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IN THIS ISSUE

A CONVERSATION WITH SOLICITOR GENERAL DONALD B. VERRILLI, JR.

By Wendy McGuire Coats

On Saturday November 16, 2013, the attendees of the Appellate Judges Education Institute Summit were treated to a frank question and answer session with Solicitor General Donald B. Verrilli, Jr.

Before his nomination to succeed Elena Kagan as Solicitor General, Verrilli served as Deputy Counsel to President Obama and as an Associate

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HONING THE KNIFE: EDITING EFFECTIVELY TO IMPROVE LEGAL WRITING

By Richard C. Kraus

The approaches and techniques for effective editing are often overlooked in legal writing programs. Panel moderator, partner in Bradley Arant Boult Cummings, LLP Kevin Newsom, introduced the AJEI breakout session on editing with the observation that few briefs are drafted and edited by a single attorney. In both public and private practice, junior attorneys delve into the record, conduct the research, and

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EDITOR'S NOTE

By David J. Perlman

The annual Appellate Judges Education Institute is the premier national forum for the exchange of ideas on appellate law. "The Summit," as it's commonly called, strikes to the heart of what's relevant, both to judges and advocates. This *Appellate Issues*, like past issues following the Summit, distills a part of that exchange. Focusing on the 2013 Summit, held in San Diego from November 14 to 18, it also recounts a webinar co-

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Deputy Attorney General in the U.S. Department of Justice. Prior to his government service, he was a partner in Jenner & Block, where he co-chaired the firm's Supreme Court practice. On June 6, 2011, the Senate in a 72-16 vote confirmed him.

Long-term friend of Verrilli's, Vice Chief Justice of the Arizona Supreme Court Scott Bales introduced the Solicitor General and asked the inaugural question after which the audience posed questions.

What have you learned about oral advocacy having held the position of Solicitor General?

Verrilli explained that the role of advocate as Solicitor General is quite different from the advocate's role in private practice. In private practice when he represented clients before the Supreme Court or any other tribunal, the clients usually had one primary interest and that was to win that particular case. The Solicitor General's perspective is very different from that singular focus on a single client for a specific case-win. Generally, private clients are not interested in the doctrinal development of the law. With the goal of winning the case at the forefront, the client's needs and the advocate's approach might require making sacrifices or concessions with which other players in a particular industry might not agree.

By contrast, it is the Solicitor General's job to look at every case and every position in every case and determine what position is in the long-term interests of the United States. Often, this means that the Solicitor General cannot make arguments that may at first blush seem the most advantageous to winning a particular case because, should a particular argument be accepted and adopted by the Court, it could undermine the interests of the United States in other areas. This also applies to proverbial "line drawing." Sometimes, the Solicitor General cannot draw hard lines when arguing a particular case because the very act of drawing the line to win one case could have the effect of placing any number of government programs on the wrong side of that line.

The frequency of the Solicitor General's appearance before the Court also dictates strategies different from those in private practice. In private practice, it is typical for the advocate to strategically assess how to get five justices to vote in his favor. Advocates before the Court typically know which one or two justices might be tacitly hostile to the position they must advocate. Accordingly, it's a common strategy to attempt to minimize the amount of time interacting with those justices hostile to a particular argument, while hoping to spend more time engaged with the justices open to that line of argument.

As Solicitor General, Verrilli is before the court every month and sometimes more than once a month, and, as a practical matter, the five justices voting in favor of his position in October may be a different constellation from the five voting in his favor in November. Consequently, it is imperative to maintain a full, respectful dialogue with all of the justices, including those actively asking questions and still unlikely to vote favorably in that particular case. Thus, the Solicitor General sometimes finds himself engaged in interactions with the Court that he knows, and everyone paying attention to the case knows, may in the short-term be completely fruitless.

While true for private practice, Verrilli has grown to appreciate even more as Solicitor General that the most important thing for an advocate is integrity. Before every tribunal, the advocate must be trusted. Because the trust and integrity of the Office of the Solicitor General are of paramount importance, the Office has historically adopted a vigorous standard of candor with the Court. For example, it will confess error even when the United States has won below and is scrupulous about identifying jurisdictional flaws. Similarly, the Solicitor General is extremely careful about the nature of its representations, including both representations concerning the record

in a particular case and representations concerning the consequences of the Court's precedents.

While in some circles, it may be considered that the creativity of an effective appellate practitioner lies in taking existing precedent and making it stand for something more, Verrilli finds this an unwise approach before the Supreme Court. He suggests that the more effective advocate articulates clearly and correctly the Court's precedent and then asserts that the result desired by the advocate may be extrapolated from existing precedent. Not only will the advocate be perceived as someone who can be trusted, enhancing the advocate's effectiveness over time, but, apart from this long-range pragmatic benefit, this level of candor is really a paradigm for appellate advocacy.

How often and when does the Office of the Solicitor General become involved in en banc petitions and criminal petitions or exercise a role that would be recognized as supervisory authority over a local United States Attorney's Office?

By law when the United States is a party, the United States cannot petition for en banc review unless the Solicitor General has approved the petition. Approval is also required when the United States loses a case in the trial court and wishes to appeal. The decision whether to petition for en banc review or appeal is a large part of the Solicitor General's job. The United States loses about 2000 cases a year, which means that about 2000 packets seeking permission to appeal land in the Solicitor General's office.

Dealing with them is anything but a rubber stamp procedure. A lengthy, somewhat elaborate, and detailed format is used to determine whether to appeal, seek en banc review, seek cert, or participate as an advocate in civil and criminal cases. Take for example a criminal case. The process starts with a memorandum from the United States Attorney's Office making a recommendation. That will go to the criminal division of the Department of Justice, which also makes a recommendation. Then both of these documents go to an assistant in the Solicitor General's Office and a memorandum will be prepared before transmission to the Deputy Solicitor General responsible for the substantive area under which the case arises. He prepares an additional recommendation. Finally, the question of whether to appeal or seek en banc review reaches the Solicitor General.

When the United States has lost and is seeking en banc review, the Solicitor General's Office exercises a great deal of control over whether to move forward and then over what arguments will or will not be advanced. The Solicitor General's judgment extends to the specific issues to be raised and the fashion in which they will be argued. The Solicitor General considers the requirements of en banc review, the federal rules, and the interests of the United States. He also considers whether the particular case is a good vehicle in which to advance a legal principle that needs advancing for the long-term interests of the United States.

Of course, the Solicitor General's supervision and control are present only when the United States has lost and absent when it has succeeded. Therefore, in a criminal matter when the prosecution was successful and there was no question whether the United States would appeal, and the defendant appeals, the United States Attorney proceeds without input from the Solicitor General. The Solicitor General may not know what arguments were made below until a cert petition is filed. Verrilli expects that every Solicitor General has grappled with the disjunction of the tight level of control in the one situation and the complete lack of control, or even involvement, in the other.

Now that you're back at the Court as an advocate, 29 years after clerking for Justice Brennan, in looking at the Court, its function, and its doctrine, do you recognize the lasting imprint of Justice Brennan?

Verrilli responded that the best way for him to an-

swer this question is to note that Justice Scalia thinks that Justice Brennan left an enduring impact on the law and the Court. And that Justice Scalia has said, many times, that he thinks that Justice Brennan was one of the most influential justices of the century.

How does the Solicitor General weigh the opposing interests within the United States, such as when the Criminal Division of the Justice Department may be on one side and the Transportation or Energy Department may be on the other?

Verrilli explained that a large part of the Solicitor General's job is to define the ultimate interest of the United States, whether he is a petitioner, respondent, amicus in favor of one party, amicus in favor of neither party, or ultimately a non-participant.

One might think that it would be fairly straightforward to figure out the interest of the United States and what its position ought to be. One might also think that in an administration where the same president appointed all of the cabinet heads there would be a shared philosophical viewpoint. But Verrilli explained that, due to several factors, including institutional pressures and perspectives, determining the interest and then the legal position of the United States is not straightforward at all.

To do this faithfully requires a time consuming, resource intensive process. To start, the Solicitor General's office circulates requests to offices within the Executive Branch giving them an opportunity to express their views on the particular issue and/or position. It is not uncommon for the Solicitor General to receive four to six or more memoranda from the various cabinet departments detailing what the position of the United States should be and why. Typically, these will be supplemented by memoranda from the various divisions within the Justice Department, such as the Civil Division, the Criminal Division, and the Office of Legal Policy. These are all then assimilated into a single coherent legal analysis before proceeding to the Assistant Solicitor General, the Deputy Solicitor General, and finally to the Solicitor General.

Then follows several rounds of meetings, including an opportunity for each party to convince the United States that it should support that party's side of the case. The Solicitor General's Office also meets with all of the government stakeholders in an effort to hash out what the position of the United States should be. Verrilli explained how he had come to deeply respect this lengthy process and had learned the hard way the consequences of not engaging with the multiple levels of interested parties.

In particular, he leaned the lesson while still Deputy Attorney General in the White House. One of his first tasks was to develop the policy regarding the United States' assertion of the state-secret privilege during litigation. He had most recently worked in the private sector and brought a private sector mentality to the task. He felt confident that he could find the three to four smartest people working in the government on this particular issue and between them they could efficiently hammer out a policy. And that's what he did. But when he circulated the result, it was like a nuclear explosion. Another 60 or so people in the Executive Branch had opinions regarding the proposed policy and were generally outraged that a policy had been drafted without their consultation. As Verrilli recounted, they were absolutely right in two respects. First, as stakeholders, they had a specific interest in how the policy would be applied and therefore they had an interest in what the policy would be. Second, the Executive Branch consists of an extraordinary amount of expertise, a resource not to be wasted.

Accordingly, the Solicitor General's fair and open process, even though time consuming, is imperative to ensure that the government's multiple views are gathered and that all interested parties have an opportunity to be heard. It also gives the Solicitor General the opportunity to explain the cogent reasons behind the ultimate decision should the decision not follow a party's particular recommendation.

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While not commenting on any specific case, Verrilli suggested that it was possible to imagine examples where certain institutional, structural conflicts could exist within the Executive Branch. For example, in the human rights context, the State Department's position of vigorous enforcement of international human rights norms against foreigners within the jurisdiction of the United States may at times conflict with the Defense Department and intelligence community, who are concerned that if we enforce those norms against officials of foreign governments or foreigners before United States courts, then our soldiers and our spies may have to submit to foreign courts purporting to do the same thing.

Although the hope is that common ground can be found, that is not always the case, and a choice between two opposing positions has to be made. The Solicitor General must choose based on what is perceived to be in the long-term interest of the United States government. And that can be hard to define, especially when statutes, best practices, and other available materials may suggest that the decision could go either way.

When a change in administration occurs, is there a procedure to evaluate the prior positions by the previous administration?

Verrilli explained that, in practice, a change in administrations is much less disruptive than imagined. He estimated that 90 percent of the Solicitor General's work would be the same regardless of who is president or which party controls the Executive Branch.

The Solicitor General's Office handles the appellate process enforcing criminal laws, defends federal officers who have been sued for damages related to their work, defends the work product of administrative agencies, and defends the positions of the Executive Branch. All of these responsibilities generally remain the same from administration to administration. This is also consistent with the Office's strong tradition of non-partisanship, reflected both in the hiring process and in the process of defining the position of the United States.

Usually there is only a small range of cases where legal policy judgments are made that could result in the United States taking a position different from the prior administration's. A good example is the antitrust case *Federal Trade Commission v. Actavis*, which the Supreme Court decided last year. The case asked whether there should be any antitrust scrutiny over "pay for delay" agreements between a brand name pharmaceutical company and a generic drug company when the brand company sues a competing generic company for patent infringement and the settlement agreement pays the defendant generic to stay out of the market for a number of years.

In the previous administration, the Solicitor General took the approach that these agreements should not be subject to antitrust scrutiny because there was no reason to believe anti-competitive potential or anti-consumer potential existed. This administration took a different policy approach, believing that a significant risk of consumer harm existed and meaningful antitrust scrutiny was therefore appropriate. It is generally accepted that legal policy is not set in stone and this sort of shift occurs in only a small percentage of case.

Referencing back to his experience drafting the policy regarding the state- secret privilege, Verrilli explained that the administration wanted a policy drafted precisely because in one of the very first cases involving the privilege argued under the new administration, the administration took basically the same position as the previous administration; it was the continuity that generated questions such as why the election had not changed the outcome. Verrilli explained that this sort of continuity is largely due to the fact that each Solicitor General is working from the same touchstone: what is the long-term in-

terest of the United States government?

What is the level of interaction between the Solicitor General and the Attorney General when formulating legal policy and is there any direct influence from the White House?

When he was Deputy Counsel to the President and nominated to be Solicitor General, there were questions from a few corners whether the path from the White House to Solicitor General was consistent with the tradition of the Solicitor General's Office and its need to exercise independent judgment on behalf of the United States.

