APPELLATE PRACTICE
AMERICAN BAR ASSOCIATION SECTION OF LITIGATION

Summer 2016, Vol. 35 No. 4

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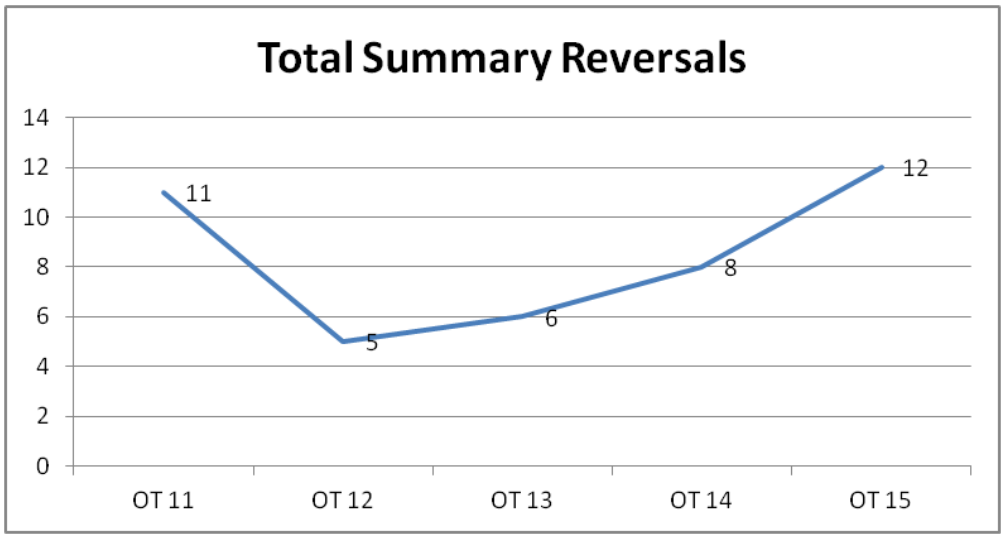
The Supreme Court's Summary Docket: Highlights, Trends, and Statistics

By Ryan J. Watson – August 23, 2016

High Court aficionados aside, lawyers and the public can be guilty of giving scant attention to the Supreme Court's summary decisions, which are issued without full briefing or oral argument. These summary decisions should not, however, escape notice. An examination of the summary docket from the Court's five most recent terms brings into focus the particularly prominent role that summary reversals had in the just-concluded 2015 Term. Moreover, delving into the substance of this term's summary decisions reveals an array of hot-button issues that prompted vociferous dissents.

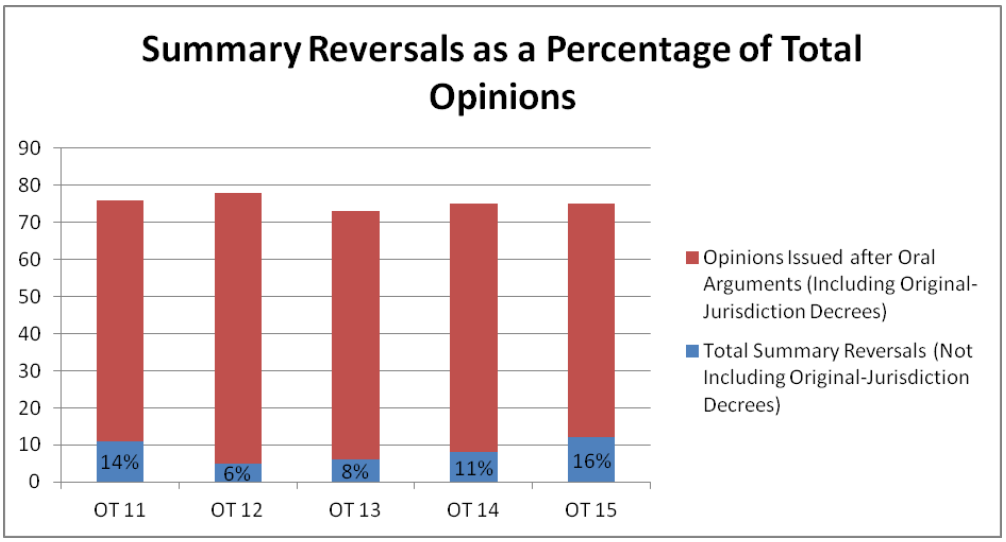
Revving Up the "Summ Rev" Docket

The Court actively engaged in summary decision making this year. In the 2015 Term, the Court issued 12 summary reversals—the most in the last five terms. As a reference point, this number exceeds the output from the Court's summary docket in the 2012 and 2013 Terms *combined*.



To drive home the importance of this term's summary docket, consider this: The Court decided approximately one out of every six decisions this term—16 percent—via its summary docket. The last time the Court came within shouting distance of that figure was four years ago, when the Court issued 14 percent of its opinions through its summary process. And since then, the summary docket has constituted only 6 percent, 8 percent, and 11 percent of the total opinions

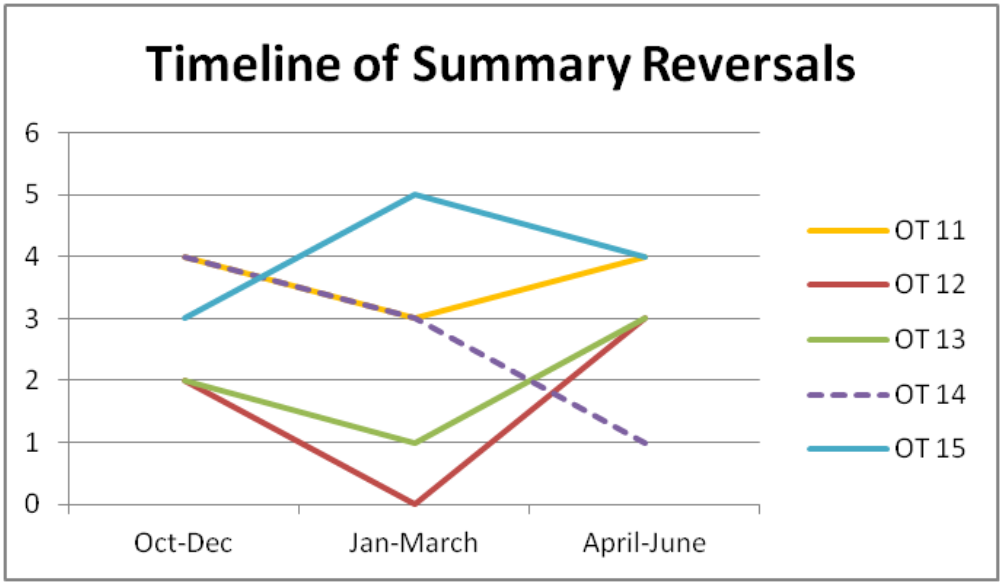
issued after oral argument. Accordingly, this term represents a material increase in the number of summary decisions, as compared to the past few terms.



At first blush, it is tempting to hypothesize that the eight-justice Court ramped up its summary decisions after Justice Scalia's death in February. And, at a superficial level, there is evidence to support this hypothesis: The Court issued *seven* summary reversals from March through June, the highest number issued during that time frame in recent years.

On closer inspection, however, it is far from clear that the uptick in summary decisions should be attributed to the dynamics of an eight-justice Court. Three of the seven summary decisions released after Justice Scalia's death—*Wearry v. Cain*, *V.L. v. E.L.*, and *Caetano v. Massachusetts*—had been distributed for the Court's Conference prior to his passing. This means that all nine justices had likely discussed these three cases. In fact, there is a real possibility that the Court already had voted to summarily reverse in these three cases prior to Justice Scalia's passing.

