

Appellate Issues



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The Scope of Appellate Review: An Evolving Problem of Constitutional Proportions

By Gaëtan Gerville-Réache and Ashley Chrysler

The appellate system in this country benefits and suffers from a split personality. Its appellate courts are usually keen to limit their task on appeal to reviewing the decision of the lower court for error and affirming or reversing accordingly. But occasionally, the appellate courts assume a different role, one of ensuring justice has been done in the case. While limiting review to issues raised and decided below continues to be treated as the “general rule,” appellate courts have created numerous exceptions, some so broad—such as “avoiding miscarriage of justice”—that they seem to suggest there is no more general rule at all.

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The Changing Business of Appellate Practice

By Virginia Hinrichs McMichael

“Appellate practice isn’t what it used to be.” That was a common refrain when I conducted an informal survey of fellow appellate practitioners. Although opinions differed on how appellate practice has changed over the last decade, there were some common themes.

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Editor’s Note

Change is inevitable. We’re immersed in it, swept along in its current. If we’re adept, we find an eddy, a chosen point of stillness, from which to observe the flow, to witness the standing waves. For this *Appellate Issues*, contributors were asked to examine change.

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Giving appellate courts greater flexibility to resolve undecided issues on appeal results in greater efficiencies in the administration of justice. But sometimes it also means injustice results and that confidence in the judicial system is undermined. This is particularly so when the appellate court fails to appreciate that the record on which it bases its decision was not complete because no one raised the new issue in the trial court. When the appellate court proceeds to dispose of the case without a remand for further development of the record, the losing party is effectively deprived of a meaningful opportunity to be heard.

This article discusses how the scope of appellate review evolved to this point and proposes a solution to the due-process problem that earlier reforms have created. The authors also suggest strategies for counsel to avoid this pitfall until the scope of review further evolves to solve the problem.

The scope of review in English courts of law and equity

Like much of the legal system in the United States, modern appellate review originated from the English judicial system. But unlike the modern American appellate system, the English system comprised two distinct models of appellate review, one in courts of equity and another in courts of law.¹ The scope of review in the courts of law differed dramatically from the scope of review in the courts of equity.²

In courts of law, the scope of review was quite restrictive. Originally, a party could only obtain

review by bringing an independent action against the trial judge—a writ of error—or jury—a writ of attain—for issuing a false judgment or verdict.³ In an action for writ of attain, the court would hold a new trial before a new jury of twenty-four individuals, which would review the action of the original twelve jurors and could punish the original jurors with imprisonment if it determined the jurors had rendered a false verdict.⁴ In an action for writ of error, the reviewing court would hold a semi-criminal proceeding against the judge personally.⁵ This latter proceeding against the judge eventually evolved into a process where the petitioner attacked the decision, rather than the decision-maker, by filing a “writ of error.”⁶

In a writ-of-error review, the petitioner had to allege that the trial court erred under existing precedent.⁷ If error were found, the case would be returned to the original court for further proceedings or a new trial.⁸ The error had to be reflected in the papers filed in the original court or the bill of exceptions, wherein the court would “record in writing the action or inaction of the judge and the fact that the party took exception to the judge’s ruling.”⁹ Given the purpose of the writ and limitations of the record, the only issues that the reviewing court could logically and fairly consider were those that had been raised and decided by the trial court and assigned as error in the writ. “[I]ssues not assigned as error were waived.”¹⁰ Ultimately, the sole purpose of writ-of-error review was to “test the correctness of the judge’s actions.”¹¹ It “did not provide an opportunity for the higher court to substitute its judgment

for that of the trial court with regard to which party should prevail on the merits.”¹² The appellate court’s determination had nothing to do with whether justice was done.¹³

By contrast, English courts of equity provided for a much more liberal review process called an “appeal,” where doing justice was precisely the point.¹⁴ The court of appeal “dispensed justice that fit the facts of the case, within general rules.”¹⁵ This approach was more flexible, allowing the courts to find the “right” result for each case.¹⁶ These courts would set aside the other court’s decision and review both law and facts *de novo* to address the individual needs of each case. Courts reviewing a previously decided case in equity could even “address new facts or law not originally raised by the parties.”¹⁷ Interestingly, it was from this more foreign system of review that the word “appeal” originated.¹⁸

The original scope of review in the United States and the “general rule”

Though the United States’ legal system is in many ways based on the colonial-era English legal system, American appellate procedure diverged long ago in at least one significant way—it emphasized writ-of-error review over appeals in equity.¹⁹ In fact, when Congress first regulated the Supreme Court’s appellate jurisdiction in the Judiciary Act of 1789, appellate jurisdiction was conferred to the Supreme Court by writ of error only, which mandated that the Court review cases for errors of law.²⁰ In general, appellate courts in the United States were limited to reviewing a trial court’s decision based only on the facts and issues presented to and decided by the trial court.²¹

This emphasis on decisional error led to what is now known as the “general rule” of appellate review. The Supreme Court broadly described this rule as follows: “a federal appellate court does not consider an issue not passed upon below.”²² The general rule of appellate review consists of two basic concepts: (1) review is limited to the record created below and (2) review is limited to the decision made below. Pursuant to this rule as it originally existed, appellate courts in the United States rarely invaded the province of the lower court by deciding new factual or legal issues in the first instance.²³

The expanding scope of appellate review in today’s system

Over time, the scope of appellate review has expanded to give appellate courts discretion to consider issues not decided below, in the interest of justice. Legal scholars have yet to identify precisely when this expansion began or what caused it. Some scholars believe it resulted from an effort to reform the American appellate process between 1900 and World War II, which was directed at “changing the focus from the procedure to the merits (i.e., doing justice between the parties).”²⁴ In any event, it is likely that the harsh, and often inefficient outcomes that resulted from adhering to a strict scope of review drove this expansion. Finding error in a lower decision required a remand to the trial judge, who might then reach exactly the same outcome on a different ground not previously reached. The losing party would then return through the appellate process for the appellate court to review this other issue, which might just as easily have been resolved in the first appeal. Beyond this “ping-pong” effect, strict ad-

herence to writ-of-error procedure meant that “appellate review in America focused on a search for error rather than a search for justice.” Dissatisfaction with this process and the outcomes it produced drove many jurisdictions to authorize appellate courts to grant whatever relief justice may require.²⁶

Perhaps more important than the expansion’s cause is its effect. Commensurate with broader authority to reach the just result in a given case, a number of exceptions to the general rule of error review appeared.²⁷ These exceptions generally allow an appellate court to decide questions of law for the first time on appeal and even dispose of the case on that alternative ground, so long as the appellate court determines that the necessary facts are in the record.²⁸ When the appellate court exercises this discretion, it represents a significant departure from the writ-of-error review and hearkens back to the appeal in equity.

While many scholarly sources have criticized the inconsistent and seemingly arbitrary application of these exceptions to the general rule,²⁹ the benefits of this expanded scope of review should not be overlooked. The strict application of error review could result in the unnecessary expenditure of resources—not to mention a severe delay in the dispensation of justice—by requiring parties to return to the trial court for a decision on legal issues that the appellate court itself is eminently qualified to decide and may have to decide anyway in a second appeal. The modern scope of review allows appellate courts to short circuit that process when appropriate, for the sake of judicial economy and speedy dispensation of justice. Many scholars further ar-

gue that allowing appellate courts to exercise more discretion in their review and disposition of the case has also led to fairer and more just results.³⁰ Overall, expanding the scope of review has significantly advanced the efficient and effective administration of justice.

The problem with the modern scope of review

Despite this benefit, permitting appellate courts to resolve new issues on appeal also creates a significant pitfall. Though review is supposedly limited to situations where the necessary facts are already in the record, appellate courts are ill-equipped to make that very determination. Presuming the record is complete when it is not means depriving the losing party of a meaningful opportunity to be heard, particularly when the appellate court raises and decides an issue *sua sponte*. This pitfall comes into plain view whenever an appellate court reaches issues that were not raised below. Often, the record in that instance was not developed for the purpose of resolving that issue because no one argued the issue below. Ironically, when an appellate court believes it must decide an unpreserved issue in the interest of justice, that is actually when the court is most likely to do injustice.

Take for example the scenario where a plaintiff asserts a claim requiring him to satisfy two elements, A and B. The defendant files for summary judgment on the basis that there is no genuine issue of material fact regarding element A. Documents submitted in response to the defendant’s summary judgment motion by happenstance contain testimony irrelevant to element A, which indicates plaintiff cannot satisfy element B. However, the defendant did not re-

quest summary judgment on element B because far more credible documentary evidence known to the parties would easily dispose of that issue in the plaintiff's favor. The trial court grants summary judgment on element A, which the appellate court finds to be error. But the appellate court also notices that the record shows plaintiff cannot satisfy element B. Seeing no contrary evidence in the record, the court affirms the judgment on this alternative legal ground, depriving the plaintiff of an opportunity to develop the record on that issue.

Anecdotally, the authors are aware of at least two cases where the appellate court made such a mistake, one in state court and one in federal court. New issues were decided *sua sponte* based upon an inadequate record without the appellate court apparently realizing it. The appellate courts never gave the parties an opportunity to brief the issues before making their decisions. Reconsideration was denied, as was discretionary review in the higher court. The court of appeals purported to resolve the case on alternative grounds in the interest of justice, but instead achieved injustice because it did not have the dispositive facts in the record—through no fault of the party who was deprived an opportunity to be heard.

Countless scenarios exist in which alternative grounds may appear for resolving a case based on a record created solely to resolve other issues. In many instances, the record's inadequacy will be even less obvious than in the scenario presented above. An appellate court never sees the full picture. This is true for several reasons: the rules of evidence narrow the record to those facts that are (believed to be) legally significant;

limited time and resources force parties and counsel to make strategic choices regarding the focus of their dispute; or the case was resolved at an early stage of the litigation, before parties had a full opportunity to develop certain issues. While it may appear from the record what the just and equitable result should be, the record might have looked quite different if the parties had prior notice. Professor Robert J. Martineau said it best:

To suggest that an appellate court can look at the record and conclude that no additional, relevant evidence could have been introduced on a completely new legal issue had the parties known it would be decisive in the case simply flies in the face of what we know about the trial process. No case is tried so completely and competently that an appellate court can confidently say that the trial would have gone exactly the same way if a new, determinative, legal issue had been raised in the trial court. The presumption should be to the contrary.³¹

Unfortunately, no such presumption appears to exist. Thus, a busy appellate court can easily be tempted to dispose of the case on appeal when an answer appears obvious from the record already created, even though the losing party never had an opportunity to develop the record on that point. Even when the appellate court still reaches the correct result, doing so in this manner at best undermines respect for the decision and judicial process, and at worst deprives that party of its fundamental right of due process.³²

Where do we evolve from here?

Some commentators recommend solving the due-process problem by tightening the many exceptions to the general rule against reviewing undecided issues.³³ Others suggest affording the parties an opportunity for briefing before deciding new issues *sua sponte*.³⁴ Neither of these solutions are tailored to the problem. When the issue is a question of law that does not turn on the facts of the case, deciding the issue *sua sponte* is not problematic from the standpoint of due process. It would certainly behoove the court to use the adversarial process to better inform its development of the law. But the parties have no right to participate in resolving a question of law which might just as easily have been resolved in a prior case without their participation.

For instance, in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), the Supreme Court decided without briefing to effectively overrule prior precedent and hold that evidence acquired in violation of Fourth Amendment rights must be excluded from state court, just as it was excluded from federal courts.³⁵ The court then reversed and remanded for further proceedings not inconsistent with its opinion.³⁶ The court's decision did not depend on the particular facts of that case, nor did it determine how its new rule of law should be applied in that particular case. While Ohio's counsel had no opportunity to persuade the court to apply *stare decisis*, neither did any litigants governed by the court's decision in future cases. It is neither reasonable nor practical to expect advance notice and an opportunity for briefing every time an appellate court resolves a dispute in a way that is somewhat different from what either party argued.

The due-process problem only arises when an appellate court relies on the record created below to reach the merits of a claim or defense without giving the parties an opportunity to be heard or to develop the record on that issue. Had the U.S. Supreme Court decided *sua sponte* that Fourth Amendment rights were violated in *Mapp* when the issue had never been raised before, this would have certainly violated Ohio's right to be heard on that issue. However much evidence in the record supported that decision, there is a serious risk of reaching the wrong result when the record has not been developed to resolve that issue.

The modern scope of review calls for a well-defined remand doctrine. Appellate courts should be permitted to resolve new questions of law on appeal, particularly when it is necessary to a proper disposition of the case. But when that issue has not been argued below, an appellate court should always remand for application of the law to the facts, rather than proceed to the next step itself on appeal. Exercising such restraint will ensure the parties always have the opportunity to develop the record, promote respect for the judicial process, and improve the chances that justice will be served.

Steering clear of the due-process pitfall

Counsel should take heart that the American legal system still carries forward a strong tradition of error review. The appellant always carries the initial burden of demonstrating error in the decision below. Review is strictly limited to the record below (though this limitation has weakened a bit as well). Appellate courts routinely deem issues not raised and argued below

to be waived. And if review does disclose some error that needs to be corrected, the courts almost invariably remand to the trial court for further proceedings when some question of fact is involved. That said, appellate courts do occasionally depart from the norm of just reviewing the decision made below, often to both parties' surprise and one party's dismay.

It is almost impossible to recover once an adverse decision issues, regardless of how egregious the court's mistake. This is truly one area of appellate practice where an ounce of prevention is worth a pound of cure. Consider the following two strategies for mitigating the risk of surprise issues cropping up on appeal.

First, best practice always calls for anticipating the other side's best arguments, but unpreserved issues are usually dismissed from that category precisely because they are unpreserved. Do not let the oversights of opposing counsel or poor reasoning by the lower court lull you into a false sense of security. Indeed, the less explanation a trial court gives for its ruling, the more dangerous the situation becomes. Appellate courts are naturally inclined to affirm the decision below if they can, and find it all the easier to come up with their own theories for affirming if the trial court did not articulate one. If you identify an unpreserved issue with sufficient merit to be of concern, subtly addressing it in your brief without making opposing counsel's argument for her would be ideal. Ignoring the issue altogether in the hope that no one will notice it, on the other hand, can be folly. You may never have another meaningful opportunity to show the facts or law are in your favor before the decision is made.

