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THE TABLET’S APPEAL

By Jeffrey Allen

As this issue focuses on the appellate lawyer, and appellate lawyers can practice just about anywhere, the Road Warrior column for this issue will address some of the mobility tools available to the appellate attorney.

Because of its relative newness and the impressive way that it burst onto the scene, the tablet will serve as the focal point of this discussion. In this article we will explore the various ways that appellate lawyers can use tablets in their practice. Those of you who do not practice appellate law should pay attention as well; many of the tips that work for appellate attorneys will also work for attorneys practicing in other areas, particularly trial work and arbitrations, both respecting written and oral argument preparation and presentation during the course of or at the end of a hearing and in connection with complex law and motion matters.

In discussing the use of tablets in practice, I will focus on the iPad, not just because I prefer the iPad myself and have greater familiarity with it, but also because lawyers, as a group, have overwhelmingly chosen the iPad over other tablets. According to the 2014 ABA Legal Technology Survey, 84 percent of surveyed lawyers who used tablets preferred the iPad; 10 percent picked Android-based tablets. The remaining 6 percent used other types of tablets. If you have a tablet other than an iPad, this does not mean that you cannot successfully use your tablet in your practice. As the Google Play Store and the Android OS mature, the gap between Android and iOS apps for tablets will likely diminish, making Android tablets increasingly functional.

For this discussion, I divided the work of the appellate lawyer into three parts: (1) preparation (meaning the process of reviewing the transcripts, research, and analysis); (2) drafting (referring to the preparation of the briefs); and (3) argument (the preparation for and presentation of oral argument). The tablet can become a useful if not essential tool for the lawyer in connection with all three segments of the work in handling an appeal.

PREPARATION

In this phase, the attorney has to collect the transcripts, review them, and analyze them. In the old days, this meant working in one location or schlepping hard copies from one place to another. Given the length and corresponding weight of some of the transcripts I have seen, it stretches the imagination to think of them as a mobile element of the practice. Nowadays we can capture the clerk’s and reporter’s transcripts as electronic files and lodge them in the cloud for later access, or carry them on a laptop or, more recently, a tablet, to keep them available, even in the absence of Internet access.

We can download apps for the iPad that let us review, note, and otherwise mark up a transcript to make it easier to find what we need. The iPad lets us carry a single tablet and have all the documents in the clerk’s transcript and the entire reporter’s transcript with us anywhere we go, even without Internet access.

Of course, with Internet access, we have the ability to access Westlaw and Lexis to do necessary legal research. Although we can access research sites through web browsers, it generally is easier to use the free apps provided by the legal research vendors. We can read cases online and also add them to the collection of information that we have on our tablet for the case. Westlaw lets you mark up the cases inside of its app. You can choose from a number of mind-mapping apps for the iPad to help you attack the analytic process more creatively. If you have not tried using mind mapping to organize your thoughts about
a case or an approach, you ought to give it a shot; you might find mind mapping a helpful tool to add to your arsenal.

Each of these possibilities makes the tablet an important tool in the preparation process and leads to the analysis that feeds into the drafting of the brief(s).

**DRAFTING**

Different people have different takes on how to handle the drafting of a brief. Those who like starting with outlines can pick and choose among several competent outlining tools for tablets. You also can convert your mind-mapped strategies into an outline to get you moving toward the brief. The availability of full-functioning word-processing programs has made it feasible to prepare an entire brief on an iPad. Although I have noticed that many younger lawyers seem quite comfortable drafting documents on iPads, I must admit that I still find it easier to work on a computer when doing serious writing (must be a sign of my age). Accordingly, I prefer to create the document on a computer. I have no problem with reviewing and editing the document on a tablet, however. Microsoft’s making Word available for the iPad has facilitated the process as I no longer have to rely on an Office work-alike and can start and finish the process using Word, jockeying between my computer and my tablet, as necessary.

Before moving on, I want to address another aspect of brief writing. More and more courts allow and even expect you to file an electronic brief. Judges often read the briefs on their own tablet computers. Accordingly, when you prepare your brief, you should consider the likelihood of a judge’s reading it on a tablet. This means you should format the electronic brief so that it will look good on a tablet. If you do this and the judge reads it on a computer, you suffer no harm. If you format it for a computer, however, and the judge reads it on a tablet, it may lose a bit in the translation.

In formatting an electronic brief, remember that shorter sentences and paragraphs look better than longer ones. I like lists as they make things a bit easier to follow. I recommend using larger fonts for all things filed with the court. Judges will likely find it easier to read larger type. I generally use 14-point type. Choose a font that looks good on a tablet. Before you file the brief, check it out on a tablet to make sure that it looks good and is readable.

**OTHER CONSIDERATIONS**

Practically speaking, you can do all the things described in this article on a laptop and most of them on a desktop computer. The tablet, however, offers the advantages of smaller size and weight (making it easier and more convenient to move from one place to another), and the fact that, with respect to oral argument, it is both less obtrusive and less invasive of the rapport that you want to develop with the court.

Apps that you may want to consider adding to your iPad to provide the functionality discussed above include: TranscriptPad, Mobile Transcript, Westlaw Case Notebook, Microsoft Office, GoodReader, iAnnotate PDF, WestlawNext, Lexis Advance, iThoughtsHD, MindNode, Inspiration Maps, SimpleMind+, OmniOutliner, PDFPen, PDF Highlighter, and PDF Expert 5. All are available on Apple’s iTunes App Store (itunes.apple.com). Note that some of these apps overlap or duplicate the functions of others. As different features appeal to different users, this list gives you many options to audition. Pick those apps that work best for you.

Pay attention to how you deal with citations. When reading electronic briefs, I prefer citations in the text instead of in footnotes, as it avoids having to move back and forth. If you are doing an electronic brief, hyperlink the text of the decision to the citation for the court’s convenience. Before filing it, make sure that the hyperlinks work.

**ARGUMENT**

In preparing for oral argument, I sometimes use a mind-mapping tool and other times use an outline to create the parameters of the presentation I want to give, subject to the court’s derailing my plans with questions. Rather than a full write-up, I much prefer to use an outline or a mind map, as they make it easier for me to adjust to the exigencies created by the court’s questions and then add, supplement, or modify my plans as necessary. I know some attorneys who feel compelled to write out their planned presentation and read it to the court. I don’t like this approach myself, but if that is how you roll, you can get apps that will let your iPad function as a teleprompter, automatically scrolling through your text at whatever speed you predetermined for it to use. I have, on occasion, successfully employed such apps to pace my outline.
ADVOCATE AND THE COURT: TRUE PARTNERS IN UNDERSTANDING

By Stephen B. Rosales

Let’s face it. The last time, perhaps the only time, many of us experienced appellate advocacy in written or oral form was during moot court in law school. My career thus far, in both small and solo firms and in big city, downtown, and suburban settings, has not presented itself with a plethora of appellate opportunities, and I certainly do not pretend to be an “appellate attorney” by trade. However, there have been times that I, and many of us, have been faced with and had to handle the appeals process regardless of what side of the “v” we are on. Many of us will be faced with similar circumstances. We all can do it, of course. Some may be more nervous than others . . . some may be more eloquent than others . . . but we all can do it. After all, as lawyers, we know the facts, legal issues, and implications of our respective cases better than anyone and have the legal training and experience to structure a workable argument. But what separates us from all others? What makes us a good or better advocate?

A good place to start is with the Preamble to the ABA Model Rules of Professional Conduct. When was the last time, if ever, that you read this preamble? If you never have, you should. If you have, read it again. It is a call and a reminder to all of us as members of this noble profession of our roles and obligations as lawyers—whether with clients, the public, the court, or the justice and legal systems. Section 2 of the Preamble sets out some of our functions, including

- As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client’s legal affairs and reporting about them to the client or to others. [Emphasis added]

The late federal judge Irving R. Kaufman observed the advocate’s role as being in partnership with the court: “The advocate is a partner of the Court in the important enterprise of dispensing justice. In our advocacy system, the quality of justice dispensed by the Courts is ultimately dependent on the quality of advocacy provided by the bar. If lawyers fail as advocates for want of skill or dedication, then judges will surely fail as well, and the coin of justice will be debased beyond recognition. This interdependence of bench and bar is a linchpin of our legal system. Contemporary developments make this relationship even more crucial” (Irving R. Kaufman, “The Court Needs a Friend in Court,” 60 ABA Journal 175 (February 1974)).

John C. Godbold, in his seminal law review article “Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal” (30 Southwestern Law Journal, 801 (1976)), takes this one step further:

Judges need all the help they can get in identifying and understanding the issues, legal and factual, and reaching the right answer. They are neither all-wise nor all-seeing. Whether in his library or on the bench, the judge is trying with every ounce of his capacity to traverse the path from issue to answer. Every intellectual pore is opened to receive help and guidance from what the lawyers say and write. That guidance is most telling when there is a minimum of artificial obstacles and irrelevant diversions that impede communication.

According to Godbold, “There are two steps in counsel’s task of convincing the Court that what he advances is correct. One is impressing his will upon the judges so that they accept what he urges; he cannot win until he moves off dead

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center the deciders who read what he has written and who listen to what he says. But there is a preliminary step. Before counsel can convince, he must inform. He must cause the Court to understand him. All is in vain unless the Court understands.”

This advice rings true not only for the appellate process but for life in general, no matter what the context, surroundings, or circumstances. Godbold’s lesson plays upon and underscores the old adage: Seek first to understand, then to be understood. It is universal advice and equally applicable to any and all aspects of our lives, both professionally (in dealing with clients, other counsel, court staff, and judges) and personally (in dealing with our friends, family, and others with whom we have contact). Having others understand you is key in getting anything done and is a quality that we should all pursue and continually hone.

To sum up and drive home this principle, Judge Godbold concludes with this simple lesson to the advocate—any advocate:

In concluding the written words in his brief, and finally his spoken words at the podium, the advocate will endeavor to leave some parting impression fixed in the minds of the judges who have read and listened. There is no better impression to leave than this composite: “I understood what he said. He did not say too much. I have confidence in what he said. I am persuaded by it and I am compelled to rule with him.”

So get out there and have at it! Get out there and practice this year’s theme: “Work Hard, Do Good, and Have Fun,” both professionally and personally. And just remember that we at the Solo, Small Firm and General Practice Division are here to assist you in any way we can. We offer so many great things to you all . . . starting with our valuable CLE, both in person and virtually; our first-rate GPSolo magazine and GPSolo eReport to keep you informed and up to date on the latest topics and practice methods; our regular, free Brown Bag luncheon series; the online Solo and Small Firm Resource Center; the GPSolo LinkedIn referral group; our vibrant “virtual water cooler” SoloSez; and the exciting Division conferences in desirable, fun locales offering opportunities to learn, network, and socialize with fellow attorneys and guests.

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So, c’mon along. Let’s all “Work Hard, Do Good, and Have Fun” together!
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So You Want to Be an Appellate Lawyer?

By Brad Pauley
For those who enjoy the intellectual aspects of the practice of law, there are many good reasons to become an appellate lawyer. Working with the law, applying it to the facts of your client’s case, and taking the time to craft arguments to persuade learned jurists to rule in your client’s favor are as satisfying pursuits as the legal profession affords. That the resulting decisions often become precedent that might one day be cited by our grandchildren means that appellate lawyers can rightly be said to practice law not only for the benefit of their clients but for the public good and for posterity. When one considers the other benefits of an appellate practice, such as longer, more flexible deadlines, no discovery, and few unpleasant interactions with opposing counsel, it is easy to understand why many attorneys and law students seek to develop an appellate practice. But it cannot be gainsaid that, for most, the skills of an appellate lawyer are hard-won. Nor can it be doubted that developing an appellate practice can be a daunting challenge.
I have practiced law for nearly 19 years. I have spent more than a dozen of those years as a full-time appellate lawyer in a 30-lawyer firm with an exclusively appellate practice. (Horvitz & Levy LLP is the oldest and largest firm in the country devoted exclusively to civil appellate litigation.) Aspiring appellate lawyers frequently ask me how to develop a full-time appellate practice. As a partner at Horvitz & Levy and chair of two major appellate bar organizations, I know a great many appellate lawyers with a broad variety of backgrounds and practices. As a result, I do have some thoughts to share, both about what makes a good appellate lawyer and about how to become one.

**All good appellate lawyers have certain characteristics in common.**

**WHAT MAKES A GOOD APPELLATE LAWYER**

Let me start by emphasizing what is not required to be an appellate lawyer. No particular outlook or social background is required. I have known equally skilled appellate lawyers who advocate the rights of Guantanamo detainees and those who advocate the rights of states to refuse to recognize same-sex marriages. I have known appellate lawyers who devote their time to advancing the causes of struggling pro se litigants and those who advocate economic freedom and deregulation as the highest good. I also have known appellate lawyers who have had every advantage in life and those who have always had to struggle. Needless to say, in some ways the gulf is vast between the two major outlooks and practices. As a result, I do have some thoughts to share, both about what makes a good appellate lawyer and about how to become one.

These include, first and foremost, a passion for the law and its development. Hopefully, all lawyers take the law and their professional responsibilities seriously. But one cannot be a good appellate lawyer unless one holds the law and professional ethics to be paramount. Any lawyer who makes winning more important might be tempted to cut corners, misstate the record, mischaracterize authority, or otherwise take shortcuts to win. It is the particular nature of appellate litigation that such lapses are usually uncovered by courts that have the time and the inclination to review the record, to read the cases, to scrutinize the statutes, and to prepare the hard questions for oral argument. And because the appellate world is small—even in Southern California—an appellate lawyer’s reputation, once impugned, is not easily repaired. All good appellate lawyers I know are not only scrupulously honest with the courts but are equally so with their colleagues and their clients.

Such honesty must be paired with, and indeed may be the essential element of, another quality all good appellate lawyers share: a capacity for critical reasoning and detached assessment. This trait is vital to the life of an appellate lawyer in at least two ways.

**Detached, critical analysis.** First, an appellate lawyer must be able to critically analyze his or her client’s case. Some lawyers approach their cases with bravado and promises of easy and complete victory. This mind set and its accompanying enthusiasm certainly have their place in the hurly-burly world of litigation and trial. But an appellate lawyer must think and act differently. He or she comes to the case after the damage has been done, after the verdict has been read and the judgment has been entered—in short, after a winner and a loser have been declared. At this point in the proceedings, it is knowledge of the substantive law and the applicable procedures, combined with a circumspect detachment and candor, that are called for.

This is because, while many attorneys might feel duty-bound to assert every conceivable claim or defense to determine what will gain traction, the craft of an appellate lawyer is precise. To prevail on appeal of an adverse judgment, an appellate lawyer cannot, indeed must not, simply identify every conceivable argument for reversal and then raise them all in the hope that at least one will be effective. A lawyer representing an appellant must survey the remains of the client’s case in the trial court, examine the entire record and all applicable law, and then, from those often-imperfect materials, fashion a spear and hurl it with conviction at the tiny bull’s-eye painted on the judgment. That spear is the appellant’s opening brief. Similar considerations apply for the lawyer representing a respondent or appellee on appeal, although the issues are then framed by the opponent’s brief and the goal is to defend the actions of the trial court and persuade the appellate court to affirm the judgment.

Because they frame the issues on appeal, the arguments raised in an appellate brief are, of course, critical to success. But so, too, is what a brief does not say. As I have heard countless appellate judges observe over the years, no case, no matter how complex, presents a dozen or more valid grounds for reversal of the judgment. The seasoned appellate lawyer knows that almost no case presents more than three or four compelling grounds for reversal, usually fewer. So rather than weighing down a brief—and boring or even annoying the appellate court—with contrived arguments with no real prospect of success, the experienced appellate practitioner carefully selects the few good arguments worthy of inclusion in the brief. To continue with the spear analogy, it is the expertly crafted but unadorned spear, and not the one weighed down with useless ornaments, that is most likely to reach its target.
It was the night before my first oral argument since leaving the appellate bench, and I could not sleep. It had been more than eight years since I last stood before a three-judge panel. I knew the record cold even though I had been retained on appeal. The trial attorneys did their job making the record. Errors were preserved, proffers made so I would not have to argue the dreaded plain error. I knew the controlling cases from memory, good and bad. In fact, I wrote one of the opinions on the same issue. I knew my appellate panel. I was elated to find the trial judge who wrote the seminal cases sitting on my panel. Knowing that judges enthusiastically discuss their own cases in argument, I was relieved that I would not have to distinguish this judge’s cases away.

So why was I having so much trouble sleeping? Then it hit me. As a judge, I was a reputed “active” questioner. The give and take is not only intellectually challenging, but it has real value because it gives the panel an opportunity to clarify an issue or correct a misapprehension. With a “hot bench” (hot because a draft opinion has been written before oral argument, not because the panel looks great, I had seen opinion outcomes change after argument.

It finally hit me—I was fearful I would start throwing questions to the panel as I had done these past years instead of fielding them.

The briefing, though, did come easier to me because I know firsthand what appellate judges want in a brief: a succinct statement of only necessary facts, a reminder of the standard of review, and correct statements of the law without ad hominem attacks on the other side or counsel. But even the briefing posed a few problems for me until I was able to regain my inner advocate. As a new judge, I had to make a conscious effort in opinion writing to become a neutral, allowing the facts and law to dictate the result. When I sat staring at a screen having difficulty writing, I forced myself to step back, knowing I might be slipping into result-oriented mode. We had a saying in my chambers: “When it will not write, it cannot be right”—it could not be correct because you are attempting to massage the facts and law to reach a certain result.

As I wrote more opinions, the neutral style of writing became second nature, so when I returned to practice I had to work to rewire my brain and recapture the passionate writing style that separates good briefs from stellar briefs.

But the most difficult part of my transition was determining where and how I wanted to practice. The practice of law had changed substantially in eight years. Trial lawyers were now routinely doing their own appeals because of the pressure to find and retain clients. I had to learn the current litigation trends. By the time an appellate judge sees a trend, it is no longer a trend. And then there is marketing. When I recognized that practice marketing is a lot like retail politics (a skill I had to learn in a state that elects its judges), the task became easier. I began attending more bar association events, volunteering to teach CLEs and write articles. I transformed political campaign literature into marketing materials.

And the best part of the transition was being able to work with clients again. Helping a client navigate through business or personal misery to reach a good result is why I still love what I do.

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that editing process and the associated dialogue about the arguments and structure of the brief, the good appellate lawyer must strike a balance. On the one hand, he or she must adhere to, and advocate for, strongly held views concerning arguments, structure, authority, and strategy. But the author also must be open-minded and willing to accept the proposed changes and constructive criticism of the editor. In this process, too, pride of authorship can only be an impediment. The quality of the final written product is the only relevant consideration.

Never rest on your laurels thinking you’ve “made it” as an appellate lawyer.

Knowledge of the appellate process and standards. A capacity for critical reasoning and detached assessment is necessary but not sufficient to be an appellate lawyer. Another factor critical to success is thorough knowledge of applicable appellate procedure. Most appellate lawyers are generalists, so they must learn the substantive law applicable to each case, drawing on their experience, their research skills, and the shared wisdom of their colleagues. But a good appellate lawyer must be intimately familiar with all aspects of appellate procedure in his or her jurisdiction, from the time for filing the notice of appeal, to procedures and deadlines for designation of the record, brief formatting requirements, and oral argument procedures. This is simple to state, but the need for ready familiarity with such procedural rules is brought home to appellate lawyers every day in countless ways.

An appellate lawyer needs to know much more, however. Few factors are more critical to success as an appellate lawyer than a thorough understanding of all applicable standards of review. At this stage, many readers’ eyes may lose focus as they vaguely recall the portions of appellate opinions they typically skim over. But a deep understanding of how standards of review work and how they will apply in a particular case is what sets an appellate lawyer apart from most other lawyers, impacting the prospects for success at every stage of the proceedings. More than any other single factor, for example, the applicable standard of review dictates which issues and arguments are selected for inclusion in the opening brief. Why, for example, present an argument subject to a deferential “abuse of discretion” standard of review if you can present a pure issue of law that the appellate court will review “de novo,” without deference to the lower court? Likewise, many an advocate has sealed an opposing appellant’s fate by pointing out the opponent’s argument is subject to a “substantial evidence” standard of review, and that sufficient evidence was presented below to sustain the challenged finding.

HOW TO BECOME AN APPELLATE LAWYER
Having now surveyed some of the most important skills of an appellate lawyer, the question remains, how does one acquire and refine these skills? The answer, of course, is to build and maintain an appellate law practice because, in truth, these skills can only be acquired by doing. But while this is simple to state in the abstract, the reality of carving out a niche for oneself as an appellate lawyer is challenging for most. This is largely because many lawyers prefer to hold onto their appeals even when it would be advisable to involve an appellate specialist who could bring a fresh perspective and a different set of skills to the case.

The complex challenge of building an appellate practice varies greatly with a lawyer’s background and level of experience. But it boils down to two interrelated considerations: establishing one’s appellate bona fides and acquiring and handling appeals.

For a small but fortunate minority, their appellate reputations are conferred upon them, frequently at the outset of their careers. These are the typically talented lawyers who clerk for federal and state appellate courts, either as term law clerks or as career staff attorneys. Working closely with esteemed jurists to craft appellate opinions has long been viewed as the surest way to launch a career as an appellate lawyer in private practice. Such experience can be invaluable in helping a budding lawyer to know how justices think, and it provides a sound basis for later claiming appellate expertise in interactions with both trial lawyers and potential clients. To state the obvious, appellate law firms and practice groups seek out such former clerks and staff attorneys when looking to hire new associates, and these candidates often have a decisive edge over other applicants.

But let’s be frank. This narrow avenue of establishing one’s appellate bona fides is not open to most aspiring appellate lawyers. Law clerk and staff attorney positions are hard to come by. So how else can one build an appellate reputation?

Certification as an appellate specialist is the next best option, at least in states where certification is available (including California, Florida, and Texas). Typically, state bars require applicants for certification to establish their knowledge of appellate procedure by passing a written examination. Applicants also must demonstrate that they have prepared a designated number of appellate briefs and have presented oral argument a number of times. Such certification requirements seem reasonable on their face. But they do present aspiring appellate lawyers with a Catch-22: If you need certification as a specialist to obtain referred appeals, how do you acquire the appeals necessary to satisfy the certification requirements?
It is not easy, but here are some ideas. First, there are plenty of pro se litigants in need of representation on appeal. Taking on such people as pro bono clients not only provides a needed service to them and to the courts, it serves the aspiring appellate lawyer by helping him or her to become certified. This is a win-win-win situation. The Ninth Circuit, for example, has a pro bono program through which volunteer attorneys can sign up to receive e-mail notifications concerning pro se appeals in which the court has determined that briefing and argument by counsel would benefit the court’s review.

Second, a similar and often overlooked way to obtain appellate experience is to handle criminal appeals. Even if you want to handle civil or family law cases later on, keep in mind that the certification requirements typically do not discriminate. Appellate briefs and arguments in criminal cases will satisfy the requirements. So inquire whether your state has a centralized agency (such as the California Appellate Project) for assigning attorneys to criminal defendants and convicts in need of appellate representation. Who knows, you might even get paid for your work.

Third, a lawyer in private practice can simply start to develop expertise and then hold himself or herself out professionally as an appellate lawyer. For this purpose, online marketing can be useful, especially in a small legal market where the number of appellate experts may be few. The same basic approach can work for an attorney in a law firm. Inform your firm colleagues that you are developing your appellate expertise and that you want to handle their appeals or assist them with their appeals. In these ways, over time, clients and colleagues will refer more and more appeals to you, and eventually you will satisfy the certification requirements while continuing to gain experience.

Finally, regardless of how you first establish a reputation and practice as an appellate lawyer, constant effort is required to build and renew that reputation and practice. You must maintain and foster both your expertise and reputation as an appellate lawyer at every opportunity. So, once you have garnered sufficient knowledge, write articles about topics of interest to appellate lawyers, volunteer to speak on CLE programs, or establish an appellate-oriented blog and contribute to it regularly. Become active in local, state, and national appellate bar organizations, which will keep you connected to recent developments in appellate procedure and the concerns of the broader appellate bar. Never rest on your laurels thinking you’ve “made it” as an appellate lawyer. To paraphrase the humorist Art Buchwald, like the rest of the appellate bar, you’re only as good as your last brief.

