

# Certworthy

Summer 2006

The newsletter of the DRI  
Appellate Advocacy Committee

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## A Primer on Motions for Summary Affirmance in the Federal Courts of Appeals

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For a variety of reasons, the image of appellate attorneys as practicing law from "Ivory Towers" is a quickly vanishing one. Given the high cost of litigation, appellate attorneys, like other litigators, must be sensitive to the financial burden that litigation imposes on their clients and must look for opportunities to minimize that burden. The need for sensitivity and creativity is particularly important where there appears to be minimal or no merit to an adversary's appeal.

While being sensitive to the financial burden imposed on their clients, appellate attorneys must simultaneously navigate their cases through the courts of appeals towards a hopefully successful result. To meet this challenge, they must be aware of the pressures faced by the federal appel-

late system and the judges who staff it. The statistics in the 2005 Report from the Director of the Administrative Office confirm that there is no end in sight to the "crisis of volume" that the federal courts of appeals have been battling since the 1990s. The caseload faced by these courts is, in a word, "overwhelming." For example, Table B to the Director's report indicates that there was a 9.1 percent increase in number of appeals filed in Fiscal Year 2005 (68,473) in the regional courts of appeals over the number filed in Fiscal Year 2004 (62,762). This increase marks the tenth consecutive, record-breaking year for the number of appeals filed. Of the 68,473 appeals filed in 2005, 28,559 were *pro se*.

As a result of the ever-growing caseload, federal circuit judges and the staffs on their courts are receptive to procedures that will help them resolve appeals within a reasonable time. They are also receptive to procedures that reduce the quantity of

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It is summertime and, in the words of George Gershwin, the livin' is easy, which makes this an appropriate time to reflect on the committee's activities during the past six months and look ahead to what's coming next.

In March 2006 the committee presented its sixth seminar, and by any measure it was the best yet, which is high praise because each seminar has been superb. More than 200 attendees were entertained and educated by fascinating presentations from an array of highly-accomplished judges, private practitioners, scholars, and corporate counsel, including Judge Michael Daly Hawkins of the Ninth Circuit Court of Appeals, Judge Priscilla Owen of the Fifth Circuit Court of Appeals, Judge David M. Ebel of the Tenth Circuit Court of Appeals, John H. Beisner of O'Melveny & Myers, Beth S. Brinkman of Morrison & Foerster, Pamela S. Karlan of Stanford University, and Robert W. Powell of Ford Motor Company. Congratulations to program co-chairs Scott

## *The Hit Programs Keep Coming*

Burnett Smith of Huntsville, Alabama, and David M. Axelrad of Encino, California, who organized the outstanding seminar.

The seminar had many highlights, but my favorite was when Judge Ebel explained how he goes about reading an appellate brief. "The first thing I do," he said dryly, "is turn to the last page to see how long it is." Certainly words to remember as you contemplate moving for leave to file an over-length brief.

Looking ahead, the DRI Annual Meeting is October 11-15 in San Francisco. Although I'm the committee chair, I'm not a complete DRI shill, so I have to admit that the Annual Meeting does not always have a lot to offer the appellate specialist. But this year is distinctly different, as the Annual Meeting will feature two programs of great interest to appellate lawyers.

First, on October 13, the committee is presenting a 90-minute program entitled *The New Supreme Court*. Committee members Linda T. Coberly of Chicago, Michael B. King of Seattle, and Mary Massaron Ross of Detroit will lead a discussion where a panel of Supreme Court watchers will gaze into the proverbial crystal ball and offer their views

about where the Court will go under the leadership of new Chief Justice John Roberts. And what a panel it will be, featuring former United States Solicitors General Charles Fried, Kenneth W. Starr, and Seth P. Waxman, and professor and supreme court advocate Kathleen M. Sullivan of the Stanford University Law School.

Later that day, the appellate advocacy committee will have its annual meeting. And I'm delighted to report that meeting will feature a presentation on technology and appeals by committee members Eric J. Magnuson and Diane Bratvold, both of Minneapolis.

So, as you can see, there are plenty of good reasons to attend the annual meeting, and I hope to see you there. But if I don't, perhaps we can connect at the next appellate seminar, which is set for February 2008 in Miami. I'm excited to announce that Diane Bratvold has agreed to serve as the program chair for the Miami seminar, and you can expect to hear from her very soon as planning begins.

And, as always, I hope to hear from you very soon if you have any questions, comments, or suggestions about the committee.

*Good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws.*  
*Plato (427 BC-347 BC)*

Once again, it's my privilege to present an interesting batch of articles in this issue of *Certworthy*. And once again, I have several people to thank.

First on the list is Diane Crowley, our vice-chair of publications, assistant editor of *Certworthy*, and Ninth Circuit reporter. Besides writing the Ninth Circuit report, Diane edits the other circuit reports. It's a lot of work—I know because I used to have her job. Thanks also to our twelve circuit reporters, who regularly sift through who knows how many reported decisions to select and bring to our attention the three or four most interesting and important ones. Many of them have performed the job faithfully for several years now, and all of them deserve our thanks.

Next on the list is Ralph Johnson, our long-time Second Circuit editor, who has lately become a regular contributor of feature articles. For this issue, Ralph contributes a primer on motions for summary affirmance. Ralph's articles are always informative and useful, and this one is no exception.

Thanks also to Matt Scott and Joe Parks. Matt and Joe have contributed an article analyzing a pair of decisions handed down by the Supreme Court about a year ago, concerning displays of the Ten Commandments on government property. The Court approved one display and disapproved the other, leaving many of us wondering how the two decisions could be reconciled. Matt and Joe examine both decisions and conclude that they can't.

Rounding out this issue: Retired appellate judge Margaret Grignon and Zareh Jaltrossian provide us a judge's

eye view of appellate oral argument. Steffen Johnson offers some pointers for writing effective reply briefs. And Beth Hanan reviews Joan Biskupic's biography of recently retired Justice Sandra Day O'Connor. My thanks to all of them.

\* \* \*

I'd like to take a minute to talk about the on-line publications of some of our committee's members. Many of you are probably familiar with the plethora of legal blogs on the Web. But many of you may not know that some high-quality legal blogs are written by members of the DRI Appellate Advocacy Committee. So when you finish reading *Certworthy*, take a few minutes to visit some of these sites:

- *Southern Appeal* (<http://southernappeal.org/>). This is a very southern, very conservative, very Federalist, politically oriented blog. Its main instigator is Steve "Feddie" Dillard of James, Bates, Pope & Spivey, LLP, Macon, Georgia. I had the pleasure of meeting and sharing a dinner table with Steve at our recent seminar in Phoenix. *Southern Appeal* is consistently thought provoking, which makes it worth your while regardless of your politics.
- *New York Civil Law* (<http://nylaw.typepad.com/>). This acclaimed legal blog is written by Matt Lerner of Goldberg Segalla LLP in Albany, New York. Matt contributed an article to the last issue of *Certworthy*. He is taking a summer vacation from blogging, but promises to return in September, shortly after this issue of

*Certworthy* is scheduled to be published.

- *SW Virginia Law Blog* (<http://swvalaw.blogspot.com/>). As the title suggests, this blog covers all things legal in the Commonwealth of Virginia. It's written by Steve Minor of Elliot, Lawson & Minor in Bristol, Virginia, who serves as *Certworthy's* Fourth Circuit reporter.
  - *Abstract Appeal* (<http://abstractappeal.com/>) covers Florida and the Eleventh Circuit. Its principal author is Matt Conigliaro of Carlton Fields in St. Petersburg, Florida. One of Matt's significant accomplishments on this blog was his in-depth coverage of the Terri Schiavo case, beginning in August 2003 and running through 2005. If you visit *Abstract Appeal*, you'll find links to his collection of entries on the topic.
  - *The (new) legal writer* (<http://raymondward.typepad.com/newlegalwriter/>). This is a Web project that I started in January 2006; so far the experiment has proven successful. The blog aspires to be "a collection of resources for lawyers, who write." If the topic interests you, then please visit.
- If you know of any other legal blog written by members of our committee, please send me an e-mail about it, so that it can be publicized in a future issue of *Certworthy*.
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paper that they need to analyze in order to resolve an appeal.

This article examines motions for summary affirmance, a procedural tool that can assist appellate attorneys with minimizing their clients' costs and with navigating through a system that some believe is at a breaking point. Besides reducing costs and assisting with case management, the use of motions for summary affirmance improves the public's confidence in our legal system by resolving controversies more expeditiously. Thus, motions for summary affirmance constitute a win-win situation for an attorney representing an appellee. They provide an opportunity to reduce the financial burden on the client and to defend an appeal in a format attractive to the court.

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#### An Option to Consider

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#### A Popular Tool for Some

Motions for summary affirmance or summary disposition have been widely used for decades by the federal government in criminal and civil cases throughout the country. *See, e.g., United States v. Serrato-Balderas*, No. 05-50920, 2006 WL 1004828 (5th Cir. Apr. 12, 2006)(per curiam); *Russell v. Department of Justice*, No. 04-5036, 2004 WL 1701044 (D.C. Cir. July 29, 2004)(per curiam); *United States v. Gomez-Perez*, 215 F.3d 315 (2d Cir. 2000); *Wilson v. United States*, 409 F.2d 604 (5th Cir. 1969)(per curiam). Motions for summary affirmance are especially popular with government lawyers practicing in the Fifth Circuit. A WESTLAW

search reveals that within the last year or so, that court has had days on which it granted dozens, if not more, of such motions. For example, on April 12, 2006, the Fifth Circuit entered 29 orders granting motions for summary affirmance in favor of the federal government. That day was hardly a record breaker. On February 24, 2006, the Fifth Circuit entered 78 orders granting motions for summary affirmance in favor of the federal government. It entered 42 such orders on December 14, 2005, 103 on November 9, 2005, and 53 on August 17, 2005.

The popularity of motions for summary affirmance is not limited to either the Fifth Circuit or the federal government. Decisions and orders ruling on these motions are also issued regularly by the D.C., Third, and Ninth Circuits. *See, e.g., Moss v. Potter*, No. 05-4021, 2006 WL 988794 (3d Cir. Apr. 17, 2006) (per curiam); *Fernandez v. Centerplate/NBSE*, 441 F.3d 1006 (D.C. Cir. 2006) (per curiam); *Cortes-Vence v. Ridge*, 164 Fed. Appx. 639 (9th Cir. 2006). Indeed, motions for summary affirmance are expressly provided for in the local rules or internal operating procedures for the First and Third Circuits. 1st Cir. R. 27(c); 3rd Cir. R. 27.4; 3rd Cir. I.O.P. 10.6. Moreover, parties in civil appeals have regularly used motions for summary affirmance with great success. *See, e.g., Aldogan v. Aldogan*, 89 Fed. Appx. 285 (1st Cir. 2004) (per curiam); *Rocha v. Antonovich*, 36 Fed. Appx. 260 (9th Cir. 2002); *Dewitt v. Wall*, 41 Fed. Appx. 481 (1st Cir. 2002) (per curiam); *Thomas v. West Baton Rouge Par-*

*ish Sch. Bd.*, 423 F.2d 1203 (5th Cir. 1970) (per curiam).