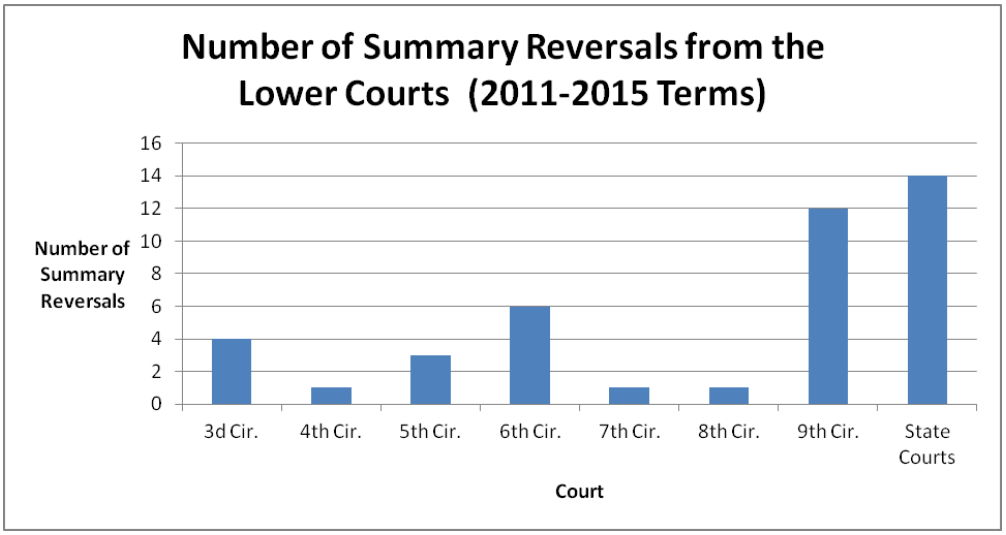
If the three cases noted above are grouped with the other summary decisions from the January–March time frame—that is, if the Court's summary decisions are grouped into trimesters—then the Court's summary output from the third trimester is not out of proportion to other terms. The line graph below demonstrates, for example, that the Court issued four summary decisions in April–June in both the 2011 and 2015 Terms. Thus, although this term's summary docket was especially robust, there is good reason to conclude that the pace of summary decisions from the nine-justice Court and the pace at which the eight-justice Court churned out summary decisions are similar.



The Lower Courts That Provoked the High Court's Ire

The favorite parlor game of summary docket watchers is predicting *which* lower courts will provoke the ire of the High Court during a given term. This year's answer: the usual suspects. That is, this term did not materially deviate from the recent pattern as to which courts are frequently on the receiving end of summary reversals.

Over the last five terms, the Court has summarily reversed the Ninth Circuit and state courts the most; the Ninth Circuit has shown up on the summary reversal list 12 times, and various state courts have been summarily reversed 14 times. Next on the list are the Sixth Circuit (six summary reversals) and the Third Circuit (four summary reversals). The Fourth, Seventh, and Eighth Circuits round out the list with one summary reversal each, while the other circuits have escaped unscathed.



Consistent with recent terms, state supreme courts and the Ninth Circuit suffered the most summary setbacks in the 2015 Term—with six reversals and three reversals, respectively. Unsurprisingly, the Sixth Circuit came next on the list, with two summary reversals. The only other circuit to be summarily reversed this term was the Fifth Circuit, with a single reversal.

One question, which is beyond the scope of this article, is *why* certain circuits are the subject of more summary reversals than others. In other words, do certain circuits produce higher-quality decisions than others, thus reducing the probability of summary reversals? Or, alternatively, is the summary-reversal rate correlated to the quantity or subject matter of decisions from the various circuits? In any event, this year's evidence confirms that certain circuits *are* more likely to be summarily reversed than others.

The Subject Matter of the Summary Docket: Not Just Habeas

Many attorneys perceive the summary docket principally as the home for habeas issues. And that is true, to some extent. In the past five terms, 17 of the Court's 42 summary reversals—40 percent—involved habeas issues. But the Court wrestles with a host of issues in the other 60 percent of its summary opinions.

Apart from habeas issues, the next most frequent category of summary reversals involves lower court decisions that fail to hew to Supreme Court precedent in other areas, ranging from due process to attorney fees and from election law to the Fourth Amendment. In addition, the Court decides approximately one qualified immunity case per year, as well as an arbitration case every year or two. The issues addressed in other summary decisions run the gamut.

The 2015 Term affords excellent examples of important non-habeas cases resolved through a summary reversal. Three cases illustrate the point: *Mullenix v. Luna*, 136 S. Ct. 305 (2015), *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), and *V.L. v. E.L.*, 136 S. Ct. 1017 (2016).

Police use of force. In the heat of summer 2016, few issues are more hotly debated than the contours of the proper use of force by police. In *Mullenix*, the Court took up that highly scrutinized issue via a summary decision that arose out of a police trooper's qualified immunity argument. 136 S. Ct. at 307. The key facts: A suspect fled after police attempted to execute an arrest warrant. This resulted in a high-speed car chase in which the suspect twice called 911 threatening to shoot police officers if they did not end their pursuit. *Id.* at 306. After an 18-minute police chase—but prior to the use of police spikes—Trooper Mullenix fired six rifle shots at the fleeing vehicle in an attempt to disable the car. *Id.* at 307. The suspect was shot in the chest four times and died as a result. *Id.*

Although the lower courts denied the officer's motion for summary judgment, the Supreme Court reversed the Fifth Circuit's decision on the basis that qualified immunity must be determined "in light of the specific context of the case, not as a broad general proposition," and the officer must "act[] unreasonably in these circumstances beyond debate." *Id.* at 308, 309 (internal quotation marks omitted). The Court compared the facts of this case to analogous precedent and ruled in the trooper's favor because "qualified immunity protects actions in the hazy border between excessive and acceptable force." *Id.* at 312 (internal quotation marks omitted).

Second Amendment. The right to bear arms is another high-profile issue that the Court recently addressed through the summary docket. *Caetano* arose out of a state-court conviction for possession of a stun gun. The defendant appealed on the ground that the conviction violated the Second Amendment. 136 S. Ct. at 1027.

The Supreme Court vacated and remanded the judgment because the state court misapplied the landmark Second Amendment decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). The High Court's summary reversal underscored that, contrary to the state court's view, *Heller* did not foreclose Second Amendment protections for arms that were unavailable at the time of the founding or for arms that are not traditionally used in war. *Caetano*, 136 S. Ct. at 1027–28. Accordingly, the Court reversed the decision of the Supreme Judicial Court of Massachusetts.

Same-sex adoption. The adoptive rights of same-sex parents were at issue in *V.L.* That case arose out of a custody dispute over children that same-sex partners raised together during a relationship spanning 1995 to 2011. 136 S. Ct. at 1019. Through reproductive technology, E.L. gave birth to twins in 2002, and a Georgia court granted V.L. adoption rights as a second parent through E.L.'s consent and without "relinquishing her own parental rights." *Id.* After the parents

broke up, V.L. sought enforcement of visitation rights in her new home state, but an Alabama court ruled that "full faith and credit" need not be granted to the Georgia judgment because the original court allegedly lacked jurisdiction. *Id.* at 1019–20.

The Supreme Court noted that "full faith and credit" must be afforded so long as jurisdiction was proper, and it further emphasized that a "State may not disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits." *Id.* at 1020. On summary review, the Supreme Court found that the Georgia adoption statute, upon which the parental rights had been granted, was not of a jurisdictional nature. It therefore reversed the Alabama Supreme Court's decision. *Id.* at 1021–22.

