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Session 3

Appellate Advocacy: Thoughts From the Bench

Moderator: Mark A. Cameli, Reinhart Boerner Van Deuren, s.c., Milwaukee
Panelists:
Justice Jill J. Karofsky, Wisconsin Supreme Court, Madison
Hon. Michael B. Brennan, Seventh Circuit Court of Appeals, Milwaukee
Hon. Lisa S. Neubauer, Wisconsin Court of Appeals District II, Waukesha

About the Presenters...

Mark Cameli is a widely respected litigator with decades of experience helping individuals and businesses navigate crises, remove obstacles and achieve their goals. He is a shareholder and chair of the firm's White Collar Litigation and Corporate Compliance Team, a former member of Reinhart's Board of Directors and former co-chair of the firm's Litigation Practice. Mark has serves on the firm's Diversity, Equity and Inclusion Committee, where he is its former chair, and he co-chairs of the Pro Bono Committee. Prior to joining Reinhart, Mark served as a state prosecutor, then as a member of the Criminal and Civil Divisions of the United States Attorney's Office for the Western District of Wisconsin where he became Chief of the Civil Division. Mark was the district' first Affirmative Civil Enforcement Coordinator. This unique professional background gives him valuable, in-depth knowledge and experience with both the prosecution and defense of business tort and fraud-based cases and the creative defense of white collar criminal and civil matters. In his work as an Assistant U.S. Attorney, Mark also served as the chief of the Financial Litigation Unit where he tried commercial disputes between the government and third parties. Mark was frequently recognized for his accomplishments — notably by the Attorney General and federal agencies. In addition to his legal practice, Mark is a seasoned presenter who speaks to client groups and professional associations on enterprise risk management and best practices. He has shared his skills in trial advocacy as a faculty member for the Attorney General's Advocacy Institute at the U.S. Department of Justice in Washington, D.C., and taught programs sponsored by the Association of Trial Lawyers of America (ATLA), Wisconsin, Ohio and Michigan Bar Associations. Away from the office, he has a wide variety of interests. He is both an opera and automotive enthusiast, enjoys spending time with his three daughters and four grandchildren, and is a dedicated purveyor and consumer of good humor.

Justice Jill J. Karofsky was elected to the Wisconsin Supreme Court on April 7, 2020 and took office August 1, 2020. Before her election to the Supreme Court, Justice Karofsky served as a judge on the Dane County Circuit Court to which she was elected in 2017. Throughout her legal career, Justice Karofsky has been a strong advocate for lawyer health and well-being. Prior to becoming a judge, Karofsky was the executive director of the Office of Crime Victim Services for the state Department of Justice. She previously served as an assistant state attorney general and Wisconsin's first Violence against Women Resource Prosecutor, an adjunct professor at the UW Law School, the general counsel and director of education and human resources for the National Conference of Bar Examiners, and as an assistant district attorney and deputy district attorney for Dane County. Justice Karofsky has served on a number of boards and committees, including the Governor's Council on Domestic Abuse, the Wisconsin Child Abuse and Neglect Prevention Board, the Wisconsin Crime Victims Council, and the Dane County Big Brothers/Big Sisters Board of Directors. She previously co-chaired the Attorney General's Sexual Assault Response Team. She also has served on the Wisconsin Judicial Education Committee and chairs the Violence Against Women STOP Grant committee. Karofsky has received the "Outstanding Victim Advocacy by a Professional" award from the Wisconsin Victim/Witness Professional Association, the "Voices of Courage" award from the Wisconsin Coalition Against Sexual Assault, and the "Significant Impact Award" from the Dane County Coordinated Response to Domestic Violence.

Hon. Michael B. Brennan was confirmed and sworn in as a Circuit Judge for the U.S. Court of Appeals for the Seventh Circuit in May 2018. He previously worked as a partner in the Milwaukee law firm of Gass Weber Mullins LLC, where he tried cases and handled appeals in federal and state courts, as a judge on the Milwaukee County Circuit, where he presided over a variety of criminal and civil calendars, and as an assistant district attorney in the Milwaukee County District Attorney's office. Brennan's undergraduate degree is from the University of Notre Dame, and his law degree from Northwestern University School of Law, where he was an editor on the law review and the moot court champion. He served as a law clerk on the U.S. District Court for the Eastern District of Wisconsin and the U.S. Court of Appeals for the Seventh Circuit.

Hon. Lisa Neubauer serves on the Wisconsin Court of Appeals, District II. She was elected to three six-year terms in 2008, 2014 and 2020. She was Chief Judge of the Court of Appeals for six years and Presiding Judge of District II for six years before that. Judge Neubauer worked in private practice at Foley & Lardner for almost two decades. She received her B.A. from the University of Wisconsin-Madison, and her law degree from the University of Chicago Law School with honors. She is a member of the Order of Coif. Judge Neubauer clerked for Judge Barbara Crabb of the U.S. District Court for the Western District of Wisconsin.

Appellate Advocacy—Thoughts from the Bench

Michael B. Brennan, U.S. Court of Appeals for the Seventh Circuit

I. The Value of Appellate Moot Courts

A. What is a moot?

More than a rehearsal—orally argue and respond to questions in the same format as the appellate argument.

Goals:

- To develop the most persuasive sequence and presentation of arguments.
- For an advocate's oral presentation to become smoother, better and clearer answers given more quickly, and record references and case citations offered more easily.
- Increase the advocate's confidence.

Can give insight into which arguments or answers may help the court decide the case in your favor.

B. Types of moots:

Formal – time limits adhered to and advocate remains "in character" as if in court

The advocate should reject the temptation to stop the exercise and seek the "correct" response from the judge who posed the question—that is not an option during the real argument.

Informal – at any point advocate can step back from the podium to discuss the case with the judges or observers.

C. Who should judge the moot?

Retired and former justices, judges, and practitioners experienced in the field.

If they formerly sat on the same court before which the case is pending, all the better.

Panelists with different levels of knowledge about the topics and issues to approximate the actual appeals court.

Should the judges include those attorneys who also wrote the brief?

- Plus is knowledge of the case.
- Minus is the echo chamber of hearing and rehearsing the same arguments.

D. Insights on the Case

Which questions come to the judges' minds vs. those questions they actually posed?

Which strengths in your case resonated with the moot panel, why did they, and how do you emphasize them?

Which weaknesses in your case were identified for you to shore up? How do you do so?

How can a question be "turned" in your favor?

- Give a response that allows the advocate to turn back to the theory of the case and fit the answer into your party's reasoning as to why it should win.

E. Predicting questions from the bench

What do you say went right or wrong at the court below, and why?

What is your proposed rule of decision?

- Does it have a limiting principle?
- What consequences does your proposed rule have for other cases?

What principles of legal interpretation allow this appeals court to rule for your client?

At a moot, the judges' imaginations formulate and put to the advocate different hypothetical questions.

F. Sharpening the advocate

The moot should be scheduled sufficiently in advance for the advocate to debrief and incorporate the moot's results into the advocate's presentation.

What question does the advocate not want to face? Develop your response before the day of the appellate court hearing.

Can be videotaped—watched with the panel, the advocate, and the client, for the advocate to see what worked and what did not.

G. Flexibility of the oral argument

Will the bench be "hot" or "cold"?

Develop an elevator argument, an argument of medium length, and a longer argument. Be prepared to deliver any one of the three.

Welcome questions from the bench – modern appellate courts as a "discussion around a conference table" with an opportunity to persuade/dissuade.

If one judge wishes to use your argument as a means of indirect persuasion—to influence a colleague—how can you use that to your advantage?

Moot provides a bridge between the argument the advocate prepares and the argument the advocate delivers.

II. Brief Writing—the "Summary of the Argument" section

A. Federal Appellate Rule 28:

(a)(7) Appellant's brief must contain "a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings"

(b) Appellee's brief "must confirm to the requirements of Rule 28(a)(1)–(8) …"

B. **Practitioner's Handbook for Appeals—Seventh Circuit (2023 edition—forthcoming)**, p. 178

Notes about the Summary of the Argument section of the brief that "[f]or longer summaries, it is useful to include references to the pages of the brief at which the principal contentions are made."

C. Six cases per panel sitting, three briefs per case, plus appendices, plus cited case law and other authorities, can result in judge reading far more than 1,000 pages per sitting.

Hence the importance of this section to bring to the judge's attention the party's best arguments, counterarguments, and the relationship between the arguments—"if decide for my client on A, need not reach B"

D. Within your brief, the first chance to persuade; sets up your argument to be considered favorably.

E. Puts forward the arguments themselves, rather than case citations (although you may need to refer to an important statute or controlling case).

Scalia and Garner in *Making Your Case*: a statement of "the main lines of thought without embellishment and quotations" (p. 97–98)

F. Draft this section last, after completing Argument section and Conclusion.

G. Summarize—express the most important facts or ideas in a short or clear form--do not just repeat.

H. Helpful authority: Judith D. Fischer, "Summing It Up with Panache: Framing a Brief's Summary of the Argument," 48 **John Marshall L. Rev.** 991 (2015) (including length, number of sources, and structures of the Summary of the Argument section from selected U.S. Supreme Court briefs).

III. Petitions for rehearing

A. Federal Appellate Rule 35 En Banc Determination

(a) When hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

B. Federal Appellate Rule 40 Petition for Panel Rehearing

- 14 days to file a PFR after entry of appellate court's judgment
  - 45 days if U.S. or an officer or agency of U.S. a party
- Must be electronically filed
- Within 3 days of electronic filing, 15 paper copies of PFR must also be filed; 30 copies if PFR with suggestion for rehearing en banc.
- Motion to extend time to file PFR may only be made during the 14-day period.
- Filing of a PFR not a prerequisite to filing of petition for writ of certiorari at SCOTUS
- Time for filing at SCOTUS tolled by timely filing of PFR.
- 15 page/3,900 word limit. White cover.
- No answer may be filed unless court calls for one.

C. Practitioner's Handbook for Appeals—Seventh Circuit (2023) edition, pp. 233–34

Should alert the panel to specific factual or legal matters that the party raised, but that the panel may have failed to address or may have misunderstood.

Panel rehearing is not a vehicle for presenting new arguments.

"Petitions for rehearing are filed in many cases, usually without good reason or much chance of success. Few are granted."

Upon filing, PFR circulated to same panel of judges, who vote on the petition.

If PFR response called for, the judge who called for the response, or any other judge, may call for the case to be reheard en banc.

D. Seventh Circuit Statistics on PFRs: Next page.

E. Other helpful publications:

J. Timothy Eaton, Elizabeth E. Babbit, and T. Hudson Cross IV, "Petitions for Rehearing in the Seventh Circuit," **The Circuit Rider – Journal of the Seventh Circuit Bar Association** (May 2023), pp. 15-19.

Seventh Circuit Petition for Rehearing Statistics

	Petitions Filed	Criminal	Civil	Enbanc Petitions	Panel Petitions	Pet. Denials	Pet. Grants	Pending
2023	98	17 (direct 10/post-conviction 7)	42 (private 35/US 7)	61	37	88	0	10
2022	176	44 (direct 26/post-conviction 18)	69 (private 57/US 12)	112	64	175	0	1
2021	236	39 (direct 26/post-conviction 13)	99 (private 96/US 3)	144	92	233	3	0
2020	254	24 (direct 19/post-conviction 5)	120 (private 99/US 21)	156	98	254	0	0
2019	282	33 (direct 25/post-conviction 8)	119 (private 98/US 21)	164	118	277	4	1
2018	294	29 (direct 24/post-conviction 5)	148 (private 120/US 28)	185	109	289	5	0
2017	309	43 (direct 35/post-conviction 8)	108 (private 99/US 9)	198	111	302	7	0
2016	306	53 (direct 37/post-conviction 16)	129 (private 93/US 36)	200	106	300	6	0
2015	259	45 (direct 38/post-conviction 7)	107 (private 92/US 15)	153	106	250	9	0
2014	389	61 (direct 56/post-conviction 5)	159 (private 128/US 31)	242	147	383	6	0
2013	360	55 (direct 39/post-conviction 16)	128 (private 109/US 19)	225	135	356	4	0
2012	277	64 (direct 51/post-conviction 13)	105 (private 88/US 17)	165	112	269	8	0

Seventh Circuit Court of Appeals Online Resources

Practitioner's Handbook for Appeals in the Seventh Circuit

https://www.ca7.uscourts.gov/rules-procedures/Handbook.pdf

Helpful Seventh Circuit Forms

https://www.ca7.uscourts.gov/forms/forms7.htm

Seventh Circuit Brief Filing Checklist

https://www.ca7.uscourts.gov/forms/check.pdf

Public Access to Audio Recordings of Oral Argument

http://media.ca7.uscourts.gov/oralArguments/oar.jsp

Frequently Asked Questions

https://www.ca7.uscourts.gov/court-info/faqs/faqs7.htm

Seventh Circuit Court of Appeals Operating Procedures

https://www.ca7.uscourts.gov/rules-procedures/rules/rules.htm#opproc

Wisconsin Appellate Court Online Resources

FAQ on Wisconsin Supreme Court E-Fiing Project

https://www.wicourts.gov/ecourts/efileappellate/docs/efiletransitionfaq.pdf

Appellate Court E-filing Guides and Video Tutorials

https://www.wicourts.gov/ecourts/efileappellate/train.htm

Helpful Wisconsin Court of Appeals Forms

https://www.wicourts.gov/forms1/appeals.jsp?Category=59

Appellate Practice Brief Checklist

https://www.wicourts.gov/courts/offices/docs/clerkappellateoutline.pdf

Guide to Wisconsin Appellate Procedure for Self-Guided Litigants

https://www.wicourts.gov/publications/guides/docs/proseappealsguide.pdf

Wisconsin Court Statistics

https://www.wicourts.gov/publications/statistics/index.htm

Supreme Court Internal Operating Procedures

https://www.wicourts.gov/sc/IOPSC.pdf

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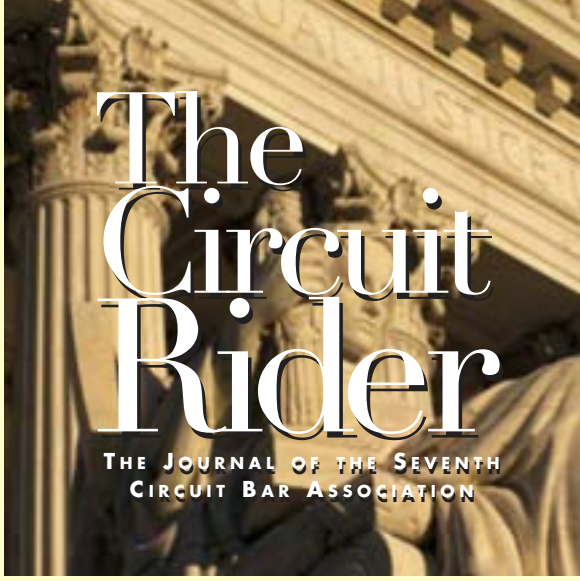

Featured In This Issue

Judge Rovner, The First Woman Appointed to The Seventh Circuit Court of Appeals, Celebrates Over 30 Years on The Bench, By the Honorable Amy J. St. Eve and Alexandra Rubinstein

What Pleases the Court? Views on Oral Argument from the Bench: Interviews of Judges Michael Scudder, Amy St. Eve, and Kenneth Ripple, By Annie Kastanek

Petitions for Rehearing in the Seventh Circuit, By J. Timothy Eaton, Elizabeth E. Babbitt and T. Hudson Cross IV

Preparing to Prepare to Mediate, By Thomas J. Wiegand

Ephemeral Messaging: Understanding Key Preservation Issues in Civil Litigation, By Philip J. Favro, ed.

