



CERTWORTHY

THE NEWSLETTER OF THE APPELLATE ADVOCACY COMMITTEE

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DICTA FROM THE CHAIR

One of my favorite legal writers, Felix Frankfurter, said that “the law affords the amplest opportunities for the greediest intellectual appetite.” H. L. Mencken expressed a similar opinion, observing that “once a cause in law or equity comes to bar it calls for every resource of the human cerebrum.” Frankfurter spoke of an “inner compulsion that selects one’s career.” And for appellate lawyers, such a compulsion might easily be traced to the intellectual challenges inherent in this area of practice.

Those of us who are privileged to serve as appellate lawyers experience this intellectual challenge in our daily practices. We have the chance to practice law in a way that employs every intellectual resource that we can muster. DRI’s Appellate Advocacy Committee provides a forum for appellate lawyers and tries to help them in this important endeavor. It is hard to believe that the Committee has been in existence for more than two years now. And it continues to grow in mem-

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EDITOR’S FOOTNOTES

As always, I want to thank the contributors to this edition of *Certworthy*. I’m glad that so many DRI appellate advocates like to write. I suppose that we choose to be appellate specialists because we are compulsive about writing.

In this edition of *Certworthy*, Gaelle Barthold helps us to prepare for oral argument and the inevitable questions we will get from the court. David Pruessner and Lance Caughfield provide an interesting report on reversal rates of plaintiff’s verdicts in the federal courts. Frank Lowrey instructs us on what is a growth area for appellate lawyers—interlocutory appeals of class-certification orders.

In our columns, John Coughlin provides some handy tips for succinct brief-writing, and Scott Smith has some helpful hints for preparing an oral-argument notebook. Mike King reviews a classic work about some classic judges. Finally, we have several circuit reports, thanks to David Lewis, our Publications Vice Chair.

The next edition of *Certworthy* will be published in June 2001. I have only one author committed for that issue, so if you would like to submit an article or column, please let me know.

Scott Patrick Stolley
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bership and to expand its programming and projects.

The Committee's publication efforts have been remarkable. *Certworthy*, the Committee's much-admired newsletter, continues to come out twice a year under the able leadership of Scott P. Stolley, Publications Chair and David C. Lewis, Publications Vice Chair. In addition, the Publications Subcommittee prepared a series of articles for the "Committee Perspectives" section of the November 2000 issue of *For The Defense*. The Publications Subcommittee is also beginning work on a long-term project to produce a book for the Defense Library Series.

DRI's Seminar Subcommittee has also been extremely active. Current Co-

Chairs, Michael B. King and John Bredehoft, are hard at work on plans for the Committee's third seminar on appellate advocacy. The seminar will take place on October 25-26, 2001 in San Francisco. Mark your calendars now. Preliminary plans include a focus on handling the "big" appeal, including a discussion of cutting-edge appeals, appeals of large verdicts, and complex appeals. Also under discussion are sessions on handling the press, appeals in state courts, particularly the highest state court, and other significant topics.

The Appellate Advocacy Committee continues to grow its membership under the able leadership of Ray Ward and Doug Collodel. They are working with the SLDO Liaison Subcommittee Chair,

Dan Lindahl, and the Substantive Law Liaison Subcommittee Chair, Roger Hughes, to recruit additional members for DRI and for the Appellate Advocacy Committee.

Like all volunteer bar organizations, the Appellate Advocacy Committee is always looking for active members. We have many exciting projects under way and hope that you will join us in bringing them to fruition. Please call or email me if you are interested in taking a more active role or if you have comments or suggestions for the Committee. I can be reached at (313) 983-4801 or massaronma@plunkettlaw.com.

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*The repetition of a catchword
can hold analysis in fetters for
fifty years and more.*

—Benjamin N. Cardozo

QUESTIONS BY APPELLATE COURT JURISTS: A THREAT OR AN OPPORTUNITY?

by Gaelle McLaughlin Barthold

To me, the most challenging and productive part of any appellate court oral argument is dealing with the questions posed by the justices or judges before whom I appear. Accordingly, it should come as no surprise that the premise of this article is that you should not only look forward to an appellate court's questions, but that you should welcome questions with open arms, and actually encourage them.

In other words, I strongly believe that oral argument should be viewed as an opportunity to engage in meaningful dialogue with the presiding appellate court jurists. We all know that a lecture to one's spouse is not a good way of getting agreement about an important issue. It is even less likely to prove an effective technique in the appellate courts.

NO SCRIPTS

Many attorneys—even very experienced trial attorneys—come before the appellate courts with “scripted” presentations, fearful that they will be interrupted and that the importance of what they want to say will be irretrievably lost because jurists are bothering them with questions. These attorneys avoid eye contact with the court. Moreover, they frequently appear to be so insecure that even jurists with pressing questions are reluctant to interrupt them and disrupt their obviously tenuous presentations. These attor-

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neys are far more likely to lose their cases. This is because they are not communicating with the people who actually have to decide the cases.

In contrast, more experienced appellate practitioners go before the appellate courts relying largely on outlines of their important points. An outline allows flexibility in presenting an argument. It is far easier to return to a short outline after dealing with an inquiry than it is to return to a “verbose” script. It is also far easier to alter the order of presentation, depending upon the precise nature of interchanges with the court which arise out of the court's questions.

OPENING AND CLOSING

Of course, experienced appellate practitioners know the value of a strong and well thought out opening statement. Such statements allow them both to succinctly present their case and to immediately capture the court's interest and attention. See Jay M. Levin, *Advocate's Forum*, “The Importance of the Opening in an Appellate Argument: A Case Study,” *Certworthy* (Winter 2000) at 13. Moreover, while presenting these openings, such practitioners make eye contact with the members of the court. They also exude sufficient presence and confidence throughout their presentation to make the court feel comfortable about interrupting them and seeking clarification and explanation, as necessary.

For all of these reasons—plus the fact that it is comforting to know that one has an “anchor” in a storm—I always prepare what I believe is a very strong opening statement, as well as an equally strong closing statement. Having done that, I then think or rethink—or sometimes even say—those statements over and over with acceptable variations. This process allows me at the outset to be comfortable with the fact that I can make eye contact

with the court members and claim their attention with a tailored opening statement that will not only pique their interest, but also alert them to the issue or issues they are being called on to decide. It also gives me confidence that I can conclude in a “dynamite” way and focus the court on the precise relief I am requesting, as well as precisely what they need to accomplish this.

OUTLINING

With these two limited exceptions, the remainder of my argument notes are generally nothing more than an outline of the points and subpoints critical to my presentation, which I want to be certain to make during that presentation. Sometimes, I incorporate into this outline possible additional points that I would like to make if time permits—points that I think might be necessary to insert into the discussion, depending on how the dialogue with the court proceeds.

This is not to say that I do not make an effort to plan the words I will use to express the various ideas and points encompassed in my outline. As with my opening and closing statements, I give a great deal of thought to the words or phrases that I might use to express my ideas. A benefit of this approach is that I can “edit” my presentation well in advance so that the words and phrases I use to express my ideas are as succinct as possible. The critical point, however, is that it is dangerous to “rehearse” in the usual sense of being wedded to particular words. What is essential is just to consider and possibly rehearse (but only in a limited way), alternative succinct ways of getting your ideas across. You should not be tied to any kind of “script.” Rather, you should be comfortable with the concepts and ideas that you want to get across using a variety of techniques, including responses to the judges' questions.

REHEARING

The best and most productive form of preargument “rehearsal” to achieve all of the above goals is, of course, a very personal matter. For some people, a moot court is not only helpful, but also absolutely necessary. Many attorneys who have had few appellate arguments—and even some who have had many appellate arguments—view a moot court as a productive process that allows them to hone their presentations, learn how a judicial mind might view the case and probe their position, and have the experience of answering questions—both anticipated or unanticipated. This is not, however, a format that has been, or ever will be, helpful for me.

Before an argument, I need to prepare by analyzing and probing the weaknesses and strengths of my case. Sometimes, I will seek input from others. More often though, I go through this terrible process by myself. Only after this part of my preparation is complete can I begin to outline my presentation. Once that is finally accomplished, I have been known to practice out loud my expression of the ideas contained in my outline. This gives me more than just a level of comfort with the words that I *might* use before the court. It also gives me a fairly accurate idea how long my argument will take, absent the interjection of questions.

As to a productive time and location for verbal “rehearsals” (if you decide to use that strategy), I find that this can be a very productive use of my car commuting time. If you choose such a forum, however, you must be prepared for the fact that nearby drivers will likely perceive you as a crazy person who should be hauled off to the nearest psychiatric center because you talk to yourself.

Thus, the use of this forum for preparation can be risky—particularly if your friends and neighbors witness your bizarre behavior. For me, however, a moot court is not a viable way of proceeding, and this is my substitute. I know that I can only do one first-class, full-blown performance. I prefer that performance be before the court, rather than before my colleagues at a moot court (as much as I might want to impress them).

TIME LIMITS

As to court-imposed time limits for argument, remember that those limits are frequently instructive, rather than absolute. Many courts feel free to reduce an advocate’s time if they conclude that the argument being presented to them is not instructive. Even courts that do not do this, will frequently “cut into” an advocate’s time by posing questions. Hence, my rule of thumb is to plan an argument that will take no more than one-third to one-half of the court-imposed time limit.

In sum, I encourage you to find what works for you so that you can engage in a pre-argument preparation that results in a great presentation. The only caveat I offer is that your form of preparation *not* be tied to a script or specific text. This can only reduce your flexibility and, therefore, your ultimate effectiveness. It is far easier to pick up and carry on after questions are posed when you are working from an outline rather than a script, and it is certainly much easier to reorganize your presentation if the court’s questions have forced you to jump ahead.

HANDLING QUESTIONS

Besides being the most enjoyable, and most challenging aspect of oral argument, judicial questions can also be the most important part of argument—a point at which your case can be won or lost. Remember that judges and justices generally do not ask questions just to be difficult. They usually ask questions because they want answers—something is bothering them or needs to be clarified. Responding to questions gives you the opportunity to convince the court that your position should be adopted and that whatever is (or might be) creating concern does not require a different result.

Only in the rarest case should a question be sidestepped. A very experienced appellate practitioner may recognize that one-in-a-million circumstance. For the rest of us, the question should be answered directly, to the fullest extent possible.

ANTICIPATING QUESTIONS

One of the most important things in preparing for oral argument is to try to anticipate what questions might be asked. To do this, you must look far beyond the arguments made by your opponent. You must take your case apart and seek to pinpoint every possible weakness or potential weakness—both factual and legal. You must identify the best possible arguments that can be made in opposition to your case and be fully prepared to rebut them. You must closely scrutinize the case record and be fully prepared to answer any and all questions about that record. If portions of the record are critical to your argument, you should xerox them and bring them to the podium so that—if asked about them or if it is otherwise appropriate—you can give the court a prompt verbatim description of the record’s specific components. If you do all of these things, you *should* be able to answer any questions thrown at you.

Situations will inevitably arise, however, where you are not certain of a critical fact or cannot intelligently discuss a particular case. In these rare circumstances, you must confess your inability to properly answer the question and offer, instead, to promptly address it in a supplemental filing. It is never to your advantage to make something up or to guess. This can only lead to trouble.

