



# CERTWORTHY

THE NEWSLETTER OF THE APPELLATE ADVOCACY COMMITTEE

Copyright ©2001 The Defense Research Institute, Inc. All rights reserved.

SUMMER 2001

## Dicta from the Chair

Famous lawyers—in history, movies, or novels—are not usually appellate advocates. From Clarence Darrow to Jon Schlichtmann, heroes in the legal profession have typically been trial lawyers, and most often, trial lawyers defending criminals unjustly accused of crime or pursuing justice for an injured victim in tort suits. They have rarely come from the ranks of the appellate defense bar. To some in this age of skepticism, the entire notion of the heroic no longer makes much sense. But heroes in the history of the law stand as a beacon calling each of us to strive for the best in our work as advocates. Today's column discusses a hero for the appellate defense bar, John W. Davis.

A solicitor general, ambassador, appellate advocate, and lawyer for the great corporations of his time, John W. Davis's

life stands as a model for the kind of achievements that we, as defense appellate advocates, can try to emulate. Many of you are no doubt aware of Davis's seminal article on appellate advocacy, "The Argument of An Appeal." His wisdom has a timeless quality that makes it useful still. But you may not be aware of some of his other suggestions for those called to the appellate bar. Davis saw the lawyer's role as "lubricat[ing] the wheels of society by implementing the rules of conduct by which the organized life of men must be carried on." He recognized that the lawyer "spends his life making enemies in other people's quarrels."

Intensely self-critical and unwilling to rest upon his reputation, Davis thought that "there is little difference in lawyers

CONTINUED PAGE 2

## Editor's Footnotes

Due to problems beyond the control of the Appellate Advocacy Committee, the last issue of *Certworthy* was extremely tardy. The DRI staff, which has recently undergone a major turnover of personnel, got backlogged on newsletter production. We are told that the problems are solved and that future DRI newsletters will be timely. We'll see if this one reaches you in August 2001, as scheduled.

Also, as you have no doubt noticed, you are receiving *Certworthy* via email, not via regular mail. This is due to a policy change implemented by the DRI Board of Directors in February 2001. As a cost-saving measure, the Board voted to discontinue mailed newsletters, and to send all future newsletters by email.

The leadership of the Appellate Advocacy Committee is disappointed with this decision, for three primary reasons. First, it is more convenient to read a printed newsletter than to read it on a computer screen. You can, of course, print it yourself, but that leads to the second problem.

Specifically, professionally printed, mailed newsletters are more attractive than emailed newsletters. The version printed off of your email will not be bound, will

CONTINUED PAGE 8

## In This Issue...

|  |    |
|--|----|
| Dicta from the Chair .....   | 1  |
| Editor's Footnotes .....   | 1  |
| Appellate Advocacy Steering Committee .....  | 2  |
| Why No-Citation Rules are Unworkable, Unwise, and Unconstitutional, and How They Should be Changed ..... | 4  |
| Ethos and Advocacy .....   | 9  |
| Subcommittee Reports .....   | 10 |
| Requiem for a Brief Writer .....   | 11 |
| Advocate's Forum .....   | 12 |
| Writer's Corner .....  | 14 |
| Circuit Reports .....  | 15 |
| Seminar Program .....  | 25 |



*It is always a silly thing to give advice, but to give good advice is absolutely fatal.*

—Oscar Wilde

## Dicta from the Chair, from page 1

save in industry; a great name is a poor substitute for the latter." Although he was so nervous early in his career that he described his feeling before argument as close to panic, once the argument began, he appeared confident and performed superbly. According to one historian, no one has equaled Davis's "ability to simplify complex matters with a few pithy Anglo-Saxon phrases devoid of adjectives and drained of emotion."

Davis's oral advocacy was based on an outline, a few "pithy" sentences, and quotations seemingly drawn from memory but in fact checked in Bartlett's and written down on his note cards. With this skeletal plan, Davis would appear for oral argument. Davis cautioned against reading the argument or memorizing it because "[a]ll the life would be gone." He began with the facts because he thought that the judges on the bench wanted first to know "What is the question? How did it arise? What happened?" Only when Davis had presented that did he "take up what's the rule of law that ought to control." In Davis's view, "you might just as well sit down" if you appear before an appellate bench and "don't give them the facts."

Davis is a model for the very highest professional accomplishments that can be achieved by an appellate advocate. As DRI's Appellate Advocacy Committee continues its efforts to provide a forum for networking and training for those who practice appellate law, Davis's life is a guidebook for us. As Chair, I hope that our programs provide each of you information and opportunities that help you build your skills, enhance your reputation through networking, speaking at our seminars, or writing for DRI's publications.

This year, the Committee continues its efforts to provide you with up-to-date information in *Certworthy*, the committee's twice yearly newsletter. Scott Stolley, the editor, has put together a fascinating series of articles on important and interesting topics. The newsletter is coming to you in a new electronic format—and one that has had some glitches as DRI has moved into this new technological era. We hope that you find it even more useful than the paper copy you received in the past and would be interested to hear your views about this change.

In addition, Mike King and John Bredehoft have put together a phenomenal ap-

pellate seminar, which will take place on October 25-26, 2001, at the Hotel Nikko in San Francisco. You will learn about managing press relations for the appeal that captures the interest of the media, coping with the "big case" record on appeal, and advocacy before state supreme courts. Speakers will also address reply briefs, jury instructions, and handling the appeal when the underlying judgment exceeds policy limits.

John W. Davis said of his career:

In the heart of every lawyer worthy of the name there burns a deep ambition so to bear himself that the profession may be stronger by reason of his passage through its ranks and that he may leave the Law itself a better instrument of human justice than he found it.

Davis certainly accomplished his goal. His life stands as a hallmark for us to follow. The programs of DRI's Appellate Advocacy Committee provide one way for members to help achieve Davis's ambition. Please join us in this effort.

**Mary Massaron Ross**  
*Plunkett & Cooney, P.C.*  
Detroit, MI

---

## APPELLATE ADVOCACY STEERING COMMITTEE

---

### **Mary Massaron Ross**

#### ***Committee Chair***

*Plunkett & Cooney, P.C.*  
243 W Congress, Ste 800  
Detroit, MI 48226-3260  
Phone: (313) 983-4801  
Fax: (313) 983-4350  
[massaronma@plunkettlaw.com](mailto:massaronma@plunkettlaw.com)

### **Michael B. King**

#### ***Committee Vice Chair and Seminar Co-Chair***

*Lane Powell Spears Lubersky, L.L.P.*  
1420 Fifth Av, Ste 4100  
Seattle, WA 98101-2338  
Phone: (206) 223-7046  
Fax: (206) 223-7107  
[kingm@lanepowell.com](mailto:kingm@lanepowell.com)

### **John Bredehoft**

#### ***Seminar Co-Chair***

*Venable Baetjer & Howard, L.L.P.*  
2010 Corporate Ridge, Ste 400  
McLean, VA 22102  
Phone: (703) 760-1629  
Fax: (703) 821-8949  
[jmbredehoft@venable.com](mailto:jmbredehoft@venable.com)

### **Douglas J. Collodel**

#### ***Membership Chair***

*Sedgwick Detert Moran & Arnold*  
801 S Figueroa St, 18th Fl  
Los Angeles, CA 90017-5556  
Phone: (213) 426-6900  
Fax: (213) 426-6921  
[djc1@sdma.com](mailto:djc1@sdma.com)

### **Tamara F. deWild**

#### ***Membership Vice Chair***

*Whitaker & Wilson, P.C.*  
1919 E. Battlefield, Suite B  
Springfield, MO 65804  
Phone: (417) 882-7400  
Fax: (417) 882-6101

### **Kelly A. Freeman**

#### ***Immediate Past Chair***

*Noble International, Ltd.*  
20101 Hoover Rd  
Detroit, MI 48205  
Phone: (313) 245-5600  
Fax: (313) 245-5640  
[kfreeman@nobleintl.com](mailto:kfreeman@nobleintl.com)

**Roger W. Hughes**  
**Substantive Committee Liaison**  
*Adams & Graham, L.L.P.*  
PO Drawer 1429  
Harlingen, TX 78551-1429  
Phone: (956) 428-7495  
Fax: (956) 428-2954  
[rhughes@adamsgraham.com](mailto:rhughes@adamsgraham.com)

**John P. Jacobs**  
**Law Offices of John P. Jacobs**  
One Towne Sq, Ste 1400  
Southfield, MI 48076  
Phone: (248) 357-5380  
Fax: (248) 357-5383  
[jpjpc@voyager.net](mailto:jpjpc@voyager.net)

**Karen Kendall**  
*Heyl, Royster, Voelker & Allen, P.C.*  
Bank One Bldg  
124 SW Adams St, Ste 600  
Peoria, IL 61602  
Phone: (309) 676-0400  
Fax: (309) 676-3374  
[kkendall@hrva.com](mailto:kkendall@hrva.com)

**Irene Keyse-Walker**  
*Arter & Hadden, L.L.P.*  
1100 Huntington Bldg  
925 Euclid Ave  
Cleveland, OH 44115-1475  
Phone: (216) 696-3982  
Fax: (216) 696-2645  
[ikeyse@arterhadden.com](mailto:ikeyse@arterhadden.com)

**Jeffery A. Kruse**  
**Young Lawyers Liaison**  
*Shook, Hardy & Bacon, L.L.P.*  
1200 N Main St  
Kansas City, MO 64105-2118  
Phone: (816) 391-5539  
Fax: (816) 421-5547  
[jkruse@shb.com](mailto:jkruse@shb.com)

**R. Daniel Lindahl**  
**SLDO Liaison**  
*Bullivant Houser Bailey, P.C.*  
300 Pioneer Tower  
888 SW Fifth Ave  
Portland, OR 97204  
Phone: (503) 499-4614  
Fax: (503) 295-0915  
[dan.lindahl@bullivant.com](mailto:dan.lindahl@bullivant.com)

**Maureen Middleton**  
**2001 Annual Meeting Co-Chair**  
*Primerica Financial Services*  
3100 Breckinridge Blvd, Ste 1200  
Duluth, GA 30199  
Phone: (770) 564-7669  
Fax: (770) 923-4239  
[maureen.middleton@pfsfhq.com](mailto:maureen.middleton@pfsfhq.com)

**Richard L. Edwards**  
**Substantive Committee Advisory Board Liaison**  
*Campbell Campbell Edwards*  
1 Constitution Plz, 3rd Fl  
Boston, MA 02129  
Phone: (617) 241-3000  
Fax: (617) 241-5115  
[redwards@campbell-trial-lawyers.com](mailto:redwards@campbell-trial-lawyers.com)

**Jody R. Nathan**  
**Web Page Chair**  
*Feldman, Franden, Woodard & Farris*  
525 S Main St, Ste 1000  
Tulsa, OK 74103-4514  
Phone: (918) 764-3121  
Fax: (918) 584-3814  
[nathan@tulsalawyer.com](mailto:nathan@tulsalawyer.com)

**Richard Neumeier**  
**2001 Annual Meeting Co-Chair**  
*McDonough, Hacking & Neumeier*  
11 Beacon St, Ste 100  
Boston, MA 02108-3013  
Phone: (617) 367-0808  
Fax: (617) 367-8307  
[rneumeier@mhnattys.com](mailto:rneumeier@mhnattys.com)

**Robert Powell**  
**Corporate Involvement Subcommittee Co-Chair**  
*Ford Motor Company*  
Office of the General Counsel  
300 Parklane Towers West  
3 Parklane Blvd  
Dearborn, MI 48126-2588  
Phone: (313) 621-6402  
Fax: (313) 248-7727  
[rpowell2@ford.com](mailto:rpowell2@ford.com)

**Raymond M. Ripple**  
**Corporate Involvement Subcommittee Co-Chair**  
*E.I. Du Pont Nemours and Company*  
1007 Market St, Ste D-7012  
Wilmington, DE 19898  
Phone: (302) 774-6403  
Fax: (302) 774-1415

**Thomas Sheehan**  
*Shook, Hardy & Bacon, L.L.P.*  
1200 Main St  
Kansas City, MO 64105-2118  
Phone: (816) 474-6550  
Fax: (816) 421-5547

**Mary Spillane**  
*Williams, Kastner & Gibbs, P.L.L.C.*  
601 Union St, 4100 Two Union Sq  
PO Box 21926  
Seattle, WA 98111-3926  
Phone: (206) 628-6656  
Fax: (206) 628-6611  
[spillamh@wkg.com](mailto:spillamh@wkg.com)

**Scott P. Stolley**  
**Publications Chair**  
*Thompson & Knight L.L.P.*  
1700 Pacific Ave, Ste 3300  
Dallas, TX 75201  
Phone: (214) 969-1678  
Fax: (214) 969-1751  
[stolleys@tklaw.com](mailto:stolleys@tklaw.com)

**Michael B. Wallace**  
*Phelps Dunbar, L.L.P.*  
MTEL Centre, Ste 500  
200 S Lamar St  
PO Box 23066  
Jackson, MS 39225-3066  
Phone: (601) 360-9330  
Fax: (601) 360-9777  
[wallacem@phelps.com](mailto:wallacem@phelps.com)

**Raymond P. Ward**  
**Publications Vice Chair**  
*Sessions, Fishman & Nathan, L.L.P.*  
201 St Charles Ave, 35th Fl  
New Orleans, LA 70170-3500  
Phone: (504) 582-1500  
Fax: (504) 582-1555  
[rpw@sessions-law.com](mailto:rpw@sessions-law.com)

**Sandra Boyd Williams**  
**Minority Liaison**  
Attorney At Law  
1922 Orleans Dr, Apt D  
Indianapolis, FL 32903  
Phone: (321) 777-8118  
Fax: (321) 777-8009  
[sbwilli@hotmail.com](mailto:sbwilli@hotmail.com)

# WHY NO-CITATION RULES ARE UNWORKABLE, UNWISE, AND UNCONSTITUTIONAL, AND HOW THEY SHOULD BE CHANGED

By Richard L. Neumeier

## INTRODUCTION

For decades, many appellate decisions have been unpublished, and courts have adopted rules prohibiting or limiting their citation. This article explains the necessity for unpublished opinions; examines the rationale for no-citation rules; discusses *Anastasoff v. United States*,<sup>1</sup> which held unconstitutional the Eighth Circuit local rule on unpublished opinions; suggests that blanket no-citation rules are unworkable, unwise, and unconstitutional; and concludes that such rules should be revised to permit limited citation of unpublished opinions.

## THE NECESSITY FOR UNPUBLISHED OPINIONS

The quantity of appellate litigation demands that many, if not most, appellate opinions remain unpublished.<sup>2</sup> In 1970, when the federal courts of appeals disposed of 10,669 cases, there were 97 circuit judgeships. The same courts disposed of 20,877 cases in 1980, 38,520 in 1990, and 51,194 in 1997, at which time there were 167 circuit judgeships.<sup>3</sup> According to Ninth Circuit judges Alex Kozinski and Stephen Reinhardt, the Ninth Circuit decided about 4500 cases on the merits in 1999, approximately 700 by published opinion and 3800 by memorandum dispositions, “the latter affectionately known as ‘memdispos.’”<sup>4</sup> In 1999, each active Ninth Circuit judge heard 450 cases as part of a three-judge panel and had writing responsibility for a third of the cases, working out to an average of 150 dispositions

---

**RICHARD L. NEUMEIER**, a partner at McDonough, Hacking & Neumeier, LLP, in Boston, Massachusetts, is a member of the DRI Appellate Advocacy Steering Committee, former chair of the Massachusetts Bar Association Appellate Litigation Committee, former chair of the Boston Bar Association Appellate Litigation Committee, and a member of the American Law Institute.