Mooting the appeal with one or two attorneys who are unfamiliar with the case but familiar with the law can be very helpful in this regard. How would they have argued the case differently in the trial court? Even if you ultimately decide not to front the unpreserved issue in your brief, you will be ready if questions on that issue arise at oral argument.

Of course, no one can perfectly anticipate every issue the court might reach, so the second way to mitigate risk is to pitch the equities of your client's position, even when it seems tangential to the claims of error raised on appeal. It can be easy to focus solely on the meritorious legal issues and forget the overall equitable picture. Seasoned practitioners inherently know that good advocacy means persuading the court that the outcome favoring your client is fair and just. If the court is sympathetic to your client's cause, it is far less likely to bend over backwards looking for unpreserved issues that would undermine your client's position. The exact opposite is true if the court views your client's position as unjust.

¹ Under the English system, courts of law, which had juries, "determined claims with damages, including statutory claims." Courts of equity, "on the other hand, decided claims, which sought specific performance or injunctions, and decided damages only under rare controversial circumstances." Suja A. Thomas, *A Limitation on Congress: "In Suits at Common Law,"* 71 OHIO ST. L.J. 1071, 1074 (2010).

² Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1026 (1987); see also Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1263 (2002).

³ Martineau, *Considering New Issues*, at 1026.

⁴ *Id.*

⁵ *Id.*

⁶ Miller, *supra*, at 1263.

⁷ Martineau, *Considering New Issues*, at 1026.

⁸ Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 927 (1997).

⁹ Martineau, *Considering New Issues*, at 1027

¹⁰ *Id.*

¹¹ *Id.* at 1026.

¹² *Id.*

¹³ Robert J. Martineau, *Appellate Justice in England and the United States: A Comparative Analysis* 6 (1990).

¹⁴ Bilder, *supra*, at 928.

¹⁵ Martineau, *Considering New Issues, supra*, at 1026.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Bilder, *supra*, at 933.

¹⁹ Miller, *supra*, at 1264.

²⁰ Bilder, *supra*, at 924.

²¹ Miller, *supra*, at 1264-65; Frederick Schauer, *The Decline of "the Record": A Comment on Posner*, 51 DUQUESNE L. REV. 51, 52-53.

²² *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

²³ Miller, *supra*, at 1265 (compiling cases); Schauer, *supra*, at 52-53.

²⁴ See Martineau, *Considering New Issues*, at 1028 (citing R. Pound, *Appellate Procedure in Civil Cases*, 374-76 (1941)).

²⁵ *Id.* at 1028.

²⁶ See, e.g., Mich. Ct. Rule 7.216(A)(7) (recognizing the Court of Appeals' authority to "enter any judgment or order or grant further or different relief as the case may require."); Cal. Civ. Proc. Code § 909 ("The reviewing court may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring

at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require.").

²⁷ Martineau, *Considering New Issues*, at 1034-36 (citing *United States v. Krynicki*, 689 F.2d 289 (1982)); see Miller, *supra*, at 1280-87 (listing and discussing numerous exceptions).

²⁸ Martineau, *Considering New Issues*, at 1035 (citing *Krynicki* and noting that courts create "an exception for purely legal issues that do not require the development of additional facts").

²⁹ See, e.g., Miller, *supra*, at 1309.

³⁰ See *id.* (citing Sunderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 3, 7-12 (1940), and Pound, *supra*, at 38-71).

³¹ Martineau, *Considering New Issues, supra*, at 1037.

³² See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that the process which is due is a function of the private interests affected, the risk of erroneous deprivation of that interest through the procedures used, and the burdens on the government of affording greater procedural protection); see also Miller, *supra*, at 1297 (identifying cases in which *sua sponte* decision-making violated due process).

³³ Martineau, *Considering New Issues, supra*, at 1061.

³⁴ Miller, *supra*, at 1309.

³⁵ *Mapp v. Ohio*, 367 U.S. 643, 676 (1961) (Harlan J., dissenting) ("The occasion which the Court has taken here is in the context of a case where the question was briefed not at all and argued only extremely tangentially.").

³⁶ *Id.* at 660.

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The Role of Technology

Not surprisingly, technology is the big game-changer for appellate lawyers. Access to online legal research, virtual paralegals, grammar-checking software, electronic filing, case management software – the appellate lawyer’s toolkit keeps expanding.

Electronic filing and service has been the biggest change over the last decade. The arduous process of photocopying and mailing briefs, and the panic-inducing experience of running to the courthouse at the last minute to get something time-stamped – both are largely a distant memory.

Legal research, writing, and formatting briefs all keep improving with technological advances. Most appellate lawyers can now run opposing counsel’s brief through a program that pulls up all the cites, with Shepherd’s notes, along with direct links to the authorities. Even keyboards have improved. I recently started using Legal-Board, a keyboard with built-in shortcuts to common legal symbols and abbreviations.

Technology has also changed the formatting of appellate briefs. After learning that many appellate judges read briefs on their iPads or other mobile devices, I now make briefs more mobile-friendly by cutting footnotes, widening margins, and shortening paragraphs to accommodate a tablet’s shorter line length. (For an in-depth examination of electronic briefing, see CAL’s 2017 whitepaper titled “The Leap from E-Filing to E-Briefing – Recommendations and

Options for Appellate Courts to Improve the Functionality and Readability of E-Briefs.”)¹ The increased use of hyperlinks in briefs enables judges to quickly check a brief’s cited authority.

Technology has also lowered the barriers to appellate practice. What was once the province of large law firms is now open to smaller firms and appellate boutiques.

Increased specialization

Charles (“Chip”) Becker, chair of appellate practice at Kline & Specter in Philadelphia, has noticed a trend among insurance companies and large corporate defendants to turn cases over to “truly specialized appellate lawyers” once a notice of appeal is filed. Appellate lawyers are also hired for interlocutory appeals: “they drop in, handle the appeal, and then turn the case back over to trial counsel.” As a result, Becker believes that “the quality of appellate lawyering has improved over the last decade.”

Becker’s experience may also reflect an apparent increase in the number of lawyers who classify themselves as appellate specialists. Texas is one of a handful of states that certifies lawyers in areas of specialization. The Texas Board of Legal Specialization currently identifies 7,225 Texas board-certified attorneys.² The number of Texas attorneys who are board certified in appellate law has increased over the past decade. In 2007 there were 327 board-certified civil appeals specialists in Texas; by 2012 there were 371.³ Today there are 429 Texas attorneys who

are board-certified specialists in civil appellate law.⁴ The Texas Board didn't start certifying criminal appellate law specialists until 2011, when there were 95 criminal appellate law specialists.⁵ In 2017, there are 127.⁶

Although the number of lawyers who are either certified or self-identify as "appellate specialists" appears to have increased, it is impossible to know whether there are, in fact, more appellate lawyers, or if they are just better at branding themselves for marketing purposes.

Appellate filings trending downward

Is there enough appellate work to keep all these specialists busy? In 2014, an article in an online newsletter quoted one appellate lawyer as saying "The Great Recession killed my appellate practice. Six years ago, lawyers at small firms would come to me for help. I handle appeals; they don't; it was worth paying me to be sure the appeal was handled intelligently. The recession killed that. Now, no one has enough work, and everyone's hanging on to every billable hour they can find."⁷ Another well-regarded appellate lawyer confided that she too is handling more general litigation and fewer appeals than she did a decade ago.

The statistics support the observation that there are fewer appeals than there were ten - or even five - years ago. The Administrative Office of the United States Courts provides an annual report of statistical information on the caseload of the federal courts. According to the AOUSC, total federal appeals court filings are down 5.25% since 2012 and 11.57% since 2007.⁸ That downward trend continues. In 2016, there were

53,649 appeals filed in the 12 regional courts of appeals, a 1% decrease from 2015.⁹

Managing costs and client expectations

Appellate lawyers have had to learn to manage client's changing expectations. With more competition for business, appellate lawyers must be prepared to provide budgets and offer flat-fee alternatives to hourly billing.

Appeals are time-intensive activities. An appeal can take 100 hours or more of attorney time. Complex cases, of course, are even more time-intensive. When an appellate attorney is retained after trial, reviewing the trial transcripts can take days. The challenge for appellate lawyers is to demonstrate to potential clients that they bring to the table expertise that justifies the expense.

Clients' cost-sensitivity can also present challenges to appellate attorneys who appear frequently before the same judges. It takes a long time to build a reputation for submitting high-quality appellate briefs. It is not worth jeopardizing that reputation because one client wasn't willing to pay for you to do your best work.

Appellate law is widely recognized as an intellectual practice that requires a high degree of skill and experience. In 2017, however, information abundance means that clients are frequently better informed than they once were. Some clients read appellate rules and cases and ask pointed questions, challenging the lawyer's authority and expertise. "The Web MD effect" is starting to spill over to appellate practice.

Marketing

Increased competition for clients has increased the pressure on appellate lawyers to market their practices. Large firms with litigation practices that once generated a steady supply of appeals may find it hard to justify the expense of a “service partner” who handles appeals but doesn’t generate business.

The pressure to market can be particularly challenging for appellate lawyers. Many appellate lawyers are naturally introverted. If given a choice, they would rather be in the library researching and writing than glad-handing at cocktail parties or chatting up CEOs on the golf course.

Some appellate lawyers have solved the marketing dilemma by blogging. Howard Bashman, a Pennsylvania-based appellate lawyer and the author of the “How Appealing” blog, spends a considerable chunk of his day posting updates on his blog. Similarly, Tom Goldstein, a partner at Goldstein & Russell in Washington, DC, is the founder and publisher of the oft-quoted SCOTUSblog. The newest social media entry, #appellatetwitter, has become an addiction of sorts for some appellate lawyers.

Diversity

Appellate practice has long been an attractive specialty for lawyers who enjoy research and writing and are looking for a family-friendly practice. In Philadelphia, where I practice, many of the heads of law firm appellate departments are women. But men also appreciate the more predictable schedule of an appellate prac-

tice. One appellate lawyer, whose wife is a physician with a busy practice, told me he appreciates the predictable schedule of appellate work.

Although some progress has been made, both women and minority lawyers remain underrepresented in the appellate bar. The most prestigious appellate representations are still dominated by white men. In the 2015-16 Term, one study found that women presented 23 percent of SCOTUS arguments.¹⁰ According to another study, between 2000 and 2012, non-white attorneys made up only about 10 percent of the lawyers who argued in the Supreme Court.¹¹

The percentages of women and other minorities are particularly low among Supreme Court lawyers representing amici. A 2016 study by Benjamin Cardozo School of Law reviewed 59 lawyers who were invited to argue as amicus curiae before the Supreme Court. Of those, approximately 10 percent were women and 5 percent were black or Hispanic.¹²

Conclusion

Appellate practice, like other legal specialties, has experienced rapid changes over the last decade. As the number of civil trials continues to decline, the number of appeals will likely also decline. An increased emphasis on attorney specialization, however, will help those appellate lawyers who can differentiate themselves from the competition and bring real value to a case. Going forward, an appellate lawyer’s ability to adapt to change will be the key to a successful practice.

¹ https://www.americanbar.org/content/dam/aba/administrative/appellate_lawyers/2017_cal_ebrief_report.authcheckdam.pdf

² Texas Board of Legal Specialization, www.tbls.org/FAQs/FAQ.aspx?id=1.

³ Per conversations with staff at the Texas Board of Legal Specialization.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Herrmann, Mark, "Appellate Practices: Big, Small, and Dangerous," *Above the Law*, Sept. 22, 2014.

⁸ <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2016>.

⁹ Id.

¹⁰ Id., citing T. Maura, "Supreme Court Specialists, Mostly Male, Dominated Arguments This Term," *Supreme Court Brief*, May 11, 2016.

¹¹ Id. citing K.S. Bhatia, "Top Supreme Court Advocates of the Twenty-First Century," *Journal of Legal Metrics*, Vol. 1, No. 3 (2012)

¹² A. Liptak, "When Appointing Friends of court, Justices Are Friendliest Toward White Men," *The New York Times*, Sidebar, May 16, 2016.

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As Steve Emmert wrote (serving as Co-Associate Editor with Travis Ramey) "...The seasoned appellate advocate of the Nineteenth Century wouldn't recognize appellate practice today. Courts have changed; brief-writing has changed; oral argument has changed. Appellate lawyers, of necessity, have changed, too."

Every contributor approaches the theme – "The Evolution of Appellate Practice" – from his or her own singular perspective.

In the "Scope of Appellate Review: An Evolving Problem of Constitutional Proportions," Gaëtan Gerville-Réache and Ashley Chrysler examine the tension between limiting review to trial court deliberations alone and achieving a correct outcome. Looking back to English common law, they offer recommendations for the future.

"The Changing Business of Appellate Practice" considers the endeavor of earning a living as an

appellate attorney in today's environment. Virginia Hinrichs McMichael grounds her portrait on interviews and statistical studies as well as personal experience.

In "Appellate AI," Travis Ramey reflects on the way our lives have changed, and are likely to change, but from a different angle. He studies the incursions artificial intelligence has made, and will continue to make, in appellate work.

In "The Recurring Problem of Unpublished Opinions and What to Do about It?" Howard J. Bashman observes that a growing judicial workload has resulted in more "unpublished" opinions, which, because of electronic communication, are inevitably published. Drawing on personal experience, he questions whether attorneys can, and should, be compelled to honor the fiction.

Michael A. Scodro's "Looking Below the Surface: Consulting the Briefs and Record Underlying a Decision" notes that the growing accessibility of trial court filings has opened up a wealth of new resources for the appellate attorney, particularly in drafting or opposing cert petitions. As usual, with more data, we can achieve a more nuanced understanding (in this case, of what occurred in the lower court), which, in turn, serves the advocate.