In fact, some courts have used a motion for summary affirmance as an opportunity to resolve an appeal, even if the proceedings below were not as clear as one would hope. For example, in *Fernandez v. Centerplate/NBSE*, 441 F.3d 1006 (D.C. Cir. 2006) (per curiam), the D.C. Circuit agreed with the employee's argument that her claim under the Fair Labor Standards Act (FLSA) was not subject to dismissal for lack of subject matter jurisdiction. In particular, the court noted that pursuant to *Arbaugh v. Y & H Corp.*, 126 S.Ct. 1235, 1245 (2006), when Congress does not rank a statutory limitation as jurisdictional, courts should treat the restriction as nonjurisdictional in character. Instead, such a limitation is an element of a plaintiff's claim for relief. *Fernandez*, 441 F.3d at 1009. Nevertheless, the D.C. Circuit agreed with the district court's conclusion that the employee did not have a claim under the FLSA. Thus, it converted the district court's dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure into a grant of summary judgment and affirmed because the district court's ruling was predicated upon the employer's undisputed evidence demonstrating that the employee was paid overtime for all hours worked in excess of 40 per week. *Id.* at 1006.

#### Numerous Opportunities and Common Scenarios

There are a plethora of cases in which the filing of a motion for summary aff-

firmance is justified and appropriate. The sheer number of pending federal appeals and the courts' ongoing search for new methods to resolve them confirms this point. For example, one commentator counted more than 6,200 summary dispositions by the federal courts of appeals in 1993 alone. Martha J. Dragich, *Will The Federal Courts Of Appeals Perish If They Publish? Or Does The Declining Use Of Opinions To Explain and Justify Judicial Decisions Pose A Greater Threat?*, 44 Am. U. L. Rev. 757, 763 (1995).

The opportunity to reduce costs through a motion for summary affirmance usually correlates with the strength of your client's position in the case. Consequently, the most obvious scenario for employing the motion is where the appellant is *pro se* and the district court has issued a thorough decision. See *In re: Rodriguez*, No. 05-5130, 2005 WL 3843612 (D.C. Cir. Oct. 14, 2005) (per curiam). The motion can also be useful in cases with litigants who file multiple lawsuits arising out of the same or related events. See *Zahran v. Frankenmuth Mut. Ins. Co.*, No. 97-1712, 1999 WL 191493, at \*1 (7th Cir. Mar. 25, 1999).

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#### Less Than Unanimous Approval

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The ability to file a motion for summary affirmance is not, however, available in all the circuits. The Sixth Circuit prohibits them. 6th Cir. R. 27(e)(3). The Fourth Circuit has indicated that such motions "are reserved for extraordinary cases only and should not be filed routinely." 4th Cir. R. 27(f). *Cf. Braitsch v. EMC Corp.*, No. 99-1149, 2000 WL 289382 (4th Cir. Mar. 20, 2000)(per

curiam). The Fourth Circuit's rules state that "[m]otions for summary affirmance ... are seldom granted" and that they "should be made only after briefs are filed." 4th Cir. R. 27(f). Similarly, the Tenth Circuit has limited the circumstances under which it will consider motions for summary affirmance to cases involving supervening changes of law or mootness. 10th Cir. R. 27.2(A)(1)(b). See *De Guzman v. INS*, 16 Fed. Appx. 935, 937 n.4 (10th Cir. 2001).

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#### Source of Authority

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The authority for summary affirmance appears to lie in Rule 2 of the Federal Rules of Appellate Procedure. *Thomas*, 423 F.2d at 1204. It provides as follows:

On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

The courts of appeals have regularly disposed of cases using language consistent with Rule 2. See, e.g., *Chemical Eng'g Corp. v. Marlo, Inc.*, 754 F.2d 331, 335 (Fed. Cir. 1984) (summarily affirming because appeal was "clearly hopeless and unquestionably without any possible basis in fact or law"); *Leigh v. Gaffney*, 432 F.2d 923, 923 (10th Cir. 1970) (per curiam) (granting motion because question presented was so unsubstantial as to not warrant further argument); *N.L.R.B. v. Playskool, Inc.*, 431 F.2d 518, 519-20 (7th Cir. 1970) (per curiam) (granting motion because contentions were found so unsubstantial

as to render the appeal frivolous and because time was of the essence); *Clark v. Gulesian*, 429 F.2d 405, 407 (1st Cir. 1970) (granting motion because issues were manifestly simple and clear, legal citations were fully dispositive of the issues, and no useful purpose could be served by oral argument).

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#### The Legal Standard

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In articulating a legal standard, the courts of appeals have been largely consistent in their belief that a motion for summary affirmance should only be granted where the movant demonstrates that the appeal is meritless. For example, in *Joshua v. United States*, 17 F.3d 378 (Fed. Cir. 1994), the Federal Circuit recognized that summary affirmance is appropriate "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Id.* at 380. See *Yates v. Nicholson*, 140 Fed. Appx. 954, 954 (Fed. Cir. 2005). The Third Circuit also applies the "no substantial question" standard. See *Ren v. Sherman*, 165 Fed. Appx. 235 (3d Cir. 2006) (per curiam); *McKoy v. Apker*, 156 Fed. Appx. 494 (3d Cir. 2005) (per curiam).

The Ninth Circuit has indicated that, although it is difficult to format a precise standard, a motion for summary affirmance should be filed only where "the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982)(per curiam). Thus, motions for summary affirmance should be "confined to appeals obviously con-

trolled by precedent and cases in which the insubstantiality is manifest from the face of the appellant's brief." *Id.* Accordingly, where the outcome of a case is beyond dispute, a motion for summary disposition is of "obvious benefit to all concerned." *Id.* "Similarly, where the outcome is not so clear, such a motion unduly burdens the parties and the court, and ultimately may even delay disposition of the appeal." *Id.* Consequently, the Ninth Circuit will not ordinarily entertain a motion for summary affirmance where an extensive review of the record of the district court proceedings is required. *Id.*

In *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294 (D.C. Cir. 1987) (per curiam), the D.C. Circuit imposed on the party seeking summary affirmance the "heavy burden of establishing that the merits of his case are so clear that expedited action is justified." *Id.* at 297. Thus, to summarily affirm, the D.C. Circuit believes that it must be able to conclude that "no benefit will be gained from further briefing and argument of the issues presented." *Id.* at 297-298. Moreover, in analyzing a motion for summary affirmance, the court is obligated to view the record and the inferences to be drawn therefrom, in the light most favorable to the non-movant. *Id.* at 298. See *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir. 1980) (per curiam).

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#### Intellectual Challenge

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It would be a mistake to assume that summary affirmance motion practice is reserved for easy cases. Indeed, the procedure has been utilized for cases involving complex issues. For ex-

ample, in *State of New Jersey v. Chesimard*, 555 F.2d 63 (3d Cir. 1977) (en banc), the defendant in a state criminal proceeding sought to enjoin state officials from holding her trial on Fridays, the orthodox Muslim weekly holy day. The district court denied her relief and she appealed. After an initial panel hearing, the Third Circuit sitting *en banc* granted the state's motion for summary affirmance in a 6 to 4 decision. It held that the principles of *Younger v. Harris*, 401 U.S. 37 (1971) barred a federal court from prohibiting state court sessions on Friday, the Islamic Sabbath, in a pending criminal trial when available state procedures to remedy the alleged constitutional infringement had not been exhausted. The case produced two dissenting opinions.

It would also be a mistake to assume that the government is always on the winning side of a summary affirmance. In *Barnes v. United States*, 678 F.2d 10 (3d Cir.), *aff'd* 685 F.3d 66 (3d Cir. 1982), the government appealed from a final judgment in favor of the plaintiff in a suit for injuries sustained as a result of a swine flu inoculation administered under the National Influenza Immunization Program. The Third Circuit held that in view of the government's concession that it was liable for \$911,396.67 of the \$1,577,112.60 awarded, partial summary affirmance of the judgment to the extent of the \$911,396.67 was proper. The affirmance allowed the plaintiff to commence collecting on the undisputed sum.

And it would be a mistake to approach a motion for summary affirmance lightly. As part of denying a motion, the court may not allow for further briefing and may address the

appeal exclusively in the context of the motion. See *United States v. Aquino-Da La Rosa*, 139 Fed. Appx. 298, 300 (1st Cir. 2005) (per curiam) (denying motion for summary affirmance, vacating sentence and remanding for resentencing).

Moreover, the results of a motion for summary affirmance can be a surprise. In *Love v. McCray*, 413 F.3d 192 (2d Cir. 2005) (per curiam), the Second Circuit denied a motion for summary affirmance filed by the State of New York in connection with a federal habeas petition under 28 U.S.C. § 2254. The appellant in *Love* was convicted in 1998 on charges of burglary and larceny. *Id.* at 193. The principal evidence at trial was the identification of the appellant by the victim. Her testimony was based, in part, on her identification of the appellant from a photographic array after the incident. However, on the evening of the incident, the victim gave a description of the burglar to the police, who used it to develop a composite sketch that allegedly did not resemble the appellant. It was disputed whether defense counsel for the appellant was told about the sketch, or received it. In any event, the sketch was not placed in evidence at the appellant's criminal trial.

Subsequently, the appellant filed a federal habeas petition arguing ineffective assistance of counsel and the prosecutor's violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The district court denied the appellant's petition and denied a certificate of appealability ("C.O.A."). The Second Circuit granted the appellant a C.O.A. on the *Brady* claim and appointed counsel to represent him.

The court-appointed attorney

moved to withdraw and filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), which maintained that the appellant had no non-frivolous claim to raise on appeal. The state filed a motion for summary affirmance of the denial of the habeas petition. The appellant filed a *pro se* brief in opposition pressing his *Brady* claim as well as the ineffectiveness claim that was omitted from his initial C.O.A application. He also requested a new attorney.

A motion panel of the Second Circuit concluded that the *Brady* claim was not frivolous. Consequently, it denied the state's motion and decided to "say nothing more about [the appellant's] prospects, and defer[ed] to the merits panel, which w[ould] have the benefit of a complete record, full briefing, and oral argument." *Love*, 413 F.3d at 194. With regard to the ineffectiveness claim, the panel concluded that it satisfied the standard for the issuance of a C.O.A. In particular, the panel believed that the

issue of whether trial counsel was constitutionally deficient for failing to make use of the sketch at trial (or in failing to procure it, as the case might have been) deserved encouragement. *Id.* at 195. Finally, the motion panel held that the appointment of new counsel was appropriate. *Id.*

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#### Conclusion

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Although efficiency and cost-savings are the primary impetus behind motions for summary affirmance, to limit the discussion to those obvious benefits is short-sighted. There is much more to the procedure than meets the eye. As demonstrated above, the issues addressed by motions for summary affirmance are not always as limited or as straightforward as the governing standards might suggest. Sometimes, complex appeals are resolved by such motions. Furthermore, even when a case might fit within the generally accepted criteria for a motion for summary affirmance,

i.e., no substantial question, counsel for an appellee still faces the challenge of drafting a motion that will persuade the court to take the appeal off the standard, full briefing track, and instead resolve it via the abbreviated procedure. If counsel for the appellant is an experienced appellate attorney, the challenge will be even greater. For the attorney who accomplishes this task, there should be a great deal of satisfaction.

