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IS PRIVACY PASSÉ? THE STATE OF FOURTH AMENDMENT PRIVACY

By L. Steven Emmert

"We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government." This commentary on National Security Agency hypervigilance and government tracking of American citizens' private e-mails reflects the cynicism of our modern time.

But wait; the words predate modern NSA snooping and even e-mail; they were written by Justice William O. Douglas, dissenting in *Osborn v. United States*, 385 U.S. 323, 341 (1966). *Osborn* authorized the use of a secretly recorded conversation as evidence in the prosecution of an attorney for attempting to bribe a juror. Of the eight justices who participated in the case – Justice White

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EDITOR'S NOTE

By David J. Perlman

The 2014 Appellate Judges Education Institute Summit was no exception. Like past Summits, it lit a spark. Convening in Dallas on Thursday, November 13, we dispersed on Sunday with renewed insight and energy.

This *Appellate Issues* carries the torch; it captures a piece of the intellectual exchange. At the same time, it offers still another dimension — the perspective of the authors. Every article displays a lawyer's mind in play, giving comprehensible shape to some aspect of law or legal practice.

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THE LURE OF THE INTERNET

By Howard J. Bashman

The lure of the internet is strong and unyielding, not only for regular people but also for many appellate judges. There once may have been a time when most if not all of what appellate judges could learn about a case pending before them for decision came solely from the papers that counsel for the parties supplied. That surely is no longer the situation today, as many state and federal appellate court rulings confirm.

Moreover, judges themselves may choose to have an online presence. In states that select appellate judges through an elective process, having a Facebook page and even a Twitter feed are becoming necessities rather than luxuries. And at least one senior U.S. District Judge has chosen to operate a blog at which he muses about all sorts of subjects, many law–related. Yet this sort of public online presence makes it far easier for judges to say things publicly that they may regret later and for parties to engage in improper *ex parte* communications that ordinary people may not recognize as prohibited.

At the 2014 AJEI Summit in Dallas, "The Lure of the Internet" program was late in the afternoon of the event's first day. Those in attendance heard a program that focused on two major components. The first focus of the session was on judges who use the internet to supplement the record to increase their knowledge of issues relevant to a case in order to make the best possible decisions, and the ensuing criticism of judges who seemingly disregard the constraints of the adversarial system in doing so. And the second main focus was on judges who have a presence on social media — primarily Facebook, Twitter, or a blog — and the ethical concerns that may arise from *ex parte* contacts initiated by litigants or even having litigants or their counsel as friends or followers.

The two presenters at "The Lure of the Internet" program were Linda Eads, associate provost of Southern Methodist University, and Elizabeth Thornburg, professor at the SMU Dedman School of Law. Throughout the program, they presented a series of hypotheticals, many based on actual scenarios that have received coverage in the legal press, involving due process and ethics–related issues. Frequently, the audience was asked to register their votes, using electronic devices, on a variety of concerns raised by the hypotheticals.

Perhaps the judicial poster child for excursions beyond the record to discover facts that the parties have neglected to present to the court on appeal is Seventh Circuit Judge Richard A. Posner. Professors Thornburg and Eads generally took a dim view of judge–initiated resort to the internet to compensate for deficiencies in or solve riddles arising from the record on appeal that the parties have created.

According to Thornburg and Eads, ethical issues for judges involving resort beyond the record to learn facts relevant to an appeal quickly transform into evidentiary issues. By that, they mean that the rules of evidence generally allow judicial notice of so–called "legislative facts" but restrict judicial notice of so–called "adjudicative facts." Legislative facts, as to which judicial no-

tice may generally be taken, describe facts that do not change from case to case and do not relate specifically to the parties in a given case. For example, the temperature at which water boils at a given elevation may be a legislative fact, as may be the day of the week on which a federal holiday occurred during a particular year. Adjudicative facts, by contrast, are facts pertaining to the specific parties and circumstances of a given case, and judicial notice of adjudicative facts may be taken where they are not subject to reasonable dispute, but only after notice to the parties and an opportunity to respond have been given.

To the extent that appellate judges sometimes find it necessary to journey outside the record the parties have created to learn facts that the judges view as pertinent to the outcome of an appeal, several different motives may be at work. Perhaps most importantly, precedential appellate rulings announce and apply legal rules that will bind not only the parties in the current case but also parties in later similar cases. In such cases, reaching the correct result may be more important than merely deciding the issue in a manner unique to the parties currently before the court owing to deficiencies in the record.

And secondly, appellate judges are naturally curious people who want to reach the correct result in a case. If the lawyers for the parties have not done the necessary work to present the appellate court with the information needed to decide the case correctly and intelligently, the parties should not be surprised if the judges go outside the record to obtain the necessary facts, in the same way that the judges may go outside the parties' legal arguments to determine the correct applicable law. Thus, while the case is pending in the trial court, lawyers can avoid later tempting judges to journey beyond the record on appeal by creating a record in the trial court that contains all of the information necessary to an informed appellate resolution.

To be sure, individual judges have their own personal views concerning the extent to which relying on facts outside the record is appropriate and should be disclosed as informing the basis of a court's ruling. But given the ubiquitous nature of the internet, and how pervasive reliance on the internet has become in our society, it is perhaps unavoidable that judges, being human, will turn to that resource to learn more about the particular facts and issues involved in the cases pending before them.

Before concluding this aspect of their presentation, Thornburg and Eads addressed one particular concern that is always lurking on the internet: ensuring the reliability of the information found there. Anyone with an internet connection and rudimentary knowledge can post information online, and thus to a large extent the seeker of information operates at his or her own risk in finding information on which to rely. However, there are plenty of sites online that have established reputations for reliability, and thus for the most part judges should at least be able to depend on those without too much concern.

The other main focus of the presentation was on judges who have chosen to have public Facebook pages, Twitter feeds, or blog sites. For example, Judge Posner was a regular contributor for many years to the "Becker–Posner Blog."

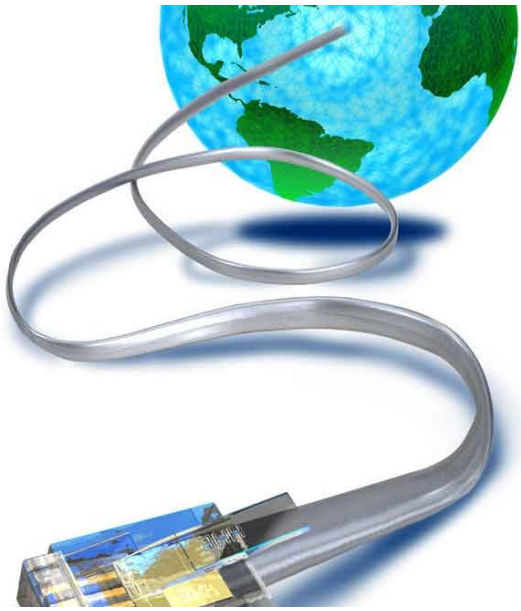
That particular blog sometimes discussed issues that were law–related, although the blog's major focus was on economic issues. More recently, U.S. District Judge Richard G. Kopf has become especially well–known for writing a blog called "Hercules and the umpire" at which he opines on all manner of things, including law–related subjects.

With regard to having a Facebook presence, which apparently has become a necessity for state appellate judges who must run for elective office, Thornburg and Eads stressed that judges must carefully monitor all the postings of others at their Facebook pages and promptly defriend anyone who uses that method to engage in improper *ex parte* communications about a case assigned to the judge. Thornburg and Eads also noted that several state courts have already had to examine whether the fact that a litigant is a judge's Facebook friend mandates the judge's recusal from a case.

By contrast, on Twitter and blogs (at least those blogs that do not allow for reader comments), a judge can exercise far more control over what information he or she is broadcasting to the public. However, one thing that the internet is notorious for is the ability of a user — even a judge — to broadcast something inappropriate to the general public that the user deeply regrets at a later time. Perhaps this can be attributed to momentary lapses of judgment or to the lack of an editor who serves as an intermediary. Regardless of the impetus for improper online commentary that seems to occur so frequently these days, judges must be cautious to refrain from posting about pending cases and from expressing opinions about issues and cases that someday potentially could come before the judge for decision.

Perhaps in the not so distant future, the worries we have today about "The Lure of the Internet" will seem quaint by comparison. Maybe in the not too distant future we will be on the verge of allowing computers themselves to decide the merits of cases. But until we have all–knowing computers that are capable of determining the best or most correct answers to legal disputes, we will need to continue to rely on human beings who have a natural thirst for knowledge and a desire to communicate with others.

The internet presents special risks and opportunities for appellate judges, and one hopes that appellate judges will employ the benefit of their accumulated wisdom in deciding how best to submit to or avoid the lure of the internet.



...*Continued from page 1:* **Is Privacy Passé? The State of Fourth Amendment Privacy**

recused himself – Douglas was the only one to rebel.

When Douglas penned his dissent, George Orwell's novel *Nineteen Eighty-Four* had been in print for seventeen years, but the book's dystopian setting was still eighteen years in the future. Indeed, Douglas would not live to see that year; he died in early 1980.

Orwell's protagonist, Winston Smith, inhabits a world in which the government proclaims, "Freedom is slavery." The book portrays an overreaching government that tightly controls all aspects of its citizens' lives. It alters the past by rewriting newspapers and books to match subsequent developments; it manages a perpetual state of far-off foreign war, and resulting supply shortages at home; it mandates public participation in daily patriotic gatherings called "Two Minutes Hate," when anger at the state's enemy is brought to a fever pitch. Thought control is normal.

But despite all these nightmarish conditions, most people remember the novel for only one premise: "Big Brother is watching you." The government in the novel claims to monitor each person's actions and even thoughts; there is no privacy at all. For this reason, *Nineteen Eighty-Four* is usually viewed as the paradigm of governmental intrusion into privacy rights.

* * *

The year 1984 has been in the rear-view mirror for thirty years, but the novel's foreboding lesson remains alive. Two presentations at the AJEI Summit, both on Saturday, focused on privacy issues in the modern era. The first was a panel discussion of recent Fourth Amendment decisions involving privacy; the second was a lecture delivered by ACLU President and Brooklyn Law School Professor Susan Herman.

The panel comprised Professor Susan Freiwald of the University of San Francisco's School of Law and Marc Zwillinger of ZwillGen PLLC. Judge Brian Hoffstadt of the California Court of Appeal moderated the discussion. The panel took up the primary topic of what digital evidence is and how we apply the Fourth Amendment to it. The moderator began with the recent case of *Riley v. California* (2014), which held that a smartphone could not be searched incident to an arrest without obtaining a search warrant.

This case, the moderator noted, provides that digital evidence is different from other types of information. There's vastly more information in your smartphone than there is in, say, an address book carried in a pocket, or even a diary. The quality of that information is also different from other collections of data. Phones now contain location data, so a person with access to your device can figure out exactly where you went yesterday, and when. Essentially, we carry around a computer that contains far more information about us than any other source.

The courts have reacted to modern privacy cases in three primary ways. The first is by looking to the original meaning of the Fourth Amendment – a singularly unhelpful exercise since the Framers presumably never foresaw smartphones. The second approach is to look to the closest non-digital legal analog and to apply the law that governs that device or medium.

The third is a normative approach: What should the rule be? This approach comes perilously close to judicial legislation.

The storage mechanism in these cases also matters. Some cases arise in the context of what's on the devices themselves. Others present entirely different legal issues: Where data is stored elsewhere, such as in the cloud, how may a government obtain that information? Since it's shared with a third party, is there a reasonable expectation that it will be private? May the third-party holder disclose it voluntarily, against the will or even without the knowledge of the customer?

Professor Freiwald discussed location-data cases, noting that they "illustrate modern legal challenges." The Supreme Court has affirmatively addressed one aspect of this issue, in *United States v. Jones* (2012). There, the Court held that the placement of a GPS unit under a car's bumper was an unreasonable search under the Fourth Amendment. (Earlier in the day, UC-Irvine Law School Dean Erwin Chemerinsky had offered a tongue-in-cheek explanation for this ruling: "If the justices can foresee the possibility that this kind of thing could be done to them, then it's going to be held an unconstitutional search.")

In *Jones*, Justice Scalia felt that the placement of the unit was a search because it's a trespass on a constitutionally protected area. Justices Alito and Sotomayor took a different route – one that became the majority holding in the case – to the same destination, finding that it was a search because of the prolonged nature of the collected data, over 28 days. In contrast, police officers could have devoted the manpower to following Jones around the city – your whereabouts when you're in public aren't a secret to anyone under *Katz v. United States* (1967) – and that wouldn't have been an unconstitutional search. But the extensive scope of data collection with the device made a difference in the outcome.

The *Jones* ruling thus implicitly calls *Katz's* primary holding into question, at least in part. The ruling indicates that, depending on the nature and extent of the data collection, a person might have a privacy interest in his public movements. This, for Professor Freiwald, makes *Jones* very important, even though the Court has not expressly stated that *Katz* no longer has the same vitality; *Jones* represents the "revitalization of the privacy doctrine," and that is indeed a big deal.

The next topic proved to be multifaceted: the third-party doctrine. This subject deals with information that is held by, or at least passes through, a third party such as a wireless-phone or internet-service provider. Professor Freiwald observed that three federal circuit courts have taken divergent approaches in the past four years on issues involving collection of cell-tower information. This data can provide a detailed and accurate log of the phone's movements, making the data almost as valuable as the GPS unit in *Jones*.

Mr. Zwillinger then addressed the issue from the perspective of service providers, noting that these companies "are spending lots of time and energy on the Fourth Amendment." He added that the providers want to find a way to protect their customers' data, as a user's feeling of security is good for the provider's business. This means that those interminable terms-of-service agreements, which everyone must consent to

but no one reads, aren't quite as unfavorable as you might think.

Mr. Zwillinger explored the basis for finding location data to be protected under the Fourth Amendment as a person's "papers and effects." The key to that, as outlined in *Jones*, is the cumulative effect over time of the data collection. If we were considering a single item of information, instead of a stream, the analysis and conclusion might come out differently. (In this sense, then, perhaps *Katz* retains significant vitality; but given the accelerating pace of technological change, one should expect more and more *Jone*s-like exceptions to *Katz's* rule.)

So why should e-mails be protected? They aren't encrypted and they clearly pass through the hands of a third party; they're viewable at every location along the route. Mr. Zwillinger noted that courts haven't followed that reasoning, preferring to use a normative approach. E-mails are protected because we really expect them to be private; just as with phone calls. In response to the suggestion that both phone calls and e-mails are optional behaviors, and that this waives the privilege, Mr. Zwillinger pointed to the holding in *Jones* to the effect that some choices are simply necessary in society – the choice to drive from point A to point B or the the choice to communicate with others.

The moderator then asked about encryption, noting the recent announcement by Apple that it planned to release devices without a "back door," a portal that can be accessed by the company in order to comply with court-ordered disclosure. This plan has caused significant concern in the law-enforcement community, since the police want to have the opportunity to get that information, even if it takes a warrant to get it.

Mr. Zwillinger noted that calls for privacy protection like this have risen dramatically in the past two years. As with terms of service, providers have an incentive to offer encryption, because it makes their products more desirable to privacy-conscious consumers. In a sense, encryption shouldn't generate a privacy issue, as it's analytically indistinguishable from speaking in a foreign language. One doesn't gain an expectation of privacy just by talking in Italian, after all.

But Professor Friewald noted that we don't know how easy it is for the government to crack encryption. The government understandably won't disclose the state of its art, even to a US Magistrate Judge who's evaluating a request for a subpoena.

The moderator then took up the related question of interaction between providers and government *without* the user's knowledge. Where the government requests, or even subpoenas, information from the provider, who has standing to object? Mr. Zwillinger began by observing that generally, you don't have standing to raise the rights of others in court proceedings. In a celebrated case that he handled in FISA courts – including in a successful appeal – Yahoo objected on behalf of its customers, and won. But the company had standing in the FISA proceeding pursuant to a statute, and that same protection isn't available in ordinary criminal proceedings.

In these situations, the customer generally has no idea that his information is being sought, so he can't challenge the request. The provider

might be willing to do so for fear of liability to the customer for a wrongful disclosure – perhaps in violation that terms-of-service agreement. Mr. Zwillinger suggested that the best way to proceed might be to refuse the request and then resist a motion to compel, so Fourth Amendment issues can be properly aired. Prof. Friewald added that in some instances, courts have asked amici to present and argue the customer's rights.

The presentation concluded with a discussion of the utility of applying non-digital analogies as legal precedent. Professor Friewald noted that that's the usual way to accommodate technological change, but advocates and courts should be careful; as *Riley* shows in the GPS context, the landscape is shifting quickly. Old analogies "don't fit anymore," she said, so the analysis requires a deeper consideration of the precedent and the reason for the prior decision. Mr. Zwillinger countered that there really is no good alternative to arguing from analogy, but he cautioned, "Pick the right one."

* * *

In the next session, Professor Herman, who, in addition to being the ACLU President wrote *Taking Liberties: The War on Terror and the Erosion of American Democarcy*, offered a detailed view of just how close we've come to Orwell's gloomy world. Her talk was the latest in a series she's offered on law and literature.

