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IN THIS ISSUE

Perspectives on the Voting Rights Act, Fifty Years On

By Devin C. Dolive

This year's AJEI Summit included two thought-provoking presentations on the Voting Rights Act of 1965. The first was a panel moderated by Justice Bob Edmunds of the Supreme Court of North Carolina; panelists were Pulitzer-prize winning author Taylor Branch, Professor Kay Butler, and Professor Lani Guinier. The second

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Justice Breyer At The Summit

By J. J. Williamson and Alicia Hickok

On November 12, 2015, Justice Stephen Breyer addressed the Appellate Judges Educational Institute Summit in Washington, D.C. Appointed to the Supreme Court by President Bill Clinton in 1994, Justice Breyer is now in his 22nd year as a Supreme Court Justice, with over 35 years as a

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Editor's Note

This *Appellate Issues* focuses on the Appellate Judges Education Institute Summit held in Washington D.C. in November. While it provides a glimpse into the depth and richness of the Summit, it also offers a glimpse into the experience and intellect of the authors. By their gift, much is conveyed here that wasn't con-

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was a conversation with Henry Frye, former Chief Justice of the Supreme Court of North Carolina.

In the wake of *Shelby County, Alabama v. Holder*, 133 S.Ct. 2612 (2013), the debate is on-going about whether Congress should or should not reinstate the pre-clearance regime of Section 5 of the Voting Rights Act and, if so, where (geographically) this pre-clearance regime should apply. However, whatever the merits of pre-clearance in today's situation, there is no mistaking that, as Professor Butler explained during the panel presentation, Section 5 was the "crown jewel" of the Voting Rights Act — it is Section 5 that added African-American voices to the legislative process, especially in the South.

Henry Frye's Personal Perspective

As the first African-American elected to the North Carolina House of Representatives in the Twentieth Century, Henry Frye was one of these voices. His presentation provided a unique personal perspective on the Voting Rights Act and the discriminatory practices that preceded it.

Justice Frye shared that, on the same day in August 1956 that he was to marry his wife, he also attempted to register to vote in rural Richmond County, North Carolina. The young Mr. Frye was familiar with North Carolina's law, enshrined in the state's constitution, requiring that registrants prove their ability to read and write by reading aloud and copying portions from the state constitution. However, when he attempted to register to vote, Mr. Frye was not given the literacy test envisioned by the letter of the law but instead was asked questions about former Presidents and signers of the Declaration of Independence. He refused to answer these unfair questions and explained that the law simply required him to prove his ability to read and write. Mr. Frye was not permitted to register. The system was not just discriminatory; it was arbitrary. His wife had experienced no trouble registering to vote elsewhere in the state, in more urban Greensboro. And later, after Mr. Frye spoke to the Supervisor of the Board of Elections in Richmond County, he, too, was permitted to register.

Justice Frye called the Voting Rights Act the most important piece of legislation Congress has ever passed. Three years after the passage of the Act, and twelve years after he himself had overcome obstacles to register to vote, Mr. Frye would win election to the North Carolina House of Representatives. The first bill he sponsored was a bill to remove the literacy test for voting (by then dead letter because of the Voting Rights Act) from North Carolina's Constitution. The legislature passed the bill, but the state's voters subsequently rejected the constitutional amendment.

Justice Frye would go on to become the first African-American to serve on the Supreme Court of North Carolina and its first African-American Chief Justice. Justice Frye concluded his presentation by stressing the importance of education

and training for those serving in government and commended the AJEI for its good work in these areas.

An Historical Perspective

Pulitzer-prize winning author Taylor Branch began the earlier panel discussion by emphasizing that the Voting Rights Act is an exception in American history. For most of our history, we have used euphemism and have avoided talking openly about race. The Voting Rights Act is an exception; the Act (and the events that preceded it in Selma, Alabama) forced a conversation about both race and voting.

Racial issues and race discrimination have been an aspect of American politics since the very beginning, going back to the three-fifths clause of the Constitution. We do not like to talk about this. Mr. Branch noted that, when the political establishment in Montgomery, Alabama, tried to put an end to the civil rights movement through private tort claims of libel, even the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), did not talk openly about race. Instead, law students to this day learn about *Sullivan*'s "actual malice" standard without understanding the context and the oppressive, segregationist political system that drove litigation against the *New York Times* and civil rights leaders. Indeed, an hour after Mr. Branch's comments, Justice Frye would share that, when he, as a newly-minted Representative in North Carolina's statehouse, was presenting his 1969 bill to eliminate the literacy test from North Carolina's Constitution, he, too, never mentioned race.

Mr. Branch wondered how the nation's history would have played out if *Brown v. Board of Education*, 347 U.S. 483 (1954), had been about voting rights, rather than about segregation in schools. After all, it was the absence of African-American voters that made resistance to *Brown* possible in many Southern states. Nine years after *Brown*, the Birmingham campaign and the March on Washington were directed at dismantling segregation in public accommodation and employment, culminating in passage of the Civil Rights Act of 1964. Despite these victories, the African-American population remained absent from voting rolls in many parts of the country.

Before the Voting Rights Act, those seeking to challenge discriminatory voting practices had to prove that local registrars were discriminating on the basis of race, a difficult burden for a litigant challenging a seemingly facially-neutral law. It was only the unfortunate events in Selma -- and the interruption of ABC's prime time broadcast of *Judgment in Nuremberg* to show footage of law enforcement's violence against protestors at the Edmund Pettus bridge -- that enabled race and voting rights to come to the surface of American politics. Suddenly, all three branches of government were talking about voting rights, and Congress responded by sending the Voting Rights Act to President Johnson for signature.

Some Unintended Consequences of the Voting Rights Act

Professor Kay Butler began by observing that it was Section 5's pre-clearance regime that added African-American voices to the legislative pro-

cess in the South. Section 5 prohibited covered jurisdictions from finding ready substitutes for the discredited literacy tests and thereby enabled large numbers of African-Americans to vote for the first time (and to continue voting thereafter).

The unintended consequences arose later, in part because of the interplay between the need to re-district after each census and the unbridled powers that Section 5's pre-clearance regime gave to the Department of Justice. When passing the Voting Rights Act, Congress was skeptical about leaving this key legislation in the hands of federal judges in the South and therefore gave the United States District Court for the District of Columbia exclusive jurisdiction to hear challenges to the Department of Justice's pre-clearance regime. As a result, many covered jurisdictions preferred not to litigate. (Professor Butler shared that she herself had been involved in Voting Rights Act litigation on behalf of the State of South Carolina, and she sensed that South Carolina was viewed as a "rogue state" by federal judges in the District of Columbia.) This allowed the Department of Justice, in many instances, to dictate terms to jurisdictions covered by Section 5.

To be fair, the Department of Justice had a noble goal -- protecting minority voting rights. However, the Department of Justice inadvertently gave elected officials everywhere license to ignore traditional standards (including even non-discriminatory standards) when re-districting.

Traditionally, Congressional districts had used county lines as their building blocks, attempting, in the wake of *Wesberry v. Sanders*, 376 U.S. 1 (1964), to include as many counties as needed to get approximately equal populations in each district. Professor Butler showed two maps during her presentation, one of Congressional voting districts in North Carolina, South Carolina, and Georgia in 1972, and the other of Congressional districts in these same three states in 1992. In 1972, all three states used counties as building blocks for their voting districts. However, by 1992, some voting districts began to resemble ink-blot Rorschach tests.

As explained in *Beer v. United States*, 425 U.S. 130 (1976), one of the purposes of Section 5's pre-clearance regime was to ensure that covered jurisdictions did not use re-districting as an excuse to dilute minority voting rights. For example, the Voting Rights Act's restrictions on literacy tests had the effect of adding many minority voters to the voting rolls for the first time, but without Section 5's pre-clearance regime, covered jurisdiction could have used re-districting to dilute the impact these new voters would have had on actual election results.

Effectively ignoring the "no retrogression" standard from *Beers*, the Department of Justice used the pre-clearance regime not just to ensure that re-districting did not dilute minority voting strength but instead to ensure that re-districting would maximize minority voting strength. Voting-district lines began to follow increasingly unusual patterns, with perhaps the most famous being the I-85 corridor in North Carolina discussed in *Shaw v. Reno*, 509 U.S. 630 (1993). However, in *Shaw* and in the subsequent decision of *Miller v. Johnson*, 515 U.S. 900 (1995), the

Supreme Court made clear that states could not separate citizens into separate voting districts on the basis of race. As explained in *Miller*, "complying with whatever preclearance mandates the Justice Department issues" is not a compelling state interest to justify racial gerrymanders. Rather, "[w]hen a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination," the Supreme Court requires "a strong basis in the evidence of the harm remedied." *See Miller*, 515 U.S. at 922. As to the re-districting at issue in *Miller*, the State of Georgia already had two Congressional districts where African-American voters were in the majority, but going beyond the "no retrogression" standard from *Beers*, the Department of Justice insisted that Georgia use its re-districting to create a third district with a majority of African-American voters. The Supreme Court in *Miller* affirmed that Georgia's actions in following the Department of Justice's directives here violated equal protection rights.

Based on these Supreme Court's decisions, it is clear that, in most instances, gerrymandering voting-district lines based on race is not permissible, even if the purpose of the gerrymander is to maximize minority voting strength. However, we are left with the principle that gerrymandering district lines for just about any other reason is permissible. "[T]raditional districting principles" focus on "compactness, contiguity, and respect for political subdivisions," but such principles are not "constitutionally required." *See Shaw*, 509 U.S. at 647. The Department of Justice's implementation of the pre-clearance regime before *Shaw* and *Miller* created a world in which "traditional districting principles" are no longer followed. If, after *Shaw* and *Miller*, district lines are no longer being drawn based on race, they also no longer necessarily follow county boundaries or any other readily discernible geographic lines.

Fifty years after passage of the Voting Rights Act, we are left with, as Mr. Branch pointed out, a system that means that Congressional districts electing Republicans to Congress have, on average, 40% more white voters than districts electing Democrats. As Professor Guinier noted, re-districting is performed by people in positions of power. Mr. Branch observed that political gridlock is now the only thing that both parties can agree on, and he suggested that the underpinnings of this gridlock are racial.

The Way Forward?

Whereas Justice Frye, Mr. Branch, and Professor Butler all shared historical perspectives on the Voting Rights Act, Professor Lani Guinier looked toward the future during her portion of the panel discussion. She explained that participation by citizens is the key to democracy and questioned whether the United States has the best approach to maximizing voter participation.

She emphasized that we must be informed regarding more functional alternatives employed in other democracies, providing examples such as Canada, where voter registration is part of the census, and Australia, where voting is mandatory (although a voter may choose to cast a blank ballot). She also noted, with some irony, that the United States had played a role in the

development of post-war (West) Germany, but had not used the American system as the model. Instead, in Germany, citizens are given two votes in a system that includes a combination of district-based voting and proportional representation. This allows voters to cast ballots based on both (i) a pragmatic assessment of the individual candidate who would best represent the district and (ii) ideological leanings favoring a particular political party.

Neither Professor Guinier nor the other panelists discussed the differences in political systems that help make these top-down approaches (such as Germany's two-vote system) effective in other countries. For example, proportional representation works best where there are centralized political parties able to put together lists of candidates. In an election using proportional representation, the voters choose parties, not individual candidates. If, following an election, a particular political party is assigned four seats in the legislature, then the first four individuals named on that party's list of candidates would sit in the legislature. The fifth person named on the party's list would go home and lick wounds until the next election. How would American voters react to the elimination of local primaries? Would Americans be more likely to vote if their representatives were selected not through open primaries but in smoke-filled rooms at party headquarters in Washington and in state capitals?

Although the panel did not delve into details of how other political systems function, Professor Guinier pointed to a fundamental contrast between these systems and the American system. She remembers litigating a Voting Rights Act case in which potential voters would have had to walk ten miles to reach a polling station or else pay for a taxi in order to exercise their right to vote. The unfairness in that case became obvious when considering that 42% of the African-American population in the jurisdiction involved did not have access to an automobile. If voting were obligatory (as it is in Australia), would local boards of elections dare to locate polling stations ten miles away from voters in areas where there is no means of public transportation?

Clearly, there remains room for debate on how best to maximize voter participation. However, the panel presentation at this year's AJEI Summit underscored that this debate should not center solely on whether or not to reenact Section 5 of the Voting Rights Act in the wake of *Shelby County*. To question Section 5 and the possibilities for its reenactment is to ask ourselves the wrong questions; Mr. Branch went so far as to call the Voting Rights Act an anachronism. Instead, we need to get creative if we, as a nation, want to maximize voter participation and mitigate against political gerrymandering. One suggestion was legislation requiring that voting districts be drawn using the smallest possible number of aggregate lines. Professor Guinier pointed to other democracies that do not rely on district-based voting but do a better job of encouraging their citizens to be informed and vote.

The Supreme Court's decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct. 2652 (2015), makes clear

that there is some room for state-level experimentation to de-politicize re-districting decisions. In that case, the Supreme Court upheld Arizona's voters use of their legislative powers to approve a ballot initiative creating an independent commission to draw Congressional district lines when re-districting. Also, the Supreme Court recently heard arguments in *Evenwel v. Abbott*, a case questioning what "one person, one vote" really means. The challenge in *Evenwel* is whether Texas can draw state senatorial districts using population figures alone, given alleged disparities between total population and voting-eligible population in some districts.

One thing is certain -- the debate about voting, re-districting, and the Voting Rights Act will continue. What remains to be determined is the legal framework that will govern this debate going forward. This might include additional guidance from the Supreme Court (perhaps in *Evenwel*), legislation from Congress (such as a reauthorization of Section 5), and/or experimentation (both good and bad) at the state level.

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judge of the federal bench. He has also served as a Professor of Law at Harvard Law School, and has published a half-dozen books on various legal topics and issues. Justice Scott Bayles of the Arizona Supreme Court facilitated the interview, which included a question and answer period from the audience.

On Globalization

The discussion revolved around Justice Breyer's most recent publication, *The Court and the World: American Law and the New Global Realities*. His inspiration for the book came from his observation that there was an uptick in the number of cases before the Court where the Justices were looking outside of the U.S. legal framework to ensure the cases were decided correctly. Justice Breyer noted that globalization and interdependence are becoming increasingly significant within the legal landscape. For example, when an issue dealing with copyright law comes before the Court, briefs pour in from all corners of the world. A Supreme Court decision could impact $3.6 trillion worth of commerce. Therefore, it is essential that the Justices understand the repercussions of their decision abroad.

In this vein, the Justices are now much more attuned to global comity – or as the European courts say, "courtesy." Just as states must determine how their laws interplay with the laws of other states who may have similar, but not identical, objectives, so must the United States

on the world stage. There is no World Supreme Court, Justice Breyer stated; accordingly, the Justices must anticipate these issues to make sure they get it right.

When asked if the Court should look to foreign case law and foreign courts in interpreting the U.S. Constitution, Justice Breyer answered that it may be helpful. More and more countries are writing similar constitutions and facing congruent problems; hence, why not look to other countries? In Justice Breyer's opinion, the reluctance in doing so springs from a fear that, by referring to foreign law, American values will somehow be diminished. It's okay to look beyond our shores, says Justice Breyer. After all we are not France or England, but a motley and diverse people, above all, committed to the rule of law. There should be no fear, then, of looking abroad to see how legal issues are handled elsewhere if, in the end, it improves our system.

On National Security

The Courts are not in charge of national security. That is left to the President – and Congress. But the Courts do have something to do with traditional human rights. Justice Breyer translated Cicero's famous maxim as: when the cannons roar, the laws fall silent. Said differently, during much of the nation's history, presidents acted in the face of war in ways that they would not have done in times of peace: and the Courts by and large have affirmed their right to do so.

It was true in the Civil War and World Wars I and II; indeed, the questions weren't perceived to be difficult. Fred Korematsu – whom Justice Breyer once met – went against the advice of his family and others to challenge the exclusion order; after all, it was 1944 and there was no chance of Japanese invasion. But the Court – the same Court that decided the *Steel Seizure* case (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)) and *Brown v. Board of Education,* 347 U.S. 483 (1954) – upheld the exclusion order "as of the time it was made and when the petitioner violated it." *Korematsu v. United States*, 323 U.S. 214, 219 (1944). Justice Black, writing for the Court, said: "In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities, as well as its privileges, and, in time of war, the burden is always heavier." *Id*. at 219-220.

It is only recently that the Court has begun, slowly, and case by case, to carve out narrow exceptions to that hands-off perspective. The trend began with *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), in a fractured opinion. Justice O'Connor spoke for four justices of the Court (including Justice Breyer), and two justices concurred in part and dissented in part, while three dissented. In essence, the Court started where *Korematsu* did – at affirming the right to detain, but it then balanced that against the rights of the individual, concluding that despite the Government's undisputed right, the detainee has at least the right to know the factual basis for his classification, and he must be presented a "fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id*.

at 533. Looking beyond the long line of cases decided with Cicero's principle in mind, the Court invoked a different principle: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Id*. at 536. As Justice Breyer framed it, the question now before the nation is "what is the check if not blank?" He posited that the Court will answer that question slowly, case by case, careful to carve out narrow answers because it does not know the broad one – and the broad one requires an understanding not just of security concerns that the Court is not privy to but how others approach the same questions.

On Pragmatism

Justice Breyer is a self-described pragmatist. While he certainly acknowledges that the Court's decisions reach beyond a single case, it is hard to apply a bright-line rule in every scenario. For that reason, judges need to look at the facts before them and determine what will pragmatically work.

Justice Breyer is adamant that politics are not what drives a judge's decision. But he explains that "politics" measures popularity, and the judiciary needs to decide the cases before them, not what is "right" or "wrong" as a general proposition. People bring different viewpoints to bear, some geographic, some not. But when those diverse viewpoints are brought into focus on specific questions, they lead to decisions in cases, not pronouncements of "right" and "wrong." Whether a law is constitutional is a very different question from whether it is "good."