In "The Amicus Curiae Brief: Its Increasing Role and Impact on Appellate Court Decisions," Katherine S. Barrett Wiik and Chelsea A. Walcker, look at the continually growing, transformative role of amicus participation.

Ellie Nieberger's "An Emerging Value of Oral Argument in the Electronic Age" posits that judges' increased reliance on electronic briefs has shifted the role, and enhanced the value, of oral argument.

Ryan Marth and Luke Hasskamp offer pointers for ensuring that electronic briefs carry their full force and effect. Their "Appellate Advocacy in the Digital Age: Adapting Your Written Advocacy to a Digital Audience" provides advice on how to write and format for the increasing number of screen readers.

Nancy M. Olsen summarizes the ABA webinar that she moderated on the scope of the record and on an appellate attorney's responses to media inquiries. Her "Ethics and the Record on Appeal" reports on how the revolution of internet research and internet communication have raised new ethical issues for appellate attorneys and judges.

I wish to thank each of these contributors for taking the risk of examining the law in a new way, not merely from the perspective of insiders, of practitioners, working the legal brief. By venturing in another direction, they've enhanced everyone's understanding. We return to our familiar space with renewed insight. I also thank Steve and Travis for their guidance and their support in conceiving this issue.

Beyond that, I wish to thank all of the past contributors and the Council of Appellate Lawyers and its Board for making the experience of editing this publication possible. For this is my last issue.

I began at the Summit of November 2010, knowing hardly a soul. Attendees were remarkably supportive and CAL colleagues – including some I met then – have been ever since.

Over the years, I had the pleasure of getting to know many fine attorneys from around the country. To me, that the vehicle was writing about the law has been key. And I enjoyed being prompted – much as I prompted others – to organize my thoughts and write myself.

But I feel the pull of the current.

I think there's an eddy in view.

David J. Perlman

Appellate A.I.

By Travis Ramey

The march of technological progress is a history of supplementing and replacing human labor. Our oldest ancestors made stone tools and harnessed the abilities of stronger animals. Early civilizations developed simple machines and the wheel. With industrialization, increasingly complex machines multiplied the fruits of human labor beyond the wildest dreams of ancient innovators. These technological leaps shaped, perhaps created, our modern world.

Humanity has seen technological advances as a cause for both hope and fear. The Industrial Revolution gave us Romanticism, which in turn gave us Victor Frankenstein's warnings of the potential unhappiness that could result from unbridled scientific exploration.¹ The same era also gave us the folk tale of John Henry, the steel-driving man, who worked so hard to beat a steam-powered hammer that he died with his hammer in his hand.

The last several decades have seen computers do for "thinking" jobs what steel and steam did for manual labor, and that process continues to accelerate. Inventor and "futurist" Ray Kurzweil wrote that human "technology will match and then vastly exceed the refinement and suppleness of what we regard as the best of human traits."² Although Kurzweil was discussing a predicted future event dubbed "the Singularity" – the unknowable changes to human civilization that would result from an artificial superintelligence – he might also have been discussing the impact of AI on all manners of "thinking" work, including the practice of law.

Appellate advocacy is not immune to these advances. From legal research, to writing, to editing, computers are increasingly capable of performing the hallmark tasks of appellate advocates. Those capabilities create the possibility that, at some point, the machines will become better appellate advocates than their human counterparts. Computers need not, however, become the greatest appellate advocates to fundamentally change appellate practice – they need not be the steam hammer that leads to John Henry's death. They need only become an adequate aid to appellate advocates for that change to begin.

Artificial intelligence and the basic appellate process.

The basic appellate process can be broken down into three components: (1) compiling the appellate record; (2) written advocacy; and sometimes (3) oral advocacy. The challenges AI faces in each of the three components are different, and so is the likelihood of one of the particular components posing a long-term structural obstacle to AI affecting appellate advocacy.

Compiling the appellate record.

Many jurisdictions still require advocates to create appendices containing the record on appeal, to designate which documents from the trial court should be included in the record on appeal, or otherwise be responsible for placing the relevant documents before the appellate court for its review.³ At its heart, this process involves surveying a limited and fixed group of documents to determine which members of the

group are relevant to the process and to predetermined issues.

Existing AI already excels at a similar process — document review as part of discovery. Numerous publications have covered the impact of AI on document review, whether discussed in terms of predictive coding, using technology to assist review, or otherwise.⁴ It seems likely that currently existing AI technology could be adapted to perform the task of identifying and compiling relevant documents for appendices or record designations with minimal guidance from an attorney.

There are, however, two reasons that appellate lawyers may conclude that AI systems are unnecessary or not cost-effective when it comes to the process of preparing the appellate record. First, trial court or administrative records tend to be relatively small. The run-of-the-mill appeal will involve perhaps several thousand pages of documents, but it will rarely involve the tens or hundreds of thousands of documents commonly reviewed in discovery. Thus, deploying an AI to review the record in the underlying proceeding to determine what should be included in an appendix or in a record designation may not increase efficiency enough to justify the expense. Second, and more foundational, appellate courts are increasingly moving toward electronic records that contain all (or most all) of the underlying proceedings. And in doing so, they have vastly reduced or eliminated altogether the parties' roles in preparing appendices or designating what documents to include in the appellate record. As more and more courts adopt similar rules, this entire facet of

appellate practice will diminish, and it may even eventually disappear.

Researching and drafting briefs.

The perhaps quintessential task of an appellate advocate is the legal research and writing that results in the appellate brief. Although they are in the earliest of states, AI systems exist that hold the potential of supplementing and perhaps one day replacing the appellate advocate's role in drafting the brief.

One of them, ROSS Intelligence, is based on IBM's Watson platform, and it is already in use at some of the world's leading firms. The goal of ROSS is to make legal research easier and more affordable, which should in turn reduce legal fees for consumers.⁵ According to one of the founders of ROSS, the goal "is not to replace lawyers but to allow them to do more than they were able to before. We're working on having lawyers teach the computer to think like a lawyer. That would be a huge step for humanity."⁶ Practitioners using ROSS for research have found it useful, with ROSS finding authority instantly that a practitioner could locate only after hours of searching.⁷

Of course, a legal-research aid does no more than supplement the work of appellate practitioners. More promising (or worrisome depending on one's perspective) is the legal memo service ROSS is currently developing. In September 2016, "ROSS developers considered the memo function to be in its early stages."⁸ By early 2017, however, one can merely type in a question "and Ross replies a day later with a few paragraphs summarizing the answer and a

two-page explanatory memo.”⁹ In the eyes of at least one practitioner, the quality of the memo was “indistinguishable from a memo written by a lawyer.”¹⁰ The developers of ROSS disagree, stating that ROSS is “not much of a writer,” and the process requires humans to take the rough draft ROSS produces and create a final memo.¹¹ Still, the goal remains to fully automate the memo-writing process.¹²

That process could, perhaps, be accelerated by successfully wedding AI writing to AI editing. Software already exists that is designed to edit writing in much the same way a human would, with the goals of increasing clarity and writing quality. One example is WordRake, a proof-reading software which integrates itself into Microsoft Office applications. Although the software is far from perfect, these early attempts at automating the editing process show promise.

If ROSS or some other system is able to fully automate the process of writing legal memoranda, it will require only a few additional steps to begin automating the brief-writing process. In most law schools, first-year students begin learning legal writing by drafting closed-universe, single-issue memoranda. They progress to performing their own legal research to write more complex memoranda. Eventually, typically in their second semester, they receive a new task – drafting an appellate brief. Although computer learning is not identical to human learning, the progression of automating the writing process through AI may follow a similar pattern. In the meantime, it seems highly likely that AI as a supplement or brief-writing aid will become a fact of life for many practitioners.

Oral Argument

In 1950, scientist Alan Turing proposed an operational test for whether AI is possible. The basic gist of the Turing Test is to replace the question of whether a computer can have actual intelligence with the question of whether a computer could mimic human intelligence well enough to fool a human being. The test Turing proposed is whether a computer could mimic human conversational ability well enough to fool a human into thinking it was talking to another human. Although others have questioned the relevance of Turing’s test, “Turing thought that he had devised a test that was so difficult that anything that could pass the test would necessarily qualify as intelligent.”¹³ As of yet, no machine has undisputedly passed the Turing Test.

Replacing a human advocate at oral argument with an artificially intelligent advocate poses a more significant challenge than does replacing the human advocate as writer. The ability of oral advocates to adapt quickly, to think on their feet, to transition from issue to issue and question to question in sometimes unusual order will be difficult to replicate. Granted, the limited scope of oral argument – confined largely to the issues of the case – may somewhat diminish that difficulty. Human conversation often takes unexpected, random turns. There may be little need for an AI oral advocate to be prepared to discuss random topics like college football, fashion, or fly fishing, but the challenge remains great nonetheless. As of the writing of this article, I have been unable to locate any developer working on an AI platform to replace human oral advocates with artificially intelligent oral advocates.

Oral argument may, however, never need to be automated. The decline in the role of oral argument in the appellate process is well documented. By the time artificially intelligent robot-lawyers are the principal brief writers, oral argument may be a dead letter.

If technology one day allows automation of the brief-writing process and oral argument survives in some form, the likely time gap before AI oral advocates could replace human oral advocates raises some interesting possibilities. Among them is the possibility of a split process somewhat akin to the division of solicitors and barristers in other jurisdictions. Perhaps the last vestige of human appellate advocacy will be a proud few human lawyers presenting oral argument in cases briefed by an AI.

Can AI duplicate other parts of appellate advocacy?

Of course, appellate advocacy goes beyond compiling documents, legal research, brief writing, and oral argument. Successful appellate advocates must also have good judgment to know whether to appeal, when to appeal, and what issues to appeal. In addition, appellate advocates increasingly play a role as part of the trial team, assisting trial counsel to preserve issues and position the case for the best possible chance of a successful appeal. These areas may pose additional challenges to the use of AI in appellate advocacy.

Artificial intelligence and strategic judgment

As early as the 1950s, computers were playing strategy games, most notably chess.¹⁴ In 1997, the IBM Deep Blue platform famously played

and defeated Gary Kasparov, the human world chess champion.¹⁵ Since 2005, no human has defeated a top-performing computer at chess under normal tournament conditions.¹⁶ Now, computers have so far surpassed the best humans at chess, with all of its strategy complexities, that the best human players refuse even to play them.¹⁷

Computers have moved on to mastering even more complex strategy games. For example, computers are now capable of defeating the best humans at Go, which is far more complex than chess.¹⁸ Nor has this success been limited to games in which computers have complete information about its opponent's activities. AI systems are now capable of competing with—and even defeating—professional poker players.¹⁹

Appellate advocacy is not chess, Go, or even poker. Nevertheless, AI companies are already working on software that analyzes judicial tendencies, predicts the legal strategies of opposing counsel, and selects arguments that are most likely to convince specific judges.²⁰ Those products, grounded in data analytics, include Lex Machina and Ravel Law, both of which are now owned by LexisNexis.²¹ Other companies are using data analytics to predict litigation outcomes,²² a short analytical step from the strategic choices appellate litigators must often make.

Further, the success programmers have had with artificial intelligence in chess, Go, and poker suggests that cracking the code to master appellate analysis is simply a matter of time. Although appellate strategic analysis is arguably more complex than even Go, and it includes the problem of acting with incomplete information

(as in poker), AI developers have shown that, given time, those are hurdles they can overcome. It seems, therefore, reasonable to suspect that given enough time to work on the problem, AI developers will be able to create applications that approach and perhaps eventually surpass the “good judgment” of even the best appellate advocates.

Appellate counsel as trial support

Appellate attorneys increasingly play a role before the appeal begins, as more and more litigation involves embedded appellate counsel.²³ The role embedded counsel plays during trial is, however, quite different than the role played before and after trial. Before and after trial, embedded counsel’s role focuses on strategy, issue identification, and legal writing.²⁴ During trial, embedded counsel may play that same role again—taking the lead in submitting and arguing motions and jury charges. But she also takes on a different role as well—the role of advisor to the trial lawyers. Embedded counsel observes, answers the trial attorney’s questions, and focuses on preserving error.²⁵

Both roles pose potential problems for an AI platform. The problems the first role poses are little different than the problems an AI platform faces in other areas of appellate advocacy. This second role presents problems more akin to those an AI would face in an appellate oral argument: the ability or inability of an AI to emulate the human ability to solve complex problems in real time. It appears no AI developer is yet focusing on this phase of appellate advocacy, though other technologies (such as ROSS) could theoretically be adapted for that purpose.

Artificial intelligence and the future of appellate advocacy

So, what is the future of AI in appellate practice? Unlike Kurzweil and the futurists, I claim no ability to prophecy what the future will look like. There are, however, two things about which I am convinced. The first is that in the years to come AI will play a role in appellate advocacy, and it will begin by supplementing the work of human lawyers. The seemingly never-ending quest to reduce legal costs and make every tenth of an hour more productive will necessitate wringing as much assistance out of AI as possible to ensure delivery of the best possible outcomes to clients at the lowest cost that is practical. The role of AI will expand from that foundation.

The second is that appellate advocates can relax; there is no need to look for an exit strategy. Perhaps the many variables involved in appellate advocacy will make it (unlike chess or Go or poker) something that will forever remain beyond technological emulation. Perhaps humans will never crack true artificial intelligence and be able to imbue machines with the type of judgment needed for quality appellate advocacy. In any event, appellate advocates are unlikely to be replaced anytime soon. If humans ever create true artificial intelligence that can replace humans as appellate advocates, it will occur in that far-off future time known only as “someday.”

But maybe someday will come. If it does, then, as has been true of many other kinds of work, appellate advocacy will one day be automated—made faster and cheaper by replacing peo-

ple with machines. In that possible future, perhaps artificially intelligent appellate advocates will play the role of the steam hammer in a folk tale about how Neal Katyal or Paul Clement was a brief-writing man who died slumped over the podium having defeated his computerized opponent. Perhaps appellate advocates, like so many other workers, “should have known the final score the day John Henry died.”²⁶ Time will tell.

