

Appellate Issues

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Editor's Note: *Appellate Issues* welcomes submissions of interest to appellate lawyers. Practice pointers, analysis of legal issues, book reviews, personal narratives, and interviews are within the range of acceptable material. Deadlines for the next two issues are February 21 and May 28. Any article concerning written persuasion or brief-writing should be submitted by February 21. Submissions and inquiries should be directed to David J. Perlman at djp@davidjperlmanlaw.com or 484-270-8946.

Inside the Judicial Sanctum

by Garrick A. Sevilla*

Appellate lawyers should strive, through their briefs and oral argument, to personally engage the individual judges or justices deciding their cases. That was one of many insights a panel of four appellate judges shared with AJEI Summit participants during a session moderated by appellate lawyer, Kirsten M. Castañeda of Locke Lord LLP. Held on Veterans' Day morning,

the panel featured Chief Judge Edith H. Jones of the Fifth Circuit Court of Appeals, Judge Brett M. Kavanaugh of the D.C. Circuit Court of Appeals, Justice

* *Garrick A. Sevilla is an attorney with Williams Mullen in Raleigh, North Carolina, where he focuses his practice on business and appellate litigation. Recently, Garrick completed a clerkship with Associate Justice Samuel A. Alito, Jr. of the Supreme Court of the United States. Garrick can be reached by telephone at (919) 981-4030 or by e-mail at gsevilla@williamsmullen.com.*

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Chairs' Column

The Publications Committee has been hard at work, gearing up for some important projects this year and next. This issue of *Appellate Issues* focuses on the 2011 AJEI Summit that took place in Washington D.C, this past November. The Summit offered many excellent presentations, and with the support of our tremendous authors, we were able

to bring many of them to you via these eight articles.

I would like to extend a special thanks to our authors and the members of the Publications Committee, in particular the new editor of *Appellate Issues*, David Perlman, who has done a masterful job of assembling, editing, and finalizing this issue. I would also like to thank Kim

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Mark D. Martin of the North Carolina Supreme Court, and Judge Eugene F. Pigott of the New York Court of Appeals.

Rarely, the judges said, do they discuss cases with their colleagues before oral argument. “The important thing to remember as a lawyer,” said Judge Kavanaugh, “is that the conversation is starting among the judges at oral argument and you want to be part of that conversation.” Concurring in this assessment, Justice Martin added that advocates must be “cognizant of the individual judge’s or justice’s prior opinions in an area.”

The judges described different starting points for their own thinking about a case. “I look at the issues on appeal and then I look at the lower court opinion,” said Chief Judge Jones. So does Judge Kavanaugh, who described the lower court opinion as “a very important starting point in [my] thinking.” While Judge Pigott also starts with the lower court opinion, a colleague of his “goes back to the original papers and . . . tries to sit as if he was a judge in the [trial] court.” By contrast, Justice Martin will start his preparation with the parties’ briefs.

All agreed that electronic briefs and records have not fundamentally changed their approaches to decision-making. The Fifth Circuit recently purchased iPads, said Chief Judge Jones. And while iPads have enabled the Fifth Circuit judges to read both the briefs and record on a single device, she does not see a “systemic change” in the task of judging. Nor does Judge Kavanaugh. “We are using [these devices] a lot more,” he said. “But in terms of how that will change decision-making, I think it won’t other than to make us more efficient.”

Along these lines, Chief Judge Jones said that electronic records have prompted more and more law clerks to examine records before oral argument. But while the volume of cases still makes it impractical for the judges themselves to examine every record pre-argument, Justice Martin cautioned appellate lawyers to know that the record will eventually be examined. “On an appellate court, after argument, there is a very painstaking and thorough, meticulous process to make sure every aspect of the record is examined.”

When appeals involve scientific or other technical information, the panel agreed that lawyers should explain the basics of these subjects in their briefs. “We don’t have a lot of time nor do we have a lot of inclination. . . to go educate ourselves on many of these things,” said Judge Pigott. The “best appellate lawyers,” added Judge Kavanaugh, will “bring their expertise to a level where. . . a generalist [judge] dealing with a lot of different issues can understand it.” Regarding foreign law in particular, Chief Judge Jones advised lawyers to submit adequate foreign law materials in order to minimize the chance that federal appellate courts will venture out on their own when reviewing these issues *de novo*.*

Whether judges consider the broader implications of an appeal can depend on the extent to which their court’s docket is discretionary. “If you have a case where the court did not have to hear your appeal,” said Justice Martin, “always be concerned about the broader implications.” Echoing this sentiment, Judge Pigott acknowledged that when his court decides to hear a case, “it is usually because we are more inter-

* See *Fed. R. Civ. P. 44.1*.

ested in the broader implications.”

While not sitting on a court of discretionary review, Judge Kavanaugh still expects appellate lawyers to explain “how [their] case fits into the bigger picture” in order to facilitate his own decision-making process. On the other hand, Chief Judge Jones said that she and her colleagues “have a strong resistance. . .to making mountains out of molehills legally.” But they do expect lawyers to “broaden their focus” in cases that genuinely present issues of great importance.

The panel offered different views on the role of pragmatism, that is, the consideration of the consequences of a particular judicial decision as a factor in determining what the decision should be. “It’s a very difficult thing to try to quantify,” said Chief Judge Jones. For example, she indicated that pragmatism can influence whether a busy appellate court decides a case on narrow grounds when the case was handled reasonably well by the court below and the issues are specific to the case. Pragmatism can also influence the opinion writing process. How much should the opinion say? What aspect of the case should the opinion focus on?

Regarding the habits or reputations of the judges below, the panel admitted to being aware of this kind of information. But the judges were less certain about its effect. “If its abuse of discretion review,” said Judge Kavanaugh, “you may be aware that this judge has made a similar mistake in the past.” “But I’m not sure I can quantify that it actually has an impact on my decision.”

Justice Martin said that appellate judges generally try not to focus on the identities of the judges below. But whether they do or not, cautioned Chief Judge Jones, the predilections of the lower court judges

should never concern counsel. “Counsel should never argue their case in terms of: ‘Well, this came up from the famous judge so and so.’ Very bad form.”

The hour-long panel discussion concluded with some parting advice for appellate lawyers.

Judge Pigott encouraged lawyers to begin their briefs with an introduction that succinctly summarizes the case and their arguments.

“In cases where the precedent is unclear,” said Justice Martin, “consider developing the factors you think the court should consider in resolving this case because the appellate court will be very concerned about the guidance that should be given to lower courts [and] to litigants.”

Chief Judge Jones advised appellate lawyers to focus on their best case. Quite often, she said, a judge is confronted with briefs citing many authorities and the judge will simply want to know which is the most important. In a similar vein, Judge Kavanaugh encouraged lawyers to be candid when describing relevant authorities and to not mislead the court through “literal truth,” by which he meant statements that are true when taken out of context, but are at least deceptive in light of the circumstances. “Literal truth may be a defense in a false statements case,” he said, “but it’s not necessarily a good practice.”

...continued *Chairs Column*

Demarchi, our website coordinator, for her efforts in connecting CAL with its members through various social-media tools. Further, I would like to acknowledge the tremendous efforts of Dana Livingston and Ben Mesches (our former Committee Chair). Thanks to their hard work, coupled with that of our many authors, CAL's first book—an "insiders'" guide of practical tips and procedure in the federal and state appellate courts (including the Supreme Court)—should be published soon and available for purchase. Stay tuned to CAL's website for more details.

