

# Appellate Issues

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## MESSAGE FROM THE CHAIR

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I am pleased to announce the publication of the Winter edition of *Appellate Issues*. This issue covers a wide variety of topics from the November 2010 AJEI summit that took place in Dallas. The summit again proved to be the premier appellate seminar in the country, featuring presentations from distinguished members of the appellate judiciary, practitioners and academics on a host of appellate-practice topics. This edition of *Appellate Issues* includes articles on the current Supreme Court term, oral argument, discretionary review, extraterritorial jurisdiction, issues percolating in the lower courts and the use of appellate lawyers at trial.

If you have any questions about CAL's Publications Committee or would like to become involved with our projects, feel free to contact me at [ben.mesches@haynesboone.com](mailto:ben.mesches@haynesboone.com).

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## AJEI Summit: Supreme Court Preview

by Matthew T. Nelson\*

Highly regarded Supreme Court advocate, Judge, and former Solicitor General Ken Starr and Stanford Supreme Court Litigation Clinic Director Pamela Karlan shared their thoughts on the current Supreme Court term, as well as challenges facing the Court, at the 2010 AJEI Summit. The panel discussion was moderated by SMU Dedman Law School Dean John B. Attanasio.

The participants began by giving general observations about the Court. Professor Karlan made two observations about the likely affect of Justice Kagan on the Court. First, Karlan noted that although exchanging Justice Kagan for Justice Steven is not likely to change the bottom line in many cases, the real effect may arise in 5-4 splits with a liberal majority because Justice Kennedy will now be the senior justice tasked with assigning who will write the decision.

Second, Karlan observed that Justice Kagan has recused herself from a significant number of cases this term because she participated in the cases as solicitor general.

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These recusals increase the risk of affirmance by an evenly divided court. And third, Karlan noted that the Court has agreed to provide audio recordings of oral arguments on the Friday following oral argument. She speculated that the Court made this change to avoid giving sound bites to the media, but noted that the recordings are useful for oral-argument preparation.

Judge Starr also reflected upon the changes in personnel on the Court. For more than a decade, the composition of the Court remained the same. Within the last five years, the Court has four new justices. He observed that the seat filled by Justice Kagan is noted for longevity. Justice Kagan succeeds Justice Stevens who served 35 years. Justice Stevens, in turn, replaced Justice Douglas in 1975 after Justice Douglas had served 36 years. Justice Kagan is 51, so it is possible that she too could serve for more than 30 years. With regard to Justice Kagan, Starr noted that because she has not spoken about or written on a vast array of topics, she is relatively free to call issues as she sees them. But Starr ultimately characterized Justice Kagan as pragmatic and suggested she may be prone to find commonality with Justice Breyer.

Dean Attanasio then turned the conversation to cases currently before the Court. He noted that at the time of the Summit, the Court had 65 cases on its docket and had heard 26 oral arguments. Seven of the cases have arisen from state supreme courts, two from state intermediate courts, and one under the Court's original jurisdiction. At the same time in the 2009 term, the Court had 72 cases on its docket en route to an eventual 92 cases, and had heard oral argument in 27 cases. Attanasio then turned the panel's attention to particular cases:

### Equal Protection: Immigration

In *Flores-Villar v. United States*, the Court will address whether the longer residency requirement for men (than women) to transmit citizenship to children born outside the United States offends equal protection of the laws under the Fifth Amendment. The Immigration and Nationality Act ("INA") provides that for children born before 1986, like Flores-Villar, American fathers must have lived in the United States for 10 years, at least five of them after the age of 14, to pass citizenship to their children. American mothers, by contrast, need residency of only one year. The Ninth Circuit denied Flores-Villar's argument that the INA violates equal protection.

Starr observed that the INA's different treatment of fathers and mothers seems intuitively wrong, unfair, and violative of equal protection. But this intuition conflicts with the Court's deference to Congress on immigration issues.

Karlan suggested that the Court may well strike down the INA's distinction but deny the remedy that Flores-Villar is seeking—citizenship.

### Terrorism & Prosecutorial Discretion

In *Ashcroft v. al-Kidd*, the Court will decide whether former Attorney General John Ashcroft has immunity from a claim that he misused the material-witness statute to arrest a terrorism suspect. In 2003, the FBI arrested al-Kidd as he was about to leave the country to study in Saudi Arabia. The government classified him as a material witness in the terrorism trial of Sami Omar al-Hussayen, and held him for 16 days. al-Kidd sued then-Attorney General Ashcroft personally alleging that Ashcroft created and authorized a program to purportedly misuse the material-witness statute, 18 U.S.C. §

3144, to detain suspected terrorists in violation of that statute and the Fourth Amendment. Ashcroft seeks absolute immunity for seeking material-witness warrants as an exercise of prosecutorial discretion, and qualified immunity for use of the warrant because he either did not violate al-Kidd's constitutional rights or the right violated was not clearly established. The Ninth Circuit rejected Ashcroft's bid for absolute immunity because the government's alleged motive for arresting al-Kidd had nothing to do with the al-Hussayen trial.

Starr observed that the Court is highly skeptical of civil litigation against high-ranking government officials addressing issues of national peril.

Karlan expects the Court will reverse the Ninth Circuit because the case involves the actions of an Attorney General. She suggests the case might turn out differently if it involved a lower-level public official.

Attanasio observed that this case may have far-reaching implications on terrorism prosecutions because nearly 50% of material witnesses held after 9/11 were not called to testify.

#### Personal Jurisdiction

The Supreme Court will decide this pair of cases to determine when foreign companies can be sued in the United States. In *Goodyear v. Brown*, the plaintiffs sued in the North Carolina courts over the deaths of two North Carolina teenagers killed in a bus accident in France. The North Carolina appeals court held that Goodyear Luxembourg could be sued in North Carolina over tires manufactured in Turkey and sold only in Europe because the company sold different tires in North Carolina through a local distributor. In *J.*

*McIntyre Machinery v. Nicastro*, the New Jersey Supreme Court held that a foreign corporation could be sued in New Jersey over a product made in the United Kingdom that was sold to a distributor in Ohio that eventually injured a worker in New Jersey.

Starr opined that the Court has recently adopted an anti-litigation theme, and it may be a bit much to subject foreign companies to claims in these cases. He thought that the more pragmatic justices, Breyer and Kagan, might wrestle with whether it makes sense to give this much power to state courts.

Karlan observed, to much laughter, that these cases sounded like bad law-school exams.

#### First Amendment: Funeral Protests

In *Snyder v. Phelps*, the Supreme Court will decide whether the First Amendment protects picketing the funerals of soldiers killed in combat. Phelps and members of his church picketed the funeral of Matthew Snyder, holding up signs saying "Thank God for dead soldiers" and "Fag troops." The demonstrators obeyed the law and were not seen by the family at the funeral. But Snyder's father saw news coverage of the protest and found additional information on the internet. The Snyder family sued for intentional infliction of emotional distress. A jury awarded them millions in compensatory and punitive damages. The Fourth Circuit reversed on First Amendment grounds, finding that no matter how loathsome the speech, because Phelps complied with the law and addressed an issue of public concern (homosexuals in the military), the courts could not impose liability for intentional infliction of emotional distress.

Karlan opined that Phelps operates a hate group masquerading as a church. But she

noted as a First Amendment matter, it is pretty clear that Phelps and his congregation had the right to do what they did. She recounted that, at oral argument, the Court was clearly frustrated and yelled at Phelps' counsel—his daughter. Karlan believes it likely that the Court will not create a new exception to the free speech right. Instead, she expects the Court to give a road map to the lower courts on reasonable restrictions including bubbles around funerals and banning face-to-face contact. She does not expect the restrictions to reach so far as to ban posting polemics on the internet. Attanasio agreed that if the Court upholds the decision, he expects to see a roadmap to time, place, and manner restrictions.

