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IN THIS ISSUE

JUSTICE SCALIA AT THE AJEI SUMMIT IN NEW ORLEANS

By Gaëtan Gerville-Réache[1]

With characteristic wit and candor, Justice Scalia graced attendees at this year's Appellate Judges Education Institute Summit with his personal stories and insights into the inner workings of the United States Supreme Court. Drawing from a set of written questions from the audience, one of Justice Scalia's former clerks, Kannon Shanmugam—now a partner at Williams & Connolly LLP and a seasoned Supreme Court advocate—interviewed the Justice on topics ranging from his early ambitions for a judgeship, to oral advocacy, to briefs, to the proverbial sausage as it's made in the Supreme Court. This article summarizes that conversation with Justice Scalia.

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EDITOR'S NOTE

By David J. Perlman[1]

Every edition of *Appellate Issues* that reports on the Appellate Judges Education Institute Summit is rich in ideas, for not only do the Summit presentations cover a range of topics but every panelist, moderator, and *Appellate Issues* writer offers his or her own take. It is a testament to the Summit, and to this issue, that there are contrarian views — the idea, for example, floated during a discussion on the presentation of oral argument, that a paper-cluttered podium can be a positive thing.

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...Continued from page 1: Justice Scalia at the AJEI Summit New Orleans

On his ambitions for judgeship

Justice Scalia's first ambition for a judgeship came late in his legal career, after experience in and out of private practice, public service, and academia. He first practiced with Jones Day in Cleveland, then taught at the University of Virginia for five years. This led to his jaunt in the executive branch, as an Assistant Attorney General in the Office of Legal Counsel. Not until he returned to teaching at the University of Chicago did he first set his eyes on a judgeship. You "can't really set your cap on it," he said, "a lot of it is luck." It just happens.

The job he really wanted was Solicitor General of the United States. "Sometimes I tell my clerks, when one door closes, another opens." When Ronald Reagan was elected President in 1980 and was looking for a Solicitor General, Justice Scalia was one of three candidates in the running, along with Rex Lee and Dallin Oaks. Dallin Oaks dropped out. He conceded that "Rex Lee was one heck of a litigator. But I thought they'd want an academic type." After he interviewed, he missed the first call from the Attorney General, but the next day, the Attorney General reached him during breakfast to tell him he was not selected. As an aside, Scalia said that his wife was disappointed because she did not want to go back to Chicago. She did not think that Hyde Park at the time was a good place to raise a family. And it was cold. But Justice Scalia said that had he gotten the job, he would never have made it to the Supreme Court of the United States.

Comparing life on the DC Circuit and on the SCOTUS

Justice Scalia's first appointment was to the D.C. Circuit. He would have happily stayed there. He loved administrative law––it was his specialty as a law professor––and the D.C. Circuit had it in droves. He even turned down a seat on Seventh Circuit because he knew there was an upcoming vacancy on the D.C. Circuit. Justice Scalia misses the issues of administrative law on the Supreme Court. "On the other hand," he says, "it is nice that you don't have to take every case. Such a luxury. You don't even have to take every issue in the cases you do take!" But "the bad news is that every time you take one, it is en banc." Justice Scalia says it is "so much more difficult" to decide a case with eight colleagues than with just two, where you can "thrash it out."

The Supreme Court Justices have "conferences," but that is really a misnomer. There is no cross-persuasion. The justices just go around the table and explain how they see the case and how they will vote. Not until they get to the last justice can one justice comment on another's views. But even then, it still is not an exercise in persuading others. Each justice pretty much has his or her mind made up, and it rarely changes. The experience has defied his image of the great appellate judge. He imagines Learned Hand taking his fellow judges to his cottage, sitting and talking about the cases, while they sip bourbon.

On confirmations

Shanmugam then focused the Justice on his confirmation, and the change in attitudes toward that process since then. The vote in the Senate was 98-0, with Barry Goldwater and Jake Garn abstaining. Shanmugam read Justice Scalia a memorandum from the White House counsel's office showing how the process used to be a bit less comprehensive. Quoting from the memo: "Military: *Apparently* none. . . Religion: *Probably* Roman Catholic." What caused the process to change?

It was bound to change, Justice Scalia said, when the majority believes in a living Constitution. "Once people figured that out, the previous criteria were insignificant." In his view, the confirmation process is exactly as it should be. As long as the court can change the Constitution, he'd rather have a byzantine manner of confirmation that expresses the public's will on how the Constitution should be changed, rather than allowing the Court to change it "willy nilly." What needs fixing, he said, is not the confirmation process, but the notion of a living Constitution.

He does, however, believe the Court today takes text more seriously than it used to, and that holds true

for the newest members of the Court. Opinions in the '80s would be half discussion of legislative history. Now there is only a little. And, of course, he declines to join in that part of the opinion.

On working with the other justices

Do the personalities of the justices create conflict? Not in Justice Scalia's view. It has been a collegial court for a long time, he said, ever since the Harvard and Yale law professors left. According to Justice Scalia, Justices Frankfurter and Douglas could not stand each other, and would not speak to each other. Whether Justice Scalia is friends with another justice has nothing to do with their jurisprudential or political views. "And that's the way it should be," he said.

"But isn't the Court a little more tense in June?" asked Shanmugam. "Not tense as in angry," said Justice Scalia. He gets disappointed, sure, in some of the views that prevail. But that doesn't affect collegiality. He has been through hard times on the Court, including *Bush v. Gore*. But all judges know if you cannot disagree without taking it personally, you ought to find another job. You are not cut out to be an appellate judge. It has to be fun.

On the Court's diminished caseload

In response to lamentations over the low number of cases in which the Court grants *certiorari*, Justice Scalia agrees that the Court hears half as many cases as it used to. But he said there is at least one major factor that accounts for that. There was a time when the Court had to accept appeals in cases where a state's statute was challenged as unconstitutional and upheld. The Court also had to hear and decide federal cases where a federal statute was struck down as unconstitutional. Congress repealed the statute that mandated that the United States Supreme Court take those appeals. As a result, the Court rarely accepts cases of the first category. Some probably wondered what the Supreme Court was doing, said Scalia, "wasting its time with mud guards on trucks." The other factor, according to Justice Scalia, that led to a heavy caseload back then was the amount of new major legislation—ERISA, bankruptcy, and others. He feels there has been less fundamental legislation enacted in recent times. The Court's major source of business is new legislation. "It takes 20 years to get the kinks out."

What cases should the Court hear more of? "Easy cases," said Justice Scalia, half-joking. "I am not one for prowling around for cases I want to take." His current colleagues don't seem to do that either, he says. They take them as they come. If there is no circuit conflict, the court almost certainly will not take the case. That is why he thinks the Federal Circuit is a problem. Justice Scalia does not like specialized courts. In every other jurisdiction, he sees the significant issues that need attention; good judges disagree. But the Federal Circuit has exclusive jurisdiction over patents, "and I don't know squat about patents." How is he to know which patent cases to take? "Lawyers always say 'this is a significant departure.' You can't believe the lawyers."

Justice Scalia's legacy case

According to Justice Scalia, his legacy case is *Crawford v. Washington*, 541 U.S. 36 (2004), where the Court overruled an earlier decision that had eviscerated the Confrontation Clause. The Court had held that all the clause means is that hearsay has to bear indicia of reliability. "We overruled it," he said. "We said that the only true indicium of reliability is confrontation." It was a 5-4 decision, Justice Scalia wrote the opinion, and he acknowledged that not everyone on the current Court likes it.

On preparing for oral argument and conferences

To prepare for oral argument, Justice Scalia first reads the briefs. The clerks tell him which ones are significant. Most are not. Many lawyers do not write to raise a new point. They write to show they are in there pitching for their clients. He does not read every amicus. He will read the ACLU's amicus in a civil liberties case. He will read the AFL-CIO's amicus in a labor case. And he will read the amicus briefs of some lawyers whose skills he respects. He generally does not discuss the case with law clerks or colleagues before oral argument.

After the oral argument and before conference, he will discuss it with his law clerks, but not colleagues. He spends a lot of time kicking it back and forth with his clerks. They'll spend one and a half

hours on some of the more difficult cases. He actually hopes the law clerks will disagree with him. The discussion is useless if they do not. When he comes to an agreement with his clerks—"which means when I make up my mind"—the clerks draft a statement to refresh his recollection during the conference.

On writing opinions

Almost all opinions begin with a law clerk's draft. He gives the clerk a general outline of the opinion and what he wants to say, and the clerk goes to task. In Justice Scalia's view, it is a waste of his time to go through the facts and other details. He would rather spend that time reading the briefs in other cases.

There have been instances where the law clerks changed his mind. In one instance, the clerk came to him and said "the opinion just won't write." The clerk persuaded him that the majority was wrong. He had the clerk write it the other way. And, sure enough, the majority agreed.

Some justices write the opinions themselves, of course. But Justice Scalia prefers to edit them. It is a distinctive talent, he says, to see the structure that should be there (but is not) when editing someone else's work. One might get the right structure writing it oneself, but not see that the structure in another's work is wrong.

After writing the opinion comes "booking" the opinion, the last step. The law clerk who was assigned the case and initial draft brings in the cases cited and they go through the opinion case by case to make sure that each case says what they say it says. It is quite a long process. One opinion could take days.

Some feel the court's opinions are too long. But Justice Scalia feels they are getting shorter. He tries to make his shorter, at least. "Just this past Tuesday," he said, "I issued an opinion that was 11 pages." He aims for 10 or less. Sometimes the facts take 12 pages, and there is nothing you can do about that. The length depends on the complexity of case. Shorter is better, he agrees. The final thing he does with an opinion is to attempt to shorten it.

When asked what he likes and dislikes about how lower court opinions are written, Scalia quipped, "It is better if they are well written." The lower court opinion, however, is not what he starts with in analyzing a case. He starts with the briefs. Reading the briefs first gives him a better idea of what to look for in the lower court's opinion.

