts its headquarters in that state, and then conducts a majority of its business elsewhere. This, according to the respondents, was the very abuse that Congress sought to prevent by providing for the dual-citizenship of corporations (rather than corporations being citizens only of the state of incorporation). Finally, the respondents contend that the per capita approach advocated by Hertz makes little sense inasmuch as under such approach, Wyoming—a state with a population of approximately 532,668—and not California—a state with a population of approximately 36,756,666—would be a corporation’s “principal place of business” if the corporation did 98% of its business in California and only 2% in Wyoming.

The parties agree that, of the circuit courts, only the Seventh Circuit has adopted the “headquarters” test. Hertz argues that the other circuit courts’ tests—
including, of course, the Ninth Circuit—are “uncertain and difficult to administer.” According to Hertz, the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits apply a “total activities” test in which the “nerve center,” or headquarters, of a corporation is considered more important as the corporation’s activities are more broadly dispersed. In other words, the location of the corporation’s headquarters is more important if the corporation has nationwide operations. The First Circuit applies the “locus of operations” test that looks to the location of the corporation’s actual, physical operations. The Second Circuit applies a similar test. The Third Circuit determines corporate citizenship by determining the “center of corporate activity”—the headquarters is most important, but the court also considers other factors. The Fourth Circuit applies a “nerve center” test when the business is engaged primarily in investments, but a “place of operations” test when the business “has multiple centers of manufacturing, purchasing, or sales.”

V. Why It Matters

“A large percentage of the cases filed in federal court each year are based on diversity of citizenship.” Frank B. Cross & Roger LeRoy Miller, The Legal Environment of Business 34 (7th ed. 2009). The Hertz case will determine whether a significant number of those cases stay in federal court (or, if they are filed in state court, whether they may be removed to federal court). In deciding this case, the Supreme Court will almost certainly reject at least one—and possibly many—circuits’ tests for determining a corporation’s principal place of business. Regardless of the outcome, Hertz v. Friend will be a standard-setting case that will significantly change the landscape of diversity jurisdiction law.


I. Introduction

In Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company, 549 F.3d 137 (2d Cir. 2008), cert. granted 129 S. Ct. 1260 (2009), the United States Supreme Court will revisit the distinction between state laws of substance and laws of procedure to determine their applicability in Federal diversity cases
under the rule first announced in *Eric Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

**II. Background**

In *Erie Railroad Co. v. Tompkins*, 403 U.S. Ct. 64, 78, 58 S.Ct. 817 (1938) the Supreme Court held that under the Rules of Decision Act (now contained in 28 U.S.C. § 1652), federal courts sitting in diversity apply state substantive law and federal procedural law. Over the next sixty-five years, that holding has been expanded, refined, and restated.

Classification of a law as substantive or procedural for *Erie* purposes is sometimes a challenging endeavor, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415,427, 116 S. Ct. 2211 (1996), but if a state rule is not compatible with a Federal Rule of Civil Procedure, the “question is usually unproblematic” and the federal rule controls under the Supremacy Clause so long as the Federal Rule is consonant with the Rules Enabling Act, 28 U.S.C. § 2072 and the Constitution. *Gasperini*, 518 U.S. at 427 n.7. In analyzing whether a state law conflicts with a federal rule, a federal court must determine whether a federal rule “is ‘sufficiently broad’ to cause a ‘direct collision’ with the state law or implicitly, to ‘control the issue’ before the court, thereby leaving no room for operation of the state law.” *See Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 4-5, 107 S. Ct. 967 (1987) (*quoting Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-750,100 S. Ct. 1978 (1980)).

If the state law does not directly collide with the federal rule, the federal court must then determine whether application of the state law would be “outcome affective,” that is, whether its application would have such an important effect upon one or more of the litigants that failure to apply it would unfairly discriminate against citizens of the forum state or would be likely to cause a plaintiff to select the federal court. *Gasperini*, 518 U.S. at 428. This question must, in turn, be answered in light of the following twin aims of *Erie*: (1) avoidance of inequitable administration of the laws; and (2) discouragement of forum-shaping. *Hanna v. Plumer*, 380 U.S. 460, 468 n.9, 85 S. Ct. 1136 (1965). A state law that satisfies the “outcome affective” test will not, however, be applied if it would threaten “an essential characteristic of the federal court system.” *Id.* at 431-32.
III. Facts
In the present case, Shady Grove, a medical practice, commenced a class action in the New York Federal District Court against Allstate Insurance Company under Section 5106(a) of New York Insurance Law on behalf of a putative class, to recover a statutory penalty for failure to make payments of first party no-fault automobile insurance benefits to class members within thirty days. Shady Grove alleged that Allstate “(1) routinely fails to pay covered claims . . . within the statutorily mandated thirty-day time period; (2) routinely ignores its obligation to pay . . . statutory interest owed in such cases; and (3) routinely and falsely claims to have never received proof of the loss from the insured, so as to avoid triggering the statutory time limits.” Shady Grove acknowledged that its individual claim was for approximately $500.00 in damages, consisting of interest on services rendered to one of its patients. See Shady Grove, 549 F.3d at 140.

Allstate moved to dismiss Shady Grove’s Complaint based upon New York’s Civil Practice Law and Rules, Section 901(b) [CPLR 901(b)], which prohibits a class action to recover a statutory penalty. The district court granted Allstate’s motion and Shady Grove appealed the order of dismissal.

IV. Analysis By Court Of Appeals
The Court of Appeals first decided that no conflict existed between the New York Statute and Federal Rule of Civil Procedure 23 because Rule 23 makes no reference to whether any particular state cause of action should be brought as a class action or otherwise show intent to occupy the field, on that question. Federal Rule of Civil Procedure 23, accordingly, left room for the operation of CPLR 901(b) which is a substantive rule of law. The court observed that an overwhelming majority of district courts that have considered the issue have reached the same conclusion. The court analyzed CPLR 901(b) to a statute of limitations, which is substantive for Erie purposes. Shady Grove, 549 F.3d at 143-44.

The Appellate Court next determined that application of CPLR 901(b) by the federal courts would serve the “twin aims” of Erie, because (1) any other conclusion would contravene the mandates of Erie by allowing plaintiffs to recover in a federal class action when they could not do so in the same state court, and (2) a failure to apply CPLR 901(b) would encourage forum shopping.

The court decided that application of CPLR 901(b) in the federal courts would not threaten any essential characteristics of the federal court system because Shady
Grove made no argument that the availability of a class action in all circumstances was such a characteristic. Lastly, the court addressed whether a class action was authorized under an exception to CPLR 901(b); that permits class actions for statutory penalties if specifically authorized by statute. The court found that, for the exception to apply a class action must be authorized by the same statute which created the penalty. The court determined that section 5106(a) of the insurance law contained no such exception and, therefore, affirmed the dismissal of Shady Grove’s Complaint.

V. Arguments In The Supreme Court

In its brief to the United States Supreme Court, Shady Grove has launched a vigorous attack on that part of the Appellate Court decision, which provides that CPLR 901(b) is a law of substance (2009 WL 2040421). Shady Grove argues that CPLR 901(b) does not create a substantive right to avoid a class action. Instead, the statute provides a procedural entitlement not to be subjected to a class action seeking certain forms of relief in the New York courts. The Statute governs only the mode of enforcing substantive rights, a matter considered procedural under Erie.

In opposition, Allstate argues that CPLR 901(b) represents a substantive policy choice by New York to limit the state statutory penalty that may be imposed in a single lawsuit (2009 WL 2040421). Although the Federal Rule of Civil Procedure 23 sets forth the criteria governing class certification in the federal court, it does not address the antecedent question of whether a given claim is eligible for class certification in the first instance. Any interpretation of Rule 23, which would permit federal courts to override a substantive policy decision that a certain cause of action is ineligible for class certification would violate the Rules Enabling Act.

In reply, Shady Grove disputes Allstate’s characterization of Section 901(b) as substantive and argues that the rule prohibits the New York courts from certifying classes in cases seeking certain forms of relief, such as statutory penalties or minimum recoveries (2009 WL 3143700). Section 901(b) and Rule 23 address the same issue, namely whether claims for various forms of relief may be pursued through class actions. However, Section 901(b) conflicts with Rule 23 in that (unless a federal law provides otherwise) any claim that satisfies the rule’s criteria is eligible for class certification whereas under Section 901(b) some forms
of relief eligible for class certification under Rule 23 may not be pursued on a class basis.