Fractured Decisions

In the 2011–2014 Terms, the Court's 30 summary decisions prompted only four dissents and one concurrence. But this year, the Court's summary decisions fractured more frequently than usual: Four dissents and two concurrences were filed in summary opinions in this term alone. And this included some vociferous opinions.

Recall that in *Mullenix*, the Court ruled in favor of the trooper who shot the fleeing suspect because "qualified immunity protects actions in the hazy border between excessive and acceptable force." 136 S. Ct. at 312 (internal quotation marks omitted). This opinion spawned two additional opinions. Justice Scalia penned a separate opinion to clarify that this case did not involve "deadly force in effecting an arrest" because the officer's force, although "sufficient to kill," was not targeted at the person, but rather the fleeing vehicle. *Id.* at 312–13 (Scalia, J., concurring in the judgment). But the real fireworks came in Justice Sotomayor's solo dissent. Continuing her focus on criminal law issues—and lashing out rather harshly at a majority opinion that did not prompt any other justice to note a dissent—Justice Sotomayor opined that there was no "governmental interest in the use of deadly force" in this case. *Id.* at 314 (Sotomayor, J., dissenting). She further contended that the inquiry surrounding the governmental interest should not have focused on "*whether* the car should be stopped [but] rather . . . *how* the car should be stopped." *Id.* at 315. And, in stark language, her dissent described the majority decision as "sanctioning a 'shoot first, think later' approach." *Id.* at 316.

Another opinion discussed above—the stun gun case from Massachusetts—featured a separate opinion. This time, Justice Alito filed a lengthy and strongly worded opinion that concurred in the judgment. Labeling the state court's rationale "a grave threat to the fundamental right of self-defense," Justice Alito, whose opinion was joined by Justice Thomas, provided an in-depth review of the state court's misapplication of *Heller*. *Caetano*, 136 S. Ct. at 1033 (Alito, J., concurring in the judgment). Justice Alito's concurrence also focused on the story of the defendant who used the stun gun as a deterrent against her abusive boyfriend. *Id.* at 1028. His opinion reinforced that "the pertinent Second Amendment inquiry is whether stun guns are

commonly possessed by law-abiding citizens for lawful purposes *today*." *Id.* at 1032. And his concurrence concluded with a stern warning against Second Amendment violations, especially in cases of nondeadly weapons—weapons that already strike a balance between advocates of self-defense and those who oppose deadly force. *Id.* at 1033.

Moreover, in several of this term's summary reversals, justices wrote separately to express strong disagreement about the Court's decision to forgo full briefing and oral argument. For example, in *Lynch v. Arizona*, 136 S. Ct. 1818, 1820 (2016), the Court summarily reversed the Arizona Supreme Court because that court erroneously concluded that a defendant did not have a due process right to inform the jury of the possibility of a different sentence. In dissent, Justice Thomas criticized the majority for a "remarkably aggressive use of [the Court's] power to review the States' highest courts." *Id.* at 1822 (Thomas, J., dissenting). Underlying his critique was the fact that the Court had not heard a "full briefing and argument" and was supporting its holding with a Court decision that had not produced a majority opinion. *Id.* Similarly, in *Kernan v. Hinojosa*, 136 S. Ct. 1603, 1606 (2016), the Court summarily reversed the Ninth Circuit because it did not apply a deferential standard to a habeas petition. In dissent, Justice Sotomayor maintained that the majority's conclusion was not supported by the "strong evidence" required to summarily reverse a lower court. *Id.* at 1607 (Sotomayor, J., dissenting).

Keywords: litigation, appellate practice, U.S. Supreme Court, summary decisions

Ryan J. Watson is a former law clerk to Justice Alito and an attorney at Jones Day in Washington, D.C. He extends his thanks to John Vivian and Ariel Volpe for their excellent research. The views and opinions set forth herein are the personal views or opinions of the author; they do not necessarily reflect views or opinions of the law firm with which he is associated.

The Art of Evaluating an Appeal: 10 Hard-Learned Tips

By Sylvia H. Walbolt – August 23, 2016

Your client lost at trial and boy is it mad about that. So, your directions are to file an immediate appeal and get it fixed. Of course, you need to advise the client of any posttrial hoops that must be jumped through for preservation purposes before filing that appeal. Hopefully the issues were set up well at the trial level and the case was tried with an eye toward a potential appeal. But, good appellate counsel always should take a step back and provide the client with an objective evaluation of whether an appeal truly is a wise course of action.

An appellate lawyer naturally wants to pursue the appeal and try to get a reversal. And the fact is, appeals often are successful and achieve meaningful relief from adverse trial results, especially if the appellant is careful in its selection of the issues for appeal. Many good articles have been written about effective appellate advocacy, and following such advice will strengthen the odds of winning on appeal.

But that is not this article. This article is limited to one discrete proposition: not every adverse trial result should be the subject of an appeal. This article hopefully will provide practical guidance on evaluating whether an appeal should be pursued.

The initial and most important step to that determination is an evaluation of the substantive merits of the arguments that could be advanced on appeal. Those arguments may be so strong that this evaluation alone answers the question whether to appeal.

There usually are, however, additional, strategic considerations that all too often are ignored in the heat of the initial dismay over the trial result. Although there always are cases where there can be no question about the absolute need to appeal, some appeals unfortunately are simply a waste of the client's time and money.

Here are 10 tips on how to determine when to make the tough recommendation that the client cut its losses and run, rather than appeal. Much of this may sound basic and obvious, but even the most experienced practitioner can benefit by going back to the basics, which are all too easy to forget while moving forward as an advocate. Indeed, these tips arise from hard lessons learned over the course of half a century of appellate practice.

Although these tips are written for an evaluation by an appellant's counsel, it goes without saying that an appellee's counsel also should do such an evaluation in order to advise their client whether to seek to settle the case, despite the victory at trial, in order to avoid an appeal; just look at these tips from the other side of the possible outcomes and reasons for those outcomes. After all, it never—well, hardly ever—can be said an affirmance is an absolute slam dunk. Neither is a reversal.

1. Respect the Odds
Start with the general percentage of reversals in the particular appellate forum, and tie that rate as closely as possible to the nature of the appeal that would be taken—i.e., how many civil jury verdicts are reversed annually. In most appellate forums, the house—the trier of fact—usually wins. Recognize that brutal reality, and tell the client if it is simply throwing good money after bad by pursuing an appeal.

2. More Likely Than Not Simply Means 51 Percent, Not a Guaranteed Win
Clients always want a specific percentage estimate as to the likelihood of success on appeal. And, notwithstanding all the caveats accompanying an estimate, any number given usually will be taken as gospel from on high.

My former mentor, the late Alan Sundberg, who earlier served for many years on our state supreme court, always told clients, "I'm not good enough to give a number; I simply can say that a reversal is 'more likely,' or 'less likely,' than not." But, we often found that clients translated a "more likely than not" opinion into a certain win and were shocked when the anticipated appellate win did not occur. To help forestall that mindset, the client needs to be reminded of the general odds against reversal when any estimate of chances on appeal is given. In doing so, appellate counsel should scrupulously follow the next tip.

3. Acknowledge the Downside of a Loss on Appeal
Sobering facts often flow from a loss on appeal, such as imposition of the other side's appellate fees, substantial interest on the judgment, bond premiums, and the like. The downside of a loss on appeal needs to be highlighted for the client during the posttrial clamor. Even apart from its own attorney fees to prosecute the appeal, it may have other financial exposure in the event of a loss on appeal. Painful as the loss may be in the first instance, those potential additional costs need to be assessed. The client needs to consider whether it is time to stop the bleeding.

