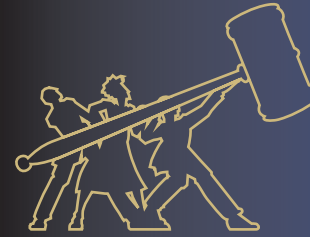


# Certworthy

Summer 2005

The newsletter of the DRI  
Appellate Advocacy Committee

  
The Voice of the Defense Bar



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## A Few Tips for Better Briefs

MARK P. PAINTER

This article is adapted from *The Legal Writer: 40 Rules for the Art of Legal Writing* (Jarndyce & Jarndyce Press/Casemaker, 2005).

### Front-Load Your Brief—Context before Detail

As with all writing, organize your brief to be front-loaded; that is, tell the judges what is coming. Put the important material up front.

Readers understand much more easily if they have a context. Because readers understand new information in relation to what they already know, tell them a piece of new information that relates to their presumed knowledge. Then, build on that information with each new piece you add.

First, ask yourself how much your audience already knows about the facts and the law of your case. The an-

swer is that the judges know very little about the facts of your case. You may have lived with your case for years, but the judges probably know nothing until you explain your case.

Strive to explain the case in a way that an average person can understand. Judges are generally sophisticated readers and can understand difficult prose if given enough time. But why make it difficult? Each extra step the reader must take in deciphering the facts of your case or the theory of your argument distracts from the force of your presentation. Make it easy for the reader.

Explain your case in the first two or three pages—including a statement of the issues and then the facts. If you cannot explain the essence of the dispute in three pages, you probably have already lost your first and best chance to keep the reader's attention.

You must build a container—context—in the reader's mind, so when

---

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*There's a great power in words, if you don't hitch too many of them together.*  
— Josh Billings

*The more you say, the less people remember. The fewer the words, the greater the profit.*  
— François Fénelon

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## Achievements and Challenges

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Now that my two years as chair of the Appellate Advocacy Committee are coming to a close, I want to look back at the committee's recent achievements and forward to its next challenges.

One constant of the committee throughout my years of involvement has been the fine work of the publications subcommittee. This issue of *Certworthy* represents the continuing excellence of Ray Ward and his staff of contributors, following the path that Scott Stolley charted for so many years. The publications team does a great job of keeping the rest of the committee up to date on the latest developments in appellate law. DRI concentrates so much on public performances at conferences and seminars that we often forget the steady work of our writers who give us quick access to information that we can use in the

briefs we write day after day. I know of no other organization that provides such timely and thorough coverage of appellate practice across the country.

Of course, our committee takes a back seat to no one in the seminar department. Our program chair Scott Smith put together our best seminar ever in New York last November, and he has agreed to organize our 2006 seminar, with the assistance of vice chair David Axelrad. In addition to the usual presentations by leading appellate judges, Mary Massaron Ross and Bob Powell are organizing a panel of corporate general counsels and appellate practitioners to present a thorough discussion of the value of appellate specialists to corporate litigation strategy. DRI had originally scheduled our next seminar for February in Santa Monica, but it was later rescheduled for March 8-10, 2006, in Phoenix. The disruption in the dates has somewhat slowed preparation, but Scott is still hard at work on adding some big names to the program. We expect the best program ever, so plan to join us for the seminar, and stick

around for the weekend to enjoy some spring training games in the Arizona sun.

My last function as your chair will take place at DRI's Annual Meeting in Chicago, to be held October 19–23, 2005. Our committee meeting is scheduled for 4:30 p.m. on Thursday, October 20. In addition to business and networking, the committee meeting will offer an hour of CLE. Ralph Johnson's presentation will be entitled, "Interlocutory Appeals: Where We Are and Where We May Be Going." Please plan to attend the Annual Meeting, and join us at the committee meeting to learn how you can get more involved in our committee.

I am most grateful to all of you who have made my time as your chair so enjoyable. My deepest thanks go to my predecessor, Mike King, who trained me, and my vice chair, Dan Lindahl, who kept me straight. The Appellate Advocacy Committee is indeed fortunate to have such a wealth of talent all across the country, and I know we will be well served by our new leaders in the years ahead.

*Good things, when short, are twice as good.*

— Baltasar Gracian

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I happen to think that the DRI Appellate Advocacy Committee contains the world's finest collection of legal-writing talent. The continued excellence of *Certworthy* bolsters that opinion. I wish to thank all contributors to this issue for continuing that tradition.

Ohio appellate judge Mark Painter gives us a fine collection of brief-writing tips, drawn from his book, *The Legal Writer: 40 Rules for the Art of Legal Writing*. I recently finished reading Judge Painter's book, and I recom-

mend it highly. It's pithy, like Strunk & White's *The Elements of Style*; I don't think you'll find anywhere else such a wealth of good advice packed into so few words and pages.

Ralph Johnson gives us an in-depth study of *en banc* rehearing. Ralph has served faithfully for years as our Second Circuit editor, so he deserves double thanks. Kathryn Wood and frequent contributor John Bursch give us what may be the world's first compendium of appellate organizations in the United States—valuable information for those of us who want to expand our circles of friends and contacts in the appellate arena.

Our circuit editors have done their usual fine job of reporting on interest-

ing developments in their respective necks of the woods. Diane Crowley deserves applause for collecting and editing those reports. It's a big job, and I'm glad someone as talented as Diane has taken it on.

This is the first issue since I've been editor in which all our "Departments"—Writer's Corner, Advocate's Forum, Browsing the Bookshelf, and Blawg Review—have been filled. Many thanks to contributors Tom Hird, Ellen Fishman, Roger Townsend, and Deb Ausburn.

*Certworthy* is as good as its contributors make it. Fortunately for the editor, the contributors have been excellent.

*It wasn't by accident that the Gettysburg address was so short. The laws of prose writing are as immutable as those of flight, of mathematics, of physics.*

— Ernest Hemingway

*The most valuable of all talents is that of never using two words when one will do.*

— Thomas Jefferson

you pour in the facts and the law of your case, the reader has the container to hold the information. Otherwise, it leaks out.

How do you read legal opinions? Too often, you have to skip to the end to find out what happened. An appellate opinion should be written so that the first paragraph or two tells you about the case and its outcome. So should your brief. Tell the court what you want to happen.

One reason we put important points up front is that we need to put context before details. The reader learns by building on prior knowledge. If the reader starts with no knowledge of your case—which is generally true—you have to give the reader everything. Do not start out giving facts about your case without giving the context. Tell the reader what kind of case it is. And the most important part of putting context before detail is framing the issue—letting the reader know what the case is about. Put that right up front.

---

**Frame the Issue in Fewer than 75 Words**

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Before you start in with facts, procedure, or anything else, tell the judges what the case is about. The most important part of your brief is framing the issue. What is the question you are trying to answer for the court? What do you want the court to decide?

Do not start writing your brief or memo until you have a succinct statement of what the case is about. And you must do this in 50-75 words. If you can't explain the case in 75

words, you do not understand it very well, and neither will your reader. Too often I have seen cases go all the way to appeal without the lawyers having figured out what the case is about.

Put your issue statement right up front, preferably in the first paragraph of your brief. Here are two examples:

Paula Jones was fired from her job with Environmess, Inc. because she consulted a lawyer about a possible slip-and-fall case against an Environmess client. If Ohio workers may only enter the courthouse in fear of losing their livelihood, they cannot exercise any of their legal rights. But Ohio law mandates that the courthouse door must remain open.

(57 Words) Mowing the grassy portion of a parcel of land for over 21 years—while using the other portion for parking—constitutes adverse possession of the entire parcel.  
(27 Words)

A short, plain statement of the issue tells the judges what the case is about and provides context for your discussion that follows. It also defines the issue in a manner that, if the court accepts your framing, will allow you to win.

At a seminar, someone asked “How can I do that when the court rules specify a format—and make me put the ‘procedural posture’ first? Should I put the 75 words next?”

Some courts do specify what you have to put in—ours does. But our rules don't prohibit you from putting a “Statement of the Case” right up front. Put it before any other text!

---

**State the Facts Succinctly**

---

Remember that you have already put the issue up front in 75 or fewer words. Then in your facts statement, you have to explain the case fully.

One can make a good argument that the statement of facts is the most important part of your memo or brief. I think I know something about the law, so I read the facts first—often I then know what's coming (or should be) in the legal argument.

Be honest, but state the facts in a manner calculated to have the reader come to the conclusion you want. If the judges reading the brief immediately think “Hey, they can't do that” (you hope about your opponent), you are halfway to winning.

You have already told the reader what the issue is and generally what kind of case it is in your 75-word—or 57-word—statement. Then expand on that. A facts statement of two or three pages should suffice. After you have done your short statement of facts, you can weave additional facts into the discussion section of your document—you can add and expand there if you need to. Your first statement is to give context—a roadmap.

Have a non-lawyer (perhaps a teenager) read your facts statement and see if that reader can tell you what the case is about. (Yes, you may, and often should, end a sentence with a preposition.) If a non-lawyer cannot understand the facts of your case, you have failed.

Be concise. Advertising and speech writers know that strong writing comes from paring words to a minimum. The fewer the

words, the more memorable the point:

“I have nothing to offer but blood, tears, toil, and sweat.”

”I have a dream.”

“Where’s the beef?”

---

### **Avoid Overchronicling—Most Dates are Clutter**

---

There is nothing wrong with stating the facts in chronological order. Your initial outline of the case should list all dates—you don’t yet know what dates are going to be important. But years later when you write your brief, do not fall into the habit of starting every sentence with a date.

Too many briefs start out by reciting a chronology of facts: “On March 23, 2000, this happened, then on May 6, 2000, this happened.” This approach confuses the readers, because we don’t know what facts are important, and what, if any, dates we should remember. As a general rule, most dates are not important.

Putting in an exact date signals the reader that *this date is important—remember it—you will need it later.*

Unless an exact date is important—as in a statute-of-limitations issue—leave it out. Instead, tell us only the material facts, and why they are important.

Judges overchronicle too. I saw a recent case where twelve straight paragraphs started with the date: “On May 23, 2000 . . . On June 1, 2000.” I just couldn’t bring myself to wade through the case.

You can maintain continuity and order by clues like “next” and “later,” or “next month.” Say “in June” rather than “on June 14, 2000.” Even worse is the expression “on or about”—if

you have been working on the case for years, you should know when events happened.

---

### **No Parenthetical Numerals**

---

Especially irritating is the practice of spelling out numbers and then attaching parenthetical numerals—a habit learned when scribes used quill pens to copy documents. The real reason for this was to prevent fraud by making it difficult to alter documents. But in typescript “four” and “seven” aren’t likely to be confused.

Lawyers commonly write, “There are four (4) plaintiffs and six (6) defendants, all claiming the ten thousand dollars (\$10,000). But only three (3) of the four (4) plaintiffs are entitled to recover from one (1) defendant.” The reader automatically repeats the numbers. It is extremely hard to read and looks silly. Unless you are writing your document in longhand—and unless you believe the judge will alter your numbers—skip this “noxious habit.”

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### **Headings are Signposts—They Should Inform**

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As part of the “container” you are building in the reader’s mind, have headings that tell the judges what is coming. And headings should convey information. “Facts” is better than no heading, but it conveys no information. “The Fire and Aftermath” tells the reader the nature of the facts that are coming. Headings are signposts that guide the reader. If the legal-argument portion of your document is three pages, you may not need to break it up; but if it is longer, separate

it into numbered headings. And why not use the headings to persuade?

Headings do not just give context, they also signal the reader when to safely take a break. The reader needs breaks in digesting complex material. Separate the parts—and subparts—into headings. And remember to use a sans serif font for headings. Examples:

- I. The Fire and the Aftermath
- II. Jones Talks to a Lawyer—And is Fired
- III. A Hurdle Too High (The case was about horses.)

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### **Write Short Paragraphs**

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Short paragraphs give the reader a chance to pause and digest what has gone before. Just like headings and short sentences, short paragraphs provide a break. If you put three or four sentences with new information in each paragraph, that is enough. Long paragraphs are daunting.

The average reader will balk at tackling a long paragraph. Breaking it up would allow much better communication.

There is no rule on how many sentences in a paragraph. Usually three or four is enough. And you can have a one-sentence paragraph—for emphasis.

And remember each new piece of information should build on the old. You have probably seen paragraphs diagrammed so that each sentence refers back to something in the last sentence. That is called building on context—building on prior knowledge.

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### **Write Short Sentences**

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Write short, crisp sentences. What is

the most underused punctuation mark in legal writing? The period—it is a key down at the lower right of your keyboard. Even though you are a lawyer, you are allowed to use it. The most overused is easy—the comma.

You should strive to average eighteen words per sentence, or fewer. If you have nineteen or twenty words per sentence, you are still okay, but if you get much over twenty, you are sacrificing readability.

Long sentences are difficult to read. The reader sometimes forgets what the first part of a long sentence said by the end. The following is just a random example, from the Ohio Supreme Court:

As indicated immediately above, the legislative history of R.C. 4113.52 clearly reveals that the General Assembly considered and rejected the notion of providing a wider range of statutory civil remedies for qualifying whistleblowers who are discharged or disciplined in violation of the statute. However, this fact alone does not answer the question whether the remedies set forth in R.C. 4113.52 are intended to be exclusive. Nor is the fact that the legislature enacted R.C. 4113.52 in apparent response to Phung a persuasive reason to hold that the statute preempts the formation or recognition of an independent cause of action in tort under Greeley and its progeny for wrongful discharge in violation of public policy. Indeed, we find nothing in R.C. 4113.52 or its history that compels the conclusion that it was the express will of the General Assembly that any and all causes of action premised on whistleblowing must be com-

menced and remedied exclusively under R.C. 4113.52. Rather, on the basis of the information available, it is much more reasonable to conclude that the General Assembly enacted R.C. 4113.52 to remedy the defect in the law caused by this court's decision in Phung, but never intended to preclude the future development of the common law of this state in the area of "whistleblowing."

(Average 43 words per sentence!)

The paragraph is long, and its constituent sentences are also extremely long. The reader must take notes to figure out what the court is saying (or attempting to say).

Briefs need more periods, fewer commas. Again, sentence length should average no more than 18. Word processors have a feature that will calculate words-per-sentence—be sure to use it. Remember, readers need to digest. Every separation—sentence, paragraph, or section heading—allows a pause and signifies to the readers that they can tackle the material in digestible portions.

Read Cardozo, Holmes, and Jackson—notice the short, crisp sentences.

*Cardozo*: No answer is it to say that the chance would have been of little value even if seasonably offered. Such a calculus of probabilities is beyond the science of the chancery. Salmon, the real estate operator, might have been preferred to Meinhard, the woolen merchant. On the other hand, Meinhard might have offered better terms, or reinforced his offer by alliance with the wealth of others.

(16 words per sentence.)

Jackson:

More than 32,000 stockholders are owners of this enterprise. They are

domiciled in every state of the Union, less than 2 per cent of them in Wisconsin. Under the corporation's charter and the applicable law of New Jersey the stockholders may be paid dividends only from its surplus or net profits. Every corporate act connected with payment of dividends takes place in Chicago. There the directors meet to declare them, there the checks are drawn and mailed. They are paid out of the corporation's general funds on deposit in Chicago or New York.(15.5 words per sentence.)

*Holmes*: Coming then to the merits, we are of the opinion that the judgment was right. The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.(15 words per sentence.)

Long sentences are especially difficult when strung together. Sophisticated readers can understand longer sentences—if they are properly constructed—but no one can wade through ten in a row. Break up the pace—follow a longer sentence with a short one.

Readability is the goal. Keep in mind Will Rogers's all-too-often-true comment about legal writing:

The minute you read something and you can't understand it, you can almost be sure that it was drawn up by a lawyer. Then if you give it to another lawyer to read and he don't know just what it means, why then you can be sure it was drawn up by a lawyer. If it's in a few words and is plain and understandable only one way, it was written by a non-lawyer.

Let's endeavor to make our briefs the exception.

# Rehearings En Banc in the Federal Courts of Appeals: The Good, the Bad, and the Unlikely

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Rule 35(a) of the Federal Rules of Appellate Procedure allows a case to be heard or reheard en banc, (i.e., by the entire appellate court), if so ordered by “[a] majority of the circuit judges who are in regular active service . . . .” Rule 35(a) cautions, however, that an en banc hearing or rehearing “is not favored and ordinarily will not be ordered” unless:

- (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or
- (2) the proceeding involves a question of exceptional importance.

Although this rule seems straightforward, its application is anything but clear. En banc proceedings have sparked controversies even between judges on the same court. Even a simple matter such as how to calculate the “majority of circuit judges . . . in regular active service” is the subject of disagreement among the circuit courts. One thing is clear, though: en banc hearings and rehearings are seldom granted.

Like other procedures in federal court, en banc proceedings have their positive and negative aspects. But unlike other procedures, en banc proceedings, especially rehearings, appear to be the subject of an institutional

dislike by many circuit judges, including several of the most prominent ones. Despite the controversy, Rule 35 exists, and rehearings en banc are a procedure that appellate lawyers must thoroughly explore in the appropriate circumstances. In doing so, they must come to terms with the complicated issues surrounding en banc proceedings, including — the good, the bad and the unlikely. The goal of this article is to help with that process.

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## The Numbers

### Few Cases Are Reheard En Banc

It has been said that the numbers never lie. To appreciate just how rarely petitions for rehearing en banc are granted, one need go no further than the statistics. For example, in a 2001 article, Chief Judge John M. Walker, Jr. of the Second Circuit noted that “between 1994 and 2000, all twelve circuits, on average, decided in banc one out of every 573 appeals filed, and one out of every 293 appeals that were terminated on the merits.” John M. Walker, Jr., *Forward: Second Circuit Survey*, 21 *Quinnipiac L. Rev.* 1, 5 (2001) (hereinafter “Walker”). In a 2002 article, Judge Douglas H. Ginsburg of the D.C. Circuit reported similar numbers for his court during the 1980s and 1990s. Douglas H. Ginsburg & Brian M. Boynton, *The Court En Banc: 1991-2002*, 70 *Geo. Wash. L. Rev.* 259, 259 (2002). During the 1980s, the D.C. Circuit heard

63 cases en banc. *Id.* During the 1990s, the number dropped to 33, of which only 28 were rehearings. *Id.* During 2001 and 2002, the D.C. Circuit did not rehear any cases en banc. *Id.* In 1990, out of 159 petitions for en banc rehearing filed, 144 failed to persuade any judge to request a vote. Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 *Geo. Wash. L. Rev.* 1008, 1052 (1991)(hereinafter “Ginsburg & Falk”).