¹ See MARY W. SHELLEY, *FRANKENSTEIN; OR, THE MODERN PROMETHEUS* 27 (Sever, Francis & Co. 1869) (“Learn from me, if not by my precepts, at least by my example, how dangerous is the acquirement of knowledge, and how much happier that man is who believes his native town to be the world, than he who aspires to become greater than his nature will allow.”)

² RAY KURZWEIL, *THE SINGULARITY IS NEAR: WHEN HUMANS TRANSCEND BIOLOGY* 9 (2005).

³ See, e.g., SUP. CT. R. 26; FED. R. APP. P 30; FLA. R. APP. P. 9.200.

⁴ See, e.g., George Socha, *On e-Discovery: What Will AI Mean for You?*, *JUDICATURE*, Autumn 2017, at 8; JOANNA GOODMAN, *ROBOTS IN LAW: HOW ARTIFICIAL INTELLIGENCE IS TRANSFORMING LEGAL SERVICES* 10–11 (ARK Grp. 2016).

⁵ Julie Sobwale, *Beyond Imagination: How Artificial Intelligence is Transforming the Legal Profession*, *ABA J.*, Apr. 2016, at 51.

⁶ *Id.*

⁷ Steve Lohr, *I, Robot, Esq.? Not Just Yet*, *N.Y. TIMES*, March 20, 2017, at B1.

⁸ Sherry Xin Chen & Mary Ann Neary, *Artificial Intelligence: Legal Research and Law Librarians*, *AALL SPECTRUM*, May/June 2017, at 18.

⁹ See Lohr, *supra* note 7.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Lawrence B. Solum, *Essay, Legal Personhood for Artificial Intelligences*, 70 *N.C. L. REV.* 1231, 1235–36 (1992).

¹⁴ Matt Blitz, *Checkmate, Human: How Computers Got so Good at Chess*, *POPULAR MECHANICS*, May 14, 2016.

¹⁵ Robert Siegal, *20 Years Later, Humans Still No Match for Computers on the Chessboard*, *NPR.ORG*, Oct. 24, 2016.

¹⁶ See Arthur David Levy, *Bilbao – The Humans Strike Back*, *CHESS NEWS*, Nov. 22, 2005, [http://http://en.chessbase.com/post/bilbao-the-humans-strike-back](http://en.chessbase.com/post/bilbao-the-humans-strike-back) (discussing the last such human victory).

¹⁷ Siegal, *supra* note 15.

¹⁸ See Paul Mozur, *Google’s A.I. Program Rattles Chinese Go Master as it Wins Match*, *N.Y. TIMES*, May 25, 2017.

¹⁹ See Catherine Caruso, *Time to Fold, Humans: Poker-Playing AI Beats Pros at Texas Hold’em*, *SCI. AM.*, Mar. 2, 2017.

²⁰ See Jason Koebler, *Rise of the Robolawyers: How Legal Representation Could Come to Resemble TurboTax*, *ATLANTIC*, Apr. 2017.

²¹ See *id.*; see also Press Release, Ravel Law, *Next Step in Our Journey* (June 7, 2017), <http://ravellaw.com/next-step-in-our-journey/>.

²² See Koebler, *supra* note 20 (discussing the Premonition and Legalist platforms)

²³ See Sean Higgins, *Significant Savings, Short Terms and Long Term: The Benefits of Early Appellate Intervention*, *IN-HOUSE DEFENSE QUARTERLY*, Fall 2016, at 72; Mark W. Wortham, *Winning Appeals Before the Verdict: Embedding Appellate Counsel in the Trial Team*, *FOR THE DEFENSE*, Oct. 2014, at 72.

²⁴ See Higgins, *supra* note 23, at 73–75.

²⁵ See *id.* at 74.

²⁶ *DRIVE BY TRUCKERS, THE DAY JOHN HENRY DIED* (New West Records 2004).

The Recurring Problem of Unpublished Opinions and What to Do About it?

By Howard J. Bashman

Once upon a time, a “golden age” of appellate judging supposedly existed. Back then, the number of pending appeals was far smaller and more manageable than now. As a result, the story is told, appellate judges had far more time and attention to devote to the resolution of each case. Consequently, appellate judges could make sure that their written opinions were fully considered, as thoughtful as possible, and reached the answers the judges could confidently feel were most correct.

Flash forward to the current era of assembly-line appellate justice, which dates back to at least the 1980s if not earlier. The bygone days of appellate judges’ enjoying the luxury of time to render fully considered appellate rulings has been replaced by a never-ending supply of cases and, consequently, brief-reading and opinion-writing responsibilities that could easily consume an appellate judge’s every waking hour.

The overwhelming press of modern appellate judging that so many judges on federal and state intermediate appellate courts must confront has resulted in a variety of judicial coping mechanisms that resemble triage. To begin with, the cases that appear to the appellate judges or their staff as easy, straightforward, and unimportant are separated from the small remainder of appeals that, for one reason or another, do not fall into those categories. Appellate judges must still devote plenty of time to the difficult and important cases, which often includes those appeals that raise significant questions of first

impression. That leaves far less time to devote to the consideration and resolution of the vast majority of the remaining cases, which still must be resolved for the court to perform its function.

As a result, those many cases ending up for whatever reason in the category of seemingly insignificant appeals are prime candidates for disposition by means of a non-precedential, not-for-publication opinion. When I began working shortly following my law school graduation in 1989 as a clerk for a judge on the U.S. Court of Appeals for the Third Circuit, that court had essentially three ways to dispose of an appeal being decided on the merits.

The first option was by means of a published opinion. Ordinarily, this meant that the case had been orally argued, although oral argument was not a strict prerequisite. A published Third Circuit opinion would operate as precedent binding future Third Circuit panels and the federal district courts within the Third Circuit. Before the Third Circuit would issue a published opinion, it had to receive the approval of at least two judges serving on a three-judge panel, and the opinion had to survive a pre-publication ritual involving circulation of the opinion to all judges in regular active service. The purpose of that pre-publication, full-court circulation was to allow any judge not on the panel to either request changes, further consideration by the panel in light of other considerations that the panel may not have been aware of, or to request a vote on whether to hear the case en banc even before the panel’s opinion ever issued to the parties. Once a Third Circuit panel issued a for-

publication opinion, the opinion would eventually end up in the Federal Reporter, a West publication collecting federal appellate court rulings, and would appear even more quickly on Westlaw and Lexis.

If a Third Circuit panel instead decided to issue an unpublished, non-precedential opinion, that opinion ordinarily would not need to be circulated to the entire court before issuance. The only exception was if the unpublished opinion reversed the judgment under review. But even then, the prospect of en banc consideration of an unpublished reversal was highly unlikely, because an unpublished Third Circuit opinion in 1989 did not constitute binding precedent for the Third Circuit or the federal district courts within the Third Circuit, and parties were not even permitted to cite to or rely on unpublished Third Circuit rulings back then.

Finally, a Third Circuit panel could dispose of an appeal in which the outcome under review was being affirmed by issuing a judgment order stating simply that, after considering the arguments being raised by the party taking the appeal, the judgment under review is affirmed. Judgment orders typically did not contain any reasoning whatsoever. After Edward R. Becker became the Third Circuit's chief judge in 1998, that court's judges agreed to abolish the use of judgment orders in most appeals, a decision that the court has largely adhered to since then.

More recently, as the internet has become ubiquitous and federal appellate courts have all launched their own websites where both their published and unpublished new decisions can be easily accessed, major legal research services

such as Westlaw and Lexis have begun including those unpublished federal appellate rulings in their electronic databases. Notwithstanding the growing ease of accessing unpublished opinions, as of late 2006, the various state and federal appellate courts across the nation maintained a patchwork of rules governing if and when advocates and courts could cite to and rely on unpublished appellate court rulings.

At the federal level, this at least was about to change effective January 1, 2007. Thanks to an initiative spearheaded by then-Third Circuit Judge Samuel A. Alito, Jr., in his role as Chair of the Advisory Committee on the Rules of Appellate Procedure of the U.S. Courts, a new rule took effect at the beginning of 2007 that would allow advocates to cite to unpublished, non-precedential federal appellate court rulings in all cases pending in the U.S. Courts of Appeals. The new rule achieved approval notwithstanding fervent opposition from many judges and advocates practicing within the U.S. Court of Appeals for the Ninth Circuit.

Apparently the Ninth Circuit was so large, and its judge so very overworked, that many of that court's unpublished opinions were prepared by staff attorneys and never carefully reviewed for errors or inconsistencies with existing law by any actual Ninth Circuit judge. To paraphrase one line of argument offered by then-Ninth Circuit Chief Judge Alex Kozinski against the new rule's approval, if a chef tells you that certain food is not safe for human consumption, what customer would demand to eat it anyway?

Yet while new Federal Rule of Appellate Procedure 32.1 was extremely permissive in terms of

allowing advocates to cite to and rely on anything potentially of use, the rule left entirely undisturbed the categorization of unpublished opinions as non-precedential. Stated another way, just because an advocate could cite to an unpublished opinion did not make the unpublished opinion binding on the court that issued it. Thanks to Rule 32.1, Judge Kozinski and his colleagues could no longer insist on receiving appellate briefs that refrained from citing to and relying on the Ninth Circuit's own unpublished opinions. But whether Judge Kozinski or any other Ninth Circuit Judge themselves deigned to consider or rely on that court's own unpublished opinions remained entirely up to the judges themselves.

Although federal appellate courts successfully and without any immediate or long lasting detriment resolved the question of being able to cite to unpublished opinions in one fell swoop over ten years ago, in many state courts, the argument rages on, unresolved. In Pennsylvania, the state in which I practice law, the Superior Court of Pennsylvania is the far busier of the state's two intermediate appellate court, resolving the vast bulk of civil and criminal appeals. The Superior Court of Pennsylvania in 2017 continues to maintain a rule that prohibits advocates from citing to or relying on its own unpublished opinions. The Superior Court of Pennsylvania resolves the vast majority of appeals presented to it using unpublished opinions. Those unpublished opinions are readily available over the court's own website in addition to via Westlaw and Lexis, and often those opinions are quite lengthy and detailed and resolve legal questions of first impression. Happi-

ly, the Pa. Superior Court now has under consideration a rule change similar to Fed. R. App. P. 32.1, which would allow advocates to begin citing to and relying on unpublished opinions issued after the new rule takes effect.

From my perspective, the argument in favor of allowing advocates to cite to and rely on unpublished and non-precedential opinions is far more persuasive than the argument in opposition. To begin with, advocates are already permitted to rely on a vast amount of non-binding authority in arguing their positions, ranging from decisions from other states and other federal circuits to books and treatises. How can one reasonably justify a rule that permits an advocate to cite a non-binding decision from a neighboring state addressing the identical issue before a court but then prohibit the advocate from revealing how the very same court in which the current appeal is pending resolved the identical issue in an appeal decided only one month previously? Enforcing a rule that prevents a court from learning how it recently ruled on an identical issue in a similar case seems to present the prospect of unnecessary intra-court conflicting decisions arising without any thought having been devoted to whether such a conflict is worth creating.

The decision whether to issue a given appellate opinion as a published or unpublished decision also can be fraught with peril. I have confidence that, in the vast majority of cases, appellate judges have a good feel for whether a given new appeal is controlled by existing precedent and would not make any new law. Nevertheless, in our common law system of judicial decision-making, each new case builds on an exist-

ing body of precedent to some degree, so it is possible to argue that any case presenting factual or procedural differences from an earlier appeal involves the making of new law to some degree.

Even more troublesome, however, is the realization that no matter how much confidence we have in appellate judges to correctly decide whether their decision in the current case does or does not announce and apply legal principles that might be critical to the resolution of some future case, there is no way for judges to predict with precise accuracy what cases or issues will arise in future appeals. The conclusion of judges that the issue decided in today's case would never arise again in the future overlooks both that the issue already arose in today's case and that predicting the future can be quite difficult to do with any accuracy. In any event, judges have not attained their position thanks to their ability to predict the future.

The most sinister and inappropriate use of an unpublished opinion must also be considered. Sometimes, it must be admitted, applying existing law to the facts of an appeal would produce a result that it is difficult to describe as "justice" in the context of a given case. In such circumstances, it may be difficult for appellate judges, as human beings, to avoid the temptation of using an unpublished opinion as a method of arriving at a just resolution of the current case while being able to disregard that result in the future as a one-off outcome having no binding effect on future cases. I wish I were inventing this possible use of an unpublished opinion, but I have heard appellate judges admit to it themselves to explain why an appeal might result in

an unpublished opinion instead of a published opinion.

Now that unpublished opinions are so readily available to the bench and the bar and even to pro se litigants, it really makes no sense whatsoever to declare them off limits to citation and reliance by litigants. Not only should appellate courts want to receive the benefit of all useful information, but indeed it is the obligation of appellate courts to strive to reach the correct result in each and every appeal. To say that an appellate court should strive to reach the correct result in every appeal, but in doing so that appellate court can only consider everything useful and relevant other than that court's own unpublished opinions addressing the very issues raised on appeal, is a position only an extremely closed-minded lawyer could find satisfying.

To be sure, there once was a time when a persuasive access-to-justice issue was implicated in the controversy over whether advocates should be allowed to cite to unpublished rulings. Back when I was clerking for a Third Circuit judge from 1989 to 1991, unpublished Third Circuit opinions were neither easily nor readily available. You couldn't access them online from the Third Circuit, nor could most unpublished opinion be accessed on Westlaw or Lexis. Sometimes lawyers who practiced on one side or another of certain substantive areas of the law would develop their own databank of helpful unpublished appellate rulings. Their adversaries, who may not practice in those areas as frequently, had no ability to obtain or discover whether any unpublished opinions to the contrary existed that may have supported their clients' position. Where litigants lacked equal ac-

cess to potentially favorable unpublished decisions, and there consequently was no way to confirm whether any given unpublished opinion was representative of the issuing court's view on the matter in question, fairness concerns strongly militated against allowing the court to consider any unpublished opinions in deciding the case pending before it.