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How to Preserve the Record
How to Preserve the Record to Win at Trial or on Appeal

By Sidney Tribe

Understanding what makes an excellent appellate record not only gives you a better shot at prevailing on appeal, it can also help you win at trial. It forces you to take a step back to evaluate those issues that will be the most contentious and make sure that the trial judge is sufficiently educated and persuaded on your positions.

Ultimately, if you can answer “yes” to the following three questions, you can tell your client that there is hope of prevailing on appeal: “Is it in the record?” “Can I find it in the record and comprehend it?” and “Can it be raised and successfully argued on appeal?”

IS IT IN THE RECORD?

Getting legal issues and facts into the record is the central and most obvious step in preserving it. If the trial court is not apprised, however briefly, of the legal rationale behind why this issue or that piece of evidence is critical, there is very little an appellate court can do to remedy the problem on appeal. There are four main avenues for making your record: motions, trial objections, offers of proof, and jury instructions.
Many events do not get put on paper in a way that will be comprehensible.

Motions in limine. Motions in limine are the evidentiary version of a summary judgment motion. They are the best tool you have for identifying potential appellate evidentiary issues.

Because trial courts are given such broad discretion in evidentiary matters, it is vital that the court gets it right the first time. Evidentiary errors are much more difficult to correct on appeal than legal ones. Although the rules of evidence are the primary source for legal authority, it is well worth spending some time doing case law research regarding evidentiary issues in order to have more ammunition for the judge.

With respect to motions in limine, remember that even if you win the motion, you must object at trial if the ruling is tentative or if the trial court orders objections. Also, although winning a final ruling on a motion in limine constitutes a standing objection at trial, I sometimes run into problems when there is controversy on appeal as to whether that particular bit of evidence actually fell into the category of evidence excluded by the motion in limine. State the specific legal basis for the objection that was raised in the motion, even though you need to do it outside the presence of the jury.

Trial objections. The preservation purpose of an objection is fulfilled when the trial court is fully and timely apprised of the specific legal reasoning behind an objection and has ruled upon it on the record.

Specificity. It is not always enough simply to object. If an appellate court is going to evaluate whether the trial court made the right or wrong legal decision about a particular objection, it helps to know the specific basis for it.

Comprehensiveness. State every possible basis for an objection. “Objection, hearsay” does not preserve the issue that the testimony was irrelevant or unduly prejudicial.

Timeliness. This is a fairly straightforward concept in theory but difficult in practice. When you are juggling multiple trial responsibilities, it is not always possible to make perfect, comprehensive objections. “When in doubt, object” is not always a practical way to conduct a trial. There is a real concern about annoying judges and juries with endless objections. Instead, prioritize your critical facts/legal issues in advance and defend these issues strongly and persistently with objections. Then you can pick and choose strategic objections regarding lesser points of evidence.

Offers of proof. The critical issue with offers of proof is to make them as detailed as reasonably possible. The appellate court needs to know specifically what evidence was to be offered because that is the only way the court can know if the exclusion prejudicially affected the outcome, which is the only way to overcome a harmless error analysis.

In the absence of testimony on the stand, a detailed written summary of the witness’s testimony should be offered. Note that this should be much more in-depth and specific than the summary offered on a witness list.

Jury instructions. Jury instructions are a common source of legal error that can be overturned on appeal, but only if a proper record is made. If you are submitting instructions regarding any issue raised by your opponent about which you have argued the facts do not warrant (for example, after an unsuccessful summary judgment motion), make sure you note for the record that you object to any instruction being offered because it is not supported by the facts.

On objecting to your opponent’s instructions, oral objections are fine, but on crucial instructions written objections are better. Either way, the basis for objection should be detailed.

After the trial court has settled the instructions, it is a good idea to resubmit in writing any objections to the final version, including omitted instructions that you thought should have been offered.

CAN I FIND IT IN THE RECORD AND COMPREHEND IT?

Even when you are confident that something made it into the record, it may not always be the reality from the appellate point of view. If a case is decided on summary judgment, the paper record is usually sufficient to address the legal issues. But things become far more complex when a case goes to trial. The trial transcript becomes vital because it is the ultimate expression of what evidence the finder of fact did or did not consider. Many things happen that simply do not get put down on paper in a way that is comprehensible to the appellate court and attorneys.

Lost in translation: Examples. Although it is difficult, you must try to be cognizant of how a testimonial exchange translates to paper. Ask yourself, “Will someone reading this in two years be able to discern what was said, what evidence the witness was referencing, and what the import is to my case?”

The following are a few examples of
how a seemingly good record can get lost in translation.

**Exhibit references in testimony.** If witness testimony is vital to an issue on appeal, and that testimony references and explains a particular exhibit, it is critical that the record reflect which exhibit the witness is talking about. This sounds easier than it is. For example, most attorneys refer to an exhibit number when they initially show a document or diagram to the jury. Then they proceed to question the witness in detail about the exhibit. If the discussion goes on for many pages, it can be difficult to track back and identify which exhibit is being referenced. Also, sometimes attorneys will turn to another exhibit in the middle of the questioning, then return to the previous exhibit by saying, “Okay, let’s go back to that earlier exhibit.” If the specific exhibit number is not re-referenced, the record can become quite ambiguous.

**Large exhibits marked up at trial.** This is a common problem. A critical document, a map, or some diagram is blown up at trial to a large and sometimes cumbersome size, and a witness marks it up with arrows, comments, etc. The testimony in the transcript is unrevealing as to the nature of the testimony, but it covers a critical disputed fact. The appellate lawyer and the court may have limited access to the exhibit.

A great solution to this problem is to attach a small paper version to the large, cumbersome exhibit. Have the witness simultaneously mark both exhibits, making sure, of course, that the markings match. Then, on appeal you can designate the small paper version.

**Video depositions/deposition transcripts.** It is exceedingly frustrating to reach a critical moment in a trial, such as an attempt to impeach a central witness, and see this in the transcript:

> (Whereupon a portion of a videotaped deposition of the witness was played for the jury.)

> (Portions of the deposition of Witness [X] taken Nov. 2, 2007, were then read into the record.)

> When you refer to or read from a portion of a deposition, it is vital that you clearly identify the source every time, even if you quote from consecutive pages of the same deposition many times in a row. A best practice is to kindly ask the court reporter to actually transcribe the read or videotaped portions of the deposition. The court reporter is more likely to comply if you keep those deposition excerpts short and sweet.

**Sidebars and in-camera proceedings.** These are tricky. Obviously sidebar and in-camera discussions are held as such for a reason. However, you would be amazed how often critical rulings are made in this context and no notation is made in the record. A simple solution that keeps trial flow going is to keep a log of various sidebar and in-camera discussions, and, during end-of-day proceedings when the jury is gone, ask that the substance and outcome of these discussions be placed into the record.

**Inaccurate trial court file.** The clerk’s office has a difficult job, and documents that you actually file sometimes do not make it into the court file. It is important that you check and verify that the trial court’s record is complete in advance of the time to file the designation of the clerk’s papers on appeal, particularly as it relates to critical briefing and rulings.

**Obtaining specific rulings.** This was discussed above with reference to objections, but it applies to any substantive legal ruling you get in the case. Nothing helps an appellate case more than being able to pinpoint errors in law and logic that reveal themselves through specific rulings. A motion for clarification allows you to get the gist of the judge’s legal reasoning into the record, and it also allows you to get the judge to rethink the issue without blatantly challenging the ruling just made.

**Findings and conclusions.** Trial courts are not required to enter findings and conclusions regarding summary judgment orders. However, without such findings, it is sometimes difficult to pinpoint where the trial court went astray. At a minimum, there absolutely must be a transcript of every summary judgment hearing in the case.

However, even if there is a hearing transcript, the court’s legal reasoning is not always clear. Moving for entry of findings of fact and conclusions of law can be a great way to crystallize not only the facts as the trial court sees them (which can then be challenged on appeal if erroneous) but also the court’s legal reasoning (which will definitely be challenged).

A trial lawyer’s job is a difficult one. But thinking about your trial from an appellate court’s point of view can actually improve your performance at trial and increase your chances of appellate success.

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Will Your Writ Petition Survive the Appellate Emergency Room?
If you are an experienced litigator, this has happened to you. The trial judge has largely gutted your case with a flagrantly erroneous pretrial ruling. Because there’s no final judgment, there’s no right to immediate appeal. You are left with an unpalatable trilemma: Ask the judge to reconsider (fat chance!), go through a whole trial and then appeal, or file a writ petition in an appellate court. You’ve heard writ review is tough to get, but (1) realistically, this judge will not reconsider, (2) going to trial is extremely expensive, and (3) anyway, your case is different—a first-week law student could see how badly the trial judge blew it.

So you dig out a writ petition form, cannibalize your motion papers for the legal content, and stitch together a petition so compelling no sane appellate judge could deny it. Two days later—before the other side even files opposition—the appellate court denies your petition. No reasons given. No further explanation.

What’s going on? Aren’t appellate judges paid to decide exactly this kind of case?

**THE APPELLATE COURT’S REALITY**

Understanding why the great majority of writ petitions are summarily denied requires looking at the situation from the appellate court’s point of view. And as all good advocates know, seeing one’s case from the viewpoint of the decision maker provides important insights into how to present the case persuasively. So what do appellate justices think about when they are confronted with a writ petition?

As always, context is all-important, and an appellate court’s attitude toward writ petitions is largely shaped by the rest of its caseload. The core of every appellate court docket is regular appeals—in fact, appeals alone normally keep the appellate court fully occupied. Appeals are cases that have traversed the trial court system to final conclusion in that forum. They may have been in the trial court for months or years, but they share a common thread: The parties have seen the case through to its natural end there, and nothing more will happen in the trial court to affect the appellate proceedings.

By Kent L. Richland
Writ petitions are very different. By definition, they seek review while trial court proceedings continue. Appellate courts can’t help but view writ petitioners as “cutting in line”—asking that their issues be heard before those of others who have patiently waited their turn. And there are other good reasons for an appellate court to grant writ review sparingly. If left to play out in the trial court, a lot can happen to change the appellate dynamic dramatically. The case can settle and go away completely. Or the victim of the error can win anyway, eliminating any motivation for an appeal. At the very least, completion of the matter in the trial court will almost always shed light on the seriousness of the error, improving the appellate court’s ability to evaluate on appeal any prejudice to the complaining party.

Medical triage categories can help you determine which writ petitions to pursue.

Moreover, the fact that the trial court continues to have jurisdiction while the appellate court is entertaining the writ petition can have serious consequences. For one thing, unless the appellate court stays the trial court proceedings, trial court rulings can make determination of the petition a moving target. But issuing a stay is itself tricky: A stay is certain to disrupt the trial court’s calendar, and it invariably slows down the litigation process. And deciding on the scope of the stay — whether to stay all trial court proceedings or only those directly related to the issue involved — is always a shot in the dark for an appellate court that has seen only a sliver of the case.

So given this bleak environment — an audience of appellate judges with a full workload of appeals who are reluctant to devote their valuable time to complicated “emergencies” that may well correct themselves over time — what can you do to maximize the chances that your petition will be one of the rare ones that is heard?

As it turns out, physicians sometimes operate in a very similar environment as the appellate system described above. And the system they have worked out for deciding how best to allocate their time in those circumstances can provide valuable insights for the advocate contemplating a writ petition.

THINK “TRIAGE”

Triage was developed by French physicians during the Napoleonic Wars as an approach to treating battlefield casualties in military hospitals, where resources are stretched thin by a constant influx of demand for medical services. In need of a method to prioritize treatment of patients with a wide variety of clinical presentations, the doctors formulated a tiered analysis of the severity of the injury and prognosis of the patient with and without immediate treatment. At its most basic level, triage entails classification of patients into three treatment categories: immediate (patients who will die or suffer profound irreversible injury without immediate treatment), urgent (patients with a serious or potentially life-threatening injury but whose medical treatment can be delayed), and minimal (patients with injuries that can be expected to resolve themselves or are so minor that they can be treated by the patients themselves or with minimal medical care).

As regards its writ docket, an appellate court is much like an emergency room. In dealing with these cases that compete for its immediate attention, the appellate court must allocate its scarce resources in the most effective way possible. As a result, appellate judges approach writ petitions — consciously or unconsciously — with a triage-informed state of mind. Petitions presenting problems that will result in genuinely irreparable, irreversible injury in the absence of “immediate” appellate court intervention are the best candidates for a grant of writ review. Where the problem presented in a writ petition is “urgent” — a serious problem, but one that does not require immediate attention in order to prevent imminent harm — an appellate court will be reluctant to grant writ review unless there is some other strong reason for doing so. And writ petitions that present relatively ordinary, “minimal” issues that will probably resolve themselves without intervention or can eventually be dealt with effectively on an appeal after judgment are easy denials.

As explained below, by keeping these triage categories in mind when contemplating and drafting the writ petition, a petitioner can significantly increase the chances of obtaining writ review.

APPLYING TRIAGE PRINCIPLES

Triage principles can inform appellate writ practice in several ways. First, the triage categories form a useful sieve for determining which cases makes sense to pursue as a writ petition in the first place. Where the issue is one that comfortably fits in the “minimal” category, it would almost certainly be a waste of the client’s resources and the attorney’s time to seek appellate writ relief. For example, most ordinary errors in the admission or exclusion of evidence, whether at the in limine stage or during trial, are poor candidates for writ review because of the high probability that the error will turn out to be non-prejudicial once the matter is tried — either because the complaining party ends up winning or because the evidence in question doesn’t prove crucial to the outcome.

But thinking in triage terms is also enormously helpful in planning and...
Drafting a writ petition. Because the triage categories comprise a spectrum, the closer to the “immediate” end of the spectrum a case appears to be, the more likely it is that writ review will be granted. Consequently, a petitioner should always be thinking about how to emphasize the aspects of the case that push it higher on the triage spectrum.

“Immediate” cases. Cases in which the harm from error will truly be immediate and irreparable in the absence of writ review are relatively rare. But there is one rather common type of error that does meet all the criteria for “immediate” treatment: a trial court order erroneously overruling a claim of privilege. Because the trial court’s ruling will result in disclosure and the entire purpose of the privilege will be destroyed in the absence of appellate relief, an appeal after the trial is no remedy at all. For obvious reasons, an order upholding an invocation of privilege is not in the same category—it is more like ordinary evidentiary error.

Other kinds of error that border closely on the “immediate” category are so-called structural errors—errors that deny a party some fundamental right that is essential to the trial process. Examples are the denial of the right to jury trial or the disqualification of a party’s counsel of choice. Although structural errors are not irreversible in the same sense as requiring disclosure of privileged information, they are not subject to the harmless error rule. Consequently, if the party prejudiced by the error loses the trial, that party has a built-in means of obtaining reversal.

“Immediate” and “borderline immediate” cases are the best candidates for writ review so long as the appellate court is convinced the ruling was error, or at least worthy of further briefing. Thus, in these cases it is particularly important that the petitioner demonstrate not just the need for immediate relief but that the trial court’s ruling was indeed erroneous.

“Urgent” cases. Cases can be described as “urgent” where the trial court has committed a very significant error that threatens all or a substantial part of a party’s case. There are endless variations on errors that fit in this category, but an example would be the trial court’s disqualification of a party’s damages expert.

As serious as such circumstances seem to the party affected, these cases generally do not stand a strong chance of getting writ review absent some other factor important to the appellate court. The appellate court’s calculus is that even what appears to be serious error will likely sort itself out in the trial process, and the worst-case scenario is that sooner or later the issue will present itself in a normal appeal.

But “urgent” cases can be made more attractive for writ review. For example, if it can be demonstrated that the case presents an issue of widespread importance or that the error involves a significant or novel legal issue or an issue on which the courts are divided, the appellate court may well view the writ petition as a good vehicle for it to elucidate an important issue.

“Minimal” cases. Cases of ordinary, everyday error are highly unlikely to catch an appellate court’s attention for purposes of writ review; no matter how fascinating the legal issue, few appellate courts will be tempted to intervene. Unless an error is both very significant to the case and involves an issue that transcends the interests of the parties, the odds of getting writ review are vanishingly small—about the same as a cold sufferer has of getting immediate treatment in an emergency room.

CONCLUSION

When an appellate court functions as an emergency room—as it does when dealing with writ petitions—it should come as no surprise that emergency-room concepts such as triage will have some application. The potential writ petitioner who considers triage principles in both evaluating and preparing a writ petition will gain valuable insights that can conserve resources and substantially improve the chances of success.

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A Judge Lays Down the Law on Writing Appellate Briefs

By Raymond M. Kethledge

When I read a brief, the first thing I’m judging is the person who wrote it. How careful is this lawyer? How competent? How candid? The answers to these questions will enhance or diminish the force of the lawyer’s arguments. For in judging, as in other areas of life, it makes sense to consider the source.

Every seven weeks, as I prepare for my next sitting, I read a stack of briefs perhaps three feet high. I read them not merely from a sense of duty, but also because I have a problem: I need to figure out the right answer for each case. A lawyer who makes an impression as credible, competent, and civil is one whose thoughts I’ll take seriously as I work my way through a case. What follows is one judge’s perspective on how to make that impression in your brief.

CREDIBILITY

Address your most difficult issues head-on. I once asked Justice Anthony Kennedy: If you could give a young lawyer a single piece of advice, what would it be? Without missing a beat, he answered: “Level with the court.”

Justice Kennedy’s point was not simply ethical. Cases that are totally one-sided usually don’t make it to the court of appeals. In cases that do, almost all parties—plaintiffs or defendants, appellants or appellees—have some weakness in their position, some point they’d rather not discuss but would be foolish not to. And that was precisely Justice Kennedy’s point. If your position has a weakness, the chances that three or more judges, and each of their law clerks, will all overlook that weakness are exceedingly slim. The smart move, and the one that will enhance your credibility with the court, is to acknowledge the weakness—directly, candidly, without spin—and then explain why you should prevail anyway.

Make your brief flawless in form. A lawyer who is careless about typos or formatting is usually careless about substance as well. Filing a brief with these mistakes is like walking up to the podium with stains on your shirt. The court will be reluctant to trust your judgment. Conversely, a flawless brief enhances your credibility as a professional.

Avoid overstatement. This rule is one that most lawyers purport to agree with but keep violating anyway. The reason is understandable: As people make arguments, they often become passionate about them and thus make them in stronger terms. But with every extreme modifier in a brief, the lawyer’s credibility is increasingly jeopardized. A brief littered with “clearly” is one whose reliability most judges will discount. One way to avoid this tendency is to edit your brief a week or so after you’ve written it, when your passions have cooled. But lawyers often don’t have that kind of time. A simpler approach—if you have...
the discipline to follow it—is to avoid extreme modifiers altogether. Words such as “certainly,” “obviously” (which tends to impugn your opponent’s intelligence), and “beyond all peradventure” (which is awful writing to boot) have little place in a brief. The same is true for the most overused extreme modifier of all: “clearly.” Use this word only if you need to when reciting or applying your standard of review (e.g., “the district court’s finding was clearly erroneous”). Modifiers such as these not only diminish your credibility and make you sound like a blowhard, they also set the bar higher than necessary for the court to agree with your argument. You only need to convince the court that your argument is correct—not that it is “clearly” so.

Most legal writing is bad writing. Well-written briefs make a judge nearly overflow with gratitude.

Carefully choose your questions presented. I once began an opinion with the line, “When a party comes to us with nine grounds for reversing the district court, that usually means there are none.” Think twice about arguing more than three grounds of error on appeal. True, cases of epic scope and complexity might fairly present six or more questions on appeal. But there are few such cases. And a brief that wastes the court’s time with junk-drawer issues is usually regarded itself as junk.

Be reasonable. This point is related to the last one. Avoid tendentious arguments in support of your position. Once, in an immigration case, the government argued that the immigrant’s petition was untimely because she had filed it more than 30 days after the date of the order she challenged—even though the government had concealed the order’s existence from her for more than seven months after that date. In another case, a major corporation argued that we should disregard the undisputedly plain meaning of its contract with an insurance company and instead apply an equitable doctrine reserved for individual claims in uninsured-motorist cases. Lawyers who make these kinds of arguments only damage their credibility and make it easy for opposing counsel to enhance their own.

COMPETENCE
Take writing seriously as a craft in its own right. Most legal writing is bad writing, so to encounter a superbly written brief makes the judge nearly overflow with gratitude. To any competent appellate advocate, William Strunk Jr. and E.B. White’s *The Elements of Style* and Bryan A. Garner’s *The Elements of Legal Style* should be old friends. Even Judge Frank H. Easterbrook—indisputably one of the finest writers in the entire federal judiciary—re-reads these books once a year. That means the rest of us should be re-reading them at least that often. I would also add George Orwell’s essay “Politics and the English Language” to this list.

Avoid block quotes. Judges usually don’t read block quotes. It’s a learned behavior: Most block quotes are filled with more chaff than wheat, which the writer is too lazy to separate. There is, however, an important exception to this rule: If your case requires the court to interpret sections of a statute, regulation, or contract, you should block-quote these sections—preferably early in your brief—rather than excerpt them into your own prose. Finally, if (apart from this exception) you think for some reason that you simply must use a block quote, be sure to use a lead-in that indicates why this block quote is actually worth reading (e.g., “Holmes put it best: . . . .”).

Avoid acronyms. Reading a brief should not be a short-term memory test, and just because “UMTRI” is defined on page three of a brief does not mean that a judge will remember what it means on page nine. Nor do most judges have the time or patience to be flipping back and forth through briefs to figure out what a bunch of acronyms mean. Indeed, some courts—notably the D.C. Circuit—have rules barring the use of most acronyms. The basic rule here is simple: *Don’t use an acronym whose meaning the reader does not already know.* Thus, FBI, EPA, and NATO are fine—you don’t even need to define them—but “USFS” (for “United States Forest Service”) is not. Just say “the Service” instead. In like fashion, you usually can use just a word or two from the entity’s formal name—“the Commission,” “the University,” “the Institute” (rather than UMTRI)—to refer to the entity. As with all writing, the touchstone is common sense: Will the reader readily grasp your meaning, or not? If the answer is yes, don’t worry about whether your approach differs from that of other legal writers.

Avoid repetition. Sometimes it’s important to inculcate a critical point in your brief, and thus you need to make it more than once. But avoid repeating yourself verbatim, which only encourages the reader to start skimming your brief—and if they start skimming, they might not stop.

Minimize boilerplate. Include only the boilerplate that you’ll actually use in your analysis. Thus, if your case comes to the court on summary judgment, and the issue is strictly one of statutory interpretation, there is no reason to say anything about the quantum of evidence necessary to create a genuine issue of material fact. Likewise, if your case involves the application of a seven-factor test, and everyone agrees that only one factor governs the outcome in your
case, there is typically no need to recite the other factors.

Treat your summary of argument like the precious asset it is. The summary of argument is the most important section of your brief, and the summary’s first sentence is the most important sentence in the brief. Don’t waste that sentence by telling me that “[t]his is a breach of contract case in which the district court granted summary judgment to the defendant.” I already know that by the time I open the brief. Instead, think of one point, above all, that you want the court to remember from your brief—and then put it in that first sentence. The sentence should be thematic, expressing an original thought that transcends the particular doctrines at issue. Two examples:

- In a case where one lawyer followed the district court’s rulings during trial and the other violated them throughout: “This case was tried according to two sets of rules.”
- In a case where the prosecution sought and obtained admission of evidence that warranted reversal of the defendant’s conviction on appeal: “Sometimes the prosecution should be careful what it asks for.”

Finally, write your summary of argument (or any introduction) last, when your mastery of the material is greatest. By then, you’re likely to have distilled an original thought or two about your position.