If you are interested in getting involved with CAL, there is no better way to do so than becoming a member of the Publications Committee. In that regard, please contact David Perlman, Kim Demarchi (Website Coordinator), or Crystal Rowe (Committee Chair) and we would be glad to help you get more involved.

Crystal G. Rowe (crowe@k-glaw.com)
Chair of the Publications Committee

Building an Appellate Practice in the 21st Century

By Wendy McGuire Coats*

On Saturday afternoon of the 2011 AJEI Summit, conference attendees got a peek at what a law practice dedicated exclusively to appeals looks like. Horvitz & Levy LLP partner, David M. Axelrad, moderated the uniquely positioned and diverse panel that included Steven L. Tucker, Michele L. Odorizzi, and Roger D. Townsend.

The panelists' perspectives and experiences varied widely, providing attendees with an extraordinarily broad range of guidance and insight.

The Solo: **Steven L. Tucker** of Tucker Law P.C. started his solo appellate practice in Santa Fe, New Mexico after a clerkship on the Tenth Circuit Court of Appeals and 18 years of private practice. He has spent the last 20 years focused solely on civil appeals. Steven was the first lawyer certified as an appellate specialist by the New Mexico Board of Legal Specialization and is one of only two New Mexico lawyers in the American Academy of Appellate Law-

yers.

The Big Firm: **Michele L. Odorizzi** is a partner in Mayer Brown LLP's Supreme Court and Appellate Practice Group. Following clerkships on the Seventh Circuit Court of Appeals and the United States Supreme Court, Michele spent over 30 years at Mayer Brown.

The Boutiques: **Roger D. Townsend** of the civil appellate firm Alexander Dubose & Townsend LLP has been board certified in appellate law by the Texas Board of Legal Specialization for more than 20 years.

** Wendy McGuire Coats of McGuire Coats LLP is a Northern California appellate lawyer. California (Northern) Super Lawyers has recognized Wendy as a "Rising Star." She serves on CAL's publications committee and on the Contra Costa County Bar Association Women's Section Board. Wendy publishes, the Ninth (www.theninthcircuit.com), a legal blog dedicated to tracking the trends of the country's biggest and busiest circuit court of appeal. Wendy can be reached by phone (925) 297-6415, by email wendy@mcguirecoats.com or at www.mcguirecoats.com.*

Prior to founding Alexander Dubose & Townsend LLP, Roger spent the first half of his legal career with Fulbright & Jaworski L.L.P., where he founded and headed the firm's appellate group.

David M. Axelrad of the largest civil appellate firm in the country, Horvitz & Levy LLP, is a California State Bar Certified Appellate Specialist. Prior to joining Horvitz & Levy LLP in 1982, David was an appellate litigation associate with McKenna, Connor & Cueno. Prior to firm practice, David was Assistant to the Director of the Bureau of Consumer Protection, Federal Trade Commission and a Federal Trade Commission Staff Attorney. He also served as a Staff Attorney for the U.S. Court of Appeals for the Ninth Circuit.

David opened the discussion with the reminder that even as the contemporary focus has shifted to written advocacy, today's appellate lawyers descend from the appellate traditions of Abraham Lincoln, Daniel Webster, and John W. Davis, all of whom were both great lawyers and great orators. Over time, the marriage of oratory and written advocacy led to the emergence of appellate law as a specialty within the larger litigation arena. Today, the appellate lawyer is viewed as distinct from the trial lawyer and valued as having a specialized skill set.

Michele next addressed the various models of appellate practice from big firm, to boutique, to solo practitioner. She noted that the most significant shift within the big firm occurred in the mid-1980s when firms first started identifying appellate practice groups as something independently marketable outside of the general litigation umbrella. Notably, this shift also coincided with the founding and rise of the boutique and solo appellate practice model. Much of the discussion revolved around the various models

and the opportunities and challenges encountered in each.

The big firm model, such as Mayer Brown's Supreme Court and Appellate Practice Group, provides a tangible benefit to the appellate attorney. Not only does Mayer Brown's reputation for exceptional appellate advocacy and high profile cases attract appellate clients, but also the firm's trial lawyers regularly turn to the appellate group for both appellate counsel and motion practice. Michele described her firm's collaborative and cooperative environment as one where appellate counsel is not competing with trial counsel. She noted that in the big firm model few attorneys are able to work on appeals 100% of the time. In a big firm, an appellate lawyer can create practice-building opportunities by becoming "the law guy" on a case. Similarly, an appellate lawyer like Michele can provide her "internal clients" – the big firm's trial lawyers – an invaluable service when it comes to crafting and drafting briefs and motions.

When asked by an audience member what rules or formulas Mayer Brown uses to account for partner billing credit or origination of fees for the work performed by the appellate practice group, she responded that Mayer Brown does not have set rules or a formula. Instead, the partners assess billing credit completely through negotiation. Assessing credit, she said, has not been a concern because the firm views the attorneys in the appellate practice group as integral and not ancillary to a case's success. However, she acknowledged that difficulties could arise in a firm that used strict billing credit rules. Michele also noted that one disadvantage to building an appellate practice in the big firm is the potential to be priced out of an appeal because of the fees associated with a large firm.

Unlike the big firm model, which comes with a built-in national or international reputation and a potential internal and external client base, today's appellate boutique and solo practitioner confront the question: "How can I make myself known so that clients want to hire me?" Representing the solo appellate practice model, Steve observed that he markets to the legal community in which he lives and practices, not the entire world. This focused approach led him to acquire his appellate specialist designation and target those most likely to refer him work—civil trial lawyers. He found that the most successful relationships are those formed one-on-one. Therefore, for the last 30 years, he has regularly taught CLE seminars and presented on conference panels addressing appellate practice, targeting New Mexico's civil bar.

Echoing Steve's observation that building an appellate practice is grounded on relationships of trust formed between and among attorneys, Roger admonished the audience to first and foremost avoid making enemies. He also encouraged appellate attorneys to view each case as potentially three cases. Case number one is the case you are working on right now for a client. Regardless of outcome, your creative, thoughtful, and professional handling of the case will hopefully lead to another case from that client in the future (case number two). In the same vein, your work and relationship with the client will prompt them to refer you to another client and generate case number three.

In addition to seminars, CLE's, and panels both on the local and national levels, Roger noted that publishing articles and books has proven valuable. For example, Roger was the editor-in-chief for the *Texas Appellate Practice Manual* (State Bar of Texas 1993) and more recently the national editor for the treatise

Superseding and Staying Judgments: A National Compendium (ABA TIPS 2007). He also has authored book chapters in *A Defense Lawyer's Guide to Appellate Practice* (DRI 2004) and *Appellate Practice in Federal and State Courts* (Law Journal Press, forthcoming 2011).

Regardless of the vehicle—in-person contact, presentations, webinars, blogging, client alerts, or publishing—Roger reminded the audience to start with two simple questions: (1) Who do you want your clients to be? (2) Who are your competitors?

Unlike a big firm, Alexander Dubose & Townsend's boutique has no associates. From a marketing perspective, Roger explained that one advantage to the boutique model is the client's appreciation that the attorney appearing on the brief is the attorney who actually performed the work and will argue the case.

