

# Certworthy

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The newsletter of the DRI  
Appellate Advocacy Committee

  
The Voice of the Defense Bar



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## When a Good Trial Goes Bad: Reversible Misconduct by Opposing Counsel

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Did you hear about the defense counsel who cross-examined the plaintiff in a sexual harassment case by approaching the witness stand, waving “the finger” in her face, and shouting “f\*\*\* you”? See *Kimzey v. Wal-Mart Stores, Inc.*, 907 F. Supp. 1309, 1316 (W.D. Mo. 1995). Clearly, such incivility violates rules of professional conduct, but can it also constitute a basis for appeal of a judgment? What can or should a trial court do to preserve the fairness of the trial? How is such conduct likely to affect jury proceedings? Stay tuned, dear readers, for answers to these burning questions.

First, let me explain the scope of this article. As an appellate lawyer with an inquiring mind, I started working on this article much as one would conduct an

investigative report—that is, I asked many questions and compiled far more information than could reasonably fit into one issue of *Certworthy*. I found many “juicy” cases involving misconduct by the major trial participants: judges, juries, counsel, witnesses, plaintiffs, and defendants. But for the sake of space, this article focuses on that ever-present trial participant, your favorite advocate and mine, Zealous Counsel. The following discussion offers a simple analysis for determining whether counsel’s alleged misconduct is reversible and offers a few cases to illustrate these points.

### Issue 1—Is the Conduct Improper?

You would think that law school courses on professional ethics would eliminate confusion regarding the types of conduct by trial counsel that constitute misconduct. Apparently not, as the cases discussed below illustrate.

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*It were not best that we should all think alike; it is difference  
of opinion that makes horse-races.*  
— Mark Twain

*Every new opinion, at its starting, is precisely a minority of one.*  
— Thomas Carlyle



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Last time I offered some highfalutin advice about dealing with pro-plaintiff state high courts. This time I will concentrate on committee news, with a focus on our seminar results and subcommittee work.

### Seminar

On May 1–2, 2003, we held our fourth Appellate Advocacy Seminar at the Westin Hotel on Michigan Avenue in Chicago. Steering Committee Member Dan Lindahl served as Program Chair for the event. I am pleased to report our most successful seminar to date. We doubled our total paid attendance from prior seminars (150+ attendees, compared with between 79–96 at past events).

We again received high marks for the quality of our speakers and topics, which continue to include presentations by leading members of the federal and state appellate judiciary. This year a mock

## *Appellate Advocacy Seminar and Other Committee News*

oral argument and follow-on panel discussion featured Judge Danny Boggs of the Sixth Circuit, Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court, and Associate Justice Alan Page of the Minnesota Supreme Court. These judges were everything one could hope for, as CLE presenters: insightful, lively, open, and just plain fun! (Yours truly got to act as “straight man” for a couple of zingers thrown by what quickly emerged as a Boggs-Abrahamson “tag team”; ah well, all for the cause.) Justice Wallace Jefferson of the Texas Supreme Court earned the “Most Dedicated Speaker” award, slogging through an all-night ghastriness of thunderstorm-induced airport holdups, and arriving at the hotel just two hours before his 9:00 a.m. presentation time. He made it to the podium on time, and delivered a superb talk, albeit dressed a tad informally, his luggage not having reached Chicago with him!

Primary credit for this “best-ever” seminar effort should go to Dan Lindahl, who did a superb job in every respect as Program Chair, and to Kelly Freeman, past committee chair, present Board of Directors member, and our Law Institute liaison.

### Subcommittee Revival

We used the seminar to begin a program to revitalize both our Steering Committee and our Subcommittees, with particular emphasis on Annual Meeting, Corporate Involvement, and a newly formed Amicus Taskforce. We have recruited a “headline speaker” (the Clerk of the Supreme Court of the United States) to address our committee meeting at the Annual Meeting being held this fall in Washington, D.C. (October 15–19), in order to substantially increase attendance. Please attend our committee meeting at 4:30 p.m. on October 16th. We hope to use the Corporate Involvement Subcommittee to identify those who have “seen the light” about appellate specialization, and recruit their in-house counsel to join our committee. We hope the Amicus Task Force will develop a network of amicus contacts, and opportunities for our members to engage more actively in this growing appellate subspecialty.

You will be hearing much more about these and other programs in the future.

*He who strikes the first blow admits he's lost the argument.*  
— Chinese proverb

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After publishing 11 editions of *Certworthy* over a five-year span, I have decided to step down as editor. I think that it is time for a new editor with fresh ideas and more energy. Hence, *Certworthy* will be left in the capable hands of Ray Ward.

I would like to thank all of those who have helped me with *Certworthy* over the years. These include members

of the DRI staff (most recently, Don Hirsch) and the many members of our committee who have contributed articles or columns or who have submitted Circuit Reports. I am grateful for the many fine writers who have donated their time, talents, and energy. Without you, *Certworthy* would have been devoid of substance.

I also want to thank the Appellate Advocacy Committee chairs for their support—Kelly Freeman and Mary Massaron Ross (past chairs) and Mike King (our current chair). Special thanks go to Kelly for giving me the op-

portunity to fill this position. Kelly took a risk entrusting the editorship of the Committee's newsletter to a total stranger. I hope that I have vindicated her gamble.

Finally, I want to thank my faithful assistant editor—Ray Ward from New Orleans—who has contributed many outstanding articles and has been responsible for rounding up and editing our Circuit Reports. Not only has Ray consistently been timely with his work, but he often got his tasks done early—a rare talent in a lawyer.

*Life is either a daring adventure, or nothing.*  
— Helen Keller

*We must not make a scarecrow of the law.*  
— Shakespeare

### How Rude!

In the *Kimzey* case (described at the beginning of this article), the jury was so offended by the conduct of defense counsel that it awarded \$35,000 in compensatory damages and \$50 million in punitive damages. *Kimzey*, 907 F. Supp. at 1316. Because the award of punitive damages bore no relationship to actual harm as demonstrated by the compensatory damages, the trial court reduced the award to \$5 million (still a hefty sum for defendant to pay for counsel's misconduct). In some cases, therefore, counsel's bad behavior may bring more prejudice to his or her client than to the opposing party, who will have no reason to appeal.

In other cases, however, the improper behavior may be less obvious to a jury, and the court may need to intervene by ordering a new trial. One plaintiff's lawyer has such a reputation for causing mistrials and having favorable verdicts reversed due to his unprofessional conduct that the United States District Court of New Jersey recently denied his application for *pro hac vice* admission. See *Kohlmayer v. National Railroad Passenger Corp.*, 124 F. Supp. 2d 877, 880–84 (D.N.J. 2000). His poor behavior in prior cases includes cursing at opposing counsel on the record in one case, *id.* at 880, improper trial tactics such as egregious leading of a witness, coaching the plaintiff during cross-examination, and attempting to address the jury while in sidebar discussions in another case, *id.* at 881, and in yet another case, threatening to “kill” opposing counsel and repeatedly calling opposing counsel a “fat pig,” *id.*

As described in the *Kohlmayer* opinion, the mistrials caused by this behav-

ior indicate that a trial court may grant a new trial if necessary to prevent the inappropriate behavior of counsel from improperly prejudicing the jury, and that appellate courts may properly review the trial court's decision in this regard. As further discussed in the *Kohlmayer* opinion, the lawyer's “pattern of uncivilized behavior” justified denial of his *pro hac vice* application, notwithstanding his client's interest in representation of his choice and his own interest in practicing his profession. *Id.* at 883–84.

The Supreme Court of Ohio has stated even more clearly that improper behavior by counsel may indeed put favorable verdicts or judgments at risk of reversal:

Appellant also contends that the trial court abused its discretion in allowing appellees' trial counsel to make inappropriate and prejudicial comments during his closing argument to the jury. Although our holding in Section I disposes of this appeal, we will briefly discuss some of the inappropriate and prejudicial comments made by counsel for appellees. We do so to provide the trial court with guidance on remand and to inform the bench and bar that abusive comments directed at opposing counsel and an opposing party's expert witness during closing argument should not be permitted by any court, and that such comments can indeed be grounds for a new trial.

*Pesek v. University Neurologists Ass'n, Inc.*, 721 N.E.2d 1011, 1015 (Ohio 2000). Thus, while some courts may view abusive and rude behavior as an issue for review only by professional ethics authorities, some courts are moving

to the view that such behavior is also reviewable by appellate courts.

### Oh, You Expected Me to Be Honest!

Candor to the tribunal is at the heart of counsel's ethical obligations. The lack of candor may result in the reversal of a misled trial judge's ruling, as well as attorney's fees for the opposing party. *Forum v. Boca Burger, Inc.*, 788 So. 2d 1055, 1062 (Fla. Ct. App. 2001) (defense counsel failed to respond with candor to trial court's questions during hearing on motion to dismiss, resulting in needless appeal and reversal of dismissal). Presumably, similar results are appropriate in cases where dishonest counsel tampers with evidence, suborns perjury, or tampers with a jury.

### My, What a Big Mouth You Have!

Can there be any doubt that trial attorneys love to talk? In fact, as the advocates for their clients, their job is to talk as they present, rebut, and argue the significance of evidence to the judge and jury. Whether in the course of conducting *voir dire*, making opening statements and closing arguments, and examining witnesses, the most common misconduct of counsel undoubtedly is bringing irrelevant and potentially prejudicial matters to the attention of the jury.

Closing argument often presents the biggest challenge to attorneys who enjoy oration: while attorneys are afforded “great latitude” in presenting closing argument, the argument must be confined to the facts and evidence (and allowable inferences) actually presented to jury. See, e.g., *Murphy v. Int'l Robotic Systems, Inc.*, 766 So. 2d 1010, 1028 (Fla. 2000). Closing argument must not

inflame the minds and passion of the jury, as a fair verdict results from the logical analysis of the evidence rather than an emotional response. *Id.* On the other hand, “[c]ounsel is not required to make such a lukewarm and sterile argument that the jury is unable to determine which side of the case he is on. Likewise, of course, counsel must be indulged the privilege of flights of oratory, and he is entitled to draw inferences from the evidence presented, whether reasonable or not.” *Houston Lighting & Power Co. v. Fisher*, 559 S.W.2d 682, 684 (Tex. Ct. App. 1977).

Certain methods of argument are occasionally challenged as crossing the line, but are not often deemed improper. For example, hyperbole is an accepted technique of colorful oral advocacy. *See, e.g., Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 838 (Tex. 1979) (plaintiff “drove by a thousand doctors” to reach the doctor recommended by plaintiff’s counsel). Similarly, references in closing argument to literary sources may qualify as proper oratory under the theory that such references are merely general or familiar observations regarding human behavior rather than outside opinions regarding the particular facts of the case. *Harris v. Pacific Floor Machine Mfg. Co.*, 856 F.2d 64, 68 (8th Cir. 1988). In *Harris*, the Eighth Circuit approved defense counsel’s reference to the following portion of an Ann Landers article in closing argument regarding the plaintiff’s products liability and negligence case:

I’m sure that many of my readers will think if we can put a man on the moon and produce robots who do housework and build automobiles, surely we could make a jack that would be safe for all purposes.

Wrong. There is no way we can make

a jack or any other piece of equipment people-proof. If folks insist on taking chances, refuse to follow directions and ignore warnings nothing can save them.

*Id.* Is there any doubt that Ann Landers’ words contributed to a defense verdict? No, but her opinion regarding people-proofing products was held to be part of a persuasive argument, rather than an improper reference to an outside authority. The question remains: when does persuasive “oratory” become improperly prejudicial? The most common instances are described briefly below.

### “In My Opinion”

Courts invariably hold that attorneys are not allowed to inject their personal opinions into the case: to do so improperly puts counsel’s credibility at issue and raises the possibility that the jury will decide the case based on non-record evidence. *See, e.g., Murphy*, 766 So. 2d at 1028. The line between improper personal opinion and permissible argument is sometimes difficult to draw, but if counsel simply sets forth a theory of the case based on the evidence and allowable inferences arising from the evidence, his or her comments are more likely to be deemed proper by a reviewing court. *See id.* at 1034 (characterizing plaintiff’s case as cashing in on a “lottery ticket” was improper, but comments regarding credibility of witness were properly based on record evidence).

In contrast, an attorney’s expression of personal opinion regarding the credibility of a witness, regarding the true facts, or regarding the justness of his client’s cause is fundamentally improper:

By [asserting his personal beliefs], an

attorney removes himself from his position as an advocate and as an officer of the court and, in effect, becomes an additional witness for his client, not subject to cross examination. His knowledge of the case is purely hearsay or opinion evidence and would not be admissible from any witness.

*Muhammad v. Toys “R” Us*, 668 So. 2d 254, 258 (Fla. Ct. App. 1996) (cites omitted; also refusing to condone defense counsel’s personal anecdote); *see Seguin v. Hauser Motor Co.*, 350 So. 2d 1089, 1090 (Fla. Ct. App. 1977) (reversing judgment because counsel argued: “I am an officer of the Court. If I lie to you, ladies and gentlemen of the jury, they would take my license away, and the practice of law and justice means too much to me and I tell you this; yes, Mr. Berrie was telling the truth. He told me that.”).

### “Us Versus Them”

This type of argument can arise in many different contexts, but the gist of the rule is that counsel may not appeal to a jury’s potential “community” biases against a plaintiff or defendant. *See, e.g., Texas Employers Ins. Ass’n v. Haywood*, 266 S.W.2d 856 (Tex. 1954) (improper appeal to racial prejudice could not be cured by an instruction). Extensive references to the large size or foreign origin of a defendant corporation also fall into this category of improper argument. *See Strickland v. Travelers Ins. Co.*, 142 F.3d 353, 359 (6th Cir. 1998); *Reese*, 793 F.2d at 1429.

### “Put Yourself in My Client’s Shoes...”

Similar to the “us versus them” argument is the invitation to the jury to put itself in the shoes of one of the parties. This type of argument is commonly re-

ferred to as the Golden Rule argument, and it is impermissible because it encourages the jury to depart from its neutral role and decide the case based on factors not in evidence, such as the feelings and personal beliefs of the jurors. *See, e.g., Joan W. v. City of Chicago*, 771 F.2d 1020, 1022 (7th Cir. 1985) (plaintiff's counsel asked jurors how they would feel if they had been strip searched, as had happened to plaintiff). Note, however, that it is not improper to merely ask the jury to remember the Golden Rule—that is, “do unto others as you would have them do unto you”—because that request does not specifically ask the jury to align itself with either party. *World Wide Tire Co. v. Brown*, 644 S.W.2d 144, 145–46 (Tex. Ct. App. 1982) (noting distinction between permissible and impermissible argument where counsel crossed the line by asking jury to award plaintiff what they would want if they were in her place).