CIVILITY

One of the most foolish things a lawyer can do in a brief is to attack the integrity or competence of opposing counsel. (A brief in support of a sanctions motion is an exception, but even then, use some decorum.) Reading a brief filled with ad hominem attacks is like listening to my kids fight, except that I have to wait until we’re in the courtroom to tell the attacking lawyer what I think about it. Judges are interested in the merits of your case, not in personal attacks on opposing counsel. Lawyers who write that opposing counsel has “shamelessly misrepresented” the holding of a case, or that an opponent’s argument is “ridiculous”—to cite two examples from my own cases—often come to rue these words before the court is done with the case. Even if the other lawyer has acted badly, the better practice is to lay out the relevant facts and let the court reach its own conclusions. Finally, if another lawyer directs this sort of attack at you, don’t respond in kind. Instead view the situation as an opportunity. One of the most admirable pieces of advocacy I’ve seen as a judge came from the lawyer who was the target of the “shamelessly misrepresented” line. In a footnote on the opening page of his reply brief, the lawyer simply recited the worst things the other lawyer had written about him, and then stated that, “in the interests of professionalism,” he would not respond to these things, but that he “wished to note his disagreement with them.” In that exchange, the targeted lawyer came out far ahead.

CONCLUSION

Every brief provides its author with the opportunity to make an impression as a lawyer worth listening to. A brief that is measured, careful, and professional will make that impression for you.

Hon. Raymond M. Kethledge (raymond_kethledge@ca6.uscourts.gov) serves as a judge on the U.S. Court of Appeals, Sixth Circuit.
Amicus Briefs
How to Write Them, When to Ask for Them

By Mary-Christine (M.C.) Sungaila

Friend of the court, or amicus curiae, briefs are often filed in appellate cases heard by the U.S. Supreme Court and state supreme courts, as well as intermediate courts of appeal. And there is considerable evidence that amicus briefs have influence: Appellate courts often cite to them in issuing their decisions. One study showed that between 1986 and 1995 the U.S. Supreme Court referred to at least one amicus brief in 37 percent of its opinions; another study revealed that state supreme courts acknowledged or cited amicus briefs in 31 percent of cases and discussed arguments made in amicus briefs in 82 percent of the cases sampled.

The California Supreme Court, for example, has recognized the “valuable role” amici play “precisely because they are nonparties who often have a different perspective from the principal litigants,” and acknowledged that their different perspectives “enrich the judicial decisionmaking process.” Connerly v. State Personnel Bd., 37 Cal. 4th 1169, 1177 (2006). The California Supreme Court and courts of appeal have also invited amicus participation in some cases. In Toyota Motor Corp. v. Super. Ct., 197 Cal. App. 4th 1107, 1130 (2011), the Second Appellate District was asked to determine whether California courts have the authority to require a corporate defendant’s foreign officers, directors, managing agents, or employees to appear for deposition in California. Recognizing that the case presented “important and novel questions,” the appellate court extended direct invitations to amicus organizations identified by the parties as being potentially interested in the outcome of the case and set up a post-argument amicus briefing schedule. (See January 21, 2011, docket entry, B225393; appellatecases.courtinfo.ca.gov.) The same division of the court of appeal invited “a number of governmental and private parties to submit amicus curiae briefs” in connection with another writ proceeding in 2008 involving “the legality of, and restraints upon, home schooling in California.” Jonathan L. v. Super. Ct., 165 Cal. App. 4th 1074, 1083 (2008).
What makes an amicus brief more effective? And how and when do you obtain one, if you represent a party on appeal?

WHEN TO SOLICIT AMICUS BRIEFS

Amicus briefs are most appropriately and frequently filed in cases before the highest court of the state or the U.S. Supreme Court. Once a case has reached this level, it raises policy issues well beyond the concerns of the individual parties to the case, and the court tasked with deciding the case will want to know the broader implications of the case beyond the parties. Amici can provide helpful guidance to the court about the real-world impact of any decision.

Amicus briefs also may be helpful in a case that raises novel issues of law before an intermediate appellate court or a case as to which broader policy concerns are otherwise at issue. If the case impacts the individual parties and raises no broader issues, however, an amicus brief will not be helpful to the court (nor are you likely to convince an amicus organization to submit one).

WHAT MAKES AN AMICUS BRIEF EFFECTIVE

When considering whether an amicus brief will be effective, first make sure it adds something to the case. If the brief just repeats arguments made by the parties and adds more pages of reading material for the judges and their clerks, it will not be well received.

Second, be mindful of the stage at which an amicus brief is being submitted. Amicus support at the petition or discretionary review stage is most helpful in demonstrating the widespread importance of the issue and the need for immediate guidance from the court. In order to convince a supreme court to grant review in a case, it is important to alert the court that groups well beyond the parties have an interest in the case and urgently need clarity and guidance on the law in that area. Amici can also help by further exploring a circuit split on an issue and describing the real-world impact of this continuing split.

At the merits stage, amici can do one of three things: amplify or supplement the legal and factual arguments of the parties or present an alternative argument not raised by any party; identify unintended consequences of a decision or rule on people or groups who are not parties to the case; and communicate the importance of the case by their very presence. In fulfilling these roles, amicus briefs often include additional legal citations, policy considerations, and social science data that may be helpful to the court.

Amicus briefs should be short (generally, 20 pages or less). Be sure to consult the court rules governing amicus briefs, and follow them scrupulously (including seeking consent of the parties or leave of court to file the brief).

The appellate experience and reputation of the counsel filing the brief and the amicus participants themselves are also important. An amicus party known for submitting high-quality, thoughtful, and helpful briefs, prepared by appellate counsel with a similar reputation, can catch a law clerk’s attention.

Finally, it is important to align the various amicus briefs in a case to tell the most effective story. Amicus briefs that intertwine but do not overlap with either the party’s brief or other amici can fill in aspects important to deciding the case. It is not helpful to have three amicus briefs that say exactly or nearly the same thing, even if it otherwise might be helpful to have each organization appear in the case. To prevent repetition, counsel for the party may suggest areas for potential amici to brief at the outset and keep track of which amicus plans to argue which points. If there appears to be potential for repetition, party counsel can alert other amici before the briefs have been drafted. If there is no way to avoid overlap, amici can consider jointly filing a brief.

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will file more readily at the petition stage or in state court; others rarely file at the petition stage and generally only in the U.S. Supreme Court. Still other organizations have priority issue areas in which they tend to focus their amicus efforts.

Once you have identified potential amicus organizations to solicit, prepare a two- or three-page memo describing the importance of the case, the pertinent deadlines, the issues raised, the arguments of both sides as to those issues, and how an amicus can add to the discussion, together with a copy of the underlying opinion and petition sought to be supported. In your memo, be sure to explain how the issues in your case reverberate well beyond the case at hand. Submit an amicus request at least three weeks before an amicus brief would be due.

Keep each organization in the loop about other potential amici. Although amicus-filing organizations have their own network and often will confer with sister organizations about their decision to file in a case, it is better for the party to advise different potential amici about other groups that already have committed to filing an amicus brief in the case.

Be careful not to compromise the independence of amici. Many courts, including the U.S. Supreme Court, require amicus counsel to assert in the brief that the brief was neither prepared by nor paid for by anyone other than the named amicus and its counsel. Having a party pay for or ghostwrite an amicus brief compromises its independence and its influence with the appellate court and may violate court rules.

CONCLUSION

Amicus briefs can be helpful to appellate courts in deciding cases of widespread importance. If you are mindful of the most effective ways to craft and solicit amicus support, you will have another means of persuading the court on behalf of your client.

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AMICUS BRIEF INTROSCTIONS

Amicus briefs should not repeat arguments made in the party briefs. But how do you reflect the scope of coverage in an amicus brief at the outset? One way is to carefully carve out the amicus arguments from those of the party supported in the introduction to the brief. A few examples:

■ In the merits briefing, the defendant has already explained why the factors in Rowland v. Christian 69 Cal.2d 108 (1968) do not warrant extending a duty to nonemployee plaintiffs in take-home exposure asbestos cases such as this. We do not repeat these arguments. Rather, we describe how two additional policy concerns centered on the burden on defendants and the consequences to the community from increased asbestos litigation and corresponding reduction in access to the courts, particularly in light of ongoing budget cuts, further militate against expanding duties to new categories of plaintiffs in asbestos cases.

■ As the opening brief on the merits explains, Plaintiff worked for Supreme Castings & Pattern, Inc. (Supreme), an industrial foundry that made metal parts. After Plaintiff developed interstitial pulmonary fibrosis, he and his wife sued several companies, including Alcoa, that supplied the raw materials used by the foundry. They contended that when the aluminum provided by Alcoa was melted in furnaces, the molten aluminum generated hazardous metal fumes. Alcoa Inc.’s briefs on the merits (joined in by the other defendants and respondents) explain that “as the supplier of multi-use raw materials, Alcoa is not responsible for the injuries allegedly caused by the plaintiffs employer’s own manufacturing process” under two related, but independent doctrines: the raw materials/component parts doctrine and the sophisticated purchaser doctrine. This amici brief explains why this Court should, for the same reasons it has adopted the sophisticated user doctrine, adopt the sophisticated purchaser doctrine as an exception to a supplier’s general duty to warn, which would preclude liability in this case.

■ Petitioners have extensively briefed the relevant legislative history and statutes and explained how the Legislature has limited to witnesses residing within California the California courts’ power to compel the attendance of individual witnesses at deposition or trial in this state. We do not repeat those arguments. Instead, amici show that (1) California courts similarly lack inherent authority to compel nonresidents to attend depositions within state borders and (2) even if the trial court here did have discretionary authority under Code of Civil Procedure section 2025.260 to order Petitioners’ individual Japanese employees to attend depositions in California, that discretion must be exercised consistent with principles of international comity as well as the factors enumerated in section 2025.260 itself.
Ten Tips for Persuasive Oral

By Andrew S. Pollis
When Andy Warhol observed, “In the future, everyone will be world-famous for 15 minutes,” he probably didn’t have appellate arguments in mind. But in the insular world of appellate litigation—where we spend so much time holed up by ourselves researching and writing—a 15-minute oral argument is sometimes our best opportunity to get out and show our stuff. And when you finally get a chance to take to the stage for your big moment, you want to perform at your best. To that end, I offer ten tips designed to elicit rave reviews from your colleagues, your clients, and—most importantly—the judges.

TIP 1: WRITE THE BRIEF
The first and best way to prepare for oral argument is actually to author the appellate brief yourself. It may sound like an obvious point, but it’s not one that appellate lawyers consistently honor. In large firms, high-powered partners may swoop in for the argument after “the team” has written the brief. In solo shops, it’s not unusual for lawyers to hire law clerks (often students) to do the “mundane stuff” like brief writing.

Anyone who has not played an active role in briefing will never understand the case as well as those who lived with it from draft to draft to draft to final product. This is not to say that the brief can’t be a team effort. But the person who argues the case needs to be an integral part of that team if he or she has any realistic expectation of arguing the case effectively.

TIP 2: DOUBLE-CHECK JURISDICTION
Appellate courts have limited jurisdiction, usually prescribed by an interconnected system of statutes and rules. They will use a jurisdictional defect to avoid hearing your case on the merits if they possibly can—sometimes surprising counsel at oral argument with questions about jurisdiction. Jurisdictional dismissals occur without the issue even having come up at oral argument.

You can guard against improper dismissal by anticipating jurisdictional problems and being prepared to address them at oral argument. Make sure you can articulate the jurisdictional basis of your appeal in a single sentence, especially if your case has not yet reached final judgment in the trial court. And if jurisdiction is uncertain—say, for example, the trial court issued a questionable certification of partial final judgment under Federal Rule of Civil Procedure 54(b)—be as prepared to address the jurisdictional issues as you are prepared to address the merits.
TIP 3: UPDATE YOUR RESEARCH—BUT JUDICIOUSLY

Time doesn’t stop just because you have filed your brief. Between the time you file your brief and the date of oral argument, courts may decide other cases that bear on yours. Part of preparing for oral argument is making sure you monitor those decisions and keep your research current. One good system for doing so is to program LEXIS or Westlaw to run periodic research queries on the key cases, statutes, rules, and issues in your case.

Most jurisdictions allow parties to advise the appellate court of new authorities. In federal appeals, Federal Rule of Appellate Procedure 28(j) permits parties to file a 350-word letter that explains the significance of supplemental authority (and permits the opposing party to respond). Some state court rules permit disclosure of new authorities but without the accompanying argument. Whatever your jurisdiction permits, take advantage of the opportunity to make sure the court is working with the current state of the law by the time it decides your case. And be prepared to address these authorities at argument, especially if you have not had an opportunity to address them in writing beforehand.

But there’s an important caveat here: Don’t over-supplement. A new case may touch on an issue in your appeal, but that doesn’t necessarily mean you have to run and tell the court about it if it adds nothing new. Remember that every piece of paper you file adds to the judges’ burden—so make sure your new authority is worth their time. And never use a notice of supplemental authority to disclose material that already existed (but that you somehow failed to discover) when you wrote your brief.

TIP 4: PREPARE A DETAILED OUTLINE—AND THEN CHUCK IT

One of the most effective ways of preparing for oral argument hearkens back to our law school days, when we would outline our courses. I always found that the process of crafting the outline was a more helpful study technique than actually having the outline. It is equally so with oral argument preparation; studying the record and the law carefully enough to prepare your detailed outline is the heart of preparation, even more than studying the outline once you have it.

And, for that very reason, you should dispense with all the papers by the time you take that fateful walk from counsel table to the podium. Go up with nothing but your brain and your charm. I say this for two reasons: First, knowing ahead of time that you will have no notes will require you to absorb the material all the better, thus ensuring that your preparation will be complete. Second, the quality of your presentation will, perforce, be immeasurably better if you have nothing to look at but the judges’ eyes.

The idea of paperless argument strikes some of us at the core of our insecurities. What if I blank out? What if I can’t remember that case name? If you have prepared adequately—and memorized your first sentence (see Tip 5, below)—it simply won’t happen. But for those who remain unconvincing, one simple trick is to have your notes sitting on the corner of the counsel table so that, in the worst-case scenario, you can go retrieve them. For the truly faint of heart, you can bring them to the podium in a closed folder that you don’t dare open unless catastrophe strikes.

TIP 5: CAREFULLY SCRIPT—AND MEMORIZE—YOUR OPENING SENTENCE

One of the most successful advertising campaigns for dandruff shampoo told us that we “never get a second chance to make a first impression.” This is even truer in oral argument. Research shows that important judgments materialize in a matter of seconds. Yet some oralists fail to exploit that crucial moment when the mouth first opens and the pearls of wisdom start to drip out. This is your moment to grab your audience. And it doesn’t matter how dry the issue may be; there is always something you can say from the outset to make the case—and your side of it in particular—sound compelling.

That opening sentence goes by many names, from the mundane (“introduction”) to the strategic (“core theory”) to the vernacular (“elevator speech”). But the purpose is the same, no matter what you call it: to distill your entire argument into a crisp and compelling statement that any listener will understand—and that will leave your listener with no doubt about what side of the issue you come down on. It’s not an easy task. Sometimes writing that opening sentence is harder and more time consuming than all your other preparation combined. But getting it right is crucial and rewarding.

An interesting anecdote on this score: In 2010 I had the honor of working alongside Cleveland attorneys David E. Mills and Chris Grostic in preparing Mills for his Supreme Court oral argument in Ortiz v. Jordan, 552 U.S. 1 (2011). The issue in Ortiz was whether the defendants could appeal the denial of their fact-based summary judgment motion, even though they had not reasserted their arguments in a post-trial motion. The three of us pored over Mills’ intended first sentence, until finally we settled on:

Denial of summary judgment is not reviewable on appeal after trial, particularly where the decision depends on whether the evidence on the merits of the claim is sufficient to cross the legal line for liability.

The weekend before the argument, I started to worry that “particularly” was a hard word to enunciate, especially when nerves are jumbled and the mouth is dry. So I counseled Mills to substitute “particularly” with “especially.” At the argument, no sooner did he eke out that first sentence (with my suggested revision) than Chief Justice John Roberts interrupted him and seized on my suggested word:

I’m sorry to interrupt so quickly, but that “especially,” I take it—I take it, is a concession that there’s a difference between claims for qualified immunity based on evidence and claims that are based on law.
It was good for a laugh afterward, of course. But it also demonstrates that we were correct to obsess about the wording because it inspired Chief Justice Roberts to zero in on one of the most important aspects of the case. (In the end, we won, 9–0.)

**TIP 6: ROAD MAP YOUR ARGUMENT**

Medical studies tell us that people are much more comfortable in the doctor’s office if they know what’s coming. If the doctor says, “I’m going to listen to your heart with my stethoscope, and then I’m going to palpate your neck to feel your arteries,” we are much more relaxed than if the doctor simply starts to do these things without warning.

Judges aren’t usually worried about being palpated, but the same principle applies. Everything goes down more easily if we expect it. It’s simply less taxing to follow. So warn your judges what path your argument will take. It’s easy to do, and it will help ensure that you structure your argument logically. Here are three important considerations to keep in mind as you craft your road map:

1. **Disclose the ultimate destination.** The best road map starts off with a general statement, which is usually the major proposition in the case. A generic example for the appellant might be: “We ask that the court reverse the erroneous trial court judgment.”

2. **Disclose the distance.** To fill out your road map, tell the court how many arguments you’re going to make in support of that statement (e.g., “for three reasons”). Three is a good number; you’re unlikely to be able to cover more than that in only 15 minutes.

3. **Disclose the route.** Briefly list each of your arguments, using ordinal numbers. “First, the trial court erred in letting the case go to the jury; second, the trial court wrongly excluded evidence; and third, the trial court gave the jury an erroneous legal instruction.” Don’t give detail here; that will come later (or not, depending on how much of your prepared argument you get a chance to deliver).

You’ll notice that for each of these elements, I used the word “disclose.” Lawyers are sometimes inclined to keep information to themselves, not to reveal their work product or their thinking for fear of giving away strategy. This might be an important concern when dealing with opposing counsel in the throes of discovery or trial, but the opposite instinct should kick in when talking to a judge. This is the time for full disclosure. This is the moment that all the strategizing has led to. You’ve worked carefully to build the best hand, so feel free to tip it at the beginning of your argument!

Also remember that road maps aren’t just for your opening. You can use them even in answering judges’ questions. If a judge asks a question to which you have multiple responses, tell the judge so before you start listing them (e.g., “There are three answers to that question, Your Honor”).

**TIP 7: AIM FOR A REAL CONVERSATION**

The goal of oral argument is, of course, to convince the court that your argument is more persuasive than your opponent’s. So ask yourself: Are you generally easier to persuade when someone is talking at you or with you? Most of us would agree that the latter approach—the conversation, rather than the lecture—is a better way to convince us of the merits of an argument. It’s no different with judges.

If you buy the premise that a conversational argument is more effective, it becomes important to appreciate the most effective components of conversation and to fold them into our presentation. It comes down to four basic points.

First, like any other conversation, listening is at least as important as talking. When judges ask questions or raise concerns, they are giving you important windows into their thinking. Only if you listen carefully to what they say can you respond and tailor your presentation to meet their concerns. Then, answer those questions as directly as you can. If they ask a “yes or no” question, give them a “yes” or “no” answer—and then, if necessary, elaborate to make that answer fit into your overall argument.

Second, it’s a group conversation. Make sure you engage the whole group, not just a single judge. Of course, you sometimes can intuit which judges may be your primary targets. For example, if you know from past experience that one of the judges on a three-judge panel is already likely to come out your way, the main focus of your energies should be on the other two. Similarly, if you know you have no hope of winning over a particular judge, engaging him or her at length may not be the best use of your time. But aside from these strategic considerations, you should strive as much as possible to give each judge equal time.

Third, as with any other conversation, relate what you say to what others have said. This is especially important in rebuttal, where the appellant gets a chance to respond to the appellee’s argument; do whatever you can to connect your rebuttal to a judge’s question or comment to your opponent. Doing so not only helps you emphasize the point in question, it also makes the judge feel good, as if you were actually listening to what he or she said. Never pass up...
Fourth, anticipate the tough questions. Talk the case over ahead of time with smart people who will find the holes in your argument. Craft answers to fill every one of these holes or, if appropriate, concede them (see Tip 8, below). Anticipating questions will also allow you to create pathways from your answers back into your prepared argument, thus increasing the likelihood that questions will enhance your flow rather than disrupt it.

**TIP 8: CONCEDE WHAT YOU CAN**

Lawyers tend to be reluctant to concede anything—even points that we don’t really need to win. It’s ingrained in us not to give any ground unless we absolutely must. Instead of conceding outright, some lawyers use that awful word, “arguendo”—as in, “even assuming arguendo I’m wrong on Point X, I’m still right on Point Y.”

But, to borrow from Ecclesiastes, to everything there is a season. A time to refute, a time to concede. And oral argument is the time to concede weak points, so long as the concession causes no disruption to the integrity of your argument. Refusing to concede points that you cannot win comes across as defensive and suggests that you are unwilling to evaluate your case objectively. This defensiveness, in turn, undercuts your persuasiveness.

By contrast, conceding points you don’t ultimately need to win accomplishes two important goals: establishing your personal integrity with the court and emphasizing your confidence in the strength of your overall argument. A good example might be an appellate decision from another jurisdiction that goes against you. If it doesn’t control your court, you might be better off conceding that it goes against you rather than trying to concoct a weak way to distinguish it. You can forcefully argue that your court should not follow the erroneous decision of the other court, and your argument is all the more forceful if you don’t shy away from what the other court held.

**TIP 9: MAKE IT LOOK FUN**

In The Adventures of Tom Sawyer, Tom famously got out of whitewashing Aunt Polly’s fence by making the task look like a treat. “Like it?” he said. “Well, I don’t see why I oughtn’t to like it. Does a boy get a chance to whitewash a fence every day?”

These days, kids get precious little opportunity to whitewash fences. But lawyers still get the chance to deliver oral arguments. And the more fun you show the court you’re having, the more confidence you exude—which is precisely the way to convince the court that you have the better side.

Fun is contagious. People who see other people having fun want to have fun, too. Especially in the drudgery of the law, where fun is sometimes the very thing we’re missing, a lawyer who can stand up and make a joyful noise is naturally going to attract a more favorable response from the other participants in the conversation.

And the best part is this: When you behave as if you’re having fun, most of the time you actually do.

**TIP 10: MOOT YOUR ARGUMENT WITH A MIXED AUDIENCE**

In a famous vaudeville joke, the straight man asks the question, “How do you get to Carnegie Hall?” The answer, of course, is “Practice, practice, practice!” That’s also the best way to get to the court of appeals. There is not a single appellate argument that cannot be improved by testing it in front of an actual audience. The more you practice, the more comfortable you will feel in your paperless walk up to the podium (see Tip 4, above).

Picking the audience should be a thoughtful exercise. Yes, colleagues in your firm are good choices, but be careful about choosing people who are already biased in your favor or—just as dangerous—eager to show you how smart they are by giving you an unnecessarily hard time.

And lawyers are not the only folks who can give you good feedback. Do a few moot courts with laypeople. There is a value in getting reaction from people who don’t know the law—they can help you identify things about your case that just don’t make sense or just feel wrong. And because they don’t necessarily understand legal doctrine and authorities, they’ll give you more thoughtful feedback on presentation style that your lawyer colleagues may miss.

**MAKE THE MOST OF YOUR 15 MINUTES**

The universal consensus about your 15-minute oral argument is that, like a reality celebrity’s 15 minutes of fame, it goes by too fast. So make the most of it, and then savor those moments as they slowly fade into memory. With any luck, you’ll get a decision down the road that will serve as a happy reminder of your glorious time at center stage. And if not, your next argument is just around the corner, offering you an opportunity for a triumphant comeback.

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Bringing together legal strategy, psychology, and persuasion theory, this book offers a fresh approach to trial preparation, one that focuses on how jurors learn, think, and deliberate.

Trial practice is more art than science. Some are born with a natural ability to tell a story through witnesses and evidence and persuade others to reach a desired result. Time and experience, however, can improve a person’s capacity to succeed at trial. Following the suggestions noted in this book will help to develop and optimize trial skills to achieve favorable outcomes for your clients.