Even with a boutique appellate practice, both Roger and David discussed that clients are increasingly seeking appellate attorneys that have developed substantive areas of expertise. Roger noted that within the larger appellate arena, Alexander Dubose & Townsend has developed a reputation with subspecialties of Texas Supreme Court practice, Fifth Circuit Court of Appeals procedure, ADR, and medical malpractice. Similarly, in addition to their reputation before the California Supreme Court and Court of Appeal, Horvitz & Levy developed specialized practice areas in class actions, intellectual property, products liability, punitive damages, and healthcare.

Client acquisition aside, the boutique or solo model afford some unique advantages and disadvantages. Steven explained that when he set out to establish his solo practice there was no model to follow. He

planned to hire staff when needed, but 16 years later, he is happily a solo shop with no employees. Steven reflected that a solo practice dedicated to civil appeals has few meetings, few hearings, few filings, few billings, low overhead, and little to no travel. He has the freedom to accept or turn down work and the freedom to shape the issues and arguments with total autonomy. Illustrating the dramatic advantage of a solo appellate attorney's ability to work from anywhere with an internet connection, Steven spent 14 months living and working in Italy and France.

Steven noted some disadvantages to his solo practice model. There are no billing quotas other than those self-imposed, so he must monitor finances, accept the natural "feast or famine" nature of solo work, and plan by putting money away for the slower periods. The absence of colleagues is inherent to solo practice. Consequently, there are few opportunities to discuss or test a legal theory or strategy. On the other hand, there are no inter-office debates over practice management. While he would likely make more money in a larger firm environment, Steven said that he would not have it any other way.

The boutique appellate practice offers similar advantages and disadvantages with the added benefit of colleagues. Similar to the solo practice, Roger highlighted the freedom and flexibility available in a boutique practice. He described a legal environment thriving with collegiality. He noted that, at Alexander Dubose & Townsend, not only do the partners in the firm know what their colleagues are working on, but they also know and like each other.

At Alexander Dubose & Townsend, freedom and flexibility permeate the entire practice, impacting the choice of cases accepted, the hours worked, and the work location, and which attorneys best fit the needs

of a specific client. Similarly, David explained that Horvitz & Levy views a client as a client of the entire firm and not of a particular attorney. Consequently, there are no internal conflicts over business origination credit or case assignment. The assignment process takes into account attorney workloads, areas of expertise, and attorney fit.

Regardless of the practice model, the panelists all agreed that some degree of trial experience, including exposure to motion practice, jury instructions, and preserving issues on appeal is an important foundation for any appellate attorney. The panelists also offered a list of avenues to gain appellate experience including state and federal appellate clerkships, state and federal Attorney General or Solicitor General positions, *pro bono* panels, criminal court appointments, and *amicus* organizations. Roger illustrated that he has approached some of his firm's traditional clients and offered to do *amicus* briefing on a *pro bono* basis and that, in his experience, the clients are very appreciative since they are "not used to having attorneys offer to do something for free."

Underlying all of the panelists' advice and observation is that, maybe, in no other specialty is "who you are" more important. An appellate lawyer must build a reputation of excellent work and disciplined focus. As David reiterated, crucial to building an appellate practice is building relationships over time with other attorneys and in-house counsel based on trust and confidence. As Roger advised young attorneys especially, try to be nice and not make enemies because you never know who might become a client or judge.

Yours, Mine and Ours: The Evolving Relationship Between Appellate Counsel and Trial Counsel

by Deena Jo Schneider*

I had the pleasure of moderating the program at the 2011 AJEI Summit entitled “Yours, Mine and Ours: The Evolving Relationship Between Appellate Counsel and Trial Counsel.” The members of the panel (which I organized with Dan Brannen, another member of the Council of Appellate Lawyers) were Jerry Ganzfried, a partner in Holland & Knight’s D.C. office who is a member of that firm’s appellate and litigation practice groups; Tom Nolan, a partner in Skadden’s Los Angeles office who is primarily a trial lawyer but has often worked with appellate lawyers in preparing and trying cases; and Kaiper Wilson, Chief Litigation Counsel at MetLife, who has both trial and appellate experience and is responsible for staffing her company’s litigation matters at both levels.

I myself have worked primarily on appellate matters during the majority of my time at the Philadelphia office of Schnader Harrison Segal & Lewis but also have litigated numerous legal issues at the trial level. As a result, I also have often dealt with the role of appellate counsel at the trial court level and the role of trial counsel once a matter has entered the appellate realm. To me, one of the most interesting points that arose from the interchanges Dan and I had with our speakers, including during the actual program, is the consensus among people with different perspectives that the key to a successful relationship (and a good litigation result) is cooperation among all the players: the client and in-house, trial, and appellate counsel. Strikingly, during the panel discussion, it was difficult to distinguish trial from appellate law-

yers.

Involving appellate counsel when litigation is first filed

Kaiper began the program with a discussion of the factors that come into play in determining whether to involve appellate counsel in a case’s initial phases. The main considerations for in-house counsel evaluating a new matter are (1) the factual and legal allegations raised, (2) the potential impact on the client’s business, (3) the people affiliated with the client who need to know about the litigation, and (4) the resources that will be needed to resolve it. An action that presents complex or important issues, is one of first impression, or may have a significant impact on how the company conducts business or on its reputation will command more attention and resources than a routine one.

Kaiper explained that the road map developed to handle more substantial litigation depends on the nature of the issues and when they are expected to arise. When a matter involves significant legal questions, appellate lawyers’ skill in thinking through a

**Deena Schneider is a partner in the Philadelphia office of Schnader Harrison Segal Lewis LLP whose practice is focused on appeals and issue-oriented litigation (frequently in trial courts). She served as co-chair of the firm’s appellate practice group for many years, is a member of the Executive Board of the Council of Appellate Lawyers within the Judicial Division of the American Bar Association, and has been recognized in The Best Lawyers in America and Pennsylvania Super Lawyers for appellate law, Marquis Who’s Who in American Law, and Corporate Counsel’s Top Lawyers. She can be reached at dschneider@schnader.com or 215-751-2166.*

case can be useful in the early stages in preparing or defending motions that may cut the action off or educate the court or parties on the issues, and possibly in teeing up certain points for interlocutory appeal. It is particularly useful to involve an appellate lawyer early when part of the case is expected to be appealed while the remainder is actively proceeding through discovery. This reassures the client that both aspects of the litigation will receive proper attention.

Jerry noted that a motion to dismiss can be very beneficial even if it does not dispose of the entire litigation because it may result in dismissal of a portion of the case or its narrowing in important respects. Defense counsel should make sure they understand the client's objectives and what range of results would constitute success from its point of view. Kaiper added that the company's primary goal will be to remove "hot button" issues that go to the heart of its business operations. While trial and appellate counsel may focus on how to simplify a case, in-house counsel will generally be trying to reduce the significance of the issues. Jerry emphasized that the assessment of a case is an ongoing process that should be revisited at each stage to avoid having a matter snowball or negatively impact a company's business or its perception by the public or the press.