HYPOTHETICALS

Hypothetical questions, of course, must be addressed when posed. There is no justification for not being ready to answer such questions. The identification of potential hypothetical questions must be part of your oral argument preparation. In my preparation, I sometimes pace back and forth, not only imagining what I will be saying to persuade the court with my argument, but also imagining interruptions by the court with valid, arguable, or even absurd questions. Next, I imagine how I would deal with such questions, using my answers to get back on track within the confines of my skeletal outline.

Regardless of whether a question is valid, arguable or absurd, it must be po-

lately and promptly answered. You cannot ignore or give short shrift to questions that might appear to you to be irrelevant or even stupid. You may not think that a question has relevance, but the judge asking the question certainly does or it probably would not have been asked. As part of your answer, you might diplomatically explain why such a question does not bear on your case. This must be done very carefully, however.

RESPONDING

Once a question is actually posed, you must make important split-second decisions. First, you must decide whether you fully understand the question. If you do not, promptly seek clarification from the questioning jurist. Answering a question that has not been posed wastes the court's time and undermines your ability to persuade. Next, of course, you must decide how to respond. Within reason, it is appropriate to take a few seconds to formulate that response before you begin to speak. A thoughtful pause is often a good way of overcoming foot-in-mouth disease.

In formulating your answer, it is helpful (if not sometimes essential) to consider the purpose of the question. Is the questioner trying to help you? Is the questioner using you as a platform to express his or her views, either about the case or on an issue of law, in order to persuade or convert other members of the court? Does he or she have a problem with your case that you can address? Does the question suggest an alternative theory of the case that might help or hurt you?

If a judge has thought of a theory or recognizes something in the record that can help your case, do not be reluctant to embrace it. On one occasion, I recognized that an entirely new theory of the case was being suggested by a judge at oral argument. I filed a post-argument supplemental brief relying on that theory as an alternative ground for affirming the court below. That theory carried the day! *See, e.g., Banic v. Workmen's Compensation Appeal Bd.* 553 Pa. 276, 281, 705 A.2d 432, 435 (1997) (stating that a lower court can be affirmed if its order was correct for any reason, regardless of the reasons relied upon).

SIMULTANEOUS QUESTIONS

On occasion you will face a situation where you are the recipient of rapid fire and simultaneous questions from two or more members of the court. Such an occurrence usually requires not only great diplomacy, but also a sense of humor. Sometimes when I am faced with this scenario, I smile, throw up my hands, and say "I don't know where to start." If that doesn't break the ice and prompt the court to give you some guidance, one alternative is to ask for guidance from the presiding justice or judge. Remember, that if no guidance is forthcoming, you must ultimately make a choice of whose question to address first. When placed in this situation you must be very careful not to suggest that one jurist's question is more important than another's.

While deciding how to answer a question you must, of course, also simultaneously consider how you can use your answer to make a point essential to your case or to get your argument back to a logical place in your proposed order of presentation. Doing all of these things at the same time usually cannot be done by a lawyer during his or her first or second or even tenth appellate argument. However, you should be aware of these goals and try to achieve them. It is sufficient and you should be very satisfied, if you can concisely and clearly answer any questions in a way that supports your case. This holds true regardless of whether the questions are factually or hypothetically based.

In fact, you must at least reach that limited goal of an accurate answer. There is no excuse for not knowing your record and identifying well in advance the hypothetical questions that might be asked, given the legal issues presented in or the factual specifics of your case. Policy level courts particularly—that is, those courts of ultimate authority that are concerned with the development of the law—must consider the systemic and institutional implications of their decisions. Potential hypothetical questions are of importance in any appellate court. They are particularly telling and critical, however, when you are arguing before a court of last resort.

POLICY CONCERNS


Few of us have the opportunity to argue before the United States Supreme Court. Arguments before state courts of last resort, however, are not so unusual. While preparing to argue before such courts—which are, definitionally, policy courts—you must consider the policy and other implications of both your case and the position that you are asserting. It is not enough to tell these courts how other courts have dealt with your particular issue. With rare exceptions, they are not bound by those other courts. Rather, if you want to prevail, you must be sufficiently prepared that your argument, including your answers to the court's questions, convinces the court that your suggested solution to the issue or problem is the "right" solution and in tune with the court's public policy goals. If you do not anticipate, and cannot properly answer, the hypothetical questions that are posed by such courts, it is very unlikely that you will be able to achieve that result.

CONCLUSION

In conclusion, one of your most important functions as an appellate practitioner—or even an occasional appellate presenter—is to be prepared to answer the court's questions, be they hypothetical or otherwise. The more appellate experience you have, the easier it will be to do this. Thoughtful preparation, however, is always necessary, regardless of your experience. You simply cannot "wing it" or prevaricate in the appellate courts.

One of the great pleasures of appellate argument is to have anticipated a difficult question and be prepared immediately to respond. Without question, the high points of my legal career are my two successful arguments on behalf of appellants in the United States Supreme Court. (I had the opportunity to present these arguments while serving in my capacity as Deputy District Attorney for Law in the Philadelphia, Pennsylvania District Attorney's Office. *See Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990 (1987); *Castille v. Peoples*, 489 U.S. 346, 109 S. Ct. 1056 (1989)). More than

those victories, however, I remember with great satisfaction being asked by a justice during one of those arguments how many jurisdictions had considered a particular issue. Having anticipated this question, I was not only prepared to say how many jurisdictions had considered

the issue, but also to specifically identify those jurisdictions and discuss the precise nature of their decisions. Proper preparation for appellate arguments will allow you to have similar satisfaction, even when very difficult questions are posed! 

INTERLOCUTORY APPEALS OF CLASS CERTIFICATION ORDERS UNDER FEDERAL RULE 23(F): THE ROAD NOW TAKEN

by Frank M. Lowrey IV

For most of the history of Federal Rule of Civil Procedure 23, class action orders generally could not be appealed until final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), put an end to any idea that class certification orders could be appealed on an interlocutory basis, either as “collateral orders” or on the theory that they sounded the “death knell” of the litigation.

Following *Coopers*, only a few interlocutory appeals of certification orders reached the appellate courts, either through 28 U.S.C. §1292(b) or on petitions for mandamus. Because interlocutory appellate review was generally not available, the defendant was forced to endure trial and the possibility of a monumental adverse judgment before challenging the certification order in the appellate courts. This put immense pressure on defendants to settle merely upon certification of a class, even when the certification decision or the merits of the claim or both were highly questionable. As early as 1973, “Judge Friendly, who

was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action ‘blackmail settlements.’” *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

Federal Rule 23 was amended effective December 1, 1998, to permit interlocutory appeals of orders granting or denying class certification, in the discretion of the appellate court. This amendment acknowledges what *Coopers & Lybrand* did not—that certification often is the practical “death knell” of the litigation, unfairly inducing what Judge Friendly termed “blackmail settlements.” Despite its relatively short tenure, new subsection 23(f) has allowed review (and reversal) of certification orders in several prominent cases. See, e.g., *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228 (11th Cir. 2000); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276 (11th Cir. 2000); *Carter v. West Publ. Co.*, 225 F.3d 1258 (11th Cir. 2000). But expansive dictum in two recent opinions by the First and Eleventh Circuits may unduly restrict the number of appeals under Rule 23(f). Depending on their subsequent application, these opinions may hinder interlocutory review of orders that the amendment was intended to cover.

REVIVAL OF THE DEATH KNELL DOCTRINE

The amendment to Rule 23 followed a series of high-profile circuit court decisions reversing class certification orders. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); *Georgine v. Amchem Prods.*, 83 F.3d 610 (3d Cir. 1996), *aff’d*, 117 S.Ct. 2231 (1997); *Andrews v. AT&T*, 95 F.3d 1014 (11th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *Jackson v. Motel 6 Multi-purpose, Inc.*, 130 F.3d 999 (11th Cir. 1997); *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 352 (4th Cir. 1998). In some of these opinions, such as *Rhone-Poulenc*, 51 F.3d at 1298, and *Castano*, 84 F.3d at 746, the courts openly acknowledged the pressure on a defendant to settle even nonmeritorious claims, once the case was certified on behalf of a sizeable class. The Eleventh Circuit expressed a similar sentiment in *Andrews v. AT&T*:

The plaintiffs suggested at oral argument that these cases would be made manageable by virtue of the fact that, if the classes are certified, the defendants would likely settle. We do not

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view this as an appropriate measure of manageability. 95 F.3d at 1025 n.6.

To varying degrees, these opinions read as criticisms, not only of the particular orders at issue, but of a perceived willingness by district courts to certify classes that almost certainly could not be adjudicated absent settlement. *See, e.g., Jackson*, 130 F.3d at 1006 (“This failure of predominance is readily apparent from a reading of the... complaint.”); *Castano*, 84 F.3d at 743 n.15 (“We find it difficult to fathom how common issues could predominate in this case....”). As the Sixth Circuit wrote in *In re AMS*: “[W]e believe the district judge’s numerous errors in this case display an utter disregard for the judicial process, and suggest... a strong bias in favor of class certification....” 75 F.3d at 1087 (footnote omitted).

These opinions signaled a belief at the circuit court level that interlocutory appellate review is necessary to curb abuses of the class action device. Because these cases were decided before the effective date of Rule 23(f), they received review only because the circuit court agreed to accept a discretionary appeal under 28 U.S.C. §1292(b), as in *Andrews* and *Castano*, or issued the extraordinary writ of mandamus, as in *Jackson*, *Rhone Poulenc*, and *In re AMS*. The courts invoking section 1292(b) did not pretend to limit their review to any “controlling question of law” underlying certification. Instead, these courts treated certification *itself* as the “controlling question” in the litigation. This is even more clear in the mandamus cases. Because mandamus is not available when the defendant has an adequate remedy through ordinary channels, the courts granting mandamus acknowledged that the opportunity to appeal a class certification order following final judgment is often illusory. In effect, these decisions revived the “death knell” doctrine, at least with respect to orders granting certification.

INTENT OF RULE 23(F)

Rule 23(f) was debated and adopted as the cases discussed above were being decided. Adoption of the rule reflected a growing, but not unanimous, consensus that a defendant should not have to endure a protracted and expensive trial, with potentially ruinous exposure, to ob-

tain reversal of a questionable certification order following final judgment. Although not using Judge Friendly’s term, the Advisory Committee Notes acknowledge the same concern regarding “blackmail” settlements made explicit in *Rhone Poulenc* and *Andrews*, and at least implicitly acknowledged in each of the circuit court opinions discussed above:

[S]everal concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

The Seventh Circuit was the first to comment upon the intent of Rule 23(f). *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999). The court identified three “reasons Rule 23(f) came into being”:

For some cases the denial of class status sounds the death knell of the litigation, because the representative plaintiff’s claim is too small to justify the expense of litigation. *Id.* at 834.

Second, just as a denial of class status can doom the plaintiff, so a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff’s probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere. *Id.*

Third, an appeal may facilitate the development of the law. Because a large proportion of class actions settles or is resolved in a way that overtakes procedural matters, some fundamental issues about class actions are poorly developed. *Id.* at 835.

The Seventh Circuit’s discussion closely follows not only the Advisory Committee Notes, but also the concerns expressed in the cases discussed above, including that Circuit’s prior decision in *Rhone Poulenc*.