Verrilli has found that concern ironic in practice, as former acting Solicitor General Walter Dellinger had suggested to Verrilli. From Verrilli's experience, the one thing that any White House worries about most is bad news that is unexpected and that it's unprepared for. Because of his year-and-a-half working in the White House, Verrilli entered the Solicitor General's office with many relationships already established among White House staff, and so it is his perception, although pure speculation, that the White House staff is much less worried that Verrilli will drive them over a cliff; they think, in Verrilli's opinion, that he is attuned to the White House's concerns — as he indeed is — and as a result, he is essentially left alone. So, in an ironic way, Verrilli's prior experience and relationship with the White House has worked to enhance his independence as Solicitor General.

The Solicitor General's interaction with the Attorney General is different from the relationship with the White House. By law, the authority exercised by the Solicitor General is derived from the authority of the Attorney General. Under the statutory framework created by Congress, the Department of Justice, under the Attorney General's direction, is granted the authority to conduct the business of the United States in court. In 1870, the position of Solicitor General was created to assist the Attorney General in carrying out this function, and a federal regulation delegates the Attorney General's authority over matters before the Supreme Court to the Solicitor General. So it is the Attorney General's authority that any Solicitor General is exercising.

Verrilli meets regularly with the Attorney General to review the Supreme Court's docket to discuss the Solicitor General's approach to the upcoming cases. This affords the Attorney General an opportunity to provide input on cases, but as a practical matter, it is rare that he does.

From the perspective of the long-term interest of the United States, is there a consistent view of federal-state relations? For example, is there a presumption that the Solicitor General will always defend either the consolidation or expansion of federal powers?

No, according to Verilli. First, the Solicitor General has to make judgments based on the law articulated by the Supreme Court. Second, the relationship between the federal government and the states is typically played out in federal statutes, and it is the responsibility of the Solicitor General to defend federal statutes.

He defends federal statutes cognizant of the Supreme Court's pronouncements, such as *Lopez* and *Morrison* and relevant cases from the last few years. Thus, Supreme Court precedent shapes the nature of arguments defending federal authority.

Verrilli referenced back to his earlier discussion on line drawing in particular cases. When defending federal statutes, he thinks it is important to consider the principles and doctrines already announced by the Supreme Court and to be cognizant that it is not the job of the Solicitor General or anyone in the Executive Branch to give away federal power in order to succeed in a particular case. It is always important to remember that drawing a line in a particular case could result in throwing 20 other statutes overboard. While it is important to be sensitive to federalism principles, the Solicitor General's role is to defend the authority of Congress to enact federal laws and

the authority of the Executive Branch to carry them out.

As a practical matter how is the White House or Congress consulted? For example, are they a part of the memorandum circulation process?

Generally, no. In very rare situations, it is important for the President to know where the Solicitor General is going with a particular case. Should this occur, it would likely be in the form of a call with White House counsel, but there is no circulation of briefs similar to the circulation that occurs with the Justice Department.

On a routine basis, Congress is not consulted. But this varies slightly when the Solicitor General is defending a federal statute or practice because in that context Congress is essentially the client. Take for example the legislative prayer cases. Because Congress starts each day with a prayer, the interest of the United States required the Solicitor General's participation in defending the continuing legitimacy of this tradition. In this regard, Congress is the client; it is the practice of Congress that is being defended. Similarly, a federal agency may be consulted when a rule promulgated by that agency is being challenged.

Is there an approach to responding when the Supreme Court invites the opinion of the Solicitor General on whether the Court should grant certiorari?

Generally, Verrilli believes that the Supreme Court tends to invite the Solicitor General's opinion when the decision is not clear. As a practical matter, if the Court does invite the Solicitor General to participate, it will take an additional three to six months before the Solicitor General responds.

In most cases, the Solicitor General recommends that the Court not take the case. This is usually because the Solicitor General has issues with it. There may be a vehicle problem. The case might not present the issues well. The parties might not agree on what the issues in the case are. The case might not result in the Court being able to reach the issues of importance that it wants to address.

Having argued before the Supreme Court in private practice and as Solicitor General, what is your sense of how oral argument has changed over your career. And what makes a good oral argument?

Verrilli recalled that when he clerked for Justice Brennan, advocates before the Court could usually speak for quite a long time before being interrupted but that is very different from the experience today.

Reflecting on his current experience, Verrilli started with the fact that the justices are incredibly prepared, smart, interested, and engaged. Because the justices truly care about every case and usually have only 30 minutes per side, they are each eager to get their questions out for the advocate and each other. The nature of this style of argument naturally leads to a feeling of disjointedness because the questions asked may not relate to each other and may not relate to the argument that the advocate was just addressing. The challenge for the advocate is to answer everything asked while coherently communicating the key points of the argument.

For Verrilli, a good day before the United States Supreme Court is when the argument flows into a structured or stylized conversation and he senses that there has been an exchange of ideas with his arguments resonating with the Court.

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prepare the first draft before more experienced attorneys become involved. Persuasive brief writing requires a corroborative editing dynamic among team members.

Illinois Solicitor General Michael Scodro explained that writing and editing are very different, but correlated, skills. The writer is "in the weeds" and must be very familiar with the record. The writer has to present the detailed facts and legal analysis required to develop the arguments. The editor, on the other hand, comes to the draft fresh. The editor is not wedded to the detailed factual statement and arguments and can streamline and simplify the draft more easily.

Stanley Panikowski, partner in DLA Piper, began by noting that the appellate team is usually leaner than the trial team. He described three types of appellate team approaches. The first, "hydra," is "drafting by committee." Each writer prepares self-contained sections. The editor needs to bring consistency and flow to the combined draft. Since there are several writers, the draft is usually too long. The same responsibility exists when a brief is edited by committee.

The second approach, the "kangaroo," is common. An associate writes and a partner edits. The style and skill of the associate can affect the editing process. The partner's ability or willingness to have the associate review and disagree with the editing also comes into play.

The third approach is the "lone wolf," where the writer and editor are the same person. The inherent problem is the inability to critique one's own work. Successful editing of one's own writing requires time and distance to gain perspective on both structure and content.

Michigan Solicitor General John Bursch, who since the AJEI Summit has returned to Warner Norcross & Judd LLP, discussed the difference between private and public practice. A private practitioner generally works with the same firm attorneys and develops an effective and cohesive team. As solicitor general, he worked with assistant attorneys general from many divisions. The briefing process involved original drafts from front-line assistants, first-level review by division heads, and then additional review and editing by the solicitor general's office. Key personnel from agencies also participated. Bursch emphasized the need to keep briefs lean. As a way to judge a brief's effectiveness, he recommended a close review of the table of contents. The section headings should present the arguments in a logical and coherent way.

Anna Manasco of Bradley Arant Boult Cummings LLP presented the perspective of the associate writer. As an associate, her goal is to produce a technically sound brief. She does not try to write in the partner's voice. The voice or style comes from editing.

Panikowski tries to not impose his own individual voice when editing. Because the judges on an appellate panel are unknown when the brief is prepared, he recommends presenting the facts and law in a neutral but persuasive voice. The focus should be on clarity and simplicity. He commonly purges the writer's style during editing. Panikowski's editing style includes looking behind the draft and reviewing the key parts of the record and cases. He spot-checks less critical cites as a way to judge the accuracy of the writer's work. A third person cite-checks the record and legal authority.

Scordo and Bursch discussed the constraints in public practice. Due to the volume of briefs they review and edit as solicitors general, they have to conserve time and resources. Scodro doesn't change the style of a draft unless he is 60% sure it will make a difference. Bursch noted that an editor can't work from just the brief and must review the foundation documents, especially the lower court opinion. On the

other hand, a busy editor does not have time to look under every rock.

Manasco expressed her view that briefing-by-committee is the worst approach. Editing by committee is less problematic because the various editors are working from a common base product. She emphasized the need to determine the objectives for edits, such as developing a tone, focusing on a particular judge, or communicating a client's specific interests. As the attorney most familiar with the record and authorities, Manasco often has to act as a mediator as she coordinates the edits and produces the final brief. A more difficult role for her is the referee who needs to eliminate arguments that cannot be supported or create risks for other arguments.

Manasco prefers to have attorneys edit on top of each other in a master document as opposed to separately editing and producing multiple documents. She stressed the need to set deadlines and keep sufficient time for the final revisions.

Panikowski talked about dealing with client edits. Often, a client wants to "turn up the volume," or include matters that may be irrelevant to the case but important for the client's business. This requires the attorney to recognize that a brief may have an audience other than the court, such as the client's shareholders or management.

Turning to the mechanics of editing styles, Newsom displayed his four-color pen that he uses on a paper copy. He tries to suggest, rather than mandate, changes. As a partner, he works to mentor the writing associates by doing more than just editing and filing a brief without sending it back to the associate.

Scodro also edits on a printed copy of the draft. This allows the original writer to know who is making the edit. It also helps prevent factual errors than can be introduced when the editor changes the original document. In most cases, the writer is more familiar with the detailed facts and law. He views editing as a teachable moment to help junior attorneys develop style and emphasis.

Panikowski edits a printed copy by doing a complete reading before any marking. He doesn't think a line-by-line edit can be helpful before seeing the draft as a whole. As an editor, he focuses on structure and logic.

Bursch was the only panelist who edits on screen by using track changes. He makes heavy use of the comment feature, which allows him to explain the rationale for the edits. He tries to empower junior attorneys to challenge his proposed edits and present their reasoning.

The next segment covered common errors seen by senior attorneys when editing. Scodrow, Panikowski, and Bursch each had their own list.

Scodro:

1. Overly neutral statements of the legal standard.
2. Overly patient approach to presenting arguments. He often sees junior attorneys who are reluctant to get to the point, instead following the logical flow from Point A to Point B as a way to lead the reader to a conclusion.
3. Editorializing and overheating. He recommends eliminating most adverbs.

Panikowski:

1. Lack of effective topic sentences.
2. "Tail wagging the dog," i.e., relying on a discussion of cases to structure a brief, rather than using the arguments to structure the case analysis.
3. Footnotes. He wants associates to weave the material into the text, to be included or deleted as necessary upon editing.

Bursch:

1. Lack of structure, often caused by the failure to outline before writing.
2. Failure to tell a story.

3. Excessive length, over citation, legalistic language, boring verbs, and lack of transitions.
4. The inadequate use of introductions.
5. Insufficient attention to key sections, especially the table of contents and statement of questions presented.

From the writer's perspective, Manasco offered the following tips.

1. Get the structure decided early.
2. Make sure that key team members know about the landmines and the arguments that can be pushed.

In response to questions, the panelists discussed whether the editing approach differs when the attorney will be arguing the case. Both Scodro and Bursch said they are much more involved, especially for Supreme Court cases. Newsom becomes heavily involved in the editing process for a different reason, viewing his participation as helpful for both the writer and editor.

The panelists talked about dealing with bad drafts. Panikowski will draft a new document using the brief as source material or send the brief back to the writer to extract an outline. Bursch will prepare general comments and send back to the writer. To avoid discouraging the writer, he will turn off track-changes or prepare an outline from the initial brief. Manasco finds it demoralizing when the senior attorney thinks a draft is not even worth redlining.

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There's special merit to these written accounts. To those who attended, the articles serve as a reminder and summary. To those who missed either the Summit or webinar, or who missed one Summit program for another, they're an edifying window into what transpired. They're invitations, as well, to view the Summit videos now available online.

But perhaps most significantly, each article provides an individual attorney's unique articulation of some facet of appellate practice as discussed by other engaged professionals. The law is grounded in language, and through our verbal casting and recasting of legal ideas and through attending as listeners and readers, we deepen our understanding.

We can't hide behind jargon. We can't be duped by it. We get nowhere on legalese. The old lumber is tired. It's by speaking, writing, listening and reading, all the while attuned to meaning, that we'll come to appreciate the significance of an all too familiar term of art. And in just the same way, we might dig up and deploy that simple, colloquial chip off the vernacular that carries the day.

The Summit and webinar planners initiated the professional exchange that continues here. And the presenters, panelists and moderators proved generous not just in knowledge but in candor. Without their contributions, this issue wouldn't exist.

To the authors, I'm especially grateful. They've succeeded in wrapping words around complexity.

HANDLING THE DIFFICULT ORAL ARGUMENT

By Nancy M. Olson

Although judges commonly tell advocates that cases are largely decided on the briefs, it remains true that cases may still be won (or lost) on the basis of a good (or bad) oral argument. Even seasoned appellate advocates can benefit from assessing their oral argument strategies from time to time, especially when an opportunity arises to take tips from the pros regarding how to navigate difficulties during oral argument. During the hour-long AJEI Summit session "Handling the Difficult Oral Argument," moderator A.Vincent Buzard of Harris Beach PLLC peppered the distinguished panelists with difficult questions, just as an engaged jurist might do from the appellate bench. The panel featured the Honorable Scott Bales of the Arizona Supreme Court, David Frederick of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, and Roger Townsend of Alexander Dubose & Townsend LLP.