### Counting the Votes

If the overall numbers were not bad enough, the voting process by which the courts of appeals consider petitions for rehearing en banc is itself another obstacle to obtaining en banc review. Jon O. Newman, *Foreword: In Banc Practice in the Second Circuit, 1984-1988*, 55 *Brook. L. Rev.* 355, 366-67 (1989). Assuming that your petition is actually voted on, as opposed to being denied because no judge called for a vote, you may find yourself in a circuit where it is numerically difficult to obtain en banc review.

The circuits do not agree on what constitutes a “majority of active judges” for purposes of granting en banc review. *Fed. R. App. P.* 35(a). One group of circuit courts defines the majority to be the majority of all authorized judgeships in the circuit, regardless of whether there are vacancies or judges who are disqualified or

recused, *i.e.*, an “absolute majority.” Mark R. Kravitz, *En Banc Voting*, Nat’l L.J. B7 (Col. 1) (Oct. 7, 2002) (hereinafter “Kravitz”). This group constitutes a majority of the circuits and appears to include the D.C., Fourth, Fifth, Sixth, Eighth, Eleventh and Federal circuits. *See id.* A second group calculates the number required as the majority of active judges within the circuit, not including those disqualified from the vote, *i.e.*, a “case majority” approach. *Id.* This group appears to include the Second, Seventh, Ninth and Tenth circuits. *Id.* The Second Circuit also does not count vacancies in calculating this number. *Id.*

The First and Third Circuits apply a “modified” approach regarding who may vote on a petition for rehearing en banc. *See 1st Cir. R. 35(a)*; *3d Cir. R. 35.3*. *See also* Kravitz, *supra*, at B7 (identifying the Third Circuit as a member of this group as of 2002). Under First Circuit Local Rule 35(a) a “[r]ehearing en banc shall be ordered only upon the affirmative votes of a majority of the judges of th[e] court in regular active service who are not disqualified, provided that the judges who are not disqualified constitute a majority of the judges who are in regular active service.” Third Circuit Local Rule 35.3 contains similar language.

Sometimes, an “absolute majority” can be practically impossible to attain. Consider the denial of en banc rehearing in *Gulf Power Co. v. FCC*, 226 F.3d 1220, 1221-26 (11th Cir. 2000), *rev’d sub nom. Nat’l Cable & Telecomms. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002), which Judge Edward Carnes identified as “a good example of why the absolute ma-

majority provision of Federal Rule of Appellate Procedure 35(a) needs to be changed by Congress or by the Supreme Court . . . .” *Id.* at 1221 (Carnes, J., concerning the denial of rehearing en banc). In *Gulf Power*, five of the twelve active judges of the Eleventh Circuit were disqualified. Of the remaining seven, one had authored the majority panel opinion. Thus, the remaining six judges were “unable to vote the case en banc under Rule 35(a), no matter how wrong they m[ight] think the panel’s majority holding is, unless the judge who authored the panel majority opinion vote[d] with them to do it.” *Id.* at 1222. *See* Kravitz, *supra*, at B7 (discussing Judge Carnes’ statement and the split among the circuits).

There is, however, some hope in sight. Judge Carnes’ words have not fallen on deaf ears. The proposed amendments to the *Federal Rules of Appellate Procedure* recently sent to Congress by the Supreme Court include a new Rule 35(a). It adopts the “case majority” approach and will become effective on December 1, 2005 unless Congress overrules it. Specifically, the new Rule 35(a) inserts the phrase “and who are not disqualified,” to identify the “majority of circuit judges who are in regular service” and who may order a hearing or rehearing en banc. The Committee Note from the Advisory Committee on Appellate Rules indicates that the committee unanimously believed that either the “absolute majority” approach or the “case majority” approach could be defended as a reasonable interpretation of 28 U.S.C. § 46(c) and Rule 35(a). *See Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1, 5 (1963). Moreover, even those committee members who

avored the “absolute majority” approach believed that the adoption of the “case majority” approach was preferable to not amending Rule 35(a) at all.

Nonetheless, appellate attorneys should temper their excitement. Even if the new Rule 35(a) is adopted, they will still have to deal with the institutional obstacles that the federal courts of appeals have erected to petitions for rehearing en banc. For example, a panel may short-circuit or preempt any petition for rehearing en banc by circulating a draft opinion to the entire court before the opinion is issued. *See, e.g., United States v. Crosby*, 397 F.3d 103, 105 n.1 (2d Cir. 2005); *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

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### Judges Dislike En Banc Proceedings

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A survey of decisions and articles by federal circuit judges reveals their strong dislike for en banc proceedings. For example, in *Hart v. Massanari*, 266 F.3d 1155, 1172 n.29 (9th Cir. 2001), Judge Alex Kozinski of the Ninth Circuit noted that an “impressive array of judges and academics” have written on the “rigors of en banc procedures.” Judge Kozinski’s citations in support of his statement included articles by circuit judges Pamela Ann Rymer, Joseph T. Sneed, James Oakes, Deanell Reece Tacha, the late Irving R. Kaufman and the late Richard S. Arnold. Comments within those articles included statements to the effect that the judges considered en banc proceedings to be “expensive and time consuming,” “the most time consuming and inefficient device in the appellate judiciary’s repertoire,” and a

“damn nuisance.” *Id.* (citations and internal quotation marks omitted). Judge Kozinski himself stated in *Hart* that because en banc procedures are so “cumbersome,” they “are seldom used merely to correct the errors of individual panels.” *Id.* Quoting a decision by Judge Richard Posner of the Seventh Circuit, he emphasized that the courts of appeals “do not take cases en banc merely because of disagreement with a panel’s decision, or rather a piece of a decision.... We take cases en banc to answer questions of general importance likely to reoccur, or to resolve intracircuit conflicts, or to address issues of transcendent public significance—perhaps even to curb a ‘runaway’ panel—but not just to review a panel opinion for error, even in cases that particularly agitate judges.” *Id.* (quoting *EEOC v. Indiana Bell Tell Co.*, 256 F.3d 516, 529 (7th Cir. 2001)(Posner, J. concurring)) (internal quotation marks omitted).

In a 1999 essay, Judge Patricia M. Wald, a former Chief Judge of the D.C. Circuit, characterized en banc proceedings as “cruel and unusual punishment for all concerned.” Patricia M. Wald, *19 Tips From 19 Years on the Appellate Bench*, 1 J. App. Prac. & Process 7, 15 (1999)(hereinafter “Wald”). Based on her experience, she believed that the criteria for en banc consideration set forth in Rule 35(a), to secure uniformity or to decide an exceptionally important question, have not been the *de facto* criteria used by the courts of appeals. *Id.* Rather, “[e]n bancs most often occur where a majority feels strongly that the panel is wrong about something they care a lot about or which may be precedential outside the confines of the immediate case.” *Id.*

Judge Wald cautioned appellate lawyers to “[t]hink before you ask” for en banc review. *Id.* She pointed out that en banc review will delay your case; an appellate court can take up to two years to “assemble itself and get all the opinions written.” *Id.* She advised parties aggrieved by a panel decision to simply proceed to the United States Supreme Court. *Id.* at 15-16. She warned that an en banc proceeding is “like a constitutional convention. Everything—in circuit law—is up for grabs. The decision may emerge on grounds argued by neither party and desired by neither party. Advocates lose control since judgepower is at its zenith; except for Supreme Court precedent, the decision can go anywhere . . . , the counsel no longer hold the road map.” *Id.* at 16.

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### **The Negative Aspects of En Banc Proceedings**

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Several reasons have been identified for the judges’ dislike of en banc proceedings, including inefficiency, the potential use of the process for ideological reasons, and the disruption of collegiality.

#### **Inefficiency**

The principal complaint about en banc review advanced by judges and commentators is its inefficiency. The courts of appeals must expend a great amount of judicial resources for each case they consider en banc. When a case is reheard en banc, “the amount of judicial time consumed probably increases four-fold, consuming resources equivalent to what it would take for a panel to hear four new cases.” Ginsburg & Falk, *supra*, at

1018. Even if the three original panelists sit on the en banc court and do not have to prepare again for the rehearing, the amount of time expended on the proceeding increases 100% for each group of three additional judges that sits on the en banc court. *See id.* Thus, for a twelve-judge court such as the D.C. Circuit, each en banc hearing requires approximately an additional 300% of judge time. *Id.* Any re-preparation needed by the original panelists further increases the amount of judicial time consumed by an en banc rehearing. As Judge Ginsburg and a co-author have recognized, the fact of the matter is that

the [original] panelists may need substantially to repeat their preparation in order to rehear a case many months after they have first heard it. Indeed, they may have to start almost from scratch if the parties have submitted new briefs for the rehearing, especially if the court has called for briefing on an issue ... not addressed before the panel; in that case the preparation time increases by 400%.

*Id.* The additional time spent preparing and hearing a single case en banc could otherwise be spent on “three to four cases before panels of three judges.” *Id.*

The preparation of an opinion after an en banc rehearing also requires significantly more time than a standard opinion produced after a hearing before a panel of three judges. For an en banc opinion, the authoring judge is required to circulate the opinion to all members of the court and any senior judges who sat on the en banc panel. Each member of the en banc panel then has an opportunity to make comments or suggestions or to author

a dissent, which will need to be addressed by the majority opinion. Thus, “[a]t each step the opinion writer must accommodate multiple, sometimes conflicting, suggestions; and the author must secure anew the concurrence of each member of the majority or minority for which he or she writes each time the opinion is revised in response to a further iteration by the other faction.” *Id.* at 1019.

In the end, the expense of these additional judicial resources may be wasted, for any number of reasons. The case may become moot before an opinion is issued. *Id.* at 1051. The en banc court may fail to reach a clear majority position, in which case the decision will not have precedential effect, or the Supreme Court may take the case on writ of certiorari. *Id.*; Walker, *supra*, at 6 (footnote omitted).

### Ideology and Controversy

Critics of en banc proceedings also allude to their alleged misuse by judges seeking to advance their own ideological beliefs. The most often cited example of this is a group of cases from the D.C. Circuit in the mid to late 1980s, which were either heard en banc or in which en banc review was hotly contested and defeated by a narrow vote. See generally Wald, *supra*, at 15; Note, *The Politics Of En Banc Review*, 102 Harv. L. Rev. 864, 864-65 (1989). See also *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987) (en banc); *id.* at 1246 (Silberman, J., concurring in denials of rehearing en banc); *id.* at 1253 (Starr, J., dissenting). In particular, there was a claim that the new Reagan appointees to the D.C. Circuit were using en banc review to advance their ideological or “majority” views. See

Michael E. Solimine, *Ideology And En Banc*, 67 N.C.L. Rev. 29, 30-33 (1988) (hereinafter “Solimine”). The concern about ideological agendas leads some to argue that en banc review should not be granted simply because a majority of the judges of a circuit believe that a panel decision was in error.

The controversy surrounding alleged ideological or political oriented en banc voting did not end in the 1980s and has not been limited to the D.C. Circuit. In recent years, the Sixth Circuit has been the site of a number of controversies revolving around en banc proceedings. For example, in *Memphis Planned Parenthood, Inc. v. Sundquist*, 184 F.3d 600 (6th Cir. 1999), an abortion-rights case, the Sixth Circuit denied a petition for rehearing en banc. Senior Judge Damon Keith vigorously dissented from the denial and noted that he would have voted in favor of en banc review but for the Internal Operating Procedures of the Sixth Circuit, which prohibited a senior judge from participating in a vote to rehear a case en banc. *Id.* at 601 (Keith, J., dissenting). He also identified by name the active judges of the court who voted for and against en banc rehearing. *Id.* at 601 n.1.

In a separate statement, Judge Danny J. Boggs pointed out that disqualification of senior judges from participating in en banc voting was not the result of the local rule, but rather the command of 28 U.S.C. § 46(c). *Id.* at 605 (Boggs, J., separate statement). He also regretted Judge Keith’s “breach of the long-standing custom of this court that actions by a member of the court with respect to petitions for rehearing en banc are

matters of internal court procedure and are not made public by other judges.” *Id.*

In 2002, the Sixth Circuit’s decision in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc), *aff’d* 539 U.S. 306 (2003) drew a great deal of attention. In *Bollinger*, the court considered whether the University of Michigan Law School’s admission policy violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The majority of the court reversed the district court’s decision that the school’s policy was unconstitutional. *Id.* at 735. However, in a dissenting opinion, Judge Boggs included a “Procedural Appendix” by which he maintained that Chief Judge Boyce F. Martin, Jr. delayed the circulation of the petition for rehearing en banc until after two judges took senior status and, therefore, became ineligible to participate in the en banc proceedings. *Id.* at 810-14 (Boggs, J. dissenting).

In addition to Judge Boggs’ dissent, there were three other dissents filed in the case, as well as two concurring opinions. In her concurring opinion, Judge Karen Nelson Moore referred to the substantive portion of Judge Boggs’ dissent as being “grounded in neither fact nor law,” and characterized his inclusion of the “Procedural Appendix” as “constitut[ing] an embarrassing and incomprehensible attack on the integrity of the Chief Judge and this court as a whole.” *Id.* at 772 (Moore, J., concurring).

Judge Alice M. Batchelder, who joined Judge Boggs’s dissent, disagreed with Judge Moore’s statement. *Id.* at 815 (Batchelder, J., dissenting). She maintained that “[p]ublic confidence

in this court or any other is premised on the certainty that the court follows the rules in every case, regardless of the question that a particular case presents. Unless we expose to public view our failures to follow the court's established procedures, our claim to legitimacy is illegitimate." *Id.*

The controversy regarding the en banc proceedings in the University of Michigan Law School case did not end with the issuance of the decision and the concurring and dissenting opinions. It was subsequently revealed that an interest group or groups urged Senator Edward Kennedy's staff to delay the confirmation to the Sixth Circuit of the U.S. District Judge Julia S. Gibbons, whom they considered to be conservative, until after the law school case was decided en banc. See Robert Novak, *Judicial-Appointment Logjam Is A Scandal*, AUGUSTA CHRON. A04 (May 18, 2004) (available at 2004 WL 79354750); Lino A. Graglia, *Rigged Justice*, 13 Am. Enter. 910 (July 1, 2002) (available at 2002 WL 8328155).

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### **The Positive Aspects of En Banc Review**

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Notwithstanding the criticisms of en banc review, the procedure remains, and en banc review continues to be granted. Judge Ginsburg and a co-author point out three good reasons to grant en banc rehearing:

First, rehearing en banc allows the full court to maintain consistency in the case law—intracircuit, intercircuit, or between the circuit and the Supreme Court. Second, the full court may wish to address an issue of great importance. Third, the full court can correct an appar-

ently erroneous result—either of the panel's own making or arising from an earlier panel's decision that bound the panel whose decision is reheard. These reasons interact too: the more important the case, the more likely an erroneous or inconsistent decision will draw the attention of the full court. Conversely, the en banc court is unlikely to devote its resources to rehearing an issue, even of the first importance, that the panel has decided to the satisfaction of the majority of the active judges of the circuit.

Ginsburg & Falk, *supra*, at 1022-23 (footnotes omitted).

In describing cases of exceptional importance, Judge Ginsburg and his co-author point out that what is important to the parties is not always what is important to the public or the court. A case may be important to the public if it concerns either a unique issue of great moment to the community, or a recurring issue that is likely to affect a large number of cases or persons. In the former category, the most striking examples in the history of the D.C. Circuit's en banc practice are the cases arising out of the Watergate affair, and especially the cases involving the subpoena of the President's tapes. Probably in the interest of maximizing public confidence in its decisions, the court heard the principal Watergate-related cases en banc from the outset, without first sending them to a panel.

*Id.* at 1025. Cases important to the court can involve "questions concerning the jurisdiction of the court or the standards for determining the justiciability of a particular case—including matters such as standing and ripeness. The resolution of these questions pro-

vides the Bar with important guidance as to whether and when a party may litigate in this circuit." *Id.* at 1028-29.

An additional benefit to en banc review identified by commentators is its ability to assist the United States Supreme Court. Steven L. Wasby, *The Supreme Court and Courts of Appeals En Bancs*, 33 McGeorge L. Rev. 30-33 (2001) (hereinafter "Wasby"); Michael Ashley Stein, *Uniformity In The Federal Courts: A Proposal For Increasing The Use Of En Banc Appellate Review*, 54 U. Pitt. L. Rev. 805, 827-29 (1993). Some believe that an increase in en banc proceedings will free up the Supreme Court to address more or different types of cases. Wasby, *supra*, at 30-31. Moreover, en banc rehearing also provides "more complete consideration and ... perspective not available to the panel." *Id.* at 31.

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### **Unlikely Candidates for En Banc Review**

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Several characteristics tend to exclude a case from en banc consideration. They include:

"A case decided via a summary order or a non-precedential opinion. Pierre H. Bergeron, *En Banc Practice In The Sixth Circuit: An Empirical Study, 1990-2000*, 68 Tenn. L. Rev. 771, 795 (2001) (hereinafter "Bergeron").

"A case that the court did not deem appropriate for oral argument. Ginsburg & Boynton, *supra*, at 264.

"A case lacking a dissenting opinion. For example, in the D.C. Circuit between 1995 and 2001, only one in every 555 of the cases de-

cided by a unanimous panel was reheard en banc. *Id.* “In sharp contrast. . . during this period, more than 81% of the cases reheard en banc came from divided panels.”

*Id.*

“A diversity-jurisdiction case.

Ginsburg & Falk, *supra*, at 1031. If such a case raises an extremely important issue, the more appropriate procedural device is to use the certification process to the highest court of the state the law of which is at issue. *Id.*

An erroneous panel decision is not, in and of itself, enough for a chance at en banc review. “[S]uch a standard reduces the en banc court to another layer of appellate review rather than a body that establishes the direction of the legal doctrine of the circuit.” Phil Zarone, *Agenda Setting In The Courts Of Appeals: The Effect Of Ideology On En Banc Rehearings*, 2 J. App. Prac. & Process 155, 166 (2000). “Accordingly, clearly erroneous panel rulings do not satisfy the test for exceptional importance, and thus do not warrant en banc review.” *Id.*

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### Cases with a Better Chance of Obtaining En Banc Review

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Besides agreeing that there is little chance of obtaining en banc review, judges and commentators also agree that there is very little definitive guidance regarding the criteria that the various courts of appeals utilize in granting petitions for en banc rehearing. See Bergeron, *supra*, at 774-75; Tracey E. George, *The Dynamics And Determinants Of The Decision To Grant En Banc Review*, 74 WASH. L. REV. 213, 216 (1999) (hereinafter “George”). For example, Judge Jon O.