(20 opinions and 103 memdispos) per judge.<sup>5</sup> If all Ninth Circuit dispositions were published, each judge would have to produce three published opinions per week. This would severely diminish the quality of published opinions, or require significantly less involvement by the judges in published opinions, or both.<sup>6</sup>

In federal courts, rule-making concerning unpublished appellate opinions began in 1964, when the Judicial Conference of the United States (the governing body of the lower federal courts for administrative purposes) issued a recommendation that judges publish only those opinions “which are of general precedential value.”<sup>7</sup> Courts were thereafter encouraged to adopt rules regarding publication, including no-citation rules.<sup>8</sup> In state courts, the same result has been accomplished by rule,<sup>9</sup> statute,<sup>10</sup> or caselaw.<sup>11</sup>

There are two reasons to write an appellate opinion: (1) to explain the result to parties and to satisfy them that their contentions have been considered; and (2) to declare what the law is for the public.<sup>12</sup> There is no reason to publish every opinion that merely serves the first purpose and does nothing to add to, clarify, or extend the second purpose.

## THE RATIONALE FOR NO-CITATION RULES

Two reasons are frequently advanced for no-citation rules. First, it is claimed that since the unpublished decisions do not appear in a book, not everyone has access to them. In dissenting from the adoption of Tenth Circuit Local Rules announcing that “unpublished opinions and orders and judgments of this court have no precedential value and shall not be cited,” Chief Judge Holloway (joined by Judges Barrett and Baldock) disagreed:

The argument fails.... We can make the rulings, together with a simple index, available at our circuit library and can distribute the rulings to the clerks of the district courts, to the state bar

associations, and to other depositories of law schools, without an undue burden. Making the rulings available in such places, with a rudimentary index, will afford the public, and bar and the district judges reasonable access to our unpublished rulings.

*Re: Rules of U.S. Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 37-38 (10th Cir. 1992). See also the dissenting opinion of Judge Abrahamson in *Matter of Amend. of Section 809.23(3)*, 456 N.W.2d 783, 787 (1990) (“[A]ll attorneys are currently able to obtain unpublished opinions from a wide variety of sources in Wisconsin.”). Even if this reason originally had some force, it evaporated sometime in the 1990s, when unpublished opinions became accessible through the internet to anyone who had access to a computer.

The second reason is that: the so-called summary decisions, while binding on the parties, may not fully disclose the facts or the rationale of the panel’s decision. This is particularly true... where the panel affirms the judgment of the court below without writing any memorandum. Summary decisions, although open to public examination, are directed to the parties and to the tribunal which decides the case, that is, only to persons who are cognizant of the entire record.

*Lyons, supra*, 19 MASS. APP. CT. at 566 n.7.<sup>13</sup>

There are many unpublished opinions that do not sufficiently explain the basis for decision.<sup>14</sup> If counsel cites such an opinion, then the response should be that the opinion is not controlling or persuasive.

There exists a genuinely felt concern by many appellate judges that if citation of unpublished opinions is permitted, they will be inundated with citations to unpublished opinions. It is not clear why this concern arises. No competent advocate wants to cite an unpublished opinion if there is a published opinion directly on point.<sup>15</sup> There is empirical evidence that permission to cite unpublished opinions

has not been abused by the bar. For example, in 1988, the Sixth Circuit modified its rule to permit limited citation of unpublished opinions where counsel believed that “an unpublished disposition has precedential value... and that there is no published opinion that would serve as well....” According to Judge Martin, who opposes even this limited citation rule: “I admit that the change in the rule has not opened the floodgates to citation of unpublished opinions.” Martin, *In Defense of Unpublished Opinions*, 60 OHIO ST. L. J. 177, 195 (1999).

### THE ANASTASOFF BOMBSHELL

The government denied a taxpayer’s refund claim, because although the claim was mailed within the requisite three-year period required under 26 U.S.C. §6511(b), it was received three years and one day after she overpaid her 1992 taxes. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000). The “Mailbox Rule” (26 U.S.C. §7502) saves untimely claims, which are deemed received when postmarked. The issue was whether §7502 could be applied, for the purposes of §6511(b)’s three-year refund limitation, to a claim that was timely under §6511(a), which measures the timeliness of the refund claim itself.

The district court ruled for the government, holding that §7502 could not apply to any part of a timely claim, and on appeal, the taxpayer argued that §7502 should apply even when part of the claim is untimely. Precisely the same argument had been rejected by the Eighth Circuit in *Christie v. United States*, No. 91-2375MN (8th Cir. March 20, 1992), an unpublished opinion, 223 F.3d at 899. The taxpayer argued that the Eighth Circuit was not bound by *Christie* because, as an unpublished opinion, it did not constitute a precedent under Eighth Circuit Rule 28(a)(i), which provides that:

Unpublished opinions are not precedent, and parties generally should not cite them. When relevant to establishing the doctrines of *res judicata*, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no pub-

lished opinion of this or another court would serve as well....  
223 F.3d at 899.

Judge Arnold, writing for the panel, held that the Rule was unconstitutional. Citing Coke, Kent, Blackstone, and others concerning the importance of precedent to the Framers,<sup>16</sup> Judge Arnold stated that: These principles, which form the doctrine of precedent, were well-established and well-regarded at the time this nation was founded. The Framers of the Constitution consider these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution. Accordingly, we conclude that the Eighth Circuit Rule 28(a)(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional. That rule does not, therefore, free us of our duty to follow this Court’s decision in *Christie*.

\*\*\*

[T]he framers had inherited a very favorable view of precedent from the seventeenth century...; the assertion of the authority of precedent had been effective in past struggles of the English people against royal usurpations, and for the rule of law against the arbitrary power of government.”  
223 F.3d at 900 (footnote omitted).<sup>17</sup>

In a concurring opinion, Judge Heaney suggested an *en banc* hearing to reconsider *Christie*. 223 F.3d at 905.

In response to a petition for rehearing *en banc*, the government informed the court that it intended to pay the taxpayer’s claim in full with statutory interest, which it did. The *en banc* court, at the government’s request, vacated the panel opinion as moot. *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000). The court rejected the taxpayer’s argument that the issue was not moot because of the uncertain status of unpublished opinions:

The controversy over the status of unpublished opinions is, to be sure, of great interest and importance. But this sort of factor will not save a case from becoming moot. We sit to decide cases, not issues, and whether unpublished opinions have precedential effect no

longer has any relevance for the decision of this tax refund case.

\*\*\*

The constitutionality of that portion of Rule 28(a)(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit.  
235 F.3d at 1056.

### NO-CITATION RULES ARE UNWORKABLE

There is no reason to publish an error-correcting opinion that merely affirms the judgment and does nothing to clarify, explain, or otherwise add to existing law. The problem with implementing this principle is that appellate judges are fallible. Time and again, they have decided that a decision is unworthy of publication, and yet the parties, counsel, or others find something worthy of citation.

Learned Hand once stated: “I conceive that the measure of [a lower court’s] duty is to divine, as best it can, what would be in the event of an appeal in the case before it.” *Spector Motor Service v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1944) (Hand, J., dissenting). Because the overwhelming majority of judges agree with Judge Hand on this point, courts have and will—when there is no controlling authority—consider (and cite) persuasive reasoning wherever it appears, whether it is in a Restatement of the Law, a law review article, a student note, a legal journal, or an unpublished decision. They have done and will do this regardless of whether there is a rule prohibiting citation of unpublished decisions.

Thus, in the First Circuit, which has a rigid no-citation rule, the Court nonetheless found persuasive and cited an unpublished judgment of the Supreme Court of Puerto Rico: “Because it is a well-reasoned and complete opinion, we have relied upon it.” *Aviles v. Burgos*, 783 F.2d 270, 283 n.4 (1st Cir. 1986) (court notes that Rule 44(c) of the Rules of the Supreme Court of Puerto Rico states: “In view of the fact that the judgments are not published, and are not accessible to the general public, it shall be considered improper to cite as an authority or precedent before any court a decision of this Court which has not been rendered through an opinion or which has not been published by the Bar Association or by the Court itself.”).

*Kentucky Central Life Insurance Co. v. Jones*, 799 F. Supp. 53, 56 (N.D. Tenn. 1992) found unpublished decisions of the intermediate Tennessee court persuasive “as to how the Supreme Court of Tennessee would rule if presented with this issue.” Indeed, the court noted that “the Supreme Court of Tennessee has applied unreported decisions in other circumstances, when such decisions ‘present the better-reasoned treatment of the issue... as well as the better result.’ *Isbell v. Isbell*, 816 S.W.2d 735, 738 (Tenn. 1991).” 799 F. Supp. at 56. The United States Supreme Court cited unpublished decisions in *Shea v. Vialpando*, 416 U.S. 251, 265, 94 S. Ct. 1746, 1756 (1974). See also *Weyerhaeuser Co. v. Commercial Union Ins.*, 15 P.3d 115, 129 (Wash. 2000) (citing two unpublished federal district decisions: “Although these decisions are unpublished, we find their reasoning compelling.”); *United States v. Luna*, 165 F.3d 316, 319 (5th Cir. 1999) (unpublished Eighth Circuit decision cited in support of a holding that 18 U.S.C. §922J was constitutional).

Sometimes courts seek to justify citation of unpublished decisions from other jurisdictions on the ground that their local rule applies only to their unpublished decisions, not to unpublished decisions of other jurisdictions. Thus, although the Massachusetts Appeals Court has repeatedly stated that its unpublished opinions may not be used as precedents<sup>18</sup> and cannot be cited in unrelated cases,<sup>19</sup> in *Langton v. Commission of Corrections*, 34 MASS. APP. CT. 564, 574 (1993), the court stated that this rule did not apply to “unpublished decisions from other jurisdictions.”<sup>20</sup> See also *Keener v. Ridenor*, 592 F.2d 581, 586, 588-89 (6th Cir. 1979) (in examining the availability of additional state remedies in a habeas case, the Sixth Circuit cited and relied upon several unpublished decisions of the Ohio courts of appeals, because the Ohio courts state that unpublished Ohio appellate opinions may be cited under certain circumstances; the Sixth Circuit, however, refused to consider its own unpublished decisions, because its rules forbid any citation of those opinions). Even a staunch opponent of citation of unpublished opinions, Sixth Circuit Judge Martin, has admitted that he has “occasionally... fallen into the trap... of citing to unpublished opinions” (but only in less than 5

percent of his published opinions). Martin, *In Defense of Unpublished Opinions*, *supra*, 60 OHIO ST. L.J. at 196.<sup>21</sup>

### NO-CITATION RULES ARE UNWISE

Rules, statutes, and caselaw dealing with unpublished opinions typically state that unpublished opinions are not precedent and may not be cited in unrelated cases. These statements have been the subject of controversy. As former Chief Judge Holloway noted in dissenting from the adoption of Tenth Circuit Local Rules:

[A]ll rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation. See *Jones v. Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972) (“...any decision is by definition a precedent...”). No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it, should be able to do so as a matter of essential justice in fundamental fairness. To deny a litigant this right may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule.

*Re: Rules of U.S. Court of Appeal for the Tenth Circuit*, 955 F.2d 36, 37 (10th Cir. 1992). See also *Jones v. Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972) (“[W]e cannot deny litigants and the bar the right to urge upon us what we had previously done.”).

The statement that an unpublished decision is not a precedent and cannot be cited in an unrelated case undercuts the fundamental rule of law that similarly situated cases must be treated in a similar manner unless, in the subsequent case, there appear to be changed circumstances or other reasons to overrule the prior case. When this occurs, the courts, to maintain public confidence, must set forth reasons explaining why the prior precedent ought not to be followed. On this point, it is difficult to improve on Judge Arnold’s language:

At bottom, rules like our Rule 28(a)(i) assert that courts have the following power: to choose for themselves, from

among all the cases they decide, those that they will follow in the future and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: “We may have decided this question the opposite way yesterday, but this does not bind us today, and, what’s more, you cannot even tell us what we did yesterday.” As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not fiat.

*Anastasoff*, 223 F.3d at 904.

Another problem with statements that unpublished opinions are not “precedent” is that some lower courts have ignored such decisions even when they are directly on point. For example, the district court in *Bologna v. NMU Pension Trust*, 654 F. Supp. 637, 641 (S.D.N.Y. 1987) (where an ERISA plan beneficiary sued for breach of contract) declined to follow an unpublished Second Circuit decision which involved precisely the same issue raised in the present case, and dealt with the same Declaration of Trust and the same Rule 20.80... [T]he ruling of the Court of Appeals was delivered orally in open court. There was no written opinion.

Such a ruling is not citable as precedent. The district court judge overlooked the damage that he was doing to public confidence in the impartiality of the judicial system by treating Fernando Bologna differently than identically situated claimants under the same ERISA plan involving the same claim. See also *Horner v. Boston Edison Co.*, 45 MASS. APP. CT. 139, 140 (1998) (lower court refused to follow unpublished appeals court decision that involved precisely the same release, same legal issue, and same defendant).

### NO-CITATION RULES ARE UNCONSTITUTIONAL

Courts have authority to impose time, place, or manner restrictions on counsel. For example, counsel can be limited to filing a brief of no more than 50 pages or, when technology enabled counsel to evade the purpose of that rule, to limit briefs to 14,000 words. See FRAP 32(a)(7)(B). Similarly, oral argument can be limited to 15 minutes (or less). Content restrictions are different:

A restriction that regulates only the

time, place or manner of speech may be imposed, so long as it is reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited “merely because public officials disapprove of the speaker’s views.”

*Consolidated Edison Co. v. Public Service Comm’n*, 447 U.S. 529, 100 S. Ct. 2326, 2332 (1980) (citation omitted).

Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492-493, 95 S. Ct. 1029, 1044-45, 43 L.Ed.2d 328 (1975). *Nebraska Press Ass’n v. Stewart*, 427 U.S. 539, 559, 96 S. Ct. 2791, 2803 (1976). Counsel cannot be sanctioned for making truthful advertising statements. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691 (1977); see also *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S. Ct. 2720 (1991) (discipline of a lawyer who made statements at a press conference about a pending criminal case vacated on First Amendment grounds); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 251 (7th Cir. 1975) (blanket proscription on certain areas of comment unconstitutional; rules against lawyer comment must be limited to matters which pose “serious and imminent threat of harm”). It necessarily follows that counsel, in brief and oral argument, may make truthful statements under the First Amendment, including informing an appellate court what it previously decided in an unpublished decision.<sup>22</sup> Cf. *Dwyer v. J.I. Kislak Mortg. Corp.*, 13 P.3d 240, 244 (Wash. App. 2000) (counsel sanctioned \$500 for citing an unpublished opinion—no discussion of lawyer’s First Amendment rights).

### A MODEST PROPOSAL

The better rule is to permit citation of unpublished opinions when counsel certifies that controlling published authority does not exist, and that the unpublished decision is directly on point. This compromise approach, which has been adopted in substance by several federal circuits, strikes the right balance. It permits citation after counsel has certified that the published cases do not contain controlling authority concerning the precise issue at hand.

This also avoids the unseemly spectacle of appellate courts claiming that they cannot consider or discuss cases that they previously decided.