Starr suggested two ways of looking at First Amendment cases like *Snyder*. The first is to consider whether the government is engaging in any form of censorship, like in the flag-burning cases. The second, is to consider cases like *New York Times v. Sullivan*,<sup>1</sup> where a common-law cause of action is displaced by the First Amendment. Starr believes that if the Court is going to reverse the Fourth Circuit, it may emphasize the gratuitousness of the decision to travel from Kansas to the East Coast to choose the Snyder funeral for Phelps' expression.

#### First Amendment: Violent Video Games

The Supreme Court granted cert in *Schwartzenegger v. Entertainment Merchants Association* to determine whether the First Amendment permits any limits on offensive content in violent video games sold to minors; and whether a state regulation for displaying offensive, harmful images to children is reviewed under the exacting “strict scrutiny” standard. California enacted a law that imposes

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<sup>1</sup> 376 U.S. 254 (1964).

restrictions and labeling requirements on the sale or rental of “violent video games” to minors. The entertainment industry brought a declaratory judgment action to prevent enforcement of the law. The district court ruled in favor of the industry, and the Ninth Circuit affirmed.

Starr noted that California argued that the Court's rule in *Ginsburg v. New York*,<sup>2</sup> allowing states to ban the sale of pornography to minors, should apply to violent video games because violence is worse than mere nudity. But Starr noted that the Supreme Court is robustly committed to free speech, citing *United States v. Stevens*,<sup>3</sup> in which the Court protected the sale of animal crush videos as constitutionally protected speech. Starr predicted that the Court would not adopt a categorical exclusion with respect to violence. But the Court struggled with the social-science evidence that really violent video games are corrosive to development.

Karlan emphasized that the Court took the *Schwarzenegger* case even though there was no circuit split and even though it had decided a First Amendment case seeking a new categorical exclusion from the First Amendment in the previous term. Karlan further noted that the case could split the conservatives on the Court over how “originalist” they want to be when faced with new media.

Dean Attanasio identified an additional intriguing theme that could arise in the context of violent video games: What is the difference between speech and action? For example, in *Brandenburg v. Ohio*,<sup>4</sup> the

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<sup>2</sup> 390 U.S. 629 (1968).

<sup>3</sup> 559 U.S. \_\_\_, 130 S. Ct. 1577 (2010).

<sup>4</sup> 395 U.S. 444 (1969).

Court distinguished between steering a group to violence and inciting a group to action. Attanasio posited the question, “What if there was a video game to train children to be terrorists?” The issue was not squarely addressed in *Schwartzenegger*.

#### Sixth Amendment: Confrontation Clause

The Supreme Court has two cases addressing the scope of the Sixth Amendment’s Confrontation Clause: *Bullcoming v. New Mexico* and *Michigan v. Bryant*. In *Bullcoming*, the defendant was convicted of driving under the influence after the State introduced a blood-alcohol test through a supervisor of the person who performed the actual test. The defendant argued that the laboratory report of his blood draw results was testimonial evidence subject to the Confrontation Clause. After the Supreme Court issued its decision in *Melendez-Diaz v. Massachusetts*,<sup>5</sup> the New Mexico Supreme Court held that the blood alcohol report was testimonial evidence, but it was admissible even though the forensic analyst who performed the test did not testify. The Court will address whether the Confrontation Clause permits the prosecution to introduce testimonial statements through the in-court testimony of a supervisor or other person who did not perform or observe the analysis described in the statements.

In *Michigan v. Bryant*, the defendant was convicted of second-degree murder and other crimes. During his trial, the State introduced statements from the victim shortly before he died that the defendant shot him. The defendant challenged the admission of the victim’s statements at trial for violating his Sixth Amendment right of confrontation. The Michigan Supreme

Court held that the victim’s statements to police before his death were testimonial and their admission violated Mr. Bryant’s right to confrontation because the victim’s statements were made in the course of a police interrogation to establish or prove events that had already occurred, not to enable police to respond to an ongoing emergency. In *Bryant*, the Court will address whether statements by a wounded victim concerning the perpetrator are non-testimonial if the purpose of the police inquiry is to enable police assistance to meet an ongoing emergency.

Professor Karlan observed that these cases may be affected by the replacement of Justice Stevens by Justice Kagan. She explained that the 5-4 split on Confrontation Clause cases is not the traditional split. Justice Scalia is the most defendant friendly justice in this context—he believes the Sixth Amendment requires face-to-face confrontation. He is typically joined by Justices Souter, Stevens, and Thomas. Karlan further noted that last term, after the Court held in *Melendez-Diaz* that forensic evidence is testimonial and must be presented by live witness, the Court granted certiorari in *Briscoe v. Virginia*. Karlan believed the Court took *Briscoe* with the idea that the addition of Justice Sotomayor to the Court could cause reconsideration of *Crawford v. Washington*.<sup>6</sup> But the Court dismissed certiorari in *Briscoe* as improvidently granted after oral argument, likely because the facts were too similar to *Melendez-Diaz*. During the argument in *Bryant*, Karlan thought the Court was hostile to the ongoing emergency concept. Ultimately, Karlan reasoned that the future of Confrontation Clause jurisprudence will depend upon the views of Justices Sotomayor and Kagan. Finally, Karlan pointed out that the Court has an additional

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<sup>5</sup> 129 S. Ct. 2527 (2009).

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<sup>6</sup> 541 U.S. 36 (2004).

Confrontation Clause case, *Allshouse v. Pennsylvania*, pending on petition.<sup>7</sup>

Dean Starr indicated that he thought it was helpful to think of the two camps in the Confrontation Clause cases as the formalists (e.g., Scalia) and the pragmatists (e.g., Roberts, Breyer). He anticipates that pragmatism will ultimately prevail.

### Supreme Court Docket

After the discussion of these cases, the panel had time to address questions and make a few additional comments. The first question inquired whether the Supreme Court is likely to respond to criticism that it is currently writing longer opinions that say less. Karlan responded to the negative. The Justices' law clerks, access to easy word processing, and tendency towards strongly held views are likely to continue the trend of longer opinions.

Starr commented that the Court needs to work harder and take more cases. He complained that there are too many conflicts that are not being resolved but warrant the Court's attention. The Court is avoiding these disputes based on rationalizations that the issues need to "percolate" further or that the Courts of Appeals may take the issues en banc. In Starr's opinion, the quality of the opinions in the early 1980s when the Court took 140 cases per year did not cause the republic to fall, so the Court would not be harmed by taking more cases now.

Karlan rejoined that, in her opinion, the quality of the Court's opinions have improved significantly since the Court began reducing its docket.

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<sup>7</sup> Kaplan's Stanford Law School Supreme Court Litigation Clinic represents the Petitioner-Defendant.

At the end of the session, Starr shared his view that Justices' delegation of the review of cert petitions to the clerk pool is unconstitutional. He noted that the clerks all know that no harm will come if a case is denied certiorari, but recommending cert be granted is fraught with opportunities to harm the clerk's reputation if the Court ultimately decided not to grant cert. Starr charged that this practice is institutionally insidious and that the Court is no longer fulfilling its responsibilities.

And with that, members of the audience were left to prognosticate on their own as to the outcome of the cases currently before the Court.

### **Deciding Whether To Seek Certiorari Or Other Discretionary Review**

Crystal G. Rowe<sup>\*</sup>

At the 2010 AJEI Summit, a panel of distinguished jurists and appellate practitioners offered valuable insight into the world of certiorari practice before the United State Supreme Court, highlighting the various factors to be weighed in determining whether to seek such discretionary review. The panel also discussed discretionary appellate review in certain state courts, including Indiana. Moderated by John Bursch of Warner Norcross & Judd, LLP, the panelists were

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the Honorable Edith Jones, Chief Judge of the Fifth Circuit Court of Appeals, Deanne E. Maynard of Morrison Foerster, Kannon K. Shanmugam of William & Connolly, LLP, and Peter J. Rusthoven of Barnes & Thornburg, LLP.