Newman, a former Chief Judge of the Second Circuit, has observed that “there is little agreement on the standards that guide a court of appeals in determining when it is ‘necessary to secure or maintain the uniformity of decision’ or when ‘a question of exceptional importance is involved.’ . . . [E]xceptional importance’ is frequently in the eye of the beholder” Jon O. Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 Brook. L. Rev. 365, 370-71 (1984).

Nonetheless, judges and commentators have identified some characteristics that may give a case a greater likelihood of gaining en banc review. First, as provided for in the language of Rule 35, a panel opinion that produces a true intracircuit conflict should be a classic candidate for en banc review. The complication arises in determining whether the opinion actually produces a true intracircuit conflict. See Solimine, *supra*, at 54-56 (providing examples of how “apparent” intracircuit conflicts “do not and need not result in en banc resolution.”). Second, a majority opinion that provokes a dissenting opinion increases the likelihood of en banc rehearing. See Ginsburg & Boynton, *supra*, at 264-65; George, *supra*, at 247 (“the mere fact of a dissent signals to a non-panelist that she may justifiably expend personal resources to rehear the case or at least investigate it further.”).

Third, an opinion issued by a panel that includes a senior circuit judge, a visiting circuit judge, or a district judge sitting by designation, may have a greater likelihood of receiving en banc review. George, *supra*, at 247-48; A. Lamar Alexander, Jr., Note, *En*

*Banc Hearings In The Federal Courts Of Appeals: Accommodating Institutional Responsibilities (Part I)*, 40 N.Y.U.L. Rev. 563, 595-96 (1965). There may be a greater likelihood of en banc review because, under such circumstances, there may be an impression that senior or visiting judges are less familiar with the current state of the circuit law. For example, in *PSINET, Inc. v. Chapman*, 372 F.3d 671 (4th Cir. 2004), Judge Paul V. Niemeyer emphasized this very concern when he lamented that in “this seminal First Amendment case[,] . . . the law of the Fourth Circuit is now written solely by two district judges who [sat by] designa[tion] on the three-judge panel.” *Id.* at 671 (Niemeyer, J., dissenting from denial of en banc rehearing).

The likelihood of en banc review increases as more of these characteristics appear in a single decision. For example, a panel decision on a controversial issue that includes a majority comprised of a senior circuit judge and a visiting circuit or district judge and a dissenting opinion by an active circuit judge generally has a greater likelihood for en banc consideration. See, e.g., *Johnson v. Governor of the State of Fla.*, 353 F.3d 1287 (11th Cir. 2003) (felon disenfranchisement), *reh’g en banc granted, op. vacated*, 377 F.3d 1163 (11th Cir. 2004). This conclusion is supported by the primary purpose behind en banc review: to maintain uniformity of circuit law. The active judges in a circuit may be more willing to employ additional judicial resources to reexamine an opinion that will be binding precedent if the two judges who made up the majority are not members of the active circuit bench.

Other characteristics identified by commentators as increasing the likelihood of en banc review include cases interpreting procedural standards, cases interpreting federal statutes, and cases involving constitutional or civil rights. See Jody Brian Martin, Comment, *The Most Abused Prerogative: En Banc Review In The United States Court Of Appeals For The Fifth Judicial Circuit*, 14 Miss. C. L. Rev. 395, 405-11 (1994). For additional insights into the characteristics or criteria applied by the courts of appeals in determining whether to grant a petition for rehearing en banc, appellate attorneys should review the plethora of decisions dissenting from the denial of

en banc rehearing. See, e.g., *Cannon v. Kroger Co.*, 837 F.2d 660, 660 n.1 (4th Cir. 1988) (Murnaghan, J., dissenting) (citing other instances of dissents from rehearing en banc); *Isaacs v. Kemp*, 782 F.2d 896, 897 n.1 (11th Cir. 1986) (Hill, J., dissenting) (citing 16 examples of other dissents from denials of rehearing en banc).

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### Conclusion

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En banc proceedings are a unique procedure. Moreover, unlike other procedures, en banc proceedings are the subject of an institutional dislike by many circuit judges, including several prominent ones. In fact, this dislike

appears to have existed since en banc rehearsals became an issue in the 1930s and 1940s. See Richard S. Arnold, Essay, *Why Judges Don't Like Petitions for Rehearing*, 3 J. App. Prac. & Process 29, 30-32 (2001). See also *Textile Mills Sec. Corp. v. Commissioner of Internal Revenue*, 314 U.S. 326 (1941). Nevertheless, Rule 35 exists, and petitions for rehearing en banc are an option that appellate attorneys must explore thoroughly and use in appropriate cases. In doing so, they must deal with the complicated issues surrounding the process: the good, the bad, and the unlikely.

*The fewer the words, the better the prayer.*  
— Martin Luther

# Compendium of Appellate Bar Organizations

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You have resolved in your 2005 business plan to make a more concerted effort to connect with judges, members of the bar, and business professionals by joining an appellate bar organization. There are many benefits to such an affiliation, including education, networking, and business development. But where do you begin? There are a multitude of groups offering a wide range of services and publications at the state, circuit, and national levels, and finding information on the World Wide Web can be difficult, at best. Simply typing in the terms “appellate” and “organizations” on Google’s search engine generates more than 725,000 results!

As a service to the members of DRI’s Appellate Advocacy Committee and appellate practitioners everywhere, *Certworthy* presents what is believed to be the first ever “Compendium” of United States appellate bar organizations and resources. You will find a list of easily accessible links for all of the organizations referenced in this Compendium with web pages at <http://www.wnj.com/appellate/links.html>.

If you are aware of additional appellate bar associations that have been

inadvertently omitted, please send an e-mail to [jbursch@wnj.com](mailto:jbursch@wnj.com) with that information so the groups can be added to the website. United in purpose, appellate organizations will continue to increase the quality of advocacy before state and national appellate benches, and the collegiality of appellate lawyers.

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## National Organizations

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### DRI Appellate Advocacy Committee.

The Defense Research Institute’s Appellate Advocacy Committee provides a forum for attorneys who handle appeals, regularly or on an occasional basis. Committee members include those practicing both in firms and in-house who want up-to-date practice tips, publications, and seminars dedicated to handling litigation before state or federal appellate courts. The Committee sponsors annual continuing education programs that focus on appellate practice, contributes to the appellate advocacy issue of DRI’s monthly publication, *For the Defense*, and publishes *Certworthy*, a bi-annual newsletter with a wide range of articles addressing the arts of written and oral appellate advocacy. DRI members can access the Appellate Advocacy Committee’s website with a password at: <http://www.dri.org/dri/committees/committeelist.cfm>.

### American Academy of Appellate Lawyers.

The Academy was formed in 1990 to advance the highest national standards and practices of appellate advocacy and to recognize outstanding

appellate lawyers. Membership in the Academy is exclusive; there are currently fewer than 300 fellows. To qualify, you must have a minimum of 15 years’ practice in appellate law and be nominated by a judge, practitioner, or existing fellow. The Academy publishes 3-4 newsletters per year and also publishes reports and recommendations on appellate practice topics. All Academy fellows receive a subscription to *The Journal of Appellate Practice and Process*, an academic publication edited by faculty members of the University of Arkansas at Little Rock’s William H. Bowen School of Law. The Academy has sponsored an award, the “Eisenberg Prize,” for the year’s best published article on appellate practice and procedure, and it offers continuing legal education seminars from time to time, often with other bar associations. You can learn more about the Academy at its website: <http://www.appellateacademy.org/>.

[www.appellateacademy.org/](http://www.appellateacademy.org/).

### TIPS Appellate Advocacy Committee.

The American Bar Association’s Tort Trial & Insurance Practice Section (TIPS) has an Appellate Advocacy Committee that provides a professional forum for attorneys and judges interested in all aspects of appellate advocacy. Membership is open to all members of TIPS. The Committee sponsors and presents continuing education programs at the annual ABA and TIPS meetings, and also sponsors several regional meetings each year of interest to local appellate and trial practitioners. The Committee pub-

lishes a quarterly newsletter and participates in the TIPS annual survey by providing an article on developments in appellate advocacy. The Committee also recently published the second edition of its popular book, *The Amicus Brief: How to Be a Good Friend of the Court*. For more information about the Committee's activities, please refer to its website: <http://www.abanet.org/tips/appellate/home.html>. [Editor's Note: Chuck Craven, Certworthy's Third Circuit editor, is vice-chair of this committee and editor of its quarterly newsletter.]

*ABA Litigation Section's Appellate Practice Committee*. The American Bar Association's Section of Litigation also has a subdivision devoted to issues involving appellate practice, the Appellate Practice Committee. In addition to continuing education programs, the Committee publishes *The Appellate Practice Journal* on a quarterly basis. In the Committee's words, its goal is to "demystify the appellate process through its programs and the work of its subcommittees." The Committee also sponsors an annual National Law Student Appellate Advocacy Contest. The Committee's website can be found at: <http://www.abanet.org/litigation/committee/appellate/home.html>.

*Council of Appellate Lawyers* (CAL). CAL, which is part of the ABA Judicial Division's Appellate Judges Conference, is the first national appellate bench-bar organization in the country. It offers annual continuing education programs that bring together judges and attorneys to discuss issues of appellate practice and procedure. CAL publishes a biannual e-Newsletter and sponsors a member ListServ. All CAL members also receive a sub-

scription to *The Journal of Appellate Practice and Process*, an academic publication edited by faculty members of the University of Arkansas at Little Rock's William H. Bowen School of Law. CAL also honors jurists and members through a Distinguished Contribution to Appellate Law Award. You can learn more about CAL at its website: <http://www.abanet.org/jd/ajc/cal/home.html>.

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### Federal Circuit Organizations

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#### *The Federal Circuit Bar Association.*

The Federal Circuit Bar Association is a national organization for the bar of the Court of Appeals for the Federal Circuit. Organized to unite the different groups that practice within the Circuit's legal community, it seeks to strengthen and serve the Court and offers a forum for common concerns and dialogue between bar and court, governmental counsel, and private practitioner, litigator, and corporate counsel. It sponsors regional seminars regarding court practice and can be contacted through its website: <http://www.fedcirbar.org/>.

*The Federal Bar Council.* The Federal Bar Council is an organization of lawyers who practice in federal courts within the Second Circuit. It is dedicated to promoting excellence in federal practice and fellowship among federal practitioners and to encouraging respectful, cordial relations between bench and bar. Over twenty former Trustees of the Federal Bar Council have gone on to service in the federal judiciary, including the Honorable Ruth Bader Ginsburg, Associate Justice of the United States Supreme Court. You can find more

information about the Council at <http://www.federalbarcouncil.org>. *The Bar Association of the Fifth Federal Circuit.* The purpose of the Bar Association of the Fifth Federal Circuit is to improve and facilitate the administration of justice within the Circuit. The organization provides continuing legal education, access to unpublished opinions that are not otherwise available on the Fifth Circuit's web page, and seeks to raise the standards of proficiency and integrity in federal practice. The Association's website is: <http://www.bar5fed.org>.

*Sixth Circuit Judicial Conference.* The Sixth Circuit does not currently have a bar association per se, but does have a Judicial Conference sponsored by the Sixth Circuit. The Court hosts an annual gathering of all circuit, district, bankruptcy and magistrate judges of the Circuit, and every other year invites members of the bar to participate. More information is available at: [http://www.ca6.uscourts.gov/internet/judicial\\_conference/judicialconf.htm](http://www.ca6.uscourts.gov/internet/judicial_conference/judicialconf.htm).

*The Seventh Circuit Bar Association.* The primary goal of the Association is to work together—as lawyers and judges—to understand and address issues relating to the administration of justice within the Circuit. Members have significant opportunities for education and networking and to communicate concerns with the judges of the circuit. The Association's website can be found at: <http://www.7thcircuitbar.org/>.

*The Eighth Circuit Bar Association.* This Association, formed in 2003, seeks to improve and facilitate the administration of justice in the federal courts within the Eighth Circuit. Its goal is to serve as a complement to ex-

isting bar organizations and to collaborate with them. The Association website is: [www.riderlaw.com/eighth\\_circuit\\_bar.html](http://www.riderlaw.com/eighth_circuit_bar.html).

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## State Organizations

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**Alabama.** The Appellate Practice Section of the Alabama State Bar serves to foster communication among lawyers and judges on matters pertaining to appellate practice. The Section also acts as a resource group for the Alabama appellate courts and the Eleventh Circuit Court of Appeals by assisting with rules evaluations and amendments, pro bono appointments, appellate mediation, and other programs. For further information, contact the Sections division of the Alabama State Bar at (334)269-1515 or [edpatter@alabar.org](mailto:edpatter@alabar.org).

**Arizona.** The Appellate Practice Section of the State Bar of Arizona provides a forum for appellate practitioners and judges to meet and exchange ideas and concerns. The Section sponsors CLE programs relating to appellate practice and appellate advocacy, conducts discussion groups regarding various aspects of the appeals process, and disseminates information to the bar and the public about the appeals process. More information on the Section can be found at [www.myazbar.org/SecComm/Sections/AP](http://www.myazbar.org/SecComm/Sections/AP).

**California.** An Advisory Commission on Appellate Law is organized under the "Legal Specialization" section of the State Bar of California. The Board of Legal Specialization administers the California legal specialization program, which provides policies and guidelines for certification and re-certification of specialists and acts upon

the recommendations of advisory commissions for approval or denial of certifications and re-certifications. The Appellate Law Advisory Commission reviews and makes recommendations on certification and re-certification applications to the Board, develops and grades the appellate law legal specialist examination, reviews and approves applications for approved education provider status and for individual education programs, and recommends revisions to the standards for certification and re-certification to reflect current practice in the area of appellate law. The chair for the Appellate Law Advisory Commission, Susan H. Handelman, may be contacted at [shandelman@ropers.com](mailto:shandelman@ropers.com) or (650)364-8200.

**Colorado.** The Litigation Section of the Colorado Bar Association maintains a subcommittee on appellate practices. The Section provides publications and seminars on current information of interest to litigation practitioners. It conducts an annual fall seminar, a summer symposium on litigation topics, and specialized programs at the annual Colorado Bar Association convention. In May 2005, the Appellate Subsection co-sponsored a CLE program on "Appellate Practice in State and Federal Court." The Colorado Bar Association can be reached for more information at (303)860-1115, or online at [www.cobar.org](http://www.cobar.org).

**Florida.** The Florida Bar Appellate Practice Section is an active, 1400-person organization devoted to promoting excellence in Florida's state and federal appellate courts. The Section holds meetings, sponsors seminars and CLE programs, and publishes a section journal, The

Record. More information on the Florida Bar Appellate Practice Section is available on its website, [www.flabarappellate.org](http://www.flabarappellate.org).

**Georgia.** The Appellate Practice Section of the State Bar of Georgia strives to foster professionalism and excellence in appellate advocacy and to encourage improvements in the appellate process. To that end, the Section publishes newsletters, sponsors programs and seminars, encourages pro bono representation, provides a forum for dialogue between the appellate bench and the Georgia bar, and advocates improvements in appellate practice and procedure through legislation. For more information on the Section, click on the "Sections" link of the State Bar of Georgia website, [www.gabar.org](http://www.gabar.org).

**Illinois.** The Appellate Lawyers Association is an organization of Illinois attorneys who regularly practice in the state and federal appellate courts. The ALA holds monthly meetings, provides presentations by judges or prominent attorneys, offers publications, sponsors a Midwest moot court competition, and has a private discussion forum for ALA members. More information can be found on the ALA website, [www.applawyers.org](http://www.applawyers.org).

**Indiana.** The Appellate Practice Section of the Indiana State Bar Association acts to bring together members of the Indiana State Bar Association who are interested in appellate practice and procedure issues. The Section publishes a newsletter, *The Appellate Advocate*, twice a year. More information can be found by contacting the Section Chair, Hon. James S. Kirsch, at [jkirsch@courts.state.in.us](mailto:jkirsch@courts.state.in.us). The Indiana State Bar Association may be

contacted at (800)266-2581, or online at [www.inbar.org](http://www.inbar.org).

*Iowa.* The Appellate Practice Committee of the Iowa State Bar Association acts to improve appellate practice and interface with the restructuring efforts of the Supreme Court. The Iowa State Bar Association may be contacted at (515)243-3179, or online at [www.iowabar.org](http://www.iowabar.org).

*Michigan.* The Appellate Practice Section of the State Bar of Michigan provides education, information, and analysis about issues of concern in appellate law through meetings, seminars, its website, public service programs, a discussion listserv for members, and publication of a newsletter on Michigan appellate practice and procedure. More information can be found online at [www.michbar.org/appellate](http://www.michbar.org/appellate).

*Minnesota.* The Appellate Practice Section of the Minnesota State Bar Association focuses on legal and policy issues related to both state and federal appellate practice. The section provides opportunities for continuing legal education on the latest developments in appellate matters and issues a Section newsletter. It provides a forum for attorneys who handle an occasional appeal as well as for attorneys whose practice is concentrated in appellate practice. More information on the section can be found at [www2.mnbar.org/sections/appellate](http://www2.mnbar.org/sections/appellate).

*New Jersey.* The Appellate Practice Committee of the New Jersey State Bar Association addresses all issues that affect practices and procedures in the Appellate Division and Supreme Court of New Jersey. The Committee comments on proposed amendments to court rules, promotes an open and

ongoing exchange of views with appellate judges and court administrators, and sponsors cooperative efforts between the judiciary and the Bar Association in order to enhance the quality, effectiveness and efficiency of justice at the appellate level. The Chair of the Appellate Practice Committee, Bruce D. Greenberg, can be contacted at (973)623-3000 or [bgreenberg@ldgrlaw.com](mailto:bgreenberg@ldgrlaw.com).

*New Mexico.* The State Bar of New Mexico Appellate Practice Section is an organization of lawyers and judges who handle appeals or are interested in appellate law. It serves to provide information and dialogue concerning issues affecting appellate law to its members, the judiciary, the State Bar, and the public. Newsletters are available to members on the Section website, found under the "Divisions/Sections/Committees" link at [www.nmbar.org](http://www.nmbar.org).

