

Appellate Issues



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Judicial Narratology: What Appellate Lawyers and Judges Can and Should Learn from Hollywood

By Devin C. Dolive

The 2017 AJEI Summit went to Southern California, home of the entertainment industry. In return, the entertainment industry came to the AJEI Summit – and in the flesh, at that. This year’s Summit attendees heard from Jonathan Shapiro, a scriptwriter, producer, and attorney. He shared video clips from his current series, *Goliath*, and shared clips of William Shatner playing Denny Crane in *The Practice/Boston Legal*. But Shapiro’s presentation at the AJEI Summit did not consist merely of Hollywood “war stories.” He had a vital point to get across to the lawyers and judges in attendance: stories matter.

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Editors’ Note

Although the 2017 Summit may feel like a distant memory, as the 2018 AJEI Summit quickly approaches, we are proud to at long last publish the recap issue for last year’s Summit. For those of you who stared longingly at your inbox wondering when the next issue would arrive, we thank you for your patience and are pleased to announce the publication hiatus is over.

We are delighted to take the editorial reins as co-editors of Appellate Issues and look forward to many issues to come. We hope the individual voice of each author who contributed to this issue puts you in a Summit state of mind, piquing your interest to attend this year’s outstanding program – scheduled for November 8-11, 2018, in Atlanta, Georgia. As your new editors, we look forward to furthering your appellate practice by providing practice insights, sharing Summit stories when you are unable to attend, providing writing opportunities, and continuing the annual themed issue, allowing you to share your voice with and learn from your appellate colleagues across the country. If you would like to contribute an article, or have an idea for a future themed issue, please contact us. We look forward to hearing from you.

Nancy M. Olson & Wendy McGuire Coats

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Shapiro began his presentation by observing that at least three “big names”¹ in the television industry told him, years before the 2016 election, that Donald Trump would eventually become President. This was not clairvoyance. It arose from simple observation of television’s power to convey a message. Shapiro explained that, with *The Apprentice*, Trump spent sixteen years being beamed into people’s living rooms. On television, Trump had portrayed leadership. The subsequent 2016 presidential campaign, like every election, was a battle of narratives, and Trump apparently had the better story.

Bringing his presentation back on-topic for the audience of appellate judges and lawyers, Shapiro observed that every trial, likewise, is a battle of narratives. In any battle of narratives, the best story wins.

Shapiro thinks judicial opinions are the most important stories being told. The judge’s job in writing a judicial opinion is two-fold: affirm the rule of reason and affirm the rule of law. Today more than ever, there is a battle going on between fact and fiction. The focus groups Shapiro works with have never been more disillusioned than at present. People desperately desire affirmation of the rule of law. Shapiro challenged the judges in attendance, noting that, if they do not provide this affirmation, no one will.

In explaining a judge’s job, Shapiro deployed the fancy phrase “judicial narratology.” This phrase has a history. Judge Richard Posner, in a

1997 book review, identified (and critiqued) a “new movement” that he called “legal narratology.”² One editor of that book responded to Posner: “Narratology ... distinguishes between events in the world and the ways in which they are presented in narratives. *** [O]ne needs to recognize – as Posner I think doesn’t – that narrative is inevitable and irreplaceable: it is not an ornament, it is not translatable into something else.”³

Shapiro explained “judicial narratology” this way: law does not derive from Mount Sinai or from the “common law.” The law is only stories, and when writing opinions, judges have something to say that will change and affect lives forever.

Shapiro shared with Summit attendees a simple, three-step formula from the entertainment industry on how to tell a compelling story to reach today’s audience:

1. Use lots of visuals;
2. Make up the facts; and
3. Hire an Academy-award-winning cast.

Shapiro acknowledged that judges do not get to use this formula. A judge’s task is not easy. We live in an era of “big data,” and we expect a tremendous amount of information to be conveyed within a short period of time. Unlike Hollywood scriptwriters, judges do not get to make up the facts, and Academy-award-winning ac-

tors are not lining up to read judicial decisions aloud.

Many lawyers and judges have complained to Shapiro that his scripts do not present an accurate portrayal of the law. In response to such complaints, Shapiro made an offer: he will write more accurate scripts when judges write more entertaining opinions. While acknowledging the difficulty inherent in writing an interesting ERISA opinion, Shapiro maintained that the rules of writing are the same for judges as for Hollywood scriptwriters.

Shapiro explained that the best judicial writing is always personal; it is about more than being a “good writer.” With some judges, reading just two or three lines of an opinion will reveal who wrote it – and this is a good thing. Channeling Posner, Shapiro emphasized that each judge should find his or her own “voice.” As an example, Shapiro cited to these opening lines from an opinion by Judge Joel Flaum (in a case analyzing the Rules of Evidence, no less): “Tom York never made a dime from his investment in the Just Friends Lounge. Not even when he tried to collect the insurance money.”⁴

Shapiro shared four rules for judges writing opinions. **First**, concise is best. Opinions would be better if judges had word limits. **Second**, know your audience. Some appellate judges write to persuade the other judges on the panel; others write for posterity. **Third**, have someone you care about in mind as the audience. This helps make writing personal. **Fourth**, apply the rules of rhetoric. The canons of rhetoric are (1) invention, (2) arrangement, (3) style, (4) memory, and (5) delivery.⁵ While judges do not

have the luxury of invention, they can focus on the remaining four canons.

Regarding the need to have an audience in mind when writing judicial opinions, Shapiro had a suggestion for the judges in the room: if you do not know for whom you are writing, write for the Denny Crane character from *The Practice/Boston Legal*. Shapiro implied that, if you can write something that might persuade Denny Crane and still affirm the rule of reason and the rule of law, you can write something that will persuade anybody.

Shapiro also had a word of encouragement: nobody has ever kept a great story from being read. Law is stories, and the opinions that judges write are the collective story of humanity.

¹ “Big names” is the author’s phrase, not Shapiro’s. One of the three “names” Shapiro provided was that of his wife. While Shapiro was modest enough not to place his wife among the “big names” in the television industry, he did reveal that his wife had written the “Smelly Cat” song for *Friends*. In the author’s opinion, that is more than enough to qualify her as a “big name.”

² See Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737 (1997) (reviewing LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gershowitz eds., 1996)).

³ Peter Brooks, *Narrative Transactions – Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1, 2 & 5 (2005).

⁴ *United States v. York*, 922 F.2d 1343, 1345 (7th Cir. 1991).

⁵ See Scott Fraley, *A Primer on Essential Classical Rhetoric for Practicing Attorneys*, 14 LEGAL COMM. & RHETORIC 99, 108–12 (2017).

Accessing Legal News amid the Demise of Print Media

By Marco A. Pulido

Online legal blogs and the steps courts can take to make information more accessible were the topics of an engaging panel discussion titled, “Courts in the Age of ‘New Media.’” Howard Bashman—the founder of How Appealing,¹ the web’s first blog devoted to appellate litigation—moderated the panel discussion joined by an all-star panel: Adam Feldman,² the founder of Empirical SCOTUS;³ Professor Rick Hasen,⁴ the founder of Election Law Blog⁵ and a professor of law; and Professor RonNell Andersen Jones,⁶ a professor of law and former newspaper reporter and editor.

At the outset, Bashman set the stage for the panel discussion, describing technology as both the “villain” and the “hero” in the quest for obtaining news about judicial decisions and the courts. Bashman recounted one of last year’s panel discussions, which focused on the decline of print media, a decline that has generally continued. As Bashman highlighted, although news coverage for the U.S. Supreme Court continues to thrive, the same is not true for other appellate courts due to the diminishing number of reporters assigned to cover them. With this apt introduction, Bashman turned the discussion over to Feldman and Professor Hasen, who discussed how, and for whom, they started their respective legal blogs.