Cyber-Liability For The C-Suite: Mitigating The Risks Of Senior Management (And Potentially Directors) Being Held Personally Accountable For Data Breach Incidents, By Charles R. Ragan and Martin T. Tully

Lingering Implications of the USA Gymnastics Case, By Jeff Bowen

The Gentleman Judge from Indiana: Remembering the Honorable Michael S. Kanne, By Charles Redfern

University of Illinois College of Law Hosts Inaugural Anderson Center for Advocacy and Professionalism Moot Court Competition, By Anthony J. Ghiotto and Thomas J. Wiegand

The Art and Craft of Judging

What *Pleases* the Court?

Views on Oral Argument from the Bench: Interviews of Judges Michael Scudder, Amy St. Eve, and Kenneth Ripple

*By Annie Kastanek**

Searching for oral argument tips? A Google search will yield hundreds, perhaps even thousands, of practice pointers, typically authored by lawyers who have never been judges. An appellate lawyer like me can suggest that you prepare for argument by brainstorming 80 questions, even if the panel will only have time to ask eight. We can suggest how best to integrate answers to anticipated questions into your affirmative argument, and direct that you absolutely never interrupt a judge. But our perspective is inherently limited by our position at the podium instead of on the bench.

Thus, when the opportunity arose to compile tips for appellate argument for the Seventh Circuit bar, I decided to go to the source: Seventh Circuit judges with a collective 50 years of experience on the bench.

In the below set of interviews, three Seventh Circuit judges — Judges Michael Y. Scudder, Amy J. St. Eve, and Kenneth F. Ripple — kindly entertained my questions on oral argument. Shaped by their experiences on and off the bench, the judges shared their views on oral argument: its importance, shifts in the styles of judges and advocates over time, and where things can go wrong for the advocate. They provided insights on how best to prepare for argument, how advocates can help the court reach the right decision, and judges' use of questioning to dialogue with fellow members of the panel.

Below I include transcripts of my discussions with these three distinguished jurists, who have developed well-earned reputations amongst the Seventh Circuit bar for their intelligence and insight.

Continued on page 9

* *Annie Kastanek is a partner in Jenner & Block LLP's Appellate & Supreme Court Practice. From 2010 to 2022, Annie was an Assistant U.S. Attorney at the U.S. Attorney's Office for the Northern District of Illinois. She served as the Chief of Appeals for the Criminal Division, supervising the Office's litigation in the Seventh Circuit. She clerked for Justice Anthony M. Kennedy at the U.S. Supreme Court and Judge Kenneth F. Ripple of the Seventh Circuit.*

What *Pleases* the Court?

Continued from page 8

Judge Michael Y. Scudder was nominated in 2018 by President Donald J. Trump to the Seventh Circuit, after a decade as a partner at Skadden, Arps, Slate, Meagher & Flom LLP. Judge Scudder was previously an Assistant U.S. Attorney, counsel to the National Security Team at the Department of Justice, and a clerk on the U.S. Supreme Court for Justice Anthony M. Kennedy.

Q: Judge Scudder, thank you so much for meeting with me to discuss oral advocacy. The Seventh Circuit bar appreciates it. I'll start with what I think is the most important question from the perspective of an appellate attorney. What do you wish lawyers would do more of, or less of, during argument?

Judge Scudder: Get right to the core of the most difficult issue faster. We hear a lot of unnecessary wind-up and table setting. Start from an understanding that we have read the briefs, have thought about the issue, and are coming into the argument ready to concentrate on how to resolve the issue presented.

Lawyers who take several minutes to recount the facts and procedural history are letting valuable time go by. A little table setting is appropriate, sure, but then get to it. And if you are the appellee, it is often effective to step to the podium and pick up with the discussion that just concluded. Providing background on the case as an appellee is rarely necessary.

Q: Those are great tips. You have been a judge now for almost five years. What has surprised you the most about oral arguments during that time?

Judge Scudder: Overall, I have been impressed with the quality of advocacy in the courtroom. In fact, sometimes lawyers who may not be the best brief writers — it is not their core skill or, for one reason or another, they were not able to devote the time they wished to their brief — can be quite articulate in the courtroom. This is not uncommon.

Brief writing may not be someone's strongest suit for all kinds of reasons, but they can make their points very well in the courtroom.

The important point, though, is one of balance. Effective brief writing goes a long way, so my suggestion is to double down on the writing if it is not your strong suit, because waiting until oral argument to win the appeal can be too late.

Q: In those situations, do you find that able articulation and effective advocacy at the argument moves the needle for you in some significant way?

Judge Scudder: Yes. It may not move the needle insofar as changing my position, but it can move the needle by providing confidence in a conclusion. If the lawyer is able to confirm or clarify something left unclear in the briefs, and it is on a material point, that clarity can translate to confidence in a particular judgment or perspective. In other words, it may not move the needle in terms of shifting the outcome, but it may move it in a way that affects my task as a judge, and the task of the court, which is to get to the right outcome.

Q: Got it. Do you find oral argument valuable?

Judge Scudder: I think oral argument is very valuable. It is an opportunity for us to get clarification on something that is not clear from the briefs or record. It is also a great opportunity to confirm our understanding of a particular fact, a legal principle, or the application of the principle to the facts. And it is a great opportunity to define and test the legal principle at play in the case.

All of those things are valuable and inform the proper reasoning, and scope of the reasoning, that will define an opinion.

Q: The Seventh Circuit is unique in that it holds argument in almost every counseled case. Do you think the court should pull back on the number of arguments it holds, or do you find the arguments in all the cases to be valuable?

Judge Scudder: I find our practice is very valuable for a few different reasons. Oral argument can really matter in cases that are very close and you are not certain of how you will vote.

Continued on page 10

What *Pleases* the Court?

Continued from page 9

As much as or more than that, though, our tradition of holding argument in all counseled cases is valuable for institutional reasons — for reasons that are important to our justice system and the role courts play in our country. Even in a case that may be very straightforward and a difficult appeal for a party to win — take for example a criminal appeal where a defendant is challenging the substantive reasonableness of a within-Guidelines sentence where everyone agrees the Guidelines were properly calculated — that appeal is hard to win but the consequences for the defendant serving the time as enormous.

There is institutional value, and broader value within the justice system, in the court of appeals giving its undivided attention to defense counsel for 10 or 15 minutes, considering the argument, and making sure that there was no legal error. I would give any defendant that time eight days a week because of the consequences and ramifications to individual liberty in a case like that.

Q: Such a great perspective. Changing the subject slightly, you and I were fortunate to clerk for Justice Kennedy, and one of my key memories from clerking was having a front-row seat to appellate advocacy at the Court, getting to know the approaches of the various Justices to questioning and the styles of frequent oralists before the Court.

How would you describe the differences between oral argument at the Seventh Circuit versus that before the Supreme Court, including with respect to how the Justices relate to each other on the bench?

Judge Scudder: You would have noticed this, too, but when you're talking about the Supreme Court bar, you are talking about the very top appellate advocates in the country — individuals who are very comfortable standing in the well of a courtroom and having a dialogue with the Justices.

In our court, like all the circuit courts around the country, we do not always have lawyers with that experience. That is not a criticism; it is just a reality. I would very much encourage people who appear in front of us to go through moot courts, to get more practice and experience standing at a podium and having a legal dialogue with judges.

The more that you are able to advocate for your client in a context where you are trying to have a dialogue, or a discussion, with the bench — as opposed to delivering a speech or being beholden to a particular script of points you need to make — the better off you will be. The lawyers who do best in our courtroom are those who approach the podium, are able to quickly frame the issue, and partake in a dialogue and discussion. The more you think in terms of dialogue and less in terms of argument, the better you are going to do.

Q: I remember Judge Ripple saying, when I was clerking for him, that he wanted it to feel like he was sitting at a table with the advocate and having a conversation. And I remember being surprised by that approach as a recent law graduate. But, of course, after you do this for a while, the more comfortable you get with that model.

Judge Scudder: Yes, and you hear people describe Supreme Court arguments as the Court having a discussion with itself — one Justice having a discussion with her or his colleague through the intermediary of a lawyer. That is often a fair way to think about what is going on in front of a three-judge panel as well.

The nature of the appeals and some of the questions we get are different, so the type of dialogue at the court of appeals will be different. We might need to confirm facts or need to get into the nitty-gritty of the procedural path a case took. But the need for dialogue and discussion remains the same.

Q: Any other tips you have for advocates we haven't talked about?

Judge Scudder: At times, I am surprised that certain questions seem to surprise a lawyer in the courtroom. I believe that often happens because lawyers are very good at thinking about and planning how to make their strongest points in oral argument. Almost all lawyers can tell you, without scripting or practice, why they should win.

But all too often lawyers seem less prepared to have a spotlight put on the weakest cards in their hand and the vulnerabilities of their positions, whether of fact or law. The more advocates can prepare by thinking about the hardest formulations of questions about the weaknesses in their case, the more prepared they will be. It is easy and tempting to think about affirmative points you want to make, but that is not often what judges are focused on. We are often not asking you to summarize your affirmative argument that way. We are asking questions that target the weaker cards in your hand, to test the persuasiveness of the position you're presenting. So that's where to devote most of your time.

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Continued on page 11

What *Pleases* the Court?

Continued from page 10

Like Judge Scudder, Judge Amy J. St. Eve joined the Seventh Circuit in 2018. Prior to her elevation to the appellate court, Judge St. Eve served for more than 16 years as a federal district court judge in the Northern District of Illinois. Before joining the bench, Judge St. Eve worked in-house at Abbott Laboratories, served as an Assistant U.S. Attorney in Chicago, and was a prosecutor on the Whitewater independent counsel team. Judge St. Eve started her legal career at Davis Polk & Wardwell in New York City.

Q: It's nice to see you, Judge St. Eve. I appreciate you taking the time to speak with me about effective oral advocacy for *The Circuit Rider.*

I would like to start off with a question that I also asked of Judge Scudder. The lawyer's job, ultimately, is to help the court reach the right result. What should lawyers be doing more of — or less of — during argument to help you and the court?

Judge St. Eve: It would greatly aid the court if more advocates endeavored to directly answer the questions the panel asks. It is not uncommon to have lawyers try to work around our questions, which either does not provide a satisfactory answer or wastes a fair amount of the lawyer's allotted time. The court's questions are intentional. It is important to attempt to directly respond to them and give them the attention they deserve.

It is also important for the advocate to do more than simply restate the law and facts as provided in the briefing. We receive a lot of high-quality briefs that inform us of the legal issues. The panel is well-acquainted with the briefing by the time of oral argument. We do not need that information repeated. Instead, use the facts and law in the briefing as the backdrop and build on it, using the court's questions as a guide.

Q: With that in mind, could you share how you prepare for argument and select the questions you ask?

Judge St. Eve: Of course. I typically start with the lower court's opinion, in conjunction with reviewing the briefs. This helps me understand from the beginning what happened in the lower court that the appellant is challenging.

Likely due to my 16 years on the district court bench, I tend to be sensitive to the issues raised before the district court and the accuracy of the parties' representations regarding what occurred there. I therefore meticulously review relevant filings in the district court and orders issued by that court, as well as the relevant transcripts. For example, if the appeal presents a *Daubert* issue regarding the district court's admission of expert testimony, I will read the district court's opinion, but I also will review the expert's testimony and reports. The specific materials I review may form the basis of questions I ask at argument.

Another critical part of my preparation is the process of identifying gaps in the applicable law. This is a very case-specific process. It's hard to generalize, but as a general matter, I conduct research and I ask questions at argument based on the applicability of, or limits in, our case law or conflicts between our case law and that of other circuits.

Q: As you mentioned, you spent many years on the district court bench, where you also held oral arguments on important issues. What do you see as the differences, if any, between arguments in the district court and those in the federal courts of appeals?