In addition, an appeal may draw a cross-appeal on issues such as the pretrial dismissal of certain claims, which could result in additional monetary liability for the client. Of course, if an appeal on that issue is taken first by the prevailing party, that usually will warrant the filing of a cross-appeal from the adverse judgment, regardless of the considerations discussed herein, if for no reason other than to give the appellate court the full picture of the case and an opportunity for

that court to split the baby and leave the parties in the same position after the trial judgment. But if that has not occurred, the downside of a possible loss on any cross-appeal that might be filed if the client appeals needs to be evaluated and taken into account in determining whether to file an appeal in the first instance.

The precedential implications of an adverse, published appellate decision on the issues in the case also need to be explained to the client. An adverse jury verdict, or even a trial court's summary judgment (which the client might be able to get vacated as part of a settlement in exchange for no appeal) is easier to deal with in future cases, and certainly is not as significant as an adverse decision on appeal, especially one that affirmatively rejects the position advanced for reversal and graphically explains why.

Finally, there always is a risk on appeal that the court will carve out an exception to the doctrine at issue in the case, especially if the equities do not favor its application under the facts of the particular case. Or, that the court will change the law altogether. Is the record in this particular case the best possible record for presenting the arguments on issues that may be recurring issues for the client? If not, an appeal of such issues in this case may be dangerous.

4. Consider the Difficult Logistics of Persuasion as an Appellant

I once heard Federal Circuit Judge Michael Boudin speak about the three things that most surprised him as a new judge. The first was how overwhelmed appellate judges are with briefs. As a result, they never—well, almost never—can know the case as well as counsel does. Consequently, the appellant's lawyers need to consider whether they can win a reversal if the appellate court does not know the case as well as counsel does.

Appellate counsel also must think about how many issues they have to raise and prevail on to get meaningful relief by an appeal in the case. How many pages of briefing will that require? Can it be done concisely? What will happen on the short oral argument, if any, that will be afforded? Can the necessary points be made persuasively in short order? If not, the odds of a reversal on appeal go down ever more.

Counsel also must factor in the reality that appellate judges inevitably become jaded. No matter how terrible the client believes the error and result was in its case, the judges have heard this before in case after case. That is especially the case in today's appellate world, where strident hyperbole and over-statement seem to be the new norm. Judges constantly are hearing the most extreme and pejorative statements, and they tend to get a deaf ear to them.

As a result, counsel must carefully and objectively consider whether a proper statement of the case in a nutshell—as it most likely would appear in the court's opinion—would lead to a

decision reversing the judgment below. In this regard, the client needs to understand and appreciate that the facts must be taken in the light most favorable to the other side as the prevailing party at any trial. If, on the other hand, the appeal is from an adverse summary judgment, so that the facts can be stated in the light most favorable to the client, that almost certainly should make the burden of persuasion on appeal easier. This tip leads to the next tip.

5. State the "Case in a Nutshell" and Test It with Someone Cold to the Case

Preparing a statement of the "case in a nutshell" and running it by some folks cold to the case can provide the splash of cold water necessary to arrive at a proper view of the actual strength of an appeal. Listening to what they are saying, however nicely they do it, is the key. They may well be seeing the case in the same way busy appellate judges, with stacks of briefs they must read, will view it. Remember once again, the appellate judges will not know this case as well as appellate counsel and the client know it, and that necessarily impacts the chances of success on appeal.

This is why, of course, it is important to do this exercise early. Not only can it help in deciding what issues to raise, it may also lead to the realization that a settlement of the case may be better than an appeal. Finding out at a moot court for oral argument that the mock judges do not like the arguments they are hearing as to why they should reverse is not the best time to learn that. Running it by folks earlier, rather than just working with other believers in the arguments, can be helpful on numerous levels, including evaluating whether seeking a settlement, or even simply accepting the adverse result at trial, may be the lesser of multiple evils, however distasteful that option may be to the client.

6. Don't Forget or Ignore the Standard of Review

A second thing Judge Boudin was surprised to realize upon going on the bench was the critical importance to appellate judges of the standard of review. An appellant's counsel need to be mindful of this and not simply assume that strong substantive legal arguments with good facts will carry the day on appeal.

The point is, appellate courts are error-correcting courts, and their charge is not to ensure that the "right" result is reached in the case. Clients often cannot believe that, and an appellant's counsel must do their utmost to bring this truth home to their client up front. That is why being self-disciplined in selecting the issues for the appeal, with the best possible standard of review, is so essential.

By the same token, once on appeal, that standard of review must be satisfied. The client needs to appreciate how difficult it usually is to establish that a trial court abused its discretion, especially as to matters it saw or heard firsthand at trial.

The client also needs to understand that even if error is in fact demonstrated, that is not enough—it must be demonstrated that the error was not harmless. Harmless error often is in the eye of the beholder and may be impossible to predict for some as yet unknown panel of judges, which leads to the next tip.

7. Never Discount the "Inertia" Effect

There is a natural, whether overtly admitted or not, reluctance of appellate courts to require a do-over, with all the labor and cost that would entail. If the appellate court feels at some visceral level that the result will be the same after a reversal, it likely will find a way to conclude reversal is not necessary. Why force the parties and the court to do it all over again if the result seems to be the natural result in the case 90 times out of 100? All the more so if the court believes that is the right result on the facts of the case, especially if the other side has established it was injured, requiring relief.

The whole decision-making process of an appellate court is designed to balance the need for finality against the need for quality and a fair trial in the trial court. "Inertia" is merely a shorthand way of saying appellate judges intuitively feel that merely concluding a dispute often has great value. Beating that "inertia" is a matter of convincing the court that the "quality" of the judgment is so low that the importance of quality trumps the importance of finality.

That is why showing "harmful error" is so critical. The more the judgment error seems harmful, the more quality wins in the balance. Counsel for an appellant accordingly must take a hard look at whether they can tilt the balance of "finality" in favor of correcting a poor-quality judgment. This squarely implicates the next tip.

8. Recognize the "Bad Facts" Syndrome

It has long been an axiom that "bad facts make bad law." But it is all too easy for appellate counsel to shove the bad facts to the back of their mind and trust that strong law will result in a win on appeal. The "bad facts" maxim is as true today as ever, however, and often can lead to a result that seems to run counter to the applicable law. In jurisdictions like Florida, where its appellate courts can, and often do, affirm by a per curiam decision without opinion, it does not even make bad law, as the decision is deemed to be without precedential effect.

The lesson here is for appellate counsel never to forget—or let the client forget—the "bad facts" of the case, no matter how strong the law may seem to be in the client's favor. Would the man on the street think the result sought on appeal is the right and proper result in the case? If not, the woman on the bench may not think so either and may look for a way to distinguish, or just ignore, the law cited on appeal; or, even change the law to avoid a harsh result under the

particular facts of the appeal. Appellate counsel must factor this possibility into their evaluation and determine just how "bad" their facts are compared to just how "good" their law really is.

9. Guard Against the "Wishful Thinking" Danger

In the same vein, it is essential that appellate counsel evaluating the potential of a reversal on appeal make sure they have not fallen in love with their own arguments. When writing as an advocate to persuade the court, lawyers inevitably tend to persuade themselves that they are absolutely right. That is only human. And the client reading it will be nodding his or her head in agreement at every step of the way and applauding counsel's advocacy on his or her behalf.

In evaluating the case as it will be presented on appeal then, it is critical that appellate counsel put the advocate's hat aside at that time and put on an "appellate judge's hat" instead. They need to think worst case and objectively evaluate the likelihood of success on appeal in light of everything, including all "bad facts."

Can the appellate court find the error was not properly preserved? Can the appellate court make the dreaded holding that "even though we might not have ruled as the trial judge did, we cannot say that ruling was an abuse of discretion"? There is that pesky standard of review again! On the even more dreaded holding, "we agree it was error to so rule but find the error was harmless on this record." There are those bad facts again!