Mr. Buzard first asked the panel, in an era of ever-shortening oral arguments, how should an opening statement be used to focus the court and not waste precious time? Mr. Frederick's response emphasized that an oral argument's opening statement should do two things: 1) establish credibility, and 2) provide a roadmap of your argument. An advocate may only have a minute or so before judges begin asking questions, so setting the theme and making two or three "headline" points around that theme are crucial. This strategy may be visualized by thinking of concentric circles. Each main point is an inner circle, and as time permits, you want to draw bigger circles around each main point by elaborating on those arguments. Choosing a mantra may help thematically present your idea. For example, consider a case where the defendant was indicted based on documents he thought were produced to the independent counsel under a grant of immunity from prosecution. The defendant's lawyer argued that the indictment was impermissible. He could not have been indicted for the contents of those documents but for the fact he had been honest in providing them. Here, Mr. Frederick focused on the mantra that a person cannot be indicted for being honest. Tying his responses back to the concept of an indictment for honesty provided an effective rhetorical link throughout the argument.

Mr. Townsend followed up on the idea of a mantra by quoting one of the most well-known mantras, "If the glove don't fit, you must acquit." Although defense counsel in the OJ Simpson murder trial made that argument to a jury, sometimes the difference between a mantra presented to the jury and one used in an appellate argument will not be vast. Short phrases that summarize the applicable law and illustrate why you should win work just as well in appellate argument. Justice Bales agreed, but further cautioned that an advocate should not be wedded to a particular theme (or two to three argument points) because sometimes those are not the topics on which the court wants to hear argument or inquire. Especially in multi-issue cases where it is not possible to predict where judges will go, it is important to take an improvisational jazz approach.

Following on Justice Bales' jazz analogy, Mr. Frederick responded that even improvisational jazz has structure, which is based on underlying scales. In other words, you have to know how to improvise your argument based on an underlying structure. If you have planned out the structure of a mantra, you can use segues to move from difficult points back to your intended affirmative points. Justice Bales responded by pointing out that this may not be the case for a "be-bop panel," where the court might take a path totally divergent from your theme. Advocates should remember it is always important to be responsive to the court and not come across as tone deaf to what the court wants to know.

Mr. Buzard next asked the panel about the best way to answer a question to deliver a point efficiently. Justice Bales emphasized the importance of answer-

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ing first, then providing a follow-up explanation to reorient the court to your chosen theme. Like lawyers, courts also see oral argument as a precious commodity. Judges want to use the time to aid in their disposition of the case. It frustrates them when attorneys provide long, meandering answers rather than simply answering the question up front. A good rule of thumb is to answer, elaborate, and then bring the court back to your theme. Mr. Frederick followed up by explaining that, during his own preparation, he focuses on "decisional points," which analyze the case by focusing on the judges' job in a particular case. In other words, consider what the judges must decide in order to dispose of a case. Those are decisional points. Focusing oral argument preparation on these points helps distill the hardest potential questions. Your goal should be to determine the best arguments on the decisional points that will help influence a decision in your favor. Advocates may get lost on telling a story in the brief, overlooking the fact that judges often must decide on a few narrow questions. You should think about the best way to give judges the tools needed to decide in favor of your client. Mr. Frederick also agreed with Justice Bales that answers to questions should be front-loaded. In contrast to trial lawyers who tell a story in a crescendo leading up to a punch line, in appellate advocacy, effective advocacy starts with the punch line and then provides an explanation grounded in black letter law.

Mr. Buzard then shifted the panelists' focus to effectively planning pivot points. Mr. Frederick recommended that an advocate's preparatory materials set out the best affirmative points, as well as the best points of the opposing party. From this list, decisional points will emerge, providing clues about where the judges will likely focus. The opposing party's best points are often a useful guide of likely tough questions. Accordingly, it may be useful to style your notes as follows: 1) anticipated tough questions, 2) direct answers, and 3) segues back to your own affirmative points. The segues should be something textual to link your direct answer back into your own theme (e.g., a policy idea, a point from case law, legislative history).

Considering other peculiarities of oral argument, Mr. Buzard asked the panel how to handle a question when you don't understand what is being asked. Mr. Townsend suggested requesting the question be repeated or simply be candid and explain that you do not understand. Being forthright is less risky than inadvertently providing an incorrect or harmful answer. Justice Bales noted that an advocate should consider the culture of practice in that particular court. In most courts, judges show patience and will repeat the question. Another way of conveying confusion would be to rephrase the question back to the panel and ask whether that fairly restates the question. You may also want to break the question down into parts in order to respond with more clarity. Advocates should remember that judges don't want to simply trip up the lawyer's argument; they want to know about the case. Getting on the same page as the judges will help you provide a clear response to the question posed. Justice Bales acknowledged that sometimes judges phrase questions poorly, but even in responding to confusing questions, oral argument should be an interactive process used to build a dialogue with the court. The term oral "argument" is indeed somewhat of a misnomer; it is, rather, a stylized conversation.

Turning to another problem faced by advocates, Mr. Buzard asked the panel what to do when the advocate suspects a judge has not read the brief. Mr. Townsend responded that you should always prepare for the worst at oral argument in case you are faced with such a situation. If a judge seems really unprepared, be ready to put on the record any equitable facts or important precedents you may have otherwise skipped over. You may also facilitate an unprepared judge's understanding of the case by referring to page ranges in your brief (e.g., concept X

is explained in greater detail at pages 16-20 of the brief; we cite the *Jones* case at page 24 of the brief). This strategy will help focus the judge without telegraphing your belief that the judge is unprepared.

Given that judges often make non-question statements and appear to expect a response, Mr. Buzard asked what advocates should do when this happens. Mr. Townsend recommended searching the statement for clues of whether it reflects the judge's view, shows a hint of a colleague's view, or perhaps merely indicates a desire to be interactive. You should evaluate the seriousness of the comment and determine whether a full response is warranted, or whether a simple "thank you" may suffice. Mr. Frederick responded that even a statement can be used as an opportunity to engage other members of the panel and refocus the discussion on your points.

Mr. Buzard then asked how to respond if a judge states that something is in the record that is in fact not there. Justice Bales recommended politely correcting the court and then pointing the court to where accurate information may be found in the record. If a judge misunderstands the law, on the other hand, Justice Bales noted that an advocate could respond by respectfully correcting the judge. Where the disagreement pertains to an earlier decision by the same court, however, advocates should be prepared to recognize that the court will have the final say in interpreting its own precedent.

Next, Mr. Buzard turned to what to do when opposing counsel misstates the facts. Mr. Townsend noted that if you have the correct quotation in front of you, it's best to correct the misstatement by reading from the source. If you do not have the source, you can say, opposing counsel stated the following, but when I read the case or that portion of the record, this is what I found. Mr. Frederick followed up by explaining that another good practice to enhance civility is to refer to opposing counsel through the name of the client rather than counsel's name. This removes any perception of two adults accusing each other of being wrong. Saying "the government" or "the union" comes across as being more courteous.

Mr. Buzard next challenged the panel to discuss how to respond to a hypothetical. Justice Bales cautioned advocates not to assume that a hypothetical has one correct answer. Hypotheticals can be used to test the limits of a position, signal to a colleague that another position would be problematic, or gauge whether the judge understands the lawyer's position. It is best not to assume every hypothetical is a trap. Answering won't necessarily hurt your position. Mr. Frederick commented that hypotheticals can be used to reinforce your theory of the case by explaining to the court where the line should be drawn and why your facts fall on a particular side of that line. Don't be afraid to politely distinguish your case from the hypothetical by saying that if the hypothetical is true, then you agree with the judge's conclusion; however, your case is not like the hypothetical for the following reasons. Justice Bales recommended stating the unstated premise of the hypothetical in order to say whether or not the same situation applies in your case. Mr. Frederick cautioned that parties should not use their own hypotheticals. Echoing that point, Mr. Townsend explained that while he does not attempt hypotheticals, he does feel comfortable using analogies. Analogies can be a good way to help a panel unfamiliar with a certain topic better understand that topic.

Mr. Buzard next asked the panel how to handle a judge hostile to your position. Justice Bales noted that if you know the panel beforehand, figure out how you will build a majority. You should pitch your arguments to that subset of the panel. Where you may have no chance with a particular judge, you should focus your energy on persuading the others. Advocates should not forget, however, that members of the majority may agree on a particular outcome but disagree on how to get there. You should be flexible in suggesting alternative routes available for the judges to come together to rule in your favor. If a judge is antagonistic, Mr. Frederick

recommended employing rhetorical tools to maintain control, composure, and poise during the argument. If a judge becomes loud and animated, the advocate should slow down his or her pace, speak more softly, and attempt to tonally contrast with the hostility coming from the bench. If one hostile judge will not let go of a particular question or argument, you should use the opportunity to respond by giving your answer to the other judges as a way of including them and attempting to shift back into a full dialogue. If it becomes obvious from a hostile panel's comments that you have lost your case, however, quickly present your remaining points and conclude your argument. You should never burn your credibility before a court on a single case.

Mr. Townsend further recommended shortening your answers in response to a hostile judge as a way of addressing the topic but then quickly attempting to move on. If a judge is trying to get a concession you cannot give, you could explain that you cannot make that concession because of an overlooked fact in the record or because your client has not authorized you to do so. Justice Bales recommended using the answer as an opportunity to pivot and refocus the argument away from the hostile judge back to the entire panel. For example, if the hostile judge argues that something is not a search therefore it was permissible, you could agree that yes, if this is not a search then no violation occurred. However, follow up by explaining the reasons why your case, in fact, involves a search. Mr. Frederick pointed out that Justice Bales' suggestion regarding pivoting provides a great method for making a number of affirmative points in an incredibly efficient way. Good oral argument strategy includes making your points quickly and then keeping things moving so you don't get trapped.

Because advocates never know what a panel may throw at them during oral argument, it may be wise to heed this panel's advice. In sum, the best strategy includes knowing your decisional points, being prepared, responding directly and succinctly to questions before elaborating, and not falling victim to a hostile judge's questions. Using pivot points effectively and attempting to return to your mantra whenever possible will help keep the argument, aka stylized conversation, moving in a favorable direction.

EFFECTIVELY USING STANDARDS OF REVIEW

By Gaetan Gerville-Reache

At the recent AJEI Summit in sunny San Diego, John Bursch, Michigan's 10th Solicitor General, who has since returned to Warner Norcross & Judd, led an insightful and pragmatic discussion of review standards. The distinguished panel discussing this topic included John Elwood of Vinson & Elkins, a former clerk for Justice Anthony Kennedy; Kannon Shanmugam, former clerk for Justice Antonin Scalia; Judge Fortunato Pedro "Pete" Benavides from the Fifth Circuit Court of Appeals; and Judge N. Randy Smith from the Ninth Circuit Court of Appeals. (Notably, all of the attorneys on the panel had argued multiple times in the United States Supreme Court: Elwood 7 times, Bursch 8 times, and Shanmugam 12 times.) The panelists discussed and debated the purpose of review standards, their impact on the outcome, ways to effectively use (or minimize) appellate review standards to their clients' benefit, and standards of particular interest and difficulty. What follows is a recap of that intriguing discourse, organized according to the various questions posed by John Bursch.

What is important to you about the standard of review?

Elwood confessed that his perspective on the review standard typically depends on whether he is sitting to the right or to the left of the bench. As the appellant, the appeal is another bite at the apple (i.e., the

review standard is less important). As the appellee, he experiences an endowment effect, and just tries to hang on to the favorable judgment (i.e., the review standard is what you cling to).

Judge Benavides pointed out that the standards are there for proper governance of the judicial process. They preserve stability and respect for finality while at the same time ensuring the law is consistent. That is why questions of law are reviewed de novo. A review for abuse of discretion, on the other hand, signals that the court is not free to substitute its decision for that of the trial court.

In Kannon Shanmugam's view, the standards are what differentiate trial lawyers from appellate lawyers. Appellate advocates look at the world through those lenses. If the two were sitting on a couch watching football, the trial lawyer would say the ball was down, the call has to be reversed. The appellate lawyer would say: well, it looks that way, but I don't think the standard for overturning the decision is met.

Judge Smith posited that the standard dictates how rigorously the court will look at the issue before it. It affects whether you appeal, how you brief the issues, what arguments you make, what the important issues are at trial, and how you recount the facts on appeal. Each judge takes a different approach to the standards. His view is different from other judges on the circuit. At the same time, if you have to draft a brief for judges from opposite sides of the spectrum, the review standard can be what brings them together on the result.