THE WASTE MANAGEMENT DICTA

The First Circuit commented broadly on the prospective application of Rule 23(f) in *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000). The court acknowledged the three purposes of Rule 23(f), as described by the Seventh Circuit in *Blair*. But the court then opined that the Seventh Circuit defined the last category of appropriate Rule 23(f) appeals—those involving unsettled questions of law—too broadly:

We worry... that the third category, as framed, may encourage too many disappointed litigants to file fruitless Rule 23(f) applications. The law is a seamless and evolving web, so a creative lawyer almost always will be able to argue that deciding her case would clarify some “fundamental” issue. 208 F.3d at 294.

The First Circuit also announced its intent to apply Rule 23(f) narrowly. “[I]nterlocutory appeals should be the exception, not the rule; after all, many (if not most) class certification decisions turn on ‘familiar and almost routine issues.’” *Id.* The court further explained:

The bar also should be aware that we intend to exercise our discretion judiciously. By their nature, interlocutory appeals are disruptive, time-consuming, and expensive. Thus, we have elevated the threshold for discretionary review in other instances, endeavoring to discourage piecemeal appeals.... Although Rule 23(f) is designed to operate from a more accessible plateau, the same policy considerations counsel in favor of some restraint. We should err, if at all, on the side of allowing the district court an opportunity to fine-tune its class certification order, ... rather than opening the door too widely to interlocutory appellate review.” *Id.* (citations omitted).

Having indulged in this broad dictum, the First Circuit then granted review in a case that it expressly acknowledged did not fit any of the categories appropriate

for review. *Id.* at 295. It is difficult to see why the court considered it appropriate to opine broadly on issues that it acknowledges were not raised by the case before it.

THE PRADO-STEIMAN DICTA

The Eleventh Circuit followed suit in *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000). The court seized upon the case as “our first opportunity to explicate the circumstances in which a court of appeals should exercise its discretion to accept... an appeal under Federal Rule of Civil Procedure 23(f).” *Id.* at 1267.

The Eleventh Circuit largely accepted the approach of the First Circuit in *Waste Management*, including the observation that the third category outlined by the Seventh Circuit in *Blair* may be too broad. 221 F.3d at 1272-73. The Eleventh Circuit also enumerated some “considerations that may weigh against frequent interlocutory appellate review of class action certification decisions.” *Id.* at 1273. First, “there are too many class actions filed each year for federal appeals courts practicably to adjudicate class certification decisions on an interlocutory basis as a matter of course.” *Id.* Second, “interlocutory appellate review of a class certification decision may short-circuit the district court’s ability—or at least willingness—to exercise its power to reconsider its certification decision.” *Id.*

After laying out these preliminary considerations, the court provided five “guideposts” that “may be utilized in determining whether to grant an interlocutory appeal under Rule 23(f).” *Id.* at 1274.

First, and most important, the court should examine whether the district court’s ruling is likely dispositive of the litigation by creating a ‘death knell’ for either plaintiff or defendant. *Id.*

Second, a court should consider whether the petitioner has shown a *substantial* weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion. *Id.*

Third, a court should consider whether the appeal will permit the resolution of an unsettled legal issue

that is important to the particular litigation as well as important in itself.... Moreover, interlocutory review under Rule 23(f) seems more appropriate if the unsettled issue relates specifically to the requirements of Rule 23 or the mechanics of certifying a class....

Id. at 1275.

Fourth, a court should consider the nature and status of the litigation before the district court.... [T]he propriety of granting or denying a class, as well as the proper scope of any class that has been granted, may change significantly as new facts are uncovered through discovery.

Id. at 1276.

Finally, a court should consider the likelihood that future events may make immediate appellate review more or less appropriate, [giving the example of settlement negotiations or an imminent bankruptcy].... Conversely, if the case is likely to be one of a series of related actions raising substantially the same issues and involving substantially the same parties, then early resolution of a dispute about the propriety of certifying a class may facilitate the disposition of future claims. Also significant is whether the district court itself has indicated that it views its class certification decision as conditional or subject to revision at a later stage in the case.

Id.

The Eleventh Circuit cautioned that these are merely guidelines:

We do not create any bright-line rules or rigid categories for accepting or denying Rule 23(f) petitions today. Our authority to accept Rule 23(f) petitions is highly discretionary, and the foregoing list of factors is not intended to be exhaustive; there may well be special circumstances that lead us to grant or deny a Rule 23(f) petition even where some or all of the relevant factors point to a different result. Moreover, none of the foregoing factors is necessarily conclusive; ordinarily, each relevant factor should be balanced against the others, taking into account any unique facts and circumstances.

Id.

Echoing *Waste Management*, however, the Eleventh Circuit announced that it

“will... use restraint in accepting Rule 23(f) petitions, and these interlocutory petitions will not be accepted as a matter of course.” *Id.* at 1277.

The Eleventh Circuit then did precisely what the First Circuit did in *Waste Management*—accept a Rule 23(f) appeal that it expressly acknowledged did not meet the standards outlined by the court. *Id.* (“[W]e acknowledge that this lawsuit may not raise the kind of issues that ordinarily might warrant granting a Rule 23(f) petition.”) It is not clear why the Eleventh Circuit considered it appropriate to write at length about issues it concedes were not posed by the case before it.

THE IMPLICATIONS

Although this is by no means a foregone conclusion, *Waste Management* and *Prado-Steiman* raise the possibility that Rule 23(f) may be applied more narrowly than intended. First, these opinions may wrongly suggest that interlocutory review should be reserved for cases involving novel or unsettled questions of law. But class orders misapplying *settled* law may impose great pressure to settle dubious claims. It is worth remembering that the circuit court decisions that preceded the adoption of Rule 23(f) did not reverse certification based on new law, but on well-established principles regarding choice of law, the individual proof necessary to establish a fraud claim, and so forth. If these cases are representative, then there are a number of certification orders based on a misapplication or disregard of settled law. Most will not reach the appellate courts absent interlocutory review.

Although both *Waste Management* and *Prado-Steiman* recognize the “death knell” justification for Rule 23(f), dicta in those opinions could be expansively read for the proposition that only the prospect of a ruinous award may be sufficient to warrant interlocutory review. In dictum, *Waste Management* suggested that the prospect of a judgment exceeding \$16 million might not justify review where the defendant is a “massive corporation.” 208 F.3d at 294-95. The Eleventh Circuit’s opinion can also be read as suggesting that the potential exposure must threaten the defendant’s solvency. *Prado-Steiman*, 221 F.3d at 1274.

If interpreted in this fashion, these

opinions could overly restrict interlocutory review. The entirely appropriate discomfort with “blackmail settlements” stems from the idea that settlements, like judgments, should be driven by the merits of a claim. To extort settlement of a dubious claim, it is not necessary to threaten a defendant’s solvency—the prospect of a very large, but payable judgment may accomplish the same thing. The question should be whether certification is the death knell of the litigation, not of the defendant.

INHERENTLY CONDITIONAL

Dictum in *Waste Management* and *Prado-Steiman* also suggests that the conditional nature of class certification decisions should weigh against interlocutory review. But as the Supreme Court observed in *Coopers & Lybrand*, “[a] district court’s order denying or granting class status is inherently tentative.” 437 U.S. at 469 (emphasis added). By the express terms of Rule 23(c)(1), all class certification orders “may be altered or amended before the decision on the merits.” The conditional nature of all certification orders was therefore necessarily taken into consideration in the promulgation of Rule 23(f). The circuit courts thus should give that factor little if any weight in determining whether to accept a 23(f) appeal.

Moreover, there is no good reason to believe that, having certified a class, district courts frequently reconsider that decision in any material way that would actually change the outcome of a Rule 23(f) appeal. At best, this might occur only in a small percentage of cases. The abstract prospect of subsequent modification should not frustrate the Rules Committee’s intent to broaden the availability of interlocutory review.

Declining an appeal based on the inherently conditional nature of the certification decision is also questionable because of the strict time limitations of Rule 23(f). The party seeking appeal must petition the appellate court within ten days of the order granting or denying certification. Thus far, the circuit courts seem inclined to treat timely filing as a jurisdictional requirement. See, e.g., *Scott v. Dennis Reimer Co.*, 205 F.3d 1341, 2000 WL 145397 (6th Cir. 2000) (unpublished); *Gary v. Sheahan*, 188 F.3d

891 (7th Cir. 1999). By the time it is clear that the district court will not modify its decision, the chance to seek interlocutory review will be gone. Even if the district court does modify its order, the circuit court may take the position that only the modifications are appealable, not the underlying order.

MODIFICATIONS

Although the Eleventh Circuit suggested that a Rule 23(f) appeal may “short circuit” the district court’s willingness to modify a class order, the opposite may more often be true. Interlocutory review may be necessary to induce modifications in the certification order that would not otherwise occur. In *Jefferson v. Ingersoll Int’l, Inc.*, 195 F.3d 894 (7th Cir. 1999), the Seventh Circuit reviewed a class certification order in an employment discrimination action. Although generally approving of certification, the Seventh Circuit directed the district court to reconsider the ruling in one respect. The district court had wrongly certified a class solely under Fed. R. Civ. P. 23(b)(2), although the class was seeking compensatory damages in addition to injunctive and equitable relief, such as backpay. The Seventh Circuit directed the district court to consider a bifurcated procedure under subsections 23(b)(2) and b(3) or certifying the entire class under 23(b)(3). This case illustrates how a Rule 23(f) appeal may cure a defect that presumably would have been fatal in any appeal after final judgment.

DISRUPTION

Dictum in both *Waste Management* and *Prado-Steiman* also emphasizes the disruptive nature of an interlocutory appeal. But there is no reason to believe that interlocutory appeals of class certification orders are any more disruptive than interlocutory appeals of the grant or denial of injunctive relief, which are appealable on an interlocutory basis as of right under 28 U.S.C. §1292(a)(1). And since injunctive relief typically requires a demonstration of likelihood of success on the merits, appeals of those orders are presumably more intertwined with the merits of the case than appeals of class certification orders.

Although review in the middle of the district court proceedings is certainly not ideal, Rule 23(f) acknowledges that re-

view after final judgment may well be nonexistent. The disruption caused by an interlocutory appeal, although undeniable, must be balanced against the practical reality that it may be the only opportunity for appeal. Even if appeal following final judgment is a realistic possibility, it is a monumental waste to try a complex and expensive case, only to have the judgment reversed because the underlying class order was erroneous.

This point is illustrated by *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 352 (4th Cir. 1998), one of the very few cases in which the defendant appealed a class certification order following a final judgment. The district court certified a nationwide class of Meineke franchisees asserting a variety of claims for breach of contract, tort and statutory unfair trade practices. The price of Meineke’s persistence was a \$590 million verdict, reduced to \$390 million by the district court. On appeal the Fourth Circuit reversed, finding numerous fundamental defects precluding certification. This reversal occurred, however, only after years of extraordinarily expensive litigation that deeply degraded Meineke’s relations with its franchisees and “came close to visiting corporate ruin on Meineke over what is a vigorous, but straightforward contract dispute.” 155 F.3d at 352. Had Rule 23(f) been in effect when this class was originally certified, it could have avoided years of litigation directed towards theories that ultimately did not survive appellate review. *Broussard* demonstrates that even when the defendant sticks it out through final judgment, reversal of the class order at that stage may not make the defendant whole.

APPELLATE PRACTICE UNDER RULE 23(F)

Although much of the *Waste Management* and *Prado-Steiman* opinions may be ill-advised dictum, they are part of the legal landscape to be navigated in seeking Rule 23(f) review. Given this backdrop, a defendant’s best pitch for interlocutory review may be summarized as “Death Knell Plus.”