The tide is shifting in favor of citation of unpublished opinions. Between 1994 and 1997, a number of federal circuits permitting citation increased from two to six.<sup>23</sup> Shuldberg, *Digital Influence: Technology on Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 569 (1997).

### CONCLUSION

Unpublished opinions are necessary because of the quantity of appellate litigation. Although they do not appear in the books, they are accessible, and thus, lack of accessibility, while formerly a reason to prohibit citation, does not exist anymore. That an unpublished opinion may not fully disclose a panel’s reasoning is insufficient to prohibit publication because many, if not most, disclose relevant reasoning. The experience of the past few decades has demonstrated that judges cannot be prohibited from citing unpublished opinions, so it is pointless to try to prohibit lawyers from doing so. Blanket no-citation rules violate the First Amendment because they seek to preclude counsel from making truthful statements. A reasonable compromise is to limit citation of unpublished opinions to situations in which counsel certifies that the unpublished opinion is persuasive on the point directly at hand and that counsel has been unable to find published authority directly on point.

### ENDNOTES

<sup>1</sup> 223 F.3d 898 (8th Cir.), *dismissed as moot*, 235 F.3d 1054 (8th Cir. 2000) (*en banc*).

<sup>2</sup> One academic has argued that all opinions should be published. Robell, *The Myth of the Disposable Opinion: Unpublished Appellate Opinions and Government Litigants in the United States Court of Appeals*, 87 MICH. L. REV. 940, 961-62 (1989).

<sup>3</sup> Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRACTICE AND PROCESS 219, 221-22 (1999). In Massachusetts, where the author practices, the statistics are comparable. In 1973, the first full year of its operation, the Appeals Court had 496 entries. By 1983, the total number of cases entered was 1,416; by 1993, 1,814; and by 1999, 2,210. Boston Bar Associa-

tion Task Force Committee on Massachusetts Appeals Court Judicial Positions, at 9-10 (May 12, 2000).

<sup>4</sup> Kozinski & Reinhardt, *Please Don’t Cite This*, ABA Lit. Sect., THE APPELLATE PRACTICE JOURNAL, at 6-7 (Summer 2000).

<sup>5</sup> *Id.*

<sup>6</sup> Thirteen years ago, the author suggested that the ever increasing quantity of appeals could be curbed by imposing sanctions in some civil appeals, at least where the panel unanimously agreed that the appeal presented no significant question. Neumeier, *Unpublished Opinions*, 17 THE BRIEF 22, 24 (1988). Chief Judge (now Associate Justice) Stephen Breyer persuaded the author that this was a poor idea that would result in a misallocation of judicial resources and lead to satellite litigation. Judge Breyer observed that, in addition to the time expended on the merits, he would need to spend time reviewing the record to determine whether sanctions were warranted. In addition, such a proposal would generate satellite litigation over the standard for sanctions and whether counsel or the client was responsible for payment.

<sup>7</sup> Administrative Law Office of the United States Courts, *Judicial Conference Reports, 1962-1964*, at 11 (1964).

<sup>8</sup> See, for example, 1st CIR. LOC. R. 36(b)(2)(F).

<sup>9</sup> See, for example, Wisconsin Section (Rule) 809.23(3) Stats.

<sup>10</sup> See, for example, Minn. Stat. §480A.08, subd. 3(c) (1996) and RCW 2.06.04.

<sup>11</sup> See, for example, *Lyons v. Labor Relations Comm’n*, 19 MASS. APP. CT. 562, 566 n.7 (1985).

<sup>12</sup> “We write opinions in part as an intellectual process to test our thinking, and in part to satisfy the parties that, rightly or wrongly, we have considered their views. We publish them, however, so that future lawyers and judges may know the law of the circuit.” *United States v. Dwyer*, 843 F.2d 60, 64 (1st Cir. 1988).

<sup>13</sup> Ninth Circuit judges Reinhardt and Kozinski state:

If memdispos could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns.

\*\*\*

Lawyers argue that we need not change our internal practices, that we should just keep doing what we’re doing, but let the memdispos be cited as precedent. But what does precedent mean? Surely it suggests that the three judges subscribed

not merely to the result, but also to the phrasing of the disposition.

With memdispos, this is simply not true. Most are drafted by law clerks with relatively few edits from the judges. Fully 40 percent of our memdispos are in screening cases, which are prepared by our central staff... If we unanimously agree that a case could be resolved without oral argument, we can make sure the proposed result is correct, but we seldom edit the memdispo, much less rewrite it from scratch. Is it because the memdispos could not be improved by further judicial attention? No, it's because the result is what matters in those cases, not the precise wording of the disposition."

Kozinski & Reinhard, *Please Don't Cite This*, *supra*, at 8.

<sup>14</sup> Occasionally, published opinions also "may not fully disclose the facts or the rationale for the panel's decision." *Lyons*, *supra*, 19 MASS. APP. CT. at 566 n.7.

<sup>15</sup> "[W]hy would any lawyer in his right mind go to the trouble of finding and citing unpublished opinions which merely reiterate rules and rely upon precedents already larding the *published* reports." Kanner, *The Unpublished Appellate Opinion: Friend or Foe*, 48 CAL. ST. B.J. 386, 446 n.75 (emphasis in the original), cited in *Re: Rules of U.S. Court of Appeals for the Tenth Circuit*, 955 F.2d at 38.

<sup>16</sup> The court's historical analysis has been criticized in Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 523-25 (2000).

<sup>17</sup> The Eighth Circuit also observed that the recently decided *Weisbart v. United States*, 222 F.3d 93 (2d Cir. 2000), appeared to conflict with *Christie*. 223 F.3d at 905 n.15.

<sup>18</sup> See, however, *Trustees of Tufts College v. Medford*, 33 MASS. APP. CT. 580, 581 n.3 (1992) (citing its unpublished decision of *Newbury Junior College v. Brookline*, 15 MASS. APP. CT. 1109 (1983), explaining that "The 1983 Newbury Junior College case was decided under Appeals Court Rule 1:28 but the unpublished memorandum is described in *Newbury Junior College v. Brookline*, 19 MASS. APP. CT. 197, 199 (1985).")

<sup>19</sup> See *Wolbach v. Beckett*, 20 MASS. APP. CT. 302, 306, n.5 (1985) (unpublished decision cited by defendant "is unavailable for use as precedent, see *Lyons v. Labor Relations Comm'n*, 19 MASS. APP. CT. 562, 566 & n.7 (1985)"); *Purvis v. Commission of Correction*, 29 MASS. APP. CT. 190, 192 n.5 (1990) ("the defendants also cite in support... a decision issued pursuant to Rule 1:28 of this court... unpublished decisions of this court are not to be relied upon or cited as authority in unrelated cases"); *Hornor v. Boston Edison Co.*, 45 MASS. APP. CT. 139, 141 (1998) ("...unpublished decisions involving other parties are not to be relied upon..."); *Chhoeun Ny v. Metropolitan Prop. & Cas. Ins. Co.*, 51 MASS. APP. CT. 471, 475 n.7 (2001) ("Opinions of this court in an unrelated case, released pursuant to Rule 1:28, may not be cited as precedent.")

<sup>20</sup> The court cited *Bird v. Bennett*, 774 F.2d 1154 (4th Cir. 1985) (unpublished), for the

proposition that failure to provide proper medical care to prisoners regardless of consent could amount to deliberate indifference giving rise to a constitutional claim.

<sup>21</sup> Circuit Judge Arnold, who opposes no-citation rules, has publicly confessed to "deliberately" citing an unpublished opinion on an important jurisdictional point in a draft circulated to all members of the *en banc* court, who "concurred without a murmur." Arnold, *Unpublished Opinions*, *supra*, at 225-26 n.9. See *McCoy v. Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1983) (*en banc*).

<sup>22</sup> Sixth Circuit Judge Martin, an opponent of citation, has stated: "We cannot forbid litigants from citing to unpublished opinions." *In Defense of Unpublished Opinions*, *supra*, 60 OHIO ST. L. J. at 194.

<sup>23</sup> See Justice Shirley Abramson's dissent from the Supreme Court of Wisconsin decision denying the state bar's petition seeking modification of the no-publication rule, explaining that initially she was in favor of the no-citation rule "because I thought the rule presented the fewest serious problems. I now conclude that changed conditions require experimenting with innovative approaches and new rules." *Matter of Amend. of Section 809.23(3)*, 456 N.W.2d 783, 785 (Wis. 1990). She also noted that "the prestigious federal study committee recommended in its recent report (April 2, 1990) that the federal courts of appeal review the non-publication, no-citation rules 'in light of increasing ease and decreasing cost of database access.' Report pp. 130-31." *Id.* at 787.

#### EDITOR'S FOOTNOTES, FROM PAGE 1

not be in color, and will be on inferior paper. These are problems that the Committee cannot solve. We will have to live with a less attractive newsletter, but will try to maintain our high standards for the substance of *Certworthy*.

The third problem is technological. Many of us could not open the attachment to read the emailed version of the last *Certworthy*. Unfortunately, it was sent in a format that some recipients' computers could not translate. DRI has been made aware of the problem, and we hope that

this edition of *Certworthy* will be sent in a format that is universally accessible by our members. If you are one of those who has still been unable to open the last issue of *Certworthy*, please let me know, and I will send you one by fax or regular mail.

All in all, the first half of this year has been frustrating for me, as the editor of *Certworthy*. I apologize to you, and hope that despite the problems, you will continue to enjoy reading *Certworthy*.

As always, many thanks to the authors and contributors who came forward to help with this issue of *Certworthy*. Special

thanks go to Ray Ward, who has taken over as vice chair of the Publications Subcommittee. Ray stepped in with admirable zeal to organize and energize our circuit editors.

The next issue of *Certworthy* is scheduled to be published in January 2002. I have only one author committed, so if you would like to contribute an article or column, please contact me.

**Scott Patrick Stolley**  
*Thompson & Knight L.L.P.*  
Dallas, TX

---

# ETHOS AND ADVOCACY

---

By Michael Ward

Every writer, by the way he uses language, reveals something of his spirit, his habits, his capacities, his bias....

No writer long remains incognito. William Strunk, Jr. & E.B. White, *The Elements of Style* 66-67 (3d ed. 1979)

**L**awyers are advocates. We write to persuade. We marshal the facts of our case. We master the law. We think logically. We argue logically. With logic and organization, we take the facts and the law and craft our arguments.

But advocacy is more than sound reasoning. Logic alone does not convince those whom we seek to persuade. Persuasion begins with ourselves. Our audience evaluates us and our writing. If we are not credible and trustworthy, the logic of our arguments will not convince others. People are persuaded by those whom they trust. They are persuaded by the advocate's ethos.

---

## ETHOS

What is ethos? To the Greeks and Romans, ethos was one of the three forms of classical persuasion, the other two being pathos and logos. Ethos refers to the advocate's credibility. Pathos concerns the emotions that the advocate instills in others. Logos is the logic that supports the advocate's argument.

Of the three, ethos was the most important to the ancients. In his treatise on rhetoric, Aristotle wrote that most people are not persuaded by logic or by emotion but by the ethos—the character—of the advocate.

---

## MORAL CHARACTER

How does an advocate establish ethos? Aristotle believed that credibility is projected by the advocate's moral character, intelligence, and good will. Aristotle wrote that good character commands at-

ention and engenders trust. Character results from the practice of a virtuous life. According to Aristotle, a credible advocate is good-natured and upright, kind and calm, and never grasping.

---

## INTELLIGENCE

Intelligence also conveys ethos. Aristotle wrote that an advocate demonstrates intelligence through the mastery of the subject and the display of good sense in combination with convincing arguments. Through knowledge and sound reasoning, an advocate gains the audience's trust in the advocate's judgments. This trust is enhanced by the advocate's use of apt examples or parallels.

---

## GOOD WILL

Good will is the last component of ethos according to Aristotle. Good will is the advocate's attitude toward the audience. Through good will, an advocate projects concern for the audience's viewpoint and respects their intelligence, sincerity, and common sense.

---

## THE ROMAN VIEW

The Romans also emphasized the importance of ethos in advocacy. Both Cicero and Quintilian stressed the importance of the advocate's character in the art of persuasion. Among the virtues that Cicero found important to an advocate's ethos were a mild tone, a modest countenance, and gentle language. Quintilian agreed. He wrote that an advocate's credibility depended, in part, on avoiding any impression that the advocate was abusive, malignant, or slanderous toward any individual or institution that might incite the disapproval of judges.

---

## ETHOS AND APPELLATE ADVOCACY

The lessons of Aristotle, Cicero, and Quintilian remain applicable today. Lawyers must not ignore the place of ethos in persuasion and appellate advocacy. If we are

not credible, we cannot persuade. How then can we demonstrate our ethos to our audience, the appellate court? The three elements of ethos identified by Aristotle—character, intelligence, and good will—provide a guide. They find expression in the following principles that all ethical appellate advocates strive to heed:

- The law and the facts should be fairly and accurately stated.
- Every statement of fact should be supported by a record reference.
- Overstatement, exaggeration, and deception should be avoided.
- The applicable standard of review should be stated and heeded.
- Adverse facts and other weaknesses should be acknowledged.
- Testimony, documents, and rulings should be accurately—not selectively—quoted.
- Inferences from the evidence should be identified as deductions, and not as evidence.
- Every statement of law should be supported with a pinpoint cite to the authority.
- Controlling legal precedent should be cited, including directly adverse legal authority.
- Caselaw should be chosen because of its holding and not its quotability.
- Briefs should be proof-read and cite-checked.
- All applicable rules of procedure should be followed.
- A civil and courteous tone should be maintained.
- The writing should be marked by sincerity and conviction.
- The case should be viewed from the court's perspective and provide the court with all the means necessary to decide the case.
- Ego should be sublimated.
- Inflammatory language and personal attacks on opposing counsel and the lower court should be exorcised.

These principles are self-evident. They are found in the rules, caselaw, and the ethical standards. They are also a matter of common sense. But no matter how obvious

---

**MICHAEL WARD** is a principal with Brown & James, P.C., in St. Louis, Missouri, where he is chairman of the firm's appellate practice group.

they may be, their importance must never be forgotten. Our practice must be guided by these principles. When we ignore them, we are unable to convince and persuade. Without them, we have a negative ethos.

---

### CIVILITY AND ETHOS

The lawyer who accurately and fairly states the law and the facts engages the court's trust. The lawyer who misstates the facts or the law, on the other hand, loses the court's confidence. And once lost, the court's trust is difficult to regain both in the case at hand and in later cases. A lawyer who does not have the court's confi-

dence has a far heavier burden of persuasion than the lawyer who has credibility with the court.

The same is no less true of the measure of a lawyer's conduct toward opposing counsel and the court. Zealous advocacy does not require personal attacks and harsh language. Boorish behavior is no substitute for a calm, conscientious presentation of the law and the facts. Civility is not a sign of weakness.

In the end, effective appellate advocacy requires respect for the importance of ethos. The principles of ethos that guided advocates in ancient Athens and Rome are no less, if not more, important today.

An appellate advocate should be a good lawyer writing and speaking well. Our briefs are a reflection of ourselves. Absent ethos, we are not worthy of the court's trust. And without trust and credibility, we cannot persuade.