On Collegiality

While the Justices certainly differ on philosophy, Justice Breyer says that they are a collegial group. There are no insults hurled across the cafeteria or the Supreme Court basketball court (a.k.a., the "Highest Court in the Land"). To the contrary, they are genuinely friends and enjoy spending time together. So why do they take shots at each other in some of the opinions? Because sometimes a Justice falls in love with a sharp, catchy phrase and can't give it up. Nevertheless, they don't take these jabs personally.

On High School Students

Justice Breyer very much enjoys speaking with high school students and encourages them to participate in their community and local government. "If you don't like something, then go out and change it," is his frequent advice. While he acknowledges that he cannot force the students to participate in their community, he counsels them that, if they don't, the Constitution won't work because it is based on an understanding that people *will* participate.

What is a hot legal topic among high school students? The First Amendment, of course. Justice Breyer likes to remind them that the First Amendment does not guarantee the freedom to speak (and hear) only those things with which they agree. And explaining that it applies only to *government* restriction of speech is a conversation that often takes a bit more time than anticipated.

On Televised Oral Arguments

Justice Breyer also briefly addressed the issue of televising Supreme Court oral arguments. There are pros and cons to doing so, he acknowledged. On the plus side, people would be given the opportunity to see what the Court does. There is some skepticism of unelected officials who are rarely viewed in the performance of their duties. With televised oral arguments, that would change. Nevertheless, there are some valid concerns with placing cameras in the courtroom. For instance, people may get the wrong impression that oral argument is more than the 5% of the job that the Justices do. And a thirty minute oral argument would inevitably get cut to fit a thirty second news clip, which would oftentimes distort the actual issues in the case. And of course, there is the very practical concern of whether judges would be nominated for the bench because they would perform well before the press. Justice Breyer noted that the Court is very conservative (small "c"), so it is unlikely that televised oral arguments will happen during his tenure. But perhaps another generation will see that change.

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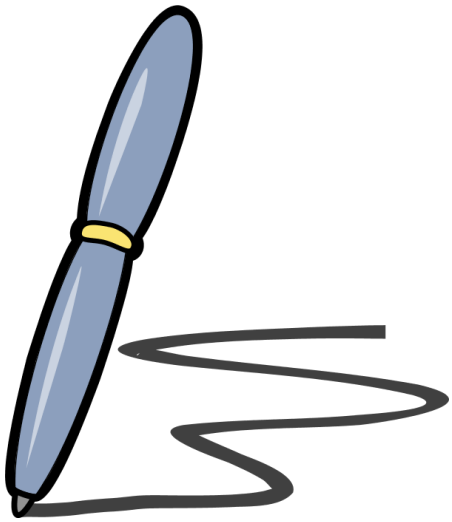
veyed there.

I'm honored to assist in putting this publication together. Contributing has intrinsic rewards, sometimes unanticipated and discovered only after the fact. I believe that writing can be a way to endow a professional life with meaning. I thank the authors for making *Appellate Issues* possible.

David J. Perlman, Editor



A Lawyer and a Reporter Walk Into a Bar...

By Steve Emmert

Those who arrived at the 2015 AJEI Summit in time for Thursday's programming got a treat in the form of a panel entitled "The Media and the Courts: What's Behind the Curtain in the Land of Oz?" John Bursch moderated a discussion between US Circuit Judge Consuelo Callahan of the Ninth Circuit, Slate's Dahlia Lithwick, SCOTUSblog's Lyle Denniston, and Marcia Coyle of *The National Law Journal*. The panel explored how the media's coverage of the Supreme Court has changed in recent years.

As Coyle describes it, here's how things worked when she started at the *NLJ* in 1987: Her editor told her to learn everything she could in advance about the subject matter of a given case. When you get a significant opinion, he told her, take your time to write about it. The paper expected a story that was destined for the front page to take about two to three weeks to write.

Here's the slightly more recent past: The opinions come down around 10:00 a.m., and the reporter picks up copies and heads off to read them, perhaps during a long lunch hour. She takes her time to compose a detailed story about one or more of the day's significant decisions, and files it somewhere around 3:00-4:00 in the afternoon, perhaps after having another writer look at it for suggestions.

And now today: The court still hands down decisions at 10, but now the media, dominated by instant-gratification sites like Twitter, needs immediate copy: a flash reaction to a ruling that the reporter hasn't even fully read yet. When *King v. Burwell* came down in June, Coyle was expected to blog about the decision immediately; then go to the plaza in front of the courthouse for a three-minute video discussion for the journal's website. She then hopped into a cab, where she responded to other media members' demand for her take on the opinion. She landed at her desk and set out immediately to write an in-depth article about the decision for the journal's website. PBS's *NewsHour* wanted a more detailed briefing from her in anticipation of that evening's 6:00 show, and she was expected to be on the air elsewhere by 5:00.

Whatever happened to contemplative journalism?

The easy answer is that immediacy happened. Denniston, who started in the business in 1958 and brags that he's covered a quarter of all of the justices who have ever sat on the high Court, now describes himself as "a blogger." His early career habits actually serve him well now: he worked for an afternoon newspaper, and his deadline for submitting copy was 11:30 a.m., just 90 minutes after the decisions came out. That taught him the kind of discipline and efficiency that's absolutely essential today.

Denniston pointed out that he spends time on cases in advance: "I keep scanning the universe for issues that may go to the Court, so I'm familiar with them when they get there." This obviously gives him a significant advantage over reporters who can devote only part-time coverage to the Court.

Denniston also pointed out one encouraging development. Back in the day, he said, print coverage was "dog-eat-dog"; highly competitive, with little or no cooperation between reporters, each of whom was trying to beat the other to the story. Online journalism, in contrast, is "truly a global village," with "a sense of community." Reporters today actually help each other.

Lithwick spoke next, and noted the tradeoff between accuracy and speed. When she began in 1999, she was expected to take a day to compose a story; now the "perils of pace" force almost instantaneous reporting, because "30 minutes old is old news."

There are costs to reporters beside the harrowing pace. Lithwick pointed out that you can't use electronics in the courtroom, so anyone who comes to the courthouse to watch as opinions are handed down can find herself 45 minutes behind other journalists who merely sit at home, download the opinions, and start reading. That's increasingly becoming the norm for the Supreme Court beat writers.

What about those reporters who do show up at One First Street? What can they add, to make up for the lost time? After all, with a delay like 45 minutes, they'll be scooped by stay-at-home bloggers. Well, there are actually dynamics inside the courtroom that obviously won't show up in the slip opinions: a justice rolls his eyes at a colleague's explanation; another's voice thunders a dissent far beyond the words on the page.

These nuanced angles make a story stick out from ordinary blogging. But they aren't measured in clicks, and those matter to advertisers, and hence to publishers and editors.

Judge Callahan spoke of the perspective from the other side of the room. Courts want accuracy in reporting because errors can hurt public perception of the judicial system. Accordingly, Judges should consider, in this age of near-instantaneous reporting, how they can help reporters do their job quickly without sacrificing accuracy.

One way to do that, she noted, might be to emulate California's Supreme Court, which announces in advance which cases will be handed down on a given court day. That allows the media to prepare for each decision. Surprise is the enemy of accuracy, and jurists should be flexible if they want an accurate report.

Following that lead, Bursch asked the panel what else the courts could do to help reporters. Lithwick started the journalists' wish list with "a website with two-syllable words." She noted that many publications don't have a dedicated courts writer, and "you no longer know who's covering the case, and they may not know substantive law." She described the process in Canada, where the courts have a dedicated Public Information Office that describes what the case is about, and can even review copy to ensure that it's accurate.

Denniston picked up that thread and noted that some courts have gone out of their way to make life tougher on journalists. For example, the Fifth Circuit handed down its ruling in a recent major case at 7:30 p.m. on Friday evening. The majority opinion was 71 pages long, "and you

had to read at least ten pages to see what they did, and to page 55 to know about an alternate holding."

This brought to mind the media aphorism that if you want to bury a piece of news, you release it after 5:00 on Friday. With the explosion of modern social media and other electronic outlets, it's no longer possible to bury a story at any hour of the day; but courts can make journalists' lives miserable that way.

Denniston also praised the syllabus that accompanies each SCOTUS decision. He felt that other courts aren't as user-friendly when it comes to giving the reader a concise report of what each case is about and what the holding is. He also criticized courts for putting too much in footnotes, observing that there are "many juicy items" in there that could just as well go in to the body of the opinion. He said he looked forward to reading Justice Breyer's opinions because he doesn't use footnotes.

Bursch prompted the panel for more "wish list" items, and Coyle plopped down a sensitive one: cameras in appellate courtrooms. Admittedly, not every case will generate the widespread interest of the Court's hot-button docket; but she felt that the public perception of the courts would improve with greater visibility. She acknowledged concerns to the contrary but felt that those arguments "don't hold water anymore."

For example, the jurist's classic objection to cameras is a form of "gotcha" journalism – "the sound-bite issue," where a news report takes a judge's question or comment out of context in preparing a story, making the judge look bad in public. But Coyle noted that print journalists have long been able to do just that. And in an appellate setting, lawyers won't exactly have time to ham it up for the cameras, especially with a hot bench. Anyway, "this isn't a criminal trial; it's an appellate argument."

Coyle also suggested a more user-friendly website, such as one where briefs are posted online. That can be an enormous help to reporters who are preparing for a major decision. She also asked the judges in the audience to consider putting the holding in the first paragraph, so the reader doesn't have to mine a long opinion to find out what happens. After all, the earlier a reporter knows the outcome, the better her sense of context when she reads along.

Lithwick decried the discontinuation of same-day audio of oral arguments, noting that now the court releases them at – surprise! – 5:00 p.m. on Friday, the place where "news goes to die."

Judge Callahan interjected an agreement, saying that "we can't be dinosaurs anymore." She pointed out that the current crop of law clerks get their information differently than the ones of a generation ago, so instantaneous access should be much more the norm. "I'm persuaded that if we want accuracy, we need to give the media access and respect their deadlines"

Bursch asked the panel if opinion-writing has changed in response to changes in media coverage. Callahan answered that judges now "try to write to a broader audience," and make sure they're explaining themselves better in high-

profile cases; but the bottom line – legal reasoning – shouldn't change.

Lithwick broached a sensitive topic, positing that some of the Supreme Court's zinger lines may be driven by the Twitter phenomenon. She pointed especially to Justice Scalia's use of inflammatory rhetoric, and felt that "the more we 'privilege' these lines, the more we're encouraging them." She worried that this might polarize the court, in which case the process becomes cheapened.

Denniston dug deeper for blame, settling on the Senate Judiciary Committee, which has overtly politicized the judicial-confirmation process. "The committee once made up its own mind, but now it's completely in the thrall of lobbyists." This sometimes causes judicial candidates to go room-to-room, sweet-talking senators and diminishing the dignity of the Court. He told the audience that he doesn't even attend the hearings anymore, "because I can't keep myself from throwing up." He suggested an end to the hearings, with a simpler process of nomination/investigation/vote on the Senate floor, because the present practice politicizes the entire Court.

Bursch then invited questions from the audience. One in particular generated wide discussion: "You're all Supreme Court specialists. Is there a solution to the problem of non-experts covering the court?"

Lithwick answered first, expressing the view that "that's not going to change." She noted that the number of journalists across the country is down, and that has caused a decrease in all coverage of the courts, even compared with just 15 years ago. She offered the idea of courts' conducting media briefings on the basics for newly minted (or newly reassigned) reporters, but offered no views on whether there's a will to do that. She felt that the trend is "probably irreversible."

Coyle agreed. She believes that editors should vet reporters, but editors have time pressures of their own, and may not be able to do this. She suggested prepared materials on the appellate process, and having the clerk act like "an old-fashioned press officer," prepared to deal with the press and establish relationships.

Denniston noted that there is a set of materials that explains the legal process in simple terms – his own book, *The Reporter and the Law*. (The audience chuckled at the shameless self-plug, for which no apology was offered or expected, even after Denniston suggested that "every court ought to have a copy.") He added that major journalism schools have legal-reporting programs that can be helpful, but those generate "only a trickle" of students.

Judge Callahan got the last word, urging judges to "be more sensitive." She described the process of actually taking calls from reporters and setting boundaries for those calls. "I prefer that they hear basic information from me."

The judges in the audience were well-disciplined, and there was no audible gasp at the suggestion that a sitting judge should actually talk to a reporter about an active (or even recently decided) case.

Canon Fodder: Judges and Lawyers on Interpreting Statutes

By Deena Jo Schneider

One of the plenary programs at the 2015 AJEI Summit featured a trio of accomplished individuals speaking about the different approaches judges and lawyers may and should use in interpreting statutes. The panel was moderated and led by Professor William Eskridge, Jr. of Yale Law School, who has focused much of his academic studies and written extensively on statutory interpretation and is one of the foremost scholars in this area. Joining him was Chief Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit. Chief Judge Katzmann is the author of *Judging Statutes*, a leading text advocating going beyond statutory language to determine legislative purpose and intent. Rounding out the panel was Virginia A. Seitz, a partner in Sidley Austin LLP's Supreme Court and Appellate practice who is a former Assistant Attorney General of the Office of Legal Counsel in the Department of Justice. Her experience thus includes advising government officials concerning the meaning of statutes and also advocating for particular statutory interpretations in the private sector.

While the panel members recognized that some judges, lawyers, and scholars would disagree, and they did not always agree completely among themselves, their general consensus was that the task of statutory interpretation may properly involve a variety of tools ranging from an analysis of a statute's language to review of its intent, purpose, context, and history. Two of the panelists would also take into account previous interpretations and applications of the statute by courts and the government, related law, and policy considerations, including the likely effects of different possible interpretations.

Approaches to Statutory Interpretation

Judicial interpretation of statutes has been occurring since the days of *Marbury v. Madison* and is critical to the decision in many cases, including almost two-thirds of a recent docket of the United States Supreme Court. Some judges, most notably Justice Scalia, take the view that analysis of the words of a statute, perhaps tested against the statutory structure, should end the inquiry. This approach to statutory interpretation is known as textualism. Other approaches include intentionalism, which seeks to determine the legislature's subjective intent; purposivism, which seeks to effectuate the statutory purpose; and pragmatism, which allows the interpreter of the statute to take into account other factors beyond intent and purpose, including practical consequences and policy considerations. Each of these other approaches involves consideration of materials outside the statutory language.

The Panelists' Views

In Chief Judge Katzmann's view, statutory interpretation should begin but not end with an analysis of the statutory text and structure. The review should also include accompanying materials documenting the statute's legislative history, the way the statutory words are used in other legislation, court and agency interpretations of the statute, and related common law and

practice. The inquiry should not be theoretical but practical, taking into account all useful means of determining legislative intent and statutory purpose. When the language of a statute is clear, a judge's work in deciding its meaning is relatively easy. When the language is ambiguous, the task becomes much harder.

Speaking from his perspective as a political scientist as well as a lawyer, Chief Judge Katzmann noted that the democratic legislative process is often chaotic, somewhat like making sausage. Legislative materials may offer valuable insights into the meaning, intent, or purpose of a statute. Conference Committee reports are generally the most trustworthy source materials, followed by the statements of floor managers at the time of the passage of the legislation. Excluding consideration of this legislative history not only eliminates useful sources of information and clues as to how a statute should be interpreted but ignores the way our government works. While occasionally legislative materials may not be completely reliable, abuses are rare and legislators' desire to maintain their credibility and the public's trust in the process is a strong incentive for accurate reporting.

Ms. Seitz stated that while the structure of a statutory interpretation argument will vary depending on which approach supports the result you are advocating, the argument should always begin with the text of the statute. Starting at a different point is likely to create suspicion that the ordinary meaning of the statutory language does not support your position. Even purposivist judges expect to see an analysis of the statutory text in the first instance. The argument should then proceed to a review of statutory context, which is also textual in nature. Only after that should external materials and considerations be discussed. All points that support your position should be included. However, care should be taken in presenting arguments concerning legislative intent, statutory purpose, judicial and regulatory interpretations and related common law, the practical consequences of particular interpretations, and similar points unless the judge deciding the case is known to be receptive to them.

Ms. Seitz's government service has made her appreciate the value of arguments based on past practice and congressional acquiescence, inaction, or passage of funding measures as indicating legislative approval of that practice. She noted that government lawyers also often focus on the practical consequences of a particular interpretation on the day-to-day operations of the government and suggested that private parties can make similar arguments.

Professor Eskridge reviewed the wide range of approaches to statutory interpretation. He noted that textualism limits the inquiry to the ordinary meaning of the statutory words at issue and sometimes also the meaning of those words in the context of the statute as a whole and the code of which it is part. While these approaches consider only enacted materials, the purposivism advocated by Chief Judge Katzmann also calls for consideration of legislative history and other indications of intent or purpose. Professor Eskridge agrees that it is antidemocratic for a court to consult dictionaries to determine the meaning of the words in a statute but refuse to inquire into how the legislature used those words elsewhere and how it has defined those

words. He would go further and endorse the pragmatism advocated by Ms. Seitz, which involves inquiry into numerous additional factors including judicial precedents, regulatory history, and what result would make the most sense.

An Illustrative Case

Application of these different methods of statutory interpretation was illuminated in the panel's discussion of the recent Supreme Court case of *Yates v. United States*. The question in *Yates* was whether § 1519 of the Sarbanes-Oxley Act, which makes it unlawful to alter or destroy any "record, document, or tangible object" with the intent to impede, obstruct, or influence a federal investigation, should apply to a commercial fisherman's throwing undersized red grouper overboard to avoid prosecution for fishing violations. Justice Ginsburg, joined by Chief Justice Roberts and Justices Breyer and Sotomayor and with Justice Alito concurring with the result, concluded that the phrase "tangible object" refers only to objects used to record or preserve information and therefore overturned Yates' conviction.

The plurality opinion reasoned that the other quoted terms, other language in § 1519, and the caption of the provision demonstrated that it is limited to records and does not apply to all physical objects. Justice Alito also mentioned these points in his separate concurrence. The plurality opinion further noted that the inclusion in the Act of a separate provision that the government conceded covered all physical objects argued against § 1519 being read so broadly and also cited the purpose and legislative history of the provision and the Act. Finally, the plurality opinion stated that the rule of lenity argued in favor of resolving any ambiguity in this criminal provision against the government.