In the wake of the 2001 terrorist attacks on America, a compliant Congress gave the President sweeping powers to combat terrorism. It passed the USA Patriot Act, which greatly enhanced the government's power to collect data for the fight against this distant, unseen enemy. Some libertarians complained that the act was too invasive, even un-American; but their concerns were overwhelmed by a wave of worry about how to fight this new type of war. After a dozen years of increased but seemingly benign surveillance, Americans became accustomed to the new normal, and the clamor died down.

And then Edward Snowden happened.

In June 2013, one man changed Americans' views of the government's surveillance practices. By disclosing a breathtaking expanse of data collection by the NSA, involving not just overt Bad Guys but ordinary American citizens, Snowden refocused those citizens' attention on whether this level of covert scrutiny was justified in a democratic republic. Even from a place of exile, Snowden shaped Americans' opinions on the actions of their government. By releasing classified documents about NSA activities, Snowden instantly became a heroic whistleblower or a traitor, depending on your point of view.

Professor Herman described this as a "watershed moment," in that we will be deciding whether to change our surveillance laws. She considers Fourth Amendment litigation "the tip of the iceberg," whereas the real debates will occur in legislatures. Viewing this issue with a historical perspective, she told the audience that our decisions to change have been based on the stories we tell. And that brings literature into the picture.

For example, she noted that a generation or more ago, many rape laws served more to shield men from false accusations than to provide a mechanism for investigation and prosecution of attackers. The culture changed when

women began telling stories – bringing rape out of the shadows and into the daylight – thus gradually changing attitudes to the point that rape laws are now more balanced.

The same is true with the balance between liberty and security. Beginning in September 2001, "the dominant story was the need to give up some privacy and liberty in order to achieve greater security." Law-abiding Americans, shocked by the scenes in New York, Virginia, and Pennsylvania, reasoned that they had nothing to fear from surveillance, as long as they weren't doing anything wrong. This was the prevailing "story" until Snowden's disclosure.

The result of Snowden's disclosures has been swift and dramatic: In November 2014, a Pew Research Center poll showed that "80% of adults 'agree' or 'strongly agree' that Americans should be concerned about the government's monitoring of phone calls and internet communications." Politicians have been sensitive to this shift, and legislation is now pending in Congress, including the USA FREEDOM Act, HR 3361, to rebalance privacy laws.

Professor Herman identified two primary authorities for surveillance. The first is the recently amended Foreign Intelligence Surveillance Act, which permits collection of data about international phone calls and e-mails. For US citizens, the NSA has described three ways in which such data is gathered: (1) incidental, such as where a citizen talks with a foreign surveillance target; (2) indirect, where two foreigners talk about a US citizen; and (3) inadvertent, which stems from erroneous targeting or an equipment malfunction. Beyond that, FISA doesn't authorize surveillance of Americans.

The second source is PRISM, a database that helps the NSA and FBI collect data from public sources such as Google, Facebook, and the like. There is, understandably, a lot of information out there, and this algorithm helps the government sort out what it thinks will be useful.

To ensure against overreaching, Congress in 2007 authorized the Privacy and Civil Liberties Oversight Board, an independent, bipartisan agency that evaluates governmental surveillance activities. In the wake of Snowden's disclosures, the board was tasked to evaluate the NSA's telephone-records program. The board's January 2014 report was critical of those activities, as its investigation revealed little evidence that the data-gathering actually served its stated purpose. NSA had originally asserted that its surveillance had stopped 50 cases of planned terrorism, but in response to the board's investigation, that figure was reduced to three or four, and then to one. The board recommended that NSA end the bulk-telephone-record-collection program and "immediately implement additional privacy safeguards."

Professor Herman next turned to the effects of surveillance fears and awareness. In doing so, she referred to social-science and psychological literature, which describes how humans react to the knowledge – or even the suspicion – that they're being watched. Such people often self-censor their speech or actions due to concern of adverse consequences.

For example, she observed that a report that the ACLU was being monitored resulted in fewer calls being made to the group, as potential callers feared that just making the phone call would subject them to unwanted scrutiny. In a similar

vein, attendance at American mosques dropped noticeably after the 2001 terrorist attacks, as innocent Moslems feared being targeted for retribution merely because of their faith. And foreign citizens are now starting to avoid doing business with American companies and are building their own networks so they won't have to use American facilities. This last phenomenon, which has little to do with personal freedom and everything to do with corporate profits, may well prove the most effective means to securing surveillance reform.

In the context of the psychological and social effects of surveillance, Professor Herman asked how close we've come to the world of *Nineteen Eighty-Four*. While there's no precise way to measure something this complex, she observed that we're moving toward a society in which the government may remain secret while humans are supposed to be transparent, instead of the other way around.

She then turned to several dystopian books in addition to *Nineteen Eighty-Four*. The 2013 release *The Circle* by Dave Eggers envisions a mega-corporation, with the slogan "Everything that happens must be known" that allows no space for privacy. It's a parallel to Orwell's work, but here the monolithic force is a corporation, not the government. David Shafer's *Whiskey Tango Foxtrot* (2014) provides a comparable view of corporate intelligence-gathering, but from outside the company. And Aldous Huxley's novel *Brave New World*, which actually predates Orwell's classic by 18 years, depicts a private company that has become a form of government. Whereas Orwell's antagonist controls people by pain, Huxley's controls them with pleasure.

The last question posed in the hour was, "Why should I care?" As you can imagine, the president of the ACLU is likely to have strong emotions about that issue. She cautioned the audience about the effect of post-9/11 laws on ordinary Americans, and added that it didn't matter whether the collector of surveillance was governmental or private. She concluded that we aren't at *Nineteen Eighty-Four's* sad state yet, but we're moving in that direction.

The debate over the balance between liberty and security in America is by no means a product of the 2001 terrorist attacks. Ben Franklin metaphorically began the conversation in November 1755 when he penned the memorable line, "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety." We've been talking about this topic, on and off, for centuries.

What *has* changed is technology. Governments and corporations now possess a capacity for data collection that Franklin never could have foreseen. Citizens have become accustomed to sacrificing bits of privacy in exchange for incentives as small as a lower grocery bill – you *do* have a frequent-customer account at your grocery store, don't you? – or in order to interact with friends across the world on social media. This has changed American attitudes to make us more receptive to the kind of intrusion that, a generation or two ago, would have been strongly opposed by much of society. Ms Herman's talk reminded the audience that if we really are going to devalue privacy, we need to do so with our eyes open – and with a healthy appreciation for the warnings in our literature.

...Continued from page 1: **Editor's Note**

I wish to extend special thanks to each of the authors for catching ideas on the fly and reconveying them. Without them, this publication would be nothing.

That a Summit presentation doesn't appear in this issue is not a judgment. Inevitably, some things always remain the province of firsthand experience — in this case, the story of the Supreme Court's latest term as told by Erwin Chemerinsky; personal memories touching on the passage of the Civil Rights Act offered by retired Texas Supreme Court Chief Justice Wallace Jefferson and Fifth Circuit Chief Judge Carl Stewart; the conscience-shocking tales of the wrongly convicted, and other programs.

Likewise, instances of serendipity are best experienced in person. Amidst a presentation on arbitration, notable for clarity, suddenly we heard the voice of Siri, blurting from out-of-pocket and from the front row, no less: "I'm not sure what you said."

Summit attendees may also recall an evening at the Winspear Opera House or perhaps a tour of the Texas School Book Depository or a visit to one of the nearby art museums — reminders, along with chords struck in presentations noted above and discussed here, that law is part and parcel of a surrounding culture manifesting itself through multiple domains.

SOCIAL NETWORKING: ETHICAL ISSUES FOR JUDGES AND LAWYERS

By Tim Vrana

Widespread use of social media is creating new ethical issues for judges and attorneys. At the 2014 AJEI Summit, a panel of experts discussed three present-day scenarios involving social media and ethical questions. Each scenario was based on a real case. The presentation was enhanced by the use of "clickers," which registered attendees' opinions on the issues.

Ice-bucket challenge

In the first scenario, trial judge Carson, whose father died of Lou Gehrig's disease, accepted a challenge on Facebook to raise awareness for the ALS Association. In a video posted on social media, Judge Carson invited her friends and "followers" (including colleagues, employees, attorneys, and family) to deliver sealed donations to the owner of a local bar. The highest bidder would win the chance to dump a bucket of ice water on Judge Carson. A well-known criminal defense attorney had the highest bid and dumped a bucket of ice water on Judge Carson's head as friends, family, court staff, and local TV camera crews looked on.

Fourth Circuit Court of Appeals Judge James Wynn, who was one of the drafters of the 2007 ABA Model Code of Judicial Conduct, pointed

out that Rule 3.7 of the Model Code allows a judge to solicit contributions for a charitable organization, but *only* from members of the judge's family or from judges over whom the judge does not exercise supervisory or appellate authority. Because Judge Carson's solicitation was not limited in that way, she violated not only Rule 3.7 but also the more general Canon 1 of the Model Code, which requires a judge to "uphold and promote the independence, integrity, and impartiality of the judiciary, and … avoid impropriety and the appearance of impropriety."

Did it make any difference that Judge Carson was acting in a personal role as opposed to a professional role? Texas Court of Appeals Justice Lana Myers said no: "As a judge, you don't take your robe off. You're still a judge when you're on Facebook." An independent, impartial judiciary is critical, she added, and judges must avoid impropriety and the appearance of impropriety in their professional *and* personal lives. Whether on or off the bench, Judge Carson is always Judge Carson.

Seana Willing, Executive Director of Texas's State Commission on Judicial Conduct, mentioned that two states have actually issued ice-bucket-challenge advisory opinions. Maryland has approved the conduct as long as the judge does not identify herself as such and does the challenge only with family. New York disapproved, stating that a judge is a judge, whether wearing a robe or not.

Our Judge Carson was faced with another predicament when an acquaintance, Mary Rivera, sent a private message on Facebook. Rivera praised Judge Carson for her efforts on behalf of the ALS Association, then mentioned that her son and daughter-in-law were in the middle of a divorce. Rivera said she was not happy with the initial rulings of the associate judge assigned to the case. Rivera also said that the daughter-in-law had falsely accused Rivera's son of domestic violence, and now the District Attorney was going to prosecute Rivera's son for assault.

Judge Carson checked court records and learned that the criminal case against Rivera's son was pending in her court. Judge Carson sent a reply to Rivera explaining that she could not communicate with her about the case and asking Rivera to desist from further contact. Judge Carson then placed a copy of the Facebook message and response in the criminal court file. She also notified the attorney for the State and the defense attorney of the contact and provided each with a copy of the messages. At a pretrial, the defense attorney asked Judge Carson to recuse. Judge Carson declined.

Dallas attorney John Browning, of Lewis Brisbois Bisgaard & Smith, who has written three books on social media and the law, said there is nothing wrong *per se* with judges being on social media. However, he cautioned, "ex parte is ex parte, even in cyberspace." Browning said that in several states, being Facebook friends with the judge is automatic grounds for recusal.

Justice Myers said that Judge Carson's actions were a model for what to do in that situation. "Disclosure," she said, "is the key." Judge Wynn agreed, for the most part, with Justice Myers. He said the issue was whether the judge's impartiality might reasonably be questioned.

Prosecutorial misconduct? Defense malpractice?

Carl Coors was allegedly intoxicated when his vehicle crossed the centerline and crashed into a minivan that contained eight children who were returning from summer camp. Several of the children were injured and one was killed. Coors was charged with DWI and vehicular homicide.

Lightly-populated Bramble County rallied around the deceased child's family. The District Attorney, Joe Williams, who was running for re-election, made various posts on Facebook and Twitter about the need to keep the community safe from "reckless drunks who take our precious angels." He also posted about the upcoming trial and Coors' lengthy DWI history.

Coors was convicted. On appeal, he argued that he was entitled to a new trial because of prosecutorial misconduct. He also argued that the trial judge erred when she refused to permit the defense attorney to conduct social-media research of the prospective jurors.

Veteran AJEI moderator Susan Alexander asked the panel if the trial judge correctly prohibited defense counsel from using social media to conduct research on potential jurors. John Browning said that according to the ABA, there is absolutely nothing wrong with attorneys looking at publicly-viewable information. Any communication with potential jurors, however, is strictly prohibited. Browning said that "following" a juror on Twitter is allowed by the ABA but not allowed by some states.

Is it malpractice if an attorney does *not* look up publicly-viewable information on social media? Browning said it probably is. Judge Wynn believed it would be a good idea for trial attorneys to look up that information for every trial.

The panel also examined the prosecutor's conduct. Justice Myers stated that the prosecutor violated ABA Rules of Professional Conduct 3.8 and 8.4 with his social-media comments. Rule 3.8(f) states that, except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, a prosecutor must refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused. Rule 8.4(d) states that it is professional misconduct for any lawyer to engage in conduct that is prejudicial to the administration of justice.

Does the prosecutorial misconduct require reversal? Seana Willing said that the issue in this case would likely be whether any of the jurors actually saw the D.A.'s postings.

Willing said that attorneys are making First Amendment challenges to ethical rules. Willing's comment led the panel into the final scenario.

May a judge blog?

State appellate justice Roy Bacon decided to write a blog with comments about his judicial philosophy, the day-to-day life of an appellate judge, and his passion for college football. In one blog, he ripped the United States Supreme Court after a controversial decision, saying (in so many words) that it was time for the Court to "shut up." Other posts contained off-color jokes that critics claimed were offensive to women and homosexuals.

Moderator Susan Alexander asked if the justice's comments about the Supreme Court decision were protected free speech.

Justice Myers declared that Justice Bacon has a First Amendment right to blog but said that right is subject to the Rules of Judicial Conduct. Off-color jokes about women and homosexuals demean the office and violate Canon 1's requirement to uphold and promote the independence, integrity, and impartiality of the judiciary. Again, a judge is a judge, whether on the bench or off.

As Judge Wynn concluded, a judge does not leave responsibilities to the judicial office behind when he leaves his chambers.

READING AND WRITING ADVANCED E-BRIEFS: WHAT WORKS AND WHAT DOESN'T

By Richard C. Kraus

This informative and timely AJEI Summit breakout session offered attendees an opportunity to learn how different courts use e-briefs and how as practitioners they can take advantage of new technology and functionality.

Don Cruse, an appellate practitioner and author of the Texas Supreme Court Blog (http://www.scotxblog.com), was the panel moderator. He began the session by asking the panel to discuss what appellate practitioners need to know as courts transition to electronic briefs and records. At a basic level, he said, an e-brief is no different from a paper brief with the same required content: table of contents, index of authorities, statement of facts, and arguments. Practitioners, however, must anticipate and respond to how appellate judges access and use the enhanced functionality of electronic briefs and trial court records.

In that regard, Justice Virginia Linder of the Oregon Supreme Court and Judge Stephen Higginson of the U.S. Court of Appeals for the Fifth Circuit demonstrated the very different systems and practices used in their courts.

Justice Linder explained the Oregon Supreme Court's fairly typical approach. Like many courts in the transitional phase, Oregon has optional e-filing, which was instituted in 2008. Participating attorneys file briefs in pdf format, but are not required to use bookmarks and other navigational tools. (The court is planning to amend its rule to encourage, but not require, bookmarking.) Briefs filed in paper form are scanned into pdf format by the court staff. Pdf briefs are printed and distributed to the justices. The justices essentially have an electronic copy of a paper brief.

The court's ability to use electronic records is also limited. Not all trial courts in Oregon have switched to e-filing. The court does not scan paper trial court records. Counsel can e-file scanned record excerpts, which serve the same function as attachments to paper briefs.

The court staff creates electronic "brief bundles" for each case. Justice Linder showed how a brief bundle looked and worked on an iPad. Each bundle includes a cover page, voting

sheet, "allow memo" (a memorandum discussing the basis for accepting a case for review), and briefs. The court does not use bench memos. The justices have different approaches for using the bundles. Most justices and clerks use a basic pdf reader program, such as iBooks, iAnnotate or GoodReader. The pdf readers have basic annotation features. A justice can review all annotations when reading the bundle and can also send the annotations by email.

The main advantage of the bundles is portability. Navigation can be quite challenging. For example, the bundle contents are paginated sequentially, rather than separately paginating of each item. As a result, a justice looking for page 18 of the appellant's brief cannot simply navigate to page 18 in the bundle. Generally, there are no hyperlinks in the bundles, except for bookmarked brief headings provided by some counsel.

Another panelist, Kevin Newsom, who chairs the appellate practice group at Bradley Arant Boult Cummings, asked whether practitioners could add more functionality to briefs as a courtesy for the court. Justice Linder explained that the current system would have difficulty accepting internal hyperlinks to record excerpts or external links to online research. Added items would be lost when the brief bundles were assembled.

Judge Higginson discussed the Fifth Circuit's development of a cutting edge system. E-filing is mandatory as in other federal circuits. However, the Fifth Circuit requires that counsel cite to the district court record and legal authority in a specialized format. The court staff processes the briefs using software that recognizes the citations and converts them to hyperlinks. Once converted, a judge reviewing the brief can directly access the electronic record to check factual references and review other relevant material. A judge can also click through a case or statutory cite and connect to Westlaw.