**VI. Summary Of Oral Argument Before The Supreme Court**

*Shady Grove* was argued on November 2, 2009. At oral argument, both sides advanced the “slippery slope” argument and stressed the impact that the Court’s decision will have on existing and future state laws. *Shady Grove* argued that the Court risked encouraging states to eliminate the right of consumers to combine their claims in federal class actions. That argument found sympathy with Justice Sotomayor who remarked that under Allstate’s theory, a state could pass a law which would prohibit class actions under any circumstances. Allstate’s counsel responded that a state could do just that for claims arising under New York law. Justices Stevens and Breyer also expressed concerns about a state’s absolute ban on class actions. Allstate argued that a reversal of the Second Circuit would place at risk many existing state laws (i.e., those cited in the appendix to Allstate’s brief) that define what remedies are available to consumers for wrongs defined by state law. *Shady Grove* conceded that some of those state laws might be invalidated.

Allstate further argued that Rule 23 only provided the grounds for when a class could be recognized in the federal court but does not address the threshold issue of whether a class could be recognized in the first instance. This argument found sympathy with Justice Ginsburg who described the New York statute as one with a procedural standard and a manifestly substantive purpose. Justice Ginsburg further stated that if *Shady Grove*’s theory was accepted, a federal court in a diversity case would be creating a claim which the state never created.

**VII. Why This Case Is Important**

This case is important for three reasons. First, it will furnish the Supreme Court with an opportunity to refine or redefine the substance-procedure dichotomy announced in *Erie*. Second, it may affect the availability of class actions in the federal courts. Lastly, *Shady Grove* may affect the ability of states to regulate businesses by way of statutory penalties.
I. Introduction: The High Court’s Decision

In its December 8, 2009 decision, the Supreme Court of the United States resoundingly rejected (9-0) the application of the collateral order doctrine to discovery orders “adverse to the attorney-client privilege” (i.e. where the order rejects the assertion of the privilege and requires disclosure of allegedly confidential attorney-client communications). The Petitioner, Mohawk Industries, supported by the American Bar Association as amicus, argued that an order compelling production of attorney-client privileged communications is subject to an immediate appeal under the collateral order doctrine first recognized in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 546 (1949). Under that doctrine, a non-final order may be appealed where (1) the district court has conclusively determined the issue, (2) the issue is both important and collateral to (i.e., separate from) the merits, and (3) the issue would be effectively unreviewable upon appeal from a final decision. The Respondent, Norman Carpenter, assisted by a consortium of judges, retired judges and law professors, contended the collateral order doctrine should not be extended to such routine discovery orders, and that to do would greatly expand and complicate federal appellate jurisdiction.

The Supreme Court sided entirely with the Respondent and amici protective of federal appellate jurisdiction, concluding that any discovery order that improperly invades the attorney-client privilege may be challenged through an appeal from the final judgment, or perhaps through an interlocutory appeal under 28 U.S.C. § 1292(b), or a writ of mandamus. The Court further noted another long-recognized mechanism for obtaining immediate appellate review—a party can choose to defy the court order so as to be sanctioned or held in contempt. But an immediate appeal under the collateral order doctrine does not lie.

II. Background: The Dispute Between The Parties

Almost overshadowed in the fusillade between proxy armies are the interests of the litigants themselves: Mohawk Industries, the flooring manufacturer, and Norman Carpenter, a former shift supervisor at the company’s manufacturing plant in Calhoun, Georgia. Mohawk Industries fired Carpenter after he made
certain statements relating to the presence of undocumented workers in the plant’s workforce. Carpenter sued his former employer arguing he was fired because he had damaging information about the company’s knowing employment of undocumented workers (hired through a temporary agency). The company contends, however, that Carpenter was fired after engaging in misconduct, including advocating that the company hire an undocumented worker.

At the core of the dispute between Mohawk Industries and Carpenter, as well as the dispute over the application of the collateral order doctrine, is the fact that Mohawk hired an outside law firm to investigate Carpenter’s report of undocumented workers at the plant. The outside law firm sent a partner and a scribe to interview Carpenter while he was still employed by the company. That investigation had special significance because the company was already the subject of a federal lawsuit—a putative class action filed by former employees who believed their wages were intentionally and unlawfully depressed by the company’s hiring of undocumented workers. Carpenter maintains that during his interview, the company’s outside counsel directed him to recant his report about undocumented workers at the plant. Carpenter claims this direction was part of a conscious effort to keep him from testifying in the pending action, which he did not know about at the time. According to Carpenter, he refused to recant his report and was fired the next day. The lawyer who allegedly tried to extract a recantation represented Mohawk in the class action lawsuit.

Carpenter sued Mohawk in federal district court asserting his employer conspired with others to intimidate him from giving truthful testimony in a pending class action, in violation of 42 U.S.C. § 1985(2) and state law. The case was assigned to the same judge hearing the related class action lawsuit against Mohawk.

II. The Discovery Order
Carpenter moved to compel production of documents prepared in the course of the company’s investigation conducted by outside counsel. Mohawk then moved for protective order asserting attorney-client privilege. The district court determined that the communications between the outside lawyer and company concerning the investigation were privileged. The district court, however, concluded that Mohawk had made the investigation an issue in the class action lawsuit, thereby waiving the privilege, by filing a brief in opposition to a motion for expedited hearing in the class action suit. The district court noted that the
company’s brief characterized its investigation of Carpenter as “appropriate” and contended that the investigation showed Carpenter had made unsubstantiated charges about undocumented workers at the plant. According to the district court, these three sentences in the brief put in issue the bona fides of the investigation, such that the privilege was waived. Based upon that finding, the district court ordered the material to be disclosed, but stayed the order to allow Mohawk to appeal or seek mandamus.

IV. The Appeal
Mohawk appealed claiming the order, requiring disclosure of attorney-client privileged material, was immediately appealable under the collateral order doctrine, and also sought mandamus relief. The Eleventh Circuit disagreed and dismissed the appeal for lack of jurisdiction, refusing to extend the collateral order doctrine to reach a discovery order respecting the attorney-client privilege. The Eleventh Circuit also determined Mohawk had not shown a clear abuse or usurpation of power that would justify mandamus.

V. Oral Argument as Accurate Predictor
The Supreme Court heard oral argument on October 5, 2009. Questions from Justices Scalia and Sotomayor conveyed skepticism that a discovery order requiring disclosure of attorney-client privileged material was within the collateral order doctrine, and the unanimous decision issued just two months later demonstrates that this was not even a close call.

VI. The Rationale
Federal appellate courts, protective of their dockets, understandably are reluctant to expand the class of non-discretionary interlocutory appeals covered by the collateral order doctrine. In rejecting the application of the collateral order doctrine to such discovery orders, the Supreme Court concluded that the “‘blunt categorical instrument of § 1291 collateral order appeal’ to privileges-related disclosure orders simply cannot justify the likely institutional costs.” Mohawk Industries, 2009 WL 4573276 at 11. The Court envisioned “successive, piecemeal appeals of all attorney-client rulings” that would delay resolution and needlessly burden the courts. Id. The Court “reiterate[d] that the class of collaterally appealable orders must remain ‘narrow and selective in membership.’” Id. at 12. The Court also noted that Congress amended the Rules Enabling Act in 1990 to make clear that judicial rulemaking, rather than
court decision, is the preferred means for determining when prejudgment rulings are immediately appealable. *Id.*

The Supreme Court’s rejection of the collateral order doctrine to privilege-related disclosure orders was unequivocal. The Court reached its emphatic conclusion even though the record showed the challenged order required Mohawk Industries to disclose information that was concededly covered by the attorney-client privilege, and the district court’s order was based upon a questionable finding of implied waiver. In the Supreme Court’s view, the harm that results from the erroneous production of such privileged information can be adequately addressed through the established mechanisms of appellate review.