Justice Kagan, joined by Justices Scalia, Kennedy, and Thomas, filed a dissenting opinion arguing that the plain meaning of § 1519 covered Yates' conduct. In Professor Eskridge's view, this use of textualism was not as complete or desirable an analysis as Justice Ginsburg's approach, which considered not only the entire text of the provision but its context and placement in the Act and legislative history and other indications of legislative intent and statutory purpose. He noted that Senator Oxley submitted a brief to the Court stating that the legislative intent of § 1519 was to deal with destruction of records and not other objects. He believes that legislative history was the decisive factor motivating the plurality decision and the Oxley brief was particularly influential even though it was not cited in the opinion. He cautioned that the form, quantity, and quality of legislative history will vary from one legislative body to another. The panelists also commented on the plurality's concern (expressed not only in the opinion but also at the oral argument) about the severity of the punishment for conduct that Yates might not have understood to be criminal.

Ms. Seitz concluded the discussion by noting that the different tacks taken in the three *Yates* opinions illustrate the value of briefing all statutory interpretation approaches, tools, and arguments supporting your position. After attending this excellent program, I concur. You never know what point will end up carrying the day.

"Secrets of Great Appellate Writing"

By Howard J. Bashman

8:15 a.m. on a Sunday in mid–November may not be the most propitious timing for a seminar on excellence in appellate writing, but a packed house turned out for Ross Guberman's presentation at the 2015 AJEI Summit. Guberman is the author of two highly regarded books on writing well for judges and lawyers: *Point Made: How to Write Like the Nation's Top Advocates*, originally published in 2011 and reissued as a revised second edition in 2014; and *Point Taken: How to Write Like the World's Best Judges*, published in September 2015.

Notwithstanding the early Sunday morning start time, Guberman was an energetic, enthusiastic, and engaging lecturer. Although it is questionable whether a one–hour talk focusing on good legal writing could actually serve to improve the legal writing of the many appellate judges and practicing attorneys who attended the presentation, having the attendees be mindful of the quality of their own written work by focusing on the effective legal writing of others certainly could prove beneficial over time.

Thinking about, identifying, and teaching good legal writing to lawyers and judges is what Guberman does for a living. Although there is no paucity of good legal writing at the highest levels of judges and practitioners, it remains true that good legal writing is not a talent or skill that exists in overabundance throughout the ranks of judges or practicing lawyers. Although the overwhelming majority of lawyers and judges may consider themselves good writers, rudimentary statistics teach us that no more than half of lawyers or judges are better than average writers.

Whether good writing or, more to the point, good legal writing can be taught or is worth pursuing are issues that can be debated at length. Think about all the skills that must be present, and used in combination, to produce an excellent appellate brief. The author must be a good storyteller. The author must be persuasive. The author must be credible. The author must explain the legal context in which the dispute arises and show why within that context the outcome favoring one's client deserves to prevail. The author must have ideas and clarity of thought, because a vacuous but well–written brief may engage the reader but is unlikely to persuade or prevail.

Good legal writing is not easy; it takes effort, it takes time, and in private practice it may even require a client that demands and is willing to pay the price tag for producing the highest quality and most persuasive writing. Putting all that aside, however, the reality remains that an appellate court in practice does not, and in theory should not, decide cases based on which side has the most talented advocate or writer. Rather, judges must decide cases based on the appellate court's view of what the proper outcome should be. If my client's position is foreclosed by precedent, and if the appellate court is unable or unwilling to reconsider that precedent in the context of my client's case, it simply won't

matter whether my client's brief is tremendously more well–reasoned and well–written than opposing counsel's. Nor should it.

Nevertheless, good legal writing is absolutely a goal worth pursuing if the circumstances otherwise allow. Appellate courts tend to be overburdened with reading, and the vast majority of appellate briefs fail to engage or otherwise capture the attention of the reader. An appellate brief that the reader enjoys reading — be that reader a law clerk or appellate judge or potential new client in a future case — certainly can redound to the benefit of the author and his or her client. And appellate judges whose writing stands out from the crowd tend to be more highly cited and may have their work come to the attention of more readers than merely the lawyers and parties in that particular case.

Via the "show and tell" method of teaching legal writing that Guberman uses in his books, Guberman's presentation at the AJEI 2015 Summit successfully communicated to his audience various effective legal writing techniques found in the writings of appellate judges and practitioners. According to Guberman, effective legal writers have a plan of attack that is evident from the opening paragraphs of an opinion or brief. He gave examples of opening paragraphs of judicial opinions that he characterized as stage–setting, stylized teasers, narrative trailers, slanted sound–bites, or contextualized op–eds. Some judges state the outcome in the opinion's opening paragraph, while others tell you when they are good and ready (at least by the opinion's concluding paragraph, one would hope).

Guberman also gave examples of noteworthy narrative lawyer openings from appellate briefs. Lawyers should have a goal for the fact section of the brief. Show, don't tell. Be an active narrator of the facts. According to Guberman, those lawyers who are exceptionally talented legal writers have mastered skills pertaining to weight of sentences, rhythm of sentences, verb choice, and examples, analogies, and metaphors.

Pulitzer prize–winning author Louis Menand has written what remains my favorite essay about trying to teach writing skills to college students. In "Comp Time: Is college too late to learn how to write?" Menand masterfully drives home the point that perhaps good writing cannot successfully be taught. The essay, originally published in the September 11, 2000 of *The New Yorker*, is not widely available, but if you have access to it, you definitely should read it.

In his unique and highly persuasive voice, Menand points out the main problems of an educational system that is failing to produce an abundance of good writers. Children are not learning how to write well before graduating from high school. Young adults are not learning how to write well in college. Then, by the time people make it to law school, the opportunities for teaching the necessary writing skills have been squandered, and little chance remains to learn or master the important written communication skills that today's young people should, but by and large do not, possess.

To the extent that I am considered a good writer, I think that my background in high school

and college journalism played an important role. Seeing what worked and what didn't from my perspective as a federal appellate law clerk immediately after law school furnished me with invaluable insight. Also, during law school and early in my legal career, I made a conscious effort to read and learn from the writings (judicial opinions and appellate briefs) of the most highly talented appellate judges and appellate brief writers.

Momentarily, I will provide my baker's dozen list of the 13 federal appellate judges whom I currently view as the most engaging and talented writers, but when it comes to lawyers who write briefs, you would rarely go wrong by focusing on the briefs of the U.S. Solicitor General's office, Paul Clement, or the Mayer Brown appellate practice section. They don't always win, but these lawyers do always (or at least almost always) produce examples of top–notch written appellate advocacy.

The list of my personal 13 favorite federal appellate judge writers, organized in terms of seniority and by the number of the circuit court on which the judge currently serves, consists of: Chief Justice John G. Roberts, Jr. and Associate Justices Antonin Scalia and Elena Kagan; D.C. Circuit Judge Brett M. Kavanaugh; First Circuit Judges Bruce M. Selya and O. Rogeriee Thompson; Sixth Circuit Judge Jeffrey S. Sutton; Seventh Circuit Judges Richard A. Posner and Frank H. Easterbrook; Ninth Circuit Judge Alex Kozinski; Tenth Circuit Judge Neil M. Gorsuch; and Eleventh Circuit Judges Edward Earl Carnes and Robin S. Rosenbaum.

Based on personal experience, I agree with Guberman that observing examples of excellence in legal writing can help improve the legal writing of an appellate practitioner. And, perhaps not coincidentally, Guberman's presentation at the 2015 AJEI Summit drew on examples of legal writing from many of the judges and attorneys whose opinions and brief writing I have already mentioned above.

In the appellate realm, improving the quality of the legal writing of advocates and judges is an important pursuit. Lawyers and judges who can improve the quality of their legal writing as the result of study and devoted effort should definitely seek to do so. At the end of the day, however, I remain certain that membership in the upper echelon of the best appellate writing results from a combination of effort and innate talent, the latter of which cannot be taught. Try to be the best and most persuasive writer that you can be. Remember, however, that in many cases the outcome will depend on facts and the judges' view of what the law is and should be, considerations over which an advocate in any given case can exercise only so much control.

Ross Guberman's *Point Taken, How to Write Like the World's Best Judges*

By Wendy McGuire Coats

I cringe each time a new acquaintance learns that I'm an attorney and then quips, "My [niece/daughter/sister] loves to argue so I told her she should go to law school, would you be willing to talk with her?" I always say yes and nod with a brief shoulder shrug, complicit in the fiction that the attorney's skill set is arguing.

I'm proud of that young woman's strength, tenacity, and courage to take a stand, which have earned her the "loves to argue" reputation. Those characteristics will serve her well. But when we meet, I will ask, "Do you love to write? Do you ever ponder whether ensure, protect, or safeguard is the right word for your sentence? Do you ever get lost in a book like David Whyte's *Consolations, The Solace, Nourishment and Underlying Meaning of Everyday Words*?" I will ask her, "Do you love to read? Do you love stories about real people doing real things, who inevitably must wrestle with an unexpected, disappointing, and broken set of circumstances? And, do you like puzzles? Are you intrigued by the idea of teaching and guiding how those broken pieces should be rotated, chiseled, and duct taped back together into a right and just result?"

I'm a lawyer who loves the law in all of its unsettled, evolving, and case-by-case glory. In practice, I'm an appellate attorney but I've increasingly come to think of myself as a professional non-fiction writer. I draw on my legal training and experience to advocate on behalf of our clients in the appellate court arena. I am paid to write.

I have a writer's habits. I write daily in some form. I'm on the hunt for great writing and I read constantly. I routinely face the blank page with a mix of joyful uneasiness and my faithful opener: "We win because . . ." I have tiny notebooks stashed in the recesses of my home, office, car, and bags in order to capture those fleeting moments when a turn of phrase or argument structure falls into place. Stacks containing William Zinsser's *On Writing Well* and *Writers Workshop In a Book: The Squaw Valley Community of Writers on the Art of Fiction* edited by Alan Cheuse and Lisa Alvarez clutter my shelves.

In 2012, Ross Guberman's *Point Made. How to Write Like the Nation's Top Advocates* secured a slot in the stack of go-to resources on my desk. In a similar book review on *Point Made.*, I praised Guberman's trek down the rabbit hole of appellate briefs on my behalf to locate, cull, and dissect the best of the best of the best and offer the legal writer tangible examples of great legal writing. In pairing specific writing techniques with language lifted directly from briefs, Guberman created a common sense, practical, legal writing workshop in *Point Made.*

He's done it again, with *Point Taken How to Write Like the World's Best Judges*. In *Point Taken*, Guberman swapped out appellate briefs for judicial opinions and created a similar handbook intended to "transform the work of some of the world's best judges into a concrete step-by-step

method accessible to judges at all levels and all jurisdictions." Much like *Point Made*., *Point Taken*, with its bright red cover, is more than a list of dos and don'ts; it is a love letter to legal writing, generally, and judicial opinion writing, specifically. The concrete examples remind the reader that legal writing can soar. Guberman's straightforward, practical advice will also inspire the legal writer to revisit and refresh writing techniques that transform the writing experience from a mundane task to a pleasurable process, a craft.

This book is not just for judges. If an appellate writer's goal is to have the court adopt the brief's arguments and reasoning and mirror them in the majority opinion, then Guberman's writing advice is equally useful to the advocate. In "Lead 'Em On: Quoting without Tears," Guberman takes on the repeatedly admonished, yet constantly included practice of long, block quoting. Leaving no room for misunderstanding, Guberman announces this section with, "Whether you're a judge, advocate, or journalist, stringing together quotations is not writing." (p. 140) Not only is it not writing, but as Guberman also breaks down, the linking from quote to quote is also not legal analysis. Ever the teacher, Guberman starts with the all too familiar example of what he describes as the "so-and-so-said-such-and-such-in-some case" approach, typically hallmarked with the phrase, "the court discussed." (p. 144)

Commanding the classic *show don't tell* model, Guberman provides a better way to use legal authority to bolster legal reasoning through the opinions of Circuit Judges Frank Easterbrook and Alex Kozinski. Instead of simply suggesting that the writer provide a thoughtful lead-in to a quoted section, Guberman provides multiple examples of judges marrying rich legal analysis with quoted material so the reader understands the importance of the quote and is less likely to skim it.

For the legal writer seeking examples of "great legal writing" to learn from and inspire, sit back and settle into the gold mine of Part Five: "The Words: 'Nice to Haves' in Style," which starts with the premise that "Great judicial writing, like all writing, paints pictures, provokes thought, and sometimes even stokes emotion." (p. 237) In the sections that follow - metaphors, similes, examples and analogies, literary and cultural references, rhetorical devices – *Point Taken* provides over 50 opinion excerpts illustrating how the great ones do it. As Guberman explains, there is a unifying force to these enduring examples: "Readers remember what they can see in their mind's eye." (p. 242.) The writing takes an abstract concept, brings it to life, and makes it concrete, often in an unexpected way.

The writer who commands understanding, writes with a confidence and clarity that requires both "reader empathy and creative juices." (p. 255.) Guberman revisits the concept that the great writing has the reader in mind when he reflects that, "I often get the sense when reading opinions that clerks and judges don't imagine a living, breathing reader on the other side." (p. 267.) The great writing, the memorable writing, the writing that engages the reader and captures attention through the judicial opinion

is neither dry nor distracting. It is not clever and cute for its own sake. It does not fall flat, like the stand up comic laughing at his own joke before the punch line's delivery. Whether in a judicial opinion or in an advocate's brief, these writing techniques are "strong spices meant to season the main ingredients" of the writing and not "doused indiscriminately." (p. 268.) And so Guberman, warns the writer to use the tools "when the moment's right." To ask a few "With You In Spirit" questions, a legal writer might ask, "How will I know if this is the right moment? Have I gone too far? Is the writing in the way of the argument?" Maybe that's Guberman's next book?

To a large degree this question is one of wisdom, requiring the writer to reflect upon the intended reader and the hoped for outcome of the written work. While Guberman has compiled example upon example of great judicial writing and assembled them to manageable categories to be studied and replicated, effectively deploying these writing techniques requires a writer's mindset of revision. It takes practice. It takes rising above the school-yard sniping and embracing a disciplined, professional craft. It takes reflection. Does the writing do what I intend? Is this working? Are the substantive points memorable? Is the argument logical? Is the position clear? Are the predicted consequences rational and reasonable? Does this reflect a professional writer in command? Will the reader sense that great thought has been invested in arriving at the conclusion? Should I be trusted?

Tech Talk: Appeals of Today and Tomorrow

By Nancy M. Olson

On Saturday afternoon of the 2015 AJEI Summit, three distinguished panelists discussed the ever-present and always-changing topic of technology: why courts need it, current developments in federal and state appellate courts, and what technology means for courts and the judicial process. The panelists included: Hon. Eric Magnuson, former Chief Justice of the Minnesota Supreme Court and currently of Robins, Kaplan, Miller & Ciresi, LLP; Honorable Barbara Jackson of the Supreme Court of North Carolina; and Honorable Ed Prado of the U.S. Court of Appeals for the Fifth Circuit.

Justice Magnuson kicked off the discussion, building upon some of the topics he covered in a recent law review article, Prospects and Problems Associated with Technological Change in Appellate Courts: Envisioning the Appeal of the Future, 15 J. App. Prac. & Process 111 (Spring 2014). In a nutshell, what judges and lawyers should know is that if you think you're going to avoid technology: think again!

Courts turn increasingly to technological solutions for the simple reason that doing so is more cost effective. Courts lack the budgets to pay the staff that would be required to handle today's volume of filings in paper form. Data

moves faster and fewer people are needed to process data than paper. For example, PACER has shifted some docketing tasks to attorneys who now complete docketing work that previously would have been done by a clerk following a paper filing. It has also allowed troves of material to become instantly accessible from any remote location with an internet connection; to obtain briefs and other filings in the past a lawyer had to travel to the law library. The functionality of CM/ECF has come a long way.

Judge Prado explained how technology allows a large and geographically dispersed court like the Fifth Circuit to do its work. From his vantage point hundreds of miles away from other judges and the Clerk's office, in the past he exchanged documents and briefs by mail, which is very expensive. The court began looking for ways to save money and increase efficiency. He suggested iPads for the judges—a suggestion that was immediately shot down. Naysayers of his proposal asked, won't judges just surf the internet if we give them iPads? Before he could convince the court this was a good idea, he became the iPad guinea pig and had the Clerk's office set up one device to see if it had the functionality that would make everyday use worthwhile for judges. An employee in the Clerk's office developed an application that allows all briefs and other case materials to be pushed out to an individual judge's iPad as soon as a case is assigned. It went live in August 2013.

Upon downloading the case materials, they can be reviewed later without wifi, which offers the opportunity to do uninterrupted work (e.g., on an airplane). The program also has the functionality to hyperlink legal research through Westlaw. With everything tied together seamlessly, a judge can read an electronic brief, click on legal citations to go directly to the appropriate pin cite or click on record citations to go to the Electronic Record on Appeal (EROA), highlight portions of a brief, write margin notes, and share annotations with colleagues. A local rule dictates citation format for legal citations and EROA cites such that, when a brief is filed, having court staff check for formatting compliance with local rules is only a click away. This ensures electronically filed documents interact smoothly with the judges' system.

Even though each judge has three monitors in chambers to maximize his or her ability to review multiple sources at once, the technology afforded through the iPad app makes it more convenient than reviewing materials on a typical computer/monitor setup. At this point, none of the judges could do the job without it.

Judge Prado believes the shift to all electronic brief and record filing is good for attorneys too. It allows for downloading in lieu of carrying heavy excerpts of record, as well as the flexibility for remote work. Eventually the court hopes to make the full system used by the judges available to attorneys. In addition, the application is being modified for use in all federal courts of appeals. The Third and the Eighth Circuits have adopted part of it already, and the Ninth Circuit has something in the works as well.

Against this new landscape the former naysayers are now saying, what took us so long to get

here!? The judges anxiously await the release of the new iPad. Technology has allowed the court to transform from all paper to printing less than one half of one percent of all case materials. Conveniently, nearly all motions are now handled entirely electronically. In the end these changes save a lot of time and money.