Concurring and dissenting opinions, Justice Scalia said, are quite different. The majority opinion has to take into account views of other colleagues––at least four of them, and hopefully more than that. "It is almost like being a district judge to write a concurring or dissenting opinion. Join it or not, I don't care." He once wrote an article for an historical publication on writing separate opinions, and in so doing, became much more in favor of dissents and concurrences than he had been before. "A dissent does some good," he said. He is always more confident of the majority opinion when there is a dissent. The worst opinions are the unanimous ones. Colleagues will make suggestions, but no one has incentive to find errors, as when there is a dissent. That is a valuable function. Even if it doesn't bring along a majority, it may in the future. And sometimes it is just nice to look back on it. "For instance, isn't it nice to know there is a brilliant dissent by Justice Jackson in the Japanese internment case?"

Justice Ginsburg, he said, tries never to write separately unless it is really important. "If I think one point is wrong, I write separately. That's a good practice. It's our tradition." In English high courts, each judge wrote his own opinion. Justice Scalia noted that we are the only country in the world where there is a signed opinion joined by other justices. "It gives the opinion some life." Chief Justice Marshall introduced that practice, and President Thomas Jefferson was against it. "Jefferson thought, 'They should all write their own opinions so we'll know whom to impeach!'" Justice Scalia admitted there was some merit to that. With a signed opinion that other justices join, you can hold the justices accountable. He does not join if he does not think it is right. "That way, you can see if I'm inconsistent. It's good that judges be accountable in that fashion."

On oral advocacy

Shanmugam noted that Justice Scalia was credited with changing the tenor of oral advocacy in the

court. "They really were a languid affair before," he said. He agreed that he started the chatty court we now have, "for better or worse." "It used to be that you got three questions, all from Byron White. It was no help at all." Though the other justices at first found it to be brash, Justice Scalia asked questions. Finally, others began to chime in. "I realize Thomas gets criticized for not asking questions, but Brennan, Blackmun, Marshall rarely asked questions. That's the way it used to be. He can continue if he wants to. I tell him not to, but . . ."

Justice Scalia acknowledged that there is a skill to asking questions, and that it can be done poorly. The questions have to be pointed. Otherwise, you eat up a lot of time asking the question. "That's not good," he says. "You have get in and get out. I try. I hope I'm successful." He does not see it as his fault that he asks a lot of questions. "I'm usually provoked," he said, smiling, "but there is nothing an advocate can do to avoid provoking me."

Are briefs more important than oral argument? Yes. "But oral argument is very important," he says. Justice Scalia does not like deciding a case without oral argument unless the right result is utterly clear. Oral argument rarely changes his mind, if he already made it up. But he often goes into oral argument on the fence. Oral argument can help him make up his mind. "You can do things like give perspective." The brief must be in a logical order. Do not discuss damages before liability. Do not discuss jurisdiction last. "But in oral argument you can say 'I made five points in my brief, they are all good, but this is the real issue.'" That cannot be done in a brief. "The brief cannot answer back." Sometimes in the margins of a brief Justice Scalia will write something like, "at best, nonsense." At oral argument, however, "I can ask, "Counsel, is this not nonsense?" He used to think oral argument was just a dog-and-pony show. Now he believes that oral argument is important.

Shanmugam asked Justice Scalia whether the press places an excessive focus on what happens at oral argument. "That's not my biggest criticism of the press," he said. "You cannot expect the press to report what is really going on. They will lose their readership. The readers want to know who is the good guy, who is the bad guy, and who won. If the good guy wins, it is a great opinion," said Justice Scalia. A Shakespearean judge once said, "You can take a pound of flesh but if any blood comes with it, your goods are forfeited." It was a terrible opinion, but nobody cared because, at the end of the play, the good guy won. Justice Scalia does not think one can expect the press to go into details of an opinion, not because the journalists are stupid, but because they don't want to lose their readership.

On the secret to excellent brief writing

Justice Scalia said that excellent briefing makes a difference. He reads a lot of briefs. All of a sudden one will grab his attention, and it is usually a lawyer he knows to be brilliant. "Briefs are not fungible," he says. First, be brief. Don't waste the court's time. Do not re-plow the same ground. Go to the point. Also, "be unfailingly accurate. False in one thing, false in everything." Writing something inaccurate destroys one's relationship with the court. "I listen to you counsel because you know more than I could possibly know. If you show you are not an expert, i.e., you don't know the law or facts, you have lost me––not just for that case, but for the next case you have." There are some words and phrases Justice Scalia cannot stand. The word "progeny," he said, is trite. So is "fatally flawed." Justice Scalia said he's sick of reading trite statements.

On being a Justice versus advocate

"I miss being the advocate," said Justice Scalia. He misses the "fang and claw" of private practice. He also misses the wonderful opportunity in academia to think about what he wants to think about and not what someone shoves under his nose. He had the most fun in the executive branch. There, he had an objective, a team, and a goal to reach. "It was exhilarating." There is no goal as judge. He does like judging the most, though, as long as he can do a little teaching, which he does do. "But," he laments, "I can't get the fang and claw."

AVOIDING DISTRACTIONS DURING ORAL ARGUMENT

By Tim Vrana[1]

Any communicator should avoid distractions. Whether a writer, oral advocate, presenter at a conference, or columnist, a person with a message to convey is more likely to be successful if interference is eliminated.

The effectiveness of "Non-Verbal Aspects of Oral Argument" was diminished by audio-visual failures. Nonetheless, attendees who overcame the distractions were able to take away helpful information.

Sue Liemer, Professor of Law at the Southern Illinois University School of Law, presented two video clips of attorneys making oral arguments to appellate courts. After each clip, a distinguished panel discussed the advocate's positive and negative nonverbal behaviors.

Following the first, Judge Edith Clement and Chief Judge Carl Stewart, both of the Fifth Circuit Court of Appeals, commented that the attorney's excessive hand gestures detracted from the presentation. Natural gesturing is one thing; "flailing" is another. Both were also distracted when the advocate frequently took her glasses off and on.

On the positive side, Judge Clement liked the attorney's pauses and voice modulation. Panelist Sidney Powell, an experienced appellate practitioner, commended the advocate for her conversational manner.

In the second clip, the advocate was significantly less conversational. Chief Judge Stewart and Judge Clement both lamented the lack of eye contact. Judge Clement also noted the attorney's clenched grip on the podium and the piles of paper strewn across it.

By this time, Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals could no longer hold his skepticism about the topic. He wondered aloud if any of this really made any difference. He found "the mess on the desk" of the advocate to be a positive thing. He also found smoothness and slickness a barrier to communication.

In the absence of further oral advocacy to critique, the panel offered general comments and suggestions.

Judge Clement said that she appreciated an attorney mentioning her name in connection with an opinion she had written. Judge Kozinski said he hated it.

Eye contact was discussed. Although most of the panel thought it important, Chief Judge Kozinski found it "overrated." He has seen effective arguments with very little eye contact. Although the focus was on the advocate's eye contact, Chief Judge Stewart stated that if the judges are not making eye contact, it may be because they are looking at their i-pad or kindle.

Chief Judge Stewart commented that advocates often pass something to the bench that the judges have not yet seen. Such a practice, he said, is "not necessarily helpful." Chief Judge Kozinski added that an attorney who does that should make sure that the document is readable.

Chief Judge Stewart and Judge Clement summed up the session by agreeing that it's just common sense that an oral advocate should eliminate distractions. Judge Clement specifically stated that it's easy to listen when the advocate is confident and the presentation is devoid of distractions.

Chief Judges Kozinski and Stewart agreed that a case will not turn on whether the advocate's presentation is of the highest quality. Chief Judge Kozinski added that knowing the case and having a good argument is more important than whether the attorney wears blue or black. He concluded, though, by stating that anything that the oral advocate does, says, or wears that distracts the judges is not helpful.

The panel was moderated by Susan Alexander of Robbins Geller Rudman & Dowd.

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APPELLATE PRACTICE: THE NEW FRONTIER OF ELECTRONIC BRIEFS, CYBER RESEARCH, APPS AND MORE

By Steven Finell[1]

A program at the 2011 AJEI Summit discussed how advocates should adapt their writing to judges' increasing use of computers and iPads to read briefs.[2] Accustomed to surfing the Internet, judges and court attorneys expect something more on their screens than a static replica of a printed page. Panelists recommended hypertext briefs, which link citations of legal authorities and record references to the underlying sources, to take advantage of the technology already in judges' hands.

Embracing this technology is not about being *au courant*. Even with standard e-filed briefs, or electronic versions of printed briefs, a reader who wants to see the cited authorities or portions of the record must note the citation, obtain the cited document, find the cited page (*if* the lawyer gave a pinpoint citation, as everyone always should), then try to find the specific language the lawyer had in mind. Compare that with clicking on a hyperlink to have the specific language instantly appear on the reader's screen.

At the 2012 AJEI Appellate Summit, Julia F. Pendery, of the Pendery Law Firm in Dallas, skillfully moderated a panel of experts in an information-rich session on using technology in appellate practice, especially how best to create hypertext e-briefs, the holy grail in modern appellate practice. One of our goals as advocates is having judges and court attorneys spend more time reading our brief than our adversaries' brief. We try to accomplish this by making our brief a more useful resource for the court, providing everything it needs to decide the appeal—preferably in our client's favor. Including hypertext links to legal authorities and record references is one more way of keeping our brief ~~in the judges' hands~~ on the judges' screens.

Yvan Llanes, IT Director of Indiana Court of Appeals, brought his court fully into the electronic age. His presentation evangelized effective use of technology in legal practice, not limited to appeals or hypertext briefs—although smart use of technology lays the foundation for hypertext briefs. Choosing to use technology, and investing time in learning how it can help create better work product more efficiently, is the most important requirement for success. Investing in adequate training and support for lawyers and office staff pays lifetime dividends. Yvan advised having technologists, whether in-house or from an outside vendor, work directly with the individuals who produce the work product, to better understand their needs and teach them to make the best use of equipment and software.