Before oral argument, each judge's iPad is loaded with the entire case file. Judge Higginson displayed the content and functions of a typical file. The first item is a list of judges on argument panels with email links to chambers. The CM/ECF dockets are included with access to all record entries. The briefs, with the hyperlinks added by court staff and record excerpts provided by counsel, are downloaded. Bench memos and the entire case record are also available.

Judge Higginson discussed his approach for reviewing briefs, while noting that each judge follows his or her personal preferences. He initially reviews the briefs on paper as a way to see the big picture. He then more closely reviews the electronic briefs (with the tables of contents as a guide), aided by a detailed bench memo. Judge Higginson begins with the appellant's reply brief. He uses the hyperlinks to review the principal legal authority and record materials. The system allows him to instantly send links to his clerk to check a fact or case.

Judge Higginson performs another final review before oral argument. At that "decisional point," he is most familiar with the briefs and record and can take advantage of direct interaction with counsel. Judge Higginson stressed a key point: The difference between traditional and electronic briefing does not change how the judge decides an appeal. The electronic brief

makes the process more efficient and effective, but does not affect the outcome.

Don Cruse then talked about the approach used in Texas. The appellate court clerks are permissive about allowing counsel to file briefs with bookmarks and hyperlinks. Counsel are expected to include key record entries with their briefs and may provide bookmarks as a navigational tool. He recommended that counsel attach the text of Texas administrative regulations that can be difficult to locate. Exhibits may be attached, subject to size limitations on electronic filings.

Kevin Newsom commented about the potential problems caused by differing levels of technological sophistication and resources among attorneys. He asked the panelists whether there was concern that disparity in counsels' ability to effectively design and prepare e-briefs could have an impact on advocacy. The 5th Circuit's system acts as an equalizer, because record and research cites in all briefs are turned into hyperlinks by court staff. Attorneys do not need to have the technical knowledge or tools.

Responding to a question about the potential for using hyperlinks to extra-record material, Judge Higginson mentioned the 5th Circuit's system addresses any concern because the court can confirm that all linked materials are in the record. The direct links to the record and Westlaw also allow the judges and staff to easily determine if counsel has selectively cited to the record or authority. Don Cruse mentioned the same issue of misleading or non-record citations exists in traditional appellate practice. Justice Linder had no additional concerns due to electronic briefing. Courts have always relied on counsel to limit citations to material in the record (and opposing counsel to monitor and respond to extra-record references).

Judge Higginson replied to a question about the ability to circumvent word limits by linking to briefs from other cases on Westlaw or Lexis. For example, counsel could direct the court to additional discussion of relevant issues that were briefed in other cases. By rule, the 5th Circuit does not allow counsel to incorporate other briefs by reference.

The panel had mixed reactions to an interesting possibility, *i.e.* whether judges could email counsel and request them to address issues or gaps in the briefing.

Judge Higginson raised the broader question whether the nature of electronic briefs should lead to more changes. He asked whether next-generation briefs should look or function differently than current briefs, perhaps more like a website.

His comment led the panel to discuss the differences in how briefs are read on computer screens and tablets. Justice Linder referred to neuroscience research demonstrating that brains are plastic and can adapt to new content formats and reading styles. The research describes the contrast between the "skimming brain" and "deep-think brain." Justice Linder is concerned about the ability to "deep-think" when reading on screen as opposed to paper. She finds that navigation tools and hyperlinks can be distracting.

Don Cruse mentioned the research indicating that people read in smaller chunks and pay attention to headings, bullets, and other attention-

markers. He believes practitioners need to recognize that some judges read briefs on screen and others on paper. Counsel should write briefs that meet the needs of both reading styles.

The panel talked about the handling of sealed material in the digital environment. The judges indicated that courts do not function as gatekeepers and expect counsel to take responsibility for properly handling sealed material.

Judge Higginson said that attorneys do not have access to the hyperlinked briefs created by the 5th Circuit's system. It was observed that this results in a disparity between the decision makers' and advocates' versions of filed material. By contrast, in Texas and other courts with less advanced systems, by virtue of service, counsel have access to the same pdf briefs that are filed and distributed to the judges.

Ben Cooper informed the attendees that the Council of Appellate Lawyers Rules Committee is particularly interested in rule changes needed for e-filing and e-briefing and invited comments and suggestions. Kevin Newsom said that the federal rules advisory committee has been taking a slow, deliberative approach due (ironically) to the difficulty in keeping up with changes in technology.

PERCOLATING AND POTENTIAL LEGAL CONFLICTS: CHALLENGES FOR LAWYERS AND JUDGES

By D. Alicia Hickok

The panel was moderated by the Honorable Brett Busby of the Texas Court of Appeals, 14th District (Houston), and was comprised of the Honorable Andre Davis of the Fourth Circuit Court of Appeals, the Honorable Nathan Wecht, Chief Justice of the Texas Supreme Court, Aaron M. Streett of Baker Botts in Houston, and Professor Ernest A. Young, Professor of Constitutional Law at Duke Law School.

The panel discussed examples of some of the constitutional and statutory questions that may be headed to the United States Supreme Court in the upcoming terms, focusing on three areas: The First Amendment (in particular, compelled speech and the ACA religious exemption); prudential standing; and the Alien Tort Statute.

First Amendment

Chief Justice Hecht focused on the First Amendment and compelled speech, the doctrine arising from the statement in *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and to refrain from speaking at all. He observed that the Court will have the opportunity to clarify requirements for commercial advertising disclosure. He explained that, like prohibited speech, compelled speech is typically tested under strict scrutiny, but commercial speech is at least a step down from strict scrutiny. Indeed, in the wake of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), if the compelled disclosure is clearly factual and intended to prevent deception, only rational ba-

sis is required. But courts do not agree whether that holds true when the government's interest is something other than protection against fraud. The Courts of Appeals for the First and Second Circuit apply the rational basis test in those non-fraud situations. The Court of Appeals for the D.C. Circuit has decided its cases inconsistently.

The Court of Appeals for the District of Columbia Circuit has created its own conflict by disagreeing about what *it* said in *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012). In *National Association of Manufacturers v. Securities and Exchange Commission*, 748 F.3d 359 (D.C. Circuit 2014), the court held that *R.J. Reynolds* had determined that *Zauderer* rational basis review was limited to instances in which the government was seeking to protect against deception, and it accordingly applied intermediate scrutiny to the question before it. In *American Meat Institute v. U.S. Department of Agriculture*, 746 F.3d 1065 (D.C. Cir. 2014), however, the panel held that *R.J. Reynolds did not* restrict rational basis review to protections against deception, and the *en banc* court affirmed that decision on July 29, 2014, holding that *Zauderer* rational basis review applies to factual and uncontroversial disclosures when those disclosures serve other government interests as well as when they are aimed at correcting deception. *See* 760 F.3d 18, 22 (D.C. Cir. 2014). The *en banc* decision in *National Association of Manufacturers* is still pending.

There is a particular subset of cases in this area addressing the constitutionality of compelled disclaimers for pregnancy resource centers, disclosures such as: Are medical services provided; is there a doctor on staff; does it perform or refer for abortions; does it encourage people to consult with their doctors? The district courts have been applying strict scrutiny, but the localities passing the ordinances have contended that the ordinances regulate commercial speech and thus should be subject to rational basis or intermediate scrutiny. The Court of Appeals for the Fourth Circuit recently decided a case *en banc* in which it addressed what constitutes commercial speech, adopting a broad definition of a commercial transaction as "offer[ing] to provide commercially valuable goods and services." *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 284 (4th Cir. 2013) (*en banc*). And "even where speech 'cannot be characterized merely as proposals to engage in commercial transactions,'" speech may be commercial if one or more of the following factors is present: (1) the speech is an advertisement, (2) the speech refers to a specific product or service, and (3) the speaker has an economic motivation for the speech. *Id*. at 284–85.

Chief Justice Hecht observed that at the time of the Summit, one such case had just received a denial of certiorari, but that there are cases pending in district courts in circuits besides the Fourth – including a Texas district. He pointed out that the questions in these cases implicate a number of additional issues, particularly with regard to viewpoint discrimination: Does an ordinance that requires a center that does not provide abortion services to say so in its public communications demonstrate a governmental preference for abortion or abortion information when the governmental interest is in seeing that there is no delay in health care? There is anoth-

er issue, which is whether the ordinances are void for vagueness, but ordinances can be made more specific. The real issues are with the proper level of scrutiny and whether there is viewpoint discrimination.

On December 5, 2014, the United States Supreme Court granted certiorari in a First Amendment case – *Walker v. Sons of Confederate Veterans*, 14-144 – where Texas had refused to allow the Sons of Confederate Veterans to sponsor a specialty license plate that would include a confederate flag. On review, the Court of Appeals for the Fifth Circuit found that the speech at issue was private, not government speech, and that the decision not to permit sponsorship constituted viewpoint discrimination. The Supreme Court granted certiorari as to both questions. The *Walker* case should be of interest to people following this area, because *Wooley* – a license plate case itself – was discussed by the Court of Appeals in its opinion. And, although the questions in *Walker* arise in the context of Texas refusing to permit license plates to carry a picture of the confederate flag, there are cases in this category that have arisen when organizations have sought to sponsor plates bearing a pro-life or pro-choice message.

Aaron Streett addressed an additional First Amendment category – the cases in the wake of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, and *Conestoga Wood Specialties Corp. v. Burwell*, 134 S. Ct. 2751 (2014). That case, decided under the Religious Freedom Restoration Act ("RFRA"), found that the contraceptive mandate placed a substantial burden on closely held businesses that were opposed to the forms of contraception mandated, and that the government had not chosen the least restrictive means; it could have used the accommodation it offered to non-profits or could have paid for contraceptive coverage itself. As of the date of the materials presented, there were 49 for-profit challenges pending that will be decided based on *Burwell*. But, as he pointed out, *Burwell* does not answer the question for the next set of cases: does the non-profit exception itself violate RFRA?

In this regard, Streett discussed *Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-1540, currently pending before the Court of Appeals for the Tenth Circuit. Because the Little Sisters of the Poor is not a church, it has to fill out a form and complained that the sending of the form was itself a substantial burden on its religion because it triggered someone else's provision of contraception. After the Court of appeals denied a preliminary injunction pending appeal, 2013 U.S. App. LEXIS 25915 (10th Cir. Dec. 31, 2013), the Supreme Court issued the preliminary injunction saying that there could be a violation.

Streett also pointed out that just prior to the Summit, the Court of Appeals for the D.C. Circuit announced a unanimous panel opinion discussing the ways in which the nonprofit accommodation has been made less onerous in the wake of *Burwell*. Now the letter does not have to go to the insurance carrier but just to Health and Human Services. This will be a tough issue going forward, requiring the Court to clarify substantial burden and articulate whether there are still less restrictive means.

There was a lot of speculation about how broadly *Burwell* would be applied. The *Burwell* major-

ity had said that it did not think that the decision would have any effect on racial discrimination statutes. Where *Burwell* is being discussed is in sexual orientation discrimination suits. These cases won't be litigated under RFRA because RFRA is a federal act and the sexual orientation discrimination statutes are state laws. It is possible, however, to see the issue come up under state RFRA statutes, and it is possible that the issues will be litigated as compelled speech issues. Streett pointed to a case involving a wedding chapel in Idaho that did not want to rent to same-sex marriages; it raised the compelled practice of religion argument. The case settled. The most analogous case involved the Boy Scouts, and the determination that the Boy Scouts did not have to admit homosexual leaders. Judge Davis raised a question whether least restrictive means would be satisfied if the government pays for health care. Streett responded that the Affordable Care Act is a new world in which the government requires coverage; perhaps courts could look at who is paying. He articulated the tension in such cases as the need to balance the reason the rule began – to protect minority religions – against a desire to articulate "substantial burden" and the temptation to place a reasonableness requirement on that burden. If you do not, "substantial burden" will be overbroad; but if you do, protection of only what is reasonable will undermine the protection of minority religions. We don't expect people to be reasonable about their faith.

Prudential standing

Judge Davis discussed the direction that standing analysis is moving, citing *Lexmark International, Inc. v. StaticControl Components, Inc*., 134 S. Ct. 1377 (2014). He mentioned that his very first published appellate opinion, which he wrote while sitting by designation on the Court of Appeals, was on standing (and that there was no standing in that case for an artist suing to prevent a municipality from covering an outdoor mural he had painted). *Lexmark* came out of the Court of Appeals for the Sixth Circuit and concerned a chip that was needed for a toner cartridge to work. StaticControl had developed a knock-off chip that enabled others to make cartridges that could be substituted for Lexmark's. Lexmark had sued StaticControl under the federal copyright laws, and StaticControl had counterclaimed that Lexmark had violated the Lanham Act by falsely advising its customers that StaticControl's chip was illegal and that it was unlawful to have non-Lexmark remanufacturers refurbish the cartridges. While conceding Article III standing (i.e., that StaticControl had suffered, or was imminently threatened with, a concrete and particularized injury in fact fairly traceable to the challenged action and redressable), Lexmark moved to dismiss the counterclaim for lack of prudential standing, which represents a series of broad prohibitions against: raising another person's legal rights, adjudicating generalized grievances more appropriately addressed in the representative branches, or raising a claim outside the zone of interests protected by the law invoked. The Supreme Court granted certiorari on "the appropriate analytical framework for determining a party's standing to maintain an action for false advertising under the Lanham Act."

Writing for a unanimous Court, Justice Scalia said that the question whether the plaintiff has a

claim is a question of statutory interpretation, and the prudential "zone of interest" inquiry is encompassed within the analysis whether Congress created the right for the person to sue and whether the plaintiff can aver facts to say that the defendant proximately caused the injury. Redirecting the focus to the statutory right to sue is particularly important in Lanham Act cases because courts had been split on whether the analysis was one of trademark infringement or false advertising (which has broader group of injured persons). After *Lexmark*, the challenge arises under Federal Rule of Civil Procedure 12 (b)(6) and not under Rule 12(b)(1). Judge Davis observed that the timing of a motion depends on which rule applies; if the question is under Rule 12(b)(6), it cannot be raised at any time.

Judge Davis also pointed out some other contexts where it is likely to see *Lexmark* apply. For example, in a pre-*Lexmark* case, a Hassidic rabbi was denied standing under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to litigate the requested modifications to a historic building in Litchfield, Connecticut. Applying *Lexmark*'s analysis, it would appear that there now would be standing. The Court of Appeals for the Tenth Circuit applied these principles to Colorado's analogue to the federal RICO statute to find standing. Judge Davis concluded that the courts will see a lot more such issues – and the Supreme Court will have to say more, as well as to explain if *Lexmark* applies to all prudential standing questions or only to the zone of interests analysis.

Alien Tort Statute

Professor Young spoke about the background of the Alien Tort Statute, the impact of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and then addressed questions that remain and whether there is a continuing need for the statute.

The Alien Tort Statute came out of the 1789 Judiciary Act, and was intended to avoid violating international law. Those advocating a broader analysis say that the purpose was to develop and enforce international law from the beginning. Since 1980, the statute has become the universal mechanism for jurisdiction to adjudicate human rights violations abroad, so long as there is personal jurisdiction.

There had been a series of cases involving the Alien Tort Statute that had gotten no further than the Courts of Appeals. In *Filártiga v. Peña-Irala*, 630 F.2d 876, 878-79 (2d Cir. 1980), the Court of Appeals found jurisdiction to hear a case about torture in Paraguay because the torturer and the victim's family had since relocated to the United States. In most of these cases, the amount of money at issue is small; the value of a verdict is symbolic. A second wave of litigation arose when the human rights bar learned that actions could be brought against corporations as well as individuals and that the claims could be against not just violators but also aiders and abetters.

It was not until 2004 that the Supreme Court decided *Sosa*, in which Justice Souter said that the Alien Tort Statute is a jurisdictional statute; it does not create a cause of action but if a violation of international law is certain, the Alien Tort Statute implies a cause of action. Thus, even though the Alien Tort Statute does not create a cause of action, it presupposes that one ex-

ists. The claim at issue in *Sosa* itself, however – which challenged detention – did not rise to that level.

Kiobel followed in 2013, further limiting the scope of the Alien Tort Statute. Finding that the Alien Tort Statute did not generally permit extraterritorial suits, the Court found that petitioners could not sustain their claim because all of the relevant conduct occurred outside of the United States. Although Justice Breyer concurred in the result, he observed (writing for four justices) that one aspect of "national" interest that would justify jurisdiction under the Alien Tort Statute is the prevention of the United States from being a safe harbor for a torturer or other enemy of mankind. Thus, Justice Breyer saw *Filartiga* as correctly decided.

Given the outcome of *Kiobel*, there are significant questions that are percolating. One is what it means under the Act to sufficiently "touch and concern" the United States. Currently, the Court of Appeals for the Second Circuit has said that it is enough for the challenged action to be in connection with conduct in the United States; the Court of Appeals for the Eleventh Circuit say that is not enough. The question that *Kiobel* could have addressed, but did not, is whether there should be liability under the statute against corporations at all. Another question is how wiretapping will be treated. And, as an overlay, we need to ask ourselves: who should decide these cases? As federal courts are less hospitable, some cases will go to state court. Should they be decided in international tribunals? Do we want private plaintiffs bringing these suits?