Professor Hasen started Election Law Blog after deciding the legal blog platform would be a better vehicle than email for conveying developments relating to election-law issues. Although

election law professors and practitioners were the initial target audience, journalists started following Professor Hasen’s Election Law Blog as well. Today, law professors and election-law practitioners are still the usual visitors, but traffic on the blog increases sharply when there are important developments related to election law. Indeed, Professor Hasen recounted a bitter-sweet occasion some time ago when his internet server crashed due to the crowds of people seeking to quench their thirst for developments about an election law-related issue.

Feldman started Empirical SCOTUS—a blog designed to look at contemporary and historical Supreme Court issues at an empirical level—after finding an audience who sought answers to empirical questions about the Court. Feldman’s legal blog, which makes empirical data accessible by making it easy to read and visually attractive, caters to legal practitioners and academics, as well as those interested in politics.

As a reader of legal blogs, Professor Jones applauded the efforts of those seeking to deliver legal news via online blogs. But Professor Jones underscored that the demise of print media is concerning nonetheless and she explained why: print media organizations, particularly newspapers, traditionally employed a reporter who covered the news about the courts and judicial decisions. The decline of print media has led to losing those reporters, and the news reports they produced. Because the general public is now less likely to learn the news from print media, the general public is also less likely to be inadvertently exposed to news about judicial

decisions. That is because, Professor Jones explained, the general public traditionally stumbled into news about the courts and judicial decisions as they perused through the various sections of a newspaper. She emphasized the importance of thinking about filling both the readership gap and the authorship gap occasioned by the decline of print media.

After this thoughtful exchange, Bashman transitioned to the second topic of the day: the steps state and federal courts can take to improve accessibility of judicial decisions and news about the courts. To set the stage, Bashman noted that the U.S. Court of Appeals for the Ninth Circuit broadcasts oral arguments on YouTube and that the U.S. Court of Appeals for the D.C. Circuit recently released a live recording of the oral argument in a high-profile case involving an immigrant teenager. Bashman then asked the panelists to share their thoughts.

The panelists offered various helpful suggestions. First, given the considerable difficulty of finding federal district court opinions and many state court opinions, courts could establish a “cases of interest” section on their websites—just like the U.S. Court of Appeals for the Ninth Circuit has done.⁷ Second, establishing electronic mailing lists allows those interested in certain cases to receive the judicial opinions and orders.

Third, lawyers themselves can share hard-to-find opinions to lighten the burden likely encountered by other lawyers and members of the public interested in those opinions. Fourth, the U.S. Supreme Court could aid the timelier dissemination of news about oral arguments by releasing the audio recording of an oral argu-

ment on the same day the oral argument takes place. Fifth, preparing syllabi for court opinions can provide both lawyers and the general public an additional tool for understanding judicial rulings.

The final topic of the day dovetailed with the first. Bashman asked the panelists about the perception of legal blogs within the legal community. None of the panelists raised any red flags about legal blogging, and the general consensus was that legal blogging is now perceived as mainstream within the legal community. Bashman recounted anecdotes about federal appellate judges who regularly read *How Appealing*. And Feldman relayed that he attended an interview where the law professors who interviewed him knew about *Empirical SCOTUS*. Professor Hasen joked that while nobody will get tenure just for blogging, legal blogs are still a great way to stay informed. One final point on which the panelists agreed: if you are inclined to start or participate in a legal blog, don’t do it to make money or get clients; do it for some larger service reason, like informing the public, filling a knowledge gap, or raising awareness to trends in the law.

This thoughtful panel discussion left a captivated audience with a much richer understanding of legal blogging and with the thorny—but important—task of thinking about creative ways to deliver news about judicial decisions and the courts amid the demise of print media.

¹ Bashman’s blog can be found at <https://howappealing.abovethelaw.com>.

²Fellow in the Empirical Study of Public Law at Columbia Law School.

³ Empirical SCOTUS can be found at <https://empiricalsoutus.com>.

⁴Chancellor's Professor of Law and Political Science at the UC Irvine School of Law.

⁵ Professor Rosen's blog can be found at <https://electionlawblog.org>.

⁶ Lee E. Teitelbaum Endowed Professor of Law at the University of Utah S.J. Quinney College of Law.

⁷The Ninth Circuit lists those "Cases of Interest" on the home page of its website, <https://www.ca9.uscourts.gov/>.

Giving and Getting Effective Edits in Appellate Writing

By Alyssa Cochran

As appellate attorneys are well aware, the first draft of a brief faintly resembles the filed brief. This panel focused on getting from first draft to final with minimum pain and suffering. Professor Mary Beth Beazley, Fisher Phillips partner, Wendy McGuire Coats, and panel moderator, Cliffie Wesson, staff attorney for the Texas Court of Appeals, guided the room through the maze of the editing process, using humor and optimism throughout.

The panel first recognized the inevitable constraint on effective editing: time. Rigid appellate deadlines dictate the end goal; and identifying the goal for a piece determines what editing processes will be useful. When time is scarce, the primary goal may be to compile a brief with as few grammatical errors and "typos" as possible. Limited time may require the writer and editor to skip some of the panelists' suggested editing tips, but the writer can use some regardless of time constraints, even beyond effective brief writing.

Understanding the Power Dynamic

The roles of writer and editor are inherently hierarchical. In most law firms, an associate serves as the writer responsible for at least the first draft. The editor is typically a partner. Being the final decision-maker, and boss, vests in the editor the responsibility of setting the tone for the entire editing process. As editor, you can empower the writer. How the editor communicates with the writer and conveys expectations solidifies for the writer how beneficial or belittling the process becomes.

The panel encouraged editors to ask themselves these questions: Did you invite the writer early in the writing process to provide his or her own thoughts and feedback? Does the writer fear suggestions or questions will be construed as disrespectful? If the editor's tone silences the writer, his or her contributions may not be realized.

An editor can set a collaborative tone with the writer in multiple ways. An editor can facilitate questions by having the writer include questions in the margins of a draft. This can allow the editor and writer to work through these

questions early in the process and ease any potential nerves the writer may have with confronting the editor. In addition, the editor will know where the writer is struggling to make a piece come together. With this awareness, the editor can provide additional guidance and explanation to aid the writer in curing these weaknesses.

Using Kindness: Attack the Writing, Not the Writer

Once the duo creates a collaborative atmosphere, the next step implicates a basic truth: writing is always personal. All writers, regardless of skill level, have invested themselves in their work. One panelist jokingly remarked that a writer rarely produces poor quality work simply to torture the editor. The editor must remember to focus upon improving the written work rather than questioning the writer's ability.

Attacking the writer instead of the writing can occur in subtle ways. Although no editor is likely to admit he or she has been "mean" to a writer, an editor may be more willing to confess to having written the word "awkward" next to a paragraph or sentence. The panelists suggested that giving this critique does nothing to fix the writing. The editor has not explained *why* the writing is awkward or how to improve it. This type of comment will likely leave the writer feeling defensive or even incompetent, making it more difficult for the writer to accept critiques since the writer feels personally attacked.

The panelists emphasized that we all thrive in an environment of praise. The editor's praise for

what the writer has done well is equally important to critiques and corrections. Without the editor's recognition of the good qualities in a written work, the writer may not know to do it again.

By utilizing this editing tip, the panelists explained, a writer might even look forward to having his or her work edited. Mindful edits that improve the written work can build the writer's confidence and improve writing skills, but kindness is key.

Growing the Writer

Like a marathon runner, writers develop their written prowess. The panelists noted that the long-term goal of editing is to spend less time editing the work of a particular writer in the future. To achieve that, the editor must start with writers at their particular skill level. A new marathon runner would not try to run 15 miles on the first day of training. Neither should a new writer start with unattainable expectations.