Effective use of appellate counsel in a case's initial stages

The discussion then transitioned to how to use appellate counsel most effectively at the beginning of litigation. Jerry noted that an appellate lawyer may help to provide the broad vision of where a case is going. Additionally, most cases that are not resolved before trial will be appealed; having appellate counsel involved early may better position the litigation for that inevitable appeal. This is particularly true for

certain pretrial proceedings that may end up being appealed, such as preliminary injunctions, which are often litigated on a very fast track. Appellate counsel's focus on the documentation and admission into the record of the various elements needed to prevail on appeal can be very valuable in these matters.

Jerry noted that another way appellate counsel can assist in framing a case deals with terminology. For example, whether a medical condition is called bovine spongiform encephalopathy, BSE, or mad cow disease is likely to have an impact on both the jury and the court. Deciding which impact is preferable early on not only maximizes that impact but avoids the confusion that can result from changing terminology on appeal. It may also save words, which is useful given the length limits on appellate briefs.

I pointed out that appellate lawyers also can add benefit in the trial court because they are always thinking about the need to record substantive discussions that occur in chambers or at side bar. Jerry agreed that this is an increasingly important point, and Tom noted that it has been expanding to discovery and other pretrial proceedings. In an effort to make litigation more efficient and less costly, trial judges now often encourage resolution of issues through informal exchanges among lawyers or telephone conferences or discussions in chambers. Because most of these interchanges are not transcribed by a court reporter, for appellate purposes they basically do not exist. A careful lawyer will seek permission to file a motion to document the denial of discovery on a particular issue or record the resolution of a significant dispute in some other way, such as in the pretrial memorandum. A trial lawyer who regularly appears in a particular court may not want to be the person always requesting that a record be created

and may prefer to have an appellate lawyer play that role.

The panel then segued into a discussion of whether and when appellate counsel should enter an appearance in the trial court. The consensus was that there is no bright line rule; rather, the appropriate balance needs to be determined in each case. Tom stated that having appellate counsel appear early on sends a message that a case is important and likely headed for a higher court. This may be appropriate in some high stakes litigation, but also may undermine the effectiveness of trial counsel. Jerry agreed that introducing appellate counsel or a large team to the jury may not be desirable. Kaiper added that it is important not to create either the impression that counsel are fungible or confusion as to different lawyers' roles.

Pre-trial division of labor

In discussing the role of appellate counsel in the pre-trial stages of litigation, Tom underscored the importance of not letting egos drive the assignment process. Every good team needs a leader who will be primarily responsible for staffing, among other things. If the leader responsible for staffing a case decides to engage appellate counsel early, the trial counsel chosen should be someone who recognizes the value of working with a lawyer designated to develop the legal framework, take the lead in preparing motions, and handle any appeals. In Tom's experience, the themes that trial lawyers develop at the outset tell their clients' factual stories powerfully and in a common sense way, but do not always adequately consider the law. Having learned from experience, he now asks legal analysts to prepare likely jury instructions and then has trial lawyers develop their themes against that backdrop. When the jury instructions

raise key areas of law that might benefit from clarification through motions, the legal analysts also focus on preparing those motions. This has the side benefit of freeing up the trial lawyers to devote more time to preparing direct testimony and cross-examination.

Tom does not always identify the people he terms legal analysts as "appellate lawyers" because that occasionally impedes their integration into the trial team. Sometimes he chooses to refer to these legal specialists as the motion practice group. Whatever their designation, he relies on them not only to provide the governing law for the case but to educate him on how it is trending, including undecided issues and larger philosophical implications.

Tom made a helpful analogy comparing a trial team to a team of sports broadcasters. The trial lawyers serve the role of the play-by-play announcers who describe the action as it occurs. The appellate lawyers function more like the color commentators who provide analysis and insight into how the game is proceeding and why. In each situation, the team becomes more effective by the inclusion of the different performers.

Appellate counsel's role during trial

A critical part of creating an integrated trial team is to respect the division of labor and make the relationship collaborative rather than destructive. Tom noted that trial counsel may understandably want to argue some of the motions, especially motions in limine, to gain respect from the court and resulting credibility in the eyes of the jury. At the same time, it is important for the judge to know that behind the trial lawyer is a legal guru who is keeping track of all the issues. The lawyers should work together to make the overall process as efficient and seamless as possible and also keep the client informed on cost. If

the client takes the position that separate appellate counsel is a luxury that cannot be afforded, the trial team in a significant case should still designate a good thinker and writer to focus on the law rather than persuasion of the jury. That lawyer will look and sound much like appellate counsel even if he or she does not officially wear that hat.

Jerry underscored that team unity should be the goal of appellate as well as trial counsel. There are two reasons for this: (1) the desire to provide the best possible advocacy for the client consistent with counsel's responsibilities as officers of the court and (2) the statistical fact that the single best indicator of success on appeal is winning at trial. The result in most appeals is an affirmance, so the best focus for all lawyers on the trial team is obtaining a victory below. The appellate lawyer's natural desire to make objections to protect the record should be tempered by the need to develop the optimal strategy to prevail before the jury and trial judge. It is not critical that appellate counsel argue all motions at the trial level. The argument decision should be made on a case-by-case and even a motion-by-motion basis. More important than who stands up is the attitude of all the players in preparing the presentation and working together towards the common goal of winning.

Tom's last point on collaboration was that law firms should stop categorizing certain people as "trial," "appellate," "antitrust," etc. lawyers. The challenge for all counsel is to bridge these divisions early on to develop the best strategy to win at trial with as few mistakes as possible while preserving important issues for appeal.

Tom elaborated by noting that trial counsel can often be as effective in making key points at trial as appellate counsel – and can also serve an important role

during the appeal by pointing out where points were preserved in the record, having lived through the trial more personally. This is a good reason for collaboration to continue even when a case shifts to the appellate arena.

Jerry agreed that cooperation between trial and appellate counsel is important throughout a litigation. Good trial lawyers who appear regularly in a particular court will know the basic rules of issue preservation in that jurisdiction (if not the more esoteric points). Trial lawyers are also often well-positioned to take the lead in establishing prejudice from a ruling, which is as critical as preserving the fact of the ruling. For example, the objection to a sudden curtailment of a trial should not be limited to surprise but should include how the client's legal position will suffer, such as by the inability to obtain the testimony of a key witness currently out of the country. Trial counsel may be in a better position to document this than appellate counsel. Establishing prejudice can be valuable even if the client prevails below, because that record can be used on appeal to counter an argument by the other side that it also objected to the ruling.

Similarly, a strategy that seems likely to be effective at trial but might create a vulnerability on appeal may not be worth the candle. An alternative strategy that lacks the same promise at the trial level but will be easier to defend later may be preferable in the long run. It is important for trial and appellate counsel to have a dialog about the pros and cons of each approach and involve the client in the final decision on how to proceed. Appellate counsel like Jerry and me who are involved in a case going to trial often end up serving in this strategic counseling role.

I commented that I have heard occasional stories of a

trial judge reacting negatively to a lawyer who is specifically designated as appellate counsel and asked if the panel members had ever experienced this. One panelist has been involved in a case where a very established appellate lawyer was not accorded the expected respect and courtesy when he was brought in to seek a mistrial. Another panelist had not personally seen this phenomenon but has been concerned about the possibility.