Balancing the demands of the client with the demands of the court can be a challenge. The motion for summary affirmance provides a tool to help meet this challenge. It is a vehicle for reducing costs and for defending an appeal in a format that should be attractive to a court system which is facing an overwhelming caseload. Accordingly, appellate attorneys should give motions for summary affirmance their full consideration.

*Loyalty to petrified opinions never yet broke a chain or freed a human soul in this world — and never will.*  
Mark Twain (1835-1910)

# The Ten Commandments Cases and the Establishment Clause: Is “Location, Location, Location” the New Three-Part Test?

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## Introduction

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On June 27, 2005, the United States Supreme Court released its highly anticipated decisions in two First Amendment cases involving the display of the Ten Commandments on government property. In *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), and *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005), the Court found, respectively, that a monument display of the Ten Commandments on the Texas State Capitol grounds was constitutional, while a document display of the Ten Commandments in two county courthouses in Kentucky was unconstitutional. Regardless of the reasoning behind the Court’s contradictory judgments, it is difficult to reconcile their results and, thus, the decisions leave a great deal of uncertainty in the increasing struggle over the proper role of religion in government.

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## Factual and Procedural Histories

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### Van Orden

In 1961, the Fraternal Order of the Eagles commissioned a six-foot tall monument inscribed with the text of the Ten Commandments and presented it to the “people and youth of Texas.” *Van Orden*, 125 S. Ct. at 2858. After the monument was formally accepted by the State of Texas, it was placed on the north grounds of the Texas Capitol building, between the Capitol building and the Supreme Court building. The Eagles paid the cost of erecting the monument, and two state legislators presided over the monument’s dedication.

The petitioner, Thomas Van Orden, first encountered the monument in 1995 during trips to the law library at the Texas Supreme Court building. In 2001, he sued seeking a declaration that the monument violated the First Amendment’s Establishment Clause and an injunction mandating its removal. Following a bench trial, the district court held the monument did not violate the Establishment Clause. The court held Texas had a valid secular purpose in recognizing and commending the Eagles for their work to reduce juvenile delinquency, and also determined that a reasonable observer would not conclude that the monument (a “passive monument”) con-

veyed the message that Texas sought to endorse religion. *Id.* at 2858-59.

The Fifth Circuit Court of Appeals affirmed with regard to both the purpose and the effect of the monument. *Id.* at 2859. Van Orden then petitioned the Supreme Court, which granted certiorari.

### McCreary

Meanwhile, in the summer of 1999, the commissioners for McCreary and Pulaski counties placed in their respective county courthouses large, framed copies of the King James Version of the Ten Commandments, complete with citations to the Book of Exodus. *McCreary County*, 125 S. Ct. at 2728. In Pulaski County, the display was accompanied by a ceremony presided over by the county judge and the pastor of his church. Shortly thereafter, in November 1999, the Kentucky ACLU sued both counties claiming the displays violated the First Amendment’s Establishment Clause. *Id.* at 2729. The ACLU sought a preliminary injunction against maintaining the displays.

Before the district court responded to the ACLU’s request for an injunction, each county’s executive body authorized second, more extensive displays to replace the initial ones. These displays included a large, framed copy of the Ten Commandments and eight other documents in

smaller frames. The additional documents all had religious themes or were excerpts of religious elements of longer documents. The resolutions authorizing these displays stated that the Ten Commandments were “the precedent legal code upon which the civil and criminal codes . . . of Kentucky are founded.” *Id.* The resolutions also recited several grounds for taking such a position, including a 1993 vote by the Kentucky House of Representatives to “adjourn in remembrance and honor of Jesus Christ, the Prince of Ethics,” and the “Founding Father[s]’ . . . explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America’s strength and direction.” *Id.*

The district court issued a temporary injunction ordering the immediate removal of the displays and prohibiting any similar displays. *Id.* at 2730. In reaching its decision, the district court employed the three-part test promulgated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In *Lemon*, the Supreme Court held that in order to pass First Amendment muster, a statute must first, have a secular legislative purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion. Finally, a statute must not foster government’s excessive entanglement with religion. The district court concluded that the original display lacked any secular purpose because the Ten Commandments “are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God.” *McCreary County*, 125 S. Ct. at 2730. And although the counties argued the original display was meant to be educational, the court con-

cluded “[t]he narrow scope of the display – a single religious text unaccompanied by any interpretation explaining its role as a foundational document – can hardly be said to present meaningfully the story of this country’s religious traditions. *Id.*

The counties appealed from the preliminary injunction and then installed a third display in each courthouse. The counties did not pass new resolutions authorizing the third displays; nor did they repeal those authorizing the second displays. The third displays consisted of nine documents, each framed the same size. The displayed documents included the Ten Commandments, the Magna Carta, the Declaration of Independence, the Bill of Rights, a picture of Lady Justice, and four other documents. *Id.* at 2731. They were entitled “The Foundations of American Law and Government Display.” Posted with each document was a statement about its historical and legal significance. *Id.*

The ACLU moved to supplement the preliminary injunction to enjoin the counties’ third displays. In response, the counties argued the third displays were intended “to demonstrate that the Ten Commandments were part of the foundation of American Law and Government,” and “to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government.” *Id.* Granting the ACLU’s motion to enjoin the third displays, the district court found the counties’ latest assertion that their broader educational goals were secular “crumble[s] . . . upon an examination of the history of this litigation.” *Id.* A fractured

panel of the Sixth Circuit Court of Appeals affirmed. *ACLU of Kentucky v. McCreary County*, 354 F.3d 438 (6th Cir. 2003). The counties petitioned for certiorari, which the Supreme Court granted.

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## The Supreme Court Opinions

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### Van Orden

#### *The plurality and concurring opinions*

Writing for a plurality of the Court (including Justices Scalia, Kennedy, and Thomas), Chief Justice Rehnquist declined to employ the three-part *Lemon* test. Although he noted that the Court had, over the last twenty-five years, “sometimes” pointed to *Lemon* as the governing test in Establishment Clause cases, he also pointed out other decisions describing the *Lemon* factors as “no more than helpful sign posts” which the Court had not applied in some recent cases. *Van Orden v. Perry*, 125 S. Ct. 2854, 2860-61 (2005). Finding the *Lemon* test not useful in dealing with a case involving the type of “passive monument” erected on the Texas Capitol grounds, he chose instead to ground his analysis in the Nation’s history and the monument’s nature. *Id.*

The Chief Justice began by detailing the “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life,” from the designation of Thanksgiving Day by President George Washington in 1789 through several Supreme Court decisions acknowledging the religion’s place in the history and government of the United States. *Id.* at 2861. He noted many other displays of the Ten Commandments in or around govern-

ment buildings “bespeak the rich American tradition of religious acknowledgments,” and that merely having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Constitution. *Id.* at 2863.

The Chief Justice then cited several cases where religious messages or symbols exceeded the boundaries of the Establishment Clause, particularly *Stone v. Graham*, 449 U.S. 39 (1980), and several other cases finding prayer unconstitutional at secondary-school functions. He distinguished these cases from others upholding the constitutionality of prayer in the state legislature, observing that nothing indicated extension of *Stone* to a legislative chamber or capitol grounds. *Id.* at 2864. In his exceedingly brief analysis, he concluded by finding the Texas display to be much more “passive” than the Ten Commandments display that confronted elementary school children each day in *Stone*. Noting the passive nature of the monument and its “dual significance, partaking of both religion and government,” the Court declined to find any violation of the Establishment Clause by the Texas display.

Justice Scalia’s concurring opinion, short and sweet, noted the lack of consistency in the Court’s opinions (“I join the opinion of the Chief Justice because I think it accurately reflects our current Establishment Clause jurisprudence—or at least the Establishment Clause jurisprudence we currently apply some of the time.”) He saw “nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, ven-

erating the Ten Commandments.” *Id.* (Scalia, J., concurring).

Justice Thomas’ concurrence provided a well-reasoned appeal for more uniformity in the Court’s Establishment Clause jurisprudence, and a call for a return to the framers’ original intent. He suggested that the text and history of the Establishment Clause resist application to the States. And if the Establishment clause does not restrain the States, “then it has no application here, where only state action is at issue.” *Id.* at 2865 (Thomas, J., concurring). Even if the Establishment Clause or Free Exercise Clause limits a state’s power to establish religion, he argued, Texas’ monument does not “establish” religion as that term was understood by the Framers. In his view, at the time of our Nation’s founding, “establishment” of religion involved actual legal coercion, such as the mandatory observance of religion or a mandatory tax supporting ministers. Merely acknowledging religion, he believed, does not constitute establishment of religion. Because the Texas display did not compel Van Orden to do anything, Justice Thomas found no coercion, and thus, no establishment of religion by the State of Texas.

Justice Breyer, who concurred in the judgment only, disavowed Justice Thomas’ call for a more standardized approach to Establishment Clause cases. He relied heavily on two things in support of his concurrence—the monument’s placement and the length of time it stood without challenge.

### *The dissents*

Justice Stevens, with whom Justice Ginsburg joined, dissenting, cast aspersions on the presumption that the

Ten Commandments statute had a secular purpose, noting it is “not a work of art and does not refer to any event in the history of the State.” *Id.* at 2873 (Stevens, J., dissenting). He believed that the monument’s placement (on the Capitol grounds as opposed to a school) enhanced rather than lessened its non-secular meaning:

The fact that a monument “is installed on public property implies official recognition and reinforcement of its message. That implication is especially strong when the sign stands in front of the seat of government itself. The ‘reasonable observer’ of any symbol placed unattended in front of any capitol in the world will normally assume that the sovereign—which is not only the owner of that parcel of real estate but also the lawgiver for the surrounding territory—has sponsored and facilitated its message.” *Id.* at 2882 (quoting *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 801-02 (1995) (Stevens, J., dissenting)).

Justice Stevens also dismissed the plurality’s reliance on previous public displays and speeches regarding religious adherence by public officials for, as he noted, there is a difference between government action and public officials’ actions. The former, he noted, cannot contain an establishment of religion, the latter can.

Justice O’Connor’s dissent incorporated her concurrence in *McCreary* (see below).

Meanwhile, Justice Souter, with whom Justice Stevens and Justice Ginsburg joined, dissenting, flatly took issue with every justification set forth in the plurality opinion for upholding the constitutionality of the

display. He pointed out that the message of the Ten Commandments is inherently religious and that singling them out for governmental display cannot be squared with governmental neutrality. *Id.* at 2892 (Souter, J., dissenting). He rejected the plurality's reasoning that a religious monument is constitutional when displayed with non-religious monuments, finding that the Texas display, as one of seventeen monuments with no common appearance, set out over twenty-two acres, would be taken "on its own terms without drawing any sense that some purpose held the miscellany together." *Id.* at 2895 (Souter, J., dissenting). He also rejected the plurality's reasoning that *Stone's* holding was limited to the classroom setting, its characterizing the monument as more passive than the displays in *Stone*, and its argument that the constitutionality of the display was bolstered by its having for 40 years without prior complaints. *Id.* at 2897 (Souter, J., dissenting).