Judge St. Eve: Most importantly, as an appellate advocate, you are constrained by the record — as am I. At the district court level, the parties are engaged in making the record. This makes the district court's task more fact- and case-specific, and it includes everything from ruling on the admissibility of evidence to making credibility findings.

But the appellate court does not decide issues on a blank slate. We review the district court's decisions against the backdrop of the appropriate standard of review and in the context of the record. For example, if an appeal challenges the district court's admission of evidence, we review the ruling for abuse of discretion. That constrains the role that I play as a judge, and it should also inform the arguments of the attorneys.

Continued on page 12

What *Pleases* the Court?

Continued from page 11

As an appellate judge, more so than I did on the district court, I consider the impact of a particular legal ruling on other cases, and this consideration may drive some of my questions at argument. For example, I may ask questions about the limiting principles of a particular argument.

Q: I would like to turn to discuss a few issues of style. What are your views on whether an attorney should provide a roadmap at the start of an argument?

Judge St. Eve: I do not have strong views about whether appellants should provide a roadmap. Typically, the first few minutes of an argument are more for the advocate than for the court — simply for the lawyer to get comfortable being before the court. As a result, do what gives you, as the advocate, comfort and gives you confidence to proceed. The judges come in extremely prepared, knowing where we want to probe and the strengths and weaknesses of the arguments. My planned questioning is generally unaffected by you starting with a roadmap.

For the appellee, however, it is generally more effective to start with the key issues. You likely can glean from questioning during the appellant's argument where the court has concerns and what the court would like to focus on. Go there. It will be most effective to jump to where the court's focus is.

Q: I typically try to organize my points during oral argument by reference to what I want the judges to consider before casting their vote in deliberations. Can you speak to how your deliberations work, and whether there are situations in which your or a colleague's vote on a case might change as a result of oral argument?

Judge St. Eve: Yes. Immediately after oral argument, the three-judge panel conducts what we call a "conference," where we discuss each of the cases from that morning. For each case, the judges cast their votes, starting with the most junior member. This is the opposite of the order used by the Supreme Court in its deliberations, which starts with the vote of the most senior Justice. On complicated cases, or if there is a split vote, our discussions may be more detailed. The length of the discussions necessarily varies by case and the nature of the disagreement.

My experience is that events at oral argument can, at least in a small number of cases, shift my vote. If I go into the oral argument uncertain about an issue of fact or law, the argument can make a significant difference — particularly if the briefs were not clear on a particular issue. The questioning of my colleagues also can be very informative.

Q: Do you ever discuss during deliberations points made by advocates?

Judge St. Eve: Yes, definitely.

Q: Any last tips for the oral advocates who appear in front of you?

Judge St. Eve: The most important opportunity to persuade the court is not at oral argument but is in your brief.

Judges preparing for argument read your briefs in detail, and it serves as the lens through which the court then views your arguments. As a result, do not miss the opportunity to write an effective brief. Make sure that you write clearly, and make sure to preserve necessary arguments.

And it never hurts to call upon someone who can edit your brief with a fresh pair of eyes — someone who may not be familiar with your case but is a skilled writer. That process is often indispensable to crafting a brief that will be persuasive to the court. We are fortunate with the high quality of briefs we see in the Seventh Circuit. It is always a pleasure to read a well-written and well-reasoned brief in advance of arguments.

* * *

Continued on page 13

What *Pleases* the Court?

Continued from page 12

Judge Kenneth F. Ripple is the veteran of this group. He was nominated to the Seventh Circuit by President Ronald Reagan in 1985 after serving in the U.S. Navy, including in the Judge Advocate General's Corps. He also was a legal officer of the U.S. Supreme Court, an assistant to Chief Justice Warren Burger, and a law professor at Notre Dame.

This year marks Judge Ripple's 38th year on the Seventh Circuit, and I was privileged to spend one of those years with him in South Bend as his law clerk.

Q: Judge, my favorite memory from my clerkship with you was sitting down after arguments to discuss the arguments together. I felt then and continue to believe today that this was invaluable to my development as an attorney and an oral advocate. You always seemed drawn to arguments that felt more like a conversation than a speech. Can you comment on that and any other recommendations for making the most of the 10 or 20 minutes a lawyer has in front of you?

Judge Ripple: Discussing oral arguments with my law clerks certainly remains one of the best parts of oral argument day.

In my view, "oral *argument*" is really an inaccurate description of what takes place — or should take place — in the modern American appellate courtroom. It is much more accurate to call it a conversation: a frank interchange among professionals about how best to resolve the case before them. The "conversationalists" all have particular roles to play in this conversation, but, in the end, the process must shed significant light on the path to decision.

As in any conversation, the participants need to treat each other respectfully and to take pains not to monopolize the conversation. Sometimes, although fortunately not very often, I have played the role of a football referee and given a time-out hand signal just to get a word in edgewise when counsel begins to "hydroplane" and ignores an attempt to ask a question. On other occasions, excessive questioning from the bench prevents counsel from presenting a complete picture of the client's argument. When that happens, I often think of Justice Brennan's comment that at oral argument the whole case often "comes together" for the first time. For that "coming together" to occur, we judges need to allow counsel sufficient time and latitude to let us grasp the totality the party's position. In short, restraint on everyone's part makes the conversation more fruitful.

Counsel also needs to appreciate that, oftentimes, there is a second "conversation" taking place simultaneously. Many of the questions asked by a judge are intended primarily for other members of the panel. The questioning judge may well be primarily interested in "educating" a fellow judge to a particular perspective on the case and is enlisting counsel in this "educational" effort.

Q: You have had a distinguished career as a judge on the Seventh Circuit, having served on this court for more than 37 years. How would you describe your approach towards argument and your questioning style, and has it changed over time?

Judge Ripple: There have been significant changes. Over the past few decades, there has been an increase in the number of questions asked by the bench and, in my view, less judicial sensitivity to the legitimate needs of counsel to present a full picture of the client's case. We need not bother ourselves attempting to trace the origins of this trend, but we must acknowledge that the practice has led, in some instances, to a new rawness in the entire oral argument enterprise. Some judges, and I suspect more than a few lawyers, leave oral argument feeling that they were deprived of full participation.

When finding myself caught in this situation, I tend to refrain from asking questions in order to give counsel the time to recalibrate and to get as much of the client's argument as possible before the court. Given Justice Brennan's observation, my primary concern is to ensure that counsel leaves the courtroom satisfied that the client's case has been presented fully.

Q: What about on the other side of the bench: Have you witnessed any evolutions in lawyers' oral argument styles, or in the field of appellate advocacy, over time?

Judge Ripple: A lawyer's "style" is, in one sense, very individual to the particular lawyer, and that is the way it should be. But some members of the bar take pains to cultivate special attitudes of mind and expression that make them outstanding. I really look forward to hearing these advocates because I know that they will be helpful. They understand that, compared to a lawyer who has lived with a case for some time, a generalist judge does not have the same familiarity with the background of the case. They take

Continued on page 14

What *Pleases* the Court?

Continued from page 13

the time to educate me about that background in the brief and, to the extent time permits, at oral argument.

I also look forward to hearing these advocates because their rendition of the law is fulsome and accurate. They frankly address the weak aspects of their case and help me see it from the perspective of their client. I really appreciate a lawyer who anticipates where I might have difficulty with a point and then takes the time to get me through that rough spot.

In short, I appreciate lawyers who take the time and expend the effort to put themselves in my shoes and anticipate the problems that I may have with the case. That is the lawyer I point out to my law clerks as worthy of imitation. The great appellate advocate is the lawyer who takes the time to appreciate the judicial task and tries to be *helpful.*

Q: From my perspective as an appellate attorney, one of the most important ways to prepare for argument is to anticipate questions and incorporate answers to those questions into your affirmative presentation, so that you preempt the judges' concerns. Do you agree, and do you have other tips for lawyers preparing for argument?

Judge Ripple: I agree. It is especially helpful to me if a lawyer begins an oral argument with a brief outline of the proposed presentation and then signals where in the argument's particularly nettlesome points will be addressed. With that assurance, I'll be inclined to hold my questions until counsel gets to that point in the argument.

With respect to your broader inquiry, I think that it is important for appellate lawyers to know that, at least in federal court, the judges now have finger-tip access to the electronic record and, consequently, have the time to review it far more thoroughly prior to argument. The advocate can expect far more record-based questions than in earlier times. We also have fingertip access to every case cited in the briefs and are far more able, before oral argument, to separate the wheat from the chaff. Nothing destroys an oral argument faster than a mischaracterization of the record or over-blown reliance on a case that is of negligible importance.

It is also important to anticipate a question on whether a trial court's misstep is "error" or "reversible error." Needless to say, if the case involves an important issue concerning the standard of review, you also can expect that the panel will dwell on it. These issues involve fundamental questions about the institutional responsibilities, and capacities, of trial and appellate courts.

Q: Do you have any tips for advocates making choices of arguments — where they should focus their attention during oral argument?

Judge Ripple: Focus on what really counts. Demonstrate forcefully why the case needs further work by the district court or, if you prevailed in that court, why the judgment should be affirmed. Disregard "brush fires," which perhaps seemed important at the time but are inconsequential in the case's present appellate posture. Ask whether a matter is really important to a client or whether it is just a matter of "lawyer ego."

Educate the judges to the facts and to the context in which those facts arose. Tell the judges *why* your view of the law ought to prevail. Why is your view compatible with the heartland of cases in the Nation? If you are asking for a change in law, say so frankly and then argue *why* that change is justified.

Q: There have been a lot of changes in personnel on the Seventh Circuit recently, with Judges Wood and Hamilton taking senior status, Judge Kanne's death, and additions of Judges Jackson and Pryor. Have these changes affected the dynamic of argument?

Judge Ripple: Even one change in membership on a collegial court has the potential to destabilize the collegial chemistry of the bench. We recently have had many changes. Yet, we have had no destabilization. The dynamics of oral argument and, indeed, the dynamics of all our work together has remained exceptionally stable. Judge Wood and Judge Sykes have provided outstanding leadership. Our new colleagues, moreover, are all very good and seasoned lawyers who have been remarkably sensitive to our traditions. Over time, they will no doubt leave their mark on how the court conducts its proceedings. But I am optimistic, enthusiastically optimistic, that the changes they make will be in the best traditions of the American judiciary.

Petitions *for* Rehearing
IN THE SEVENTH CIRCUIT

*By J. Timothy Eaton, Elizabeth E. Babbitt and T. Hudson Cross IV**

I. INTRODUCTION

Petitions for a panel rehearing or rehearing *en banc* are sometimes filed reflexively after an unsuccessful outcome in the Seventh Circuit as if one is entitled to a second bite of the apple. But that "second bite" is rarely allowed and is subject to rigorous standards, which if not followed, could lead to repercussions. For example, in *Crenshaw v. Antokol,* after the appellant filed a meritless petition for rehearing, the Court sanctioned the appellant with a monetary fine, ordering that if the fine was not timely paid, the appellant would be precluded from conducting civil litigation in all courts in the Seventh Circuit until the fine be paid in full. 206 F. App'x 560, 565 (7th Cir. 2006). The sanction in that case may be extreme but is fair warning that filing a post-opinion petition is subject to certain requirements. What those requirements are and how the process works is the subject of this article.

A petition for panel rehearing is governed by Federal Rule of Appellate Procedure 40 ("FRAP 40"), and a petition for rehearing *en banc* is governed by Federal Rule of Appellate Procedure 35 ("FRAP 35"). In either scenario, the party must strictly adhere to the Federal Rules of Appellate Procedure, as well as any applicable Seventh Circuit Local Rules. Even when those rules are followed to the letter, the likelihood of success under FRAP 40 or FRAP 35 is remote. The Seventh Circuit's Practitioner's Handbook for Appeals reiterates that both types of rehearing petitions are very rarely granted. *See* Practitioner's Handbook for Appeals to the U.S. Court of Appeals for the Seventh Circuit at 207, 210 (2020 ed.). The proverbial

Continued on page 16

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Elizabeth E. Babbitt is a Partner at Taft Stettinius & Hollister LLP and a member of the Taft executive committee. She has significant experience in complex litigation in both federal and state courts. She previously served as President of the University of Illinois College of Law Alumni Board.

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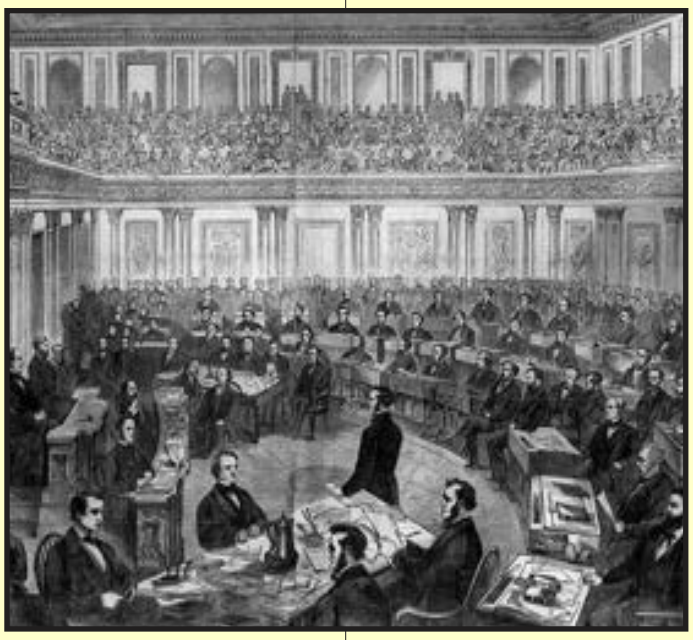
Petitions *for* Rehearing

Continued from page 15

second bite of the apple is very limited.