Better to think in the first instance about all the potential ways the appellate court could affirm, rather than to have an affirmance come as a nasty surprise to the client in the end. Remember, the arguments that would be advanced on appeal have been rejected once (unless they are unpreserved, in which case there is an entirely different problem). It always is possible those arguments will be rejected again. Seeking a settlement, rather than pursuing an appeal, may be in the client's best interests.

10. Even a Blind Hog Sometimes Finds an Acorn in the Forest

Appellate counsel must avoid the common mistake of assuming that a reversal is in the can because the trial judge is not well regarded and has a high rate of reversals. It likely is not a 100 percent rate of reversal, as every judge gets affirmed on occasion. This case could be the occasion where the appellate court thinks the trial court actually got it right for a change and is happy for the chance to affirm this judge.

Conclusion

Some cases simply cannot be settled on any realistic terms or be allowed by the client to stand without challenge. Those cases are easy—the client has to appeal and appellate counsel has to do the best they possibly can to maximize the chances on appeal. After all, the appellate court exists

precisely to cure prejudicial errors in the trial court, and reversals are obtained in many cases, sometimes even resolving the dispute with finality in the appellant's favor as a matter of law—the best possible result on appeal.

Some cases, however, can and should be settled without an appeal, even if it dismays the client to even consider doing so. To this end, appellate counsel owes it to the client to help it understand the risks and downside of the appeal, the likelihood of success, and the likely nature and extent of relief resulting from the appeal. Returning to the basic realities of the appellate world is key to that exercise.

Then, having worked through all these steps, it is important to return to the odds on appeal. They may tip the scales on seeking a settlement or not. It may be helpful to put a decision-making tree on paper—evaluating mathematically the probability of success on each issue and the costs of going forward with an appeal. It never can be precise but may provide a sobering indicator for the client.

Keywords: litigation, appellate practice, likelihood of success, financial exposure, precedential implications, case in a nutshell, harmful error, settlement

Sylvia H. Walbolt is a shareholder at Carlton Fields Jorden Burt, P.A. in Tampa, Florida.

What Do Appellate Clinics Do?

By Thomas Burch – August 23, 2016

A few years ago, the *New York Times* published an article titled "What They Don't Teach Law Students: Lawyering." Among other things, it chastised law schools for emphasizing "chin-stroking" scholarship over teaching "practical" skills, ultimately claiming that not enough schools trained students to provide actual legal services when they graduate. The not-so-subtle point, of course, was that law schools were failing in their basic mission of teaching students how to practice law.

Regardless of whether you agree with that point, the article also noted that many law schools are making at least one change to address the perceived problem: increasing the number of legal clinics offered to students. In particular, it noted that clinics are a "growing presence on nearly every campus," with many getting "high marks for quality and participation." These clinics, the article recognized, teach the types of skills that better prepare students to enter the legal marketplace.

Even so, many lawyers who are hiring these students know little about what it is that clinics do exactly. For example, since I began teaching in the Appellate Litigation Clinic at the University of Georgia School of Law (UGA), I have frequently encountered questions about the nature of our clinical work. With that in mind, this article hopefully sheds a little more light on the topic, specifically in the context of clinics that focus on appellate practice.

Appellate Clinics—A Growing Presence with Diverse Emphases

Appellate clinics, like clinics in general, have been a growing presence on law school campuses over the last decade, and as their presence has grown, so has the diversity of their work. For example, some schools (like Stanford and UCLA) have added appellate clinics that focus primarily on work before the U.S. Supreme Court, while others (like Georgetown) have added clinics that focus primarily on work before state and federal courts of appeals. Still others (like NYU and Cornell) have added appellate clinics that focus on a particular substantive area such as bankruptcy or immigration. Pick an appellate court and a substantive area of litigation, and an appellate clinic probably exists that is willing and competent to help clients in need of representation.

The rise in appellate clinics over the last 10 or so years is attributable to employer and student demand. Specifically, because they teach students critical advocacy skills (both oral and written), they help satisfy employers' calls for greater practical training, and because they teach these skills in an attractive, real-world setting (before state and federal courts of appeals, including the U.S. Supreme Court), they satisfy students' desire for an engaging, practical learning environment. In other words, they filled a need, and as the *New York Times* article noted, they generally have done so with "high marks."

How Appellate Clinics Get Their Cases

No uniform strategy exists for obtaining cases. Some clinics have cases referred to them by attorneys who seek clinics' help. Some actively pursue cases that align with their educational mission. Some partner with nonprofit organizations that help clients find representation. Some have cases appointed directly by the courts. And some do a combination of all of the above.

At UGA, we typically receive three to four new case appointments each year from the Fourth, Eleventh, or D.C. Circuit. The substantive nature of the cases varies. Most involve habeas claims, but we have also taken cases involving Title VII, the False Claims Act, and section 1983, to name a few. The courts usually appoint us at the beginning of the academic year, allowing us to brief and argue each case within that year. But sometimes we are appointed mid-year, meaning that the case will carry over to the next year's group of clinic students.

Sometimes, too, our cases arise organically from existing or former clinic clients. For example, we may win a remand on appeal, but then lose before the district court, requiring us to appeal again. Or the Supreme Court may issue an opinion that helps a client who was unsuccessful in our original appeal, prompting us to either file a new habeas petition or apply for leave to file one. The timing of these cases is more unpredictable than our court-appointed cases, requiring a little flexibility. But they add balance to our caseload, ensuring that we have plenty for each year's group of clinic students to do over the entire course of the year.

What the Clinic Students Do

Because different appellate clinics have different emphases, student experiences across clinics can vary. But, given the basic nature of the work being performed (writing briefs and making oral arguments), those experiences are on a general level somewhat similar.

At UGA, we have between six and 10 students each year, with two to three students working on each new case. Together, the students and I review the record, identify issues to raise, outline our arguments, and begin drafting the opening brief.

The students usually prepare the initial draft. I then revise it, and they then revise my revisions. This routine may repeat itself two or three times for the opening brief and one or two times for the reply brief, depending on the complexity of the issues and the quality of the initial drafts. Along the way, we compile the appendix, ensure compliance with court rules, and update our research. The process essentially mirrors the process they will go through when working on similar projects in practice.

Once the opening and reply briefs are complete, we start preparing for oral argument. While the courts don't always grant argument, we prepare for it just the same, beginning with practice arguments before me and the other clinic students. Once we feel comfortable with our initial practices, we set up arguments before other faculty members and alums who graciously volunteer their time. In all, we may have eight to 12 practice arguments before arguing the case to the court of appeals.

What the Clinic Students Learn

Many have written about the value of clinical education, and I won't attempt to address in any detail the arguments that they have made. I'll simply say that I've seen students struggle with the difficulty of organizing a coherent argument out of a complex record. I've seen them recognize just how challenging writing can be and therefore how much time and thought have to be put into it. I've seen them work through the difficulties that arise when creating a joint work product. I've seen them realize the importance of deadlines and of being responsive both to me and to clients to meet those deadlines. I've seen them shake an opposing counsel's hand before and after arguments that we thought we might win and before and after arguments that we thought we might lose. I've seen them, in short, learn to become more professional, more responsible, more competent lawyers.

Every student who takes a clinic like this has the opportunity to work toward that basic goal. That's because working in a clinic is the closest they will come in law school to seeing what full-time law practice is actually like—all the highs, all the lows, all the demands. That exposure is great for developing the skills needed to meet the expectations that they will face after graduation, and it is a primary reason why taking a clinic (any clinic) can be so beneficial to students' future careers.