Justice Magnuson asked Judge Prado if pre-iPad he was a geek? Judge Prado admittedly was not. He hesitated to buy his own iPad before having it integrated into is daily work. Now he has become the "IT Proctor" of the Fifth Circuit. Acknowledging courts' slowness to change, combined with generational differences vis-à-vis technology, he advises other judges and attorneys to give up the security blanked of having paper in front of you and embrace technology.

After hearing about developments in the federal appellate courts, Justice Jackson described North Carolina as both the tortoise and the hare when it comes to technology. North Carolina started out as the first voluntary e-filing state in 1996, but upon receiving the electronic filing the court printed out and distributed multiple copies of the filing. All this accomplished was shifting the burden from the attorneys to the court. Over time, the courts have scaled back a bit and you might see only a single copy of case records printed for use on the bench. The end goal is to get rid of all of the paper. Justice Jackson noted that she is a big fan of the Fifth Circuit's all-electronic and linked approach. North Carolina continues to explore technology advancements with the vision that the right technological solution should provide the right information, at the right time, right where you are.

One of the issues faced in North Carolina is the fact that the courts serve a diverse user base; besides the typical audience of attorneys and judges, the system also handles things like e-citations for law enforcement. To effect a change in the system you have to get elected officials to buy in; the judges cannot modernize by fiat. The courts do have a technology committee to help move the efforts forward. Sometimes the forward-looking vision of the courts is at odds with that of the General Assembly, which, ironically, has cut the technology budget of the counties, resulting in the use of multiple different applications. The courts would like to streamline into a more modernized and uniform system. In addition, the courts are exploring offering an e-compliance option so disabled citizens can take care of court business without physically coming to the courthouse. Eventually, Justice Jackson would like to see the local rules change to allow for hyperlinking and other technology-friendly features.

Justice Magnuson turned the panel's attention to the interplay between ethical rules and privacy rules on the one hand, and technology on the other hand. Under ABA Model Rule 1.1, lawyers owe clients a duty of competence; i.e., lawyers have an ethical duty to be technologically competent. This means that lawyers must understand the benefits and risks associated with the relevant technology. At its most basic, this duty encompasses things like keeping your email address up to date in PACER. In the case of a missed filing, technological incompetency

does not equate with excusable neglect. In all filings, lawyers have an obligation to understand how to use technology to protect confidential information, for example, by filing a sealed document, or by redacting certain personally identifiable information (PII) such as a social security number or bank account number. Court rules typically dictate the required process in both instances, but the underlying issue for attorneys involves the duties of competence and confidentiality intersecting with the use of technology.

The panel next turned to discuss the impact of technology on the appellate process, focusing on three areas: (1) independent online research by judges; (2) link rot; and (3) potential impact on the standard of review.

With respect to independent online research by judges, the panel acknowledged Federal Rule of Evidence 201 (and its state analogs), which provides that the court may take judicial notice on its own at *any* stage of the proceeding. But does any really mean any? The Second Circuit says not so fast. In *United States v. Bari*, 599 F.3d 176 (2d Cir. 2010), the court held that the district court abused its discretion by conducting independent online research *after* the court had taken the matter under submission. This decision raises questions such as, should judges tell parties if they research factual matters, and, does the timing of such research matter? Although judges may be tempted to conduct independent research, especially when there are gaps in the record, it is a bad idea. Depending on when such research is done, it may trigger an opportunity to be heard by the parties. For more information on this topic, the article The Curious Appellate Judge makes a strong case against judicial notice in these scenarios. Relatedly, judges should be mindful of tech-savvy law clerks who may be inclined to conduct independent internet research and/or cite to improper internet sources. (For further exploration of this area, see the Summer 2015 *Appellate Issues*.)

The panel next acknowledged that "link rot" is a problem. Link rot occurs when hyperlinks point to sources that have become unavailable. One study concluded that 50% of links cited in Supreme Court decisions are now dead. Enter Perma.cc, developed and maintained by the Harvard Law School Library. Perma.cc has fortunately stepped in to provide a service to scholars, courts, and others by creating citation links that will never break. When a user creates a Perma.cc link, Perma.cc archives the referenced content and generates a link to an archived record of the page. Regardless of what may happen to the original source, the archived record will always be available through the Perma.cc link.

Turning to the impact of technology on the standard of review, the panel queried whether a high-tech record will undermine deference to the trial court. For example, typically appellate judges defer to a trial court's credibility findings. What if, however, the trial or other key evidence such as a police interview was video recorded? Judge Prado noted that when he was a trial judge he experimented with using video for about a year. He became suspicious about some reversals that purported to be based on a deferential standard of review, but where reviewing judges may have made their own as-

sessment of witness testimony. On the other hand, this feature could work in a trial court's favor by thawing the cold record for the appellate court to let it see particularly powerful and moving testimony. The panel acknowledged that the interplay between technology and the standard of review certainly presents interesting questions that warrant further discussion not feasible within the time limitations of this discussion.

Rounding out the presentation, Justice Magnuson gave a brief tutorial about "screen writing," i.e., writing for screen reading on an iPad. Lawyers should be aware that different considerations arise when striving for readability on an iPad versus a traditional paper brief. Fortunately for judges and lawyers, screen reading has become easier as technology has improved (e.g., more dots per inch, better fonts). Although many lawyers default to Times New Roman, court rules typically require the use of a serif font, not one font in particular. Litigants should be aware that different fonts look better on paper versus screen. Microsoft created a font called "Clear Type" with the intent that it would be easier to read on a screen. A good rule of thumb for briefs and other materials that are likely to be read on a screen: use a font with "book" in the name (e.g., Century Schoolbook). Acknowledging that the finer points of writing for the screen are a super geeky issue, Justice Magnuson cautioned lawyers to pay attention nonetheless because studies show screen readability makes a difference in how readers digest your material.

Lastly, Justice Magnuson provided guidance on the typical requirement that briefs be double spaced. Achieving clean double spacing was easy on a typewriter, it simply involved hitting Enter twice. In word processing programs, however, you may be creating more white space than you need, which matters in page-limit jurisdictions (not so much in word-count jurisdictions). In Microsoft Word, for example, at 12-point font the program defaults to 2.3 line spacing (slightly over double). Recognizing that tablets are smaller, optimal spacing is 120-145% of the point size you are using (e.g., 14-point font translates to 17-20-point font spacing for readability). For anyone interested in further geeking out on this topic, a more detailed discussion is available in the related Screen Writing for Screen Reading presentation.

The Rise and (Pit)falls of the Modern Amicus

By Richard Kraus

Amicus curiae briefs are an increasingly common – and increasingly important – part of appellate litigation. A well-executed amicus brief can provide valuable assistance to an appellate court, offer strong support for a party's position, and advance the amicus's interests. A poorly done brief always wastes the court's time and, in some cases, may be counterproductive for the party and amicus. Bringing a wide range of perspectives to a lively and interesting AJEI Summit session, the panelists offered very helpful advice for being a good "friend of the court."

The moderator was Kevin Newsom, partner and chair of the appellate group at Bradley Arant Boult Cummings, LLP. The panelists included Judge Richard Dietz of the North Carolina Court of Appeals; Professor Allison Orr Larsen of William & Mary Law School; Michael Scodro, a partner at Jenner and Block; and Kate Comerford Todd, Senior Vice President and Chief Counsel for the United States Chamber of Commerce.

Professor Larsen reviewed the history and evolution of amicus curiae briefs in American courts. Originally, amicus briefs were filed by attorneys who were indeed "friends of the court." Lawyers who did not have any association with the litigants, but were knowledgeable about the substantive law, would submit briefs to help the court understand the legal issues. In the 1930's, the role of amicus briefs began to change with an increased emphasis on advocacy, so that an amicus was more often a "friend of a party." The growth has been remarkable. Amicus briefs are filed in 98% of United States Supreme Court cases, and were cited in 55% of the Court's opinions. Participation by amici has also expanded in other state and federal appellate courts.

Kevin Newsom posed a question about moving to strike an amicus brief because the filer was too interested, acting more as a party than assisting the court. Professor Larsen explained that the federal rules no longer require neutrality. Supreme Court Rule 37 only requires disclosure whether counsel for a party authored the brief or whether a party, its counsel, or other persons funded its preparation or submission. Mike Scodro noted that Justice Alito, when he was on the Third Circuit, required amicus curiae to show a special interest in the case. The panelists agreed, however, that a brief's value can be diminished if the amicus's self-interest is too strong.

Judge Dietz offered his perspective as an intermediate appellate court judge. Because amicus briefs are optional, writers must think about ways to entice busy judges to take the time to read and study them. Judge Dietz or his judicial clerk will first skim an amicus brief to see if it is worthwhile; so a brief should grab the reader up front. He looks for an amicus with a significant interest in the case who can distinguish its position from the parties'. An effective amicus should use argument headings to point out such

differences. Judge Dietz finds that amicus briefs are very helpful in state intermediate courts, particularly because they are often better researched and written than those filed by the parties and can help the court understand the context for a legal issue.

The panel then discussed when amicus briefs are warranted. From a party's perspective, Mike Scodro commented that an amicus can be helpful by providing a "real world contribution" and explaining the empirical effect of the substantive issue. Courts are interested to know if a group with a broader stake, especially a governmental entity, is affected by the case. Kate Todd gave a client's point of view. The U.S. Chamber of Commerce focuses its amicus efforts at the discretionary phase, when a court is looking at the "big picture" to see if there is a reason to take the case. Generally, the Chamber looks for the right case with clean facts and preserved issues, and can be concerned when an important legal issue is presented with bad facts or unsympathetic parties. Judge Dietz agreed that amicus briefs have the most impact at the discretionary stage, even though his state's court rules do not expressly provide for them. Several panelists mentioned the need for creativity in getting amicus briefs in front of the court, such as an early filing of a motion to appear as an amicus on the merits with the proposed brief attached. Another suggestion was a mention by a party in its petition for discretionary review that amici would file briefs if the court accepted the case for merits review.

Professor Larsen offered a taxonomy of amicus briefs. The first is the "me too" brief, which is often not worthwhile. The value of "me too" briefs comes from the names of the amici on the cover sheet, and can have value at the certiorari phase. She talked about the "thud factor" when the clerks and justices look at the volume of briefs filed supporting or opposing certiorari. The second is the "not me" brief where a party explains why the court should not take an appeal or issue a decision affecting the amicus's interest. The third is the "just weighing in" brief, when an amicus provides background information without advocating a specific position. The final category is the "Brandeis brief," which customarily explores non-record social or empirical facts. In recent years, Brandeis briefs have been filed frequently by amici and cited by the courts. These briefs can be either valuable or dangerous, depending on the reliability and accuracy of the information offered by an amicus. As an example of how Brandeis briefs can be very influential, Professor Larsen talked about *Brown v. Entertainment Merchants Assoc.*, where the Supreme Court considered a statute banning the sale of violent video games to minors. The relevant neuroscience presented in amicus briefs was cited as key support for the Court's ruling.

The panel discussed the nature of information provided in amicus briefs, which can range from facts subject to judicial notice to rank speculation. Professor Larsen said the traditional legal distinction has always been that legislative facts are appropriate, but adjudicative facts are not. It is, of course, hard to draw a line. Judicial opinions indicate that courts are more open to receiving legislative facts and are giving them increased significance.

Kevin Newsom asked how members of an amicus team can work together to effectively contribute different perspectives and positions to a court. Kate Todd explained the need for strategic conversations between the parties and amici. Counsel for the party can offer guidance to amicus counsel and help avoid "me too" briefs. One helpful approach is having numerous amici consolidate their positions and arguments in one brief. Coordination requires that a party's counsel contact prospective amici very early in the process. It can even be worthwhile to consider contacting potential amici when issues are raised at the trial court level, in anticipation of subsequent appeals.

The conversation then turned to "surprising source" amicus briefs. Kevin Newsom related an experience as Alabama Solicitor General in filing an amicus brief in *Gonzales v. Reich*, where the Supreme Court considered the federal government's authority to criminalize use of marijuana in states with laws allowing production and use for medicinal purposes. While a conservative state like Alabama would not be expected to support such laws, it did have an interest in limiting federal involvement in state matters and filed an amicus brief opposing the federal government's position. Mike Scodro described a "surprising source" as a group with a fundamental or underlying interest that outweighs its likely position on a specific issue. A governmental body can often be a surprising source. He talked about a brief filed when he was Illinois Solicitor General in *FTC v. Phoebe Putney Health Sys.*, which focused on the "clear articulation" prong of the state action exemption from federal antitrust laws. Illinois and several other states believed it was more important to retain the principle requiring a clear legislative expression of a state policy justifying the anticompetitive effects of state action, although the rule would make it difficult for states to claim exemptions from antitrust laws. While states would ordinarily be expected to advocate for broad exemptions, they were more concerned about the potential for inadvertent exemptions that could cause injury to citizens and consumers.

Kate Todd said the Chamber believes that amicus briefs may be more helpful in state courts and lower federal courts, and therefore, is devoting more resources to those courts. This is mainly due to the oversaturation of amicus briefs at the United States Supreme Court. The Chamber finds that state courts are very receptive to amicus briefs. Judge Dietz agreed, noting that amicus briefs are becoming much more common in state intermediate courts. Amicus briefs can be very helpful in complex regulatory cases. Often, the attorneys for the parties are too immersed in the details. An amicus can help explain the issues in a more objective and understandable fashion. Mike Scodro also noted the increase in frequency of requests to file amicus briefs in state courts and federal district courts.

The panelists offered differing views of the recent phenomenon of amicus briefs filed by academics. Kevin Newsom has not sought an academic amicus in his cases. Professor Larsen believes that a professor with a strong interest in an issue and research expertise in the relevant field can be effective. She has, however, seen

too many instances where a professor lends her or his name by merely signing a brief at the request of a colleague or friend. She thinks this practice dilutes the credibility and value of true academic briefs. Mike Scodro noted the benefit of using briefs targeted to the external restraints on judicial decision-making, such as briefs filed by linguists and historians in statutory interpretation cases where the meaning of language or the historical content are relevant. Professor Larsen noted that professors can serve as "expert witnesses" on topics within their field.

The panelists and several session attendees talked about approaches for responding to amicus briefs, especially briefs referring to extra-record material or raising new arguments. Professor Larsen indicated that such briefs put the parties in a tough spot. Parties do not want to highlight the brief, but often need to respond. The problem with filing a response or motion to strike is that it guarantees a court will read the challenged amicus brief. At the United States Supreme Court level, the responses are commonly done through competing amicus briefs. Mike Scodro indicated that he has filed short, pithy responses to objective misstatements in amicus briefs, and in some cases solicited the filing of corrective amicus briefs explaining why a court should not accept the representations or positions taken by amici supporting the other party. Kate Todd suggested filing a response only if it provides a "kill shot" or if the amicus will not have a chance to respond. All panelists agreed that challenging the interest of an amicus is insulting to the court. Judges can decide whether an amicus has anything worthwhile to say.

The session concluded with an often overlooked situation when a party does not want amicus support. Mike Scodro said this can be an awkward conversation, especially when an amicus wants to file a brief opposing a petition for certiorari. He has found most prospective amici will not file once he explains the concern, *i.e.* the fact that an amicus has a strong interest in a petition for certiorari can leave the impression there may be a reason to consider the appeal. Professor Larsen said that one tactic can be declining to file blanket consent to amicus filings, so that a party has the opportunity to discuss any concerns before filing. There is little that a party can do if an amicus cannot be persuaded to not file a brief. Kevin Newsom commented on the situation where an unwelcome amicus may actually be beneficial. For example, an amicus may take such an extreme position that the party appears to be the voice of reason.

Attorneys for parties and amici would be well served by reading the September 2015 issue of *Appellate Issues*, which is devoted to many of the issues discussed by the panel. The issue is available at www.americanbar.org/content/dam/aba/publications/appellate_issues/2015sum_ai.pdf

Guns & Gavels: A Second Amendment Update

By Nancy M. Olson

Seven years after the Supreme Court handed down *District of Columbia v. Heller*, 554 U.S. 570 (2008), and five years after the Court applied its ruling in *Heller* to the States in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), attendees at the 2015 AJEI conference received a detailed Second Amendment update from none other than Paul Clement, former Solicitor General and current partner at Bancroft PLLC. Notably, Mr. Clement participated in oral arguments for both *Heller* (presenting the government's views as Solicitor General) and *McDonald* (on behalf of the NRA). Joining Mr. Clement on the panel was Professor Joseph Blocher, a rising star in the field of Second Amendment scholarship and Professor at Duke Law School. Hon. Scott Stucky of the U.S. Court of Appeals for the Armed Forces moderated.

To set the stage, Professor Blocher provided an overview of Second Amendment jurisprudence. Acknowledging a fair amount of common ground in this area, he set out to provide a snapshot of the Second Amendment landscape. Scholars read *Heller* to stand for many different things, but at a minimum it announced the settled rule that individuals have a right to keep a gun in the home irrespective of membership in a militia. When the Court decided *Heller*, the relevant Washington D.C. law amounted to a ban on possessing a gun in the home. Next, applying *Heller* to the states in *McDonald*, the Court struck down a similar municipal handgun ban. Practically speaking, *McDonald* represents a hugely important decision because most gun regulations in this country are promulgated at the state and local level.

Alongside the individual right, Professor Blocher noted that the cases also state that the right to own a gun is subject to some type of regulations. Supporting gun control and supporting the Second Amendment are not contradictory positions; rather, they can coexist. For example, the Court cautioned that recognition of this right should not cast doubt on regulations restricting gun ownership by felons or mentally ill persons. The Court, however, left open the contours of the right and did not state the level of scrutiny to be applied.

Gun rights notwithstanding, Professor Blocher noted that this country has had a robust tradition of gun regulations. Although certain historical regulations may be unimaginable today, around the time of the founding, various East Coast cities had implemented strict regulations. In the more recent past, even Tombstone, Arizona, known for wild-west gun battles, had banned guns altogether.