Post-trial division of labor

The discussion then moved to the topic of what to do after a verdict and how the roles of trial and appellate counsel may shift at this stage. Kaiper noted that, while it is always difficult to read the tea leaves during trial, in-house counsel needs to consider as a case proceeds how to protect or attack the eventual verdict. If none of the lawyers involved in the trial has been thinking about what is, should be, and could be in the record, that consideration should become a priority once the jury renders a decision. Appellate counsel is often the best choice at this point to consider how the record might be improved or the issues clarified to enhance the prospects on appeal.

Jerry underscored that one of the main items requiring attention as a case is being positioned for appeal is the transcript. Counsel should carefully review the record of all proceedings to make sure that it is both complete and correct. Addressing issues preventively before the record is finalized is much easier than trying to cure mistakes after the fact before an appellate court. Post-trial motions may also be appropriate to pull certain points together in a slightly different way to emphasize their significance to the trial judge. The time frame for these tasks is generally quite short. Trial counsel are often exhausted at the conclusion of a case and may not be as objective

or able to jump into post-trial practice as appellate counsel who assisted in the proceedings below. New counsel can be brought in, especially on post-trial motions, but a complete and well-coordinated trial team probably includes a legal analyst who is in a good position to assist and may already have the basic framework at hand.

Concluding remarks

The objectives of this program were to identify when and why it might be desirable to engage appellate counsel early in litigation; to understand clients' concern to avoid unnecessary or duplicative effort and figure out a game plan to achieve the desired result quickly and cost-effectively; to explain strategies for maintaining an appropriate balance between trial and appellate counsel as a case proceeds; and to emphasize that the client and in-house, trial, and appellate counsel will all be able to perform better when they work as a cohesive team. While I may be somewhat prejudiced, I think the discussion more than met these goals.

The panelists' overall theme was the importance of checking egos at the door and respecting the different skills and perspectives each player brings to the table. My response to that is a resounding Amen – or, perhaps more appropriately, I concur.

Life During Wartime

A Constitutional Perspective

By L. Steven Emmert*

After the September 11, 2001 terrorist attacks on the United States, President George W. Bush assumed powers to respond to these threats in ways that would have proved quite unpopular on September 10. For example, the government employed extraordinary rendition and held captured suspects without criminal charges and without access to counsel for years at a time. The nation's civil libertarians erupted in protest, contending that the government was, in responding to the threat, employing un-American means that were typical of petty dictatorships, not the world's greatest free republic.

But were these tactics really atypical of our government? In the closing presentation of the 2011 AJEI Appellate Summit in Washington D.C. on November 13, Harvard Law Professor Jack Goldsmith offered an insider's perspective and a remarkable historical context for the nation's military and law-enforcement response to the terrorist attacks. His comments previewed his upcoming book, *Power and Constraint: The Accountable Presidency After 9/11*, which will be published in March 2012.

Goldsmith is a former general counsel for the Department of Defense, and served as legal counsel to President Bush in 2003 and 2004. In the latter role, he participated in Executive Branch discussions of various techniques to deal with captured enemy combatants, and reportedly did what he could to rein in others' efforts to expand the President's powers, particularly with regard to interrogation techniques.

Goldsmith's presentation, "The Constitution in War-

time - Historical Perspective," focused on the historical backdrop of the Bush Administration's decision-making. Goldsmith noted that the curtailment of civil rights is nothing new in America. Abraham Lincoln famously suspended the right of habeas corpus during the Civil War (something that Bush never did); Woodrow Wilson cracked down on dissent during World War I with sedition prosecutions; and Franklin Roosevelt convened truly secret military commissions to try - with remarkable speed and efficiency - captured enemy combatants in World War II.

Quoting Roosevelt's Attorney General Francis Biddle (who went on to become a judge at the International Military Tribunal at Nuremberg), Goldsmith observed that through and including the Second World War, "the Constitution has never greatly bothered any wartime president." He also cited historian Arthur Schlesinger, Jr., from 1973: "The Supreme Court has never tried to interfere with wars in progress." The American public historically has been largely tolerant of the government's efforts to protect a nation at war, even if that resulted in the loss of civil liberties during these times. And yet, Goldsmith noted, by the time of the Bush Administration, Congress, the nation, and especially the courts were willing to push back. What changed?

* L. Steven Emmert is an appellate attorney with Sykes, Bourdon, Ahern & Levy, P.C. in Virginia Beach, Virginia. He is the founder and immediate past chairman of the Virginia Bar Association's Appellate Practice Section, and is the immediate past chairman of the Virginia State Bar's Appellate Practice Committee. Steve analyzes Virginia appellate decisions and trends at the website *Virginia Appellate News & Analysis*.

There are several answers to that question, but among them, the most important may be the evolution of society and the law between 1942 – the year of Japanese-American internments – and 2001. Over that span, no war (after World War II) had implicated civil liberties, in large part because places like Korea, Vietnam, and Grenada were far from our shores and, as Goldsmith noted, the direct threat was thus widely perceived as more remote. In contrast, the nation had experienced the explosion of personal freedom of the 1960s and the distrust of the government engendered by the Watergate scandal. Americans were more willing to ask questions before concluding that the government was doing the right thing.

Goldsmith outlined several ways in which institutions – particularly the federal courts – have checked the Presidency in the past decade. He ticked off several key Supreme Court rulings over that span, mentioning the *Hamdi* and *Hamdan* decisions, but emphasizing *Boumediene v. Bush* (2008), which brought United States habeas-corpus protection to the shores of Guantanamo Bay. (Ironically, many captured combatants and detainees had been transferred to Guantanamo because some of the President’s advisers – probably not including Goldsmith – had assured him that habeas-corpus rights could not be enforced there.)

Others in this string of decisions – especially *Hamdan*, which Goldsmith noted “brought the CIA’s interrogation program to a halt” – may have received more ink, but Goldsmith concluded that *Boumediene* was the most important in reining in the limits of presidential power. Presidents Bush and Obama have released many prisoners – 500 as of 2010 – because they felt that they could not meet the require-

ments for detaining them in the wake of the *Boumediene* decision. The ruling, Goldsmith quotes one observer as saying with perhaps a dollop of exaggeration, has led to an unprecedented situation where “the courts supervise the battlefield conduct of the United States military.” And while *Boumediene* does not apply in Afghanistan (since the United States does not exercise actual or virtual sovereignty there), Goldsmith explained that the US military is applying its requirements there anyway, making US troops both soldiers and evidence-gatherers with an eye toward eventual litigation over the lawfulness of detentions.

Goldsmith also explored how entities aside from the courts have furthered the checks on presidential prerogative. The press has been ever more vigilant in seeking classified documents under the Freedom of Information Act; Congress, once a “lap dog” to the President during wartime, has passed carefully crafted legislation that grants powers to the President but reserves Congressional oversight over important aspects of those powers. The legislature, for example, authorized the use of military commissions instead of civilian courts, but did so in a way that ensured that Congress retained some control over those commissions. The President thus got what he wanted, but not *everything* he wanted; Congress was showing that it would indeed push back.

By 2004, the Supreme Court was ready to declare (in *Hamdi v. Rumsfeld*) that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” (The reader is invited to imagine such a declaration from the Supreme Courts of 1862 or 1942.) And yet, Goldsmith is untroubled by this tension between the branches of government; instead, he sees these developments as evidence that

“the Constitution is working well,” even as it forever changes the powers of the President during wartime.