Effective editing is an investment in the long-term relationship. While this may be the most tedious part of effective editing, it will also bring the greatest return. The panelists provided a few examples of how an editor can work on growing the writer with each brief or written document.

First, when a writer repeatedly makes the same grammatical or typographical errors, the editor probably has not properly addressed this with the writer. The editor should convey to the writer these mistakes appear consistently, and then suggest how to fix them. Continue to work with the writer until you, as the editor, no longer see

the same mistakes, and do not resign yourself to simply fixing them yourself.

Second, if the writer is making the same stylistic or organizational errors, the editor should question whether the writer understands why those changes are being made. Instead of drawing arrows that indicate how to rearrange paragraphs, the editor should explain to the writer why reorganization improves the piece. Also, ask the writer why he or she organized the document in a particular way to understand the thought process. Again, editors should not make the changes themselves. The writer must understand what needs to be changed, why, and how to do it.

Third, the panelists suggested that editors should not use track changes in Word. While track changes may be fast and efficient, using it allows the writer to quickly accept edits without ever contemplating why the editor made the changes. In doing so, the writer avoids the editing process. If edits are handwritten in the margins, the writer must read and incorporate them and process the logic behind each one.

The panelists finally recommended debriefing everything, good and bad, about a written document after receiving it. During this reflection period, the editor should identify three things for the writer to work on for the next task. The writer is held responsible for checking for those three things before submitting the next first draft. This exercise gives the writer ascertainable goals and emphasizes that the goal is to continue improving his or her writing skills.

The “Make It Better Phase”

Wendy McGuire Coats endorsed a final editing tool, which she coined the “Make it Better Phase.” She urged there is always room to make our writing more concise. Therefore, in the final phase of editing, the editor gives the writer *carte blanche* authority to do so.

Once a brief is ready to file, give it back to the writer one final time with the only instruction to cut ten percent and make it better. Every part of the brief is fair game. The writer can focus on each paragraph and section, ensuring every point is conveyed with the utmost clarity..

With a less experienced writer, the “Make it Better Phase” can come with additional instructions. For example, the editor may ask the writer to review every section header or topic sentence and make those points more concise. This exercise results in a better brief overall, simultaneously boosting the writer’s confidence and empowering the writer with autonomy.

What the Writer Can Do Alone to Improve

The burden of improving a writer does not fall entirely upon the editor. The writer must also take the initiative to improve. For example, using Mary Beth Beazley’s article, “The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique,” writers of all experience levels can learn how to better edit their written work.

Beazley explained the challenge of editing one’s own work. A writer naturally sees what he or she meant to write, not necessarily what was actually written. The writer may be certain that a particular point is made (or rule of law has

been stated) when it has not. To better self-edit before sending a first draft for review, the writer must create targeted editing goals.

One way to perform targeted self-editing is for the writer to highlight the rule of law in one color and the critical facts applying the law in another color. If the two colors appear far apart in the document, the writer can assess whether the analysis is too conclusory and see whether analysis of facts incorrectly comes before stating the rule of law. If the two colors appear close together, the writer can focus more critically on whether that point of law has been adequately supported.

Another self-editing tool is highlighting the topic sentence of each paragraph, and then reviewing the paragraphs to see if the substance of the paragraph truly fits within that sentence. Next, the writer evaluates the topic sentences in the scope of the entire brief: Do these sentences form a concise outline of the entire brief? This assessment allows the writer to spot any gaps in the overall analysis.

With self-improvement in mind, the panelists also suggested that the writer keep a writing checklist. Because writers typically write for more than one editor, writers can keep track of individual preferences by creating a checklist for each editor. Besides editor-specific items, the writer should include his or her own common mistakes. Before submitting a first draft, the checklist reminds the writer what to look for. This avoids repetition of previous mistakes. The writer will eventually learn to make these edits automatically.

Conclusion

Editing encompasses the majority of appellate brief writing. Panelists McGuire Coats and Beazley explored many techniques for editors and writers to improve the editing process. Editing should be educational and collaborative. Editors should be kind to their writers. Writers should be mindful of commonly made mistakes and understand why edits have been made. While we are all trained to be adversarial, the editing process should not be contentious.

Cyber Issues Over the Horizon – Public/Private Concerns

By Gaëtan Gerville-Réache

John Pulitzer once said, “There is not a crime, there is not a dodge, there is not a trick, there is not a swindle, there is not a vice which does not live by secrecy.” Benjamin Franklin, on other hand, famously wrote, “They who can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.” Freedom from unreasonable searches, a right enshrined in the Fourth Amendment, certainly counts as one such liberty. But securing that liberty inherently means preserving a certain right to privacy, or what some might call secrecy. New technology, such as cell phones and artificial intelligence, presents new challenges for determining what level of privacy must be preserved and what should be sacrificed to ferret out and prevent crime.

A panel of experts dove into this cutting-edge topic at the AJEI Summit this past November. The panel included the Chair of the American Bar Association Cybersecurity Legal Task Force, Harvey Rishikof (who is also a former professor of national securities studies); Facebook’s Head of Global Policy Management, Monika Bickert; and a former general counsel for the National Security Agency, Rajesh De, who is now a partner at Mayer Brown. What follows is a summary of that discussion, with only a little editorializing from this author.

Practical challenges in ferreting out and stopping cybercrime

The discussion began with a description of the practical challenges these panelists have faced

in balancing privacy protection with stopping cybercrime. Ms. Bickert manages Facebook’s global foreign policy across all of the countries in which Facebook is used (which is practically all of them). In each foreign-government territory, the content of Facebook posts and targeted advertising are all subject to different regulations. Complying with these regulations, and even keeping up with changes to them, poses a serious challenge when more than two billion people use Facebook every day, and more than 85% of those users live outside the United States.

As one example of these difficulties, Germany recently enacted a statute that requires social media companies to remove content that violates any number of German laws, and do so within 24 hours of becoming aware of it. So when does Facebook become aware? Facebook already has one set of global policies that identifies and removes a lot of illegal content. But those policies do not map perfectly across every country. For example, what constitutes intellectual property or pornography varies widely. Facebook has therefore hired people around the globe to identify violations that become publicly known or reported. And it is already using technology to automatically remove images with a hash number (a marking that identifies the unique image as illicit or not, once it has been evaluated). But is that enough?

When Mr. De joined the National Security Agency as general counsel in 2012, he regularly dealt with the balance between government secrecy and government transparency and

worked through a lot of the privacy/security issues that have become a hot topic of public debate today. But in addition to its information gathering, the NSA has a second mission, one receiving much less attention in public discourse: information assurance. The NSA manages cybersecurity for the most sensitive networks, such as communications within the Pentagon or with troops in a foreign theater. The NSA is usually first to encounter the cybersecurity issues that soon become a more common threat to Internet users. It also explores how traditional foundational legal doctrine can apply in a world that no longer resembles the world in which those principles were born. Do the traditional doctrines hold up in the modern context?

The third-party doctrine: what is a reasonable expectation?

From Fourth Amendment search-and-seizure jurisprudence, a general principle has emerged: those who voluntarily give their information to third parties have no reasonable expectation of privacy in that information. The body of jurisprudence and law concerning this principle is known as the “Third Party Doctrine.” What courts recognize as a reasonable expectation is often quite different from what people actually expect in the real world.