In many instances lawyers boldly declare that trials are “over” by the end of voir dire or opening statement, that nothing can be said or done during closing arguments that will change the outcome of the trial. Do not listen to this.

Approach every closing argument as if only one juror is on your side—a juror who will never know the facts as well as you and who will only remember a fraction of what you say during closing argument. Resolve that, by the end of your closing argument, the juror will (1) know what exhibits to call for and what to do with those exhibits, (2) be able to identify a turning point in the trial, (3) remember the bios of your key witnesses and the tags of your opponents’, (4) be able to picture how the evidence stacks up on both sides of the scale, (5) be prepared for prejudicial and emotional comments, and (6) know how you would respond to compromise.

Every trial lawyer must develop his or her own style and undoubtedly will learn trial tactics through experience and trial and error. But most lawyers can learn so much from other lawyers. From the Trenches: Strategies and Tips From 21 of the Nation’s Top Trial Lawyers brings together 21 top trial lawyers to offer insightful tactics and strategies to make attorneys stronger in court.

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Secrets to Effective Electronic Documents in the Appellate Process

By Sean L. Harrington

This is an article on electronic briefs. But it’s more accurately a commentary on knowing your audience, knowing your rules, and knowing your tools. When I was invited to write on this topic, the editors probably were looking for a straightforward how-to and some encouragement for the continuing adoption of electronic briefs in appellate practices. But there are many excellent publications that do both, including several produced by the American Bar Association. (See the sidebar on page 41.) I thank the editors for extending me the latitude to approach this topic from a somewhat different angle, while remaining faithful to the learning objective: effective utilization of electronic documents for appellate practitioners. (For the purposes of this article, I limit the scope of my discussion to the use of Adobe Acrobat Professional and for briefs that will be opened on computers using the Windows or Mac operating system.)

Since at least 2000, we have been promised that electronic briefs could “change the way judges analyze legal precedent . . . a sort of deeper foundation of the law, or even encouraging judges to search the Web to check factual assertions” (Bradley J. Hillis, “Electronic Briefs in Trial and Appellate Courts,” JURIST, April 20, 2000). As I reflect on some articles styled, for example, “e-briefs and e-filing are e-z” (David L. Masters, GPSolo magazine, June 2004), I feel compelled to share the truth that neither e-briefs nor e-filing has been easy for everyone—including me, a legal IT professional.
Although converting a Microsoft Word document to Adobe Portable Document Format (PDF) is easy enough, and although uploading a document to the federal courts’ Case Management/Electronic Case Files (CM/ECF) system is usually problem free, the disparate policies and technologies used by various courts have proven difficult and confusing for many practitioners. For example, in Minnesota, where I live, the e-filing system requires all documents to be “submitted in searchable PDF format only” (Minnesota General Rules of Practice 14.03), but “No Optical Character Recognition (OCR) data shall be contained in or associated with the document.” Id. at 14.03(b)(2). In reality, what this means is that formatted text—e.g., PDFs converted from WordPerfect, OpenOffice, or Word—are okay, but one must disable OCR when scanning in images (such as a signature page). In practice, I have observed many attorneys struggle to understand how to comply with these requirements.

Take the time to understand the limits and capabilities of your e-filing system.

Aside from the nuances of state court e-filing and federal courts CM/ECF, complex (fully hyperlinked) electronic briefs traditionally have been more difficult and time consuming than mere PDFs converted from word-processing documents and certainly have been more expensive. As I will discuss below, hyperlinked briefs may even be controversial or cost a practitioner the case. But, when utilized effectively, they can be very impactful.

Are electronic briefs permitted, and in what form? Perhaps one of the best examples of what can go wrong comes from personal experience: In 2006, I was involved in a case in the U.S. Court for the District of Colorado and endeavored for many days and nights to assemble a substantial filing—a brief in opposition to a magistrate’s recommendation for dismissal—as a complex electronic brief, complete with hyperlinks to trial court filings, cases, and law review articles for the convenience of the judge. Prior to filing, I discussed this plan with the court’s ECF project manager, who confirmed that hyperlinked briefs were accepted and encouraged.

The difficulty with CM/ECF at that time, in contrast to so-called “companion” e-briefs that traditionally were submitted on compact disks to appellate courts, was that it disallowed PDF documents containing embedded-attachment hyperlinks. Consequently, any hyperlink to reference material—anything other than a web resource—had to be appended to the end of the brief. Fortunately, the Electronic Filing Guidelines provided that, “Neither a hyperlink, nor any

I included a conspicuous notice, such as below:

Please note: This is Part B (of 12) of a fully hyperlinked brief pursuant to § H(2)(a) of ver. 2 of the D.Colo. ECF Procedures and which part consists of 6 pages. Pages appearing after page B-6 are for reference only and should not be printed out or construed as if they were incorporated by reference or considered as part of a total page count. (See § X(C) of ver. 2 of the D.Colo. ECF Procedures.)

Between the end of the brief proper and the start of the reference material, I inserted a page with the following notation:

THIS PAGE INTENTIONALLY LEFT BLANK. THE PAGES THAT FOLLOW ARE FOR HYPERLINK REFERENCE ONLY.

So, what happened? When the trial judge received his notification through CM/ECF that the brief had been filed, he took note of the number of pages stated in the document history display, became very cross, and did not read the brief. Instead, he wrote the following in an order of dismissal:

It is hard to imagine a more frivo-lous, burdensome, prolix, sense-less, and harassing filing than the one containing Plaintiff’s objections. The objections themselves are spread over 2,610 pages, and the exhibits occupy an additional sixty pages. The bulk of the filing consists of an apparently random mixture of copies of cases and exhibits. It is im-possible to follow or make sense of this heap, and any attempt to do so would require abandonment of all other cases. . . . The objections to the recommendation are “redundant, immaterial, and impertinent,” Fed. R. Civ. P. 12(f) and will be stricken.

To dull the sting of this outcome, I could rationalize that the judge simply
didn’t read even the first page of the brief, or that he later resigned his Article III office in response to allegations that he was engaging in conduct in chambers other than reading briefs at about the time frame in question, or that I later obtained some unrelated relief on appeal. But the more sobering conclusion was that the system simply wasn’t conducive for submitting complex electronic briefs, that I was ahead of the times, and that I failed to know my audience.

You can avoid such a mistake by taking the time to understand the limits and capabilities of the e-filing system you are using, and, if you intend to file a “companion” brief on DVD-ROM or other media, by having a frank discussion with court staff about not only whether it will be accepted but also whether it is likely to be used by one or more of the judges on the panel. (Note that, depending on how matters are handled in your jurisdiction, the more invasive the questioning about the judges’ internal procedures or the more prolonged the contact with the judges’ clerks, the more such communications may be vulnerable to allegations of improper ex parte pandering.)

RULES VIOLATIONS AND IMPROPRIETY (OR THE APPEARANCE THEREOF)

Know not only your audience, but also your rules. Failure to do so, whether inadvertent or intentional, could result in a brief being stricken, an appeal being dismissed, or the attorney being sanctioned:

- PDF files can be purposefully laced with so-called web bugs that allow a party to learn when a PDF file was opened and to which page it was read, so long as the reader has an Internet connection. I believe that such surreptitious monitoring could be a violation of ABA Model Rule of Professional Conduct 8.4(c), which prohibits an attorney from engaging in conduct involving deceit, dishonesty, or deception.

- Every effort must be taken to not include content that the opposing party cannot open. For example, whereas electronic briefs in some jurisdictions may be permitted to include audio, videos, or animations, it may be tempting to include other files, along with the necessary software to open them, to which the opposing party may not have access. This can be perceived as creating an unfair advantage. (See, e.g., Yukiyo, Ltd. v. Watanabe, 111 F.3d 883, 886 (Fed. Cir. 1997), in which the electronic brief gave an unfair advantage because opposing party lacked the technical equipment to view it). Be prepared to provide to the opposing party anything and everything provided to the court.

- PDF files allow for electronic annotations. One way I have used this is pop-up comments where a rule of evidence or civil procedure or rule of professional conduct is cited: I have made the rule appear as a URL. Instead of being “clickable,” hovering over the text results in a pop-up containing the rule text. As this is no different than including a copy of the rule as part of the appendix, this is not likely to violate word count regulations in many jurisdictions, but if this feature is used to provide commentary (i.e., argument), it surely would add to the word count, and it would not be visible in the paper brief that opposing party may, instead, be reviewing.

- If you are filing a companion brief, and assuming the appellate judges eschew the paper brief in favor of your electronic brief, they or their clerks may not be checking for the accuracy of the hyperlinked supplemental material. In other words, the electronic brief could provide an opportunity to circumvent the certification of the record on appeal by including additional content that was not properly preserved. This could be a hyperlink to an alias of a trial court pleading but which itself has links to materials outside the record (e.g., photographs), or it could be a hyperlink to falsified motions, deposition transcripts, case law, or even a website created or operated by the attorney or the client made to appear as an authoritative blog or that contains impermissible content outside the record. Although I do not need to explain why such subterfuge would likely result in the most severe consequences for both the client and the attorney, innocent practitioners experimenting with electronic brief technology must assiduously resist any temptation to include additional material that is not properly preserved. Even linking to an enhanced or clarified—but different—image or plat map than was available in the lower court proceedings could be viewed as an impropriety.

STABILITY AND CONVENIENCE

When assembling an electronic brief, you probably will want to configure...
each link to open in a new window. (This is done by editing the properties of each hyperlink.) The reason is that, if readers click on a link that takes them to a different document, they may not know how to navigate back to the master document (your brief) and must reopen it, thus losing their place—very annoying. However, if every link opens as a new window and your readers are in the habit of minimizing linked documents, the readers’ computer could crash. (This obviously detracts from the desired objective of using technology to facilitate persuasion.) This is because a PDF file with myriad hyperlinks to other PDF files (either embedded within the master PDF or via a relative path to another directory on the media) that open in new windows can result in scores of PDF files open on the reader’s computer. Eventually, these scores of minimized documents consume so much system resources that the computer becomes unresponsive.

The way I have overcome this dilemma is to create an action button at the top right of every page of every linked PDF that is eye-grabbing green and labeled “Back” with an arrow:

![Back](image)

This “back” button, which uses a custom icon, is actually a trick: Clicking on it closes the linked PDF, returning the user to the master PDF. (Under button properties, the Select Trigger for this button is “Mouse Up,” and the action executed is “File>Close.”)

Another convenience feature is to include an active table of contents. In Word, for example, if you use the insert TOC feature and then convert to PDF, Acrobat bookmarks will be automatically created. You may also want to edit the properties of the PDF such that the initial view is “Bookmarks Panel and Page.” This way, navigating your brief from section to section is very easy to do. Keep in mind, however, that the bookmarks panel will take up screen real estate, but also that the user can close that panel easily. Also, if you are embedding attachments within the master PDF (and this is not disallowed by the e-filing system you are using), you would not want to have the initial view be “Attachments Panel and Page” because seeing hundreds of attachments in a panel at the bottom of the page would likely be distracting for any reader.

A feature that I mentioned earlier is the hover-over comment feature. I accomplish this by making the desired text appear to be a hyperlink: To do this, I make that text blue (matching the real hyperlinks), then use the “underline text” feature (an Acrobat annotation tool) with a line color that matches the blue, and I make sure the “Author” field for the underline properties is null. Now, when the reader moves the cursor over the blue underline text, a comment immediately pops up but does not show an author name. This is useful for providing rule or statute text (if short). Figure 1 (above) shows a pop-up where the cursor is over § 1331.

**LONGEVITY AND VALIDITY OF URLS**

Concerns of URL permanency have been raised for years: One professor lamented, “Too many recent opinions rely upon questionable or non-available sources, and such misplaced reliance certainly cannot be what judicial authors wanted or intended” (Coleen Barger, “On the Internet, Nobody Knows You’re a Judge: Appellate Courts’ Use of Internet Materials,” *Journal of Appellate Practice and Process*, Fall 2002 (4:2)). Another enumerated many of the benefits of digital briefs and e-filing, yet pointed out that, “Ironically, the benefits of shifting to e-briefs may actually diminish our ability to successfully archive the information we are attempting to preserve” (Michael Whiteman, “Appellate Court Briefs on the Web: Electronic Dynamos or Legal Quagmire?,” *Law Library Journal*, Summer 2005 (97:3): tinyurl.com/ocy9aw9). He worried that future changes to the format in which these files were created may no longer be readable by future technology standards. For this reason, external sources should be selected carefully based on both quality and probable longevity, as it may be several months before the briefs are reviewed.

**CONCLUSION**

Complex electronic briefs can be a powerful tool of persuasion, and, if done correctly, can greatly simplify the work of appellate judges and their law clerks. Unfortunately, owing to inconsistencies between the state courts (including differences between a state’s trial and appellate court e-filing systems) and design limitations in the federal CM/ECF system, or else owing to express or unwritten procedures, many practitioners are limited to filing electronic briefs with reduced functionality. To get the most out of your electronic brief usage and dollars, know your audience, know your rules, and know your tools. ■

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The value of your practice is not your time or talent, it’s your clients. In this new second edition of How to Capture and Keep Clients: Marketing Strategies for Lawyers, the best and most innovative solo and small firm lawyers share their secrets, approaches, and strategies to that age-old puzzle of growing your law firm. Through this wealth of savvy advice, you’ll learn how to:

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The book is packed with strategies on how to overcome obstacles and position yourself for lifelong success. This step-by-step, how-to guide is so easy to use, you don’t even have to read the chapters in consecutive order to get the full benefit. Read the chapters that are most important to you right now, and implement those techniques. What is not-so-important today may have greater meaning in a few months. How to Capture and Keep Clients, Second Edition, will be the law firm bible for all solo, small firm, and general practitioners.
Four Tips for Managing Unfavorable Outcomes on Appeal

By Paul W. Flowers
suppose I shouldn’t have been surprised when I was asked to write this article. I was the appellate counsel of record on the wrong side of several high-profile appeals, including Chambers v. St. Mary’s School, 82 Ohio St.3d 563 (1998) (holding that negligence per se does not apply to violations of administrative regulations), Estate of Hall v. Akron General Medical Center, 125 Ohio St.3d 300 (2010) (effectively prohibiting res ipsa loquitur charges in medical malpractice actions), Erwin v. Bryan, 125 Ohio St.3d 519 (2010) (eliminating most John Doe substitutions after the statute of limitations expires), and Cullen v. State Farm Mutual Auto. Ins. Co., 137 Ohio St.3d 373 (2013) (requiring class certification to be proven by a preponderance of the evidence). And few Ohio Supreme Court decisions have produced a greater uproar within the civil justice system than Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216 (2003), which overturned the cash cow styled Scott-Pontzer v. Liberty Mutual Ins. Co., 85 Ohio St.3d 600 (1999). My co-counsel and I had felt quite confident about our chances while walking out of that argument, but we were sadly disappointed.

Now it is only fitting that I offer some wisdom for those of you who routinely win your appeals but have grown concerned that perhaps an adverse ruling looms in your future. The following are a few simple rules that have guided my practice ever since I awoke to the realization that accepting difficult cases dooms any chance of maintaining a sterling appellate win-loss record.

1. PROMISE NOTHING

At no time during the course of my consultations with the clients or referring trial counsel do I ever offer any guarantees of success. I will offer ballpark estimates of the odds of a successful outcome, which is always rooted in the familiar statistic that the trial court is affirmed roughly 90 percent of the time. From that figure I’ll make modest adjustments based on the nature of the proceedings, such as when summary judgment has been granted (better chance of reversal) or a timely objection was not raised (little chance of reversal). Although perhaps this rule has cost me an appeal or two, I have never found myself responsible for a disappointed client’s unrealistic expectations.

2. RUN SCARED

While drafting my brief and preparing for oral argument, I continually remind myself that any appeal can be lost. Overconfidence causes many attorneys to overlook, or fail to appreciate, issues that later become the basis for the decision. Nothing is worse than not only receiving an adverse ruling but also realizing that a proper response to the position was never furnished. I always review an adverse trial court ruling and the opponents’ filings during several different sittings, including while one of the final drafts of my brief is being typed. More often than not, I will find an argument or two that I either missed or misunderstood. When all the issues have been covered as thoroughly as reasonably possible, there should be no legitimate reason for blaming the appellate attorney who receives an unfavorable ruling.

3. MAKE NO ASSUMPTIONS

Having handled more than 200 appeals, I have developed the firm conviction that little can be predicted from oral argument. What may seem like friendly, insightful questioning may actually be the court’s way of affording the attorney one last chance to talk the panel out of a preliminary decision. Sometimes lawyers are asked no questions at all because the judges are in full agreement with their positions, and sometimes because the effort does not appear to be worthwhile. I always try to resist gauging the panel’s leanings during argument; I focus instead on advocating my positions during the limited time afforded. And once the proceeding has concluded, I never, never join in any speculation over who won and who lost. Such prognostications frequently prove to be wrong, which will then require a difficult explanation to the client.

4. DON’T OVERREACT

Any lawyer who truly cares about the client will experience a range of emotions once an adverse ruling has been received, and the natural response is to lash out at the court. Blaming the judges for failing to read the briefs or listen during oral argument will likely cause the client or referring trial attorney to question the appellate lawyers’ competence. In the overwhelming majority of appeals, however, the issues are not cut-and-dry, and legitimate room for disagreement exists. Although I immediately alert everyone concerned that a decision has been released, I try not to discuss the court’s reasoning until I’ve had a substantial period for reflection. Intelligently discussing the basis for the opinion not only can help restore confidence in the appellate lawyer but can lay the groundwork for rectifying the situation. Little will be gained by firing off a virulent motion for reconsideration or immediately commencing an appeal to a higher authority.

Restrain is particularly important when an appeal is being publicly followed. As I experienced in the wake of Galatis, media and legal journal reporters monitor the Supreme Court’s daily decision list closely and expect a public comment from counsel before their publication deadlines expire. Venting anger and frustration on the court is not just unprofessional but also potentially detrimental to the client. If a public comment is necessary, respectful disappointment coupled with optimism for future improvements in the law is perfectly appropriate.

Paul W. Flowers, Esq. (pwf@pwfco.com), is an appellate law specialist and the principal of Paul W. Flowers Co. L.P.A., based in Cleveland, Ohio. He has argued appeals in all 12 judicial districts as well as on several occasions before the Supreme Court of Ohio.
How to Apply for a Clerkship—and What to Expect

By Mishkah Ismail, Andrew Kim, David E. Hackett, and Michelle L. Tran
A clerkship can be among the most formative experiences in a lawyer’s career. But how does one go about applying for and securing such a position, and what should a new clerk expect, both in terms of daily responsibilities and lasting lessons? To help answer these questions, GPSolo presents here the insights and advice from a law school career counselor and three former clerks, one who clerked for the U.S. Court of Appeals, one who clerked for the U.S. Court of Appeals and the U.S. District Court, and one who clerked for the California Court of Appeal.

APPLICATION TIPS FROM A LAW SCHOOL CAREER COUNSELOR

By Mishkah Ismail

Obtaining a federal judicial clerkship is a dream for many law school students and alumni. The chance to enhance one’s research and writing skills, learn from and receive mentorship from a judge, and gain unique behind-the-scenes insights into how chambers function and how judges make decisions is very appealing for many as they embark on their legal careers. An appellate level clerkship is often considered the most prestigious and is a distinction that follows clerks throughout their careers.

The judicial clerkship application process is highly competitive, especially in light of the end of the Federal Hiring Plan (a formal, organized process that was in place for more than ten years), and even more so for those eager to work in a circuit court setting. Successfully navigating the process requires not only a keen understanding of the steps of the process and the many changes occurring regularly but also a clear understanding of your goals and flexibility. As such, it is important to seek help from your law school career services office. Clerkship advisors provide candidates with advice on strategy, help them put together a compelling application that will stand out when it arrives in chambers, conduct mock interviews, and assist them with the later stages of the process.

Below are some tips that candidates should keep in mind to successfully navigate the clerkship application process.

Deciding on the right clerkship to pursue. In an initial meeting with a career counselor, applicants should be prepared to discuss their reasons for pursuing a clerkship and what they would like to get out of the experience. Applicants who pursue circuit court clerkships generally thrive in academia and will enjoy having the time to think carefully about each case, the associated issues, and potential outcomes. They may be interested in gaining a behind-the-scenes look at the courtroom but should be happy to spend the majority of their time conducting research and writing independently. They must be extremely detail-oriented and appreciate taking the time to perfect their documents. Because the overall pace of a circuit court is slower than a district court, they will generally have more time to think and spend on each assignment.

Ultimately, however, not all applicants will pursue clerkships at the circuit court level. For example, an applicant who is interested in a career as a litigator and has a desire to see as much motion practice, oral argument, and courtroom action as possible may find that a district court or magistrate-level clerkship is the best fit. Knowing the detailed goals of applicants allows a counselor to guide them in a direction that most closely aligns with their goals.

Application strategies. In this competitive climate, where judges often receive thousands of applications from qualified candidates for a particular term, it helps to have a broad strategy. Circuit court judges tend to hire earlier than other federal judges, often two years before the start of the clerkship term; however, depending on geography, some may hire later, such as a year prior to the start of the clerkship term. To maximize their chances of success, applicants are encouraged to have the broadest geographic scope possible, especially if they are interested in particularly popular circuits such as the Ninth, Second, and D.C. Circuits. In some cases, candidates may be successful by first obtaining a district court clerkship and then applying for clerkships at the circuit court level.

Alumni candidates are gaining great success with their clerkship applications. Many federal judges look favorably on applicants with practice experience and a keen ability to hit the ground running. In fact, some federal judges even expressly prefer alumni candidates. Alumni candidates often achieve the best results if they apply within five years of graduating from law school, at a time when it makes sense for them to take a break from their practice.

Components of a successful application. Judges weigh many factors when deciding to interview a potential candidate, such as academic performance, skills, and experience. Application materials include a polished résumé, a well-written cover letter, a law school transcript, an exemplary writing sample, and three glowing letters of recommendation. Because law clerks often complete the initial screening of applications, calling an alumni clerk in chambers and establishing a connection can be helpful. Successful résumés are well-tailored and display not only a high GPA, law review membership (ideally a board-level position), and publications, but also relevant experience that showcases exemplary practical skills such as analysis, research, and writing.

Soft skills are extremely important, and candidates can often highlight this information in their cover letter. They should show examples of a superior work ethic, strong attention to detail, and excellent interpersonal skills. In addition, they should clearly and thoughtfully explain their motivation for pursuing this type of clerkship, highlight their geographic ties, if applicable, and establish their interest in clerking for this particular judge, if relevant.

In deciding which writing sample to submit, an academic piece is often best for a circuit court clerkship. However, when choosing among multiple options, applicants should also think about which document showcases their reasoning, research, and writing abilities in the best light.

The importance of strong and engaged recommenders. Letters of recommendation can make or break an applicant’s chance at success during the application process. Candidates should think carefully about identifying three recommenders who know them best in...
The clerkship application process is like a black box to many would-be clerks.

How to stand out during an interview. Candidates should conduct as many mock interviews as possible—clerkship interviews are often more intense than interviews with other legal employers. Career counselors not only can conduct mock interviews with candidates, but they may provide direct insight into specific judges’ interviewing styles. By gaining as much practice as possible with this stage in the process, an applicant will feel comfortable, prepared, and ready to shine when meeting with a judge and the law clerks in chambers.

Conclusion. Successfully navigating the judicial clerkship application process is not easy and should not be attempted without the support of the applicant’s career counseling office and law school faculty, all of whom are eager to help student and alumni candidates reach their professional goals. By keeping the above tips in mind, the chances of success increase greatly. Those applicants who are fortunate enough to attend a federal judicial clerkship will embark on an exciting and rewarding experience that for many will be one of the most enriching of their careers.

APPLICATION TIPS FROM A FORMER LAW CLERK
By Andrew Kim

Each year, hundreds of thousands of clerkship applications are submitted to judges across the country. It goes without saying that clerkships are highly regarded and widely coveted. But if the road to a clerkship is well-trodden, the inconstancy of the application process may make the path seem unfamiliar.