II. Petitions for Panel Rehearings



The most common type of petition an unsuccessful party files is a FRAP 40 petition for panel rehearing. A petition for panel rehearing "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." Fed. R. App. P. 40(a)(2). The Seventh Circuit is very clear what a panel rehearing is *not.* "Panel rehearing is not a vehicle for presenting new arguments, and, absent extraordinary circumstances, we shall not entertain arguments raised for the first time in a petition for rehearing." *Easley v. Reuss,* 532 F.3d 592, 593-94 (7th Cir. 2008) (*per curiam*). A panel rehearing is expressly intended to address a genuine error of fact or law or to consider an issue presented to the court that the panel did not address. "Panel rehearings are designed as a mechanism for the panel to correct its own errors in the reading of the factual record or the law." *Id.* at 594. As a practical matter, a petition for panel rehearing is more likely to be granted if there was a dissent in the panel's original decision. This is because a litigant must persuade at least two of the three judges on the panel to grant a rehearing, and a litigant may already have one vote from the dissenting judge in the original decision.

III. Petitions for *En Banc* Rehearings

The litigant may also file a FRAP 35 petition for rehearing *en banc.* Unlike panel rehearings, which "are designed as a mechanism for the panel to correct its own errors in the reading of the factual record or the law, rehearings *en banc* are designed to address issues that affect the integrity of the circuit's case law (intra-circuit conflicts) and the development of the law (questions of exceptional importance)." *Easley,* 532 F.3d at 594.

FRAP 35 makes it clear that *en banc* requests are "not favored" and "ordinarily will not be ordered" unless the petitioner demonstrates that: (1) the underlying panel decision creates an intra-circuit conflict or Supreme Court precedent; or (2) the proceeding involves a "question of exceptional importance." Fed. R. App. P. 35(a).

A petitioner seeking an *en banc* rehearing must back up the claim that the original panel decision creates a conflict with Seventh Circuit or Supreme Court authority: the petitioner is obligated to provide "citation to the conflicting case or cases" which demonstrate the need for the full Court to maintain the uniformity of its decisions. Fed. R. App. P. 35(b)(1)(A). The *en banc* petition must state in a concise sentence at the beginning of the petition why the appeal satisfies the requirement of either exceptional importance or to avoid a conflict.

Exceptional importance does *not* mean that the case happens to be exceptionally important to your client. For example, in *HM Holdings, Inc. v. Rankin,* the Seventh Circuit denied a petition for rehearing en banc after the petitioner (who failed to identify any conflict or split created by the underlying decision) utterly failed to demonstrate exceptional importance. 72 F.3d 562, 563 (7th Cir. 1995) (*per curiam*). The *HM Holdings* matter involved a claim by a land buyer that they did not receive "merchantable title," because the defendant contaminated the land. *Id.* In the petition, the appellant sought a petition for rehearing *en banc* "because in today's environmentally sensitive world the issue of 'merchantable title' to real estate and how it is practically affected by the presence of contamination on that real estate is of great importance . . . ." *Id.* The Seventh Circuit, noting the "overwhelming workload of federal courts," summarily rejected the petition, concluding that "[t]he only basis for the petition is that Rankin prefers this Court to find in her favor." *Id.* The Court further cautioned that it would impose sanctions on parties or counsel who file "similarly irresponsible petitions." *Id.*

Continued on page 17

Petitions *for* Rehearing

Continued from page 16

Cases that satisfy the requirements of FRAP 35, by their nature, tend to be matters of great consequence. For example, *Hope v. Commissioner of Indiana Dep't of Corr.,* 9 F.4th 513, 519 (7th Cir. 2021), was a case brought by six sex offenders residing in Indiana, who challenged Indiana's Sex Offender Registration Act because they had to register upon moving to Indiana despite already registering in other states previously. The Southern District of Indiana had entered summary judgment in plaintiffs' favor. *Id.* The Commissioner of the Indiana Department of Corrections appealed, and the Seventh Circuit affirmed the district court's ruling, with Judges Rovner and Wood affirming the decision and Judge St. Eve dissenting.

The Commissioner then filed a petition for rehearing en banc, on the grounds that the majority decision raised a question of exceptional importance: whether the Privileges or Immunities Clause prohibits all state laws that have a disparate impact on newer residents. *Hope,* Case No. 19-2523, Dkt. 35, Petition for Rehearing *En Banc.* The Commissioner further maintained that the panel decision conflicted "with precedents of the Supreme Court, [the Seventh Circuit], and at least one other circuit court — and threatens to invalidate scores of longstanding state laws." *Id.* Amicus curiae briefs were filed on behalf of seventeen other states, urging the court to grant *en banc* review.

The Seventh Circuit granted the *en banc* petition and vacated the panel's opinion and judgment. Ultimately, the case was heard *en banc,* and the Seventh Circuit reversed and remanded the judgment entered by the district court, with Judge St. Eve writing the majority opinion. A case of such importance and potentially broad impact, as well as the risk for conflict, undoubtedly played a role in the *en banc* petition being granted.

Typically, the granting or denial of a petition for rehearing *en banc* is a one-line order, with little indication of the thinking beyond the ruling. However, last year in *Pierre v. Midland Credit Management, Inc.,* the Seventh Circuit voted 6-4 to deny a petition for panel rehearing and *en banc* rehearing, and the four judges who voted in favor of granting the petition published a dissent. 36 F.4th 728 (7th Cir. 2022). Writing for the dissent, Judge Hamilton opined that the case (which involved whether a plaintiff who claimed she suffered emotional distress and anxiety after facing a false debt collection) presented an "important question on the extent of Congress's power under the Constitution to regulate interstate commerce [through] its power to authorize private civil remedies for statutory violations." *Id.* at 729. Judge Hamilton concluded that "the Supreme Court may need to revisit the subject," in light of the Seventh Circuit's treatment of it. *Id.* at 736. Nevertheless, the plaintiff's petition for writ of certiorari was denied. 143 S. Ct. 775 (2023).

IV. The Timing and Length Requirements for Rehearing Petitions

The deadline to file a petition for panel rehearing or rehearing *en banc* is 14 days after entry of judgment, unless that time is shortened or extended by the Court's order or local rule.[1] Fed. R. App. P. 40(a)(1); Fed R. App. P. 35(c). Although disfavored, you can file a motion to extend the time for filing either rehearing petition, which must be supported by an affidavit. 7th Cir. R. 26. If the petition for panel rehearing or rehearing *en banc* is not timely filed, then the Court will issue its mandate within 7 days after expiration of the time period. Fed. R. App. P. 41(b).

Either type of rehearing petition is not to exceed 3,900 words except by leave of the Court. Fed. R. App. P. 35(b)(2)(A); Fed R. App. P. 40(b)(1). If you decide to file both a petition for panel rehearing and a petition for rehearing *en banc,* the requests will be considered a single document for purposes of the word limit even if filed separately. Fed. R. App. P. 35(b)(3). The effect is that you will not be able to skirt the word limit by filing two separate rehearing petitions.

Continued on page 18

Petitions *for* Rehearing

Continued from page 17

V. The Petition Has Been Filed – Now What?

Once your petition is filed, the Court may request an answer to the petition in making its determination whether to grant a petition. No answer to a petition for panel rehearing or rehearing *en banc* shall be filed unless the Court requests one. *See* Fed. R. App. P. 40(a)(3); Fed. R. App. P. 35(e).

If a petition for rehearing *en banc* is filed, any Seventh Circuit judge in regular active service, or any member of the original panel that issued the decision sought to be reheard, may request for an answer to be filed. 7th Cir. Oper. Proc. 5(a). The judge must make this request within 14 days after the *en banc* petition is filed. *Id.* Within 14 days after the answer is filed, any judge entitled to request an answer may then request a vote on whether to grant the petition for rehearing *en banc. Id.*

Typically, an answer is requested prior to a request for a vote on the petition for rehearing *en banc.* 7th Cir. Oper. Proc. 5(b). However, sometimes a request for a vote on the petition is made prior to a request for an answer. *Id.* In such instances, any Seventh Circuit judge in regular active service, or any member of the original panel that issued the decision sought to be reheard, may request a vote on the petition within 14 days after the petition is filed. *Id.*

Voting on the Petition for Panel Rehearing

The Seventh Circuit handles panel rehearing petitions expeditiously. Once a petition for panel rehearing is filed, and the petition does not suggest rehearing *en banc,* it is circulated solely to the panel that issued the original decision. *See* Practitioner's Handbook for Appeals to the U.S. Court of Appeals for the Seventh Circuit at 208; 7th Cir. Oper. Proc. 5(h). The same three judges vote on the petition (without any hearing), and a majority rules. Practitioner's Handbook for Appeals to the U.S. Court of Appeals for the Seventh Circuit at 208.

Voting on the Petition for Rehearing *En Banc*

Petitions for rehearing en banc are distributed to all regular active members of the Court, including the panel that initially heard and decided the appeal. Practitioner's Handbook for Appeals to the U.S. Court of Appeals for the Seventh Circuit at 210; 7th Cir. Oper. Proc. 5(h). At this point, either a judge in regular active service or a member of the initial panel may request for a vote to be taken on the en banc request. Practitioner's Handbook for Appeals to the U.S. Court of Appeals for the Seventh Circuit at 210. If no request for a vote is made, the petition for rehearing *en banc* will be denied, and the panel's order denying the petition will reflect that. *See, e.g., Great Divide Ins. Co. v. McGee,* No. 22-1725, 2023 WL 1770451 (7th Cir. Feb. 3, 2023). If there is a request for a vote, then the petition for rehearing *en banc* will be granted only if a majority of the voting active judges vote in favor of granting the petition. Fed. R. App. P. 35(a); 7th Cir. Oper. Proc. 5(d)(1).

Once the vote is completed, the authoring judge prepares the appropriate order. 7th Cir. Oper. Proc. 5(e). If a petition for panel rehearing or petition for rehearing *en banc* is denied, minority positions will be noted in the order unless the judges in the minority request otherwise. 7th Cir. Oper. Proc. 5(e); *see, e.g., Hildreth v. Butler,* 971 F.3d 645 (7th Cir. 2020) (*per curiam*) (Hamilton, J., dissenting). However, minority positions on orders granting rehearing petitions will not be noted in the order unless requested otherwise. 7th Cir. Oper. Proc. 5(e); Notably, an order granting a petition for rehearing *en banc* will vacate the original panel's decision. *Id.*; *see, e.g., Schmidt v. Foster,* 732 F. App'x 470, 471 (7th Cir. 2018).

In the rare instance a petition for rehearing *en banc* is granted, only the Court's active members, and any Seventh Circuit senior judges who were members of the original panel, are allowed to participate in the rehearing *en banc.* 7th Cir. Oper. Proc. 5(f). Because an order granting rehearing *en banc* vacates the panel's decision, if the *en banc* Court is equally divided on the merits,

Continued on page 19

Petitions *for* Rehearing

Continued from page 18

then the judgment of the lower court is affirmed rather than the judgment of the original panel. Practitioner's Handbook for Appeals to the U.S. Court of Appeals for the Seventh Circuit at 210.

Oral Argument

A panel rehearing does not necessarily mean the case will be reargued. Rule 40 provides that the panel can make a final disposition of the case without re-argument, restore the case to be reargued or submitted, or issue any other appropriate order. Fed. R. App. P. 40(a)(4). Oral arguments are generally held if a petition for rehearing *en banc* is granted. The *en banc* panel may either rely on the existing briefs or order new briefing before the oral argument is held.

VI. Amicus Briefs

When submitting (or opposing) a petition for panel rehearing or rehearing *en banc,* you might find it useful to solicit amicus in support of the petition. For instance, amicus might assist in presenting new ideas, arguments, or theories not found in the petition. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC,* 976 F.3d 761, 763 (7th Cir. 2020). However, a litigant filing a rehearing petition must keep in mind important timing considerations if it wishes to have amicus support a petition. The default rule under Fed. R. App. 29(b) provides that amicus taking a position on the panel rehearing or *en banc* request must file its brief (and motion when necessary) no later than seven days after the petition is filed. *See* Fed. R. App. P. 29(b)(5). However, the Rule allows Circuit Courts to set different deadlines, and the Seventh Circuit has done so. *See* Fed. R. App. P. 29(b)(1). In *Fry v. Exelon Corp. Cash Balance Pension Plan,* the Seventh Circuit held that an amicus brief in support of a petition for panel rehearing, or rehearing en banc, must be filed on the same day as the petition. 576 F.3d 723, 725. In doing so, the Seventh Circuit noted that it has the discretion to accept an untimely filing if "the value of the potential *amicus* brief justifies the inconvenience of requiring the judges to review a case multiple times." *Id.* Parties should ensure that their petition and any potential amicus briefs in support of their petition be filed on the same day. Note, though, that this timing requirement does not apply for an amicus motion to file a brief on the merits after the Court already grants the petition for rehearing.

VII. Conclusion

Petitions for rehearing may, on some occasions, be useful to the Court. The Court wants to "get it right." But filing a petition for rehearing because you did not like the result is not going to advance your client's cause or its resources.

Notes:

[1] In civil matters involving the United States, a United States agency, or a United States officer or employee sued in an official capacity, the time to file a petition for a panel rehearing or rehearing *en banc* is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1)(A)-(C); Fed. R. App. P. 35(c).

Writers Wanted!

The Association publishes The Circuit Rider twice a year. We always are looking for articles on any substantive topic or regarding news from any district — judges being appointed or retiring, new courthouses being built, changes in local rules, upcoming seminars.

If you have information you think would be of interest, prepare a paragraph or two and send it via e-mail to: Jeffrey Cole, Editor-in-Chief, at Jeffrey_Cole@ilnd.uscourts.gov or call 312.435.5601.