**I. Introduction**

A bedrock principle of the United States Constitution is that governmental powers are divided among three separate and independent branches: legislative, executive, and judicial. The separation of powers doctrine ensures that no branch of government exercises any power that is not explicitly conferred by the Constitution or that is not essential to the exercise thereof. In that regard, the Appointments Clause of the Constitution bestows upon the President the power, by and with Senate consent, to appoint “Officers” of the United States. See U.S. Const. Art. II, § 2. Under the Appointments Clause, however, Congress may vest the appointment of “inferior officers” in the “Heads of Departments.” *Id.* In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.2d 667 (D.C. Cir. 2008), *reh’g en banc denied, cert. granted* 129 S. Ct. 2378 (2009), the Supreme Court will address the constitutionality of the Sarbanes-Oxley Act’s creation of the Public Company Accounting Oversight Board (“Oversight Board”), whose members or officials are appointed—and subject to removal for cause—by the Securities and Exchange Commission (the “Commission”), and not directly by the President.
II. Background: The Sarbanes-Oxley Act And The Oversight Board

Following the Enron and Worldcom accounting scandals—which exposed serious weaknesses in the self-regulatory reporting requirements for certain publically held companies and, as a result, shook public confidence in the nation’s securities markets—Congress enacted the Sarbanes-Oxley Act of 2002. See, e.g., 15 U.S.C. § 7201. The Act—which was named after its sponsors, Senator Paul Sarbanes and Representative Michael G. Oxley—set new or enhanced standards for public company boards, management, and accounting firms. Title I of the Act established the Oversight Board—an organization designed to be free from political influence—to oversee the audits of public companies. See 15 U.S.C. § 7211(a). The purpose of the Board is “to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors.” Id. The Sarbanes-Oxley Act empowered the Commission to vest the Oversight Board with certain responsibilities, including (without limitation) enacting auditing standards, inspecting and investigating auditors of public companies, and setting its own budget. 15 U.S.C. § 7211(c).

The five members that comprise the Oversight Board are appointed by the Commission after consultation with the Chairman of the Board of Governors of the Federal Reserve and the Secretary of the Treasury. See 15 U.S.C. § 7211(e)(4)(A). Two of the five members must be, or have been, certified public accountants. See 15 U.S.C. § 7211(e)(2).

The Commission has explicit authority over the Oversight Board. See, e.g., 15 U.S.C. §§ 7217, 7218. The Commission, for example, must determine that the Board was properly organized and has appropriate rules and procedures in place, before the Board may commence operations. 15 U.S.C. § 7211(d). The Commission’s prior approval is also necessary before any rule of the Oversight Board may become effective. 15 U.S.C. § 7217(b)(2). Further, the Commission has the right to “abrogate, add to, and delete from” the Board’s rules. 15 U.S.C. § 7217(b)(5). All Oversight Board adjudications are subject to the Commission’s de novo review and may be reviewed sua sponte by the Commission. 15 U.S.C. §§ 7215(e)(1), 7217(c)(2)(A).

The Commission may censure or remove from office a member of the Oversight Board “for good cause” shown, upon a finding that such member willfully violated
the Act or abused authority, or failed to enforce compliance with a rule or standard without reasonable justification. 15 U.S.C. § 7217(d)(3). The Commission may also relieve the Board of any enforcement authority, as well as censure the Board and impose limitations upon the activities, functions, and operations of the Board. 15 U.S.C. § 7217(d)(1), (d)(2).

II. Facts: The Controversy And The District Court’s Decision
Beckstead & Watts (B&W) is a Nevada accounting firm that was inspected by the Oversight Board in 2004 and is the subject of an on-going disciplinary investigation. B&W is also a member of the Free Enterprise Fund (the “Fund”), which is a non-profit public interest organization that promotes economic growth, lower taxes, and limited government. The Fund (joined by B&W) filed a lawsuit against the Oversight Board, seeking an order enjoining the Board from taking any further action against B&W and, in addition, alleging that Title I of the Sarbanes-Oxley Act is unconstitutional. Specifically, the challengers maintain that the creation of the Oversight Board violated the Appointments Clause, separation of powers doctrine, and non-delegation principles, inasmuch as the Oversight Board is appointed—and under certain circumstances may be removed—by the Commission, leaving the President without any authority to appoint or remove Board members. The United States intervened in the suit to defend the constitutionality of the Act.

The District Court denied the Oversight Board’s motion to dismiss, concluding that both the Fund and B&W have standing to pursue their claims and were not required to exhaust the administrative remedies provided by the Sarbanes-Oxley Act. Free Enter. Fund v. Public Company Accounting Oversight Board, 2007 WL 891675 (D.D.C. 2007). The District Court, however, granted summary judgment to the Oversight Board because the latter’s creation did not violate the Appointments Clause, the separation of powers doctrine, or the non-delegation doctrine. Id. With respect to the Appointments Clause, the District Court determined that the members of the Oversight Board are “inferior officers” because they (1) have no power to render a final decision on the United States’ behalf unless permitted to do so by other executive officers, and (2) are subject to the administrative oversight and removal authority of the Commission. Id. The District Court also found that the Commission is a “department” for constitutional purposes, but that the Commission as a whole is not the “head” of the department. Still, the District Court affirmed the constitutionality of the Act under
the Appointments Clause because the Fund lacked standing to argue that the Commission was not a department head. *Id.*

Next, the District Court upheld Title I of the Sarbanes-Oxley Act under the separation of powers doctrine because the President has not been stripped of his ability to remove the Oversight Board members, as he can remove for cause the Commission’s commissioners who, in turn, can remove the Board members. The Court also noted that the “good cause” removal standard enunciated in 15 U.S.C. § 7211(e)(6) is not unduly severe and is, therefore, sufficient to withstand the facial constitutional challenge. Lastly, and with regard to the argument that, via its creation of the Oversight Board, Congress unlawfully delegated legislative power to the Board, in violation of Article I, section 1 of the Constitution, the District Court held that the Act’s use of intelligible standards (i.e., 15 U.S.C. § 7213(a)) brings it squarely within the bounds of modern non-delegation doctrine.

**III. Appellate Review: The District of Columbia Circuit’s Decision**

On appeal, the District of Columbia Circuit—in a divided decision—affirmed the District Court’s grant of summary judgment to the Fund. *Free Enter. Fund*, 537 F.3d at 667. In particular, the Circuit Court first held that the Sarbanes-Oxley Act does not run afoul of the Appointments Clause because members of the Oversight Board are subject to the direction and supervision of the Commission. *Id.* As such, the members are “inferior officers” not required to be appointed by the President. The District of Columbia Circuit also concluded that the Commission is a “department” whose “head” consists of its several Commissioners. Second, the Circuit Court determined that the Act does not contravene the separation of powers doctrine because the for-cause limitations on the Commission’s power to remove Board members, and the President’s power to remove Commissioners, do not strip the President of his power to influence the Board. In the majority’s view, the bulk of the Fund’s challenge to the Act was fought—and lost—over seventy years ago when the Supreme Court decided *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935). At that time, the Court held that the “concept of a unitary Executive embodied in the Constitution does not require the President to have an alter ego (i.e., an official serving at the pleasure of the President and removable at will) within independent agencies.” *Free Enter. Fund*, 537 F.3d at 685. The District of Columbia Circuit noted that the key question, which must be resolved, concerns whether “the Act so limits the President’s ability to influence the Board as to render it
unconstitutional.” *Id.* The Circuit Court answered that question in the negative, concluding that, in light of the President’s broad-ranging authority under the Act, the Fund’s facial challenge fails. *Id.*

Circuit Judge Kavanaugh wrote a vigorous dissent, which was longer than the majority opinion. In Judge Kavanaugh’s opinion, Title I of the Sarbanes-Oxley Act violates the Appointments Clause and the removal powers because neither the President nor a Presidential alter ego can remove the members of the Oversight Board. Instead, the members are removable only by the Commission, and only for good cause. As a consequence, the President is two levels of “for-cause removal” away from the Oversight Board. In his dissent, Judge Kavanaugh next urged that the Board members are principal, as opposed to inferior, officers because they are not removable at will and have plenary statutory authority to conduct the Oversight Board’s most critical functions—inspections, investigations, and enforcement actions.

**IV. Arguments In The United States Supreme Court**

In the Supreme Court, the Fund argues that the Sarbanes-Oxley Act violates the separation of powers doctrine because it undermines the authority and independence of the President by “reassigning or splintering his executive power.” According to the Fund, by vesting the power to appoint, remove, and review the work of the Oversight Board members in the Commission—an independent agency itself insulated from Presidential oversight—the Act impermissibly burdens the President’s power to control or supervise executive officials. In addition, the Fund contends that the Act violates the Appointments Clause, which exists to ensure that the politically accountable President will be responsible for appointments and, further, that no important officer will be appointed without the check of Senate confirmation. Lastly, the Fund asserts, in the alternative, that even if the Oversight Board members are inferior officers, their appointment by majority vote of the Commission is unconstitutional inasmuch as the Commission is not a “department” and the Chairman—not the five Commissioners as a whole—is its “head.”