---

### SOURCES

Michael Frost, *Ethos, Pathos and Legal Audience*, 99 DICK. L. REV. 85 (1994)  
John C. Shepherd & Jordan B. Cherrick, *Advocacy and Emotion*, 138 F.R.D. 619 (1991)  
Martin E. Aspen, *Let Us Be "Officers of the Court,"* 83 A.B.A.J. 94 (July 1997)

## SUBCOMMITTEE REPORTS

### Seminar

Plans proceed for our third Appellate Advocacy Seminar, to be held at the Hotel Nikko in San Francisco, on October 24-26, 2001. Speakers will include the renowned United States Supreme Court advocate Alan Morrison, an appellate lawyer who worked on *Bush v. Gore*, and a panel of state high court jurists from around the country. Brochures were mailed in early June. We hope to see you in San Francisco for another successful program!

#### Michael B. King

*Lane Powell Spears Lubersky, L.L.P.*  
Seattle WA

#### John Bredehoft

*Venable Baetjer & Howard, L.L.P.*  
McLean, VA

---

### Publications

As described earlier—in the Editor's Footnotes—we have had some problems this year with the production and transmission of *Certworthy*. We hope that these problems will be solved with this and future issues of *Certworthy*. The next issue is scheduled to be published in January 2002. Please contact me if you would like to contribute.

Next, the Appellate Advocacy Committee is still considering a long-term project to publish an appellate "how-to" manual for DRI's Defense Library Series. We hope to have more information about this at our Appellate Advocacy Seminar in October. If you are interested in helping, please contact me.

Finally, I want to thank our outgoing vice chair, David Lewis, who left his firm in Phoenix to go inhouse with a software company in Utah. Best wishes to Dave. I also want to welcome our incoming vice chair, Ray Ward of New Orleans. Ray has already proven that he will be a welcome addition to our subcommittee leadership.

#### Scott Patrick Stolley

*Thompson & Knight L.L.P.*  
Dallas, TX

---

### SLDO

The State and Local Defense Organization Subcommittee facilitates a two-way flow of information between the Appellate Advocacy Committee and state and local defense organizations, through a network of committee members who serve as liaisons to their local defense organizations.

A primary function of the SLDO Subcommittee is to make SLDOs aware of the activities of the Appellate Advocacy Committee. There remain many states without an SLDO liaison from the committee. Because SLDO liaisons will be crucial to the success of the upcoming seminar in October, any Appellate Advocacy Committee member interested in serving as a SLDO liaison is urged to contact subcommittee chair Daniel Lindahl at [dan.lindahl@bullivant.com](mailto:dan.lindahl@bullivant.com) or (503) 499-4614.

#### R. Daniel Lindahl

*Bullivant Houser Bailey P.C.*  
Portland, OR

---

### Membership

The Appellate Advocacy Committee continues its steady growth. In October 2000, we counted 250 members within our ranks. A more recent count, which reflects members as of May 31, 2001, reveals a substantial increase to 271 members. We look forward to continuing our growth, especially in view of the upcoming seminar in October.

#### Douglas J. Collodel

*Sedgwick, Detert, Moran & Arnold*  
Los Angeles, CA

---

# REQUIEM FOR A BRIEF WRITER

---

by Katherine Bryan Jenks and Mark Herrmann

*Editor's Note: Many thanks to Ms. Jenks, Mr. Herrmann, and the American Bar Association for granting us permission to reprint this article from Litigation, vol. 26 (Summer 2000). Copyright 2000 American Bar Association. All rights reserved.*

Since December 1, 1998, experienced appellate brief-writers have been trickling over to the ranks of buggy-whip makers, telegraph servicemen, and elevator operators. Under recent amendments to the Federal Rules of Appellate Procedure, briefs that were constrained by manually counted page limits are now constrained by computer-counted word limits. This means that technology has consigned us to obsolescence.

What a shame it is. We had such a finely honed set of skills. That was especially reflected in the apotheosis of our art, squeezing the signature block into the very bottom of the last—formerly the 25th, then just the 15th—page.

Captions, for example, always got their own first (but unnumbered) page so that text could bulge right up to the top of the following page, which was boldly labeled “1.” Word choices and abbreviations required a hawkish eye: Every “automobile” became a “car,” every “General Motors” became a “GM,” every adjective and every adverb was mentally cross-examined and discarded if inessential.

Then there were the paragraph breaks. Many were the drafts that were cast again and again, while the editor swooped down upon every paragraph with a final line less than half the width of the page. The goal was to excise enough stray words from the paragraph to make it one line shorter, and the skillful could always expand the concept of “stray” to meet the goal. There was always something somewhere that,

on reflection, could be said more pithily or termed superfluous or redundant or supererogatory.

(No competent brief-writer, fighting to get down to that 15th page, would ever keep “superfluous or redundant or supererogatory.” If the concept was needed, it would plainly be “surplus”—35 fewer spaces.)

The footnote gambit was, of course, frowned upon; no one could be sure that the judges would read the footnotes, and relegating argument to footnote did not shorten things all that much, anyway. The appendix idea was still worse. It bordered on the unethical and was tactically unsound to boot: Isolating an argument to an appendix guaranteed it would languish unread.

But there were so many other elegant and effective ways of reaching 15-page nirvana. One-line headings with no extra spacing above or below. Abbreviations without punctuation or definition: FRCP, NLRB, IBM. Case citations that ruthlessly pruned all parallel cites and, in extraordinary situations, even omitted all but the first names of well known cases: *Miranda*, *Affiliated Ute*, *Cipollone*. (*Cipollone*? Well, how well-known a case had to be to justify this trick depended on the level of the brief-writer's desperation.)

No brief-writer worth her salt ever let a sloppily verbose citation to the record escape the red pencil. “Transcript of August 12, 1998, Deposition of Joseph Smith at p. 212, Appendix at 573” slimmed down to a brisk “App. 573,” with a parenthetical (Smith) permitted if, but only if, space allowed. In a longer brief with many references to the record, the cumulative effect of a further contraction to “A573” could win a writer as much as half a page.

Nor was this highly skilled work entrusted to mere desk-bound scribes. It called for persuasive human qualities beyond the common, as the incredulous client had to be slowly brought around to the realization that the court was interested not in the best argument but in the best 15-page argument. This notion—that a true but complex idea that would push the brief to 16 pages could survive

only by muscling other true ideas out of the brief—did not comport well with many laymen's expectations of justice. The tears, the rage, the scornful hoots with which non-lawyers would greet the news were appellate practitioners' daily fare.

Like the ice box, the sundial, and the rotary phone—gone, gone, all gone.

What cataclysm obliterated the value of these hitherto-priceless skills? New Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure (FRAP to us now-obsolete old-timers) did the deed. This new rule discarded the old way of compressing briefs into a pre-set page count in favor of the stuff of the new millennium: the computer would now count the words. Actually, the 15-page limit remains an available alternative under FRAP 32(a)(7)(A), but the computerized word count typically gives the writer more room. Given the brief-writer's insatiable greed, the computer usually prevails.

Under the new regime, it no longer matters whether something is “surplus” or “supererogatory.” In either case, says the computer, it is just one word and counts as such. Too bad for the scholars who have spent their lives turning “automobiles” into “cars,” “memoranda” into “memos,” “transcripts” into “trs.” The computer is oblivious.

---

## NEW PROBLEMS

---

With the new rule, of course, has emerged a new set of problems. In *DeSilva v. DiLeonardi*, 185 F.3d 815 (7th Cir. 1999), for example, lawyers escaped sanctions only because they convinced the court that they had not realized that the technical structure of the Microsoft Word '97 word-count program conflicted with the word-count requirements of FRAP 32(a)(7)(B)(iii). Blithely believing that they could rely on what the computer told them, they signed a certificate swearing to a word count that, under FRAP 32(a)(7)(B)(iii), was plain wrong.

The *DeSilva* Court went out of its way to bless the word-count program of Corel WordPerfect as satisfying the rule, but here

---

KATHERINE BRYAN JENKS and MARK HERRMANN are with the Cleveland, Ohio, office of Jones, Day, Reavis & Pogue. The views expressed in this article are not necessarily those of their firm (or even of the authors).

the Court itself was too sanguine. Even using this one piece of software, there are two ways to count words. The user can move through “File” to “Document” to “Properties” [File/Document/Properties] to get one count and can also use “Tools” to “Grammatik” to “Analysis” to “Basic Counts” [Tools/Grammatik/ Analysis/Basic Counts] to get another—and, often, much smaller—count.

This article, for instance, has either 1,214 (by the first method) or 1,159 (by the second) words. If this publication imposed on its writers a sworn-to 1,200-word limit, the choice of paths would

mean the difference between compliance and violation. *DeSilva* does not tell us which path the Court took.

The threat of sanctions seems, to the technologically illiterate, a harsh penalty for guessing the wrong path. Lawyers whose mistrust of computers finds reinforcement in cases like *DeSilva* may want to consider counting the old-fashioned way: by using their fingers.

For those still willing to essay the computer, there are obviously complexities yet to be plumbed in these modern times, this brave new world. There are also opportunities for confusion: Compare, for

example, how computers count “clear error review” (three words) and “clear-error review” (just two). Still, the soulless spirit of the bean-counters is creeping like a blight over what used to be a creative process for real artisans.

Put this threnody in an old box, where it can gather dust next to the long-playing records, the eight-track tapes, and the manuals for the firm’s last word-processing program. The world is spinning too fast. It is too late to hurl shoes into whirling machines; we have, alas, been relegated to honing not form but (carefully counted) content.

## ADVOCATE’S FORUM

### CANDOR DURING ORAL ARGUMENT

The Model Rules of Professional Conduct specifically address attorney candor toward the tribunal. Model Rule 3.3 provides:

- (a) A lawyer shall not knowingly:
  - (1) make a false statement of material fact or law to a tribunal;
  - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;
  - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

- (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

This rule specifies the minimum requirements. It does not, and should not, provide direction as to the appropriate method for advocating a client’s position while maintaining credibility and standing with the bench. More is required than simply following this rule if we, as lawyers, wish to be both successful and respected as honest, effective advocates.

The model rule does not differentiate between candor in written submissions and candor during oral argument, specifically appellate oral argument. Written submissions generally take weeks to prepare, and can be edited mercilessly. The appellate lawyer cannot edit words during oral argument.

Given the nature of oral argument—the question-and-answer format, the quick thinking and mental reflexes required, the attitude and predisposition of the judge or judges, and the dramatically heightened sense of interaction between court and advocate—the appropriate level of candor toward the tribunal can be a more difficult task. Certainly, the appellate advocate must always begin at the base line set forth in

Model Rule 3.3. During oral argument, however, more is required. At the appellate stage, the law is being crafted, so the highest level of candor is required.

In light of this objective, developing a strategy to ensure proper oral presentation is critical for achieving a client’s objectives. Following are some general suggestions for how to avoid the pitfalls of oral advocacy when it comes to candor toward the tribunal. Some of these tips may seem basic, but all are important to the success of one’s argument as well as one’s credibility with the bench.

---

#### (1) Know the Facts of the Case

Although seemingly simple, many appellate advocates fail to focus properly on the underlying facts of the case. Due in no small measure to the laser-like attention paid to the legal issues, failure to recognize subtle facts can be problematic.

---

#### (2) Know the Appellate Record

Law clerks and judges learn the case from the record, and more specifically from the joint appendix. They are versed in the details found therein. Whoever argues the case should be intimately involved in assembling the record and choosing the contents of the appendix. Close attention should be given to the contents of the appendix, and how those contents will be employed during oral argument.

---

#### (3) Know Your Own Arguments

Often appellate lawyers focus on the merits

of their legal arguments to the detriment of the weaknesses. Judges frequently focus on the weaknesses in an effort to formulate a well-reasoned opinion. Be prepared to explain the weaknesses.

---

**(4) Know the Opposition's Arguments**

A favorite tactic of judges is to present the opposition's arguments during your presentation. Be prepared to discuss your opponent's arguments in detail.

---

**(5) Do Not Oversensationalize the Facts**

Although knowing the facts of the case is crucial, do not overstate the facts that support your position. Appellate judges are not jurors.

---

**(6) Do Not Unnecessarily Minimize the Facts**

Appellate judges are disinterested in your characterization, or mischaracterization, of the facts that support your opposition's case. Simply be prepared to concede that some facts do not support your position, as there are always some facts that do not

**(7) Do Not Embellish When You Don't Recall**

One of the critical mistakes made by inexperienced appellate lawyers is to attempt to recite the facts of the case when they obviously cannot remember them. Do not invent facts. Never fumble around in the record. Know your entire record, not just what is contained in the appendix.

---

**(8) Admit Weaknesses**

All cases have weaknesses. All arguments have weaknesses. Although advocates are not required to concede their position, they must be prepared to candidly admit the limitations in their arguments. Appellate judges have already decided what weaknesses your arguments contain. Therefore, it is refreshing when an advocate can demonstrate an understanding of the weak spot in his or her position. If you have prepared adequately, the weaknesses in your arguments will be overshadowed by their strengths.

---

**(9) Do Not Bend The Law**

The model rule prohibits knowingly mak-

ing a false statement of law. This goes without saying. Appellate judges are familiar with the law, so never attempt to skirt or ignore precedent. The trickier task comes when the law is unclear. In those situations, do not attempt to bend the law in ridiculous directions. A bad faith or ludicrous argument is easy to spot. Conversely, it is always helpful to cite the panel to persuasive authority, particularly when a member of the panel has penned the authority.

---

**(10) Admit When You Don't Know**

Appellate judges will often attempt to pinpoint your position by introducing similar or dissimilar legal theories. If you are faced with an unfamiliar legal theory, acknowledge so, and refocus the court on your position. Otherwise, you may find yourself traveling an unknown and treacherous path.

**Richard H.C. Clay**

**Mark B. Wallace**

*Woodward, Hobson & Fulton*

Louisville, KY

---

## CIRCUIT EDITOR WANTED

We need a volunteer to be our Third Circuit editor. The job entails preparing summaries of Third Circuit cases for each issue of *Certworthy*. In general, we are looking for summaries of cases that might interest appellate practitioners. We would prefer to have a volunteer who lives in the Third Circuit, but residency is not a requirement. If you are interested, please contact the Publications Subcommittee vice chair, Raymond Ward, at (504) 582-1500 or rward@sessions-law.com.

### THE THEORY ON APPEAL

"It's not always reverse or affirm; it's what theory we adopt."

Anthony M. Kennedy, Savannah, Georgia, May 11, 2001

The theory on appeal is the most important aspect of litigating a case on appeal. It focuses your research. It organizes your brief. It helps you answer questions at oral argument. Most importantly, it tells the court in a succinct, straightforward manner why your client should win.

It is surprising how many attorneys brief and argue an appeal with no theory. In those cases, the lack of a theory is obvious. Twice in the past year, appellate judges have complained to me that lawyers at oral argument only rarely can explain their theory. This reveals a lack of intellectual interest in the law, generally, and in your case, specifically. Furthermore, without a theory on appeal, your research appears shallow, your brief disorganized, and your oral argument rambling and unresponsive. More often than not, your chances of success will suffer as well.

#### Developing Your Theory

How do you develop your appellate theory? First, digest the entire record on appeal. Seize the opportunity to see the case in a new light. Even if you were trial counsel, you need to review all of the pleadings, evidence, and hearing transcripts to sort out which legal issues will control the outcome on appeal.

Second, conduct deep research of the legal issues. Deep research should start with legal treatises or law review articles on the area of law. Only after you have a complete understanding of the legal doctrine should you conduct case-specific research of the issues on appeal. Deep research will not only reveal where your specific issue fits into the jurisprudential framework, it will also help you identify the best way to either defend or challenge the ruling on appeal.