## McCreary

### *The majority opinion*

Relying largely on *Stone*, Justice Souter, writing for a majority of the Court that included Justices Stevens, O'Connor, Ginsburg, and Breyer, found significant similarities between the displays held unconstitutional in *Stone* and those installed by the counties. *McCreary County*, 125 S. Ct. at 2732-33. He noted that the counties' displays contained the actual text of the Ten Commandments, as opposed to a more symbolic representation such as blank tablets, or tablets merely containing ten roman numerals. In the majority's view, including

the text of the Ten Commandments made the religious message hard to avoid. Also, the counties' initial decision to display the Ten Commandments alone (and in a subsequent display, only with other documents highlighting religious concepts) prevented them from credibly arguing that the Ten Commandments were being incorporated into an otherwise secular display. *Id.* at 2739-40.

Justice Souter's majority opinion also found *Lemon's* "secular legislative purpose" inquiry viable, if not dispositive. *Id.* at 2732-33. The county resolutions directing the installation of the displays, together with the circumstances surrounding the displays' dedication, provided ample evidence of the counties' predominantly religious purpose in placing the displays in their respective county courthouses. *Id.* at 2739. The majority rejected the counties' argument that true purpose is unknowable. It also rejected the counties' argument that purpose should be inferred only from the counties' actions in installing the third and final displays. "No reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays." *Id.* at 2740.

Finally, in determining the reach of the Establishment Clause, the majority explained that no "elegant interpretative rule to draw the line in all the multifarious circumstances" is to be had. *Id.* at 2742. Nonetheless, believing that the Establishment Clause requires governmental neutrality in religious matters, the majority rejected the dissent's position that the deity in the minds of the Framers was a monotheistic God and that the government may thus espouse "a tenet of traditional monotheism." *Id.* at 2744-45.

Justice O'Connor, in her concurrence

(and, as it turns out, one of her last great writings reflecting her common-sense and moderate approach to the law), emphasized that when the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, "it encroaches upon the individual's decision about whether and how to worship." *Id.* at 2747 (O'Connor, J., concurring). While acknowledging that many Americans find the Ten Commandments in accord with their personal beliefs, she emphasized, "[W]e do not count heads before enforcing the First Amendment." *Id.*

### *The dissents*

Justice Scalia's dissent, joined by Chief Justice Rehnquist, Justice Thomas, and, as to parts II and III, Justice Kennedy, dismissed the very foundation of the majority's opinion, arguing the First Amendment *does not* mandate governmental neutrality between religion and non-religion. Rather, Justice Scalia asserted that the plain text of the Constitution, coupled with the history and traditions of the Nation, demonstrate that public acknowledgment of religion is proper. *Id.* at 2750 (Scalia, J., dissenting). He began by noting the Framers' belief that morality was essential to the well-being of society, and that encouragement of religion was the best way to foster morality. He continued by detailing several references to a supreme being by public figures throughout history. He concluded, "Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no farther than the mid-20<sup>th</sup> Century." *Id.*

Justice Scalia noted his support for

governmental neutrality between religion and irreligion when public aid or free exercise of religion is involved, but wrote that such neutrality should be applied in a more limited fashion when the issue is public acknowledgment of the Creator. In his view, “[h]istorical practices . . . demonstrate that there is a distance between the acknowledgement of a single Creator and the establishment of religion.” *Id.* at 2752-53 (Scalia, J., dissenting).

Justice Scalia also rejected *Lemon’s* requirement that government action have a secular purpose and called for its abandonment. He argued that under the Court’s application of *Lemon*, a display demonstrated to have no purpose of advancing religion would still violate the constitution if an objective observer erroneously believed that the purpose of the display was to advance religion. *Id.* at 2757 (Scalia, J., dissenting). He concluded by arguing that even if *Lemon* were applied, the counties’ displays were constitutional, opining that when the Ten Commandments are displayed along with other documents of secular significance, “the context communicates that the Ten Commandments are included, not to teach their binding nature as a religious text, but to show their unique contribution to the development of the legal system.” *Id.* at 2759 (Scalia, J., dissenting).

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#### Commentary

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The Court disserves us with two opinions addressing the same subject, involving nearly identical facts, but which leaves us with markedly different results – the government’s display of the Ten Commandments constitutional in one setting, yet unconstitutional in another. As appropriately pointed out by Justice

Thomas in his concurrence in *Van Orden*, “[T]he incoherence of the Court’s decision in this area renders the Establishment Clause impenetrable and incapable of consistent application. All told, this Court’s jurisprudence leaves courts, governments, and believers and nonbelievers alike confused – an observation that is hardly new.” *Van Orden* at 2866 (Thomas, J., concurring). The physical location of the Ten Commandments display, apparently the determinative factor in the Court’s inconsistent decisions in *Van Orden* and *McCreary*, should not make the critical difference in the display of a clearly religious symbol on government grounds.

#### **The Schoolhouse, the Statehouse, or the Courthouse: Should Location Really Matter?**

The Court’s decisions in *Stone*, *Van Orden*, and *McCreary*, tell us, respectively, that the display of the Ten Commandments is unconstitutional in public school buildings, constitutional on the grounds of the state capitol, and unconstitutional in a county courthouse. Some distinction can arguably be made between the public schoolhouse, with its captive audience of impressionable young minds, and the locations at issue in *Van Orden* and *McCreary*. However, when the circumstances involve the display of the actual text of the Ten Commandments by the government, there simply is no meaningful distinction between the grounds of the state capitol and the walls of the county courthouse.

Few would argue that the state capitol and the county courthouse differ in their significance as symbols of government and governance. Fewer yet would argue that these buildings

do not represent components of the very foundation of state or local government: the physical location where the law is made, and the physical location where the law is brought to bear. The very fact that these venerated locations are sought for placement of other symbols (here, a religious symbol) is evidence of the extraordinary symbolic importance that these government facilities represent.

When mulling over the unfavorable facts present in a case they are litigating, many a lawyer has uttered the phrase “it is what it is.” With regard to the Decalogue at issue in *Van Orden* and *McCreary*, it is what it is: a religious symbol. Regardless of the argument (to which there is no disagreement by the authors) that in many respects, the rule of law can be traced to the Ten Commandments, the overwhelming, primary character of the Decalogue is, and will always remain, that of a religious symbol. As such, whether it is incorporated into a monument and placed on the state capitol grounds among other monuments, or framed and placed among other framed documents on the wall of a courthouse, these superficial distinctions do not change the underlying character of the Ten Commandments as a religious symbol. Even if the debate over whether *Lemon* remains a viable test were clearly resolved in favor of the three prong test, changing the locale of a religious symbol still does not affect the underlying purpose nor the underlying character of an undeniably religious symbol such as the Decalogue. Furthermore, for purposes of determining the First Amendment constitutionality of an object or symbol,

looking to the intended purpose under *Lemon* is perilous since such a determination may be limited by the forthrightness of those proposing the display.

Arguably, in some circumstances, there may be some grey area as to whether a particular symbol is inherently religious. If one were to arrange variations of representations of the Ten Commandments on a continuum of degrees of “religiousness,” reasonable minds might differ as to what point a particular representation becomes “inherently religious.” For example, at one end of the spectrum (e.g. an outline of a stone tablet containing no writing) a particular representation might not be considered inherently religious, whereas, if we work our way up the scale, (e.g. stone tablets with Roman numerals I through X, or a representation of Moses holding the stone tablets, or stone tablets containing the actual text of the Ten Commandments) reasonable minds may differ as to the point at which a particular representation crosses from “not inherently religious” to “inherently religious.” However, regardless of the point at which a variation of an object or symbol becomes considered “inherently religious,” the object’s

physical location or placement has nothing to do with its inherent religious character. Rather, the religious nature of an object or symbol is determined by its physical characteristics and its historical meaning – not its physical location.

### **Van Orden Cannot Be Reconciled with McCreary**

In all practicality, the Ten Commandment displays at issue in *Van Orden* and *McCreary* were identical. While one was incorporated into a granite monument and the other was incorporated into a framed document, both displays contained the full, biblical text of the Ten Commandments, complete with references to “the Lord.” Both would fall at the same point on the hypothetical “continuum of religiousness” discussed above and one would be in a difficult position to credibly argue that these specific representations of the Ten Commandments are not inherently religious. With all due respect to the Court, the only relevant analysis remaining to be made is whether or not the display of an inherently religious symbol on government owned property promotes religion. Moving the symbol from one type of government owned prop-

erty to another simply makes no difference in the analysis of whether the government is or is not taking sides on religion.

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### Conclusion

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Notwithstanding the viability of the *Lemon* test, and regardless of how the Court determines whether or not an object or symbol is inherently religious, or whether or not the display of an inherently religious symbol on government property constitutes the promotion of religion by government, differences in the physical location of the government owned property should not be a factor, certainly not the apparent determinative factor as demonstrated in *Van Orden* and *McCreary*. The starting and ending points of any Establishment Clause analysis should be whether the challenged action equates to government favoring one religion over another, or religion over no religion. Evaluating Establishment Clause challenges is different from evaluating real estate. As such, the Court should not focus so heavily, if at all, on location, location, location.

*Prejudice is opinion without judgment.*  
*Voltaire (1694 - 1778)*

### Senior Judge Who Sat on Panel May Take Part in En Banc Rehearing, even though Panel Decision Withdrawn

***Igartua de la Rosa v. United States*, 407 F.3d 30 (1<sup>st</sup> Cir. 2005)**

Following the ruling in *Igartua de la Rosa v. United States*, 386 F.3d 313 (1<sup>st</sup> Cir. 2004), concerning whether Puerto Rican residents may vote for the United States president and vice president, a petition for rehearing was filed. The panel granted rehearing, *withdrew its opinion*, and asked the parties to address whether the United States was in default of its treaty obligations and the availability of declaratory judgments concerning the government's compliance with any such obligations. The majority of the active judges then voted that the rehearing should be en banc.

The original panel had two active judges and one senior judge, and a question arose as to the eligibility of the senior judge to take part in the rehearing. In a *per curiam* opinion, the First Circuit decided that the senior judge could also sit on the en banc proceeding, citing *United States v. Hudspeth*, 42 F.3d 1013 (7<sup>th</sup> Cir. 1994). This prompted a dissent that distinguished *Hudspeth* on the ground that, in that case, the panel had agreed upon its decision which was about to be released when the grant of rehearing en banc intercepted it, whereas, in the instant case, the panel had *withdrawn* its opinion and thus

“it had before it for review only the district court opinion from which the appeal had been taken.” 407 F.3d at 33. In the dissent's view, a correct interpretation of 28 U.S.C. 46(c) meant that the senior judge who sat on the panel should *not* sit en banc review because “there is currently no panel decision available for the en banc court to review.” *Id.* at 34.