Is there a clear difference between the various standards?

John Bursch presented a fascinating study of the five districts in the Illinois Court of Appeals revealing that courts may not be treating review standards exactly the way one would expect. In Illinois, appeals are decided by a panel from a single district rather than by multi-district panels. The study looked at reversal rates within each district across four standards: the "de novo" standard, the "clearly erroneous" standard, the "manifest weight of the evidence" standard, and the "abuse of discretion" standard. Bursch presented charts of the results, showing that courts applied the more deferential standards inconsistently; there was a wide variation in reversal rates between the five districts for the more deferential standards. Interestingly, the charts also showed that between the de novo standard and the clearly erroneous standard, there was, overall, no material difference in reversal rates.

Elwood found the outcome of this survey counterintuitive. When you limit yourself to only two or three issues, you tend to eliminate the issues with difficult review standards. Issues reviewed under the clearly erroneous standard are usually the first to go. Even issues that fall under abuse of discretion can sometimes be reframed as a legal error to make them friendlier to the appellant. Clear error issues, on the other hand, are hard, if not impossible, to reframe as a legal error.

Shanmugam observed that these survey results are extremely important for issue selection. "At the risk of sounding like a legal realist, there are really only two standards: de novo and deferential," said Shanmugam. Of course, there are nuances, but when you get down to it, the standards distinguish only between those errors providing a clear shot at reversal and those errors overturned only if the appellate court is firmly convinced that the trial court got it wrong. If you are the appellee, you will use the deferential standard to frame the issues. If you are the appellant, you try to minimize the significance of the standard. In either case, a good appellate lawyer will be mindful of the standard, mentioning it not only in the standard-of-review section but also throughout the argument section. You might not want to mention it on every page, but counsel should recognize it and incorporate it into her argument to show she can prevail under that standard.

How do you succeed on appeal when the most important issue is subject to deferential review?

Elwood said you really have to avoid the deferential standard at all costs, and that usually means digging into the record and learning it inside out. You need to find good statements from the judge showing that the lower court applied the wrong legal principle. If there is silence in the record, good luck. Though you hate to appeal a 70-page opinion because it suggests significant thought, the length also gives you a lot to work with in searching for legal error.

Shanmugam pointed out that often the hard work on a brief happens in the argument section, but when the key issue calls for a deferential standard, that usually means it involves questions of fact. Then the hard work is in the statement of the facts. The appellant is first to tell the story, and that is a powerful opportunity to highlight the evidence and the court's misstatements of the facts and to influence the appellate court's first impression of the case. Tell the story in a way that is fair-minded but illustrates where the court went awry; you are then 99% of the way there in making your argument.

Shanmugam went on to say that the appellant has to face up to the standard. Sometimes there is a real debate about what the standard should be. Or there may be a difficult line to draw between issues of law and of fact in cases involving mixed questions of law and fact. Take advantage of those opportunities if they exist.

Elwood added that crafting a good statement of facts is frequently overlooked. Some attorneys are too argumentative. The Solicitor General's office does a good job with this, he said. The office appears fair in its statement of facts, but through a selective inclusion and framing, it makes a strong case for the Government's position. The Solicitor General does not pound the table in the fact section. If you sound like an honest broker, the court may be more likely to listen to you and adopt your world view.

Judge Benavides said that he evaluates a procedural or evidentiary question by the applicable review standard, but when the court is forced to take a hard look at what the standard means, differences often appear among judges. You can usually find cases that describe the standard in a way that can be helpful to your case. Those different pronouncements can affect their view. Thus, it helps to cast your discussion and argument in the context of those helpful formulations of the review standard.

Judge Smith said that he relies on two basic principles as an appellate judge. First, there is a presumption of correctness. Second, the court can affirm on any ground. (The court must reach the correct decision, but not necessarily for the reasons given by the advocates.) The review standard reflects how difficult it will be for the appellant to overcome the presumption of correctness. With de novo review, this presumption evaporates immediately. With clear error, the court needs to have a firm conviction that a mistake was made. With the abuse of discretion standard, the result has to be implausible and unreasonable based on the record.

Judge Smith added that one should not think that conservatives are more wed to the standards than liberals. He finds the conservatives are just as willing to look past the standard to get to the result that they want. Judge Smith warned against starting with a discussion of the review standard at oral argument. Appellate judges can get really involved in the underlying issues when they want to, but when they are forced to think about the standard, they are more likely to step back and not get as involved.

To the judges on the panel, how does your thinking about the standard make its way into the opinion and how does it differ from your colleagues' view?

According to Judge Benavides, something is happening in the Fifth Circuit in terms of how the review standards are perceived. For instance, until 1981, the court had never granted mandamus in a

transfer of venue case. It had recognized that mandamus could be available. But the court never granted it; the case was just sent back for the judge to consider the right standards for venue transfer. If the judge announced the correct factors, the court would not weigh the analysis and there would be no mandamus. Abuse of discretion review applies after the final order enters. As the mandamus standard goes, unless the abuse of discretion is "clear and indisputable," the court should not grant mandamus.

Then, in 1981, a really bad case came out, where the trial court judge relied on a factor that it should not have considered in denying transfer of venue, while all the other factors went the other way, favoring a venue transfer The Fifth Circuit held that mandamus should lie. Then another bad case came along, where the judge outlined all of the factors, and did not add any extra ones to the analysis, but the result was incorrect. En banc, the Fifth Circuit held that when all the factors favor venue transfer, it is a "clear and indisputable" abuse of discretion to deny a transfer of venue, and mandamus relief is warranted. But when most but not all of the factors favor a transfer of venue, then there is no "clear and indisputable" abuse of discretion and no mandamus relief.

Judge Benavides's point is that the outcome often turns on how the judges perceive and characterize the standard. He lamented that sometimes, the court will characterize an issue a mixed question to avoid the deferential standard and do what it wants with a fact laden issue that should be deferentially reviewed. The existence of a legal question does not always dictate de novo review. Judge Benavides noted that there are some times when the court must defer even to purely legal determinations. Under Antiterrorism and Effective Death Penalty Act, "we are not to stick our nose in it, unless they come down totally outside what the Supreme Court has said or made a very bad determination."

How do you view the standard applied to en banc petitions?

The Fifth Circuit has a standard rule for granting en banc petitions, said Judge Benavides. It first has to be a substantial legal question. The opinion under review must fail to conform with Supreme Court precedent, involve a significant legal question, or be a really important case. Sometimes the latter is enough. The court used to have a rule that it would not address state law questions. But the court has started doing that too, so that limitation was removed from the rule. Judges often differ on what amounts to an important legal issue. Sometimes it is a matter of protecting your own opinion from ten years ago. Judge Benavides feels that the Fifth Circuit does a fairly good job at holding to its standard. This is evident in the fact that while some think there is too much en banc review, an equal number of judges think that there is not enough.

How do you establish that your case is so important that it deserves en banc review?

Shanmugam observed that the standard for en banc review is pretty stringent, by and large. And it is strictly applied. He saw a statistic that in the last year, in the entire country, fewer en banc petitions were granted than cert petitions. Shanmugam admitted that he has a case on his plate at the moment where he is foregoing rehearing but would nevertheless file a petition for writ of certiorari. In some circuits, there is no decent chance at en banc review, but there is a good chance of being granted a writ of certiorari. In a case Elwood is handling, he recently looked at the chances for en banc review and determined he had a ten-times-greater chance that the United States Supreme Court will grant cert.

One way to establish importance, said Elwood, is to show that the issue comes up every day in the courts below. In other words, volume is one way to demonstrate importance. Confusion is another way. The amount of money at issue is another way. "Commentators screaming bloody murder for you is

also great," he said, but that is less common. Then, the next best thing is amici support. But finding someone interested is difficult. The timing of the process also makes it difficult to garner amici support, unless the government gets a really long extension.

Judge Smith added that a conflict between the underlying decision and a decision of the Supreme Court or a decision within the same circuit would probably qualify as important enough. A conflict with other circuits can also qualify as an important issue.

HIRING OUTSIDE APPELLATE COUNSEL: THE IN-HOUSE PERSPECTIVE

By Deena Jo Schneider

One of the final programs at the 2013 AJEI Summit featured a trio of experienced corporate counsel who spoke about their views and practices concerning hiring outside appellate counsel in appropriate cases. The panel included Maggie Heim, Senior Vice President, Content Protection at Sony Pictures Entertainment; Deanna Lee Johnston, Vice President Litigation & Coverage Counsel at Fireman's Fund Insurance Company; and Alexander H. Rogers, Senior Vice President & Legal Counsel at Qualcomm, Inc. Katharine J. Galston, Counsel at Akin Gump Strauss Hauer & Feld LLP, ably moderated the program. The panelists all recognized the value of having lawyers with appellate expertise involved in their cases but employed somewhat different methods of accomplishing this. They provided helpful advice on how appellate lawyers can provide value at both the trial and appellate stages of litigation and specific tips on how appellate lawyers can better market themselves and their services. The speakers' views on various specific points raised by Kate and comments and questions from the audience are summarized below.

Factors motivating hiring of appellate counsel and timing

Alex retains appellate counsel in every case and often before it is ripe for appeal, such as when a motion for summary judgment or judgment on the pleadings is being prepared. Deanna does not always hire appellate counsel, especially at the trial level. The factors that lead her to do so include the amount at stake, the precedential nature of the legal issues, the value of having appellate expertise during motion practice, and the likelihood of an appeal.

Both Alex and Deanna consider it important to integrate appellate counsel hired at the trial level into the litigation team and to maintain a role for trial counsel on appeal. They each sometimes have trial counsel continue as the primary lawyer on an appeal. Even in this situation, Alex will still bring in an appellate lawyer, possibly at the same firm, to obtain a fresh and objective view of the case and to shed light on the appellate process. He views this not as switching horses but rather using different people to handle different aspects of the case. Deanna noted that many trial lawyers also regularly litigate appeals. She tries to select the best attorney to handle the trial and then the best attorney to handle the appeal. If a case is fact intensive, this weighs (but not conclusively) in favor of relying at the appellate level on the lawyer who built the record at trial. When the questions presented are primarily legal, a lawyer well-versed in that substantive area of the law who has credibility with the appellate court may be the better choice.

In contrast, Maggie tends not to bring appellate counsel into a case but to hire a trial lawyer who also has appellate expertise to provide that dual perspective throughout the litigation. An exception is

when Sony or one of its trade associations participates as an amicus in a case that is viewed as having an industry-wide impact. Appellate counsel is regularly hired in such situations.

Value obtained from hiring appellate counsel, especially at the trial level

Members of the audience expressed the view that while trial lawyers may have a better feel for the facts than appellate lawyers, they tend not to be as objective or sensitive to the need to preserve errors and create the best possible record for appeal. Appellate lawyers approach the record as the appellate court will, whereas trial lawyers may blur the line between the facts and what is actually in the record. Additionally, appellate lawyers are more familiar with the legal standards that will govern on appeal and inform the key points that should be incorporated into the record to maximize the chance of success. They can be particularly useful resources on motions for summary judgment, where the issues are legal and frequently preview the points that will be raised on appeal. These are some of the reasons why it is good to have an appellate lawyer present at the trial level, assuming the case is large or important enough to warrant this investment.

Maggie and Alex agreed that appellate expertise at the trial level is desirable but noted that often the trial team is able to provide that. Accomplished trial lawyers are used to making extremely quick decisions on how to present a case and create a good appellate record. Alex added that it is the job of appellate lawyers to educate prospective clients as to the value they can add at trial and how they will integrate themselves into the litigation team and avoid creating tension or distractions.

Deanna recommended a recently published book called *The End of Lawyers*? by Richard Susskind, which discusses how legal services are currently provided and a range of future options. She suggested that appellate lawyers consider where their particular skill sets can best be used throughout a litigation and then market their services in those niche areas, including pretrial motions, summary judgment motions, and motions in limine in addition to appeals.

Researching and selecting appellate counsel

Maggie reaches out to California appellate lawyers she knows for recommendations for lawyers in other locations. Sony generally hires larger firms with both trial and appellate capabilities. Maggie makes the final decisions after talking with other members of the in-house legal department and occasionally executives who may have suggestions for particular cases. She is also one of six in-house lawyers from different companies who retain appellate counsel to handle cases involving the movie industry on behalf of the Motion Picture Association of America. While both Sony and the MPAA tend to turn to a group of lawyers they have previously used, they are always looking for and researching new suggestions to expand that group. When specialized subjects such as copyright are involved, they generally look for someone who specializes in that area as opposed to an appellate lawyer who is a generalist. They can usually find a lawyer or a law firm with both substantive and appellate expertise.