Ms. Bickert observed that, in Facebook’s experience, most people do expect some modicum of privacy in private messaging, such as Facebook Messenger. They expect Facebook to keep the information it gathers to itself. Before she joined the company, Facebook sometimes offended people’s notions of privacy by announc-

ing, “Monica just bought shoes at this company,” whenever the user purchased shoes or other goods. Facebook was roundly criticized and subjected to oversight as a result of this; the company had to report to a privacy review board. Privacy is now built into the system. There is an intense process to release any information for any product. Companies like Facebook have taken such measures in response to the expectations of people using those services.

When the government is prosecuting crime, such high privacy expectations are probably unreasonable, but there is at least a question of whether third-party information is always unprotected. As Mr. De observed, the line regarding what privacy can reasonably be expected in the context of third parties is under review in *Carpenter v. United States*, which was argued this term, after the Summit. Carpenter was convicted of a string of bank robberies, and the government obtained third-party cellphone location data to place him at the scene of the crime at the time that each robbery occurred.

The question in *Carpenter* was whether the government had to obtain a warrant to obtain cellphone location data from the third-party cellular-service provider. Traditionally, data held by a third party is subject to subpoena. But traditional doctrines become questionable when they collide with new technologies like cellphones, which are kept on one’s person most of the time. Does such a doctrine need to adapt to current expectations of privacy, particularly when it resembles a homing device if used to track location? On the other hand, how can a witness — in this case, the cellular-service provider — be forced to keep silent about what it saw?

Congress appeared to weigh the issue in favor of law enforcement when it enacted the Stored Communications Act of 1986. The act generally protects the privacy of the contents of communications through an entity providing an electronic-communication service. But Section 2 allows voluntary disclosure for limited purposes, such as providing it to law enforcement whenever inadvertently obtained contents “appear to pertain to the commission of a crime.” 18 U.S.C. § 2702(b)(7)(A). And another section permits law enforcement to compel production of such documents. 18 U.S.C. §2703.

Since the panel discussion, the Supreme Court resolved the issue by holding that the acquisition of Carpenter’s cell-site records from the wireless carrier was a Fourth Amendment search. In the Court’s view, prior precedents revealed a societal expectation of privacy in the voluminous personal-location and movement information maintained by a third-party wireless carrier. Given the unique nature of these business records, the Court held a warrant is generally required to obtain them.

Ms. Bickert explained that Facebook complies with the Stored Communications Act in one of two ways. First, it may disclose content through the voluntary process under Section 2 if it may do so in accordance with its terms of service, which allow disclosure when necessary to prevent harm. Facebook has a team of 250 people working just on terrorist use of its network, to prevent the use of Facebook by terror groups for propaganda, planning, coordination, and training. Such content would be disclosed voluntarily. If the terms of service do not pro-

vide for voluntary disclosure of the content, Facebook will only produce content if U.S. law enforcement serves a warrant. Incidentally, such procedures also appear consistent with the *Carpenter* decision. Ms. Bickert explained further that non-content information can always be obtained via subpoena; no warrant is required.

According to Ms. Bickert, when a request comes from a foreign government, Facebook follows a different legal process for disclosing information. If the foreign government wants non-content information, it can provide a court order, and Facebook will conduct its own legal analysis to ensure the law is consistent with international norms. For example, Facebook would not respond if the disclosure was requested to suppress dissent. If the foreign government desires content information, it must comply with the treaty process. Facebook nevertheless recognizes that foreign governments and law enforcement are grappling with serious safety issues and sometimes legitimately need access to content information.

Mr. De noted that the Supreme Court also granted certiorari in October to consider a case that serves as an interesting juxtaposition to *Carpenter*. In *United States v. Microsoft*, the question is not whether law enforcement needs a warrant to obtain electronic communications, the question is whether law enforcement can even get a warrant for certain data. Like *Carpenter*, the case arises under Section 3 of the Stored Communications Act of 1986, but this case deals with issues of extraterritoriality and the storage of data.

The specific question, as stated in the petition, is “[w]hether a United States provider of email services must comply with a probable-cause-based warrant issued under 18 U.S.C. § 2703 by making disclosure in the United States of electronic communications within that provider’s control, even if the provider has decided to store that material abroad.” As Mr. Rishikof explained, many use the banking analogy. As with money, many courts deem the *res* (in this case, the data) to reside with its owner, no matter where the hardware storing the data is located. (But as this author will note, money is fungible, data is not. Does that make a difference? We may never know; the appeal was remanded and case dismissed as moot when Congress amended the Stored Communications Act to require disclosure of overseas records in the wireless carrier’s control.)

Encryption: the most popular privacy-protection measure

Finally, the panel addressed the problem of encryption and who holds the keys. Ms. Bickert said that a senior person at NSA once told her that the rise of encryption is the single biggest concern for law enforcement, particularly when data is encrypted before it travels from one terminus to another. In no other context is an individual guaranteed total privacy. Until end-to-end encryption, the existence of privacy was purely a question of what outcome one attained in the legal process.

The most convincing pro-encryption argument is security: encryption allows Internet users to thwart hacking. In these debates, the argument is often made that if the U.S. government can

access encrypted information, how can anyone object to another government accessing it? The counterpoint is that we should not equate non-democratic regimes with the United States. That, of course, dodges the question of “why not?” The panel did not explore that question, probably because it would require a whole panel discussion in and of itself. Perhaps it will be food for thought at the 2018 Summit.

Ms. Bickert is frequently asked whether she is for or against encryption, but as she explained, the issue is far more complicated than what this binary question presumes. Everyone is in favor of encryption in some sense, because everyone wants to know their sensitive information is safe and protected. Encryption provides that safety. To that end, encryption has become more sophisticated over the years. Facebook, for instance, owns What’sApp, which provides end-to-end encryption. Only the receiving device can decrypt the message. Facebook never sees the message, does not own it, and cannot decrypt it.

There are valid reasons for encryption, but there is also a cost to society in allowing it. Sometimes the content *is* the evidence of a crime or is itself a crime (as with child pornography). Though the panel did not go into detail, it did note that quantum computing may be law enforcement’s solution to this and other sophisticated forms of encryption; its ability to crack encryption is revolutionary. It is unclear what encryption could withstand quantum computing’s ability to efficiently solve problems. For encryption advocates, it is a “nightmare game changer.”

The other workaround solution to encryption is for law enforcement to use the metadata that electronic communications produce, such as information on who is communicating with whom. Ms. Bickert restated that if Facebook receives the proper legal process, it will provide location information and other metadata, even if it cannot access the communication itself. Artificial intelligence, with its ability to analyze large volumes of data for predictive functions, has begun to play a significant role in this arena. But are constitutional lines crossed when AI is used to detect a person's behavior patterns and predict future behavior?

According to Ms. Bickert, Facebook already uses AI to identify bad content, such as beheading videos and child pornography. At this point, it can recognize faces, or a nude image, or a Nazi symbol. AI can even search for would-be terrorists, by using videos, or by identifying certain signals by looking at how many friended accounts have had terrorism violations. Trying to find this sort of material on Facebook is like looking for "an ever-changing needle in an ever-growing haystack." To accomplish that task, the AI looks for the intersection of language and bad behavior. But AI has its limitations. For instance, it has a difficult time looking at a brand-new image and determining its content.

The legal and ethical questions raised by this powerful technology include what information should AI appropriately be asked to search for, and how can it conduct the search while still maintaining some measure of user privacy. In Europe, this issue has come to a head: There is legislation prohibiting the use of AI technology,

but, legislators nonetheless impose a duty to become aware of illicit material and misuse of the system. Facebook has been asked by foreign governments to create algorithms to detect this information.