Near the conclusion of his remarks, Goldsmith returned to the words of Schlesinger: “The test of whether checks and balances are working well is the vital mechanism of self-correction.” In hindsight, with a hot war on American soil, it’s understandable that Lincoln would resort to extraordinary measures to preserve the Union and protect its citizens from a

threat that was all too immediate. Even in 1942, there was a widespread perception that the government had to do whatever it could to ensure the safety of American citizens in a worldwide conflagration. But in enabling modern legal institutions to correct over-extensions of presidential power, Goldsmith sees the Constitution as doing what it was intended to do: secure the blessings of liberty even as it provides for the common defense.

Preparing for the Important Oral Argument

by Julia F. Pendery*

On the first afternoon of the AJEI Summit, CAL members heard an excellent panel of experienced attorneys and a judge describe their personal approaches to oral argument. The moderator was Mark Stancil of Robins, Russell, Englert, Orseck, Untereiner and Sauber, LLP, of Washington, D.C. Panelists included the Honorable Jeffrey S. Sutton of the Sixth Circuit Court of Appeals; Paul Clement of Bancroft, PLLC in Washington, D.C.; Roy Englert, Jr. of Robins, Russell, Englert, Orseck, Untereiner and Sauber, LLP in Washington D.C.; and Mike Hatchell of Locke, Lord, Bissell & Liddell in Austin, Texas.

Each was asked for a description of his standard preparation for an important oral argument. Hatchell said he is “a two-weeker” and that his approach depends on each case’s personality. He said that in some cases, the law is more important. In others, the facts are more important, and in others, public policy issues are paramount. He first reads and digests the record, then the cases in the order in which they appear in the brief. He then outlines his oral argument.

Hatchell said he starts an outline early, using color coding and a notebook with statutes, quotes, etc. He tries to determine what the court will need at oral argument. Sometimes it is education on the area of the client’s industry, sometimes explanation of complicated facts, and sometimes policy analysis. Once he gets to court, he takes his notes to the podium before the judges enter, so they do not realize he has any notes. He approaches argument as if he is just there to answer the judges’ questions.

Englert spends two to three weeks on “the obsessive phase.” He reads all the briefs, then goes to the various source materials cited if he thinks he does not know them well enough already. Englert said that he considers wordsmithing very important, so he writes out the entire argument but then does not use the written product at all. Writing forces him to think more carefully about word choice. In the end, he carries to the podium a one-page cheat sheet with re-

** Julia F. Pendery is a board-certified civil appellate lawyer who has practiced in Dallas for more than thirty years. She has worked in large firms, medium firms, and now has her own solo firm. In addition to appeals, she represents landowners in eminent domain. She has been voted a Texas Super Lawyer by her peers every year since the distinction was initiated.*

cord cites and important quotes.

Clement said that it is easier to write about the difficult issues in your brief, where you can discuss complicated ideas and give in-depth responses to arguments, than it is to present them at oral argument for the first time. But argument, in that case, acquires new importance and new challenges because it follows from the in-depth brief. Clement noted that sometimes his perspective changes between the reply brief and the argument and sends him in a different direction when preparing for argument. He agreed with Englert that the hypothetical exercise of composing exactly what you would say if you were uninterrupted is valuable. He takes to court a small piece of paper listing four to five things he wants to make sure he communicates at oral argument. He often leaves the list at counsel's table and argues without notes, adding to the desired conversational approach.

Judge Sutton, who was a very distinguished appellate practitioner before he took the bench, said he prepared by writing short answers to anticipated questions on note cards. Judge Sutton said the Sixth Circuit will not discuss a case before argument, although some courts might. He advised knowing how your court prepares beforehand. He noted that judges break down into those who rely on facts and those who are law-oriented. He advised to always argue to the middle of the court.

The moderator asked each participant whether he conducted a moot court before an important oral argument. Clement said he "would not leave home without doing a couple." He found the questions invaluable. He uses people with fresh perspectives, combined with one or two who have been working on the case. He always wants a tough questioner

from the other side of the issues. Englert said he does the same, but strictly with people fresh to the case. Judge Sutton noted that, when in private practice, he did four moot courts before his U.S. Supreme Court arguments. Hatchell does not like moot courts, and often puts in his fee agreement that he will not conduct one. He said they are never like the real thing. He said it is more important to know your court and how *they* prepare for oral argument. A roundtable of people who know the particular court can be helpful.

When asked about rebuttal, Clement said that is when you can make the best statement of your position. Englert suggested tagging onto a judge's prior question but reframing the issue to make the point you want to make. Hatchell said you have to "sense where the wind seems to be blowing, and get in that draft." He suggested signaling upfront that you have, say, three points to make, so that if your time runs out and you are still on point two, a curious judge will give you extra time to get in your last point.

Judge Sutton said that judges' questions offer a clue to their internal disagreements. He recommended suggesting in rebuttal a common ground between such disagreement. He also said that if you state that you are answering what Judge X asked your opponent, the other judges will feel they are interrupting Judge X if they interrupt *you*, so you are more likely to be allowed to finish what you wanted to say. That strategy also emphasizes the point that Judge X may have been making to Judges Y and Z when he asked the question in the first place.

Hatchell said to make sure the other side does not set your agenda for rebuttal. You have to get in what you need to get in and not get sucked down into something that is not the point *you* want to make.

His philosophy is to put the judges' minds at ease, to show how his way supports justice. He suggested concentrating on "logical arguments that will make a judge who is philosophically against you embarrassed to vote against you in that case."

Clement suggested saying on rebuttal, "Here's the problem with the other side's answer to the question you asked, Judge X," then framing the solution in your terms. Englert said he feels the court turns its attention off as soon as the appellee has finished, so you must work to get its attention again for rebuttal. He uses approximately six rebuttal points and makes them in "staccato fashion."

The moderator asked what to do with a "judge-highjacker" who uses your time going off on a tangent or continuing to disagree with you about a specific point. Judge Sutton suggested using that as an opportunity to break a possible tie by neutralizing that judge and suggesting another way to go. How-

ever, he also said that often there is nothing you can do about the hijacking judge except hope that another judge comes to your rescue. All agreed you have to learn when to concede something and do it early in your argument. Those who will not concede anything, even if it does not harm the bottom line of their case, are not effective.

The program concluded with a discussion of whether oral argument really matters. Judge Sutton said that argument is more likely to change the path to outcome, not the outcome itself. Englert said it was much easier to lose a winning case at oral argument than to turn an impending loss into a win. His statistical analysis found that one time in ten, oral argument alters a result. He said that of *that* one time in ten, nine times out ten, a winning case was lost because of oral argument. He concluded that one in a hundred cases could be turned at oral argument from a preliminary decision that you lose into a final decision that you win.

Re-Imagining the Appellate Brief

by Timothy J. Vrana*

Not all truths are eternal. Nor are the ways to put together a good brief. The AJEI panel "Re-Imagining the Appellate Brief" discussed whether advances in technology require us to write differently now than we did just a few years ago.

Many judges are reading differently

Panelist and 9th Circuit Court of Appeals Judge Randy Smith disclosed that most 9th Circuit judges now use iPads. In contrast, panelist and former Georgia Supreme Court Justice Leah Ward Sears, now

with Schiff Hardin in Atlanta, said that a few, but not many, Georgia Supreme Court justices use them.