Alex also is always looking for potential new counsel because Qualcomm is involved in between 40 and 70 cases a year and there are many actual and policy conflicts in its industry so big firms are often unavailable. Unlike law firms, appellate lawyers rarely request the opportunity to pitch their capabilities to him. Some general counsel for large companies may feel obliged to hire a large firm even if they believe a smaller firm or solo practitioner could do as good or even a better job because of their desire to avoid being blamed if the litigation does not go well. Alex personally considers small boutique firms a good option because they are less likely to have conflicts. When educated on Qualcomm's key policy issues, they can be particularly effective as amicus

counsel. He will sometimes ask trial counsel for appellate counsel suggestions but only when he thinks the conversation will be a positive one. In other cases, he will make the decision himself and inform trial counsel. His goal is always to have a good working relationship among counsel that will generate the best overall work product.

As in-house counsel at an insurance company that wants to keep its costs down, Deanna loves to hire small law firms and solo practitioners. Her focus is always hiring and creating a relationship with a particular lawyer, not a firm. In larger cases that require appellate counsel, Fireman's Fund collaborates with the general counsel's office and claims organization and will invite a few appellate attorneys to come in and pitch the case. Deanna will also ask the trial lawyer for an appellate counsel recommendation if she has not been able to identify one. Everyone has a chance to provide input before the final decision is made and stands behind it, so she does not worry that if an appeal is lost she will be blamed for not hiring a large firm.

How small firms and boutiques can better market their appellate expertise

Deanna commented that some lawyers are very persistent about seeking an opportunity to talk with her, and that can sometimes be effective. She is less interested in a lawyer's hourly rate than the value that will be added to the case from a holistic perspective, such as an explanation as to how he or she would approach the case and hone in on the key issues.

Alex noted that the appellate lawyers he hires do not necessarily take the lead even on briefing. A smaller firm can participate in litigation in a variety of ways, such as assisting with *Daubert* issues, pretrial briefing, or other aspects of the case to set it up for appeal, and thereby demonstrate the firm's judgment and skills to build a deeper relationship with the client going forward.

Amicus participation opportunities

Maggie is very interested in receiving information from outside counsel that might help to identify important cases or issues that could affect Sony or one of its industries or industries having similar interests. This is a good way for a law firm to broaden the scope of information it provides prospective clients and gain additional exposure with them. Alex agreed that these types of informational contacts are helpful but noted that Qualcomm is cautious about agreeing to play an amicus role in litigation for fear that its brief may end up being used against it in a later case. While he is happy to have cases brought to his attention, he may become involved in only one or two of every five he considers.

Deanna commented that Fireman's Fund usually does not participate alone as an amicus but will do so through its trade organization, the American Insurance Association. The company also sometimes asks the AIA to lend industry support in its own cases.

Creating successful relationships with in-house and trial counsel

Alex suggested that appellate lawyers not take hardline positions and exercise their interpersonal skills when interacting with trial counsel, who are likely to be fairly invested in their point of view after years of working on a particular case. Even when there is disagreement over how to prioritize arguments or whether to include a particular argument, the outside lawyers should try to work things out among themselves and avoid creating stand-offs that the client must resolve. Maggie added that the appellate lawyers she works with must be able to handle a diversity of opinions and clients because so many of the cases involve multiple lawyers, companies, and even industries. A good appellate lawyer requires excellent social skills to navigate through the differing views, occupy the "sensible center," and find a unified vision that will make everyone feel that their views have been incorporated.

Deanna likes to see lively discourse among trial and appellate counsel and the in-house team as long as the debates do not become personal. The final calls she must make at the end of the day are more informed when she has received thoughtful input from diverse sources. The key is for all participants to be respectful to one another and not turn challenges into disputes that she has to referee.

Billing for appellate services

Maggie stated that the MPAA generally negotiates a fixed rate for amicus briefs, with Sony trying to have some input in the process. About 14 industry amicus briefs were filed last year for the MPAA at an average cost of around $10,000. This may be a bit of a loss leader for the appellate lawyers involved, but Maggie pointed out that the briefs are often cited by the courts so can generate significant interest.

Alex noted that appellate counsel fees vary from case to case. One of the lawyers Qualcomm uses quite a lot in major cases has the highest hourly rate of all its outside litigators, and the company considers that cost well-spent. In contrast, it will look for a small firm to assist in a more ordinary contract case and try to build a new relationship in the process.

Deanna tries to determine what makes the most sense for each case. She sometimes uses fixed fees as Maggie describes and in appropriate appeals will pay high hourly rates as does Alex. She also is happy to negotiate a flat fee with a kicker in the event of a good outcome. In her view, a small firm can obtain a competitive advantage over a larger or national firm by being willing to engage in creative billing arrangements.

Specialists vs. generalists

The panelists all agreed with a comment from the audience that a generalist appellate lawyer can serve a valuable role in simplifying a case so it will be more understandable to the judges who also are generalists. Alex considers this to be part of the objectivity that appellate lawyers add to the process beyond their procedural expertise. Maggie commented that appellate judges rarely know much about technology or specialized areas of law like copyright, so it is good to have non-specialists involved in preparing the briefs and argument to make them understandable. In her view, appellate lawyers should explain this better to clients so they will rely less on specialists. Deanna prefers not to use appellate lawyers who specialize in particular substantive areas because in her experience appellate generalists tend to look at cases from a higher level and are more creative in how they present the arguments. They serve as a nice balance to her trial lawyers, who tend to be specialists in the subject matters at issue, and when working together provide the best of both worlds.*By Deena Jo Schneider, program moderator*

I had the pleasure of moderating the program at the 2013 ABA Midyear Meeting entitled "Effective Oral Advocacy: What You Really Need to Know." The program, which was sponsored by the Council of Appellate Lawyers, featured Judge Andre M. Davis of the United States Court of Appeals for the Fourth Circuit; Justice Elizabeth Lang-Miers of the Texas Fifth District Court of Appeals; and Roger D. Townsend, a partner in the Houston office of Alexander Dubose & Townsend LLP.

The panel members have had very significant experience in oral argument, especially at the appellate level. Judge Davis, who was a trial judge for 22 years in the United States District Court for the District of Maryland and in Baltimore, also was an appellate attorney for the Department of Justice, an Assistant U.S. Attorney for the District of Maryland, and a private practitioner. Justice Lang-Miers practiced for 28 years at the firm now known as Locke Lord, LLP before joining the bench in 2003. And Roger D. Townsend has been certified in civil appellate law by the Texas Board of Legal Specialization since 1987. The following is just a sampling of these individuals' many prominent positions in the judiciary and the bar: Judge Davis has served as Chair of

the Conference of Federal Trial Judges and on the Executive Committee of the Maryland Judicial Conference, Justice Lang-Miers as Chair of the Appellate Judges Conference of the ABA's Judicial Division and on the Executive Committee of the Board of Directors of the State Bar of Texas, and Mr. Townsend as President of the American Academy of Appellate Lawyers and Chair of the Appellate Practice and Advocacy Section of the State Bar of Texas.

Judge Davis began the program by offering what he called his personal "six R's" of oral argument. Starting with three negative R's, he said first that counsel should never *read* during oral argument, except (perhaps) for 20 words of a statute or regulation. Second, counsel should not *recite,* i.e., deliver a prepared speech as opposed to having a conversation with him. Third, counsel should not *repeat* themselves; if they do not have something new to say, they should sit down. Judge Davis then provided three positive oral argument R's for counsel, beginning with *respect* for the court, judges, client, and record, which he noted he and the other judges on his court will return. Second, counsel should *retreat* if it seems they have lost an issue and move on to another point. Finally, counsel should work to *recover* their footing by offering him something fresh a few minutes later or during rebuttal to provide a different take on what might have appeared to be a lost point.

Justice Lang-Miers focused her opening remarks on how counsel should prepare for oral argument. She quoted United States Supreme Court Justice Robert Jackson as saying that as Solicitor General he made three arguments in every case: the one he planned, which was logical, coherent, and complete; the one he actually presented, which was interrupted, incoherent, disjointed, and disappointing; and the utterly devastating one he thought of after going to bed that night. Providing a judge's as opposed to lawyer's perspective, Justice Lang-Miers noted that in her experience, most judges prepare for oral argument using the briefs as a workbook. If counsel does not plan to follow the organization of the brief during argument, it is important to tell the court that at the outset so the judges can keep on track and counsel does not waste the value of their preparation. Counsel should also consider in advance how the opinion must read to reach his or her desired result and then use that as a practical focus for guiding the court during the argument, including when responding to questions.

Mr. Townsend reminded the audience of the old saying that a person who wants to learn to catch a fish should ask a fish, not a fisherman, and suggested that judges may be in a better position to tell lawyers how to conduct themselves during oral argument than other lawyers. He then gave a brief overview of how he approaches argument. It is important to be respectful and try to keep on track in light of the time limits, focusing on the relevant law and material facts on each of the issues. At the same time, counsel needs to be prepared to engage in a conversation with the court and earn its respect by showing that he or she knows the issues, the record, and the law, and has thought through the problems in the case. This will give the judges comfort that they will not be making a mistake by ruling in the way counsel advocates. Counsel should also figure out in advance the minimum necessary to win, which then allows concessions on unnecessary points while respectfully standing ground on the points that matter.

Responding to my question as to what determines whether oral argument will be held in an appeal and how important it is, Judge Davis noted that the Fourth Circuit now hears argument in the smallest percentage of its 5,000 cases of any federal circuit: about 9%. The court heard many more arguments when he clerked there, and when he joined the bench, he thought he would put more cases on the argument calendar. After serving for three years, he has concluded that the court does a pretty good job of hearing argument in cases where the likely benefit exceeds the likely cost. Counsel may request or

disclaim argument, but the decision whether to hear argument in a particular case is the court's. Staff attorneys screen the cases carefully and also work up those that are not assigned to be argued. Any judge on a panel may put a case on the argument calendar; the other judges may then elect whether to remain on the panel or disclaim further interest in the case.

The Fourth Circuit now hears four cases a day six times a year, giving each side 20 minutes and almost always finishing before lunch. It is the only circuit where the judges come off the bench after each argument to shake counsel's hands, which is viewed as a means of preserving respect and civility.

Justice Lang-Miers stated that counsel must request argument in the Court of Appeals of Texas. Most, but not all, requests are granted through a judicial screening process. Her court tries to hear as many arguments as possible, but has a substantial non-argument docket as well. As the legislature has created more interlocutory and expedited appeals, the court has established an accelerated docket to deal with cases with statutory priority. Justice Lang-Miers personally loves oral argument and thinks most other judges also enjoy it. A good presentation can be very persuasive and particularly valuable in a case of first impression. She has seen arguments occasionally change judges' minds and believes the process helps improve the quality of opinions.

Following up on this discussion, I asked what factors go into appellate courts' decision to hear argument and whether a denial means that the decision below will be affirmed. Judge Davis noted that while the appellate reversal rate varies from jurisdiction to jurisdiction, the overall rate in civil cases is in the low single digits. Judges on the Fourth Circuit are reluctant to impose on litigants and counsel the financial cost and exertion of coming to Richmond for argument where the outcome of the case seems very clear based on existing precedent. However, the single-judge opt-out procedure may result in argument being held even in some such cases, especially where the stakes are high or the parties are corporations not likely to be concerned about cost. Argument is also generally granted when an appeal involves a serious constitutional challenge or criminal law question. Additionally, the court is now putting more cases on the argument calendar to fill in gaps in Fourth Circuit jurisprudence that resulted from the shortage of judges on the court for a number of years.

I then asked Mr. Townsend whether he ever opts not to request oral argument or agrees to a shorter than normal time limit. He responded that when representing an appellant, he always asks for argument because some judges have indicated they will not take a case seriously absent such a request. In these circumstances, he uses the statement requesting oral argument to summarize the problem with the decision on appeal and preview his substantive argument. When representing an appellee, he tries to give the court his honest view as to whether oral argument is appropriate and why.

In response to a question from the audience about oral argument in the trial court, Justice Lang-Miers stated that in her view the basic rules and skills are the same in all courts. One difference between trial and appellate courts is that an appellate court is focusing on just the part of the case that is before it, whereas a trial judge or jury has a much broader view. Additionally, while arguments in the trial court are likely to be very fact-based, arguing the facts on appeal is probably not a good use of counsel's time.

Judge Davis agreed and noted that another important R is the record, which is created in the trial court and not on appeal. In his view, as a general matter state courts are skeptical of or even hostile to summary judgment because of their profound respect for the jury trial process. In contrast, federal courts are more willing to grant summary judgment, especially after the Supreme Court's trilogy of cases in 1986 permitting this. It is important to argue the evidence as opposed to the facts on a summary

judgment motion; rather than proving a point, counsel need only muster sufficient support to get to the jury. Both Judge Davis and Justice Lang-Miers stressed the importance of preserving issues properly and creating a good record. Appellate counsel should make sure that trial lawyers they work with regularly understand how best to develop cases in light of the standards of review that will apply on appeal depending on the nature of the issues and the proceedings below.