Fostering Interactions with Alums and Other Practicing Attorneys

Alums and other practicing attorneys may be involved in clinic work in multiple ways. They may review draft briefs, giving feedback before the final brief goes to the court. They may help students prepare for oral argument, shaping the argument that is ultimately presented. They may, if a case is remanded, help the clinic file pro hac vice in a

jurisdiction where the clinic supervisor is not admitted to practice. Or they may refer cases to the clinic or ask the clinic to draft an amicus brief. Whatever the role, these interactions can be some of the most valuable experiences that clinics provide to the students who take them because of the long-term relationships the interactions can foster.

Improving Access to Justice

Appellate clinics take complex cases for indigent clients and give them quality representation. Sometimes that involves addressing technical and complicated habeas questions that may be difficult for a pro se inmate to address on his or her own. Or sometimes it involves helping an employee pursue a Title VII claim—a type of appointed case that law firms often shy away from taking. Whatever the type of case, providing that representation helps both the clients and the courts.

Perhaps just as important, working in a pro bono capacity can help students recognize the importance of continuing pro bono work after they graduate. When they settle a section 1983 claim for an inmate who was assaulted in prison, or when they win an inmate an opportunity to lodge a new challenge to his or her conviction, or when they convince the president to grant an inmate clemency, they see the merit in providing representation to people who otherwise cannot afford it. In that way, clinics improve access to justice beyond just the clients they represent on a year-to-year basis. They have a long-term, lasting effect.

Final Words

Clinics, regardless of type, teach students how to practice law, helping to improve basic skills that are transferrable to any type of law practice. Clinics also strengthen ties with alumni and provide representation to clients who otherwise could not afford it. It should be no surprise, then, that they have become so popular over the last decade. And it should be no surprise if that popularity continues to increase over the coming years. Law schools increasingly want that to happen. So do law students. So do employers. And so do the clients whom clinics represent. Clinics are, on the whole, a positive for everyone involved.

Keywords: litigation, appellate practice, law school clinic

Thomas Burch is the director of the University of Georgia School of Law Appellate Litigation Clinic.

Building an Appellate Clinic

By Tillman J. Breckenridge – August 23, 2016

Reflecting on my first four years building the William & Mary Law School Appellate and Supreme Court Clinic (Clinic) into the mature program it is now, I can't help but think of the myriad challenges we faced, and the help I got meeting those challenges. Without the support of 36 students (30 enrolled in the Clinic, and six research assistants over that time), our dean, and numerous other faculty, the Clinic could never have achieved its numerous successes. There are many sources of potential support, and to all the lawyers out there itching to put a clinic together but who do not have the time, there are ways in which you can be the support.

The Clinic after Four Years

Most cases that come to the Clinic face a near-zero chance of success on appeal because the issues are complex, and the clients are either unrepresented or represented by counsel who may have a strong trial background but lack the experience or available time to effectively appeal an adverse ruling. Nonetheless, the Clinic has filed briefs and presented oral arguments that have (1) produced positive outcomes for our clients, (2) established important precedents affecting large swaths of the American population, (3) provided 30 students the opportunity to learn professionalism and appellate practice by working appeals all the way through the process, and (4) aided the media coverage, reputation, and brand recognition of the school. Among the Clinic's many successes are:

- The mayor of Philadelphia announced that, based on a ruling of the Third Circuit in a Clinic case, as well as another case, he would change Philadelphia's policy toward joint operations with the United States Immigration and Customs Enforcement (ICE). The Clinic represented three American citizens detained by the ICE for hours after determining they were American citizens out of a speculative fear they would tip off other cab drivers to the sting operation that had ensnared them. The Third Circuit ruled such detention was unallowable.
- The Supreme Court relied on the Clinic's amicus brief in *Riley v. California* and*United States v. Wurie*, the cell phone search cases, in which the Clinic represented criminal law professors and argued—based on the articles of William & Mary Law School Professor Adam Gershowitz—that requiring police officers to obtain warrants to search cell phones would not lead to significant loss of evidence because police could use Faraday bags, or even ordinary aluminum foil, to protect the data on the phones.
- The *National Law Journal* named a Clinic cert petition its Brief of the Week. The petition raised the—unfortunately still unanswered—conflict among the circuits over whether the detailed affidavits of indigent civil plaintiffs and criminal defendants should be presumptively sealed to prevent extortion, embarrassment, and identity theft.
- The Sixth Circuit ruled that taking a person from home confinement to jail is a change in conditions of confinement, triggering constitutional rights against such confinement.

The Clinic's Structure and Origin

There are many ways to structure an appellate practice clinic. Most law schools do not blend federal intermediate appellate court practice with Supreme Court practice. They have one clinic or the other, or sometimes both operating separately. I believe there is particular advantage to blending the work into one clinic. First and foremost, it gives participating students a full view of the entire appellate process. They get to work on the strategy of cases that usually present issues that may become cert-worthy and plan accordingly. Second, it offers a variety of experience. Some students are most excited to work on a cert petition. Others get their kicks with arguing a case. In the William & Mary Clinic, they may find themselves doing both. Third, it helps build a lasting relationship between the students and the clinic. I constantly receive emails from my former students asking me about their cases that are working their way through each level. The long arc of some of these cases binds the students through the years, and the Clinic itself.

One particular case, *United States v. Williams*, worked its way through each of my four classes so far. Thankfully for the client, no other students will have to work on the case. My first class found the case—a criminal matter presenting an issue that has vexed me since I was two years out of law school: at what point one *Terry* stop becomes two *Terry* stops, whereby the second stop must be supported by independent suspicion. My second class briefed the issue in the Fourth Circuit, as well as an alternative ground for reversal, on which the circuits were divided—whether a traffic stop may be extended for the purposes of engaging in a drug investigation. The case was set for oral argument, but then stayed pending the Supreme Court's resolution of *Rodriguez v. United States*. After *Rodriguez*, my third class engaged in supplemental briefing on how *Rodriguez* affects the question of whether there were sufficient indicia of drug activity during the traffic stop to extend it into a drug investigation. Then, finally, my fourth class argued the case, and thankfully, received a thorough, published opinion that explained how indicia of drug activity interact, and held that our client was subject to an unconstitutional extended detention.

Seeing the end of that case was bittersweet, because it left only the Clinic itself as a link between the coming year's students and all the students who came before them. It also yielded an opportunity to reflect on how far the Clinic has come. As I contemplated changing firms six years ago, I saw an opportunity to fill a void. A petition for a writ of certiorari had been denied in a case that I felt should have been granted. I looked up the petition and read it. I was disappointed in the poor quality. Right then, I knew that I would enjoy forming a clinic to pursue broad-reach appeals in the First and Fourth Amendment realms.

I was fortunate enough to have had an appellate clinical experience at the University of Virginia School of Law, and I could remember what I felt were its strengths and weaknesses. I relished the opportunity to build a clinic on a new model that retained the strengths and allayed the weaknesses of what I had seen before. I also relished the opportunity to teach again, almost a decade after I had taught First Amendment law and constitutional civil liberties courses at DePaul University. I missed teaching, and I missed the energy of interacting with students. I wanted to make an impact on the law, and I wanted to make an impact on some of the people who would shape it in the future. I also wanted the practice development opportunities a clinic could provide.

Over the next several months, I set out to design a new form of appellate clinic that worked at both the intermediate level and the Supreme Court level. I studied clinics from all over the country, and found none that blended the two. I learned about federal intermediate appellate clinics, and I studied the handful of successful Supreme Court clinics. I wanted to give my students the ability to see the full appellate process, and I wanted to give at least some of them the opportunity I had to argue a real federal appeal before they finished law school. I then looked for the ideal school at which to teach. I was, of course, limited by geography and whether a school already had an appellate clinic, but that still left several options. In the end, I chose William & Mary based on the quality of its students, my perception of its atmosphere, and the flexibility I felt it could provide. I made the right choice.