Making the best use of the technology you already have is more important than having the "best" possible technology. Many law offices waste much of their technology investment by not learning how to get the most from it. For example, both Microsoft Word and WordPerfect have under-utilized features that can help prepare briefs and other documents, but only if you know they exist and how to use them. These include having a well designed set of styles for use throughout the brief; marking citations to automatically generate a table of authorities; tracking revisions to facilitate collaborative drafting and revision by multiple lawyers; invoking software features that prevent awkward line and page breaks before they occur; using heading styles that automatically create a table of contents, with automatic numbering of point and sub-point headings (so you can reorganize the brief without manually renumbering anything); and using automatic cross-references to other pages, points, and footnotes in the brief (ditto). Also, begin hyperlinking your brief in the word processor: hyperlink table of contents entries to the target headings, hyperlink table of au-

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(2) *See Timothy J. Vrana, Re-Imagining the Appellate Brief, APPELLATE ISSUES, Winter 2012, at 17.*

thorities entries to each citation in the body, and hyperlink cross-references to their targets. Using these and other features make it easier to write and, especially, to revise the brief and minimize errors. If done correctly, when converting the word processing document to PDF, heading styles will create bookmarks in the PDF, which makes navigating the document much easier (discussed further below). Also, by working directly with lawyers and support staff, technologists can develop templates and processes, tailored to your specific practice and preferences, that you, your practice group, or your firm can use as a foundation for creating legal documents.

Yvan recommends Adobe Acrobat Pro for working with PDFs. I would go further: every law office should have Acrobat Pro, at least version X (the current version is XI). It can combine PDFs, create bookmarks and hyperlinks, "Bates" stamp documents, renumber pages, add headers and footers, annotate and mark up PDFs, apply digital signatures, compare two PDFs and show the differences—the list goes on and on. Many of these features are useful in creating briefs for e-filing and hypertext briefs; some of them are essential. Acrobat Pro can convert an "ordinary" PDF to the PDF/A archival standard, which many court e-filing systems either require or "prefer." Acrobat Pro has powerful tools for dealing with forms: making fillable forms by scanning a paper form or converting a non-fillable PDF; filling fillable PDF forms; and creating forms from scratch or by adapting existing forms.

Yvan turned briefly to the old-fashioned technology of dictation. Even for some skillful keyboardists, dictating may be a better use of a lawyer's time, especially for first drafts. With speech-to-text software, you dictate into a microphone and the program produces text. Dragon Dictate is the leading product for Windows and Macintosh computers. This is one instance where the software needs more training than you do; results improve as the program learns a specific individual's pronunciation and speech patterns. Yvan's court is also evaluating Express Dictate (http://www.nch.com.au/software/dictation.html), which turns an iPhone into a digital dictation machine (versions are also available for Windows and Mac). You then email the sound file to an assistant for transcription. A companion program, Express Scribe, turns a Windows or Mac into a transcription machine. I found other dictation apps for Android on the Web.

Blake A. Hawthorne, Clerk of the Supreme Court of Texas, discussed best practices in preparing briefs for e-filing and also for creating hypertext e-briefs. Unlike most courts, Texas appellate courts have adopted many of the best practices as rules. Therefore, Blake's "A Guide to Creating Electronic Appellate Briefs" (http://www.supreme.courts.state.tx.us/pdf/GuideToCreatingElectronicAppellateBriefs.pdf) is mandatory reading for appellate lawyers in Texas, and instructive reading for the rest of us. In addition to stating the specific requirements (plus some optional suggestions), the guide gives detailed instructions for using Word, WordPerfect, and Adobe Acrobat to comply with court rules and best practices. For the audio-visually inclined, Adobe's Rick Borstein created an instructional video on electronic briefs (https://my.adobeconnect.com/_a295153/p72935018/), although it provides less detail than Blake's guide.

While I urge readers to get Blake's guide for more complete information, here are some highlights from his presentation. First, always create your PDF brief directly from the word processing software; never print the brief (or any document) then scan it to create a PDF. Amen! This creates much sharper, more legible text, with a smaller file. In my experience, a scanned PDF is roughly 10 times the size of the same document converted to PDF directly from a word processor, and can be a few hundred times larger if one mistakenly uses settings for scanning color photographs (which are the default settings on some scanners). These large, image based PDF files load slowly on portable devices. With text PDFs, one can copy or search the text with complete accuracy. Using optical character recognition (OCR) for a scanned document is much less accurate. When creating PDFs from a word processor, or any program, be sure to scrub all metadata. Second, for the same reasons, in records and appendices use PDFs created from native application files whenever available. Third, if providing copies of legal authorities (as you should), use text PDFs rather than scans, preferably

versions that hyperlink the authorities they cite. Materials from Westlaw, Lexis, Google Scholar, and other sources have hyperlinks. Use single column PDFs; they are easier to read on a screen than dual column. Blake remarked that judges have complained about the difficulty of scrolling up and down and up and down to read dual column text on a screen. Westlaw and Lexis usually have dual column as the default, but you can choose single column (annoyingly, Lexis requires you to un-check the dual column check box for every print job). If more courts required text PDFs whenever available rather than scans, they would reduce their future digital storage requirements by more than 50%.

Texas chose to require a single PDF file containing the brief, appendix, and copies of legal authorities. This is the easiest approach, especially if you are not using an outside vendor to create your electronic brief and record. Acrobat can combine multiple documents into a single PDF. Blake recommends liberal use of bookmarks in the PDF to aid navigation; they are the digital equivalent of tabs. He surveyed the justices of the Texas Supreme Court; all nine said they strongly prefer having bookmarked briefs and appendices. One or two justices expressing that preference would be enough to convince me.

I recommend an additional navigation aid: Use Acrobat's page numbering feature to match the PDF's internal, electronic page numbers to the numbers that appear on the pages themselves. That means using the same numbering styles as the document uses (e.g., lower case Roman numerals for prefatory material and Indo-Arabic numerals for the body), and restarting the PDF page numbering to match the document's displayed numbering (e.g., resetting the PDF page number to 1 on the first page of the brief's body text, resetting the PDF page number to i on the first page of the appendix's or record's table of contents, and resetting the PDF page number to 1 on the first page of the appendix's or record's body text). This makes it easy to jump to a specific page using the page number on the printed page or in the table of contents or authorities.

Only one step remains to achieve the current ideal in electronic briefs: hyperlinking each citation of authority and record reference to the corresponding page in the source document. That step requires the most work, but has the biggest payoff in inducing judges and court attorneys to use your brief as their guide. In-house or contract paralegals with the right training in Acrobat can do this job. Acrobat Pro can also redact sensitive personal information, to comply with confidentiality statutes and court rules.

Leane Medford, of Polsinelli Shughart PC, is a pioneer in using technology in trial and appellate litigation, especially in big cases with large evidentiary records. Beginning in 2000, as an alternative to lugging around boxes of trial transcripts and other papers, she developed a method of compiling for her own use an electronic record, including listing and annotating the testimony, exhibits, and other parts of the record she intended to use on appeal. To focus on the important evidence and rulings, she eliminates the parts of the record that she knows are not relevant to the appeal. She began using litigation support software in place of paper sticky notes, to record ideas, questions, and issues, and to highlight important material. Because she carefully annotates everything important in the record as she reads it, she never has to re-read or search the record to find something she may have forgotten.

Today, Leane uses, and loves, Case Notebook, a litigation support program published by Thomson Reuters Legal Solutions (the business unit that owns the West brand). The program includes a database with annotations of and links to the documentary record and exhibits plus the annotated trial transcript. You can define issues in Case Notebook and link relevant evidence to those issues, then analyze each issue together with all evidence relevant to it. Westlaw Next can send a case with your annotations to Case Notebook, where you can link the case to specific issues. With this type of program, you can have your entire knowledgebase about a case, including your analyses, ideas, and questions for further research, in one well organized place—*provided* you use the program for all these functions. In addition to using Case Notebook in writing briefs and compiling the record or appendix, Leane brings the database to oral argument on a laptop, and refers to it when an unanticipated question about the record comes up.

While litigation support software is designed for managing and analyzing evidence throughout discovery and in preparing for trial, it is just as useful for appellate practitioners. Case Notebook's feature-set appears to be modeled on the CaseMap family of litigation support software (now owned by LexisNexis), which I use at the trial court level and on appeal. From Leane's description, Case Notebook appears to have a more modern user interface that makes it easier to use than CaseMap, which, even though regularly updated, still has 1998 technology as its core. Several other litigation support programs have similar features, with varying strengths and weaknesses.

For those who cannot afford expensive litigation support software, Leane recommends Visionary. The "standard" version is free, so you can't beat the price. Leane used this program for several years, before she fell in love with Case Notebook. Visionary has the same basic features as other litigation support software and, according to Leane, is easy to use. In my opinion, any lawyer in private practice should invest in feature-rich litigation support software. It is well worth the cost, and pays continuing dividends.

Leane prepared her first hypertext brief in 2003. She had an appeal in which they "literally had to back a truck up to the courthouse to deliver the record." She realized that this volume of paper "was not useful to the court." She turned to a commercial vendor to create an e-brief package that included the entire clerk's record, the transcript of the jury trial, key exhibits, and the records in two interlocutory appeals. In the brief, every record reference and legal citation was linked to the source. That job was at the high end of complexity scale and cost $30,000. Today, an outside vendor would charge $1,000–$5,000 for an e-brief, including one with the same complexity. However, Leanne now compiles her e-briefs in-house using trained paralegals or administrative assistants. This makes the process affordable even for relatively small cases.

Leane also has staff hyperlink her adversary's brief for her own use, if the adversary did not serve a hypertext brief. She then can quickly click the adversary's record references and legal citations to check their accuracy and possibly find something that helps her case.

When Leane submits a hyperlinked e-brief, she also prepares and gives the court a hyperlinked version of her adversary's brief, if the adversary does not file one. She views this as giving the court the entire case in electronic form, rather than only one side, and as helping overburdened and underfunded appellate courts do their work more efficiently and effectively. Leane's experience and record of success entitles her opinions to serious consideration. Nevertheless, I doubt that many other leading appellate advocates carry generosity this far. This is still an adversary system. If my hypertext brief makes it easier for judges and court attorneys to follow my side of the case, while my adversary makes it more burdensome for the court to follow his, I believe I have served my client and done no disservice to the court.