*New York.* The Commercial and Federal Litigation Section of the New York State Bar Association provides a Section newsletter and reports on commercial and federal litigation issues. The Section includes a Committee on Appellate Practice. For more information on this Committee, you may wish to contact the New York State Bar Association at (518)463-3200.

*North Carolina.* The Appellate Rules Committee of the North Carolina Bar Association is concerned with improving the quality of appellate practice in North Carolina. Its members (lawyers and judges from across the state) meet regularly to discuss appellate problems and possible solutions. The Committee has drafted proposed amendments to the North Carolina Rules of Appellate Procedure for con-

sideration by the Supreme Court.

More information on the Committee can be found at [www.ncbar.org/about/committees/appellate.aspx](http://www.ncbar.org/about/committees/appellate.aspx).

*Ohio.* The Ohio State Bar Association Litigation Section Appellate Practice Committee works to establish a new degree of cooperation and coordination between appellate judges and practitioners. It contributes to the Litigation Section newsletter and has organized an appellate continuing legal education program. More information can be accessed by members at [www.ohiobar.org/mem/login.asp](http://www.ohiobar.org/mem/login.asp). Andrew S. Pollis, the Litigation Section chair, can be reached at (216)274-2386 or [aspollis@hahnlaw.com](mailto:aspollis@hahnlaw.com) for more information.

*Oklahoma.* The Appellate Practice Section of the Oklahoma Bar Association hosts speakers on appellate issues and organizes continuing legal education. Contact Chairperson Barbara S. Kinney at (405)522-1165 or [Barbara.Kinney@oscn.net](mailto:Barbara.Kinney@oscn.net) for more information on the Section.

*Oregon.* The Appellate Practice Section of the Oregon State Bar provides appellate practitioners in state and federal court with an opportunity to develop and improve their skills, and provides a forum for communication and action. The Section generally sponsors two continuing legal education seminars each year and also publishes a newsletter for its members. More information can be found on the Section's website, [www.osbappellate.homestead.com](http://www.osbappellate.homestead.com).

*Pennsylvania.* The Pennsylvania Post-Trial and Appellate Committee is charged with promoting, supporting and improving post-trial and appellate advocacy through regular member dialogues, seminars, a newsletter, and

interactions with the courts and similar national and state organizations. The Pennsylvania Bar Association can be contacted at (717)238-6715 or [info@pabar.org](mailto:info@pabar.org) for more information. *South Carolina*. The Trial and Appellate Section of the South Carolina Bar sponsors and supports programs on litigation skills, effective advocacy and specialized areas of litigation practice in an effort to improve the art and technique of trial advocacy. It co-sponsors a CLE seminar at the South Carolina Bar convention and encourages members to submit articles to *South Carolina Lawyer*. Other projects include monitoring legislation and posting Section information on the Bar's website and through the Section's electronic mailing list. Contact Tara Smith at (803)799-6653, ext. 146, or [tara.smith@scbar.org](mailto:tara.smith@scbar.org) for more information on the Section. *Texas*. The Appellate Section of the State Bar of Texas provides continuing

legal education opportunities for appellate practitioners, sends e-mail alerts on appellate law issues to members, and publishes a Section report, *The Appellate Advocate*. More information regarding the Section can be found on its website, [www.texapp.org](http://www.texapp.org).

*Utah*. The Utah State Bar Appellate Practice Section sponsors continuing legal education programs, provides practitioner materials, and provides notices of interest to appellate attorneys on its website. More information on the Section can be found online at [www.utahbar.org/sections/appellatepractice](http://www.utahbar.org/sections/appellatepractice).

*Virginia*. The Virginia State Bar Litigation Section maintains an Appellate Practice Subcommittee. More information regarding this Subcommittee can be obtained by contacting its Chair, William H. Shewmake, at (804)282-8800.

*Wisconsin*. The State Bar of Wisconsin

Appellate Practice Section brings together members of the Wisconsin Bar who have a special interest in the field of appellate practice and encourages the communication and exchange of ideas between attorneys practicing in state and federal appellate courts. The Section publishes a newsletter and sponsors the Appellate Practice Workshop, where participants brief and argue an appellate case and then receive feedback from appellate judges and experienced practitioners. More information can be found on the Section's page of the State Bar website, [www.wisbar.org](http://www.wisbar.org).

*Wyoming*. The Wyoming State Bar maintains a Permanent Rules Advisory – Appellate committee. The Chairperson of the committee is Gregory C. Dyekman, who can be reached at [Greg.Dyekman@draylaw.com](mailto:Greg.Dyekman@draylaw.com), or at (307)634-8891.

**Argument that Business Risk Exclusions Rendered Coverage Illusory Not Preserved for Review**  
*B & T Masonry Construction Co, Inc. v. Public Service Mutual Insurance Co.*, 382 F. 3d 36 (1<sup>st</sup> Cir. 2004).

B&T Masonry Construction Company was one of several subcontractors sued by the general contractor on a school construction project after the city sued the general, alleging that faulty workmanship had caused damage to the building. When B&T tendered its defense to defendant, its commercial general liability insurance carrier, the insurer disclaimed coverage, relying on several “business risk” exclusions which, generally speaking, bar coverage for property damage caused by the insured’s own work. The district court granted summary judgment to the insurer, holding that all damages described in the third-party complaint fell within the business risk exclusions.

On appeal, B&T argued for the first time that the exclusions render the insurance policy “illusory,” and are therefore unenforceable. “We cannot countenance such a bald-faced switching of horses mid-stream,” responded the First District in affirming. Referring to a “prudential principle firmly embedded in our jurisprudence,” the court cited numerous other decisions holding that “legal theories not raised squarely in the lower court cannot be broached for the first time on appeal.” When B&T

tried to argue that a rhetorical question during oral argument seemed to raise the question below, the court made clear what it meant by “raising” an issue below: “To preserve a point for appeal, some developed argumentation must be put forward in the nisi prius court – and a veiled reference to a legal theory is not enough to satisfy this requirement.” Then, adding insult to injury, the court noted “in the interest of completeness” that the theory would not have prevailed even if it had been properly preserved, as the business risk exclusions at issue “do not completely vitiate the bargained-for coverage,” and thus do not render the grant of coverage illusory.

**Summary Judgment Vacated Because Losing Party Not Given Adequate Opportunity To Respond**  
*John G. Alden, Inc. of Massachusetts v. John G. Alden Insurance Agency of Florida, Inc.*, 389 F. 3<sup>rd</sup> 21 (1<sup>st</sup> Cir. 2004).

John G. Alden, Inc. of Massachusetts and John G. Alden Insurance Agency, Inc. (collectively, “Alden Mass”), brought a breach of contract and trademark infringement action against John G. Alden Insurance Agency of Florida, Inc. (“Alden Florida”) and John G. Alden Special Risks, Inc. (“Special Risks”), collectively, “appellees.” Alden Mass owned several federal registrations for trademarks related to the Alden name, and on December 9, 1981, entered into a license agreement with Alden Florida that required a payment of a percentage of gross commissions on insurance sales, and stated further that Alden Mass could terminate the license if Alden Florida failed to make the required payments. Alden Florida

stopped making payments in 1987, and Alden Mass stopped its collection efforts no later than 1993.

On September 30, 2002, Alden Mass gave written notice, purporting to terminate the agreement. Alden Florida did not respond and continued to use the Alden Mass registered marks until 2003. Meanwhile, Frank Atlass, founder of Alden Florida, incorporated Special Risks on November 18, 1999, and although there was never a licensing agreement, used the Alden Mass registered marks until after this suit was filed.

On November 1, 2002, Alden Mass filed suit against appellees. August 10, 2003, was set as the deadline for filing summary judgment motions, and September 10 for filing oppositions. On August 11, appellees filed an opposition to Alden Mass’ summary judgment motion and, for the first time, advanced the theory that Alden Florida had repudiated the license agreement at least fifteen years earlier by stopping the payments. On August 15, Alden Mass replied, contending that, as a matter of law, a contract cannot be repudiated by mere inaction. With court permission, appellees then took a late deposition of a former employee of Alden Mass and, as a result, filed on September 30 a motion for leave to file a late summary judgment motion, claiming for the first time that they had repudiated the contract not only by a non-payment but also by affirmatively “informing [Alden Mass] that future payments would not be made.” On October 3, the court denied appellees’ motion to file late, and on October 15, appellees moved for reconsideration of that denial. During the hearing, the judge noted the new affirmative repudiation theory and in-

### The Eternally Timely Motion for New Trial

#### Casey v. Long Island Railroad. Co., 406 F.3d 142 (2d Cir. 2005).

James Casey sued his employer, the Long Island Railroad Company (“LIRR”) under the Federal Employers’ Liability Act, 45 U.S.C. § 51 et seq., alleging on-the-job injuries. On September 12, 2002, the jury’s special verdict awarded Casey damages totaling \$1.75 million, including \$1.3 million for future pain and suffering. After the verdict, LIRR’s counsel orally moved for judgment as a matter of law and argued that the award for future pain and suffering was excessive. The district court asked for the motion in writing and, in the meantime, *did not enter judgment on the verdict*. Casey’s counsel wrote to the district judge, arguing that the delay in the entry of a judgment was inappropriate under the rules and asking that the court enter judgment *nunc pro tunc*. The court denied that request, and ordered instead that enforcement of judgment was stayed pending determination of LIRR’s motion for judgment as a matter of law.

LIRR filed its new trial motion on November 21, 2002, and Casey opposed, arguing both the merits and that the district court lacked jurisdiction to entertain the motion. On July 16, 2004, the court granted the motion, rejecting Casey’s jurisdictional challenge by stating that it had discretion to delay entry of the judgment. The court also found that the award of \$1.3 million for future pain and suffering was “so high as to shock the judicial conscience,” and ordered a new trial on that aspect of the verdict

unless Casey accepted a remittitur to \$450,000.

On August 4, 2004, Casey filed a notice of appeal from the new trial order. Then, apparently realizing that the order was not appealable either under 28 U.S.C. § 1291 as a final order or under 28 U.S.C. § 1292(a) as an injunctive order, the parties returned to the district court and obtained certification for an immediate appeal pursuant to 28 U.S.C. § 1292(b). Five days later, on October 26, 2004, Casey filed his brief, arguing that the district court had no power to extend the Rule 59(b) deadline for LIRR’s new trial motion and thus no authority to grant that motion and that there was sufficient evidence to support the damage award.

The Second Circuit denied the petition for leave to appeal and dismissed the appeal. First, the court found that, after obtaining a § 1292(b) certification, a would-be appellant must petition for permission to appeal and must do so within ten days after entry of the certification order, as “The district court’s certification confers no right to appeal but only the right to petition the court of appeals to exercise its discretion to entertain an appeal.” Further, Federal Rule of Appellate Procedure 5(a)(2) establishes that the “ten-day window” under §1292(b) is mandatory, not discretionary. Here, no petition for permission to appeal had ever been filed. However, the court noted that, in appeals as of right, a court may find that the rule has been met if the litigant’s action is the functional equivalent of what the rule requires and, because Casey filed his brief within ten days of the certification order, the court found that it was the

vited Alden Mass to submit a letter, alerting the court of anything in the recent deposition or elsewhere that could raise a disputed issue of fact, but making clear, however, that “discovery is closed” and “there’s no more briefing.” Alden Mass submitted the requested letter on October 23.

On November 26, the court granted appellees’ motion for reconsideration, denied Alden Mass’ motion for summary judgment and granted summary judgment to appellees. The court determined that Alden Florida had repudiated the contract approximately fifteen years prior to suit and, therefore, Alden Mass’ contract claims were barred by the statute of limitations and its Lanham Act claims were barred by the equitable doctrine of laches. The decision made no mention of Special Risks’ use of Alden Mass’ marks.

Alden Mass appealed, and the First Circuit vacated and remanded. The court found that, because Alden Mass learned for the first time that it was the target of a motion for summary judgment on November 26, when the district court both granted appellees’ motion for reconsideration and entered summary judgment in their favor, Alden Mass had not been afforded the ten days to reply required by Federal Rule of Civil Procedure 56(c).

In addition to the district court’s failure to follow the requirements of Rule 56(c), the circuit court also noted that remand was necessary because there was at least one significant unresolved legal issue, as the decision made no reference to Special Risks’ use of Alden Mass’ registered marks.

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functional equivalent of a petition for leave to appeal, and treated it as the required application.

Casey's application did not, however, meet the substantive criteria of section 1292(b). To warrant leave to appeal under that section, an appeal must concern a question of law, that question must be one that is controlling, and that controlling question must be one "as to which there is substantial ground for difference of opinion." The only questions presented in Casey's brief were whether the district court had the power to delay the entry of judgment so as to extend the Rule 59(b) deadline for LIRR to make its new trial motion and whether the jury award for future pain and suffering was properly set aside as excessive – which Casey's counsel conceded at oral argument is not a question of law. With regard to the first question, although the Second Circuit found that it was a question of law, it did not find it to be controlling, as the dispositive question in the case was whether LIRR's new trial motion was timely. The court then identified several bases on which the motion could be found to be timely.

First, the Second Circuit recognized that Rule 58's 10-day period for filing a new trial motion is expressly and exclusively triggered by the entry of a judgment, and "under the Rules as they existed at the time of verdict . . . [the] failure by the district court to enter a judgment . . . , far from foreclosing a timely Rule 59(b) motion, virtually guaranteed its timeliness."

Admitting that this "anomaly of eternal timeliness" was alleviated by amendments to Rule 58, the court concluded that LIRR's motion would

still be timely. The court found that the amended rule requires that, where there is no separate document entering judgment, the time to move for new trial pursuant to Rule 59 expires 160 days after the entry of the verdict on the civil docket, and LIRR's motion papers were filed well within that period.

Finally, the Second Circuit concluded that LIRR's motion would have been timely even if a judgment had been entered on September 12, because the rules provide that a motion need not be in writing if it is "made during a hearing or trial," which is exactly what happened at the trial. The Second Circuit found that the district court's reference to the LIRR counsel's oral motion to reduce the award showed an understanding that counsel was moving for a new trial unless Casey accepted a remittitur, and that this motion was within the time limit of Rule 59(b).

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### Third Circuit

#### **RICO: Standing and Causation** **Anderson v. Ayling, 396 F.3d 265** **(3<sup>rd</sup> Cir. 2005),**

Decisions of the United States Supreme Court require more than "but for" causation to confer standing to sue for civil damages under RICO, the Third Circuit found in this matter, noting that there must be *proximate* cause, a direct causal relationship between

the harm and an act that is illegal under RICO.

Plaintiffs alleged that they lost their jobs in retaliation for whistleblowing on corrupt union activities. However, the court found that the defendants' "alleged falsehoods were filtered through [a] long chain of intervening causes," which ultimately led to the plaintiffs' being fired. Because the plaintiffs' complaint failed to show the required proximate cause, the Third Circuit affirmed the dismissal of the plaintiffs' complaint.

#### **Dismissing without Prejudice** **May Affect Finality of Order** **Quashing Writ of Attachment** **LNC Investments LLC v. The** **Republic Nicaragua, 396 F.3d 342** **(3<sup>rd</sup> Cir. 2005)**

Plaintiff, a judgment creditor of the Republic of Nicaragua, tried to garnish sums from the \$50 million allegedly owed by Megatel to Nicaragua. The district court quashed the writ of attachment, concluding that Megatel would be exposed to double liability if the writ were enforced because Nicaraguan law would not regard that payment to plaintiff as a discharge of Megatel's obligation to Nicaragua. On appeal, the Third Circuit held that it lacked jurisdiction to consider the appeal because the order quashing the writ was not a final disposition of the case.

Originally, the plaintiff issued writs of attachment against Megatel and its two parent corporations. When the district court dismissed the attachment against Megatel, plaintiff appealed that dismissal. The appellate court asked whether the attachments against the parent companies precluded treating the dismissal of the

attachment against Megatel as a final order. In response, plaintiff dismissed those attachments *without prejudice*. The jurisdictional issue confronting the Third Circuit then became whether the dismissal without prejudice of the writs of attachment against the parent companies was sufficient to render the case procedurally final for purposes of appeal, and the court decided that it was not.

The court referred to *Erie County Retirees Ass'n v. County of Erie, Pa.*, 220 F.3d 193, 201 (3d. Cir. 2000), which held that there is ordinarily no appellate jurisdiction “when an appellant has asserted a claim in the district court which it has withdrawn or dismissed without prejudice.” The court noted an exception where the claims dismissed without prejudice are “effectively barred,” but did not find that the exception applied here, as the record would not allow it to hold that plaintiff could not pursue its attachments against the parent companies. Consequently, the court dismissed the appeal, noting that plaintiff could obtain appellate review after it pursued its garnishment action against the parent companies “to their conclusion in the District Court, or withdraw those proceedings with prejudice.”

### **Attorney's Fees and Costs Found Relevant to Determination of Punitive Damages in Bad Faith Case**

#### **Willow Inn, Inc. v. Public Service Mutual Insurance Company, 399 F.3d 224 (3<sup>rd</sup> Cir. 2005)**

The district court awarded \$2,000 in compensatory damages, \$150,000 in punitive damages, \$128,075 for attorney fees, and \$7,372 for costs on the plaintiff's insurance coverage bad faith

claim. On appeal, the Third Circuit, addressing each of the three *Gore/Campbell* guideposts for proper determination of punitive damage awards, and “acknowledging the ‘inherent imprecision’ of the substantive due process analysis,” affirmed, finding the \$150,000 punitive damages “to approach but not cross the constitutional line.”

First, the court accorded deference to the lower court's finding of the insurer's “reprehensibility,” explaining that the fact that “the quantum of reprehensibility necessary to support the punitive damages award was determined to exist by a judge exercising diversity jurisdiction lessens our concern that the conclusion was the product of local bias, distaste for corporate defendants, or sympathy for the plaintiff.”

Secondly, the court looked at the ratio between the punitive award and the financial harm inflicted on plaintiff, and found acceptable at nearly 1:1. Finding the \$2,000 compensatory damages award incidental to the claim, which had been paid in full before this action was filed, the court concluded that the attorney fees and costs awarded were proper points of comparison with the punitive award for ratio purposes.

On the third factor, a comparison to civil penalties for the misconduct, the court noted that the punitive damages were nearly 30 times the analogous penalty of \$5,000. However, the court was reluctant to upset the award on that basis, because it stated that the United States Supreme Court has not yet given directions on how this comparison was to be measured.