### Defense Counsel Sanctioned for Misleading Court and Plaintiffs *Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1 (1<sup>st</sup> Cir. 2005)

Two cases were filed against defendants River Valley fitness club and its owners, one by former employee Sheppard, alleging sexual harassment, and the other by club manager Aubin, alleging he was fired in retaliation for reporting Sheppard's complaints. Defendants counterclaimed against both plaintiffs, alleging they had conspired to fabricate claims against the club. The two cases were consolidated for discovery.

Defendants' attorney Whittington, the key player in this opinion, wrote to Aubin's counsel, summarizing settlement discussions and stating that the parties would settle if Aubin would agree to a stipulated judgment against himself in the amount of \$50,000. However, Aubin would only pay the defendants \$100 – plus providing defendants details of his discussions with Sheppard about their claims. In addition, Whittington wanted information from two other people whom defendants thought were also involved in the alleged conspiracy against them. His letter stated that the parties would not file a stipulated settlement until after deposing those two witnesses and, in the mean-

time, counsel would jointly inform the court that “we're close to settlement.” 428 F.3d at 3. The letter contained an emphasized statement that the settlement was contingent upon defendants' satisfaction that Aubin was assisting the defendants in good faith to the best of his ability. *Ibid.* The next day, Aubin's counsel signed and returned the letter.

As promised, Whittington told the *Aubin* court that the parties were close to settlement. A few months later, having resolved discovery issues and having obtained a satisfactory affidavit from Aubin, Whittington authorized Aubin's counsel to file a stipulated judgment and release the other settlement documents, and judgment was entered in the *Aubin* case.

Whittington then tried to put the *Aubin* settlement to defendants' advantage in Sheppard's case by writing to her counsel, informing her of the settlement of Aubin's case for a “\$50,000 judgment,” and demanding \$50,000 in settlement from Sheppard, as well. The letter did not say that defendants had agreed to accept a mere \$100 as satisfaction from Aubin.

Wanting to see the settlement agreement, Sheppard's counsel filed a motion to compel its production. Whittington responded by moving for a protective order seeking to keep the terms of the agreement secret. That motion led to the sanctions at issue here. Whittington offered to let the court review documents *in camera* and requested that any other access be limited to Sheppard's counsel. The court granted the order to the extent it allowed counsel's-eyes-only review. After reading the agreement, Sheppard's counsel filed a motion for

relief from the protective order, seeking full freedom to disclose the agreement, and for “sanctions pursuant to Rule 26(c).” The magistrate judge agreed, ordered the settlement agreement to be unsealed, and scheduled a hearing on “appropriate sanctions, if any.” *Id.* at 5.

After that hearing, the magistrate judge made three findings: Whittington had misled the court about the *Aubin* settlement; intentionally misled the plaintiffs to intimidate them into a \$50,000 settlement; and sought the protective order to conceal his deceptive conduct in the *Aubin* case. *Ibid.* The magistrate judge ordered Whittington to compensate plaintiffs for expenses and fees in connection with the opposition to the motion for relief from the protective order. The district court affirmed, except for rejecting the magistrate judge’s finding that Whittington sought the protective order “to conceal his deceptive conduct in the *Aubin* case.” *Ibid.* The magistrate judge assessed \$6,538 in costs and fees, and the district court affirmed.

Whittington appealed. Affirming the monetary sanctions, the First Circuit found that the magistrate judge correctly concluded that Whittington’s “too-artful words ‘intentionally misled the plaintiffs into believing that Aubin did commit to a \$50,000 payment in order to intimidate them into a \$50,000 settlement in this case.’” *Id.* at 10. The court also found that Whittington’s arguments in connection with the protective order “. . . were so unjustified that he must personally bear the cost of opposing it.” *Id.* at 11. However, the court vacated the lower court’s finding that Whittington had misled

the *Aubin* court when he informed it that the parties were close to settlement.

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## Second Circuit

### Certification of State-Law Questions

#### *Northfield Ins. Co. v. Derma Clinic, Inc.*, 440 F.3d 86 (2d Cir. 2006)

In this declaratory judgment action, the district court denied coverage to the defendant massage therapy clinic and its president under a professional liability policy issued by one insurer and a portfolio policy (the “NIC policy”) issued by a second insurer which included commercial general liability coverage. Three women had filed lawsuits against the clinic, its president and one of its employees, alleging a physical or sexual assault that occurred during a massage treatment.

The Second Circuit concluded that the appeal raised undecided but dispositive questions of Connecticut insurance and contract law, and certified, pursuant to Conn. Gen. Stat. § 51-199b (2005) and Second Circuit Local Rule § 0.27, the following questions to the Connecticut Supreme Court:

- (1) In a policy with multiple coverage parts like the NIC policy, does a criminal acts exclusion in the Commercial Crime Coverage Form apply to disputes arising under the Commercial General Liability Form?
- (2) Can [the employee’s] plea of nolo contendere and the re-

sulting conviction be used to trigger an insurance policy’s criminal acts exclusion?

- (3) When applied to the business of massage therapy, does the term ‘professional services’ include acts ancillary to the business of massage therapist, e.g., the investigating, training, monitoring, supervising of masseurs?
- (4) Under the language of the NIC Policy, do the negligence claims against [the clinic and its employee] arise out of the rendering of professional services when the underlying acts involve physical and sexual assaults during the performance of a massage?

The Second Circuit noted that certification is a discretionary device, both for the certifying court and for the court requested to answer the questions. Local Rule § 0.27 permits certification to the highest court of a state on unsettled and significant questions of state law that will control the outcome of a case pending before the Second Circuit. Reciprocally, the Connecticut Supreme Court may answer a question of law certified to it by a court of the United States, if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statute.

### Appellate Jurisdiction

#### *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006)

Plaintiffs alleged improprieties in the operations of the defendant company, and two newspapers filed a motion to

intervene and sought access to documents filed under seal in connection with the defendants' motion for summary judgment, arguing that the documents were "judicial documents" to which they had an immediate right of access under both the common law and First Amendment. A magistrate judge issued an order holding the motion "in abeyance" until after the district court ruled on the summary judgment motion, reasoning that it could not assess the strength of the newspapers' argument until that time. The district court adopted the magistrate judge's decision.

The Second Circuit held that the district court erred in holding the motion in abeyance because the contested documents were judicial documents to which a presumption of immediate access applied. Because it was not in a position to assess whether the presumption had been overcome, the Second Circuit remanded the case to the district court to make specific and immediate findings.

With regard to the issue of appellate jurisdiction, the newspapers had argued that although the order holding their intervention motion in abeyance was not a final judgment, the Second Circuit nonetheless had jurisdiction under the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). To fit within *Cohen*, the interlocutory order must: (1) conclusively determine the dispute in question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.

The Second Circuit had previously allowed media intervenors to appeal

from apparently interlocutory orders under the collateral order doctrine on the grounds that orders denying access are final as to the intervenors and that the intervention motion could have been treated as a separate civil case in which the ruling would have been final. However, in this case, the court acknowledged that the matter stood in a slightly different posture, as the district court held "in abeyance" the intervention motion rather than denying it outright.

Nevertheless, the Second Circuit rejected the defendants' argument that, based on this distinction, there was no conclusive determination of the dispute and the appeal should be dismissed for lack of appellate jurisdiction. It noted that in none of the cases dealing with motions held "in abeyance" was the relief sought dependent on timing. In contrast, in the instant matter, the newspapers sought an *immediate* right of access to the contested documents. Consequently, the Second Circuit concluded that this case was within the ambit of its prior cases. In particular, it found that the district court's decision did conclusively resolve a disputed issue—"whether the Newspapers had a right of immediate access to the contested documents"—and thus satisfied the first prong of the collateral order exception.

With regard to the second prong, the Second Circuit held that the question of public access to the documents was completely separate from the merits of the underlying action. In particular, it noted that it did not need to say anything about the merits of the plaintiffs' underlying allegations in order to rule on the propriety of the district court's order as to the

newspapers. Thus, it concluded that the second prong was satisfied. As to the third prong, the Second Circuit held that the denial of the "prompt public disclosure" the newspapers sought would be unreviewable in an appeal from a final judgment, and any damage would be irreparable.

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### Third Circuit

#### **Entry of Final Order Does Not Provide Appellate Jurisdiction to Previously Appealed Unappealable Discovery Orders** *ADAPT of Philadelphia v. Philadelphia Housing Authority*, 433 F.3d 353 (3<sup>rd</sup> Cir. 2006)

In connection with motions to enforce a settlement agreement, over which the trial court retained enforcement jurisdiction, the court issued certain discovery orders. The defendant filed a notice of appeal as each order was entered. Subsequently, the district court entered its final order, which denied all of the motions to enforce. No appeal was taken from that order.

The threshold question posed and answered by the Third Circuit was whether entry of the final order provided appellate jurisdiction over the otherwise premature appeals from the discovery orders. The court held that appeals from discovery orders do not qualify as premature appeals that may ripen upon entry of final judgment, and dismissed for lack of jurisdiction.

## Court Must Determine Personal Jurisdiction Before Addressing Forum Non Conveniens Questions

*Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co., Ltd.*, 436 F.3d 349 (3<sup>rd</sup> Cir. 2006)

The Third Circuit joined the Fifth, Seventh, and Ninth Circuits in holding that a court must determine whether or not it has personal jurisdiction before it addresses a question of *forum non conveniens*. The Second and D.C. Circuits have ruled that a court may pass over the personal jurisdiction issue to resolve a question of *forum non conveniens*.

### A Notable Quote

*Kuhnle v. Prudential Securities, Inc.*, 439 F.3d 187, 190 (3<sup>rd</sup> Cir. 2006)

“This is a sad case. But, given the procedural history, we cannot grant relief under the governing laws. As the Supreme Court stated more than two hundred years ago: ‘[M]otives of commiseration, from whatever source they flow, must not mingle in the administration of justice. Judges, in the exercise of their functions, have frequent occasions to exclaim, “*durum valde durum, sed sic lex est.*” See *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 89, 1 L. Ed. 507, (1795) (‘Hard very hard, but such is the law.’).”

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## Limiting Comity Bar Admissions Is Not Discriminatory

*Morrison v. Board of Law Examiners*, 2006 WL 1644010 (4th Cir.)

A lawyer licensed in California filed suit against the North Carolina Board of Law Examiners, claiming that the board's requirements for obtaining comity admission to practice law in North Carolina violate the Privileges and Immunities Clause of Article IV, the Equal Protection Clause and the Privileges or Immunities Clause of the Fourteenth Amendment. North Carolina requires lawyers licensed in other states to pass the bar exam for admission to practice, in the absence of a reciprocal agreement allowing North Carolina lawyers to be admitted without taking the other state's bar exam. The board denied the plaintiff's application for admission because for four of the six years preceding his application to the board, he had practiced in California, which does not have comity with North Carolina.