In portraying the certification order as the “death knell” of the litigation, *Waste Management* and *Prado-Steiman* counsel in favor of submitting record evidence of

the financial impact a judgment in favor of the class would likely have on the defendant. Sometimes this will be a simple matter of showing that the alleged damages exceed the defendant's net worth. But even when the potential verdict is substantially short of that, it may nonetheless create inappropriate settlement pressures. The mere entry of a sizeable verdict may, for example, preclude a corporate defendant from obtaining needed credit or constitute an event of default under current loan obligations.

A persuasive application under Rule 23(f) should include some "plus" factor in addition to the "death knell" argument. *Blair, Waste Management*, and *Prado-Steiman* advise that the defendant must show that the certification decision was "questionable." *Prado-Steiman* indicates that this is most likely to be true "when the district court expressly applies the incorrect Rule 23 standard" (surely that will be rare), "or overlooks directly controlling precedent." 221 F.3d at 1275. In the latter situation, "interlocutory review may be warranted even if none of the other factors supports granting the Rule 23(f) petition." *Id.* The Eleventh Circuit suggests that errors of law, as opposed to application of law, are more amenable to interlocutory review. *Id.* at


1275 n.9. If possible, a Rule 23(f) petition should make the case that the district court either ignored the substantive law defining the elements of the class claims or remade that law to render the class manageable. See, e.g., *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318, 327 (5th Cir. 1978) ("It is axiomatic that a procedural rule cannot 'abridge, enlarge, or modify any substantive right.' ... [T]he fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove up a claim for relief.") (quoting 28 U.S.C. §2072)).

Showing that the district court ignored controlling authority is somewhat at odds with one of the other "plus" factors identified by *Blair, Waste Management*, and *Prado-Steiman*. These opinions suggest that review is warranted to consider unsettled issues of law, particularly those pertaining to the application of Rule 23 itself. This may require a defendant to choose whether to pitch its appeal as one in which the district court ignored settled law or one that presents an unsettled question of law.

The defendant applying for review should also address the idea that certification is conditional. Is modification a mere abstract possibility in all class certi-

fication orders, or is there some good reason to expect material changes in the order? Other than downplaying the significance of this factor along the lines suggested above, the application for appeal should focus on fundamental errors in the certification order that cannot be cured short of decertification. If decertification is the only permissible option, interlocutory review is not premature.

CONCLUSION

Although interlocutory review of class certification orders is not an ideal procedure, long experience with the alternative has demonstrated that affording review only after final judgment is frequently equivalent to denying review. Rule 23(f) acknowledges that reality. Properly applied, Rule 23(f) should promote the proper use of the class action device and produce a well-developed body of law to guide district courts in making certification decisions. Narrow application of the rule, as suggested *in dictum* in *Waste Management* and *Prado-Steiman*, would be inconsistent with the intent of the amendment. A persuasive Rule 23(f) application must, however, take into account the concerns expressed by the First and Eleventh Circuits in making the case for interlocutory review. 

SUBCOMMITTEE REPORTS

Membership

Membership in the Appellate Advocacy Committee continues to grow, slowly but steadily. As of September 30, we numbered 250 members. This represents a 4 percent increase in membership during the six-month period ending September 30.

The Appellate Advocacy Committee leadership recognizes that increasing Committee membership is a job for all of us, not just the Membership Subcommittee. Thus, the Steering Committee and all Subcommittees have been involved in efforts to increase membership.

The Membership Subcommittee has developed lists of attorneys who have shown an interest in appellate advocacy.

This includes lawyers who hold themselves out as appellate practitioners, attend appellate-practice CLE seminars, or belong to other appellate-advocacy organizations. The idea is to target these attorneys by direct mail. For example, in connection with the recent DRI Annual Meeting in New Orleans, we sent a letter to attorneys who attended a Louisiana appellate advocacy seminar last spring, inviting them to join the DRI Appellate Advocacy Committee and to attend the Annual Meeting and the Committee Meeting. We plan to send a similar letter to those who attended the ABA Appellate Practice Institute that was held last June in New Orleans.

All Committee members can help with this effort. If you attend a non-DRI appellate advocacy seminar, try to get a list of the attendees and send it to Doug Collodel or Ray Ward. We'll take it from there.

Meanwhile, here is what the Steering Committee and other Subcommittees have been doing to increase membership:

- Each member of the Steering Committee has written to five appellate lawyers, sending them a copy of *Certworthy* and inviting them to join DRI and the Appellate Advocacy Committee.
- The Minority Involvement Chair, Sandra Boyd Williams, will invite membership from lawyers in various minority bar associations.
- An SLDO Liaison Subcommittee has been created. Its purpose is to identify two or more Committee members to serve as Liaisons with the SLDOs in

each state. The Liaisons will encourage SLDO members to become members of DRI and the Appellate Advocacy Committee.

- The Corporate Involvement Subcommittee has written to DRI's corporate members, encouraging them to participate in the Appellate Advocacy Committee and to market our next seminar.
- The Liaison Subcommittee has identified Liaisons for DRI's various substantive-law committees. These Liaisons will work to encourage members of those committees to join the Appellate Advocacy Committee.
- The Seminar Subcommittee has undertaken extensive efforts to market our seminar, and to market DRI and the Appellate Advocacy Committee at our seminars.
- The Young Lawyers Liaison, Jeff Kruse, has solicited members for the Appellate Advocacy Committee at the YL seminar. Jeff is also working to encourage the YL Committee to include appellate speakers at its next seminar and will help identify appropriate speakers.

We encourage all Committee members to help increase membership. Please tell others about the benefits you've received from being part of the Appellate Advocacy Committee, and invite them to join us.

Douglas J. Collodel
Sedgwick Detert Moran
Los Angeles, CA

Raymond P. Ward
Sessions, Fishman & Nathan, L.L.P.
New Orleans, LA

Seminar

The Seminar Subcommittee has begun planning the Committee's third Appellate Advocacy Seminar, to be held in San Francisco (at the Hotel Nikko), October 25-26, 2001. Marketing efforts will kick off in February, with the goal of increasing attendance by at least 50 percent over levels previously achieved in Washington, D.C. (January 1999) and New Orleans (March 2000).

Michael B. King
Lane Powell Spears Lubersky, L.L.P.
Seattle, WA

John Bredehoft
Venable Baetjer & Howard, L.L.P.
McLean, VA

Publications

Besides publishing *Certworthy*, the Publications Subcommittee has been involved in two projects this year. First, we submitted five articles for the "From the Committees" section of the November 2000 issue of *For The Defense*. We viewed this project as a way for the Appellate Advocacy Committee to gain more recognition. Many thanks to the authors who contributed to this project (Mary Massaron Ross, Mike King, Dan Lindahl, Lori Massey Cliffe, and Scott Stolley).

Second, we have continued to supply authors for the monthly "Writers' Corner" in *For The Defense*. We foresee continuing this role and, in fact, have several authors committed for months in 2001. If you would like to take an open month, please contact me.

Finally, we are in the incubation stage of planning a long-term project to do a book for the Defense Library Series. We envision a "how-to" manual for defense lawyers handling appeals. We will probably begin in earnest some time in 2001. If you would like to help with the planning, or even write a chapter in this book, please contact me.

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

SLDO Liaison

Since its creation a few months ago, the SLDO Liaison Subcommittee has focused on finding Appellate Advocacy Committee members interested in serving as liaisons to local defense organizations. At this time the Appellate Advocacy Committee has liaisons in 16 states, which means there is room for other committee members who would like to serve in this important capacity.

An SLDO liaison's job is to act as an information conduit between the Appellate Advocacy Committee and the liaison's local defense organization. For example, the SLDO liaisons will be instrumental in helping to publicize the committee's upcoming seminar in October 2001.

Persons interested in learning more about the SLDO liaison program are invited to contact Daniel Lindahl at 503-499-4614 or dan.lindahl@bullivant.com.

R. Daniel Lindahl
Bullivant, Houser, Bailey, P.C.
Portland, OR

*The search is for the just word, the
happy phrase, that will give expression
to the thought, but somehow the
thought itself is transfigured by the
phrase when found.*

—Benjamin N. Cardozo

TRACK RECORDS: A COMPARISON OF THE RATES OF REVERSAL OF PERSONAL-INJURY JURY VERDICTS IN THE FEDERAL CIRCUITS

By David Pruessner and Lance Caughfield

What are your chances of reversing a plaintiff's jury verdict in a personal-injury case in federal court? The answer may well depend on which circuit will hear the appeal. As this article demonstrates, the different federal circuits have widely different "track records" on rates of reversal regarding plaintiffs' personal injury verdicts. Some circuits grant almost complete deference to juries, while other circuits are more receptive to arguments that a jury was "inflamed by passion" or influenced by harmful errors in the trial, or simply that a reasonable juror could not have rendered a verdict in favor of the plaintiff.

NEED FOR STATISTICS

Of course, *all* appellate courts claim to grant great deference to jury verdicts. In fact, the various courts of appeals often use identical language when reviewing jury verdicts, citing the Seventh Amendment¹ or stating that the court will not "substitute" its opinion for that of the jury. However, the track records of the different circuits indicate that the actual deference shown to plaintiffs' jury verdicts varies widely between the circuits.

Reversal-rate information would seem to be critical to appellate lawyers. Counsel would certainly want to know the rate of success *before* advising a defendant to

pursue an appeal that attacks a jury verdict. After all, the medical profession provides patients with statistics on rates of survival for particular diseases, and rates of cure for particular treatments. No doubt, doctors could decline to provide such information and resort to the truism often cited by lawyers, "every case is unique." And they would be right. General statistics gloss over the unique circumstances of each situation and never translate easily to any particular case. However, the general statistics supplied by doctors enable their patients to make better-informed decisions. How can we, as appellate lawyers, fail to provide our clients with similar guidance?

Defendants faced with the decision whether to appeal after an adverse verdict would probably find it quite helpful to know how often defendants in general are able to convince a particular court of appeals that the jury was either prejudiced by errors in the trial, or that the jury simply reached an untenable conclusion. Similarly, both plaintiffs and defendants may wish to consider the statistics in evaluating and negotiating post-trial settlement offers. As will be seen below, a defendant's threat to appeal an adverse verdict may be viewed as either an ominous warning, or a dying utterance, depending on the circuit in which the threat is made.

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LANCE CAUGHFIELD (J.D., University of Texas School of Law 1996) is an appellate attorney at the Dallas office of Fletcher & Springer, L.L.P. His practice encompasses appeals in both state and federal courts. He may be contacted through his web site: www.fletchspring.com.

DEARTH OF STATISTICS

Despite this legitimate need for information on the rates of reversal of jury verdicts,² there has been very little research published on the topic. We have found no articles devoted to this topic and no meaningful statistics from which an article can be produced. The Administrative Office of the U.S. Courts provides some useful information regarding appeals in general, although the information is not collected or published in categories that address jury verdicts. The Administrative Office maintains statistics on the rates of reversal for *all* cases, both civil and criminal.³ These statistics are compiled for the circuits as a whole and for the individual circuits.