THE GROWING SPHERE OF FIRST AMENDMENT PROTECTION

By Brian K. Keller

"First Amendment Speech—Who and What are Protected?" was AJEI's Saturday evening panel, moderated by the Honorable Xavier Rodriguez, U.S. District Court, Western District of Texas with panelists Tom Leatherbury of Vinson & Elkins LLP, Dean Robert Schapiro from Emory University School of Law, and the Honorable Leslie Southwick, U.S. Court of Appeals for the Fifth Circuit.

Dean Schapiro outlined the development of law from *Buckley* through *Hobby Lobby*. The first campaign finance restrictions were put in place after Watergate and upheld by the 1976 *Buckley* decision. *Buckley* "set the terms" that remain with us today for analyzing campaign finance restrictions. *Buckley* did two things: (1) it upheld limits on contributions to candidates because of the danger of *quid pro quo* corruption—such as handing cash directly to political officeholders in return for favorable action; and (2) it said that limits *cannot* be placed on independent expenditures—such has television advertising—made in hopes of influencing candidates.

After *Buckley,* organizations attempting to influence elections spurred the 2002 McCain/Feingold Campaign Finance Reform Act—which regulated organizations engaging in "electioneering communication" expenditures—paid-for communications that used the name of a candidate within a certain time peri-

od before an election. Corporate and union electioneering expenditures were completely banned. In 2003, the Supreme Court looked at McCain/Feingold and largely upheld these rules in the 5-4 decision of *McConnell v FEC*. *McConnell* also reaffirmed the 1990 *Austin v. Michigan Chamber of Commerce* case, which had upheld a state ban on independent corporate expenditures intended to influence elections.

Next, Dean Schapiro outlined the 2010 *Citizens United* decision. There, the Court examined how all these regulations applied to "Hillary: the Movie"—a partisan documentary, funded by a corporation, airing before an election. Initially, the Court considered whether McCain/Feingold applied to this sort of documentary; it decided not to deal with this statutory question and ordered reargument on the facial constitutionality of McCain/Feingold.

In reaching its conclusion, the Court looked to the reasons for regulating corporate expenditures. One potential reason could be "distortion"—the aggregation of money that "distorts" the marketplace of ideas; but the Court found this was *not* a legitimate reason for governmental regulation of speech. In contrast, "corruption" could be a legitimate ground—but the Court noted that independent corporate expenditures, without a *quid pro quo,* can't really be corrupt.

Hence, *Citizens United* overruled both *McConnell* and *Austin,* and held 5-4 that electioneering communications restrictions on corporate political expenditures violated the First Amendment. But *Citizens United* also cast doubt on *Buckley* and other cases that upheld regulations on both express corporate advocacy and also electioneering communications. It held that aggregate limits—discussed in *Buckley*—were unconstitutional, since they are not "quid pro quo" corruption. *Citizens United* suggested that SuperPACs were largely exempt from campaign finance restrictions, though what level of disclosures may be required remained a live issue. Justice O'Connor, reading *Citizens United* and no longer on the bench, mused that *Citizens United* may impact the Court's *Cafferty* decision, which had required a judge to recuse himself based on an independent expenditure.

This all led to *Hobby Lobby*. Hobby Lobby is a large for-profit closely held corporation that wanted to avoid paying for an employee's contraceptive coverage by using the Affordable Care Act's exception that was reserved for religious non-profits. It relied on the Religious Freedom Restoration Act, which provides that the federal government may not substantially burden the exercise of religion unless there's a compelling governmental interest and the burden is the "least restrictive means."

First, the Court found, by 5 to 4, that corporations are "persons" under RFRA via the Dictionary Act, which says corporations are persons unless the context indicates otherwise—which here it didn't. Justices Ginsburg and Sotomayor dissented on this issue. Next, the Court found a substantial burden on the religious belief of the owners whether or not they provided contraceptive services or fulfilled the alternative requirement of paying a fee. Justice Kennedy wrote a concurrence to explain that the Government could just pay this fee. Finally, the Court declined to decide whether the religious nonprofit exemption was "sufficient" or complied

with RFRA.

The theme of these cases, Dean Schapiro noted, was that the Court is closely divided: the majority protects corporations as individuals, and a core minority disagrees.

Following this excellent background by Dean Schapiro, Judge Rodriguez posed several questions to the panel.

Expenditures:

First, Judge Rodriguez asked about expenditures. Citing recent headlines, he noted that the City of Richmond, California, has had nearly $3 million funneled into campaign committees in order to influence the November 2014 Richmond city election. Of 107,000 residents, that's $72 per registered voter. How should this be looked at?

Judge Southwick took the first shot—he noted that much is still not set in stone; profit and nonprofit aren't useful distinctions; and the distinction between expenditures and contributions is unclear. Tom Leatherbury noted that, in light of *McCutcheon* and other recent cases, it's hard to see any aggregate limits on expenditures being upheld but observed the Richmond example shows how important disclosure requirements are; most disclosure laws are still being upheld at all levels after *Citizens United.*

Dean Schapiro agreed: it was hard to see limits being imposed on independent expenditures. But he wondered what could be required beyond requiring disclosures? He looked to *Caperton*—where $3 million was spent in a state judicial election, the Court didn't prohibit the $3 million, but did require judicial recusal. Perhaps, Dean Schapiro suggested, there could be lobbying regulations or recusal rules in the judiciary or legislature—where there's a high level of expenditures by a party with an interest in legislation. But, perhaps, too, these would be seen as "backdoor restrictions."

Judge Southwick suggested that *Caperton* might just be a "one shot wonder" where there are different rules for expenditures and contributions in the judicial area.

First Amendment rights?

Judge Rodriguez asked whether a judge's First Amendment rights were violated by requiring recusal—after all, *Republican Party of Minnesota v White* says judges can speak on the issues of the day. Tom Leatherbury noted the Court's *Nevada Commission on Ethics v. Carrigan* decision in 2011, where a political office holder was required to recuse himself and challenged this, claiming his vote was protected speech. He wanted to vote on a developer project while having ties to the developer. The Court upheld the restriction—holding that voting was *not* speech.

Audience Question: intersection between *Caperton* and *Citizens United*

The audience asked what happens if a "Committee to Elect Great Judges" made direct expenditures for Judge X—that is, put up billboards, sent mailers, tv ads, etc. Must a judge recuse?

Dean Schapiro suggested it would depend if the judge knew who was contributing. If the judge knew one or more of the contributors—then partiality could be affected. If it's an aggregate of money, or none of the contributors are known—then it might be a different case.

Contributions: after *Citizens United*, what limits exist on corporate political spending on contributions?

Tom Leatherbury cited several post-*Citizens United* cases that upheld, as constitutional, direct bans on corporate political contributions: the Fourth Circuit's *Danielczyk* and Eighth Circuit's *Iowa Right to Life v. Tooker* cases. Dean Schapiro agreed: there's a long history of prohibiting direct political contributions. On the other hand, Dean Schapiro noted, there's a new tension because corporations are now "persons" with first amendment rights.

***Hobby Lobby:* Who's the "person" exercising First Amendment rights?**

Dean Schapiro noted that the corporation is "closely held" in *Hobby Lobby* doesn't seem important to the reasoning of the case. The Court noted it couldn't imagine that larger corporations could reach consensus on the sorts of things that Hobby Lobby did. So too, "closely held" doesn't seem to be the stopping point for application of the holding. Tom Leatherbury added that "closely held corporations" are different in different states.

What happens at trial? When rubber meets the road, how does a trial judge determine whether the corporation actually has the claimed religious beliefs?

Dean Schapiro stressed that courts are hesitant to disbelieve litigants who profess religious beliefs. He thinks the "great deference will continue in the corporate context" so long as someone says "this is a sincerely held religious belief." The deference will continue if only because it's so difficult to determine if the belief is true. So he thinks there will be two lines of caselaw that develop: some where the court may deal with this on the merits; and another corporate law line of cases dealing with this.

Is the *Priests for Life* petition denial inconsistent with *Wheaton College*?

Dean Schapiro noted that, in the *Priests for Life* case, the organization Priests for Life complained that the burden of filling out Form 700 in order to opt out under the contraception provisions of the Affordable Care Act violated its religious rights. The Supreme Court denied Priests for Life's petition for writ of certiorari. Tom Leatherbury believed that this was indeed inconsistent with the preliminary injunction that the Court granted in *Wheaton College*, where one issue was whether the college had to fill out the Form 700. Dean Schapiro said there was a basic dividing line: (1) will an organization have to indicate it's not going to provide coverage, which, in turn, would trigger alternative coverage?; or, (2) will the burden be on individuals to claim "I'm not getting the care to which I'm entitled"—and then courts tell the government to fill the gap. Health and Human Services wants to place that burden on the individual; but the Affordable Care Act's purpose, in contrast, is to make things *easier* for individuals.

How far does *Hobby Lobby* take us? If you're a for-profit corporation—or religious—can you invoke religious beliefs like "we don't believe women should be in management" or "we won't hire Muslims"?

Tom Leatherbury didn't think so. Dean Schapiro noted that current doctrine allows for "a great deal of discrimination" when you look at core religious organizations. But you *can* tell

organizations they can't discriminate. So how to resolve this tension is up in the air. Tom Leatherbury said there's another tension—The Supreme Court has broadened the religious and first amendment rights of corporations, but at the same time has "embraced neutral principles" and applied general corporate law principles to religious corporations. How do you decide who's a priest? Who's a bishop? Many questions are implicated by this tension.

Responsibilities: some cases are holding internet providers responsible for what's posted on the internet; Facebook has been sued a few times. Where are we headed?

Dean Schapiro noted that internet companies are "satisfied with Congressional gridlock." Internet Service Providers (ISPs) are in good shape—there's not going to be a great expansion of liability to include ISPs. He noted the 2008 Fifth Circuit *Doe v. MySpace* case—where MySpace was immunized for content posted by someone that led to a sexual assault. He also noted a new Ninth Circuit case—*Doe 14 v. Internet Brands*—which held, at the motion to dismiss stage, under a "failure to warn" theory, that Section 230 of the Communications Decency Act doesn't bar a negligence claim against the ISP for allowing a victim to be lured, via online postings, into being drugged and sexually assaulted: the ISP could have changed its terms of use, or posted something, or could have made minor modifications to prevent the assault. The Ninth Circuit stressed it wasn't opining on the merits, though. Otherwise, cases are generally trending in the *Doe v. MySpace* direction: Section 230 provides general immunity for ISPs and those who don't "materially contribute" to the content of material posted on the internet.

The Yelp case recently argued before the Virginia Supreme Court: a Virginia carpet cleaning business subpoenaed Yelp's San Francisco headquarters for the identity of someone who anonymously gave the business a bad rating; Yelp refused to comply and claimed First Amendment protection.

Tom Leatherbury noted that the Virginia case *Yelp Inc. v. Hadeed Carpet Cleaning, Inc.* was procedurally similar to the August 2014 Texas Supreme Court case *In Re John Doe a/k/a "Trooper"*. The *Yelp* case asks whether having a registered agent in the state subjects a business to jurisdiction for purposes of a pre-suit discovery petition. The issue in *Yelp* is whether Yelp must turn over the identity of the speaker. But also, the issue is whether there was a showing that the anonymous critic of the carpet cleaning company was even subject to personal jurisdiction in Virginia. He noted that Virginia has one of the most favorable standards for those who seek the identity of anonymous speakers online.

Right to be forgotten?

Dean Schapiro said we won't get one—that is, a right to be forgotten online. The United States is far more protective of free speech than other countries. He thinks we will continue to go our own way and be more protective. He also cited the example of the European concert pianist that recently wrote a letter, published in the Washington Post, asking that an unfavorable review a few years ago about one of this concerts be taken down. "About fifty articles later, he's certain not to be forgotten because there will be many more hits on his name."

PENNOYER STRIKES BACK: PERSONAL JURISDICTION IN A GLOBAL AGE

By L. Steven Emmert

If you went to law school more than a few years ago, you probably have but a dim recollection of some case called *Pennoyer v. Neff* from your first-year class in civil procedure. You might even recall that it dealt with *in personam* jurisdiction. Beyond that, given the radical restructuring of Supreme Court jurisprudence on this aspect of jurisdiction in the past 70 years, you were probably justified in leaving it to wither on the vines of your distant memory.

But as a Sunday-morning audience at the AJEI Summit learned in a lively panel discussion, *Pennoyer* may not be really-most-sincerely dead. SMU Dedman Law Professor William Dorsaneo led a discussion among retired Chief Justice Wallace Jefferson of the Texas Supreme Court, Judge Jennifer Elrod of the Fifth Circuit, and University of Texas Law Professor Alexandra Albright. The panel explored the Supreme Court's seemingly irresolute decisions in this field, and offered opinions on whether we really know all we need to know in order to understand the current state of *in personam* jurisdiction.

One last preliminary point: I had planned to attend this presentation as a matter of academic interest, since I like history. I rapidly came to a different conclusion: This subject matters, a lot, even to lawyers who don't deal in complex jurisdictional issues. I came out of this presentation thinking not, *Gee that was an interesting history lesson*, but more ominously: *Uh-oh*.

Development of in personam jurisprudence

Here's a quick micro-history of the development of *in personam* jurisprudence, mentioning just a few of the major decisions, to get you up to speed on the topic:

Pennoyer (1877) held that a state's courts had jurisdiction only over persons who could be served with process within that state. Each state was sovereign under the relatively new Fourteenth Amendment, so no state could assert long-arm jurisdiction over a citizen of another state, absent his presence in the forum. There's a strong hint that those courts may obtain quasi-*in-rem* jurisdiction via a pre-lawsuit attachment, though the litigant didn't do that here.

International Shoe v. Washington (1945) changed that, permitting long-arm jurisdiction over citizens of other states, as long as the defendant has "minimum contacts" with the forum state.

Hanson v. Denckla (1958) held that minimum-contacts analysis requires proof that the defendant "purposefully avails itself of the privilege of conducting activities within the forum State."

After a pause lasting twenty years, the Court then decided *Shaffer v. Heitner* (1977), effectively ending much of quasi-*in-rem* jurisdiction and refocusing the inquiry on the relationship of the forum state to the subject of the litigation.

World-Wide Volkswagen v. Woodson (1980) took things into the commercial realm, requiring the plaintiff to demonstrate more than just the foreseeability that a given product would have made its way, over time, to the forum state. This

was a win for manufacturers and vendors, who didn't have to face litigation in remote locales.

In *Helicopteros Nacionales de Colombia v. Hall* (1984), the justices first adopted the terms *general jurisdiction* and *specific jurisdiction*. The former applies where jurisdiction isn't based on a defendant's contacts with the forum state; the latter concerns cases where the litigation relates to the defendant's contacts. The best illustration of general jurisdiction is that a defendant can be sued in his home state for any right of action, even one with no factual nexus to that state.

Burger King v. Rudzewicz (1985) created a two-prong test to evaluate minimum contacts. Courts should evaluate whether the defendant purposely directed activities at citizens of the forum state; if the plaintiff succeeds in that, the next step is to evaluate several other factors to determine whether this comports with the "fair play and substantial justice" requirement in *International Shoe*.

Asahi Metal Industry v. Superior Court (1987) came next, and revealed that the *Burger King* approach didn't fit very well. It also exposed a fractured Supreme Court, with a plurality finding that just selling a product doesn't subject a defendant to forum-state jurisdiction; a dissent would hold the exact opposite, as long as it's predictable that the product will wind up there.

Thus, by the end of the Reagan Era, the Court's jurisprudence seemed to have wandered all over the map. Whether a trial court had jurisdiction depended on which decade it was, as much as on what contacts the defendant had. We then see another 20-year pause, followed by the four cases that are the real thrust of this panel discussion.

The modern decisions

In *Goodyear Dunlop Tires v. Brown* (2011), the Court retook the *in personam* stage and ruled that a company can be sued wherever it "engages in substantial, continuous, and systematic course of business." That, the panel noted, just looks like a fuller explanation of *International Shoe*. But three years later, the justices wiped this fresh ink off the pages, with *Daimler AG v. Bauman* (2014).

The *Daimler* Court found its *Goodyear* holding to be "unacceptably grasping." (This is the Court's language; not the panelists' or this reviewer's.) Just transacting business regularly, even systematically, within a state was no longer enough to subject a company to a courts' general jurisdiction. Starting in 2014, the real test is whether companies' contacts with the forum state "are so 'continuous and systematic' as to render them essentially at home in the forum State."

This, one panelist noted, is the Dorothy Principle: "There's no place like home." It also looks very much like *Pennoyer*, which effectively forbade long-arm jurisdiction unless your defendant was unlucky enough to wander into the forum state, perhaps on vacation, when a process server walks by.

There's more. The *Daimler* Court also called for evaluation of the defendant's contacts in the forum state against the backdrop of all of its activities – worldwide, if necessary – to determine if it meets the new test. The general sense of the panel is best summed up by this brief exchange: [Moderator] "So now, after the *Daimler* decision,

where is Daimler 'at home'?" [Prof. Albright] "Stuttgart."

This split-second dialogue explains why this issue matters so much. For example, in products cases, where a manufacturer places a product into the stream of commerce and it causes an injury, where may the manufacturer be sued? In the absence of general jurisdiction, such as with a foreign manufacturer, that question becomes problematic.