Regardless of the rate of change, many jurists are shifting from reading on paper to reading on screens. Panel moderator Susan Alexander, of San Francisco's Robbins Geller Rudman & Dowd, asked the panel (1) how this shift changes the way judges read and (2) what those changes mean for the brief-writer.

** Mr. Vrana clerked at what is now Frost Brown & Todd in Indianapolis, then did trial and appellate work at Sharpnack Bigley in Columbus, Indiana, for 22 years. For the past 7 years, his solo practice has focused on civil appeals, Social Security disability cases, and long-term disability cases.*

Less deep reading, more skimming

Panelist Robert Dubose, of Houston's Alexander Dubose & Townsend, has written a book on the subject. Author of *Legal Writing for the Rewired Brain: Persuading Readers in a Paperless World*, Mr. Dubose suggested that as we move from reading paper to reading screens, we seem to be moving from deep reading to skimming.

Five features of the screen environment have changed how we process information, according to Mr. Dubose:

1. Access to the internet is virtually unlimited.
2. Google and Westlaw create an expectation for quick answers.
3. Windows enables multitasking.
4. E-mail interrupts us, preventing sustained concentration.
5. Bright screens are tough on the eyes, causing us to read more slowly. To compensate, we skim.

Mr. Dubose said that studies show that screen-readers do not see every word but read in an "F-pattern." That is, the words that we actually read form a very rough capital "F" on each page with the eye traveling all the way from left to right only at the very top of a block of text. In other words, screen-readers focus more on what's at the top and left side of the page. Also, they read headings. They look for structure.

Justice Sears asked whether this is any different from the way people read a printed page. Mr. Dubose believed that it probably is different, but noted an absence of comparison studies.

Suggestions for better brief-writing

With judges reading briefs on iPads, or at least spending more time on computers generally, should lawyers be writing their briefs differently?

Mr. Dubose answered affirmatively, and suggested that brief-writers:

1. Use "visible, intuitive structuring" to enable the reader to skim the material, because that is what the reader will do. Examples of such structuring are:
 - * headings
 - * outlines
 - * bullet points
 - * numbered points
2. Bookmark the Table of Contents and the Appendix, making the structure of the argument more easily accessible and the brief look more like a website.
3. Simplify. A good website is simple. A good brief should be simple. The reader should not have to work hard to understand the writer's point.

Justice Sears followed up, noting that everything Mr. Dubose said about writing for screen-readers applied equally to writing for paper-readers. Judge Smith added, "All I do is read. I'm a reading machine. . . . You have to think about how to grab your reader's attention."

Hyperlinks likely to become more common

Mr. Dubose has already seen briefs with hyperlinks

to photographs, exhibits, and audio-visual material, and expects hyperlinks to become more common in briefs. He added that we have the technology to hyperlink to testimony but declared that “problematic.” Justice Sears and Judge Smith cautioned that appellate judges are not fact-finders and will not be retrying the case.

Changes in the appellate rules needed?

With the changes in the way jurists are reading, Justice Sears suggested rule changes to require cleaner fonts and cleaner, shorter briefs. Mr. Dubose advocated for rules that allow the use of hyperlinks. Judge Smith would like to see the Table of Authorities at the end of the brief. He also suggested that every brief have an Introduction.

The more things change . . .

The fundamentals of good brief-writing rarely change. Good written material grabs the reader’s attention. It is easily read and easily understood. Outlines, with headings and numbered points, are helpful. The good brief is clean and concise, with no distractions.

Technology has given us new tools, appellate rules permitting. We can now bookmark the Table of Contents of the brief. We can bookmark the Appendix. We can hyperlink to cases and to evidence in the Record.

These new devices are neither good nor bad *per se*, but used in the right place, in the right way, they can make for a more effective brief.

From Your Court to the Supreme Court

by Julia F. Pendery*

Many appellate lawyers, while they may never argue before the United States Supreme Court, will brief one or more cert petitions. The APEI panel “From Your Court to the Supreme Court” offered valuable advice on both seeking and opposing discretionary review before the nation’s highest court.

Moderating was Professor Steven H. Goldblatt, Faculty Director of Georgetown’s Supreme Court Institute and Director of its Appellate Litigation Program. Panelists included Jamesa Drake, Assistant Public Advocate in the Capital Post Conviction Division of the Kentucky Department of Public Advocacy; Professor Irv Gornstein, Executive Director of George-

town’s Supreme Court Institute; Thomas C. Goldstein of Goldstein, Howe & Russell, P.C., in Washington D.C. and Co-founder of SCOTUSblog; and Patricia A. Millett head of Supreme Court practice at Akin, Gump, Strauss, Hauer & Feld, L.L.P, Washington, D.C.

Other than Jamesa Drake, all of the panelists had multiple experiences in getting cert petitions granted and arguing before the Supreme Court. Drake brought the refreshing perspective of a person who

** Julia F. Pendery is a board-certified civil appellate lawyer who has practiced in Dallas for more than thirty years. She has worked in large firms, medium firms, and now has her own solo firm. In addition to appeals, she represents landowners in eminent domain. She has been voted a Texas Super Lawyer by her peers every year since the distinction was initiated.*

argued her first case (on behalf of a criminal defendant) in the Supreme Court last year.

Professor Gornstein noted up front that four of five cases in which cert is granted involve circuit splits. The rest are divided among cases in which a federal statute is struck down as unconstitutional, presidential election issues are raised, or a circuit court defies Supreme Court precedent. Approximately 7,000 petitions a year are filed; the Court's recent grant number has been approximately 80 per year.

Professor Gornstein noted five factors influencing a cert decision:

1. Is there a pure legal question of federal law involved?
2. Should the Supreme Court step in?
3. Why should the Court step in now?
4. Why is this case the right vehicle (does it have a good record, is the issue dispositive, etc.)?
5. Why is it important to reverse *this* case?

When asked about opposing a petition, Goldstein said he does not recommend waiving a response to a petition. Instead, he said to mirror the Petitioner's format, then state why there is really not a conflict in the circuits by noting different factors present in your case and saying there is no indication of what the other circuits would do if those factors had been present. He suggested that if you are stuck with a direct conflict, argue that the issue should percolate and the present case is not the right vehicle. For example, it would be helpful to argue that there are alternative grounds you could win on below if you lost before the Supreme Court on the circuit-split issue. Similarly, it would influence the Court if you

were to point out problems with the record.

Millet spoke on reply briefs supporting a petition. She advised staying focused on why the Supreme Court should take *this* issue, in *this* case, at *this* time. She cautioned against getting sucked into a "tit-for-tat" response.

All parties noted that *amicus* support is important. Anything that involves a federal statute administered by an agency will trigger the Court to call for the views of the Solicitor General. There is nothing in the rules about that procedure but, as a matter of practice, on four justices' request, the Solicitor General is asked to participate. Millett noted that if the Solicitor General is asked for his/her views, you should meet with the Solicitor General. She suggested doing your homework in preparation for such a meeting and determining from the SG's website what the government's position has been before on similar subject matter. At the meeting with the SG, discuss your petition and how it might fit into the flow of that position. Do not plead why the S.G. should feel sorry for your client, but rather, convince the Government lawyers that they should be troubled or offended by the court of appeals' result.

Drake noted that if you anticipate going to the U.S. Supreme Court, you need to be careful to monitor your case in the lower courts between the issuance of a mandate and the petition schedule. Trial courts often get jurisdiction back before the briefing schedule is over in the U.S. Supreme Court. You should advise the trial court you are filing a cert petition or seek to stay the mandate so it does not make a final ruling in the case while you are still writing the petition.