Third, apply the law to the facts of your case. Although this advice may sound pat, this is exactly how the law clerks who review your appeal and the judges who decide it will analyze the case. Once you have

finished your legal analysis, try to distill why you should win into two or three sentences that contain no case citations. This will be the beginning of your theory. If you cannot briefly explain your theory as you would at the dinner table to someone who knows nothing about your case, then you are not ready to start drafting your brief.

#### Weaving the Theory Into Your Brief

The appellate rules do not provide a place for the theory in the brief. You must weave it in. The easiest place to incorporate your theory is in the summary of the arguments. But do not overlook the other opportunities provided by the rules.

From the outset, use every opportunity to tell the clerks and judges the theory on appeal. Usually, the first opportunity is the jurisdictional statement or the statement regarding oral argument. Rather than include the perfunctory "This Court has jurisdiction from final judgment under 28 U.S.C. §1291," tell your reader how you got there.

For example, if your theory is that the trial judge improperly submitted legal questions to the jury, your jurisdictional statement should conclude with something like: "After the parties argued their case to the jury from blowups of the case reports and the District Court told the jury it was their duty to interpret the law, the jury returned a \$10 million verdict for the Plaintiff. The trial court entered final judgment, despite the Defendant's post-trial motions. This Court has jurisdiction over final judgment on the jury's verdict under 28 U.S.C. §1291."

Or, if your theory is that the appeal is untimely, rather than using a typical oral argument statement that "Oral argument is unnecessary," tell the court: "The Appellant's appeal arises from a repetitive motion that the District Court denied three times over the last five years. This appeal is untimely and should not be heard on the merits. Oral argument is therefore unnecessary." With this kind of opener, the first page of your brief gives your reader a sense of the case and why you should win.

The theory on appeal will also help you write the statement of the case. Using the

theory as the theme of your brief will help you separate the important facts and procedural occurrences from the rest. Rather than use the parade of dates and pleadings on the docket sheet as your organizing principle (which is the fastest way to put the clerk or judge to sleep), your reliance on the theory will make the statement of the case an integrated part of your argument.

Of course, the summary of the argument is the most important opportunity for you to explain the theory on appeal. Although some brief writers wait to write the summary until after they have finished writing the argument, this approach gets things backwards. Drafting the summary is the best way to see your brief holistically before you begin writing the details. Moreover, drafting the summary first, rather than last, forces you to express the essence of the case without the distraction of legal citations or case discussions. The summary should contain the theory on appeal, nothing more. If you cannot write the theory on appeal in one or two pure, concise paragraphs, you are not ready to write the argument.

#### The Payoff

The often excruciating effort required to formulate and express your theory in the summary will payoff. A well-written brief expresses the theory on appeal from beginning to end. Weaving the theory into the brief from the outset, and laying it out in the summary, will make the argument easier to write. As you draft the argument, use the theory as a framework. Oftentimes, the key sentences from the summary will provide natural subheadings for your analysis. When these are incorporated into the table of contents, you and your reader will see how the theory drives the argument.

Lastly, your conclusion should distill the theory into a request for the relief you seek. Resist the temptation to write the lazy conclusion. Resorting to the "For these reasons, the Appellant asks this Court to reverse the District Court" squanders your last opportunity to explain why you should win. Forcing yourself, instead, to summarize your theory in your conclusion promises to make your brief more convincing.

**Scott Bennett Smith**

*Bradley Arant Rose & White LLP*  
Birmingham, AL

# CIRCUIT REPORTS

## U.S. Supreme Court

### STANDARD OF REVIEW

In a case decided May 14, 2001, the Supreme Court clarified the standard of review that federal appellate courts must use in reviewing constitutional challenges to punitive damages awards. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001), the Court held that in such cases, the courts must apply a *de novo* standard of review.

*Cooper Industries* involved Lanham Act claims for trade-dress infringement, false advertising, and unfair competition arising from the marketing of competitive multi-function pocket tools. The jury awarded a modest \$50,000 in compensatory damages, but tacked on \$4.5 million in punitive damages (90 times the compensatory damages). The district court reviewed the punitive damages award and let it stand. The Ninth Circuit affirmed, applying an abuse-of-discretion standard. The Supreme Court remanded the case to the Ninth Circuit to review the award *de novo*.

Previously, in *BMW of North America, Inc. v. Gore*, 517 US 559 (1996), the Supreme Court had set out three criteria for evaluating whether a punitive damages award was grossly excessive, but the court had not clarified the standard of review. In rejecting the abuse-of-discretion standard, Justice Stevens explained that unlike compensatory damages awards, which are based on factual determinations, punitive damages awards involve some degree of "moral condemnation" being expressed by the jury. Thus, punitive damages awards are different from fact-based compensatory damages awards, to which the appellate courts apply an abuse-of-discretion standard. Justice Stevens concluded that overall, trial courts are no better able to apply the *Gore* factors than are appellate courts. In addition, Justice Stevens looked to other contexts where excessive penalty claims are raised, such as death-penalty determinations and other claims of grossly disproportionate punishments. In such cases, the Supreme Court applies the *de novo* standard.

The Court left open the standard for reviewing constitutional challenges of punitive damage awards in state courts, which

could raise federalism concerns. Justices Scalia and Thomas concurred, indicating that although they had dissented in *Gore*, the *de novo* standard was appropriate. Only Justice Ginsburg dissented.

### ATTORNEY'S FEES

In another recent decision, the Supreme Court rejected the broad "catalyst theory" for awarding attorney's fees in civil rights cases, concluding that the theory went beyond the traditional prevailing-party analysis. In *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 121 S. Ct. 1835 (2001), the Court affirmed the Fourth Circuit in rejecting a fee award sought in a case brought under the Fair Housing Amendments Act (FHAA) and Americans with Disabilities Act (ADA).

In *Buckhannon*, an assisted-living facility was cited for a state-law violation. The facility sued for a declaratory judgment that the state statute was invalid because it violated the FHAA and ADA. While the suit was pending, the state legislature repealed the statute. The facility then sought attorney's fees, arguing that its lawsuit was the "catalyst" that brought about the desired change in the state law. Nine federal circuits have applied the catalyst theory in awarding attorney's fees in civil rights cases.

But the Court rejected the catalyst theory, based on its interpretation of the statutory term "prevailing party." That term clearly involves the notion of a court-ordered change in the legal relationship between the parties, either through a judgment or a court-approved consent decree. While the lawsuit might be a "but-for" cause of the legislative change, the lack of any judicial imprimatur for the change negated any claim that the plaintiff was a prevailing party.

Chief Justice Rehnquist, writing for the

---

*The Court is the creature  
of the litigation that  
the lawyers bring to it.*

—Earl Warren

---

majority, noted that while the Court was interpreting fee provisions specifically in the FHAA and the ADA, many other attorney's fees statutes use the term "prevailing party." This is a clear indication that the Court's interpretation can be applied to those other statutes.

Justice Ginsburg, joined by three others, dissented, believing that history and prior usage among the circuits supported the broad reading of the prevailing-party provision.

**Frank E. Noyes**

*Duane, Morris & Hecksher, L.L.P.*  
Wilmington, DE

## First Circuit

### STANDING

*Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35 (1st Cir. 2000)

Microsystems Software, Inc. developed and distributed "Cyber Patrol," a software program for parents who wish to prevent their children from roaming into salacious internet websites. The program contains a secret list of objectionable websites and, once installed, prevents computer users from accessing those sites. Defendants Jasson and Skala reversed-engineered Cyber Patrol and wrote a bypass code that enabled users not only to thwart the program, but also to gain access to the list of blocked sites. They then posted the bypass code on their own websites and gave blanket permission for others to copy it. Appellants took advantage of this offer.

Microsystems sued for injunctive relief against Jasson, Skala, and "those persons in active concert or participation with them." Microsystems complained that it suffered irreparable injury because many individuals throughout the United States and the world downloaded, copied, and created "mirror" websites revealing the bypass code. Two days after the district court entered a temporary restraining order, Microsystems e-mailed copies of the order, along with sundry supporting documents, to various persons, including appellants. Microsystems also served appellants with subpoenas directing them to disclose information concerning the identity of each person "who produced, received, reviewed, downloaded or accessed [the bypass code] or any derivative thereof from [their] Web site or Web site hosting service." The ap-

pellants promptly removed the bypass code from their websites, filed special appearances in the injunction proceeding, and moved to quash the subpoenas. They also opposed a pending motion for preliminary injunction, but they did not move to intervene.

The district court granted the motion to quash. A few days later, Microsystems settled with Jasson and Skala, and proffered a proposed permanent injunction that purported to prohibit Jasson, Skala, and those “in active concert” with them from posting the bypass code. Even though appellants had not intervened, the district court allowed them to orally argue and to file a memorandum in opposition to the entry of the injunction. After appellants filed their opposition, the district court entered a permanent injunction. Microsystems immediately notified appellants of the injunction. The appellants sought a stay, but the district court denied it, ruling that the appellants had no standing to appeal because they had never intervened in the case.

The First Circuit dismissed the appellants’ appeal for the same reason. The court held that nonparties who had the opportunity to intervene in the district court, but decided not to intervene, have no standing to appeal. The First Circuit declined to follow the Second Circuit’s decision in *Kaplan v. Rand*, 192 F.3d 60, 66-67 (2d Cir. 1999), under which a nonparty with an “interest” in the outcome of the litigation might have standing to appeal.

#### ALTERNATIVE GROUNDS

*In re Baylis*, 217 F.3d 66 (1st Cir. 2000)

The beneficiaries of a trust sued their trustees in Massachusetts probate court, accusing them of breach of fiduciary duty, conversion, fraud, and negligent misrepresentation. After a bench trial, the probate court found that one trustee (Baylis) was negligent in preventing the other trustee from breaching her fiduciary duty. The probate court further found that both trustees had acted in bad faith. The probate court entered a judgment for damages in favor of the beneficiaries and against the trustees. The trustees appealed. The Massachusetts intermediate appellate court affirmed both the negligence and bad-faith findings of the trial court. The Supreme Judicial Court of Massachusetts

---

*To be brief is almost  
a condition of being inspired.*

—George Santayana

---

affirmed the probate-court judgment on negligence grounds, but expressly refused to reach the issue of bad faith.

Baylis filed for bankruptcy. The beneficiaries opposed discharge of the judgment debt to them under 11 U.S.C. §523(a), alleging that the debt arose from “defalcation while acting in a fiduciary capacity” or from “willful and malicious injury.” The parties filed cross-motions for summary judgment. The beneficiaries argued that the bankruptcy court should give preclusive effect to the probate court’s finding of bad faith against Baylis. The bankruptcy court disagreed, found neither defalcation nor willful and malicious injury, and held that Baylis’s debt to the beneficiaries was dischargeable. The beneficiaries appealed to the district court, which reversed the bankruptcy court and gave preclusive effect to the probate court’s bad-faith finding.

The First Circuit reversed the district court judgment and reinstated the bankruptcy court judgment. The court held that under Massachusetts law, when a trial court judgment is based on two grounds, and the intermediate appellate court affirms on both grounds, but the state’s highest court affirms on only one ground and does not address the other, only the first ground is given preclusive effect.

**Richard L. Neumeier**

*McDonough, Hacking & Neumeier, LLP*  
Boston, MA

#### Second Circuit

##### COMITY

In *Diorinou v. Mezitis*, 237 F.3d 133 (2d Cir. 2001), the Second Circuit presents a useful and informative discussion of the various definitions of “comity” used by district judges and the standard of review applicable to each. The court considered comity in the context of a district court’s enforcement of a Greek judgment concerning the Hague Convention on Civil Aspects of International Child Abduc-

tion. The court concluded that review of the district court’s enforcement of the Greek judgment must be *de novo*.

#### IMMUNITY

Also, in a case of first impression involving unusual facts, the court held that prosecutorial immunity applies not only to conduct during trial, but also to post-judgment conduct while an appeal is pending, if the conduct falls within the prosecutor’s duties. In *Parkinson v. Cozzolino*, 238 F.3d 145 (2d Cir. 2001), New York prosecutors were sued for keeping the criminal defendant’s prosthetic leg during trial and following conviction while the defendant’s appeal was pending. The Second Circuit overturned the district court ruling, which held that prosecutorial immunity does not apply after conviction. The court noted that, though neither it nor the Supreme Court had squarely addressed the issue, “if a prosecutor’s conduct prior to conviction is protected by absolute immunity, equivalent conduct pending appeal of the conviction must be afforded the same protection.” *Id.* at 151.

#### STANDING

In *Altman v. Bedford Central School District*, 245 F.3d 49 (2d Cir. 2001), the court reaffirmed that a plaintiff’s standing (and thus subject-matter jurisdiction over the plaintiff’s claim) must exist not only at the time of the trial and judgment, but also during the pendency of the appeal. “[I]f the plaintiff loses standing at any time during the pendency of the proceedings in the district court or in the appellate courts, the matter becomes moot, and the court loses jurisdiction.” *Id.* at 69. In *Altman*, parents of school children brought First Amendment challenges to activities at an elementary school, a middle school, and a high school. When the suit was filed, at least one of the children attended or was eligible to attend each of the schools. But when the case was finally tried, all but one of the children was beyond elementary-school age, and one child’s family had moved out of the school district. By the time the case was appealed, all the children involved were either beyond middle-school age or had moved out of the school district. The Second Circuit held that the district court should have dismissed all claims based on activities at the elemen-

tary school, because those claims had become moot. And for the same reason, the Second Circuit dismissed the claims based on activities at the middle school.

### DIVERSITY JURISDICTION

Finally, the court rendered a decision in the DES-litigation case of *E.R. Squibb & Sons, Inc. v. Lloyds and Companies*, 241 F.3d 154 (2d Cir. 2001), which has been pending for approximately 18 years. In this most recent decision, the court reviewed a district court ruling that diversity jurisdiction existed. The Second Circuit had previously remanded the case to the district court because the Lloyd's member or "name" who had been sued in his individual capacity and as representative of other Lloyd's underwriters (Haycock) died during the pendency of a previous appeal. Squibb and Lloyd's had moved to substitute another Lloyd's name (Merrett) as defendant in place of Haycock. The Second Circuit had remanded the case to the district court "to reassess all the facts supporting diversity jurisdiction." The court's concern was that if the Lloyd's name was sued in a representative capacity, then the citizenship of each party that the individual represented had to be considered in deciding whether diversity of citizenship existed.

On remand, the district court found that Merrett could be substituted and named as defendant solely in his individual capacity. And on this appeal, the Second Circuit affirmed. The court approved the district court's finding that the special contractual relationship between the Lloyd's names would result in all of the Lloyd's members being bound by an individual judgment against any one of them. Accordingly, Merrett could be substituted in his individual capacity only, thus preserving subject-matter jurisdiction while assuring that any judgment against Merrett would, as a practical matter, bind all Lloyd's underwriters whom Merrett represented.

Michael S. Taylor  
*Horton, Shields and Cormier, PC*  
Hartford, CT 06105

### Fourth Circuit

#### RULE 59 MOTIONS

The appellants in *Panhorst v. United States*, 241 F.3d 367 (4th Cir. 2001), sought to salvage the loss of appellate jurisdiction

resulting from an untimely Rule 59 motion and notice of appeal, by invoking the unique-circumstances doctrine. Citing the questionable validity of the doctrine, the Fourth Circuit strictly construed the doctrine and dismissed the appeal for lack of jurisdiction.