In response, the Oversight Board argues that the Supreme Court lacks jurisdiction to consider the Fund’s constitutional challenge because the Fund failed to invoke the exclusive review procedures delineated in the Act. In defense of the Circuit Court’s opinion, the Board also contends that the Sarbanes-Oxley Act is constitutional under the Appointments Clause because
Oversight Board members—who are directed and supervised by the Commission—are “inferior officers,” and the Commission is a “department” with the Commissioners collectively constituting its “head.” Next, the Oversight Board maintains that the Circuit Court properly found the Act to be consistent with the separation of powers doctrine, given the Commission’s pervasive control over the Board and the President’s oversight of the Commission.

V. The Oral Argument Before The Supreme Court

*Free Enterprise Fund* was argued on December 7, 2009. The oral argument focused primarily upon the President’s removal power, if any, vis-à-vis the Oversight Board. The Fund argued that Title I of the Sarbanes-Oxley Act is unconstitutional because the President cannot appoint or remove members of the Board; nor does he have the ability to designate the chairman or review the work product. The Fund also complained that the Commission cannot control the Oversight Board as evidenced by the fact that the Board can investigate public companies without a subpoena, and the Commission has no power to stop such investigation. The Fund further took issue with the fact that the President can remove the Chairman at the President’s pleasure, but can only remove the Commissioners for cause.

By contrast, the Solicitor General—arguing in defense of the Sarbanes-Oxley Act—noted that the President has constitutionally sufficient control over the Commission, who, in turn, has comprehensive control over the Oversight Board. As an end result, the President has sufficient control over the Board, thereby defeating the constitutional challenge. When barraged with questions suggesting that the President’s power may be insufficient in light of the double “for-cause” requirements of the removal, the Solicitor General responded that the removal power is not the ultimate consideration. Instead, the paramount issue is the level of presidential control. This response, however, did not seem to assuage the Justices, as Justice Alito fired back that the more layers of for-cause removal Congress adds, the less control the President can exercise. At one point, the Solicitor General conceded that the President cannot order around the Commissioners, but can only remove them for cause. In any event, argued the United States, the Commission can effectively remove the Board without cause by simply promulgating a rule in the Commission’s favor. Indeed, the Commission can relieve the Oversight Board, as a whole, of its responsibility.

Dovetailing the Solicitor General’s arguments, the Oversight Board asserted that
the Commission has pervasive authority over the Board’s operations, given that all Board inspections and investigations are subject to the Commission’s plenary control. As a possible hurdle for the Fund, Justice Ginsberg kept returning to the reality that any perceived harm is fictional because the case is a facial challenge to the Act.

VI. The Significance Of The Free Enterprise Fund Case

The Free Enterprise Fund suit is significant because, depending upon how the Supreme Court rules, it has the potential to call into question decades of constitutional doctrine. It could also impact other agencies, such as the Commission, Federal Trade Commission, and Federal Communications Commission, that (like the Oversight Board) were created to be free of direct presidential supervision.

by John J. Bursch

At the 2009 Summit for Appellate Judges, Lawyers, and Staff Attorneys in Orlando, Florida, a distinguished panel of judges and scholars discussed the important issue of how judges engage in the decision-making process, and why the process in which they engage may sometimes lead to critical error. Moderated by Professor Jeffrey Rachlinski (Cornell Law School), the panel included Judge N. Randy Smith (U.S. Court of Appeals, Ninth Circuit), Chief Justice Peggy A. Quince (Florida Supreme Court), Judge Delissa A. Ridgway (U.S. Court of International Trade, New York), Judge Nannette A. Baker (Missouri Court of Appeals, Eastern District), and Professor Mark J. Mills (Columbia University).

Professor Rachlinski began by noting that humans make decisions in basically two ways: intuitive (system 1) and mathematical (system 2). He posed a series of problems that tested attendees’ ability to suppress their system 1 decision-making in favor of system 2:

1. A bat and a ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the all cost? [Stop and think.]
   The system 1 decision-making process may cause you to say the answer is $.10, but the correct answer is $.05 ($ .05 + $1.05 = $1.10).
2. If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets? [Stop and think.]
The system 1 process may cause you to say 100, but the correct answer is 5 minutes, because each of the 100 machines can make one widget in 5 minutes.

3. In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake? [Stop and think.]
The answer is 24 days, right? Only if you quickly jump to an erroneous conclusion. The correct answer is 47 days. In a room of roughly 250 appellate judges, lawyers, and staff attorneys, only 24% correctly answered all three questions. 30% answered two questions correctly, 22% answered one question correctly, and 25% answered no question correctly, thus demonstrating the potential pitfalls of a rush to judgment and the importance of careful deliberation.

Professor Rachlinski then moved through a series of legal scenarios and accompanying questions. The first hypothetical involved a plaintiff injured by a barrel that broke loose and rolled away from a warehouse. Safety inspectors determined that (1) when barrels are negligently secured, there is a 90% chance that they will break loose; (2) when barrels are safely secured, they break loose only 1% of the time; (3) workers negligently secure barrels only 1 in 1,000 times. How likely is it that the barrel that hit the plaintiff fell due to the negligence of one of the workers, 0-25%, 26-50%, 51-75%, or 76%-100%? [Stop and think.]

Only 51% of the attendees correctly answered 0-25%. The problem is that many people assume incorrectly that if an accident happens, there must have been negligence. But not all accidents arise from fault. You have to know the background statistics to know whether negligence was more likely than not (or, in this case, more likely than another possible cause). It is not enough to assume that if a barrel hits someone, there is negligence. When the data was broken down further, it showed that 55% of female attendees correctly answered the question, while only 39% of the males did so. Political-party affiliation had no statistically meaningful impact on the number of individuals who answered
correctly. As an interesting aside, this factual scenario brought forth the doctrine of *Res Ipsa Loquitur*.

The next hypothetical involved a statute that required an appellate court to accept an appeal if a notice of appeal was filed “not less than 7 days after entry of the order.” The appellant filed his notice of appeal 43 days after entry of the order. The appellee argued that there was a scrivener’s error, because it makes no sense to require a notice of appeal to be filed *more* than 7 days after an order is entered. The appellant urged application of the statute’s plain language. Should the appeal be dismissed? [Stop and think.]

84% of attendees said no (a strict, plain language approach), 16% said yes (a common sense approach). Notably, the attendees were given slightly different fact patterns in their question packets. Given the added fact of an unpublished decision (½ holding one way, ½ holding the other) made no meaningful difference in the outcome.

The next hypothetical involved a statute that makes it a misdemeanor to “forge an identification card.” The defendant, a Peruvian citizen, was arrested after cashing a check using his passport. The passport was valid, but the defendant had pasted into it a forged U.S. entry visa. The defendant said he was trying to enter the U.S. to find a job that would allow him to earn money to pay for a liver transplant for his critically ill nine-year-old daughter. The defendant was convicted and the trial court sentenced him to one year in prison, to be followed by deportation. Would you overturn the conviction because attaching a fake visa does not make the passport a “forgery,” or affirm because attaching a fake visa does make the passport a “forgery”? [Stop and think.]

A significant percentage of attendees said they would reverse. But again, there were two different question forms. When the above hypothetical was presented, roughly 58% of attendees stated that they would reverse; when the defendant was not a father but instead looking for a member of a drug cartel, only 47% would reverse, even though the reason why the defendant was in the United States should be completely irrelevant to the statutory interpretation issue presented. So why the difference? Because all of us are subject to coherence-based reasoning, i.e., bad actors draw bad rulings, even if the actor’s character is irrelevant to the legal issue presented.
The next hypothetical was an employment dispute where the defendant employer admitted liability for a manager that discriminated against a Mexican-American employee who was terminated. The governing statute authorized compensatory damages for “mental anguish,” and at the bench trial, the plaintiff testified credibly that she suffered from anxiety, sleeplessness, and bad dreams. She also mentioned the she saw a case similar to hers on television where the plaintiff received $415,300 for mental anguish. The defendant objected to the evidence, but the trial judge overruled the objection, eventually awarding $50,000 for “mental anguish.” Precedent makes it clear that the testimony should not have been admitted. The defendant has appealed, but the plaintiff’s lawyer argued that the testimony’s admission was harmless error. How would you decide the appeal? [Stop and think.]