### Personal Attacks on Opposing Counsel or Opposing Witnesses

Abusive trial tactics include making unsupported personal attacks on counsel or witnesses. “To attack counsel for appellant and appellant's expert witness was inexcusable, unprincipled, and clearly outside the scope of final argument.” *Pesek v. University Neurologists Ass'n*, 721 N.E.2d 1011, 1017 (Ohio 2000) (responding to defense counsel's argument that the jury should feel “[d]isgust that the legal system would allow this to happen and disgust at Mr. Corrigan as an attorney” and similar unsupported statements alluding to underhanded and shady conduct by counsel and the expert witness); *accord Amelia's Automotive, Inc. v. Rodriguez*, 921 S.W.2d 767, 773 (Tex. Ct. App.

1996) (even if “invited” by statement of opposing counsel, unsupported attack on personal integrity of opposing counsel was irrelevant and served no purpose other than to improperly inflame and arouse prejudice in jury).

### Inaccurate Representations Regarding the Evidence

“While counsel is entitled to vigorously argue his client's case and draw reasonable inferences from the evidence, counsel may not misrepresent evidence, argue facts not in evidence, or create evidence.” *Koonce v. Pacilio*, 718 N.E.2d 628, 634 (Ill. Ct. App. 1999) (counsel's personal opinions were not evidence and counsel made assertions not supported by the evidence). This situation may arise in counsel's opening statement regarding the evidence that will be presented, as well as in closing argument. *See South v. National Railroad Passenger Corp.*, 290 N.W.2d 819, 834–35 (N.D. 1980) (counsel inaccurately characterized anticipated testimony and was required to retract his statement before the jury).

### Pointing to an Empty Chair

Prejudice can occur as early as *voir dire*, as the *Muhammad* case shows. There, defense counsel for Toys “R” Us (the only defendant in the case) used a *voir dire* question to raise the possibility that the plaintiff had already settled with the absent manufacturer of the allegedly defective bicycle, despite counsel's knowledge that there was no such settlement. 668 So. 2d at 256. The appellate court noted that “pointing to an empty chair” was an improper tactic under Florida law regardless of whether any settlement had occurred. *Id.*

### Out of Whose Pocket?

Whether direct or implicit, refer-

ences to insurance or the lack of insurance are universally viewed as improper. Examples include defense counsel asserting that the defendant “will have to pay the damages out of her own pocket,” *St. Pierre v. Houde*, 269 A.2d 538, 538 (Me. 1970), defense counsel stating that if the defendants lose, “everything they've gotten is threatened because of a possible verdict,” *Koonce*, 718 N.E.2d at 633, as well as plaintiff's counsel stating that the defendant had no financial interest in the case, *Cuccarese v. Soloman*, 405 F.2d 866, 866–67 (2d Cir. 1969). The issue of whether a judgment will be covered by insurance or paid personally by a defendant is both irrelevant to the issue of negligence and highly likely to influence the jury's liability and damage determinations in a close case. *E.g., Koonce*, 718 N.E.2d at 634.

### Inflammatory References

Examples of improperly inflammatory argument include comparing defendants to the Watergate defendants, *Houston Lighting*, 559 S.W.2d at 684, and referencing large verdicts in cases involving celebrities as a basis for awarding a large verdict in the non-celebrity plaintiff's case, *Wright & Ford Millworks, Inc. v. Long*, 412 So. 2d 892, 893–94 (Fla. Ct. App. 1982).

### Occasional Exception—By Invitation Only

Argument or references that would otherwise be improper may not be subject to challenge if the opposing party “invited” such argument by raising the issue first. *See, e.g., Houston Lighting*, 559 S.W.2d at 684.

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## Issue 2—Can the Appellate Court Review the Misconduct?

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The examples of misconduct described above occur in the courtroom on the record. Therefore, unlike certain issues involving judges and juries, the difficulty is not how to prove that the conduct occurred, but rather, whether the error has been properly preserved for appeal. Trials move along at a fast pace. Trial counsel must make split-second decisions regarding objections, taking into account whether an improper tactic is actually prejudicial, which party is most likely to be prejudiced (as demonstrated by the *Kimzey* case, such tactics may backfire on the client whose counsel's conduct is at issue), and whether an objection and "curative" instruction from the court will reduce the potential prejudice or merely reinforce it in the minds of the jurors. Another factor to consider is what relief should objecting counsel ask for—can the potential for prejudice be removed by special or general instructions to the jury, or is the potential for prejudice incurable, requiring a mistrial? Is the right to appeal lost if counsel fails to object or ask for appropriate relief?

### Contemporaneous Objection Requirement

Appellate courts have clearly stated their reluctance to review errors that were not brought to the attention of the trial court: "For there to be reversible error, it is mandatory for the appellant to properly identify the error to the trial court and to suggest a legally appropriate course of action." *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 n.1 (3d Cir. 1982). This "contemporaneous objection" rule preserves the trial court's discretion to correct an error and

provides the parties with an opportunity to make a more fully developed record for review. *Id.* Requiring a timely objection in the trial court prevents "sandbagging," which occurs if a party remains silent in hopes of a win but then claims error if the end is unsatisfactory. *Oxford Furniture Cos., Inc. v. Drexel Heritage Furnishings, Inc.*, 984 F.2d 1118, 1128 (11th Cir. 1993); *accord Murphy*, 766 So. 2d at 1026 (counsel cannot have their cake and eat it too).

The general requirement of a contemporaneous objection also reflects the appellate assumption that the trial court is in the best position to assess the propriety of challenged actions, the degree of potential prejudice from the alleged error, and the appropriate steps to "cure" the error (*i.e.*, negate any prejudice). *See, e.g., Murphy*, 766 So. 2d at 1026. Conversely, the rule helps to prevent problems that arise when appellate courts make "cold record" decisions. *Id.*

Trial court options for correcting prejudice from misconduct may include the following: (1) requiring a retraction of prejudicial statements by counsel; (2) corrective instructions to the jury; (3) permitting a response or corrective statement by counsel for the prejudiced party; or (4) ordering a mistrial. *E.g., St. Pierre*, 269 A.2d at 540. New trial motions are another way to seek relief while giving credence to the trial court's greater familiarity with the case. *See, e.g., Murphy*, 766 So. 2d at 1027 (prohibiting review in cases alleging improper argument of counsel unless appellant made a timely objection or at least filed a motion for new trial).

### Plain Error Exception

Without a doubt, "the overarching concern that a litigant receive a fair trial

and that our system operate so as to deserve public trust and confidence" may override the contemporaneous objection rule in exceptional cases. *Murphy*, 766 So. 2d at 1026. Most jurisdictions acknowledge this concern by allowing appellate review for "plain" or "fundamental" error when the error is raised for the first time on appeal, but the standard for reversal is more difficult to establish. *See, e.g., Strickland v. Travelers Ins. Co.*, 142 F.3d 353, 358 (6th Cir. 1998) (failure to make contemporaneous objection did not amount to "waiver," but did require higher showing of prejudice to obtain relief on appeal). Other courts focus on whether the alleged misconduct was curable—if so, the right to review may be waived by failure to object in the trial court. *Standard Fire Ins. Co.*, 584 S.W.2d at 839–41 (finding waiver and noting that improper closing arguments are rarely incurable).

Other courts may justify appellate review in the absence of contemporaneous objection by noting the trial court's obligation to act *sua sponte* to correct the prejudicial effects of gross and abusive misconduct. *Pesek*, 721 N.E.2d at 1016 ("The judge who presides over a cause is not a mere umpire; he may not sit by and allow the grossest injustice to be perpetrated without interference."). Because of the tactical reasons that trial counsel may not object, the failure of a trial court to act *sua sponte* should not be the basis for appeal except in the most prejudicial of circumstances. Under this analysis, however, the standard of review may be more lenient than the "plain error" standard because the appellate court is focusing on the trial court's inherent responsibility to manage the trial. *See Pesek* at 1017 (reversal appropriate where misconduct leaves doubt in fairness of jury verdict).

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### Issue 3—Does the Misconduct Justify Reversal?

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The answer to this question primarily depends on two factors: first, the standard of review applied by the appellate court; and second, viewing the case as a whole, whether any perceived error creates the potential for prejudice or is harmless under the circumstances. The concepts of trial court discretion and “curability” play heavily in the ultimate determination of whether misconduct requires reversal.

#### Standard of Review

The standard of review on appeal is directly related to the contemporaneous objection rule. If the trial court received notice of error, the appellate court will focus its review on the actions of the trial court and only indirectly review the alleged misconduct. If no objection was made in the trial court, the appellate court will directly review the alleged misconduct under the plain or fundamental error analysis. In both cases, it is important to note that the trial and appellate courts must assess the potential for prejudice: actual prejudice can neither be proved nor assessed in light of the protections given to jury deliberations. *See, e.g., Strickland*, 142 F.3d at 358 (where timely objection was made in trial court, verdict should be set aside only if there is “reasonable probability” that jury verdict was influenced by improper conduct; greater degree of prejudice is required where no objection was made at trial); *DeJesus v. Flick*, 7 P.3d 459, 462 (Nev. 2000) (under “plain error” review, reversal is warranted if misconduct permeated entire proceeding so as to provide conviction that jury was influenced by passion and prejudice; proof that misconduct actually changed

the outcome of the trial is not necessary).

#### Abuse of Trial Court Discretion

Because the trial court has broad discretion regarding trial proceedings and post-trial motions, errors stemming from the alleged misconduct of trial court participants are usually reviewed for abuse of the trial court’s discretion in responding to the potentially prejudicial conduct. *See, e.g., Murphy*, 766 So. 2d at 1030–31 (reviewing grant or denial of new trial motion based on improper closing argument of counsel); *Joan W.*, 771 F.2d at 1022 (although remarks of counsel were clearly improper, relevant inquiry on appeal is whether the trial court’s response or lack of response is prejudicial abuse of discretion). “If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.” *Murphy*, 766 So. 2d at 1031 n.25 (cites omitted).

This standard of review is a tough one for appellants—even if the appellate court judges would have responded differently than the trial court, the trial court’s action is reversible only if indisputably unreasonable. Such may be the case, however, if the trial judge simply fails to perceive the risk of prejudice and overrules an objection to misconduct. By doing so, the trial court not only fails to remove the prejudice, but also reinforces the jury’s perception of the argument as proper. *See, e.g., Wright & Ford Millworks, Inc. v. Long*, 412 So. 2d 892, 893–84 (Fla. Ct. App. 1982) (by overruling objection to improper

closing argument, trial judge reinforced its prejudicial effect on jury); *World Wide Tire Co.*, 644 S.W.2d at 146 (harmful effect of improper Golden Rule argument could have been removed if the trial judge had sustained the objection and instructed the jury not to consider it; instead, trial judge overruled the objection and the jury must have concluded that the argument was proper).

An appellate court may also conclude that improper conduct has created such a risk of prejudice that the trial court abuses its discretion by not ordering a mistrial. *Pesek*, 721 N.E.2d at 1017 (new trial should have been ordered by trial court where improper attack on opposing counsel and expert witness raised doubts as to whether jury rendered its verdict based on the record evidence or the improper argument of counsel). In reaching this conclusion, the appellate court may note that lesser attempts to cure actually increase the risk of prejudice. For example, the trial court’s admonishment of plaintiff’s counsel and instruction to the jury not to consider defendant’s ability to pay a judgment may be insufficient to negate the prejudice created by references to insurance coverage. *Cuccarese*, 405 F.2d at 866–67 (motion for mistrial should have been granted as trial court’s instructions to jury were ambiguous and may have made the situation worse by reminding the jury of the improper references to insurance).

In another notable case, counsel for both sides moved for a mistrial after one counsel made improper attacks on the other, allegedly in retaliation for an earlier remark about frivolous lawsuits. *Amelia’s Automotive*, 921 S.W.2d at 773–74. The comments were incurable and the risk of prejudice was increased

by trial court's action in excusing the jury without explanation immediately upon the comments being made, and then failing to provide any explanation or instruction upon the jury's return. *Id.* at 773. Under such circumstances, the appellate court concluded that "[t]he possibility that the jury's feelings regarding appellant's attorney colored their view of the case is impossible to overcome."

It is impossible not to consider the present distaste our society has for attorneys in general. If the members of the jury had the general impression that attorneys are cunning and dishonest, how much more would their opinions be colored once they were exposed to the childish and malicious conduct displayed by the attorneys in the case?

*Id.* at 774 & n.2. Therefore, the trial court abused its discretion in denying the parties' motion for mistrial. *Id.*

#### Plain or Fundamental Error

Although fundamental error is "extraordinarily difficult to define," its purpose is clear: "to preserve the public's confidence in the judicial system." *Murphy*, 766 So. 2d at 1033 (Pariente, J., special concurring op., cites omitted). "Relief is granted for a fundamental error not because the party has preserved a right to relief from a harmful error, but because the public's confidence in our system of justice would be seriously weakened if the courts failed to give relief as a matter of grace for certain, very limited and serious mistakes." *Id.*

The exceptional cases where reversal is appropriate for "plain error" include those where an error substantially affects "the basic fairness, integrity, or public reputation of judicial proceed-

ings." *Reese*, 793 F.2d at 1429 (cites omitted). Countervailing issues of fairness arise from the appellate court's reluctance to reverse a jury verdict arrived at after an extensive trial. *Id.* at 1427. Thus, reversal under this standard comes only in cases where basic fairness is at stake, rather than fairness to the specific appellant who failed to preserve his or her rights by making timely objection in the trial court. Plain error will not be found where the prejudice could have been cured by proper instructions to the jury from the trial judge. *Id.* at 1429 (while "community conscience" arguments may be unfairly prejudicial, proper instructions from court would have removed whatever slight prejudice might have been caused by a few isolated comments of counsel).

Plain error has been found by at least one court in relation to the improper conduct of trial counsel. In the *DeJesus* case, liability was certain where the plaintiff had been deliberately run off the road by the defendant, but the plaintiff's damages were heavily disputed. Plaintiff's counsel gave an emotionally charged, Oscar-caliber closing argument:

Flick's attorney, W. Randall Mainor, presented an emotional and provocative closing argument to the jury, and he injected his personal life and opinions into this argument. Among other things, Mainor personally vouched for the justness of his cause, talked about his grandchildren, his career with the FBI, his twenty years' experience as a trial lawyer, and even cried during his closing argument. Mainor expressed his disdain for DeJesus, said he was in a better position than the jury to know Flick's suffering and stated he would not trade the

use of his own fingers for ten million dollars. In painting a negative picture of DeJesus's medical experts, Mainor informed the jury that Drs. Dunn and Oliveri were motivated to testify for DeJesus solely by money and that, in his opinion, Dr. Oliveri lied and the jury could discard his testimony in a garbage can. Finally, Mainor invited the jury to punish defense counsel and all civil defense attorneys with its verdict.