The limited unique-circumstances doctrine was recognized by three United States Supreme Court decisions in the early 1960s, but has not been applied since. See *Wolfsohn v. Hankin*, 376 U.S. 203 (1964); *Thompson v. INS*, 375 U.S. 384 (1964); *Harris Truck Lines, Inc., v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962). In *Harris*, the district court granted a motion to extend time to file a notice of appeal for "excusable neglect or good cause." The Seventh Circuit dismissed the appeal in *Harris*, stating that the circumstances did not constitute "excusable neglect." The Supreme Court reversed, holding the trial court's finding of excusable neglect should be given great deference, because of the "obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of that finding." Although the Court extended the unique-circumstances doctrine to facts involving untimely motions for new trial in *Wolfsohn* and *Thompson*, it did so over the vigorous dissent of four justices.

In a 1989 decision that declined to apply the unique-circumstances doctrine, the Supreme Court stated that the doctrine "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that his act has been properly done." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989) (rejecting the doctrine's application where the initial notice of appeal was mistakenly viewed as effective though rendered a nullity by the pendency of a motion).

---

*The trouble with lawyers is they convince themselves that their clients are right.*

—Charles W. Ainey

---

The Fourth Circuit's *Panhorst* opinion questioned the continued viability of the unique-circumstances doctrine. After *Thompson and Wolfson*, the Supreme Court has repeatedly held that the timely filing of a notice of appeal is "mandatory and jurisdictional," and other circuits have also questioned the doctrine's vitality. 241 F.3d at 371-72. Noting, however, that only the Supreme Court itself may overrule one of its precedents, the Fourth Circuit assumed that the unique-circumstances doctrine remains good law, but strictly applied its requirements.

The Fourth Circuit held the unique-circumstances doctrine did not apply in *Panhorst* because: (1) an untimely Rule 59 motion accompanied by a motion for extension of time to file can never be "properly done," since Rule 59 forbids such an extension; (2) an untimely Rule 59 motion can never "postpone the deadline for filing [an] appeal;" and (3) the district court's grant of an extension of the time to file a Rule 59 motion was not a "specific assurance" by a judicial officer that appellants' actions were properly done, especially since such an extension is beyond the court's authority. 241 F.3d at 372-73.

Gina Fantasia  
*Jackson & Kelly, PLLC*  
Fairmont, WV

### Fifth Circuit

#### ENTRY OF JUDGMENT

In *Wilkins v. Johnson*, the Fifth Circuit held that a notice of entry of judgment sent by facsimile satisfies the requirements of FRAP 4(a)(6), which allows for the re-opening of time to file an appeal. 238 F.3d 328 (5th Cir. 2001). Wilkins's attorney claimed to have never received the service copy of district court's judgment that the clerk mailed to him on the day it was entered, June 18, 1999. He was, however, faxed a copy of the judgment on September 7, 1999, following a telephone conference with the court's staff attorney. Almost 30 days later, on October 4, 1999, Wilkins's attorney moved for leave to file a late notice of appeal, which the district court granted. The sole issue before the Fifth Circuit was whether receipt of the September 7, 1999, fax copy of the judgment qualified as "notice of the entry" of the judgment under

FRAP 4(a)(6). The Fifth Circuit held that any written notice of entry received by the potential appellant or his counsel, regardless of how or by whom sent, is sufficient to open FRAP 4(a)(6)'s seven-day time limit. Because the motion to reopen the time to file an appeal was not filed within seven days of the notice of entry of judgment, the court dismissed for want of jurisdiction.

### SERVICE OF PROCESS

The Fifth Circuit recently addressed the requirements of service of process under the Foreign Sovereign Immunities Act, in the case of *Magness v. Russian Federation*, 247 F.3d 609 (5th Cir. 2001). There, the plaintiffs attempted service on the defendants in three ways: (1) by serving counsel who appeared for the defendants at a TRO hearing; (2) by serving the Texas Secretary of State, with instructions to forward service papers to Russia; and (3) by sending service papers to the State Department, with instructions for service through diplomatic channels. Even though the State Department notified the plaintiffs that it could not effect service because of procedural errors in the paperwork, the district court found that the plaintiffs had substantially complied with the service requirements, and entered a \$234,000,000 default judgment. In vacating the judgment, the Fifth Circuit held that the FSIA requires strict compliance with the requirements for service on a foreign state or political subdivision, but allows substantial compliance with the requirements for service on an agency or instrumentality of a foreign state if there is actual notice of the suit. The court reasoned that the language of §1608(b)—which authorizes certain service “if reasonably calculated to give actual notice”—requires only substantial compliance if the proper individuals within the agency or instrumentality have actual notice of the suit and the consequences thereof. Proof of actual notice under the FSIA requires more than a mere showing that somebody in the foreign state knew of the claim.

**Robert L. Galloway**  
*Thompson & Knight L.L.P.*  
Houston, TX

---

*Words are not pebbles  
in alien juxtaposition.*

—Learned Hand

---

### Sixth Circuit

#### APPELLATE JURISDICTION

In *Anderson v. Roberson*, 2001 WL 468485 (6th Cir. May 4, 2001), the court held that it lacked appellate jurisdiction in a case where the parties appealed from an order giving the plaintiffs a choice between a remittitur and a new trial.

After a jury trial, the trial court granted the defendant's motion for remittitur, eliminating a punitive-damages award and substantially reducing the compensatory-damages award. One defendant filed a Rule 60(b) motion to correct or clarify the remittitur order. The district court granted the motion and entered an order stating that the remittitur included both defendants and that the defendants would be granted a new trial if the plaintiffs rejected the remittitur. This was the last order entered by the trial judge. Defendants filed a notice of appeal the day this order was entered, and the following day, the plaintiffs filed their notice of appeal. About two weeks later, the plaintiffs filed an acceptance “under protest” of the remittitur, purportedly reserving their right to appeal, but 15 days later filed a purported withdrawal of that acceptance.

The Sixth Circuit held that it lacked jurisdiction, holding that the district court's order giving the plaintiffs a choice between remittitur or a new trial was not a final, appealable order. Therefore, all notices of appeal were premature.

The court rejected defendants' argument that the plaintiffs' purported acceptance of the remittitur “under protest” cured the prematurity of both sides' notices of appeal, because the trial court had taken no action on the plaintiffs' filing. “Until the district court either enters a final order based upon the plaintiffs' election to accept the remittitur, or proceeds to judgment after a new trial, there is nothing for this court to review.”

The Sixth Circuit also rejected the plaintiffs' argument that their objection

to the trial court ruling on punitive damages was sufficient to confer appellate jurisdiction. The court concluded that the compensatory and punitive aspects of the damages award were not severable for purposes of triggering appellate jurisdiction, a position consistent with other circuits that have considered the same issue.

#### RELIEF FROM JUDGMENT

In *Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, 2001 WL 459913 (6th Cir. May 3, 2001), the court held that a change in decisional law did not justify the trial court's granting of a motion for relief of judgment under Rule 60(b)(6). The court held that under the facts of this case, the court's interest in the finality of judgments outweighed any considerations favoring relief from the judgment.

In 1992, Congress passed legislation (the Coal Act) that included a “super reachback provision,” which imposed retroactive liability on coal companies, including Blue Diamond, for premiums on health and welfare benefits to coal miners. Blue Diamond contested the constitutionality of the Coal Act, but lost in the district court (in a 1994 decision), the court of appeals (in a 1996 decision), and the United States Supreme Court (writ denied in January 1997). Blue Diamond thus paid some \$14 million in premiums under the super reachback provision.

But in 1998, the United States Supreme Court rendered an opinion in another case, finding the super reachback provision unconstitutional. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998). The government promptly ended payment proceedings against other companies affected by the super reachback provision, waived the debts of companies that had failed to pay premiums before the *Eastern Enterprises* ruling, and refunded payments to companies that had made payments under the provision. But the government refused refunds to companies, like Blue Diamond, that had paid premiums under a pre-*Eastern Enterprises* final judgment or settlement.

Blue Diamond then filed a motion in the district court for relief from the judgment under Rule 60(b)(6), a catch-all provision that allows a district court to vacate a final judgment for “any other reason justifying relief from the operation

of the judgment.” The Sixth Circuit reversed, holding that the district court abused its discretion in granting relief from the judgment. The court adhered to the consensus position that changes in decisional law do not themselves constitute extraordinary circumstances meriting relief under Rule 60(b)(6). The court found that the public policy favoring finality of judgments and termination of litigation “circumscribed” the district court’s discretion under Rule 60(b)(6). That public policy, combined with the length of time between the final judgment and the Rule 60(b)(6) motion (4 years), “clearly favor[ed] adhering to the district court’s final judgment.”

### ESTABLISHMENT CLAUSE

Two recent decisions under the Establishment Clause have drawn considerable attention. In *Simmons-Harris v. Zelman*, 234 F.3d 945, a divided panel invalidated Ohio’s school-voucher program. Judge Clay’s majority opinion employed the so-called *Lemon* test and, relying extensively upon both the Supreme Court’s 1973 decision in the *Nyquist* case and Justice O’Connor’s concurring opinion in the recent *Mitchell v. Helms* decision, held that Ohio’s program allows the diversion of state funds to sectarian or religious institutions, a result at odds with principles of neutrality and endorsement. Judge Ryan dissented. Disagreeing with the weight afforded *Nyquist* and instead drawing upon the neutrality principle more recently outlined by the plurality opinion in *Mitchell*, Judge Ryan argued that Ohio’s program avoids indoctrination, and instead allows genuine and independent private choice to govern the expenditure of state funds.

In *ACLU of Ohio v. Capitol Square Review & Advisory Board*, 243 F.3d 289, a divided *en banc* court rejected a challenge to the State of Ohio’s motto, “With God, All Things Are Possible.” Judge Nelson’s majority opinion surveyed the history of public expressions of religious sentiment, analyzed the issue under many strands of the Supreme Court’s Establishment Clause jurisprudence, and ultimately concluded that the motto reflects not a state-sponsored endeavor to coerce a particular belief, but rather a broadly worded expression of religious or philosophical outlook shared by many Ohioans. The dissenting judges argued that, unlike our national motto

(“In God We Trust”), Ohio’s motto, with its source in the New Testament, endorses a sectarian Christian message in violation of fundamental precepts underlying the Establishment Clause.

**Michael Scudder**  
*Jones, Day, Reavis & Pogue*  
Cleveland, OH

### Seventh Circuit

#### LIST OF COUNSEL

In *Sharp v. United Airlines, Inc.*, 236 F.3d 373 (7th Cir. 2001), the Seventh Circuit gave a word of warning to attorneys required to file disclosure statements under Circuit Rule 3. Fortunately, there was a happy ending for the attorney involved.

Circuit Rule 3 requires parties on appeal to identify all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this case. Counsel for the defendant-appellee, who had represented the defendant since discovery had begun, answered the question by identifying only himself. He neglected to identify another firm that had represented the defendant only on an early motion to dismiss the complaint.

When the court of appeals discovered the omission, it issued a rule to show cause why the attorney shouldn’t be sanctioned for his incomplete disclosure. A few days later, defense counsel filed a reply apologizing for the error, assuring the court that the omission was inadvertent, and confessing that he had simply forgotten about the other firm’s earlier representation.

The court commended counsel’s quick and candid response and discharged the rule to show cause. The court also reminded Seventh Circuit practitioners of the importance of the Rule 26.1 disclosure. The judges rely on the disclosure statements in determining whether any judge or staff member is ineligible to participate in the case. Misstatements, even when discov-

---

*One must be chary of words  
because they turn into cages.*

—Viola Spolin

---

ered early, “can cause significant delays and waste of already stretched judicial resources.” The court suggested that attorneys use computer technology to quickly retrieve the history of a case when needed to comply with Circuit Rule 3.

### VOIR DIRE

Another interesting ruling comes from Judge Posner in *Thompson v. Alzheimer & Gray*, 2001 WL 392697 (7th Cir. Apr. 29, 2001). The Seventh Circuit reversed a jury verdict because the trial judge failed to “push” a questionable juror “hard enough” to determine whether the juror could suspend her candidly expressed bias for purposes of deciding the case. Plaintiff’s counsel moved to strike the juror for cause, but the district court denied the motion. The Seventh Circuit reversed the verdict and instructed that when a juror expresses a belief that is material and contestable, it is the judge’s duty to inquire and confirm that the juror can be unbiased and impartial. The trial judge’s failure to do so warranted reversal of the verdict. The Seventh Circuit reminded that the harmless-error doctrine does not apply to cases like this: “Denial of the right to an unbiased tribunal is one of those trial errors that is not excused by being shown to have been harmless.”

**Karena Bierman**  
*Wildman, Harrold, Allen & Dixon*  
Chicago, IL

### Eighth Circuit

#### NOTICE OF APPEAL

*Moore v. Robertson Fire Protection Dist.*, 2001 WL 487702 (8th Cir. May 9, 2001)

Three men, claiming race discrimination under Title VII, sued the Robertson Fire Protection District, after the District decided not to interview them for the position of fire chief. The district court granted summary judgment against two of the plaintiffs. Three weeks later, the claim of the third went to trial. The jury found in favor of the Fire District. The only plaintiff identified in the notice of appeal was the third, whose case went to trial. And the only judgment identified in the notice of appeal was the judgment on the jury verdict. But the plaintiff-appellant’s brief was purportedly filed on behalf of all three plaintiffs and included argu-

ments on behalf of the two whose claims were dismissed by summary judgment.

The Eighth Circuit held that it had no jurisdiction over the purported appeal of the first two plaintiffs. While recognizing the policy of liberal construction of notices of appeal, the Eighth Circuit pointed out that neither of the first two plaintiffs (whose claims were dismissed on summary judgment) indicated any intent to appeal until submission of the appellate brief. "In these circumstances, to find that we have jurisdiction over the non-existent appeal by [the two summary-judgment plaintiffs] would be to expand the policy of liberal construction beyond its scope and effectively eliminate the procedural requirements for an appeal."

In a footnote, the court acknowledged that FRAP 3(c) does not strictly require naming of all parties to an appeal. The rules allows such designations as "all plaintiffs," "the defendants," "the plaintiffs A, B, *et al.*," or "all defendants except X." But the notice of appeal in this case contained no such designations.

#### REMAND ORDER

*Smith v. American States Preferred Ins. Co.*, 2001 WL 502465 (8th Cir. May 14, 2001)

Rhonda Smith brought a class action lawsuit in state court against American States Insurance Company, asserting consumer claims under her auto policy. American States removed the action to federal court on the basis of diversity jurisdiction. The district court remanded the case for lack of subject-matter jurisdiction, because American States could not meet the \$75,000 amount-in-controversy requirement. The Eighth Circuit dismissed American States' appeal.

Under 28 U.S.C. §1447(d), an order remanding for lack of subject-matter jurisdiction cannot be appealed, unless the action is removed under 28 U.S.C. §1443 (pertaining to civil rights actions, not applicable to this case). The court thus declined to address American States' arguments that it could meet the amount-in-controversy requirement by aggregating the individual plaintiffs' claims, by aggregating any state statutory penalties that might be assessed, or by considering the possible award of attorney's fees to the plaintiffs.

The court rejected American States' "attempt to bypass §1447(d)" by claiming constitutional due-process and equal-

---

*The best way to win an argument  
is to begin by being right.*

—Jill Ruckelshaus

---

protection violations. "Our own circuit precedent requires the district court to rely solely on the plaintiff's viewpoint in meeting the requisite amount." Reliance on the plaintiff's claims as a basis for deciding jurisdiction did not violate the defendant's constitutional right. And "[w]ithout a meritorious constitutional claim, American States [could not] seek review of the remand order."