So what's left of specific jurisdiction? Here again, two recent decisions explore this branch of the *in personam* stream. The first, *J. McIntyre Mach. Ltd. v. Nicastro* (2011) contains no majority opinion, because it was impossible to array five justices on the same side of the dispositive issue. Five justices ultimately agreed with the conclusion that a British company could not be sued in New Jersey after it shipped a defective product to America. The Court's plurality ruled that what mattered was not the defendant's contacts with America but with New Jersey.

Here, the plurality's primary focus of jurisdictional analysis was whether the defendant's acts show an intent to submit to a given sovereign. That excludes consideration of "general notions of fairness and foreseeability." This language portends that *International Shoe* may be slipping away as a basis for long-arm jurisdiction. Two justices (Breyer and Alito) thought excluding consideration of fairness and foreseeability goes too far in abandoning *International Shoe*, calling the plurality's view a "seemingly strict no-jurisdiction rule."

Three dissenting justices (Ginsburg, Sotomayor, and Kagan) agreed that the plurality should not summarily dispatch *International Shoe*. That makes five votes in favor of retaining at least some vestige of long-arm jurisdiction based on *International Shoe's* fair-play-and-substantial-justice doctrine. So, that's settled, right?

Hardly. The Court took up the issue once more, and this time ruled in a unanimous opinion: *Walden v. Fiore* (2014). In that case, the Court ruled that minimum-contacts analysis means minimum contacts with the forum state, not such contacts with persons in that state. Regardless of whether the tortious conduct is negligent or intentional, the jurisdictional analysis must evaluate whether the defendant "formed … jurisdictionally relevant contacts with" the forum state.

Walden involved a TSA agent in Georgia who wrongly seized currency belonging to travelers on their way home to Nevada. The travelers returned home and sued the agent in a Nevada court, claiming that although his conduct occurred in Georgia, it caused foreseeable harm in Nevada. But the justices concluded that the agent didn't do anything in Nevada, so he formed no jurisdictionally relevant contacts with that state.

The horizon

The panel agreed that the area of e-contacts is pregnant with jurisdictional issues. Justice Jefferson described this as the key development of "the future – and it's a fun future." He gave the example of blogging and trade libel by a John Doe post in an unknown location. That scenario presents the secondary question whether the defendant, through an attorney, can challenge jurisdiction, even while staying anonymous.

Justice Jefferson hints that he likely will be able to do just that.

But, as the moderator noted, "The Supreme Court isn't saying." Judge Elrod agreed, noting that the unanimous *Walden* ruling – which Prof. Albright described as the justices' saying, "That's it; we're done with this topic" – expressly reserves the question of e-contacts to another day.

She posited a situation where a company sells worldwide from its website; that site features popup ads that will foreseeably be seen in many potential forum states. Is that kind of targeted advertising enough to establish minimum contacts? Resolution of that question may turn on a number of factors, such as how interactive the site is. These and related questions, she felt, were destined for future cases – and, in the interim, for law professors' exams.

* * *

While the topic of *in personam* jurisdiction isn't at the forefront of most lawyers' minds – we take such jurisdiction for granted in most cases – this panel presentation suggested that this subject isn't one that should be relegated to academics only. Foreign defendants may foreseeably seize upon the Supreme Court's apparent exhumation of the long-buried *Pennoyer* doctrine, which allowed for almost no long-arm jurisdiction, to challenge lawsuits in a variety of case areas.

The moderator offered an observation that drew no dissent, and a couple of knowing nods, from the panel. We now have three types of jurisdiction: General, which is very limited; specific, which has been sharply narrowed over time; and no-jurisdiction, which is the largest category. Trial lawyers who fashion pleadings against nonresident defendants must now look beyond the question whether the defendant has appointed a registered agent in the forum state; the recent caselaw suggests that tagging a foreign defendant might now be almost as difficult as it was when *Pennoyer* was decided.

THE LAST SCALIA & GARNER BOOK. MAYBE.

By Marie E. Williams

On Saturday morning of the AJEI Summit, United States Supreme Court Justice Antonin Scalia and Professor Bryan A. Garner presented on "Reading, Interpreting & Writing About the Law." The session primarily was an overview of the book the two recently published, *Reading Law: The Interpretation of Legal Texts*.

It began with a standing ovation for the speakers, which Professor Garner acknowledged never happens unless Justice Scalia is presenting with him. That set the tone for the session, which included plenty of good-natured banter between Justice Scalia and Professor Garner.

Reading Law is the second book that Justice Scalia and Professor Garner have written together. They spent 200 hours side-by-side, and their work on the book spanned three-and-a-half years. The result is a 600-page tome on interpreting legal texts, a copy of which was provided to all conference attendees.

The idea for the book came from the duo's prior book, *Making Your Case: The Art of Persuading Judges*. Section 23 of that book advises advocates to "Know the rules of textual interpretation," but offers a scant two-and-a-half-page summary of those rules. Professor Garner suggested to Justice Scalia that they might write a second book on the topic. But after the two spent 100 hours side-by-side working on the first book, Professor Garner self-deprecatingly explained that Justice Scalia didn't want to write a second book with him. Eight months after the first book was published, however, Justice Scalia reportedly decided that he missed Professor Garner, and they began working on the second book. (And this is why I say "maybe" in the title. Although the pair predict that this will be their last book together, you never know!)

The goal of the second book was to collect all of the principles of textual interpretation in one volume. Professor Garner explained that these are all "textualist principles." Because if the enterprise of judging is deriving ***meaning*** from legal instruments, rather than ***intent***, then every judge is a textualist to some degree. Justice Scalia explained that the alternatives to textualism are unsatisfying, but the adage "*Verbis legis tenaciter inhaerendum*" – hold tight to the words of the law – is difficult for students of current law schools to understand because we are students of the common law. Law school curricula teach very little about how to interpret texts.

And so the need for this book arises. There has not been a compendium of canons of interpretation published in a century. Professor Garner and Justice Scalia believe that some judges are not textualists simply because they don't know ***how*** to be textualists. The authors find fault with "abstract purposivism" or "consequentialism" because a judge can rationalize whatever outcome he wants to reach through those approaches. The textualist approach, on the other hand, means that judges will not infrequently arrive at a decision that the judge doesn't like, says Professor Garner. Justice Scalia puts it more bluntly: "Show me a judge who is happy with every decision he renders, and I will show you a bad judge."

* * *

Professor Garner and Justice Scalia then gave an overview of the book's organization, explaining – among other things – that the book contains 57 valid canons of construction and 13 bogus canons of construction. They said had a lot of fun debunking the bogus canons. Then they launched into a discussion of some of the canons.

Fundamental Principles

1. Interpretation Principle: ***Every application of a text to particular circumstances entails interpretation.***

2. Supremacy-of-Text Principle: ***The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.***

Justice Scalia translated: "It is the text that is the law."

3. Principle of Interrelating Canons: ***No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.***

Professor Garner explained that, often, more than one canon comes into play. Usually multiple canons reinforce one another, but sometimes they point in different directions. Justice Scalia commented that conflicting canons do not mean that the canons are useless. Rather, they require us to know which ones are the strongest. Both authors emphasized that one must know what they are doing when applying canons of construction. This is presumably the knowledge their book can impart.

4. Presumption Against Ineffectiveness: ***A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.***

Justice Scalia again translated: Where there is ambiguity, resolve it in favor of rendering a provision effective.

5. Presumption of Validity: ***An interpretation that validates outweighs one that invalidates (ut res magis valeat quam pereat).***

Professor Garner offered the example of a will. If you can interpret a will in a way that would violate the rule against perpetuities, or in a way that does not violate the rule against perpetuities, favor the interpretation that makes the will valid.

Semantic Canons

6. Ordinary-Meaning Canon: ***Words are to be understood in their ordinary, everyday meanings – unless the context indicates that they bear a technical sense.***

Professor Garner commented that people frequently forget this canon. Drafters in particular forget that this canon is their best friend, and include excess definitions in legal texts. Justice Scalia offered an anecdote about Princess Anne, who he encountered when she accompanied Magna Carta to the Library of Congress last fall for a celebration of Magna Carta's 800th anniversary. Princess Anne defined the difference between knowledge and wisdom as follows: Knowledge is knowing that a tomato is a fruit. Wisdom is not putting it in a fruit salad.

7. Fixed-Meaning Canon: ***Words must be given the meaning they had when the text was adopted.***

Professor Garner described this as the most troubling canon. He offered the example of the word "nimrod." Most people in the room thought the word means "idiot." The word, however, comes from a character in the Bible who is a hunter. In 1925, a statute might have said "All nimrods must have licenses" because hunters were required to be licensed. But the cartoon character Elmer Fudd changed the popular understanding of "nimrod" because Bugs Bunny would pop out of a hole and label Elmer Fudd a "nimrod!" Now, everyone under a certain age thinks that nimrod means idiot. Words change meaning over time, and *Reading Law* devotes more than 14 pages to explaining why we must give them the meaning they had when the text was adopted.

8. Omitted-Case Canon: ***Nothing is to be added to what the text states or reasonably implies (casus omissus pro omisso habendus est). That is, a matter not covered is to be treated as not covered.***

Justice Scalia viewed this canon as rather fundamental. To imply anything from an omission transcends the judicial function.

10. Negative-Implication Canon: ***The expression of one thing implies the exclusion of others (expressio unius est exclusio alterius).***

18. Last-Antecedent Canon: ***A pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent.***

Justice Scalia offered the example of Article II of the Constitution: "In Case of the Removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President." When President William Henry Harrison died in 1841, the question was whether "the said Office" or "the Powers and Duties of the said Office" devolved on his Vice President John Tyler. Because the nearest antecedent to "the Same" is "the said Office," it was the office of the presidency that devolved, and John Tyler became President.

Contextual Canons

24. Whole-Text Canon: ***The text must be construed as a whole.***

Professor Garner admitted that he is not entirely happy with the examples given in Section 24 of the book. He invited anyone to send him great examples of the whole-text canon, by letter to bgarner@lawprose.org .

25. Presumption of Consistent Usage: ***A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.***

For example, Justice Scalia offered that if a will uses the word "land" in one place and "real estate" elsewhere, the second term presumably includes improvements in addition to the land itself. Otherwise, there would be no reason to use different terms.

31. Associated-Words Canon: ***Associated words bear on one another's meaning (noscitur a sociis).***

Professor Garner offered the example of a Minnesota case involving a statute that made it a crime to carry or possess a pistol in a motor vehicle unless the pistol is unloaded and "contained in a closed and fastened case, gun box, or securely-tied package." The defendant was carrying a pistol in her purse; the purse was fastened at the top. Did she violate the statute?

Justice Scalia noted that operating against the canon *noscitur a sociis* here is the canon that criminal laws should be interpreted in favor of the defendant in the event of an ambiguity. Is this situation close enough to being ambiguous?

Professor Garner shared that some people have asked that, in the next edition of *Reading Law*, the authors establish a hierarchy for the canons to identify which canons trump others. Professor Garner said this can't be done. And Justice Scalia added it would take the fun out of textual interpretation.

32. *Ejusdem Generis* Canon: ***Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned (ejusdem generis).***

Justice Scalia once again offered the example of a will. Consider the provision: "I leave my nephew all my tables, chairs, cabinets, and all other property." This provision does not mean that the nephew gets everything. For example,

the language would not convey real estate or cash to the nephew. Justice Scalia described this canon as "common sense."

33. Distributive-Phrasing Canon: ***Distributive phrasing applies each expression to its appropriate referent (reddendo singula singulis).***

This canon comes up a lot where the word "respectively" is used.

Expected-Meaning Canons

43. Extraterritoriality Canon: ***A statute presumptively has no extraterritorial application (statuto suo clauduntur territorio, nec ultra territorium disponunt).***

Justice Scalia noted that this canon does not apply to everything; just to governmental prescriptions. For example, in the *American Banana*[1] case, the Supreme Court held that the Sherman Act did not apply to claims brought by one American corporation against another alleging there had been unlawful price-fixing on bananas in Central America. Banana price-fixing was not unlawful in Central America, and no claim under the Sherman Act could be maintained. (Note that interpretation of the Sherman Act has changed since that decision in 1909.)

Government-Structuring Canons

45. Repealability Canons: ***The legislature cannot derogate from its own authority or the authority of its successors.***

Private-Right Canons

49. Rule of Lenity: ***Ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor.***

Justice Scalia commented that he wished the Supreme Court were more faithful to this canon. Although the Court says it frequently, it also ignores it frequently. The canon serves two purposes: (1) notice; and (2) criminal laws should be adopted by legislatures, not by judges. Sometimes, a statute can have both civil and criminal applications. And because a word can't mean two different things in civil applications and criminal applications, the rule of lenity can apply even to civil provisions,

Stabilizing Canons

55. Presumption Against Implied Repeal: ***Repeals by implication are disfavored – "very much disfavored." But a provision that flatly contradicts an earlier-enacted provision repeals it.***

Anti-Canons, Phony Canons, or "Thirteen Falsities Exposed"

58. ***The false notion that the spirit of a statute should prevail over its letter.***

66. ***The false notion that committee reports and floor speeches are worthwhile aids in statutory construction.***

Justice Scalia reminded us that one should be able to read the law and know what it means. And even if you were looking for the intent behind the language, legislative history is not the place to find it. Legislative history is affected by political concerns and money influence, among other things. The only thing we can know for sure is what the text says.

The session was a fast-paced, high-level, two-hour romp through all of these canons. Maybe they are Justice Scalia's and Professor Garner's

1 *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

favorite canons. Maybe they are the most important canons. But the session was enough to convince me that I should consult their book from time to time as I work on my cases.

The session concluded with a question-and-answer session. One attendee asked: If you know some of the judges you are appearing before do not believe in textualism, shouldn't you argue other things? Justice Scalia adroitly replied: Of course. But if you're appointed a judge, don't do that.

THE BUSINESS OF APPEALS: COST-EFFECTIVE AND CREATIVE STRATEGIES FOR TODAY'S MARKETPLACE

By Ann H. Qushair

On Sunday morning, the last day of the 2014 AJEI Summit, those attendees who showed up for the homestretch were rewarded with some valuable tips on how to remain both competitive and profitable in today's more challenging legal marketplace. Solo practitioner John Derrick moderated a diverse panel, which included Ray Cardozo, Janet Dhillon, and David Paige.

Moderator and Solo Practitioner: John Derrick is a solo practitioner in California whose statewide practice is devoted exclusively to appeals and related matters in both state and federal court. He is certified as a Specialist in Appellate Law by the California Board of Legal Specialization. John has written a well-reviewed book — *Boo to Billable Hours* — which critically examines the prevalent method of billing for legal services and advocates alternatives. He also prefers, in his own practice, to work on flat fee cases.

Big Firm Practitioner: Ray Cardozo is the Chair of Reed Smith's Litigation Department. He previously served as the Office Managing Partner of the firm's San Francisco office, as well as the Practice Group Leader of the firm's Appellate Group. Ray has had lead responsibility for more than 150 appellate matters in state and federal courts and has argued before the United States Supreme Court, California Supreme Court, federal circuits, and state appellate courts. Ray also is certified as a Specialist in Appellate Law by the California Board of Legal Specialization.

The "Client": Janet Dhillon is Executive Vice President, General Counsel, and Secretary of J.C. Penney Company, Inc. J.C. Penney is one of America's leading retailers, employing over 100,000 associates worldwide. Janet previously worked in-house, in various capacities, at US Airways.

Legal Advisor: David Paige is the founder and Managing Director of Legal Fee Advisors, a New York-based consulting firm that provides auditing and expert testimony services to ensure its corporate clients pay only fair, ethical legal fees. He is among the nation's foremost experts on the propriety of legal fees and billing.

Three types of appeals define the appellate market.

The business of appeals has changed. As Janet explained, General Counsel no longer enjoy carte blanche authority to incur limitless legal fees. They have to run their legal departments not like lawyers but like businessmen and women. Legal fees must be reasonable and, above all, make good business sense for the corporation. This economic reality has significantly impacted the legal profession as a whole but it plays out a little differently in the appellate world. In some cases, it also plays out differently depending on the type of appeal one is handling. On that note, John started off the presentation by identifying three major categories of appeals, specifically:

Category 1 Appeals: The first category of appeals involves corporate/institutional clients that are repeat appellate customers. Often the opposing party is also a repeat player. These appeals involve high stakes, whether financially or because they involve rules of law and/or policy that could have a future impact on the client or its industry overall. These appeals typically are handled by large firms on both sides.

Category 2 Appeals: The second category of appeals may involve the client on at least one side being a repeat customer. But the case is more run of the mill. One of the sides may be represented by a solo or small firm practitioner. These cases are usually employment and consumer or, to a lesser extent, commercial cases.

Category 3 Appeals: The third category of appeals involves both sides typically not being repeat players in the appellate marketplace. These cases include probate cases, family law cases, partnership and real estate disputes, and some commercial cases. Although these cases may involve a lot less money they may not necessarily be simpler to handle. They can still be complex to litigate and require a lot of time and effort. Also, working with individual clients, who are often less sophisticated, may demand more attorney time and personal attention.

Build your personal reputation as an appellate attorney.