A substantial majority of the attendees said the testimony was harmless error and the award should be affirmed. Breaking those numbers down based upon differences in question forms, in the ½ of cases where the forms discussed a bench trial, roughly 80% would affirm. The other ½ of the forms involved a jury trial, and there, only 50% would affirm.

Attendees were also asked how much effect, if any, the admitted testimony had on the trial judge’s award in this case? 44% of the total population said “no effect.” That number increased to roughly 55% for those with the bench trial hypothetical, and only 13% for those with the jury trial, with 37% opining that the testimony had a substantial effect in a jury trial.

Interestingly, this same question was also presented to a group of trial court judges in two scenarios: one where the television testimony did not recite a damage award, and a second that recited the $415,300 figure. The average trial judge award in the first scenario was only $6,500; the average award in the second was $50,000. Simply giving a figure created an “anchoring” effect that substantially impacted the average outcome. So perhaps irrelevant testimony can influence a judge more than we expect.

In sum, Professor Rachlinski cautioned appellate judges and practitioners to use their intuition, but to temper it with a slower, more deliberate kind of thinking that can be missing when trying to manage a busy docket. If you are interested in a
more in-depth discussion of this topic, two articles available online are *Using Research Into Intuitive Fallacies to Guide Advocacy* and *Appealing to Judicial Snap Judgments*, both authored by John Bursch.

**When You Do Not Want to Wait for Final Judgment to Appeal**  
*by Gaëtan Gerville-Réache*

On November 20, 2009, a panel of two appellate judges and some distinguished appellate advocates navigated the gauntlet of interlocutory appeals and other alternatives to obtain appellate review without waiting for a final judgment. Sharon Freytag and Mary Massaron Ross moderated a panel consisting of Judge Charles R. Wilson, *United States Court of Appeals, Eleventh Circuit*, Judge Margret G. Robb, *Indiana Court of Appeals, Fifth District*; Professor William V. Dorsaneo III, *SMU Dedman School of Law*, and Sanford Svetcov, a distinguished appellate advocate. Ms. Freytag moderated discussion of types of interlocutory orders other than class certification; Ms. Massaron Ross moderated discussion of types of interlocutory orders that involve class certification.

**I. Interlocutory Appeals That Do Not Involve Class Certification**

Ms. Freytag began with the United States Supreme Court’s opinion that prohibiting piecemeal appellate review advances the efficient administration of justice. Similarly, the Eleventh Circuit has ruled that interlocutory appeals are inherently time consuming, expensive, and disruptive. She then turned to the panel for their opinions of that viewpoint.

According to Judge Robb, thirty-seven states—including her State of Indiana—allow interlocutory appeal. Fifteen do not require the lower court to certify the order for appeal, twenty-two do require certification, and two permit the Court of Appeals to decide for itself, regardless of what the lower court decided. If she does not have enough information to make a decision, she will err on the side of not allowing interlocutory appeal. With cases that raise purely factual issues, litigants have no chance of interlocutory appeal. Many of the petitions, however, do not give the Court enough information to permit a conclusion that the issue is a legal one. That argument should be made up front in the briefing.

Ms. Freytag explained that, under the “collateral order doctrine,” a litigant may have a right to appeal if (1) the order conclusively determined a disputed
question, (2) the order resolves an important issue completely separate from the merits of the case, and (3) the order would effectively be unreviewable on appeal from a final order.

Judge Wilson discussed Carpenter v. Mohawk Industries, 541 F.3d 1048 (11th Cir. 2008), which was on appeal in the United States Supreme Court at the time of this panel discussion. (Since then, the Supreme Court affirmed the decision of the Eleventh Circuit; see Mohawk Industries v. Carpenter, No. 08-678.) Mohawk involved a discovery order to disclose privileged attorney-client communications. Norman Carpenter, an employee of Mohawk Industries, was terminated from Mohawk after he refused to recant. The trial court found that the information concerning the meeting the company’s attorneys had with Carpenter was privileged, but the privilege had been waived. The Eleventh Circuit panel dismissed the case for lack of jurisdiction. In so doing, the Eleventh Circuit first recognized that discovery orders are not generally appealable because they are not final. It then identified the exception carved out in Cohen v. Beneficial Industries Loan Corp., 337 U.S. 541 (1949), which established a three-prong test, the last of which is that the order must be effectively unreviewable on appeal from the final judgment. The panel found the issue was reviewable after the final order. The Eleventh Circuit was particularly concerned about opening the floodgates to interlocutory appeals. The Circuit Courts are evenly split over whether such orders are appealable under the collateral-order doctrine.

Ms. Freytag focused on a couple of comments of the justices during oral argument. Justice Scalia asked “except for the fact that you and I are lawyers, do you really think that the confidentiality right is any more essential than the protection of trade secrets?”

A. What Do You Believe Is The Proper Balance Between Respecting The Final-Judgment Rule And Protecting The Privilege?

Mr. Svetcov believes such issues are not appealable because of the interest in avoiding piecemeal appeals. The privilege is often fact based. It is largely a discretionary decision. If you authorize interlocutory appeal under that heading, you open the possibility to appeal in a lot of fact-specific cases, and it will be the exception that overwhelms the narrow rule. What is not protected in the process is that you cannot fix the disclosure of the information. But you can issue a protective order to prevent its further dissemination.
In Professor Dorsaneo’s view, the collateral-order doctrine strikes him as odd and outdated because it was created in 1949 before the enactment of 28 U.S.C. § 1292(b). First, it has to be important, which is a vague standard. Second, it has to be separate from the merits. Third, it must be effectively unreviewable. Fourth, it must be final. Some calls are so important we cannot wait until the case is finally over. In his view, the question that should be asked is whether resolving the issue before final judgment impairs or promotes the efficient administration of justice. Justice Ginsburg did not think it was an efficiency rule, just a rule. There will inevitably be delay, but if it is important enough, it is probably worth the wait. It struck him as odd that the justices discussed the importance of the review, but not in terms of its importance to the case at hand.

Judge Robb believes there is nothing more important than the attorney-client privilege. In the mandamus context, you consider whether it is irreparable. On one hand is the weight of the ramifications of the disclosure; on the other hand is the question of whether review is appropriate at the interlocutory stage. The balance depends upon how much of the facts both sides agree on. Judge Wilson pointed out that the arguments in the Supreme Court focused heavily on the importance of this privilege, with the justices often characterizing it as heavier than the final judgment rule.

B. What Is The Impact Of The Allowance Of Interlocutory Appeals By Statute?

Judge Robb said she looks at it in terms of efficiency. Will the appeal eliminate one major issue or party (through settlement) or is it just inviting the second appeal anyway? Her court is busy and does not want just another appeal later.

Mr. Svetcov explained that California’s statutory scheme is complex, and supplemented with case law. For class certification, there are no statutes. The California Supreme Court held that denial of class certification is a final judgment against all members of the class except the named plaintiff. If a case is terminated fully as to one of the parties, that party can appeal. There is not an appeal from a grant of certification. Of course, in federal court, certification is discretionary. When you give appellate courts discretion to deny writs, they will. Professor Dorsaneo noted that Texas has statutes identifying appealable issues. There is no discretion in the appellate court. Class-certification denials can go all the way to the Texas Supreme Court. Appealable issues include receivership, immunity matters, denials of summary judgment in matters of qualified immunity,
and motions to dismiss medical malpractice. The list keeps growing. In 2001, Texas enacted legislation similar to Section 1292(b), but without giving the court discretion, and the parties must agree that the statute is satisfied. Agreement is unlikely, unless the lower court certifies it may have made a mistake.

Judge Wilson opined that a winning petition for Section 1292(b) relief depends upon, first, the certification order. He gives some deference to the district court’s decision. It is not practical for the court to reexamine the issue. Other factors his court considers include: Are we going to conserve resources? Will it significantly decrease the complexity and length of trial? Is the appeal tactical? Does the appeal involve an unsettled issue of circuit law? Would it make the trial unnecessary? How long is the trial that we are trying to avoid? When is the appeal taken—prior to trial or well in advance? His court is more inclined to allow the appeal if it is well in advance of trial. His court looks at efficiency and whether it will have an effect on the law as applied in that case.