A follow-up question from the audience concerned the criteria used by appellate courts to filter the cases in which argument will be heard and the propriety of denying litigants a full opportunity to present their case. Judge Davis agreed that in an ideal world, argument would be held in more cases, or at least when it was requested. But every error that is briefed is not a reversible error. Counsel often argue points that are not critical to the decision below or for changes or evolution in the law. Judge Davis carefully scrutinizes all the cases assigned to him and votes to hear argument when there is a plausible argument that what the district court did constituted reversible error. Given the standard of review, an appeal from a judgment on a jury verdict or a trial judge's ruling on a matter of evidence is unlikely to be successful. He does not consider it to be a good use of judicial or litigants' resources to have counsel come to Richmond and stay overnight to present argument for 20 minutes in such a case. Technological advances are making it possible to hold arguments with some counsel and judges participating from remote locations; as a result, argument may be heard in more cases in the future.

Justice Lang-Miers added that a court's argument docket has only a limited number of slots. The court fills them based on the priorities set by the legislature and the briefs in the cases before it, which it assumes present the parties' best arguments. The judges have many other obligations beyond hearing argument, including writing opinions and dealing with motions for rehearing and writs. If counsel believes there is a particular reason why a case should be argued, this should be explained in the statement requesting argument.

Another audience question was whether an appellate advocate is more likely to persuade the court based on fairness or legal principles. Mr. Townsend stated that a legally sound and logical argument is the key to success on appeal. Notions of fairness or explanations of how the requested rule will work in the real world will help to inform the argument but should not be its primary basis. Judge Davis agreed, reiterating that the job of appellate courts is to correct reversible error. A party's brief should tell the court how to rule in its favor based on a statute, rule, or precedent. Oral argument offers an opportunity to tell the court why it should rule in the party's favor, which touches on fairness but is not the rule of decision. Judge Lang-Miers added that judges do not make law but apply the law to the facts. The resulting outcome may not seem fair, but that is not a point of persuasion except to the extent it is incorporated into the legal standard.

One audience question concerned a new rule of Texas procedure generally limiting the length of trials in civil cases involving requests for less than $100,000 in monetary relief to just eight hours per side. Justice Lang-Miers expressed the view that while this rule may present some issues, appeals from cases following it will probably be reviewed on an abuse of discretion standard, which is difficult to satisfy.

In response to another audience question, Judge Davis said that the percentage of cases in which his ultimate decision has been altered by oral argument is probably in the very low single digits. He comes to the bench well prepared to decide the case with a view of the law and the likely outcome that is not often modified. He prepares every case in the same way whether or not it is being argued, giving careful attention to the memos prepared by clerks or staff attorneys and doing independent research where appropriate. Even when argument does not change the result, the opinion may benefit from the discus-

sion of the law and also be more sympathetic to the losing party. Judge Davis later noted that in the Fourth Circuit, judges generally do not discuss cases until the conference after the oral argument, when they express their views in reverse order of seniority and tentative decisions and opinion writing assignments are then made. In contrast, opinions are assigned before oral argument in the intermediate appellate court in Maryland and some other states.

Justice Lang-Miers noted that the judges on her court also prepare thoroughly for oral argument. The decision who will write the opinion is not made until afterwards, so every judge comes to court with the understanding that he or she may end up as the author and prepares accordingly. She personally reviews portions of the record as well as the briefs and cases and writes a pre-submission memo to herself. There is a chance that argument will change a judge's mind, but the likelihood of this occurring is relatively small. The decisional process can be fluid, because after the initial conference the opinion author may look further into some of the issues and the panel may have additional conversation. While counsel may want to deliver a final filing as late as possible to avoid giving the other side extra time to respond, it is important to make sure the judges have time to review it as part of their argument preparation.

Judge Davis added in response to a similar question that argument is more likely to alter the result in an appeal when it reveals a fact or point that was not presented or well-developed in the briefs or when the briefs are not well-written. While it is not the court's job to make the world safe from poor lawyers, no judge wants to rule against an appellant because he or she had a lawyer whose brief did not explain what the case is really about and what went wrong in the court below. Justice Lang-Miers stated that an appellate court is more likely to change its mind on a discrete legal issue than a question of abuse of discretion, which is what most appeals present. In her view, the most effective appellate arguments occur when counsel have thought in advance about the easiest way for the court to rule in his or her client's favor, and then focus on the key issue and the specific points the court should consider to reach the desired result.

I asked the panel to discuss in more detail how counsel should prepare for and present an appellate argument. Mr. Townsend noted that the starting point is always the briefs because, as previously explained, the judges hearing the case will have a strong leaning based on what they have read and it will be very hard to shift them in a different direction. Thus, a lawyer should begin by presenting a solid case on paper. As an appellant, it is easiest to prevail if the dispute is over the law and the case is one of first impression. In contrast, a dispute over the sufficiency of the evidence will rarely be successful. If the dispute is over the application of the law to the facts, it may be best to point out why the other side's suggested application would be unfair or unworkable in this case or focus on a procedural error that avoids judicial consideration of the facts.

Mr. Townsend noted that once counsel has identified the best arguments, every section of the brief should be built around them, including the statement of facts. At oral argument, counsel should proceed based on the same structure but highlighting the key points in sound bites. The presentation should be legally sound but also appeal to the judges' senses of fairness and pragmatism. As Edmond Cahn wrote long ago in *The Sense of Injustice*, it is much easier to argue that a particular result is unfair than that it is fair.

Mr. Townsend perceives three general values to oral argument. First, argument appears to provide due process to the client, who knows it had its day in court even if it lost the case. Second, argument presents the opportunity for counsel to address any questions the judges may have about the case after reading the briefs. (Ironically, however, a judge is likely to have fewer questions in better-briefed cases and have less confidence in the quality of the an-

swers in cases that are not as well-briefed.) Third, where opinion writing responsibility is assigned in advance of argument to one of the judges on the panel, argument may be counsel's best chance to attract the attention of the other two judges.

Judge Davis added that a lawyer who prepares for argument properly will never be paid for all the effort because he or she will spend more time than is reasonably necessary reviewing the record, preparing the brief, participating in moot courts, updating the research, and having at hand the key record citations and the important cases. Justice Lang-Miers noted certain phrases counsel should never say, including "I wasn't trial counsel" and "the judge or jury didn't get it." She reiterated that the key to a good argument is putting yourself in the court's place, thinking about what they need to do to reach the decision you want for your client, and avoiding extraneous matters.

The time allotted to this program ended long before the panelists ran out of pointers on oral argument. The speakers' give and take and the number of audience questions made for a lively pace and interesting discussion. I hope to be able to continue the conversation on another occasion.

MAKING APPELLATE BRIEFS MORE EFFECTIVE: SELECTING ISSUES AND STRUCTURING THE ARGUMENT

By Deena Jo Schneider

I had the pleasure this summer of moderating a webinar on how lawyers can improve their appellate briefs, with specific focus on how to select the issues to be presented and structure the argument. The CLE program, which was presented by the ABA's Council of Appellate Lawyers and co-sponsored by the ABA's Judicial Division and Center for Professional Development, featured Judge Danny J. Boggs of the United States Court of Appeals for the Sixth Circuit, Susan K. Alexander of Robbins Geller Rudman & Dowd LLP, and Roger D. Townsend of Alexander Dubose Jefferson & Townsend LLP.

The panel members all have extensive experience preparing and reviewing appellate briefs. Judge Boggs joined the bench in 1986 and has been a member of the Advisory Committee on Appellate Rules of the Judicial Conference of the United States and Chair of the ABA's Appellate Judges Conference. Suzi Alexander has represented individuals, labor unions, and pension funds in securities fraud class action appeals for the past 13 years and previously worked with the California Appellate Project, where she prepared and supervised appeals and habeas corpus petitions on behalf of individuals sentenced to death. And Roger Townsend has handled several hundred appeals, written prolifically on appellate advocacy, and held numerous leadership positions in appellate organizations, currently serving as the President of the American Academy of Appellate Lawyers.

The program was presented in a question and answer format, with the audience having the opportunity to ask questions as it proceeded. The panelists offered many helpful insights on how to analyze appeals and present them persuasively. The following summarizes the discussion on the many different topics covered:

What makes appellate briefs effective

Judge Boggs noted that a good appellate brief should flow smoothly and tell a coherent story with no grammatical problems, logical problems, irrele-

vancies, or inappropriate language to divert from the flow. It must of course be in accord with the law and the facts. It should also be respectful of the other side and the other side's arguments and the court below, even when it needs to disagree with them.

Suzi considers an advocate's most important tool to be personal credibility, so her first rule is to be scrupulously accurate in stating the facts and the law and citing the record and supporting cases. Her second suggestion is to keep the brief interesting by avoiding the passive voice, eliminating unnecessary words, and substituting single words for prepositional phrases. Telling a story that will make the court want to rule for your client based on the facts is also key.

Following the rules

Judge Boggs stated that judges vary on the importance they attach to different appellate briefing rules. The clerk's office will generally check for compliance with rules concerning length and inclusion of various required sections. He personally is more interested in whether the brief makes sense than whether it follows every rule. However, it is important to him that lawyers make sure the page references in the table of authorities are accurate so he can find the discussion about a particular case easily.

Roger believes in knowing and following the rules but exploiting them when appropriate to make a brief more persuasive. For example, the jurisdictional statement can be a good place to point out why a court of discretionary jurisdiction should hear a particular case. Similarly, the statement of the issues often benefits from an introduction to provide context. Bryan Garner's "deep issue" and the Solicitor General's framing paragraph preceding the statement of the questions presented in the Solicitor General's Supreme Court briefs illustrate two different ways of accomplishing this. It is also effective to begin the statement of the case and the summary of argument with a paragraph that sets out the advocate's theme. Another rhetorical technique to consider is "lexical strings," a term Professor George Gopen of Duke uses to describe the repetition of three to five key concepts throughout the brief that the reader will remember.

Why issue selection matters

Judge Boggs noted that the statement of issues is the basis for the structure of the brief. It should be determined by counsel's analysis of what is required to win the case, whether by attacking or defending the lower court's decision. Use of a decision tree can be helpful in identifying the issues to present. In some cases, logic dictates them; in other cases, the lawyer has discretion to choose which are most likely to be successful. The issues selected should always be the ones that lead to the desired outcome. No peripheral points should be included.

Roger agreed that the statement of issues is the most important part of the brief and noted that it is the one area where the court will rarely reach out to supplement the parties' presentation. Although it is the lawyers' job to provide the relevant law and appropriate citations to the record, judges and their staff will research these points if necessary. Cases can be won even when the briefs are inadequate, but counsel must at least identify the right issues. Suzi added that counsel should remember that while they have lived with and understand their case, a court addressing it for the first time needs some context to understand why facts are important or unimportant. The statement of issues explains what the court is being asked to do and serves as the coat hanger for everything else.

The number of issues to present

Judge Boggs stated that the nature of the law and facts and the decision tree for the appeal should dictate the number of issues to present. This will differ from case to case but in his view will only rarely be more than three. Because 85- 90% of all appeals are affirmed, it is usually better to present only one or two major errors that an appellant believes require

overturning. But the nature of some cases, especially jury trials, may require presentation of multiple errors or elements of damage.

Roger agreed that it is best to present as few issues as possible, but sometimes multiple issues must be addressed when a trial has been particularly lengthy, the case involves numerous theories of liability or damages, or counsel wants to keep certain points in play for settlement purposes. Raising just one or two issues is a good way to keep the court's attention, develop the arguments effectively within the space limits, and demonstrate confidence in the strength of your position on appeal.

In response to a question from the audience, the panelists uniformly agreed that when a case presents six theories of liability, all of which were rejected below, counsel should evaluate them critically and determine the one or two (or at most three) best ones to press on appeal. This may require a "tough love" conversation with the client. Judge Boggs added that in the rare case where a party needs to prevail on six points to win, all of them should be discussed at least briefly. In some cases it may be possible to group similar theories or points to decrease the overall number.

Ordering the issues

Roger noted several different ways to order the issues. He generally starts with his best point, that is, the one that has the highest chance of winning based on the standard of review. Another possible order is by the type of relief sought (e.g., reversal of the judgment followed by remand followed by modification of the judgment). Some appeals may involve a contextual point that permeates the entire case and so should be explained to the court first. When these alternative approaches point in different directions, counsel should weigh the issues carefully to try to resolve the tension and also consider obtaining reactions from others before making a final decision on issue order.

Judge Boggs stated that the logical flow of the arguments should be the deciding factor in choosing the order of the issues. The key is to make the decision tree the reader is being asked to follow as clear as possible. Suzi agreed that focusing on how the court can best understand the case is the optimal way to decide issue order.