### **Self-Executing Dismissal Order Was Ineffective**

#### **WRS, Inc. v. Plaza Entertainment, Inc., 402 F.3d 424 (3<sup>rd</sup> Cir. 2005)**

With both parties and the district court believing that this case had been dismissed by plaintiff without prejudice to reinstatement, plaintiff filed a motion to reopen. The court denied the motion, holding that the dismissal required plaintiff to file a new case. When plaintiff appealed, the Third Circuit dismissed and remanded, holding that the action had never been dismissed in the first place.

The court of appeals held that the district court's apparently self-executing dismissal order – which stated that the case would be dismissed if a specific event did not occur before a certain date – was merely an administrative closing of the case, not a final order, and that a separate order of dismissal was necessary to effect the dismissal.

### **A First for the Circuit – Rule 11 Sanctions by Default**

#### **DiPaolo v. Moran, 407 F.3d 140 (3<sup>rd</sup> Cir. 2005)**

This case is significant for two reasons. First, it began as a wrongful termination of employment case, but the sanctions issues which it developed outlived the case's substantive claims. Second, it represents the first *published* opinion in which the Third Circuit upheld a district court's imposition of sanctions under Rule 11 by default.

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## Nudist Association Has Standing to Challenge Law Prohibiting Youth Camps

**White Tail Park, Inc. v. Stroube**, — *F.3d* —, 2005 WL 1554600 (4<sup>th</sup> Cir.)

In the 2004 session of the Virginia General Assembly, the law regulating licenses for summer camps was changed to prohibit the licensure of nudist camps for juveniles attending without their parents. The American Association for Nude Recreation held such a camp in Virginia in 2003 and planned another for 2004. Along with the campground and three sets of parents, the association sued for a declaration that the new law violated their constitutional rights to privacy and freedom of association under the First Amendment. After its motion for preliminary injunction was denied, the association dropped its plans for a youth camp in Virginia during 2004. Because the association moved its 2004 camp to another state, the district court dismissed the association's claims on grounds of both mootness and lack of standing.

On appeal, the Fourth Circuit reversed in part. Based on the representations of the association and the campground of their plans to make the youth camp in Virginia an annual event, the court ruled that the case still presents a live controversy. As to the anonymous parents, the court agreed that their claims are moot, because they had no alleged plans to send the children to a Virginia camp affected by the new law.

On standing, the association claimed injury to itself as an organization, and did not rely on injuries to

its members. It asserted that the prohibition against camps for young people only would reduce the size of the audience for its message of social nudism and this reduction will continue so long as the law remains in effect. While the district court rejected this consequence as *de minimis*, Judge Traxler disagreed, concluding that a state law that reduces the size of a speaker's audience can constitute an invasion of a legally protected interest.

As to the campground, Judge Traxler found no such interest. The association, and not the campground, obtained the state permit. The association itself operates the camps and does the work of spreading its message. Accordingly, Judge Traxler concluded that only the association, and not the campground owner, has standing to challenge the statute.

## Law Student Has Constitutional Right to ADA Accommodation for Constitutional Law Exam

**Constantine v. Rectors and Visitors of George Mason University**, — *F.3d* —, 2005 WL 1384373 (4<sup>th</sup> Cir.)

Carin Constantine suffered a migraine headache during her final exam in constitutional law. Previously, she had been diagnosed and prescribed medication for her problem with migraines. Law school faculty members refused Ms. Constantine's request for extra time to finish the test, and she received a failing grade. After her repeated demands for a second chance, school officials allowed her to retake the exam, but only on short notice, and again she failed.

Ms. Constantine claimed unlawful discrimination under the Americans with Disabilities Act and the Rehabilitation Act and retaliation in viola-

tion of her First Amendment rights. The district court dismissed her claims under Rule 12(b)(6). On appeal, the Fourth Circuit reversed.

Defendants argued that consideration of the Eleventh Amendment should precede a ruling on the sufficiency of Ms. Constantine's allegations. Writing for the court, Judge Shedd agreed that Eleventh Amendment immunity should be decided first, even though it is not an issue of subject matter jurisdiction. Expanding on *Tennessee v. Lane*, 541 U.S. 509 (2004), the court held that Congress has abrogated the Commonwealth's immunity for plaintiff's ADA claim, and that 42 U.S.C. § 2000d-7 requires Virginia to waive its immunity for the Rehabilitation Act claim. Furthermore, the Eleventh Amendment is no bar to Ms. Constantine's claims for declaratory and injunctive relief.

On the merits, Ms. Constantine alleged that she had been able to complete her other exams without incident and that, with accommodation, she would have been able to pass this exam. The court concluded that Ms. Constantine's allegations, if true, could show that she was "otherwise qualified" and had been denied the benefits of the course in constitutional law. The defendants claimed that no First Amendment violation occurred, because they did not stop Ms. Constantine from speaking. The court dismissed this argument, explaining that the First Amendment requires an objective test to measure the chilling effect of the government's action.

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**Non-Sectarian Legislative Invocations**  
*Simpson v. Chesterfield County Board of Supervisors*, 404 F.3d 276 (4th Cir. 2005)

The Chesterfield County Board of Supervisors has opened its meetings with a non-sectarian invocation since 1984, when the Supreme Court upheld legislative invocations under the First Amendment's Establishment Clause. The Board invites members of the local clergy to sign up to perform the invocations. Clergymen on the list include Catholics and Protestants, Christians and non-Christians.

Cynthia Simpson sought her way onto the list of religious leaders, identifying herself as a spiritual leader among a local group of witches. After county officials told her that the County would not accept a witch on the list of religious leaders, Ms. Simpson sued, claiming the Board's policy impermissibly advances Judeo-Christian religions. The District Court granted Ms. Simpson's motion for summary judgment. On appeal, the Fourth Circuit affirmed, in an opinion by Judge Wilkinson.

Refusing to apply Establishment Clause cases of more general application, Judge Wilkinson chose to follow *Marsh v. Chambers*, 463 U.S. 783 (1983), which deals expressly with legislative invocations, and which the Supreme Court decided after the other leading cases. In *Marsh*, the Supreme Court has carved out for legislative prayer "a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines." Judge Wilkinson distinguished the Fourth Circuit's other prayer cases, and concluded that Chesterfield County carefully tailored its policies to fit within the limits of *Marsh*. In a concurring

opinion, Judge Niemeyer emphasized that prayer by government is subject to lesser scrutiny than prayer by the people imposed by government.

### Fifth Circuit

**Taxation of Prejudgment Interest**  
*Chamberlain v. U.S.*, 401 F.3d 335 (5th Cir. 2005)

When the IRS assessed income tax of more than a million dollars against the prejudgment interest plaintiffs were awarded in a personal injury action, plaintiffs paid the tax under protest, requested and were denied a refund, and brought suit seeking recovery of the tax. The district court granted summary judgment for the United States, holding that federal law controls, and that the interest was taxable as gross income.

The Fifth Circuit affirmed, rejecting plaintiffs' contention that section 104(a)(2) of the Internal Revenue Code provides that gross income does not include "the amount of any damages received . . . on account of personal injuries or sickness," and thus excluded prejudgment interest from taxation. Finding this provision ambiguous, the court turned to prior United States Supreme Court decisions, and concluded that, in order to constitute damages "on account of" personal injury, an amount must be awarded "by reason of" or "because of" that injury, and that prejudgment interest does not fall within section 104(a)(2) because it compensates a plaintiff only for "lost time value of money," not the personal injury.

This was a matter of first impres-

sion for the Fifth Circuit, which found decisions from the Tenth, First, and Third Circuits, all of which held that prejudgment interest is subject to taxation, to be persuasive. (*Brabson v. United States*, 73 F.3d 1040, 1047 (10th Cir. 1996), "prejudgment interest is not linked to the injury in the same direct way as traditional tort remedies"; *Rozpad v. Commissioner*, 154 F.3d 1, 6 (1st Cir. 1998), because the personal injury does not cause the delay in payment, prejudgment interest is not received "on account of personal injury"; *Francisco v. United States*, 267 F.3d 303 (3rd Cir. 2001), prejudgment interest does not compensate plaintiffs for any of the traditional harms associated with personal injury; rather, it compensates for an economic harm that is normally taxable.)

**Jurisdiction/Joinder of Parties under the National Childhood Vaccine Act**

**McDonal v. Abbott Laboratories**, 408 F.3d 177 (5th Cir. 2005)

After their daughter suffered from mercury poisoning allegedly resulting from exposure to Thimerosal, a vaccine preservative, plaintiffs sued several defendants, both resident and nonresident, including the Thimerosal manufacturers, in state court. Defendants removed to federal court, claiming the action arose exclusively under the National Childhood Vaccine Act, 42 U.S.C. §§ 300aa-1 to -34. The district court denied the McDonal's motion to remand, holding that the non-diverse defendants were improperly joined, and dismissed all claims, stating they must first be exhausted in the United States Court of Federal

Claims, as required by the Vaccine Act.

On appeal, the Fifth Circuit referred to its recent holding in *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568 (5th Cir. 2004) (en banc), which held that a party is improperly joined if actual fraud exists in the pleading of jurisdictional facts or if plaintiff is unable to establish a cause of action against the non-diverse party in state court (i.e., if there is no reasonable basis for the court to predict that the plaintiff might be able to recover against an in-state defendant). But if it is shown that the plaintiff cannot recover against *any* of the defendants, then remand would be appropriate because the initial joinder would not have been improper. It then would be a decision on the merits, as opposed to joinder.

Under this reasoning, the court determined that remand would not have been proper because *some* of the defendants did not fall within the provisions of the Vaccine Act. The court then upheld the dismissal of claims against the defendants targeted by the Vaccine Act, but reversed the dismissal of the Thimerosal defendants because they “are not deemed to be ‘vaccine administrators or manufacturers’ within the understanding of the Vaccine Act.”

### Was Tropical Storm Allison a “Business Interruption” or a Sales Bonanza?

**Finger Furniture Co., Inc. v. Commonwealth Ins. Co.**, 404 F.3d 312 (5th Cir. 2005)

The heavy rains of Tropical Storm Allison, which hit the Houston area in 2001, forced plaintiff Finger Furniture to shut down its stores all day on

June 9 and part of June 10. The following weekend, Finger slashed its prices and, in the court’s words, “sales soared.” Finger’s claim for lost sales on June 9 and 10 was denied by the defendant insurer in part because it contended Finger made up the loss through its post-storm sales. When the insurer filed a declaratory relief action, Finger prevailed on summary judgment and was awarded \$342,029.32 for its lost sales.

One of the chief issues on appeal was whether the court should have offset Finger’s storm losses with its post-storm profits. The Fifth Circuit determined that the only reasonable interpretation of the business interruption provision of the insurance contract is that the loss must be calculated based upon the business’s experience *before* the date of the loss, not what occurred *after* the loss, i.e., the record sales, and affirmed the award.

### Stay in Favor of a Non-Parallel State Suit

**American Guarantee & Liability Ins. Co. v. Anco Insulations, Inc.**, 408 F.3d 248 (5th Cir. 2005)

The district court stayed American Guarantee’s suit for declaratory relief and restitution against its insured, Anco, pending the outcome of a state proceeding involving some of the same parties and issues. The insurer appealed, asking whether the district court’s stay of a federal suit in favor of a non-parallel pending state suit constituted an abuse of discretion, as its preclusive effect would foreclose federal review of certain issues. The Fifth Circuit determined that, because the plaintiff was seeking monetary relief in addition to declaratory relief, the district court’s discretion to stay was

governed by the “exceptional circumstances” standard set forth in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). *Colorado River* discretion is available only where the state and federal proceedings are parallel, i.e., where the two suits involve the same parties and the same issues. Accordingly, the court found this stay to be an abuse of discretion because one party was named in the federal suit but not the state suit, and as the state action did not encompass the claim for restitution.

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## Sixth Circuit

### Rooker-Feldman and Younger Abstention Doctrines

**Gilbert v. Ferry**, 401 F.3d 411 (6th Cir. 2005)

Plaintiffs filed a 42 U.S.C. § 1983 action against four justices of the Michigan Supreme Court, seeking a declaration that the justices’ failure to recuse themselves violated plaintiffs’ due process right to a fair hearing before an impartial tribunal.

One of the plaintiffs was Michigan lawyer Geoffrey Fieger, who had won substantial judgments for the other plaintiffs in two actions filed in the Michigan state courts. In both of those cases, appeals were taken. In one, the Michigan Court of Appeals affirmed the judgment but granted Fieger’s opponents leave to appeal to the Michigan Supreme Court, which

accepted *amicus curiae* briefs from the Michigan and the United States Chambers of Commerce. In the second case, the Michigan Court of Appeals reversed the judgment and denied Fieger's clients leave to appeal to the Michigan Supreme Court.

Fieger moved for recusal in both cases, arguing it was necessary due to the probability of actual bias on the part of the justices because they had received large monetary donations and campaign support from both chambers of commerce. He also argued that the justices' public discourse revealed a personal and professional animus toward himself.

Affirming the district court's dismissal of the section 1983 action for lack of subject matter jurisdiction, the Sixth Circuit held that the district court could not have found a due process violation on the ground that the plaintiffs would not receive a fair hearing before an impartial tribunal without first determining that the Michigan Supreme Court justices had wrongly decided the motions for recusal. Despite the fact that plaintiffs filed the section 1983 claim before the motions to recuse were denied, the *Rooker-Feldman* doctrine nonetheless divested the court of subject matter jurisdiction once the motions to recuse were denied. Moreover, the Sixth Circuit found that even if the *Rooker-Feldman* doctrine had not divested the district court of jurisdiction, it would affirm the court's ruling on *Younger* abstention grounds because (1) the motions for recusal constituted ongoing judicial proceedings at the time the federal complaint was filed, (2) important state interests were implicated, and (3) plaintiffs

had an adequate opportunity to raise their constitutional challenge.

### **Rule 11 Sanctions Warranted when No Evidence Supports Claim**

**Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Aguirre, 410 F.3d 297 (6<sup>th</sup> Cir. 2005)**

Plaintiffs, a union and five former employees of a bankrupt automobile parts supply company, filed a complaint against four principal shareholders of the company, alleging violations of the Employee Retirement Income Security Act, 29 U.S.C. § 1101 et seq. and claims under the Labor Management Relations Act, 29 U.S.C. §141 et seq., and the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq. When plaintiffs argued that defendants were personally liable for the company's alleged statutory violations, the district court rejected their contention that there was such a thing as a "veil-piercing version of the alter ego doctrine," entered summary judgment in favor of the defendants and awarded sanctions against plaintiffs' attorney.

On appeal, the Sixth Circuit considered the two concepts separately and found that neither permitted recovery against defendants. The alter ego doctrine was found inapplicable because the case did not involve what the court called a "disguised continuance situation" or a "double-breasted operation," and the alleged undercapitalization of the company did not warrant piercing the corporate veil. The Sixth Circuit also found that the district court properly granted the

sanctions motion of one defendant for all of his fees and costs of trial, stating that it should have been clear to plaintiffs' attorney by the close of discovery that the evidence failed to support any type of claim against that specific defendant.

### **Post-9/11 Contract Termination Republic/NFR&C Parking of Louisville v. Regional Airport Authority of Louisville and Jefferson County, 410 F.3d 888 (6<sup>th</sup> Cir. 2005)**

Plaintiff Republic was awarded a five-year contract to operate the parking concession at the Louisville International Airport in exchange for paying defendant Airport Authority the greater of a monthly minimum guarantee of 85 percent of the gross receipts received during the same month of the previous year, or an amount equal to 93 percent of its actual gross receipts for that month.

Things went well until the Federal Aviation Authority halted commercial air travel for approximately three days after the 9/11 terrorist attacks, and strengthened airport security restrictions prevented the use of approximately 14.4 percent of the parking spaces. Republic terminated the contract in November 2001 because airline travel remained significantly below 2000 levels, and filed a complaint seeking a declaratory judgment that it be allowed to terminate its parking concession because of financial losses after the terrorist attacks. The Airport Authority counter-claimed, asserting breach of contract.

Both sides moved for summary judgment, referring to the section of the contract allowing for termination in the event of "damage" or "destruc-

tion” of all or a material part of the premises used or occupied by the concessionaire. The district court ruled in favor of Republic, finding that the decline in use of the airport after 9/11 resulted in a substantial loss of the value of the parking facilities, leaving Republic unable to perform as required by the agreement. The court rejected the argument that “damage” was limited to physical damage, not loss in value, and determined that Republic was entitled to terminate the contract and only pay a percentage of its actual receipts from September 11 to the date of termination.

The Airport Authority appealed. Reversing, the Sixth Circuit held that the district court erred in finding that the FAA’s security restrictions on parking after 9/11 constituted “damage” or “destruction” to the premises that would release Republic from its contractual obligations, as a straightforward reading of the contract indicated that “damage” could not be construed to mean simply loss of value. The court then remanded with instructions to enter summary judgment for the Airport Authority.

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## Seventh Circuit

### Appellate Jurisdiction/Amount in Controversy

#### Goulding v. Global Medical

Products Holdings, Inc., 394 F.3d 466 (7<sup>th</sup> Cir. 2005)

Unless they independently satisfy the

requirements of federal jurisdiction, disputes concerning settlement contracts must be resolved in state court.

Pursuant to a settlement agreement brokered by a magistrate judge in July of 2003, defendant was to pay \$45,000 in two installments, after which the underlying suit was to be dismissed. The agreement provided that defendant was entitled to tender stock in lieu of cash, but plaintiff was free to reject the stock and demand cash and, if defendant failed to perform, plaintiff was free to resume litigation.

Defendant tendered and plaintiff accepted the first stock tender, which plaintiff thereafter sold for \$22,388. The second settlement installment was likewise made via a stock tender. However, plaintiff rejected the stock tender as not being worth enough. Attempted tenders of the same stock certificates were made a second and third time, both times being rejected by plaintiff. After the third attempted stock tender was rejected, the stock rose 25-fold in over-the-counter trading. Not surprisingly, plaintiff promptly requested the stock certificates it had thrice rejected. Instead of submitting the stock certificates, defendant sent cash pursuant to the settlement agreement. Refusing to grant plaintiff’s request for the stock certificates and finding that defendant fulfilled its obligations under the settlement agreement, the district court dismissed the complaint.