#### INTERLOCUTORY APPEAL

*Consul General of the Republic of Indonesia vs. Bill's Rentals, Inc.*, No. 00-3322 (8th Cir. May 16, 2001)

In this multi-claim tort case, the Eighth Circuit held that: (1) it did not have appellate jurisdiction over an interlocutory judgment that had been certified for appeal under 28 U.S.C. §1292(b), because the appellant failed to apply for permission to appeal within 10 days after the certification order; and (2) it did not have appellate jurisdiction over a summary judgment dismissing fewer than all tort claims, because the judgment was not final under FED. R. CIV. P. 54.

Twelve Indonesian citizens were killed or injured in a car accident in Iowa. The Consul General for the Republic of Indonesia filed a wrongful death and negligence action in federal court on behalf of the injured and deceased Indonesians. The district court decided that the Consul General had standing under an international treaty on consular relations. But the district court also decided that the Consul General was not the real party in interest with respect to the wrongful death claims. The district court also found that two of the six powers of attorney given by the injured Indonesians to the Consul General had been revoked. By judgment rendered on April 6, 2000, the district court thus granted partial summary judgment, dismissing the wrongful-death claims and the negligence claims of the two Indonesians who had revoked their powers of attorney. The district court also certified the question of the Consul General's standing for ap-

pellate review under 28 U.S.C. §1292.

Rather than applying to the Eighth Circuit for appeal, the Consul General filed several post-judgment motions, all of which were denied by judgment dated August 7, 2000. The Consul General filed a notice of appeal within 30 days after the August 7 judgment.

The Eighth Circuit held that it did not have appellate jurisdiction. Despite the district court's certification of an interlocutory appeal on the issue of the Consul General's standing, the Eighth Circuit had no appellate jurisdiction over that judgment because the Consul failed to apply to the Eighth Circuit for permission to appeal within 10 days after the certification, as required by 28 U.S.C. §1292(b). Nor did the Eighth Circuit have appellate jurisdiction over the granting of partial summary judgment. Since that judgment dismissed fewer than all remaining claims, and since the trial court did not certify that judgment as final under FED.R.CIV.P. 54(b), that judgment was not appealable.

#### DIVERSITY JURISDICTION

*Smith v. Ashland, Inc.*, 2001 WL 527277 (8th Cir. May 18, 2001)

Sandra Smith sued Ashland, Inc. in federal court on claims of discrimination based on race and gender, sexual harassment, and retaliation. Smith originally alleged both state and federal claims. The parties later stipulated to an amendment of the original complaint dismissing the federal claims as untimely, but recognizing diversity jurisdiction over the remaining state-law claims. The district court then granted Ashland's summary-judgment motion, dismissing Smith's suit.

Smith argued on appeal that the dismissals were invalid, "because federal jurisdiction was based solely on the parties' stipulation to diversity jurisdiction, and such consent to the parties by itself does not satisfy subject matter jurisdiction." Smith argued that the parties were not completely diverse because Ashland owns and operates a refinery in Minnesota.

The Eighth Circuit disagreed. Although the court agreed that consent alone cannot confer subject-matter jurisdiction, the parties could stipulate to the fact of diverse citizenship based on Ashland's incorporation and principal place of business in another state. This stipulation fulfilled the diversity requirements under 28 U.S.C.

§1332(c)(1). “Such a stipulation is controlling because citizenship based on the location of the principal place of business is valid for diversity purposes, and a corporation’s additional presence in another state does not destroy diversity jurisdiction.” On the merits, the court affirmed the summary judgment in Ashland’s favor.

**Eric J. Magnuson**

*Rider, Bennett, Egan & Arundel, L.L.P.*  
Minneapolis, MN

## Ninth Circuit

### EN BANC CONSIDERATION

“Courts make mistakes, too,” admitted a distinguished panel of Ninth Circuit jurists in a recent opinion that provides a fascinating insight into the workings—and, yes, the occasional misapplication—of the mysterious *en banc* procedure.

In *John v. United States*, 247 F.3d 1032 (9th Cir. 2001), the court dealt with whether the United States may enforce the rural subsistence priority established by the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§3103-3233, at a particular Native American fishing site. The district court said yes, the State of Alaska appealed, an *en banc* rehearing was denied, and *certiorari* was denied. The district court’s opinion and judgment were then returned to the Ninth Circuit in *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995). After the district court ruled, another appeal ensued, and a majority of the active judges voted to hear the appeal *en banc* rather than by the standard three-judge panel. The *en banc* court decided, however, that the judgment rendered by the prior panel, and adopted by the district court on remand, should not be disturbed.

The result of this decision, in the words of Circuit Judge Stephen Reinhardt, “caused eleven judges an inordinate amount of work, including reading 13 briefs totaling 454 pages, ruling before the hearing on various motions, and preparing, reviewing and voting on five separate opinions.” “Under these circumstances,” Judge Reinhardt wrote, “it would be helpful to acknowledge our error and commit ourselves to examine more carefully any future suggestion by a judge (or anyone else) that we hear a case *en banc*.”

Judge Reinhardt explained that the *en*

*banc* court had taken the matter directly from the district court, bypassing its regular three-judge panel hearing process, something it ordinarily does only when there is a direct conflict between two Ninth Circuit opinions and a panel would not be free to follow either. See *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (*en banc*). Here no such conflict was asserted, but nevertheless—for reasons not stated in the opinion—the court decided to take the appeal *en banc* “without the benefit of a panel opinion or opinions that would, at a minimum, have provided a clear statement of the issues raised.”

Had there been a panel opinion to guide the *en banc* court, Judge Reinhardt conjectured, it would have emphasized that the present appeal asked the court to resolve the same question it had already decided earlier in the same case, and which it had already declined to review *en banc*. “The issue before the panel then would have been whether the law of the case applied, or whether this case falls into one of [its] exceptions....” If the panel had found that law of the case applied, he wrote, “we would then have been able to vote on whether *en banc* consideration was warranted with the benefit of the panel’s analysis of at least two issues: whether the prior panel’s opinion was clearly erroneous and whether its result created a manifest injustice.” Although admitting that these questions would not have been dispositive because the law of the case doctrine does not bind this court sitting *en banc* (*Jeffries v. Wood*, 114 F.3d 1484, 1492 (9th Cir. 1997) (*en banc*)), Judge Reinhardt commented that, “at least we would have known far more about the case than when we cast our ill-advised *en banc* votes.”

In admitting that his court had erred in the procedure it followed, Judge Reinhardt remarked that, “I believe it important to state... that in this case, we made an error in granting an initial *en banc* hearing, a procedure in which we engage infrequently. There was no justification

---

*The obvious is better than  
obvious avoidance of it.*

—H.W. Fowler

---

for taking so unusual an action here.” Then he concluded, “Having said all that, I concur in the *per curiam* opinion.”

**Diane R. Crowley**

*Law Offices of Diane R. Crowley*  
Berkeley, CA

## Tenth Circuit

### DUTY TO DEFEND

*Marathon Ashland Pipe Line LLC, v. Maryland Cas. Co.*, 243 F.3d 1232 (10th Cir. 2001)

Marathon had a contract requiring SSI to acquire a liability insurance policy and to name Marathon as an additional insured. SSI accordingly endorsed Marathon as an additional insured on its CGL policy with Maryland Casualty, which included a supplemental employer’s liability insurance (SELI) provision. Marathon requested that SSI hire Berg, a 17-year old high school student, to work at Marathon’s direction for the summer. Berg was severely injured on the job, and Maryland Casualty denied Berg’s claim, based on the CGL policy’s workers’ compensation and employee exclusions. Berg then sued Marathon, which promptly demanded a defense from Maryland Casualty.

A Maryland Casualty claims adjuster left one telephone message with Marathon’s counsel, purporting to offer to share in defense costs with other insurers. But Maryland Casualty failed to respond in writing to Marathon’s repeated requests to provide a defense. Marathon sued Maryland Casualty, seeking a declaration of coverage and damages for bad faith. One month later (four months after being notified of the claim), Maryland Casualty finally informed Marathon that it would defend the company in the Berg lawsuit under a reservation of rights. Recognizing that Marathon had already procured its own defense counsel, Maryland Casualty requested that Marathon forward all of the bills it had already incurred.

After Berg settled his claim against Marathon, the trial court rendered summary judgment in Maryland Casualty’s favor on all issues. The Tenth Circuit reversed the coverage findings, holding that Marathon qualified as an additional insured, and that there was sufficient causal connection between SSI’s operations and Berg’s injuries to trigger the additional-

insured endorsement. Maryland Casualty claimed that its offer to defend and offer of the SELI limits discharged any duties it owed to Marathon. The court held that Maryland Casualty's offer to defend was untimely and therefore insufficient to discharge its duty to Marathon. The court further held that since Maryland Casualty's notice that it would defend was untimely, Marathon's failure to respond to the untimely notice did not waive coverage. The court also found that a triable factual issue existed on whether Maryland Casualty's failure to offer its \$1 million policy limit to settle Berg's claim constituted bad faith.

### ATTORNEY'S FEES

*Stauth v. National Union Fire Ins. Co.*, 236 F.3d 1260, (10th Cir. 2001)

The insured successfully prosecuted a declaratory judgment action against its insurer for coverage under a directors-and-officers policy. The insured then sought to recover its attorney's fees. Relying on an Oklahoma statute and its own caselaw, the court held that the successful insured could recover its attorney's fees in prosecuting a declaratory judgment action. The statute applied to declaratory judgment actions to determine either the duty to defend or the duty to indemnify. Further, the court held that an award of fees under the statute was mandatory, overruling in part its prior holding in *Adair State Bank v. American Cas. Co.*, 949 F.2d 1067 (10th Cir. 1991).

### LAPSE IN COVERAGE

*Adams v. American Guar. & Liab. Ins. Co.*, 233 F.3d 1242 (10th Cir. 2000).

The plaintiffs' claim against American Guarantee arose out of a complicated series of dealings between them and Gregory, an insurance agent that American Guarantee insured under an errors-and-omissions ("E&O") Policy. The plaintiffs and Gregory were involved in "factoring arrangements," under which plaintiffs paid Gregory his expected commissions up front. In return, the plaintiffs received the right to Gregory's commissions paid over time. Eventually, the plaintiffs advanced Gregory more commissions than he earned, and he was unable to pay them back. The plaintiffs sued, seeking to recover in part under Gregory's E&O policy. The insurer denied coverage, contending that the claims did not arise out of Gregory's rendering of

---

*The picture cannot be painted if  
the significant and the insignificant  
are given equal prominence.  
One must know how to select.*

—Benjamin N. Cardozo

---

professional services as an insurance agent. The plaintiffs then obtained a judgment against Gregory and sought to enforce it against the insurer. The district court granted summary judgment to the insurer, holding that the claim was not covered because it occurred during a lapse in coverage. The Tenth Circuit affirmed.

### DUTY TO DEFEND

*Signature Dev. Cos. v. Royal Ins. Co. of Am.*, 230 F.3d 1215 (10th Cir. 2000)

Signature is a developer of custom homes. Royal issued a general liability insurance policy to Signature for the period January 1, 1989 to August 1, 1990. After that time, Signature was covered by Travelers.

Signature was sued by homeowners who claimed that swelling and expanding soils caused property damages to their homes purchased on or after August 1987. Signature notified Travelers, which began defending Signature subject to a reservation of rights. Signature further notified Royal, which acknowledged its coverage for Signature from January 1, 1989 through August 1, 1990, and stated that "if it [was] determined that a defense [was] owed we will reimburse/issue payment for all reasonable fees and cost incurred subsequent to the initial tender of this matter."

Later, Signature informed Royal that Signature and Travelers were negotiating a settlement with the plaintiffs, and that they believed the claims could be settled for \$4 million. Royal did not respond and did not attend the settlement meeting. Later, Royal tendered a \$100,000 check to contribute to settlement. Signature refused the check because it contained an endorsement purporting to absolve Royal from any further liability.

Eventually the claims settled for \$4 million, of which Travelers paid 75 percent. Signature then sought the remaining \$1 million from Royal, along with contribution for defense costs expended by Travelers. The district court granted Royal

summary judgment, finding no evidence that any of the homes sustained damage during Royal's coverage period and that Royal did not breach its duty to defend.

The Tenth Circuit reversed. Royal contended on appeal that it discharged its defense duties by permitting the counsel hired by Travelers to defend the claim. Royal argued that it would have contributed to its share of costs, but had received no invoices until this suit was filed.

The court rejected these arguments, holding that Royal breached its duty to defend. The court noted Royal's failure to respond to settlement overtures, failure to communicate with Signature, and failure to fully cooperate in settlement negotiations. "[T]he fortuitous existence of another insurer who was willing to meet its own obligations" did not excuse Royal from discharging its duty to defend. An eventual finding that the claims were not covered by Royal's policy did not excuse Royal from fully defending the claims in the first instance.

The Tenth Circuit then discussed the damages recoverable. Though the insured received a competent defense, the court was unwilling to permit Royal's breach of its duty to defend to inure to Royal's benefit. The court held that Royal owed Signature a *pro rata* portion of attorney's fees, costs, and expenses incurred in settling the underlying litigation.

On the coverage issue, the court determined that Colorado would likely permit an insurer who breaches its duty to defend to nonetheless contest coverage. The court affirmed the summary judgment in Royal's favor on coverage, because there was no evidence that any of the damage to the homes occurred during Royal's policy period.

### REASONABLE EXPECTATIONS DOCTRINE

*Pirkheim v. First Unum Life Ins.*, 229 F.3d 1008 (10th Cir. 2000)

Plaintiffs' son, Logan, was insured under an accident policy, which covered only losses resulting "directly" from accidental bodily injury and "independently of all other causes." Logan suffered from cardiac arrhythmia (an abnormal heart beat), which required a pacemaker. Four years after the pacemaker was implanted, Logan died after suffering from arrhythmic seizures, which the pacemaker should have prevented. An

autopsy showed that the pacemaker's battery had prematurely depleted.

The court held that Logan's death was caused by an accidental bodily injury, but not "independently of all other causes." The court deemed Logan's arrhythmia to be another "cause" of his death. The court refused to apply the common-law doctrine of reasonable expectations, under which courts sometimes interpret policy language liberally to protect the insured's "reasonable expectations." The court held: "General ERISA principles simply do not permit us to rewrite the terms of the insurance contract. Where the insuring clause or exclusionary provision is conspicuous, clear, and unequivocal, we conclude application of the common law doctrine of reasonable expectations is improper." 229 F.3d at 1011.

#### GHOSTWRITING

*Duran v. Carras*, 238 F.3d 1268 (10th Cir. 2001)

The plaintiff's purportedly *pro se* brief was actually ghostwritten by plaintiff's former attorney. The court issued an order for the plaintiff and his former attorney to show cause why they should not be sanctioned for this behavior. The court held that an appeal brief written by an attorney for a purportedly *pro se* litigant constitutes a misrepresentation to the court by both the litigant and attorney and a violation of Fed. R. Civ. P. 11(a).