Even these general statistics demonstrate that rates of reversal vary widely between the circuits. Among the circuits as a whole, the rate of reversal of all cases is approximately ten percent. At the low end of this spectrum, the Second Circuit has a reversal rate of approximately two percent. At the other end of the spectrum, the Seventh Circuit has a reversal rate of more than fourteen percent. This startling difference in the reversal rates in all cases certainly suggests that the circuits are likely to produce different results when they review jury verdicts. However, these statistics maintained by the Administrative Office aggregate very broad categories of cases: civil, criminal, prisoner suits, etc. They provide no guidance on how often the circuits reverse jury verdicts, as opposed to summary judgments and other dispositions. Therefore, the statistics from the Administrative Office are not particularly useful in evaluating the likelihood of overturning a plaintiff's verdict.

FINDING STATISTICS

This dearth of information is understandable. It is a daunting task for anyone to review all appeals for several years to locate the relatively small number of appeals that involve reviews of personal injury verdicts. We performed this task with the help of computerized legal research. Specifically, we tailored a computerized Westlaw search to locate appeals that involved judicial reviews of jury verdicts in personal-injury cases. The search was conducted for all cases (both published and unpublished) that resulted in an opinion issued after 1996. The search therefore covered a time period of almost four years.

Numerous refinements were made to the search to eliminate various types of irrelevant jury verdicts, such as those in criminal cases, business disputes, etc. This refined search was then run in the databases of each of the eleven circuits.⁴ We then evaluated the resulting list of cases to make sure the cases actually fit the “profile” (appeals involving plaintiffs’ verdicts in personal-injury cases),⁵ and

those cases were then classified in terms of result: affirmance or reversal. The precise methodology of our search can be explored, and criticized, on the website of one of the authors.⁶

Readers should realize that, to locate appellate reviews of jury verdicts, it was necessary to employ a search that is naturally “biased” in favor of locating cases in which the court is *upholding* a jury verdict. This bias is not intentional, but unavoidable. Once an appellate court is expressly addressing whether to defer to the jury (and therefore using the type of language that would flag the case for our computerized search), the appellate court has already reached the point where it is more likely to affirm the verdict, rather than reverse. If a court of appeals subtly reversed a jury verdict by discussing the case as if it were purely a question of law (such as finding that a plaintiff was adequately warned, as a matter of law, completely ignoring a contrary verdict), then such a “subtle reversal” might have escaped our search. Given the “affirmance bias” to our search, it is not particularly

surprising to find that, *from the results of our particular search*, some circuits had a high rate of upholding jury verdicts. For example, in the cases located through our computerized search, the Seventh Circuit upheld verdicts in favor of plaintiffs one hundred percent of the time.

COMPILING THE STATISTICS

Despite this “affirmance bias” in our computerized search, we submit that the comparison of “rates of reversal” is still both legitimate and helpful. We are comparing the results of identical searches conducted in each circuit. Thus, even though the search is “affirmance biased,” it is identically biased for all the circuits. Our search still compares “apples to apples” in terms of results. It fairly compares the results of cases in which the appellate court openly discusses whether to defer to the jury’s decision. More importantly, as shown below, even the “affirmance bias” search revealed fairly high rates of reversal of plaintiff jury verdicts. The study results are as follows:⁷

Tabulation of Rates of Reversal

Circuit	Rate of Reversal of Plaintiffs’ Verdicts ⁸	General Rate of Reversal—All Cases ⁹
1st	18 percent	6 percent
2nd	50 percent	2 percent
3rd	20 percent	10 percent
4th	14 percent	7 percent
5th	66 percent	11 percent
6th	8 percent	10 percent
7th	0 percent	15 percent
8th	40 percent	9 percent
9th	25 percent	8 percent
10th	12 percent	10 percent
11th	33 percent	10 percent
Average	26 percent	9 percent

EVALUATING THE CIRCUITS

From these results, several important conclusions can be drawn. First, contrary to “conventional wisdom,” appeals involving plaintiffs’ verdicts in personal-injury cases actually result in reversals *more often* than the general reversal rate for all cases. For example, while the average reversal rate of all cases (civil and criminal) in all circuits is approximately nine per-

cent,¹⁰ the average reversal rate of cases involving a plaintiffs’ jury verdict in a personal injury case is more than twenty-five percent.

The second important observation is that the circuits vary a great deal in the rate at which they reverse plaintiffs’ verdicts. In some circuits, such as the Second and Fifth Circuits, a defendant losing a personal injury verdict has a reasonable chance of convincing the appel-

late court either that the jury was wrong or was misled by error. Appellate practitioners in those circuits should not shy away from framing issues on appeal that directly question the legitimacy of the jury’s verdict.

The Fifth Circuit is particularly inclined, not only to find that the verdict is wrong, but that the evidence requires that judgment be *rendered* in favor of a defendant. According to our search re-

sults, the Fifth Circuit led all other circuits in reversing *and rendering* judgment in favor of defendants.

On the other hand, attorneys in the Sixth, Seventh, and Tenth circuits should realize that a defendant who has lost a personal-injury verdict is very likely to lose a frontal assault on the verdict. Defendants appealing in those circuits should realize that, if they can prevail at all, it will probably be on a purely legal argument that is largely unrelated to the verdict. Such an appeal is least likely to lead the appellate court to conclude that the appellant simply disagrees with the jury's verdict.

PLAINTIFFS' STATISTICS


Although our study was not meant to cover *plaintiffs' appeals* after a defense verdict, we did notice some interesting results in the course of our study. We had expected that, after losing a jury verdict, the plaintiff would rarely appeal, and even more rarely succeed. That is true for most circuits, but not the Fourth, Sixth, Seventh, and Tenth circuits. In those circuits, plaintiffs not only appealed adverse jury verdicts (including low damage awards), but won new trials in approximately thirty-three percent of their appeals. In those particular circuits, plaintiffs were approximately as successful as defendants in attacking adverse jury verdicts. Apparently, these circuits are open to the argument that the defense verdict was the result of procedural errors in the trial that denied the plaintiff a fair trial. In those circuits, a plaintiff's threat to appeal can not be lightly dismissed. Successful defendants in those circuits may wish, before they celebrate, to review the procedural decisions (*i.e.*, possible er-

rors) in the trial and then consult the "track record" of their particular circuit.

Finally, it is interesting to note that, although the Second and Fifth Circuits are the most active in scrutinizing (*and reversing*) plaintiffs' verdicts, they apparently do not extend that level of scrutiny to plaintiffs complaining of defense verdicts. These two circuits are among the most active in reversing plaintiffs' verdicts, but among the least active circuits in reversing defense verdicts.

CONCLUSION

In reviewing decisions from the various circuits, it becomes apparent that each circuit holds to its own unique philosophy. Some circuits strongly hold to the principle of judicial deference to the jury's role. Others seem willing to scrutinize the evidence and arrive at an independent determination whether the evidence permits a plaintiff's recovery. Some circuits will respond positively to a direct challenge to the sufficiency of the evidence, but others will not.

Appellate counsel would be wise to examine the opinions of the controlling circuit by conducting a similar database search of appeals involving reviews of jury verdicts. By doing so, winning arguments and trends may be recognized, significantly improving the chance of success on appeal. At the very least, such research provides the data needed to provide accurate counsel to clients who have lost a verdict but hope to find relief on appeal. 

ENDNOTES

¹ "...the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules

of common law." U.S. Constitution, Amendment VII.

² For ease of reference, we will refer to "affirming" or "reversing" a jury verdict, although, of course, the court of appeals is actually affirming or reversing the trial court's grant or denial of a motion for judgment as a matter of law under FED.R.CIV.P. 50, or a motion for new trial under FED.R.CIV.P. 59.

³ See Leonidas Ralph Mecham, Administrative Office of the U.S. Courts, Judicial Business of the United States Courts, 1999 Annual Report of the Director, which can be found at www.uscourts.gov/judbus1999.

⁴ The Federal Circuit and the D.C. Circuit were not included in this study, due to the limitations on their jurisdiction.

⁵ In most of the cases in our study, the defendant was the appellant, because the judgment was entered in accord with the plaintiff's verdict. However, our study also includes those cases in which the plaintiff won a verdict, then lost a post-verdict renewal of the defendant's motion for judgment under Federal Rule Of Civil Procedure 50 (*i.e.*, judgment was granted *non obstante verdicto*), and then the plaintiff appealed.

⁶ The exact search and methodology are described under "Track Records" at www.pruulaw.com.

⁷ For ease of reading, percentages have been "rounded" to the nearest percentage point.

⁸ As calculated for cases decided after January 1, 1997 and located by the Westlaw search described in the article and detailed at www.pruulaw.com.

⁹ For 1999. See Leonidas Ralph Mecham, Administrative Office of the U.S. Courts, Judicial Business of the United States Courts, 1999 Annual Report of the Director (percentages rounded to nearest whole number.)

¹⁰ See Leonidas Ralph Mecham, Administrative Office of the U.S. Courts, Judicial Business of the United States Courts, 1999 Annual Report of the Director.

*Bluster, sputter, question, cavil; but
be sure your argument be intricate
enough to confound the court.*

—William Wycherley

MAKING AN EFFECTIVE ORAL-ARGUMENT NOTEBOOK

Having confidence when you step up to the podium can make all the difference at oral argument. An oral-argument notebook can instill such confidence. The process of creating a notebook will help you prepare an organized argument, and having the notebook at the podium will allow you to deliver direct, responsive answers to the judges' questions. The following is a step-by-step discussion of how to compile an effective oral-argument notebook.

First, read the briefs with an open mind. Oral arguments are the court's chance to ask questions about your case, so the first step is identifying the questions raised by the briefs. Set aside your bias for your client's position, and imagine you are a law clerk assigned to write the bench brief on your case. As you read the briefs, make a list of questions that come to mind concerning the facts, the procedural history, preservation of error, the legal issues, and the like. You may also want to enlist one of your colleagues to help you make a list of potential questions. Once compiled, this list will help you prepare a notebook that contains all of the answers you will need at the podium.

Second, organize your primary argument. For this step, put aside objectivity and become an advocate again. The most important section of the notebook is your main argument. This section should be tabbed "Main Argument" on both sides of the tab for easy reference. The main argument should fit on either one page, or two facing pages, so you can see your entire argument without having to flip pages. To fill in your main argument, summarize your theory on each issue into

one or two sentences, the way you would explain it to a spouse or parent. Sometimes, this will track the argument in your brief; other times, you may want to express your position in a new way. Regardless, you should distill each issue down to its essence, and then put it down on paper in a way that will remind you at a glance.

Under each issue, use subdivisions that answer all of the potential questions raised by that issue, be they factual, procedural, or substantive. If, for instance, you think a judge might question whether the issue was properly preserved, include a citation to the relevant portion of the record. Or, if you discover an especially helpful portion of a case on point, put the case name and a pinpoint citation in the responsive subheading. Consult your list of questions to ensure that you have a concise answer to every anticipated question on the issues presented. Finally, prepare some brief concluding remarks that will tell the judges the exact relief you are seeking on appeal.

Third, prepare separate sections on subsidiary arguments. Although the main argument is your script of how you would like the argument to proceed, most appeals contain subsidiary issues that might come up at oral argument. These may be procedural concerns raised in earlier proceedings or legal arguments tangential to your main issues. Your list of questions will usually help you identify the subsidiary issues raised by your case. For each subsidiary issue, prepare a brief response with relevant subheadings and citations to the record. You should then place each response behind an appropri-

ately titled tab after your main argument. If one of these subsidiary points comes up at oral argument, you can easily flip to your response, make the points listed there, and then flip back to your main argument without losing stride.