*DeJesus*, 7 P.3d at 461-62.

The Nevada Supreme Court noted that defense counsel failed to object to most of the improper arguments, but determined that review was warranted to prevent plain error due to the "inflammatory quality and sheer quantity of misconduct in this case." *Id.* at 462. [Ten-point question to see if you remember Issue 1, above: In what ways was Mainor's closing argument improper? Answer: (1) personal opinions (and emotions) of counsel; (2) unsupported attacks on personal integrity of opposing expert witness (actually accusing him of perjury); (3) "us versus them" argument relating to defense lawyers who use the system against injured parties; (4) improper Golden Rule argument, asking jurors to put themselves in plaintiff's place; (5) unsupported, logically unrelated, emotional argument regarding plaintiff's fear as woman who was afraid to be alone, afraid to take a bath, afraid to get married, afraid to get pregnant.] The court held that the cumulative effect of all of the improper arguments (not all of which were set forth in the opinion) was that the entire trial was tainted. The jury returned a verdict of \$1.47 million, far in excess of even what plaintiff's counsel dared to suggest, let alone what the record objectively supported. Therefore, the verdict could not stand. *Id.* at 464-65.

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**Bottom Line: “Harmless” Error or Incurable/Uncured Prejudice?**

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As the United States Supreme Court has long held, “[a litigant] is entitled to a fair trial but not a perfect one,” for there are no perfect trials.” *Brown v. United States*, 411 U.S. 233, 231–32 (1973) (cites omitted). The “harmless error” rule is supported by financial concerns as well:

Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials. It seems doubtful that our judicial system would have the resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing caseload.

*McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984)

A number of factors are relevant to the concept of “harmless error” as it relates to reviewing the improper conduct of counsel: (1) whether the argument of counsel was in fact improper; (2) whether the argument of counsel was invited or provoked by prior statements of opposing counsel; (3) whether objection was preserved by a proper request for relief in the trial court; (4) whether any prejudice could be cured (by counsel’s retraction, trial judge’s admonishment of counsel, or corrective instruction to the jury); (5) the nature, degree, extent, and cumulative effect of the improper argument; (6) the argument’s probable effect on a material finding to be made by the jury; and (7) the significance of the argument in light of the entire course of proceedings, beginning with *voir dire* and ending with the closing argument and instructions to the jury. *Standard Fire Ins.*, 584 S.W.2d at 839–40. To demonstrate reversible prejudice, the probability of harm arising from the improper conduct must be greater than the probability that the verdict

was grounded on the proper proceedings and evidence. *Id.*

Many instances of improper conduct by trial counsel can be cured by proper instructions to the jury, or other curative measures. *See, e.g., South*, 290 N.W.2d at 834–35 (trial court required counsel to retract incorrect assertion regarding evidence); *id.* at 837 (standard instructions that statements of counsel not to be considered as evidence); *id.* at 839 (objections sustained and cautionary instructions given to jury regarding counsel’s references to post-accident changes); *id.* at 839 (admonishment of counsel in front of jury regarding counsel’s table-pounding incident); *id.* at 840 (admonishment of jury to disregard counsel’s negative inference regarding opposing party’s failure to present evidence that would have been inadmissible). If a sensible jury follows the instructions of the trial court and comes back with a reasonable verdict, no reversible prejudice exists. *See, e.g., Bryar v. Wilson*, 204 A.2d 831, 832–33 (Conn. 1964) (jury instructed to ignore plaintiff counsel’s improper references to insurance; return of verdict on low side indicated that they had not been prejudiced in favor of plaintiff.)

On the other hand, if all circumstances reveal that prejudicial conduct could not have been cured by the trial court or the trial court’s actions increased the risks of prejudice, then reversal is appropriate. Such prejudice appears most likely to occur with certain forms of egregious conduct: (1) references to insurance when all counsel knows this is improper, *see, e.g., Cuccarese*, 405 F.2d at 867 (trial court’s instruction may have reinforced improper references to insurance); *Priel v. R.E.D., Inc.*, 392 N.W.2d 65, 67–68 (N.D. 1986) (improper references to insurance could not be cured by standard instructions); (2) unsupported personal attacks on the integrity of opposing counsel or opposing witnesses, *see, e.g., Pesek*, 721 N.E.2d at

1017 (personal attacks on integrity of opposing counsel and expert witness created doubt in soundness of verdict, and required reversal due to trial court’s failure to intervene *sua sponte*); *Amelia’s Automotive*, 921 S.W.2d at 733 (personal attacks on opposing counsel could not be cured); and (3) repeated and cumulative forms of improper argument, including personal opinions of counsel, *see, e.g., Muhammad*, 668 So.2d at 259 (collective effect of improper “empty chair” argument and personal opinions of counsel could not be cured by trial court rulings and instructions); *Koonce*, 718 N.E.2d at 458 (cumulative effect of references to insurance, personal opinions regarding character of defendants, improper Golden Rule argument, and inaccurate references to evidence was unfair trial for plaintiff); *DeJesus*, 7 P.3d at 464–65 (multitude of improper arguments permeated whole trial, requiring reversal for plain error).

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**Final Thoughts**

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We must each do our part in combating abusive and improper conduct of Zealous Counsel, particularly where the interests of our client are at stake. We can educate ourselves and assist in the education of less experienced trial counsel, who may not know where the line lies between zealous advocacy and overzealous presentation of prejudicial ideas not properly received in evidence. We can make timely objections to the improper conduct of opposing counsel, and point the trial court in the right direction by seeking the proper level of relief (*e.g.*, curative instructions or mistrial), rather than contributing to the problem by retaliating in kind. We can move for new trials when faced with patently unfair jury verdicts. Finally, we can appeal to the judicial consciences of the higher courts; we owe it to our clients, we owe it to our judicial system, and we owe it to the public.

# The Effect of Trial Court Technology on the Appellate Record

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Technology has touched all areas of legal practice, from computer word processing in law offices, to sophisticated computer simulations presented at trial, to the real-time court transcription of trial testimony. Despite technological advancements in the practice of law, most court reporters still spend an exorbitant amount of time (sometimes hundreds of hours) preparing a written paper transcript of the trial proceedings. This typed manuscript then accompanies the lower court's record and the appellant's brief to the appellate court.

But what happens to the appellate record when there is no paper record of trial court proceedings? Unlike traditional courtrooms, new electronic courtrooms boast sophisticated video and audio equipment, including the real-time generation of trial testimony on computer monitors that are situated at the judge's bench and counsel tables, multi-camera videotaping of trial testimony, and the electronic presentation of trial exhibits. The prospect of "paperless trials," in which all motions and briefs, exhibits and transcripts exist only in electronic format and are never actually typed on paper, is fast approaching. Exactly how the rapid spread of technology will impact appellate advocacy is an unexplored frontier.

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## Effects on Appellate Advocacy

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Appellate courts will need to adjust to the coming paperless era. The nature of the appellate record will change from the traditional reams of typed pages of text to multimedia presentations that may encompass video, audio, and electronic presentations of trial proceedings. As trial courts evolve and attorneys employ new technology in their practices, appellate courts will soon be inundated with electronic bytes, rather than paper pages, of information.

The electronic trial court poses some interesting issues for appellate judges who not only must review the conduct of trials and their results, but also the *effects* of such technology at trial. The nature of appeals themselves must undergo change; the trial record, which was once transferred as text, will now be multimedia, and this may impact the *standard* of appellate review. See G. Nicholson, *A Vision of the Future of Appellate Practice and Process*, 2 J. App. Prac. & Process 229 (Summer 2000). Technology also promises to affect appellate *practice*, as courts consider electronic hyperlinked briefs, see M. Devin, *CD-ROM Briefs: Are We There Yet?* 2 J. App. Prac. & Process 377 (Summer 2000), and receive appellate argument in the form of electronic, perhaps even multimedia, presentations. Appellate hearings may also change as judge and counsel appear from remote locations by two-way video. See S. J. McEwen, Jr., *TV or Not TV: The Telecast of Appellate Arguments in Pennsyl-*

*vania*, 2 J. App. Prac. & Process 405 (Summer 2000); E. Toussaint, *Minnesota Court of Appeals Hears Oral Argument Via Interactive Teleconferencing Technology*, 2 J. App. Prac. & Process 395 (Summer 2000).

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## Improving the Traditional Record

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Currently, the appellate record consists of paper transcripts, hard copies of trial exhibits, a copy of the lower court's file (comprising pleadings, motions, briefs, orders, etc.) and a bound appellate brief. Although it could encompass dozens of boxes in size, the traditional appellate record is relatively easy to use. A judge requires no special tools to manually thumb through volumes of material, select pertinent portions of text for discussion, and review and record impressions by placing Post-it notes on relevant pages. Additionally, a judge can easily transport excerpts of the transcript to conferences or to other remote locations. This system has been in place for decades, and although it can be slow and tedious, it has worked pretty well.

So why change an established process that works? Change is needed because the traditional method of appellate review has its share of disadvantages. For example, time, cost, storage, and accessibility are just a few of the problems associated with the "old-fashioned" practice.

The new technology boasts improved efficiency that overcomes many of the deficiencies associated with the tradi-

tional appellate record. For example, judges who once labored over voluminous paper records in search of pertinent text, will be able to use sophisticated computer search engines to sift through hundreds of pages of transcripts in seconds to find relevant testimony. See, e.g., P. Talmadge, *New Technologies and Appellate Practice*, 2 J. App. Prac. & Process 363, 367 (Summer 2000) (discussing *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 998 P.2d 856 (Wash. 2000)).

Additionally, multiple copies of the record can be made available and disseminated in minutes. Traditionally, only one copy of the appellate record is produced, thereby permitting only one judge at a time to view the file. This tradition limits review since cases are typically decided in panels of at least three judges. Thus, judges who once had to wait their turn to acquire the record and review relevant passages could, in the future, enjoy *simultaneous* discussion with other judges from remote locations. Increased efficiency will result as time is saved in coordinating with staff to schedule conferences, acquiring multiple copies of transcripts, and physically delivering the materials to the relevant parties. Staff, for example, can attend to other matters while judges can “get down to the business” of appellate judging with little distraction.

The considerable expenditure of time and money necessary to prepare and mail the written trial transcript and to mechanically reproduce the trial court’s file will also be significantly reduced with the implementation of advanced technology. What traditionally involves months of work to prepare will now take seconds. See Marilyn Devin, *CD-ROM Briefs: Are We There Yet?* 2 J. App.

Prac. & Process 377 (2000). Rather than being a bound, typed trial transcript that could be thousands of pages in length and a lower court file that could fill dozens of banker’s boxes, the entire record could be delivered to the appellate court on one CD-ROM disk. The reduction in file size not only makes dissemination of the record easy, but it also will save courts tens of thousands of dollars in annual storage fees.

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### The Virtual Record

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As trial court technology evolves, the nature of the appellate record will change. Proceedings taking place in new electronic courtrooms will necessarily transform the traditional appellate record into a multimedia presentation encompassing electronic transcripts, audio, video, and other visual records of the trial evidence and presentations. Computerized real-time transcripts will appear on computer monitors in the courtroom. These “documents” will likely remain in electronic format when transmitted to the appellate court. Additionally, video records of trial—the presentation of evidence via television and computer—will likewise be transmitted to the appellate court as part of the appellate record in its virtual form.

Many trial courts now accept the electronic filing of documents. This process allows for the electronic filing of pleadings, motions, briefs, and other court documents by e-mail or by direct file transfer to court computers. The court clerk then electronically disseminates these filings to the appropriate judge, who reviews the material while still in electronic format. When a case is ultimately appealed and the lower court’s record is transferred, it is these

electronic files, and not paper pleadings, that comprise the appellate record.

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### Potential Drawbacks

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Although an electronic appellate record provides many benefits, there are several potential issues that must be overcome for the paperless appellate record to work.

Most important are issues relating to the formatting of the electronic record. A critical problem that must be overcome in the preservation and presentation of the electronic record for appellate review is the need for consistent and standardized formatting of all electronic materials. Data may be stored electronically in a variety of different formats, each of which may require a different software application to access. Should electronic trial transcripts be presented to the appellate court in TXT or PDF format, or should they be presented in Microsoft Word or Corel WordPerfect? This is but one of many questions that needs to be addressed. While each storage system will allow for text searching, page formatting for each will necessarily vary depending on computer type and individual settings.

Appellate courts must receive true and accurate records that allow an appealing party and the reviewing court to easily view and cite to applicable portions of the record. This may be easier said than done with respect to electronic records. The trial court may use different computer software applications than the court reporter, who may use still different computer software applications than the attorneys in the case. Under this scenario, the resulting electronic record would be a hodgepodge of miscellaneous file types, each of which

might require a different proprietary computer application to access. This problem is amplified in situations where an appellate court has jurisdiction over multiple county courts within a state, and each county court system uses different formatting. Standardization of all lower court electronic files, including electronic trial transcripts and e-filing of pleadings, is critical to the accessibility of the electronic appellate record.

In addition to formatting issues, there are issues associated with an electronic trial transcript. Ignoring the security issues associated with easy alteration of the transcript itself, reviewing a lengthy electronic transcript can be tedious and eye-straining. It is quite easy to quickly scan through a traditional paper trial transcript and mark pages for later review. It is equally easy to quickly find an exact page and line reference in a paper transcript. These tasks can be more burdensome with electronic versions of the transcripts. And while electronic versions of these transcripts allow for text searching, a judge is required to use special equipment (*i.e.*, a computer) to view the transcripts. Additionally, many judges may not be familiar with the necessary “new technology” or software applications, which will lead to resistance and inefficiencies. Additionally problematic is actual citation to a “record” that has no “pages.”

There are also several practical difficulties associated with video and audio evidence presented to appellate courts.<sup>1</sup> First, and unlike the review of paper trial records, judges will need special equipment to review these records. Whether it be a tape player or a videocassette player and television, review will no longer be a matter of simply opening a paper transcript and beginning to read. Complicating the review is the fact that video and audio records are linear, so one cannot simply quickly skim pages or jump from page to page, as with a paper tran-

script. In the case of a three-week long jury trial that goes, for example, for six hours per day, an appellate judge could conceivably have almost 100 hours of linear video or audio record to review. Absent a coupling of a video or audio record with a searchable typed record, this is a difficult review. Additionally, it is difficult, if not impossible, to accurately cite to a “page” in the video and audio record.