Clerkship applications are like a black box to many, save for those individuals fortunate enough to attend a school with a team and faculty devoted to assisting applicants.

On its face, the process may seem relatively straightforward: Put together a cover letter, résumé, transcript, writing sample, and letters of recommendation. But the holistic nature of the application review process adds a number of other considerations that may not be obvious. Here are just a few.

Location. The prevailing wisdom is that one should apply to as many clerkships as life will allow. The biggest constraint tends to be geography, largely owing to familial commitments. But geography can also be a key advantage—a hometown or familial tie to a particular region will give an applicant a leg up in the process. (Although this is less true in major metropolitan areas.)

Timing. Perhaps the biggest mystery of the application process is when to apply. State courts have always marched to the beat of their own drum and have long had their own hiring timetables. As for federal judges, most had once adhered to the Federal Hiring Plan, under which law students would apply for clerkships at the start of their third year. A few years ago, the Plan collapsed, and we’ve since reverted to the pre-Plan free-for-all; many federal judges will hire their law clerks anywhere from one and one-half years to two years in advance, although it’s never entirely clear when a particular judge will review applications. And there are outliers on both ends—some judges will hire even farther out than two years (college seniors, ready your clerkship applications), and some judges will hire closer to the start date of the clerkship. But alumni applicants (i.e., most readers of this publication) are usually welcome to apply at any time.

Cover letter. There is much debate about what should go in the cover letter. Conventional wisdom says that, absent circumstances uniquely connecting you to a particular judge, locale, or subject matter, the clerkship letter should be short and simple. But some judges are unconventional; these judges expect detailed cover letters explaining why an applicant would like to clerk for them. Some judges make this clear in their clerkship postings, others do not.

Résumé. A stellar résumé is usually necessary, but not sufficient, for most clerkships. Most candidates have impressive grades, law review membership, various honors, and publications under their belt—and this is before graduating from law school. Alumni applicants have the benefit of actual legal practice—whether in the public, nonprofit, or private sectors—and the distinct advantage of listing achievements accomplished in that practice. (In fact, some judges either prefer or hire only alumni applicants.) The key to the résumé is to stand out. Too many applicants treat the résumé as an opportunity for listing every single legal accomplishment since their first year of law school, rather than highlighting and showcasing substantive legal work and accomplishments.

Writing samples. Another great mystery of the process is deciding what kind of writing sample to include. An applicant should always err on the side of caution and adhere to the Federal Hiring Plan, under which law students would apply for clerkships at the start of their third year. A few years ago, the Plan collapsed, and we’ve since reverted to the pre-Plan free-for-all; many federal judges will hire their law clerks anywhere from one and one-half years to two years in advance, although it’s never entirely clear when a particular judge will review applications. And there are outliers on both ends—some judges will hire even farther out than two years (college seniors, ready your clerkship applications), and some judges will hire closer to the start date of the clerkship. But alumni applicants (i.e., most readers of this publication) are usually welcome to apply at any time.

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substance over procedure; even for trial-level clerkships, a law clerk or judge is likely to look at briefing for a dispositive motion more favorably than something procedural, such as a motion for a continuance. Applications to appellate clerkships tend to contain academic writing samples, although this is certainly not a requirement. Regardless of what an applicant chooses, the sample should show innovative thinking and effective writing. And once an applicant selects a piece, he or she should follow the golden rule of wordsmithing: There is no such thing as good writing, only good rewriting. To that end, a writing sample should be checked many times over for substance, style, grammar, and plain old typos.

**Recommenders.** Letters of recommendation are part and parcel of any clerkship application. But applicants must beware of being damned with faint praise; a letter from a law professor, supervisor, or colleague with little to say about the substance of an applicant’s work is worse than no letter at all. If a recommender knows a particular judge or is a well-respected figure in the legal community, an applicant should consider asking the recommender to make a phone call to chambers. When an application is in a stack of thousands, a phone call from a familiar voice may go a long way in persuading a judge to take the application out of the pile.

**Interview.** Of all the components of the clerkship application process, this part may be the most chambers-specific. It is a given that the hiring judge will interview a candidate. Less certain is whether the judge’s law clerks will participate. And there is absolutely no certainty as to the kinds of questions a judge will ask. Some judges may ask personality or interest-based questions; others may ask what an applicant thinks about a recent Supreme Court decision. Established clerkship advising programs will document interview format and questions asked, but not every applicant has access to that type of resource. The best across-the-board advice is this: Be prepared for anything, but ultimately, be yourself. At the interview stage, judges are more interested in fit than ability—chambers are tight quarters, and a year can be a long time with the wrong combination of people.

There is no magic formula for a clerkship—at the end of the day, clerkship hiring is entirely at the discretion of a judge. But these tips should help an applicant navigate the path. At the end of the road lies an incredible experience with an invaluable mentor, and that alone makes the process worthwhile.

**THE CLERKING EXPERIENCE IN THE FEDERAL SYSTEM**

**By David E. Hackett**

The Ninth Circuit’s inner workings have gotten a lot of attention lately. There’ve been allegations (never proven, and in my view, dubious) that court staff used calendaring “hijinks” to assign numerous hot-button cases to one judge. There’s also been the release of Supreme Ambitions, David Lat’s colorful novel about a Ninth Circuit clerk dreaming of a Supreme Court clerkship.

The court I observed during my clerkship with Senior Judge Alfred T. Goodwin was not a place of hijinks or interchambers drama. But it was a fascinating place with its own unique customs, traditions, and personalities.

**Preparing for an argument calendar.** One of the most interesting aspects of the job was the opportunity to learn about the Circuit’s case-management procedures.

Once a case is fully briefed, a staff attorney summarily reviews the arguments, prepares an advance sheet about the key issues, and generally assigns the case a numeric “weight” based on its complexity. The court’s calendaring unit then sets the weighted cases for argument dates before three-judge panels, taking care not to over- or under-distribute work. (Case assignments and judges’ names are released internally, but the parties first learn them Monday of the week before argument.)

After cases are calendared, a four-step process occurs:

1. The Clerk’s Office sends the advance sheets for each case to the three judges’ chambers.
2. The panel’s presiding judge assigns each case to one “writing judge,” who is the presumptive author of the court’s written disposition.
3. Each judge (“writing” or not) internally divides the legal research and writing responsibilities for each case among his or her clerks.
4. Clerks read the briefs, examine the record, research the law, and prepare bench memorandums analyzing each case and proposing dispositions.

Not every Ninth Circuit judge handles the last step in the same way. Some judges “share” bench memos for all calendared cases. The “writing” judge and designated clerk prepare one lead bench memo for their assigned case and circulate it to the other judges before argument. (Judge Goodwin, a former journalist, was adept at taking a sharp red pencil to bench memos and challenging clerks to write clearly and concisely.) Although all judges and their clerks independently analyze the case, the shared memo is a starting point.

Other judges don’t share. When they sit on three-judge panels, they neither send nor receive memos from other chambers. Instead, they keep their preargument legal analysis in-house.

It is important to note that—unlike the practice in some other courts—bench memos are not shadow opinions. (For example, I can recall multiple instances where panels voted unanimously to reject a memo’s proposed disposition—including my own.)

**Tips born of experience.** As I prepared bench memos, I must have read thousands of pages of briefs and excerpts of record. Here are some tips based on what I saw:

- **Keep briefs simple and do not use excessive jargon, acronyms, or legalese.** Specialist counsel writing briefs sometimes forget that generalist judges (and their clerks) do not start reading the briefs with expert-level knowledge of the important legal principles. The best approach is to use the introduction to capture their attention and then carefully guide them along.

- **The leading case should be mentioned early and often.**
Sometimes, a party buries its most helpful case—the linchpin of its argument—on page 13 or 15 of its brief. Citing that case in the introduction—or elsewhere on page 1 or 2—captures the court’s attention right from the start.

- **Excerpts of record should be consecutively paginated and tabbed.** Using tabs to separate different materials in the excerpts of record filed under Ninth Circuit Rule 30-1 makes the record clearer and ensures that key documents are easier to find.

Calendar weeks were memorable times: the hush in the courtroom before the judges entered; the rapid give-and-take of arguments; the late-afternoon conversations where my co-clerks and I would speculate about the judges’ conference votes.

Pasadena calendar weeks were also special because they brought the court together, thanks to Judge Dorothy Nelson’s “brown bag” lunches; then-Chief Judge Alex Kozinski’s movie nights; Judge Sandra Ikuta’s wine-and-cheese socials; and the clerks’ happy hours in Old Town.

Calendar weeks outside Pasadena were special, too, because Judge Goodwin allowed his clerks to travel with him. One trip to Portland stands out. After finishing the arguments, the Judge drove us a few hours southeast to his home in central Oregon and took us on a tour of his family’s pine-tree farm. The sight of Judge Goodwin felling tall pines with a chainsaw less than 24 hours after sitting on the bench typifies his personality.

**Memories of the judge.** In fact, despite being on “senior status,” Judge Goodwin is still a very active man. While I would take the elevator to chambers, the then-89-year-old judge would be climbing five flights of courthouse stairs. Over his long life, Judge Goodwin has done it all: military service in both theaters of World War II; 14 years as a state judge, including nine years on the Oregon Supreme Court; a couple years as a U.S. District judge; and more than 43 years on the Ninth Circuit, including a three-year tour as chief judge. But in spite of the disparity in our age and experience, he was never aloof. To the contrary, he shared a wealth of stories and experiences with his clerks.

He told us about his memories of driving Justice Sandra Day O’Connor and her husband through central Oregon. He told us about his grandfather’s acquaintance with President William McKinley. And he spoke fondly of his San Gabriel Mountain trail rides with Judge Harry Pregerson.

And Judge Goodwin could bring a self-deprecating humor to life. He told us about his practice, when visiting the San Francisco courthouse, of checking the hall of judges’ portraits (“Just to make sure they didn’t accidentally move my portrait to the dead judges’ wall”). He also described the secret to his longevity and vitality—“I’m just a lucky man who had old grandpas.”

Usually, he would chat with us for a few moments, then say “Okay, back to billable time,” and head to his office. And to Judge Goodwin, these stories were probably just water-cooler conversation. But I will never forget them. They were perhaps the very best part of my law clerk experience.

**The Clerking Experience in the State System**

By Michelle L. Tran

I had the opportunity to clerk for Judge William F. Rylaarsdam of the Fourth District, Division Three, of the California Court of Appeal. My clerkship originally was for a three-month period, but I had the good fortune to be allowed a six-month extension on the clerkship. In retrospect, my clerkship with the California Court of Appeal was invaluable because it taught me more than just effective legal writing and research. It taught me instrumental skills that I carry into my current practice, including courtroom decorum, persuasive legal writing, and interaction with the bench and bar. I also learned the importance of creating a good record and placing relevant exhibits into evidence, the differences between the trial and appellate levels, and how to weigh tactical and strategic choices such as requesting

Of all the application components, the interview may be the most chambers-specific.
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Currently I practice family law, and my practice is devoted 100 percent to litigation. Although my clerkship was with an appellate court, I actually learned quite a bit about the trial level and the importance of making a clear record, which has been extremely helpful in my current practice.

However, what made the clerkship so exciting was that it allowed me to be exposed to different types of cases, ranging from criminal law, to corporate law, to family law, to civil law. I had the opportunity to research different areas of the law, which helped me decide what type of law I wanted to practice after I graduated law school.

The most thrilling part of the clerkship was writing legal memorandums to the research attorneys or the justice and seeing portions of those memos being incorporated into a judge’s opinion. I would spend hours doing legal research, and seeing my work actually being used in an opinion was always a very proud moment.

Below is an overview of the activities that comprised the bulk of my experience as a clerk—along with some tips for those thinking of applying for a clerkship or practicing at the state level.

Legal research and writing. The majority of my clerkship activities related to legal writing and researching. First, I reviewed the record and the two briefs submitted by the appellant and the respondent before making sure the law cited was still good law. Thereafter, I would conduct legal research to determine which side had the most persuasive argument and support in the law for its argument.

Relative to legal writing, the court is only able to rely on the record and nothing else. After reviewing dozens of cases, I found it was clear which records were well prepared and which were going to cause an issue on appeal.

The record should consist of all relevant pleadings, orders, and evidence that either the appellant or respondent would like the court to consider on appeal. If it does not exist on the record, it does not exist to the court, and the court will not consider facts not included in the record.

It is also crucial that, at the trial level, there is a request for a statement of decision. The statement of decision will outline why the trial court made its decision and the law the trial court relied on to support its decision. This is important because the appellate court will be able to understand how the trial court reached its decision and if there was any error in reaching its decision. Without the statement of decision, it is extremely difficult for the appellate court to make any determinations on the appellate level.

**Writing effective legal briefs.** The legal brief is the most important part of the appellate level work, and the court relies on the legal briefing significantly in coming to its decision.

When preparing legal briefing, counsel should make sure the order of issues is appropriate. The strongest legal argument should be the first issue in the brief, and the issues should descend by order of importance.

Recognizing and outlining your strong points and weak points are equally as important. Outlining the strong points of your case is the easy part. The most difficult but most effective part of legal briefing is recognizing your weak points, addressing them, and persuasively arguing why your position is more legally sound than the other side’s.

**Formatting legal briefs.** The California Court of Appeal follows the *California Style Manual* and the rules pertaining to proper citations. Many law students and attorneys are used to the rules set forth in the *Bluebook*, but briefs submitted in California must follow the *California Style Manual*.

As simple as it sounds, make sure to Shepardize and that the law cited in your brief (and oral argument) is correct and good law. There is nothing worse than relying on case law that is no good. Moreover, finding case law that has similar facts and circumstances to the facts in your case will also be persuasive to the court, especially if there are any cases on point that were decided by that same particular district and division.

**Oral argument.** Observing oral argument was another component of my clerkship. Counsel on both sides (or self-litigants) would make their arguments in front of a three-judge panel.

**A formative experience.** My clerkship with the California Court of Appeal was extremely significant in the development of my career, and I would highly recommend others to pursue the same experience.

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Advice from an IT Consultant on Choosing the Right Software

By Jeff Stouse

Understanding the nuances of language is a skill honed by legal professionals because it often can determine the success of cases. However, this skill does not always translate to an understanding of the nuances of information technology (IT) language, which often can determine the success of case management. If you and your IT consultant or vendor perceive these nuances differently—if expectations are not discussed thoroughly and the right questions are not asked before decisions are made—you may discover too late that your perceptions of these nuances have led you to the wrong choices when selecting software.

For example, the choices software developers make in how programs interact with each other (e.g., how practice management software interacts with billing, document management, word processing, spreadsheets, and PDF programs) sometimes can be “deal breakers” with regard to their effects on how you run your office. Nuances affecting compatibility, work flow, start-up protocols, and even appearance of screens must be considered before your final decisions are made.

Five significant aspects of software that involve the most important nuances for you to consider have been grouped here into “The Big Three” (items that will affect all law firms) and “The Specialized Two” (items that will affect those firms not using industry-standard software such as Microsoft products and those firms that wish to import data from existing programs into new ones):

**The Big Three**
- Which location
- Which software
- Which features

**The Specialized Two**
- Ease of integration
- Ease of data import

When choosing new software, not enough law firms undertake the necessary due diligence by asking vendors about these five aspects and the nuances they present. Although all law firms essentially perform the same general tasks, each firm runs differently. This is what makes these nuances so important.

**WHICH LOCATION**
Will you support the IT infrastructure yourself on premises? Will you use some software that is web-based so that the manufacturer hosts this software (also known as Software as a Service, or SaaS) and it is accessed through a browser? Or will you subscribe to a hosted platform where *all* your software “lives” in the cloud so that you can access it from the office, your home, on the road, or anywhere you have an Internet connection?
When choosing among these location/environment options, consider your management style.

If you are an “I need a reliable program, without the fuss of updates, backups, and support” person, then you should consider some form of hosted environment where all your software is installed and runs from a hosted server. Each user would access a “virtual desktop” that connects to that server. An Internet connection (and a monthly payment) is all that you need to make this happen. Depending on the vendor, your data could be housed only on a server that is not in your office, which creates the nuance of whether your data can be backed up to a local server in your office (your security blanket). The inability to do so, or to do so without incurring additional costs from outside companies, could be a deal breaker. It usually can be done, however—for a fee, of course. This option also creates another nuance: the issue of data security, given the requirement imposed on all attorneys to preserve all privileges and confidentiality (including work-product protection) of the data with which they work. You must ensure that access to your data is absolutely limited to those persons to whom you grant specific permission and that the security of your data is inviolate.

If your style is hands-on and “I want to be involved in decisions regarding when and what to upgrade, how each upgrade affects other software I use, when the backups run, and where the off-site storage is located,” then an on-premises choice is probably the way to go. A key nuance here is that “pure” cloud solutions—those that only run in the cloud—are omitted from this option. A small number of practice management programs offer both cloud and on-premises options; HoudiniEsq and Amicus Attorney are two examples.

Consider on-premises systems if your style is hands-on. Otherwise, head for the cloud.

If you prefer a mixture of “I don’t want to be responsible for certain programs, while others I want to manage completely,” then perhaps a SaaS approach is the best to use. Most of your main programs would be on-premises, but perhaps your practice management or your document management programs would live in the cloud. The main nuances involved here are how your on-premises software can/will interact with the SaaS software. You should not assume that the programs will interact well, even if the vendors say they will, especially if one program is a cloud version and the other is on-site. It is always best to verify. Another nuance is how you access your online environment—do you need a specific program to “connect” or can you just open a browser and log in? If you need a specific program to connect, then how easy is it to get to that program if you are not using your regular computer/laptop? Finally, if the SaaS application is processing or caching your data in the cloud, you again must ensure that access to your data is absolutely limited to those persons to whom you grant specific permission and that the security of your data is inviolate.

WHICH SOFTWARE

These choices start when the decision is made to move from a multipurpose program such as Outlook to a dedicated practice and/or document management program that supports the concept of a matter. The nuances involve how the new software supports the matter paradigm.

Very few law offices function at their best if they are not able to track what they do (e-mails, documents, phone calls, events, to-dos, etc.) in the context of a matter/case/engagement. Tracking information in this manner follows the ways attorneys work the majority of the time, so it is best to choose a program that offers a “matter-centric” view of your data.

We often assume that all firms need a practice management system to view their data, but this is not necessarily so. For some firms, a document management system is the most important tool to track data, and a document management system that offers a matter-centric view of the documents and e-mails saved to a particular matter may be the best choice.

If there is more than one person who handles scheduling responsibilities (two or more calendars or separate lists of tasks or billable hours), then practice management software generally is required in order for all involved to easily see the necessary information.

WHICH FEATURES

Does the billing program you are considering support LEDES (Legal Electronic
Data Exchange Standard) for electronic billing, if necessary? Does the document management program provide a “work space” layout, as opposed to the traditional folder view of documents? Can billing occur from a mobile device, whether it be an iPhone, iPad, or Android device? The flexibility of how the features work may make one program vastly superior to another.

Most law firms use Microsoft Outlook as their e-mail program of choice. Initially, larger firms may have used an Exchange server that offered more functionality, while smaller firms and solos could not or did not want to assume the cost. Now, the cost is less of an issue, and there are many providers (such as Google hosted exchange server or Office 365) that can provide a hosted Exchange server to take advantage of these extra features at a cost that competes with similar offerings from other e-mail products (Google Mail, for example).

EASE OF INTEGRATION

Does the practice management software you want interface with your document management software as you want or need it to? Is there an easy way to save e-mails into your practice management or document management system? Does your practice management or document management system interface with your PDF program of choice?

Most attorneys would be able to come up with a short list of programs they use each day, such as e-mail, word processing, practice management, billing/accounting, Internet browser, and PDF reader/creator. Unfortunately, although there are relatively few categories, there are often many different program choices within each. (An exception is word processing, which has two main choices: Word and WordPerfect.)

This means that the software developer must examine what its product is supposed to offer and then decide how that product will interact (if at all) with programs that attorneys use all the time. For example, word processors should interact seamlessly with document management and practice management systems—and given that there are only two main choices in that category, it is expected that the software will integrate.

But given the many choices that exist in the e-mail or PDF reader/creator categories, it is possible that the program you want to use is not an integration partner with the practice management or document management system you want to purchase, especially with the options of on-premises or SaaS thrown into the mix. You should ask (rather than assume) whether the product you are considering will integrate with the software you already use, and whether it will do so at the same level of functionality as it does with a different software option. For example, NetDocuments is currently one of two major document management system programs, and it works much better with Internet Explorer than with other browsers. The program is being revised with an improved interface with other browsers, including Chrome and Firefox, but the new version has not yet been delivered. How the software will interface with the new Microsoft browser likely is an open question.

EASE OF DATA IMPORT

Every developer wants to keep its clients, so very few developers make it easy for clients to export data stored in its software for import into a competitor’s product. Although the process can be done, it is often difficult, time consuming, and costly. Moving data from one program to another is never simple.

Any consultant asked to move data from one program to another will tell you that the process can be a black hole—a mystery until time has been spent to analyze the condition of the data to be exported. Is it in the right field? Is it spelled/formatted properly? What about duplicates? It will take time and effort (which translate to cost) to move any but the simplest blocks of information (such as name, address, city, state, and zip code). Moving custom data from fields in one practice management system to another or moving documents from one document management system to another is often complicated and costly because the programs generally are designed not to integrate easily. This fact encourages a firm to continue using software that no longer meets its needs, simply because changing is too complicated or expensive. Understanding the nuances of data-importing constraints can save a lot of time and money when the time comes to upgrade or change systems.

NUANCES MATTER

It’s your job to know what you are comfortable with, what you need versus what you want, and how your choices will scale in three years or five years. Only by asking vendors questions about “How does it work?” will you know if the products you choose will coordinate in the manner you expect. Ask for a demonstration of each process you will use. And ask what the software would not do well given your practice specialties and the functionality you require. That way, you will understand the nuances before they become problems too big to overcome.

Jeff Stouse (jeff@excedere.com) has been a solo practice management consultant for 16 years. He uses his consulting experiences and teaching background when he explains the nuances of practice and document management systems.
DOCUMENT AUTOMATION
Using Technology to Improve Your Practice

By Nerino J. Petro Jr.
So what is document automation (also referred to as document assembly), and why do lawyers need it? Simply put, it is a way to assemble documents or populate documents with variable information. Document assembly traditionally referred to the creation of documents from separate clauses and information based on the answers provided during an interview or question-and-answer process within a piece of software or on a website. Document automation, in contrast, was viewed as “a fill-in-the-blank form” where information such as names, addresses, company names, etc., was added. Today, the lines are blurred and either name can be used interchangeably. The terminology used is not what is critical—the real question is why do lawyers need document assembly? The answer is quite simple: money.

**TIME IS MONEY**

Yes, it really is all about the money. Lawyers, especially solo and small firm lawyers, face increasing competitive pressures from other lawyers and from non-traditional service providers that seem to be in a race to the bottom when it comes to fees. Service providers such as LegalZoom (which bills itself as providing “self-help services at your specific direction”), Rocket Lawyer, and others pose a significant threat to firms focused on the average consumer. These non-traditional service providers often charge less than a lawyer does for preparation of similar documents. Granted, the consumer does not receive the benefit of getting the experience and advice from a lawyer, but the reality is that the consumer is too often singularly focused on price. These non-traditional providers have, in fact, done what Richard Susskind discusses in his book *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press, 2008), which is the commoditization of many legal services.

To compete against this pressure, you need to be practicing as effectively and efficiently as possible. One of the ways to do this is to focus on gaining efficiencies in the preparation and production of documents used on a regular basis in your practice. While you can try simply to charge less while preparing your documents in the same old way, doing so will only get you sorry and sore. Instead, you must create your documents in a way that is more productive in the use of your time and more efficient by leveraging standard language that you use over and over again. You can then simply modify or add the language that changes each time—variable language such as names, birthdays, agents, amounts claimed, etc.

**REUSING “DUMB” DOCUMENTS VS. CREATING AUTOMATED DOCUMENTS**

When it comes to preparing documents, too many lawyers simply reuse existing word processing documents; they open the old document, and then they go through and change the information each time they create a new one. Does this work? Yes. Is it a good idea? No, it is not. At some point this practice not only can end up embarrassing you but can lead to potential violations of the ABA Rules of Professional Conduct.