When I proposed the Clinic to William & Mary, it had shown clear support for clinical programming. Clinical Professor of Law Patricia Roberts, the head of clinical programs, was my first contact. I emailed her pretty much out of the blue, and I asked a William & Mary alum to follow up with an endorsement. The three of us had lunch shortly thereafter, and Professor Roberts was excited about my design from the outset. She provided invaluable advice about what to include in my written proposal, and she pressed me with tough questions she knew I would need to answer.

Professor Roberts and I then met with Dean Davison Douglas. Dean Douglas was skeptical of whether we could obtain the case load necessary to thrive under my plan, which eschewed the traditional method of going to the home circuit court and asking it for cases. Rather, we would scour the dockets for broad-reach First and Fourth Amendment cases. Thankfully, Dean Douglas had the humility to defer to his expert head of clinical programs, and the willingness

to take a risk on a program that could be a great boon to the law school's offering for students. He has been a champion of the Clinic ever since.

The Lifeblood of the Clinic: Support from All Corners of the Law School Community

Particularly as a course taught by adjunct faculty, the Clinic could not achieve these successes without outstanding support. The Clinic would not have gotten started without the support of Professor Roberts and Dean Douglas. The students are the largest source of support, particularly in terms of hours spent. When I ran my design of the Clinic by some professors at several schools, many expressed concern over the amount of time involved, insofar as it may take longer to rewrite student work than to simply do the work myself. Thankfully, I have had an outstanding group of students that very rarely turn in work requiring a significant rewrite.

The faculty also have been incredibly helpful. They have had open doors to the students to ask questions of the experts on particular subject matters during briefing, and a dozen or more professors have lent their time to students as judges on moot panels. Most students have mooted a case five or more times before their arguments, and that is wholly dependent on the strong support the faculty provide.

Some schools have full-time positions for faculty running appellate clinics, but for a part-time faculty member like me, firm support also is key. Clinical adjuncts must effectively convince their firms of the benefits of having a partner spend a large chunk of his or her time on pro bono cases. In the appellate realm, the cases help build brand recognition for the firm and help develop the reputation of the appellate practice. Some firms recognize this more than others, and that can affect the success or failure of a clinical program. I am very thankful for the support Bailey & Glasser has provided, as I know some colleagues at other firms would like to found clinics but are prevented by onerous and short-sighted firm metrics.

For anyone thinking about starting a clinic, or anyone running one now, a supportive law school environment is key to success. I encourage clinicians to evaluate from where they receive support, and evaluate from where they might receive more. Lawyers from outside the school could be a great additional source of support for almost any clinic. When I was at a larger firm, I was able to utilize associate help. Another course would be to team up with an organization. For instance, I would love to have a companion criminal appellate clinic that teamed up with a pro bono organization on the defense side, or the government on the prosecution side. Many such clinics exist around the country. A third course would be to find four experienced appellate lawyers who would team up with my four pairs of students to provide an additional viewpoint and sounding board for cases. So I encourage practitioners to contact their local law schools to see what help they can provide to a clinic of their interest. It has been an incredibly rewarding and fulfilling experience for me. And it would not be possible without a wide swath of intelligent and generous supporters.

Keywords: litigation, appellate practice, Supreme Court practice, law school clinic

Tillman J. Breckenridge is a partner at Bailey & Glasser LLP and an adjunct professor of law at William & Mary Law School.

Silly Lawyer Tricks V

By Tom Donlon – August 23, 2016

The latest column in our continuing series on real mistakes and misdeeds by real lawyers (or wannabes) on appeal.

***In re Crawford*, No. B270705, 2016 Cal. App. Unpub. LEXIS 3895 (May 24, 2016)**
This case arises in an unusual posture—a decision finding contempt by counsel before an appellate court. The shocking facts set out in the opinion demonstrate that the ultimate imposition of only a fine—without the imprisonment that the state statute also authorized—can only be viewed as magnanimous.

The opening paragraphs describing the history of the case grab the reader's attention. The decision reports that during a deposition in the trial court, the attorney (who represented himself) "threatened opposing counsel with pepper spray and a stun gun." *Id.* at *1. When the defendant moved to dismiss the action as a sanction for this outrageous conduct, the attorney "filed an opposition that was openly contemptuous of the trial court." *Id.* The trial court granted the defendant's motion and the court of appeals affirmed. Then the attorney filed his petition for rehearing, which became the basis of the contempt charge.

Under the heading "Count 1: Impugning the Integrity of the Court," the opinion goes on for pages quoting the repeated slurs against the court that appear in the attorney's petition for rehearing. *Id.* at *2–10. The attorney created his own derogatory name for the panel—"the Granddads of Anarchy"—and then repeated it continuously. The petition accused the judges of "purposefully misstating . . . the facts and bastardizing California law," which the attorney claims is "evidence of their endless corruption, bias and senility." *Id.* at *2. The petition referred to the judges as "feeble-minded nincom*poops*," "corrupt, pathetic, low-life scum of human refuse," "crusty, old corrupt codgers," "disgusting old, white corrupt Justices," and "corrupt, senile and morally bankrupt individuals." *Id.* at *2–6. (The opinion also quotes the attorney's repeated scatological references, which need not be repeated here.) The petition then attacked "this Reviewing Court's perverted bias, prejudice and unquestionable alliance [with the defendants]," and concluded by charging "that these three corrupt politicians *spawn anarchy* to the populace with their genuine lack of respect for the law specifically, and flaccid respect for humanity, in general." *Id.* at *7, *10.

As if that were not enough, the court's opinion includes a second series of quotes from the petition for rehearing under "Count 2: Falsely Stating the Appellate Justices Accepted a Bribe." *Id.* at *10–13. The attorney was not subtle in making this claim. He stated that the errors in the

initial opinion were so numerous, one has to "wonder out loud how much the Grandads of Anarchy were bribed by [the appellee]." *Id.* at *11; *see also id.* at *11–12 ("The only question left outstanding is '*how much*,' dear, old Grandads of Anarchy, did [the appellees] pay you to write this fiction-based fecal opinion?").

The decision points out that all these "statements were not made in the heat of a courtroom battle, but were deliberately made in a petition for rehearing." *Id.* at *14–15. Based on all this evidence, the appellate court had no difficulty in finding the attorney in criminal contempt, fining him the maximum $1,000, and referring the matter to the state bar. Only the report that the attorney was receiving "intensive treatment for various underlying issues," *id.* at *15, appears to have saved him from jail.

***Ritchie Capital Management LLC v. Costco Wholesale Corp.*, No. 15-3294, 2016 U.S. App. LEXIS 12114 (2d Cir. July 1, 2016)**

This case concerns the more prosaic, yet not unimportant, question of preserving issues for appeal. In the trial court, the defendant corporation successfully moved to dismiss for lack of personal jurisdiction. On appeal, the plaintiff made only one argument—that personal jurisdiction existed because the defendant was registered to do business in the state. However, the Second Circuit points out, "[i]t is undisputed that [the plaintiff] did not raise this argument below." *Id.* at *2. Because the plaintiff "has presented no explanation for why it did not make this argument before the district court," the court held the argument was waived and affirmed the decision below. *Id.* at *3.

Often in such cases, it is hard to know if the appellate counsel made a mistake in raising a new argument, or did so intentionally realizing he or she had nothing else on which to rely. Sometimes an appellate court will allow a party to get away with raising new arguments, but the practice is fraught with danger because almost every court has settled precedent allowing them to reject arguments not presented below. Here, the Second Circuit did not let counsel get away with it.