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### The “Virtual” Impact

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Why haven’t appellate courts embraced technological advancement with the same enthusiasm as lower courts? Because the *nature* of appellate advocacy itself promises to change. With the “new record” comes the possibility of a “new standard of review.” See R. Owen & M. Mather, *Thawing Out the “Cold Record: Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review*, 2 J. App. Prac. & Process 411 (Summer 2000). Appellate judges who can “see” and “hear” witnesses, and gauge intonation and appearance may all but eliminate the “abuse of discretion” standard and become “triers of fact.” Additionally, advanced technology introduces new “rules of engagement” and poses some potentially difficult issues for appellate judges.

The Arizona Court of Appeals, Division Two, in Tucson, has dealt with some of these issues by limiting e-filing to licensed Arizona attorneys who must register with the court and comply with Arizona Supreme Court Rule 124 and Division Two requirements. Although this system necessarily excludes public access and *pro per* defendants for now, the technology is in its infancy, and the courts are mindful of the hurdles ahead.<sup>2</sup>

In the few jurisdictions that are attempting to introduce technology at the appellate level, among the varied concerns raised is fairness. Specifically, will the advent of tech-

nology, and in particular CD-ROM briefs, prejudice one party over another? Could an unscrupulous party hide a program on the CD that would somehow insert undetectable errors in their opponent’s work product? Could the technology compromise security on the court’s computer network, or worse, permit hacking into confidential files or invent a virus to bring down the system and cause a mistrial?

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### Conclusion

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Technology will undoubtedly continue to impact trial proceedings; care, however, must be taken to ensure the integrity of appellate practice and process. Although electronic courtrooms will boast improved efficiency, economy and communication, there are numerous potential pitfalls, and only time will tell if the costs outweigh the benefits.

1. Several states have permitted videotaped records, and at least one, Kentucky, requires no additional written transcript. In commenting on Kentucky’s system, the United States Court of Appeals for the Sixth Circuit observed: “The record is replete with difficulties, not the least of which being its presentation as a videotape. First, the videotape is marginally audible at times, particularly when the trial judge and the attorneys whispered their sidebar conferences and whenever two or more participants spoke at once. Second, we are not equipped to produce efficiently the written transcription on which careful review must be founded. Finally, the parties did not have our transportation—indeed, they seemed not to have any transcription—rendering oral argument about the events of the trial an exercise in futility.” *Dorsey v. Parke*, 982 F.2d 163, 164–65 (6th Cir. 1989).
2. Electronic filing of court documents (e-filing) is being implemented in the Arizona Court of Appeals, Division Two, as a result of a two-year pilot project with the Tucson office of the Arizona Attorney General’s Office and the Pima County Legal Defender’s Office. The adaptation from paper to electronic was “challenging” according to its creator and major proponent, The Honorable Philip G. Espinosa, Chief Judge of the Arizona Court of Appeals, Division Two.

# Positional Conflicts of Interest and the Appellate Counsel

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In recent years, ethical issues have acquired important practical ramifications. First, ethical violations (particularly, conflicts of interest) have set the standard of care for legal malpractice suits. They also set the standard for disqualification. Second, fee forfeiture can result from serious breaches of fiduciary duty, even if the client suffered no legal injury. See *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999).

Identifying ethical issues is the first step to avoiding problems. Although several problems areas do not have easy answers, knowledge of the basic rules can help counsel fashion sound, defensible solutions.

This article surveys a peculiar conflicts problem for appellate counsel: “positional” conflicts. The 1984 ABA Model Rules of Professional Conduct first articulated the argument that an appellate lawyer has a conflict of interest by simultaneously taking both sides of the same legal question in two pending appeals. The new ABA Model Rules of Professional Conduct, adopted by the ABA in August 2002, and the Restatement (3d) of the Law Governing Attorneys take a new slant on “positional” conflicts.

This new slant is important. The ABA Model Rules are usually the foundation for state disciplinary rules and are often cited by federal courts. The Restatement (3d) is a recent scholarly work that covers in detail many current problems. Both works reduce conflicts-of-interest problems to a single standard, rather than granulate them into distinct rules. This means that having a firm grasp on general conflicts rules will be more important. It is anticipated that the courts will see “positional” conflicts as a variant of the general rule rather than a unique problem for appellate counsel.

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## General Conflict of Interest Rules

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The 2002 ABA Model Rule 1.7(a) prohibits representation of a client when: (1) that representation is directly adverse to another client; or (2) a significant risk exists that the representation will materially limit representation of another client. In either case, the lawyer may represent both clients if: (1) the lawyer reasonably believes that he or she can provide competent and diligent representation to both; (2) it will not require one client to make a claim against the other; and (3) the clients give informed consent, confirmed in writing. 2002 ABA Model Rule 1.7(b). Comment (5) to 2002 Model Rule 1.7 indicates that the first prong is an *objective*

standard. If a disinterested lawyer cannot reasonably conclude that each client will receive competent and diligent representation, then the lawyer cannot properly ask the client to consent.

Restatement (3d) sections 121 and 122 reach the same result but by a single standard. Under section 121, absent the client’s consent, the lawyer may not represent the client if there exists a substantial risk that representation will be materially and adversely affected by the lawyer’s duties to another current or former client, or to a third party. Under section 122(2)(c), the lawyer cannot represent the new client, even with consent, if it is not reasonably likely that the lawyer will be able to provide adequate representation to one of the clients. Section 122, comment g(iv) makes it clear that consent does not permit a lawyer to provide “objectively inadequate” representation.

Generally, the lawyer can almost never represent a current client against another current client in unrelated matters. Restatement (3d) §128(2); 2002 ABA Model Rule 1.7(b)(3), cmt (17). Representing two or more clients in the same matter is prohibited if there is a substantial risk that representation will be materially and adversely affected by duties to the other client. Restatement (3d) §128(1); 2002 ABA Model Rule 1.7(b)(3) cmt (17). The rationale is to balance the duty to preserve confidences

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and the client's faith in the attorney's loyalty, with the clients' joint desires to save money and benefit from coordinated positions; also, counsel must consider whether the court will view the parties' positions positively if made by the same advocate. Restatement (3d) §128 cmt (b). Therefore, appellate counsel must evaluate at the outset whether joint representation is advisable from each client's point of view.

The problem is complicated further by duties owed to former clients or parties to joint defense agreements. Restatement (3d) section 131 and ABA 2002 Model Rule 1.9(b) prohibit representing someone in a matter if the lawyer represented a former client in the same or a substantially related matter and the client's interests are materially adverse to the former client. The principal rationale is to preserve client confidences and any continuing duties owed the former client. Restatement (3d) §131 cmt (b). However, the rule should not transfer every engagement into a lifetime commitment; otherwise, lawyers would be discouraged from taking small, "one-shot" cases. *Id.* Because protecting confidences is a key, the rule applies also to confidences gained through "joint defense" agreements with non-clients in multi-party cases. See generally James Fisher, *The Attorney-Client Privilege Meets the Common-Interest Arrangement*, 16 Rev. of Litigation 631 (1997).

Conflicts of interest present a special problem in federal courts. Some federal courts permit the opposing party to disqualify counsel for conflicts of interest in which the opposing party has no actual standing. *In re American Airlines, Inc.*, 972 F.2d 605, 610–11 (5th Cir. 1992). This is compounded by the lack of a single federal "common law" of legal ethics. See Ted Schneyer, *Nostalgia in*

*the Fifth Circuit: Holding the Line on Litigation Conflicts Through Federal Common Law*, 16 Rev. of Litigation 537, 540 (1997). Thus, the appellate lawyer may believe that no conflict exists based on the forum state's law, yet the federal court may survey legal ethics guidelines nationwide and find a conflict. Familiarity with the ABA and Restatement (3d) standards will allow appellate counsel to avoid such pitfalls at the outset.

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### Positional Conflicts of Interest

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The 1984 Model ABA Rules handed appellate lawyers a unique problem: "positional" conflicts. Former ABA Model Rule 1.7, comment (9) (1984 ed.), recognized that appellate lawyers have the unique ability to argue for case law that will adversely affect other clients. Comment 9 argued that it could be improper to represent parties with antagonistic positions on legal issues pending at the same time in appellate courts. The former ABA rule forbade concurrent representation if the firm would have to argue contrary legal positions in the same jurisdiction, unless neither case is likely to lead to precedent harmful to the other. ABA Comm. on Ethics, Op. 93–377 (1993). See generally Dzienkowski, *Positional Conflicts of Interest*, 71 Tex. L. Rev. 457 (1993) ("Dzienkowski"). Strictly interpreted, the concept applies only when the lawyer represents two clients simultaneously and argues two different interpretations of law that will adversely affect one of them. J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 SW. L. J. 677, 690 (1989) ("Medina").

This rule was premised on the view that the individual advocate has some effect on the tribunal's decision concerning which rule to accept; advocat-

ing two sides of the same question would neutralize the advocate's effectiveness for one or the other client. Norman Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service of Pro Bono Publico*, 50 Stanford L. Rev. 1395, 1399–1401 (1998) ("Spaulding"); Dzienkowski, at 485–91. There was substantial criticism that the rule was unduly limited to appellate litigation. Dzienkowski, at 463, 473; Douglas Richmond, *Choosing Sides: Issue or Position Conflicts of Interest*, 51 Flor. L. Rev. 383, 390 (1999) ("Richmond"). There was also the sticky problem of withdrawal if the lawyer first discovered the conflict after taking both cases. Richmond, at 393. It was argued that positional conflicts implicated the duty of zealous advocacy, preservation of client confidences, client expectation of loyalty, and protecting the integrity of the legal system. Dzienkowski, at 483.

The ABA's Formal Opinion 93–377 (1993) recognized that a "positional" conflict could occur in trial courts in the same venue if the decision of one judge might carry precedential or persuasive authority with the other trial judge. The ABA Opinion concluded that a conflict existed if the decision of the first court would materially undercut the position in the other court. It concluded that the advocate had to consider whether there is a significant risk that the impact of one decision on the other court and whether the advocate would be tempted to soft pedal or alter arguments in one case in some effort to reconcile both cases. Thus, the issue became whether there was a significant material risk that representation of one client would suffer. Spaulding, at 1404–05.

Restatement (3d) section 128, com-

ment (f) took a broader view from the original 1984 ABA Model Rules. Comment (f) refers to this problem as “[c]oncurrently taking adverse legal positions on behalf of different clients.” It makes no distinction between trial and appellate courts. Instead, it requires consideration of whether a substantial risk exists that the actions in one case will adversely affect the other, whether the issues are procedural or substantive, the client’s reasonable expectations in retaining the lawyers, and the practical significance on each client’s immediate and long-term interests. The focus is on whether the lawyer might “pull his punches” on the legal arguments in one case to favor the other case’s outcome.

In August 2002, the ABA modified comment 9 to Rule 1.7. 2002 ABA Model Rule 1.7 cmt (24). The new comment (24) adopts the Restatement view. A “positional” conflict of interest exists if there is a “significant risk” that the lawyer’s action for one client could materially limit the lawyer’s effectiveness for another client in another case. Otherwise, the lawyer may take different positions on the same issues in different tribunals at different times; in that circumstance, there is no conflict even if arguing for a legal position adversely impacts the interests of another client. *Id.* The elements to consider are borrowed from the Restatement.

Positional conflicts implicate deeper issues about counsel’s role as an advocate and a professional. Spaulding, at 1398–1401. In various fields, representation can become polarized. Medina, at 691. Law firms can gravitate towards representing one side in a particular field, *e.g.*, banking/consumer, personal injury plaintiff/defense, legal aid, etc. Increased *pro bono* work by the trial section of a large firm may create conflicts for the appellate section that represents banks, utilities, landlords, etc.

Spaulding, at 1409. It has been argued that a conflict in antagonistic values between existing clientele and the potential client may be so sharp as to trigger a duty to disclose to the client. Medina, at 691. Clients are possessive of counsel’s loyalties and may view representing rival interests as a violation of that loyalty. *Id.*; Spaulding, at 1410; *but see id.* at 1421 (arguing that the ABA Model Rule 6.3 allows participation in legal service organization projects notwithstanding conflicts with the interest of paying clients).

However, this must be balanced against the legal profession’s obligations to remain detached professionals, capable of arguing both sides. Restatement (3d) section 129 comment (f) recognizes that law firms may take inconsistent positions in different courts at different times; a contrary rule would force law firms to specialize in one side of the docket. Restatement (3d) §209 cmt (f). For the time being, appellate lawyers are urged to take positional conflicts seriously. Medina, at 691.

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### Handling the Positional Conflict

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The current standard for positional conflicts under the 2002 ABA Model Rules and the Restatement (3d) both simplifies the analysis and integrates it into the general conflicts analysis. The focus has moved towards whether the concurrent representation impairs duties owed the client, and away from the appearance of impropriety. This movement has expanded the potential for conflicts to reach trial and transactional representation. By treating positional conflicts as a subset of the general rules, counsel can now analyze their duties under one standard; the problem is that this expands the number of situations in

which positional conflicts can arise, such as *pro bono* work, conflicts between former and current clients, the migrating lawyers and paralegals, etc.<sup>1</sup>

The first problem is to recognize when the conflict exists. Under the Restatement (3d) and the 2002 ABA Model Rules, this focuses on whether there is a significant risk that representing one client will materially limit the representation of the other. 2002 ABA Model Rule 1.7 cmt. 24; Restatement (3d) §128 cmt (f). There can also be a problem if there is a possibility that one client’s confidences will be used for or disclosed to the other client.

Dzienkowski, at 494-95.

Rule 1.7, comment 24 seems to suggest that positional conflicts arise only under Rule 1.7(a)(2)’s “materially limit” standard, rather than Rule 1.7(a)(1)’s “materially adverse” standard.

Dzienkowski, at 473. Thus, it can be argued that the 2002 ABA Rule will tolerate positional conflicts that are directly adverse to one client, so long as advocacy is not impaired. *Id.*; Richmond, at 417–18. However, commentators argue that it will be rare when concurrent representation could be “directly adverse” without the risk that it will materially limit the lawyer’s responsibility. Richmond, at 416–17. 2002 ABA Model Rule 1.7, comment 6 states that “directly adverse” includes the damage to the lawyer/client relation if the client believes the lawyer will not be effective in his case out of deference to the other client.

The factors that trigger the conflict include:

- where the cases are pending;
- whether the issues are substantive or procedural;
- the temporal relation between the matters;

- the significance of the issues to the long/short terms interests of the clients; and
- the clients' expectations when they retained counsel.