How are the cases coming out? Empirically speaking, even after the Court recognized a right to gun ownership, 93 percent of more than 1,000 Second Amendment challenges have failed. The numbers are not surprising when you consider that most of the challenges have been brought in the context of felon-in-possession charges. Still, other types of restrictions have been upheld post-*Heller* and *McDonald* as well. For example, courts have allowed bans on gun ownership by persons with

domestic violence convictions, assault weapons and high-capacity magazine bans, restrictions related to safe gun storage, and restrictions requiring good cause for obtaining a concealed-carry permit. In considering such restrictions, courts apply a two part test that examines: (1) the scope of the Second Amendment right asserted, and (2) the means-ends fit of the regulation. Under this analysis, some restrictions don't clash with the Constitution (e.g., bans on possessing a nuclear weapon or bans on felons owning guns).

Turning to the second part of the test, means-ends scrutiny, Professor Blocher explained that courts elevate the scrutiny applied depending on (1) how close the burden imposed comes to the core function of the Second Amendment right—self-defense, or (2) how heavy of a burden the regulation imposes. In plain English, Professor Blocher explained that this seems to be intermediate scrutiny. Some courts have identified it by name. To pass muster, a regulation must further an important governmental interest by means that are substantially related to that interest.

After Professor Blocher provided a historical and analytical framework, Mr. Clement weighed in on the state of Second Amendment rights post-*Heller* and *McDonald*. He noted that the Second Amendment should fascinate anyone interested in constitutional interpretation because of how we analyze it. Normally constitutional scholars review Supreme Court precedent to define the parameters of a constitutional right. For example, this is what is done when analyzing the contours of individual rights under the Fourth Amendment. Scholars do not look at what the Framers did to understand whether the Fourth Amendment applies in a given case. In contrast, however, understanding the contours of the Second Amendment is like digging up a time capsule going back to the enactment of the Bill of Rights. Virtually no case law exists on which lower courts and scholars can base current analysis. Against this backdrop, it is unsurprising that disagreements over the contour of the rights afforded by the Second Amendment will uniquely lead to litigation given the massive amount of gun-related convictions in place before the Court announced *Heller*.

One view of *Heller* is that the individual right afforded by the Second Amendment means only that an individual can have a gun in his or her home. Another view is that *Heller* should be read as a tool to determine the outer contours of that right. *McDonald* made interpretation of the right everyone's problem because all state and local gun regulations must now be viewed in light of this constitutional right. It provides an interesting examination of a provision that is more than two-hundred years old and that lay dormant for a very long time. Mr. Clement further explained that he thinks *McDonald* clarifies that the Second Amendment is a true fundamental right, to be viewed alongside the other rights set forth in the Bill of Rights; thus, it should not be treated differently from any of those rights. Justice Alito rejected any lesser treatment of the right recognized by the Court. Notwithstanding, Mr. Clement opined that some of the current litigation in this area concerns restrictions that would not pass muster

with respect to other fundamental rights.

Mr. Clement agreed that it is true that gun regulations and gun rights have co-existed for a long time. Admittedly, looking back at the past 70 years, the public and courts would not have agreed that the Constitution set forth an individual right to own a gun. In fact, the Circuit Courts of Appeals overwhelmingly held that *United States v. Miller*, 307 U.S. 174 (1939), recognized only the collective right of a militia to bear arms. The dynamic underlying the current debate on Second Amendment rights is fascinating when you consider that *Heller* and *McDonald* announced a shift away from decades of a collective-rights view to the watershed recognition of an individual right. Mr. Clement noted that although this shift should have called into question the viability of gun ordinances based on the now-defunct collective-rights view, this has not really happened. Practically speaking, with *Heller* and *McDonald* now the law of the land, any regulation or ordinance premised on *Miller* and its understanding of the Second Amendment essentially needs an asterisk next to it.

Mr. Clement next provided examples of how gun ownership under the Second Amendment continues to be treated as a lesser fundamental right. First, although it is permissible for governments to charge a fee to cover the costs of gun-licensing regimes, it should be impermissible to charge fees that allow for the collection of additional revenue. Yet, some ordinances remain that essentially raise government revenue on top of permissible reimbursement of government costs. There are examples of cases from the South circa 1870 where high fees were imposed, but those fees were geared toward discriminating against African Americans, not gun control generally. Thus, this line of cases cannot be used to support the fees some cities continue to impose today.

Mr. Clement agreed that courts apply intermediate scrutiny to challenges of gun ownership-related regulations. Even though the government has the burden under this test, however, the government is still winning. This is not the case with other fundamental rights subjected to the same intermediate means-ends balancing. Where the government and the challenger present competing empirical data, the government loses; but that is not happening in gun cases. As lower courts purport to apply *Heller* and *McDonald*, Mr. Clement concluded that the approach applied appears to be more akin to the balancing test suggested in Justice Breyer's dissent, which was rejected by the majority.

Judge Stucky asked Professor Blocher to respond to the suggestion that the Second Amendment is being treated as a second-class right. Professor Blocher opined that in the vast majority of cases the answer is no. In his view, courts are enforcing *McDonald*, which says that reasonable regulations may continue. Post-*McDonald* we have seen relatively few changes to gun regulations. In Professor Blocher's view, this may be partially because in most parts of the country, gun control is not particularly stringent. Courts do seem to take notice when asked to weigh in on more stringent regulations, even if courts continue to proceed with caution. Courts seem to take this approach because they don't want the Supreme Court's recognition of an individual right to lead to chaos.

Next, Judge Stucky asked what the Supreme Court is waiting for before it decides to weigh in on the contours of the individual right. Although the Court has considered a few cert petitions in this arena, it has denied all of them. In *Jackson v. San Francisco*, a case involving an ordinance requiring lawfully owned guns to be kept in a locked container or contain a trigger lock, Mr. Clement represented the petitioners and argued that the Ninth Circuit refused to effectuate the right announced in *Heller*. Although the Court denied certiorari, Justices Thomas and Alito dissented from the denial and adopted a similar view.

Again, Mr. Clement raised the question: can you imagine this type of treatment with respect to any other constitutional right? Another example is a federal regulation barring handgun ownership until age 21. In the case of every other fundamental right, the right generally applies before an individual turns 18, but certainly kicks in by the time you reach the age of legal majority (e.g., voting). Nonetheless, a sharply divided Fifth Circuit failed to overturn the ban en banc, and the Supreme Court denied cert. Yet another example is a restriction in place in New York limiting possession to the keeping of a gun inside the home and using it outside the home only at six city-owned firing ranges. In other words, the law prohibits a gun owner from taking his or her gun to a private range, an out-of-state marksman competition, or a summer home upstate. If you have two homes, practically speaking you would need two guns and two licenses, leaving one gun unattended in an empty house for half of the year. Mr. Clement questioned whether comparable restrictions would be upheld on other fundamental rights based on a single affidavit of a police officer, as was submitted in support of the gun restriction in the New York case.

Lastly, Judge Stucky asked the panel to comment about the right to carry a gun. Mr. Clement noted that some commentators argue that the right recognized in *Heller* is limited to a home-bound right. He finds this problematic based on the text, which says "keep and bear," which necessarily includes bearing a gun on your person, especially considering that the purpose of the right is self-defense. Undoubtedly, that need does not cease outside of one's home. Conversely, there has been a long-standing tradition on restricting the right to carry. Going back to Blackstone's era restrictions existed against bringing weapons to certain places. Paradoxically, in a historical context "gentle persons" were known to carry guns openly whereas only a "cowardly or dastardly" person would think to conceal his weapon. With respect to courts' current interpretation on the right to carry, applying relevant state and local rules in conjunction seem to create an effectual ban on carrying outside of the home. In sum, courts are responding to the notion that the Second Amendment comprises the right to carry with skepticism.

Professor Blocher acknowledged that both the balance of interest and the history behind the right change when we discuss carrying outside of the home. For example, *Heller* acknowledged that the need for self-defense is most acute in the home. It is also true that, historically, more regulations have been enacted regarding what may be done with guns in public. The South led

the way in banning concealed-carry altogether. It's possible that the Court may consider *Peruta v. San Diego County*, a case out of the Ninth Circuit addressing a good cause requirement for concealed-carry permits, but truth be told there is not yet a circuit split on the issue so the Court may continue to wait on the sidelines.

Stay tuned for future coverage of this important issues at future AJEI summits.

Making Your Appellate Motions Count

By Kate Galston

During this Saturday afternoon breakout session of the 2015 AJEI Summit, attendees were treated to an informative panel that offered perspectives from the bench, bar, and court staff on the intricacies of appellate motion practice. Panelists shared information regarding the particular practices and procedures of appellate courts, while imparting valuable insights for those filing motions in any appellate court.

H. Thomas Watson, Partner at Horvitz & Levy LLP, moderated a panel comprising the Honorable Albert Diaz of the U.S. Court of Appeals for the Fourth Circuit, Frank Gibbard, Staff Attorney of the U.S Court of Appeals for the Tenth Circuit, and Frank Sullivan, Former Justice of the Indiana Supreme Court and Professor of Practice at the Indiana University Robert H. McKinney School of Law.

Understanding Your Court's Particular Practice For The Disposition Of Appellate Motions

Mr. Watson first asked the panelists who decides an appellate motion: Is it the clerk's office? A single judge? A motions panel? Or, is it the panel of judges who will decide the merits of the appeal?

Judge Diaz responded by first emphasizing that the procedures for deciding appellate motions will vary widely from court to court. He advised appellate advocates to pay careful attention to the appellate court's rules and also to become familiar with the staff in its clerk's office, who can help advocates navigate the court's procedures. It is imperative that appellate advocates understand the nuances of practice before a particular appellate court when filing an appellate motion. In federal appellate courts, for example, Judge Diaz explained, practice is governed by both Federal Rules of Appellate Procedure and the circuit's local rules; and so advocates must be well-versed in both.

To highlight the importance of understanding the appellate court's local rules regarding appellate motions, Judge Diaz gave an example of a particular local rule in the Fourth Circuit that pertains to the practice of filing replies to a response to an appellate motion. Rule 27 of the Federal Rules of Appellate Procedure provides: "Any reply to a response must be filed within 7

days after service of the response." Fed R. App. P. 27(a)(4). However, the Fourth Circuit's Local Rule 27(d)(2) expressly states that the Fourth Circuit "will not ordinarily await the filing of a reply before reviewing a motion and response." 4th Cir. R. 27(d)(2). Therefore, "[i]f movant intends to file a reply and does not want the Court to actively consider the motion and response until a reply is filed, movant shall notify the clerk in writing of the intended filing of the reply and request that this Court not act on the motion until the reply is received." *Id*.

As far as who decides appellate motions, Judge Diaz responded that, in the Fourth Circuit, all but the most basic, administrative motions are decided by a single judge or a motions panel. Judges are randomly selected for the motions panel. There is no standing motions panel in the Fourth Circuit. But the practice pertaining to the composition of a motions panel is one that varies by circuit court.

Judge Diaz recommended that advocates consider who will be deciding the appellate motion when preparing it for the court. In the Fourth Circuit, for example, a motion for the enlargement of the word count of a brief is one that is handled by a single judge, not the clerk's office.

Mr. Gibbard described the Tenth Circuit's practice of allowing a number of appellate motions to be granted by the Court's clerk's office, to the extent they are uncontested, without any involvement of a judge of the court. The Tenth Circuit's Rule 27.3 states that "[s]ubject to review by the court, the clerk is authorized to act for the court on any of the following motions" and lists eleven categories of appellate motions, plus "any other motion the court may authorize." 10th Cir. R. 27.3(A).

As one example, Mr. Gibbard explained that motions to expand the appellate record, if uncontested, are handled exclusively by the clerk's office in the Tenth Circuit. See 10th Cir. R. 27.3 (A)(3) (listing motions "to supplement or correct records or to incorporate records from previous appeals" as one for which the clerk is authorized to act for the court, subject to the court's review). If there is an objection to such a motion regarding the record on appeal, then the motion will be referred to an initial motions panel. See 10th Cir. R. 27.3(B) ("If any motion listed in (A) is opposed, the clerk will submit the matter to the court.") Mr. Gibbard explained that the Tenth Circuit's practice is to use an *ad hoc* panel of judges to handle the disposition of motions submitted to the court.

Justice Sullivan added that the disposition of appellate motions is incredibly important and there is a need for both transparency and judicial review of such determinations. He suggested that appellate courts make information regarding the way they handle motions available to litigants and also proposed that the disposition of motions in particular appeals should be made available to the public via the court's website. He commented that such practices could provide valuable information for litigants seeking to bring particular motions, especially unusual motions.

Motions To Dismiss An Appeal

Mr. Watson proceeded to drill down on the issue of who decides particular appellate motions

by asking the panelists specifically about motions to dismiss an appeal: Should these types of motions be decided by a motions panel or a merits panel? Justice Sullivan responded that, while this again may be an area that varies by local practice, a motions panels should be cautious when deciding a motion to dismiss. He suggested that there be rules in place allowing for reversal by the merits panel of a motions panel's granting of a motion to dismiss.

Judge Diaz cautioned advocates to consider carefully the merits of a motion to dismiss before filing such a motion. Advocates should make sure it is capable of being efficiently resolved at that early stage of the case. If there is any doubt, then the resolution of the motion to dismiss may be properly delayed to the merits phase of the appeal.

Justice Sullivan agreed with Judge Diaz that there is an understandable reluctance on the part of appellate courts to terminate an appeal when there may be additional information that needs to be brought to the court's attention. Justice Sullivan recommended, however, that motions to dismiss an appeal should nonetheless be made at the earliest stage possible—to avoid any concern that raising such an issue later in the briefing could be seen as untimely.

Mr. Gibbard added that bringing a motion to dismiss early in an appeal can be very helpful to the work of the appellate court in determining jurisdiction. In the Tenth Circuit, the clerk's office, as soon as an appeal is filed, evaluates whether the court has jurisdiction over the appeal. If there is a question as to the court's jurisdiction, the clerk will promptly issue an order to show cause. Bringing the jurisdiction issue to the court's attention early on in an appeal is thus extremely helpful to the work of the court in evaluating this issue. As an example, Mr. Gibbard pointed out that, in a criminal appeal, the government should always file a motion to dismiss if there has been a waiver of the right to direct appeal in connection with a guilty plea. This will assist the court in evaluating this jurisdictional issue in such cases.

Motions Filed By Amici

Mr. Watson then asked the panelists about motions filed by individuals or groups seeking to participate in an appeal as an amicus. What weighs in favor of allowing the filing of amicus briefs and when will such motions for leave be denied?

Judge Diaz answered that amicus briefs are prevalent and indeed are being filed with increasing frequency at the circuit court level. He said that a thoughtful amicus brief has the potential to be valuable to the court and, for that reason, courts will generally grant a timely motion to file an amicus brief as a matter of course where the parties consent to its filing. Judge Diaz explained that, as a general principle, the more information that the court has available to it, the better. The court can always decide not to consider an amicus brief if it turns out to be of little value. But amicus briefs may provide the court with special expertise or express a point of view on an issue that may have been touched on only briefly by the parties. He emphasized, however, that an amicus may not inject new issues into the appeal. Amicus briefs that seek to do so will be rejected.

Mr. Gibbard seconded Judge Diaz, agreeing that amicus briefs can be very helpful at the circuit court level and can bring an issue before the court into better focus.

Justice Sullivan agreed with both Judge Diaz and Mr. Gibbard regarding the importance of thoughtful amicus briefs. He explained that, in his time serving as a Justice of the Indiana Supreme Court, he found amicus briefs to be very helpful in deciding cases before that court. He cautioned the audience, however, that individuals and groups seeking to participate in a case as an amicus must be completely candid in describing their interest in a particular matter. If not, their amicus brief could do more harm than good.

The panel expressed a somewhat differing view, however, when it came to requests by an amicus to participate in oral argument. Judge Diaz stated that, while a court may be permissive when considering motions for leave to file amicus briefs, a request by an amicus to participate in oral argument is a different matter. The court generally will not allow an amicus to argue unless a party wishes to give up a portion of its own time to the amicus. On this issue, Justice Sullivan added that, while he saw parties try to split oral argument on a number of occasions during his 19 years on the Indiana Supreme Court, he never once thought it was successful. And, in a few cases, it was a disaster!

Mr. Watson asked the panelists their thoughts on balancing the benefits of having amicus briefs with the concern that more briefs may increase the time required for the briefing of an appeal. Mr. Watson shared that, in practicing before the California Supreme Court, he has seen extensions of time granted for the filing of an amicus brief. How do courts weigh the interest of including the amicus perspective with the efficient disposition of cases before the court?

Justice Sullivan responded that, in a court of last resort like the Indiana Supreme Court, there has likely been sufficient time while the case has been pending for an interested individual or group to learn about an issue presented by the appeal and to plan to file an amicus brief. An amicus can therefore prepare well in advance to timely file its brief. He explained that, in certain circumstances, the court would allow an amicus to file out of time but then give the parties an opportunity to respond. He noted, however, that delays are a serious matter and make the process more expensive. Judge Diaz agreed that it is important to keep the process moving. Judge Diaz did not recall ever seeing a motion to extend the time to file an amicus brief in the court. This is likely because those seeking to file an amicus brief understand that it is a great opportunity.

Motions To Certify Questions Of State Law

Mr. Watson asked the panel regarding the frequency of appellate motion practice related to the certification of questions. Judge Diaz responded that the certification procedure provides a useful and powerful tool that the courts use sparingly. He estimated that, in approximately five years on the court, he likely has certified questions to the state court about 5 times per year. He said that for difficult, nuanced questions of state law, it makes sense to call upon colleagues in the state court to answer the

question for the appeal in the federal court. He mentioned that there have been instances where the state court has granted the request and answered the certified question in a way that the panel would not have answered the question. The panel was thus grateful to have the state court's response.

Mr. Gibbard raised the issue that, when considering whether to move to certify a question of state law, appellate advocates should always take into account the issue of the delay in the resolution of the appeal. The certification process takes time. Indeed, it could take up to a year to have a certified question answered by the state's highest court. It is also for this reason that a federal appellate court may decline to certify a question in a case where the parties need an answer to the question and the resolution of their appeal right away. Additionally, a federal appellate court is unlikely to certify a question of state law if there is a jurisdictional or other defect in the case that renders the question non-essential to the court's resolution of the appeal.