At present, and for more than a decade now, at least in federal appellate courts, opposing parties and their advocates have enjoyed essentially identical access to both helpful and unhelpful published and unpublished opinions. Thus, trying to achieve a level playing field with regard to access to unpublished opinions no longer seems to be a legitimate concern in deciding whether courts should allow parties to rely on and cite to such decisions.

Before concluding, I cannot help but remember that some Ninth Circuit-based opponents of the rule change that allows unpublished opinions to be cited in federal appellate courts had argued that the change would cause legal research to become overwhelming and unduly burdensome. In my experience, that has not been the case, either within the Ninth Circuit or elsewhere. My online legal research service of choice, Westlaw, allows me with the push of a button to ensure that my legal research results do not include any unpublished opinions from the appellate court whose decisions I am researching. I push that button without hesitation those times when my legal research terms produce far too many results to usefully review when unpublished opinions are included. Because only published opinions constitute binding precedent in the courts in which I most fre-

quently handle appeals, I always choose to rely on published opinions for their holdings when that is an option.

Other times, however, I am researching an issue in an area of the law where a paucity of relevant judicial decisions exist. In such instances, it may be the case that the only useful and relevant decision is an unpublished opinion. If the court in which my client's appeal is pending allows me to cite to such a non-precedential decision, I will do so, because having something to rely on in support of my client's position on appeal is often far better than the alternative.

The most common research outcome that I face falls between the two extremes mentioned above. Most of the time, my legal research results will consist of a reasonable number of unpublished and published opinions. Frequently, those unpublished opinions point me on the right track by revealing directly on-point published precedents that, for whatever reason, my legal research had yet to uncover. Obviously, it is always preferable to cite to published opinions in place of unpublished opinions where both options are available, but far too often to count my legal research begins with finding the most helpful precedents cited in unpublished opinions as a shortcut to discovering the strongest authorities on which to rely.

For the reasons explained above, I am firmly of the view that appellate courts should permit litigants and their advocates to cite to unpublished opinions whenever the litigants and their advocates view such citations as useful. I am especially pleased that my view is now the prevailing view in federal appellate court and contin-

ues to gain acceptance among state appellate court. Yes, some courts retain their outdated view that unpublished opinions should not be cited to or even mentioned to the issuing court, but the reasons for that approach, as I have discussed above, have overtime begun to lose

whatever force they once may have had. It is my sincere hope that, sooner rather than later, all appellate courts will allow litigants and their advocates to cite to unpublished opinions for whatever persuasive value those opinions may contain.

Looking Below the Surface: Consulting the Briefs and Record Underlying a Decision*

By Michael A. Scodro

Technological advances account for some of the many modern trends in appellate practice. Among these tech-driven developments is the increasing ease with which attorneys can access not only published judicial opinions, but also unpublished orders, appellate briefs, trial court filings, and transcripts and audio recordings of oral argument. Court websites, including the federal ECF system, as well as on-line services like Westlaw and Lexis, offer access to a trove of briefing and other material, as do cites like Scotusblog and Oyez (for U.S. Supreme Court filings and oral argument recordings). Meanwhile, many law firm and organization web cites offer links to briefs and other materials in cases those firms and groups have litigated. And if all else fails, one can always email the lawyer who filed a brief and politely request a copy. In short, for many cases, and many filings, gone are the days of traveling physically to a far-off clerk's office to photocopy papers. Underlying litigation material is only a few key-strokes away.

The ease of obtaining briefs and other filings bears on the practice of law in several ways. It

is now far easier, for example, to see precisely how the parties litigated a case similar to the one you are handling. The underlying briefing in that case may contain strains of argument that went unmentioned in the court's opinion, the parties may have cited useful authority, or a litigant may have advanced an argument that your opponent has yet to raise but that you should anticipate and do your best to preempt. Likewise, it can be extraordinarily helpful to read or listen to oral argument in a court before whom you're preparing to appear, especially if you can find an argument that shares a legal issue with the case you're about to present. Doing so may offer a more fine-grained understanding of the court's concerns, or of sub-arguments or lines of inquiry of particular importance to certain members of the court. And in the end, of course, reading fine briefing—like listening to or reading skilled oral advocacy—is valuable in its own right. All of this has become increasingly easy for the appellate practitioner, who now has ready access to trial court and appellate filings and oral argument records in countless state and federal cases.

Seemingly less discussed, however, is the *direct* use to which appellate attorneys sometimes put

such material in their advocacy. Faced with an especially salient precedent open to multiple (more or less advantageous) interpretations, at times counsel will draw on the case's underlying matter to argue for a particular construction of the court's decision. Trial court filings or appellate briefs may offer a clearer picture than the opinion does of the arguments advanced by the parties, or these materials may provide a fuller view of the case's factual landscape. And while a discussion of whether and when courts should consider such matter in construing an ambiguous decision is beyond the scope of this article, there can be no doubt that finding and citing this material has become much easier. For those who have yet to observe this approach in practice, this article collects a handful of illustrations.

It should come as no surprise that many of the examples we found (using an electronic database, of course!) appeared in filings seeking or opposing certiorari review before the U.S. Supreme Court. By nature, these filings put federal appellate and state supreme court decisions under a microscope, with the petitioner trying to show legal divisions between and among lower-court authorities and the respondent working to harmonize these same decisions. Petitioners are tempted to root out evidence, wherever it may be, that two lower-court rulings with opposite outcomes are factually and legally indistinguishable. While respondents have an offsetting need to show that cases with different outcomes are the product—not of competing legal rules that the Supreme Court must reconcile—but of material factual or other differences. It is predictable that petitioners and respondents would sometimes go beyond the

face of these lower-court rulings to explain why they are in conflict or harmony.

A better understanding of the underlying facts

An example of a petitioner using this technique appears in support of the certiorari petition seeking review of the Eleventh Circuit's ruling in *Brush v. Sears Holding Corp.*, 466 F.App'x 781 (11th Cir. 2012), cert denied, 568 U.S. 1143 (2013) (mem.). There, petitioner asked the Court to resolve a purported circuit split over how Title VII's anti-retaliation provision "appl[ies] to management officials . . . whose duties include assuring compliance with Title VII or implementing an employer's anti-discrimination policy." Cert. Petition, 2012 WL 3805774, at *i (Aug. 29, 2012). Petitioner claimed that the D.C. Circuit—in a 1981 decision called *Smith*—followed a legal rule favorable to the plaintiff and contrary to the Eleventh Circuit's ruling in petitioner's case. *Id.* at *19-20. In its brief in opposition to the certiorari petition, respondent countered that the D.C. Circuit was in perfect harmony with the Eleventh Circuit. And in support of that theory, respondent quoted a more recent, unpublished D.C. Circuit decision purportedly in step with the Eleventh Circuit's decision in *Brush*. Brief in Op., 2012 WL 6636179, at *18-19 (Dec. 19, 2012).

Petitioner obviously wanted to explain why respondent's unpublished opinion did nothing to reconcile the two circuits' opposing legal rules. Unfortunately for petitioner, however, the short, unpublished opinion offered little explanation for its ruling. So petitioner turned to the underlying briefs in that case to argue that the D.C. Circuit's unpublished order could not have

adopted the Eleventh Circuit’s rule. Why? Because the underlying D.C. Circuit briefs showed that the case did not even *involve* managers. Rather, “[t]he briefs . . . make clear that the plaintiff . . . in that 2003 decision was not a supervisor and had no managerial responsibilities.” Reply in Support of Certiorari Pet., 2013 WL 65968, at *7 (Jan. 2, 2013). In short, without enough factual recitation in the opinion itself, petitioner relied on the parties’ description of the facts in their briefs to argue for a more limited reading of the court’s ruling.

A more refined view of the parties’ legal arguments

There is more to the underlying briefs and other record material than a better sense of the facts, however. Parties use briefs, in particular, to identify the precise legal arguments underlying an opinion. The certiorari-stage papers in *Samantar v. Yousuf*, 135 S.Ct. 1528 (2015) (mem.), offer an excellent illustration. Petitioner in *Samantar* asked the Court to decide whether “a foreign official’s common-law immunity for acts performed on behalf of a foreign state is abrogated by plaintiff’s allegations that those official acts violate *jus cogens* norms of international law” —that is, generally accepted international norms such as bans on “torture, summary execution and prolonged arbitrary imprisonment.” Certiorari Pet., 2014 WL 1916750, at *i, 7 (May 5, 2014) (internal quotation marks omitted).

As part of the alleged circuit split, petitioner argued that the Fourth Circuit’s decision in *Samantar* conflicted with a 2004 Seventh Circuit decision in a case called *Ye*, which granted immunity to the former Chinese President. Per-

haps anticipating that respondent would argue for a limited construction of *Ye*—one that avoided any inter-circuit conflict—the certiorari petition used the United States’ amicus brief in that case (and later amicus filing describing *Ye*) to give the broadest possible construction to the Seventh Circuit’s holding. *Id.* at *17-18. Sure enough, respondent urged the Supreme Court to read *Ye* narrowly, to apply only to “head-of-state immunity,” not more broadly to other officials. Brief in Op., 2014 WL 3492045, *21-22 (July 14, 2014).

On reply, petitioner returned to its reliance on the *Ye* briefs: “[T]he briefing in that case shows that both head-of-state and foreign official immunity were at issue, and the Government urged the Seventh Circuit to reject a *jus cogens* exception to both forms of immunity.” Reply in Support of Certiorari Pet., 2014 WL 3735447, at *11 (July 29, 2014). Moreover, petitioner continued, “the Government has since characterized *Ye* as rejecting a *jus cogens* exception in both the head-of-state and foreign official immunity contexts.” *Id.* at *11-12. Petitioner thus used the legal arguments advanced in the government’s briefs to seek a broad reading of the Seventh Circuit’s decision.

A matter I worked on some years ago, while serving in the Illinois Attorney General’s Office, offers another example. See *Choose Life Illinois, Inc. v. Jesse White, Ill. Secretary of State*, 547 F.3d 853 (7th Cir. 2008), cert. denied, 130 S.Ct. 59 (2009) (mem.). In responding to a petition for certiorari, we faced an argument from petitioners that a recent Eighth Circuit decision conflicted squarely with the Seventh Circuit ruling in our case. The litigation involved specialty li-

cense plates, and the Seventh Circuit had upheld the state legislature's failure to issue a particular plate. Petitioners claimed that the legislature acted without guiding standards in violation of the First Amendment, and that the Eighth Circuit had invalidated similarly standardless legislative action in its recent decision. We responded that the Eighth Circuit's decision involved *administrative*, not legislative, action—a distinction we emphasized throughout our brief. And we supported that view, not only with language from the Eighth Circuit opinion, but with even more conclusive evidence from the trial and appellate court briefs in that case, all of which we found on-line. The briefs confirmed that the prevailing party in the Eighth Circuit argued the case exclusively in terms of administrative action, even stressing that plaintiffs were *not* raising an argument based on a legislative determination. Brief in Op., 2009 WL 2402031, at *28-29 (July 31, 2009). For us, that meant no split in authority between the Seventh and Eighth Circuits.

Insight from oral argument

Oral argument transcripts and recordings also may offer a window into the ensuing decision. In *Ryan v. Nationstar Mortgage*, 2015 WL 502941 (9th Cir. Feb. 5, 2015), for example, appellant's brief acknowledged an unpublished Ninth Circuit decision called *Junod* that—at first blush—seemed adverse to appellant's position. In contrast, an even earlier Ninth Circuit case, *Glaski*, favored appellant, who sought to show that the *Junod* panel would have reached the same outcome as the panel in *Glaski* but for one distinguishing fact, present in *Junod* but absent in both *Glaski* and *Ryan*. To make his point, appel-

lant was able to use the fact that "*Glaski* was heavily discussed at oral argument in" *Junod*. Brief of Appellant, 2015 WL 4380696, at *23 (July 13, 2015).

There may be pushback

Of course, even as oral argument transcripts, briefs, and other record matter has become easier to access, there remains something unorthodox in relying on such material to color the meaning of precedent. Accordingly, if you choose to go that route, be prepared for a possible rebuke from opposing counsel, as another Ninth Circuit appeal illustrates. In *Gable v. National Broadcasting Co.*, 438 F.App'x 587 (9th Cir. 2010), appellant relied on a district court decision in a case called *Fleener* to challenge the award of summary judgment for appellees. Appellees responded that the published decision in *Fleener* on which appellant relied referred, in turn, to several pages of discussion in a prior, unpublished order in that same case: "Thus, *Fleener's* reference to 'six common elements' . . . is shorthand for what was apparently at least eight pages of detailed substantial similarity analysis in the summary judgment order, analysis that was not reiterated in the cited published opinion and, thus, incapable of comparison to this case." Brief of Appellees, 2010 WL 6762790, at 52 n.21 (Nov. 12, 2010). Appellant fired back in an effort to rehabilitate *Fleener*: "Appellees attempt to distinguish this case by referring to purported facts not in the opinion itself. . . . This is a highly unusual and somewhat desperate attempt to distinguish a well-reasoned opinion which stands squarely on its own feet." Reply Brief of Appellant, 2010 WL 6762791, at 19 n.20 (Dec. 8, 2010). In short, although appellees

in *Gable* relied solely on the *Fleener* court's own reference to its prior, unpublished order—without quoting or citing anything from that order—the very notion that appellees would look beyond the four corners of the published opinion drew a spirited response.

* * *

Technological advances have brought about innumerable changes in appellate practice. Many—like electronic research and on-line filing—are part of our everyday professional lives.

But technology also exerts other, more subtle, influences on our practice, including ever-increasing ease of access to the filings and other materials underlying legal precedent.