Plaintiff appealed, arguing that the parties had orally modified the settlement agreement in January of 2004 without the supervision of the magistrate judge, following plaintiff’s initial rejection of the second stock tender. Pursuant to that oral agreement,

plaintiff claimed, it was entitled to the stock certificates.

Rather than addressing the merits of plaintiff’s argument, the Seventh Circuit found that the appeal failed on jurisdictional grounds. The court noted that, although the original claim satisfied the requirements for diversity jurisdiction, the alleged later modification of the settlement agreement did not. Specifically, the alleged oral modification concerned stock valued at approximately \$22,500 at the time. Further, the fact that the stock value later rose did not change the stakes for jurisdictional purposes.

Having found that the alleged modification failed to meet the amount in controversy requirement, the Seventh Circuit also found that it lacked authority pursuant to its ancillary jurisdiction, which includes settlements that the court has entered as judgments or has reserved authority to enforce. Concluding that the alleged oral modification in January of 2004 “was reached outside the court’s auspices, was not presented to or approved by the magistrate judge and therefore cannot be enforced under the supplemental jurisdiction,” the court affirmed the district court’s dismissal of the action.

### Final Judgment/Review of Sanctions

**American National Bank & Trust Co. of Chicago v. Equitable Life Assurance Society of the United States, 406 F.3d 867 (7<sup>th</sup> Cir. 2005)**

The district court’s dismissal without prejudice for lack of complete diversity constituted a “final action,” permitting party to appeal the sanctions the court had imposed prior to dismissal.

Plaintiffs, buyers of annuities, brought a diversity action against defendant insurance company/seller asserting contract and tort claims in connection with attempts to restrict the plaintiff's sub-trading of annuities. During the course of discovery, defendant produced a log claiming privilege on a number of documents. After utilizing a sampling review of the privileged documents, and on the motion of plaintiffs, the district court struck defendant's entire privilege log as a sanction. Specifically, the court found that defendant's log, composed of more than 400 documents, included five non-privileged documents.

Long after the order striking the privilege log, plaintiff discovered that complete diversity of citizenship was lacking. As a result, the district court entered an order dismissing the claim without prejudice. Thereafter, defendant appealed the district court's order striking its entire privilege log.

On appeal, the Seventh Circuit first held that, although subject matter jurisdiction turned out to be lacking for this particular action, it had authority to adjudicate matters regarding sanctions. The court further held that a dismissal of the "entire action," as compared to the mere dismissal of "the complaint" that can be amended, constituted a final judgment. Since the dismissal of the entire action ends the litigation, the court held that appeal is proper pursuant to 28 U.S.C. § 1291.

Turning to the merits of the appeal, the Seventh Circuit found that the magistrate's order was improper. Specifically, the court found that the defendant had a good-faith basis for claiming privilege for the documents that the magistrate later declared non-

privileged. Noting that "Simply having a good-faith difference of opinion is not sanctionable conduct," the court found that defendant had not acted in bad faith and that sanctions were not proper.

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## Eighth Circuit

### Clear Legal Error and Manifest Injustice Support an Exception to Law of the Case

#### **Sulik v. Taney County, Mo., 393 F.3d 765 (8th 2005) ("Sulik II")**

In a case that has been before the court on two appeals, the Eighth Circuit applied an important exception to the law of the case doctrine, holding it could decline to apply the doctrine where there was clear legal error and manifest injustice would result.

*Sulik v. Taney County, Mo.*, 316 F.3d 813, 814-16 (8th Cir. 2003) ("*Sulik I*"), involved a section 1983 action brought by a Missouri prisoner against numerous county and city officials based on a jailhouse assault. The district court dismissed Sulik's claims as untimely filed. The Eighth Circuit reversed in part, ordering reinstatement of Sulik's claims against all defendants except the police officers, holding those claims untimely because they were governed by a three-year, rather than a five-year, statute of limitations. *Id.* On remand, the district court, although doubtful about the Eighth Circuit's ruling, dismissed

the claims against the police officers. *Sulik II*, 393 F.3d. at 766.

In the second appeal, Sulik asked the Eighth Circuit to revisit its holding in *Sulik I* with regard to the statute of limitations issue. *Id.* The court of appeals noted the issue typically would be governed by the law of case doctrine, which requires that a decision concerning a rule of law govern the same issue in subsequent stages of the same litigation. *Id.* The court held, however, that it is not required to adhere to the doctrine where an earlier opinion contains a clear error regarding a legal issue and "works a manifest injustice." *Id.*

The court determined that application of the three-year limitations period to Sulik's claims against the police officers was a clear error of law and would result in manifest injustice. *Id.* at 766-67. Thus, the court overruled *Sulik I* with regard to that issue and remanded the case for reinstatement of Sulik's claims against the police officers. *Id.* at 767.

### Jury Verdict Finding Liability and No Damages Is Not Inconsistent Dairy Farmers of America, Inc. v. Travelers Insurance Company, 391 F.3d 936 (8th Cir. 2004).

The Eighth Circuit opened its opinion with a statement that foreshadowed the rest of its analysis: "These issues were for the jury and the jury has spoken." *Id.* at 938. The court then rejected the argument of plaintiff Dairy Farmers of America ("DFA") that the jury verdict was inconsistent when it found the defendant insurer had breached its fiduciary duty, but awarded no damages.

This case, before the court of appeals for the second time, arose out of

DFA's claim that defendant Travelers failed to appoint separate counsel to represent DFA in a personal injury claim. On remand, the jury returned a special verdict finding that, if Travelers had offered separate counsel, DFA would have instructed that counsel to prosecute a cross-claim against a co-defendant, to save the expense of filing a separate indemnity action. The jury also found no damages, declining to award attorney fees incurred in filing the indemnity action and for lost interest on monies expended in settlement of the underlying case.

On appeal, DFA argued the jury's findings were inconsistent and irreconcilable. The Eighth Circuit rejected this argument for two reasons. First, the court held that DFA waived its claim of inconsistent verdicts by failing to object to the inconsistency before judgment was entered. Second, the court determined that, even if DFA had properly raised the issue, "a jury's finding of liability without a corresponding award of damages does not invalidate the verdict." *Id.* at 945. Rather, if a jury finds a party's damages speculative or unreasonable, the jury does not have authority to "pull a more modest figure out of the air." *Id.* at 946.

On the facts before it, the court noted that DFA "clearly" sustained damages as a result of Traveler's failure to appoint separate counsel to negotiate DFA's interests in the underlying litigation. *Id.* at 945-46. Nonetheless, the court decided DFA failed to carry its evidentiary burden of proving damages from the breach. The court concluded that

Instead of focusing its damages theory on actual damages sustained, DFA pitched to the jury

speculative damages . . . and provided the district court with no legal precedent to support [its] theory of damages. The jury was entitled to, and apparently did, reject DFA's theory of damages. *Id.* at 946. Accordingly, the appellate court affirmed the district's court's judgment, commenting that the DFA "was entitled to a fair trial, not a perfect trial, and DFA received a fair trial." *Id.* at 946.

### Venue Waiver in Forum Selection Clause Precludes Removal

**iNet Directories, LLC v. Developershed, Inc., 394 F.3d 1081 (8th Cir. 2005).**

The Eighth Circuit held that the forum selection clause in a contract between two commercial parties unambiguously prohibited a defendant from removing the case to federal court.

Appellant Developershed sought review of the district court decision remanding iNet Directories' breach of contract action to Missouri state court after Developershed removed the claim to federal court. The district court had granted the motion for remand to state court based on the contract's forum selection clause, which stated:

The Parties hereby irrevocably waive any and all objections which any Party may now or hereafter have to the exercise of personal and subject matter jurisdiction by the federal or state courts in the State of Missouri and to the laying of venue of any such suit, action or proceeding brought in any such federal or state court in the State of Missouri.

*Id.* at 1081. On appeal, Developershed argued that this clause did not clearly

and unequivocally waive its right to removal. The Eighth Circuit disagreed. Relying on *Waters v. Browning-Ferris Indus., Inc.*, 252 F.3d 796, 797-98 (5th Cir. 2001), the court held that removal constitutes an objection to venue, and the forum selection clause should be enforced, and affirmed.

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### Ninth Circuit

#### Free Speech v. Fair Trial

**Turney v. Pugh, 400 F.3d 1197 (9th Cir. 2005)**

Turney handed out cards in an Alaska courthouse, urging recipients to call the number shown for the Fully Informed Jury Association. One juror did so, was advised about "jury veto power," and was told he was free to "judge the law itself as well as the facts regardless of the instructions from the judge." During deliberations, he told the other members of the jury about the phone message; the jury was then unable to reach a verdict and was excused.

Turney was subsequently indicted under Alaska's jury tampering statute, which outlaws direct or indirect communication with a juror "with intent to (1) influence the juror's . . . action as a juror; or (2) otherwise affect the outcome of the official proceeding." His motion to dismiss was denied. The Alaska Supreme Court affirmed, finding that the statute "proscribes only speech intended to influence a juror in his or her capacity as a juror,"

and that such speech is unprotected. Turney was then convicted of three counts of jury tampering. On appeal, his arguments on overbreadth and vagueness were rejected, and the Alaska Supreme Court denied review. Turning to the federal courts, he was denied a writ of habeas corpus by the district court, which found the earlier state supreme court opinion “fully in accord with United States Supreme Court jurisprudence.” The district court denied Turney a certificate of appealability, but the Ninth Circuit granted review under 28 U.S.C. § 2253(a) with respect to the question of whether the statute is overbroad.

Stating that this case raises “the perennially difficult issue of the proper balance between two of our society’s most treasured guarantees,” the Ninth Circuit affirmed. The court found that, while the First Amendment is “generally quite protective of speech concerning judicial proceedings,” it does not shield the “narrow but significant category of communication to jurors made outside of the auspices of the official proceeding and aimed at improperly influencing the outcome of a particular case,” and that Alaska’s tampering statute was “carefully narrowed” to apply only to unprotected speech of that type.

### Conditional Settlement May Render an Appeal Moot

**Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125 (9<sup>th</sup> Cir. 2005) en banc**

Article III requires that a live controversy persist throughout all stages of federal court litigation, and that limitation is not relaxed in declaratory judgment contexts. The Ninth Circuit, rehearing this matter *en banc*,

dismissed it as moot following a settlement under which one side modified the software which prompted the litigation and the other side relinquished all claims.

Gator.com is the proprietor of a software program that made discount coupons for an L.L. Bean competitor pop up on screen when a customer tried to view the L.L. Bean website. Litigation ensued in California, and the district court dismissed for lack of jurisdiction over L.L. Bean, a Maine entity. Gator.com appealed. After briefing and oral argument, the parties advised the court that they had reached a settlement of other litigation, but not of this appeal. After reviewing the agreement, the court issued an order to show cause why the matter should not be dismissed as moot, and both sides opposed. Rejecting the reasoning of several Supreme Court decisions which found a live controversy *may* survive a conditional settlement, the court found that the agreement “wholly eviscerated” the dispute, mooted the appeal. When the parties pointed to a condition in the agreement that Gator.com must pay L.L. Bean \$10,000 if the Ninth Circuit affirms the lower court’s dismissal, the court brushed it off as a “side bet,” and dismissed the appeal.

### Play It Again, Sam — Two Standards of Review for Injunctive Relief

**Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113 (9<sup>th</sup> Cir. 2005)**

The Ninth Circuit began this opinion involving an environmental organization’s challenge to the U.S. Army Corps of Engineers’ issuance of a permit for construction in Arizona’s Sonoran Desert with an amusing ex-

cept from the movie *Casablanca* which, the court noted, “distills this dispute to its essence.” Then the court moved to less entertaining matters, such as how to choose the correct standard of appellate review. As the court noted, “A district court’s order with respect to preliminary injunctive relief is subject to limited review and will be reversed only if the district court ‘abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.’” *Id.* at 1120-21, citation omitted. This review may be *de novo* when the district court’s ruling rests solely on a premise of law and the facts are either undisputed or established, but where, as here, the order is grounded in factual findings, a deferential standard must be applied, and the appellate court may reverse only if the lower court abused its discretion.

### Extraordinary Rejection of Boilerplate and Blanket Responses to Discovery

**Burlington Northern & Santa Fe Railway Company v. United States District Court for the District of Montana, 408 F.3d 1142 (9<sup>th</sup> Cir. 2005)**

In an extraordinarily rare move, the Ninth Circuit has *published* an opinion denying a petition for writ of mandamus — which it calls “an extraordinary remedy limited to extraordinary causes” — in a *discovery* dispute. Annoyed by the range of approaches to discovery disputes throughout the circuit and elsewhere, the court tried to “chart a middle road through the wide spectrum of caselaw regulating discovery.” In a decision that could change discovery procedures dramatically, the court con-

cluded: “We hold that boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege. However, we also reject a *per se* waiver rule that deems a privilege waived if a privilege log is not produced within Rule 34’s 30-day time limit.” Instead, the court asked district courts to make a case-by-case “holistic reasonableness analysis” of the privilege question, and to consider a lengthy list of factors included in the opinion before ruling.

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### Tenth Circuit

#### Decision on Merits Final Even without Ruling on Attorney’s Fees

**In re Yates, B.A.P. No. WY-04-036, 2005, Bankr. LEXIS 8 (B.A.P. 10<sup>th</sup> Cir., Jan. 11, 2005).**

In *Unified People’s Fed. Credit Union v. Yates*, an unpublished opinion of first impression, the United States Bankruptcy Appellate Panel for the Tenth Circuit adopted the bright-line rule that a decision on the merits is final even if an award of related attorney’s fees has not been quantified. The court asserted that this line of reasoning prevents case-by-case analyses of the merits and fee awards, thus providing certainty. The court relied heavily upon *Budinich v. Becton Dickenson & Co.*, 486 U.S. 196, 201 (1988), in which the United States Supreme Court upheld a Tenth Circuit decision and concluded that the

“effect of an unresolved issue of attorney’s fees for the litigation at hand should not turn upon the characterization of those fees by the statute or decisional law that authorizes them.” The court distinguished contrary decisions of the Tenth Circuit decided prior to *Budinich*.

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### Eleventh Circuit

#### Standard of Review: Expert Testimony

**United States v. Brown., — F.3d —, Nos. 03-15413 & 03-15459, 2005 WL 1594456 (11th Cir. 2005).**

The Eleventh Circuit in this opinion written by Judge Ed Carnes explains “why it is difficult to persuade a court of appeals to reverse a district court’s judgment on *Daubert* grounds.” *Id.* at \*6.

“We recognize a significant range of choice for the district court on evidentiary issues, which is to say we defer to its decisions to a considerable extent,” the court explained. *Id.* “What is true about the review of evidentiary issues in general applies with equal or greater force to *Daubert* issues in particular, an area where the abuse of discretion standard thrives.” *Id.* at \*7. The court described this as a “heavy thumb—really a thumb and a finger or two — that is put on the district court’s side of the scale.” *Id.* at \*10. This heavy thumb applies “whether the district court admits or excludes

expert testimony.” *Id.* at \*7. It also applies to the district court’s determination of which *Daubert* factors are necessary to make the expert’s testimony reliable. *Id.* at \*10. Even though the expert testimony at issue met only one of the four *Daubert* factors, the court concluded the district court had not abused its discretion in admitting it. *Id.*

#### Standard of Review: Motion to Dismiss

**Ameritas Variable Life Ins. Co. v. Roach, — F.3d —, No. 05-10307, 2005 WL 1385212 (11th Cir. 2005).**

This case marks the Eleventh Circuit’s first opportunity to discuss the factors governing when a district court should decline to exercise jurisdiction under the Declaratory Judgment Act out of deference to a parallel action pending in state court. In the process, the court elaborated on the abuse of discretion standard governing a district court’s decision to grant or deny a motion, stating

When we say that a decision is discretionary . . . , we do not mean that the district court may do whatever pleases it. The phrase means instead that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.

*Id.* at \*2 (following *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984)). Specifically, the court explained that an abuse of discretion

. . . can occur in three ways: (1) when a relevant factor that should have been given significant weight is not considered, (2) when an ir-

relevant or improper factor is considered and given significant weight, and (3) when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.

*Id.* (internal quotation and citation omitted). Thus, the court will not disturb a district court's ruling "unless . . . the district court has made a clear error of judgment, or has applied the wrong legal standard." *Id.*

### Post-Judgment Motions: Suspending the Time for Appeal **Castleberry v. Goldome Credit Corporation**, 408 F.3d 773 (11th Cir. 2005).

The time for filing a notice of appeal is suspended if *any* party files a timely post-judgment motion, the Eleventh Circuit clarified in this opinion. This appeal arose from a partial summary judgment granted in favor of one defendant in a class action. Almost a year later, the district court granted summary judgment to a second defendant on both the plaintiffs' claims and a cross-claim against the first defendant. At that time, the court issued a Rule 54(b) certification. The first defendant then filed a timely Rule 59 motion to alter or amend the judgment on the cross-claim. The court found that this post-judgment motion, though limited to the cross-claim, suspended the time for filing a notice of appeal for *all* parties. *Id.* at 780. As a result, the court found the plaintiffs' subsequent appeal was timely. *Id.*

### Law of the Case: Different Evidence Exception

#### **Jackson v. State of Alabama Tenure State Comm'n**, 405 F.3d 1276 (11th Cir. 2005).

In this employment discrimination matter, the Eleventh Circuit clarified the law of the case doctrine. The case had been before the Eleventh Circuit once before, following summary judgment for defendants. In the first appeal, the Eleventh Circuit had reversed in part, finding summary judgment was inappropriate on plaintiff's First Amendment and statutory retaliation claims. On remand, the district court ultimately entered judgment for defendants on those two claims, based upon a full evidentiary record developed at trial.

On the second appeal, plaintiff argued that the district court violated the law of the case. The Eleventh Circuit disagreed. It explained that the law of the case doctrine binds both the district court and the appellate court to "those legal issues that were actually, or by necessary implication, decided" in a prior appeal." *Id.* at 1283. One exception to the doctrine applies "when substantially different evidence is produced." *Id.* As the court explained, "When the record changes, which is to say when the evidence and the inferences that may be drawn from it change, the issue presented changes as well." *Id.* Because the full evidentiary record on plaintiff's retaliation claims was substantially different from that presented at summary judgment, the court found the district court had not violated the law of the case. *Id.* at 1284–85.