Suzi added that an effective responsive brief will often flip the order of the issues and deal first with the vulnerabilities in the opening brief. The appellant's reply brief will likely return to the original order and discuss the strongest issue first. Judge Boggs does not think this would be of concern to the court as long as the later briefs explain early on that they are changing the issue order and why. He further noted that rather than covering the same ground as the opening brief, a reply brief should be limited to a refutation of one or two crucial points in the responsive brief. Roger suggested that a lawyer who changes the issue order consider including a cross-index following the table of contents to assist the court in matching responses to arguments. The index can be organized by page number or by section number in the case of electronic briefs.

Selecting the issues

Suzi stated that in deciding what issues to present in an appeal, counsel should consider not just the strength of different arguments and the client's goals but whether each potential issue is sufficiently important that a favorable ruling on it would change the result in the case. This analysis is especially relevant when the appeal involves a dismissal of a case at the pleading stage. She also looks for an erroneous legal standard or a subtle heightening of a standard that was incorrectly applied even if correctly stated and for failure to credit facts or weigh evidence sufficiently with respect to the standard. When appellate jurisdiction is discretionary, she looks for really persuasive facts as the key to attracting the court's attention.

Roger focuses on two factors in deciding which issues to present in an appeal: (1) the relief his client wants and (2) the standard of review and whether he can meet it. Judge Boggs emphasized that lawyers should only select issues to present on appeal that they can win and should be honest with themselves and their clients in determining their chances of success. A brief with a nugget surrounded by dross may not prevail because the court is likely to form a negative view of the case before reaching the nugget.

Creating a structure for the argument

Judge Boggs and Suzi stressed that the key to an effective brief is to lay out a road map early on so the reader can understand counsel's theory of the case and the logic of the presentation. Preparing an outline before beginning to draft may assist in accomplishing this. The road map should be set out in the introduction and previewed in the table of contents.

Judge Boggs recommended that headings in the table of contents be limited to no more than two lines each. Suzi agreed that brevity is important but noted that headings should also provide specifics about the case. Roger also endorsed keeping headings short and suggested that they be drafted or at least revisited after the argument has been fully developed so they fairly reflect each point. Judge Boggs commented that capital letters may be appropriate for single-line headings, but regular type makes longer ones easier to read. In general, it is important for a brief to be physically easy to read and to allow jumping from point to point because often judges do not read word for word.

Organizing the argument

Roger noted that one of the most important tasks of an appellate advocate is determining what is really in dispute and then detailed how he organizes his argument depending on the types of issues presented. When the issues are purely legal and his position is supported by existing law, he lays out the controlling precedents, the policies the law is trying to serve, and any analogous parts of the law suggesting the result he wants. He is also careful to discuss and distinguish any adverse authority that might be viewed as related. In contrast, when he is trying to change the law, he tries to show that circumstances have changed since the law was adopted, the policies it was meant to serve are now being disserved, and changes have occurred in analogous law that support changes in this one. If the court he is appearing before does not have the authority to change the law, he still argues for a change to preserve the point but explains this to avoid losing credibility.

An appeal that presents a primarily factual dispute is very difficult to win. In such a case, Roger acknowledges the standard of review and tries to meet it by finding as many undisputed facts as possible to narrow the dispute and then showing what is wrong with one limited finding. He also looks for evidentiary, procedural, or charge errors that skewed the fact-finding process to turn the standard of review in his favor. In the most common type of appeal that involves the application of law to facts, he again lays out the law and its underlying policies and then argues how a decision in favor of his client is not only the fair result based on the current record but pragmatically workable in future cases.

Suzi agreed with Roger's analysis and emphasized that the bulk of what appellate advocates do occurs before they begin to write. It is critical to begin by reviewing the record fully and thinking the case through with trial counsel and other attorneys to determine the legal errors and standards of review, the helpful and problematic facts, the best few arguments for prevailing, and an overall theme. The KISS (Keep It Simple, Stupid) principle is particularly apt with respect to appeals, and thinking upfront is the best way to generate an appeal that looks easy for the court to decide in your client's favor.

Judge Boggs added that in structuring the argument (having already decided what relief to seek and the main line of attack), counsel should think of the

court not as judges but rather readers who are generally knowledgeable about the law but not this particular case and have a limited amount of time and attention. It is important to create a structure readers can follow easily, with every point foreshadowed so they do not stop to wonder why it is coming up. As he put it, the brief should go down like jello, not cauliflower, and have no burrs. When an appeal requests multiple unrelated forms of relief, such as reversal on the merits and levying of sanctions, the structure of the argument should be adjusted accordingly.

Suzi noted that in Daniel Kahneman's book *Thinking Fast and Slow* explains that a reader is not affected much by material that follows logically (cognitive ease), whereas something unexpected will attract attention (cognitive disease), and wondered about the relevance of this concept to appellate brief-writing. Judge Boggs expressed the view that if a point that seems discordant is inserted in a brief for effect, this should be explained promptly so the judges do not wonder why it is there for long and lose confidence in the template that has been presented for how the case should be decided. Roger noted that as an appellant he deliberately tries to create a discordancy in the facts he presents so the court will react with surprise at the result.

Effective brief-writing techniques

After her initial extensive thinking about the case, Suzi generally begins the brief-writing process by drafting the statement of the issues and outlining the argument to key everything else to that. She typically drafts the facts next because of her belief that equity always matters. Judges are human beings as well as legal decision makers, and she tries to persuade them to want to reach the result she is advocating. It is critical to be faithful to the record and credible as well as an advocate. She focuses on the facts that support her client's position but also anticipates and deals with those that are harmful. The first and last sentences of paragraphs tend to get the most attention, so she places "good" facts there and "bad" facts in the middle of a paragraph. She tries to place the most helpful points at the end of sentences, where readers also focus.

Suzi then turns to the argument, where she also not only presents her own case but responds to the other side's. Even as an appellant, she tries to anticipate and take the sting out of her opponent's points before they are made. Once the argument is completed, she reviews and revises the headings to make sure they reflect the points developed during the drafting process and drafts the summary of argument, which focuses on her legal points. The last thing she drafts is the introduction to the brief, which she tends to make a summary of the factual background of the case.

Roger endorsed this approach and added that he also keeps in mind that the human mind processes information based on what it already knows. Accordingly, he tries to begin the facts with good things about his client so by the time a bad thing is discussed it will not sound quite as bad. He follows the same approach in his argument, building on settled law that nobody disputes and trying to gain some momentum before dealing with more controversial points. Judges generally decide cases based on the law but, in his view, are more likely to distinguish unhelpful authority if they believe that fairness is on your side. He reiterated that it also is important to deal with pragmatics and show that the rule you advocate will be workable in future cases or can be legitimately distinguished if it would be unfair when applied to a different set of facts.

Use of footnotes

Suzi believes that footnotes are overused in briefs and tend to distract the reader's attention. Additionally, a substantive point may not be considered to be preserved if it is raised only in a footnote. She tries to minimize the use of footnotes but occasionally finds a footnote a useful place to respond to a small point made by her opponent that she wants to address in case a judge or clerk picks up on that

point. She cannot remember the last time she filed a brief with more than five footnotes. Judge Boggs agreed that footnotes should be limited as much as possible.

Briefing cross-appeals

Judge Boggs and Suzi noted that in cross-appeals it is particularly important to establish a clear roadmap based on the decision tree so the court will understand how the appeals are interrelated and what would happen if it wants to affirm one point from the main appeal and one from the cross-appeal. When the cross-appeal does not raise a sub-issue to the main appeal, the case can become complicated to brief and argue. Most courts have a default rule establishing which party (typically the first to appeal or the plaintiff below) will be designated as the main appellant unless the parties agree on, or the court orders, a different designation.

Quoting from authorities

Judge Boggs recommended when a case is being cited for what appears to be a discordant proposition, counsel include a quotation to explain its holding. In contrast, paraphrasing is the better approach when cases are cited for a conventional proposition or one that is not likely to be disputed. It is critical to maintain credibility and make sure that any paraphrase will not be undercut by the original text. If a text is ambiguous, it is best to let it stand for itself and argue from it rather than taking the best language out of context.

Roger added that block quotes should be avoided because the reader is likely to skip over them. Suzi noted that Judge Kozinski of the Ninth Circuit has called block quotes "written sleeping pills." If a long quote is important to an argument, Roger recommends breaking it into bite size chunks rather than reproducing it on half a page of the brief. Suzi noted that short bullet points can also be used effectively to highlight the three most important points in a block quote and are good rhetorical devices generally.

Policy considerations

In Judge Boggs' view, a discussion of policy is not critical to deciding most appeals unless the court is faced with a relatively unconstrained choice between competing lines of authority. Counsel should not just appeal to the judges' sense of justice but tie their policy argument to the law, which is the basis on which appellate judges make decisions. Suzi noted that it is also important to be prepared to counter your opponent's point that a legal decision in your client's favor will lead to some parade of horribles. Roger distinguishes between a naked appeal to fairness and the specific policy underlying a particular provision of law at issue. The former will rarely advance the ball; the latter allows you to argue how your facts fit the law and can be an effective form of advocacy.

Writing a Persuasive Appellate Brief: The Judicial and Advocate Perspectives

Join the Council of Appellate Lawyers for a complimentary CLE program at the 2014 Midyear Meeting in Chicago on Friday, February 7th . The program will be from 1:00 p.m. to 2:30 p.m. at the Hyatt Regency Hotel in the Crystal Ballroom A, Green Level, West Tower. Attendees will receive judicial and private-practice insights on all aspects of appellate brief-writing.

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JUDICIAL SELECTION AND DISQUALIFICATION

By Nancy M. Olson

When citizens think of political elections in the United States, campaigns for judicial office likely do not spring to mind. The concept of judicial elections is not new, however. Rather, the idea dates back to Jacksonian democracy as a means of giving citizens a direct voice in selecting judges. What may have started as a democratic ideal has been transformed in an era of modern political campaigns, increasing campaign contributions, growing partisanship, and hotly contested seats on the bench. Against this backdrop, a distinguished panel of jurists discussed issues surrounding judicial selection, disqualification, and ethical dilemmas. John B. Attanasio, Judge William Hawley Atwell Professor and Former Dean, SMU Dedman School of Law, moderated the panel, which featured: Hon. Sarah Parker, Chief Justice of the North Carolina Supreme Court; Hon. Thomas R. Phillips (Ret.), formerly Chief Justice of the Supreme Court of Texas and currently Partner at Baker Botts LLP; and Hon. Ruth V. McGregor (Ret.), formerly Chief Justice of the Supreme Court of Arizona. During this lively discussion, the panelists shared insights on balancing the need to run for election against the judicial duty of impartiality.

The panel began by considering whether the public should rely on the integrity of individual judges to be impartial or whether rules or statutes are necessary to ensure the fairness on the bench as a whole. While the public should be able to rely on the integrity of judicial officers to remain fair and impartial, some panelists expressed the view that lawyers and judges need to maintain public confidence in the judicial system. In other words, while lawyers may generally support or oppose a judicial candidate, they should not get involved in judicial campaigns as a means of influencing judicial decision-making and judicial candidates should not solicit such involvement.

Justice Parker recognized that changes in judicial elections are forcing a change in the way judicial candidates run for office (e.g., more money flows to campaigns from special interest groups independent of the candidate's actions). Unless the judiciary is both fair and impartial and is *perceived* as being so, the public will lose faith in the judicial system. At the trial court level, half of the states have implemented a streamlined procedure adopting an auto-strike system where parties may move to have a case transferred to a different judge. Although this has not been adopted at the appellate level, some panelists thought that this tool may help address any perception of unfairness and partiality. Justice McGregor agreed that having a procedure to address issues of bias is important, and the debate should focus on the best procedure. Recognizing the importance of public perception, the panel analyzed how perceptions could be changed. Historically, the public may have viewed judicial elections in a different light than other types of political elections. Over the past few decades, however, with social issues increasingly being addressed by judicial decisions rather than legislative enactments, interest groups increasingly exert pressure on judicial candidates to take positions on such issues in determining whether to endorse the candidates. The view of voters also presents a conundrum because, on one hand, voters complain that elected judges are not impartial. On the other hand, however, the same voters continue to clamor for the right to elect the judiciary. While no immediate solution to this tension became readily apparent from the discussion, the panel agreed that better informed voters may be the key to addressing the problem.