#### **A. Identifying Issues Worthy Of An Interlocutory Appeal**

The panel began its discussion by recognizing that the Supreme Court receives over 9,000 Certiorari Petitions each year, but only accepts approximately 75 under its discretionary review. Generally speaking, then, obtaining Supreme Court review is a daunting task. Given these statistics, the panelists explained that it is simply not enough to allege that an error occurred in the lower courts. Instead, certworthy cases typically need to (1) involve a defined conflict in the law or circuits, (2) present an issue that is of heightened public importance, (3) demonstrate that the lower court improperly invalidated a statute as unconstitutional, or (4) concern an extremely important question of law.

The panel noted that the vast majority of successful cert petitions involve conflicts in the law creating circuit splits. A lesser number of granted petitions concern allegations that the lower courts incorrectly invalidated a federal statute as unconstitutional and, even fewer, address questions of law without a recognized conflict or circuit disagreement. If the petition rests upon fact disputes or presents questions of state (rather than federal) law, it will likely be unsuccessful at persuading the Justices to accept discretionary review.

The panel advised petitioners seeking certiorari review to always frame their issues in accordance with Supreme Court Rule 10. That Rule provides, in pertinent part:

A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted

error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

With respect to specific issues, the panel advised that jurisdictional questions should be raised at the cert petition stage. The panel also warned petitioners to consider (before filing a cert petition) whether higher review is appropriate, given that the Court may rule against them. In other words, a vague judgment against the petitioner, if challenged, may come out of the Supreme Court even more clearly against the petitioner, than before.

#### **B. Overall Culture Of The Supreme Court—Find Reasons To Deny Cert Petitions**

Panelists Deanne (a former clerk to Justices Powell and Breyer) and Kannon (a former clerk to Justice Scalia) discussed the cert pool procedure employed by most of the present Supreme Court Justices. In brief, the cert pool is a system that enables the Justices to pool together their clerks to review cert petitions more efficiently and expeditiously. One clerk, instead of multiple clerks, will review the cert petitions and draft a memorandum, which is circulated to all participating Justices.

The panelists explained that the general culture of the Supreme Court cert pool is to look for reasons to deny petitions. Deanne and Kannon remembered participating in the cert pool and recommending that the Justices deny petitions that were fact-based, asserted no conflict with Supreme Court precedent, and revealed no split in the circuit courts. Kannon stated that, as a clerk, when encountering these types of petitions, he would write simply “fact-bound/split-less/deny,” as his ultimate recommendation.

#### **C. Tips For Responding To A Petition For Writ of Certiorari**

The panel further provided tips to appellate practitioners facing the dilemma of whether to incur the time and expense necessary in responding to a petition or waiving their client’s right to respond. The panelists remarked that, if after reviewing the petition, the practitioner believes that it will likely receive dismissive treatment by the Court, such that the petition does not warrant a response, the advocate may waive the right to file a formal response by filing a waiver letter. Although the waiver procedure is easier and less expensive than preparing and filing a formal response in opposition to the cert petition, the panel cautioned that there are risks associated with waiving a client’s right to file a formal response. First, without the benefit of a response in opposition, the Court may decide to grant the Petition for Writ of Certiorari. The panel remarked, however, that this risk is low given the Court’s usual practice of affirmatively requesting a response if it finds something of interest in the case.

According to the panel, the greater risk is that, by not filing a formal response at the outset, the practitioner may unwittingly put momentum behind the cert petition if a response is eventually requested. In that regard, the petitioner might prematurely believe that his or her case has merit. What is more, the law clerk who recommended that a response be filed may have developed a bent or leaning toward the petitioner’s viewpoint, vis-à-vis the certworthiness of the matter, which may be difficult to counteract in the opposition brief.

The “take-away” message for the respondent is that waiver should only be used in certain cases where the practitioner believes a petition is so unworthy that a response is



unnecessary. If it is a close case, prepare a response. Also, it is important to note that the underlying merits of the case at hand are not of primary concern at the petition stage.

#### **D. The Role Of Amici Curiae**

Lastly, the panelists discussed the role of amici curiae in the certiorari process. The panel members agreed that amici may help petitioners catch the eye of the Court—especially when such amici are the federal government or solicitor general. By contrast, a respondent generally would not want to enlist the help of amici, as they may simply persuade the Court that the petition is certworthy.

#### **E. Discretionary Review At The State Court Level**

Moving away from Supreme Court practice, the panel offered insight into state courts' discretionary review procedures. Notably, Peter provided numerous tips on practicing before the Indiana Supreme Court.

### **Appellate Lawyer as Wingman: The Increasing Use of Appellate Specialists at Trial**

by John J. Bursch\*

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When and why should an appellate lawyer be included as part of the trial team? A distinguished panel of appellate practitioners shared their answers to that question at the 2010 AJEI Appellate Summit in Dallas, Texas. Moderated by Bradley Arant partner Matt Lembke, the panelists were Ben Cooper of Steptoe & Johnson, David Myer from Howrey, and Alan Wright of Haynes & Boone.

Alan began by discussing the important roles that an appellate lawyer can play at trial: conducting legal research, drafting briefs, presenting oral argument, and preparing and arguing jury instructions. By performing these tasks, the appellate lawyer leaves the trial lawyers free to focus on witnesses and exhibits. More generally, an appellate specialist can also be helpful in identifying the key legal issues that will frame the case, both at trial and on appeal. From Alan's perspective, it makes sense for the trial lawyers to introduce the appellate lawyer to the judge and clerks as soon as possible, because the appellate lawyer will then be identified as a member of the trial team before the occurrence of crucial trial milestones such as the jury charge and post-judgment motions.

David Meyer added that there is an advantage to having a somewhat-more-objective participant in the trial strategy, someone who has an eye on the legal issues. For example, the trial lawyers may have strategic reasons to push the envelope on a jury instruction, but for the long-term good of the case, it may be better to drop that request and avoid a potentially reversible legal error.

Ben opined that the greatest value of the appellate lawyer on the trial team may be temperament, rather than substantive function. But you have to know your place.

Just as an appellate lawyer would prefer that a trial lawyer not be passing notes to the podium during an appellate argument, the trial lawyer would prefer that the appellate lawyer not be tugging on the trial lawyer's sleeve, begging for an evidentiary objection. While the appellate lawyer can play a key role in protecting and preserving the record, you do not want to interfere with the relationship the trial team is trying to build with the jury. One way to serve the record-preservation function without sitting at counsel table is to create checklists that the trial lawyers can use for record-preservation purposes. Alan agreed that unless you will be speaking to the jury, it is best not to be at counsel table.

Matt had a different perspective on where appellate counsel should be seated. In post-verdict conversations after a number of high-stakes trials in which he participated as the appellate voice for the defense team, the jurors said they were not at all bothered either by his presence at counsel table or by the large number of lawyers in the courtroom. In fact, the jurors expected a large legal team for a case of such importance.

An audience member noted a personal experience when a trial-court judge was extremely perturbed by an appellate lawyer's presence at trial. The judge went so far as to voice his negative feelings in several footnotes of an opinion. Ben acknowledged that such a negative reaction is always a risk, but noted that most judges will expect an appellate lawyer's involvement in a significant trial. In addition, potential judicial animosity can be defused if the appellate lawyer consciously works early on to develop a relationship with the judge.

Alan shared similar negative experiences in cases on which he worked 15 years ago. But in his view, that somewhat negative judicial mindset had changed over time, to the point that in a recent case, the judge criticized the appellate lawyer for not being in the courtroom sooner! Ben and David added that it helps if the appellate lawyer is truly an integrated part of the trial team, acting as the sole voice of that team in all matters involving briefing and legal-issue argument. Making the appellate lawyer's role clear at the outset of the proceeding will go a long way toward alleviating the court's concerns about the lawyer's presence.