The state of the art is a moving target. Today, it is an electronic brief, the appendix or record, and copies of legal authorities in a single package—either in a single PDF file or on one digital storage medium, such as a CD or memory card—with each citation and record reference hyperlinked to its source. If we can be sure that our readers will have Internet access whenever they may choose to read our brief, we might link legal citations to Westlaw, Lexis, or other online libraries. Increasingly, e-filed papers in trial courts will become the official record on appeal, with no need for an appendix. E-filed appellate briefs will link to specific passages in documents in the trial court's online database. Leane points out that we can already create hyperlinks in electronic briefs to specific pages in documents that are accessible through PACER. Delivery of documents on physical media, whether paper or digital, will become obsolete, replaced by pure electronic transmission. This shift is already transforming the recording, motion picture, and publishing industries.

After that, the evolution of technology may begin to get interesting.

WRITE SOFTLY: PROFESSIONALISM IN APPELLATE WRITING

By Richard Kraus[1]

As the former administrative general counsel for the Louisiana First Circuit Court of Appeal, Susan Crapanzano Kalmbach offered a helpful perspective on the critical role of professionalism in legal writing at this Fall's AJEI summit. Ms. Kalmbach began by emphasizing that for appellate judges and practitioners, "the words we use are frozen in time, readily available for the world's consumption." With the advent of online dockets and databases, unpublished opinions, briefs, pleadings and other appellate filings are publicly available. Professionalism in writing affects both substance and tone. Briefs that are overly aggressive or argumentative and briefs that are disorganized or unintelligible are equally unprofessional.

Ms. Kalmbach next examined the aspirations for brief writing by practitioners. The goal should be higher than simply complying with court rules that require briefs to "be free from vile, obscene, obnoxious, or offensive expressions." Courts can deal with attorneys submitting briefs that fail to meet these standards through sanctions. Ms. Kalmbach discussed a recent decision, *United States v Vanable*, 666 F.3d 893, 904 n.4 (4th Cir. 2012), where the court stressed that advocates "do themselves a disservice when their briefs contain disrespectful or uncivil language directed against the district court, the reviewing court, opposing counsel, parties, or witnesses." From her perspective as an appellate staff attorney, Ms. Kalmbach noted that courts do not only view discourteous briefs as reflecting poorly on counsel, but also as indicating a lack of merit in the arguments presented.

Ms. Kalmbach also commented on the consequences of "inadequate writing," such as excessive typographical errors, inaccurate citations, improper formatting, and other deficiencies. In egregious cases, courts have sanctioned attorneys for briefs that were "careless to the point of disrespectful." She maintained that courts should recognize the circumstances affecting attorneys in the trenches who frequently do not have the luxury of time when preparing pleadings and briefs. However, appellate courts have less reason to overlook poorly drafted briefs than do trial courts. Courts are increasingly treating shoddy writing as sanctionable.

After discussing the problems for courts and practitioners caused by unprofessional writing, Ms. Kalmbach then led a debate about how to deal with attorneys who fail to meet acceptable standards. She recommended that an attorney should not respond to abusive behavior by an opposing counsel. In most cases, it is best to simply ignore overly aggressive arguments or personalized attacks on counsel. The court will notice without being prompted. At most, an attorney should respectfully note the opponent's approach and decline to enter the fray.

This was followed by a lively conversation about how courts should respond to attorneys who cross the line. Some attendees maintained that courts should take an active and visible role by striking briefs and sanctioning attorneys. There were several comments about the benefit from courts calling out attorneys who misbehave. Otherwise, attorneys think that they can get away with such behavior, or even worse, believe that their tactics work. A judge said that a court has the duty to tamp down incivility by the parties and attorneys. An attorney added that courts also need to consider the impact of criticizing attorneys in opinions. A court's ruling that an argument was waived due to inadequate briefing is difficult to explain to a client.

On the other hand, an attendee discussed an apparent overreaction when a court denied a motion to file a brief exceeding page limits and demeaningly

(1) Richard Kraus concentrates on appellate practice with Foster, Swift, Collins & Smith, P.C., in Lansing, Michigan. He was named as 2006 Lawyer of the Year by Michigan Lawyer's Weekly and received the Distinguished Brief Award for Exceptional Appellate Advocacy before the Michigan Supreme Court. He is chair of the American Institute of Appellate Practice (Litigation Counsel of America) and serves as a member of the Council of Appellate Lawyers Program Committee.

instructed the attorney to read Garner's text on legal writing. A judge commented on the practice in her court for the clerk to privately contact attorneys to discuss deficiencies in briefing. Several participants thought the problem was frequently due to attorneys who don't handle appeals on a regular basis; the problem is not attitude or skill; it is lack of appellate experience.

Ms. Kalmbach concluded the session by reminding the audience that "words matter."

Due to the spirited discussion, Ms. Kalmbach did not have time to discuss the role of professionalism in judicial opinion writing. But in her prepared materials, she stated that "the writer of opinions is held to no lesser standard than that of a practicing attorney."

The article also included a number of helpful suggestions for approaching the review of another's substantive and stylistic writing. The review process is a collaboration aimed at creating a clear, well-reasoned written product. A reviewer who identifies a potential substantive error should advise the writer and provide the relevant record citation or legal precedent. This approach allows the writer the opportunity to decide whether a correction is needed. Kalmbach recommends a similar collaborative effort for stylistic editing. Because style preferences are personal to the author, the reviewer should be careful in critiquing another's writing unless the document is difficult to understand. Be mindful of the way suggestions are presented. If there is a recurring error, note it only once. Preface suggestions with courteous language, such as "you may wish," "consider," or "perhaps."

Ms. Kalmbach's article also commented on the need for authors of dissenting and concurring opinions to remember that chastising other members of the judiciary reflects poorly on the writer and undermines the integrity of the justice system. She quoted Justice Anthony Kennedy's observation that:

> The collegiality of the judiciary can be destroyed if we adopt the habits and mannerisms of modern, fractious discourse. Neither in public nor in private must we show disrespect for our fellow judges. Whatever our failings, we embody the law and its authority. Disrespect for the person leads to disrespect for the cause.

...Continued from page 1: Editor's Notes

The 2012 Summit was held in New Orleans from November 15-18. It was organized by the Appellate Judges Conference, the Council of Appellate Lawyers, and SMU's Dedman School of Law. This *Appellate Issues* provides a recap, valuable both to attendees and those who didn't attend.

First and foremost, I wish to thank the authors. Also, this issue would not exist without the work of the presenters and Summit organizers.

Appellate Issues will be published again this year. The theme of the next issue will be oral advocacy. Submissions on any aspect of oral argument — on preparation, presentation, its significance, its history, or anything else that touches on oral argument — would be appropriate. Articles on other subjects that are of particular interest to the author are also encouraged and will be published. Practice pointers, analysis of legal issues, book reviews, personal narratives, and interviews are all within the range of acceptable material.

Questions should be directed to me at djp@davidjperlmanlaw.com and submissions should be forwarded by June 17, 2013.

David J. Perlman

MAKING YOUR APPELLATE POSITION MORE APPEALING: THE IMPORTANCE OF FRAMING THE ISSUES

By Deena Jo Schneider[1]

I had the pleasure of moderating the program at the 2012 AJEI Summit entitled "Making Your Appellate Position More Appealing: The Importance of Framing the Issues." The participants in this program were not only experienced in framing issues for appeal but able to speak with authority on what courts prefer in this important aspect of briefing.

The members of the panel (which I organized with Matthew T. Nelson, another member of the Council of Appellate Lawyers) were Judge Stephen A. Higginson of the United States Court of Appeals for the Fifth Circuit, who was previously a federal government lawyer specializing in appeals and a law school professor and a clerk for Judge Patricia M. Wald of the District of Columbia Circuit and for Supreme Court Justice Byron R. White; Justice Deborah G. Hankinson, who served on both the Court of Appeals and the Supreme Court of Texas before returning to private practice, where she specializes in appellate law; and Associate Professor Judith D. Fischer of the Louis D. Brandeis School of Law at the University of Louisville, where she teaches legal writing and women and the law.

I also have worked primarily on appellate matters as a private practitioner with Schnader Harrison Segal & Lewis LLP but have litigated numerous legal issues at the trial level as well, including positioning them for eventual appeal.

Judge Higginson began the program by offering his preliminary thoughts on framing appellate issues. Identifying the issues to be presented on appeal is just the initial step; preserving those issues below and elaborating upon them in the appellate brief are even more important. As one of the eleven mandatory elements of a federal appellate brief under Rule 28(a) of the Federal Rules of Appellate Procedure, the statement of issues should not only draw the reader in initially but also serve as the thread that unites the brief's other elements, gaining in strength and persuasiveness along the way. While the statement is carefully crafted in the brief, at oral argument a skillful lawyer will often depart from that formulation and focus on the danger that could result if the court rules against him.

Judge Higginson generally thinks not of an issue but a question presented, which is the term used by the United States Supreme Court. An appellate lawyer will typically argue that a particular question should be analyzed in one of three ways: (1) existing law requires the Court to answer the question in favor of my client, (2) the specific facts of this case require an answer favoring my client, or (3) the only workable rule or answer to the question that would be fair going forward is the one I am advocating. A good lawyer should consider each of these temporal dimensions (the past law, the present facts, and future cases) in deciding how to present the question. In responding to questions at the end of the program, Judge Higginson stated that the best approach for the brief will usually be the first of these options. The other options may work better at oral argument, where the lawyer is trying to reassure the court that the answer to the question he is urging is fair to his opponent and will make sense in other circumstances. Judge Higginson would not re-characterize the presentation of a question in a reply brief, as opposed to oral argument, because there is a risk that the court will say that is improper.

One of the biggest challenges for an appellate lawyer is the issue that is not directly presented but seized on and made the focus of the case by an active appellate court. It is particularly important that the appellee's lawyer consider and answer not just

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the issues specifically stated by the appellant but those that may be lurking in footnotes or subparts of the arguments. Issues also are sometimes developed for the first time in the reply brief or even at oral argument. The appellee may argue that those issues are improper and even move to strike them, but sometimes the court will consider them anyway or even elicit them through questioning. The lawyer confronted with this situation should seek to respond to new issues when they arise, perhaps by requesting leave to file a supplemental brief or submitting a Rule 28(j) letter.