Reusing a previously created document for a different client requires you to find each piece of information for that prior client and replace it with the information for the new client. This requires you to carefully review the form and find every piece of prior variable information. You then need either to (1) highlight and delete each and every piece of that prior information and then type in the new information or (2) highlight each piece of information and then use the overwrite function of your word processor to replace each piece of the prior information. Experience shows that this takes you more time than even just using a blank form each time in either scenario.

By reusing a prior form you also run the risk of failing to fully remove some of the old information pertaining to the prior client. At some point, we have all come across a document whether from another lawyer or our own office that was clearly created from a prior document for a different client or matter. The tip-off could be something as simple as an incorrect pronoun—“he” where it should be “she” or “her” where it should be “him”—or an address or description that has nothing to do with the client or matter at hand. At a minimum, this can be embarrassing; at the worst, it could invalidate a document and lead to a malpractice claim. ABA Model Rule of Professional Conduct 1.6 requires all lawyers to act competently to safeguard their clients’ confidential information. Rule 1.6 does not provide an exception for inadvertent disclosure such as failing to properly remove a prior client’s information from a document you use for a new client or matter.

To avoid running afoul of Rule 1.6 and potential malpractice issues, at a minimum you need to use a template requiring you to save the document as a new file while preventing you from overwriting the template itself. By doing this, there is never any client information saved to the template, thereby eliminating the risk of inadvertently including information you should not.

But what if you actually automate your document creation process? Automating the creation process allows you to generate documents in less time, with fewer potential errors, while providing more pricing flexibility for your work. Let’s consider an example of how document automation can affect creation of a very simple form such as the Illinois Statutory Short Form Power of Attorney for Property (POA).

The Illinois POA form requires that you provide the identity of the Principal, the Agent, a Successor Agent, and the Witness. You also can expand or limit the powers granted in the statutory form and provide for effective and termination dates other than signing and death. Document automation works best when you begin with simple documents and progress to more complex documents as you gain confidence with the process. For this discussion we will create a basic POA that is designed to work for a large number of basic POA needs and that will minimize the number of variables we need to change for each document. These variables are:

1. Full name and address of the Principal
WHAT ARE YOUR OPTIONS?
When it comes to document automation, you can get started with your existing software and leverage the tools that already exist in your Mac or PC. Or you can buy software to automate document creation that includes the ability to customize document phrases and clauses based on answers to questions or other logic placed in the template you create.

Automating a document can be as simple as creating a Word template that has certain language already completed, such as making our POA effective on signing, terminating on death, and with predefined terms for limitations such as the additional power of making gifts. You can then use simple substitution, such as using double chevrons << >>, to identify information that needs to be added. Using this substitution, you can search and replace replaceable variables without worrying about leaving behind another client’s details. A better option, in my opinion, is to use add-ins that allow you to answer questions and create the document with the required variables inserted by the add-ins.

AUTO-CORRECTION, TEXT REPLACEMENT, AND TEXT EXPANSION
One of the easiest ways to start automating document creation is to use the tools already included in the programs or platform we use daily. For most of us, this will be using text expansion or text replacement. With text expansion or replacement, you type a special word, series of letters, or characters, and it is replaced with something else, such as a name, phone number, phrase, or even an image. Although there are third-party text expansion programs, you can easily get started using the auto-correction feature built into programs such as Word, Outlook, or WordPerfect or that are included in your operating system such as iOS and OS X.

So what is auto-correction? Open your word processor of choice and deliberately misspell a word as you type. For example, type “teh” in Word and hit the spacebar, Word automatically changes “teh” to “the.” In other words, Word automatically corrects your misspelling. This is auto-correction of text. As with many software features, it may be called something other than auto-correction—Microsoft calls it AutoCorrect while WordPerfect calls it QuickWords. In the end, they all work similarly by changing or replacing the text or characters typed.

Many auto-correction tools include pre-configured words and characters for the most common misspellings, while others provide a few examples and let you create your own (as in iOS). But their usefulness does not stop with simply correcting misspelled words: You can add your own words and corrections to those that are preconfigured. This allows you to start automating document creation using existing tools.

If you find yourself typing the same text over and over again, such as a signature block or a phrase, use the auto-correction feature of your program to automatically insert that language when you use the abbreviated text you assign to that language in the auto-correct feature. For example, you can elect to add “vty” to your auto-correction tool and have it replace these three letters with a signature block such as:

Very Truly Yours,

Nerino J. Petro Jr.
Attorney at Law

Or add “;wfr” to the auto-correction tool and have it replace these letters with:

I will await your response.

Here are just a few of the online resources on how to use auto-correction for text expansion and replacement:

- Use Microsoft Word’s AutoCorrect feature to expand text: neuropsychnow.com/2013/07/hackWord
- In praise of text expansion (or, how to keep from typing the same thing 100 times): legalofficeguru.com/in-praise-of-text-expansion
- Creating formatted AutoCorrect entries in Outlook 2010: bit.ly/1AELLWO
- QuickWords (WordPerfect): wptoolbox.com/tips/QWords.html
- Entering text automatically in...
LEGOS FOR WINDOWS

If you want to be able to create standard clauses, pleading headers, notary or witness provisions, etc., and be able to save those to designated categories (e.g., real estate, wills, family law), take a look at Microsoft Quick Parts. Quick Parts consist of several different parts and are referred to as Building Blocks in Word and Outlook. According to Jim Calloway and Diane Ebersole:

Quick Parts (see tinyurl.com/3ctj4s) is an extremely easy to use tool contained within the 2007, 2010, and 2013 versions of Microsoft Word. Quick Parts allows you to build a library of “parts” just like the name implies. These parts can be a short phrase, a signature block, or text that is several pages long. Creating Quick Parts is very simple. Select the text you want to turn into a Quick Part, click on the Insert tab followed by the Quick Parts icon, and “Save selection to the Quick Parts Gallery.”

It is strongly suggested that no matter how sophisticated a document assembly program one might have, the built-in tools of Microsoft Word—particularly AutoCorrect and Quick Parts—should be used to insert items very quickly like a pleading signature block or to generate short routine documents like a fax cover sheet. This operation can be done in just a couple of clicks of the mouse without ever invoking the more powerful word processing and document assembly programs. This link (tinyurl.com/3ctj4s) explains how to do this as well as providing links to building blocks and other more powerful tools. A particular advantage of Quick Parts is that it works in Microsoft Outlook as well, allowing the lawyer to use sophisticated document assembly techniques in e-mails. (Excerpted with permission from “Magic in Minutes—Effective Use of Document Assembly” by Jim Calloway and Diane Ebersole, updated by Diane Ebersole, Law Practice Today, September 2012, tinyurl.com/8h4ztxp.)

Using Quick Parts, you can “build” your document from clauses or substitute a Quick Part for a standard existing clause in a template. Quick Parts provide more flexibility in formatting and the amount of text captured than Word’s AutoCorrect feature. For WordPerfect fans, QuickWords will do basically the same thing as Quick Parts. (For WordPerfect users, Barry MacDonnell’s Toolbox for WordPerfect site, wptoolbox.com, has great tips on automating WordPerfect documents and much, much more.) One downside to Quick Parts is that, by default, Word and Outlook keep all your Quick Parts in a single location (e.g., all your family law Quick Parts would be found in the same list as all of your real estate Quick Parts). Luckily, you are not forced to keep them all in the same place and can change this default action.

Here are a number of articles on dealing with this conundrum:

- Share AutoText and Quick Parts with others: bit.ly/1AEZSeM
- Share custom Word building blocks with anyone: tek.io/1d8eNmZ
- Share Quick Parts: bit.ly/1d8eQir

There also are numerous general online resources on using Quick Parts, including:

- Microsoft Support site guide to Quick Parts: bit.ly/1I6OOZl
- How-to guide for using Quick Parts in Office 2010: bit.ly/1I6OTMN
- Save time with Microsoft Office Quick Parts: bit.ly/1I6OXm
- How to create or insert quick parts (reusable entries) in Outlook: bit.ly/1I6Pa23
- Add, modify, and delete Quick Parts: msoutlook.info/question/93
- Outlook Quick Parts: youtube.com/watch?v=SoM3LBHjB5o
- Fun with Microsoft Word Quick Parts: youtube.com/watch?v=R6IlUpgo6M

If you search the Internet on how...
to use Quick Parts using your favorite search engine, you will find many more resources than the few I’ve listed above. For those of you who use iWork’s Pages for Mac or iOS, I am not aware of any equivalent feature to Quick Parts.

**TOOLS IN PRACTICE MANAGEMENT SOFTWARE AND SERVICES**

Most popular desktop practice management software (e.g., Time Matters, Amicus Attorney, and PracticeMaster, to name just a few) and cloud-based services (e.g., Clio, Rocket Matter, and MyCase) include differing levels of document automation. Desktop software includes the ability to use the merge features of Word and even WordPerfect (although integration with WordPerfect is rapidly dwindling owing to its decreasing market share) and templates for both desktop and cloud-based products. With document automation templates in these products, users generally upload a template in Word, Pages, or PDF format (with a very few exceptions, you must first convert WordPerfect templates to PDF). Then using field codes provided by the software or service, users can import variable data from the software or service to create the document. Generally, these features rely on set templates based on built-in logic and with no alternative clause selection or substitutions, except in some of the desktop products. Learn more at the following links:

- Amicus Attorney: bit.ly/1AF4FwR
- Clio: bit.ly/1AF3l5S
- MyCase: bit.ly/1AF3rl7
- PracticeMaster: bit.ly/1AF3FbT
- Rocket Matter: bit.ly/1AF3u0b
- Time Matters: bit.ly/1AF3vP

**WORD ADD-INS**

These products are designed to install within Word to add document assembly and automation features. The two products covered in this category are Pathagoras and TheFormTool/Doxserá. Although not as full featured as a standalone product such as HotDocs, they provide much of the same functionality while being significantly less expensive and complex, so they are much easier to set up and begin using.

Pathagoras (pathagoras.com) allows you to get started quickly by taking your existing documents and creating the variables by placing square brackets in your document. Inside the brackets, you type the name for the variable. Pathagoras calls this “plain text” document automation as you are simply surrounding text with the brackets—there is no use of field codes or other scripts to identify the variables. These brackets and plain text serve as placeholders in the template for the actual information to be inserted.

For example, to create a simple letter to a client, your variables would look like those in Figure 1 (below).

One of the nice features with Pathagoras is that you do not need to start from scratch if you already have a document you want to use as your model. Open that document and place the text that you wish to be a variable in brackets. Then replace the text inside the brackets with the variable name, for example replacing Mary Smith with [Client Name]. Pathagoras also has the ability to select multiple instances of the same variable once and turn all instances in the document into a variable without the need to select each and every instance and adding brackets and the plain text. So if you have a document that has a company name in it multiple times, you can select the first instance of that name and, using the Create Variables Assistant, Pathagoras will select all instances of that name and replace all of them with the new variable. Pathagoras allows you to save the information that you use to replace the variables within its “Instant Database System” so you can reuse it for other documents at a later date. You can also create interviews to help you with selection of alternative clauses and provisions as well as complete multiple documents at the same time. Pathagoras also allows you to link to other database sources to pull in information that you may already have in a practice management or time-and-billing program. However, this is not a feature that is widely used and may be more than you need—at least when you begin automating your documents. Pathagoras has some very complex logic and other capabilities hiding beneath its surface and continues to be improved regularly.

Pathagoras offers a 90-day free trial and has also recently added a cloud version called Pathagoras on Cloud (pathagoras.com). Pathagoras on Earth (the desktop version) starts at $379 for the first user with discounts for additional users and offers an annual maintenance plan after the first year. You can also subscribe on a

```
[Date of Letter]

[Client Name]
[Client Address]
[Client City], [Client State] [Client Zip Code]

RE: [Regarding]

Dear [Salutation]:

Thank you for returning your signed representation agreement and advanced fee of $[Advanced fee amount]. We will be sending you the completed documents by [UPS/FedEx/USPS] when complete in the next 10 days.

Very truly yours,

[Attorney Name]
```

Figure 1
monthly or semi-annual basis. Pathagoras on Cloud offers a 30-day trial and starts at $30 per user per month. Discounts apply for additional users.

TheFormTool (theformtool.com) and its sister cloud product Doxserá are also Word add-ins and integrate with Word versions 2007 and later. TheFormTool helps you create what it calls “smart forms” using a two-step process: Step One is to create a Q&A table that asks questions of the form preparer, and Step Two is to add fields to the form where the answers from the Q&A table are placed in the form. Unlike Pathagoras, you do not simply place brackets around a name to create the variables. However, in some ways TheFormTool method of document automation—with its ability to add complex logic and nested variables—provides more powerful tools than Pathagoras. It also allows you to create easy-to-understand questions for the document preparer to answer, along with the ability to add reminders or descriptive information for each field in the Q&A table.

To use TheFormTool to create the same simple letter we created above with Pathagoras, you first create your Q&A table (see Figure 2 at right). The labels here have been placed in the order they appear in the sample letter. If you prefer to group them together putting critical information first—such as names and addresses followed by dates and other information—you can do so. TheFormTool provides video tutorials and help guides on how to do this on its website.

Step two is to put in your fields in the document, which ends up looking like Figure 3 (at right).

You next fill in the “Answers” on the Q&A table (see Figure 4 at right). Finally, you click the Fill button in TheFormTool toolbar on the Word ribbon, which results in a letter like the one in Figure 5 on page 62.

TheFormTool has been joined by Doxserá, which is its cloud-based sibling. Doxserá adds the ability to populate multiple documents simultaneously using the same Q&A table. Unlike Pathagoras, TheFormTool and Doxserá currently do not allow you to use data found in other
programs and databases, but the soon-to-be-released Doxserá DB is supposed to add these capabilities. TheFormTool offers a free version that has basic functionality so that you can try it and see if it will work for you. The free version is yours to keep. If you like it and want to get even greater functionality, TheFormTool Pro is $89 per user for a lifetime license. Doxserá is $89 per user per year. The upcoming Doxserá DB is listed at $279 per user per year. Several bar associations are offering member discounts. For Mac users, TheFormTool/Doxserá can be installed on a Mac running Mac OS X 10.9 Yosemite; if you don’t want to install it yourself, TheFormTool folks will do it for you for about $350 (bit.ly/1GP5RPf). For a full comparison of the features of the free and Pro versions of TheFormTool, Doxserá, and Doxserá DB, see the comparison chart at theformtool.com/support/comparison. Expect to see CLE and other providers offering form templates for TheFormTool and Doxserá.

**OTHER DOCUMENT AUTOMATION TOOLS**

There are a number of other desktop and cloud-based document automation tools. Many of these such as HotDocs (hotdocs.com), XpressDox (xpressdox.com), Exari (exari.com), ProDoc (prodoc.com), and ContractExpress (bit.ly/1GOXSSI), to name just a few, are more powerful than Pathagoras and TheFormTool/Doxserá. Some are free-standing tools that run on their own, outside of Word. However, with that power comes greater complexity, higher purchase and deployment costs, a steeper learning curve, and the need to employ a consultant to get the most from the product. Companies that assist with these types of products and deployments include Basha Systems (bashasys.com) and Capstone Practice Systems (capstonepractice.com).

There are also premium subscription-based services available, typically delivered online. These solutions provide standard document language, clauses, and terms that are bundled with the document assembly process. These solutions generally focus on a specific practice area, and you are paying for the well-drafted clauses and documents as well as the speed and efficiency of the document assembly process itself. Some examples of these would include Cowles Trust Plus for estate planners (tmsnrtsrs/1GOZKKN), AIA Contract Documents by the American Institute of Architects (bit.ly/1GOZNWX), and WealthDox from WealthCounsel for estate planners (bit.ly/1GOZPhD), to name a few.

A product that was announced at ABA TECHSHOW 2015 in April is a tool from Leaflet Corporation (leafletcorp.com). Like Pathagoras and TheFormTool/Doxserá, it is a Word add-in, but it goes beyond that. Billing its product as “collaborative document automation,” Leaflet provides capabilities including electronic signatures, Q&A tables (called Leaflet Interviews and also Word questionnaires), which can be placed on your website for clients to complete online or that you can share, and more. Leaflet uses a subscription model, and according to its founder, Sam Muthusamy, it will be affordable for smaller firms. From a brief demonstration, Leaflet holds a lot of promise in this market space.

There are a number of other products that can be used for document automation. The following is not an all-inclusive list but provides information on many of the products that are available:

- DataPrompter: wordsite.com/products/dpdas.htm
- Docosaurus: docosaurus.com
- DocXtools for Legal: bit.ly/1GP2Mic
- draftonce: draftonce.com
- MacSimplePrompter: wordsite.com/products/sp.htm
- Smokeyball: smokeyball.com
- SmoothDox: smoothdocs.com
- Westlaw Doc & Form Builder: tmsnrtsrs/1GP1Vy2

**CONCLUSION**

There is no reason for lawyers and their staff not to take advantage of today’s document automation tools. These tools exist for every need and at every price point, ranging from the free and basic to the expensive and complex. The improved efficiency and effectiveness these tools bring to the legal practice will not only reduce potential embarrassment and malpractice but will have a direct and positive impact on the bottom line.

Nerino J. Petro Jr. (npetro@hkrockford.com) is the chief information officer for HolmstromKennedyPC in Rockford, Illinois. He is a lawyer and technologist and was the practice management advisor for the State Bar of Wisconsin LOMAP program from 2006 to 2014.
Demand letters serve many purposes, from initiating to preventing a lawsuit, providing required notification to manufacturers and retailers about everything from defective products to infringement claims, and tracing a respondent. In this engaging, to-the-point manual, author David J. Cook demonstrates the importance of these letters, the appropriate processes in using them, and how to react in different scenarios.

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**BUILDING YOUR BEST ARGUMENT**
By Cecil C. Kuhne III (ABA Solo, Small Firm and General Practice Division; 2010; 5150439; $79.95; ABA member price $69.95; GPSolo member price $64.95)

This book helps lawyers strategize to fully inform judges about the case's background and to carefully construct an argument that both candidly and completely applies the facts to law.

**FEDERAL APPELLATE COURT LAW CLERK HANDBOOK**
By Joseph L. Lemon Jr. (ABA Solo, Small Firm and General Practice Division; 2007; 5150312; $59.95; GPSolo member price $44.95)

This book provides the ammunition that new and soon-to-be clerks need to perform their duties successfully from the first day in chambers. It is also valuable to those considering applying for an appellate clerkship who want to learn the nuts-and-bolts of what the job actually entails.

**TECHNOLOGY SOLUTIONS FOR TODAY'S LAWYER**
By Jeffrey Allen and Ashley Hallene (ABA Solo, Small Firm and General Practice Division; 2013; 5150463; $89.95; GPSolo member price $75.95)

Technology poses numerous challenges and opportunities for attorneys. This book provides detailed information in basic terms to help navigate the challenges lawyers face in keeping abreast of technology and using it as a strategic tool within their practice.

**ADR HOT TOPICS: APPELLATE ARBITRATION, SANCTIONS AND ARBITRABILITY (ONLINE COURSE)**
(ABA Center for CLE; 2015; CE1506ADRUMB; $119; ABA member price $99; 1.0 credit hours; also available on CD-ROM and as an audio download)

Arbitration is shunned by some because of the absence of an appeal. But appellate arbitration rules exist and can be availed of—the question is, should they be? Arbitrability is a thorny question—just when do courts, rather than arbitrators, decide this question? Learn the answers to all these questions in a lively and informative conversation by our panelists.

THE AMICUS BRIEF: ANSWERING THE TEN MOST IMPORTANT QUESTIONS ABOUT AMICUS PRACTICE, 4TH EDITION
By Reagan W. Simpson and Mary Vasaly (ABA Tort Trial and Insurance Practice Section; 2015; 5190520; $139.95)

This incisive publication provides guidance on writing and understanding amicus briefs, with practical suggestions on all aspects of the amicus practice.

**APPELLATE PRACTICE COMPENDIUM**
Edited by Dana Livingston (ABA Book Publishing; 2012; 1620494; $199.95; ABA member price $179.95)

This exhaustive reference is the complete insider’s guide to appellate practice rules and procedures of all 50 states and Washington D.C., all federal circuit courts, and the U.S. Military Appellate Court.

**A BRIEF GUIDE TO BRIEF WRITING: DEMYSTIFYING THE MEMORANDUM OF LAW**
By Janet S. Kole (ABA Section of Litigation; 2013; 5310427; $39.95)

This book will enable brief writers to understand and tell the client's story in a persuasive and effective manner. Use this book as an outline or a refresher for any type of brief that must be written, whether it’s a main brief, reply brief, or sur-reply, and whether it’s a lower court or appellate brief.

**THE COURT OF THE FUTURE: USE OF COURT TECHNOLOGY IN THE NEXT GENERATION (ONLINE COURSE)**
(ABA Center for CLE; 2014; CET14COFUMB; $149; ABA member price $129; 2.0 credit hours; also available as an audio download)

This program examines how courts and the judicial process will change with the next generation of technological innovations. The program focuses on the use of technology not simply to improve current practices but to reimagine the entire judicial process from intake through the issuance of an appellate mandate.

**EFFECTIVE APPELLATE ADVOCACY, REVISED EDITION**
By Fredrick Bernays Wiener (ABA Section of Litigation; 2004; 5310333; $110)

In this timeless book on appellate advocacy, now revised for today’s litigator, one of the great appellate lawyers tells you how to most effectively prepare a brief and argue a case on appeal.

**FROM THE BENCH: ALL THE WORLD’S A STAGE**
(DOWNLOADABLE ARTICLE)
By Cathy R. Silak (ABA Section of Litigation; 2005; $19.95;
ABA member price $14.95

When arguing before an appellate panel, it's not enough to know the briefs and the case law. Appellate advocates must learn the intricacies of the forum and its members, in addition to performing a dress rehearsal, before stepping into the spotlight. (Published in Litigation magazine, Winter 2005, 31:2.)

THE LITIGATION MANUAL, THIRD EDITION: SPECIAL PROBLEMS AND APPEALS
By John G. Koeltl and John S. Kiernan (ABA Section of Litigation; 1999; 5310264V3; $95)

This collection of articles from Litigation magazine presents the strategies, techniques, and practical wisdom of many of the country’s preeminent trial lawyers and judges.

THE PRACTITIONER’S GUIDE TO APPELLATE ADVOCACY
Edited by Anne Marie Lofaso (ABA Section of Litigation; 2010; 5310396; $89.95)

This book takes you step-by-step through the process of appellate advocacy, offering practical advice and diverse viewpoints from appellate advocates in private practice, the government, and academia.

QUESTIONS FROM THE BENCH
By Douglas S. Lavine (ABA Section of Litigation; 2004; 5310334; $65)

Learn how to respond to a judge’s questions directly and persuasively. Written by a trial judge, this guide includes a discussion of general principles related to advocacy as well as basic approaches, themes, and “rules” to consider when answering questions from the bench.

TEN RULES FOR A SUCCESSFUL APPELLATE ARGUMENT
(DOWNLOADABLE ARTICLE)
By William K. Suter (ABA Government and Public Sector Lawyers Division; 2010; $19.95; ABA member price $14.95)

Written by the clerk of the U.S. Supreme Court who has witnessed more than 1,300 oral arguments, this article (published in The Public Lawyer, Winter 2010, 18:1) offers practical tips for making your case, along with fascinating war stories.

VETERANS APPEALS GUIDEBOOK: REPRESENTING VETERANS IN THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS
Edited by Ron Smith (ABA Section of Administrative Law and Regulatory Practice; 2013; 5010075; $69.95; ABA member price $59.95)

Explore this valuable resource that assists practitioners representing veterans and other claimants who are appealing or wish to appeal to the U.S. Court of Appeals for Veterans Claims.