Ben queried whether the appellate lawyer's role should be so integral that the lawyer actually examines a few witnesses. But Alan's preference was not to do that, because it takes his time and focus away from the other important roles he is playing. David added that there is also a danger of losing objectivity when an appellate lawyer actively participates in trying the case.

What cases justify an appellate lawyer's participation? Any case that is large or important. But Ben observed that approval for an appellate lawyer's participation will depend on whether the client understands that the trial is not the entire conflict, but only the first battle. And the only time to assess victory is following the final stage rather than an intermediate one.

Another audience member asked how to sell an appellate lawyer's value to a trial lawyer who ordinarily handles all aspects of a case. The panel said this is a matter of marketing and education. An appellate lawyer needs to make the case that an appellate perspective is valuable from a case's inception—even before the complaint is filed (e.g., to deal with venue and jurisdiction issues)—and can add value along the way without duplicating

effort. The key is for the client and the trial lawyers to understand that litigation is like a football game, where final judgment represents halftime, not the game's end. And from the trial lawyer's perspective, the appellate lawyer can be both guardian angel and life preserver, safeguarding victory and averting disaster as necessary.

Alan has been successful in educating clients by putting together a timeline of litigation milestones that shows the important roles that an appellate lawyer can fill throughout the process. Such a timeline also allows the client to see how many balls the trial lawyers are juggling even while the appellate lawyer is fully engaged. Repeat litigation clients tend to understand this reality from experience, and trial lawyers are generally growing to accept it. In one of Matt's cases, the trial lawyer told him "you sure made my life easier. I never want to go through a trial without that kind of assistance again."

What happens when a client calls on the eve of trial and asks for appellate help? Ben starts by asking for extensions on all his current appellate briefing deadlines. Then he asks for the complaint and any pre-trial briefing, as these pleadings provide the quickest way to get up to speed. David added that a lengthy conference with the client is also essential. Matt noted the diplomatic challenge of dealing with the trial lawyer in such a circumstance.

An audience member remarked that an important function of his firm's appellate monitoring function is to report to the client, on a daily basis, how the trial is progressing. This presents the delicate problem of providing an accurate and objective report without jeopardizing the relationship with trial counsel. But as Ben noted, the problem is really no different than that confronted by

the appellate lawyer when retained after an adverse final judgment, when the client asks what could have been done differently at trial. As Alan emphasized, extreme objectivity is required.

Another audience member asked how to balance the importance of positioning a case for appeal while avoiding the serious problem of annoying the jury. David suggested doing as much as you can outside the jury's presence (e.g., resolving anticipated evidentiary objections, arguing motions in limine, debating the jury instructions, etc.). Juries are most frustrated when a process they do not understand is delaying the trial. The appellate lawyer can also help trial counsel maintain a positive relationship with the court by playing the "bad cop" who argues motions in limine and debates the jury charge.

In *abstentia*, CAL Chair Jerry Ganzfried noted that another role for the appellate lawyer at trial is to review the daily transcript for conventions that may be useful in post-judgment briefing and on appeal with respect to how to define the parties and witnesses, or to describe key concepts (e.g., MCD versus Mad Cow Disease). The appellate lawyer can then work with trial counsel to start using those conventions during trial.

Finally, David cautioned appellate lawyers to carefully study the local trial and appellate rules. The steps necessary to preserve the trial court record vary by jurisdiction, and the appellate wingman needs to know the rules of engagement before takeoff.

## **Oral Argument 411 (and 911!): Thoughts from Both Sides of the Bench**

by Gaëtan Gerville-Réache\*

At the AJEI Summit on Friday, November 19, 2010, a panel of distinguished jurists and appellate advocates shared valuable insights into preparing for, surviving, and maybe even making a difference at oral argument. Moderated by Kevin C. Newsom of Bradley Arant Boult and Cummings LLP, the panelists were the Honorable Jennifer Walker Elrod of the United States Court of Appeals, Fifth Circuit, Carter G. Phillips of Sidley Austin LLP, Gregory G. Garre of Latham & Watkins LLP, and Gregory S. Coleman of Yetter Coleman LLP.

### **How do you prepare for the fast-paced and very public affair of oral argument?**

Carter began the discussion by explaining that he does not generally use moot courts to prepare. His first experiences in the Supreme Court were as an assistant to the Solicitor General, and mootings were not the practice in that office at the time. Greg Garre later noted that the practice in the Solicitor General's office changed with Justice Scalia's arrival. Before Scalia, the Court was not very active in the oral arguments. But now the justices are active. Carter agreed that it can help to have someone asking real questions that they

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legitimately think are important to disposing of the case properly. You can use their feedback to refine your answers.

According to Carter, there is not one preferred way to prepare. How you prepare depends upon how long you have been involved in the case. Carter added that one of the keys to being well prepared is identifying the 3-5 points you absolutely must convey during the oral argument. Carter literally checks off those points as he presents them at the oral argument.

According to Greg Garre the best thing one can hope for is lots of questions from the judges—their questions reveal how they view the case. Greg explained that moot court reveals how the case may look from the perspective of the judges. But Greg cautioned you to remember that preparation for oral argument is always a work in progress. He advises advocates not to lock in their answers after the moot court. Just use the moot court to refine your answers as you go.

In preparing for oral argument, Greg Garre writes out a list of questions, then charts the answers and works his main points into each answer. He begins to generate the list several weeks in advance, as the issues come to mind. Greg recommends writing the questions and answers as if you were speaking them, not writing them as if you were drafting a brief. Otherwise, the presentation will be awkward and difficult to follow. The response should be simple, framed well, and summarized in a sentence or word. Then you can elaborate.

Carter warned that a danger of moot court is that you become accustomed to hearing certain questions. This lulls you into assuming that you know what question is coming before the judge finishes the

question. It can be quite annoying for the judge.

Unlike Carter, Gregory Coleman said that he loves moot courts. He likes to moot in front of different panels, to avoid getting the same questions and point of view every time. Many law professors will host moots by a panel of professors in front of students. The professors know they are much smarter, and they are excited about the opportunity to prove that to their students. The professors try to grill and embarrass you and he prefers to be embarrassed there rather than in front of a court. Round tabling is also a good technique for preparing for oral argument—just sit at a table and discuss the issues in the case with others.

Gregory Coleman also advises not to look at oral argument as a speech or presentation. It is an opportunity to coax the judges into expressing their concerns or questions, and to answer those questions in a way that may change or guide their thinking on the issue. One of the judges may be on the fence and ready to be persuaded to create a majority in your favor.

### **How does a judge prepare for oral argument?**

Judge Elrod was obviously the most qualified panelist to field this question. Oral argument is Judge Elrod's favorite part of her job. She reads the briefs, assigns a law clerk a bench memo, re-reads the memo and brief, and reads opinions below. Judge Elrod then makes a list of questions about the appellate record, and asks the law clerk to find answers and excerpts in the record. When that is completed, she formulates a final list of questions that will (1) elucidate areas in the record that are unclear, (2) flush out questionable or poorly briefed case law, and (3) define the case parameters or narrow

the issues, what she calls “conceding” questions. Judge Elrod sees oral argument as an opportunity to narrow the case to its core issues. The day before oral argument she reviews the briefs and memos. Some judges do not get into the record until the day after the oral argument. You have to be ready to answer questions for both types of judges. You have to be in the trees and the forest at the same time. Figure out what kind of judges you are dealing with early on.

### **How do you turn a question from defense to offense?**

According to Carter, the key aspect of the case is to understand your case well enough to know the bare minimum that you cannot give away without conceding the case. Make your key points at the beginning of the oral argument if possible, but then try later to use the questions as an opportunity to emphasize your points. Do the best you can in making that transition from the hostile question into the central argument.

Greg Garre tries to answer the hostile question directly. He does not resist. According to Greg, you are digging a deeper hole if you resist, and you will eventually have to dig yourself out. Concede that it is a difficult point for you. Say, for instance, “That’s a fair point” or “You’re right, that case is difficult for us,” and then finish with “But your honor . . . ,” and explain how that problem should be overcome. If you do this, the judge will usually give you some leeway to rebut.