The attendees received some early encouragement from John and Janet that all qualified appellate attorneys across the board have the potential to vie for high-level corporate work.

When it comes to doing appellate work, John explained, solo practitioners and small firms are on a level playing field with large firm or government attorney opponents. This is because the ability to effectively represent a client in an appeal usually does not depend upon having extensive, internal resources at one's disposal. With litigation, on the other hand, smaller firms can be overwhelmed by discovery and motion practice, which can drain their labor and economic resources. Janet has no reservations about hiring solo practitioners or boutique firms for her appellate work. In fact, she believes substantive specialties can lend themselves particularly well to smaller firms.

Additionally, although Janet acknowledged there are times when a larger firm is hired for its reputation or resources, she stated also that, at other times, individual appellate attorneys are sought on account of their personal reputation. Appellate counsel who have a strong track record with their local appellate courts and particular insight into their local appellate justices

are valuable to clients who have cases in their geographic region. Thus, while some clients, like Janet, generally rely upon counsel in larger cities to handle their appeals in smaller towns, they are open to using local appellate counsel, which can be especially beneficial for oral argument. "We just need to find you and know you're the guy (or gal) for the job," Janet advised. Likewise, many of David's clients will hire a particular specialist to work on their cases and then will follow that attorney wherever he or she goes once counsel has earned their trust. Therefore, appellate attorneys who make a name for themselves but do not have a big firm name behind them can compete effectively for corporate appellate work, even Category 1 appeals.

John pointed out that clients may even benefit from working with solo practitioners or appellate attorneys in smaller firms. These attorneys generally will be able to provide greater pricing flexibility than firms whose pricing hinges on various firm metrics. Whereas some large firm client relationship partners, such as Ray, who work with repeat clients may have significant discretion to determine what their clients pay for a matter, this may not always be the case with large firm counsel.

Provide value.

A central theme in the program was that providing cost-effective legal representation to today's clients is less about "cost," per se, and more about "value." As explained further below, providing value, in turn, is about ascertaining what clients need in a given case and then giving it to them in a manner that makes good business sense to them (and, ideally, for counsel too). Effectively serving clients also means being readily accessible to them to address new needs as they arise.

Ray explained that companies are result-oriented. How much they are willing to pay for appellate representation will depend primarily on the importance of the ruling. Clients are not as concerned with cost in the abstract, therefore, as much as what they are willing to pay to bring about a particular outcome. For the same reason, Ray noted, the question of an appellate attorney's rate has lost relevance over the years. Clients are more interested in what appellate counsel can bring to the table to serve their interests.

David agreed about the decreased importance of an attorney's hourly rate, noting that clients are increasingly seeking out legal specialists with particular substantive knowledge who can add a lot of value to a case but who likewise tend to have higher rates. That said, as John pointed out, regardless of whether a client is willing to pay for a particular attorney's time, one of the most effective ways to add value to a case is to help with a particular task *without* billing.

Be willing to Serve your clients' appellate needs in different capacities.

A company's cost/benefit analysis on a particular appeal may cut against using outside appellate counsel in their traditional role, if at all. As a result, appellate attorneys must be willing to assume different, potentially more limited, roles for their clients, as needed.

Many attendees were surprised and, not surprisingly, a bit concerned to learn from Janet

that J.C. Penney handles 40% of its appeals in-house, up from just 10% a few years ago. She also had shared with me prior to the program that, as a result, when hiring in-house counsel for the legal department, she is particularly interested in attorneys with appellate experience. (Before anyone panics too much, keep in mind that J.C. Penney has a fairly large legal department. Smaller companies simply do not have the capacity to handle that much appellate work in-house. Nonetheless, this significant shift in-house is a bit of a wake-up call.) Thus, larger corporate clients are not as dependent on outside appellate counsel as they used to be.

Having experienced this change first hand, Ray spoke of how his corporate clients also are asking him to assist in differing capacities. They no longer just retain him to handle an entire appeal, from beginning to end. Sometimes they just want him to review a draft of their internally generated brief, to ensure they captured all of the issues, or to draft a portion of a brief — more limited roles that Janet also has asked her appellate counsel to assume. Or sometimes they will ask him to take the strategic lead in deciding how to resolve an appeal, while the in-house attorneys and/or trial team are tasked with doing most of the legwork on the case. The good news, David recognized, is that even when the client is actively working the case, someone — usually the appellate attorney — needs to be at the helm to bring order and direction to the representation. Otherwise, it's just too chaotic.

Be a team player.

One lesson to be gleaned from the discussion, therefore, is that appellate attorneys need to be prepared to step out of or share the driver's seat when assisting a client with an appeal. Further, regardless of their specific role in a case, appellate attorneys must ensure their clients perceive them as helpful, cooperative, and valuable members of the client's legal team. Everyone's familiar with the stereotype of the intelligent but introverted appellate attorney who sees her job as conveying her brilliance through key strokes on the computer, in isolation, and behind closed doors. Given this panel's observations, that attorney won't get the work.

To drive home the importance of being a team player, Janet shared a cautionary tale that illustrates how appellate counsel should <u>not</u> act if they want to serve their client's best interests. Janet had hired local appellate counsel to advise during a trial. Her out-of-town trial team had rented space at the hotel to use as a war room. After the trial was over, she learned that her appellate counsel's office was right across the street from the courthouse. Yet he had never bothered to mention this detail nor, more to the point, ever offered his office space for the trial lawyers to use. Janet was struck by how appellate counsel apparently had not viewed himself as part of the team. Result: She used this attorney to handle the appeal but never hired him again. What was dispositive was that the attorney misunderstood the role she had expected him to fill.

As Ray stressed, treating trial counsel as a fellow team member not only results in good client service it also can help an appellate attorney's business development. Trial counsel just might bring an appellate attorney, with whom they had previously had a positive working ex-

perience, her next appeal. So having a cooperative and non-competitive relationship with trial counsel is just good business, all the way around.

Provide clients with predictability and transparency.

David also stressed that today's clients' concerns about cost, in large part, are more precisely concerns about the *predictability* of costs. As Janet explained, running her legal department like a business means being able to accurately budget for legal costs from the outset and throughout the representation as circumstances change. Thus, in order to effectively assist in-house attorneys meet their new economic challenges, appellate counsel must provide them with greater predictability and transparency, primarily in the context of fees.

The panel agreed that the traditional pricing model of billing clients by the hour fails to address these client needs. Even when what was thought to be a realistic budget is in place, counsel often end up devoting more time to a matter than originally anticipated. This results in either an unhappy client being hit with unanticipated costs or counsel having to begrudgingly cut their bills and eat the difference. As the speakers stressed, the need for appellate counsel to be flexible and offer flat fee or other alternative fee arrangements is essential to remaining competitive in today's market. Many firms have already adopted this new approach to billing. As David noted, there has been a marked increase in flat fee agreements in the industry overall. Ray also stated that even at Reed Smith he has complete flexibility in this regard. In fact, he estimates his firm has more fixed or hybrid fee cases than traditional hourly cases. Of note, however, John polled the audience regarding the use of flat fees for appeals and, to his surprise, few of the attendees were using such agreements in their practice.

As both Janet and John noted, fortunately, for appellate lawyers, appeals lend themselves to flat fee agreements more naturally than litigation matters because there are fewer variables at play. Janet finds it relatively easy to come up with an initial cost estimate for a flat fee agreement. J.C. Penney's billing system tracks the cost and expense analytics on prior appeals so she can refer back to what the company paid on prior, similar appeals. Also, what audience members may not have realized is that, according to Janet, general counsels have a good relationship with one other. Thus, she can ask her counterparts at other corporations what they think a particular case should cost or even about specific bills in a particular appeal. The lesson being that clients are going to come to the table prepared to discuss what they think constitute fair fee agreements and are not simply going to defer to their counsel, as they may have done in the past. (Of course, as David pointed out, having a good track record of performing efficient, quality work for a client helps build a certain level of trust as to billing matters.) Further, in Ray's opinion, the three factors that have the greatest impact on cost are those known from the outset of the appeal: (1) the size of the record, (2) the type of disposition being appealed from/procedural posture, and, again, (3) the significance of the issues to the client. Accordingly, both counsel and client usually have the information necessary to either set a fair flat/

hybrid fee or agree on a realistic budget from the outset of the case.

Adopt broader notions of profitability.

The discussion regarding the benefit to the client of alternative billing arrangements, such as flat fees, begged the question whether they likewise can be profitable for counsel. To any skeptics in the room, concerned about the risk attorneys bear if a matter ultimately takes more time than anticipated, the answer was "yes." In conveying this message, Ray and John also provided a useful perspective on how to measure profitability in a less dollar-oriented and more business-savvy manner.

Handling mostly Category 1 appeals, Ray has found at Reed Smith that flat fees can be profitable, in the larger sense of the word, because of the non-economic benefits of the appeals. Ray discussed how an appellate attorney may be willing to take an economic loss on a Category 1 appeal, by taking on a representation either pro bono or at a significantly reduced fee. High profile appeals and/or appeals that present novel issues of law can build the reputation of an attorney or his or her firm. Also, offering a special rate to an institutional, repeat client likely will result in new business. Ray's position was that when it comes to Category 1 appeals it's easy for appeals to be profitable, even when an attorney is not being compensated for all of his time.

With an even longer history of using fixed fees in his practice, John confirmed that flat fee agreements are equally if not more viable in small firm practice, involving primarily Category 2 and 3 appeals. In deciding whether to take a case at a particular fee, John considers such factors as whether he finds the case interesting, whether he has the time, whether it would help him create new business relationships, and what the case is worth to the client. His analysis, therefore, like Ray's, goes above and beyond simply how much time he believes he would need to devote to the case and whether the flat fee would enable him to realize a particular hourly rate.

In order to come up with a fee that makes good business sense, John stressed, attorneys must try to anticipate circumstances that could require them to spend more time. For example, in response to a question from an audience member regarding what to do with a flat fee family law case that had become "messy" and, thus, much more time consuming because of client management issues, John advised that you have to build factors such as the "needy" client into your flat fee proposal from the outset. (Because not all such circumstances can be anticipated, however, how counsel and the client will deal with unanticipated costs is itself something the fee agreement should address.)

Although the panel focused primarily on the need for flat fee agreements, it observed that, for those appeals billed on an hourly basis, clients' increased sensitivity to cost has translated into increased scrutiny of bills. In fact, according to David, some clients even have third parties reviewing their legal bills. In some cases, these reviewers have to approve additional billing attorneys and other staff not included in the initial work plan. Given such scrutiny, it is clear that to maximize a client's acceptance of billed time, billing entries should clearly and

precisely convey the nature of the work and its value in helping achieve the client's desired outcome, and should demonstrate attorney efficiency.

Communicate honestly, openly, and frequently.

The panel stressed that effective communication is paramount to effective representation since it enables clients to predict how a particular appeal will affect their business economically and otherwise. Attorneys trying to win a client's business all too often feel the need to over-promise a desirable outcome under less than desirable circumstances. In Janet's view, hiding the ball in this manner is a disservice to clients. Clients are not looking to be impressed by their counsel; they just want their needs met. Counsel who think their clients are going to lose their appeal, therefore, should not hesitate to have that admittedly difficult conversation with in-house counsel as soon as it becomes apparent. Be open and honest, Janet reiterated, not only about costs but about the risks and benefits of pursuing an appeal or, if on the respondent's/appellee's side, of losing.

Janet has observed a reluctance on the part of appellate counsel to talk openly with the entire litigation team. She, therefore, addressed the unwarranted concerns of those who may be leery that being the bearer of bad news on a case might reflect poorly on how the client will perceive them. In her view, appellate counsel should not be concerned that the client will think that the attorney lacks creativity or is not thinking outside the box (or, one might add, that other appellate counsel are whispering as much in the client's ear). As Janet explained, being honest will enable a client to better prepare for a particular outcome and, thus, is a sign of respect the client will appreciate. Even more, however, it is the attorney's duty. "You owe it to the client to tell her."

More generally, Janet also encouraged frequent discussions/meetings between counsel and their attorneys throughout the representation regarding not only the budget but what's at stake. She said it is important to engage in a constant cost-benefit analysis with the client. Likewise, to facilitate this analysis, it is critical that counsel promptly raise with the client and anyone else on the appellate team any development, such as new law, that would affect the cost or outcome of the case. Constant transparency is especially important if a flat fee agreement is not in place. Much of the tension that develops between attorneys and their clients stems from billing and budgetary issues. John recognized that flat fee agreements help foster a more relaxed attorney-client relationship, impliedly because there are no billing surprises and everyone knows where they stand. On the flip side, absent effective communications about cost, such tension and resulting resentment could fester and eventually destroy the attorney-client relationship.

Increase efficiencies.

The panel also shared some preliminary thoughts on how appellate counsel can be more efficient working a case. David reminded the audience that attorneys must be respectful when using their clients' increasingly limited resources.

Strategize early.

Janet stressed the importance of creating an early game plan. Adopting a preliminary strategy at the outset imposes a sense of discipline on the appellate team. Janet has observed that appellate counsel not involved at the trial level are often tempted to throw a significant amount of resources at the problem, especially after a trial court loss. She recommended, instead, taking two steps back and viewing the case more objectively.

Circling back to the importance of teamwork and communication, she also recommended, as part of this planning process, forming an appellate roundtable to strategize with the other lawyers involved in the case. The senior appellate attorney should then take the lead in determining what work must be done and how it should be done, acting as a billing gatekeeper of sorts. Ray agreed that by spending more time on the front end, the lead attorney can ensure a more efficient and cost-effective process going forward.

Review the record methodically.

As Ray noted, the size of the record could have a significant impact on the time attorneys need to invest in a case. To navigate the record more efficiently, he recommended that counsel first focus on the documents that are going to tell them the most about the case, such as the summary judgment papers or a trial brief. (Also, prior to the program, Ray shared that while he ultimately will read the record himself, because his clients expect him to be actively involved in the work, he will have a junior associate first summarize it, which, in turn, will enable him to digest it more efficiently.)

Council Board Member Gaetan Gerville-Reache echoed Ray's recommendations about efficient record review in a post-program LinkedIn discussion. "[T]he most important thing is to know what you are looking for before you start reading. An initial discussion with trial counsel can help a lot. Then I look at the decision below, and then the argument that resulted in that decision. By then you can almost always figure out what part of the transcript or the rest of the record is worth reading, and what information to glean out of it the first time you read it. True efficiency often doesn't allow a second read through, except for maybe those few critical parts. Taking notes as you read, with page numbers, helps one avoid having to go back, or at least helps you get back to those critical parts without searching."

Council of Appellate Lawyers Chair, Brad Pauley, added in his LinkedIn post: "I do make it a policy to 'review the entire record,' since clients hire appellate lawyers for their appellate expertise, which includes issue-spotting. But, as a practical matter, that review is necessarily informed by what I know happened below. For example, I will spend much less time on voir dire transcripts when I know the sole issue on appeal is whether the court properly granted a motion for directed verdict."

"Cut the Fluff" From Your Brief Writing Process — or Not

"Gold or plastic?" No, we're not talking about grocery bags. We've all heard a number of analogies that differentiate between higher and lower quality standards. Well, at the program, Council member Ben Cooper gave us a new one

— the gold vs. plastic dichotomy. Addressing efficiency in brief writing, he expressed his views that an appellate attorney needs to know which appeals warrant the "gold standard" and which do not. When they don't, the attorney should "cut the fluff" to save time and money. A brief does not need to be perfect to be an effective, quality brief, Ben argued. It is neither efficient nor necessary, for example, to pontificate about line editing. As he put it, "You do not need several people consulting on the phone to determine whether a sentence should be split."

Ben's example may have been a bit extreme but his comments planted the seed for a debate on when, if at all, an attorney should treat an important, high budget appeal (e.g., Category 1) differently from a run-of-the mill, lower budget appeal (e.g., Category 2). Ray cautioned that applying a different work standard to different appeals can be problematic because even a relatively small case could have a profound effect on the client's business. Janet agreed, stressing that clients always expect quality work product.

Unfortunately, we had limited time at the end of the program to discuss what differentiates Ben's gold standard from his plastic standard. Are there, as Ben contends, frills in appellate work — nonessentials that do not affect the quality of a brief — that appellate attorneys can and should forgo? Further, are there appropriate ways to streamline other stages of the appellate process, not discussed here, such as oral argument preparation? I guess this debate will have to be continued on another day, perhaps at this year's Summit in D.C. — early in the morning, over coffee and Danishes.

STRESS MAKES YOU STUPID

By Marie E. Williams

On Thursday afternoon of the AJEI Summit, two members of the Brain Performance Institute at the University of Texas Center for BrainHealth presented a session on training your brain to thrive. Though titled "Brain Games to Stay Motivated," the session wasn't about games at all. Instead, the panelists offered guidance on how to avoid habits that drain cognitive potential and on how to improve our strategic attention.

The panelists were Dee O'Neill-Warren, a Senior Clinician at the Center for BrainHealth; and Matthew Neyland, Head of the Warrior Training Team at the Brain Performance Institute and an attorney. The discussion was moderated by Cliffie Wesson, Chief Staff Attorney for the Fifth District Court of Appeals in Dallas, Texas.