Ms. Freytag reminds advocates to remember Federal Rule of Civil Procedure 54(b). Get a certification that there is no reason for delay.

II. Interlocutory Appeals Regarding Class Certification

Ms. Massaron Ross began the second half of the panel discussion on class-certification appeals by noting the same tensions exist there. It was very difficult for a number of years to take an appeal, but she has seen a shift after an opinion from Judge Posner and others discussing the certification decision amounting to a dispositive decision. It led to amendments to the federal rules. Certification issues in state court may offer other avenues. Some states have a death-knell notion in their definition of final judgment, akin to the collateral-order doctrine. Some have mandamus review, others have special rules modeled after the federal rules, amounting to Section 1292(b) certification. She focused the panel on the decisional authority under the federal rules.

A. What Factors Seem To Be Compelling In The Federal Courts?

Mr. Svetcov explained that class certification is generally reviewed for abuse of discretion. But under that, is the application of the provisions of the rules. If there is a legal error, in understanding or application, the chances are stronger, especially if clearly wrong. Some cases refer to such error as manifest error in applying Rule 23. If the issue is novel or there is a conflict, that helps. You need
to find a legal question, otherwise you will not succeed in persuading the court to exercise its discretionary review.

Judge Wilson explained that the circuits have their own standards. The Eleventh Circuit has borrowed from the First Circuit. There are five factors in accepting the appeal: (1) whether the grant or denial of certification is effectively dispositive of the case, (2) whether there is weakness in the certification decision, (3) whether the grant or denial involves an unsettled legal issue, (4) the status of the litigation (length of time pending, where it is in discovery), and (5) miscellaneous factors such as whether there are settlement negotiations, a pending bankruptcy, and so on so forth.

B. To What Extent Do The Court’s Look At The Merits?
Judge Robb said, in Indiana, similar to federal law, they follow very specifically the factors. The focus is whether there is very clear error? They stick to the deferential review.

C. How Do Daubert And Choice-Of-Law Issues Impact The Certification Decision?
Professor Dorsaneo explained that review is always discretionary in the Texas Supreme Court. The court would evaluate whether the certification rule was followed. Do the common issues actually predominate individual issues? The drill involves identifying the issues and determining on what issues the Court would spend most of its time. Ten years ago, the Texas Supreme Court required the choice-of-law decision to be decided first, before engaging in that drill.

Mr. Svetcov said that if there are conflicting expert opinions on damages or causation, the motions may exclude that testimony, but those motions typically go to the merits. Class certification is a question of whether the requirements are met. Can the merits issue be tried class wide? That is the issue. If the expert offers a methodology that permits application to the entire class, that bears on the class-certification issue. Courts struggle over when Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), is key to certification. Many times judges refrain from ruling on the reliability issue and simply rule on the Rule 23 requirements. They say it does not matter how it comes out with the experts because the case can be decided without the experts.
D. To What Extent Should The Merits Matter?
Judge Wilson tries to stay away from merits. He only considers it if necessary to determine whether Rule 23 is met. Judge Robb agreed; she really does not look at merits.

E. What Tips Do You Have For Advocates To Persuade A Court To Review Certification?
Mr. Svetcov urged litigants to find a legal error in the application of Rule 23. Professor Dorsaneo added that an argument that the class representative lacks standing will sometimes justify review. If you want the case certified, do it by the numbers, to make sure the rule is met. Judge Robb noted that her court has affirmed denial before, but remanded to see if a narrower class could be certified. Lesson: never give up.

Judge Wilson advised that there are some practical considerations to persuading the court. First, it is a permissive appeal, brevity is important to persuasiveness. There is more tendency to scan the petition if it is long. The court will pay more attention if it is short. Second, convince the court this is an important case. Third, consider a green brief, an amicus curiae brief by an interested party. That will draw more attention to the petition from the court.

Two Appellate Programs Address Writing and Editing
by L. Steven Emmert

We are all professional writers; that’s one of our primary job qualifications. But even the pros need an occasional refresher course in the basic skills of their craft, and lawyers are no exception. As we well know, most appeals are decided on the briefs, instead of the oral argument. Writing skills are therefore particularly crucial for appellate advocates. Two programs at the 2009 AJEI Appellate Summit in Orlando accordingly focused on writing and editing.

I. Skill Of Writing
Duke University Rhetoric Professor George D. Gopen spoke for an hour on “A New Understanding of the ‘Plain’ in ‘Plain English.’” His presentation had a dual purpose: He analyzed statutory plain-language requirements (such as in consumer or insurance contracts), and offered suggestions to members of the
audience regarding how to make their own writings easier to understand.

Professor Gopen began by expressing his disagreement with the manner in which 37 states define plain English—from New York’s well-meaning but essentially meaningless provision, all the way to Florida’s extreme approach, which relies upon a mathematical formula that factors in, among other things, the average number of syllables per word. He approved of Pennsylvania’s approach as “a good example of how plain English should be written.”

Gopen’s views of good writing are disarmingly direct: He recommends an approach based upon readers’ expectations. Elementary-school writing teachers, for example, are looking only for the ability to demonstrate certain basic writing skills. Judges, in contrast, don’t need to be shown that a lawyer has mastered a subject; they need to be persuaded. Those two situations call for very different approaches to writing.

Readers have relatively-fixed expectations of where in the structure of a unit of discourse of any size—from a single sentence all the way to a large treatise—to look for certain kinds of substance. Professor Gopen believes that if the writer places information in the correct location, 85-90% of readers will get the message. Placed in the wrong location, the information will evade 90% or more of the intended audience.

For example, a reader expects the subject of a sentence to be followed, more or less immediately, by the verb. A short interruption, such as this one, is often acceptable; but too long an interruption will cause the reader to get lost, waiting for the verb to arrive and make sense of the sentence.

Gopen also described the importance of stressed positions within sentences. He recommends placing the most important word or phrase just before a colon, semicolon, or period, to give it greater emphasis. The last word before such a stop resonates a bit longer in the reader’s mind. As a result, “front-loading” sentences with the key information is not the most effective way to write. By restructuring sentences in this way, the writer can reduce the need to italicize certain words to give them greater emphasis; merely placing them before the punctuation marks can have the desired effect.

Gopen describes his views, as expressed in two writing books he authored in
2004, as “a whole new way of looking at language and predicting how readers will respond.” The goal, as with all good legal writing, is clarity. If the reader gets delivery of what the writer was trying to send, the writer has communicated effectively.

II. Necessity Of Editing
Writing consultant Steve Armstrong then spoke for 90 minutes on the vital process of editing. His primary emphasis was on the organizational level of a written presentation, not what he called “the micro level.” Given the existence of a complex subject matter, and the need to communicate with clarity, he believes that clear thinking and logic simply are not enough to create what he terms “super-clarity.”

Armstrong began by emphasizing the importance of introductory context. He employed an example from a brief that simply began to recite facts relating to a search and seizure. Stripped of context, the reader is left to read through the facts and try to remember them all, without knowing which ones are important to the case. He then inserted a brief introductory paragraph that summarized the principal argument. This simple addition made the fact statement far easier to read, as the reader knew what to look for amid the many facts. In this way, Armstrong emphasizes the importance of “making the readers smart enough to absorb the information they’ll get.” Armstrong believes that this signposting should be used throughout the brief, not merely at the beginning. This focusing is important wherever the reader is likely to need some guidance as to context.

He next challenged one of legal writing’s most cherished views—that shorter is always better. Generally speaking, shorter really is better—just ask any appellate jurist with a stack of page-limit briefs to read—but Armstrong provided a few examples in which the addition of a key sentence or two to an introductory paragraph significantly improved the clarity of the piece. In this light, a little more effort at the beginning can make your entire brief more readable.

Brevity played a major part in Armstrong’s next message as well: A particularly long sentence, paragraph, or section indicates a structural problem. It is easy to envision a judge’s eyes glazing over when he or she opens a brief and sees a “long gray line” of text in which a single paragraph stretches over more than a page. The reader might put forth the effort to plow through all this material, but
why make it hard? The best way to deal with this problem is to break the material up into more manageable chunks.

We’ve all heard criticism of the use of the passive voice in writing. Armstrong agrees that it’s overused, but he believes that it has legitimate uses, such as when the sentence focuses on the effect on the recipient of the action (“My client was badly injured by the defendant’s negligence”) or on the effect in general (“Traffic was completely stalled on I-95”). While clearing out overuse of the passive voice will improve your writing, Armstrong expressed that this should be a relatively low priority for larger documents.