Kevin Newsom added that Rex Lee, a former Solicitor General, had a unique ability to use this “confession and avoidance” technique. He knew that if he was candid, the judges would give him leeway to explain how the court should avoid the problem the judge had presented.

Judge Elrod reiterated that the key to effective advocacy is knowing what you can concede. If you have not thought it through, you are in trouble. Do not be the person who will not concede anything because the judges will not listen to you. You might as well have stayed home because you cease to be persuasive when you become stubborn in your position.

### **What are the annoying things that lawyers do at oral argument?**

Judge Elrod was well prepared with a list of the Top Ten Most Annoying Types of Oral Advocates.

10. The Church Mouse and the Wild Gesticulator: if the judges cannot hear you it does not matter what you say. Make sure you are heard. You can use your hands a little, but not too much.

9. The “I think / I believe” Advocate: either you know or you do not know. State your position with conviction, if you have one.

8. The Pesky Questioner: The judges ask the questions, not the lawyer. Lawyers should only ask questions to understand the questions they are being asked. For instance, questions such as “How did you like it when you were stopped by the police?” and “How would you like it if these young people came in and took your jobs?” are inappropriate and annoying.

7. The Self-righteous Advocate: be passionate but also dispassionate. Do not make it personal.

6. Theatrical Trial Lawyer: this lawyer usually is either full of contempt or makes unnecessary and visual demonstrations.

5. Unprepared Pettifogger: this lawyer does not know the case, resorts to trickery, and, as a result, tells the judges things that are not in the record.

4. The Filibusterer: In Judge Elrod’s words, “all you are going to do is step in something if you continue to talk when no one is asking questions.” As the saying goes, when you hit oil, you should quit drilling.

3. The “I Will Not Concede Anything” Advocate: even if the issue is irrelevant, this advocate will concede nothing. This leads to total loss of credibility.

2. The “With All Due Respect” Advocate: this lawyer usually has anything but respect for the court. It is very noticeable.

1. The Artful Dodger: This lawyer won’t answer any questions, dodging even the softball questions. One panelist commented that sometimes you cannot hit the softball out of the park, if you want to persuade people in the middle. But according to Judge Elrod, her court is not that sophisticated. You should at least swing at the softball question.

Notice that not being able to answer the question did not make the list. According to Judge Elrod, the worst day in oral argument is not when you don’t know the answer to the question. Just say, “May I submit a 28J letter to answer that question?”

### **What did the panelists as young lawyers learn from their mentors?**

Carter learned two things from Rex Lee: First, the most fun you will ever have is arguing in the Supreme Court. It is helpful to remember that when you step into the courtroom. Second, be conversational. Rex was known for being remarkably

conversational and making the judges feel comfortable.

Greg Garre learned two things from Chief Justice John Roberts. First, he learned that preparation was important and everyone has to do it. There was no better advocate than Chief Justice Roberts. But for every case he argued, John Roberts' level of preparation was astounding. He would learn every single fact and every single case on point. That is a good lesson for us mere mortals. Second, Chief Justice Roberts never wanted to be the story of the oral argument. He understood his role was to answer questions and do so aptly and not to score points with theatrics. That is why he was so successful.

Greg Coleman had no mentor to speak of. His firm had no appellate group. But he wanted to do appellate law, so he frequently attended oral arguments and listened to oral arguments on tapes. The courtroom was his class room. He learned good habits from observing others.

### **What do you do with the filibustering judge?**

Carter advises to avoid staring at that particular justice. The situation is very apropos at the Supreme Court. If you stay focused on that justice, it just keeps the unfavorable exchange going. Look to someone else on the bench. Answer the question as honestly as you can, which may mean acknowledging you just do not agree with that justice's point of view.

Kevin Newsom recounted that in one of his oral arguments in the Supreme Court, Justice Souter hated his position. Justice Souter had a unique ability of finding the kernel of your case and smacking you in the face with it. Kevin made the mistake of engaging only Justice Souter on that issue.

When they finally came to an impasse, he said "Justice Souter, it doesn't appear that I am convincing you." Justice Souter gracefully relieved the tension by saying, "Well then convince the others."

### **How do you handle the hostile panel when you get multiple questions at the same time?**

When multiple judges ask you questions at the same time, Gregory Coleman recommends trying to pick the judge that started first. As far as hostility from the panel is concerned, earnestness goes a long way in the Court. Occasionally, a judge will continue to beat you up. But usually, if the judge sees you are prepared and presenting your best case, the judge will eventually back off.

Judge Elrod recommended saying, "your honor, I haven't answered the other judge's question yet. May I do that first." If it is unclear who asked the question first, answer the presiding judge's question first.

### **United States Extraterritorial Jurisdiction in an Era of Globalization**

by Jason J. Jarvis<sup>8</sup>

Two noted experts on international law discussed the issue of extraterritoriality—the application of the United States Constitution and other federal law outside the territorial boundaries of the United States—at the 2010 AJEI Appellate Summit in Dallas, Texas.

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The panel was moderated by Justice Elizabeth Lang-Miers of the Texas Court of Appeals, Fifth District; the panelists were Professor Gerald L. Neuman of the Harvard Law School and Professor Anthony Colangelo of the SMU Dedman School of Law.

Professor Colangelo made the initial point that extraterritoriality usually means the application of domestic law in foreign jurisdictions. Put another way, extraterritoriality concerns when and how the United States can exercise power outside its geographic boundaries. Professor Colangelo focused on three main issues that arise regarding the extraterritorial application of federal statutes.

First, Professor Colangelo discussed Congress's power to legislate extraterritorially. He noted the most common sources for Congressional power are the "Foreign Commerce" Clause, the "Define and Punish" Clause, the "Necessary and Proper" Clause, and the Foreign Affairs Power (*see* U.S. CONST. art. 1, § 8, cls. 3, 10, and 18). These constitutional provisions afford Congress the internal power to define international law and the external power to apply it extraterritorially. Of course, the parameters of this power are somewhat controversial.

The second issue Professor Colangelo addressed related to two doctrines that courts employ in evaluating domestic statutes in an international context. The first doctrine is the presumption against extraterritoriality. This presumption has been in existence for a long time but has not—until recently—been used with great frequency by the Supreme Court. The second is the *Charming Betsy* doctrine, a canon of statutory construction. The *Charming Betsy* doctrine takes its name

from the case of the same name, in which the Supreme Court noted that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

The third issue Professor Colangelo addressed was the possibility of due process violations resulting from an arbitrary application of international law against persons who lack a sufficient nexus with the United States. A nexus, he pointed out, must involve a connection with the United States, in part because Congress's power is to regulate commerce "with foreign Nations"—not simply "among foreign Nations."

Professor Colangelo discussed these three issues primarily through the prism of a recent Supreme Court decision: *Morrison v. Nat'l Austl. Bank, Ltd.*, 130 S. Ct. 2869 (2010). In *Morrison*, the Supreme Court addressed whether federal securities fraud legislation could be applied to fraud occurring outside the United States. The defendant in *Morrison* was Australia's largest bank, National Australia Bank (NAB). NAB is a publically-traded company; its shares are traded, among other places, on the New York Stock Exchange. Following a valuation write-down of its mortgage subsidiary, HomeSide, which is based in Florida, several investors sued NAB in federal district court in New York for securities fraud under Section 10(b) of the Securities and Exchange Act of 1934. But the Supreme Court held that Section 10(b) does not apply extraterritorially because Congress did not so state in the text of the statute. Accordingly, in *Morrison*, the Supreme Court revitalized the presumption against extraterritoriality and criticized several lower court rulings as overly-



interventionist in applying domestic law in the international context.