Justice Sullivan echoed the other panelists on the power of the certified question tool and added that the question whether it is the state or federal court that decides the question may have real and profound consequences on the law in the jurisdiction. Justice Sullivan did not recall a single instance during his service on the Indiana Supreme Court when the court declined to answer a question that had been certified to it by a federal court.

Motions Or Requests To Publish An Opinion

Nearing the end of the session's hour, Mr. Watson asked the panelists, in conclusion, to share any thoughts regarding motions or requests for the court to publish a particular opinion. Judge Diaz responded that he has never seen a request pertaining to publication made in a brief but has seen, on occasion, motions made after the court's issuance of an unpublished opinion. Judge Diaz shared with the audience that the U.S. Court of Appeals for the Fourth Circuit often issues unpublished opinions.

Indeed, during the 12-month period ending September 30, 2014, 93.8 percent of the Fourth Circuit's opinions or orders filed in cases terminated on the merits after oral argument or submission on the briefs were unpublished. United States Courts, Caseload Statistics Data Tables, Table B-12—U.S. Courts of Appeals Judicial Business (September 30, 2014), available at http://www.uscourts.gov/statistics/table/b-12/judicial-business/2014/09/30. The total percent of unpublished decisions by the U.S. Courts of Appeals in total was 87.7 percent for the same period. *Id*.

Thus, at the close of this session, the panelists again focused attendees on the importance of understanding the rules, practices, procedures, and tendencies of the particular appellate court in which you are practicing when filing appellate motions. In addition, the discussion throughout this session underscored the benefit of communication between the bench and bar as to nuances of appellate motion practice.

Religious Freedom on Appeal

By Devin C. Dolive

Judge Catharina Haynes of the United States Court of Appeals for the Fifth Circuit moderated a panel at the AJEI Summit on religious freedom. Panelists were Professor Thomas Berg of the University of St. Thomas School of Law in Minnesota, Allyson Ho with Morgan, Lewis & Bockius in Dallas, Texas, and Daniel Mach with the American Civil Liberties Union.

The Framework

The panel began with an overview of the current state of the law: modern jurisprudence on religious liberty began with *Sherbert v. Verner*, 374 U.S. 398 (1963). Adell Sherbert had been discharged from employment after she refused to work on Saturday for religious reasons. When she applied for unemployment-compensation benefits, South Carolina's Employment Security Commission found her ineligible for benefits because she had refused to accept "suitable work when offered." Finding in favor of Ms. Sherbert, the Supreme Court came up with a deceptively simple two-part test: (1) is there a burden on religious beliefs; and (2) if so, is there a compelling state-interest involved? South Carolina's unemployment-compensation regime failed this test, insofar as the state's system burdened religious beliefs by barring benefits to any claimants who would not work on Saturdays.

A decade later the *Sherbert* test was applied again in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), examining the criminal prosecution of Old Order Amish parents who had violated Wisconsin's truancy laws by refusing to send their children to school beyond eighth grade. In *Yoder*, the Supreme Court concluded that the State of Wisconsin had failed to show how granting a narrow exemption to the Old Order Amish would adversely affect the state's "admittedly strong" interest in compulsory schooling to age sixteen (rather than the age of fourteen used by the Amish).

Following these landmark cases, state and local governments figured out how to defend litigation challenging laws on religious liberty-grounds and eventually began winning. In *Sherbert*, a state lost a religious-based challenge to its unemployment-compensation laws, but twenty-five years later, in *Employment Division v. Smith*, 494 U.S. 872 (1990), another state prevailed on a religious-based challenge to its unemployment-compensation laws. In *Smith*, the Supreme Court upheld Oregon's Department of Human Resources' denial of unemployment-compensation benefits to drug-rehabilitation counselors discharged from employment after using the hallucinogenic controlled-substance peyote as part of a religious ceremony. Use of peyote was a crime in Oregon. Therefore, Oregon's Department of Human Resources was simply barring unemployment benefits for claimants terminated from employment for criminal misconduct. In *Smith*, the Supreme Court effectively limited religious-freedom challenges to neutral laws of general applicability.

Congress responded to *Smith* by passing the Religious Freedom Restoration Act ("RFRA") in 1993, which enshrined in statute the "compelling interest" standard familiar from *Sherbert*. However, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that the application of RFRA to states and their subdivisions exceeded Congress's authority under Section 5 of the Fourteenth Amendment. The impact of *City of Boerne* is limited, insofar as many states have also enacted their own state-law versions of RFRA in the wake of *Smith*. The interplay between *City of Boerne* and these state statutes means that religious-liberty cases may end up being litigated, more often than not, under state law.

Where the federal government is concerned, RFRA remains alive and well, as the decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), makes clear. For state and local governments, not only are there state-level RFRA statutes, but there is also Congress's response to *City of Boerne* to consider: the Religious Land Use and Institutional Persons Act ("RLUIPA") of 2000. RLUIPA is narrower than the pre-*City of Boerne* RFRA and applies to state and local government regulations on matters such as zoning and historic preservation, and to state prisons.

Of course, even without RFRA and RLUIPA, it remains possible for governmental action to fail the *Sherbert* test, as illustrated by *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). First Amendment jurisprudence is particularly nervous about "religious gerrymanders," and in *City of Hialeah*, a city government failed the "gerrymander" test when it banned the ritual slaughter of animals in religious ceremonies.

The Hypotheticals

The panel went on to examine the interplay between religious freedom and state interests by means of hypotheticals. The first concerned a state law requiring pharmacies to dispense all legal drugs prescribed by a doctor. The First Amendment and (state-law) RFRA challenge in this hypothetical centered around a small pharmacy objecting, on religious grounds, to dispensing certain contraceptives. The panel analyzed whether or not the law was both neutral and generally applicable. The law in this hypothetical contained "business exemptions," excusing non-compliance where a pharmacy lacked equipment or expertise needed to dispense certain drugs. One question concerned these exemptions and how broad they are, insofar as too many exemptions might mean that the law is not generally applicable. Professor Berg observed that legislatures like "business exemptions," those that exempt compliance with (potentially costly) laws, such as where a pharmacy would have to purchase prohibitively expensive equipment in order to comply with a law requiring it to dispense certain medicines. However, often overlooked in these discussions is the fact that it is not just the cost of compliance that might force someone out of business. The business owner's conscience might also cause her to close the business.

The panel then moved on to a number of hypotheticals relating to same-sex marriage. One such hypothetical involved a grocery store's

"artiste" baker, who refuses to inscribe a wedding cake with the words, "Congratulations Jim Bob and Joe Bob." The panel agreed that the grocer might have a problem, assuming laws prohibited discrimination based on sexual orientation. The "artiste" angle in the hypothetical raised an interesting Free Speech defense. Mr. Mach pointed out that courts have not been receptive to Free Speech defenses or to the argument that other grocers could supply the same cake.

At this point, a (mild) disagreement arose amongst the panel. Mr. Mach suggested that third-party harm should play some role in the analysis of religious exemptions. Professor Berg responded that we should not become too focused on how religious exemptions to laws of general applicability might affect others subject to the law. Take, for example, the classic case of the military draft. If the law allows a pacifist to avoid compulsory military service on religious grounds, someone else will have to take the pacifist's place in the draft. Thus, the religious exemption necessarily affects others, because someone who does not have a religious objection will have to serve in place of the objector.

Turning to freedom of religion in the courts — literally — the panel then discussed the hypothetical of whether judges could cite religious grounds when refusing to perform weddings for same-sex couples. Earlier this year, the Supreme Court of Ohio's Board of Professional Conduct issued an advisory opinion explaining that (i) a judge may not refuse to perform marriages for same-sex couples while continuing to perform marriages for opposite-sex couples and that (ii) a judge may not decline to perform **all** marriages in order to avoid performing marriages for same-sex couples. The panel agreed that part (i) of this question was the "easy bit" but noted that part (ii) presented a "harder" case.

The panel then discussed how much economics (e.g., simple greed) might play a role in the outcomes of the hypotheticals. Ms. Ho noted that many small businesses are vulnerable to the costs of litigation and will therefore comply with laws that impinge on religious freedoms so as to avoid these costs. In response, Professor Berg suggested that perhaps the focus should not be on for-profit businesses (such as the Hobby Lobbies of the world) but on social-service agencies, since laws may force social-service agencies, such as adoption agencies that do not wish to place children with same-sex couples, to cease operations.

This raised the question of whether laws on same-sex marriage, in the wake of *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), might lead to more litigation and "hold outs" than laws prohibiting race discrimination. Professor Berg predicted that there will be more religious "hold outs" on the same-sex marriage issue. Mr. Mach responded that there was widespread opposition to interracial marriage at the time of *Loving v. Virginia*, 388 U.S. 1 (1967). According to Mr. Mach, at the time of *Loving*, only 20% of Americans approved of interracial marriage. Claims by religious "hold outs," however, did not fill the courts.

The panel moved on to discuss regulation of prisoners and the hypothetical of a rule prohibiting prisoners from keeping their hair long, as applied to a prisoner who wears dreadlocks for religious reasons. Mr. Mach observed that the problem in this hypothetical was the lack of evidence of any incidents of prisoners hiding contraband in their hair (the cited basis for the rule), but Professor Berg countered that commonsense arguments can and should be made. He opined that prison authorities should not have to wait for some prisoner to actually conceal a razor-blade in long hair before promulgating a rule regulating hair length. Of course, in light of *Holt v. Hobbs*, 135 S. Ct. 853 (2015), this hypothetical is not all that hypothetical. *Holt* involved a RLUIPA challenge to an Arkansas prison policy prohibiting beards but, oddly enough, allowing long hair. As Ms. Ho observed, the Arkansas policy suffered from under-inclusiveness. The risk of hiding contraband in a half-inch beard would seem to be similar to the risk of hiding contraband in long hair, so why bar one and not the other?

The panel went on to touch on hypotheticals involving employer accommodations of religion in the wake of *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028 (2015). In *Abercrombie*, the employer had a "look" policy prohibiting employees from wearing "caps," and the employer cited its policy as the reason it had not hired an applicant who showed up for an interview wearing a headscarf. The employer assumed that the applicant was wearing her headscarf for religious reasons, and the Supreme Court determined that this was enough to show a Title VII violation, even though the job applicant had never expressly requested a religious accommodation. Judge Haynes polled the panel on whether the *Abercrombie* holding might mean that Hooters wait-staff will soon be insisting on the right to wear burqas? Professor Berg observed that it is harder to defend "look"-based employment policies when businesses look (no pun intended) like other businesses. He said that Hooters might have an easier time defending a no-burqa "look" policy than, say, a rental car agency. Mr. Mach added that employer policies here may need to favor religion: a "look" policy might need to allow employees to wear headscarves, but the same policy need not allow baseball caps.

The final hypothetical concerned a zoning regulation barring "commercial enterprises" from operating in residential areas. The panel discussed how the regulation might apply to an in-home prayer meeting attended by twenty people. Both Professor Berg and Mr. Mach agreed that the question, as presented, would pose a problem, insofar as the hypothetical regulation expressly included "worship activity" in its definition of "commercial enterprises." However, even if the regulation had not singled out "worship activity," this would not end the analysis. Ms. Ho pointed out that conflicts can develop rather easily in this area -- people may have sincere religious beliefs that compel them to operate a soup kitchen or a halfway-house for former prisoners, but the zoning for these uses may be another matter. The quirky nature of zoning also begs religious-freedom questions; there may be reason to suspect "targeting" of religious practices through local zoning deci-

sions and regulation, even where the regulation appears to be facially neutral.

Conclusions

The AJEI panel did not provide easy, one-stop answers to the hypotheticals discussed, but the panel provided a good overview of the framework to be applied when analyzing these difficult issues. One thing is clear: especially in the wake of *Obergefell*, we can expect to see appellate courts struggle to balance religious freedom with other rights and interests.

So You Want to be a Lawyer: The Legal Education Crisis and Why it Matters to Judges and Lawyers

By Conor Dugan

At the 2015 AJEI Summit, a distinguished panel discussed the crisis in legal education. The panelists were Justice Mark S. Massa of the Indiana Supreme Court, Jennifer Collins, Dean of Southern Methodist University Dedman School of Law, and Blake Morant, Dean of George Washington University School of Law. The Honorable Randall T. Shephard, Retired Supreme Court Justice of Indiana, moderated.

The crisis is perhaps best summed up by a recent *New York Times* editorial that noted that "[f]orty-three percent of all 2013 law school graduates did not have long-term full-time legal jobs nine months after graduation," and that in 2012 "the average law graduate's debt was $140,000, 59 percent higher than eight years earlier." *The Law School Debt Crisis*, N.Y. Times, Oct 24, 2015. Worse yet, there has been a "drastic drop in law school applications since 2011 which has in turn exacerbated the problem — to maintain enrollment numbers, law schools have had to lower their admissions standards and take even more unqualified students." *Id*. This was the reality that the panelists addressed.

The panelists discussed the nature of the crisis, its causes, and potential solutions, attempting to shed light on the issue. One of the recurring themes was that the current crisis is not the first in legal education. Nor is legal education the only part of higher education suffering from a crisis. Still, they acknowledged that the current crisis, set into motion by the Great Recession of 2008, is different in nature and scope from previous crises. Unlike its predecessors, this crisis seems deeper and longer-lasting.

Dean Morant said that two root causes are a crisis of identity and a crisis of money. With respect to the first, Dean Moran spoke of a crisis of professionalism. He argued that the sense of nobility and professionalism in the law is disappearing. Whereas in the past, America's best and brightest students would consider and often pursue a legal career, this is no longer the case. Too often the legal profession is defined by the worst lawyers and the worst practices of lawyers, and this has a negative effect on legal education.

The second issue, money, was one that the panelists came back to time and time again. Legal education is incredibly expensive and this expense shows no signs of abating. Financial aid provides significant pressure on the upward trend of tuition and costs, but it is not the only thing leading to rising costs. The experiential and practical courses that students and the profession are increasingly demanding also pose a significant cost. In other words, practical clinics, while valuable, also push tuition and costs higher.

An inseperable part of the debate of costs was discussion of the U.S. News and World Report's law school rankings. Indeed, one panelist observed that the perverse incentives of the law school rankings effectively *reward* high tuition and cost. The panelists seemed united in the view that the focus on school ranking is problematic. Still, Dean Collins indicated that the rankings are not going away. Indeed, she said that they will continue to pose issues until alumni and law firms refuse to give the rankings so much power and credence.

One practical suggestion regarding rankings that arose during the panel is that law firms need to be more flexible in their considerations when hiring new lawyers. This is most acute in the initial pool of candidates firms are even willing to interview. Panelists spoke of law firms being unwilling to interview people below a certain law school ranking, or firms being unwilling to consider students under certain GPAs. Firms need to be more flexible and creative in their approach to hiring. Dean Collins recounted an Atlanta law firm that has tested out potential hires by bringing them to its office and having them work through a project. She pointed to this as an innovative model that allows firm recruiting efforts to go beyond the cold numbers on a transcript.

The panelists also discussed the need for law schools to take a more creative and imaginative approach to legal education. One of the watchwords in recent discussions is practical experience, and the panel mentioned several recent experimental initiatives. The State of Arizona allows qualified third-year law students to sit for the bar in February of their final year of law school. If students pass the bar, they are allowed to begin practicing law the day they graduate. The panel also discussed the State of Washington's limited law license program which is akin to a physician's assistant program for the law. The panelists seemed to believe that more pilot programs and approaches like these are necessary to break legal education out of its current mold, and that both law schools and state bars need to be more open to trying such alternative legal education.

Dean Morant argued that despite all the issues in legal education, law schools must still work to recruit classes that are representative of society. He argued that this is tied into basic notions of access to justice. In order to best serve justice, we need law students that represent a diverse cross-section of society.

Despite the difficulties, the panelists seemed genuinely enthusiastic about the legal profession. While legal education may be in crisis, the panelists have not given up on the law or legal education.

I *Heart* the Law, I *Heart* the Movies: The "Reel Appeal" Panel

By Brian K. Keller

Rounding out some great panels at the 2015 AJEI Summit was an unexpected surprise and breath of fresh air: a panel tying together the ubiquitous love of movies with AJEI attendees' love of appellate law. The panel was moderated by the Honorable James E. Lockemy from the South Carolina Court of Appeals, and sitting on the panel were Kirsten Castaneda from Alexander Dubose Jefferson & Townsend LLP, Professor Paul Bergman of UCLA School of Law (author of Reel Justice), and Mark A. Kressel of Horvitz & Levy LLP (high-street cred: a former Broadway musician).

Judge Lockemy presented the panelists with questions—they responded with entertaining movie clips. I'll present a few of the questions, a link to the movie, where applicable, along with a summary of the discussion that followed.

Question 1: "What if you get a question and it throws you off?"

Professor Bergman pointed to a clip from the 2015 movie "Woman in Gold," the true story of Marie Altman (played by Dame Helen Mirren), a woman who fought all the way up to the Supreme Court (*Republic of Austria v. Altmann,* 541 U.S. 677 (2004)) to secure the return of her family's art collection which included Gustav Klimt paintings, stolen by the Nazis but later "held onto" by the Austrian government. In the clip, during oral argument in *Altmann,* her lawyer is asked a convoluted question by Chief Justice Rehnquist—the lawyer is confused—and the Chief Justice adds "I'm not sure I understand my question either." Professor Bergman met the attorney—and verified that the exchange indeed took place.

Kirsten Castaneda noted the clip raised Model Rule of Professional Conduct 1.1, the need to bring the necessary legal knowledge into oral argument—but it also raised "candor to the court." That is, even when prepared, an appellate oral advocate must notify the court if a question is too confusing to answer. Failure to do so could raise an additional duty, later, to file a post-submission letter. On the other hand—judges might ask a question that references information outside the record. That too could give rise to the duty to notify the court that the question demands reference to extra-record information.

Question 2: "Aren't there rules about not concealing information from the court? And aren't there issues with getting too close to the judge?"