December 2019

Featured In This Issue

In Memoriam Randall Crocker, By Jeffrey Cole

An Interview with Justice Ruth Bader Ginsburg, By Hon. Elaine Bucklo

A Historic Chief, By Steven J. Dollear

An Interview with Judge Charles P. Kocoras, Editor's Note By Jeffrey Cole

A Life Well Lived: An Interview with Justice John Paul Stevens, By Jeffrey Cole and Elaine E. Bucklo

Appeals: The Classic Guide, By William Pannill

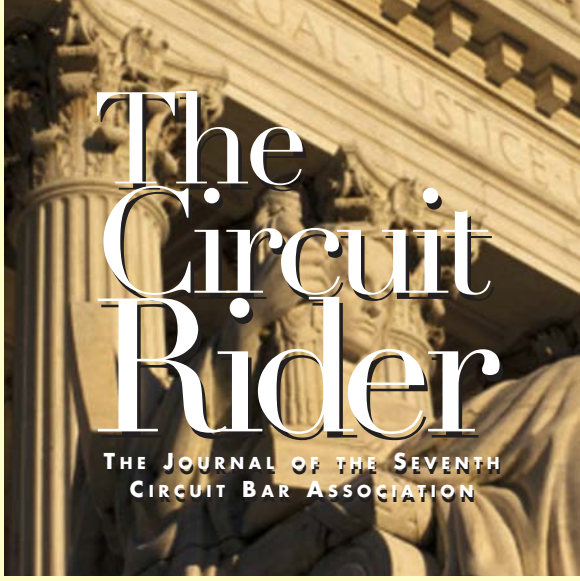
John Paul Stevens: A True Gentleman of Justice, By Rachael D. Wilson

Reversing the Magistrate Judge, By Jeffrey Cole

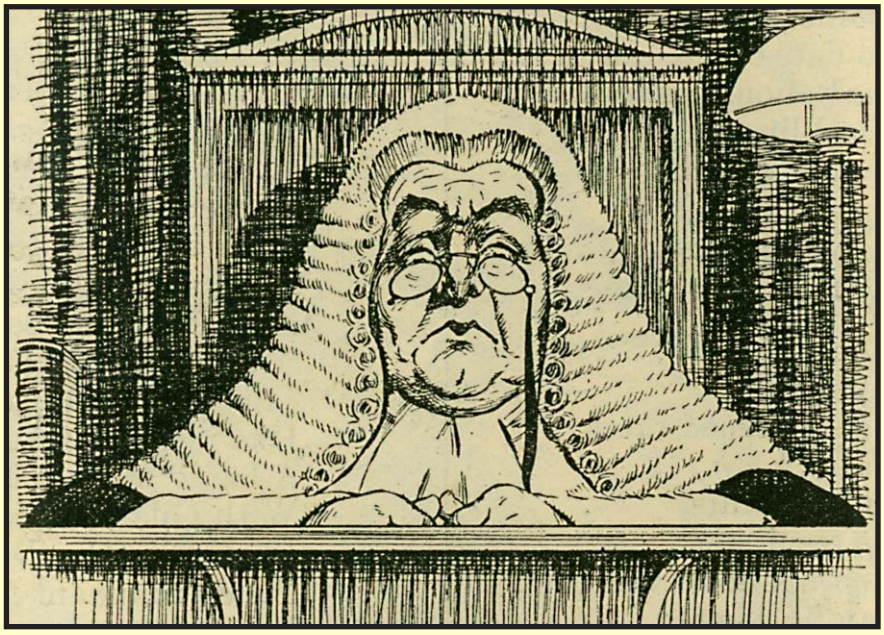
Answering the Call, part 2: The Northern District of Illinois' Rockford Bankruptcy Help Desk, By Laura McNally

In Recognition of Barbara Crabb, Comments By Diane P. Wood

Around the Circuit, By Collins T. Fitzpatrick



Judges



Appeals: *The* Classic Guide

*By William Pannill**

When you want the best advice on handling an appeal, turn to the classics. The classic book about how to write a brief and argue an appeal is Effective Appellate Advocacy, by Colonel Frederick Bemays Wiener. It originally appeared in 1950. Although revised and reprinted with new cases and examples in the 1960s and 1970s under the title Briefing and Arguing Federal Appeals, Wiener's book is now out of print and largely forgotten. Yet Wiener's treatise is one of the finest books ever written about briefing and arguing an appeal. I have read it again and again.

I came across Briefing and Arguing Federal Appeals early in my career in a large law firm. Although I had a graduate degree in journalism and five years of writing for daily newspapers, my briefs kept running aground on the partner for whom I worked. One day, in the time when legal self-help books were rare, I saw this book on the shelf in the firm library. I read it straight through. That single reading turned me into an effective brief writer. My next brief made it past the partner in charge and into the court of appeals, where it won the case.

For years, I thought anyone writing a brief would have read this book. Yet for a quarter of a century I never encountered another lawyer-except for some of the editors of this magazine and the lawyers in my own law firm-who had read it. I have listened (as required) to dozens of speeches about appellate practice and read even more papers from courses of continuing legal education on the subject. Not once has an eminent speaker or author mentioned Wiener's book.

As a result, I have been able to keep to myself for 25 years this wonderful guide to the art of appeals. For an appellate lawyer, owning the book was like owning the formula to Coca-Cola. Colonel Wiener

Continued on page 40

**William Pannill was with Pannill, Moser & Barnes, LLP in Houston, Texas. He was the Editor-in-Chief of LITIGATION from 1982-84. Along with Judge Bucklo's Interview of Justice Ginsburg, Mr. Pannill's Article is one of only eight that were deemed to be classics and were reprinted in the Spring 2019 issue of LITIGATION. Mr. Pannill's observations and insights are as meaningful and insightful today as they were when his Article first appeared in the Winter 1999 issue of LITIGATION. It is invaluable to veterans as well as to those who appear in the courts of appeals only infrequently. Anyone who is involved in appeals must read this Article. The above article is reprinted with the kind permission of LITIGATION Magazine.*

Appeals: *The* Classic Guide

Continued from page 39

died in 1996 at the age of 90. Reluctantly, I have decided that now is the time to part with this great secret before the book and I both disappear.

Why is the book so good? In part, it is because Wiener was such an elegant legal writer. Wiener's style of writing aims at clarity above all else. It is far superior to most legal prose. Here is Wiener's statement of purpose for his work:

> Advocacy needs to be taught, and it needs to be learned. Too many, far too many, lawyers burden appellate courts with poorly prepared, poorly presented, and thoroughly unhelpful arguments-for which they receive, and clients pay, substantial and not infrequently handsome fees. Lawyers, like other professional men, can be divided into the classic threefold scale of evaluation as able, unable, and lamentable. Nonetheless, and after making due allowance for the frailties of mankind, it is really amazing how few good arguments are presented and heard, quite irrespective of the tribunal concerned. About a dozen years ago, I was told by a Justice of the Supreme Court of the United States that four out of every five arguments to which he is required to listen were "not good" ...

Effective Appellate Advocacy at 6.

In my experience, you can expand Wiener's lament to include briefs. He concludes:

> The present book is a response to the conviction that there is nothing mysterious or esoteric about the business of making an effective written or oral presentation to an appellate court, that the governing principles of that process can be extracted and articulated and therefore taught, and that any competent lawyer has the ability, with study and proper application, to write a brief and make an argument that will likewise be competent-and that will further his client's cause.

Briefing and Arguing Federal Appeals at 6-7.

Wiener-known as Fritz-graduated from Brown University in 1927 and Harvard Law School in 1930, where he was an editor of the *Harvard Law Review.* He developed his craft as a government lawyer in the 1930s, after Felix Frankfurter brought him out of private practice to join the New Deal in Washington. He worked in the Department of the Interior, served as a captain in the Judge Advocate General's Corps of the United States Army during World War II, and served for several years in the Office of the Solicitor General of the United States. He rose to become Assistant to the Solicitor General before he resumed private practice in 1948.

Perhaps Wiener's most famous exploit as a private lawyer was persuading the Supreme Court of the United States to reverse itself on rehearing-a feat as rare then as it is now. *Reid v. Covert,* 354 U.S. 1 (1957). An Army court martial had tried a military wife in Japan for killing her husband and sentenced her to life in prison. In a companion case, an Air Force court martial had tried a sergeant's wife who had killed her husband in England and sentenced her to life in prison. The Supreme Court first held in the 1956 Term that courts-martial could try civilians accompanying the armed forces overseas. But Wiener persuaded the Court to grant rehearing, and the Court changed its mind the next year by a vote of 4 to 3, holding that courts-martial had no power to try civilians in peacetime.

Writing the Brief

Wiener's principles of brief writing and argument render his book invaluable. If you follow his precepts, it is impossible to write a bad brief or give a poor argument. Here are the points on brief writing I consider the most important:

1. Write the statement of facts so that the facts alone will make the court want to decide the case in your favor

Remember that the briefs will almost always decide your case. Not only are oral arguments disappearing in appellate courts under the drive for efficiency, but many judges read the briefs and make up their minds before they hear argument. So you cannot dash off a bad brief and cure that with oral argument.

Continued on page 41

Appeals: *The* Classic Guide

Continued from page 40

You should put the kind of effort and skill into writing a brief that a poet or novelist puts into his art, for when you write a brief you are a professional writer.

Wiener writes that, "In many respects, the Statement is the most important part of the brief." Effective Appellate Advocacy at 52. In my experience, the facts are always the most important part of the brief. The facts make each case stand out; the facts are what the judges strive to learn from the brief. If you can explain the facts of the case in your brief, clearly but completely, you have taken a giant step toward persuasion of the appellate court. As Wiener put it:

> Here the task is to present the facts, without the slightest sacrifice of accuracy, but yet in such a way as to squeeze from them the last drop of advantage to your case - and that is a task that in a very literal sense begins with the first sentence of your Statement of Facts and continues through the last one (in which you set forth the opinion or judgment below).

Briefing and Arguing Federal Appeals at 49.

Yet, most lawyers fail to use the facts to persuade. Only last year, I saw the appellees drop a five-page summary of the facts of an immensely complicated case into a 50-page brief. The statement of facts should not be an afterthought or a summary that you scribble out of the case file. Properly written, it is a complete story of the vital events and procedural history of your case. Your job as an advocate is to bring the case to life in the minds of the readers so that they incline to your side.

Wiener recommends writing the statement of facts before you take up any other part of the brief. That forces the brief writer to lay out his entire case on the facts-to tell the story of the case-before he begins any of the argument. This leads to the second of Wiener's principles.

2. Never argue or editorialize in your statement.

The shrieking statement of facts has become more and more a part of brief writing as the "me generation" takes over the courts. Your goal is for the court to accept your brief as the most accurate and complete statement of the case. When you begin to argue or snipe at your opponent, the court's guard instantly goes up and you lose the value of the statement as a means of persuasion. Wiener makes the point this way: "[A] court reading a statement wants to feel that it is getting the facts, and not the advocate's opinions, comments, or contentions."

Effective Appellate Advocacy at 64.

The way you write a statement of facts that persuades is to tell a complete story. Arrange the facts in logical order-usually chronological. But work at stating all the facts that are material to your case. Wiener puts it this way:

> In short, write your statement of facts from beginning to end, from the first paragraph to the last, with this one aim always before you: to write your Statement so that the court will want to decide the case in your favor after reading just that portion of your brief.

Id. at 54.

This is a much easier principle to state than to execute. I usually spend the majority of my writing time pulling the facts together. The statement requires constant trips to the record while you check facts and select testimony or exhibits to work into the statement.

The advantage of Wiener's way of writing the statement is that you will look at your case in a different way if you recite the facts fairly. Even if this is your first time with the case, writing the facts forces you to understand and organize the evidence in your own mind in a way that reading alone will not. You will see connections between facts that you did not recognize before. I think of it as turning a diamond in the sunlight. The brilliance of the gem flashes in different ways as it revolves.

The effort to put the facts together so that they persuade without argument yields many dividends. Like a novelist, you have to arrange and compress facts to produce a readable narrative. With a thorough knowledge of the record, you will seek out and find evidence to paint a picture of the plaintiff and the defendant that illuminates the situation in the readers' minds. Wonderful material often lies overlooked in the record. You have a reason to search for it and use it.

Wiener gives several examples of an effective statement of facts. Here, for example, is a paragraph from an appeal by the United States to the Supreme Court. The government asked for

Continued on page 42

Appeals: *The* Classic Guide

Continued from page 41

review of a case in which a man called up by the draft on the last day of World War I, but not taken, had obtained a judgment 25 years later that awarded him an honorable discharge and veterans' benefits.

> Pursuant to the provisions of Section 2 of the Selective Draft Act of 1917 (c. 15, 40 Stat. 76, 77-78) and regulations promulgated thereunder, respondent James John Lamb was ordered by the local draft board at Davenport, Iowa, to report for military duty at 9:00 a.m. on November 11, 1918 [Armistice Day] (R. 2-3). The order recited that "From and after the day and hour just named you will be a soldier in the military service of the United States" (R. 13). He reported at the time and place fixed in the order and was appointed leader of a contingent of drafted men who were to travel to Camp Dodge (R. 3-4). Before actually entraining for camp, however, he was orally notified by the local board that he should not entrain because of cancellation of all calls for induction and mobilization (R. 4-5). The cancellation had been made by order of the Provost Marshal General under instructions of the President, the contents of the order being communicated to all State draft executives by telegram on November 11, 1918 (R. 16). On November 15, 1918, respondent was notified in writing by his local board of the cancellation order and advised that "such cancellation in cases of registrants who were inducted has the effect of an honorable discharge from the Army"(R. 5, 15). On January 26, 1919, respondent received a certificate entitled "Discharge from Draft" on Form 638- 1, A.G.O., dated November 14, 1918 (R. 5-6, 17).

Id. at 243. (The entire brief appears in *Effective Appellate Advocacy* at 242-51.)