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### Frivolous Recusal Motion May Merit Sanctions

#### **Securities and Exchange Commission v. Loving Spirit Foundation, Inc.**, 392 F.3d 486 (D.C. Cir. 2004)

The District of Columbia Circuit rejected appellant's challenge to the district court's denial of a motion to recuse, finding the motion (and the appeal of its denial) frivolous in two respects. First, the motion to recuse was "blatantly" untimely, given that it came two years after the first order complained of and six months after the last such order; meanwhile the movant had made other filings during the delay. The circuit panel chided that any reasonably diligent attorney should have known that the delay in filing the motion was indefensible. Second, the motion to recuse – ostensibly based on the grounds of personal bias – rested entirely on judicial rulings, which virtually never provide a basis for recusal; counsel could identify no case in which any federal court recused a judge based only on his or her legal rulings. The panel stated that the moving attorneys should consider themselves lucky that the district court declined to impose Rule 11 sanctions (but only temporarily so, as the court then noted its independent authority under Federal Rules of Appellate Procedure 38 and 46 to ensure compliance with ethical standards, and ordered counsel to show cause why they should not be sanctioned).

### Check the Court Docket Frequently

#### **Fox, et al. v. American Airlines, Inc.**, 389 F.3d 1291 (D.C. Cir. 2004)

The district court did not abuse its

discretion in granting defendant's motion to dismiss plaintiffs' amended complaint on the grounds that plaintiffs' failure to respond to the motion within the time limits mandated by local rule operated as a concession of the motion's validity. Pointing to counsel's independent obligation to monitor the court's docket, the D.C. Circuit panel rejected the argument by plaintiffs' counsel that judgment should be vacated because he never received a notice from the court's electronic filing system that defendants had filed the motion. The court noted that plaintiffs' failure to receive a timely answer to the amended complaint should have aroused his suspicion that something was amiss, thus prompting him to check the court's docket for any recent filings.

### **District Court May Not Sanction Appellate Misconduct**

**Manion v. American Airlines**, — *F.3d*—, No. 03-7165, 2004 WL 2983604 (D.C. Cir. 2004)

A district court oversteps its bounds when it sanctions conduct in appellate proceedings that the appellate court itself has authority to sanction, and thus the district court may not compensate a party for its litigation costs related to an interlocutory appeal.

During closing arguments in an action for personal injuries allegedly sustained during a flight from Chicago to Boston, counsel for the defendant airline made statements to the jury that, counsel conceded (at least for purposes of appeal), violated certain orders of the district court. After the jury returned a defense verdict, plaintiff moved for a mistrial and sought costs associated with the need for a new trial, arguing that the dis-

trict court had authority to award such relief pursuant to its inherent power as well as 28 U.S.C. § 1927. The district court granted plaintiff's motion for a mistrial and further ordered that, in accordance, with section 1927, plaintiff would recover costs, including reasonable attorney's fees, of the trial. In so ruling, the district court noted that defendant's opposition made no mention of plaintiff's request for costs pursuant to section 1927. The defendant then petitioned for mandamus and noted an appeal of the section 1927 sanction; a D.C. Circuit panel denied mandamus and granted plaintiff's motion to dismiss the interlocutory appeal as untimely, given that the challenged order did not conclusively determine the sanctions award as no amount had been set. Significantly, however, that appellate panel denied plaintiff's motion for sanctions in connection with appellate proceedings.

Plaintiff settled the underlying dispute with the airline, and the district court awarded sanctions against the defense attorney, including costs plaintiff incurred in defending against the interlocutory appeal and petition for mandamus. On the appeal of the sanctions award, the circuit held that a district court may not award the cost of interlocutory appellate proceedings as part of a sanctions award under section 1927. The court declined plaintiff's invitation to consider whether the district court could have imposed the sanctions pursuant to district court's inherent power, because the district court explicitly invoked only its power under section 1927. The court observed that allowing the district court that imposed

the sanction to decide whether an appellant should pay his opponent's costs after an unsuccessful appeal "would be likely to chill all but the bravest litigants from taking an appeal." *Id.* at \*5 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 408 (1990)). The court noted that its own denial of plaintiff's motion seeking sanctions for the defendant's interlocutory appeal of the district court's sanctions award should be "the end of the matter" and the district court should not impose sanctions for conduct in appellate proceedings that the appellate court has authority to (and in this case did) consider.

### **Court May Request Supplemental Submissions on Standing**

**American Library Association v. Federal Communications Commission**, 401 F.3d 489 (D.C. Cir. 2005)

The D.C. Circuit allowed additional submissions by petitioner to establish standing under Article III, setting forth a protocol for cases in which the parties reasonably, but incorrectly, assume that a petitioner's standing is self-evident.

Rejecting the argument of intervenor Motion Picture Association of America that the court's review of petitioner's standing is limited to the submissions accompanying petitioner's brief or those filed in response to a motion to dismiss for lack of standing, the D.C. Circuit emphasized that its precedent does not create a "gotcha" trap to dismiss cases for lack of standing when both parties reasonably think the issue is self-evident. The court noted that intervenor's position would necessitate long, wasteful jurisdictional state-

ments in virtually all opening briefs. The D.C. Circuit held that an appellate court has the inherent authority to request supplemental submissions when more information is necessary to determine whether a petitioner satisfies standing requirements.

**Lawfulness of Document Disclosure Policy Ripe for Review**  
**Venetian Casino Resort, L.L.C. v. Equal Employment Opportunity Commission, 409 F.3d 359 (D.C. Cir. 2005)**

Reversing the district court's dismissal (on ripeness grounds) of plaintiff's amended complaint, the D.C. Circuit found the EEOC's document disclosure policy to be a clear-cut and focused legal question ripe for judicial review.

Plaintiff—an employer that had submitted confidential or trade secret information to the EEOC and had been subpoenaed to submit additional information—alleged that the EEOC follows an unlawful policy or practice that permits the agency unilaterally to release, without prior notice, privileged documents submitted to the EEOC. In admonishing that it would be senseless to defer judicial review until after a sensitive document was released, the court accepted as true plaintiff's allegation that the EEOC's disclosure policy would allow the release of the plaintiff's privileged and confidential materials without notice. The D.C. Circuit was careful to note, however, that the EEOC's policy was the ripe issue, rather than the validity of its subpoena of additional documents from the plaintiff (an issue which would not ripen until plaintiff's refusal to comply is met

with judicial enforcement of the subpoena).

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**Federal Circuit**

**Limitations on Cross-Appeal Reply Briefs**

**In re Violation of Rule 28(c), 388 F.3d 1383 (Fed. Cir. 2004)**

Appellee/cross-appellant in a patent infringement case violated Federal Rule of Appellate Procedure 28(c) by filing a reply brief that addressed issues related to the main appeal. Rejecting appellee's contention that the applicable rules lack clarity regarding the permissible content of cross-appeal reply briefs, the Federal Circuit noted that Rule 28(c) clearly limits the content of such briefs to "issues presented by the cross-appeal," and that the Practice Notes promulgated by the Federal Circuit explicitly warn cross-appellants "to limit the fourth brief to the issues presented by the cross-appeal." *Id.* at 1384 (citing Federal Circuit Rule 28 (2004) and accompanying Practice Notes).

The court was not sympathetic to appellee's observation that Federal Circuit Rule 31 (governing the Federal Circuit's procedures for filing briefs, including cross-appeal reply briefs) does not explicitly reference Rule 28's content limitations. Even so (and even though roughly 20 pages of the offending brief's 23 pages addressed issues related solely to the main appeal and not the cross appeal),

the court declined to impose sanctions for counsel's inadvertent violation of Rule 28(c). The appellate panel warned that, in the future, even inadvertent procedural rule violations will potentially subject counsel to sanctions because such violations impose an unfair burden on opposing counsel as well as on the judicial system.

**No Adverse Inference May Be Drawn from Absence of Legal Opinion**

**Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., et al., 383 F.3d 1337 (Fed. Cir. 2004) (en banc)**

At trial, the district court found appellants Dana Corporation, Haldex Brake Products Corporation, and Haldex Brake Products AB liable for willful infringement of a patent on a brake system belonging to Knorr-Bremse Systeme. As permitted based on the finding that the infringement was willful, the district court awarded partial attorney fees under 35 U.S.C. § 285. Appellants sought reversal of the finding of willful infringement and the attendant award of attorney's fees, arguing that an adverse inference should not have been drawn from either the withholding by Haldex of an opinion of counsel concerning the patent issues, or from the failure of Dana to obtain a legal opinion on patent issues. Applying Federal Circuit precedent, the district court inferred that the opinion of counsel withheld by Haldex was unfavorable to the defendants. The Federal Circuit took the case *en banc* to reconsider its precedent on the applicability of attorney-client privileges in this area, and invited additional briefing from

the parties and the numerous amici curiae.

Overruling Federal Circuit precedent to the contrary, the court held that no adverse inference that an opinion of counsel was or would have been unfavorable flows from an alleged infringer's failure to obtain or produce an exculpatory opinion of counsel. The court reasoned that no risk of liability should attach to disclosures to and from counsel in patent matters, because any such risk can intrude upon full communication and ultimately the public interest in encouraging open and confident relationships between client and attorney. The court therefore vacated the judgment of willful infringement and remanded for re-determination of that issue without the evidentiary contribution or presumptive weight of an adverse inference that any opinion of counsel was or would have been unfavorable.

## **Jurisdiction for Tucker Act Claims Clarified**

### **Fisher v. United States, 402 F.3d 1167 (Fed.Cir. 2005)**

Plaintiff, alleging that, while on active duty as an Air Force physician, he was entitled to disability status and an award of retirement pay, brought claims under the United States Court of Federal Claims' Tucker Act jurisdiction (28 U.S.C. § 1491). To come within the jurisdictional reach of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates a right to money damages — *i.e.*, the source must be “money-mandating.” The Court of Federal Claims dismissed the action for lack of jurisdiction in what it saw as a military determination. Plaintiff appealed.

Overruling prior precedent, the Federal Circuit discarded a two-step test in favor of a unified approach to determine both subject matter jurisdiction and the merits of a money-mandating source for a cause of action under the Tucker Act. Under the old rule, determining whether the source was money-mandating entailed two separate steps: first, the plaintiff was required to make only a non-frivolous allegation that the statute or regulation was money-mandating to satisfy the jurisdictional element; second, the case could later be dismissed if the issue was pressed and the plaintiff could not support his initial allegation. Observing that relevant Supreme Court cases lacked any mention of a multi-step process, the Federal Circuit established a new, consolidated test whereby the trial court will determine at the outset, either *sua sponte* or in response to the government's motion, whether the statute or regulation is money-mandating. The trial court's determination of money-mandating status is then subject to appellate review as a question of law. Finding that the Court of Federal Claims has jurisdiction to hear this matter under this analysis, and that the issue is justiciable, the Federal Circuit reversed and remanded.

## **Vacatur of Judgment in a Moot Case Appropriate under Special Circumstances**

### **Kaw Nation v. Norton, 405 F.3d 1317 (Fed.Cir. 2005)**

The Federal Circuit held that the appeal of a decision by the Interior Board of Contract Appeals (ICBA) was moot, and furthermore that special circumstances warranted vacatur of the decision below. In the underlying decision, the ICBA had nullified the government's acceptance of the retrocession of the Kaw Nation tribal court system (and the funds provided by the

government for its operation). The ensuing appeal, and urge for vacatur, was brought by a faction of the Kaw Nation that had been excluded by the ICBA from the original proceedings.

Finding that the disputed funds had already been relinquished with a waiver of any future right to secure their return, the court stated that the resolution of that controversy rendered moot any evaluation of the ICBA's jurisdiction to hear the case in the first place. The court emphasized that when an underlying controversy is clearly moot, the “preferred course” is to decide mootness before reaching more difficult legal questions. Moreover, a pending application for costs resulting from the litigation did not prevent the controversy from being moot.

Although the Federal Circuit noted that vacatur of a judgment on appeal is not typically appropriate when a case becomes moot because of the voluntary action of the losing party, the court held that this case satisfied the exception for “special circumstances.” Specifically, the court determined that a balancing of the equities favored vacatur in two respects. First, the precedential effect of the judgment had the potential to affect parties who did not cause the underlying controversy to become moot, and who thus had no opportunity to challenge the correctness of the judgment on appeal (specifically the jurisdictional determinations of the tribunal below). Second, prior precedent has recognized the appropriateness of vacating a judgment when there are questions concerning the jurisdictional authority of the tribunal under review.

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## Subcommittee Reports

### Programs

Since the last *Certworthy*, there has been a change in the time and place for the DRI's next Appellate Advocacy seminar. The seminar will be held March 9–10, 2006, at the Pointe Hilton Tapatio Cliffs Resort outside Phoenix, Arizona. Please save the date on your calendars. The resort offers a full range of activities, including golf and spa facilities, plus access to Major League Baseball spring training games at that time of year. Given these attractions, we hope to have over 200 appellate lawyers from across the country attend this year's seminar.

The Program Committee is currently developing the schedule of presentations and speakers for the seminar. Judge Michael Daly Hawkins of the Ninth Circuit has agreed to be one of our keynote speakers. We also have invitations outstanding to Justice Sandra Day O'Connor, former Solicitor General Ted Olson, and Judge David Ebel of the Tenth Circuit. David Axelrad of Horvitz & Levy in Encino, California has agreed to serve as Co-Chair for this year's seminar. If you are interesting in helping the Program Committee plan the next seminar, please contact me at [ssmith@bradleyarant.com](mailto:ssmith@bradleyarant.com) or 256/517-5198 or David Axelrad at [daxelrad@horvitzlevy.com](mailto:daxelrad@horvitzlevy.com) or 818/995-0800.

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### Publications

Now that the Summer 2005 issue of *Certworthy* is out, it's already time to start planning the Winter 2006 issue. If you want to get involved in publications, this is your opportunity. If you enjoy writing, if you like seeing your name in print, if you like getting complimentary letters and email from people you don't know who live 1,000 miles away, if you like the idea of hundreds of people reading your ideas, if you'd like to beef up your résumé with some publications—then read on.

We need authors for the following things:

- Two or three substantive articles dealing with some aspect of appellate law or practice. Ideal length is between 3,000 and 5,000 words, but shorter than 3,000 is okay if the topic can be sufficiently discussed in fewer words.
- Writer's Corner: A column of around 1,000 words, focused on legal writing.
- Advocate's Forum: A column of around 1,000 words, focused on the art of oral argument.
- Research Brief: A column of around 1,000, giving tips on legal research. We haven't done this one before, not even in the current issue. It's something that I'd like us to try, for two reasons: First, as appellate lawyers, many of us are excellent legal researchers. Second, all of us would benefit from sharing those ideas and techniques with each other.
- Browsing the Bookshelf: A review of one or more books likely to be of interest to appellate lawyers.

I suspect that with the electronic distribution system that DRI uses,

*Certworthy* reaches an audience much larger than our committee's membership. Write for *Certworthy*, and your words will be read by several hundred lawyers, judges, law students, and others interested in appellate advocacy.

In addition to *Certworthy*, we should think about our Next Big Project. We completed two big projects in 2004: *A Defense Lawyer's Guide to Appellate Practice* (a 24-chapter, nearly 400-page book) and the Committee Perspectives section of the April 2004 issue of *For the Defense* (a collection of meaty articles published in DRI's flagship publication). Right now, we don't have a big project on the drawing board. If you have an idea for our next big project, please send me an email telling me about it.

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# No Reply?

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I love replies. Maybe it's just about having the last word in an argument. But having worked for several judges, I also know the reply is typically the last document read before a judicial decision is made, and that a persuasive reply can make all the difference. I think the only time a reply should not be written is when victory or defeat is so certain a reply could not possibly make a difference. It should be noted, though, I have thought more than once I was on one side of that equation when in fact I was on the other.

Judgment calls often have to be made about a reply brief even before the motion it supports has been written. Sometimes a motion says too much. Should you address a weakness or likely response argument in your

motion, or wait to address it in your reply? Will opposing counsel (or the judge) even think of it? Will you be unnecessarily spotlighting problem areas and making arguments for the other side, or tactically beating them to the punch and phrasing the matter in terms most favorable for your client? These are all reply-related questions that must be considered at the motion-writing stage.

Such judgment calls are even more complicated in courts where replies may be filed only upon leave of court. Much will depend upon the proclivity of the particular judge to allow replies, and whether you can present cogent reasons why a reply brief should be allowed. Even a well-reasoned motion for leave to reply does not assure that leave will be granted. This uncertainty can make a difference in strategy, and in the length of your motion. Normally I like to see how (and if) the other side attacks a

problem area, and then counter in my reply. But in courts where replies may be filed only upon leave of the court, the possibility that no reply will be allowed must be considered in determining the scope of the motion. The enactment of local rules allowing replies only upon leave of court appears to be a growing trend. I question the efficacy of such rules, as they result in lengthier motions and responses, as well as added paperwork and procedure.

Style-wise, a reply should be short. While conciseness is a virtue in all legal writing, in the context of a reply brief, it is particularly appropriate. Judges understandably are not impressed with an extended rehashing of what has already been presented. Your last words to the court should be short, punchy, and powerful. Having the last word in an argument can make a difference. Take advantage of it if you can.

# Punching Up Your Writing: Advice From the Experts

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“Writing is fighting,” Muhammad Ali once said. That’s certainly true of much legal writing. Just as the boxer who punches better than his opponent is more likely to win the fight, legal writing that has more punch is more likely to accomplish its purpose. How then, do we punch up our writing? Here is a collection of tips from the experts.