Mr. De noted that AI not only has functional limitations, but it also will never be able to make value judgments. Take the iconic picture of the nude child running down the street away from napalm in Vietnam; AI identified this photo as child pornography, but the photograph has political content. Such value judgments must be made when designing the algorithm AI uses because the starting point of the algorithm reflects the values we want it to apply. For instance, ethical considerations must go into the decision-making algorithm used in automated cars. One engineer addressing this issue recently said that he would always program his car to save himself at all costs. Mr. De also warned that sometimes those value judgments are made unconsciously, such that algorithms could have built-in unconscious bias.

The content and presence of value judgments in algorithms raises questions about how such technology will be regulated. Will the state allow that to take place? Will it create a privacy issue? Will liability arise based on the program that is selected? The panel concluded by providing much food for thought on this issue.

So Many Appeals, So Little Time: Ways in Which Intermediate Appellate Courts Strive to Handle Growing Caseloads

By Howard J. Bashman

Judge N. Randy Smith of the U.S. Court of Appeals for the Ninth Circuit and Justice Cheryl Chambers of the New York Supreme Court, Appellate Division, Second Department, headlined a breakout panel at the 2017 Appellate Judges Education Institute Summit on the subject of how intermediate appellate courts are striving to handle growing caseloads. Both Judge Smith and Justice Chambers have first-hand familiarity with the topic, as the courts on which they serve are among the busier intermediate appellate courts in the United States. Also on the panel was John Doerner of the National Center for State Courts, an independent, nonprofit organization that works collaboratively with judicial leaders to improve court administration across state courts.

Justice Chambers was the first to address the attendees, explaining that 22 judges serve in the Second Department of the New York State Supreme Court's Appellate Division, which is headquartered in Brooklyn, New York and covers all of southeastern New York State other than Manhattan and the Bronx. The Second Department is the busiest of the four departments of the Appellate Division in New York State. According to Justice Chambers, in deciding which cases are selected for oral argument, if an appeal is directly governed by existing precedent or if the issues are adequately presented in the briefs and the judges believe that oral argument would not be of assistance, the case will be designated for submission on the briefs without oral argument.

Next, it was Judge Smith's turn to describe the manner in which the Ninth Circuit selects cases for oral argument. He began by explaining that his court typically resolves some 12,000 cases per year. When a new appeal arrives at the court, staff attorneys will evaluate the appeal with an eye toward deciding whether the appeal should be assigned for oral argument. On average, 75 percent of the cases that the Ninth Circuit decides do not receive oral argument.

Ninth Circuit cases that are not initially selected for oral argument will be referred to a staff attorney to prepare a proposed non-precedential ruling. Ultimately, the staff attorney will present that proposed decision to a screening panel of judges to see whether they agree with the proposed disposition of the case. If those judges do not agree, they can assign the appeal to the oral argument track, if they deem that appropriate.

Even appeals that end up on the oral argument track at the Ninth Circuit are not guaranteed to receive oral argument, Judge Smith explained. The decision whether a case will be argued is up to the judges on the assigned three-judge panel. If any judge on the argument panel wants oral argument of a case, the case will be listed for oral argument. If the case is on the oral argument track but is removed from the oral argument calendar by the assigned three-judge panel, then the panel will decide the case based solely on the briefs.

Demonstrating how infrequently some appellate courts request oral argument, the third pan-

elist, John Doerner, observed that Indiana's intermediate appellate courts allow oral argument in fewer than ten percent of all appeals.

In addressing how attorneys might help assure that their clients' appeals receive oral argument, which might help raise the prospects of reversal for the party taking the appeal, Judge Smith observed that writing a good brief helps to greatly increase the likelihood of oral argument. And Justice Chambers observed that a procedure exists for attorneys to request oral argument in appeals where they believe it would be most useful, and when her court receives such requests, the court usually grants oral argument.

The panel next focused on how different appellate courts decide appeals. Judge Smith explained that at the Ninth Circuit, if he is assigned an opinion from an oral argument panel, he and his elbow law clerks become responsible for drafting the opinion. By contrast, the Appellate Division of the New York State Supreme Court relies far more heavily on staff attorneys (not assigned to a specific justice) to prepare bench memos for cases to be argued and also to prepare drafts of opinions for argued cases.

Although courts employ various types of attorneys to assist judges with their workload, Doerner explained that while staff attorneys on average costs 15 to 33% more than elbow law clerks who often arrive directly from law school, staff attorneys tend to be more efficient because they are often more experienced.

The panel next turned to address the time for decision after oral argument. In the New York State Supreme Court's Appellate Division, there

are no internal deadlines for deciding cases after oral argument, Justice Chambers explained. The Ninth Circuit, by contrast, does maintain a list of appeals that have been pending undecided for more than six months after oral argument. Judge Smith explained that different judges have different attitudes about having cases appear on that list. Judge Smith observed that although it may take a long time for a case to reach oral argument in the Ninth Circuit, once case has been argued, his court tends to be efficient in issuing a decision.

Lastly, the panel touched on the issue of appellate mediation. The Ninth Circuit, in common with many other federal appellate courts, has an active appellate mediation program for civil cases. According to Judge Smith, some 1,135 cases settled as the result of the Ninth Circuit's mediation program in 2016. And the Ninth Circuit even sent 416 cases to mediation after oral argument in 2016, perhaps demonstrating that it's never too late to give appellate mediation a try. Justice Chambers did not offer settlement statistics for her court's mediation program, which she said is staffed with former and retired appellate court justices.

As intermediate appellate courts across the nation struggle with growing caseloads and shrinking resources, it was instructive to learn how two quite busy intermediate appellate courts have adapted to face those challenges. The challenges that growing appellate caseloads present for courts, attorneys, and clients is surely a topic that will continue to be relevant into the future.

When My Emergency Becomes Your Emergency: Interlocutory Appeals and Extraordinary Remedies

By Jill Wheaton

This panel included the Honorable Joel Bolger of the Alaska Supreme Court; the Honorable Catharina Haynes of the United States Court of Appeals for the Fifth Circuit; and Alicia Hickok, a Partner at Drinker Biddle, Robert Byer, a Partner at Duane Morris, moderated the panel.

The panelists began by discussing how interlocutory appeals vary by jurisdiction. Judge Haynes noted that in the federal system, you can seek interlocutory review from: orders granting or denying injunctive relief; orders denying arbitration; orders under Fed. R. Civ. P. 54(b) where the district court finds part of the case final; and orders certified for potential interlocutory review by the district court under 28 U.S.C. §1292(b). Interlocutory review may also be sought on a writ of mandamus. In Texas state court, many statutes allow for interlocutory review of certain kinds of orders. Other states, in contrast, permit applications for discretionary leave to appeal from virtually every form of interlocutory order, while granting an immediate appeal of right in few, if any, circumstances. Justice Bolger pointed out that Alaska is one of the latter states, indeed all interlocutory review is discretionary. The Alaska Supreme Court rarely grants such review, and it accepted only three interlocutory appeals in 2017. Alicia Hickok indicated that in Pennsylvania, certain types of interlocutory orders are expressly appealable as of right, including orders regarding privilege or trade secret designations, denials of motions to intervene, and double jeopardy rul-

ings. Interlocutory rulings involving legal questions can be certified for immediate review. Alicia also noted that some states specify types of orders that are reviewable on an interlocutory basis as of right, whereas other states have only a vague discretionary standard that is applied to all orders. Audience members added that in many states, including Illinois, parental termination orders are immediately reviewable as of right.

The panel next focused on class certification rulings. Under Fed. R. Civ. P. 23(f), a federal court may grant immediate review of a class certification ruling. Here too, state courts differ. Because in Alaska, all interlocutory review is discretionary, such orders are accepted for immediate review only some of the time. Pennsylvania is unique in that an order refusing to certify a class is immediately appealable, whereas an order certifying a class is not. Legislation is pending in Congress (HR 985) that would make orders granting or denying class certification immediately appealable in the federal court system, removing the discretionary component of the current Fed. R. Civ. P. 23(f), so practitioners should keep an eye on this legislation.