Jody R. Nathan

*Feldman, Franden, Woodard & Farris*  
Tulsa, OK

#### Eleventh Circuit

##### FINALITY

In *Hood v. Plantation Gen. Med. Ctr.*, 2001 WL 524387 (11th Cir. May 17, 2001), the court reaffirmed the rule that "partial adjudication on the merits, followed by voluntary dismissal without prejudice of a pending claim, does not create a final appealable order." The district court had disposed of several claims, one plaintiff dismissed his remaining claim with prejudice, and another plaintiff dismissed its remaining claim without prejudice. The Eleventh Circuit dismissed the appeal for lack of a final, appealable order. The court said that the rule stated above "allow[s] district courts, not litigants, to control when and what interim orders are appealed," and

"forc[es] litigants to make hard choices and to evaluate seriously their cases."

William E. Shreve, Jr.  
*Lyons, Pipes & Cook, P.C.*  
Mobile, AL

#### D.C. Circuit

##### NOTICE OF APPEAL

*Slinger Drainage Inc. v Environmental Protection Agency*, 237 F.3d 681, *reh'g denied*, 244 F.3d 967, *reh'g en banc denied*, 244 F.3d 968 (D.C. Cir. 2001)

Federal Rule of Appellate Procedure 26(a) gives general rules for computing filing deadlines on appeal. But beware: a federal statute may mandate a different computation method. For the appellant in *Slinger Drainage*, the harsh result was dismissal of an appeal for being filed a day late.

Slinger Drainage tried to appeal a final decision of the EPA's Environmental Appeals Board. The Board found that Slinger had violated the Clean Water Act (CWA) and imposed a \$90,000 civil penalty. Slinger argued—and the D.C. Circuit assumed—that the penalty order was issued on September 30, 1999. The CWA includes an appeal provision, 33 U.S.C. §1319(g)(8)(B), which gave Slinger 30 days to appeal that assessment, "beginning on the date the civil penalty order is issued."

In counting the days it has to appeal, Slinger evidently followed FRAP 26(a)(1), which states that in computing any time period, one should "[e]xclude the day of the act, event, or default that begins the period." Excluding September 30, 1999, the 30th day would have fallen on Saturday, October 30, 1999. Thus, under FRAP 26(a)(3), Slinger would have had until Monday, November 1, 1999, to appeal.

But the D.C. Circuit found otherwise. The court reasoned that the general provision of FRAP 26(a)(1) was superseded by the CWA's appeal provision. The CWA, unlike FRAP 26(a)(1), requires that the date of the judgment appealed by included,

---

*Man does not live by words alone,  
despite the fact that sometimes  
he has to eat them.*

—Adlai Stevenson

---

not excluded, from the 30-day appeal delay. Thus, according to the court's computation, the 30th day fell on Friday, October 29, not Saturday, October 30. The court therefore dismissed Slinger's appeal for lack of jurisdiction.

#### ANTI-INJUNCTION ACT

*Thomas v. Powell*, 2001 WL 427605

(D.C. Cir. Apr. 27, 2001)

Although the Anti-Injunction Act exhorts federal courts not to stay state court proceedings, the "relitigation exception" to the Anti-Injunction Act allows a federal district court to enjoin state court proceedings when the state court action is an attempt to relitigate a claim already adjudicated in federal court. The D.C. Circuit recently upheld a district court's decision to enjoin state court proceedings that the district court determined has been filed to circumvent its approval of a class-action settlement. Because the state court plaintiffs argued in the federal proceeding that class counsel has "sold out" by agreeing to a settlement without the consent of all class members, and because the district court performed its duty of determining that the settlement was not the product of collusion and was otherwise fair and reasonable, the district court did not err in granting an injunction to prevent "relitigation" in state court of issues concerning the fairness of the settlement and the actions of class counsel.

#### STANDARD OF CARE

*National Tel. Coop. Ass'n v. Exxon Mobil Corp.*, 244 F.2d 153 (D.C. Cir. 2001)

Reasoning that an oil company's failure to meet its own environmental remediation goals does not itself constitute negligence, the D.C. Circuit reversed a \$2.4 million jury award against the oil company.

The National Telephone Cooperative Association owned and operated an office building next to an Exxon gas station. In 1990, black liquid from the gas station began to seep through the basement wall of the NTCA's office building. Exxon sent environmental engineers to repair the wall and investigated the petroleum contamination on its own property. Exxon developed a "corrective action plan," or CAP, with the stated goal of establishing "hydrogeologic control" to prevent future leakage. But despite Exxon's efforts, the leakage of black liquid recurred in 1995. This, in turn, caused NTCA's pending

sale of its building to fall through.

The NTCA sued Exxon, alleging that Exxon negligently performed the environmental remediation, resulting in property damage and lost profits from the scuttled sale of NTCA's building. At issue in the district and appellate courts was whether NTCA established a standard of care, the breach of which could be negligence. NTCA argued that Exxon's own CAP supplied the standard of care. The district court agreed and let the case go to the jury. The jury, in turn, returned a \$2.4 million verdict against Exxon.

But on appeal, the D.C. Circuit sided with Exxon. The goal in Exxon's CAP was not a standard of care because that goal was self-imposed; it stood unrelated to any accepted industry practice or standard that Exxon could have breached. Because NTCA failed to establish a standard of care consistent with its negligence theory, NTCA did not prove its case. The appeals court reversed and entered judgment for Exxon.

#### COPYRIGHT EXTENSION

*Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001)

According to a divided panel of the D.C. Circuit, Congress has the authority to extend copyright protection terms for existing works, and doing so does not violate the Constitution's requirement that a copyright last for only a "limited time."

The Copyright Term Extension Act (CTEA) amends the Copyright Act of 1976 by extending the terms of all copyrights by 20 years. Plaintiffs (individuals and groups that rely on public-domain works for their businesses) contended that the CTEA violates the First Amendment in both its prospective and retrospective application, runs afoul of the originality requirement in the Copyright Clause in its application to pre-existing works, and violates the "limited times" requirement of the Copyright Clause in extending the term of subsisting copyrights.

The court rejected the plaintiffs' First Amendment claims, because the plaintiffs have no First Amendment right to exploit the works of others. The court also rejected the argument that the CTEA cannot extend an existing copyright because the work already exists and therefore lacks originality. The court reasoned that a work under an existing copyright "has already satisfied the requirement of

originality and need not do so anew for its copyright to persist."

Finally, a majority of the panel rejected the plaintiffs' claim that the CTEA violates the "limited times" clause of the preamble to the Copyright Clause, the text of which provides that "Congress shall have power... to promote the Progress of Science and useful Arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The panel relied on the prior circuit precedent to reject the plaintiff's argument that the preamble to the Copyright Clause constitutes a limitation on congressional power.

In dissent, Judge David B. Sentelle said the Constitution requires some "outer limit" on Congressional power. Judge Sentelle reasoned that the logic of *United States v. Lopez*, 514 U.S. 549, 552 (1995)—in which the U.S. Supreme Court struck down the Gun-Free School Zones Act on the ground that Congress had extended the limits of its power under the Commerce Clause—should apply to other parts of the Constitution. Judge Sentelle characterized the majority's ruling as allowing Congress to achieve indirectly an objective that Congress could not achieve directly: permanent protection for copyrighted works. Judge Sentelle viewed the CTEA as beyond "the proper understanding of enumerated powers reflected in the *Lopez* principle of requiring some definable stopping point."

Rebecca A. Womeldorf  
*Spriggs & Hollingsworth*  
Washington, DC.

#### Federal Circuit

##### APPELLATE WAIVER

In *Tronzo v. Biomet, Inc.*, 236 F.3d 1342 (Fed. Cir. 2001), the court held that a defendant who successfully appealed compensatory damages, but failed to appeal punitive damages could not, on remand

*The right to dissent is the only thing  
that makes life tolerable for a judge  
of an appellate court.*

—William O. Douglas

or in a subsequent appeal, seek reduction of punitive damages.

Tronzo sued Biomet for violations of federal patent law and state law. Following a jury trial, the district court entered a judgment for \$7.1 million in compensatory damages and \$20 million in punitive damages. Biomet appealed to the Federal Circuit, challenging the jury's determination of both liability and compensatory damages. Since the ratio of punitive to compensatory damages awarded by the jury was less than 3 to 1, Biomet did not challenge the punitive damages award. The Federal Circuit found that the district court calculated compensatory damages on an improper basis, vacated the award, and remanded the case to the district court "to determine an appropriate award of damages..." *Tronzo v. Biomet, Inc.*, 156 F.3d 1154 (Fed. Cir. 1998) (*Tronzo I*).

On remand, the district court reduced the amount of compensatory damages from \$7.1 million to \$520. Because the ratio of punitive to compensatory damages after remand had become 38,000 to 1, Biomet moved for a reduction in the amount of punitive damages. The district court reduced the punitive award from \$20 million to \$52,000 (100 times compensatory damages). Tronzo then appealed to the Federal Circuit.

In its *Tronzo II* decision, the Federal Circuit held that Biomet, by failing to appeal the punitive damages award in the *Tronzo I* appeal, waived that issue and was barred from raising it on remand. The court further found that the district court had exceeded the mandate of *Tronzo I* when it reconsidered the amount of punitive damages on remand. The court declared that the change of the ratio of punitive damages to compensatory damages—from 2.8 to 1, to 38,000 to 1—was not so significant as to warrant deviation from the "appellate mandate rule," which provides that issues within the scope of the district court's initial judgment, and thus within the court of appeal's mandate in the first appeal, could not be revisited in subsequent proceedings. The Federal Circuit further opined that the 38,000-to-1 ratio was not in itself unconstitutional. Accordingly, the Federal Circuit reinstated the \$20 million punitive-damage award.

Rebecca A. Womeldorf  
*Spriggs & Hollingsworth*  
Washington, DC

# SEMINAR PROGRAM

The DRI Appellate Advocacy Committee will be holding its 3rd Appellate Advocacy Seminar on October 25-26, 2001, at the Hotel Nikko in San Francisco. The program schedule is set forth below. Please make plans to attend. Not only is strong attendance important to the future of our Committee, but you will also profit from your attendance. The Seminar Subcommittee has assembled an exciting and enlightening program covering several topics not ordinarily found on an appellate program. Brochures have been mailed, but if you did not get one, please contact DRI headquarters.

## Wednesday, October 24

6:00 p.m. **Registration and Cocktail Reception**

## Thursday, October 25

7:30 a.m. **Registration and Continental Breakfast**

8:30 a.m. **Welcome and Introduction**

Kelly A. Freeman, *Noble International, Ltd.*, Detroit, MI  
Michael B. King, *Lane Powell Spears Lubersky, LLP*, Seattle, WA  
Mary Massaron Ross, *Plunkett & Cooney, P.C.*, Detroit, MI

8:45 a.m. **Managing the Fourth Estate: Press Relations**

Merrie Spaeth, *Spaeth Communications, Inc.*, Dallas, TX  
*Ms. Spaeth prepares us for the "public" appeal that captures the interest of the print, audio, and visual media.*

9:45 a.m. **Coping With the "Big Case" Record on Appeal**

Michael B. Wallace, *Phelps Dunbar LLP*, Jackson, MS  
*Some appeals are challenging due to the breadth and depth of the factual record in the lower court. Some big cases have little record at all, because they move so rapidly on an emergency basis. Mr. Wallace discusses techniques to make sure the appellate court sees the real picture.*

10:45 a.m. **Break**

11:00 a.m. **Litigating the High Profile Case**

Michael A. Carvin, *Cooper, Carvin & Rosenthal, PLLC*, Washington, D.C.  
*Appellate litigation can be tricky at the best of times. When the nation waits with bated breath for your next brief, well... Mr. Carvin will favor us with a perspective sharpened by his oral argument experience before the Florida Supreme Court in Bush v. Gore.*

12:00 p.m. **Lunch** (provided)

*Join us for an informal session of networking with judges, speakers, and other attendees as we discuss hot topics in appellate advocacy.*

1:30 p.m. **Ethics of Appellate Advocacy: Unpublished Opinions**

Richard Neumeier, *McDonough, Hacking & Neumeier, LLP*, Boston, MA  
*Although published opinions occasionally cite unpublished decisions, many appellate courts, by local rule or otherwise, prohibit or limit such citation. Mr. Neumeier explores the ethical (and constitutional) issues involved in representing the client zealously within the bounds of the law governing the use of unpublished opinions before appellate courts.*

- 2:30 p.m. **Keynote Presentation: Advocacy Before the Supreme Court of the United States**  
**Alan B. Morrison**, *Public Citizen Litigation Group*, Washington, D.C.  
*One of the nation's most experienced U.S. Supreme Court oral advocates transmits the accumulated wisdom of decades. In what way is litigation before the U.S. Supreme Court the same as—and radically different from—ordinary appellate advocacy?*
- 3:30 p.m. **Break**
- 3:45 p.m. **Play it Again, Sam!**  
**Andrew C. Jordan**, *Fireman's Fund Insurance Company*, Novato, CA  
*Managing appellate issues can take on a new dimension where the same or similar issues are raised more than once. Mr. Jordan gives us a unique perspective on appeals considered as part of a system of litigation management.*
- 4:45 p.m. **Meeting of the Appellate Advocacy Committee**
- 6:00 p.m. **Cocktail Reception**
- 7:30 p.m. **Dine Arounds**  
*Sign up at either cocktail reception to join other seminar attendees and speakers in sampling the world famous cuisine of the area restaurants.*

## Friday, October 26

- 8:00 a.m. **Late Registration and Continental Breakfast**
- 8:45 a.m. **Keynote Presentation: Advocacy Before the Supreme Courts of the Several States**  
**The Honorable Nancy A. Becker**, *Associate Justice*, Nevada Supreme Court, Las Vegas, NV  
**The Honorable Susan M. Leeson**, *Associate Justice*, Oregon Supreme, Salem, OR  
**The Honorable Robert P. Young, Jr.**, *Associate Justice*, Michigan Supreme Court  
**John M. Bredehoft**, *Venable, Baetjer and Howard, LLP*, McLean, VA  
*A distinguished panel of state Supreme Court Justices discuss the always distinctive, and occasionally idiosyncratic, practice of appellate advocacy before the state courts of last resort. Individual presentations by the Justices will be followed by a short break. Following this break, the Justices will be joined by a trio of highly experienced state supreme court advocates for an "open mike" discussion including questions from the audience.*
- 12:00 p.m. **Lunch** (on your own)
- 1:30 p.m. **Getting the Last Word**  
**Karen L. Kendall**, *Heyl, Royster, Voelker & Allen, P.C.*, Peoria, IL  
*For the appellant, the reply brief is arguably the single most important appellate submission. For the court, the framing of issues in the reply acts as a roadmap to decision. An effective reply brief can win the case! Ms. Kendall provides proven suggestions on how to craft an effective reply.*
- 2:30 p.m. **Preserving Error: A Case Study in Jury Instruction**  
**Sylvia H. Walbolt**, *Carlton Fields*, Tampa, FL  
*The best hope of overturning a jury verdict often rests on persuading the reviewing court that there was error in how the jury was instructed in the law. For precisely that reason, requirements of preserving error when giving instructions are especially onerous. Ms. Walbolt, former president of the American Academy of Appellate Lawyers, explains what works, and what doesn't, to preserve such error.*
- 3:30 p.m. **Break**
- 3:45 p.m. **Focus on Insurance: The "Excess" Appeal**  
**Roger W. Hughes**, *Adams & Graham, L.L.P.*, Harlingen, TX  
*Every insurance defense attorney should attend this practical and informative session on an all-to-frequent occurrence. What are the special problems on appeal when the underlying judgment exceeds policy limits?*
- 4:45 p.m. **Adjourn**