2002 ABA Model Rule 1.7 cmt. 24; Restatement (3) §138 cmt (f). Commentators also suggest considering: whether the lawyer has specialized knowledge of one client's business; how often one client litigates that issue; the likelihood that confidential information may be revealed to another client; and the magnitude of injury to either client.

Richmond, at 414–16; Dzienkowski, at 507–520.

Commentators urge that such conflicts will rarely occur between an existing and former client. Richmond, at 410–13; Spaulding, at 1406; Dzienkowski, at 480, 496–98. 2002 ABA Model Rule 1.9, comments (2) and (3) indicate that the focus is on protecting unique factual knowledge concerning a client; the lawyer may later represent new clients on “factually distinct” problems, although this may involve taking an adverse position against a former client. Thus, the conflict can arise when the lawyer represents a “repeat player” or may use information gained earlier. Dzienkowski, at 496–97.

The issue is then whether the attorney can solve the conflict with a waiver from the clients. If a disinterested lawyer would conclude that a significant risk exists that concurrent representa-

tion will materially affect representation of one client or the other, the lawyer cannot ask for consent. 2002 ABA Model Rule 1.7 cmt. 24; Restatement (3) §138 cmt (f). Likewise, waiver may not be possible if the lawyer cannot guarantee that client confidences will be preserved. Dzienkowski, at 481. It is permissible to ask the client to limit representation to avoid a conflict, such as eliminating legal arguments that would directly impact the other client. Medina, at 690; Richmond, at 419–20.

Even if a waiver or consent is possible, the lawyer must provide sufficient information to the client to allow the client to make an informed decision. 2002 ABA Model Rule 1.7(b)(4) cmt 18; Restatement (3) §§122, 128. The consent should be specific, identifying the potentially adverse parties, the specific issue on which the conflict turns, and the context in which the conflict has or could arise. Richmond, at 423–34.

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### Conclusion

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The new slant on positional conflicts-of-interest responded to the criticism that it should apply to trial attorneys and that it should be subsumed into the general rules on conflict-of-interest. The new slant is a double-edged sword for appellate lawyers. On one hand, they now have a single rule that had been frequently interpreted in other contexts.

This allows some flexibility in allowing simultaneous representation and in resolving the conflicts with the client. On the other hand, the single rule's broad application to a variety of contexts means that positional conflicts can arise in new situations. The appellate counsel has to consider problems of conflicts with former clients, conflicts caused by pro bono work, migrating attorneys and paralegals, etc.

In all cases, the paramount problem is determining when one client's position may conflict with another client's case. Most firms catalogue their clients; few catalogue the issues raised by every case. This becomes even more difficult for firms with multiple offices. Counsel can use foresight to spot conflicts when initially retained, but this cannot prevent conflicts that are first detected in the course of the proceedings. Only frequent intra-firm communication and sensitivity to clients' needs can help counsel spot the “positional” conflicts.

<sup>1</sup> Federal courts have held that class counsel can be disqualified for positional conflicts. *See, e.g., Fiandaca v. Cunningham*, 827 F.2d 825, 829–31 (1st Cir. 1987) (conflict found where lawyer argued a remedy for one client that precluded remedy sought by other client); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978); *Estates Theatres, Inc. v. Columbia Pictures Ind., Inc.*, 345 F.Supp. 93 (S.D.N.Y. 1972).

*The profound thinker always suspects that he is superficial.  
Words . . . are the great foes of reality.  
— Benjamin Disraeli*

### Membership

Since Y2K, our committee has added nearly 100 new members. The continuing interest and growth in our committee is gratifying. Equally satisfying is the fact that many new members are actively participating in committee events, including last month's successful seminar. We encourage everyone to take a more active role in the committee and the many opportunities afforded by the Appellate Advocacy Committee to publish articles and network with other appellate practitioners.

DOUGLAS J. COLLODEL  
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### Programs

The Appellate Advocacy Committee held its fourth seminar on May 1–2 in Chicago. An overflow crowd of nearly 160 attendees heard from leading judges and appellate lawyers from throughout the United States, including Judge Danny Boggs of the United States Court of Appeals for the Sixth Circuit, Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court, Justice Alan Page of the Minnesota Supreme Court, and Justice Wallace Jefferson of the Texas Supreme Court. Speakers covered

a broad range of interesting topics, including *amicus curiae* practice, challenging punitive damages, obtaining interlocutory review, successfully marketing an appellate practice, and resolving ethical challenges unique to an appellate practice.

Seminar attendees also enjoyed the opportunity to socialize with seminar faculty and other attendees at several social events staged in conjunction with the seminar.

Planning has already begun for the next seminar. Anyone interested in participating in that process should contact either the committee chair Mike King ([kingm@lanepowell.com](mailto:kingm@lanepowell.com)) or the program's subcommittee chair Dan Lindahl ([dan.lindahl@bullivant.com](mailto:dan.lindahl@bullivant.com)).

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### Publications

As mentioned in *From the Editor*, I have decided to relinquish my positions after six years as Publications Subcommittee Chair and five years as Newsletter Editor. Our current Vice Chair, Ray Ward, will move up to become the new Chair of this subcommittee.

In *From the Editor*, I thanked those

who have helped me with *Certworthy*. I also want to thank those who helped me with other Publications Subcommittee projects. As with *Certworthy*, I am grateful for the many talented writers and editors who have donated their efforts to our other projects.

I will be hanging around to finish one pending project—our effort to publish an appellate manual for DRI's Defense Library Series. The four co-editors for this project (me, Ray Ward, Mary Massaron Ross, and Doug Collodel) have received drafts of 20 out of 26 chapters, and two other chapters are nearing completion of a first draft. Thus, we have made considerable—though slow—progress. Please bear with us as we wrap up this project. I want to express my deep gratitude for the work that has been done thus far.

As for future projects of the Publications Subcommittee, be on the lookout for our "Committee Perspectives" section in the April 2004 issue of *For The Defense*. If you would like to help, contact Ray Ward, and he will put you in touch with the right person.

SCOTT P. STOLLEY  
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 Dallas, TX

*A writer lives, at best, in a state of astonishment.*  
 — Jules Renard

### Sanctions

#### *Tower Ventures, Inc. v. City of Westfield*, 296 F.3d 43 (1st Cir. 2002)

The district court punished a plaintiff's disregard of the scheduling order by dismissing the suit. The First Circuit affirmed, rejecting plaintiff's argument that the defendant was not prejudiced.

On May 30, 2001, the district court entered a scheduling order that required Ventures to respond to discovery and to make certain disclosures by July 16, 2001. The deadline passed without Ventures' making any discernable effort to comply. On August 14, 2001, the parties jointly moved to revise the scheduling order. In the motion, Ventures said that it had been unable to comply due to "summer vacations of certain individuals needed to provide information to assist in providing discovery responses." The motion asked the court to extend the discovery-response deadline to August 17, 2001, and to set a deadline of October 19, 2001, for Ventures to file an anticipated summary-judgment motion. The court granted the request. The deadlines passed, but nothing happened.

The court ordered Ventures to show cause why the action should not be dismissed with prejudice. On the same day, Ventures moved for a further extension because of "unexpected delays in assembling the information" needed to respond to the discovery. Ventures timely responded to the show-cause order, asserting that it had furnished some draft discovery, that defendants had not objected to the requested extension of

the scheduling order, and that the defendants would not be prejudiced by further delay. But Ventures gave no reason for its failure to comply with the prior orders, except for a general statement that its counsel had been preoccupied with handling other matters.

The district court dismissed the case for failure to comply with court orders and want of prosecution. On appeal, the First Circuit affirmed, rejecting Ventures' argument that its non-compliance did not prejudice the defendant, because "it ignores the court's independent interest in administering its docket." Although dismissal is a harsh sanction reserved for extreme misconduct, "disobedience of court orders, in and of itself, constitutes extreme misconduct (and, thus, warrants dismissal)." The court explained that sanctions serve two purposes: to punish the offender, and to deter others from similar misconduct. "The sanction imposed here achieves both ends. It is reasonably commensurate to the infraction, and its imposition sends a clear signal to others that court orders must be obeyed."

### Notice of Appeal

#### *In re Perry Hollow Mgmt. Co.*, 297 F.3d 34 (1st Cir. 2002)

After the district court affirmed a bankruptcy court's judgment, the creditor appealed. The creditor filed its notice of appeal 48 days after the district court entered judgment. In civil cases, an appellant normally must appeal within 30 days after the district court enters judgment. Fed. R. App. P. 4(a)(1)(A). But if the United States is a party, the appellant has 60 days. Fed. R. App. P. 4(a)(1)(B). The jurisdictional issue was whether the United States was a party to this case. The First Circuit found that it was; therefore the appeal was timely.

The cases started as an adversary proceeding in bankruptcy court, with the creditor asserting a security interest in the debtors' golf carts. The Chapter 11 trustee moved for summary judgment, seeking to void the security interest on grounds that it had not been properly perfected. The creditor cross-moved for summary judgment, seeking to establish the validity of its security interest. The bankruptcy court decided the adversary proceeding in the trustee's favor, granting the trustee's motion for summary judgment.

The trustee then initiated another proceeding, the "contested matter," by filing a motion for authority to sell the golf carts free and clear of any liens or encumbrances. The creditor opposed this motion. The Assistant U.S. Trustee participated in the hearing of the contested matter by cross-examining the potential buyer of the golf carts. The bankruptcy court granted the trustee authority to sell the golf carts.

The creditor timely appealed both bankruptcy-court rulings to the district court. The district court consolidated both appeals "for all purposes." By judgment entered March 27, 2001, the district court affirmed the bankruptcy-court judgments. Forty-eight days later, the creditor filed a notice of appeal.

The First Circuit found that the United States was not a party to the adversary proceeding, because the only parties were the creditor and the trustee. Because the trustee was a private bankruptcy trustee not employed by the United States Government, the trustee was not an officer of the United States.

The contested matter, on the other hand, involved a third party: The Assistant U.S. Trustee, who exercised the U.S. Trustee's discretionary right to appear and be heard. The First Circuit ex-

plained that the United States is a party to a case not only when it is a named party, but also when it actively participates in the proceedings. Since the United States, through the Assistant U.S. Trustee, actively participated in the contested matter, the United States was a party. And since the district court consolidated the two appeals “for all purposes,” the 60-day limit to appeal the contested matter extended to the entire consolidated case. Therefore, the appeal was timely.

### Scope of Appeal

#### *Correa v. Cruisers, Div. of KCS Int’l, Inc.*, 298 F.3d 13 (1st Cir. 2002)

Motorboat purchasers sued the boat manufacturer and engine manufacturer for breach of warranty. The trial court rendered judgment on a jury verdict in favor of the purchasers. Both manufacturers appealed, but the engine manufacturer’s notice of appeal did not explicitly mention some post-judgment orders amending the judgment. Ordinarily, a party’s failure to designate in the notice of appeal the judgment or order being appealed prevents the party from appealing from the unspecified judgment or order. The purchasers argued that the engine manufacturer appealed from only the original judgment, not the orders amending the judgment, which were not mentioned in the notice of appeal. But the First Circuit rejected this argument because the engine manufacturer clearly intended to appeal from both the original judgment and the post-judgment orders. In its brief, the engine manufacturer explicitly adopted the boat manufacturer’s arguments regarding reimbursable expenses and attorneys’ fees, which were the subject of the post-judgment orders.

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### Appellate Jurisdiction

#### *In re Litas Int’l Inc.*, 316 F.3d 113 (2d Cir. 2003)

The appellant, Winoc Bogaerts, appealed from a district court’s dismissal of his appeal from a bankruptcy-court order. The order purported to conditionally dismiss Bogaerts’s claims in the underlying adversary proceeding. The district court dismissed Bogaerts’ appeal for lack of jurisdiction. It found that the notice of appeal was not filed within the requisite 10-day period. The Second Circuit reversed, holding that the time to appeal had never begun to run because the bankruptcy court had failed to enter a final judgment, as required by Fed. R. Civ. P. 58.

The Second Circuit recognized that (1) Bogaerts could appeal to the district court from a bankruptcy judge’s final order, so long as he filed a notice of appeal within the 10-day period, and (2) the 10-day period would begin to run on the date that the bankruptcy court’s final judgment—set forth in a separate document—was entered. In this case, however, the bankruptcy court’s supplemental order was not “final,” but “conditional.” Thus, the situation raised two issues: whether such a conditional order could be appealed from at all; and, if so, whether the time for appeal from such an order may lapse as a result of its “self-execution” on a set date.

The Second Circuit relied on Rule 58’s separate-document requirement to resolve these issues. It concluded that the separate-document requirement had to be mechanically applied in order to avoid uncertainties as to the date on which a judgment is entered. In Bogaerts’s case, the bankruptcy court itself had failed to treat its July 12, 2000

“self-executing” order as final. The Second Circuit believed that any uncertainty that had been created by the bankruptcy court’s order could easily have been eliminated by the clerk’s use of a “tickler” marking to trigger the entry of a final judgment or by PNL’s requesting the entry of a final (Rule 58) judgment.

Bogaerts could have filed an appeal within 10 days of the entry of the supplemental order. In the absence of a final (Rule 58) judgment, however, he was free to wait for the entry of such a judgment, no matter how long it took for that judgment to be entered. Because the bankruptcy court did not enter a final judgment, Bogaerts’ time to appeal had not lapsed. Accordingly, the Second Circuit vacated the dismissal of Bogaerts’ appeal and remanded the case. On remand, the district court had the option of considering the merits of Bogaerts’ appeal or directing the bankruptcy court to enter a final judgment from which Bogaerts would have to file another notice of appeal.

### Summary Judgment

#### *Giannullo v. City of New York*, 322 F.3d 139 (2d Cir. 2003)

The plaintiff-appellant, Mark Giannullo, appealed from a summary judgment in favor of the defendant-appellee, the City of New York, and a police officer. Giannullo had sued under 42 U.S.C. §1983 alleging that his arrest on drug-possession charges (which were never pursued) was made without probable cause. The district court found, on what it believed to be the undisputed facts, that the city and the police officer had probable cause to arrest Giannullo and therefore, had a complete defense to his claims. In a 2-1 decision, the Second Circuit re-

versed, finding no competent evidence to support the “undisputed facts.”

The facts are that an undercover police officer conducting surveillance in the vicinity of a methadone clinic saw Giannullo exit the clinic and walk over to a second individual, Kevin Oliver. After a brief exchange, Giannullo returned to the clinic and emerged minutes later with a brown bag, which he handed to Oliver. Giannullo and Oliver then left the scene, walking in opposite directions. A short distance away, Oliver removed an item from the bag, placed it in his pocket, and discarded the bag. Oliver was then arrested. A search revealed that he had in his possession two bottles of methadone—one of which had someone else’s name on it—and a glassine of heroine. Meanwhile, another officer arrested Giannullo. Despite Giannullo’s protests that he was a licensed drug counselor at the clinic and that the bag he had given Oliver contained only a “bleach kit” that he was authorized to distribute, Giannullo was held in custody for most of the day. He was later released with no criminal complaint being filed against him.