**Many thanks to Evan Bianchi, a student at Northwestern University School of Law and former summer associate at Mayer Brown LLP, for his excellent research for this article.*

The Amicus Curiae Brief: Its Increasing Role and Impact on Appellate Court Decisions

By Katherine S. Barrett Wiik and Chelsea A. Walcker

Since the start of the twentieth century, the role of amicus curiae (“friend of the court”) briefs has changed dramatically. At the start of the twentieth century, amicus briefs were filed in only about ten percent of the U.S. Supreme Court’s cases¹ and were typically used to provide an impartial observer’s viewpoint on the case.² Since then, there has been a steep rise in the filing of amicus briefs before the U.S. Supreme Court, as well as a shift in the function of the briefs.³ Today, amicus briefs are commonplace and are increasingly influential on matters of public concern. Although most high-profile amicus briefs continue to be filed with the Supreme Court, there is a significant opportunity for amicus impact on other federal appellate courts as well as state appellate courts, where amicus participation is less common.

The use of amicus briefs

The rise of the use of the amicus brief has been largely credited to the pivotal role that the amicus brief played in the U.S. Supreme Court’s decision in *Mapp v. Ohio*, 367 U.S. 643 (1961).⁴ In *Mapp*, the American Civil Liberties Union (ACLU) argued that the Fourth Amendment⁵ protected against unreasonable searches and seizures, and that it applied to the states through the Fourteenth Amendment. The Supreme Court found the ACLU’s argument to be persuasive, and largely based its decision on the arguments of amici.⁶ Following the Supreme Court’s decision in *Mapp*, the use of amicus briefs increased significantly.⁷

During the 2014-2015 term, ninety-eight percent of U.S. Supreme Court cases had amicus filings (meaning all but one case).⁸ In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme

Court's landmark marriage equality ruling, a record 148 amici filed amicus briefs.⁹ That broke the previous record of 136 amici briefs filed in the companion health care cases challenging the Affordable Care Act in 2012.¹⁰ By contrast, amici averaged approximately one brief per case in the 1950s, before the *Mapp* case was decided.¹¹

Amicus participation

Historically, the United States government has played a large role as amicus in appellate matters, particularly at the highest appellate level.¹² The most common governmental representatives that file amicus briefs include the United States Solicitor General, attorneys general of the states, counsel of federal agencies, and counsel for county and municipal governments.¹³ As amicus, the Office of the Solicitor General, which represents the United States before the Supreme Court, is particularly active in Supreme Court cases. During the 2014-2015 term, the Solicitor General appeared as an amicus in thirty-three of the sixty-six argued cases.¹⁴ One of the reasons for the prevalence of governmental representation as amici is that the Supreme Court rules, along with the rules governing the courts of appeals, afford more discretion to the government when serving in the role of amicus.¹⁵ For example, the government, as amicus, is permitted to file without the consent of the parties, in contrast to all other types of amici.¹⁶

Increasingly, a growing number of legal observers have perceived amici as interest group lobbyists representing private interests.¹⁷ Although the Supreme Court and federal appellate rules require private persons or organizations to obtain the consent of both parties to file an amicus

brief, such consent is often granted.¹⁸ The top amicus participants during the 1976-2006 terms include the ACLU, the National Association of Criminal Defense Lawyers, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the International City Management Association, the Washington Legal Foundation, the Council of State Governments, the Chambers of Commerce, the National Conference of State Legislatures, and the AFL-CIO.¹⁹ Thus, while the federal government continues to participate as amicus in federal appeals, non-governmental entities are increasing amicus participants.

The role of amici

The amicus brief has also shifted in function over the past several decades. Judge Richard Posner of the Seventh Circuit Court of Appeals once famously quipped that the role of an amicus should be a "friend of the court," not a "friend of the party."²⁰ Although amicus briefs still serve to assist and inform the court, more frequently, they are actually written by a "friend of a party."²¹ In other cases, the amicus briefs represent distinct interests altogether, acting almost as a third party. However, while the amicus brief has evolved in function, a compelling amicus brief should still fulfill its original role as a helpful resource and respectful adviser to the court. But amicus briefs also serve to inform the court regarding competing policy issues, provide specialized or unique perspectives on issues, interest group endorsements, and supplement a party's brief, among other functions. Because amici may serve a variety of functions and represent a variety of interests, it

is customary for parties at the Supreme Court to file blanket consent to amicus briefs.²²

Counsel for parties in high-profile cases before courts that can experience a deluge of amicus filings should think strategically about amicus contributions. More is not always better. Courts overwhelmed by high volumes of amicus briefs may be less inclined to spend substantial time considering those that make the most compelling or helpful points. It may therefore be in the parties' best strategic interests to sometimes turn down certain amici who may wish to file amicus briefs. For example, in the high-profile U.S. Supreme Court case, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), Solicitor General Neal Katyal chose to accept only 37 amicus briefs out of a proposed 150 briefs because he did not want repetition and wanted to avoid blunting the impact of the strongest, most diverse amici.²³ Surveys of Supreme Court law clerks seem to lend support to such strategies: one survey of Supreme Court law clerks reveals that the more amicus briefs that are filed on the merits, the greater the chance that the valuable ones will get lost in the shuffle.²⁴

Today, amicus briefs are also used to affect whether petitions for certiorari are granted, in addition to influencing the court's decision on the merits.²⁵ Amici commonly write amicus briefs both in furtherance of and in opposition to the granting of a writ of certiorari.²⁶ Based on studies of the effect of amici filings at the cert level, it is clear that the interest of amici can be a factor in the court's decision to grant review. For example, during the 2005-2006 term, the presence of at least one amicus brief supporting a cert petition increased the odds of cert being

granted by twenty percent.²⁷ The odds of review jumped to fifty-six percent if four or more amicus briefs supported the petition.²⁸ At a time when the number of cert petitions is increasing, while the number of cases the Supreme Court actually accepts is decreasing, it is imperative to find ways to elevate a cert petition to the Court, and amicus briefs may provide an effective solution.²⁹

The impact of amici on appellate courts

Over the past several decades, the role of amici has transformed appellate practice. The filing of amicus briefs is now commonplace in federal and state appellate courts and is particularly prevalent in matters of public concern. Although the effects of amicus submissions are difficult to evaluate, appellate courts, particularly the Supreme Court, cite to amicus briefs with increasing regularity.³⁰ Amicus briefs can present arguments not found in the parties' briefs and can play a critical role in appellate courts' rationale for a decision.³¹ In some cases, courts will base its decision solely on arguments presented in an amicus brief.³²

As a byproduct of the changing role of amicus briefs, the workload of appellate courts has increased significantly.³³ Amicus briefs were filed in ninety-six percent of all Supreme Court cases during the 2013-2014 term, and in ninety-eight percent of all cases decided during the 2014-2015 term.³⁴ Although perspectives within the legal community about the utility of amicus briefs vary, the most common reaction among judges is supportive based on the assistance they can provide to the court in its deliberations.³⁵ For example, Justice Black wrote that

“most of the cases before [the Supreme] Court involve matters that affect far more than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against amicus curiae briefs.”³⁶ Others consider such filings as imposing unwarranted burdens on judges and their staffs.³⁷ For example, Judge Posner has argued that the court should be more restrictive towards amicus submissions because “judges have heavy caseloads . . . and [therefore] wish to minimize extraneous reading.”³⁸ Surveys also reveal that former Supreme Court clerks believe that most amicus briefs are duplicative, and find that a truly useful amicus brief was like finding “diamonds in the rough.”³⁹ Although amicus briefs may have increased appellate courts’ workloads, most judges remain supportive of amici participation.⁴⁰

Takeaways

The participation of amici and the function of amicus briefs have changed dramatically in the past century. Amicus briefs have clearly become an important phenomenon in appellate litigation. Despite the increased burden placed on courts due to increased amicus filings, amicus briefs continue to be requested and allowed in appellate courts because of the ultimate benefit that such briefs confer on the court.⁴¹ The fact that justices routinely cite amicus briefs suggests that they serve a helpful purpose in the court’s decisionmaking.⁴² Appellate practitioners are well served to consider a role for amici in appellate matters, particularly in matters of public concern, and look for opportunities to invite amicus participation that could be impactful not only before the U.S. Supreme Court

but in other federal appellate courts and state appellate courts as well.

¹ Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 744 (2000).

² Nancy Bage Sorenson, Comment, *The Ethical Implications of Amicus Briefs: A Proposal for Reforming Rule 11 of the Texas Rules of Appellate Procedure*, 30 St. Mary’s L. J. 1219, 1220 (1999).

³ See Sorenson, *supra*, at 1230.

⁴ See Sorenson, *supra*, at 1229.

⁵ See Sorenson, *supra*, at 1229; Ernest Angell, *The Amicus Curiae: American Development of English Institutions*, 16 Int’l & Comp. L.Q. 1017, 1036 (1967).

⁶ See Sorenson, *supra*, at 1229.

⁷ See Sorenson, *supra*, at 1229; Kearney & Merrill, *supra*, at 743.

⁸ Anthony J. Franze & R. Reeves Anderson, *Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm*, Nat’l L. J. (Aug. 19, 2015).

⁹ Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. R. 1901, 1911 (2016).

¹⁰ Larsen & Devins, *supra*, at 1911.

¹¹ Anthony J. Franze & R. Reeves Anderson, *Justices Are Paying More Attention to Amicus Briefs*, Nat’l L.J. 11 (Sept. 8, 2014).

¹² See Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* 1–2 (2008); Sorenson, *supra*, at 1231.

¹³ Sorenson, *supra*, at 1231–32.

¹⁴ See Larsen & Devins, *supra*, at 1932.

¹⁵ See Sup. Ct. R. 37.4; Fed. R. App. P. 29(a); Karen O’Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 Just. Sys. J. 35, 37 (1983).

¹⁶ Sup. Ct. R. 37.4.

- ¹⁷ See Kearney & Merrill, *supra*, at 783.
- ¹⁸ Sup. Ct. R. 37; Fed. R. App. P. 29.
- ¹⁹ See David Hooper Scott, *Friendly Fire: Amicus Curiae Participation and Impact at the Roberts Court*, Diss., Univ. Tenn. 22 (2013).
- ²⁰ See *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); Larsen & Devins, *supra*, at 1912.
- ²¹ Sorenson, *supra*, at 1231; John Howard, *Retaliation, Rein-statement, and Friends of the Court: Amicus Participation in Brock v. Roadway Express, Inc.*, 31 How. L.J. 241, 256 (1988).
- ²² See Larsen & Devins, *supra*, at 1925.
- ²³ See Jonathan Mahler, *The Challenge: Hamdan v. Rumsfeld and the Fight over Presidential Power* 231–32 (2008); Larsen & Devins, *supra*, at 1925.
- ²⁴ Larsen & Devins, *supra*, at 1907; Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Pol. 33, 44–45 (2004)
- ²⁵ See Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and Its Effect on Certiorari*, 9 J. App. Prac. & Process 175, 176–77 (2007).
- ²⁶ Sorenson, *supra*, at 1230.
- ²⁷ Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Geo. L.J. 1487, 1528 (2008).
- ²⁸ Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 Geo. L.J. 1487, 1528 (2008).
- ²⁹ Timothy S. Bishop et al., *Tips on Petitioning for Certiorari in the U.S. Supreme Court*, The Circuit Rider 28 (2007).
- ³⁰ See Larsen & Devins, *supra*, at 1907.
- ³¹ Kearney & Merrill, *supra*, at 745.
- ³² See, e.g., *Teague v. Lane*, 489 U.S. 288, 300 (1989); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 368 n.3, 382 (1977); *Mapp v. Ohio*, 367 U.S. 643, 646 n.3 (1961); see also Kearney & Merrill, *supra*, at 745.
- ³³ Sorenson, *supra*, at 1230.
- ³⁴ Larsen & Devins, *supra*, at 1911.
- ³⁵ Kearney & Merrill, *supra*, at 745.
- ³⁶ John Harrington, Note, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 Case W. Res. 667, 677 (2005); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 715 (1962).
- ³⁷ Kearney & Merrill, *supra*, at 745.
- ³⁸ *National Organization for Women v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000); Harrington, *supra*, at 677.
- ³⁹ Lynch, *supra*, at 45.
- ⁴⁰ See Kearney & Merrill, *supra*, at 745.
- ⁴¹ Sorenson, *supra*, at 1230.
- ⁴² Kearney & Merrill, *supra*, at 757.

An Emerging Value of Oral Argument in the Electronic Age

By Ellie Neiberger

Over the past few decades, there's been much discussion about the value of oral argument in modern appellate practice. Most of the discussion has focused on how oral argument is becoming less and less important. There is a downward trend in the number of appeals in which argument is granted and in the length of time allotted to each side in cases where argument is heard.¹ There is no question that briefs have played an increasingly important role over the past several decades. This has caused scholars and practitioners to question whether oral argument has any effect on how appeals are decided.

While the significance of written briefs cannot be understated, the changing way in which judges read briefs may create a new value for oral argument. Over the past several years, many judges have transitioned from reading briefs in paper format to reading them electronically on a laptop or tablet screen. The number of judges who read briefs exclusively in electronic format will only increase in the future.

Reading on screen is different from reading paper in ways that make it more difficult to understand and retain information.² The first way reading on electronic media affects reading is by changing the reader's working environment.³ Tablets, laptops, and remotely accessible filings give judges mobility, allowing them to work from home, on vacation, and other places that are more prone to distractions than the office. Furthermore, electronic media is itself designed

for multi-tasking. Computers and tablets allow users to have multiple programs open at the same time and switch between them.⁴ Email programs and social media pages generate alerts for new messages and other notifications.⁵ On average, it takes 64 seconds to recover from each email interruption.⁶ The bottom line is that judges who read briefs on electronic media have many things competing for their attention and rarely read without interruption

In addition to a reading environment filled with distractions and interruptions, screens are just harder to read than paper. Studies show that people read 10 to 30 percent slower when reading word for word on screen than on paper.⁷ For this reason, people simply skim text instead of reading word for word.⁸ They scan down the left side of the page, reading more words on the top left corner, and reading the least amount of words on the bottom right corner. Reading on a screen is also nonlinear.⁹ Screen readers often jump around in search of the type of information they are looking for, which makes it easier for them to become disoriented and completely miss certain pages or sections. The lack of physical pages also makes it more difficult to understand a document's structure and logic.¹⁰

Of course, appellate practitioners should be mindful of the challenges judges face when reading on screen and take steps to prepare briefs in a way that maximizes readability on screen. However, counsel cannot eliminate everything that reduces reading comprehension when reading in electronic format, such as the distractions, interruptions, and physical differences in eye movements.