WHAT TO DO WHEN THE JURY GETS IT WRONG
(DOWNLOADABLE ARTICLE)
By Charles W. Douglas (ABA Section of Litigation; 2006; $19.95; ABA member price $14.95)

Even the most experienced and successful lawyers have probably encountered a jury’s verdict that just wasn’t right. This article (published in Litigation, Fall 2006, 33:1) shows you how to prepare for an appeal but also discusses your options before the jury even disbands: a jury poll or jury interviews.

WHAT YOU NEED TO KNOW ABOUT APPELLATE PRACTICE:
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(ABA Center for CLE; 2013; CE1411APTUMB; $119; ABA member price $99; 1.0 credit hours; also available on CD-ROM and as an audio download)

Successful trial attorneys understand the importance of preserving issues on appeal at the trial level before, during, and after trial. In this program, our expert panelists will cover the essentials of appellate advocacy, including critical rules of appellate procedure and preservation of error; discuss effective brief writing; and explore how to make the most out of oral argument.

GPSOLO DIVISION LINKS
“e-briefs and e-filing are e-z” GPSolo magazine, June 2004: tinyurl.com/pwy894z
“How to Build Electronic Briefs” GPSolo magazine, June 2010: tinyurl.com/q4h9gpx
Resource page for starting and running a law firm: tinyurl.com/clwojlp
Solo/Small Firm Forms Library: ambar.org/gpsolofoms
Sponsors page: tinyurl.com/7bzlt7p

POPULAR THREADS ON SOLOSEZ
“Criminal: Delivering the Worst of News. Advice?,” tinyurl.com/ok5wzr3
“How Do You Handle Losing?,” tinyurl.com/o9vv73o
“If You Could Ask Two Appellate Judges Anything,” tinyurl.com/q9nh56b

OTHER LINKS FROM THE ABA
ABA Section of Litigation: americanbar.org/litigation
ABA Solo and Small Firm Resource Center: ambar.org/soloandsmallfirms
DATA BREACH CLASS ACTIONS

By J. Thomas Richie

Data breach cases are almost always class cases because an individual’s expected damages are very low. The need to seek classwide damages constrains plaintiffs to pursue only those theories of relief that conceivably can apply to an entire class.

Standing. The first major fight in most data breach cases is whether the plaintiff has suffered an injury—in fact sufficient to confer standing. To have suffered a sufficient injury, the plaintiff’s injury must be “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks omitted).

The U.S. Supreme Court’s recent decision in Clapper v. Amnesty International USA, 133 S. Ct. 1138 (2013), has appeared in several data breach cases. In Clapper—a case about the Foreign Intelligence Surveillance Act (FISA), not a data breach—the Supreme Court held that the plaintiffs lacked standing to challenge FISA. The court found that “respondents’ theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending.” Moreover, the Court rejected the argument that the plaintiffs had standing because they had incurring expenses to avoid the possibility of the government’s intercepting their communications.

A decisive majority of the cases to cite Clapper have found that data breach plaintiffs lacked standing. While the cases do not permit drawing absolute conclusions, the general conclusion is that plaintiffs alleging increased risk of identity theft are much less likely to have Article III standing than plaintiffs alleging that a data thief actually misused their data.

Actionable injury. Many plaintiffs who have survived standing challenges find their claims dismissed because the plaintiff has not alleged an injury sufficient to satisfy the damages requirement of a tort claim. As the Oregon Supreme Court put it in Paul v. Providence Health Sys.—Or., 273 P.3d 106, 112 (Or. 2012), “Every court that has addressed damage claims for credit monitoring following the theft of computer records containing personal information—but no wrongful use of that information—has reached a similar conclusion,” that is, no actionable damages.

Issues in class certification. Requiring plaintiffs to plead specifics about their data breach experiences pushes their cases away from class certification because the very facts that allow the plaintiffs to survive a motion to dismiss give the defendant a road map showing that individualized issues predominate in these cases.

Before discussing the particular class certification issues in data breach cases, a quick recounting of Federal Rule of Civil Procedure 23 may help. A plaintiff seeking class certification must satisfy the four Rule 23(a) factors—numerosity, commonality, typicality, and adequacy of representation—and must show that the case fits into one of the Rule 23(b) categories. Most plaintiffs seek certification under Rule 23(b)(3), which requires that the plaintiff show predominance and superiority—that is, “that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”

Few data breach cases have reached the class certification stage, but one example that touches on the central problem of class certification is In re Hannaford Bros. Customer Data Security Breach Litigation, 293 F.R.D. 21 (D. Me. 2013). In this case, outsiders breached a grocery chain’s systems and stole 4.2 million debit and credit card numbers. The plaintiffs alleged negligence by the grocer and breach of implied contract to maintain the security of the plaintiffs’ information. The court held that damages would be limited to actual out-of-pocket expenditures made to mitigate damages. The court found that the plaintiffs could not meet Rule 23(b)(3)’s requirement of predominance owing to variance in actual impact in the form of actual losses and expenditures.

To avoid this predominance problem, some plaintiffs have tried bringing federal claims for statutory damages. Statutory damages cases are attractive to plaintiffs because the injury is usually defined as a statutory violation by the defendant—which the plaintiff may reasonably be able to prove by classwide proof—and damages are uniform across the class without the need for proving actual fraudulent transactions or identity theft.
Beyond the predominance problems that have thwarted class certification, an emerging defense is ascertainability. Courts have long required that class definitions provide objective criteria for identifying class members. But two recent cases have brought this ascertainability requirement to prominence. The more discussed of the two is *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), in which the Third Circuit held that there was no administratively feasible method to identify a class of purchasers of a weight-loss product. The retailers who sold the product did not keep records to identify every purchaser. And the court rejected the notion that purchasers could assert their class membership by submitting affidavits because it found this process to be too cumbersome and did not allow the defendant the opportunity to challenge class membership without mini-trials. Another recent case on ascertainability, this time from the Fourth Circuit, is *EQT Production Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014). The Fourth Circuit reversed class certification and rejected the district court’s proposal to identify class members by reference to land records: Numerous heirship, intestacy, and title-defect issues plague many of the potential class members’ claims to the gas estate. In our view, these complications pose a significant administrative barrier to ascertaining the ownership classes.

These cases likely apply in the data breach context to make certification less likely. In a typical hacker attack on a merchant, payment card information is stolen from a point-of-sale device while the information passes through the memory of the device. The data remains on the device for only a matter of seconds before it is automatically deleted. Thus, the merchant often cannot tell which specific customers were affected because the merchant has no record of specific transactions that would allow a plaintiff to identify the class.

Plaintiffs have not had success in obtaining contested class certification, but class-wide settlements remain possible. The most salient example of a large data breach settlement is *In re Heartland Payment Systems, Inc. Customer Data Security Breach Litigation*, 851 F. Supp.2d 1040, 1048 (S.D. Tex. 2012), in which the district court granted final approval to the settlement of a class of consumers arising from a data breach that affected roughly 130 million accounts. To get an idea of the scale of the settlement, the defendant agreed to pay a minimum of $1 million for the benefit of the class.

*Where are data breach class actions heading?* The current state of data breach class actions favors defendants. Undeterred, plaintiffs have continued to bring these claims. One emerging trend is that smaller banks and credit unions are bringing claims against merchants who have suffered data breaches. These banks claim that they issued payment cards to their customers, and these customers shopped at affected merchants. After the data breach, the issuing bank claims that it suffered losses by reimbursing fraudulent transactions or by paying to have payment cards reissued to the affected customers.

The most significant changes to data breach litigation will likely come from regulators and legislatures, not courts. The Federal Trade Commission (FTC) has shown signs of starting to take a more active role in data security regulation, and its authority to do so was recognized in *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602 (D.N.J. 2014), a case involving a large data breach at a hotel chain. On the state legislative side, Minnesota has enacted the Plastic Card Security Act, a statute that defines the liability of merchants for data breaches affecting payment cards. Other states will likely follow with legislation of their own, but the more momentous development would be congressional action. Congress has considered many bills, most of which have focused on creating uniform rules governing how companies notify of data breaches. Congress has not yet taken up major issues—most notably, the creation of a private right of action.
A MEDIATOR’S REFLECTION ON BOCK V. HANSEN

By Charles Ferguson

Last year I had the privilege of mediating a homeowner insurance coverage case reported as Bock v. Hansen, 225 Cal. App. 4th 215 (Cal. App. 1st Dist. 2014). Because oral argument at the appellate level had occurred several weeks before the parties contacted me, the assignment was challenging from the start. The plaintiff homeowners were asking the state intermediate appellate court to overturn a trial court ruling in favor of an employee of the defendant insurer and declare that henceforth policyholders could sue their insurers’ employees directly if an employee carelessly misstated a material term of a policy to them, a ruling that would significantly increase the bargaining power of policyholders in coverage disputes.

I was asked to conduct a one-day mediation immediately, with only two days to prepare. The facts of the case are familiar to many homeowners: After a part of a large tree fell onto their house, Michael and Lorie Bock filed a claim with their homeowners’ insurer, which assigned an adjuster to assess the loss. In a suit charging both the adjuster, Craig Hansen, and the insurance company, the Bocks claimed that Hansen altered the scene before taking photos, was rude to them, and misled them about their coverage. I was able to work with the parties to reach a settlement on schedule, but my confidence in the durability of the settlement was severely shaken the very next day. Unfortunately, one critical party, the appellate court, had not weighed in. Early in the morning after the dispute was settled, the homeowners’ notice of settlement and voluntary dismissal request forms were filed at the courthouse and transmitted by the court clerk to the appropriate panel of appellate judges. The court denied the request for dismissal and later that same day issued its decision, accompanied by an order reinstating the adjuster Hansen as a defendant and directing the parties to return to the trial court for further proceedings. Consequently, the settlement agreement was in danger of being treated as unenforceable by one or both sides.

The Bock decision opens new territory in the law governing the California insurance market by authorizing policyholders to sue an insurer’s employee directly for carelessly misrepresenting terms of a policy, notwithstanding the absence of privity of contract between California policyholders and their respective insurer’s employees. Traditionally in California, tort causes of action for negligent misrepresentations of policy terms have been allowed to stand only as against insurance companies because they are in privity of contract with their policyholders and thus held to a special duty of care to their insureds owing to their unequal bargaining power over policyholders. However, in Bock the policyholders tried a fresh strategy. The Bocks sued their insurer for negligent misrepresentation, breach of contract, and bad faith. And they named Hansen, the insurer’s employee, as a defendant. Two claims were stated against Hansen—intentional infliction of emotional distress and negligent misrepresentation of the terms of the policy. The emotional distress claim is not new in California. Employees of insurance companies committing intentional torts while engaged in the scope of their work in California have always been susceptible to a lawsuit. But before Bock, they had not been held liable for negligent misrepresentations while carrying out their employment duties. Given the difficult burden of proof for the plaintiffs associated with their intentional infliction of emotional distress claim against Hansen, the opportunity to sue Hansen for negligent misrepresentation, if upheld, had potential for far-reaching consequences and implications for the plaintiffs, for Hansen, for his employer, and for insurance companies in general.

California’s First Appellate District has been a strong advocate for mediation, and the California legislature has made it clear that all state courts should encourage mediated settlements as a matter of public policy. By choosing to issue its ruling on Bock at this point, after the
As with most court-administered programs, the appellate court’s mediation program was structured to include a program director whose role was critical to its operation. Unfortunately, when severe judiciary budget cuts in 2013 left insufficient funds for the program, the director’s position was eliminated. By the time the Bocks appealed, the court’s mediation program was effectively defunct. With no one to run the program, the Bocks did not have the benefit of being monitored or coordinated with the work of the assigned panel. The parties pursued mediation privately, and their mediation efforts were not reported in advance to the court.

The rules for giving a California appellate court notice of a settlement requires parties only to report that a settlement has been reached—not that the settlement came about through mediation. The official form appellants use to request a voluntary dismissal is a “check-the-box” affair, with no opportunity to indicate whether the request was prompted by a successful mediation. Nevertheless, when the Bocks filed their request for dismissal, they did inform the court in writing that the dispute had been successfully mediated.

The court received the request for dismissal in the morning, denied it forthwith, and issued the reported decision before the day was over. Ironically, a case on which the Bocks relied to deny the Bocks’ request for dismissal, Bay Guardian Co. v. New Times Media LLC, 187 Cal. App. 4th 438, 445 n.2 (Cal. App. 1st Dist. 2010), provides a blueprint for what the Bocks could have done at this point. In Bay Guardian, the parties reached settlement after oral argument. The court certified only a part of its decision for publication and only after first “consulting the parties regarding the partial publication of the decision in this case” and “receiving written reply from counsel for the parties that both sides agree the partial publication . . . is appropriate.” The Bocks could have acted similarly before issuing its decision and disposition by communicating with the parties about the circumstances of the settlement and weighing whether it would be better to wait for another case to come along with similar facts but without a mediated settlement.

Liberty Mut. Ins. Co. v. Fales, 8 Cal. 3d 712, 715-716 (Cal. 1973), established the standard for when an appellate court can reject a request for voluntary dismissal and render a decision on the merits: if the case “involves a matter of continuing public interest and the issue is likely to recur.” Unfortunately, this test, which Bocks uses, calls for an appellate court merely to identify a public interest that might be served by issuing a decision instead of granting a request for dismissal. It invites courts to assume that any public interest invariably trumps the interests of parties who settle, at least the interests of those who settle outside a court-administered mediation program, and the public interest in having them settle.

Mediators and counsel can avoid being caught in a similar predicament by litigating in California or federal appellate courts. Disputants can incorporate provisions into a settlement agreement that anticipate the possibility that an appellate court will deny a request for dismissal of an appeal. If there is any prospect that multiple public interests, especially mutually exclusive public interests, may be entwined with a mediated dispute, parties should discuss savings and reformation clauses, including releases and covenants not to pursue further litigation and clauses for allocation of risks and attorney fees and costs if certain events occur after settlement negotiations.
NOT TO DECIDE IS TO DECIDE—SORT OF

By Robert E. Shapiro

The decision of the U.S. Supreme Court in fall 2014 not to grant certiorari in several different cases regarding gay marriage came as something of an early surprise during the 2014–2015 term. By not deciding the matter, the Court left standing the decisions of courts of appeals to strike down state statutes banning gay marriage. By not deciding the matter, the Court had, practically speaking, decided it. But it had done so with what might be called “plausible deniability,” keeping itself removed from the storm of public debate.

Whom did the Court think it was fooling? A Supreme Court decision on the question of the constitutionality of statutes prohibiting gay marriage was inevitable, no? Right on cue, just a few weeks later, in *DeBoer v. Snyder*, 2014 U.S. App. LEXIS 21191 (6th Cir. Nov. 6, 2014), a Sixth Circuit panel upheld state laws banning gay marriage. The resulting split in the circuits needed to be resolved. The Court could not duck the issue permanently, critics argued. Even if it had allowed the division to continue for a time, sooner or later the Court would have had to face the issues presented by gay marriage under the Constitution.

Adding to the force of the denial of certiorari, even if it has no preponderant value, was what it tells us about the justices’ substantive views on the High Court. We already know a lot. The recent decision striking down the anti-gay marriage provisions of the Defense of Marriage Act, though on different grounds, certainly suggested that the decision would ultimately favor gay marriage.

There is substantial momentum building toward acceptance of gay marriage. More and more states are legalizing it, and more and more courts are striking down restrictions on fairness principles. Part of the reason is that gay marriage proponents can offer a narrative about it that appeals to conservatives, too. If homosexuality is accepted, conservative principles might be thought to dictate encouragement stability in gay relationships. If the family serves that goal well in heterosexual circumstances, why not in homosexual unions, too? For this reason, it sometimes appears that the real dispute is not about gay marriage at all, but about homosexuality, with gay marriage as a kind of proxy. And because the trend in the United States certainly seems to favor full rights for homosexuals, the availability of gay marriage would seem to come almost as a matter of course, for liberals and at least some conservatives alike.

So all signs pointed to doom for those statutes outlawing gay marriage, even in the absence of a Supreme Court fight. Whether this analysis is valid or not, the reluctance of the Supreme Court to get involved in the gay marriage debate is striking. Again, it is not characteristic of any wing or justice to leave well enough alone. In this respect, the Court’s initial non-decision might be viewed as a kind of victory for Chief Justice John Roberts. Over the last couple of years, Roberts has staked out a position of being the Court’s moderate voice.

When the Court decides to stay out of matters, it becomes something for legislatures and lower courts to decide. The chief justice seems to be saying that the Court not only can but should stay out of this process for as long as possible, allowing the matter to be more a political one, rather than a stark vote of yea or nay under the Constitution.

New reserve. This approach to judicial policy making is a bit of a throwback to an earlier day. Certainly, it is not the favored approach now. In fact, the Sixth Circuit judge who upheld the legislative enactments banning gay marriage expressed frustration that the Court had refused to inject itself into the process or even allowed itself to proceed when a decision at the highest level seemed natural and desirable. In recent years, it has been much more the case that the Supreme Court has been willing, not to say eager, to state its views on matters that were not always completely thrashed out previously in the lower courts. This has been true even when there was a
legislative enactment to consider. Chief Justice Roberts’s view seems to be that the Court ought to be an absolute last resort, something that happens only after all other alternatives have been completely exhausted.

There are good reasons for delay. One is that, left to themselves, legislatures and lower courts slowly seem to make their way to the right decisions. What takes longer may also be more lasting. The American people seem slowly to accept the larger social trends. And under modern constitutional theory, the social trends are what should primarily drive the ultimate decisions in the Court anyway. In short, the Court should enforce the will of the people, not stimulate it. Still, the downside is significant. During this slow process of development, many suffer.

**Roe v. Wade.** These considerations are nicely highlighted by two landmark cases during the second half of the twentieth century. Roe v. Wade, 410 U.S. 113 (1973), has been a lightning rod for arguments for or against abortion. It could be argued that the decision was premature and unnecessary. During the years before the decision, legislatures and courts had slowly, seemingly surely, moved to a liberalization of abortion rights. The progress had not been steady, to be sure. What was the point of delay? If the trend was really in favor of abortion rights, why not decide early and in a manner that ensured uniformity and immediate relief?

The answer can partly be seen in the result. To be sure, there is now greater uniformity of the law. But more political rhetoric has been spent on the abortion issue in the past 40 years than on any other single matter. Because the decision came before its outcome had gathered widespread popular acceptance, the Court has become the issue, and to some its decision became a symbol for what’s wrong with America.

**Brown v. Board of Education.** Compare Roe with a second, earlier landmark case, Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). Here, too, there was a slow development in the lower courts toward a greater recognition of the defects in the doctrine of separate but equal. The Supreme Court itself kept nudging legislatures by finding some separate arrangements not equal. Allowing this trend to continue, rather than wading into the controversy, might have brought about the right result without the Supreme Court’s having to decide at all. But, again, there were major problems. First, there were huge geographic disparities. Second, ongoing enforcement of Plessy v. Ferguson, 163 U.S. 537 (1896), was wreaking havoc on individual lives. And, perhaps most important, the duration of the process was extraordinary. Progress was far too slow. It is much more difficult to conclude that waiting still longer was a plausible alternative. Some problems just cannot, or do not, fix themselves.

One of the striking aspects of both decisions is how thinly reasoned they are. This would suggest that, in both instances, it might have been preferable for the Court to let the matter percolate in the lower courts and legislatures. And both became rallying cries.

In any case, it appears the justices are taking a new, more restrained approach. It remains to be seen if it makes the Court a less controversial and more effective vehicle for adapting to social change. ■
ARE WE CRIMINALIZING ADOLESCENCE?

By Jay D. Blitzman

We now know, as the founders of the juvenile court system intuited at the dawn of the twentieth century, that children are not little adults. Youth are accountable, but in a constitutional sense they are different than adults. Practitioners across the country are considering the implications of the message of proportional sanctioning and sentencing in a variety of contexts, including zero tolerance in schools, capacity to form mens rea, mandatory transfer, and collateral consequences. However, this landscape has been complicated by a disturbing and counterintuitive narrative: the recriminalization of status offense conduct (e.g., not attending school, running away from home, violating curfew) that was decriminalized in the aftermath of In re Gault, 387 U.S. 1 (1967), and the enactment of the Juvenile Justice and Delinquency Prevention Act (JJDPA) in 1974.

Prior to Gault, juvenile justice operated on a nonadversarial medical model, with a nonrebuttable presumption that a child needed treatment or “fixing.” A youth’s noncompliance with home or school rules was treated as a criminal matter, often leading to lengthy periods of incarceration.

On June 8, 1964, Gerald Gault and a friend, Ronald Lewis, were arrested. Gault was 15 years old and had been on probation for having been in the company of another boy who had stolen a wallet from a lady’s purse. A neighbor had made a verbal complaint about a telephone call in which the caller or callers had made remarks “of the irritatingly offensive, adolescent, sex variety.” As there was no evidentiary hearing, it was never conclusively established which statements, if any, could be attributed to Gault or to Lewis. After a session in the judge’s chambers, without the right to counsel or confrontation of witnesses, Gault was committed to the State Industrial School for the period of his minority (a six-year sentence). An adult in similar circumstances would have faced a maximum term of not more than two months or a fine of $5 to $50. Of course, an adult in the criminal system would have also been entitled to the benefit of due process and rehabilitation. Permitting state intervention and often subjective best-interest determinations without honoring the presumption of innocence and conducting rigorous fact finding unnecessarily entangled youth in the juvenile justice system.

In 1974 Congress passed the JJDPA, which provided federal juvenile justice dollars to the states in return for compliance with sweeping reforms. The JJDPA reflected the national consensus that status offenses should be decriminalized. Accordingly, the JJDPA’s initial core requirements were the deinstitutionalization of status offenders and sight and sound separation from adults. Removing juvenile offenders from adult prisons and reducing disproportionate minority contact with the juvenile justice system later became the other core principles of the legislation. Deinstitutionalization was designed to keep youth accused of status offenses from being housed with juveniles accused of criminal acts. Many states responded by enacting comprehensive statutory schemes to address offenses that only apply to minors, such as truancy or running away.

However, the so-called due process revolution was short-lived. Only four years after Gault, a reconstituted Supreme Court, viewing the history of juvenile justice through a different lens, held that jury trials in juvenile proceedings were not constitutionally mandated. Gault had only addressed the basics of fundamental fairness during the adjudicatory stage. Issues such as bail, transfer, and sentencing were not reached. Accordingly, each state was left to design the contours of its juvenile system, and the full realization of Gault’s promise of due process remains aspirational. The valid court order (VCO) enabled states to keep youth accused of status offenses from being housed with juveniles accused of criminal acts. Many states responded by enacting comprehensive statutory schemes to address offenses that only apply to minors, such as truancy or running away.
that adopted the provision to treat children accused of violating conditions of treatment as the functional equivalent of delinquent probation violators and subject them to secure detention. The rehabilitative impulses of Gault were quickly countered by social and cultural concerns about rising arrest rates, the pernicious mythology of juvenile predators, and demographic projections forecasting a tsunami of juvenile crime. The “tough on crime” rhetoric had great resonance, and most jurisdictions raced to amend legislation by targeting violent offenders for adult prosecution.

**State offense redux.** Researchers have started to focus on what has been described as the “school-” or “cradle-to-prison pipeline.” The factors contributing to the pipeline implicate questions of race, class, geographic segregation, and access to public education. The dramatic increase in school exclusions and court referrals has compounded issues of racial and educational equity. The process has been accelerated by zero-tolerance policies and the deployment of police in schools.

**Understanding the problem, changing the solutions.** In 2012 a national summit, “Keeping Kids in School and Out of Court,” was held to address school-to-prison pipeline issues. The Office for Civil Rights and the U.S. Department of Education statistics, documenting the racial disparities and rates of school suspension and court referral, were focal points of discussion. Strength-based alternatives to zero tolerance, including positive behavioral support, emotional supported learning, restorative justice, and positive youth development were presented. Collaborative systemic partnerships between schools, police, advocates, and juvenile courts designed to divert cases and provide alternatives to legal processing were also featured.

States are also rethinking school suspension and expulsion policies. Many jurisdictions have realized that community-based treatment alternatives are more affordable than costly incarceration that has not reduced recidivism. The adult sanctioning model in schools and juvenile justice is inconsistent with what we know about adolescent development. Zero tolerance becomes intolerance when educators and jurists sanction in a way that is not proportionate.