Ms. O'Neill-Warren first explained the history of the Center for BrainHealth, and then gave some general background on brain science. Perhaps most hopeful for all of us was the message that it's never too late to train your brain to work differently. The brain is the most modifiable organ, by design. It can build new brain cells and new connections. And the better health your brain is in, the better able it is to regener-

ate, should you suffer a traumatic injury.

"Brain performance" is using your cognitive skills to the best of their ability. Although our brains are fully developed by about age 25, they reach their peak performance level around age 42. Cognitive function begins to decline after that. But the folks at the Brain Performance Institute think we can delay the decline of our brain performance if we challenge our brains properly.

To challenge our brains properly, the panelists suggest that we need to think about our mental energy. Strong mental energy offers us endurance, efficient use of cognitive resources, laser focus, a feeling of being "in the zone," clarity, sharp thinking, and constructive and productive use of time. Things that commonly deplete our mental energy include information overload, constant distractions, a lack of stopping points, and too much effort spent on low-level tasks. Not surprisingly, when a brain is too busy, it does not operate efficiently.

Stress, too, reduces how well our brain is working. Chronic stress reduces neuron activity in the brain. Put another way, stress makes us stupid.

So in the face of inherently stressful careers, how can we make our brains smarter? Ms. O'Neill-Warren explained that a "smart brain" equates to frontal lobe integrity. The frontal lobe is what separates us from all other forms of life. It guides our planning, reasoning, novel thinking, decision making, judgment, and managing our emotions. And we can train that part of the brain to be more engaged and active.

The Brain Performance Institute offers their "SMART" approach: Strategic Memory Advanced Reasoning Training. They teach strategies to improve brain performance, but one must continually practice those strategies in order to improve brain health. Mr. Neyland explained that these are not new things to add to our daily obligations, but rather different ways to think through our day and incorporate the training strategies into our lives. Ms. O'Neill-Warren contrasted such strategies with Lumosity as a cognitive training program that is really just a game – it does not engage our brains in a way that will improve brain health and increase blood flow. Mr. Neyland said that Sudoku and crosswords are similar. They offer no generalized benefits for brain performance.

The panelists then turned to specific examples of ways the Brain Performance Institute can help train our brains, focusing on increasing our "Strategic Attention" through strategies called the "Brainpower of Two," "Brainpower of One," and "Brainpower of None."

Brainpower of Two

Attendees were led through an example of the Elephant/Rabbit prioritization list. We were asked to think about our daily to-do list in a different way. The "elephant" is a high-priority task that requires higher-order thinking, but can be accomplished today. We should identify only two elephant priorities each day. They suggested breaking larger projects down into one-hour components, making your "elephants" one-hour tasks each day. The remainder of your daily to-do list should be "rabbits." Rabbits are lower priority tasks that require little thought or effort. They may still be time sensitive, but they are part of your normal obligations.

The panelists urged us to prioritize our to-do lists in this way because our brains cannot sustain higher-order thinking all day. As Mr. Neyland said: "If everything is a priority, nothing is." The Elephant/Rabbit list requires you to be strategic about identifying your actual priorities for the day. (And to help, the Brain Performance Institute gave us cute "To Do" notepads with pictures of elephants on the top two lines of each sheet, and rabbits on the remaining lines.)

Brainpower of One

In terms of then executing on our Elephant/ Rabbit list, Ms. O'Neill-Warren urged us to use the "Brainpower of One:" to turn off all distractions for at least 30 minutes to work on an elephant task for the day. Those 30 minutes will offer you a surprising amount of productivity. To drive the point home, attendees were asked to play a game. First, we were asked to write the sentence: "Multitasking is toxic for the brain." Second, we were asked to write the numbers 1 through 31. Finally, to demonstrate the challenge inherent to multi-tasking, we were asked to write the sentence and count the number of characters below it, alternating one letter and one number. So we ended up with text looking like this:

1. Multitasking is toxic for the brain.
2. 2. 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31
3. M u l t i t a s k i n g i s t o x i c f o r 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 t h e b r a i n . 23 24 25 26 27 28 29 30 31

Mr. Neyland timed the room's average completion time for each of these sentences. Not surprisingly, completing task 3 took far longer than the combined time spent on tasks 1 and 2. The point is that nobody is really a good multitasker, even if we think we are. To improve brain performance, it is important to focus on one thing at a time. Put away other tasks or distractions as much as possible. This is particularly important because we are more error-prone when cognitively switching between tasks that require higher brain functioning.

Brainpower of None

Finally, the panelists discussed what they call the "Brainpower of None." They urge us to take breaks during our day to re-energize and refill our brains. They suggest taking five minutes, five times a day (5x5) of quiet time. Something as simple as turning off the radio while driving to work will give your brain a rest. You don't need to meditate or have zero thought, just zero brain effort. Staring out the window is another example of something that works well. And if you can take those rest breaks throughout the day, you will return to your tasks feeling more refreshed.

The written materials provided by the Brain Performance Institute outline much more that we might learn from them to increase our brain performance. As one who suffers from the "everything is a priority, so nothing is" syndrome, I enjoyed learning a little about how I might optimize my approach to my to-do list. When I feel overwhelmed by the day ahead of me, I try to at least identify my elephant priorities, and start there.

Q&A WITH LAWYERS & JUDGES

By Nancy M. Olson

Closing out another successful AJEI conference, attendees were treated to a much-anticipated panel offering insight from the bench and the bar. The Honorable Scott Bales, Chief Justice of the Arizona Supreme Court, moderated a panel comprising the Honorable Diane M. Wood, Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, the Honorable N. Randy Smith of the U.S. Court of Appeals for the Ninth Circuit, and Roger D. Townsend, Partner at Alexander Dubose Jefferson & Townsend and immediate past president of the American Academy of Appellate Lawyers.

Chief Justice Bales first asked the panel to discuss challenges in identifying and framing issues on appeal and to provide insight on how to approach these challenges and write better briefs. Mr. Townsend responded first that one challenge he faces as a practitioner is finding the time to sit down for critical thinking about the issues. Another important consideration is analyzing the issues in light of the standard of review (e.g., in an insufficiency of the evidence challenge, make sure there is *no* admissible evidence rather than just little evidence with which you disagree). He also noted that it's best to lead with issues subject to de novo review because they receive full review by the appellate court. You should also rank the issues by overall strength, unless there is a reason to do otherwise (e.g., a question of jurisdiction). Wise practitioners should also consider subsidiary issues, which are questions that may arise depending on the outcome of one or more issues presented in your brief. Lawyers often make the mistake of raising too many issues in a brief; one to two issues is ideal, three to five is acceptable. Procedural issues that will affect the overall outcome will strengthen a brief.

Mr. Townsend went on to explain that lawyers should follow the best practice of providing the right level of detail when describing an issue. For example, a heading that says "insufficiency of the evidence" does not offer enough information for an understanding of the issue. "Insufficiency of the evidence regarding knowledge of the conspiracy" is a little better, whereas "In this antitrust case, there is an insufficiency of evidence that defendant conspired with X and Y to drive the company out of business" gives a much clearer picture. Framing the issues in some detail will be helpful to the court. You should always go back and refine these statements after you have finished drafting the brief.

Providing the view from the bench, Chief Judge Wood echoed the advice that lawyers need to be willing to let issues go on appeal. It can be painful to read a brief where a lawyer clings to inconsequential issues. Lawyers should also be concise in identifying issues; don't use seven lines in all caps just to identify an issue. Chief Judge Wood noted, however, that a rare exception to letting issues go may be in capital cases. She reiterated the common, though too infrequently observed, dictum: in all briefs, no matter the subject matter, lawyers should be mindful not to waste space and to avoid unnecessary repetition.

Judge Smith agreed with the recommendation

to present the strongest issue first, but he cautioned that before identifying your strongest issue you need to consider the standard of review. It will dictate your strongest issues. In a circuit of widely differing views, standard of review may be the only way for a divergent panel to find common ground. Because appellate judges spend endless amount of time reading and writing, he also suggested that lawyers should be mindful with how they fill the pages of their briefs. Starting with a strong de novo issue will help the judges engage with the brief.

Given these responses, Chief Justice Bales next asked, if you do start with the strongest issue and a judge doesn't agree with you from the start, does it shut down the effectiveness of the rest of the brief? Not necessarily. Chief Judge Wood indicated that if you've written a good brief that anyone would enjoy reading, you will be able to keep a judge's attention, even on later pages. The Seventh Circuit does not screen cases where only some go to oral argument; all cases with two lawyers will be scheduled for oral argument. In this scenario you won't wear out the court as long as you carefully decide what you want to present and how to present it.

Judge Smith agreed and added that he will stay with a writer throughout the brief if they've taken care to write well. He understands that the circuit court is effectively the court of last resort and therefore takes very seriously what the parties have to say. Notably, in the Ninth Circuit, the brief is the predominant way to make it happen. Where only 30% of cases go to oral argument, Judge Smith observed, the brief is really what matters.

Chief Justice Bales queried whether issue framing raises challenges with clients. Mr. Townsend responded that a big challenge is convincing clients to drop issues that aren't worthwhile. To preempt this impasse, he regularly sends the book *Distilling the Case* as a gift to clients, and then later, when he needs to persuade clients to follow a sound approach to issue selection, he can cite the outside experts in support.

Chief Justice Bales noted that when petitioning discretionary review courts, how you frame the issues is determinative of whether the case will go forward. He went on to asked the panel, considering the interplay between the standard of review and issues in the case, how can lawyers do a better job of this?

Judge Smith responded that in his experience parties mention standard of review, as required under the rules for brief formatting, but that is the last time he hears of it throughout the brief. If you are operating under an abuse of discretion standard, you must cite authority holding that something really is an abuse in order to win. Practitioners should be mindful to weave the standard of review into their argument throughout the brief to help illustrate why their position is correct.

Chief Judge Wood noted that the standard of review is usually undisputed. As Judge Smith mentioned, under the Federal Rules of Appellate Procedure, citing the standard of review is required. Lawyers should keep in mind that this requirement is not for the benefit of the judges: they already know the standard. The standard should act to inform how you present your arguments. In cases where the standard may be disputed (e.g., mixed questions of law and fact), the brief may look different. Chief

Judge Wood cautioned attendees that a pet peeve is when two briefs in the same case are ships passing in the night. To better help the court, you have to engage the other side's arguments.

Chief Justice Bales concluded this part of the discussion by noting that how you identify an issue can impact the operative standard of review. For example, did the lower court misunderstand the Rule 404 analysis (de novo), or did the lower court come to an improper (discretionary) conclusion about admissibility under Rule 404 (abuse of discretion).

Upon hearing the judges explain that briefs are the most important part of an appeal, Chief Justice Bales next asked the panel to weigh in on the hallmarks of really good briefs. Chief Judge Wood first explained that she looks for good organization and clear writing. Drafters should aim for a coherent narrative and unnecessary duplication. Lawyers should read the brief out loud before filing. If you hear yourself saying something you'd actually never say, leave those things out (e.g., "in the instant case" rather than "in this case"). In addition, it is very important to make clear to the court what you want the court to do.

Mr. Townsend added that transparency in a brief is important: lawyers should present sound logic that a court may easily follow. This helps distill where the dispute lies. Of course, anything presented must be accurate. He also echoed the suggestion to read briefs out loud before filing. In addition to cleaning up language, reading a brief out loud will also assist in the overall editing process.

Judge Smith agreed and emphasized that judges expect lawyers to be correct. The more times the cited cases say what you claim they say, the more reliable your brief will be. He hates "smoke and mirrors" briefs as well as briefs that lodge attacks at the district judge or opposing counsel. Lawyers should go straight to the legal issues and tell the court what they want it to do.

Chief Judge Wood added that lawyers should think about the rule of law that decides their case. Specifically, you should also be mindful of how the rule for which you are advocating may impact future cases. As a final check, lawyers should also ask whether the argument makes sense.

Chief Justice Bales noted that while it is important not to say too much, lawyers must remember that you have to say enough to win your case. For example, in the case of fundamental error (or plain error in federal court), where the appellant failed to object to the error below, on appeal the appellant must (1) establish legal error *and* (2) prejudice. In the past he has seen lawyers forget the second part. Consider all aspects of your claim and be sure to include all dispositive issues.

Chief Judge Wood agreed and noted that lawyers should also be mindful of harmless error review. Just because you establish error does not mean you have won your case.

Chief Justice Bales then asked the panel to consider how to keep briefs concise in very complicated or complex cases. Mr. Townsend reminded the audience that, again, you have to limit your issues. He makes it a general practice not to ask for extra pages in a brief. Instead, you

have to look for themes that will cut across as many issues as possible. Chief Judge Wood added that, although acronyms are not ideal, when dealing with complex cases, parties should consider adding an acronym glossary at the front of the brief. Judge Smith further suggested that in complex cases such as big environmental cases, parties should pare down the record to only what is needed. In reviewing cases, his practice is to start with the appellant's issues, make an outline of his issues and questions, read the district court's decision, then review the record—all before reviewing the other briefs. An unwieldy record does not assist in working efficiently and reviewing the pertinent issues.

To increase efficiency, Chief Judge Wood added that in bench memos, her law clerks add hyperlinks to the pertinent cases and record citations. In the near future, courts may start requiring hyperlinks like this in all briefs. Lawyers should consider what steps they can take along these lines to show the court that you respect its limited time and it is your goal to help the court use its time well.

Next Chief Justice Bales steered the discussion to what happens at the court between the time a brief is filed and a case is heard at oral argument. He asked the judges whether intermediate steps between brief filing and oral argument have an impact.

Chief Judge Wood noted that each court is different. In the Seventh Circuit, cases are added to the oral argument list, added to the court's schedule, and assigned to panels that sit every week. She divides her cases between three law clerks who then check all of the record cites and case law and research what other circuits are doing in similar cases. She also has them check whether the Supreme Court has anything on its current docket that may affect the outcome of a case. In reviewing the case, she often starts by reading the district court opinion followed by the briefs. She also tends to keep Westlaw open as she reads so she can review cases as needed. She then reviews the bench memo prepared by her clerk and has the clerk prepare questions to ask at oral argument. With respect to lengthy records, in Chief Judge Wood's opinion a five volume appendix is too much. Lawyers should pare the record down to a manageable size.

Judge Smith explained that the Ninth Circuit operates differently. Staff attorneys who work for the court at large conduct the first review of a case and assign each case a complexity weight. Any case assigned a weight of 3 or more will be assigned to an oral argument panel. Any case assigned a weight of less than 3 goes to a "rocket docket" panel. Those panels hear over 400 cases per week as presented to the panel by staff attorneys. For those cases going to an oral argument panel, the assignment is done by computer. Sometimes assignments change if there is a disqualification issue, etc. Judge Smith has not seen cases hand-picked to be assigned to a specific panel. In preparing for oral argument, most judges share their bench memos with other members of the panel so the memo writing responsibilities can be split between chambers. It's up to the individual judge to decide whether to exchange bench memos and how to use them. By the time a case gets to oral argument, the briefs have been read by all of the following: members of the court staff,

various chambers law clerks, and the panel judges. After cases are decided by the oral argument panel, there is also a possibility the case will be heard en banc. Out of all the circuits, the Ninth Circuit hears the most cases en banc.

Turning to the topic or oral argument, Chief Justice Bales posed the question: what are you hoping to get out of it? Mr. Townsend responded that he uses it as an opportunity to tell the court why we are here. The purpose of oral argument may vary from court to court and panel to panel. In some cases, the court may have serious questions it needs help answering, or in other cases, it may be held more as a matter of course or to provide due process to the lawyers/clients.

Chief Judge Wood added that she would not minimize the importance of the due process function. It is not our tradition to simply say affirmed/denied; rather, traditionally we explain ourselves and our reasoning. The law is built upon this tradition. Oral argument also allows the attorneys to see that the panel has reviewed the case and understands the issues. In addition, unexpected things can happen at oral argument. An attorney can distill an issue in a new way, concessions can be made, etc. After oral argument, it is not unusual for judges to change their minds in 10-15% of cases. Oral argument further helps the court identify the best rationale for its decision and to reach a unanimous decision.

Turning back to the unique procedures employed by the Ninth Circuit, Judge Smith reiterated that the court engages in a multi-step process to determine whether it will hold oral argument in each case. Even after a case has been assigned to a merits panel for oral argument, the panel can decide that they believe oral argument is unnecessary to the disposition of the case and take that case off calendar. If only one judge on the panel prefers to hold oral argument, however, the case will proceed to oral argument. The Ninth Circuit is geographically large and it can be cumbersome to coordinate oral argument. The court also considers the burdens on the parties (e.g., where to hold the argument). Judge Smith agreed that oral argument can affect the outcome in about 10-15% of cases. Generally, judges have an idea of where they want to go with the case by the time they hear argument. Oral argument tests the judges' theory or theories and any contrary positions. Overall, oral argument gives judges an opportunity to make sure they are arriving at the correct decision.

In conclusion, and looking to the future of appellate practice, Chief Justice Bales posed a final question: what can lawyers and judges do to improve the appellate process? Chief Judge Wood noted that this is a tough question. She explained that the court has before it such a wide range of practitioners—from the most experienced to brand new attorneys—and she would like to reach as many of those practitioners as possible through educational programs. Updating technology such as video streaming could also be a benefit. Currently the Seventh Circuit posts audio of oral argument the same day it is heard, but this could be improved. She also stated that it might be helpful if judges could identify for other practitioners particularly effective briefing and argument as a way to teach others what is helpful.