Oral argument may very well be the only time the case has the judges' sustained, undivided attention. While the judges' questioning often dictates the matters that are discussed in oral argument, advocates usually have at least some window to communicate the information they consider most important to the case. Therefore, oral argument could provide a valuable opportunity to ensure that a particular issue (which may have been overlooked due to the nature of screen reading) is brought to each judge's attention.

¹ Michael Duvall, *When is Oral Argument Important? A Judicial Clerk's View of the Debate*, 9 J. APP. PRAC. & PROCESS 121, 122 (2007), available at <http://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1294&context=appellatepracticeprocess>.

² E.g., Robert B. Dubose, *Legal Writing for the Rewired Brain: Communicating in a Paperless World* 1, 3-6 (2010), available at http://www.texasbarcle.com/Materials/Events/10949/140308_01.pdf For a thorough discussion on how screen reading is different from reading on paper, see Maria Perez Crist, *The E-Brief, Legal Writing for An Online World*, 33 N.M. L. Rev. 49, 68-78 (2003).

³ Dubose, *supra* at 1-4.

⁴ *Id.* at 4.

⁵ *Id.*

⁶ *Id.* (citing Thomas Jackson, et al., *The Cost of Email Interruption* 5 (2001), <http://interruptions.net/literature/Jackson-JOSIT-01.pdf>).

⁷ *Id.* (citing Sri H. Kurniawan and Panayiotis Zaphiris, Wayne State University, *Reading Online or on Paper: Which is Faster?* pt. 4 (Aug. 2001), http://users.soe.ucsc.edu/~srikur/files/HCI_reading.pdf); Farris Jabar, Scientific American, *The Reading Brain in the Digital Age: The Science of Paper versus Screens* (Apr. 11, 2013), <http://www.scientificamerican.com/article/reading-paper-screens/>.

⁸ Dubose, *supra* at 4-5 (citing Jacob Nielsen, *F-Shaped Pattern for Reading Web Content* (Apr. 17, 2006), http://www.useit.com/alertbox/reading_pattern.html); George Buchanan & Tom Owen, Information Interaction in Context Symposium, *Improving Skim Reading for Document Triage* 83, 83-84 (ACM 2008), available at <http://cs.swan.ac.uk/~cstomo/publications/IliX08.pdf>.

⁹ Dubose, *supra* at 6 (citing Smashing Magazine, *10 Principles of Effective Web Design* (Jan. 31, 2008), <http://www.smashingmagazine.com/2008/01/31/10-principles-of-effective-web-design/>).

¹⁰ Crist, *supra* at 71, 74.

Appellate Advocacy in the Digital Age: Adapting Your Written Advocacy to a Digital Audience.

By Ryan Marth and Luke Hasskamp

Know your audience. Nearly all lawyers and most non-lawyers have heard this admonition at some point in their lives. For appellate advocates, the implications of knowing one's audience have always been straightforward; we write briefs for judges with decades of experience in the law and their law clerks who led their classes at the nation's top law schools. And our audience consumed our legal prose in neatly printed, bound briefs, which they proceeded to thumb through, annotate, and occasionally stain with coffee.

Since the release of the iPad in 2010, at least part of this scenario has changed. It should surprise nobody that today's law clerks—many of whom were 18 years old at the iPad's release—are comfortable reading long texts, such as legal briefs, on tablets. But you may be surprised that many appellate judges have also adapted to new technology. For Hon. Richard C. Wesley of the Second Circuit, the iPad was a “game changer,” which has allowed him to “work from anywhere” with WiFi access. Judge Wesley added that not only does he use his iPad “all the time,” but so do many of his fellow judges.:

One thing that has not changed, however, is the volume of material that appellate judges and law clerks are asked to consume. The Seventh Circuit Practitioner's Guide estimates that a typical judge can have 1000 pages of material to read for a typical day's argument section.

Thus, appellate advocates are now tasked with making their work visually appealing and memorable on a medium that many are unaccustomed to writing for. This, according to the Seventh Circuit's Practitioner's Guide, clearly encourages the advocate to “mak[e] [his or her] briefs typographically superior.” The Guide adds that, while improving the appearance of briefs “won't make your arguments better... it will ensure that judges grasp and retain your points with less struggle. That's a valuable advantage, which you should seize.”

This article heeds the advice of the Seventh Circuit and explores the implications of e-briefing, while offering some practical tips for making briefs more readable on digital media.

Times New Roman's time has passed

Many lawyers default to Times New Roman font when composing text. But the reality of writing for digital readers should cause us all to rethink this habit.

Times New Roman gets its name from the New York Times, which adopted the font in the 1930s. At that time, the newspaper sought to make text readable while squeezing as many words as possible into a newspaper with a finite number of pages, columns, and lines. Now that most appellate courts (and many district courts) have moved from page limits for briefs to word limits, there is little reason to continue using a font designed to meet the challenge of finite space.

The case for abandoning Times New Roman is even stronger in the age of digital readers. Despite the improvement in screen resolution, most e-readers are still unable to display text at a resolution that matches that of a laser printer. This means that smaller, more tightly spaced fonts such as Times New Roman are more difficult on the eyes than wider fonts. In the course of a 14,000-word brief, small differences in readability can make a large impact on the reader.

So what is an appropriate replacement for Times New Roman? Advocates are somewhat restricted by appellate-court rules, which generally require brief text to be written in a font that contains serifs—the small “hooks” on the ends of letters in fonts such as Times New Roman. Among serif fonts, several options exist that can make an appellate brief more visually pleasing to its reader. Book Antiqua, Century Schoolbook, and Bell MT are widely available options that resemble fonts frequently used by book publishers. But while courts may require brief text to be in a serif font, the same restriction often does not apply to section headlines, which opens up for the use of non-serif fonts such as Calibri or Franklin Gothic Book. These less commonly utilized fonts improve readability by further breaking up the monotony of text on the screen.

Use headings, sub-headings, and sub-sub-headings

Headings improve the navigability of a brief by providing signposts for the reader, which is especially true for documents in electronic format. And because many judges and law clerks read a brief’s table of contents first, descriptive head-

ings turn the table of contents into an executive summary of sorts that educates the reader on the substantive points that the brief will make. Headings are especially beneficial to readers of e-documents, as they divide the brief’s key points into more easily digestible chunks and help the reader keep track of where he or she is in the document.

Lists and bullet points can be powerful

The use of lists and bullet points is a simple but powerful way to present a key point in an easy-to-digest format. Lists and bullet points also help break up blocks of text, including long sentences and long paragraphs.

- Lists and bullet points give the eye a needed break from the ordinary block of text in full paragraph form.
- Lists and bullet points present the writer’s key points in a format that is easy to comprehend; and
- Lists and bullet points provide alternative structures that give readers visual cues about relationships among facts or concepts.

Don’t be afraid to use graphics

Regardless of the medium, readers’ eyes gravitate toward pictures, tables, and graphs. This effect is even more pronounced on electronic devices, whose users are accustomed to viewing several images in a short time span. While bound and printed briefs constrained earlier generations of appellate lawyers from making extensive use of graphics in their briefs, those previous constraints have largely disappeared

with electronic filing and e-readers. Moreover, contemporary word-processing software makes it easier than ever to incorporate graphics into briefs in an attractive and persuasive manner. Thus, in appropriate circumstances, advocates should consider using a trial exhibit, verdict form, chart, or table to make a point without using large amounts of text.

Create extra white space

The use of white space is another powerful technique to keep in mind as writer prepares any brief, but especially for the e-reader. Many e-devices are much smaller than the 8.5 x 11 inch paper on which printed briefs typically appear. This means that some of the white space you create for an 8 ½ x 11 sheet of paper will disappear when that sheet is converted to the tablet format. This additional white space often has additional utility of making the brief more navigable by making it easier to scroll through.

Avoid footnotes

Legal-writing experts have long discouraged the use of footnotes for substantive arguments. Footnotes are even less desirable on e-readers, where the reader must often scroll extensively in search of the footnote, potentially losing his or her place when returning to the body of your brief.

Know the Rules

In this article we make suggestions that run contrary to how some appellate lawyers have presented their written work product for many years. While adopting our suggestions may help make your work more visually appealing to its

audience, aesthetics are no use if they run contrary to the rules of the court you are practicing in. Thus, before making any changes to your tried-and-true templates, it is imperative that you understand the rules of the forum in which you are practicing. Some may require that font be 12- or 13- point rather than “at least” a certain size. Some may mandate Times New Roman. Others may not permit the adjustments in spacing that we suggest to make briefs more readable by increasing white space. Be sure that, however you adapt your writing style, it not run afoul of the court’s rules.

Conclusion

Digital devices have already changed the practice of law dramatically. A wise lawyer adapts to these changes rather than assuming his or her daily life is unaffected. And an even wiser lawyer realizes that he or she is not alone – courts and judges are adapting too. Get on the bus or be left behind.

<http://abovethelaw.com/2014/08/todays-tech-a-federal-judge-and-his-ipad-part-1/>

Ethics and the Record on Appeal: Webinar Recap

By Nancy M. Olson

On March 21, 2017, the Council of Appellate Lawyers presented a successful ABA webinar entitled *Appellate Ethics Review: The Scope of the Record on Appeal and Responding to Media Inquiries About Your Appeal*. After moderating the program, I was asked to share its substance with readers unable to attend the live program. I believe the program succeeded for two reasons: the timeliness and usefulness of the subject matter, and the knowledge and preparation of the distinguished panelists. The panel comprised practitioners from a broad spectrum of the legal profession, which added depth of perspective and insight to the discussion. The panel included Justice Steven David of the Indiana Supreme Court; Amber Hollister, General Counsel to the Oregon State Bar; and Jan Jacobowitz, Director of the Professional Responsibility and Ethics Program and Lecturer in Law at the University of Miami School of Law.

The webinar had three learning objectives: (1) analyze the ethical rules implicating the scope of the record on appeal; (2) discuss evidentiary and ethical rules governing judicial expansion of the record on appeal; and (3) review ethical rules governing lawyer communications with media regarding issues on appeal. Ms. Hollister set the framework for the discussion by reviewing the model rules implicating the scope of the record on appeal. First, Ms. Hollister noted that Model Rule of Professional Conduct (MRPC) 3.3, governing candor toward the tribunal, is, at its core, about being truthful to the court regarding the record. More importantly for appel-

late lawyers, it also requires lawyers to correct any mistakes or false statements about the record. Next, MRPC 3.4, admonishes lawyers to follow court rules and prohibits lawyers from knowingly disobeying them. It is, however, permissible to make a non-frivolous argument that something should be included in the record. Next, MRPC 3.5 contains a general prohibition against ex parte conduct intended to disrupt a tribunal. Lawyers should take care not to violate this rule while appellate cases are pending, which can be a long time. Lawyers should avoid making statements about pending cases that might reach judges directly or indirectly.

After a summary of the rules, Justice David weighed in on candor and impartiality. He explained that the rules significantly affect the scope of the record on appeal because judges want to make the best decision they can, based solely on the record on nothing extraneous to the record. If lawyers stray from the rules, they could find themselves in an ethical dilemma up to and including an ethical complaint. For example, Justice David noted that Indiana had a case involving an attorney who supplied an inadequate appellate record. The court issued an order to show cause regarding the inadequacy, to which the lawyer responded by improperly expanding the argument and including improper material in the record. In the resulting opinion, the court politely called out the lawyer on this problem, which led to an investigation and prosecution. The court recently agreed to a conditional resolution of the matter with a public reprimand. Justice David advised, let this example be a lesson that attorneys must stay mindful of improperly expanding the record on appeal.

Turning to MRPC 3.4 regarding fairness to opposing counsel, Professor Jacobowitz explained that the rule applies not only in the trial and discovery context. Part of the rule prohibits lawyers from citing to evidence outside of the record. It also applies in the appellate context with respect to professionalism and civility among counsel. Maintaining decorum falls under the umbrella of being fair. Justice David agreed, the fewer distractions and diversions created by counsel (intentionally or unintentionally) the better off they will be. Of course, this is not to say judges don't expect to hear some civil disagreement about what the record reflects. Thus, it is very important to state in your argument, with specificity, and explain what supports the argument and where it can be found in the record. Corrections and clarifications in response to opposing counsel's representations can and should be done with professionalism and civility to opposing counsel.

Next, the panel turned to consider ways to expand the record on appeal without violating these ethical rules. Ms. Hollister explained that following the rules helps lawyers build credibility with the court. Understanding your obligations under the rules will help the panel trust you and foster civil arguments. If you merely need to correct the record on appeal, you should study the requirements of Federal Rule of Appellate Procedure 10(e). You should also consider the appropriate forum before which to raise the error and seek correction (*e.g.*, trial court or appellate court). Lawyers may find themselves in a conundrum when they want to reference an essentially undisputed fact but its source is not readily found in the record. Federal Rule of Ev-

idence 201 governs judicial notice and this issue. To seek judicial notice, Ms. Hollister explained you must clearly state the fact and demonstrate that it is not reasonably in dispute and can be found in sources whose accuracy cannot reasonably be questioned. Lawyers should avoid asking courts to take notice of things that are in dispute. We don't want appellate courts sitting as fact finders thereby depriving the intended fact finder (*i.e.*, trial court or jury) of the opportunity to resolve a disputed fact. Finally, Ms. Hollister provided a warning to lawyers who want to cite online or non-record sources: think carefully about whether the citation implicates Rule 201 or whether you are really attempting to make an indirect correction or modification of the record. Even where the practice of law is modernizing and we may think of online sources as part of our collective existence, local rules may strictly control such practices. For example, in some circuits you cannot even cite unpublished decisions issued before a certain date. In sum, be mindful of citing to appropriate material and ask for the required notice or modification as needed.