Justice Hankinson noted that her experience serving at two levels in the appellate system demonstrates that no one size fits all situations with respect to drafting and presenting the issues. The function of an intermediate appellate court hearing appeals as of right is error correction, whereas a high court operating with discretionary review must first decide whether to take a particular case. A lawyer crafting the statement of issues in the first situation generally is trying to persuade the court to rule in his client's favor; his goal in the second situation is to get the court's attention and convince it that deciding his case is important to its jurisprudence. Similarly, an appellate judge deciding the issues will frame them differently depending on whether he is sitting on an intermediate or discretionary court.

Professor Fischer summarized her empirical research into how lawyers draft issue statements, which is published under the title *Got Issues? An Empirical Study about Framing Them*, 6 J. Ass'n Legal Writing Dirs. 1 (2009), available at http://www.alwd.org/LC&R/CurrentIssues/2009/pdfs/Fischer.pdf. Her study examined issue statements in briefs filed in the highest courts in six different states, analyzing the number of issues presented and length of a single issue, the clarity of the statements, the number and structure of the sentences used to state a single issue, the opening words that occurred most frequently, how the parties were identified, and the extent to which facts were included and persuasion was employed. She saw a wide variation among the statements she studied and developed drafting recommendations for appellate lawyers based on the ones that seemed most effective, some of which she summarized during her later remarks.

The program then turned to specific drafting and strategic questions, starting with how many issues to include in a single appeal and how to order them. Justice Hankinson strongly endorses the general rule that the fewer the issues (and the shorter the briefs), the better. The best approach in any particular case depends on how it proceeded at trial and how many points need to be addressed on appeal for the client to prevail. To determine the optimal order of the issues, the lawyer should develop the critical decision tree that the court must follow to decide the case. Dispositive issues should be stated first, followed by remand points. The brief's table of contents should set forth the decision tree as a road map for the court, including sufficient details to show the legal and record analysis involved and which issues need to be answered to resolve the appeal. Justice Hankinson considers the table of contents the second most important part of the brief after the statement of issues: it serves as the starting point for the court in deciding the case and may also impact whether a court of discretionary jurisdiction takes the case.

Professor Fischer agrees that it is better to restrict the number of issues presented except in the exceptional case where that would disadvantage the client. Judge Higginson recommends listing first the issues that are particularly compelling, such as ones where the court below ignored controlling law or an intervening decision makes clear how the case should now be decided. He would also give priority to an issue that the highest court in the jurisdiction has agreed to hear or on which co-equal courts are split. In presenting a conflict of authority, a lawyer should try to determine the optimal basis on which to ask the court to decide the issue; that choice may determine the substantive outcome of the case.

Judge Higginson noted that a common problem judges and law clerks see is separate identification of an issue that is fairly comprehended in another issue so does not need to be listed independently. As a lawyer is working to simplify the list of issues to be presented, it is useful to develop a separate list of issues he is *not* asking the court to decide. This list can sometimes be used effectively at oral argu-

ment to reassure the court that it can reverse or affirm the decision below without overreaching.

The next topic discussed was the most effective form of an issue statement, including whether to begin with "whether" and whether to use more than one sentence in stating a single issue. Judge Higginson said that while syntax is not particularly important to him, he would generally start with whether and then add clauses referring to the standard of review, the facts, and the law, assuming they are helpful to the client's position. By the time the court finishes reading those clauses, it is likely to feel it has no choice but to rule on the issue the lawyer is presenting in the way he desires. It is important not to ask for relief the court cannot give (for example, because the issue is not fairly presented or is controlled by existing law). The appellee's lawyer will often want to rephrase the issue to raise waiver or other procedural concerns or to point out the favorable record on the issue, which may suggest that the decision below was well-considered and should not be disturbed.

Justice Hankinson does not endorse using any particular issue format across the board; as with the number and order of issues, what will be most effective depends on the case. Some of the variables are whether the party is seeking correction of error by an intermediate court or discretionary review of an important legal issue by a court of last resort, whether the answer to the question is driven by law or fact, and how much context is necessary to avoid abstraction. The most important consideration is clarity, which is achieved over time as a result of critical thinking about the case. The initial statement of the issues should be recrafted multiple times as the lawyer completes his analysis, research, and writing. Once the arguments are matured, they will show the lawyer how to lay out the road map for what the court must decide and how the court should do that; this may result in some final fine-tuning of the issue statement.

None of the panel members favored use of the "deep issue" statement advocated by Bryan Garner among others, which includes in separate sentences for a single issue a statement of the applicable law, a recitation of the relevant facts, and the question the court is being asked to answer, stated in a way that makes clear what the answer should be. Justice Hankinson expressed the view that this approach may seem disrespectful to the court in suggesting that there is nothing for it to do other than apply the stated law to the recited facts. Each section of a brief is designed to serve a particular purpose. She does not consider the statement of issues the appropriate place to lay out the entire case in the hope that the court will stop reading, but believes that a short version of the key law and facts are more effectively presented in the summary of argument. When representing an appellee, she is happy to see a deep issue statement from the appellant, because it gives her the opportunity to seize control of the appeal with an issue statement that provides the court a road map to rule in her client's favor.

Professor Fischer added that in her opinion a single-sentence statement of the issue generally provides more clarity than the deep issue approach. The single sentence also gives the lawyer a better opportunity to show the relationship between the law and facts and the question the court is being asked to decide. Judge Higginson agreed that a good advocate can generally present an issue in one carefully crafted sentence, which may require deep thinking.

Professor Fischer asked whether the other panel members preferred beginning the statement of an issue with a phrase invoking the standard of review such as "whether the trial court erred in holding …" as opposed to merely presenting the actual question to be decided. Judge Higginson responded that the second more direct approach may make the case look simpler and have some attraction from the appellant's standpoint. The instinctive response to a more complex question is likely to be that there was no error, and this may be a better tactic for an appellee. On the other hand, a short direct question presented that goes for the jugular is often more effective at oral argument, where the issue can be recharacterized to highlight its impact on future cases. A point he has only come to realize since going on the bench is the number of gatekeeper reviews that occur before appellate briefs are submitted to a merits panel. It is important to frame the issues in a way that will not motivate one of the early screeners to

conclude that the case is appropriate for dismissal or summary disposition.

Judge Higginson noted that the Solicitor General of the United States suggests that lawyers finish their briefs seven days before they are due so there is time for rewriting. Legal writing can always be improved, and a lawyer should work to make his product as good as it can be. That is more important than the format of what is written.

Judge Higginson also observed that it is critical to do the homework necessary to present the appeal in light of what happened in the trial court. An appellate lawyer who is new to the case may make powerful arguments that were not preserved well below. On the other hand, the trial lawyer continuing to handle a case on appeal sometimes is tempted to relitigate an important point that was lost before the jury. Both of those types of issues are forfeited and should be avoided.

In discussing interlocutory appeals, Justice Hankinson noted that the lawyer seeking interlocutory review should first consider the legal standard for such review. Interlocutory appeals are generally a form of extraordinary relief, and the justification for seeking that relief should be clearly spelled out in the statement of issues. As in other situations, the key is to provide the court with the optimal presentation and organization of the case, identifying the core issue to be decided and the sub-issues that are not as essential.

With respect to issues raised for the first time in a reply brief, Judge Higginson remarked that he found it helpful as an advocate to bring to oral argument not just an outline of his own presentation but a separate page listing at the bottom a few points he wanted to cover no matter what else was said, including rebuttal of any issues that had been raised since his brief was filed. During the argument, he made notes on this page of his opponent's arguments and also the judges' questions, which he considered much more important. He would focus his argument on the questions from the bench and then use the yellow light that went on near the end as a reminder to check the bottom of the page and make any of his key points that had not yet come out. As for issues raised for the first time by the court, he recommends relying on veteran judges to recognize that the court cannot reach points that were not preserved below. Justice Hankinson agreed that the statement of issues is a good way for appellate lawyers to keep judges focused on the questions properly before them, which is especially important in a discretionary court.

In response to a question from the audience, Justice Hankinson emphasized that an appellate lawyer needs to explain to the client that raising every possible issue on appeal will not increase the likelihood of winning but is more likely to weaken the brief by making it too long and diffuse. Similarly, a lawyer asked to argue an issue that was not preserved below (often for good strategic reasons) should point out that this will damage the client's and his credibility and not advance the cause. When the other side engages in these tactics and prevails, it is the lawyer's job to help the client understand that there was a breakdown in the process. Even knowing that this may occur, it is still better to work within the rules because that helps the system to function as it should and also provides the best chance of success.

Another audience question asked what portions of the briefs judges consider most important in developing the issues. Judge Higginson stated that he reads the reply brief first where there is one, followed by the summary of argument and the decision on review. Although other judges may focus on different sections of the briefs or read them in a different order, he considers the summary critical. Justice Hankinson agreed that the summary of argument is very important, but she personally read the issues first and then the table of contents.

The objectives of this program were to identify different ways to frame appellate issues and provide insight on what approaches may work best in different cases and different stages of the appellate process. In my view, the panelists provided significant guidance on these points speaking from their perspectives as judges, advocates, and teachers. The conversation was lively and interesting. I for one was sorry to see it end.

ACCESS TO JUSTICE: WHAT PROCESS IS DUE

By D. Alicia Hickok[1]

From the title, one expected the seminar to focus on the challenges facing the court system today – due either to alarmingly shrinking budgets or to constrictions on certain avenues of relief for criminal defendants. Instead, the panel brought outsiders' eyes to two opinions on the proper standard for granting motions to dismiss for failure to state a claim. The two decisions of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) are so frequently discussed together that civil litigators have coined a term, "Twiqbal," as shorthand for the grounds for a motion to dismiss that argues that even if the non-conclusory averments pleaded by a plaintiff in a complaint proved to be true, the plaintiff would not have demonstrated an entitlement to relief, and that the case should accordingly not proceed through discovery.