In writing the statement of facts, you are creating a mosaic using many different bits of the record. You may use testimony and other evidence, but you may also use the pleadings, documents from related cases, the lower court's own judgment and opinion, its findings and conclusions, the docket sheet-anything that fairly illuminates the case. You must bring the case alive for the appellate court.

3. Always be accurate.

"If the court finds that you are inaccurate," Wiener says, "either by way of omission or of affirmative misstatement, it will lose faith in you, and your remaining assertions may well fail to persuade." *Briefing and Arguing Federal Appeals* at 49. This is another way of saying that like all advocates, the most important quality you have is your credibility. When court or jury ceases to believe in you, they will also cease to believe in your case.

One way to make sure of accuracy is to insert a record reference for each sentence in the statement of facts. Although a tedious and time- consuming process, that will force you to test your statements of the facts against the record.

Citing to the record also allows you to review crucial testimony and other evidence you might overlook when you write from a digest. As different facts take on new significance, you will find yourself modifying your arguments-or thinking of entirely new ones (which, with any luck, you have preserved in the trial record). Write those ideas down (mine usually come in the middle of the night), because some of them will improve your brief.

Err on the side of understatement. Understatement forces you to build your case through successive record references. Do not risk losing your credibility by stating something as fact that the judges cannot find in the record.

I constantly encounter briefs that tell only part of the story. When you are answering, read not only your opponent's legal citations-some of which will probably turn out to help you-but also the record references. Misstatements of fact impeach a brief as much as a witness.

4. "Grasp your nettles firmly."

Tell the court about the facts that hurt you. Lawyers constantly violate this principle. Every case has some bad facts, or it would not have gone to trial in the first place. It is tempting to ignore facts that go against you, in the hope that the appeals court will not pick up on them. But an alert opponent will point out every one of your omissions to the court. As Wiener says, "No matter how unfavorable the facts are, they will hurt you more if the court first learns of them from your opponent." *Effective Appellate Advocacy* at 55.

There are several reasons behind Wiener's suggestion that you explain the problems in your case. If your client has done some

Continued on page 43

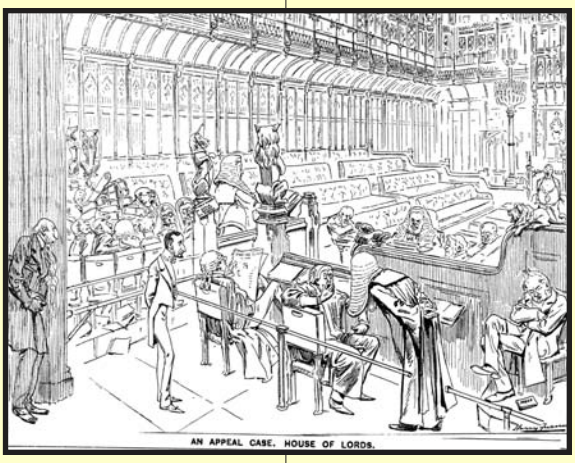
Appeals: *The* Classic Guide

Continued from page 42

questionable things, you should be the one to explain and mitigate his actions, if possible. Moreover, some of the facts that seem to hurt your cause may have a reasonable explanation that a court may well accept if the court hears about the problem from you.

5. Index the record.

Wiener offers several suggestions for writing the statement of facts. The most vital is to prepare an index of the entire record. That means that the brief writer must also read the record. Wiener puts it bluntly: "The painful but inescapable preliminary to writing the Statement is reading the record; there just isn't any short cut or laborsaving gadget to spare the man who actually pushes the pen." *Effective Appellate Advocacy* at 102.



It takes time to read and digest any record. But you can hardly arrange the mosaic without sorting the tiles. Even if you are a senior partner who leaves it to the juniors to write the briefs, Wiener says you must still read the record:

> No lawyer, and I will say it dogmatically, here and now and many times again, should ever risk his reputation by arguing a case on a record he has not read. And since you should read it anyway, the time for that reading is when the process can still influence the brief.

Id. at 105.

Wiener recommends making handwritten notes-or better, dictating the notes. Here is one place where dictation has a place in the writing of briefs. For actual composition of the brief, you should write it yourself by hand or by typing. Dictation produces wordy writing. Once you have written a clear statement of the facts, you can begin the remainder of the brief. Follow Wiener's advice about the argument.can also get involved by contacting the Clerk of Court and Counsel to the Chief Judge, Meg Robertie.

6. Phrase the "question presented" by the appeal so that the question will lead the reader to answer the question your way.

The most memorable pages of Wiener's book are the ones in which he collects examples of how to state the question presented. The question presented is the first of your argument that a federal appellate court sees. Many state appellate courts follow the same practice. Even Texas, which long required the advocate to state points of error, now allows the use of a question. TEX. R. APP. P. 38.1(a). The question presented is therefore your first opportunity to persuade the court.

Wiener offers two forms for presenting a question. The first form is to write a sentence that begins with "whether," e.g., "Whether postmortem declarations are admissible." The second-for use in complicated cases where you cannot cram the essential facts into a single sentence-consists of a statement of the most important facts followed by a statement of a simple question, e.g., "The question presented is whether in these circumstances the later proceeding is barred by the earlier judgment." *Effective Appellate Advocacy* at 74. The challenge for the appellate lawyer is how best to write either kind of question.

Wiener says the "essential technique" for writing an effective question is "to load the question with the facts of the particular case or with the relevant quotations from the statute involved," fairly stated, so that "you can almost win the case on the mere statement of the question it presents." *Id.* at 74. Here, for example, is the question in the Armistice draft case quoted above:

> Whether a court may, by mandamus, order the Secretary of War to issue an "Honorable Discharge from the Army" to an individual who received a "Discharge from Draft" in 1918, over 25 years prior to the institution of suit, where such individual simply reported for induction on November 11, 1918, returned to his home on that day because of the cancellation of all draft calls by order of the President, never entrained for travel to a military camp, never wore the uniform, and never was accepted for military service by the Army.

Id. at 76, 243.

Continued on page 44

Appeals: *The* Classic Guide

Continued from page 43

The court of appeals had held in the draftee's favor. The Supreme Court unanimously reversed the court of appeals- "a mere thirteen days after oral argument." *Id.* at 76; *Patterson v. Lamb,* 329 U.S. 539 (1947).

Like drafting the statement of facts, drafting the question presented requires concentration and (in my case) many drafts. You must know the case so well that you can sum up the argument in a single sentence.

7. "Think before you write the argument."

This is the hardest of Wiener's admonitions for me to follow because I am always behind schedule and under deadline pressure after pulling together the statement of facts. But he is right: "Never start to write until you have thought the case through and completed your basic research." *Id.* at 106. If you write too soon, the final brief reflects it-just as the wall you build will not stand straight if you have not strung it out beforehand.

An equally good reason to plan your argument and read the cases is that "the basic authorities are always full of suggestive leads for further development." *Id*. But how do you know when you are through with the research? Wiener says, "The only answer is, you come to sense it." *Id.* Then, you start to write.

I have never been able to outline an argument on paper as Wiener suggests. Writing the statement of facts and doing the research sets up the argument in my mind. A formal outline would doubtless work better. Whatever your method, do not hesitate to move sections of the argument all around in later drafts. You must find the strongest point in your case and lead with that.

Remember, writing is thinking. Revisions trim and simplify your argument. Every changed word or crossed-out sentence helps you perfect the flow of your argument. Go through as many revisions as time permits. Your goal is to write an argument that your opponent cannot answer. No one produces arguments of that kind in the first draft.

8. "Never let the other side write your brief."

If you take away only one idea from Wiener's book, take this one. I have seen myriad briefs that begin by reciting the other side's argument. The purpose of your argument is to persuade the court that your position is the correct one. Restating the other side's contentions will not help you do that. Restatement can only persuade the court that your adversary's position is correct.

I knew an appellate lawyer who was such a fine writer that he restated the adversary's contentions before each section of his own argument far better than his adversary had stated the matter to begin with. I call this throat-clearing: The lawyer was writing the other side's argument to make sure he understood it. Start with your argument, not your opponent's.

Grab your opponent by the throat (figuratively, of course) with the very first sentence of your argument, and say some thing positive. "The lower court erred because ...," or "The evidence proves that..." In the rest of your argument, refer to your opponent in passing as you knock down his contentions. Rebut your opponent's point as you state your own.

Wiener tells you not to write a responsive brief that merely answers the other side's argument point by point: "Don't follow the appellant's outline of points, even when you must reply to all of them. Put your own strongest point first, because what may be strongest for him may not be so for you." *Id.* at 107. Wiener illustrates this point with an anecdote. A solicitor general asked one day when the government's brief in such-and-such a case would be ready. The reply came back that the lawyer had not started drafting the brief because he had not yet received the appellan's brief. "What's the matter?" asked the solicitor general. "Haven't we got a case?" *Id.*

Drop weak points. Weak arguments in your brief will dilute all your other arguments. If you think you must include every conceivable argument regardless of its strength, remember what Wiener says: "Indeed, critics of outstanding competence have emphasized that it is the ability to discern weak points, and the

Continued on page 45

Appeals: *The* Classic Guide

Continued from page 44

willingness to discard weak points, that constitute the mark of a really able lawyer." *Briefing and Arguing Federal Appeals* at 96.

9. Always use argumentative headings.

The most useless heading I encounter in a brief is: *"I. Introduction."* It tells the reader nothing. It grabs nobody and goes nowhere. And yet I have seen it in dozens of briefs.

You write every word, every sentence, and every paragraph in the argument of a brief for only one reason: to advance the argument. It follows that headings, too, should advance the argument.

In many briefs I see headings like, "The defendant was negligent." That is better than "Introduction" or even "Negligence," but all it does is make an assertion. The statement proves nothing.

What you want to make is an argument, and you make an argument by telling the reader why: "The defendant was negligent because he saw the train approaching at a high rate of speed but did not wave his red flag at the plaintiff." That kind of heading boils down your argument on that point into a single sentence. If you work hard enough on the sentence, it will stick in the court's mind.

Wiener gives an example of "how not to do it," using what the newspapers call label heads, i.e., verb-less headings:

> I. The Rule of Jurisdiction Invoked by the Court Below Is Not Unconstitutional.
> A. The Intent of Congress.
> B. The Constitutional Considerations.
> C. The Application of the Constitutional Considerations to this Case.
> D. The Effect of Petitioners' Contentions.

Id. at 71-72

Go back to recent briefs you have received. Many will contain headings of this type. They tell you nothing of value to the argument. Wiener writes:

> Every one of the subheadings is blind, giving the reader no clue whatever to the substance of the argument; and the principal heading is only assertive. It falls short of being argumentative because it does not explain why the rule being appealed from is not unconstitutional-a matter of more than passing importance, since that was the vital issue in the case.

EFFECTIVE APPELLATE ADVOCACY AT 73.

Do not use argumentative headings in the statement of facts. Label heads work well in the statement of facts, where you wish to appear objective. But label heads do not argue. An argumentative heading grabs the reader and pulls him into the argument.

Repetition

There are other advantages to the argumentative heading. Repetition drives a point home, as advertising shows us. But you had better not repeat yourself in today's era of page limits and time constraints. As Judge McGarry said in these pages, "Say it once. Say it right-but say it once." *McGarry's Illustrated Forms of Jury Trial for Beginners,* 9 LITIGATION, No. 1, at 42 (1982). The argumentative heading allows you not only to repeat your main arguments **but to do it in boldfaced type.** Of course, you do not want to start your argument under each heading with the exact sentence you have just used for a heading. But each heading should sum up and encapsulate the argument of each section of the brief.

Wiener points out another advantage of the argumentative heading: A series of argumentative headings turns the table of contents into a powerful tool of persuasion. The reader can scan the table of contents and see not only the complete history of the case but also each point of the argument. *Effective Appellate Advocacy* at 70.

10. Do not use footnotes.

Wiener makes a persuasive case against footnotes in briefs. He says:

> Perhaps no single implement of all the vast apparatus of scholarship is so thoroughly misused in the law as the footnote. There may be some justification in the manifold sphere of the academic world for that formidable display of learning and industry, the thin stream of text meandering in a vale of footnotes, but that sort of thing is quite self-defeating in the law, because it makes the writer's thoughts more difficult to follow-and hence far less likely to persuade the judicial reader.

Continued on page 46

Appeals: *The* Classic Guide

Continued from page 45

> The worst offenders on this score are undoubtedly the law reviews, whose student editors have at least the excuse of still being at the apprentice stage, and whose faculty editors may have had but insufficient opportunity to gain firsthand acquaintance with judicial psychology. Next in order are the attorneys at law who are not lawyers but who like to make a show of erudition.

Id. at 157-58.

Nevertheless, Wiener believes there are occasions on which you may use footnotes. Here I disagree with the master. I do not believe anything justifies a footnote in a brief. The purpose of a brief is to get read. Anything that interferes with reading jars comprehension. What greater interference can there be for a reader than to stop his eye at the top of the page and drop it down to the bottom to read small type single-spaced?

Your goal in a brief is to hook the reader with the first sentence and pull him inexorably from each sentence to the next until he has read the entire brief. You want to turn your product into a legal thriller. You may not attain that goal, but it is certainly your aim. A footnote allows the reader to pause and to put down your brief. When that happens, you have failed. Never use footnotes.

11. Use "good, clear, forceful English."

For some reason, Wiener did not have much more to say on the subject of legal writing-style than that. *Id.* at 66. He urged lawyers to use short sentences and to minimize legal formalisms such as "the said," hereinbefore," "thereinafter," and so on. But in general, he concluded that "[s]tyle is of course an individual matter." *Id.* at 67.

Wiener was a natural writer. Most lawyers, sadly, are not. Therefore, let me add some writing suggestions that I make to new lawyers in my office.