Professor Colangelo noted several principles that persisted in light of this opinion and suggested how they might be applied to future cases. First, where Congress states its intention to implement international law, the presumption against extraterritoriality is effectively subsumed by definition. The second principle Professor Colangelo suggested survives *Morrison* is that the United States should seek to avoid conflicts with international law. Thus, where the presumption against extraterritoriality actually conflicts with customary international law, United States law should be applied extraterritorially. Third, the judicial intervention criticized in the *Morrison* decision is actually a good thing for the concerns of the United States and the international community because it affords domestic courts the opportunity to harmonize United States law with international law.

Professor Neuman discussed the extraterritoriality of the United States Constitution, particularly with respect to whether foreign nationals located within American spheres of influence (but outside the territorial borders of the United States) are entitled to the individual protections of the Bill of Rights. He began by tracing the history of extraterritoriality, starting in the nineteenth century when the prevailing view was that constitutional rights only applied within the territorial boundaries of the United States.

Then, in the *Insular Cases*, a series of cases from the beginning of the twentieth century, the Supreme Court distinguished between full territorial incorporation (e.g., Alaska and Hawaii) and unincorporated association (such as Puerto Rico and the Philippines) for

purposes of applying the Constitution (it applied in the former and not the latter). In 1950, the Supreme Court held in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that United States Courts lacked jurisdiction over German war criminals held in an American-administered prison located in Germany. In *Eisentrager*, the Supreme Court held that “the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.” *Id.* at 785. Finally, in 1990, the Supreme Court further refined application of the Constitution’s extraterritoriality in *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990), where the Court held that legal but involuntary presence on United States soil was an insufficient basis to confer constitutional protections.

With this background in mind, Professor Neuman highlighted a recent Supreme Court decision that arose out of the military detainees at Guantanamo Bay. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court held—in a 5-4 decision authored by Justice Kennedy—that prisoners held in military detention in Guantanamo Bay had a right to petition for a writ of habeas corpus under the Constitution despite the fact Guantanamo is not formally a part of the United States. Distinguishing the *Insular Cases*, (and relying upon Justice Kennedy’s reasoning in his concurrence in *Verdugo-Urquidez*) the Court held that the United States holds de facto sovereignty over Guantanamo Bay, even if it does not have de jure jurisdiction over Guantanamo. Such sovereignty was sufficient, in the Court’s view, to confer on the detainees in Guantanamo their individual Constitutional rights. In so holding, the Court distinguished the prior line of cases and adopted a “functional approach,” described

by the Court as “the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.” *Id.* at 764.

Professor Neuman discussed these objective factors and practical concerns, which are threefold: (1) the citizenship or status of the detainee; (2) the nature of the detention; and (3) practical obstacles to applying United States law. Expanding on the last of these three factors, Professor Neuman addressed some of the problems that courts (or the executive branch) might confront in affording constitutional rights, such as the right of habeas corpus, outside domestic territories. For example, there may be cultural inappropriateness (such as imposing common law on civil law jurisdictions), an inability for the United States to operate unilaterally without interfering in other sovereign acts, and the logistical constraints of operating either far from American spheres of influence or in areas of significant discord (such as war zones).

### **Civil Issues Percolating in Federal Courts**

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At the 2010 Appellate Judges Education Institute Summit, a knowledgeable panel discussed Civil Issues Percolating in Federal Courts. Professor Suzette Malveaux focused on unresolved issues relating to the federal pleading standards announced in *Twombly* and *Iqbal*. Julia Blackwell Gelinas discussed two federal circuit splits on arbitration issues. And Roger Townsend explained a federal circuit split on an environmental allocation issue. Regardless of the specific subject matter, circuit splits reveal valuable information about the way that certain circuits analyze issues generally, how willing a circuit is to depart from the majority and follow its own drummer, and what interests are most important to a circuit when it balances competing objectives.

### **Courts Are Addressing Questions Raised by *Twombly* and *Iqbal***

The shift from “notice pleading” to “plausibility pleading” in federal courts has left litigants and district courts struggling to resolve numerous grey areas. The plausibility standards set forth in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), leave many questions unanswered, including those discussed below. As more and more district courts produce opinions, some conflicting, the issues are making their way up to the circuit courts.

### **Does the plausibility pleading standard apply equally to affirmative defenses?**

Both *Twombly* and *Iqbal* focused on the Rule 8(a) standards for complaints, but litigants are increasingly filing Rule 12(f) motions to strike affirmative defenses,

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arguing that the same plausibility standards should apply to all pleadings. District courts have split on whether the *Twombly/Iqbal* pleading standards apply equally to affirmative defenses.<sup>9</sup> See, e.g., *HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp.2d 687, 690-91 & nn.1 & 2 (N.D. Ohio 2010) (collecting cases on both sides of the issue and holding that *Twombly/Iqbal* pleading standards apply); Manuel John Dominguez, et al., *The Plausibility Standard as a Double-Edged Sword: The Application of Twombly and Iqbal to Affirmative Defenses*, 84 FLA. BAR J. 77 (June 2010). This issue is percolating up to the circuit courts, which have yet to weigh in. See, e.g., *Ruffin v. Frito-Law, Inc.*, No. 09-CV-14664, 2010 WL 2663185, at \*2 (E.D. Mich. June 10, 2010) (noting that Sixth Circuit has not yet addressed the issue).

How are factual allegations properly analyzed without considering the legal framework in which they are made?

As the first step in its analysis, the Supreme Court in *Iqbal* stripped all conclusory allegations and legal conclusions from the complaint and refused to consider them in analyzing plausibility, on the basis that they are not entitled to the presumption of truth. 129 S. Ct. at 1951. At the same time, the

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<sup>9</sup> Indeed, the Eastern District of Michigan appears to be split internally on whether the plausibility pleading standards apply to affirmative defenses. Compare *Shinew v. Wszola*, No. 08-14256, 2009 WL 1076279, at \*2-5 (E.D. Mich. Apr. 21, 2009) (holding that *Twombly/Iqbal* pleading standards apply to affirmative defenses) with *First Nat'l Ins. Co. of Am. v. Camps Servs., Ltd.*, No. 08-cv-12805, 2009 WL 22861, at \*2 (E.D. Mich. Jan. 5, 2009) (holding that *Twombly/Iqbal* pleading standards do not apply to affirmative defenses).

Court recognized that legal conclusions create the framework for making the factual allegations. *Id.* at 1950. A complaint is a composite of allegations – some legal and some factual – that build on and interrelate with each other to explain why the plaintiff believes he/she is entitled to relief. Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address The Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 81 (2010). By culling out legal conclusions and considering only factual allegations, courts are left to determine the plausibility of a complaint largely stripped of its meaning. To this process is added the initial difficulty of identifying which allegations are conclusory and which are not. See *Twombly*, 127 S. Ct. at 1976 (acknowledging difficulty in distinguishing between evidence, facts, and conclusions). Despite the Supreme Court's assertions to the contrary, does the plausibility standard amount to a probability test?

In *Iqbal*, for example, the Court weighed plausibility by comparing the likelihood that the plaintiff's allegations described legally actionable conduct rather than a hypothesized innocent alternative. 129 S. Ct. at 1949-51. The Court compared the plaintiff's theory of the case to other theories, judged them relative to one another, and rejected plaintiff's as implausible because of the unlikelihood – *i.e.*, the improbability – of its occurrence. Malveaux, *Front Loading and Heavy Lifting*, 14 LEWIS & CLARK L. REV. at 83. Yet, the Court has repeatedly denied that the plausibility standard is akin to a probability requirement. See *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 127 S. Ct. at 1965. This “do as I say, not as I do” approach leaves ambiguity in the application of the “plausibility” standard.

Prior to a ruling on a motion to dismiss, might a plaintiff be entitled to “plausibility discovery” in order to gain access to information over which the defendant has exclusive or superior control?