On appeal, the Fourth Circuit upheld the North Carolina rule. The court noted that reciprocity rules have generally been upheld, even though they may result in different outcomes for some individuals. The court concluded that, by the comity rule, the state does not discriminate against citizens of other states in favor of her own, but instead merely obtains for its citizens an advantage by offering that advantage to citizens of any other state on condition that the other state make a similar grant.

## Only Decisions on Identical Issues Will Collaterally Estop Litigation in Bankruptcy Court Adversary Proceeding

*In re Duncan*, 448 F.3d 725 (4th Cir. 2006)

After a state court jury determined she was liable for compensatory and punitive damages for the wrongful death of a child in her care, the debtor filed a bankruptcy petition. In the bankruptcy case, the representative of the child's estate filed an adversary proceeding, contesting the dischargeability of the wrongful death judgment. The bankruptcy court ruled that the debtor was not collaterally estopped by the outcome of the state court case from contesting the issue of whether the debtor had acted willfully and with malice. The estate filed an interlocutory appeal to the district court, which in turn concluded that the debt was dischargeable, because the state court verdict precluded a finding that the underlying injury was a deliberate or intentional one.

Applying the strict standards under Virginia law for collateral estoppel, the court of appeals rejected the views of both the estate and the district court and agreed with the bankruptcy court, concluding that the state court verdict on liability and punitive damages was not identical to the dischargeability issue of willful and malicious injury, and therefore the debtor was not collaterally estopped by the outcome of the state court case and the issues determinative of dischargeability would have to be heard on the merits in the bankruptcy court.

## Qualified Immunity for Some, not All, University Personnel

***Ridpath v. Board of Governors Marshall University*, 447 F.3d 292 (4th Cir. 2006)**

At Marshall University, the plaintiff's position involved overseeing compliance with NCAA regulations. He sued the former football coach and university officials, claiming that they wrongfully sought to pin the blame on him for a series of rules violations. The defendants appealed the denials of their motions to dismiss, claiming qualified immunity. The court dismissed the appeal for lack of standing as to the football coach, who had not raised qualified immunity in the district court, but agreed to take the other appeals, even though those defendants had belatedly raised qualified immunity for their first time in the reply briefs on their motions to dismiss. The court held that the official-capacity defendants cannot claim qualified immunity. As to the individuals, the court ruled by a split 2-1 vote that the plaintiff had stated a "liberty" claim based on the stigmatizing effect of the defendants' efforts to blame him for the rules violations.

In addition, the entire panel agreed that the plaintiff had stated valid First Amendment claims when he alleged retaliation for his speech on matters of public concern. As to whether these constitutional rights were "clearly established," the court concluded that, on the limited record presented by the motions to dismiss, the individuals were not entitled to qualified immunity, in spite of the disagreement within the panel about the liberty claim and the traditional rule on First Amendment claims that "only infrequently will it be clearly established that a public employee's speech on a matter of public concern is constitutionally protected." *Id.* at 320.

## Defining "Supervisor" for Harassment Charges and Defenses

***Howard v. Winter*, 446 F.3d 559 (4th Cir. 2006)**

A U.S. Navy employee brought suit under Title VII, claiming that she was subjected to sexual harassment, including physical contact. Critical to the plaintiff's claims was the issue of whether the harasser was her "supervisor," because under the Supreme Court's Title VII jurisprudence, an employer has only limited defenses for sexual harassment by a supervisor. The court noted that plaintiff had failed to show that the bad actor was in a position to take tangible employment actions or make economic decisions affecting her, as she failed to produce evidence that he could fire her, promote or demote her, reassign her, or take any other direct action against her. The plaintiff provided secretarial services for the harasser and 54 others, but the court concluded that the harasser's limited control over the plaintiff's work was not enough in terms of quality or quantity for him to be considered her supervisor. Because the Navy could not be liable for the co-worker's conduct unless it was negligent in response to what it knew or reasonably should have known, the plaintiff had to prove what the Navy knew. The court concluded that knowledge of prior incidents involving the display of inappropriate images or use of foul language was insufficient to prove that the Navy had constructive knowledge that the co-worker would engage in the type of harassment the plaintiff suffered.

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## Enforcing a Consent-To-Settle Clause

***Motiva Enterprises, L.L.C. v. St. Paul Fire & Marine Ins. Co.*, 445 F.3d 381 (5th Cir. 2006)**

This case originated from an explosion at a Motiva Enterprises refinery that killed one employee and injured several others. National Union supplied \$25 million of umbrella coverage, providing for both the duty to defend and to indemnify once the underlying insurance was exhausted. The policy also contained a standard consent-to-settle clause. After National Union sent Motiva a letter that tendered a defense subject to a reservation of rights, Motiva settled with a plaintiff in the underlying suit without National Union's consent. Motiva paid the settlement out of its own funds and requested reimbursement from National Union. After National Union denied reimbursement, Motiva brought suit. The district court granted partial summary judgment for National Union.

On appeal, Motiva argued that National Union's tender of defense subject to its reservation of rights gave it the right to settle the underlying claim without consulting National Union. Relying on the Texas Supreme Court's decision in *State Farm Lloyds Ins. Co. v. Maldonado*, 963 S.W.2d 38 (Tex. 1998), which held that an insurer that tenders a defense with a reservation of rights is entitled to enforce a consent-to-settle clause, the Fifth Circuit disagreed and affirmed for National Union on this issue.

Motiva also argued that, even if it breached the consent-to-settle clause, National Union could not refuse to

pay policy benefits unless it showed actual prejudice from the breach. The Fifth Circuit agreed, holding that if the insurer is not prejudiced by the breach, it has not been deprived of the benefit of the bargain and is obligated to provide coverage. However, upon reviewing the summary judgment evidence, the court held that National Union had suffered prejudice as a matter of law because it was deprived of its right to participate in the settlement process, and affirmed on that issue, as well.

Improper Joinder of a Non-Diverse Party Precludes “Voluntary-Involuntary” Removal Rule

*Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529 (5th Cir. 2006)

In this wrongful death suit, plaintiffs (collectively, “Crocket”) sued the tobacco defendants (collectively, “Reynolds”) and the healthcare defendants (collectively, “Gulf Coast”) in Texas state court. Because Crocket and Gulf Coast were citizens of Texas, complete diversity of citizenship did not exist. Nevertheless, Reynolds removed the case to federal court, alleging that Crocket fraudulently joined Gulf Coast to defeat removal jurisdiction. The federal court determined there had been no fraudulent joinder and remanded the case to the state court.

On remand, Reynolds successfully severed Crockett’s claims and again removed. Reynolds then moved for judgment on the pleadings while Crocket moved to remand, arguing that Reynolds’ second attempt to remove was improper because diversity had not been created through a voluntary act of the plaintiff. The district court granted Reynolds’ judgment on the pleadings and denied Crocket’s motion as moot.

On appeal, the main issue was whether Reynolds’ second removal was proper under the judicially created “voluntary-involuntary” rule. Under this rule, a suit that was not removable when it commenced may only become removable by the voluntary act of the plaintiff. An exception to the rule exists when a claim against a non-diverse defendant is dismissed because of fraudulent joinder. In that instance, a remaining diverse defendant may then request removal. The Fifth Circuit noted that there had already been a previous finding that fraudulent joinder did *not* exist, which was unreviewable.

The court determined, however, that a party can be improperly joined without being fraudulently joined and still meet the policy exception to the voluntary-involuntary rule. The purpose of the fraudulent-joinder exception is to prevent plaintiffs from blocking removal by joining non-diverse defendants who should not be parties — a finding of improper joinder will satisfy that purpose. In this case, the state court severed the claims because the burden of proof necessary to prove a product liability claim is completely different than that for a medical malpractice claim. The state court’s severance on that ground was synonymous with a finding of improper joinder. Accordingly, the court held that severance and removal based on improper joinder would also preclude the application of the voluntary-involuntary removal rule; accordingly, Reynolds was permitted to remove to federal court. The Fifth Circuit affirmed the judgment on the pleadings in favor of Reynolds.

## Lost Profit Damages for Breach of a No-Hire Agreement

*Blase Industries Corp. v. Anorad Corp.*, 442 F.3d 235 (5th Cir. 2006)

In this breach of contract action, Wilson Solutions sued Anorad Corporation for breaching a consulting agreement that prohibited either party from hiring the other’s employees. Jason Schwartzman, a former consultant for Wilson, was hired by Anorad in 1999. Wilson brought this action, seeking \$341,000 in lost profits for the year that Schwartzman worked for Anorad. The trial court granted summary judgment to Anorad, holding that the no-hire provision was unreasonable and unenforceable.

On appeal, the issue was whether Texas law would allow an employer to seek lost profit damages for breach of a no-hire agreement regarding an at-will employee. In Texas, lost profit damages must be established with reasonable certainty, and cannot be based on speculative, uncertain, contingent, or hypothetical evidence. The Fifth Circuit held that it was impossible to determine what amount of consulting fees Schwartzman would have earned for Wilson if he had not been lured away by Anorad because, as an at-will employee, he was free to resign from Wilson at any time. Moreover, it was not possible to prove with reasonable certainty the length of time that Schwartzman would have remained an employee for Wilson, but for Anorad’s offer of employment. Accordingly, the Fifth Circuit affirmed.

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**Rule 54(b) Certification*****Lowery v. Federal Express Corp.*, 426 F.3d 817 (6th Cir. 2005)**

In a suit alleging federal claims for employment discrimination and retaliation under Title VII as well as state law claims for breach of contract, the district court granted summary judgment in favor of the employers on the Title VII claims but denied summary judgment on the state breach of contract claim. The district court granted plaintiff's request for entry of final judgment on the Title VII claims under Fed.R.Civ.P. 54(b).

The Sixth Circuit dismissed the appeal, holding that the district court had erred in entering final judgment under Rule 54(b) because plaintiff's claims arose out of the same aggregate of operative facts and sought to recover for the same underlying injury, thus constituting a single claim for purposes of Rule 54(b) analysis. Moreover, the district court abused its discretion in finding that there was no just reason for delay because: (1) the claims were so closely related, there was a possibility that the same facts under a different theory might have to be revisited in a second appeal, and (2) a trial on the breach of contract claim could render the appeal on the Title VII claims moot.

**Interlocutory Appeals from Denials of Immunity Defenses*****Kelly v. Great Seneca Financial Corp.*, 447 F.3d 944 (6th Cir. 2006)**

Plaintiffs filed suit against a law firm and its clients, alleging violations of the Fair Debt Collection Practices Act and the Ohio Consumer Sales Practices Act. The law firm had previously

filed a state action to collect a debt allegedly owed by plaintiffs. When plaintiffs sought discovery, the complaint was dismissed without prejudice. In their federal complaint, plaintiffs asserted that the law firm and its clients had filed the state collection complaint knowing that they did not have any means of proving that such debt was owed. In their defense, the law firm and clients claimed that they were absolutely immune from suit for behavior that occurred during the course of the state court litigation. When the district court denied the defense of absolute witness and advocacy immunities, the law firm and its clients sought an interlocutory appeal pursuant to the collateral order doctrine. Relying upon *Will v. Hallock*, 546 U.S. \_\_\_, 126 S. Ct. 952 (2006), which clarified appellate jurisdiction under the collateral order doctrine, the Sixth Circuit dismissed the interlocutory appeal because defendants failed to demonstrate how any "substantial public interest" would be imperiled by delaying their appeal until after the district court entered a final order. The Sixth Circuit also held that mandamus relief was not warranted. For a related case, see *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432 (6th Cir. 2006).

***Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005)**

A section 1983 civil rights lawsuit was filed against a deputy sheriff who had shot and killed an intoxicated arrestee who was attempting to flee arrest after gaining control of the police cruiser where he had been handcuffed but left unsupervised while the deputy spoke briefly with the tow truck driver. The district court denied in

part the deputy's motion for summary judgment that had raised the qualified immunity defense due to credibility issues and conflicting evidence as to whether the shooting was in self-defense. On the appeal from the denial of summary judgment on the excessive use of force claim, the Sixth Circuit determined that it had appellate jurisdiction despite the deputy's several arguments relating to unreviewable issues about disputed facts. The Sixth Circuit had jurisdiction to consider the purely legal issue of whether the facts, as alleged by plaintiff and construed by the district court, would support a claim that the deputy's actions violated a clearly established right at the time of the shooting. On that issue, the denial of summary judgment was affirmed.

**Postjudgment Motions for Attorney's Fees*****Miltimore Sales, Inc. v.******International Rectifier, Inc.*, 412 F.3d 685 (6th Cir. 2005)**

In a case "present[ing] sort of an issue of first impression" regarding the timeliness of post-judgment motions for attorney's fees under Fed.R.Civ.P. 54(d)(2)(B), the Sixth Circuit held that because a timely filed Fed.R.Civ.P. 59(e) motion destroys the finality of the judgment, a motion for attorney's fees pursuant to Rule 54(d)(2)(B) is timely if filed within fourteen days of the district court's order disposing of the Rule 59(e) motion. Noting that the interplay of the federal rules "create inefficiency and/or uncertainty for litigants in this context," the Sixth Circuit cautioned that "[i]n nearly every case where attorney fees are available, the prevailing party will now need to file not one,

but two fee applications — an initial fee application for fees incurred securing the favorable judgment, and a supplemental application for fees incurred defending postjudgment motions such as Rule 59(e) motions.” *Id.* at 691.

***Deja Vu of Nashville, Inc. v. Metro. Gov’t of Nashville & Davidson County*, 421 F.3d 417 (6th Cir. 2005), cert. denied, 2006 U.S. LEXIS 4703.**

Affirming an award of attorney’s fee pursuant to 42 U.S.C. §1988, the Sixth Circuit held that the United States Supreme Court’s intervening decision in *City of Littleton v. Z.J. Gifts*, 541 U.S. 774 (2004) did not upset plaintiff’s status as a prevailing party because that status became final when the Supreme Court denied certiorari during an earlier appeal taken in the case. Moreover, almost continuously since the lawsuit was initiated, plaintiff had successfully raised constitutional challenges that enjoined defendant’s enforcement of a local ordinance requiring sexually oriented businesses to obtain operating licenses and performers in such businesses to obtain permits. The injunctive relief constituted a legally sanctioned change in the relationship between the two parties more than ample to justify plaintiff’s “prevailing party” status. Finally, the Supreme Court’s decision in *Z.J. Gifts* did not introduce any “special circumstances” that would render an award of attorney’s fees unjust.

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### **Order Remanding for Further Development of Administrative Record Not Appealable**

***Borntrager v. Central States, Southeast & Southwest Areas Pension Fund*, 425 F.3d 1087 (8th Cir. 2005)**

Applying the collateral order doctrine, the Eighth Circuit dismissed a pension fund’s appeal and held that the district court’s order remanding for further development of the administrative record was neither final and appealable nor appealable under the collateral order doctrine.

CRST, a collective name for several interstate trucking companies, contributed to Central States, a multi-employer pension fund, on behalf of CRST’s employees. *Id.* at 1088. Because CRST replaced departing employees with independent contractors and deprived Central States of new member contributions, Central States expelled CRST for violating its “adverse selection” policy and CRST paid withdrawal liability of over \$300,000. *Id.* at 1089. CRST (and affected union member employees such as plaintiff Borntrager) then sued Central States and moved for an order declaring that it had been wrongfully expelled from the pension fund, among other things. *Id.* at 1088, 1089. The district court denied Central States’ motion to dismiss and remanded to the Central States Trustees for further development of the record and additional discovery on adverse selection. *Id.* at 1089. Central States appealed.

The Eighth Circuit granted CRST’s motion to dismiss the appeal for lack of appellate jurisdiction.

First, the appellate court noted that five sister circuits have held that an order to remand to an ERISA plan administrator is not appealable as a final decision. *Id.* at 1090. The court then applied the collateral order doctrine, which provides that an interlocutory order is immediately appealable if it conclusively “resolve[s] an important issue completely separate from the merits of the action” and is “effectively unreviewable on appeal from a final judgment.” *Id.* at 1092 (citation omitted). Reasoning that the order to remand was not immediately appealable because it was integral to the merits of the wrongful expulsion claim and fully reviewable upon final judgment, the court also observed that Central States did not justify immediate appellate review simply by showing additional litigation expense could be avoided. *Id.* at 1092-93.

The district court’s remand order included the opportunity for further development of the administrative record, but this ruling also was not immediately appealable. The Eighth Circuit concluded that Central States was free to confirm its decision on the existing record, although the district court’s order “intimated” it would not uphold it. “The fact that a discovery order may be onerous or inconvenient does not make the order immediately appealable under the collateral order doctrine.” *Id.* at 1093.

### **Premature Notice of Appeal Does Not Save Appeal From Interlocutory Orders**

***Dieser v. Continental Casualty Co.*, 440 F.3d 920 (8th Cir. 2006)**

In dismissing an appeal where the appellants had appealed from two orders but not the third order that resolved

pre-judgment interest, the Eighth Circuit adopted a narrow interpretation of the rule saving prematurely filed appeals. Federal Rule of Appellate Procedure 4(a)(2) provides that notices of appeal filed after a decision or order but before entry of judgment may be treated as filed on the date of entry.

The case involved recovery of disability benefits under ERISA. An August 2004 order and memorandum opinion awarded a former employee some benefits but also set a bench trial to resolve remaining issues. A second memorandum and order in March 2005 assessed statutory penalties and attorney's fees but also ordered the former employee to show cause as to prejudgment interest and provided for a response. The employer and plan administrator filed a notice of appeal 30 days after the March 2005 order. A third order in June 2005 resolved remaining issues, but appellants did not appeal from that order.

The Eighth Circuit, acting *sua sponte*, held that the notice of appeal was premature because the first two orders "did not purport to dispose of all issues in the case." *Id.* at 923. Further, the Eighth Circuit held that the appeal was not saved by Rule 4(a)(2), which states that "[a] notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." The court cited *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269, 276 (1991), where the Supreme Court held that Rule 4(a)(2) applies "only when a district court announces a decision that *would be* appealable if

immediately followed by the entry of judgment." The court held that because the first two orders expressly left matters unresolved, the notice of appeal was not saved by Rule 4(a)(2).

The court added that the employer and plan administrator were not within the group that Rule 4(a)(2) was intended to protect. Based on statements in their district court briefs and in the notice of appeal, appellants appeared to realize that the August and March orders were not appealable and that they intended to "include in their appeal any award of prejudgment interest." *Dieser*, 440 F.3d at 926. However, this "statement of intent is insufficient" to satisfy the appellate rules and, without a notice of appeal filed after the June order, the appeal was dismissed for lack of jurisdiction. *Id.* at 926-27. Requests for rehearing and rehearing en banc were denied.

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#### Ninth Circuit

### **Statutory Construction and the Absurdity Doctrine: Less Is More, More or Less**

***Amalgamated Transit Local Union 1309 v. Laidlaw Transit Services, Inc.*, 435 F.3d 1140 (9<sup>th</sup> Cir. 2006) ("Amalgamated I"); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, 448 F.3d 1092 (9<sup>th</sup> Cir. 2006) ("Amalgamated II")**

These two opinions play upon the appellate lawyer's biggest fear – missing the deadline for filing a notice of appeal – and complicate the calculation

of one such deadline by holding that "less" will henceforth mean "more." Sometimes.

Most briefly stated, in *Amalgamated I*, the union filed suit in state court against employer Laidlaw, alleging violations of meal and rest period laws, Laidlaw removed to federal court, the union moved to remand, and the district court denied the motion. Six days later, the union filed a notice of appeal in the district court from that order, citing 28 U.S.C. § 1453(c)(1), the provision of the Class Action Fairness Act allowing appeals from orders granting or denying remands of class actions. That section states that a court of appeal *may* accept such an appeal "if application is made to the court of appeal not *less* than 7 days after entry of the order" (emphasis added).

Laidlaw moved to dismiss the appeal in the Ninth Circuit, arguing that, because a section 1453(c)(1) appeal is discretionary, Federal Rule of Appellate Procedure 5 applies, and that the notice filed did not comply with Rule 5, as it was filed in the wrong court and did not set forth the facts of the case or the questions to be raised on appeal, as required. The union opposed and filed a petition under Rule 5 for permission to appeal 43 days after entry of the order, this time elaborating on the facts and issues and filing in the Ninth Circuit.

Under the precise wording of the statute, requiring filing "not *less* than 7 days after entry of the order," the first notice of appeal was untimely, as only six days had elapsed, while the later petition to appeal was timely, as the statute imposes no final date. However, the court saw things exactly in reverse. It held that what Congress

really meant to say was “not *more* than 7 days,” which made the first notice timely and the second notice untimely. But the *timely* notice was *defective*. “Under our interpretation, [the union’s] timely notice of appeal is ineffectual and their subsequent petition for permission to appeal was filed too late.” *Amalgamated I*, 435 F.3d at 1146.

However, it seems that two wrongs made a right for the union: “To avoid the serious unfairness and potential due process violation that applying our holdings to this case might raise, we exercise our authority under FRAP 2 to suspend for good cause the requirements of FRAP 5(a)(1), (b)(1), and (c) in this case, and construe [the union’s] timely notice of appeal and untimely petition . . . as together construing one timely and proper petition for permission to appeal.” *Id.* at 1146-47. Laidlaw’s motion to dismiss the appeal was denied.

At this point, the real shouting match began. As detailed in *Amalgamated II*, a Ninth Circuit judge, hearing of this “rewriting” of the statute, called *sua sponte* for a vote on whether to rehear the matter en banc. The call for rehearing failed, but a small minority of judges dissented.