The panel next examined the view from the other side of the bench. Courts are not immune to the impulse of searching for information online. To illustrate this point, participants were asked to participate in a live poll regarding four hypothetical judicial search scenarios by selecting which of the four did *not* occur. The correct answer, selected by more than half of participants, was a judge searching for the value of an item on eBay. In this internet age, the other proposed answers did in fact occur, including searching for the definition of "gansta rap," citing an

online dictionary for the meaning of “goth,” and searching to determine if Chinese banks are open on Sunday. This poll was not intended to imply that any of the searches were improper, but rather to illustrate that the impulse to look online for helpful information is not limited to attorneys.

Turning to the parallel rules governing judges, Justice David explained the applicable rules and discussed how he balances them with the demands of daily work. Canon of Judicial Conduct (CJC) 2.9(A)(3) and (C) govern *ex parte* communications, and subsection (c) in particular is the heart of the ongoing debate. The rule provides that a judge shall not investigate facts independently. The challenge for judicial officers is balancing appropriate judicial notice with avoiding investigations of disputed facts or improperly supplementing the record. As lawyers try to introduce more extra-record and internet-based information, this increases the challenge for judges. Next, judges should consider CJC 2.4 regarding external influence on judicial conduct, and CJC 2.3 governing bias and prejudice of judges. Conducting independent judicial research might bolster your position regarding case outcome, but it also leans toward advocacy and away from serving as an impartial judicial officer. From an institutional perspective, we want to maintain trust in the process and know the rules of the game. From a judicial perspective, judges may want to educate themselves to become more comfortable or knowledgeable on certain subjects, and the debate regarding where the line should be drawn continues.

Along these lines, Professor Jacobowitz described a recent case where judicial research ap-

parently affected the outcome of a case. In *Mitchell v. JCG Industries*, No. 13-2115 (7th Cir. Mar. 18, 2014), a Fair Labor Standards Act case, employees at a poultry processing plant claimed the employer violated overtime pay requirements by not compensating them for time spent donning and doffing required sterilized work uniforms before and after their lunch breaks. The plaintiffs appealed to the Seventh Circuit and Judge Posner sat on the appellate panel. While considering the case, he and his law clerks timed how long it takes to put these close on and take them off. Judge Posner concluded that the 15 minutes alleged by the employees in the trial court was incorrect; rather, it took only about two minutes. The panel upheld the denial of overtime wages in favor of the employer. The dissenting judge expressed shock at this technique, but Judge Posner said he was using common sense and satisfying a curiosity rather than determining an adjudicative fact. He explained he was using intuition. This case highlights the delicate balance between a judge wanting to apply common sense and unilateral judicial expansion or looking outside of the record.

Justice David recommended that parties do their due diligence on where and how a case will be heard and understand the role of judges and law clerks. If he received a similar case he would be more inclined to agree with the view expressed in the dissenting opinion. Justice David explained he was a trial judge for many years and he lacked the time or desire to act as a proxy lawyer. He strove to make decisions based on the facts before him. If a case was lacking something, that might be reflected in the decision, but he was not comfortable filling in the

blanks on his own. He also noted there is a big difference in researching facts to determine if some evidence is more credible than others, but an occasional Google search to find a definition or background information on a particular topic is understandable. For example, the Indiana Supreme Court has issued a couple of opinions in the last few years referencing inconsequential Google searches in footnotes (*e.g.*, a brief search showed that Mr. X was the director of a company). Such information was not determinative of any disputed issue, but merely provided a helpful background fact. A prudent approach for a judge who feels he or she lacks needed information is to ask for supplemental briefing to allow the parties to provide the missing information.

I asked the panelists if they had any advice regarding what to do if it becomes apparent a judge or panel has conducted extra-record researched. Ms. Hollister responded that she has seen successful lawyers offer supplemental briefing on a topic that appears to be of interest to the panel during oral argument. To be a good appellate lawyer you have to be a good listener. Thus, if you hear a question that has not been addressed by the briefs, offer to fill in the gaps. Justice David suggested lawyers maintain a deferential attitude, acknowledge the area of confusion, clarify what the judges are looking for, share in the responsibility for the confusion, and offer a solution. Whether this issue becomes apparent at oral argument or from a written decision, you should conduct a “red, amber, green” analysis regarding the importance of the issue. Does the panel’s misunderstanding hurt you? If the impact is minimal and it did not affect the

outcome, let it go. If it really hurts your case, consider a request to reconsider, but remember if you’re going to take a kill shot, you’d better have a kill shot. If you find yourself in this situation, present the request gently so as not to offend the reader. Professor Jacobowitz added that if you find yourself in the “red” zone, you need to balance making a record to preserve your position and protect your client with addressing the issue in a respectful way. Offering more information can be helpful to clarify the problem.

A webinar participant asked the panel whether it would be proper for a court to take judicial notice of other decisions by a magistrate court where that court had dismissed similar cases for lack of jurisdiction? The panel agreed that it was unclear whether those decisions are both applicable and indisputable. Although more information was needed, as a litigant or a judge, you should ask what difference does the notice make (*e.g.*, is it procedural such that it ends the case without an opportunity to litigate, does it limit admissibility of documents). Hypothetically, if taking judicial notice ended the case, the next step may be a motion for reconsideration. Lawyers can miss golden opportunities with such motions by laying out to the judge, not what the judge did wrong, but how this result occurred and how it can be remedied. Fall on the sword a bit and say here is where we went wrong, let me fix it by laying out more information or a better explanation.

Turning to media attention of appellate issues, Ms. Hollister noted that times are changing from the days when the people following appel-

late cases were only Nina Totenberg on NPR and a handful of appellate lawyers. Lately big appellate cases have become more general interest, with the recent example of the travel ban case heard by the Ninth Circuit and live streamed through the court's website, as well as through a number of popular media outlets such as CNN and MSNBC. Although livestreaming oral arguments is typical practice for the Ninth Circuit, it is still rare for other courts and media outlets. This oral argument in particular attracted a massive audience. On one hand, Ms. Hollister noted this is a great way to educate the public on the work of the judicial branch, but on the other hand it can create additional rifts caused by intense scrutiny. Ethical implications come into play with heightened media coverage. Lawyers should consult MRPC 3.6 regarding trial publicity, which is also applicable to appeals. At its heart, the rule is about avoiding prejudice to an ongoing proceeding. It bars a lawyer participating in a matter from making extra-judicial statements that the lawyer reasonably knows will be disseminated through the press that are likely to prejudice the proceeding. It is an important rule to protect the integrity of the system.

Relatedly, MRPC 3.8(f) is a special rule applicable to prosecutors. It places a heightened requirement on prosecutors regarding extra-judicial statements that have a high likelihood of prejudicing the matter. For example, a statement regarding the prosecutor's belief of the guilt or innocence of the defendant would violate this rule.

On the other side of the bench, CJC 2.10 places restrictions on judicial comments regarding

pending and impending cases. It has the same underlying public purpose: we don't want to affect the outcome of the case or create a perception of bias in a case before the court. We want to encourage public trust in the judiciary.

These rules implicate lawyers' and judges' free speech rights. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), however, the Supreme Court upheld the crux of the rule, explaining that lawyers can be limited in speaking to the press based on the substantial likelihood of material prejudice. Ms. Hollister advised that although it has become common practice for media outlets to ask lawyers for their opinions in high profile cases, ongoing ethical obligations should not be forgotten.

Against the backdrop of these obligations, I asked the panel how lawyers may ethically respond to media inquiries or make public statements (e.g., on a blog) on issues of public importance. Professor Jacobowitz acknowledged the First Amendment concerns, but she makes it her practice when teaching on this topic to explain that part of the privilege of having a law license is giving up a bit of First Amendment rights. For example, lawyers must also keep the confidentiality of their clients as well as follow the rules regarding publicity. A permissible response will differ depending on whether you're involved in the case. If you are not, you may have more leeway to speak about a topic of general interest. If you are involved, you need to keep it close to facts in the public record to stay compliant with MRPC 3.6 even in the appellate context. Professor Jacobowitz recommended avoiding statements that could be seen as an attempt to influence the panel. Even if you are not

involved and you simply want to comment on social media, you still have duties under MRPC 8.2, which is essentially codification of a defamation standard in the professional responsibility context (*i.e.*, you may not make knowingly false statements about the lawyers and judges involved).

Regarding whether this issue comes up on the bench, Justice David noted that he supports CJC 2.10 and occasionally uses it as a shield. Most courts have a Press Information Officer and protocol regarding when judges should pick up the phone to get help handling the media. He loves to talk to organizations and discuss the judicial process but is mindful of the fine line between talking about general principles versus actual cases. He finds it easiest to explain the ethical constraints up front and explain why this rule is important. He makes it a practice to stay far away from that line. Even though it may be difficult, it is better to always take the high road. Justice David concluded by saying judges can get themselves in trouble when they don't think it through or "phone a friend" for further advice; sometimes if you speak off the cuff information comes out that you will later regret.

I asked the panel what lawyers should do if a judge makes a public comment about a case. The panel agreed: first you should gather all of the facts, discuss your options with another attorney in your office, and you may need to speak with your client about the issue. Attorneys should assess the harm the comment may cause and ask whether the issue is important to the outcome of the case. If you conclude that something needs to be done, carefully analyze your desired outcome and the concurrent risks.

You might be able to address it informally if your goal is to affect future practices and prevent it from happening again. If you believe the comment has or will cause serious damage to your case, an applicable motion might be necessary. Before filing anything, you should ask whether you are comfortable with potentially triggering a complaint to be filed against the judicial officer. This should be the last resort.

Turning to completed cases, Justice David explained he has no problems talking with an attorney about a case after the appellate process has been exhausted. It can be a useful discussion to learn what worked and didn't work. He does not reveal in-chambers private conversations, but welcomes attorney comments on the opinion and what unanswered questions remain. He does not want to discuss things in terms of an issue that could be filed in another upcoming case, but general discussions might help improve the practice in later cases. Constructive criticism can be useful. He thinks it's very important to do this, but always know your audience. Judges have different philosophies. A different judge could take personal offense to this kind of dialogue.

Professor Jacobowitz explained this area remains in flux because of the proliferation of social media and the related First Amendment concerns. Judges must balance the duty to educate with the duty to remain impartial and unbiased, a balancing act implicated more frequently for judges active on social media. For example, in a recent Texas case, a judge was admonished for her attempts to educate the public about an ongoing trial through Facebook. The judge appealed the admonishment and pre-

vailed in a trial de novo on First Amendment grounds. Professor Jacobowitz noted this case presents a question likely to come up in other cases as social media use becomes more prevalent: is a particular use of social media with the goal of educating the public permissible as a new manifestation of traditionally permissible conduct, or does it cross the line?

Turning back to lawyers, Ms. Hollister offered an example of an attorney speaking with the media that led to court scrutiny and a concern of improperly injecting non-record material. In *Rodriguez v. Robbins*, 803 F.3d 502 (9th Cir. 2015), at oral argument a lawyer made reference to a 3-day old news article. The panel issued an order to show cause asking the attorney to explain her citation to this non-record material and to show whether government attorneys planted the contemporaneous story to try to influence the panel. The panel also expressed concerns regarding the accuracy of the article. The panel noted the attorney failed to seek judicial notice of the article. It further explained that, in any event, the article was not proper subject matter for judicial notice because its representations were not generally known or its accuracy readily determinable. Ms. Hollister cautioned that lawyers should be particularly cautious in comments made during oral argument. First and foremost, stick to what's in the record. Just because something has been published in the newspaper does not transform that material into proper content for judicial notice. Journalists can make mistakes and there could be inaccuracies, as was the case in *Robbins*. In *Robbins*, after reviewing the attorney's response, the panel concluded the government had not planted the story to influence the panel and thus did not sanction the attorney.

This discussion prompted a participant question regarding writing an article on a *completed* case. The participant asked the panel to discuss any ethical issues. Professor Jacobowitz responded that client confidentiality is the main concern. Even though something is part of the public record, it doesn't necessarily alleviate your duty of confidentiality to the client. If it's a particularly high-profile case and a lot of information is already in the public record you may have a bit more flexibility, but the best practice is to ask first for your client's consent. Ms. Hollister added that attorneys should remember the duty of confidentiality is greater in scope than the attorney-client privilege. If it would be embarrassing to your client to have you tout their major loss, for example, this should be relevant to your decision about writing and publishing an article. Professor Jacobowitz further advised that confidentiality rules vary slightly state-by-state. Some states maintain the old rule which focuses on avoiding client embarrassment and secrets, with other states adopting the more contemporary rules that captures everything learned in the course of a representation.

To conclude the program, Professor Jacobowitz walked participants through live polling questions posing hypotheticals on attorney statements to the media. In sum, the hypotheticals illustrated that law students working as summer clerks must be supervised by attorneys so the clerks' conduct is consistent with the rules regarding media interaction (see MRPC 5.1-5.3); and, an associate attorney speaking to a reporter about an ongoing case and lodging insults against the judge and opposing counsel in her blog violated the rules (see MRCP 8.2). She

should also be supervised and subject to a firm social media policy.

At the end of the program, a participant asked about best practices for amicus brief authors speaking to the media. Justice David noted the same question implicated in direct representation cases: are you trying to educate the public about the point of the representation or the interest involved? If so, this is different than trying to interact or interfere with the judicial process. Ms. Hollister noted that amicus authors must also follow MRPC 3.6 regarding trial publicity. Professor Jacobowitz concluded by explaining that since amici must identify who they are and what interest they have, they may have more latitude to comment on the position taken in the brief. The best practice, however, is to stay away from the media because you won't risk being misquoted.

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