Read and memorize the first five rules that George Orwell lays down to writers in his essay "Politics and the English Language," 4 *Collected Essays, Journalism & Letters of George Orwell* at 127, 139 (New York 1968):

- "Never use a metaphor, simile or other figure of speech which you are used to seeing in print."
- "Never use a long word where a short one will do"- not even if you wrote for the law review.
- "If it is possible to cut a word out, always cut it out." ("Always" is the important word in this sentence.)
- "Never use the passive where you can use the active."(This rule applies particularly to lawyers, who do not seem to know what the active voice is. See Strunk & White, *The Elements of Style* 18 (1979 ed.).)
- "Never use a foreign phrase, a scientific word or ajar-gon word if you can think of an everyday English equivalent." (Words such as "hereinafter," and "aforesaid," and "such," and "said" (as in "said case"), and "prong" (as in "the second prong of the rule") are jargon. There are many more, which you have spent years learning. Translate them into every-day English or leave them out.)

Forget the sixth rule, which allows you to "[b]reak any of these rules sooner than say anything outright barbarous." Lawyers in general write so barbarously that, like alcoholics, they cannot take any liberties with the rules.

I have three other suggestions for briefwriters:

- Never dictate a brief or any other kind of argumentative writing. Talk, especially formal lawyer-talk, becomes far too corpulent for easy reading.
- Do not file your first draft. As Kipling suggested, "Let it drain"-at least overnight.
- Then revise it, and revise it many times until some nonlawyer can explain to you what you are talking about. Try to imagine yourself as the reader. Move around to the other side of the desk. What seems powerful on Monday in the throes of composition will look weak and wordy on Tuesday or Wednesday.

Wiener suggests reading good legal opinions, such as those of Chief Justice Hughes, to improve your argumentative writing. *Effective Appellate Advocacy* at 68. But do not confine yourself to legal writing. Read widely. For example, read the essays of Sir Francis Bacon-the pithiest writing in English-and the prewar speeches of Sir Winston Churchill that urged the British nation to re-arm against Hitler.

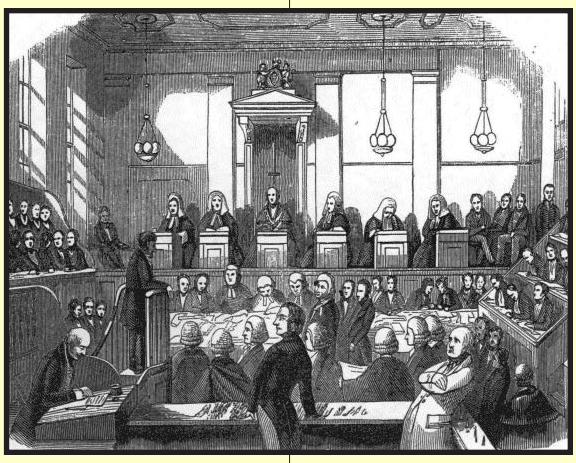
Continued on page 47

Appeals: *The* Classic Guide

Continued from page 46

Wiener also had some suggestions for oral argument. If you are lucky enough to get an oral argument in this day of maximized judicial efficiency, the most important is to study the record.

1. Achieve complete knowledge of the record.



Wiener insists that you read the record yourself, and reread the critical portions:

> If I were asked to name the advocate's secret weapon- a weapon, indeed, that still remains a secret to many- I should say that it is complete knowledge of the record... No lawyer, no matter how able he may be, can afford to argue any case in ignorance of the record. It is done, of course, but it is risky, on a par with passing a car on a curving hill; you may pull it off, but the chances are heavily weighted against you.

Briefing and Arguing Federal Appeals at 293-94.

2. State the facts clearly.

You must have the ability to explain a complicated set of facts to the court just as much as to the jury. Even the panel that tells you it is familiar with the facts will require explanation of some points. You must be able to tell the judges quickly and simply what the problem is all about. Wiener writes:

> "The great power at the bar is the power of clear statement." If that expression standing alone seems unduly sententious, just listen someday to a really able lawyer outlining a complicated fact situation to a court or jury, and compare his exposition with the efforts of some garrulous dowager at the bridge table to explain just what happened to the girls at the last big country club dance. The lawyer states the essentials first, then develops and unfolds the details; the dowager runs on endlessly and repetitiously, expounding whole masses of trivia.

Effective Appellate Advocacy at 186-87.

3. Give an effective opening.

You must catch and seize the court's interest in the opening minutes of your argument. This is particularly true for the appellee, who must "in his opening sentence seize upon the central feature of the case, and, by driving it home, dispel the impression left by his adversary." *Briefing and Arguing Federal Appeals* at 286.

Perhaps the most effective opening in the book is that of Wiener himself arguing for the United States Government in a denaturalization case in the Supreme Court: "The question in this case is whether a good Nazi can be a good American." *Id.* at 289. The case was *Knauer v. United States,* 328 U.S. 654 (1946).

Wiener could handle questions during oral argument with equal aplomb. In fact, when he was an assistant to the solicitor general, Wiener gave one of my favorite answers to a question asked during an oral argument. A former postal employee sued the government in federal court in his home state of Oregon claiming unlawful termination. The government contended that Congress had changed long-existing law and required the ex-postman to bring his suit in the District of Columbia. Wiener had to defend the government's interpretation.

In preparing for argument, he struggled to come up with an answer to a question that he knew was coming- how could Congress have possibly thought that it was reasonable to make an ex-employee go 3,000 miles to have his routine case heard? The question did come, and Wiener gave his prepared answer: Congress knew that any court deciding these cases must have an intimate knowledge of complex government regulations. Because courts in the seat of government must be more familiar with these regulations than some court in the hinterlands, Congress had favored Washington, D.C.

Continued on page 48

Appeals: *The* Classic Guide

Continued from page 47

Justice Frankfurter now joined the debate. He pointed out that he had been an Assistant United States Attorney in New York early in his career and that suits by postal workers were common. Those cases were so easy that the United States Attorney always assigned them to the most inexperienced lawyers in the office so they could get some trial time. With that in mind, Justice Frankfurter asked, would Wiener reconsider his previous answer.

Wiener's response:

> "Your Honor, there were giants in those days"

* * *

These are only the highlights of a work containing dozens of suggestions about brief-writing, oral argument, and rehearings. Even the most experienced appellate lawyer will take something away from a reading of Wiener's book.

After several years of practice using Wiener's treatise, I discovered a division of opinion between those who preferred the original 1950 edition of the book and those who preferred the 1967 edition. I had never seen the 1950 version, so I began a search for the first edition. That ultimately led me to the author himself.

In the mid-1980s, someone scheduled a committee meeting of some kind for Phoenix, where Fritz Wiener-then nearing 80-lived in retirement with his wife, Doris, to whom he had dedicated the 1967 edition. I resolved to meet this eminent lawyer, both to tell him what a wonderful book he had written and to see if he himself had an extra copy of the first edition.

But for some reason, I had to drop out of the trip. So I telephoned him, explained that I was a devotee of his 1967 work, and said that I would like to own a copy of the first edition as well.

I asked if he had an extra copy of the first edition and offered to pay for it.

"Well, what do you think I should charge you?" Wiener asked. "You set the price," I replied.

"How about a hundred dollars?" Wiener said.

I agreed, although I remember thinking that the price was high for an out-of-print book. But then the book arrived, and I began to read it. I realized that Fritz Wiener underestimated the true value of his masterpiece. Indeed, I had bought all this wisdom at a bargain price.

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Featured In This Issue

The 200th Anniversary of the United States District Court for the District of Illinois: A History of the Court And Its Judges, By Jeffrey Cole

Just Follow the Rules and No One Gets Hurt: The Importance of Jurisdictional Statements in the Seventh Circuit, By Sopen B. Shah

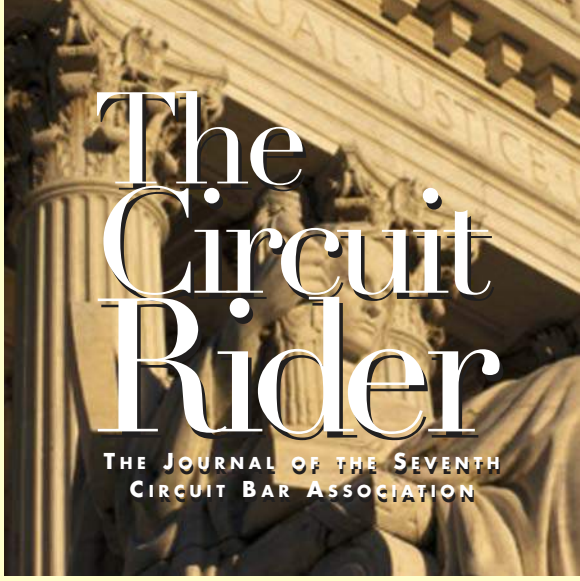
An Interview with Judge Marvin E. Aspen, By Hon. Edmond Chang, Sidney Schenkier, and Jeffrey Gilbert

Racially Selective Law Enforcement Litigation in Federal Stash House Cases, By Alison Siegler

Excluding Lived Experience from the Courtroom: Where Batson *Fails Us,* By Hon. Joan Gottschall and Molly Armour

A Brief Primer on Bankruptcy Appeals, By Kyle R. Hosmer

What are the Consequences for Failing to Preserve ESI? My Friend Wants to Know., By Hon. Iain D. Johnston



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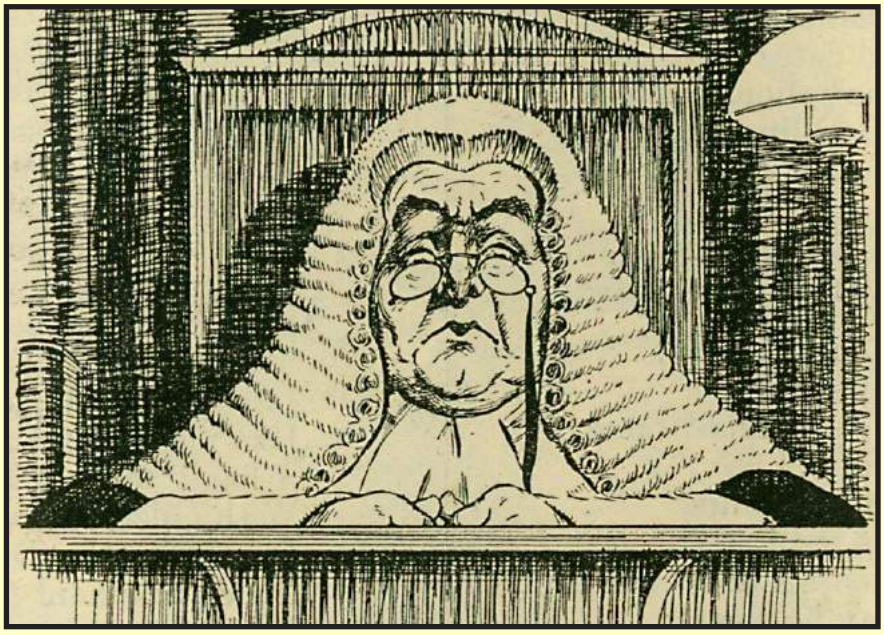

Just Follow *the* Rules *and* No One Gets Hurt:

The Importance of Jurisdictional Statements in the Seventh Circuit

By Sopen B. Shah[*]

Nothing spoils the moment of post-filing relief like a notification from the Seventh Circuit Clerk's Office telling you that the court cannot accept your brief. Unfortunately, the clerk says, your jurisdictional statement does not comply with the appellate and circuit rules. It is easy to treat that section as an afterthought — to write it hurriedly at the end of the process along with other parts of the brief's front matter. But counsel should not let the apparently rote nature of the jurisdictional statement fool them.

Chief Judge Diane P. Wood recently bemoaned the "distressing number of briefs filed" in the court that do not comply with the "straightforward" requirements about jurisdictional statements in "F[ederal] R[ule] [of] A[ppellate] P[rocedure] 28, as fleshed out in Circuit Rule 28."[1] The court strikes almost "two dozen" briefs every month because of jurisdictional-statement deficiencies.[2] Such "obvious flaws" "impose[ ] needless costs on everyone involved."[3] Thus, Chief Judge Wood issued an opinion, *Baez-Sanchez v. Sessions,* "in the hope that attorneys practicing in the Seventh Circuit, as well as [ ] *pro se* litigants, will take heed and avoid [ ] errors in the future."[4]

In *Baez-Sanchez,* the court struck the United States Department of Justice's response brief because of a problem with the jurisdictional statement.[5] Under Federal Rule of Appellate Procedure 28, an appellant's jurisdictional statement must include, among other things, the basis for the district court's subject-matter jurisdiction and for appellate jurisdiction, the filing dates "establishing the timeliness of the appeal or petition for review," and an "assertion that the appeal is from a final order or judgment that disposes of

Continued on page 25

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Just Follow *the* Rules *and* No One Gets Hurt

Continued from page 24

all parties' claims."[6] Circuit Rule 28(a) adds further "details" that the appellant must include. An appellee must thoroughly review an appellant's jurisdictional statement and then "state explicitly *whether or not* the jurisdictional summary in the appellant's brief is complete *and* correct."[7] If the appellant's statement is either incomplete or incorrect, an appellee must state that the statement is not complete and correct and produce, *in full,* a complete and correct jurisdictional statement. It is insufficient for appellee to merely point out and rectify opposing counsel's mistake or omission.[8] The United States' *Baez-Sanchez* brief stated only that the appellant's jurisdictional statement was "correct," leaving the court to wonder about the statement's completeness.[9] Another appellee in that case stated that the appellant's jurisdictional statement was "complete" but said nothing about correctness.[10] The court ordered both appellees to file new briefs within seven days.[11]

Problems persist even after *Baez-Sanchez*. Over a year later, the Seventh Circuit chided a counseled party for failing to file a complete jurisdictional statement after a pro se appellant did not plead appellees' citizenship.[12] Federal Rule of Appellate Procedure 28(a) requires appellants to not only include the basis for the district court's subject-matter jurisdiction but also to "stat[e] relevant facts establishing jurisdiction." Circuit Rule 28(a)(1) further clarifies that, in diversity cases, "the statement shall identify . . . the citizenship of each party to the litigation."[13] The court once again "remind[ed] . . . attorneys practicing in this court[ ] that [judges] rely on them to provide accurate jurisdictional statements when [the court] must decide whether subject-matter jurisdiction exists."[14]

The Seventh Circuit has long paid careful attention to jurisdiction and jurisdictional statements and frequently admonishes counsel for not doing the same. If lawyers violate the jurisdictional-statement rules, the court will ask them to file a supplemental or amended jurisdictional statement. Sometimes, the court asks counsel to show cause why the court should not impose sanctions for the error.