The *Twombly* and *Iqbal* decisions have taken the lower courts by storm since the Supreme Court issued them; according to LEXIS, *Twombly* has been cited over 100,000 times since the decision was published in May 2007 (in over 70,000 opinions), and the Supreme Court's confirmation two years later in *Iqbal* that *Twombly* meant what it said has been cited by courts over 50,000 times. By way of comparison, courts have cited *Brown v. Board of Education*, 347 U.S. 483 (1954) less than 5,000 times since 1954. The panel at the Summit was troubled by the decisions, concluding that they were opaque in their analysis and that the opinions were susceptible to being read in ways that could inhibit plaintiffs who have meritorious claims from proceeding. These concerns were the focus of the panel's discussion.

The moderator for the panel was Professor William V. Dorsaneo, III, of the SMU Dedman School of Law. He was joined by two other professors – A. Benjamin Spencer of the Washington and Lee School of Law and Lonny Sheinkopf Hoffman of the University of Houston Law Center – as well as Texas Supreme Court Justice Nathan L. Hecht. Justice Hecht is responsible for amendments to the Texas Rules of Civil Procedure and has participated in a federal advisory committee on the Rules of Civil Procedure. Professors Spencer and Hoffman have written about civil procedure.

Professor Spencer began the discussion by tracing the philosophical roots of Federal Rule of Civil Procedure 8(a) to a reaction against fact pleading, fueled by Charles Clark's conviction that technical requirements serve as obstacles to reaching decisions on the merits and that other rules – such as the ability to seek a more definite statement – adequately protect defendants. In *Conley v. Gibson*, 355 U.S. 41 (1957), the United States Supreme Court reached beyond the narrow question presented[2] to confirm that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Id*. at 47-48. Professor Hoffman added that Clark distrusted technical rules of pleading because he thought they were traps for the unwary. Clark also had tre-

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(2) *The district court had granted the motion to dismiss on the ground that the National Railroad Adjustment Board had exclusive jurisdiction and the Court of Appeals for the Fifth Circuit had affirmed. Id. at 43-44.*

mendous faith in the ability of judges to apply general rules. In all, the emphasis was on permitting cases to proceed to trial. Justice Hecht noted, however, that Clark had also said that each era had to reconvince itself of the wisdom of assessing cases at the pleading stage. In Texas, for example, the demurrer had been abolished in 1940 – but was reinstated shortly before the summit opened. The basic premise of the panel was that *Twombly* and *Iqbal* threatened the longstanding presumption that the burden at the pleading stage was low.

As Professor Spencer recognized, however, *Iqbal* and *Twombly* did not come completely out of the blue. Courts had started trying to impose heightened pleading standards in civil rights cases back in the 1960s. In those areas – and others such as antitrust and RICO – the perception was that frivolous claims are too easy to pursue if there is no testing. Justice Hecht explained that, in Texas, heightened pleading had not been a problem because "fair notice" is simply laid out in a straightforward negligence case. The Supreme Court had resisted the efforts to impose heightened pleading standards in certain classes of cases through decisional law. In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), it unanimously rejected applying a heightened pleading standard on § 1983 municipal liability claims. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) and *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005) were also unanimous reaffirmations of *Conley*, and they all reflected a sense that judges were not to write rules from the bench. In contrast *Twombly* – issued a mere two years later, was a 7-2 decision, and *Iqbal* was 5-4.

Professor Spencer recognized that *Twombly* and *Iqbal* address those cases in which behavior may be consistent with liability but may not suggest liability. Professor Hoffman explained that what *Twombly* and *Iqbal* instruct a court to do in order to determine whether a complaint is adequate is to strike out all conclusory statements (step one) and then evaluate whether what remains is plausible (step two). This two-step process allows a court to differentiate between liability based on conduct and liability based on characterization. *Iqbal* approaches both steps more aggressively than *Twombly*. According to the panel, there are two views of *Iqbal*'s filter at step two – in part because some of the language in the case appears internally inconsistent.(3) One view is that once the properly pleaded statements are added together, if taken as true, the pleader could not prevail, the complaint should be dismissed. The other is that a complaint is plausible if there is a greater than 50 percent chance that the reason for the suit is true.

Justice Hecht opined that the two cases might not be saying too much. In *Iqbal*, the standard of liability was an underlying issue: because there was no vicarious or supervisory liability, the averments needed to allege wrongdoing by the Attorney General and the Director of the FBI *themselves*. The panelists expressed a hope that when courts look to whether there is a lawful alternative explanation they will not impose upon plaintiffs a burden to demonstrate in their complaint that they are more than 50 percent likely to succeed.

Justice Hecht does not think that *Twombly* and *Iqbal* have had much effect in state courts, and he recited the old adage that a wise man learns from his mistakes and the wiser man waits for others to learn. When the Texas legislature reinstated the demurrer, it did not import *Twombly* and *Iqbal*. Professor Spencer pointed out that roughly thirty states have rules modeled after the Federal Rules of Civil Procedure. Seven have adopted *Twombly/Iqbal*. Four other notice pleading states have not even discussed them.

Professor Spencer opined that judges should not have the authority to get rid of meritless claims at the motion to dismiss stage, especially because information about the merits may be in the defendant's hands. Professor Hoffman commented that defense lawyers have seized on *Twombly* and *Iqbal* – since those decisions, plaintiffs are twice as likely to face a motion to dismiss. Administrative costs at that stage are thus higher. Moreover, motions to dismiss are getting granted at a much higher rate. What can't be measured is whether plaintiffs are re-

(3) Professor Spencer said that seemingly analogous statements were sometimes labeled "conclusory" and sometimes not. He drew from that that the Court was saying that judges should apply their judicial experience and common sense to evaluate the complaint.

fraining from filing cases because they are concerned they will be dismissed, or whether meritorious cases are getting dismissed. Justice Hecht opined that the courts of appeals will need to address whether the new test is successfully separating the chaff from the wheat. He also recognized that the *Twombly* and *Iqbal* decisions were a response to high discovery costs. The panel thought that other steps could be taken to address the cost problems, such as expedited trials in certain cases; alternative dispute resolution (which was intended to be less expensive and have less delay); and court-imposed discovery limitations.

At the end of the day, the panel did not explain why *Twombly* has been cited over 100,000 times in five years. Logically, the cases have been relied on so much because they filled a void: district courts need (and have needed for quite some time) tools to differentiate at the inception of a case between claims based on a plaintiff's experience (and the "car-ran-a red-light and –hit my-car" negligence cases) and conclusory averments based on inferences drawn from publicly available information in the hope that demands for massive discovery will either compel a defendant to settle or provide support for the pleaded legal theories. Moreover, although alternative proposals look good on paper, they do not always work out as "cost-cutting" in practice. Most of the alternatives presume that the filing of a complaint triggers a right to at least some discovery or case development. Almost any litigator can tell stories of expedited trials that necessitated that firms to take and defend depositions in three different locations on the same day because of a truncated discovery schedule without a commensurate restriction on the nature or amount of discovery; of arbitrations that ended up being several disconnected two- and three -day sessions over long periods of time; and a frustration at the inability to counsel clients accurately at the beginning of a case about prospective costs of litigation because of the wide variations among judges in their willingness to impose limitations on discovery and their views on what limitations should be imposed. Only *Twombly* and *Iqbal* address those situations in which no such process is due.

THE ART OF DISAGREEMENT AND DISSENT- COLLEGIALITY

By Lucy R. Dollens[1]

A dissenting opinion, even one presented in a very animated and forceful tone, can and should be molded to comport with the concept of collegiality in order to be effective. That key concept was presented at a session of the 2012 AJEI Appellate Summit in New Orleans on November 17, 2012. The panel of distinguished presenters for the session included the Chief Judge Carl E. Stewart of the Fifth Circuit, Judge Richard G. Schickele,of the Ninth Circuit, and Professor Timothy P. Terrell of Emory Law School. The panel was introduced by Ninth Circuit Judge Consuelo Maria Callahan, who bravely offered up one of her own dissenting opinions to the panel for review and critique.

Judge Stewart began the session by emphasizing that dissenting is an art and not an empirical science. There is no tried and true method to authoring an effective or collegial dissent, but rather it must be filtered through the lens of the personality and make -up of each court. Judge Stewart advised that a dissenting opinion should not be used to torpedo the institution of the court; rather it should be used to embrace the points from which one dissents. To be effective, a dissent should be authored in a manner that does not alienate the disagreeing members of the court. Clerks play an important role in this process, querying whether a judge really wants to sub-

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mit a given dissent, especially one that can be toned down or made more effective.

Judge Stewart, pulling from other scholars on this topic, highlighted the six different contexts in which judges should dissent: (1) when the goal is to attract the attention of the whole court on a case or particular issue; (2) to crystallize an issue when the panel indicates that the decision was a close one; (3) when the majority makes a factual error; (4) to keep one's jurist colleagues honest by making the majority acknowledge a fact, concept, or legal point; (5) to send a message that an error is going to be capitulated; and (6) in extreme circumstances when the behavior or direction of the majority is egregious. Judge Stewart praised the value of a dissent in providing a holistic view of a case and encouraged the attendees in the session to view the drafting of dissents as a highly cognitive exercise.

Judge Schickele spoke about some steps that should be undertaken as part of that cognitive exercise. First, consider whether to write a full-blown dissent. Would doing so end up more definitively fixing the majority's opinion in stone? Will a full-blown dissent make the majority's opinion more of a statement of law? Second, ask how the dissent will affect colleagues on the court. Most judges do not like to be told they are wrong. And if they must be told, they prefer to be told in more general terms, rather than in a point-by-point manner.

Once a judge has decided to issue a dissent, Judge Schickele outlined five different types of dissent one can author:

(1) The friendly dissent: The dissenter believes the majority is bound by precedent, but the dissenter does not agree with the precedent. A concurrence might be appropriate in this context as opposed to a dissent.

(2) The simple dissent: The dissenter simply believes the majority got it wrong, or the dissenter simply cannot go where the majority has gone. This type of dissent is relatively short. It focuses on the particular analysis or conclusion with which the dissenter disagrees. One example is dissenting from the majority's finding that the trial court abused its discretion because the dissenter believes the trial court was well within its discretion.