The recriminalization process has also affected adolescents in the child welfare system. A significant percentage of youth who are status offenders in our child welfare system are also involved in the juvenile justice system. These “crossover” youth who have both civil and criminal contact with the court are more likely to be female, children of color, transgender, and/ or lower performing in school than the general population.

VCOs have also had a disparate impact on marginalized youth. While females constitute only 28 percent of petitioned delinquency cases, adolescent girls comprise a significantly higher percentage of all classes of status offenders. The numbers are particularly troubling given the context of the often-violent and dangerous households from which many runaway girls flee. The VCO has also had an adverse racial impact, with youth of color being detained at higher rates than their white peers.

Action can be taken to address these disconcerting trends, including not imposing pretrial conditions of release that are unrelated to court appearance and that criminalize adolescence. The JJDPA was last reauthorized in 2002 and has been due for reauthorization since 2007. There is a consensus among major juvenile justice organizations and prominent jurists in favor of the reauthorization of the JJDPA and the repeal of the VCO.■

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**ABA CRIMINAL JUSTICE SECTION**

This article is an abridged and edited version of one that originally appeared on page 18 of Criminal Justice, Spring 2015 (30:1).

For more information or to obtain a copy of the periodical in which the full article appears, please call the ABA Service Center at 800/285-2221.

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TOBACCO MARKETING: A VIOLATION OF HUMAN RIGHTS IN LATIN AMERICA

By Kelsey Romeo-Stuppy

Many people, particularly in the United States, are convinced that tobacco is a problem of the past. Unfortunately, this is far from true. Tobacco products still kill more people than alcohol, AIDS, car accidents, illegal drugs, murders, and suicides combined. Left unchecked, tobacco use will kill 1 billion people this century. The World Health Organization (WHO) has called on all countries to take urgent action to reduce smoking; it projects the number of deaths will rise to 8 million annually by 2030 unless action is taken.

The public health and international law communities came together in 2004 to create the WHO Framework Convention on Tobacco Control (FCTC), the first global treaty designed to combat a specific public health issue. The FCTC and its guidelines instruct countries on effective measures to reduce tobacco use. Obligations under the FCTC include tax and price measures, smoke-free air laws, education, the banning of tobacco marketing, and the prevention of tobacco industry interference in all these measures.

Smoking is a growing problem in Latin America and other developing regions. Many countries are not protecting their citizens from the harms of tobacco; this represents a failure to live up to treaty obligations under regional human rights treaties.

Tobacco and Latin America. Tobacco in Latin America is cheap and within the purchasing power of almost the entire population. Between 8 percent and 10 percent of smokers in the world live in Latin America, and more than half will die of smoking-related disease. Youth tobacco usage in the region is on the rise, with 13.16 percent of young people between the ages of 15 and 18 smoking.

The World Lung Foundation determined that in 2010, tobacco companies reported $35 billion in profits. There is a lot of money at stake for tobacco corporations around the world, but tobacco multinationals have a great deal of interest in Latin America. Five of the top 25 largest tobacco producers are in the region. Generally, the tobacco industry has successfully defended against domestic tobacco control efforts, and companies in the industry have brought legal actions against Latin American countries that attempt to comply with the FCTC.

Seeking a human rights remedy in the Inter-American system is advisable for three reasons. First, domestic measures have been strongly contested and less than effective. Second, the strong rights-based framework of the Inter-American system means a human rights case is more likely to be effective. Finally, a favorable ruling could have a broad and profound impact, both as favorable precedent in the Inter-American system itself and because individual countries rely on the Inter-American system as authoritative in domestic litigation and to shape domestic legislation.

Which rights to assert? The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are both related to the Organization of American States (OAS). The American Convention on Human Rights was established under OAS auspices, and the American Convention in turn created the Commission and the Court. The Commission works with states to help strengthen laws and institutions that provide human rights protections. The Court is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention.

The Commission can take a variety of actions, including visiting member states, issuing reports, issuing advisory opinions on a petition, and requesting precautionary measures from the Court. Any individual can file a petition with the Commission against any OAS member state. A petition of the kind recommended here would allege violations of the American Convention if the state has ratified that treaty, or it would allege violations of the American Declaration of the Rights and Duties of Man if the state has not. The American Declaration is one of the foundational documents of the OAS, and as such, it imposes a degree of moral authority over all OAS member states.
The Commission can refer a case to the Court. Because individuals cannot petition the Court themselves, this is the only way cases brought by individuals are heard in the Court. For the Commission to refer a case to the Court, the state must have accepted the Court’s contentious jurisdiction or the state must accept the Court’s jurisdiction in that specific instance.

The American Declaration recognizes the rights to life, health, the protection of children, and a safe and healthy work environment. The American Convention recognizes the right to life, sets forth the obligation of protection of the child by the state, and bans inhumane treatment. A petition would likely assert a number of these rights; however, bringing the case within the ambit of the right to health would be an effective way to narrow the issue. In the context of smoking and its detrimental impact on public health and safety, the right to health seems an obvious choice.

However, there is a significant question as to whether the right to health is currently justiciable in the Inter-American system. Therefore, another, more traditionally justiciable right should be considered. For example, many tobacco ads target women or children, and this kind of targeting could raise issues of equal protection. Advocates have recommended using an individualized petition in the Inter-American system against a state on behalf of a vulnerable group exposed to tobacco industry advertising or secondhand smoke.

**Why the Inter-American system?**
In many countries in Latin America, actions of the Commission and decisions of the Court are authoritative. Bringing suit against a state could result in a recommendation or ruling from the Commission or Court imploring the defendant state to implement particular practices or protections. There would be potential for impact from the beginning, regardless of the outcome of the case. A positive ruling or recommendation could be cited by advocates in domestic cases and could directly offset the arguments the tobacco industry and its lobbyists make in the countries’ domestic courts and legislatures. Any proceedings would also draw media attention to the issue, could shame the state into taking proactive measures or addressing the problems, and could have a dramatic chilling effect on the tobacco industry.

While it would be possible to bring a domestic suit in tort, most Latin American countries follow a civil law system. A high burden of proof, a narrow definition of standing, and limits on recovery tend to lessen the impact of domestic suits. However, because some domestic litigation has been brought, litigation guides and scholarship on invoking international human rights law in the Inter-American system already exist. Relevant experts, arguments, and authority also could be gleaned from the domestic cases. Still, a strategy of action against states through fundamental rights litigation is more widely practiced and more effective than domestic litigation. Furthermore, bringing a regional international suit could help counteract the tobacco industry’s influence in Latin America.

The tobacco industry has not just used litigation to interfere with tobacco control legislation. Civil society organizations have reported that common tactics by the industry include lobbying, political pressure, misinformation mass media campaigns, personal attacks on opponents, and exploitation of loopholes within the tobacco control laws. However, perhaps the most troubling tactic is “corporate social responsibility.” By carrying out philanthropic campaigns, the industry dispersion of its message. A suit would mitigate or even erase the impact made from tobacco companies’ so-called “corporate social responsibility.”
I am excited! With summer having passed, school is starting for students of all ages. Like the students all around us, we should take this opportunity to embark on a new adventure. Too many attorneys stay in their same routine, season in and season out, year after year, despite the obvious time markers all around us signaling changes. My colleagues, it’s time to wake up from your slumber. Let’s get to it!

THE MOST OBVIOUS CHANGE
The most obvious change that comes to mind for most of us is in our physical appearance and fitness. It was at this time a year ago when I decided to lose weight. I jump-started my new healthy lifestyle with a juicing diet, and then I ate well and drank homemade vegetable and fruit smoothies, while also giving up sodas. I lost 45 pounds. I am happy to report that, a year later, I have kept off 35 pounds (yes, I did gain ten pounds back).

I am prepared to jump-start another health kick, including again giving up sodas, drinking vegetable and fruit smoothies, and working out in the gym. Now, you don’t necessarily need to do all the things I’m prepared to do, but changing at least one thing about your physical lifestyle will help you. Once you are encouraged, you will be motivated to do more! Before too long, you will notice a change in the way you look and feel. Trust me, I am a cancer survivor and I know what it feels like to have an unhealthy body. A healthy body wins out every time, and I’m looking forward to losing another 35 to 45 pounds!

CHANGES IN YOUR LEGAL PRACTICE
Other than changes in our health, another change we often think about is in our legal career. Whether you are a sole practitioner, small firm attorney, government attorney, judge, or any legal professional, there are areas (big and small) in our work that are ripe for improvements and/or wholesale changes. Whether these changes are small and incremental (such as changing your office procedures) or big and powerful (such as changing your practice area or where you work), changes can reinvigorate your dedication to the profession and significantly enhance your legal career.

I recently saw a foreign commercial that promoted the idea of parents teaching their children how to fend for themselves in this world without being dependent on others. In the commercial, a mother teaches her daughter how to make money by cutting up pineapples, freezing them, and then selling them to the public in her local community and school. The daughter couldn’t have been more than ten years old, but she learned everything from using the raw material (whole pineapples) to creating a finished product (frozen pineapple slices on a stick) and then how to market and price her product based on what worked in her local community. The commercial was thought provoking because it showed that we all can learn something new and succeed from that new endeavor.

When is the last time you gave yourself an hour, much less a half-day, to reflect and think about what you could learn or apply that would make a difference to your personal satisfaction with your career? I’d venture to guess the vast majority of us only do so when required by outside forces, such as financial pressure, sickness or disease, or an employer’s dissatisfaction with our performance. Why wait to think about career satisfaction and potential changes until your mind is under a tremendous amount of pressure? Why not engage in that reflection and thinking when you are in a good place and not overly stressed? Although many of us can make good decisions while thinking on our feet, we all can make better decisions by giving ourselves time, focus, and energy to...
engage in self-evaluation. Think about it and then take action; you’ll be surprised how much better you will feel with the positive changes in your legal career.

Changes in your legal career don’t necessarily need to include wholesale changes to your work situation. What about attending more CLEs to become more knowledgeable in your area of practice or in a new area of practice you are mulling over? What about writing for personal satisfaction, whether it be a blog, magazine column (wink!), or book? What about volunteering more and either helping out with local clinics or taking on pro bono cases? These are just a few minor changes that can give you deep rewards in your personal satisfaction with your legal career.

**CHANGING HABITS**

The end of summer marks a natural time to begin new actions and behavior that lead to better habits and ways of living. Maybe your legal career is where you want it to be, but you recognize that there are other aspects of your life you wish to change, such as exercise, healthy eating, better sleeping patterns, more religious devotion, new volunteer efforts, or being more grateful. Lest you be fooled, such changes are not usually accomplished simply by wanting the change and having a good day or two, but rather by sustained, consistent effort over a long period of time.

The old cliché that it takes 21 days to form a new habit is nice, but its simplicity lulls us into a false sense of security. Even if we are successful in creating a new habit owing to 21 days of consistent effort, habits are not simply gained, never to be lost. We easily can lose a habit by taking too much time off from the habit. You must have an intention to follow through consistently with your habit until it becomes part of your subconscious and no longer thought of as a new habit but rather as a way of life. In the words of investor and motivational speaker Warren Buffet (paraphrasing Samuel Johnson’s *The Vision of Theodore*), “chains of habit are too light to be felt until they are too heavy to be broken.” Habits, whether intentional, positive habits or lazy, negative habits, will wrap themselves around you, so you must be ever vigilant about your habits of thought and behavior.

**IT’S TIME TO WAKE UP FROM YOUR SLUMBER.**

**CHANGING YOUR CAREER?**

In the past few years, a number of books about lawyers leaving the profession have been published. An entire blog is dedicated to the unhappiness many lawyers feel (Jennifer Alvey’s *Leaving the Law*, leavinglaw.wordpress.com). It seems there is money to be made in the dissatisfaction lawyers feel with their chosen career.

Do you really need to change your career to become happy? Maybe some do, but the vast majority of us don’t need to walk away from the legal profession. Some of us just need coaching and training. Lawyers don’t like to admit that we need life, career, and business coaching and training just like everyone else. Clients come to us expecting us to have the answers, so we lull ourselves into the false security of thinking we have all the answers, not only for our clients but for ourselves in our own lives. Personal coaches are great at getting us to connect with ourselves and discover what we can do to make us happier with our career.

For those attorneys who truly are done with practicing law and would rather just do something else, their legal education and training have prepared them to ask the right questions and, one hopes, make good decisions in the future. A suggested resource is Monica Parker’s *The Unhappy Lawyer: A Roadmap to Finding Meaningful Work Outside of the Law* (Sphinx, 2008). In discussing her book with the *Wall Street Journal* (June 23, 2008) and talking about lawyers needing a guidance counselor of sorts, Parker stated that lawyers “feel like they should be able to figure it out on their own, but it’s almost impossible to figure it out on your own unless you’re determined to make a change.”

**MY RECENT MAJOR CHANGE**

To reveal a change I recently made that could give you an idea for your own career, in August I became a certified coach, trainer, and speaker with the John Maxwell Team. Not only does this still fit within my nature of helping others, but it’s not so different from practicing law that I can’t do both. I don’t see myself ever giving up the practice of law, but I’m looking forward to coaching other professionals, executives, and business owners as well as training and speaking on leadership. The break from pure law practice allows me to feel more excited about my law practice and forces me to become more focused about what type of law I want to practice.

I hope I have given you food for thought about possible changes you can make in your personal life, work situation, and possibly your career. As Heraclitus wrote, the only constant in life is change.
THE APPLE WATCH

By Victoria L. Herring

I’m just old enough to remember the comic strip Dick Tracy and its image of the detective talking into his wristwatch, a two-way radio. The Apple Watch can be seen as something similar, but it’s more than that. Plus, it’s a bit weird to be talking into your wrist, even if there’s an Apple Watch on it, so that is not something you’ll do all that often.

I did not buy my Apple Watch immediately. I decided to wait and see the early reviews. Besides, I am not in the habit of wearing a watch and normally just look around for a clock or pull out my iPhone to check the time. However, after a few weeks I decided to go ahead and buy an Apple Watch, hoping it would be a good investment. Of course, I didn’t buy the top-of-the-line model, not having an extra $17,000 for the gold Apple Watch Edition. Instead, I opted for the $349 Apple Watch Sport with a black sport band and a 38 mm space gray aluminum case. I now have some views on how the Apple Watch has already or will in the future impact my life.

A word of caution is warranted. If you will be getting an Apple Watch, you want to make sure that you have the correct iPhone to work with it: an iPhone 5 or any later model. If you have an older iPhone or no iPhone at all, the Apple Watch is a nice timepiece and will do some things, but not that much. And, frankly, you want to be able to set up the Apple Watch to run the way you want it to run using the Apple Watch application on the iPhone. In fact, that’s almost the first thing you should do when you unbox your Apple Watch and pair it to your iPhone.

CUSTOMIZING YOUR APPLE WATCH
The Apple Watch has a number of features that allow for customization. You will want to go into the Apple Watch app on the iPhone and go through each part of it step-by-step. First, you can set up the application layout on your Apple Watch, tweaking it to make the apps you need easy to find and open. My apps are in a diamond layout with the important ones on or near the four corners. Over time I have deleted or moved some apps to the less-traveled areas of my watch face, accessible but not demanding.

What some people want as their watch features no doubt differs from what others want. For example, my stepson sent me a picture of his Apple Watch’s face, and it was the bare minimum “simple” clock face. I couldn’t use it that way, as I use my watch to fill me in on basic data that I need immediately. So I use the Modular watch face customized to show date, time, my calendar, a stopwatch, my activity, and any alarms. That’s pretty much all I really need to know upon giving my watch a quick look. These additions to the face are called “complications.” Some—such as Astronomy, Chronograph, and Motion—are actually beautiful as well as useful.

There are quite a few apps for your iPhone that now have an Apple Watch component. But rather than having every single app come into your watch when you add it to your iPhone, turn that feature off in Settings and add them only as you wish or need. There is nothing to be gained from gunking up the watch face with a plethora of apps.

GLANCES AND NOTIFICATIONS
There are other ways to customize your Apple Watch. With “Glances” you can set up a number of applications to be accessed quickly by flicking up on the screen and then sliding left or right. I have mine set to access my calendar, the New York Times, my physical activity summary, the weather, and stock information. I even use Glances to send myself quick reminder notes. Glances allow you to set your Apple Watch and iPhone to airplane mode or “do not disturb,” so you don’t have to pull your iPhone out every time you fly (just be sure to re-pair it after you’ve turned off airplane mode). And if you’ve misplaced your iPhone, perhaps enjoying a senior moment, you can just ping it with your Apple Watch and find it that way. No more running to your computer or iPad to hunt it down with Find My iPhone.

You can also customize which notifications you will receive and in what manner, limiting their number and intrusiveness. In my view, you do not want to have notifications coming from every app. In Settings you can turn
them on or off, and if on, then set them
to come by sound (I do not do this) or
by haptic touch (which works fine for
me). This way, you can be notified of
what you want to know without it be-
coming as bothersome as a ringing and
pinging iPhone.

For instance, if you receive a call or
text on your iPhone, your Apple Watch
can notify you by haptic touch. And as
long as you’re within range of the iPhone,
you can answer a telephone call like Dick
Tracy, talking (briefly, one hopes) right
into your Apple Watch. You can reply to
a text directly from your watch as well.
Your response will go to your iPhone
and then out to the caller/texter.

There are other forms of notifications
that make sense. Incoming e-mail may be
a good thing to know about, even if you
don’t intend to and shouldn’t respond
immediately. Passbook and Apple Pay
notifications are important, and you can
have those sent to you. You can shut off
notifications just by cupping your hand
over the phone.

SECURITY
One feature that I appreciate and use quite
a lot is two-factor verification. If you re-
ally want security, a strong password is
not enough. You will want to require two-
factor verification for your most impor-
tant online accounts. With this system,
entering a password is only the first step
to gaining access; you also must enter a
randomly generated four- or six-digit code
sent to your pre-approved mobile device.

Not too long ago I was checking my
bank account via my computer, but my
browser was different from the one I
used before. The bank wanted to verify
that I was, in fact, the person who should
have access. So I instructed the bank’s
website to send me a verification code.
It came through on my iPhone, which
was upstairs, but it also came through
as a message on my Apple Watch. This
gave me the four-digit code right on my
wrist, and I was able to enter it into the
verification field and gain entry to my ac-
count. If you are worried about security
if your Apple Watch is lost or accessed by
someone else, rest assured that the watch
needs to be on your wrist and your pass-
code properly entered for it to operate.

APPLE WATCH HAS MADE ME
MORE MINDFUL OF MY HEALTH
AND ACTIVITY.

APPLE WATCH UNTETHERED
As long as you have your iPhone within
Bluetooth or extended WiFi distance of
your Apple Watch, there isn’t anything
it can’t do: It can handle telephone calls,
gather data from the Internet, send texts,
notes, and e-mails, etc. Basically, it’s an
extension of the iPhone. But there are
some things the Apple Watch can do
without an iPhone present. For instance,
you can still use it to track your steps and
workouts (but without GPS capability),
you can use its Apple Pay function.

If you have a Bluetooth headset or speak-
ers linked to your Apple Watch, you can
play music. (Apple Watch holds up to
2 GB of audio; it also has built-in speak-
ers, but they’re not very good.) Without
the iPhone you can’t make telephone
calls, but you can see who has called re-
cently and read texts that have been re-
ceived. You can even listen to voicemail.

Other features that work without the
iPhone present include the timekeeper
and watch functions, the world clock,
the alarms, the timer and the stopwatch,
the exercise tracker and heartbeat track-
er, and the workout application (again,
without GPS). You can also access any-
tHING that is already downloaded, such
as mail, calendar, and messages. Basi-
cally, the Apple Watch syncs with the
iPhone and holds current data as of the
last syncing with that iPhone. You can’t
get new messages or data, but you can
get information from the last time the
sync occurred.

USING MY APPLE WATCH
I now have been using my Apple Watch
every day for more than two months.
What I have found to be true for me—
and what I have seen in other reviews—is
that instead of hauling out my iPhone
anytime I want to receive or send a text,
e-mail, or phone call, I do most of these
things on the Apple Watch. My iPhone
stays in my briefcase or purse—and the
intrusion is minimized.

This is the first Apple Watch and
software, and no doubt improvements
will be made in the future, but I have not
noticed too many problems at all. Some
people questioned whether battery life
would be sufficient for it to run all day. I
haven’t found this to be a problem. When
I plug it in at night, it usually has 35 per-
cent power remaining. Just like any other
computer, however, the Apple Watch
does need to be restarted every now and
then when it seems to be lagging.

Will Apple Watch be a good fit for
you? Apple’s website (apple.com)
provides a host of short videos on the
watch’s features, as well as quite a few
downloadable articles. Checking out this
information might be wise before you
run out to get your own Apple Watch.
Personally, I do find the Apple Watch has
made me more mindful of my health and
activity. And it’s saved me from running
upstairs every time my iPhone rings.
WHAT I WISH I HAD KNOWN ABOUT APPELLATE PRACTICE

By Dineen Pashoukos Wasylik

As appellate practice is a great niche for lawyers who love to write, love to tackle hard legal questions, love the minutiae of following procedural rules, and love the thrill of being grilled by a panel of judges. Because I am a self-proclaimed rules geek and board certified in appellate practice by my state bar, I expected to find it easy to run my own appellate practice after being at larger firms for more than a decade. The past year as a solo appellate practitioner has taught me a great deal, however, not only about appellate practice but also about the business of appellate practice. Here are some of the things I wish I had known a year ago.

Have a reader. No matter how good of a writer and editor you are, it is impossible to catch 100 percent of the mistakes in your own work. Even if you are a true solo with no staff, you need to have someone else read your final drafts. It doesn’t have to be a lawyer—a non-attorney often can spot not only typos but impenetrable language. I rely heavily on both my spouse and my assistant to ensure my written arguments are typo-free and make sense to someone not immersed in the case.

You need systems. Appeals follow a fairly standard life span, from notice of appeal to record compilation to briefing to oral argument. But there are traps for the unwary, and the consequences of missing a deadline are devastating. Systems and checklists are key to ensuring every rule is followed every time, especially for a solo.

Invest in technology. Technology makes it easier than ever for a solo lawyer to compete with larger firms for appellate work, but to be competitive solos must invest the time and money to use technology to their advantage. You can’t be an appellate lawyer today without understanding how to work with PDF files—even the U.S. Supreme Court is moving toward requiring PDF filing. And aside from the briefs, records are often electronic. Some courts are now requiring not just a printout-style PDF, but a dynamic brief with internal links and cross-references. You can’t get away with using just a PDF reader. Invest in a robust PDF program, such as Adobe Acrobat Professional, that allows you to add bookmarks, set cross-references, and convert documents to be computer readable by optical character recognition (OCR). Learn how to annotate and take notes directly on PDFs. Moreover, be sure to know your word processor and its functions for styles, tables of authorities, and tables of contents. While it is certainly possible to create appellate briefs without utilizing these tools, solos save time and frustration by using technology.

It’s about relationships. At the beginning of my appellate career, I was in a larger law firm and all my appeals were generated in-house from lawyers I knew and worked with at the trial level. When I struck out on my own, I realized I had been spoiled by being in on the cases from the start. As a solo, I started getting requests to take on appeals from lawyers I did not know well, along with requests directly from potential clients. I quickly learned that the best legal theories in the world don’t do any good if they aren’t properly preserved. Building relationships with well-trained trial counsel will save you hours of time on client intake. When certain lawyers refer cases to me, I know the record is there, and my intake process is shortened significantly. Building these relationships by meeting and networking with other lawyers takes a lot more time out of the office than I expected.

Your job starts in the trial court. As you are building relationships with trial lawyers, you will ultimately make your own job easier if you work with trial counsel at the earlier stages of their cases. Educate other lawyers on the art of preservation and provide research and brief-writing services at the trial level on important issues that may yield an appeal. Finding ways to be helpful to other solos at the front end of their litigation work will provide you with better appeals when it is your turn to shine.
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