When interlocutory review is discretionary, certain factors increase your chances of immediate review. Justice Bolger noted that appellate courts are more likely to grant permissive interlocutory review where: postponement of review would result in injustice; purely legal issues control; the lower court's decision is clearly wrong under well-established law; and when

issues such as the Fifth Amendment, trade secrets, immunities, attorney client privilege, grants of injunctive relief, venue, and arbitrability, are involved. As he explained, courts are more likely to grant discretionary interlocutory review if you can say: 1) “if you do not take this case I will lose something very important”, such as a privilege or trade secret, or 2) “if you do not step in now, everything we continue to do in this case will be a waste of time”, such as when arbitration, preemption, venue, or judicial disqualification, are at issue.

Judge Haynes highlighted the language in 28 U.S.C. § 1292(b), explaining that you must convince the federal court of appeals, after convincing the district court, that an immediate appeal really will resolve the case, and the law really is unsettled (as opposed to your not liking the law, or thinking it should be changed). For writs of mandamus, the appellant must show clear and indisputable error. And for appeals under the Class Action Fairness Act (“CAFA”), the law gives the appellate court 60 days to determine if it will grant review, so the petitioner must show that there are truly CAFA issues involved and that its case deserves to go to the front of the line in the appellate court.

The panelists agreed that appellate courts are especially reluctant to grant immediate review of discovery orders, because trial courts are given great discretion when it comes to discovery. If you seek immediate review of a discovery ruling, show the appellate court why the disputed discovery could resolve the case or harm the producing party. It must involve something other than a garden variety discovery dispute. A North Carolina Court of Appeals judge in the

audience echoed this sentiment, stating that court will generally only review discovery rulings that involve clear privilege issues. In all applications for review, the panelists advised that the appealing party must remember that the appellate court has not been living with the case as long as you and the trial court have, so you must add necessary background information to your petition or application to give appropriate context to your request.

The panel concluded with a brief discussion on stays pending appeal. Judge Haynes noted that when presented with a motion for stay, the Firth Circuit applies the same factors as for injunctive relief, and the same is true for most other federal appellate courts. Justice Bolger indicated the same is true in Alaska state courts.

Pro Bono Appellate Court Programs and Clinics: Doing Good for Clients and the Courts

By Deena Jo Schneider

One program at the 2017 AJEI Summit was devoted to a review of pro bono appellate programs and clinics. Moderating the session was Judge Samuel Thumma, Vice Chief Judge of the Arizona Court of Appeals, Division One. The members of the panel were the Honorable Edward Carni, Associate Justice of the New York Supreme Court, Appellate Division, Fourth Department; Susan Gelmis, Chief Deputy Clerk for Operations of the United States Court of Appeals for the Ninth Circuit; and Eugene Volokh, Gary T. Schwartz Professor of Law at the University of California Los Angeles School of Law. The speakers brought extensive experience and different perspectives on this topic, which led to an interesting and lively discussion.

Judge Thumma began the program by noting that the American Bar Association's Council of Appellate Lawyers (which is involved in planning the AJEI Summits) had just released the second edition of its *Manual on Pro Bono Appeals Programs for State Court Appeals*. The manual provides analysis of each state court's pro bono appellate program for which information is available, and assists states without pro bono appellate programs to develop them and encourages the expansion of and cross-pollination among existing programs. Copies of the *Manual*, which was prepared by the Council of Appellate Lawyers' Pro Bono Committee currently chaired by Katie Barrett Wiik, were distributed at the Summit. The *Manual* is also available online at www.americanbar.org/content/dam/

[aba/administrative/appellate_lawyers/cal_probonomanual.pdf](http://www.americanbar.org/content/dam/aba/administrative/appellate_lawyers/cal_probonomanual.pdf).

The speakers' presentations began with Ms. Gelmis - termed by Judge Thumma the "godmother" of pro bono appellate programs - providing a brief history of the Ninth Circuit's program. In 1992, a single law clinic in Idaho was assisting a few litigants who could not afford appellate counsel. Then-Chief Judge J. Clifford Wallace envisioned a larger bench-bar collaboration that would benefit all groups engaged in the appellate process: the Court would receive better briefs similar to those available in other cases, the parties would gain proper legal representation, and the lawyers would obtain valuable experience they could harness in future appeals. Ms. Gelmis worked with Chief Judge Wallace to design the program, which includes these elements:

- The Ninth Circuit guarantees oral argument for every pro bono appeal in the program. This was and is a large carrot designed to attract lawyers to participate, as the Court ordinarily grants argument in only a small fraction of the cases.
- Pro se litigants may object to having any counsel appointed to represent them or to the individual attorneys appointed. The Court is also liberal with requests from lawyers to withdraw from specific cases.
- When the program was being developed, attorneys requested malpractice insurance to

cover their pro bono work. The Court could not provide this but works with coordinators regionally to assist in obtaining coverage.

- Attorneys also wanted to seek counsel fees in pro bono cases, especially when they succeeded. While their clients cannot pay them, fees may be available from the government in certain cases. The Court's attorney admission fees fund reimburses some costs, and the Court pays for travel to the arguments.
- Appeals are screened before entering the program to determine which cases would benefit the most from full briefing and argument. This has become important in recent years as the Court's caseload has doubled with no increase in the number of judges. There has also been a significant increase in pro se appeals: over the last eight years, they have grown from one-third to one-half of the Court's docket. The influx of immigration cases presents special challenges because the law is complicated and not all attorneys handling these matters are equally capable.

Justice Carni then provided information about New York's appellate pro bono program, which started under the leadership of Cynthia Feathers – the first Chair of the Council of Appellate Lawyers' Pro Bono Committee, who also spearheaded the development of the initial *Manual on Pro Bono Appeals for State Court Appeals*:

- The program is run not by the courts, but by the State Bar's Committee on Courts of Appellate Jurisdiction. The courts supported

the concept when it was proposed in the early 2010s but did not want the responsibility of choosing either the cases or attorney volunteers.

- The program began as a pilot program in the Third Department of the Appellate Division and has since been extended to the Fourth Department, but not yet to the First or Second Department. Further appeals to the New York Court of Appeals are also covered.
- The program is limited to civil appeals in such areas as family law, housing, unemployment insurance, and workers' compensation. A committee of between eight and ten people screens possible cases and chooses those that appear meritorious, about a dozen each year. The program's annual budget is a modest \$8,000-\$10,000.

Professor Volokh then described a different type of pro bono program, the law school amicus brief clinic he started around 2013 at UCLA:

- The clinic began as a way to provide formal clinical training in legal writing to law students. A secondary goal is to serve the bench through the submission of amicus briefs in First Amendment cases, an area in which many attorneys are not specialists.
- Each semester, Professor Volokh selects different cases from across the U.S. in which non-profits such as the Reporters Committee for Freedom of the Press, the Electronic Frontier Foundation, and the American Civil Liberties Union want to participate as amici.

Students work in teams of three on each brief and on three briefs each semester, appearing as attorneys of record for the amici under his supervision.

- While the clinic's goal is to improve students' legal writing, with editing sessions during class, oral argument is heard in between one-quarter and one-third of the cases. The clinic seeks the parties' and the courts' consent to participate in argument once the briefs have been filed. In several cases, students have presented argument.