Based on its review of the record, the Second Circuit concluded that a reasonable fact-finder, drawing inferences favorable to Giannullo, could readily conclude that before Oliver’s arrest, no police officer could reasonably believe that he had probable cause to arrest Giannullo. Before Oliver’s arrest, the police knew nothing about Giannullo or his relationship to Oliver, had observed no drugs in the possession of either of them, had seen no money passed, and had overheard no incriminating conversation between them. Thus, the Second Circuit vacated the judgment and remanded the case.

## Qualified Immunity

*Toussie v. Powell*, 323 F.3d 178 (2d Cir. 2003)

In this case, the Second Circuit held that a private defendant faced with §1983 liability for allegedly conspiring with state officials to violate federal rights was not protected by qualified immunity. The decision did not address whether private defendants acting under a government contract or court order could be shielded by qualified immunity.

The Second Circuit relied upon *Wyatt v. Cole*, 504 U.S. 158 (1992), to resolve the qualified-immunity issue. In *Wyatt*, the Supreme Court considered whether private defendants charged with §1983 liability for invoking state replevin, garnishment, and attachment statutes later declared unconstitutional were entitled to qualified immunity. In determining that qualified immunity did not apply, *Wyatt* examined whether there was a common-law immunity that Congress intended to incorporate into the Civil Rights Act. The court also noted that it had granted qualified immunity to government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service.

Applying *Wyatt*’s analysis, the Second Circuit held that a private defendant faced with §1983 liability for allegedly conspiring with state officials to violate federal rights was not protected by qualified immunity. The court did not believe that the public interest would be impaired by private individuals having to proceed to trial to resolve their legal disputes. Applying its holding, the court concluded that Powell was not entitled to qualified immunity.

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## Federal Jurisdiction

*Desi’s Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411 (3d Cir. 2003)

This case stemmed from an action filed in a state court to close a bar as a nuisance under the Pennsylvania Liquor Code. The bar owners responded to the state court action by filing a civil-rights suit in the federal district court and by filing an answer in the state court that reserved the adjudication of their federal claims to the district court. The state court issued a preliminary injunction without a hearing. A week later, the state court heard evidence and concluded that the bar constituted a nuisance under the Liquor Code. The state court ordered the bar closed for one year. In the federal case, the defendants moved for partial dismissal of the complaint, but the district court dismissed the owner’s civil rights action in its entirety on the basis that it lacked jurisdiction under the Rooker-Feldman doctrine. On the owners’ appeal, the Third Circuit reversed, in an opinion which elucidates the standard and scope of appellate review of a district court’s dismissal order under the Rooker-Feldman doctrine.

The doctrine, which derives its name from the Supreme Court’s decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), governs the jurisdiction of the lower federal courts over decisions of state courts. The doctrine recognizes that, while Congress granted jurisdiction to the Supreme Court to review decisions of state high courts in 28 U.S.C. §1257, Congress did not extend comparable jurisdiction to the lower federal

courts. Based on that recognition, the doctrine holds that the lower federal courts lack jurisdiction to adjudicate actions in which they would have to determine that the state court's decision was wrong in order to grant federal relief. A claim is barred by Rooker-Feldman under two circumstances: first, if the claim was "actually litigated" in the state court before the filing of the federal action; or, second, if the claim is "inextricably intertwined" with the state adjudication, "meaning that 'federal relief can only be predicated upon a conviction that the state court was wrong.'" *Desi's Pizza, Inc.*, 321 F.3d at 419.

Because the Rooker-Feldman doctrine pertains to the district court's jurisdiction, the scope of review of an order dismissing a case under that doctrine is plenary. Moreover, the appellate court must examine both aspects of the doctrine, even where the defendant concedes the inapplicability of one of those aspects. *Id.* at 419.

The Third Circuit held that the plaintiffs' action should not have been dismissed under the Rooker-Feldman doctrine. The plaintiffs' complaint included alleged actions against their other businesses in addition to the bar. The finding that the bar constituted a nuisance under the Liquor Code did not preclude a claim that the bar was singled out in a campaign of racial and ethnic discrimination. "[T]he complaint does not set out the procedural due process claim with sufficient particularity to permit us to decide whether it is barred by Rooker-Feldman." *Id.* at 426. Finally, the plaintiffs' request for an injunction against the closure of Desi's pursuant to the state court's order is moot, as the state court's injunction has expired and Desi's has resumed operations." *Id.* at 427-428. "Moreover,

Rooker-Feldman does not apply to the plaintiffs' request for an injunction against future harassment, since no state court order currently governs the plaintiffs' conduct, and the requested injunction thus cannot prevent the enforcement of a state court order." *Id.* at 428.

### Notice of Appeal

#### ***Schneider v. Fried*, 320 F.3d 396 (3d Cir. 2003)**

In this case, the Third Circuit allowed an untimely appeal due to "unique circumstances," because the untimeliness was caused by reliance on a magistrate judge's order. The plaintiff-appellant had filed a motion for new trial more than 10 days after entry of judgment, relying on the express order of a magistrate judge. Although a motion for new trial filed beyond the 10-day period specified by Fed. R. Civ. P. 59 does not toll the period for filing an appeal, the Third Circuit applied the "unique circumstances" doctrine to hear the subsequent untimely appeal.

The parties in *Schneider* consented to try a medical-malpractice case before a magistrate judge, who granted defendants' motion to dismiss the case. The plaintiffs filed a timely motion for a new trial, but they failed to order production of the trial transcript as required by the district court's local rule. Under that rule, the magistrate judge denied the plaintiffs' motion, but the denial order also allowed the plaintiffs to file a second motion for a new trial within 30 days of their receipt of the trial transcript.

The Third Circuit ruled that, because the 10-day filing period for a motion for a new trial under Fed. R. Civ. P. 59 is mandatory and jurisdictional and may not be extended by the court, the magistrate judge did not have the juris-

diction to allow the plaintiffs to file a second motion for a new trial more than 10 days after dismissing the case. Nevertheless, because the magistrate judge expressly allowed the plaintiffs to file a second motion for a new trial, and the plaintiffs relied on the magistrate judge's order, the Third Circuit deemed the appeal timely filed under the "unique circumstances" doctrine, which the Supreme Court recognized in *Thompson v. INS*, 375 U.S. 384, 387 (1964). That doctrine "permits an untimely Rule 59 motion to extend the time for filing an appeal when the party filed a late appeal in reliance on the actions of the district court." *Schneider*, 320 F.3d at 403.

The doctrine of unique circumstances does not apply where the filing delay was partly due to the attorney's own incompetence. But the Third Circuit held that counsel was not at fault. Arguably, counsel should have realized that the magistrate judge exceeded his authority by allowing the plaintiffs to file a second motion for a new trial more than 10 days after the case was dismissed, and counsel should have filed a notice of appeal immediately after the magistrate judge denied the first motion for a new trial to preserve the appeal. But "where the Magistrate Judge misunderstood his own authority to grant an extension to the ten day filing period contained in Rule 59(b), and conferred upon plaintiff 'the right' to an extension, it would be a harsh result to require the plaintiffs to question the Magistrate Judge's power to do so. The unique circumstances doctrine was designed for situations such as this, to prevent the appellant's reliance on the district court's mistake from prejudicing the appellant." *Id.* at 403.

## Ripeness

### *Lauderbaugh v. Hopewell Township*, 319 F.3d 568 (3d Cir. 2003)

Sometimes legal principles emerge from a party's ironic argument. *Lauderbaugh* brought a civil rights lawsuit against Hopewell Township, which had forced her to remove her mobile home from a lot that had been zoned to preclude mobile homes. The core of her argument was that the township's regulation focused on the structural integrity of her mobile home, and that the regulation was preempted by HUD's regulations that governed the construction of the mobile home. The township contended that its regulation was not preempted, because it focused on aesthetics and other conditions that had nothing to do with the mobile home's structural integrity or the HUD regulations. When *Lauderbaugh* prevailed in the district court, the township appealed.

The township's first argument challenged the ripeness of *Lauderbaugh's* lawsuit. As the Third Circuit recited, "[I]n §1983 cases involving land-use decisions, a property owner does not have a ripe claim until the zoning authorities have had an opportunity to 'arrive at a final, definitive position regarding how [they] will apply the regulations at issue to the particular land in question.'" 319 F.3d at 574. The township asserted that *Lauderbaugh's* lawsuit was not ripe, because its zoning board had not rendered a final decision before *Lauderbaugh* filed suit.

The Third Circuit rejected the township's ripeness argument, because the township's zoning board had continued *Lauderbaugh's* appeals indefinitely and threatened that "it would institute state court litigation to remove her home and assess any costs against her." *Id.* at 575. "Hopewell cannot treat

its zoning decision as final enough to force a significant hardship upon *Lauderbaugh* by forcing her to pay to move her home but not final enough to be ripe for adjudication... Hopewell's threat to institute state court litigation to remove *Lauderbaugh's* home and tax any costs against her is clearly a definitive position that threatens a concrete injury." *Id.* Therefore, *Lauderbaugh's* claim was ripe for adjudication.

## Finality

### *Federal Home Loan Mortgage Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431 (3d Cir. 2003)

Freddie Mac filed a three-count complaint against the insurer and later filed a motion for summary judgment on Count I of the complaint. The insurer filed a motion for summary judgment on all three counts of the complaint. The trial court granted Freddie Mac's motion and denied the insurer's motion. The trial court's order also awarded specific sums to Freddie Mac. The trial court later entered a consent judgment, which allowed the insurer to appeal and which dismissed the two remaining counts of Freddie Mac's complaint without prejudice, and which declared the judgment final under Fed. R. Civ. P. 54(b).

The Third Circuit questioned its appellate jurisdiction *sua sponte*. Because the consent judgment allowed Freddie Mac to refile its dismissed claims if the Third Circuit reversed the district court's summary judgment on Count I, the Third Circuit held that the consent judgment was not a final, appealable judgment. Had the remaining claims been effectively barred by the statute of limitations or on other grounds, the situation might have been different.

The Third Circuit also held that the

district court's Rule 54(b) certification did not confer appellate jurisdiction to reach the Count I issues. "The district court made only the stark-naked statement that 'this Consent Judgment shall be deemed final pursuant to Rule 54(b) for purposes of defendant's intent to appeal this court's Judgment of March 19, 2001 in favor of the plaintiffs . . . .' [citation omitted]. In so doing, the district court failed to make and give reasons for the 'express determination that there is no just reason for delay,' as the text of Rule 54(b) requires. The district court left us with no grounds upon which to review the district court's exercise of its discretion. Nor could we ascertain from the record a basis for such a certification." 316 F.3d at 441.

At oral argument, counsel for both parties essentially conceded that they could not identify reasons supporting the district court's Rule 54(b) certification. Counsel for Freddie Mac requested in open court, after oral argument had ended, that the court not issue any order concerning our jurisdiction for three days so that he could consult with his clients. The Third Circuit granted his request. At the deadline, Freddie Mac's counsel submitted a letter informing the court that Freddie Mac was dismissing the two remaining counts with prejudice. The district court entered an order to that effect.

In light of the post-argument dismissal of Freddie Mac's two remaining claims, the Third Circuit found that it had jurisdiction to review the merits of the district court's judgment in favor of Freddie Mac. Ultimately, the Third Circuit affirmed that award, but not before it chastised counsel. "We feel constrained to remind counsel that both their time and the Court's time, as well as judicial resources, would have been

conserved by earlier recognition of a 'flawed' final order and meaningful consultations between Freddie Mac and its counsel." *Id.* at 442.

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## Fourth Circuit

### HIPAA

*South Carolina Med. Ass'n v. Thompson*, 2003 WL 1949811 (4th Cir. 2003)

Plaintiffs sought a judgment declaring that the Health Information Portability and Accountability Act of 1996 (HIPAA) impermissibly delegated Congress's legislative function and exceeded congressional authority. The district court dismissed plaintiffs' suit, and the Fourth Circuit affirmed. The Fourth Circuit also rejected plaintiffs' claim that HIPAA's non-preemption provision was void for vagueness. That provision states that a regulation promulgated under HIPAA does not supersede any state law that imposes requirements "more stringent" than the regulation. The court ruled that while the non-preemption provision requires courts to make common-sense evaluations, the provision was not too vague to pass constitutional muster. The court found the provision "sufficiently definite to give fair warning as to what will be considered a 'more stringent' state privacy policy."

### Establishment Clause

*Mellen v. Bunting*, 2003 WL 1958708 (4th Cir. 2003)

Cadets enrolled at the Virginia Military Institute (VMI) sued the Institute's superintendent for declaratory and in-

junctional relief and for damages, because of VMI's "supper prayer." The supper prayer was read by the student chaplain to the assembled corps of cadets in the dining hall before evening meal. The district court granted declaratory and injunctive relief, but also ruled that VMI's superintendent enjoyed qualified immunity from any claim for damages. Both sides appealed.

On appeal, the Fourth Circuit first confronted the threshold issue of mootness. The cadets who had originally filed suit had graduated from VMI. The Fourth Circuit found that the plaintiffs' graduations mooted their claims for declaratory and injunctive relief, but not their claim for damages.

On the merits, the Fourth Circuit held that the supper prayer violated the Establishment Clause, which prohibits state-sponsored prayer at public colleges. In this case, the supper prayer forced the cadets to participate in religious worship. Nonetheless, VMI's superintendent enjoyed qualified immunity from any award of money damages.

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## Sixth Circuit

### Class Certification

*In re Delta Air Lines*, 310 F.3d 953 (6th Cir. 2002)

The Sixth Circuit has provided additional guidance for litigants hoping to take an interlocutory appeal from a district court's order certifying a class action. The court explained that the key factors in granting such an appeal are: (1) whether the class certification decision, as a practical matter, is dispositive of the case; (2) whether the class certifi-

cation raises novel or unsettled questions of law; and (3) whether there is a strong likelihood that the class certification decision will be reversed on appeal. The court also cautioned that an interlocutory appeal of a class certification order "is never to be routine." *Id.* at 961.