Last, you may want to make an index of the record to include at the end of the notebook. Oral argument often turns on the record, either because the judges have questions about what happened below or because your adversary raises an issue that brings the record into play. In these circumstances, an index of the record can prove handy, especially if the record is voluminous. Creating a record index is also a good way to review a record that may have grown cold in the interim between briefing and oral argument. Make your index using words or phrases that call to mind every portion of the record salient to the issues on appeal. For each word or phrase, write down page references to the joint appendix or the document number in the record excerpts. Then alphabetize the words and phrases for easy reference. This will place the answers to questions about the record at your fingertips, so you can quickly get back to your main argument.

Completing these steps should help you prepare a well-organized argument that fits easily inside a small three-ring binder. The information contained in your notebook can boost your confidence at the podium, by allowing you to answer questions about your main argument, subsidiary issues, or the record, without hesitation. For further information on how to compile an effective oral argument notebook, see Michael E. Tigar and Jane B. Tigar, *Federal Appeals: Jurisdiction and Practice* §10.07 (3d ed. 1999).

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Judges are, in many respects, like parents. You have to give them a good enough reason to do what you want.

—Darlene Ricker

U.S. Supreme Court

EVIDENTIARY OBJECTIONS

In *Ohler v. United States*, 120 S. Ct. 1851 (2000), the Court held 5-4 that, where a court rules that the prosecution may introduce evidence of a prior conviction and the defendant makes a strategic decision to introduce that evidence preemptively on direct examination, the defendant loses the right to assert error. The defendant in this case was charged with importation and possession of marijuana with intent to distribute. Before trial, the district court granted the prosecution's motion to introduce Ohler's prior felony conviction under F.R.E. 609(a)(1). At trial, Ohler admitted on direct examination that she had previously been convicted of possession of methamphetamine. Ohler appealed the trial court's ruling allowing the prosecution to use her prior conviction for impeachment. The Ninth Circuit affirmed, holding that the defendant had waived her right to challenge the evidence of her prior conviction. *Id.* at 1853.

The Supreme Court affirmed. In doing so, it relied on the principle that "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted." *Id.* (citing 1 J. Weinstein & M. Berger, *Weinstein's Federal Evidence* §103.14, 103-30 (2d ed. 2000)). Although normally this proposition is not controversial, in *Ohler* the only reason the defendant "chose" to introduce the prior conviction was because the prosecution had won the right to use it against the defendant. The Court pointed out that in a trial, both sides must make tactical choices and live with their decisions. *Id.* at 1854-55. The Court reasoned that Ohler could have chosen to preserve her objections if she wanted to, and it is not unfair to require the defendant to make a choice as to how to deal with adverse evidence that the court has ruled admissible. Moreover, requiring the defendant to make such a choice does not unconstitutionally burden her right to testify. The dissenting justices countered that the ruling is in-

consistent with the rule that a party may "bring out evidence ruled admissible over his objection to minimize its effect without it constituting a waiver of his objection." *Id.* at 1856 (citing 1 J. Strong, McCormick on Evidence §55, p. 246 (5th ed. 1999)).

HABEAS CORPUS

In *Slack v. McDaniel*, 120 S. Ct. 1595 (2000), the Court addressed three issues affecting habeas corpus appeals in light of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which added a requirement that the circuit court make a threshold determination that the appeal has merit and issue a "Certificate of Appealability" (COA) before addressing the merits of the petition.

The appellant, Antonio Slack, was convicted of second-degree murder in 1990, and thereafter filed a writ of habeas corpus in federal court, raising issues he had not pursued in his state post-conviction appeal. The federal court dismissed his habeas petition for failure to exhaust state remedies, and after unsuccessfully pursuing his state remedies, Slack refiled his habeas corpus petition. The district court again dismissed the petition on procedural grounds—that the refiled petition raised issues already raised in the original petition, *i.e.*, a "second or successive petition" (even though the issues previously raised had never been reached by the district court). Thus, the petition was dismissed twice without reaching the merits. While the petition was pending in district court, the AEDPA became effective, but when Slack appealed to the Ninth Circuit, it applied the pre-AEDPA law, and dismissed his appeal.

Addressing the threshold issue, the Supreme Court held that the AEDPA governed any habeas appeal filed after the effective date of the 1996 act, regardless of whether the petition was filed in the district court before or after AEDPA's effective date. Thus, the appellant was obligated to obtain a COA before proceeding in the circuit court, even though his habeas petition had been filed in district court before the COA requirement existed.

Second, the Court clarified the standard to apply when deciding if a Certificate of Appealability should be issued. The general standard, derived from *Barefoot v. Estelle*, 463 U.S. 880 (1983), requires a "substantial showing of the denial of a constitutional right." The Court rejected the state's claim that where the habeas petition is dismissed on procedural grounds, there can never be a showing that denying the petition was a constitutional deprivation. Instead, the Court held that where the petition is dismissed for procedural reasons, a COA can be issued upon a showing that the petition raises at least a debatable constitutional violation from the perspective of a "reasonable jurist."

Finally, the Court held that when a habeas petition is refiled after initially being dismissed for failure to exhaust state remedies, it is improper to then dismiss it as a second or successive petition. Rather, it should be considered as a first petition by the court. The matter was remanded to the Ninth Circuit to determine if a COA should be issued.

PUNITIVE DAMAGES

The Court has granted certiorari in a trademark case on the question of what standard of review should be applied when punitive damages are challenged as constitutionally excessive. *Cooper Indus., Inc. v. Leatherman Tool Group Inc.*, No. 99-2035 (Oct. 10, 2000). In that case, the jury awarded \$50,000 in compensatory damages on a common-law unfair-competition claim, but found for the defendant on the infringement claim. It then assessed \$4.5 million in punitive damages—90 times the compensatory award. The trial court let the punitive damages stand, with little analysis. Applying an abuse-of-discretion standard, the circuit court affirmed as to punitive damages. The question for review is whether due process requires application of less deferential *de novo* review for constitutional challenges of punitive-damages awards. The Court has addressed due-process questions regarding punitive damages on several occasions in the last

decade. See *BMW of North Am. v. Gore*, 116 S. Ct. 1589 (1996); *Honda Motor Corp. v. Oberg*, 114 S. Ct. 2331 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1993). Although these decisions did engage in review of punitive-damages awards on due-process grounds, they did not explicitly determine which standard of review applies.

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Second Circuit

COLLATERAL ORDERS

In several recent decisions, the Second Circuit has further defined those cases in which interlocutory appeals concerning claims of immunity will be heard. In *Rohman v. New York City Transit Auth.*, 215 F.3d 208 (2d Cir. 2000), the court noted that the collateral-order doctrine allows interlocutory appeals to be taken from determinations of “claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” *Rohman*, 215 F.3d at 214. Claims falling within this category include a claim for qualified immunity by a Transit Authority supervisor who was sued by a former Transit Authority employee for his part in the employee’s arrest, *Rohman*; a claim for immunity under the Eleventh Amendment by the Commissioner of the Connecticut Department of Environmental Protection in a suit by a Connecticut resident, *Farricielli v. Holbrook*, 215 F.3d 241 (2d Cir. 2000); and a claim for qualified immunity by a New York City police officer in a civil-rights case involving the intentional exposure of arrestees to the press (a practice known in New York as the “perp walk”), *Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000).

APPELLATE JURISDICTION

The court ruled that it had jurisdiction to consider an appeal from an order indefinitely staying litigation against the former Socialist Federal Republic of Yu-

goslavia. In *767 Third Ave. v. Consulate General of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000), the district court ruled that the property claims made in the case raised political questions (caused by the breakup of Yugoslavia) that could not be addressed by the court. Instead of dismissing, however, the court stayed the case indefinitely. The Second Circuit recognized that the “abstention-based stay order” was appealable as a final judgment because it effectively put the litigants out of court. *Id.* at 159.

STATE SOVEREIGNTY

In *Connecticut v. Cabill*, 217 F.3d 93 (2d Cir. 2000), the circuit court considered as a matter of first impression whether a suit is within the jurisdiction of the district court or the original jurisdiction of the United States Supreme Court. The suit involved a claim by Connecticut against certain New York officials charged with enforcing what Connecticut claimed was an unconstitutional New York law. The law allowed licensed lobstermen domiciled in New York to take lobsters from a certain area near Block Island Sound but did not allow licensed lobstermen from other states to take lobsters from the same area. The district court dismissed for lack of subject matter jurisdiction, ruling that the State of New York was the sole real party in interest and that the case therefore fell within the Supreme Court’s exclusive jurisdiction over actions between states. On appeal, the Second Circuit conducted a thorough and useful discussion of when a state may or must be named as a defendant (and also when a state may properly act as a plaintiff in a suit against another state). Ultimately, the court held that a state must be named as a defendant where: (1) the alleged injury was caused by actions specifically authorized by state law; and (2) the suit implicates the state’s core sovereign interests. After analyzing these criteria, the court held, over a dissent, that the case did not involve New York’s core sovereign interests. Accordingly, Connecticut could, but need not necessarily name, New York as a party, and the district court’s dismissal was improper.

AMERICANS WITH DISABILITIES ACT

The court had an opportunity to inter-

pret the Supreme Court’s trio of 1999 ADA decisions (*Sutton*, *Murphy*, and *Albertson’s*) in a case on remand from the Supreme Court, *Bartlett v. New York State Bd. of Law Examiners*, 226 F.3d 69 (2d Cir. 2000). In *Bartlett*, the plaintiff claimed an impairment due to dyslexia and requested special accommodations to take the New York bar examination. The district court found that the plaintiff was not substantially limited in her ability to read because of her demonstrated ability to “self-accommodate” to make up for her reading difficulties. The district court also found, however, that the plaintiff was substantially impaired in the major life activity of working and granted the plaintiff’s requested relief. The Second Circuit originally affirmed in part and reversed in part, finding, *inter alia*, that the district court erred in considering the plaintiff’s “self accommodation” when determining whether she was substantially impaired under the ADA.

The Supreme Court granted certiorari and vacated and remanded in light of *Sutton v. United Air Lines*, 527 U.S. 471, 119 S. Ct. 2139 (1999), *Murphy v. United Parcel Service*, 527 U.S. 516, 119 S. Ct. 2133, (1999), and *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162 (1999). On remand, the Second Circuit discussed the application of *Sutton*, *Murphy*, and *Albertson’s* to the plaintiff’s claim of disability and the elements of proof required to establish a disability in the major life activities of working and reading. Ultimately, the Second Circuit remanded to the district court for further findings consistent with its legal analysis. Although somewhat specific to its facts, the case offers a useful analysis of the Supreme Court’s current position on defining disability under the ADA.

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Fourth Circuit

RESTITUTION

In *United States v. Jones*, 225 F.3d 468 (4th Cir. 2000), the Fourth Circuit resolved a conflict with other circuits concerning the courts’ jurisdiction to award damages in an action seeking the return of confiscated property under Federal

Rule of Criminal Procedure 41(e). Jones sought the return of confiscated property or, alternatively, damages for property that had been destroyed by the government. The court's earlier decision in *United States v. Kanasco, Ltd.*, 123 F.3d 208 (4th Cir. 1997), held that a Rule 41(e) action does not become moot when the government destroys the property sought by the plaintiff. The *Kanasco* decision appeared to conflict with Third and Fifth Circuit decisions holding that actions for damages under Rule 41(e) are barred by sovereign immunity. See *United States v. Bein*, 214 F.3d 408, 412-16 (3d Cir. 2000); *Pena v. United States*, 157 F.3d 984, 986 (5th Cir. 1998).