Armstrong then turned to two topics that lawyers don’t usually consider in editing their writing: Rhythm and flow. Expanding on Professor Gopen’s teaching about the placement of words within sentences, Armstrong argued that the use of varying sentence lengths (thereby varying the reader’s rhythm) can emphasize particular information, such as when it’s presented in a short sentence that is found amid longer ones. In those instances, the sudden stop of a short sentence makes that information stands out in the reader’s mind.

Sentences within paragraphs flow much more freely if the nexus between them is clear. Armstrong recommends placing linking words relatively close to one another, so the reader essentially brings the previous sentence along when he or she travels to each new sentence. The same is true for paragraphs.

III. Conclusion
The common theme of these two presentations was to encourage writers not merely to express their views, but to do so in a way that conveys the ideas with clarity and requires the least amount of effort from the reader. Erudite language and complex sentence patterns may make the writer seem profound; but communicating that way is not the way to persuade a reader—particularly one who, like an appellate jurist, is strapped for time. Think of the last time a passage sent you scurrying off to find a dictionary, just so you could understand what the writer was trying to convey, and you can easily appreciate the value of these kinds of approaches to writing and editing.
On November 20, 2009, a panel of appellate advocates and one former appellate judge provided helpful tips and insights on preparing for oral argument, after the briefs have been written. Tom Warner moderated a panel composed of Mark Friedman, Assistant Deputy Public Defender for New Jersey; June G. Hoffman, from Fowler, White, Burnett, P.A.; Larry Klein, a retired judge with 16 years on the appellate bench; and James Layton, Solicitor General of Missouri.

I. How Do You Prepare For Oral Argument?
Mr. Layton began by explaining that he begins preparing after receiving notice that oral argument has been calendared, approximately two weeks prior to the argument. He first rereads the briefs to refresh his memory of the issues and, then, scopes out the structure of his argument. He also identifies the cases and the record cites that are critical and will return to those in the few days before oral argument. At some point, an overarching theme for his oral argument emerges, either intentionally or by happenstance. Mr. Friedman agreed that the first step is to look at the briefs and issues in them. He then writes the Missouri Supreme Court to inform them of what he will focus on in his oral argument. He developed this practice when appealing capital cases in the attorney general’s office. The letter informs the court which issues he believes are most worthy of oral argument. Ms. Hoffman typically does not develop an overriding theme for her oral argument presentation. She focuses instead on the equity driving the case because it influences the context in which the issues in the case are ultimately resolved.

II. Do You Research The Prior Decisions Of Judges On The Panel To Tailor Your Oral Argument?
Mr. Klein explained that in his 28 years of practice before the District Courts of Appeals in Florida, he never saw much indication in the opinions predictive of a particular judge’s proclivities. Often, before an opinion is published, other judges not on the panel will review it and may raise issues and concerns that take the opinion ultimately in a different direction. It is, however, important to know the judges’ areas of expertise, so that you can avoid insulting their intelligence or will be prepared to explain the area of law at issue, when necessary. But researching the panel’s prior opinions is not helpful in developing a persuasive
argument, in Mr. Klein’s opinion. Mr. Layton stated that, when he practiced in the Missouri Court of Appeals, not once did he research the opinions of the judges on the panel. He did not think it was a very useful exercise, even though he would not have to bill a client for it.

One member of the audience explained that it is helpful to know if a judge will be contentious, in order to prepare the client. Mr. Friedman also wants to find out the history of the particular judges—how long have they been around, what do they know about that particular area of law and what their track records are?

Mr. Layton qualified his earlier statement, explaining that he does watch for any members of the panel deciding other cases germane to his issues. The panel agreed, however, that pointing out to the panel that one of them had decided an earlier relevant case was not generally a good idea. Mr. Klein had a rule that he never referred to a judge by name, including the trial judge, and he never mentioned who wrote an opinion. Mr. Warner added that many of his clients want to know as much as they can about the judges on the panel.

**III. How Do You Handle Getting Stumped By The Court?**

Mr. Klein stated it is impossible to fully know an extensive record, so you do the best you can. It is good to have the trial lawyer next to you to figure out the answer and tell you where it is. The judges often ask questions that you would not expect. For instance, one judge asked what happened at the pre-trial conference, which was not in the record. The response from Mr. Klein was that he did not know.

Mr. Layton described one case where he never read the transcript because the judge’s opinion had no basis in the transcript and the issues had nothing to do with the transcript. Before you decide what you will do to prepare, figure out what is really at issue and what portions of the record are really important to the issues on appeal.

Mr. Friedman mentioned that the last capital case he argued was on behalf of another attorney who had briefed the case and became ill. He read the briefs and identified the issues. Once you decide what the critical issues are, much of the transcript becomes irrelevant.
Concentrate on the parts of the record that are at issue. Often, though, he has to have a general sense of the record, because he needs to know what the basic case was about to explain why the errors were not harmless. He has to demonstrate that the error made a difference.

Ms. Hoffman, when stumped, honestly admits that she does not recall the answer. She then requests permission to submit a later brief in response. Mr. Klein has never heard a judge be critical of a lawyer who did not know something about the record and who was honest about it. According to him, the most important thing is candor. If you are honest with the court, it should not be a big deal. Mr. Layton explained that the key is to do an effective moot court because that is the best preparation for unexpected questions.

IV. Is A Moot Court Effective Or Necessary?

Mr. Warner contends that the key to a moot court is to get someone from outside the case and find out what issues they find important and what questions they might have. At least do an informal moot court. One member of the audience recounted an experience where he conducted a moot court prior to oral argument and was told by the panelists that the last issue in the case—the one he thought was completely unimportant—would be the focus. He prepared for that and it turned out to be true. Ms. Hoffman does a lot of informal moot courts, even over lunch. Often others will think of questions or an angle she has not considered. Her clients typically do not tolerate formal moot courts because of their costs, and she does not find them particularly helpful, personally. Mr. Warner summarized that the most important thing is getting that outside critique and perspective. According to Mr. Friedman, whether he does a moot court depends upon the nature of the issues. The more purely legal the issues are, the more useful the moot court is. If the issues are very factual, then it will require the moot court panel to read the record to be effective, which is typically not possible.

V. What Is The Least Effective Way To Start An Oral Argument?

Mr. Klein recounted a lawyer who had received summary judgment in a fraudulent conveyance case. The first thing out of his mouth was “in its last two opinions on this area of law, the court has taken fraudulent conveyance back to the stone age.” He then said, “and two members of this panel were on the panel
in those cases.” Justice Sullivan finds self-deprecating humor can be good, but generally humor is only a good idea if it comes from the bench.

VI. Are Demonstrative Exhibits Useful Or Permitted?
Mr. Layton has prepared demonstrative exhibits. In Missouri, it is not uncommon to see. It is particularly helpful when there is a geographical question to have a map or aerial photo. But his cases typically involve words. If he prepares a chart, it has to have fewer than 15 words. It is not unusual for him to create a sheet of paper with 50 or 60 words that outline statutory language, analytical structure, and so forth, and hand it to the panel. He might also, for instance, put on the chart the 10 words that really matter. Pictures or maps help put the matter in context. Justice Sullivan allows demonstratives in his court, but his experience is they often do not add value. Sometimes it strikes him as a little “gimmicky” to come in at the last minute with a demonstrative exhibit. If it was truly helpful, you would think it would have been provided in advance. His understanding is that the last-minute use of demonstratives requires permission from the other side.

VII. What Do You Do When You Get A Dumb Question From The Panel?
When Mr. Layton gets a dumb question from the panel, he just answers it. Mr. Friedman says there is no such thing as a dumb question from the bench, only misguided ones. Occasionally, it indicates there is part of the record that was not understood. Some questions are opportunities for teaching. Take it as such and as an opportunity to calmly advocate your position. Sometimes the questions are for the benefit of another judge. Every question serves a purpose.

VIII. How Do You Handle A Judge Who Has Demonstrated Disfavor For Your Position?
Mr. Klein explains that, first of all, you can never really know the purpose of a question, so you cannot assume from the question that the judge is adverse. The most effective thing in preparing for oral argument is to figure out everything you can give away without conceding your case. Judges will often ask you to concede things in a hypothetical, and often the only thing you can say is “that is not this case.”