(3) The true dissent: The dissenter pleads to the higher court to correct the majority's approach on an issue. This requires significant quoting and citing to U.S. Supreme Court decisions. This type of dissent requires extensive time, energy and research to draft. Most law clerks believe that every dissenting opinion should be this type, but a judge should ask himself if he really needs to expend such energy to author this type of a dissent on a particular issue.

(4) The Brandeis or time-bomb dissent: The dissenter has a vision that he wants to plant now, so that it will germinate and later influence the course of law. This dissent addresses why law should develop in a certain way.

(5) The debilitating dissent: The dissenter explains to the lower court how to get around the majority's opinion. For example, the majority holds that the grant of a motion was premature. The dissenter notes that the trial court is free to exercise its discretion once a timely motion is filed and highlights the fact that the majority has not told the trial court how it should exercise that discretion. This type of dissent is the one most likely to cause offense to fellow jurists.

Judge Schickele advised that when an attorney receives a dissent in a given case, counsel should consider which type of dissent has been issued. It will signal whether or not the dissenter is inviting counsel to seek review by a higher court.

Professor Terrell next made comments focused on the form and structure of a dissent. He provided some perspective and asked whether the "rhetoric theory" applies to dissents. After all, a dissent represents an attempt to persuade by a judge who has already failed to persuade his colleagues. Consequently, the dissenter must attempt to persuade an audience that views the dissenter as the "loser" and is quite hostile to the dissenter. Professor Terrell emphasizes that such an audience is skeptical and risk-adverse. Therefore, a dissenter must be adept

at organizing arguments in such a way to dispose of the doubting and suspicious questions that formulate in the reader's mind as he reads the dissent.

Professor Terrell proposed using a model of persuasion created by the logician and rhetorician Stephen Toulmin to implement this strategy. The use of this strategy, which Professor Terrell further built upon to better fit this context, enables a dissenter to state an argument in a respectful and collegial manner, while still being effective.

To conquer the skepticism of the reader, the dissenter must establish a credible dissent position by addressing the following five elements:

(1) Context: identify the problem about which the reader should care and why;

(2) Claim: address why the majority got it wrong on this issue;

(3) Grounds or data: address why the reader should believe your dissent and the data upon which your dissent relied;

(4) Warrant: address the underlying case law that supports your dissenting position; and

(5) Backing: look underneath the data to establish that not only does the data exist, but that it is good/credible data; perhaps also include the reason for a law's existence.

To conquer the risk-aversion of the reader, the dissenter then must demonstrate the action that the dissenter's position would produce is reasonable and safe. Professor Terrell proposes doing so by including the following four elements in a dissent:

(1) Qualifier: state, for example, that while a given principle is true here, it will not be true in all cases;

(2) Exception: ask for something more limited that makes your dissenting position more tenable;

(3) Consequences: identify what society will look like under your dissenting approach versus the majority's approach; and

(4) Other side: acknowledge the majority's approach, including areas to which the approach would likely apply and why it would be a dangerous slippery slope or precedent to set.

Professor Terrell then applied this strategy by offering proposed revisions to a dissent written by the Honorable Consuelo Maria Callahan in 2010. The practical application of these concepts to her writing proved very instructive to attendees.

Ultimately, the session conveyed that drafting a dissent in a persuasive, yet collegial manner, significantly and positively impacts the decision making process of appellate courts. Not only can it force the majority to redraft portions of its own opinion, it may cause the majority to drop an issue unnecessary to decide the appeal, especially one that is not yet

THIS IS ETHICS: THERE ARE NO RIGHT ANSWERS

By Marie E. Williams[1]

The 2012 AJEI Summit was my first. And New Orleans was a great place to begin. Among the many excellent speakers and panels was the Saturday afternoon session on "Ethical Conundrums for Appellate Judges and their Staff." It was a lively and interactive panel discussion moderated by Associate Provost Linda S. Eads of Southern Methodist University. The panelists were retired judge Peter D. Webster, now a Shareholder in the Tallahassee office of Carlton Fields; Chuck Plattsmier, Chief Disciplinary Counsel for the Louisiana Attorney Disciplinary Board; and Steven Scheckman, of Schiff, Scheckman & White LLP in New Orleans.

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The format of this panel discussion was unique and made for a great interactive session. The audience was presented with a series of hypotheticals outlining ethical conundrums, and asked to vote for the correct answer using real-time voting "clickers." After voting closed for each hypothetical, the panelists and Professor Eads offered their thoughts on the hypothetical and the answer.

Hypothetical 1: Thanks for the Donation

The first hypothetical asked the audience to consider a situation where the local prosecutors' PAC almost totally funded an appellate judge's election campaign. May the judge then sit on cases where one of the prosecutors is appearing?

The answer, of course, is maybe. Mr. Scheckman offered that the answer depends on the code of judicial conduct in your state. The Model Code indicates that the relevant consideration is whether the judge's impartiality reasonably may be questioned. The Model Code also includes a specific provision on judicial campaign funding, although most states haven't adopted that provision. The panel talked about the relatively recent Supreme Court case of *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), which held that the Due Process Clause of the United States Constitution required a judge's recusal under the facts in that case.

Judge Webster agreed that the primary consideration is whether the judge's impartiality may reasonably be questioned. If it can be questioned, then the judge has a duty to recuse. But Judge Webster also raised the issue of a judge's concomitant duty to *hear* cases, which can create a dilemma for judges. Professor Eads emphasized that it is the *appearance* of impropriety – rather than the reality – that could require a judge to recuse himself or herself. And she posed the follow-up question: if a judge were disqualified in such a situation, how long would the disqualification continue? Again, it depends.

Personally, living in a state that does not elect our judges, I find this issue academically interesting, but troubling. Removing money from the judicial selection process would solve a lot of the ethical conundrums in this area.

Hypothetical 2: Among Friends

The second hypothetical asked whether an appellate judge is required to recuse in cases where a long-time friend is the lawyer representing one of the parties. The audience was roughly evenly split in their answers, and the panel's answer again was maybe.

One audience member offered that, in any moderately close bar or state, judges will have long-time friendships based on their bar association or Inn of Court memberships. Recusal in every case where you know one of the lawyers is neither necessary nor practical. On the other side, another audience member suggested that a judge and a lawyer who are long-time friends and socialize together create the appearance of impropriety. Clients will not believe they have a fair judge in such a situation.

Some attendees suggested that, on a court of appeals, a single judge's recusal is not particularly problematic, as there are other judges available to hear cases. But others quickly pointed out that, in small rural appellate districts, this will not necessarily be the case.

Judge Webster emphasized that judges should be concerned with perceptions. If either party is concerned that they will not have a fair judge, then the judge probably needs to consider recusal in that case. Mr. Plattsmier sympathized with smaller and rural jurisdictions where recusal can create a major problem. He suggested that, so long as a judge discloses the friendship, believes they can serve without bias, and the litigants agree, then there should be no reason for recusal. Mr. Scheckman agreed that disclosure is essential. He offered his perspective as Disciplinary Counsel that judges get in trouble when they do not make disclosures of close friendships.

Of course, in situations where judges actually will have bias or prejudice towards one party, disclosure of a friendship will not be sufficient. There, recusal always will be required.

Hypothetical 3: Legal Aid is a "Good Thing"

The next hypothetical asked whether an appellate court staff attorney can donate to a local legal aid

organization, and nevertheless continue to work on cases that were referred to private lawyers by the legal aid organization. About 60% of the audience said yes.

Professor Eads believes the answer is yes but shared that the panel initially leaned towards no. Mr. Plattsmier indicated that he believes the answer is yes, so long as the legal aid group involved is a general organization. If it were an issue-specific organization, the answer might be different. Mr. Scheckman believes a relatively small contribution is no problem because, in this hypothetical, the lawyer appearing before the court is not even an employee of the legal aid organization. If, however, an employee of the legal aid organization was appearing in the case, and the staff attorney contributed a large amount of money to the group, the situation would eventually cross the line to where the staff attorney could not work on the case. Judge Webster also agreed that it is not a problem in the normal case, and noted that in Florida, there is a mandatory *pro bono* requirement for all lawyers, including staff attorneys. These situations are bound to arise with regularity.

Professor Eads asked a follow-up question: does the situation change if the staff attorney is on a particular judge's staff, rather than working for the court as a whole? The panel and the audience agreed in that case: the staff attorney must always disclose the situation to his or her judge, and let the judge decide whether there is an appearance of impropriety requiring that the staff attorney not work on the case.

Hypothetical 4: I'm Not Your Lawyer

The next hypothetical posited a situation where a former colleague telephones a court of appeals staff attorney directly. May the staff attorney answer questions from the colleague about court practices and rules that do not relate to the specific facts of a case? The audience was evenly divided.

Judge Webster commented that although there probably is no ethical issue here, the former colleague is exercising very poor judgment. He suggested that the staff attorney might indicate that he or she cannot answer the lawyer's questions, and simply transfer their call to the clerk's office. Mr. Scheckman agreed that the best practice is for the staff attorney to decline answering any questions from private attorneys.

The panel reminded the audience that ethical rules are the "floor" governing our behavior, and you do not want to get too close to that floor. Sometimes being careful is the best answer, even if the ethical rules would not strictly prohibit certain conduct.

Hypothetical 5: My Spouse, The Teacher

The final hypothetical asked whether a judge must recuse himself or herself from a case that would potentially affect their spouse's working situation. The hypothetical was presented in the context of a spouse who is a teacher, and a case involving a teachers' group challenging a labor statute. The majority audience opinion was that a judge cannot decide such a case. Mr. Scheckman agreed, and noted that this is a case where the judge's partiality may reasonably be questioned.

Although the session ended before the panel could fully discuss several variations on this hypothetical, a few themes came through. Whether recusal is required is likely to depend on how broad the issue presented is or how specifically it may affect a spouse's livelihood. The lesson was that a judge must think about recusal issues relating to family members as well as themselves.

Before the session began, I heard one of the panelists comment: "This is ethics. There are no right answers." And that was just what the session demonstrated.