Sanctions are possible if counsel fails to correct the mistake in any supplemental or amended statement or to give a good reason for the error. (I have yet to find an example of a reason that the court found to be good.) In one case, the appellee incorrectly stated that the appellant's jurisdictional statement was "complete and correct" when the appellant's statement failed to disclose the corporation's principal place of business in a diversity case.[15] The court stressed that it "ha[d] warned litigants about th[is] precise pattern[:] a patently erroneous jurisdictional statement by the appellant, and a patently erroneous statement by the appellee that the [ ] statement is complete and correct."[16] The court directed the parties to file supplemental statements of jurisdiction.[17] Although the supplements were complete and correct, the court took issue with the "feeble excuse" counsel provided for the "erroneous allegations of jurisdiction": namely, that the "complaint had alleged jurisdiction so."[18] The court reprimanded both counsel.[19]

A few years later, the court imposed monetary sanctions for a similar problem. In *BondPro Corp. v. Siemens Power Generation, Inc.,* both parties made jurisdictional-statement mistakes when the appellant failed to indicate the citizenship of the parties and the appellee's brief "erroneously stated that the [appellant]'s jurisdictional statement was complete and correct."[20] The court asked the parties to show cause why they should not be sanctioned for violating the rule. After the parties merely apologized and "suggested no excuse, let alone justification" for the violation, the court ordered counsel to pay $1,000 each, an "exemplary" step to "deter[ ] future violations."[21]

Continued on page 26

Just Follow *the* Rules *and* No One Gets Hurt

Continued from page 25

In *Smoot v. Mazda Motors of America, Inc.,* the appellants' jurisdictional statement failed to state Mazda's principal place of business and did not even mention the second appellee, an insurance company.[22] The appellees stated that the appellants' jurisdictional statement was "neither complete nor correct" but provided an incomplete and incorrect one themselves.[23] They stated that the appellees were "citizens of a different state" than the appellants without naming the particular states.[24] They also failed to cite the relevant provision of the diversity statute because the insurance company was a "citizen of a foreign country."[25] The court "asked the parties to submit supplemental jurisdictional statements."[26] After counsel, including "the major Chicago law firm representing the appellees," failed to correct the original "blunder[s]," the court ordered the parties to show cause why "counsel should not be sanctioned" and "to consider specifically the appropriateness, as a sanction," of "being compelled to attend a continuing legal education class in federal jurisdiction."[27]

In some cases, the Clerk's Office and senior court staff provide a layer of screening before an appeal reaches the merits panel. For instance, the Clerk's Office will not accept the brief for filing if there are obvious problems with the jurisdictional statement. Counsel typically has seven days to file a brief with a corrected jurisdictional statement.[28] The docketing statement provides yet another chance for litigants to catch jurisdictional issues before a Seventh-Circuit judge sees their filings. Appellants must file "a docketing statement" around the same time as the notice of appeal, and the docketing statement must comply with Circuit Rule 28.[29] (If the appellant's statement is not complete and correct, an appellee must provide a complete and correct docketing statement to the clerk within 14 days.[30]) "[S]enior court staff" reviews each new appeal "shortly after it is docketed to determine whether potential appellate jurisdiction problems exist."[31]

That said, ultimate responsibility for proper jurisdictional summaries lies with the litigants, and the Seventh Circuit does not hesitate to hold parties accountable. As an initial matter, the court can examine or reexamine jurisdiction at any time, even if counsel does not raise the issue. The panel once raised questions about jurisdiction for the first time at oral argument, a nightmare scenario for many oral advocates.[32] And, as illustrated above, many cases reach a panel for decision with jurisdictional flaws.

Moreover, some jurisdictional-statement mistakes are unfixable. Specifically, a pair of 2018 decisions held that counsel can waive or forfeit rights under nonjurisdictional rules in jurisdictional and docketing statements.[33] In *Walker v. Weatherspoon,* the plaintiff-appellant filed her appeal "many months too late under Fed. R. App. P. 4(a)(7)(A)(ii), which says that a judgment is deemed to be entered on the earlier of the Rule 58 judgment or 150 days after a dispositive order is entered on the civil docket."[34] The jurisdictional statement in the appellees' brief, however, treated the appeal as "premature" rather than late.[35] The "court alerted the parties to a problem with the appeal's timing" after the appellees filed their brief. The appellees then asserted in their supplemental statement that the appeal was late.[36] The court agreed that the appeal was untimely, but held that the appellees "relinquished the benefit" of Rule 4 in their original jurisdictional statement.[37] "Enforcing waivers and forfeitures gives litigants incentives to explore issues themselves rather than wait for the court to do the work."[38]

The *Weatherspoon* court relied on *Hamer v. Neighborhood Housing Services of Chicago,* where the Seventh Circuit held in a matter of first impression that declarations in docketing statements waived "[r]ights under nonjurisdictional rules."[39] The *Hamer* plaintiff filed pro se her notice of appeal "outside the maximum" allowable deadline under Federal Rule of Appellate Procedure 4(a)(5)(C).[40] The defendants, however, stated in their docketing statement that the "Plaintiff-Appellant timely filed a Notice of Appeal."[41] The plaintiff argued that the defendants' statement "waived any challenge to the timeliness" of her appeal.[42] The court, after citing *Baez-Sanchez* and emphasizing the importance of representations to the court, agreed.[43]

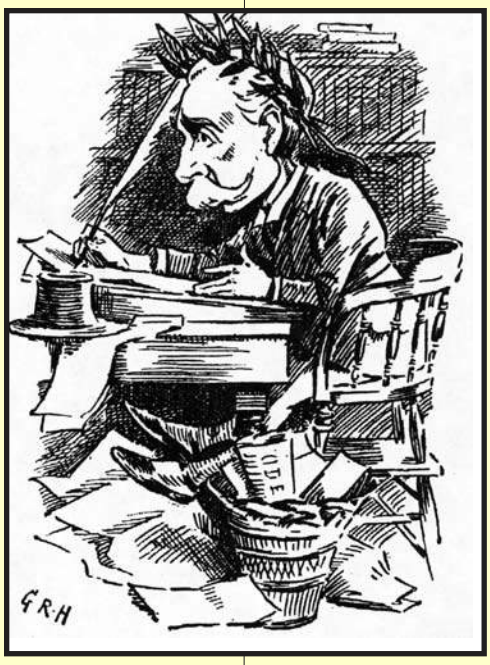
The cases discussed above illustrate some of the most widespread mistakes in jurisdictional statements. A more exhaustive list is below, sourced largely from the Practioner's Handbook for the Seventh Circuit.[44]

Continued on page 27

Just Follow *the* Rules *and* No One Gets Hurt

Continued from page 26

- Appellee fails to state explicitly that appellant's jurisdictional statement is "complete and correct" using exactly those words (*e.g.,* "agrees" or "concurs with" is insufficient);
- Appellee mistakenly states that appellant's jurisdictional statement is "complete and correct";
- The party relies on 28 U.S.C. § 2201 (declaratory judgments) as the basis for subject-matter jurisdiction;
- The statement fails to provide both the date of entry of the judgment or order appealed and the date that the notice of appeal (or petition to review) was filed (merely calling the appeal "timely" is insufficient);[45]
- If the appeal is of an order other than a final judgment, the statement fails to provide additional information sufficient for the court to determine whether the order is immediately appealable;[46] and/or
- The statement fails to include the requisite details of the magistrate judge's involvement if the magistrate judge issued the final decision in a case.[47]



The issues with jurisdictional statements in diversity cases deserve their own list.[48]

- Parties cannot rely on a naked statement that there is diversity of citizenship. The rules require supporting facts.[49]
- Parties should not confuse residency with citizenship.[50]
- Parties must separately identify a corporation's principal place of business and state of incorporation.[51]
- In general, parties should not "stop at the first layer of citizenship if left with something other than individuals or corporate entities."[52]
  - Parties must list the citizenship of all of the members of an LLC, and, if necessary, each member's members' citizenships.
  - A party must disclose the citizenship of a partnership's limited and general partners to determine whether there is complete diversity.

Every Seventh Circuit practitioner should read the Handbook, which contains a wealth of helpful practice pointers about jurisdiction and other topics. (There is also a helpful Seventh Circuit Brief Filing Checklist on the court's website.[53]) For example, the Handbook states that the Seventh Circuit Clerk's Office will, upon request, "preview briefs," including the jurisdictional statement, "for compliance with court rules."[54] Another tip: if counsel notices an error in opposing counsel's jurisdictional statement, he should not move to strike the brief. Rather, counsel should point out the error in the responsive or reply brief.[55]

In sum, lawyers should spend substantial time writing, checking, and double-checking jurisdictional statements for compliance with Federal Rule of Appellate Procedure 28 and Circuit Rule 28. With proper attention to these rules, members of the Seventh Circuit bar can enjoy, uninterrupted, their post-filing moments.

Continued on page 28

Just Follow *the* Rules *and* No One Gets Hurt

Continued from page 27

Notes:

[1] *Baez-Sanchez v. Sessions,* 862 F.3d 638, 639 (7th Cir. 2017) (Wood, C.J., in chambers).

[2] *See* Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit 138 (2017 ed.), *available at* http://www.ca7.uscourts.gov/forms/handbook.pdf (hereinafter "Handbook").

[3] *Baez-Sanchez,* 862 F.3d at 642.

[4] *Id.* at 639, 642.

[5] *See id.* at 641-42.

[6] Fed. R. App. P. 28(a)(4).

[7] Cir. R. 28(b) (emphasis added).

[8] *See United States v. Naud,* 830 F.2d 768, 769 (7th Cir. 1987).

[9] 862 F.3d at 641-42.

[10] *Id.* at 642.

[11] *Id.*

[12] *Slottke v. Wisconsin Dep't of Workforce Dev.,* 734 F. App'x 354, 2018 WL 3854842 (7th Cir. 2018) (unpublished).

[13] *See id.* at 356.

[14] *Id.*

[15] *Cincinnati Ins. Co. v. E. Atl. Ins. Co.,* 260 F.3d 742, 747–48 (7th Cir. 2001).

[16] *Id.* at 747.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 748.

[20] 466 F. 3d 562, 563 (7th Cir. 2006) (per curiam).

[21] *Id.; see also Slottke,* 734 F. App'x at 356 (counsel failed to correct the mistake in a supplemental statement but court did not engage in its typical practice of ordering a counseled party to show cause for violating Circuit Rule 28).

[22] 469 F.3d 675, 676 (7th Cir. 2006).

[23] *Id.*

[24] *Id.* at 676-77.

[25] *Id.*

[26] *Id.* at 677.

[27] *Smoot v. Mazda Motors of Am., Inc.,* 469 F.3d 675, 678 (7th Cir. 2006). *But see id.* at 682-83 (Evans, J., concurring) (calling the "jurisdictional statement hiccups" "minor flaws," not "felonies").

[28] *See Naud,* 830 F.2d at 769; Handbook at 134.

[29] *See* Cir. R. 3(c)(1).

[30] *Id.*

[31] Handbook at 19-20.

[32] *Yassan v. J.P. Morgan Chase & Co.,* 708 F.3d 963, 968 (7th Cir. 2013).

[33] *Walker v. Weatherspoon,* 900 F.3d 354, 357 (7th Cir. 2018) (jurisdictional statement), *cert. denied,* 139 S. Ct. 832 (2019); *Hamer v. Neighborhood Hous. Servs. of Chicago,* 897 F.3d 835, 839 (7th Cir. 2018) (docketing statement); *see also Kontrick v. Ryan,* 540 U.S. 443 (2004); *United States v. Neff,* 598 F.3d 320, 323 (7th Cir. 2010).

[34] *Weatherspoon,* 900 F.3d at 356.

[35] *Id.* at 357.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Hamer,* 897 F.3d at 839-40.

[40] *Id.* at 837.

[41] *Id.* at 838.

[42] *Id.*

[43] *Id.* at 839-40.

[44] *See* Handbook at 135-37.

[45] *See* Cir. R. 28(a)(2)(i) & (iv).

[46] *See* Cir. R. 28(a)(3) (illustrative list).

[47] *See* Cir. R. 28(a)(2)(v).

[48] *See Smoot,* 469 F.3d at 677–78 (the court is "plagued by the carelessness of a number of the lawyers practicing before" the Seventh Circuit "with regard to the required contents of jurisdictional statements in diversity cases").

[49] *See, e.g., Slottke,* 734 F. App'x at 356.

[50] *See, e.g., Heinen v. Northrop Grumman Corp.,* 671 F.3d 669, 670 (7th Cir. 2012) ("counsel for both sides were surprised" to learn at "oral argument" that residence is not citizenship).

[51] *See, e.g., Smoot,* 469 F.3d at 676.

[52] Handbook at 136.

[53] Seventh Circuit Brief Filing Checklist (Jan. 2019), *available at* http://www.ca7.uscourts.gov/forms/check.pdf.

[54] Handbook at 134.

[55] Handbook at 138.

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