Ms. Hoffman suggested that really hard questions should be welcomed. You prepare for those questions. From an academic standpoint and a case-resolution standpoint, they are an opportunity to persuade. According to Mr.
Layton, when you encounter filibustering judges, do not cut them off, but acknowledge you disagree and then redirect them to another issue. Moreover, when the other side gets a difficult question they cannot answer, tackle it. Mr. Layton says the best opening as appellee or respondent, is to stand up and say “Judge Klein, in response to your question” and then give a good answer to the question to which the other side gave an unsatisfactory answer.

Sometimes, you do not get an opportunity to respond and the other side gives a wrong answer to a question, what then? Mr. Friedman explained that when the other side makes a serious misrepresentation in rebuttal that is significant to the case, it is appropriate to write a letter to the court. Mr. Layton added that sometimes the misrepresentation is so blatantly wrong that there is no need to write a letter.

The Art and Science of Appellate Oral Persuasion by John J. Bursch

A remarkable panel of current and former judges and justices, and a professor with expertise in speech and theater, gave a very informative presentation on the subject of oral persuasion at the 2009 Summit for Appellate Judges, Lawyers, and Staff Attorneys in Orlando, Florida. Moderated by Robert Biasotti (of Carlton Field), the panel included Justice Barbara Pariente (Florida Supreme Court), Justice Robert D. Rucker (Indiana Supreme Court), Judge Nelly Khouzam (Florida Second District Court of Appeal), Dr. Susan Demers (St. Petersburg College), and Raoul G. Cantero III (White & Case LLP and former Justice of the Florida Supreme Court).

Former Justice Cantero began by discussing how he prepared for oral argument as a Justice of the Florida Supreme Court. In that court, a clerk from one of the Justice’s chambers writes a memorandum summarizing the case and independently analyzing the record and the law. That memorandum is then circulated with the briefs to all the Justices. Justice Cantero always started his preparation by reading the Court of Appeals opinion, because it was likely to be the most objective recitation of the facts and law. If there was a conflicting case, he would read that as well. He would then delve into the briefs, analyzing them issue-by-issue, rather than by brief, then turn to the clerk’s memo. Finally, he
would write down several questions he wanted to ask counsel at the oral argument.

Justice Rucker also talked about his oral-argument-preparation procedures at the Indiana Supreme Court. A staff attorney (rather than a law clerk) prepares a memorandum analyzing the Court of Appeals' opinion and the parties' transfer petition and response. Like the Florida Supreme Court, the Court circulates the memorandum, which contains the staff attorney’s independent analysis as well as a summary, to all the justices. Justice Rucker will often ask his law clerks to draft questions for use at oral argument. Following oral arguments, the Court goes into conference immediately to discuss the case and reach a preliminary decision.

Justice Pariente's philosophy is that oral argument is *not* a passive experience for the Justices. As she prepares, she thinks about the questions she would like to ask at oral argument and the questions some of the other Justices may ask. If an advocate submits a poor brief, he or she will be "behind the 8 ball" once oral argument begins. She does not rely on her clerks to formulate questions.

Judge Khouzam relies upon her staff to prepare a memorandum that is not a summary at all, but actually a merger of the appellate briefs (that is why counsel is required to submit briefs electronically). The judges do not discuss the case before oral argument, so the court's collective thoughts about the issues are presented the first time at oral argument. Once she has analyzed the briefs, Judge Khouzam also reviews the record, and many of her peers do the same. Advocates should be scrupulously accurate in their citations to the record, because the judges will notice discrepancies. Because of the lack of any pre-argument conference or analysis, the judges' questions may be directed at other judges as much as to the parties.

Judge Khouzam noted that oral arguments *do* make a difference. In one case, her final opinion changed completely from her initial view of the merits. The most effective oral argument she ever heard was an appellee who witnessed the appellant bombarded with hostile questions, then simply asked the judges if they had any questions and sat down.
Former Justice Cantero reiterated that oral argument can make a difference, perhaps in as many as 10-20% of cases. That relatively small percentage should not be surprising, because if the briefs frame the arguments well, the court should have a good understanding of the case before the oral argument. Oral argument is particularly meaningful in the close cases, where the court could easily go either way. In some of those cases, the justices may not know ahead of time how they are going to rule. Justices may also be swayed by the comments of their peers at conference.

Professor Demers observed that any group takes on a distinct personality as a result of the individuals that compose it, and as an outsider, it is difficult to make any significant impact on the path that group is taking. To maximize impact, an advocate needs to pay close attention to questions and body language and then adjust on the fly (i.e., “be in the moment”). Use your eyes, and take inventory of which members of the court are listening. Then choose pitch, tone, and rhythm to maximize the attention the judges are giving you. Professor Demers cautioned that a successful presentation nearly always comes down to the sound; you need to be sure that you are being heard. Every person in the United States over 30 years of age has noise-induced hearing loss. So be sure you understand the acoustics of the courtroom before the argument begins; take the time to learn how you will sound; and adjust your presentation accordingly. She encouraged advocates to avoid speaking into their papers, but to instead look directly at the members of the court.

Professor Demers added that in any communication, 55% of the meaning is communicated through body language, and 38% through vocal inflection. That leaves only 7% of the meaning for the actual words used. Body language and inflection matter a great deal.

Justice Pariente said the number one challenge for any advocate is to be as responsive to the questions as possible. That requires careful listening. It also requires advocates to slow down. When you are asked a question and then immediately respond with only prepared remarks, you are losing the questioner, confusing the other members of the court, and inviting another judge or justice to interrupt you with another question. If you think of the judges not as an audience but as a group that needs to know what you are saying, that perspective can very positively influence the way you approach the argument.
Justice Rucker reiterated that oral argument is not a rhetoric contest. The most effective advocates are those that have a dialogue with the court. Particularly in a court of last resort, think about the impact the ruling you have requested will have on future cases. The advocates’ answers to questions may have a great deal of impact on how the opinion is shaped. Do not confuse appellate oral argument with a closing argument to a jury. Just talk with the court. Such a style persuades and may also give ammunition to those justices or judges who support your position. Use candor, and admit when you simply “don’t know” the answer to a particularly thorny question.

Judge Khouzam sat for 14 years as a trial court judge and reiterated Justice Rucker’s admonition that appellate advocates leave their theatrics in the trial court. She also recommended learning as much as possible about the judges before whom you are arguing, including their previous decisions in related cases. Judge Khouzam cautioned against using humor at oral argument in nearly all circumstances. Humor is always appropriate at oral argument—if it comes from the judge. That does not mean the advocates should reciprocate.

Mr. Biasotti asked the panel to share any particularly memorable openings to an appellate oral argument. Justice Pariente spoke about an opening in a case where the issue was whether the state had withheld material evidence in a death penalty case by its failure to exercise due diligence. The defendant’s attorney stood up with a piece of paper torn in half. He said that his legal team had one part of the file, but it wasn’t until they had the other part (putting the two pieces together) that they could see the whole picture. While Justice Pariente generally does not favor demonstrative exhibits, which are difficult to see and can backfire, this was a particularly effective use of such an exhibit.

Former Justice Cantero also recommended a business-like approach and cautioned against making particularly grandiose statements; e.g.: “Unless this Court reverses, the lower court order threatens democracy as we know it.” Or, “this is one of those few cases where the defendant is actually innocent.” Knowing that the exercise is a question-and-answer session, he tries to anticipate the questions he will most likely be asked that go to the heart of his case. Be prepared to quote from the record to prove a point.

Justice Rucker recalled a persuasive opening that illustrated the importance of context. The case involved the termination of parental rights and an arcane
question of statutory interpretation and legislative intent. The appellee stood up and laid out in detail the pain and suffering that the child had undergone, placing all the issues of the case in context. The courtroom was completely silent, to the advocate’s advantage.

Judge Khouzam emphasized the importance of preparation and encouraged advocates to avoid pandering (during the argument or otherwise). Judges take very seriously their responsibility to reach the right result.

Justice Pariente shared that an advocate who can cite chapter and verse from the record has instant credibility with the court. One of her pet peeves is an advocate who cannot answer a record question and tries to excuse it by reminding the court that he or she was not the attorney of record in the trial court. She also dislikes it when attorneys pander by saying, “That was a really great question,” or exaggerate by saying, “Such a holding would really open the floodgates.”