The panel next considered how to deal with recusal for past political support in practical terms. Recusal may depend on a number of factors such as the amount of contribution, the source of contribution, the type of case (e.g., civil/criminal, jury trial/bench

trial, trial/appellate), and the judge's knowledge of the contribution. With respect to contribution source, the panel considered whether contributions from lawyers should be treated differently because judges do not decide for or against a lawyer but instead decide for or against a particular party. This rule might make sense, some panelists believed. Because lawyers owe a duty to the court, most lawyers recognize the importance of electing well-qualified judges, and lawyers may make campaign contributions with an eye toward improving the quality of the bench. Parties, on the other hand, are not representatives of the court and they lack the same understanding and commitment to the purpose and function of the judicial system.

Justice Phillips suggested that statutory limits on campaign contributions could help improve the perception of fairness and impartiality. Difficulties arise, however, when attempting to draw a bright line demarcating an acceptable contribution amount because setting a fixed amount does not necessarily consider proportionality, independent expenditures (i.e., not a direct contribution to the candidate), aggregation of contributions, and contributions for/against an opponent. While the perfect recusal statute may be an elusive concept, in order for any recusal statute to function properly, the panel agreed that a strong presumption of fairness and impartiality should apply where the candidate has stayed within the prescribed statutory limits. In crafting a recusal statute, the panel agreed that contribution limits should not be so restrictive as to leave candidates with inadequate campaign funding. The panel noted that if judges are sometimes proactive about these situations, then improper incentives sought by funding sources will decrease. In other words, sometimes the best solution may come from how an individual judge handles the situation.

The panel concluded its discussion by raising a red flag about lawyers or parties using judicial campaign contributions to "judge shop" by abusing robust recusal requirements. This type of forum shopping would involve, for example, a lawyer contributing to a particular judge's reelection campaign as an offensive strategy so that the lawyer could then seek to have the judge prohibited from hearing a particular case. Robust recusal rules hold the danger of strategic litigants seeking to game the system.

Overall, the discussion raised many poignant issues about the increasingly partisan nature of judicial election campaigns, while recusal statutes may play some role in addressing this problem, lawyers and judges must also do their part to uphold a fair and impartial system. Lastly, public education should be a top goal because a better informed public will likely have more confidence in the fairness and impartiality of the judicial system.

THE ART OF DISSENT

By Mary-Christine Sungaila

One panel at the 2013 Appellate Judges Education Institute Summit focused on dissenting opinions: reasons to write them, their role and possible impact, and the preservation of court collegiality when dissenting. Moderated by Ninth Circuit Judge Margaret McKeown, the panel featured jurists who represent a range of tendencies to write separately: Judge James Wynn of the U.S. Court of Appeals, Fourth Circuit (separate opinion rate of approximately 30 percent), Justice Goodwin Liu of the California Supreme Court (separate opinion rate of approximately 20 percent in two years on the court), and Justice Eileen Moore of the California Court of Appeal, Fourth Appellate District, Division Three (ten dissents and partial dissents in over twenty years on the court).

Why dissent?

The panelists described seven reasons to dissent: legal correction, principle and posterity, letter to another court, letter to the legislature, development of the law, message to losing party, and damage control (i.e., "this court's ruling is effective for this day only and this case only"). Justice Moore, who expressed a strong preference for unanimity in decisions in order to provide solid guidance for those governed by the court's rulings, added some nuances to these reasons, including: sending a message to the legislature or a higher court to change the current legal rule; sending a message to the losing party that, even though the party lost, the unfairness of the result is still acknowledged; and planting a seed to change the law later.

Justice Liu observed that dissents should be approached cautiously not only because their presence means the court does not speak with one voice, but because once a justice dissents, he has no influence over the majority anymore – not only can he no longer seek to soften that opinion, but if the majority rejects the views set forth in the dissent related to the potential impact of the majority's decision, the dissenter could end up enhancing the majority opinion's impact. Judge Wynn noted that in North Carolina, where he previously sat as a state appellate judge, the court rules allow an appeal as of right if there is a dissenting appellate court opinion in a case; this rule tends to encourage dissents.

Role and impact of a dissent

The panel also discussed the interplay between the majority opinion and the dissent. For example, sometimes the dissenting opinion can become the majority opinion or influence the wording of the majority opinion. Other times, the dissenting opinion can be used to cabin the majority opinion and do "damage control" for future cases. Judge Wynn noted that he never views the dissent as "opposing" the majority's position; it is not personal, just a different view of the precedent and law, and a recognition that there can be two different approaches.

Crafting the dissent

All observed that a concurrence or dissent can speak more directly to policy than a majority opinion and that, when crafting a dissent, collegiality is of paramount importance. The panel made a number of recommendations in this regard: Acknowledge that the majority got some points right, and hone in on the points with which the dissent disagrees; avoid sharp language; focus on substance; put the majority opinion in the absolute best light possible — do not belittle the other side or misstate the majority position. Write with a tone that says: "These are all matters of reasonable disagreement — not bad faith, arbitrariness, or wrongheadedness."

HOW JUDGES DECIDE: A MULTIDISCIPLINARY PERSPECTIVE

By Nancy M. Olson

We know that, before deciding a case, judges read the parties' briefs and review legal precedent. But does this fairly summarize how judges decide? Or does something else, even something physiological, influence their decision making? When a multidisciplinary panel considered this question, they challenged the audience to take a broad approach to analyzing judicial decision making. The panel divided the discussion into three segments. First, Professor Paul J. Zak, of the Claremont Graduate University, explained the role of brain chemistry in interpersonal and moral decision making and revealed the "moral molecule." Next, Professor Lee Epstein, of the USC Gould School of Law, discussed findings from the book she co-authored with Judge Richard A. Posner and William Landes, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*. Lastly, the Honorable Eva Guzman of the Supreme Court of Texas provided a critique of Professor Epstein's book from a judge's and student's perspective.

Professor Zak began the discussion by relating his studies of what makes someone a "frequent flyer" in the criminal justice system. In a typical person, a large variety of positive social behaviors stimulates the production of a chemical called oxytocin. This chemical helps the brain identify others as being safe or familiar. In five percent of the population, however, ordinarily positive stimuli do not result in the release of oxytocin. Frequent substance abuse can also cause a deficiency. Professor Zak explained that low oxytocin levels are associated with high stress and high levels of testosterone. His research has examined whether the positive stimuli / oxytocin production pathways can be repaired. The answer may be, at least in the case of drug use, that the damage is permanent. Another factor to consider is that people with certain psychiatric problems lack empathy and do not release oxytocin. Testing this in criminals, he found that criminals tend to exploit people to achieve what they want; they don't view others as sentient human beings with their own goals. Interestingly, higher levels of oxytocin do not affect abstract moral judgments (e.g., is it better to kill one person to save five?). In other words, judges with high levels of oxytocin can abstract the rules without having an overwhelming empathetic response. Professor Zak closed by noting that judges may want to think about this "moral molecule" when considering cases because it might help them understand certain behaviors.

Professor Epstein next discussed the study of judicial behavior, which dates back to the 1940s. The field has changed a lot since then, with instant access to better data fueling the current study of judicial behavior. Professor Epstein explained some of her research on the individual judge and how her book tries to take a realistic view of judging by treating judges as human beings with the same underlying personal concerns as other people. Professor Epstein also noted the importance of ideology in judging. For example, in affirmative action cases, 75% of Democratic judges upheld affirmative action plans whereas less than half of Republican judges did so. She did note, however, that ideology plays less of a role as you move down from the Supreme Court to intermediate appellate courts and the trial court. Moreover, ideology cannot perfectly explain judicial decision making. Professor Epstein posited that other factors such as the anticipated reaction of colleagues, workload, desire to be elevated to a higher court, and personal background characteristics may also play a role. Notably, gender has a big effect on judging, which has become more noticeable with the rise in the number of female judges on the bench. Her book examined gender in 13 areas of the law, and in one in particular, sex discrimination cases, she found that liberal female judges are 12% more likely than male judges to rule in the plaintiff's favor.

Next, Professor Epstein examined how the behavior of colleagues affects judges who sit on panels. Turning back to sex discrimination cases, she noted that male judges sitting with female judges are much more likely to rule in the plaintiff's favor. She also noted that, outside of the Supreme Court, panels on the intermediate appellate courts infrequently have

dissents. This might be explained by the fact that one judge who may disagree could decide to go along with the majority or what was once the majority may be persuaded by a dissenting view. It comes down to a cost/benefit analysis wherein a judge may consider his or her reputation for authoring creative dissents versus being deemed a "workplace irritant" by making his or her colleagues do more work. In closing, Professor Epstein noted that in deciding not to dissent, judges also likely consider the fact that dissents are rarely cited but can carry serious congeniality costs.

Justice Guzman, the only member of the judiciary on the panel, shared her view of the theories raised in Professor Epstein's book. Justice Guzman first learned of the book while a student in Duke University's LLM program for judges. After reading the book, the class reacted collectively with shock at the idea that judges were motivated by anything other than the desire to serve. While Justice Guzman believes the field of judicial behavior is one worthy of study, she thinks the focus of study should be on how judges can do their jobs better. Turning to the hypothetical labor-market model that assumes judges are motivated by pecuniary and non-pecuniary factors, ideology is only one motivating factor. In that model, other factors including job satisfaction, external satisfaction, leisure, salary, promotions, and not upsetting one's colleagues also play a role. Justice Guzman explained that her initial impression of this model is that judges don't necessarily value leisure over their work or focus on the potential for promotion. Moreover, while judges consider how their colleagues will view a potential dissent, this consideration does not drive the decision making process regarding whether to file a dissent. She believes that such models do a disservice to the value of deliberation.

Justice Guzman also took issue with the authors' discount of self-reporting. She wonders whether judges really think about things like leisure and promotions when doing their job. While the authors of *The Behavior of Federal Judges* posit that judges don't realize they are being motivated by something else, Justice Guzman pointed out that this conclusion lies in tension with other things in the book. Even if you assume all of the book's factors matter, the book does not weigh the different motivators. She also criticized the book discounting 80% of cases as "formulaic," while in the other 20% of cases, it assumes judges are doing something different. Justice Guzman took issue with discounting this volume of cases as well as discounting the role of advocates in helping to shape the judicial decision making process. Justice Guzman also questioned the book's assumption that extra-judicial activities are not work. Serving on commissions, for example, is a type of work that may be lumped into making an "appearance" outside of court. The book also doesn't consider dissents that are written but never issued when, for example, a panel happens to resolve the disagreement. This is a source of unaccounted-for work. Justice Guzman noted that the authors also don't weigh time spent on reviewing and deliberating over petitions for review.

Justice Guzman acknowledged that some of the research in the book is useful because the better judges are understood by lawyers, the better lawyers can be at representing their clients. It is also helpful to understand one's own motivations and that of one's colleagues. She agreed that the book raises important questions and that we should engage those questions and not be afraid of the assertions made in the book. Rather than rejecting the theories outright, Justice Guzman believes that it is better to point out the issues. In closing, she stated that the bottom line is, judges want to know how they can improve and do their jobs better, so engaging the literature to deepen that understanding is a good thing.

Correction to "Cameras in the Courtroom"

In the August 2013 *Appellate Issues*, Gaëtan Gerville-Réache and Kristina Araya reported on the prevalence of video cameras in the highest state courts across the country. At the end of that article, they included a survey of all 50 states and the several territories of the United States, with links to the various video archives and live streaming websites. Since then, thanks to interested readers and more digging on their part, they discovered that even more courts of last resort have cameras in their courtrooms than originally thought. They have included that additional information in the table below and the online version of the original article has been updated accordingly.

State	Cameras in the Court?	Link to Video
Alaska	Yes	Gavel to Gavel Alaska, 360 North, http://www.360north.org/alaska-supreme-court/
Connecticut	Yes	http://ct-n.com/ondemand.asp?dir=SC
Georgia	Yes (no live video, archives only)	Oral Arguments, Supreme Court of Georgia, http://www.gasupreme.us/media/oa/
Nevada	Yes (live video only, no archives)	Live Video, Supreme Court of Nevada, http://supreme.nvcourts.gov/
South Carolina	Limited video archive (one case per month)	Supreme Court Case of the Month, South Carolina Judicial Department, http://www.sccourts.org/caseOfMonth/index.cfm
Wisconsin	Yes	Video Archive, Wisconsin Eye, http://www.wiseye.org/Programming/VideoArchive/ArchiveList.aspx?cv=34

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Call for Submissions

Appellate Issues seeks submissions for the next issue. The general theme is amicus representation. Articles may address any aspect of this broad subject — such as, strategy, cooperation with counsel for a party, a party's solicitation of amicus support, occasions when a party might answer an amicus brief, effective and influential types of amicus argument, rhetorical styles or subjects uniquely appropriate to amicus briefs, techniques for distinguishing your brief from the growing stack, interesting representations or briefs, amicus oral argument, business development and billing arrangements, etc.

Submissions should be sent to David J. Perlman at djp@davidjperlmanlaw.com by June 22, 2014. Inquiries are welcome, as are submissions on other matters of interest to appellate attorneys.

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