In *Delta Air Lines*, a district court had certified a class of plaintiffs who were challenging certain airline ticketing practices. The defendant airlines immediately filed a petition seeking permission to appeal class certification. The sole question on appeal was whether the appellate court would hear the appeal at all because, as the court explained, Rule 23(f) gives the court of appeals unfettered discretion to permit the appeal. *Id.* at 957. In asking for the appeal, the airlines argued that the class damages sought by the plaintiffs—nearly \$1 billion—imposed undue pressure on the airlines to settle. Thus, class certification would, for all intents and purposes, decide the case. The defendant airlines also challenged the lower court's determination that the plaintiff representatives met the typicality and commonality requirements of Rule 23.

The Sixth Circuit panel was unconvinced, and denied the airlines' petition for an immediate appeal. The court began its analysis by brushing aside the airlines' concerns that the decision to certify the class would, as a practical matter, decide the case. The court explained that "[a]lthough the instant lawsuit is probably more than a mere unpleasantness, the impact of the class certification alone does not support an appeal. Nor are we entirely convinced that, in the absence of an immediate appeal, these defendants will have no recourse but to settle." *Id.* at 961. As for the other factors, the court

determined that the class certification analysis was “so enmeshed with the merits of the case as to disfavor immediate review.” *Id.* The court found that many of the class-certification issues needed further factual development, and explained that class certification could be revisited after a full trial on the merits.

The lesson here for litigants hoping to appeal class certification is to develop a factual record in the lower court, should one later need to take an immediate appeal. A litigant also should not rely solely on the likelihood that class certification will put undue pressure to settle. This factor is likely to be present in most cases and is probably not enough, by itself, to persuade a court to grant an interlocutory appeal of a decision certifying a class action.

## Standing

### *Perry v. The American Tobacco Co., Inc.*, 324 F.3d 845 (6th Cir. 2003)

In a matter of first impression in the Sixth Circuit, the court recently held that a group of plaintiffs bringing a class action against tobacco manufacturers did not have standing to sue under the Racketeer Influenced and Corrupt Organizations Act (RICO), because the causal link between the plaintiffs’ alleged injury and the defendants’ alleged conduct was too attenuated and remote to allow the plaintiffs to bring their “cost-recovery” claims.

The plaintiffs in *Perry* were individuals who had purchased a group health insurance policy that included both smokers and non-smokers in the insurance pool. Plaintiffs claimed that they had been forced to pay increased insurance premiums due to the additional cost of treating smoking-related illnesses, and they sought to hold tobacco manufacturers liable for

these additional costs under RICO. The district court dismissed the case, holding that the plaintiffs lacked standing to bring a RICO suit because they had not shown that their claimed injuries were proximately caused by the defendants’ alleged conduct. *Id.* at 848.

The Sixth Circuit agreed, affirming the district court’s finding that the plaintiffs had not shown proximate cause. The court explained that common law principles of proximate causation are incorporated into RICO. And a central element of proximate cause is the requirement of a “direct injury.” *Id.* at 848. The court concluded that the alleged causal connection between the plaintiffs’ injury (having to pay more for insurance) and the alleged conduct of the tobacco companies (causing smoking-related illnesses) was too remote to sustain the plaintiffs’ RICO claims. Among other things, plaintiffs’ injuries were contingent on harm to third parties and on the insurance companies’ increasing their premiums due to smoking-related medical costs. On this basis, the court concluded that the plaintiffs lacked standing to bring the RICO claims.

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## Seventh Circuit

### Limitations

#### *Stephan v. Goldinger*, 325 F.3d 874 (7th Cir. 2003)

The Seventh Circuit recently ruled that a plaintiff will be bound by a contractual limitations period, even when the contract provides for shorter limits than the applicable statute of limitations.

Stephan entered into a contract with Refco to open a commodity-futures trading account. Although the Commodities

Exchange Act provided for a two-year statute of limitations, Stephan’s contract with Refco stated that suits arising from its terms could not be brought more than one year after the cause of action arose. Stephan eventually lost his investment and sued Refco for fraud under the Act, but brought his suit more than one year after the alleged fraud occurred. The district court dismissed the suit for failure to comply with the contractual time limitation.

Stephan argued on appeal that a statutory limitations period could not be shortened by contract. The Seventh Circuit disagreed. The court reasoned that statutes of limitations have two purposes: primarily, they protect defendants from having to litigate stale claims; and secondly, they spare the courts from adjudicating such claims. Statutes of limitations are not meant to benefit plaintiffs. Therefore, as here, a plaintiff is free to restrict himself to a shorter limitations period by contract. And although courts may sometimes refuse to enforce exculpatory contractual provisions, the shorter limitations period here is not truly exculpatory, because it is reasonable to expect a plaintiff to bring suit within a year.

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## Eighth Circuit

### Attorney’s Fees and Costs

#### *Concord Boat Corp. v. Brunswick Corp.*, 309 F.3d 494 (8th Cir. 2002)

In earlier proceedings, defendant-appellant had won reversal of an antitrust judgment. Defendant then returned to the district court seeking an award of costs as the prevailing party. Rather than holding plaintiffs jointly and severally liable for defendant’s costs, the district court allocated costs

on an individual basis, according to each plaintiff's participation in the original action and the amounts of their respective claims for damages. The Eighth Circuit held that the district court abused its discretion in failing to apply the "general rule for joint and several liability."

The Eighth Circuit also held that the district court abused its discretion in reducing defendant's award for photocopying costs by 40 percent. In reducing this award, the district court evaluated a series of factors that the Eighth Circuit found "unsupported." These included "insufficient documentation, appellant's comparatively larger copying costs and number of attorneys and paralegals, and appellant's failure to make a reduction from its charged cost and for copies related to unsuccessful pretrial work." The Eighth Circuit found that the maximum proper reduction in photocopying costs was 15 percent.

### **ERISA—Attorney Fees**

#### ***Martin v. Arkansas Blue Cross & Blue Shield*, 299 F.3d 966 (8th Cir. 2002)**

Overruling its panel decision in *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980), the *en banc* Eighth Circuit held that prevailing plaintiffs in cases brought under the Employee Retirement Income Security Act (ERISA) are not entitled to a presumption in favor of an award of attorney fees. In *Landro*, the court had adopted the presumption in favor of awarding attorney fees to ERISA-prevailing plaintiffs by reference and analogy to similar fee-shifting statutes in federal civil rights cases, where it is well established that prevailing plaintiffs may ordinarily recover attorney fees unless special circumstances make an

award unjust. *Landro*, 625 F.2d at 1356. In *Martin*, however, the Eighth Circuit observed that ERISA and the federal civil rights statutes have different overall aims. "ERISA protects statutorily-created economic interests, while the civil rights statutes protect constitutionally-based dignitary and individual economic interests, which are uniquely important to our nation as a whole." *Martin*, 299 F.3d at 971. The Eighth Circuit reasoned "that it would belittle the stature accorded civil rights cases to apply the fee-shifting presumption in other types of cases." *Id.*

In addition, the court observed that the legislative history of the civil rights statutes warranted a presumption in favor of attorney-fee recovery, whereas ERISA lacks similar legislative history. *Id.* Rather, ERISA's language and legislative history were more closely analogous to that of the Copyright Act, for which it is established that prevailing plaintiffs are not entitled to a presumption in favor of attorney fee recovery. *Id.* (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523–25 (1994)). Lastly, the Eighth Circuit stated that the presumption runs counter to the "American Rule" that each party normally bears its litigation costs unless Congress expressly provides otherwise. *Id.*

In place of the *Landro* presumption, the Eighth Circuit (with Judges Bye and McMillian dissenting) reaffirmed its adherence to a multifactor test for determining whether to award attorney fees under ERISA. These factors, which the court stated "are by no means exclusive or to be mechanically applied," *id.* at 972, are: (1) the degree of culpability or bad faith of the opposing party; (2) the ability of the opposing party to pay attorney's fees; (3) whether an award of attorney's fees against the opposing party might have a future deterrent ef-

fect under similar circumstances; (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of a plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions. *Id.* at 969 n.4.

### **Judicial Bias**

#### ***Moran v. Clarke*, 309 F.3d 516 (8th Cir. 2002)**

In response to the district court's inflammatory and public display of acrimony toward the appellate court's prior remand of a district court order denying a motion to recuse, *see Moran v. Clarke*, 213 F.Supp.2d 1067 (E.D. Mo. 2002), the *en banc* Eighth Circuit Court of Appeals took the unusual step of recalling its mandate to angrily rebuke the district court for "certain remarks and assertions the district court made in its opinion."

The underlying case was a civil rights action in which the district court had entered judgment as a matter of law against the plaintiff, a white police officer, who sued several municipal defendants (including several African-American public officials), alleging that the defendants violated his substantive due process rights by conspiring to frame him for the beating of a mentally impaired African-American teenager. In a 6-4 decision on appeal, the *en banc* Eighth Circuit reversed the judgment as a matter of law and remanded the case for a new trial. In addition, the Eighth Circuit remanded the district court's denial of the plaintiff's motion seeking the district court's recusal. The recusal motion was based upon the fact that one of the individual defendants disclosed at deposition that she had known the presiding district judge for over 21 years, and that she and the judge had visited each other's homes

on various occasions. The district court initially denied the recusal motion without comment. The Eighth Circuit remanded the issue to the district court, suggesting “that it revisit and more thoroughly consider and respond to [the] recusal request.” *Moran*, 309 F.3d at 517 (quoting *Moran v. Clarke*, 296 F.3d 638, 649 (8th Cir. 2001)).

On remand, the district court more closely examined the merits of the plaintiff’s recusal motion and determined that his recusal was not warranted under controlling law. Nevertheless, the district court recused himself anyway, stating that “the disrespect this court feels has been visited upon it” by the appeals court made it impossible for him to stay on the case. *Moran*, 213 F. Supp.2d at 1076. In so doing, the district court pointedly noted that in the earlier Eighth Circuit opinion, “a majority of six white men” had voted to reverse the decision, while “two white men, one white woman and an African-American man” had dissented. *Id.* at 1074. “Had I been white,” the district court continued, or had the plaintiff been black, the appeals court decision “would have been significantly different.” *Id.* at 1075. He was, the district court said, “offended, insulted, troubled and confused.” *Id.*

In recalling the mandate, the Eighth Circuit did not question the district court’s decision to recuse on remand. Instead, in a *per curiam* opinion, the appellate court focused its ire upon the district court’s aforementioned remarks and observations, stating that these “were calculated to impugn the integrity of this court in the eyes of the public.” *Moran*, 309 F.3d at 517. In the words of the appeals court:

A proper respect for its obligations to the public and to the judiciary

should have counseled the district court to have put aside its baseless, personal, racially oriented speculations, and to have terminated its published recusal order at the end of Part II, instead of engaging in a personal polemic. [*Id.* at 518.]

### **Finality**

#### ***P.A.C.E. v. School Dist. of Kansas City*, 312 F.3d 341 (8th Cir. 2002)**

In this class action desegregation case, the Eighth Circuit concluded that an order denying class members’ motions to decertify the class, to certify a subclass, and to disqualify class council, was interlocutory and not a final and appealable order. In dismissing the appeal, the court rejected the class members’ contention that the United States Supreme Court’s recent decision in *Devlin v. Scardelletti*, 536 U.S. 1 (2002) commanded a different result. The Eighth Circuit observed that *Devlin* concerned the separate issue of the appealability of an order approving a class settlement. Under *Devlin*, the latter species of order is final and appealable. But the Eighth Circuit refused to extend *Devlin* to the district court’s order denying the class members’ motions. The court emphasized that before *Devlin*, the Supreme Court had determined that orders granting or denying class certification are interlocutory and not final, see *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 464–65 (1978), as are orders denying motions to disqualify counsel. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 370 (1981).

The court noted that under Fed. R. Civ. P. 23(f), the class members could have sought discretionary review of the aspects of the district court’s order denying the requested class decertification and subclass certification. But the class

members failed to seek discretionary review within 10 days of the order’s entry, as required by Rule 23(f). In addition, the court of appeals “note[d] in passing that even if the PACE members had made the appropriate Rule 23(f) application to this court, it is far from clear that they would have been able to show that the denial of their motion was appropriate for interlocutory review.” *P.A.C.E.*, 312 F.3d at 342.

### **Preliminary Injunctions**

#### ***United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737 (8th Cir. 2002)**

United Healthcare began to manage all of AARP’s pharmacy services, including a drug discount program managed by AdvancePCS. But some of the pharmacies failed to reroute the member’s prescription claims to United, and instead continued sending them to the prior manager, AdvancePCS. In response, AdvancePCS launched its own drug discount program and treated the claims it received as though the members had submitted to using its program. AdvancePCS did not notify the program participants that AdvancePCS, not AARP, had processed the claim, or that AdvancePCS was no longer the AARP’s program manager. United sued AdvancePCS under state law for deceptive trade practices, and applied to the district court for a preliminary injunction to prevent AdvancePCS from processing the AARP drug discount claims. The district court granted the preliminary injunction based on affidavits alone, without an evidentiary hearing. On appeal, the Eighth Circuit affirmed.

The Eighth Circuit held that loss of reputation and goodwill may constitute irreparable injury. The pharmacies that participated in the AARP program in-

consistently routed prescriptions to AdvancePCS. Because prescriptions filled at different pharmacies may have been routed to two different program administrators, there was a possible divergence in the members' prescription histories, which made it impossible for either program to accurately identify potential drug reactions. Further, AdvancePCS's failure to notify members that they were no longer part of the AARP's drug benefit program may have caused the members to wrongly attribute any drug interaction problems to United and the AARP.

The court then considered *United* and the AARP's likelihood of success on the merits and held that under Minnesota Deceptive Trade Practices Act, AdvancePCS had likely engaged in "passing off." *Id.* AdvancePCS's failure to take reasonable precautions to prevent customer confusion with the pre-existing product, by silently processing the AARP participant's claims without obtaining consent, was enough for the court to find United and AARP were likely to succeed on the merits.

The court also analyzed whether the district court's decision to forego an evidentiary hearing before granting the preliminary injunction was an abuse of the court's discretion. The court stated "an evidentiary hearing is required prior to issuing a preliminary injunction only when a material factual controversy exists." *Id.* at 744. AdvancePCS argued that a factual controversy existed regarding the standard industry expectations of who should notify pharmacists of a terminated relationship. However, the court's decision that "passing off" has no causation requirement meant this issue was not relevant, and no material factual controversy requiring an evidentiary hearing existed.