Judge Thumma then asked each speaker to provide some best practices and lessons learned from their experiences with these programs. Ms. Gelmis noted that it has taken a long time to develop good programs and considers the availability of oral argument to be a large reason for their success, with hundreds of attorneys signing up as volunteers even in areas where the number of cases requiring counsel is much smaller. She suggested expanding the use of volunteers to include staffing a call center and also recommended creating a means of removing attorneys who do not perform adequately from the list of future volunteers. Justice Carni expressed a wish that the New York courts were more involved in determining the types of cases included in the program. He hopes the program can be expanded to include all Departments of the Appellate Division and perhaps litigants of modest means who currently do not qualify. Professor Volokh emphasized that students' legal writing is improved not by handing them marked-up drafts, but instead highlighting various sections of their drafts, asking what is wrong or how they could be improved.

While this type of dialog is more time-consuming, it is a much more effective way of teaching.

When the program was opened to questions and comments from the audience, one attendee discussed how the California state appellate courts might benefit from a pro bono program. (Currently there is a program only in Los Angeles County.) Higher quality briefs would assist in the screening of appeals that takes place initially by court staff, who steer some cases away from argument panels, and later by argument panels, which in the end decide half of their cases on the briefs. Judge Thumma agreed that receiving better briefs would also be helpful to Arizona's appellate courts.

Another attendee suggested that an additional way to enhance access to justice would be to provide opportunities for experienced appellate attorneys to guide newer ones. Judge Thumma noted that Arizona does this, but not as the main focus of its pro bono program. Ms. Gelmis stated that law school clinics provide this type of assistance and the Ninth Circuit's formal Appellate Mentoring Program also offers general guidance on immigration and habeas corpus law. http://cdn.ca9.uscourts.gov/datastore/general/2013/03/22/ninth_circuit_applt_lawyer_rep_mentoring_project.pdf. Another audience member added that attorneys accepting pro bono assignments in Texas are given the opportunity to request a mentor.

One member of the audience commented that if a pro se litigant is provided an attorney, the other party to the appeal may be upset, especially if

oral argument is granted as a result, thereby increasing the cost of the appeal. Ms. Gelmis responded that while this may sometimes be true, other parties might prefer to litigate against a competent pro bono attorney rather than a pro se litigant who files a brief to which it is difficult to respond. Professor Volokh noted that some courts, including the Ninth Circuit and courts in Massachusetts and New York, affirmatively call for amicus briefs in certain cases, which is an indication of the value of such briefs.

The final comment from the audience was that the cost of obtaining a transcript could create an additional problem in pro bono appeals. Federal statutes are available to provide relief in some

but not all cases.

This program provided significant insight into how to structure appellate pro bono programs and how these programs benefit pro se litigants, attorneys, and the courts. Hopefully, more courts and law schools will adopt these programs and expand existing ones.

Public Policy and Judicial Decision Making

By Nancy M. Olson

Public policy may influence judicial decision making in a variety of ways, some subtle and others hard to ignore. The role of public policy in judicial decisions can be especially pronounced in appellate decisions by a court of last resort. During a panel discussion moderated by Mary Massaron of Plunkett Cooney, P.C., Chief Justice Stephen J. Markman of the Michigan Supreme Court and Judge David O. Carter of the U.S. District Court for the Central District of California discussed the implications of public policy in judicial decision making and shared their respective views on its appropriate limits.

Ms. Massaron began by invoking Judge Ruggero J. Aldisert's book, *Opinion Writing*, which

suggests that no discussion of judicial decision making is complete without discussing the role of judicially-made public policy. Building on this premise, Chief Justice Markman and Judge Carter discussed their views on the role of public policy in judicial decision making. Although they disagreed on what that role should be and how it should unfold in practice, they each provided thoughtful insight for their respective positions.

Chief Justice Markman began his remarks by noting the commonly understood definition of "policy" from *Black's Law Dictionary*. Policy is "the general principles by which a government is guided in its management of public affairs." With that non-controversial definition as a backdrop, Chief Justice Markman explained that he

believes the role of public policy in judging lies at the heart of a bigger debate, that is, the judiciary's proper role in our constitutional structure. State-court judges have the distinctive authority to develop common law. Federal judges, on the other hand, are not operating under, or tasked with developing, a body of federal common law.

Because developing the law has a quasi-legislative aspect, judges grapple with how to wield this power in a principled manner. One approach is to consider the external standards by which judicial power should be measured. For example, the judicial role of answering questions of first impression is different than interpreting the precise words of a contract. Chief Justice Markman believes that judges should be ready to submit to external standards imposed, separate from personal feelings of right or wrong. He sees this as the important trait of judicial discipline.

Returning to state law to illustrate his view of appropriate judicial restraint, Chief Justice Markman noted that state-court judges strive to understand the common law and its gradual evolution, but this remains a challenge. He is inclined to agree with Blackstone—judges cannot alter common law according to personal judgment. Their job is to “maintain and expand” the old law. To accomplish this, judges must look retrospectively at customs and norms, not prospectively at what they think those values should be.

Next, Chief Justice Markman explained his view that “public policy” must be more than “code” for the personal preference of individual judges. Judges must say what the law is, not what it

ought to be. He believes that the role of the judiciary is to focus on policies adopted by the public, as promulgated in federal and state constitutions, statutes, and state common law. In contrast, judicial decisions should not be made based on general concern for the public interest. He encouraged judges not to substitute personal preferences for those of the public, because, he explained, such an approach is incompatible with the rule of law. Especially in the federal system, courts have limited authority to exercise judicial power. Thus, they must say what the law is, not what it ought to be.

Chief Justice Markman next acknowledged the potential of an internal judicial temptation driven by the allure to do good, and perhaps to try to fill perceived gaps by making laws more logical or consistent. He cautioned, however, that if the law seems incomplete, in all likelihood the relevant legislative body did not have enough votes to enact something more complete. If judges follow the temptation to render public policy to make laws more “consistent” or “rational,” we will end up with their improperly carrying out the legislative function. A judge does not sit on the bench in the position of “legal corrector general.” Judges wield grand but limited authority, and that balance must be respected.

Chief Justice Markman gave an example of a judicial confirmation hearing during which a nominee was asked what he would do if a particular decision was required by law or statute, but it offended his conscience. The nominee (now judge) responded he would be compelled to follow his conscience, which overall was steeped in this country's morals and traditions. In Chief Justice Markman's view, to follow

one's own conscience in judging is actually unconscionable.

Chief Justice Markman closed by expressing his view that we have a skewed balance of judicial policy making in this country. Specifically, he believes that courts have increasingly become the dominant public policy makers. With this shift of power, the concept of "passive virtues of adjudication" has dissolved. The balance of separation of powers has been altered by "constitutionalizing" public policy determinations, thereby insulating them from challenges or changes by the electorate. In conclusion, Justice Markman explained judges are lawyers and lawyers are trained to read and give meaning to the law. But in striving to give meaning to it, judges must be cautious to limit themselves by the law.

Judge Carter responded, beginning with his view of public policy as moral principles that are widely accepted in the community, as well as sometimes those not widely accepted. He grew up in a conservative community with a conservative upbringing, but to his surprise, his first case as a federal judge there involved a dispute about whether students could form a "gay/straight alliance" club. He believes that judging involves certain "groundhog principles," including routinely balancing equally competing policy interests and addressing blanks or gaps left by Congress. The Constitution is only "this big" and it does not provide all of the answers.

As an example, Judge Carter discussed a complex, five-month "Mexican Mafia" trial he presided over (also known as the "ethnic cleansing" case). The Mexican Mafia wanted to take

over the streets of Los Angeles and "cleanse" the streets of African Americans in the process. The court issued 11,800 jury summonses to be able to call up a jury pool of 50 people. The Mexican Mafia were accused of murdering four of their own associates during a period of internal strife. Judge Carter showed the audience a real courtroom surveillance video clip from that trial that depicted, in the flash of a second, one defendant, known as "Mini Me," attempting to stab another co-defendant with a pen. Unless you knew what to watch for in the clip, the defendant's actions were so quick you might have missed them. After this attempted stabbing, Judge Carter had to address the competing values of fairness/prejudice in front of the jury (*e.g.*, did the jury see?), versus the real need for public safety (*e.g.*, are more restraints needed?), especially concerns for the defense counsel sitting inches away.