Since the *Kanasco* case did not directly raise the jurisdictional issue of sovereign immunity, the Fourth Circuit stated it was free to address that issue in *Jones*. 225 F.3d at 469, citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984), and *Webster v. Fall*, 266 U.S. 507, 511 (1925). Consistent with the decisions in *Bein* and *Pena*, the Fourth Circuit then ruled that sovereign immunity deprived the courts of jurisdiction to award damages under Rule 41(e) for property destroyed by the government.

The Fourth Circuit was aware of the problems created by the possibility that the government could deprive a court of jurisdiction over a Rule 41(e) motion by unilaterally destroying the property sought. In footnote 3 of the *Jones* opinion, the court reminded the government that the Due Process Clause requires notice and an opportunity to be heard before it may deprive an individual of property.

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Fifth Circuit

REMOVAL

In *Johnson v. Heublein Inc.*, 227 F.3d 236 (5th Cir. 2000), the Fifth Circuit found removal appropriate even though it occurred over a year after the complaint was filed. The provisions of 28 U.S.C. §1446(b) require removal of a state-court action within 30 days. If a later pleading creates the basis for removal, section 1446(b) limits the removal time period to one year after the case was initially

filed. Despite these provisions, the Fifth Circuit applied the judicially-created "revival exception" and held the defendant regained the right of removal when the plaintiffs filed an amended complaint. Under the Fifth Circuit's standard, "a lapsed right to remove an initially removable case...is restored when the complaint is amended so substantially as to alter the character of the action and constitute a new lawsuit."

POST-TRIAL MOTIONS

In *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496 (5th Cir. 2000), the Fifth Circuit addressed a blanket prohibition on the filing of post-trial motions. After ruling on the defendant's 12(b)(6) motion, the district court prohibited any further post-judgment motions absent compelling new evidence not previously available. After affirming the motion to dismiss on the merits, the Fifth Circuit recognized that blanket prohibitions were a common practice among district courts. The court found that no judge has the authority to prohibit "litigants from filing motions for reconsideration or relief, such as those contemplated by Fed. R. Civ. P. 59 and 60." The Fifth Circuit directed judges within the circuit to entertain such post-judgment motions and to "carefully consider each such motion on its merits, without begrudging any party who wishes to avail himself of the opportunity to present such motions in accordance with the rules of procedure and with the standards of professional conduct."

RECUSAL AND JURISDICTION

In *Republic of Panama v. American Tobacco Co.*, 217 F.3d 343 (5th Cir. 2000), a defendant filed a motion to recuse, challenging the district judge's prior involvement in a tobacco-products case. The district court denied a motion to recuse before remanding the case to state court. When the recusal issue was appealed, the plaintiff argued that the Fifth Circuit lacked jurisdiction over the appeal of a recusal decision. According to the plaintiff, the proper method to appeal the denial of a motion to recuse was through an immediate writ of mandamus. Moreover, the plaintiff argued that a remand decision is generally not reviewable under 28 U.S.C. §1447(d). The Fifth Circuit disagreed, holding that the

issue of recusal may be challenged for the first time on appeal. Additionally, any action following an erroneous ruling on a motion to recuse should be vacated, and thus, the Fifth Circuit's action did not violate the general prohibition against review of a remand order. The court noted that where a district judge should have been recused, vacating the remand order is an unrelated "ministerial task."

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Seventh Circuit

EXPERTS

Expert witnesses may not testify to untested theories. The Seventh Circuit affirmed the lower court's decision to exclude expert testimony because it was not used by others in the industry nor was it scientifically tested. *Bourelle v. Crown Equip. Corp.*, 220 F.3d 532 (7th Cir. 2000). In finding that speculative opinions of experts are not admissible, the Seventh Circuit premised its opinion on *Daubert* and *Kuhmo*. The witness in *Crown* was qualified as an expert and had reviewed depositions and relevant facts before giving his opinion. But the expert's hypothesis or suggestion that a modification to the equipment would have prevented the accident was incompetent even in light of his qualifications as an expert. The court noted the lack of testing or study of the proposal and the failure to prepare necessary engineering and mechanical documents to support the theory.

WORK PRODUCT

On a different note, a case from the Northern District of Illinois provides a detailed analysis of the work-product privilege. *Caremark, Inc. v. Affiliated Computer Servs., Inc.*, 195 F.R.D. 610 (N.D. Ill. 2000), sets forth a full analysis of the history and application of the work-product privilege and provides a good overview. The discussion focuses on documents prepared in anticipation of litigation that are also used for general business purposes. In essence, once a document otherwise meets the work-product privilege requirements, it does

not lose that privilege because the document is also utilized in making a nonlitigation-related business decision.

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Eighth Circuit

RETROACTIVITY

A motorist who was injured in an automobile accident brought a motion for relief from a judgment in favor of the seat-belt manufacturer. The district court had concluded that the Minnesota “seat belt gag rule,” codified in statute, barred her claims. The Eighth Circuit affirmed, and denied the plaintiff’s petition for rehearing. The Eighth Circuit issued its mandate on March 15, 1999, and a certified copy of the mandate was filed with the district court as its final judgment on March 17, 1999.

One month later, the Minnesota Legislature amended the statute to provide that it does not affect the right of a person to bring an action for damages based on a defective seat belt. The amendment became law on May 18, 1999. The plaintiff returned to the district court, filed a motion under Rule 60 to vacate the “final judgment” on the basis of the new statute. The district court denied the motion, holding that the lawsuit was not “pending” on the day the statute became effective. The Eighth Circuit affirmed.

The court held that plaintiff’s case was no longer “pending,” since the mandate and final judgment had been entered. There was nothing further for any court to do. Although the time for petition to the United States Supreme Court for certiorari had not expired, no petition had been filed. Thus, the case could in no way be characterized as “awaiting a decision.” The Eighth Circuit noted that generally “a change in the law that would have governed the dispute, had the dispute not already been decided, is not by itself an extraordinary circumstance” warranting Rule 60(b) relief from a final judgment. *Carlson v. Hyundai Motor Co.*, No. 99-3103 (8th Cir. Aug. 15, 2000).

COLLATERAL ORDERS

Plaintiff sued her employer in a Title VII action. In the course of litigation, she brought several motions to compel dis-

covery, and was herself subject of a discovery sanction. She appealed these orders, asserting that the appellate court had jurisdiction under the collateral-order doctrine. Although recognizing the authority in some circumstances and by other circuits to allow an appeal from pretrial discovery sanctions, the Eighth Circuit stood fast by its prior precedent that pretrial discovery orders are not immediately appealable because they can be effectively reviewed after final judgment. *Tenkku v. Normandy Bank*, No. 99-1930 (8th Cir. 2000), citing *Sedlock v. Bick Corp.*, 926 F.2d 757, 758 (8th Cir. 1991), and *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981).

RULE 50 PRESERVATION

Plaintiff sued the City of St. Louis and two supervisors alleging race discrimination. After the jury returned a verdict on some but not all counts, the court entered judgment, and the defendants appealed. The Eighth Circuit held that the city did not preserve its challenge to the evidentiary sufficiency of the verdict because, although it did move for judgment as a matter of law on some counts, it did not move for JAML on plaintiff’s Title VII count. “Under Rule 50(b) of the Federal Rules of Civil Procedure, ‘a litigant who fails to move for judgment as a matter of law at the close of the evidence cannot later argue—either in a post-trial Rule 50 Motion or on appeal—that the verdict was supported by insufficient evidence.’” The court held that the co-defendant had moved appropriately for JAML on the ground of insufficient evidence of discrimination.

This case presents no new law, but serves as a reminder of the necessity to specifically, clearly, and inclusively state the grounds for a motion for judgment as a matter of law at the close of the evidence. *Jackson v. City of St. Louis*, No. 99-1807 (8th Cir. 2000).

UNPUBLISHED DECISIONS

In an exceptional decision, the Eighth Circuit has declared its own Local Rule 28A(I) (providing that unpublished opinions are not precedent) unconstitutional under Article III of the United States Constitution “because it purports to confer on the federal courts a power that goes beyond the ‘judicial.’”

Plaintiff sought a refund of overpaid federal income tax. The Internal Revenue Service denied her claim because, although mailed within the statutory period, the claim was received one day late. The issue on appeal was whether the “Mailbox Rule” should be applied to save her claim. The Eighth Circuit observed that in a prior unpublished opinion, it had rejected exactly the same argument that the taxpayer raised in the instant appeal. The court noted “although it is our only case directly on point, [plaintiff] contends we are not bound by [it] because it is an unpublished decision and thus not a precedent under Eighth Circuit Rule 28A(I). We disagree.”

The court started its analysis with a review of *Marbury v. Madison*, 1 Cranch 137, 177-78 (1803), and followed the development of the concept of judicial power through to current times. The opinion contains a lengthy discussion of the doctrine of precedent, which it described as a doctrine “well established in legal practice” by the late 18th century. The concept of precedent was, in the Eighth Circuit’s view, intended by the framers of the Constitution to be included when they drafted Article III.

The court concluded by admonishing that its decision was not about whether opinions should be published, and if so, in what form. “Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report. Such decisions may be eminently practical and defensible, but in our view, they have nothing to do with the authoritative effect of any court decision.” The court also rejected the notion that “practicalities” should govern which cases are precedential and which are not. “We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only.” Finally, the court noted that it was not creating a “rigid doctrine of eternal adherence to precedence,” noting that cases can be overruled, and sometimes should be.

Based on its reasoning, the court held that it was not free to ignore its prior un-

published decision, and thus, the court ruled against the plaintiff. In the ongoing debate concerning unpublished opinions, this case is certain to draw considerable attention. *Anastasoff v. United States*, No. 99-3917 (8th Cir. 2000).

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Ninth Circuit

COLLATERAL ORDERS

The Ninth Circuit recently explored the mechanics of pendent appellate jurisdiction and the collateral-order doctrine—the appellant’s friend—in three consolidated cases against the City of Los Angeles, its mayor, police officers and numerous other city officials. In *Cunningham v. Gates*, 2000 WL 1299744 (9th Cir. 2000), plaintiffs alleged use of, or acquiescence in the use of, excessive force by police officers and an unconstitutional policy of indemnifying officers against punitive-damages awards in excessive-force cases. Defendants moved for summary judgment on one or both of two theories, qualified immunity and what may be called *Heck* issues, based on the holding in *Heck v. Humphrey*, 512 U.S. 477 (1994) (holding that a successful claim under 42 U.S.C. §1983 that would “necessarily imply” the invalidity of a plaintiff’s criminal conviction is not cognizable until that conviction is overturned). The district court granted summary judgment to the mayor, but denied it as to all other defendants, who then appealed.

Since denials of summary-judgment motions are not final, the court looked first at the collateral-order doctrine to see if it conferred jurisdiction to hear this matter. Appeals from collateral orders are permissible when the order conclusively determines the disputed questions, resolves an important issue completely separate from the merits of the action, and is effectively nonreviewable on appeal from the final judgment. Applying these criteria stringently “to ensure that this narrow exception ‘never be allowed to swallow the general rule’ that a judgment be final prior to appeal,” the court

found that it had jurisdiction over an order denying summary judgment on a qualified-immunity defense, but only as to “purely legal issues.”