***En-Tech Corp. v. City of Newark*, No. A-4360-13T2, 2016 N.J. Super. Unpub. LEXIS 1053 (May 9, 2016)**

This case involves the related, but even more universally disfavored, practice of raising a new argument in a reply brief. The plaintiff contractor was the low bidder on a municipal contract to rehabilitate city sewers. As often occurs in such cases, over the term of the contract, disputes arose whether some additional work was outside the scope of the contract or due to jobsite conditions different than described in the bid materials. The contractor eventually sued the city and the company serving as the city's engineer on the project. The engineering company was granted summary judgement, and the contractor appealed.

On appeal, the contractor asserted "for the first time in its reply brief" that the engineering company had exceeded the scope of its agency on behalf of the city. *Id.* at *3. The appellate court dealt with this succinctly, noting "an argument raised for the first time in a reply brief is not properly before the court." *Id.* The contractor "did not properly raise this issue in its initial brief," and thus the court concluded "this argument is waived." *Id.*

While raising an argument for the first time on appeal may be a tactical decision, raising a new argument in a reply brief is simply a mistake. Whether the counsel held something back so the appellee would not be able to respond, or missed the argument until after seeing the opponent's brief, the result is the same. What might have been a persuasive argument is simply ignored by the appellate court.

***In re Arunachalam*, No. 2016-1560, 2016 U.S. App. LEXIS 9696 (Fed. Cir. May 27, 2016)**
This decision deals with another common problem in appeals—the requirement of finality. On reexamination of a patent, the Patent Trial and Appeal Board (PTAB) affirmed the examiner's rejection of certain claims, but designated a new ground for rejecting one claim. As allowed under the patent statutes, the (self-represented) patent holder elected to return the matter to the examiner. When the examiner once more rejected the claims, the patent holder filed an appeal in the Federal Circuit, rather than go back to the PTAB.

The Federal Circuit quickly dismissed this appeal. Holding that only a PTAB decision is an appealable final judgment, the court stated, "there can be no doubt that the Patent Office's actions are non-final for the purposes of judicial review and that Dr. Arunachalam's appeal is premature." *Id.* at *2.

This patent holder has not had a good year before the Federal Circuit. As noted in earlier *Silly Lawyer Tricks* columns, this same party had an appeal dismissed last year by the Federal Circuit when she tried to avoid the word count limits by compressing phrases and citations in the brief into a single word. Just last January, the U.S. Supreme Court denied her petition for certiorari in that case. Perhaps, this patent holder would be better served in the future by not continuing to represent herself on appeal.

***Miller v. Appellate Court*, 136 A.3d 1198 (Conn. 2016)**
The final case returns to the difficult topic of attorney discipline. An attorney was suspended from practice before the state appellate court for her conduct in four separate appeals. The attorney then sought review of the order by the state supreme court. The supreme court's decision went through each of the four appeals, addressing in detail the attorney's numerous errors. Her conduct constitutes a veritable what not to do list.

In the first appeal, the attorney was cited for failure to meet deadlines and to follow court rules regarding timely filing of her brief. The attorney claimed that she had filed timely and that someone in the appellate clerk's office "has deliberately manipulated [the] electronic website information to justify the claim that no filing has been made." *Id.* at 1199–1200 (alteration in original). When informed that she had failed to file the necessary certifications of service, resulting in the electronic brief being rejected by the clerk, the attorney claimed no one told her the certifications had not been filed. The decision, however, points out that the attorney was sent two separate notices advising her the brief had to be resubmitted with the certifications. *Id.* at 1200.

In the second appeal, in which no brief was filed, the attorney claimed that she discovered, only shortly before the brief was due, that pages of the transcript were missing. The supreme court noted that the attorney had received two prior extensions to submit this brief—one of four months and the second of six months. Six weeks after the second extension expired, she submitted another request for extension citing the missing transcript pages. This third request for extension was denied because requests have to be submitted before the date the brief is due. Even then the appellate court gave her two more weeks to file the brief before the case was dismissed. Months later, at her show cause hearing, she still had not filed the brief. *Id.* at 1201.

In the third appeal, the attorney failed to obey an order to inform the appellate court when the trial transcript would be finished. The attorney, a solo practitioner, said she was out of the country when the order arrived and did not return until after the time to respond had expired and the appeal was dismissed. When asked at her hearing by the appellate court what assurance she could provide that this would not happen again, the attorney stated that she would try to have someone cover for her on a pro bono basis, and that she should be "commended," not sanctioned, for taking on pro bono appeals. *Id.* at 1201–02. The appellate court did not agree.

The final matter involved a frivolous appeal. In the initial civil case, the plaintiff (who the attorney represented) was nonsuited for failure to respond to a defense motion. The attorney filed a motion to open the judgment, and then unsuccessfully appealed denial of that motion. The attorney then refiled the original case, seeking to take advantage of the state's accidental failure of suit statute. In opposing the defendant's subsequent motion for summary judgment, the attorney stated "as a solo practitioner, she had no one to teach her the 'ins and outs' of Connecticut practice, and, as a result, she was 'ignorant' of the rules of practice." *Id.* at 1202. The trial court granted summary judgment because the first nonsuit was not the result of "mistake, inadvertence, or excusable neglect," and specifically found that the second action was meritless and not brought in good faith. *Id.* at 1202–03. When the attorney appealed this second decision by the trial court, the appellate court granted dismissal of the appeal as "frivolous" and commenced the sanctions action that led to her suspension. *Id.* at 1203.

Noting that disciplinary proceedings are "for the purpose of preserving the courts of justice from the official ministration of persons unfit to [practice] in them," the supreme court concluded that the attorney's suspension for "her repeated failure to meet deadlines, to comply with the rules of practice, and for filing a frivolous appeal" was not an abuse of discretion. *Id.* at 1205 (alteration in original). The court noted that the attorney's arguments "reveal a disturbing disregard for or ignorance of the facts underlying this case," and in particular pointed to her "persistence in making such reckless allegations" against the appellate clerk "when even a cursory review of the [record] reveals that they are wholly unfounded." *Id.* at 1207. (In Connecticut, the appellate clerk's office also serves as the clerk of the supreme court, so the attorney was effectively accusing the supreme court's own clerks of this serious misconduct without any evidence.) The supreme court stated, "[The attorney's] repeated assertion that the brief and appendix were removed from the website in an effort to damage her credibility with the Appellate Court underscores the propriety of the Court's determination not only that [the attorney's] handling of her cases threatened the vital interests of her clients, but also that she had demonstrated a regrettable inability to accept personal responsibility for her professional mistakes." *Id.*

The supreme court's opinion concludes in affirming the appellate court's referral of the attorney to the state bar disciplinary counsel to inquire if other unacceptable conduct might have occurred during the attorney's representation of other clients. While the supreme court says it does not know if such conduct will be discovered, "in light of the number and nature of [the attorney's] transgressions," *id.* at 1209, the appellate court was justified in making the referral.

The attorney in this case may have felt that she had nothing to lose in seeking review of the order suspending her—and in fact the state supreme court did not increase her punishment. The resulting opinion, however, cannot help but further damage her reputation in the bar and in her community. Further, no matter how circumspect its language, the opinion's strong endorsement of the referral to the disciplinary counsel does not bode well for this attorney's future.

Keywords: litigation, appellate practice, error, contempt, new argument, briefing, finality, attorney discipline

Tom Donlon is counsel with Robinson+Cole LLP in Stamford, Connecticut. A former cochair of the Committee, Tom continues to serve as a vice-chair.

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