Mr. Townsend responded that one good suggestion is that before a lawyer can be admitted to practice in a specific circuit, each circuit should create formal requirements for admission so it becomes incumbent on lawyers to learn what is expected of them and follow the rules. He also believes panels such as this are an excellent way to exchange views. For example, judges and lawyers have debated the merits of amending the appellate rules to decrease the allowable word limit in briefs.

Judge Smith agreed that conferences like this provide a fantastic opportunity for judges to receive input on what they are doing well and what areas need improvement. He believes it can be beneficial to have bar groups come in and deliver presentations to the bench, but he wants you to be candid regarding what's really going on. The Ninth Circuit now has Lawyer Representatives with whom they can openly discuss how to do things better. At the end of the day, we don't want a "robe-itis" court. The judges want to do the best they can and this type of input is very helpful. Having this type of give-and-take with attorneys is very important. At the conclusion of an oral argument, he often tells attorneys, from the bench, when they have done a good job. He also likes to compliment lawyers when he sees them acting with civility toward one another. In sum, the whole process is geared toward getting to the right outcome and anything that can be done to further this goal is important.

PERSPECTIVES ON ORAL ARGUMENT

By Wendy McGuire Coats

At the 2014 AJEI Summit, the Honorable Frank Sullivan, formerly serving on the Indiana Supreme Court, moderated a panel discussion entitled *Oral Argument From Both Sides of the Bench.* The panelists were Chief Justice of the Texas Supreme Court Nathan L. Hecht, Justice Barbara A. Jackson of the North Carolina Supreme Court, and Judge Consuelo Maria Callahan of the United States Court of Appeals for the Ninth Circuit.

Before drilling down on the inner workings of oral argument, the panelists were asked to rank on a scale of 1-5, with 1 being less important and 5 being most important, the importance of oral argument. Does oral argument play an important role in an appellate judge's decision making or is it simply scheduled as a due process ritual for the parties?

Justice Jackson: 3. Sometimes it is extremely important. Sometimes through oral argument there is potential to move the court to a position different from its initial starting point. Sometimes, however, in a very straightforward case, oral argument is less important.

Chief Justice Hecht: 3 – 4. Appellate courts typically rely most heavily on the written materials submitted by the parties but there is a dynamic that happens at oral argument that is not present in the writing.

Judge Callahan: 2 at the state court of appeal and a 4 on the federal court of appeals. When

serving on the state court of appeal, the justices had conferenced and prepared a tentative draft of the opinion prior to oral argument. In that situation, oral argument worked to refine the opinion and test theories and possible consequences.

But on the Ninth Circuit Court of Appeals, while the judges may have exchanged bench memos, they have not prepared a draft and usually have not discussed the case. Going into oral argument, the judges likely have no particular knowledge of their colleagues' thoughts on a case. Oral argument then is useful not only in testing theories of the case but also for serving as an opportunity for a judge to convince colleagues that he suspects intend to go another way.

Judge Callahan observed that, on the state court of appeal, appellants had a right to oral argument, whereas at the federal level, the court decides which cases receive oral argument. So, if a federal case is scheduled for argument, the attorneys are alerted that at least one of the judges has determined that the case should not be submitted solely on the brief. This typically should indicate that there is a fighting chance. The attorneys might not know what that "chance" is or who has it but it's a fighting chance, nonetheless.

Next the panelists were asked to discuss what characteristics make a case good for discretionary appellate review, and once granted review, what makes a case appropriate for oral argument.

Chief Justice Hecht: A conflict between the Texas courts of appeal. A case that is very much in error. An issue that is of importance to other parties and not just those present in a particular case. He noted that as a practical matter it does not do an advocate any good to assert any of these things if they're not really true.

Justice Jackson: Unlike in other jurisdictions, every case granted discretionary review before the North Carolina Supreme Court will be scheduled for oral argument. There is also a rare quirk in North Carolina. If there is a dissenting opinion in the intermediate court of appeals, the party who is the subject of the dissent, that is, the otherwise prevailing party, has a right not only to appeal but has a right to receive a decision from the Supreme Court on the issue that was the point of the dissent. Sometimes if it is just one issue and the appellant wants the court to hear additional issues, it can seek discretionary review. In practice, this places quite a bit of power in the intermediate appellate court judges.

Justice Jackson reflected that when she served as an intermediate appellate court judge, her decisions were not always written for North Carolina's Supreme Court but she was also writing to the legislature. She noted that not every change in the law needs to be or can be a judicial change, but that sometimes a legislative change is needed. In these situations it is appropriate, and an advocate would do well, to assert the need for legislative intervention so that the appellate court judge may write the decision accordingly. This especially appropriate when the legal problem is created by well-settled legal precedent that can be altered by the legislature.

The panelists were asked to consider whether amicus briefs were helpful as part of their pre-

oral argument preparation,

Justice Jackson: They can be helpful if they inform the court of the big picture outcome that a particular case's decision may play in the larger legal context.

Chief Justice Hecht: Yes. An amicus brief can be particularly helpful when it explains how the rule, outcome, or decision may impact a broader level of issues and is not simply a "me too" brief. Amicus briefs are not helpful if they are exaggerated or not substantive.
Judge Callahan: They are helpful if they focus on the legal issue and advocate how to decide a particular case. Useful amicus briefs take a 30,000-foot approach to the issue and are not in the weeds of a case's particular facts. Amici can play a significant role assisting the court with the long game on an issue by helping establish its importance and potential impact on the legal landscape.

The panelists were offered a prompt that always elicits practical takeaways: "identify what not to do at oral argument."

Justice Jackson: Of late, she has noticed a trend of running over time and not being attentive to the time. Know how to wrap up so that it leaves the court with a clean, clear, and succinct closing of your argument.

Chief Justice Hecht: The worst is obfuscation. Next, attorneys should start fast and keep moving through the oral argument. There just is not a lot of time. And any exaggeration of the facts or the case will send oral argument into a tailspin.

Judge Callahan: The panel always talks about the lawyers. Generally, 10% are really good and 10% are really bad. It is disappointing when good lawyers are unable to quickly go to the heart of why their argument should prevail or when they do not understand the law and the body of facts that the court must consider. It is not effective to ignore the standard of review and indulge in the same arguments that were presented at the trial court that already lost. Instead, make your two to three points early and go straight to what you want the court to do and why.

The panel observed the qualities that consistently make the best advocates.

Justice Jackson: Credibility and confidence. The best advocates make the arguments early and have confidence to know when to sit down.

Justice Hecht: Preparation. When a lawyer is thoroughly in command of the case and answers questions directly, regardless of whether that attorney's client wins or loses, there's a feeling that there was a good argument.

Judge Callahan: Sophisticated advocates have usually researched their panel. They have perfectly assessed that they understand how the individual judges are likely to vote and if they need a particular vote.

Thus, at the close of an intense and productive Summit, the panelists' observations served to refocus attendees on practical realities that can help or hinder the effectiveness of oral argument.

E-DISCOVERY: LEAN, GREEN, BUT NOT UNSEEN

By Nancy M. Olson

On the final day of the AJEI conference, attendees learned about the changing landscape of civil e-discovery from a distinguished panel of two jurists and one practitioner. The Honorable Harvey Brown of the Texas Court of Appeals, First District moderated the panel. The panelists included the Honorable Jane Boyle of the U.S. District Court for the Northern District of Texas, and Monica W. Latin, a Partner at Carrington Coleman who has chaired both the ABA's National Institute on E-Discovery and the Sedona Conference Institute. The panel focused on the proposed amendment to Federal Rule of Civil Procedure 37(e) regarding the preservation of electronically stored information. It also touched upon taxing the cost of e-discovery as "costs" under the Rules and the discoverability and admissibility of electronic information stored on social media platforms.

Mindful of his audience, Justice Brown first posed the question, "why should appellate judges care about e-discovery?" Judge Boyle, who sat on the front lines of discovery disputes during her ten-year tenure as a magistrate judge, noted that certain issues relating to e-discovery do make their way up on appeal. One good example: sanctions awards. Recounting the history of e-discovery, Judge Boyle explained that in the nineties when e-discovery became a big issue associated with "Rambo litigation," parties engaged in tactics such as over-objecting to discovery requests to resist turning over certain documents or, conversely, over producing unmanageable and unorganized documents to conceal the proverbial needle in the haystack. Although these litigation tactics have not changed much, she explained that the underlying technology has changed. The same type of discovery disputes now involve new terms that may be unfamiliar to judges. As with all technological changes, the judges will need to learn and adapt.

Proposed Rule 37(e)

Turning to proposed Federal Rule of Civil Procedure 37(e), similar to earlier rules amendments, Judge Boyle noted that this change is another attempt to simplify and streamline the discovery process with an eye toward requiring cooperation between the parties.

Before diving into the mechanics of the proposed amendments to this rule, Ms. Latin explained the background of this set of proposed amendments. The Rules Committee has proposed and passed e-discovery rules, but before the amendments may be enacted, the Supreme Court must pass them by May 2015 and send them to Congress, and then they could go into effect as soon as December 2015. Although the Committee considered certain stringent proposals (e.g., a limit on the number of requests for production), those were not generally included in the approved amendments.

Ms. Latin turned to the specifics of Proposed Rule 37(e): failure to preserve electronically stored information. In its September 2014 Report, the Rules Committee noted that

> [p]resent Rule 37(e) was adopted in 2006 and provides: "Absent ex-

> ceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Since the rule's adoption, it has become apparent that a more detailed response to problems arising from the loss of electronically stored information (ESI) is required.

See Summary of The Report of The Judicial Conference Committee on Rules of Practice and Procedure.[1]

Ms. Latin explained that Rule 37(e) was previously referred to as the "safe harbor" rule regarding the avoidance of sanctions as a result of a failure to *produce*. In contrast, the new version of the rule focuses on the failure to *preserve*. Shifting the focus from production to preservation is the crux of the amendment. The Committee also intends this change to address the corporate fear of sanctions and to alleviate ongoing concerns regarding over-preservation.

The amended rule provides two different remedies, depending on the cause of the lost electronically stored information (ESI). The amendments balance reasonable efforts to preserve against intentional efforts to deprive. Where a party took reasonable steps to preserve the information and it has been lost nonetheless, the court may fashion a remedy no greater than necessary to cure any prejudice. For example, the Court may allow the moving party to take additional discovery or provide a jury instruction regarding lost information without going so far as instructing an adverse inference.

On the other hand, where a party acted with intent to deprive the moving party of information the Court may impose broader sanctions. Under this two-pronged approach, the focus on the underlying conduct tracks the standard already applied by the Fifth Circuit and other courts.

Justice Brown next asked whether this rule will make people busier. Judge Boyle believes the answer is unclear, but the rule is designed to make things more efficient. The goal is to provide a uniform framework so that some courts do not grant terminating sanctions based on mere negligence. Under the revised rule, before such severe sanctions may be imposed, courts will need to hold a hearing, make a credibility determination, and find bad faith on the record.

Judge Boyle noted that Rule 26(b)(1), scope of discovery, is well-intentioned, but it will only work if there is oversight by the judges and cooperation between the parties. Scheduling orders should require the parties to meet and agree on the details of e-discovery and related matters to minimize future disputes.

Ms. Latin pointed out that "unduly burdensome" is no longer just an objection to be made in discovery. The new buzz word is "proportional." The amended rule considers whether lost ESI was *relevant* and whether the efforts taken to preserve it were *proportional*. The standard is not whether the lost information was "reasonably calculated to lead to discoverable information." Notwithstanding,

[1]Available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf, pp.14-15.

this change won't alter judicial discretion or turn appellate courts into micro managers. But, if judges don't take a proactive role in forcing the parties to talk, the civil justice system will falter. The new rule is intended to force attorneys to look at whether it makes sense, which is part of the inquiry of whether something is discoverable. Judge Boyle added that it is important to get lawyers face to face to resolve disputes.

With respect to appeals, Ms. Latin noted that the evidence-sharing record will be important, but it may not contain as much information as desired because discovery issues often happen on the fly. Going forward, wise practitioners will be more diligent in making a record. Trial judges will also need to be more proactive.

Justice Brown noted that judges and lawyers need to learn more about the emerging technologies to be able to navigate the process successfully. Judge Boyle analogized this to the old practice of bringing in an IT expert to explain technology; now, parties may need to bring in a specialized discovery vendor to explain the procedures employed.

The panelists commented that another interesting development in the e-discovery arena is technology assisted review. This type of review uses a combination of technology that can supplant lawyer review. It is similar to relying on Google to gather data and tell us what's most relevant. Similarly, technology assisted review uses algorithms that rely on key words. The key to its accuracy is that the algorithms are trained by humans. For example, a lawyer can code a sample set of documents and put the information back into the system. That input teaches the system what to look for. Although this represents a significant technological advance, human improvement of the technology remains important. Interestingly, studies show that technology assisted review is more accurate than pure human review when done properly.

Justice Brown queried whether the parties get to decide what method of review to use. Judge Boyle explained this is a learning period in legal history. It's still evolving. If the lawyers can agree on protocol, that will be the easiest and most efficient way to proceed. If the lawyers can't agree, Ms. Latin noted that sometimes the judges will have to become technologists to inform their discovery orders. To assist with these issues, district judges can utilize special masters. Appellate judges, however, do not have that resource. Judge Boyle pointed out that sometimes an arbitrator may be necessary to help resolve discovery issues before moving forward with the merits of the case.

Ms. Latin pointed out that under the new inquiry into the reasonableness of preservation, we will essentially need discovery about the discovery process. This raises many questions such as: how much do parties have to reveal regarding where they searched; is relying on the "black box" enough; should the court hold a *Daubert* hearing regarding the scientific method used in the searching, and the list goes on. Most of the cases resulting in sanctions come out of very large litigation, which represents a minority of overall litigation. The focus should be what efforts are sufficient and reasonable to get through discovery efficiently and prepare for trial. For further guidance, Justice Brown advised that lawyers should read the proposed

rules and the comments thereto. Judge Boyle echoed this recommendation and noted that the key to winning a discovery dispute can be found in the Committee Notes.

Although the panel's discussion of Rule 37(e) took up the bulk of the discussion period, the panel also touched on questions regarding taxing the cost of discovery as "costs" and the intersection of e-discovery and social media.

Taxing discovery costs

Turning to the question of whether the cost of discovery may be taxed as "costs" under the rules, some courts examine whether electronic costs can be analogized to the paper days. In sum, not all e-discovery costs are allowable. It would be disproportionate and typically involve an element of unfair surprise to simply allow exorbitant discovery costs to be treated as "costs" in the statutory sense of the word. The panel noted that wise attorneys may want to plan their course of discovery thinking about what costs may actually fall under the rules.

E-discovery and social media

Lastly, the panel discussed the role of social media ESI in e-discovery and evidence admissibility. Ms. Latin noted that there is no doubt this material is discoverable. From a technology standpoint, the question is how do you capture it? In conducting investigations involving social media profiles, ethical rules must be taken into account. Reviewing public information is okay, but gaining access to semi-private information under false pretenses is not allowed. To obtain discovery of that information attorneys must go through the proper channels. With respect to public information, having such information available online may cut down on the need for formal discovery.

In deciding whether social media evidence is admissible at trial, Judge Boyle looks at how it was acquired and determines whether it was ethical. Getting the information into evidence may be easier than you think. The determination usually boils down to a question of authentication. Rule 403(b) balancing may come into play, but otherwise courts can generally admit this type of evidence. Although the admissibility of social media material rarely ends up as an appellate issue, Ms. Latin concluded by noting that it could come up in appeals of summary judgment orders where such evidence was excluded and the appellate argues such evidence was wrongly excluded and creates a disputed issue of material fact.

For CAL members interested in further reading, a summary of recently decided cases involving emerging e-discovery issues accompanies the conference outline to this panel discussion.

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Call for Submissions

"All too often, the facts that are important to a sensible decision are missing from the briefs, and indeed from the judicial record." Judge Richard A. Posner, *Reflections on Judging* at 131.

Sometimes an empirical context useful to an advocate or to a court issuing a precedential decision is missing. Sometimes a case-specific fact is missing. At the same time, a wealth of information is available through the internet and other means.

What resources beyond the record, if any, can or should a court rely on? When have courts, at any appellate level, relied on non-record information, whether explicitly or implicitly? When have courts made assumptions when empirical information would have been preferable?

How can an appellate advocate bring non-record information or analyses to a court's attention? What role can or should amicus briefs serve? What are the limits of judicial notice? What errors or abuses have occurred, whether by advocates or courts? How can an advocate protect against abuse and preserve the integrity of the record? What are the implications for trial court strategy?

"The Appellate Record: Adequate or Not?" is the focus of the next *Appellate Issues*. Articles touching on this theme from any angle — descriptive, normative, critical, autobiographical, etc. — are welcome. The deadline for submissions is June 22, 2015.

Inquiries and submissions may be directed to David J. Perlman, reachable at djp@davidjperlmanlaw.com or 484-270-8946.

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