THE PRESIDENTIAL ELECTION'S IMPACT ON THE COURTS

By George T. Patton, Jr.[1]

This first program of the AJEI Summit was led by moderator Kevin C. Newsom of Bradley Arant Boult & Cummings LLP and included Greg Stohr of Bloomberg News, Stuart S. Taylor, Jr. of the Brookings Institution, and Marcia Coyle of the *National Law Journal*. The moderator began the discussion with the United States Supreme Court's decision upholding the federal health care law and congratulating Greg Stohr of Bloomberg News for being the first to report the decision correctly (two national cable news stations initially provided erroneous information).

Greg Stohr was asked about the mandate surviving under the tax clause and how that would affect constitutional jurisprudence generally and Chief Justice Roberts' legacy specifically. He answered that the bottom line was that the Obama Administration won in upholding almost the entire law, but the conservatives won on the commerce clause and spending clause. He asked rhetorically why the Court even wrote on the commerce clause given that the opinion could have been written without addressing the issue. As to the spending clause, the Court had never struck down a federal law on this ground as pointed out by Justice Ginsburg in her dissent. He wondered what other conditions would be unconstitutional. As to the "new" Chief Justice Roberts who voted to uphold the health care law, he thought it highly unlikely for similar votes in the present term as Roberts would return to the conservative fold with the host of equal protection cases.

Stuart Taylor said he was fascinated by the psychoanalysis of Chief Justice Roberts. Some said his healthcare vote would be cover for striking down § 5 of the Voting Rights Act or affirmative action. But Taylor found Roberts' actions consistent with his confirmation hearing where he proclaimed himself a "judicial minimalist." Taylor pointed to: (1) avoiding Constitutional questions as in the earlier § 5 decision where Roberts "tortured the statute" to allow for the bailout; (2) as-applied versus facial challenges particularly in the First Amendment context such as *Wisconsin Right to Life* (except *Citizens United*, about which he said we do not know the full story); (3) severability such as the Medicaid portion of the health care opinion; and (4) not overturning precedent by issuing a limited ruling in the health care case. He doubts other statutes will fall.

Marcia Coyle noted the speed of change. In the health care opinion, five Justices accepted the inactivity/activity distinction when it had never been accepted before. The origins of the idea only dated to September 2009 when Georgetown law professor Randy Barnett floated the idea and in a bit more than two years the theory became enshrined in U.S. Supreme Court precedent. She noted that the Second Amendment for 70 years was a militia-based right until recently. The tax holding in the health care opinion is in keeping with Chief Justice Roberts' approach to the law. The tax argument had been in the case the whole time but the federal government did not play it up for political reasons. Solicitors General Don Verrilli and Neal Katayl pushed to include the tax argument. The mystery is why Justices Breyer and Kagan agreed with the majority that the Medicaid expansion was an unconstitutionally condition coercive upon the States and thus violated the spending clause. Coyle was shocked by the spending clause part of the decision and speculated about why they may have voted that way pointing to possibly cementing Chief Justices Roberts' vote upholding the law under the taxing power.

Newsom then pushed the Anti-Injunction Act portion of the healthcare decision where the Court unanimously rejected an option to decide the case later. He pointed out the strangeness of the decision that the law was a tax for the Constitutional analysis but not a tax under the Anti-Injunction Act. Taylor responded that the country wanted the case decided. Although the analysis was awkward, it held together in his opinion.

Newsom asked Coyle about the presidential election's impact on the Court, specifically on member-

(1) *Partner in the Washington, D.C. office of Bose McKinney & Evans LLP and first Chair of the Council of Appellate Lawyers.*

ship in President Obama's second term. She pointed out that Justice Ginsburg is most likely to retire and Justice Breyer second most likely. Four of the Justices are over 70. Justice Ginsburg has said she would like to serve until she is about 82, three more years, which was the age Justice Brandeis retired from the Court. Justice Ginsburg is healthy and doing fine enjoying the assigning power that comes with her seniority. She is also writing more dissents. Her husband died in 2010 so the work keeps her going (as was the same for Chief Justice Rehnquist in his later years on the Court). Coyle discussed a 2010 study that raised the politicized departure hypothesis; from 1789 to 2006, during the first two years of a four-year term, Justices were 2.5 times more likely to retire if they were of the same party as the President. Deaths in office tripled if the Justices were of the opposite party. Justice Scalia said he would have to be "some kind of fool" to leave if his replacement would seek to undo his legal theories. So retirement speculation has focused on Justices Ginsburg and Breyer. Coyle pointed out that some law professors even suggested they depart immediately in case President Obama lost reelection.

Stohr added that he agreed that Justices Ginsburg and Breyer were the most likely to depart but predicted they would not retire at the same time. He noted that Justice O'Connor left the Court to care for her husband but he was too ill for her to help much and died shortly afterward. She later talked in wistful tones about the Court and mused that she might have retired earlier than she needed to under the circumstances as they unfolded.

Newsom asked about the short list for replacements. Stohr predicted that if Justice Ginsburg retired, her replacement would be a woman. Some names he floated included California Attorney General Kamala Harris, Minnesota Senator Amy Klobuchar, or other women with experience other than as a federal appellate court judge such as a political background. Taylor added Secretary of Homeland Security Janet Napolitano and D.C. Circuit nominee Caitlin Halligan to the list. Coyle said that she likes someone with a backstory that President Obama finds interesting. She mentioned White House Counsel Kathryn Ruemmler, Illinois Attorney General Lisa Madigan, and Ninth Circuit Judge Paul Watford. Age would be important so those over 55 would be out-of-luck. She did not see a middle-aged, white male such as D.C. Circuit Judge Merrick Garland being appointed. Stohr added that Garland, who was on the short list when Justice Kagan received the appointment and is acceptable to Republicans, could be nominated if Justices Scalia or Kennedy were to leave.

Newsom pointed out that, in 2004 and 2008, the Court was an issue in the Presidential race but in 2012 it was not. Taylor stated that Republican Mitt Romney did not want to talk about abortion so that kept the Court out of the discussion. He was not sure why President Obama did not do more with the Court given the healthcare ruling. Coyle agreed that the Court was not an issue as it was when Richard Nixon ran against the Court's criminal law rulings or Franklin Roosevelt ran against the Court's anti-New Deal rulings. The economy was the focus in 2012 and most American feel the Court is where it should be. Stohr stated that if the Court had struck down healthcare, then President Obama would have made it an issue during the election. He added that it is rare for the Court to be an issue in a Presidential election.

Newsom asked the panel to opine on three pending or potential cases this term: (1) affirmative action, (2) § 5 of the Voting Rights Act, and (3) gay marriage or the Defense of Marriage Act ("DOMA"). Coyle said the present term will be different from the last one that dealt with structural lines of government power in the context of healthcare and immigration. She predicted the Court will take one of the DOMA/gay marriage cases (it ultimately took two) and that it will be a different, more conservative Chief Justice than in the healthcare opinion. She noted not much was in the pipeline because Congress has not produced much major legislation in the last couple years. She expected challenges to the Dodd-Frank financial services law. Stohr predicted that the Court will strike down § 5 of the Voting Rights Act. Taylor agreed, pointing out that Congress ignored an earlier warning from the Court but noted D.C. Circuit Judge Tatel's opinion in the Texas ID case convincingly found some residue of discrimination

in covered jurisdictions and found that the voter ID law was designed to discriminate against minorities. Taylor also expressed the view that the Court will strike down the University of Texas' affirmative action program.

Stohr posed the question of what the Court takes from this election: minority participation vs. minority suppression. Coyle said some of these cases were manufactured by Edward Blum to end racial classification. He finds the clients, he finds the lawyer and he is "smart, capable and watching" for test cases. Stohr said that Court will take up DOMA, but not gay marriage. Coyle agreed pointing out that two federal appellate courts had struck down DOMA. Ultimately, of course, the Court did take up gay marriage while also adding a threshold standing question that may prevent a ruling on the merits.

The first question from the audience asked about confirmation battles ahead. Taylor noted that Democrats gained a couple seats in the Senate and some Republicans are against filibustering judicial nominees. Stohr said there will only be a confirmation battle if Justices Scalia or Kennedy departed, but not if the others such as Justices Ginsburg or Breyer left.

The second question from the audience asked about President Obama's appointments to the lower court bench. Coyle said that Democrats and President Obama did not push on judicial appointments to the lower court bench in contrast to the Reagan Administration that took a long view. Perhaps President Obama had too much on his plate in his first term. Stohr said the Constitution Society is happier now with two nominees for the D.C. Circuit. Taylor said it was a shame that someone had to be a federal appellate judge to be appointed to the U.S. Supreme Court. The Court has plenty of them already so a Cabinet member or sheriff should be next.

The third audience question asked about Chief Justice Roberts' healthcare opinion on the taxing power in light of his clerkship with Judge Henry Friendly. Coyle answered that Judge Friendly was a fascinating figure whom Roberts was close to in a mentorship relationship. During oral argument, Chief Justice Roberts raised either an opinion or law review written by Judge Friendly.

The next question was who other than appellate judges should be appointed to the Court. Taylor responded that the Court makes decisions with large political effects thus experience in the world is important. The Court in *Brown v. Board of Education*, for example, consisted of a former governor and no former federal appellate judges.

The penultimate question was about the confirmation process and whether the Court was already politicized. Taylor answered that the Court has five conservative activists and five liberal activists--Justice Kennedy serving in both roles.

The final question was about unusual voting patterns between the Justices. Coyle noted that Arizona immigration case and the confrontation clause cases under the Sixth Amendment. Stohr referred to Fourth Amendment privacy cases such as Justice Scalia's opinion requiring a warrant for thermal imaging. He also noted punitive damages where the two ends are fighting against the middle. Taylor pointed to Justices Breyer and Kagan joining Chief Justice Roberts' healthcare ruling on Medicaid. He described this as "stunning," not a realignment but a one-off.

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. The next issue will focus on oral advocacy but articles on other subjects of particular interest to the author are also encouraged and will be published.

The deadline for the next issue is June 17, 2013. Submissions and inquiries should be directed to David J. Perlman at djp@davidjperlmanlaw.com or 484-270-8946.

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