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## Get Your Facts Right

“Fundamental accuracy of statement is the one sole morality of writing.” — Ezra Pound

“Name names. Make your writing physical. Use lots of exact nouns. ‘Food’ is an idea; ‘black-bean soup’ is a thing. Naming not only makes the writing more visceral, it makes the reader trust you. And use your own expertise, whatever ‘insider information’ you have. Use words like *soffit*, *draw shave*, *spit valve*.” — David Long

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## Go Easy on the Modifiers

“Substitute ‘damn’ every time you’re inclined to write ‘very’; your editor will delete it and the writing

will be just as it should be.” — Mark Twain

“I notice that you use plain, simple language, short words and brief sentences. That is the way to write English — it is the modern way and the best way. Stick to it; don’t let fluff and flowers and verbosity creep in. When you catch an adjective, kill it. No, I don’t mean utterly, but kill most of them — then the rest will be valuable. They weaken when they are close together. They give strength when they are wide apart. An adjective habit, or a wordy, diffuse, flowery habit, once fastened upon a person, is as hard to get rid of as any other vice.” — Mark Twain

“Cross out as many adjectives and adverbs as you can. ... It is comprehensible when I write: ‘The man sat on the grass,’ because it is clear and does not detain one’s attention. On the other hand, it is difficult to figure out and hard on the brain if I write: ‘The tall, narrow-chested man of medium height and with a red beard sat down on the green grass that had already been trampled down by the pedestrians, sat down silently, looking around timidly and fearfully.’ The brain can’t grasp all that at once, and art must be grasped at once, instantaneously.” — Anton Chekhov

“Show, don’t tell.” — Henry James

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## Be Plain; Be Yourself

“And yet, we know how fatal the pursuit of liveliness may be: it may result in ... tiresome acrobatics. ... Flashy effects distract the mind. They destroy their persuasiveness; you would not believe a man was very intent on ploughing a furrow if he carried a hoop with him and jumped through it at every other step. ... When virtuosity gets the upper hand of your theme, or is better than your idea, it is time to quit.” — Katherine Anne Porter

“My notion of a failed writing workshop is when everybody comes out replicating the teacher and imitating as closely as possible the great original at the head of the table. I think that’s a mistake, in obvious opposition to the ideal of teaching which permits a student to be someone other than the teacher. ... The successful teacher has to make each of the students a different product rather than the same.” — Nicholas Delbanco

“When a new writer defends his ‘style,’ the teacher smiles (or cringes) because real style isn’t an artifice. Real style — voice — arrives on its own, as an extension of

a writer's character. When style is done self-consciously and purposefully it becomes affectation, and as transparent as any affectation — an English accent on an old college chum from New Jersey, for example.” — Bill Roorbach

“Read over your compositions, and where ever you meet with a passage which you think is particularly fine, strike it out.” — Samuel Johnson

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**Work at It**

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“Nothing is more satisfying than to write a good sentence. It is no fun to write lumpishly, dully, in prose

the reader must plod through like wet sand. But it is a pleasure to achieve, if one can, a clear running prose that is simple yet full of surprises. This does not just happen. It requires skill, hard work, a good ear, and continued practice.” — Barbara Tuchman

“What is easy to read has been difficult to write. The labour of writing and rewriting, correcting and recorrecting, is the due exacted by every good book from its author, even if he knows from the beginning exactly what he wants to say. A limpid style is invariably the result of hard labour, and the easily flowing connection of sentence

with sentence and paragraph with paragraph has always been won by the sweat of the brow.” — G. M. Trevelyan

“You can't rely on inspiration. I don't even *believe* in inspiration. I just believe in working.” — David Long

“The first draft of everything is shit.” — Ernest Hemingway

*Have something to say; say it; and stop when you're done.*  
— Tryon Edwards

*Let thy speech be short, comprehending much in few words.*  
— Ecclesiasticus

# Really Bad Oral Arguments

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In the New York appellate courts in which I regularly appear, there can be as many as 25 civil and criminal cases on a single afternoon's calendar.

When, as is invariably the case, my appeal is at the bottom of the calendar, I try to view it as an opportunity to see the members of that day's panel in action. One can certainly learn a great deal from others who go before.

All too often, what I observe instead is a series of appearances by attorneys who just do not seem prepared for the specialized task of arguing appeals. I have watched in horrified fascination as some really big-name lawyers let their cases slip away. Why should this be?

It is often easier to pick up on subtle aspects of the interaction between appellate judges and advocates when sitting and watching rather than being on one's feet. I well recall one appellate judge who regularly led attorneys through a series of seemingly innocuous questions, until he closed the trap with devastating finesse. This is always much easier to appreciate when it is happening to somebody else.

There are lawyers who start off arguing just fine, but are easily thrown by the colloquy that is characteristic of appellate courts. Unfortunately, it is necessary for advocates to prepare well-ordered speeches in which only

the first few words may get heard. So, I have nothing but sympathy for young lawyers, especially those trying to field the question that comes completely out of left field. With experience, one can get past the nerves and rise to such occasions with grace and humor.

The kinds of arguments that bother me most are those in which the client is badly served by the choice of a more senior advocate. I will never forget one day in the Appellate Division, First Department, in Manhattan. That afternoon, a well-known law professor was admitted *pro hac vice* to argue on behalf of a defendant appealing his homicide conviction. Although the court was quite deferential to the professor at the outset, his style of lecturing the judges tolerated no interruptions. Before long, he had completely turned the court against him in this very serious case. One member of the panel said, in effect, "If you're not going to answer my questions, I'm not going to listen to you." That judge then wheeled around in his chair so that his back was to the famous professor for the rest of his argument.

Experienced appellate attorneys learn to be flexible in their presentations. Oral argument can be a lot like a presidential news conference, for which one can anticipate certain questions and prepare accordingly, but those questions may come flying in no apparent order and inevitably, there will be some surprises.

Appellate advocates must know both the record on appeal and the applicable law so thoroughly that any reference can be retrieved immediately in whatever order may please the members of the panel. A good attorney also will be familiar with the idiosyncrasies of the court hearing the appeal.

Quite a few fine litigators are equally at home on trial and on appeal, but that is not universally so. It is not uncommon for the time-consuming task of researching and writing an appellate brief to be assigned to relatively junior attorneys in a firm. Then, a name partner will appear in court to present the oral argument, after reviewing the brief prepared by others. In my opinion, appeals are just too important to handle in this piecemeal fashion.

A busy court does not want to hear some Reader's Digest version of the appellate brief. The judges have had an opportunity to read the briefs, so they do not need oral argument on every point in the order presented in the brief. Generally, the judges have something that particularly bothers them about the appeal. It is the appellate advocate's job to address that concern promptly, candidly and persuasively.

To me, that means that it is more important to know the material inside-out than to be a great orator or a familiar face. The lawyer whose only involvement is to argue the appeal may master the material in the brief,

but can get into trouble if the argument goes beyond the four corners of that document.

Even if the attorney arguing the appeal is the one who handled the case in the lower court, sufficient familiarity with the case cannot be presumed. In fact, trial attorneys sometimes remember things that may have happened, but do not actually appear in the printed record. Trial attorneys also have been known to argue an appeal by making an emotional pitch as if they were in front of a jury.

A good appellate advocate will

know exactly what is in the record, where to find it on a moment's notice and just what tone is appropriate on oral argument. What's more, the attorney who actually struggled through the writing of the appellate brief is bound to have a more thorough grasp of the legal authorities involved in the case than someone who just steps in for the argument.

I watched in amazement once when a senior partner making a presentation in the Appellate Division was asked to distinguish a particular case. Surely this is a moment familiar to all appel-

late attorneys. On this occasion, the lawyer responded to the judge's question by thrusting his hand out so that an associate would creep forward from the first row of the spectators' seats to give him the decision.

Obviously, oral argument is not the time to get acquainted with the relevant cases. If an attorney is simply too busy or too important to prepare properly for an appellate court appearance, I submit that the client will be better served by having the appellate brief writer make the argument.

# Topical Takes

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Legal blogs are quickly becoming the best way to keep up with new cases and legislation. A good legal blog combines the immediacy of advance sheets with the analysis and historical context of law reviews. This month, the Blawg Review surveys legal blogs that focus on particular legal issues or practice questions.

One of the pioneers of legal blogging, Denise Howell, explains intellectual property law, as well as whatever else strikes her fancy, at *Bag and Baggage* ([http://bgbg.blogspot.com/bgbg\\_about.html](http://bgbg.blogspot.com/bgbg_about.html)). *LawMeme* (<http://research.yale.edu/lawmeme/>), staffed by Yale Law students, follows the legal issues surrounding technology, particularly computer technology and digital rights. *Bytes in Brief* (<http://www.senseient.com/bytesinbrief/bytes.asp?page=currentbytes>) also covers technology law, particularly the Internet. You will find information about one of the newest and fastest-moving fields of law at *Electronic Discovery Law* (<http://www.ediscoverylaw.com/>).

For questions about labor and employment law, and human resources issues in general, visit *George's Employment Blawg* (<http://employmentblawg.blogspot.com/>).

Professor Peter Tillers covers the latest law of evidence at the blog named, appropriately enough, *Tillers on Evidence* (<http://jurist.law.pitt.edu/views/blogs/tillers/index.htm>). *Jag Central* (<http://www.jagcentral.org/>) bills itself as the first blog to cover military justice and military law issues. Lawyers with opposing perspectives can be found at the *Insurance Defense Blog* (<http://www.insurancedefenseblog.net>) and the *Atlanta Injury Law and Civil Litigation Blog* (<http://www.atlantainjurylawblog.com/>).

If you have a question about how to interpret a statute, stop first at the *Statutory Construction Zone* ([statconblog.blogspot.com](http://statconblog.blogspot.com)). For help understanding HIPAA regulations, check out Jackson Walker LLP's *HIPAA Blog* (<http://www.hipaablog.blogspot.com/>). For patent law questions, one of the best resources available is *Patently-O: Patent Law Blog* (<http://patentlaw.typepad.com/>).

The *Legal Ethics Blog* (<http://cowgill.blogs.com/legalethics/>) covers a topic important to every practicing attorney, and recently has provided a case study in ethics. The author, Ben Cowgill, has been negotiating with the Kentucky Attorneys' Advertising Commission, which has an arcane rule that could require him and other Kentucky attorneys to pay a \$50 fee for every post on the blog. Read the blog to follow developments in those negotiations.

Other blogs focus on litigation and trial practice in general. The *Illinois Trial Practice Weblog* (<http://www.illinoistriallpractice.com/>) provides good ideas for attorneys in any jurisdiction. Another site full of good ideas is *Jim Calloway's Law Practice Tips Blog* (<http://jimcalloway.typepad.com/lawpracticetips/>). The editor of this newsletter discusses principles of good legal writing at *Minor Wisdom* (<http://raymondward.typepad.com/>). For jury research, history, or "all things jury," there's no better site than *Jury Geek* (<http://jurygeek.blogspot.com/>).

Some of the more interesting blogs address, not substantive legal issues or practice tips, but quality-of-life issues for lawyers. One of the most entertaining, *Anonymous Lawyer*, claimed to be the musings of "a fictional hiring partner at a large firm in a major city." It turned out to be the work of a **law student** ([http://www.legalunderground.com/2004/12/jeremy\\_blachman.html](http://www.legalunderground.com/2004/12/jeremy_blachman.html)) who started the site as an experiment in satire. Like all good satire, the blog contains more than a few kernels of truth. There's something both amusing and frighteningly accurate about entries, such as this one on July 27, 2004: "I just woke up to an e-mail from an associate who's been looking more and more pregnant recently, but was in the office as recently as yesterday. 'I just gave birth to a daughter, [name], this morning at 4:13 A.M. So I will not be in the office today. I will

be checking my Blackberry throughout the day, so feel free to let me know if you need anything. Thanks.”

Evan Schaeffer, the real-life attorney author of the Illinois Trial Practice Weblog noted above, posts interesting and challenging ideas about the legal life at *Notes from the (Legal) Underground* (<http://www.legalunderground.com/>). The author of *Running With Lawyers* (<http://runningwithlawyers.typepad.com/>) takes advantage of his anonymity to

post frank and thought-provoking ideas about legal practice. Bruce McEwen addresses management of law firms at *Adam Smith, Esq.* (<http://www.bmacewen.com/blog/>). Another blogging pioneer, Matt Homann, takes on the structure of legal billing at *the (non)billable hour* (<http://thenonbillablehour.typepad.com/>).

Finally, no one checking legal blogs should miss the classic stories of Judge Jerry Buchmeyer, who has been collecting legal humor for 20 years, and has started posting contributions from

attorneys throughout the country at *Say What?* (<http://www.texasbar.com/saywhat/weblog/index.html>).

*Talk low, talk slow, and don't say too much.*  
— John Wayne

# David C. Frederick, *Supreme Court and Appellate Advocacy: Mastering Oral Argument*

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In *Supreme Court and Appellate Advocacy*, David C. Frederick has done what few appellate lawyers thought could be done: He has said something new about oral argument. Although his book has unique insights to offer with regard to appearing before a red-hot, policymaking court such as the Supreme Court, most of his tips are appropriate for an oral argument before any appellate court.

Frederick begins by tracing the historical evolution of oral argument, including the development of the Office of the Solicitor General. Facing the current debate about the importance of oral argument, he addresses the necessary reduction in both the number of cases receiving oral argument and the duration of the few oral arguments that occur. Aside from the increase in the caseload, Frederick attributes the decline to courts' perceptions that most oral arguments are unhelpful because of the poor quality of the advocacy. Improving that quality is the purpose of Frederick's book.

One of the best features of the book is its lengthy section on preparing for oral argument. Frederick correctly points out that preparation begins with writing the brief. He also

notes the all-too-common mistake of not allowing enough time to prepare. He suggests scheduling the specific steps of preparation. He then turns to the two most important components of a good oral argument—an opening and answers for the court's questions. Proper preparation, plus delivery, of those two components largely constitutes the remainder of the book. Both require creating a theory of the appeal that can be encapsulated in a theme. To create a theory, the advocate must fully know not only of the record and law, but also the policies informing the law and the predilections of the justices hearing the argument. The same is largely true for answering the court's questions. Thus, preparation for oral argument focuses on these two components.

One step is to create what Frederick calls the "argument podium binder." Frederick suggests a tabbed binder containing references to key facts and critical authorities, copies of statutes, a chronology, a list of affirmative points, and suggested answers to questions. He also gives detailed instructions for creating what he refers to as "argument blocks or modules." These are short sections of the key points to be made for each issue, with a few supporting authorities or record references next to them. Each is abbreviated just enough to remind the advocate of the argument to speak extemporaneously. The greatest benefit

of argument blocks may be their flexibility. While addressing issue 1, an advocate may be questioned about something falling under issue 3. The advocate can quickly use the argument block to give all the key points under issue 3 in answering the question, before returning to issue 1. Issue 3 then can be omitted later, since it was covered in the earlier answer. Frederick, however, stresses the importance of considering various segues to move seamlessly from one block to another. He suggests shuffling the blocks into different orders and practicing transitions among them.

Preparation of the opening depends on the theme of the oral argument. The theme must synthesize the heart of the case in perhaps only 15 seconds. It can then lead to the development of sound-bite arguments for its support. This, in turn, will lead to a "mantra," which is a phrase encapsulating the main point that can be repeated in identical or similar words several times during the argument, especially when cornered by troubling questions.

Critical to the preparation phase is developing answers to anticipated questions. Frederick has compiled a comprehensive list of the types of questions appellate courts usually ask. Broadly speaking, these concern the background of the case, the scope of the rule being advocated, the implications of the rule being advocated, and

judicial idiosyncracies. Within each of these categories, however, Frederick list several different types of questions and gives examples (lifted from real arguments) of how to deal with them.

Of course, one of the best ways to ferret out all likely questions is to hold moot courts prior to the oral argument. Colleagues who have not worked on the case can read the briefs coldly like the appellate justices and then ask questions that occur to them. Frederick is a huge proponent of moot courts, particularly since they are routinely used in the solicitor general's office.

The last few days of preparation focus on reviewing affirmative points, absorbing the mantra, and arranging materials to take to the argument. Frederick also suggests various relaxation and visualization techniques. He even includes an all-inclusive list of

items to take to the argument, mentioning throat lozenges, extra glasses or contact lenses and solution, and aspirin.

Frederick then includes specific tips and examples of different sides of oral argument, whether you are the petitioner, respondent, or amicus curiae. He also gives examples of rebuttals and of arguing a case when the government is involved.

Perhaps the most entertaining part of the book — and also the most compassionate — is the one about common mistakes. These include not only errors of speaking style and decorum, but also more substantive errors. He quotes liberally from the transcripts of actual Supreme Court arguments. Some of the mistakes are forgivable; one or two are unpardonable. Most of us have learned many of these lessons the hard way at one time or another.

Frederick uses them to illustrate the finer points of his book, and he almost always does so with delicate sympathy for the advocate.

Rather than conclude with a negative, however, Frederick closes with a chapter about the attributes of the best advocates. This serves as a useful summary of the entire book. In the following appendices, he includes various useful checklists for preparation. And he gives examples of various parts of oral arguments from the best advocates.

When I originally heard about this book, I was (like many others) skeptical of whether I would learn anything new. I learned a lot, and so will you. Therefore, I both recommend and urge you to add this book to your collection. You will find yourself using it as often as you have an oral argument.

# Big Win for Emineminar

Former DRI Appellate Advocacy Committee chair **Leggs Trix-E** (real name **Mary Massaron Ross**) won a significant victory in the Michigan Court of Appeals for rap star **Eminem** (real name Marshall Mathers III). Eminem was sued for invasion of privacy by DeAngelo Bailey, former schoolyard bully, over the lyrics to Eminem's *Brain Damage*, a track on his 1999 album, *The Slim Shady LP*. Bailey sued Eminem over these lyrics about their grade-school days:

Way before my baby daughter  
Hailey  
I was harassed daily  
by this fat kid named DeAngelo  
Bailey,  
an eighth-grader who acted obnoxious,  
'cause his father boxes.  
So every day he'd shove me into the lockers.  
And he had me in the position  
to beat me into submission.

He banged my head against the urinal until he broke my nose.  
Soaked my clothes in blood,  
grabbed me and choked my throat.  
But because Bailey admitted to bullying Eminem when the two were in grade school, the appellate court affirmed dismissal of Bailey's suit. Commenting on her big win, Trix-E said:

DeAngelo's lawsuit is through  
Because Eminem's rap was true.  
Minor embellishments in the story,  
Making the details a bit more gory,  
Didn't change the essential truth  
That DeAngelo was a bully in his youth.  
DeAngelo admitted that when he was in school  
He treated Eminem in a manner most cruel.  
So Eminem didn't need DeAngelo's permission,  
'Cause the rap was true by  
DeAngelo's admission.

The ruling affirms the October 2003

decision by Macomb County Circuit Judge Deborah Servitto.

## Chuck Craven Competes With Certworthy

Committee member and *Certworthy* Third Circuit editor **Chuck Craven** has been appointed as Vice Chair of the Appellate Advocacy Committee of the American Bar Association's Tort Trial & Insurance Practice Section (TIPS). His term is for the ABA's 2005–2006 fiscal year, which begins in August. Chuck also serves as editor-in-chief and Third Circuit editor of that committee's quarterly newsletter.