In light of the shift from notice pleading to the more rigorous plausibility standard, discovery may be needed with regard to the elements central to plausibility. For example, a defendant may control information without which a plaintiff is unable to provide more detailed factual allegations that would establish plausibility. Much like limited discovery for jurisdictional or class certification purposes, district courts are examining whether to allow “plausibility discovery” before ruling on a dismissal motion. Malveaux, *Front Loading and Heavy Lifting*, 14 LEWIS & CLARK L. REV. at 108. And if plausibility discovery is an option, questions arise about the standard for granting or denying such discovery, the burdens of proof, and the scope and form of the discovery. *Id.* at 133-40.

If *Twombly* and *Iqbal* effectively heightened the pleadings standard, should *pro se* pleadings be construed under a lesser, more liberal standard?

The Ninth Circuit has noted that it “continue[s] to construe *pro se* filings liberally when evaluating them under *Iqbal*.” *Hebbe v. Pliker*, 627 F.3d 338, 341-42 (9th Cir. 2010).

How much of a role should “judicial experience” and “common sense” play in deciding whether a plaintiff has shown a plausible claim for relief?

In applying the plausibility standard, courts are permitted to draw on their judicial experience and common sense. *Iqbal*, 129

S. Ct. at 1950. Variances between judges’ experience and views diminish predictability and uniformity. Furthermore, despite their best and most sincere efforts to perform an impartial analysis, studies have shown that judges, like everyone else, have two cognitive systems for making judgments: the intuitive and the deliberative. Malveaux, *Front Loading and Heavy Lifting*, 14 LEWIS & CLARK L. REV. at 100. The intuitive system appears to have a powerful effect on judges’ decisionmaking, which can produce erroneous and unjust outcomes in some cases. *Id.* How to use judicial experience and common sense in determining plausibility is another issue percolating up to the circuit courts.

### **In Appeals from Denial of a Motion to Compel Arbitration, Courts Are Split on Whether a Stay of the Underlying Action Pending Appeal Is Required**

When a federal court denies a party’s motion to compel arbitration, the Federal Arbitration Act allows for an automatic appeal. 9 U.S.C. § 16(a)(1)(C). However, the FAA does not specify whether the interlocutory appeal stays the underlying proceeding.

Federal circuit courts have split as to whether a stay is required or whether it is optional. Courts holding that the stay is required, so long as the appeal is not frivolous, include the Third, Seventh, Tenth, and Eleventh Circuits. *See Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007); *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 474 (10th Cir. 2006); *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162 (10th Cir. 2005); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251, 1253 (11th Cir. 2004); *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506

(7th Cir. 1997). The D.C. Circuit has taken the issue one step further, holding the stay is automatic barring a finding that the interlocutory appeal is frivolous. *Bombadier Corp. v. Nat'l R.R. Passenger Corp.*, No. 02-7125, 2002 WL 31818924, at \*1 (D.C. Cir. Dec. 12, 2002). Courts holding that the district court may grant the stay, but that a stay is optional, include *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53-54 (2d Cir. 2004); *Britton v. Co-Op Banking Group*, 916 F.2d 1405, 1411-12 (9th Cir. 1990); and *Hill v. Peoplesoft USA, Inc.*, 341 F. Supp. 2d 559, 560-61 (D. Md. 2004) (district court in otherwise undecided Fourth Circuit). The only court within the Fifth Circuit that appears to have addressed the issue is *Trefny v. Bear Stearns Sec. Corp.*, 243 B.R. 300, 309 (Bankr. S.D. Tex. 1999). That court noted the Seventh Circuit's approach, but employed a four-factor analysis as to whether the case should be stayed pending appeal.

The source of the conflict is the United States Supreme Court's decision in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). In that case, the Court stated that the filing of a notice of appeal is an event of jurisdictional significance and that "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Id.* The common phrasing used to describe the situation following the filing of an interlocutory appeal is that the "district court is divested of jurisdiction upon the filing of the notice of appeal with respect to any matters involved in the appeal" but that the district court "may still proceed with matters not involved in the appeal." *Taylor v. Sterrett*, 640 F.2d 663, 667-68 (5th Cir. 1981). As explained in Moore's Federal Practice treatise, this phrasing is not precisely correct. "The principle is not derived from the jurisdictional statutes or

from the rules. It is a judge-made doctrine, designed to promote judicial economy." 20 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 303.32[1] (3d ed. 2009).

The disagreement between the courts of appeals is the question of what, very precisely, is being appealed. For the courts which decide the stay should be granted so long as the appeal is not frivolous, the issue before the court of appeals is "[w]hether the case should be litigated in the district court," and it views that question as the mirror image of the question presented in the appeal. *Bradford-Scott*, 128 F.3d at 506. The Ninth Circuit, on the other hand, views the issue of arbitrability as being something that is separate from the merits of the case. *Britton*, 916 F.2d at 1412.

As a result of these different viewpoints, appellate courts such as the Tenth Circuit have established a system by which, upon the filing of a motion to stay, the district court determines whether the appeal is frivolous. *See McCauley*, 413 F.3d at 1162. If the appeal is not frivolous, then the district court must grant the motion to stay. *Id.* On the other hand, courts such as the Ninth Circuit have determined that the district court can exercise its discretion with respect to a motion to stay and that the court is not required to grant such a motion, even when the appeal is not frivolous. *Britton*, 916 F.2d at 1412.

### **Courts Also Split on Whether a Party Asserting Waiver of the Right to Arbitrate Must Demonstrate Prejudice**

Waiver is commonly defined as the "intentional or voluntary relinquishment of a known right . . . ." BLACK'S LAW DICTIONARY 1580 (6th ed.). It is generally unilateral, requiring nothing of the party in

whose favor it is made. *Id.* Nevertheless, when a party asserts waiver of a right to arbitration, a majority of circuits – First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth, and Eleventh – require the asserting party also to demonstrate prejudice. See *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 920 & 923 n.8 (8th Cir. 2009) (requiring prejudice and collecting cases); *Petroleum Pipe Ams. Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476, 480 (5th Cir. 2009); *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 921 (9th Cir. 2009); *Crossville Med. Oncology, P.C. v. Glenwood Sys., L.L.C.*, 310 Fed. Appx. 858, 859 (6th Cir. 2009); *Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340, 343 (4th Cir. 2009); *Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 231 (3d Cir. 2008); *In re Tyco Int’l Ltd. Secs. Litig.*, 422 F.3d 41, 46 (1st Cir. 2005); *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315-16 (11th Cir. 2002); *Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 888 F.2d 696, 701 (10th Cir. 1989). The Seventh and D.C. Circuits do not require a showing of prejudice. See *Khan v. Parsons Global Servs., Ltd.*, 521 F.3d 421, 425 (D.C. Cir. 2008); *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995); see also *Grumhaus v. Comerica Secs., Inc.*, 223 F.3d 648, 650-51 (7th Cir. 2000).<sup>10</sup>

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<sup>10</sup> Although the Seventh Circuit does not require proof of prejudice to the party asserting waiver, the Court has noted that, in cases where waiver is a close question, such proof “should weigh heavily” in deciding whether a case should be sent to arbitration. *Cabinetree of Wis.*, 50 F.3d at 391; see also *Grumhaus*, 223 F.3d at 653. Thus, even where prejudice is not a *required* element of waiver, it may be a component of proof that the party asserting waiver finds useful (or, if lacking, a missing component that the party seeking arbitration should identify).

The added requirement of prejudice is not supplied by the Federal Arbitration Act or any established exception to general waiver principles. Rather, the imposition of a higher waiver standard in the arbitration context appears to arise from: (1) the vigorous policy favoring arbitration; (2) the disfavor of waiver in the arbitration context; (3) the presumption against waiver in the arbitration context; and/or (4) the heavy burden of proof on the party asserting waiver. See, e.g., *Park Place*, 563 F.3d at 921; *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 577 (5th Cir. 1991); *Shinto Shipping Co., Ltd. v. Fibrex & Shipping Co.*, 572 F.2d 1328, 1330 (9th Cir. 1978); *Hilti, Inc. v. Oldach*, 392 F.2d 368, 371 (1st Cir. 1968). In light of these policies and presumptions, the First Circuit observed that “we do not think that the evidence of inconsistent action or delay is strong enough to justify findings of waiver or default . . . .” *Oldach*, 392 F.2d at 371. Under this rationale, a court “must be convinced not only that the [responding party] acted inconsistently with that arbitration right, but that the [party asserting waiver] was prejudiced by this action before we can find a waiver.” *Shinto Shipping*, 572 F.2d at 1330.