Professor Bergman cited a clip from the 1959 "Anatomy of a Murder." In the clip, one of the prosecutors (played by George C. Scott) demands a chambers conference, arguing that because the testimony established the defendant knew right from wrong, he could not legally be judged insane. In chambers, the judge, defense lawyer (played by Jimmy Stewart), and two prosecutors, confer about the viability of an irresistible impulse defense. To the prosecutors' annoyance, the defense counsel affably banters

with the judge about frog lures, handing the judge a reporter marked with a lure and asking the judge to turn to the bookmarked page. The reporter contains precedent directly on-point in the defense's favor. Despite demanding the chambers conference, the prosecutor is revealed to have known about the precedent all along. But as we know, Model Rule 3.3 compels candor toward the tribunal. Mark Kressel noted that, while collegiality between the parties and the court is important, it can lead to grey areas. Model Rule 1.2 compels judges, at all times, to act in a way that demonstrates both impartiality and the appearance of impartiality—regardless of the pre-existing relations between the attorneys and judge. Judge Lockemy noted Joseph Welch, the actor portraying the judge, was famous for earlier confronting Senator Joseph McCarthy with the words: "Have you no sense of decency, sir?"

Question 3: Judge Lockemy asked—do we have the duty to learn local rules?

Professor Bergman noted that in "My Cousin Vinny," Joe Pesci's character Vinny Gambini wasn't prepared for Alabama rules. In the clip, Vinny upsets the trial judge by sitting when addressing the court, not "looking lawyerly," and failing to grasp how to plead guilty or not guilty. The judge impatiently explains: "I'm not about to revamp the entire judicial process just because you find yourself in the unique position" of having clients claiming they "didn't do it."

Kirsten Castaneda noted that judges have to make tough calls when they spot possible malpractice. After all—is shaky courtroom performance indicative of just an unsuccessful strategy? Or is it really malpractice? Should judges note the issue in their opinion? Should the attorney be reported for malpractice? Appellate attorneys face the same quandary when reviewing the record and stumbling upon repeated missteps or a single significant misstep. Rule 1.1 could impose a duty to report such information to the client. And Rule 1.4(a)(2) requires reasonable consultation with the client as to how the appellate attorney plans to accomplish client goals.

She discussed how problems compound when the trial attorney is a source of referrals for appellate work. She made three points: (1) appellate representation agreements and engagement letters might include express carve-outs, excluding advice about malpractice claims against other lawyers from the scope of appellate representation; (2) appellate attorneys may need to disclose the relationship with trial counsel as the source of referral—and may need to get a waiver from the client regarding potential conflicts; and (3) overall, clear communication with the client about these issues is crucial.

Question 4: What about issues of judicial appointment, lifetime tenure, and "judges as political animals"?

Professor Bergman pointed to the sanity hearing in the original "Miracle on 34th Street". In the clip, the judge must make a ruling whether a man is Santa Claus—or is just insane. In chambers, the judge muses that he can't agree to rule there is a Santa Claus. But the judge is cajoled

by a local politician with the parade of horribles: if kids don't believe in Santa Claus, the candy companies, the Salvation Army, and many other locals will be upset—and further, the judge won't be re-elected.

Professor Bergman also discussed "Roxie Hart," a 1942 comedy with Ginger Rogers, based on the 1926 play *Chicago* (which was, in turn, adapted into the 2002 film of that name). The clip depicted a trial court proceeding-turned-media event—with witness histrionics being photographed and interviews conducted by the media on-the-spot in the courtroom, and the judge obsequiously accommodating the press during the proceeding.

Kirsten Castaneda talked about the risk of an appearance of, or actual, impropriety when judges are swayed by glamor or fear of criticism. She compared the daily challenges of service on the bench with the hardships of military service—she noted that the problems judges face provide a glimpse of the more serious dilemmas service members face when making the choice to act courageously, in line with a higher code of conduct, and in the face of personal hardship and risk to self. Acting according to ethical rules as judges and appellate attorneys, she argued, involves "day to day acts of courage."

Mark Kressel and Professor Bergman noted it was important for attorneys to be careful not to unthinkingly wade into making strong policy arguments. Sometimes an appellate attorney must argue policy—but given the role of appellate courts, it's frequently unwise to do so. And Judge Lockemy added that, as a member of the bench, he disagreed that the high profile of cases influences a decision to publish, or not publish, an opinion. Nor does the visibility of a case affect the ultimate opinion.

Question 5: Finally, Judge Lockemy asked Mark Kressel about nervousness before going into the appellate courtroom—were there any clips that tackled the myriad considerations and overcoming the hurdles of impressing those you don't know?

Mark Kressel responded with a clip from the 1983 "Flashdance." (available on Netflix streaming.) The clip was unique in that it had nothing to do with appellate attorneys, courts, or the law… But wait—maybe it did. Jennifer Beals' character, Alex, apprehensively entered a large hall for a dance audition – a cold panel of judges, averting their eyes, shifting in their seats, expecting "more of the same." But as Alex dances, she specifically engages (albeit wordlessly) with each judge on the panel—making eye contact, and "speaking" to them individually. Despite beginning the dance tentatively, she moves the judges from indifference—to individual contact—and to full engagement.

Despite a first-blush lack of relevance to appellate law, on reflection the clip points to core challenges in our profession. Professor Bergman noted the parallels with advocacy. Like the hesitation the clip portrays of Alex first putting the needle to the record before her dance routine—you don't want an initial scratch—you want the argument to go off without a hitch. And Mark agreed—the performance, like

advocacy, is a dialog—furthered by eye contact and personal connection that forwards the "argument," that is, the dance. Kirsten agreed: when an appellate advocate encounters an unfamiliar panel, there are new and surprising challenges to overcome, but necessary challenges to meet. And perhaps the lack of clear relevance is the point of this panel: that parallels to the key tenets of appellate practice, and lessons to improve our practice, may be found further afield than we may appreciate.

The panel served an important purpose. The Summit is filled with speakers and panels offering no-nonsense substantive information and deep dives into appellate law hot-button issues. But after several days of learning, the segue back to everyday life is usually provided by the attendees. Not so here: This panel did that. It widened my aperture—it reminded me of the glorious Technicolor and Cinemascope world of appellate law outside the conference hall. I'll be watching movies with a different appreciation (and will be thinking of schemes to translate my Netflix queue into CLE credits). Well done!

The Summit's Roundtables

By Ann H. Qushair

This year we're pleased to include in *Appellate Issues* summaries of several of the Breakfast Roundtables — an annual staple at the Summit since 2013. The Council of Appellate Lawyer's Roundtables provide Summit participants with a unique opportunity to share their tips, strategies and war stories in a more informal environment on a wide range of both substantive and practice-oriented topics. The Roundtables also give the Council 's committees an opportunity to discuss their past, present, and future projects. The fact so many attendees — private attorneys, government attorneys, and judges alike — are willing to sacrifice an extra hour of much-needed sleep to participate (especially my fellow West Coasters having to operate on East Coast time) is a testament to the value and enjoyment they derive from these early breakfast gatherings.

I had the pleasure of coordinating the Roundtables in D.C. The topics included e-filing, cost-effective appellate practice, post-verdict landmines, dos and don'ts from judicial staff attorneys, and the annual "Help!" table, where participants are encouraged to ask questions about pending cases or any other topic with which they need immediate assistance. Last year, the Roundtables also provided the Council's Rules Committee, Government Lawyers Committee, and Pro Bono Committee, with a forum for discussing their work and topics of interests to members, and to encourage Committee involvement.

Thank you, again, to everyone who helped make last year's Roundtables a success, particularly to the moderators and the authors of the following summaries.

Cost-Effective Appeals: The Gold vs. Plastic Debate Continues

By Gaëtan Gerville-Réache

This breakfast roundtable continued the conversation we started at the 2014 AJEI Summit in Dallas about handling appeals in a cost-effective manner. The roundtable was moderated by the Chair of AJEI, the Honorable Margaret G. Robb of the Indiana Court of Appeals, Fifth District, Bennett Cooper, of Steptoe and Johnson, and Ann H. Qushair, Attorney at Law.

Appellate Counsel In The Trial Court

Judge Robb advocated that trial counsel use appellate attorneys to brief the court at the summary judgment stage to save the client time and money. Though it may seem counterintuitive, doing this will result in efficiencies both in the trial court and on appeal. Appellate counsel who prepared the briefing below will already be familiar with the issues and applicable law should an appeal be necessary, allowing him or her to more efficiently prepare the appellate briefing. Appellate counsel can usually prepare the lower court briefing more efficiently and often prepare a better product from which the appellate brief can be developed. There is also a risk-management element to it; "you wouldn't call a plumber to rewire your house," as Judge Robb put it. She said one of the biggest problems is not getting appellate counsel involved at the trial stage. She recently had to affirm a multi-million-dollar case where key information was not in the record.

Tapping into the appellate bar and finding a good appellate attorney to do this is a matter of contacting the Chair of the Appellate Practice Section, or an attorney on the Council of Appellate Lawyers or in the American Academy of Appellate Lawyers.

Selecting Appellate Counsel

Judge Robb noted that the standard the client needs and deserves depends in large part on what appellate court you are in. It is a misperception that bringing in the "big guns" from a big-name, out-of-state firm increases the likelihood of success in the intermediate appellate courts. Often, doing so is counterproductive. In her experience, these counsel often treat the judges as just a necessary stop along the road to the supreme court, when they instead should be more concerned about persuading the intermediate appellate court. Judge Robb has found that often, local counsel who have a pre-existing relationship and familiarity with the court of appeals do a better job on the appeals and are likely to be able to do so for less. They know how to address the judges and how to do what is required to persuade them without working the case beyond what is necessary to succeed.

Preparation And Review Of The Appellate Court Record

Economy can also be found in preparing the record. Some lawyers do not appreciate the difference between the full record and an appendix. In many jurisdictions, the court of appeals already has ready access to the record (particularly in this age of e-filing), in which case there is no need to copy and file it with the court. In those cases, if there are key pieces of

evidence that should be provided, attorneys can reduce printing costs by creating an appendix that supplies only those few since, unless the court rules say otherwise, preparing one does not preclude you from citing to other parts of the record that are not in the appendix. Therefore, counsel should make sure they are familiar with the particular rules and procedures of record preparation / record transfer to the appellate court that apply in their case before designating the record / preparing their appendix.

If you operate in a state where the issues must be raised in a new-trial motion, then that motion is a good place to start (assuming appellate counsel were not prudently brought onboard before then). That briefing will show you which issues were preserved, potentially narrowing the scope of your record review.

Some practitioners find that in cases with relatively large records, document review software (such as Ringtail) can be a useful tool for reviewing and analyzing the record efficiently and well worth the cost of using it. With such software, OCR'd transcripts can easily be searched electronically, annotated, printed as excerpts, and made accessible to everyone on the team.

Issue Selection

Minimizing the issues on appeal is a great way to reduce fees. Doing so reduces the time spent on research, record review, and brief writing. This is not only more efficient but often strategically beneficial to the appeal, as it increases the level of scrutiny on those issues you do raise. (Selecting only the strongest issues for appeal can have other benefits as well, such as increasing a party's credibility with the court.) Sometimes limiting the issues in this way is not possible in criminal appeals, however, where a more shotgun approach may be expected and even required to effectively protect the rights of the accused.

Legal Research and Brief Writing

Avoiding reinventing the wheel is also important when it comes to preliminary legal research. Some attorneys spend too much time at the beginning researching the law online through commercial legal research tools (such as Westlaw and Lexis), when there are perfectly good secondary resources that compile the relevant cases for you and provide commentary. Such state and federal resources include articles, treatises, legal encyclopedias, ALR Annotations, Restatements, and Looseleaf services. Why start from scratch when someone else has already done the work?

We were only able to quickly touch upon the subject of brief writing. Cutting down on the "fluff" in the brief also can save some time. What constitutes "fluff?" One participant suggested that run-of-the-mill cases do not require briefing (or at least more than minimal briefing) of the basics, like the standard for summary judgment.

Preparing for Oral Argument

The group also discussed the use of video archives of oral argument, available on court websites, as another way to economize. These archives provide new appellate lawyers or law-

yers who have not practiced before a particular court with a free educational resource, allowing them to learn from viewing others' oral arguments and observe how particular judges conduct oral argument. Attorneys can also use the live video stream or recording to save on travel costs, by enabling their co-counsel who are not arguing the case to observe argument live without having to attend the argument in person.

In short, doing less does not have to mean giving your clients less and, in some contexts, doing more can actually save your clients more in the end.

"If It's Broke, Help Us Fix It!" A Conversation with CAL's Rules Committee

By Deena Jo Schneider

One of the roundtable discussions at the 2015 AJEI Summit focused on recent and ongoing projects undertaken by and possible new projects for the Rules Committee of the Council of Appellate Lawyers. David Tennant, who chaired the Committee until recently (I have now taken over that role), moderated the conversation. We were very fortunate to have Judge Catharina Haynes of the United States Court of Appeals for the Fifth Circuit, Judge Christopher J. McFadden of the Georgia Court of Appeals, and Justice Jane Bland of the Texas First Court of Appeal participate in this roundtable. Other participants included Robyn Aoyagi, one of the heads of the Committee's current project on e-briefing, and Jill Wheaton, who headed up our project concerning Rule 28 (j) letters.

Length Limits on Submissions

The discussion began with a report of the Rules Committee's work in connection with the proposed amendment of the Federal Rules of Appellate Procedure (FRAP) to trim the length of briefs and other submissions, such as motions and petitions for rehearing. We spent a good deal of time analyzing this proposal, polling CAL's members, and preparing comments on behalf of the organization. Our comments stated that the suggested change was unsupported by history, unlikely to lead to more focused and less repetitive briefs, and undesirable because some cases need more expansive briefing and it is difficult to get permission to file briefs over the limit. Along with other appellate groups, we also participated in hearings on the proposal before the Advisory Committee on Appellate Rules. As a result of the significant opposition to the original proposal, the Advisory Committee ended up recommending a lesser reduction from 14,000 to 13,000 (instead of 12,500) words for principal briefs.

The new lower federal limits may not apply in every case. David Tennant noted that the Second Circuit has indicated its intention to retain

the current word limits for briefs and other circuits may do the same. The participants in the roundtable also noted that state courts vary in the limits they impose on brief length (some being shorter than the federal limits) and also the extent to which they enforce those limits and how they monitor compliance. Regardless, it was agreed that the upper limit should not always be used, even if a party wants counsel to make every argument as fully as possible. Lawyers should manage their clients' expectations and explain that this is often not the best form of advocacy and may actually detract from a brief's force. It has been suggested that CAL and other appellate groups such as the American Academy of Appellate Lawyers might be able to assist the courts and counsel alike by creating videos or other materials to be posted on judicial websites educating lawyers on the applicable rules and how to write concisely and effectively. CAL and the Rules Committee are considering the feasibility of this project.

The Advisory Committee's recommendation to change the federal rules includes addition of a comment encouraging the circuits to grant extensions of the new briefing limits in appropriate appeals, including multi-party and complicated cases. Judge Haynes suggested that another good project for CAL would be to develop suggestions as to other grounds that might justify such extensions (for example, a lengthy record, a case of first impression, a fractured issue, a multiplicity of issues, or the involvement of foreign law) and recommended procedures governing extension requests. In her view, a request should explain specifically why more space is needed. The other side's agreement may be helpful but is not likely alone to carry the day.

E-briefing

Under the leadership of Robyn Aoyagi and Bennett Evan Cooper the Rules Committee's e-briefing project has been broken into subgroups that are working to identify best practices and develop recommendations on formatting, readability, navigational aids, external links, and software and hardware. The goal is to generate a report summarizing all the recommendations explaining the bases for each.

Petitions for Rehearing

Another ongoing Rules Committee project is a review of each federal circuit's practices regarding petitions for panel rehearing and rehearing en banc to determine whether the rules are working and, if not, how they might be improved. More work remains to be done, and there is also a need for someone to help lead the project.

Amicus Briefs

A topic that might form the basis for a new Rules Committee project is the use of amicus briefs in appeals. The roundtable participants noted that friend of the court briefs are submitted increasingly often in federal appeals but state experience is more variable. Several of the judges present expressed the view that these briefs can add value in explaining the impact of the court's decision beyond the case before it, especially as an appeal proceeds to higher courts or questions arise as to whether a case is appropriate for en banc or other discretionary

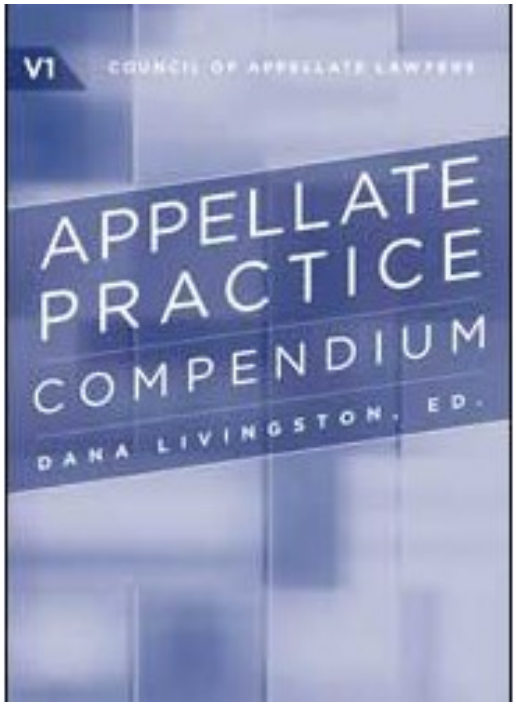
review. Informal comments submitted in letter format can create issues because they constitute third party communications and must each be disclosed. Trial courts may not be as hospitable to amicus briefs and especially letter comments, which are sometimes simply discarded.

Appellate Opinions

Another topic that the Rules Committee could consider studying is the increasing number of appeals decided without opinions or with opinions designated as "not for publication." These decisions are usually non-precedential, and some state courts provide that they may not be cited before the issuing court or any court. (FRAP 32.1 no longer permits federal circuit court rules precluding or otherwise limiting citation of decisions issued on or after January 1, 2007.) Some courts have procedures permitting parties and even non-parties to request that the designation of a particular decision be changed so it becomes both precedential and citable. The author of an unpublished decision or the panel does not always favor doing this, as the opinion may have been designated as "not for publication" because it was not as carefully crafted as others. On occasion, a party or non-party may also seek to "depublish" an opinion.