Not satisfied with such limited review, the defendants argued in the alternative that pendent appellate jurisdiction allowed the Ninth Circuit to review this matter as an interlocutory appeal, raised in conjunction with other issues properly before the court. In considering this argument, the court was guided by *Swint v. Chambers County Comm’n*, 514 U.S. 35, 44 n.2 (1995), which set out the general rule against exercising pendent jurisdiction over related rulings, but left open the possibility that the circuit courts could extend such jurisdiction if the rulings were “inextricably intertwined” or if review was necessary to ensure meaningful consideration of the independently reviewable issues. Noting that it has consistently interpreted “inextricably intertwined” very narrowly, the court found that neither the *Heck* issues argued by the individual defendants nor the constitutional claims argued by the city were so intertwined. The court therefore found that it lacked pendent jurisdiction to review these matters.

Returning to the qualified-immunity issues that it had found reviewable as collateral orders, the court admitted it generally had no jurisdiction to consider such an appeal where the district court had found disputed material facts. However, the court asserted that such a ruling does not become nonappealable merely because the district judge *stated* that there were material facts in dispute; after all, the court noted, whether a disputed fact is material is solely a question of law, and thus reviewable on an interlocutory basis. Criticizing the lower court for its failure to conduct the required individualized analysis of each defendant claiming qualified immunity, the court undertook its own individual scrutiny, and resolved the matter by affirming the denial of summary judgment as to three groups of defendants and extending the qualified-immunity privilege to all others.

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D.C. Circuit

APPELLATE JURISDICTION

Failing to distinguish between a decision and a judgment can be fatal to an appeal. Dissenting from a decision to deny a petition for rehearing en banc filed by an amicus curiae, four judges advised their colleagues to instruct the clerk of court to issue all judgments following Model Forms 31 and 32 to avoid inadvertent and unintentional loss of appellate rights that might occur when a document disposing of a case is misconstrued as not being a “judgment” under Rule 58 that would start the appellate deadlines. *Kidd v. District of Columbia*, 214 F.3d 179 (D.C. Cir. 2000) (dissent).

TAX EXEMPTIONS

Churches that publicly oppose specific political candidates risk losing tax-exempt status. For the first time in history, the IRS revoked the tax-exempt status of a bona fide church because of its active participation in the political process. *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000).

In 1992, before to the presidential election, the Church at Pierce Creek in Binghamton, New York placed a full-page ad in both USA Today and the Washington Times. The ad was captioned “Christians Beware.” The text alleged that certain of candidate Bill Clinton’s positions violated Biblical teachings. The IRS revoked the church’s tax-exempt status, and the church instituted suit for its reinstatement. The trial court granted summary judgment to the IRS, and the appellate court affirmed. The D.C. Circuit held that the church’s constitutional rights were not violated by the revocation. Indeed, the court explained that the revocation was “more symbolic than substantial” as contributions may remain tax deductible and church income tax-free due to other provisions in the Code. Furthermore, the church may continue to engage in politics without compromising its status by forming a related organization under §501(c)(4).

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JACK BASS, *UNLIKELY HEROES*

Deluged with new books on this and that, the avid lawyer reader—and what truly good lawyer isn't?—may sometimes feel it is all that he or she can do just to keep up with the latest issued by the publishing houses. Well, this review is intended as a check on that tendency. Jack Bass's *Unlikely Heroes* was published 19 years ago. A chronicle of the vital role played by a handful of federal appellate judges in achieving a peaceful end to "Jim Crow" discrimination in the South, Bass's book is essential reading for appellate lawyers, for at least two reasons.

First, the book brings home the fact that social change through law cannot be achieved without the willing participation of intermediate appellate courts. Too many lawyers—never mind members of the general public—think of the legal framework of the civil rights revolution almost entirely in terms of Supreme Court decisions (of which *Brown v. Board of Education* is the archetype) and congressional enactments (most notably, the Civil Rights Act of 1964 and the Voting Rights Act of 1965). But during the 10 years that passed between *Brown* and the passage of the Civil Rights Act, it fell to the federal judges in the Fifth Circuit, and especially to the members of the Court of Appeals for the Fifth Circuit, to confront what rapidly became a region-wide determination on the part of the "Jim Crow" white South to resist the desegregation mandates of *Brown*, and the Supreme Court decisions that followed *Brown*. Bass makes clear that it was the willingness of the leading Fifth Circuit judges—John Robert Brown of Texas, Ri-

chard Taylor Rives of Alabama, John Minor Wisdom of Louisiana, and Elbert Parr Tuttle (born in California and raised in Hawaii, but who practiced law in Atlanta)—to enforce vigorously the full mandate of *Brown* which, time and again, frustrated the obstructionist intentions of state and local authorities. One shudders to think of the course that history might have taken had the Fifth Circuit been dominated by the likes of Benjamin Franklin Cameron of Mississippi, a passionate devotee of the Southern status quo.

The second reason why lawyers—and particularly appellate lawyers—should read this book is how much one will learn about the decision-making processes of an intermediate appellate court. To be sure, this subject has been canvassed by many authors, and I do not mean to suggest that Bass's efforts begin to approach the analytical precision of a Ruggero Aldisert. But what Bass's book does, that more abstract works cannot, is bring to life the human dynamics of appellate judges engaged in deciding cases. And precisely because the circumstances of the cases involved are at least generally familiar to all of us, the reader can better appreciate the context in which these judges had to struggle to reach their decisions.

The book has its weaknesses. The organizational structure is anything but rigorously chronological, and the cutting back and forth between persons and events sometimes leaves the reader confused, especially early on when Bass assumes too great a working familiarity with the day-to-day unfolding of the

course of the civil rights struggle of the 1950's and 1960's. Moreover, the writer's views on a number of topics, notably the question of judicial activism, reflects a rather unquestioning "straight-line" projection of the doctrines developed by Tuttle and his colleagues to address the specific problem of the Southern white defense of Jim Crow, into areas (notably school finance) where their application lacked a comparable legitimacy. But as I have already indicated, one does not read Bass for his grasp of grand jurisprudential theory, and these deficiencies are more than made up for by the book's core strengths.

I have one last point that is one peculiar to the appellate lawyer's point of view. I was struck by how the work of "the Four" (Brown, Rives, Tuttle, and Wisdom) was made possible by the intimate collegiality of the Fifth Circuit bench. It seems inconceivable that our present-day federal circuit court system, with its hundreds of judges churning out published decisions at a rate that will fill the contemplated 999 volumes of the Federal 3d reporters in a fraction of the time it took to fill the Federal 2d set, would be able to dedicate the time and effort, both individual and collective, required to address a great social and political crisis in the fashion with which "the Four" so magnificently met the challenge of "massive resistance" to ending segregation. Let us hope we never confront the need for an American intermediate appellate court to address a comparable challenge to the authority of the law. But if we do, let us hope the judges of that court have the wisdom to remember and be guided by the example set by the "unlikely heroes" whose story has been so well told by Mr. Bass.

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*Our opinions are at best
provisional hypotheses.*

—Learned Hand

"THE TEN-MINUTE WORKOUT" TO SHED UNWANTED POUNDS FROM YOUR BRIEF

The point at which a writer has successfully organized all supporting argument and authorities into clear structure is actually only the halfway mark, after which the focus should shift to—well—focusing. The length of your brief can be reduced in direct proportion to the time spent revising. Many writers frequently make the mistake of skipping that last ten-minute review of the written product and, in the process, sacrifice brevity.

The increasing number of court rules imposing page limitations on submissions to the court tells us what we should already know—most briefs are anything but brief. Verbosity and failure to edit are the principal causes of overwriting. When it comes to making a point, the editor's sword is often mightier than the writer's pen.

Even if we are not constrained by rule from writing endlessly, we should consider the audience, which may have neither the time nor the temperament to wade through a twenty-page argument about the present-sense-impression exception to the hearsay rule. The reasons for overwriting range from "pride of authorship" to "brief by committee" to "belt and suspenders." None of these reasons outweigh the risk of alienating your audience or diluting the effectiveness of your presentation.

Sometimes the issue is so complex that we subconsciously feel the need to document the struggle we endured. Many ideas, however, take a day to research but only a moment to explain. Simplification of the idea takes place on paper more than it does in the writer's head, so the first draft is not only ripe for further organization, it is ready for a trim.

This is not to say that the "long form" has no value. To the contrary, the first draft will refresh your understanding before oral argument and might even serve to justify your bill to a questioning client. Save the document as a "draft" and create a new "final" on your word-processing system. In creating the final version, consider the following suggestions:

LONG QUOTES

The excitement of finding a supporting case with facts and law on point often manifests itself in a series of 100-word block quotes, separated by narratives like "the court also added." When used properly, quotes can be the most direct line of attack. When used obsessively, quotes can be downright boring.

Before reproducing the entire case in the form of single-spaced block quotes consider this: (1) the court may have a speaking or working familiarity with the case; or (2) the court may benefit most by reading the entire case (seeing is believing). If your case really hits the bull's-eye, consider attaching it and encouraging the judges to read it for themselves.

ARGUING BOTH SIDES

Integrity and the rules of ethics (hopefully in that order) require the advocate to disclose contrary authority. (See ABA Model Rule of Professional Conduct 3.3.) In anticipating the response of your adversary, don't make his/her whole argument and then respond to it. Wait and see how well the opposition builds its argument before picking it apart or illuminating the key distinction. This process not only shortens the initial submission, it enables you to keep the cards closer to your vest and get the last word by way or reply.

SURPLUSAGE

Avoid the desire to start a point with adjectives or adverbs that are harder to swallow than a glass of sawdust ("amazingly," "not coincidentally," or my personal favorite, "parenthetically"). Sentences that begin with adverbs will likewise begin with a comma and a pause. Overuse of such words is disruptive to the more important ideas that follow. Rather than begin with judgmental terms that the reader may not believe, allow the court to decide if your point is truly "amazing."


Words don't have to be long to be

wasteful, however. Consider the "passive verbs" that precede active verbs but add no action. ("The car was driven by Jane." should read "Jane drove the car.") Sometimes, the passive voice is useful to focus on a subject ("The check was canceled by the bank." rather than "The bank canceled the check."), but that style is best used sparingly. As a final revision to any written work, the writer should scrutinize such passages and limit their application. Although the net result may eliminate only a few words, the writing will be clearer and easier to read.

HEADINGS, SUMMARIES, CONCLUSIONS

We often lose sight of the fact that the first two pages of a 35-page brief consist of the argument headings found in the Table of Contents. Don't treat as an afterthought the first section that the court will read. Keep the headings as short as possible and cut them down to "road maps" that tell the reader where your argument is going. The longer the heading is, the more likely it will appropriately belong in the first paragraph of the argument. Before editing, however, you should review any applicable rules of court governing style and substance of headings to be sure that the revisions don't violate the rules.

Summaries of argument and conclusions are equally susceptible to overwriting. In the attempt to finish up, we should be mindful of how important these sections are to the reader, as they usually set the intellectual tone and the pace of the argument.

Professional basketball star Shaquille O'Neill invoked Aristotle to explain his recent selection as the NBA's MVP: "Excellence is not a single act, it is a habit." Unlike athletes, however, writers never peak. The longer they work at their craft, the better they become. Although experience may be the best teacher, those who intend to continue to develop should also be aware of useful writing seminars and texts for reference. One excellent reference is Steven D. Stark's *Writing to Win* (Doubleday 1999). Mr. Stark's traveling one-day seminar is also highly recommended. 

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