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### Confronting *Stare Decisis*

*Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003); *Nordyke v. King*, 319 F.3d 1185 (9th Cir. 2001); *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003); *Rico v. Terhune*, 2003 WL 21186323 (9th Cir. 2003); *Wallace v. Castro*, 2003 WL 21186336 (9th Cir. 2003); *Turner v. Candelaria*, 2003 WL 21186338 (9th Cir. 2003)

What happens when you are a judge, and the law you are bound to apply or the procedure you are required to follow offends your idea of right and wrong? Do you recuse yourself, or do you look for a way to argue for what you see as a more just outcome? Several judges in the Ninth Circuit have been wrestling publicly with this issue in recent months, and have reached diverse solutions, including angry discussions of the offending law or procedure in opinions or concurrences, dissents, cries for *en banc* or Supreme Court review, criticism of those who disagree, and out-and-out refusals to go along. In many instances, they have also shed light on issues of appellate procedure and precedent, such as which arguments are most likely to trigger *en banc* review.

In the circuit's most high-profile case, *Newdow v. U.S. Congress*, which held the Pledge of Allegiance to be "unconstitutional," the court recently issued an amended opinion; the only change is that now the Pledge is found to be unconstitutional only for public school children and teachers, not the population in general. *Newdow II*, a two-judge opinion, is accompanied by three dissents to the denial of the petition for rehearing *en banc*. The principal dissent was by Judge Diarmuid O'Scannlain, who condemned *Newdow*

*I* as "an exercise in judicial legerdemain which, not surprisingly, produced a public outcry across the nation," and found *Newdow II* not "defensible." *Id.* at 472. In criticizing his brethren for "a serious mistake" in not granting *en banc* review, O'Scannlain wrote,

We should have reheard *Newdow I en banc*, not because it was controversial, but because it was wrong, very wrong—wrong because reciting the Pledge of Allegiance is simply not "a religious act" as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it set up a direct conflict with the law of another circuit, and wrong as a matter of common sense.

*Id.* He then requested Supreme Court review "to correct the error for us." *Id.* at 482.

The single concurrence in the refusal to rehear *en banc*, written by Judge Stephen Reinhardt, attacked O'Scannlain's dissent for "a serious misconception of fundamental constitutional principles and the proper role of the federal judiciary." *Id.* at 469. Offended by what he saw as a "suggestion" in the dissent that "public and political reaction" to a decision could be seen as evidence of error in that decision, Reinhardt argued that federal judges must decide constitutional issues without regard to popular vote. *Id.* at 471. He also criticized the dissent by Judge Margaret McKeown for suggesting that a case should be heard *en banc* whenever it involves a "question of exceptional importance," arguing that the decision must also be shown to require "correction" (*id.* at 469)—precisely the approach used in the O'Scannlain dissent.

Cries for *en banc* or Supreme Court review also were heard in two cases ex-

aming the right to bear arms under the Second Amendment. First, *Nordyke v. King* examined the issue and came to the same conclusion as last year's *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002): The right is collective, allowing the states to maintain an armed militia; not individual, allowing private gun ownership. The *Nordyke* court conceded that it was "inclined to follow" *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001), which found that the Second Amendment protects the rights of individuals, not just members of a militia, to privately possess and bear arms, but that it was bound instead to follow *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996), finding only a collective right. *Id.* at 1191–92.

Rather than expounding upon *Silveira* as supporting its own holding, the *Nordyke* majority mentioned it only in a footnote—and then with a note of anger, calling it "unpersuasive," "an unnecessary historical disquisition" and "improper." *Id.* at 1192 n.4. The offense? The court explained that "Because 'only the court sitting *en banc* may overrule a prior decision of the court,' ... the *Silveira* panel was bound by *Hickman*, and its rather lengthy reconsideration of *Hickman* was neither warranted nor constitutes the binding law of this circuit." *Id.* The footnote even chastised, on *stare decisis* grounds, an earlier litigant for arguing that *Emerson*—which the panel admitted it preferred—not *Hickman*, should govern.

The lengthy special concurrence by Judge Ronald Gould also criticized *Silveira*, calling for a reconsideration of *Hickman* by the *en banc* court or the Supreme Court, and embracing the "individual rights" view of *Emerson*. The message is clear—it's OK to call for a

"reconsideration" of an adverse opinion, but not to ask the circuit court to "overturn" or "overrule" it.

Soon thereafter, four angry dissents by six judges were filed when *Silveira's* petition for *en banc* review was denied in a published opinion. Judge Harry Pregerson argued that *en banc* rehearing should have been granted simply because the case involved a constitutional right, while Judge Alex Kozinski spoke of the need for the court, as "guardians of the Constitution," to be consistent in its interpretation and to remember the "bitter lessons of history" when armed troops have turned against unarmed populations. Judge Andrew Kleinfeld criticized the reasoning of the "collective right" analysis of the Second Amendment at length, and Gould spoke of the undermining of individual liberty.

Pregerson recently attracted the attention of *The Recorder*, a San Francisco legal newspaper, for his defiance of the United States Supreme Court in several unpublished decisions involving the California Three Strikes Law, which imposes sentences of 25 years to life for third offenses. A recent article described how numerous Three Strikes appeals had been held up while the Supreme Court decided *Lockyer v. Andrade*, 123 S.Ct. 1166 (2003), on the constitutionality of the law. After Three Strikes was upheld, these cases were sent to a screening panel, of which Pregerson was a member, for disposition. In three of the appeals for non-violent offenses, two of the three panel members objected to imposing sentences of between 25 and 50 years to life for petty theft. Co-panelist Reinhardt wrote, "I concur only under compulsion of the Supreme Court decision in *Andrade*. I believe the sentence is both unconscionable and

unconstitutional." Pregerson went further, dissenting and writing that, "In good conscience, I cannot vote to go along with the sentence imposed." As *The Recorder* summed it up, "Since judges are not normally free to ignore Supreme Court rulings, Pregerson's stare-down with *stare decisis* is remarkable."

Court watchers have had plenty of advance warning that Pregerson is a judge who looks first for fairness in the law; the *Los Angeles Times* reported that, in his 1979 confirmation hearing, he said, "If I had to follow my conscience or the law, I would follow my conscience." But does he accomplish anything other than incurring the wrath of legal scholars by adding his voice to the criticism of this law? Let's put it this way: As the *Los Angeles Times* notes, prosecutors all across California are now seeking fewer Three Strikes prosecutions, and some have eliminated all non-violent prosecutions under that law.

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## D.C. Circuit

### Collateral Order Doctrine

***United States v. Philip Morris, Inc.*, 314 F.3d 612 (D.C. Cir. 2003)**

Parting ways with the majority of its sister circuits, the D.C. Circuit held that it would exercise jurisdiction under the collateral-order doctrine to review a challenge by Philip Morris to an adverse ruling on attorney-client privilege. The discovery dispute at issue centered on "the Foyle Memorandum." Philip Morris claimed the Foyle Memorandum was protected from disclosure by the attorney-client privilege, but Philip Mor-

ris failed to list the document on its privilege log. The district court held that Philip Morris waived any privilege in the Foyle Memorandum by failing to log the disputed document. The district court thus found it unnecessary to consider the substance of Philip Morris's privilege claim.

On Philip Morris's petition for an emergency stay pending expedited appeal, the D.C. Circuit agreed with Philip Morris that the district court's order would be effectively unreviewable absent immediate appeal. Relying on the pivotal role of the attorney-client privilege in our adversary system, Judge Sentelle's opinion for the majority concluded that "the institutional benefits of allowing interlocutory review of attorney-client privilege claims outweigh the costs of delay and piecemeal review that may result." Judge Sentelle dismissed the notion that the case was not worthy of collateral order review because the district court's disclosure order rested on a finding of waiver, reasoning that a decision defining the contours of waiver of privilege is no less important than a decision defining the contours of the privilege itself; an erroneous decision as to either eviscerates the same important institutional interests in preserving privileged information.

### Appellate Procedure

#### *Yates v. District of Columbia*, 324 F.3d 724 (D.C. Cir. 2003)

In a case the D.C. Circuit described as "presenting a few procedural tangles," the court clarified that a judgment "defective" under Federal Rule of Civil Procedure 58, because it was not set forth on a separate document, did not affect the validity of appeal from that judgment. The court noted its conclusion was in accord with amendments to the Federal Rules of Appellate Procedure that were not yet in effect when

the appeal was taken. *See* Fed. R. App. P. 4(a)(7)(B).

The next procedural oddity noted by the court was that the defendant improperly had filed (and the lower court improperly had considered) a motion to dismiss under Rule 12(b)(6) even though Rule 12(b) was inapplicable based on the defendant's earlier-filed answer. The court noted that the motion should have been submitted as one for judgment on the pleadings pursuant to Rule 12(c). But in any event, the parties' submission and the lower court's consideration of matters outside the pleadings converted the Rule 12 motion into a motion for summary judgment. The D.C. Circuit held that the resulting order must be treated as a grant of summary judgment under Rule 56, even though the lower court dismissed a pending motion for summary judgment as moot. Despite all of this, the D.C. Circuit affirmed.

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## Federal Circuit

### Post-Judgment Interest

#### *Tronzo v. Biomet, Inc.*, 318 F.3d 1378 (Fed. Cir. 2003)

What happens when an appellate court's mandate that "modifies or reverses a judgment" fails to include "instructions about the allowance of interest" as mandated by Rule 37(b) of the Federal Rules of Appellate Procedure?

This issue arose in round three of appellate proceedings in *Tronzo*. A jury initially awarded Tronzo \$7.1 million in compensatory damages and \$20 million in punitive damages premised upon patent infringement, fraud, and breach of confidential relationship. In the first appeal, the Federal Circuit held that the asserted patent was invalid and remanded for reconsideration of

compensatory damages. On remand, however, the district court slashed both the compensatory and punitive damage awards. In the second appeal (*Tronzo II*, the subject of an earlier *Certworthy* case report), the Federal Circuit held that the district court exceeded its mandate in reducing the punitive damage award, and thus reinstated the original award of \$20 million.

The Federal Circuit labeled its own mandate in *Tronzo II* as "flawed in its failure to instruct as to interest" as required by Rule 37(b). Without instruction from the appellate court, the district court awarded interest back to 1996, the date of the original judgment awarding \$20 million in punitive damages. The Federal Circuit reversed, finding that "when, as here, the appellate court's mandate did not contain the requisite instructions, the district court is powerless to award interest other than as provided in 28 U.S.C. §1961, that is, from the date the district court enters judgment on the return of mandate." Although the appellate court had discretion to award post-judgment interest from the date of the original judgment or from a later date, the Federal Circuit concluded that post-judgment interest should accrue from the date of the final judgment entered in the district court after the second appeal. The Federal Circuit reasoned that despite its "appellate lapse," the Advisory Committee Notes to Rule 37 placed the burden on *Tronzo* promptly to seek reform of the flawed mandate, but *Tronzo* failed to raise the issue until his appellate brief in *Tronzo III*, more than 14 months after mandate issued in *Tronzo II*.

### Attorney's Fees

#### *Libas v. United States*, 314 F.3d 1362 (Fed. Cir. 2003)

Faced with a perfunctory order denying Libas's petition for award of attorney's fees under the Equal Access to Justice Act (EAJA), the Federal Circuit faced what it

termed an issue of first impression in the circuit: Whether a lower court's denial of an EAJA petition for attorney's fees and expenses can be upheld under an abuse-of-discretion standard when the trial court fails to explain its basis for denying the petition.

The EAJA provides that a trial court must grant a timely application for attorney's fees filed by a prevailing party if the government's position in the litigation was not substantially justified, and no special circumstances exist that would make an award of fees unjust. In response to the "perplexing brevity" of the trial court's denial of Libas's petition for fees, the Federal Circuit explained that in EAJA cases, it is the trial court's explanation of why the government's position was substantially justified that provides the record for review and undergirds the appellate process. The Federal Circuit rejected the government's argument that "substantial justification" for its position was "readily apparent" from the earlier decisions on the merits issued by the lower court, in favor of a "sunlit process whereby the court explains in its denial why the government's position was substantially justified." Accordingly, the Federal Circuit vacated the denial order and remanded for further proceedings.

### Ripeness

#### ***Cooley v. United States*, 324 F.3d 1297 (Fed. Cir. 2003)**

The Federal Circuit affirmed the Court of Federal Claims' decision that a plaintiff's taking claim based on the denial of a wetland-fill permit was ripe. The court rejected the argument by the Army Corps of Engineers that the 1993 permit denial was not a final decision, as evidenced by the

Corps' later issuance of certain provisional permits. The court held that the 1993 denial was final because it effectively prohibited any commercial development on the land, and the Corps' regulations provided the plaintiff no means of administrative appeal. Although acknowledging an agency's prerogative to reconsider its own decisions, the court reasoned that the Corps' later issuance of provisional permits did not affect the finality of its 1993 permit denial, but rather went to the issue of whether the taking was temporary in nature. The Federal Circuit remanded on other issues related to the compensability of the taking.

### Standing

#### ***Paradise Creations, Inc. v. UV Sales, Inc.*, 315 F.3d 1304 (Fed. Cir. 2003)**

Here, the Federal Circuit affirmed the district court's dismissal of a company's patent-infringement suit for lack of standing, holding that the company did not have standing to sue because at the time it entered into the subject contract for the patent rights and filed suit, it had been administratively dissolved and was not authorized under Florida law to conduct any business except that necessary to "wind up and liquidate its affairs." Plaintiff argued that it did have standing because its corporate status was reinstated under a Florida statute that provided that after reinstatement, a corporation "resumes carrying on its business as if the administrative dissolution had never occurred."

The first wrinkle here was that dissolved corporation—incorporated under Florida law—did have capacity to sue under Florida law when the dissolved corporation filed its patent-infringement complaint in federal court. Judge Dyk's opinion for the

majority distinguished concepts of capacity to sue (a question of state law) from standing to sue (a question of federal law). Judge Dyk then reasoned that the sole issue on appeal was whether a state's corporate-revival statute can retroactively confer Article III standing if it did not exist when the complaint was filed. Answering the question in the negative, Judge Dyk expressly left open the question whether in a newly-filed action, the corporate reinstatement of the plaintiff, which lifted Florida's bar on enforcement of contract rights acquired during the period of dissolution, would allow plaintiff to sue in federal court for damages that occurred during the dissolution period.

### Standing

#### ***Johnson v. United States*, 317 F.3d 1331 (Fed. Cir. 2003)**

This case involved a takings claim filed by the sole shareholder of a corporation that owned and managed several water and sewage treatment facilities. The shareholder filed suit after a federal court granted the petition of the EPA and the State of Louisiana to appoint a receiver over the corporation with broad powers to ensure compliance with the consent order. The Federal Circuit dismissed the claim for lack of standing, reasoning that although the shareholder had standing when the suit was filed, his shares were canceled during the intervening bankruptcy proceedings, and his failure to maintain shareholder status during pendency of the proceedings terminated his right to assert the takings claim.

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