A Call for Volunteers

The Rules Committee is one of the most active committees of CAL. Work is currently proceeding on our e-briefing and rehearing projects, and members of our Committee are also starting work on an update of CAL's *Appellate Practice Compendium* that provides insight into the rules and procedures of every appellate jurisdiction in the United States. We can use additional lawyers to assist on these projects and also to develop new ones, including perhaps those mentioned above. Please consider joining us; we would love to have your help! You can volunteer by emailing me at dschneider@schnader.com.



To Appeal or Not to Appeal: Considerations for Government Lawyers as Potential Appellant

By Margie Slagle

I moderated this roundtable, organized by CAL's Government Appellate Lawyers Committee, along with Andrew Cooper, Chief Deputy District Attorney and Director of Appeals, Colorado District Attorney's Office. The roundtable included additional participants from both sides of the courtroom.

Deciding whether to appeal in the criminal context – the topic of this roundtable -- raises unique challenges for counsel. In fact, many government offices have an entire division of attorneys to review the pros and cons of taking an appeal. We started off our discussion exploring the different challenges faced primarily by prosecutors in making this key decision. We then discussed how, despite these different considerations, both prosecutors and defense attorneys share some overriding perceptions and concerns when determining which cases to appeal.

Distinct Challenges Faced By Prosecutors and Defense Counsel

The Government's right to appeal an acquittal is extremely limited. As a result, for prosecuting attorneys, for all intents and purposes, the decision whether to appeal amounts to deciding whether to take an interlocutory appeal. This decision can be complicated. Such an appeal usually lies from an order suppressing the Government's evidence following a pre-trial evidentiary motion by defendant. In this case, the Government is required to certify to the appeals court that (1) the Government cannot proceed with its prosecution absent the excluded evidence, and (2) the appeal is not taken to delay the proceedings. Such a certification has serious ramifications. If the Government loses the appeal (and, with it, the right to rely upon the excluded evidence), it is held to its certification. This means that the Government is not permitted to even attempt to prosecute the case further, and the defendant goes free.

Perhaps counterintuitively, deciding whether to appeal can also get complicated for prosecuting attorneys because of their fear the Government is likely to *win* on appeal when it is not clear that it should. For example, participants agreed that it can be difficult for prosecutors to represent the Government's interests in cases in which ever-evolving technology comes head to head with more slowly evolving search and seizure law. Of particular concern, current case law does not address the privacy implications of increasingly intrusive forms of technological surveillance tools – like drones – that are available to law enforcement. In cases where the law and, thus, the scope of a defendant's constitutional rights are unclear, many prosecutors are reluctant to pursue charges that involve the controversial evidence, and some have refused to do so. We all seemed to agree that, in these cases, the Government's interest in prosecuting those who have violated the law, for the sake of the common good, can be at odds with its interest in protecting its citizens' constitutional

rights. Whether it would be in the Government's best interests to prosecute such matters, in the trial court or on appeal, is far from obvious.

Defense Counsel

Our discussion only touched upon defense counsel's challenges in deciding whether to appeal. This is because defense attorneys have only limited discretion in this area. Certain jurisdictions confer on criminal defendants the absolute right to appeal. In those jurisdictions, the defendants make the decision for their attorneys, even when bad facts all but guarantee an affirmance. This can be especially frustrating for defense counsel. Equally frustrating for separate appellate counsel is when an appeal cannot succeed because of either the lack of exonerating evidence in the record or the failure of trial counsel to preserve issues for appeal. In those cases, defense counsel will focus on raising and preserving federal issues so the defendant can file a federal habeas petition in the future. Ideally, appellate counsel will work with the trial attorneys in their office to ensure errors are preserved for appeal. Often, the appellate division knows that it wants to litigate certain issues and will work with the trial lawyers to identify and preserve those issues for appeal as the case proceeds.

Shared Concerns of Prosecutors and Defense Counsel

The group agreed that whichever side you're on, the following considerations tend to make their way into the "Do we appeal?" equation:

Avoiding making bad law. Bad facts make bad law, which sometimes is reason enough for counsel to decide not to appeal.

Clarifying the law. Legislators often write ambiguous laws and sometimes court decisions raise more questions than answers about how those laws should be applied. Counsel, therefore, may decide to appeal a decision in hopes of helping to resolve such confusion. In such cases, knowing what the law is and how it should be applied is critical for prosecutors and defense attorneys alike to make the most out of such opportunities for clarification.

Considering the potential precedential effect of a decision. Appellate decisions are not made in a vacuum but instead may affect future cases. Understanding how one's case may end up shifting the direction of the law, therefore, is another common consideration in deciding whether to appeal.

Preserving issues for appeal. Attorneys must keep up-to-date on issues currently on review by the appellate courts that could end up impacting their pending cases. They also must make sure to raise and preserve those same issues in their own cases in order to be able to take advantage of any upcoming changes in the law.

Call for Members

I'm sure everyone sitting around the table at the Summit that morning would agree that the roundtable provided prosecutors and defense attorneys a rare opportunity to engage in an

open and honest dialogue about appellate issues facing their practices. This is one of the primary benefits of the Government Appellate Lawyers Committee. The Committee strives to offer educational and networking opportunities of interest to public lawyers across a wide spectrum of practice areas (e.g., prosecution, defense, solicitors general, agency lawyers, and military lawyers).

We strongly encourage all government lawyers to participate. The Committee welcomes all current and former government appellate practitioners, or those who are interested in appellate practice. For more information about this Committee, please contact the Chair, Nancy Olson, Assistant United States Attorney, United States Attorney's Office, District of Oregon at Nancy.Olson@usdoj.gov.

"Help!" CAL Colleagues to the Rescue to Answer Your Appellate Questions

By Anna-Rose Mathieson

The "Help!" roundtable – an annual fixture at CAL's Breakfast Roundtables – is designed to answer attendees' pressing appellate questions on their pending cases. This year's roundtable was moderated by AJEI's current President, the Honorable Steven H. David of the Indiana Supreme Court, George T. Patton, Jr. of Bose McKinney & Evans LLP, and CAL's immediate past Chair, Bradley S. Pauley of Horvitz & Levy LLP.

While no one had prepared any questions in advance this year, we didn't let that stop us.

Petitions for Review

Judge David kicked things off with a discussion of petitions for review. He stressed the importance of taking a moderate tone, noting that requests for review can be roughly divided into three stacks. Some claim "the sky will fall unless you grant this petition!" while others drip with boredom and say nothing more than "here's a mildly interesting issue the court could consider if it is has nothing else to do." You don't want your petition to get put in either of those two piles; petitions in the third category that take a more restrained approach generally receive more credence and attention.

Oral Argument

We then turned to difficult situations that arise during oral argument, most notably what appellate attorneys should do if they think a judge is dead set against their position. One participant recounted an oral argument where a justice asked him a question that seemed designed solely to highlight the lack of merit in his argument rather than afford him a genuine opportunity to address perceived weaknesses. The group agreed that the best strategy in this difficult situation is to answer the question seriously and candidly, then soldier on despite the knowledge that you likely have no chance of picking up that vote.

We next discussed the importance of knowing the factual record, and all agreed that when asked an unexpected question about the record, appellate counsel should never attempt to justify their ignorance of the facts on the grounds that they were not trial counsel. Instead, counsel should be honest, apologize, and offer to provide the requested information either later in the argument or in a supplementary filing.

Record Review

We concluded the hour with a helpful discussion of strategies for mastering a complicated factual record. The group ran the gamut from old-fashioned to high tech: some people simply used highlighters and flags on paper copies of the transcript, while others used electronic pdf annotations and special computer programs designed for tracking record facts. All agreed, though, that the most important thing was developing a system appropriate to your work style and the length of record.

Remember that your CAL colleagues will be there again to help you at this year's Summit in Philadelphia, so bring your questions with you!

Contributors

Howard J. Bashman is a nationally known attorney and commentator whose practice focuses on appellate litigation at the Law Offices of Howard J. Bashman in Willow Grove, Pennsylvania. His blog, *How Appealing*, is hosted by Breaking Media and is regularly visited by U.S. Supreme Court justices and many other federal and state appellate judges, appellate lawyers, members of the news media, and other interested readers.

Wendy McGuire Coats is Appellate Counsel at Fisher & Phillips LLP in San Francisco, where she lead's the firm's California Appellate Practice. She serves on CAL's publications committee, the California Women Lawyers amicus committee, and the Contra Costa County Bar Association Board of Directors.

Devin Dolive is a partner in the commercial litigation and labor & employment practice groups at Burr & Forman LLP's Birmingham, Alabama office. He is admitted to practice in Alabama and Ohio and received his B.A., *summa cum laude*, from Amherst College and his J.D. from the University of Virginia School of Law.

Conor Dugan is senior counsel in the Appellate and Supreme Court Practice Group at Warner Norcross & Judd LLP in Grand Rapids, Michigan. Prior to returning home to Grand Rapids, he worked as an appellate litigator at the Department of Justice and in an appellate boutique in Washington D.C.

CAL member **Steve Emmert** is a partner in Sykes, Bourdon, Ahern & Levy in Virginia Beach, Virginia, where his practice is exclusively appellate. He is the founder and past chair of the Virginia Bar Association's Appellate Practice Section, and is the publisher of *Virginia Appellate News & Analysis* (www.virginia-appeals.com). He and his wife, operatic contralto Sondra Gelb, have one slightly spoiled daughter, Caroline.

Katharine J. Galston, Chair-Elect of CAL and member of the CAL Executive Board, is a partner in Degani & Galston LLP, a boutique appellate litigation firm in Los Angeles, California. Kate has over ten years of experience successfully briefing and arguing appeals in federal and state courts of appeal on wide-ranging legal issues, including labor and employment, real estate, and complex business disputes. Kate also regularly advises clients on legal strategy issues in trial court litigation. She can be reached at kate@deganigalston.com.

Gaëtan Gerville-Réache is a partner in the Appellate and Supreme Court Practice Group at Warner Norcross &Judd in Grand Rapids, Michigan. He currently serves on the governing Council for the State Bar of Michigan Appellate Practice Section and on the Executive Board for the ABA's Council of Appellate Lawyers. Gaëtan also is editor in chief for the One Court of Justice Blog, the leading blog analyzing Michigan's appellate courts, which can be found at http://www.ocjblog.com.

D. Alicia Hickok is the head Drinker Biddle's Appellate Practice team, and is a member of the CAL Executive Board. She handles appeals before both federal and state appellate courts. Alicia is an adjunct professor of Appellate Advocacy at the University of Pennsylvania Law School and serves as Deputy Counsel to the Pennsylvania Appellate Court Procedural Rules Committee. She regularly contributes to *Appellate Issues*.

Brian K. Keller currently serves as the Deputy Director of the Appellate Government Division for the Department of the Navy, and represents the United States in cases before military appellate courts. He served as an active duty Marine Corps officer and judge advocate for nine years. The views presented here are his and do not necessarily represent the views of Department of Defense or its Components. He may be reached at (202) 685-7682 or by email at brian.k.keller@navy.mil.

Richard Kraus is a shareholder with Foster, Swift, Collins & Smith, P.C. in Lansing, Michigan, and head of its appellate practice group. He is a member of the Council of Appellate Lawyers Executive Committee and serves as the Council's State Chair for Michigan. Richard is immediate past chair of the American Institute of Appellate Practice (Litigation Counsel of America) and a member of the State Bar of Michigan Appellate Practice Section Council. He was named as 2006 Lawyer of the Year by Michigan Lawyers Weekly in recognition of his representation of the University of Michigan before the Michigan Supreme Court.

Anna-Rose Mathieson is a partner in the California Appellate Law Group, a nine-attorney appellate boutique based in San Francisco. She focuses on proceedings in the Ninth Circuit, California appellate courts, and the US Supreme Court, and serves on the Board of Directors of the Family Violence Appellate Project. She graduated first in her class from University of Michigan Law School and served as a law clerk to Justice Ruth Bader Ginsburg.

Nancy M. Olson is an Assistant United States Attorney in the District of Oregon. Before moving to Oregon she worked in private practice in southern California and also clerked for the U.S. District Court for the Central District of California and the U.S. Court of Appeals for the Ninth Circuit. She writes for *Appellate Issues* solely in her personal capacity and any views expressed herein are her own, not that of the U.S. Attorney's Office or Department of Justice.

David J. Perlman is the Editor of *Appellate Issues* and a member of the Council of Appellate Lawyers Executive Board. He is a sole practitioner based in Philadelphia. He concentrates on appeals. He also consults with law firms. He has published more than twenty articles and presented on legal rhetoric and analysis. He can be reached at djp@davidjperlmanlaw.com.

Ann Qushair is a Los Angeles appellate and management-side employment attorney. Ann is the Council's Southern California Chair and a longtime member and former Executive Board Member of the Council. Ann has helped plan several programs for the Summit and conceived of the Roundtables and served as Editor of the Roundtable summaries in this issue. Ann can be reached by phone at (714) 356-1748 or by email at qushairesq@gmail.com.

Deena Schneider is a partner in the Philadelphia office of Schnader Harrison Segal Lewis LLP whose practice is focused on appeals and issue-oriented litigation. She co-chaired the firm's appellate practice group for many years; has been a member of the Executive Board of the Council of Appellate Lawyers and currently serves as the Chair of its Rules Committee; and is a founding member and on the Board of Governors of the Bar Association of the Third Federal Circuit, where she serves as Co-Chair of its Rules Committee. She writes and speaks regularly on appellate and other areas of law and has been recognized in *The Best Lawyers in America* and Pennsylvania Super Lawyers for appellate law, *Marquis Who's Who in America* and *Who's Who in American Law*, and *Corporate Counsel*'s Top Lawyers. She can be reached at dschneider@schnader.com or 215-751-2166.

Margie Slagle is a staff attorney in the appellate division at The Law Office of the Hamilton County Public Defender. Ms. Slagle began practicing law at the Ohio Justice & Policy Center, a non-profit dedicated to criminal justice reform, where she developed her passion for criminal defense. Ms. Slagle has practiced as a trial and appellate attorney in the areas of criminal defense and civil rights. She has handled civil and criminal litigation in both state and federal courts and has argued appeals in the Ohio Supreme Court and numerous Ohio appellate courts.

J.J. Williamson is an associate at Drinker Biddle & Reath LLP in Philadelphia. His practice involves a variety of commercial litigation matters, focusing on federal and state appeals and white collar criminal defense. Most recently, J.J. played a lead role in drafting an ABA amicus brief for the United States Supreme Court. Prior to joining Drinker Biddle, J.J. clerked for the Honorable William H. Yohn, Jr. in the Eastern District of Pennsylvania. He earned his J.D. from the Villanova University School of Law and is a graduate of the United States Military Academy.

Call for Submissions

By David J. Perlman

When the AJEI Summit convenes in Philadelphia in November, history will loom large. Here the Constitution was forged. The Articles of Confederation having failed, members of the Convention met at the State House, known today as Independence Hall, between Fifth and Sixth on Chestnut Street, from May to September 1787, to try again.

Their objective was to realize in a political system the ideals expressed in the Declaration of 1776, also drafted in Philadelphia and approved at the State House — equality before government, individual rights to protect against government, and government by representation. They debated a bill of rights but didn't include one; it was a refinement added in 1789.

The leaders meeting in Philadelphia had embarked on an experiment. They were uncertain whether it would work, and of course, there was no turning back.

Conflict was embedded in their final product. As Lincoln observed in his brief, earth-shattering speech, which also came into being in Pennsylvania, the nation was put to the test by the Civil War.

And as Justice Breyer said in his recent book and in interviews, including his interview at the D. C. Summit, the Constitutional experiment continues.

As I write, the Constitution's delegation of power to appoint judges to the highest court is being tested as never before.

It was less than a year ago that, by a five-to-four vote, the Supreme Court recognized a Constitutional right, predicated on the founding principle of equality, to gay marriage. But the dissents were biting. In one of four dissents, Chief Justice Roberts chastened those who would applaud the ruling

not to celebrate the Constitution: "It had nothing to do with it," he wrote.

Each of us is living amidst this continuing Constitutional experiment, at many levels, as both citizens and attorneys. It may affect us in personal ways. It may touch deep convictions. It may challenge us intellectually. It may impact our practice. Living amidst the experiment can be inspiring, infuriating, fascinating.

How do we interpret this document — whether the open-ended declarations of ideals or specific delegations of power? (The Art. II, Sec. 2 power of the President to appoint Supreme Court Justices with the advice and consent of the Senate included.) What is the role of history in interpretation? What is the role of precedent, including precedent that is arguably or even manifestly wrong?

Are the Constitutional principles, delegations of power, and rights absolute, immutable, and unchanging through time or are they determined by changing circumstances?

Do doctrines make sense? Does the exclusionary rule work? Has the death penalty become cruel and unusual? How far does religious freedom go? Or the freedom to arm oneself?

Has the right to free speech swallowed common law defamation for any person or subject in the public eye? Meanwhile, have defamation claims over private issues suppressed speech?

How do new technologies affect searches and seizures and privacy?

What constitutional issues have you experienced? What have you litigated? What approaches or strategies are effective?

In today's polarized environment, is the legitimacy of judicial review and of the judiciary itself in a state of crisis? How, if at all, can we preserve the legitimacy of the courts or the other branches of government created by the Constitution?

How does the U.S. Constitution compare to others, such as the British or Canadian constitutions?

The theme of the next *Appellate Issues* is, "The Constitution: Experiment At Work."

Submissions may be sent to Editor David J. Perlman at djp@davidjperlmanlaw.com by **July 4, 2016**. He can also be reached at 484-270-8946.

Articles on subjects apart from the theme, of particular interest to the author, are also welcome.

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

Appellate Judges Conference
Council of Appellate Lawyers
Denise Jimenez
denise.jimenez@americanbar.org

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

AMERICAN BAR ASSOCIATION
Judicial Division
APPELLATE JUDGES CONFERENCE