In taking the opposite approach, the Seventh Circuit observed that “in ordinary contract law, a waiver normally is effective without proof of consideration or detrimental reliance.” *Cabinetree of Wis.*, 50 F.3d at 390. At least one court that *does* require a showing of prejudice has likened the right to arbitration to “any other contract right.” *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986) (stating that “[t]he right to arbitration, like any other contract right, can be waived”). The D.C. Circuit correctly observed that the “strong federal policy in favor of enforcing

arbitration agreements” is founded on contract enforcement principles, rather than a preference for arbitration *per se*. *National Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987). Thus, there is a solid foundation for the minority courts’ position that waiver of the right to arbitration should not require proof of prejudice.<sup>11</sup>

Even where prejudice is an element of waiver, it may overlap with the “inconsistent act” prong. For instance, the Fifth Circuit has stated that substantial invocation of the litigation process qualifies as “the kind of prejudice . . . that is the essence of waiver.” *Petroleum Pipe*, 575 F.3d at 480 n.2. This type of “overlap” may have prompted the Seventh Circuit’s observation that “[o]ther courts require evidence of prejudice—but not much.” *Cabinetree of Wis.*, 50 F.3d at 390.

### **In Another Split, Circuit Courts Diverge on the Standard of Review for Environmental Allocation Under CERCLA**

CERCLA has two overarching purposes: (1) to facilitate the prompt cleanup of hazardous waste sites; and (2) to shift the cost of environmental response from the taxpayers to the parties who benefitted from the wastes that caused the harm. *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997). After a plaintiff proves that multiple defendants are liable under CERCLA, the burden shifts to the defendants to prove, if they can, their divisible share of responsibility. *Amoco Oil*

*Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989). A defendant that makes the required showing is held liable only for the harm the court finds it caused. *In re Bell Petroleum Servs, Inc.*, 3 F.3d 889, 901-02 (5th Cir. 1993). On the other hand, a defendant that cannot prove its divisible share becomes jointly and severally liable for the indivisible injury. But if such a defendant pays more than its portion of the joint and several award may seek contribution through an equitable allocation under section 113. *See Amoco Oil*, 889 F.2d at 672; *see also U.S. v. Burlington Northern & Santa Fe Railway Co.*, 520 F.3d 918 (9th Cir. 2008) (discussing differences between apportionment and contribution).<sup>12</sup>

Under section 113, courts allocate CERCLA responsibility among liable parties “using such equitable factors as the court determines are appropriate.” 42 U.S.C. § 9613(f)(1); *see also Bedford Affiliates v. Sills*, 156 F.3d 416, 429 (2d Cir. 1998) (acknowledging that CERCLA’s “expansive language” affords a district court “broad discretion to balance the equities in the interests of justice”); *U.S. v. R.W. Meyer, Inc.*, 932 F.2d 568, 571-73 (6th Cir. 1991). Thus, the court not only has discretion to shape an equitable decree, but also full discretion to determine what equitable factors to rely upon in doing so. *R.W. Meyer*, 932 F.2d at 573-74; *U. S. v. Davis*, 50 F.3d 1530, 1536 (10th Cir. 1995); *see also, e.g., Elementis Chromium L.P. v. Coastal States Petroleum Co.*, 450 F.3d 607, 613 n.7 (5th Cir. 2002); *New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 104 (3d Cir. 1999); *Env’tl Transp.*

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<sup>11</sup> The D.C. Circuit did note that, although the strong policy favoring enforcement of arbitration agreements does not support creation of an additional prejudice requirement, it would require that, if there is any ambiguity as to the scope of a party’s waiver, such ambiguity be resolved in favor of arbitration. *National Found.*, 821 F.2d at 774.

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<sup>12</sup> *Accord Goodrich Corp. v. Town of Middlebury*, 311 F.3d 154, 168 (2d Cir. 2002); *Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 656-57 (6th Cir. 2000); *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69, 78 n.8 (1st Cir. 1999); *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 934 (8th Cir. 1995).

*Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992). Not surprisingly, then, allocation under section 113 is inherently imprecise, and Congress has recognized that judicial allocations of costs related to a site deemed to be indivisibly harmed can provide only “rough justice.” See Robert P. Dahlquist, *Making Sense of Superfund Allocation Decisions: The Rough Justice of Negotiated and Litigated Allocations*, 31 ENV’T L.L. REP. 11098, 11099 (2001).

Circuit courts have split with regard to the proper standard of review applicable to the district court’s equitable balancing process. Most circuits – including the First, Second, Third, Sixth, Seventh, and Tenth – specifically recognize the ultimate section 113 allocation decision as an equitable decree reviewed only for abuse of discretion. See, e.g., *Beazer East, Inc. v. The Mead Corp.*, 412 F.3d 429, 445, 446 n.18 (3d Cir. 2005); *Am. Cyanamid v. Capuano*, 381 F.3d 6, 19 (1st Cir. 2004); *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 450 (6th Cir. 2004); *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 894 (10th Cir. 2000); *Franklin County Convention Facilities Auth. v. Am. Premier*, 240 F.3d 534, 549 (6th Cir. 2001); *Goodrich Corp. v. Town of Middlebury*, 311 F.3d 153, 169 (2d Cir. 2002); *Browning-Ferris Indus. of Ill., Inc. v. Ter Maat*, 195 F.3d 953, 958-59 (7th Cir. 1999); *Bedford Affiliates v. Sills*, 156 F.3d 416, 429 (2d Cir. 1998). See also John M. Hyson, PRIVATE COST RECOVERY ACTIONS UNDER CERCLA, 261 (Env’t Law Inst. 2003) (concluding that the only sensible standard of review is abuse of discretion).

In *Elementis*, however, the Fifth Circuit affirmed an equitable allocation as a fact-finding under the clearly erroneous test, without analysis or citation to another CERCLA case (and the end of an opinion

focused on a different issue).<sup>13</sup> 450 F.3d at 613. Also applying what it characterized as clear-error review to the ultimate allocation determination, the Ninth Circuit in *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1187 (9th Cir. 2000), articulated that a section 113 contribution plaintiff must present “sufficient evidence from which a reasonable and rational approximation of each party’s individual contribution to the contamination can be made.” Yet, in reaching this conclusion, the Ninth Circuit cited two cases concerning apportionment of damages under the divisibility-of-harm defense available to defendants in a section 107 cost-recovery action, not an equitable-contribution allocation under section 113. See *Boeing*, 207 F.3d at 1187 & n.33, 1188 & n.39 (citing *Bell*, 3 F.3d 889 and *U.S. v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993)). This blend of the intensely factual requirements of section 107 with the wholly equitable discretion of section 113 appears contrary to the statutory intent.

## Conclusion

In conclusion, federal circuit courts are grappling with a variety of issues, both procedural and substantive, and in some areas, courts are reaching differing conclusions. Advance knowledge about these percolating issues can be useful at all levels of litigation: in the district court (e.g., laying the groundwork for an appeal), in the court of appeals (e.g., pursuing a decision of first impression in your circuit or seeking *en*

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<sup>13</sup> In *Elementis*, the principal issue before the court was whether the imposition of joint and several liability (for past response costs) was proper in the contribution action brought under section 113. The Court joined the majority of other circuits in holding that it was not and that only several liability was contemplated under section 113. 450 F.3d at 612. The court remanded for allocation of the past response costs among the parties. *Id.*



*banc* rehearing), and even in seeking relief in the United States Supreme Court. Stay tuned for further developments.