This high-profile trial provided other examples of public policy determination bound up in daily judicial decision making. Judge Carter allowed his jury to remain anonymous, but defendants claimed that this violated their right to a transparent proceeding. He concluded that the jury's privacy and safety outweighed the defendants' right in this instance.

Another issue involved keeping the jury from seeing restraints worn by the defendants. One day, as the jury was leaving, a juror turned around briefly as a U.S. Marshal began moving one of the defendants too early. The juror may have seen the marshal affixing restraining chains. This presented countervailing policy issues: Should the court question the juror out of the presence of the other jurors, but in doing so possibly alert the juror to the restraints if he or

she had not noticed them? Should the court declare a mistrial 3½ months in to an anticipated five-month trial on the basis that one or more jurors may have noticed the fleeting attempted pen-stab or caught a glimpse of the chains? If the court declared a mistrial, was the only way to avoid repeating these risks by trying the defendants individually?

Questions like these often come down to resource allocation. Judges face hard decisions on a daily basis with underlying clashing policy interests such as balancing the individual rights of a defendant against judicial economy, preservation of resources, jury privacy, courtroom safety, etc.

As another example, Judge Carter turned to a case he presided over involving allegations of “material support” in which two men from Orange County, California were convicted of conspiring to fight for ISIS. He allowed the jury to see videos of beheadings, but believed he had to draw the line somewhere, thus excluding videos depicting rape, on the ground that the probative value was substantially outweighed by the danger of unfair prejudice.

In the same case, one of the defendants asked for new counsel and was assigned a female attorney from the Criminal Justice Act appointments panel. The defendant claimed his culture did not allow him to have a female attorney, and the defendant went on a hunger strike in protest. The defendant advised the court that if it simply appointed a male attorney he would resume participating in the case. Again, public policy rears its head—what do you do? Remove the female attorney? Force the defendant to keep that attorney?

Judge Carter saw this question as equality clashing with cultural convictions. He decided that the importance of equality outweighed the defendant’s conviction of rejecting female attorneys. But, he explained, making one policy-oriented decision often leads to other, sometimes more difficult, questions. For example, having denied the defendant’s request for a male attorney, do you order him force fed so he is able physically to participate in his case? Although this sounds barbaric, and is also a cumbersome process, Judge Carter decided to do so. He took care to make a record demonstrating that this drastic measure was warranted because the defendant’s hunger strike had him on the verge of being comatose. Judge Carter acknowledged that being in the position of making this call was not enviable. More importantly, he explained, whatever decision one would make in such a situation, it inherently involves public policy considerations; you cannot simply look to precedent to discern a clear or “right” answer.

Judge Carter next discussed another aspect of judicial decision making that he believes involves making policy determinations. That is, when a party seeks a specific outcome, judges need competent counsel to explain the reasons *why* the court should rule in a particular way. Oftentimes it is not enough to cite relevant cases; close questions should prompt the attorneys to explain real-world implications of a decision.

Judge Carter strives to show a thorough factual basis and demonstrate application of the correct legal standard so the court of appeals understands the basis for each part of the decision, whether it agrees with him or not. When he writes opinions, he is mindful of views on the

importance of public policy in judicial decision making, no matter what role it plays in any particular decision. After making this record, the outcome is in the circuit's hands and Judge Carter explained, when he is reversed, "the circuit is always right." If a case returns on remand, he strives to fairly apply the appellate decision. The court has to "get back to it and be fair." He cautioned appellate advocates, whether you win or lose, the circuit deserves your utmost respect.

In concluding, Judge Carter explained that he finds it helpful to divide policy questions into categories to determine when the court should be most willing to base its decision on policy principles. To illustrate this process, he pointed to death-penalty cases. In the penalty phase of a California capital trial, the jury makes factual findings about special circumstances underlying a defendant's aggravating or mitigating role in the crime. The judge, however, has to make evidentiary and other rulings determining what the jury may consider. Under *Williams v. Illinois*, 567 U.S. 50 (2012), the Supreme Court allows consideration of certain non-testimonial hearsay because it does not violate the Confrontation Clause. This principle applies in the penalty phase of capital cases.

As an example, in one death-penalty case over which Judge Carter presided, the government wanted to admit an FBI agent's statement that informants reported murders inside the San Quentin prison. Under *Williams*, Judge Carter acknowledged that such testimony could be legally permissible. But the evidence did not sit well with him. On the one hand, he could simply take the statement at face value. But he knew nothing about the three informants who report-

edly told authorities about the murders. Nor did the defense have any way to probe the hearsay statements. Because he believes "death is different," Judge Carter demands more indicia of reliability in a situation like this. His decision to not rely on the informant statements involved an inner reflection, after which he concluded that what he had before him was insufficient, even if legal authority would have allowed him to reach the opposite conclusion.

Responding to some of Judge Carter's remarks, Chief Justice Markman expressed agreement that judges review a wide spectrum of issues. Indeed, he noted that wise appellate judges have an obligation to recognize that trial courts operate in a different world, and he hopes that appellate courts strive to view trial-court decisions through the lens of what the trial court had before it at the time.

Ms. Massaron asked the panelists to address how they would handle a case that turned on an old law that society had arguably moved past, noting that legal scholars often distinguish between a judge allowing a societal moral view to influence a decision, versus allowing an idiosyncratic personal moral view to influence the outcome.

Judge Carter responded that this country is a big place, so in principle it would be difficult to apply a single societal moral view. For example, he acknowledges that the Fifth Circuit has followed *Williams* to come out the other way in a death-penalty case, but perhaps the Ninth Circuit would agree with him. In any event, in his view, even murderers deserve due process.

Chief Justice Markman stated he agrees with Judge Carter in at least one area—the approach to capital cases. Although Michigan has never had the death penalty, he acknowledged that these cases present extraordinarily different and difficult issues for any judge, whatever the judge’s individual views on the role of public policy in decision making. Where capital punishment is an appropriate sanction and the required process is satisfied, Chief Justice Markman believes it is appropriate to subordinate a judge’s personal sense of right and wrong to the views of the community (*i.e.*, if a state provides for the death penalty, the community has decided that the death penalty is appropriate in certain cases).

Similarly, Chief Justice Markman cautioned that judges cannot assume the role of an all-powerful dictator; rather, they must operate within our constitutional structure. Judges must subordinate their own personal sense of justice to the law. He explained, “I don’t do justice. I do justice under law.” He closed by noting that rarely a day goes by where he doesn’t disagree with the law, but unless that law is unconstitutional, he won’t substitute his judgment for that of the people.

Judge Carter answered that he and Chief Justice Markman do in fact disagree on the topic of capital cases. Judge Carter believes that, in some cases, one’s personal experience and morality take precedence over precedent. Often, not everyone agrees, and community values can differ; but whatever the penalty outcome, he tries to explain the competing policy interests in a way that will allow the appellate court to agree, at the very least, that deciding the issue is not cut and dried.

In closing, Ms. Massaron noted that when these judges first accepted judicial positions, common practice during confirmation hearings was to ask what kind of judge a person would be, not to grill candidates about personal, religious, moral, or other values that might underlie policy. As the debate over the role of public policy in judicial decision making continues, such questions have become more common of judicial candidates. And as this panel demonstrated, a variety of cases and approaches can result in diversity of views and outcomes.

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