Drake also spoke about help she got from various people who learned of the Supreme Court petition in

her case. She recommended deciding early how involved in merits briefing you want to be and whether you are comfortable with law student involvement. Many top Supreme Court practitioners participate in law school clinic programs and would be pleased to use your case in their program. She said it is also important to decide early whether, if cert is indeed granted, you want to be the one to argue the case because for many of the attorneys offering assistance, arguing the case themselves is a dealbreaker. On the other hand, she emphasized that even if you want to keep total control of the case, there are still attorneys willing to help in the U.S. Supreme Court and you should take advantage of that support.

Drake raised the prospect of some Supreme Court

litigators offering assistance preferencing their professional interests over your clients'. For example, it would be possible for a new attorney to prefer a Supreme Court victory no matter what the impact a particular remand order may have on your client. Millett and Goldstein said that such a prospect is unlikely among reputable members of the Supreme Court bar. One possibility, if a client would not be served by a certain argument, would be for interested *amici* to cover that argument.

One speaker went beyond the expected advice to practicing appellate attorneys, offering advice to the judges in the audience. It was suggested that they protect their opinions from having cert granted by narrowing their holdings, noting alternative grounds, and making the opinion very fact specific.

Only Words: Scott Turow on Law and Literature

by David J. Perlman*

"It's Only Words: Thoughts of a Lawyer and Novelist" was the title to Scott Turow's November 11 AJEI lunchtime presentation. Weaving anecdote, theory, and fiction, Turow described two modes of discourse, legal and literary. Each, he observed, offers its vision of truth. Each has its force and effect. Each has its limitations.

Turow opened with an anecdote about his Amherst English Professor, Theodore Baird. A friend of Robert Frost's—who also taught at Amherst—Baird viewed literature through the lens of "new criticism." Analogous to the lawyers' "four corners" interpretive method, "new criticism" locates meaning in the words of the text alone. "It doesn't matter, "

Turow quipped, "that the writer was a cross-dresser raised in a cage or that a nuclear bomb exploded outside of his house."

In his opening class, Baird drove home his point with idiosyncratic pedagogy: he patrolled the room striking students on the head with a pencil, asking each to name the object in hand.

"A pencil," was the first answer.

"No," Baird said.

"An oblong yellow instrument," was another at-

* David J. Perlman practices commercial litigation and appellate law in Philadelphia. He is Editor of *Appellate Issues*. His website is www.davidjperlmanlaw.com and he can be reached at djp@davidjperlmanlaw.com.

tempt.

“No.”

Finally, Baird enlightened the young initiates: “It’s a weapon.”

Baird’s message, Turow said, was that words have dramatic implications. Call a pencil a weapon, and it may become one. Or use it as a weapon, and it may be called one. Law, like literature, concerns the power to choose the word and hence define reality, with all the consequences thus entailed.

Turow invoked another student of Baird’s, founder of the law and literature movement, James Boyd White. In White’s view, the language of law, like the language of literature, interprets experience and confers meaning. As White wrote in *The Edge of Meaning*, law translates “mute and inexpressible experience to another plane, where it acquire[s] significance of a new kind. It [is] a way of giving meaning to life.” As Turow observed, the law thrusts into public discourse private issues otherwise lacking a forum.

But the languages of law and literature are markedly different. For one, law is impermanent. The statements, pronouncements, rules, opinions—the writings of law—sacrifice permanence to achieve their pragmatic end; they are swept away, into the dustbin of history, to make room for new, more workable legal statements. Turow commented that Seventh Circuit Judge and literary stylist Richard Posner considers his opinions to last only so long as they are useful, which may not be long at all. While Shakespeare remains vital, Tudor reports are historical oddities. The law, Turow said, is a fluid accommodation between opposing forces, not an expression of

abiding truths.

Yet, law’s mutability, rather than repelling Turow, fascinates him. Before attending law school, he was a writing fellow at Stanford, surrounded by a coterie of talented writers. At the time, his own fictional endeavor hinged on the lawyerly subject of the implied warranty of habitability. Turow said he was intrigued by the law rejecting the original English concept that a tenant rented only the ground beneath a structure with no assurance that the structure was fit for human habitation. He found it compelling that the law could shift course to achieve a pragmatic, political objective—that it could “turn its back on itself” and become an instrument to resolve differences between people separated “by a power differential.”

Yet, to remain effective, Turow observed, the law “fudges” certain truths. He cited a study of the factual records underlying the classic textbook appellate cases. The study revealed that the famous opinions “glossed over messy facts” that would have undercut the outcome. “Law is not literature,” he said. “It must be unambiguous to bind human behavior. It must pretend that there are no contradictions or ambiguities.” Every case is result driven, he concluded, for the facts must fully justify the rule of law. Ultimately, however, he said the drive toward absolutism undermines law’s authority and erodes its permanence.

In addition to being fleeting, law, unlike literature, speaks in an impersonal, institutional voice. While law consists of verbal formulations, Turow observed, the lawyer is denied access to his personal vocabulary. Judges and lawyers speak on behalf of an unfeeling entity, while creative writers cultivate a voice — an application of diction, syntax, tone, rhythm,

indeed, of all the aspects of language — to convey an individual personality.

Yet, literature, like law, still has its limitations, which Turow suggested through an anecdote. He disclosed that *Presumed Innocent's* first draft didn't identify the murderer. He had narrowed the suspects down to two, thinking this uncertainty was comparable to a not-guilty verdict when the evidence is insufficient to convict one of a number of suspects. This resolution corresponded to Turow's experience as a prosecutor. It was an outcome possible at law, a principled means of containing indeterminacy. But ultimately, it was an outcome Turow found incompatible with art.

"Mystery novels don't leave things hanging like the reality of courtrooms," he said. Realizing that mystery novels must observe their own conventions to sustain their meaning, Turow revised the ending to identify a murderer. Ultimately, we resort to literary art for relief from incongruity, contradiction, and uncertainty; as Frost famously said, a poem is "a momentary stay against confusion." Or as Turow said, explaining his revision and his own literary genre: "The mystery novel is the

antidote to our inability to reclaim the past."

Turow concluded by reading from *Limitations*, his 2006 novel about an appellate judge named George Mason. Beset by personal problems, Mason was the swing vote on a three-judge panel. The legal issue concerned the statute of limitations. But the case, a rape case, was uniquely consequential, for it touched Mason's own festering guilt over his participation, many years before, in a student gang rape.

Citing Mason, Turow described judging as a complex personal process in which judges always hold some concealed stake in their decisions. He said that judging implicates personal meanings that the law can never acknowledge in its detached, institutional voice. The law's objective rules, he said, may be driven off course by individual needs, conflicting moral imperatives, or a remoteness from emotion. Yet, he said that he does not write about law from a judgmental or imperial standpoint.

"I love the law," he said, "even though I'm resigned to its failures."

Contact the ABA Judicial Division
321 N. Clark St. 19th flr
Chicago, IL 60654

**Appellate Judges Conference
Council of Appellate Lawyers**
Christie Breitner
christie.breitner@americanbar.org

Publications and Membership
Jo Ann Saringer
joann.saringer@americabar.org

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