The original panel stated that its duty was to “discern the intent of Congress,” and that the “plain meaning rule” justified its decision. *Amalgamated II*, 448 F.3d at 1093. The dissent, reading 43 days as a time period “not less than 7 days” and thus timely under the terms of the statute, stated that the refusal of the court to rehear the matter en banc suggested “the parade is marching in the wrong direction.” *Id.* at 1094-95. The dissent asserted that, because the major-

ity admitted in *Amalgamated I* that the statutory language was unambiguous, the duty of interpretation never arose, and that the only “legislative history” the panel had to rely upon was irrelevant, as it was a report not submitted to the Senate, House or president until *after* all three had already passed the bill into law.

The dissent also argued that none of the three exceptions to the “plain language rule” allowed the panel to redraft the language:

1. The “constitutional avoidance doctrine” only allows deviation from the language of a statute when adherence to the apparent meaning would render the statute unconstitutional, a claim never made here.
2. The “scrivener’s error exception” does not apply where there is no obvious clerical or typographical error; here, the wording “makes perfect sense.”
3. The “absurdity doctrine” does not apply because the plain language does not lead to “patently absurd results,” such as rendering another section of the statute inoperative or contradictory. Citing several other statutes also using the “not less than \_\_\_ days” phrase, the court noted that “Congressionally-imposed deadlines are ‘inherently’ arbitrary and are not absurd, even when they may seem irrational.” *Id.* at 1098-99.

Finally, the dissent argued that the majority’s action “forces both legislative and judicial branches to deviate from their respective constitutional roles,” “strips citizens of the ability to rely on the laws as written,” and,

most importantly, “undermines our own credibility.” *Id.* at 1100. The dissent then concluded:

We command no army; we hold no purse. The only thing we have to enforce our judgments is the power of our words. When those words lose their ordinary meaning – when they become so elastic that they may mean the opposite of what they appear to mean – we cede our right to be taken seriously. Neither Congress, nor the parties, nor the judiciary benefits from the panel’s decision.

*Ibid.*

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#### Eleventh Circuit

### Interlocutory Appeals: Appeals of CAFA Remand Orders

#### *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006)

The Eleventh Circuit in this case held that petitions for permission to appeal remand orders in cases removed under the Class Action Fairness Act must be filed within 7 days of the order in question. In so holding, the Court joined the other circuits who have read CAFA’s language requiring a petition to be filed “not *less* than 7 days after entry of the order” to mean “not *more* than 7 days.” The Court observed that to read the statute literally would produce an absurd result: “there would be a front-end waiting period (an application filed 6 days after entry of a remand order would be premature) but there would be no back-end limit (an application filed 600 days after entry of a remand order

would not be untimely.” The Court also held that CAFA’s 60-day limit on an appellate ruling runs from the Court’s later entry of an order granting permission to appeal, not from the earlier filing of the petition for permission to appeal.

### **Preservation of Error: *Batson* Challenges**

*United States v. Houston*, — F.3d —, No. 04-16524, 2006 WL 1995456 (11th Cir. July 19, 2006). This criminal case has broader application to challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court held that the *Batson* challenge at issue had not been sufficiently preserved. The appellant argued that the Government improperly struck African-American jurors from the jury because they had family members with a criminal history. The appellant argued this was pretextual because there were white members of the venire who also had family members with criminal histories that the Government did not choose to strike. The Eleventh Circuit refused to consider this argument, however, because the appellant did not raise it at trial. As a result, the Court observed that it did not have “the benefit of the prosecutor’s explanation for why he struck the black venire members rather than the white venire members” nor did it have “the benefit of a finding by the trial judge as to the credibility of such explanations.”

### **Record on Appeal: Incomplete or Confused Record**

*Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320 (11th Cir. 2006). The Eleventh Circuit made an exception to the rule that it will affirm the judg-

ment on review if the appellant fails to ensure the record on appeal is complete. The record on appeal in this case was a complete mess. Even after oral argument, the Court asked the attorneys to attempt to reconstruct some of the evidence that the District Court relied on to find a biology textbook sticker violated the Establishment Clause. When even the parties could not figure out what evidence had been offered, the Court threw up its hands. Under these circumstances, the Court was unwilling to affirm based on the state of the record. Instead, it held that remand was more appropriate based on the presence of six factors: (1) the appellant did not have access to the evidence at the time the appeal was taken, (2) it was not the appellant’s fault that the evidence was missing from the record, (3) both the appellant and the appellee diligently (but unsuccessfully) attempted to supply the Court with the missing evidence, (4) the Court had serious doubt about the decision below without the missing evidence, (5) both side challenged the district court’s decision, and (6) the issues were of substantial public importance and “need[ed] to be resolved on their merits based on the facts instead of based upon mutual mishaps, mistakes, and misunderstandings about the evidence.”

### **Bonds: Cost Bond for Appellate Attorney’s Fees**

*Young v. New Process Steel*, 419 F.3d 1201 (11th Cir. 2005). The Eleventh Circuit held that a district court cannot force a losing civil rights plaintiff to post a bond covering the defendant’s appellate fees, unless the court makes a finding that the antici-

pated appeal is “frivolous, unreasonable, or groundless.” The Court found that *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), necessitated this additional finding in the civil rights context. The court made clear that a district court generally has the discretion to require a bond to cover an opponent’s anticipated appellate fees if the fee-shifting statute includes attorney’s fees in the definition of “costs.”

### **Appellate Jurisdiction: Appealable Arbitration Orders**

*Jackson v. Cintas Corp.*, 425 F.3d 1313 (11th Cir. 2005). The Eleventh Circuit held that an order compelling arbitration and dismissing a complainant is a final appealable order, despite the court’s decision to retain jurisdiction over a pending Rule 11 motion for sanctions.

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D.C. Circuit

### **Governments Are People, Too (at least under Rule 45)**

*Yousuf v. Samantar*, —F.3d —, 2006 WL 1651050 (D.C. Cir. 2006) Reversing and remanding the district court’s denial of plaintiffs’ motion to compel compliance with a subpoena served upon the United States Department of State, the D.C. Circuit confirmed that the United States is a “person” subject to subpoena under Rule 45 of the Federal Rules of Civil Procedure. Rule 45(a)(1)(C) provides that every subpoena shall: “[C]ommand each *person* to whom it is directed to attend and give testi-

mony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that *person*....” Fed.R.Civ.P. 45(a)(1)(C) (emphasis added). The district court hinged its denial of plaintiffs’ motion to compel the government’s compliance with a Rule 45 subpoena on a “longstanding interpretive presumption” recognized by the D.C. Circuit in *Al Fayed v. CIA*, 229 F.3d 272, 274 (D.C.Cir.2000), that the term “person” in a statute does not include the United States.

In *Al Fayed*, the D.C. Circuit decided that the term “person” as used in 28 U.S.C. § 1782 did not include the government, based on the application of the common law presumption of statutory interpretation that the government is not a “person,” as well as the Dictionary Act, 1 U.S.C. § 1. As to the meaning of the same term “person” in Rule 45, however, the D.C. Circuit panel in *Yousuf* found that neither the Dictionary Act nor the common law presumption controlled.

As to the Dictionary Act, the D.C. Circuit noted that it “found no

caselaw applying the Dictionary Act to the Federal Rules, and found it doubtful . . . whether the Rules are properly considered an ‘Act of Congress’ subject to that Act.” *Id.* at \*3. The panel observed, however, that the definition of “person” in the Dictionary Act, 1 U.S.C. § 1 (defining “person” to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals”) would not control its analysis in any event, as the version upon which the government relied was passed after Rule 45 was drafted.

The panel also found that the district court erred in presuming the government is not a “person” covered by Rule 45, finding that the common law presumption against defining the government as a person operated in only two categories of cases not implicated by Rule 45: (1) where the statute, “if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest,” such as a statute of limitations; and (2) where deeming the government a “person” would “work obvious absurdity as, for example, the application of

a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm.” *Id.* at \*5, citing *Nardone v. United States*, 302 U.S. 379, 383-84 (1937).

Turning to customary tools of statutory interpretation, the D.C. Circuit panel determined that the term “person” as used in the Federal Rules of Civil Procedure consistently means not only natural persons and business associations but also governments, including the United States. Finding that the government provided no reason for the appellate court to ignore the Supreme Court’s command that courts interpret each federal rule *in pari materia* with the others, the panel held that the government is a “person” subject to subpoena under Rule 45 regardless whether it is a party to the underlying litigation, and remanded to the district court for further consideration of the government’s remaining objections to the subpoena. Rebecca Womeldorf  
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# The Anatomy of an Effective Reply Brief

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In law, as in life, not everyone gets the last word. So when that opportunity comes along, you have to make the most of it. For appellate brief-writers, that opportunity is the reply brief. And in a close case, the reply brief can be vital to helping the court see the case your way.

How do you make the most of your reply? There are the basics, of course. Avoid simply rehashing the points made in your opening brief. Do not advance new arguments or theories (unless justified by developments that post-date your opening brief). Thoroughly rebut the other side's main attacks on your case, but make the brief no longer than necessary. And in the rare case where the other side fails to cast any real doubt on your opening points, waive your reply.

The most effective reply briefs, however, do something more. Ideally, they leave the panel feeling that both the law and the equities are on your side—that the law will make more sense if you prevail. Moreover, the best reply briefs waste no time getting to the heart of the case. What follow are five basic tips for how best to accomplish these objectives.

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## Reestablish Your Theory of the Case

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Most often, judges pick up the reply

brief after finishing the appellee's brief. If your opposing counsel have done their job, that brief will have advanced a substantial theory supporting affirmance or have muddied the waters with extraneous material—deflecting attention from the real issues or making the case seem too complicated to do anything but affirm. Either way, your audience is not likely to be thinking on your terms when it picks up your final brief.

Your job, then, is to re-establish your theory of the case. In fact, by the time the judges have read the introduction to your reply brief, they should be singing your tune again, or at least remember what that tune is. So how do you get the judges refocused on the right issues and themes?

The answer depends upon the case, but here are two practical tips. First, re-read your opening brief and make a list of any significant arguments to which your opposing counsel did not respond. This is a simple discipline, but it will ensure that you do not miss an opportunity to point out their failure to address a key point, and it will refocus your attention on your most compelling themes. (In a close case, it will also boost your morale, by reminding you that you have things to say.)

Second, stop and think. What is your most compelling theme? About which of your opponent's arguments can you say: "If we lose that argument, we lose the case?" If the judges read only the introduction to your brief, what things *must* they know? The an-

swer to these questions will dictate the focus and organization of your reply brief.

For example, suppose you are briefing a case in which the plain language of a contract favors you, but the other side has muddied the waters with extrinsic evidence about what the parties *really* intended. If so, lead off by pointing out that the principal failure in your opponent's brief is its failure to come to grips with the contract's terms. Then, in a succinct, hard-hitting way, remind the court why those terms govern. Close your introduction by explaining why, even if the court were to look at extrinsic evidence, the case should come out your way. Approaching your reply brief in this way will help the judges see not only why your opponent should lose, but why you should win.

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## Spend Extra Time Writing a Compelling Introduction

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As noted above, the most important goal of your introduction is re-establishing your theory of the case. The best introductions, however, will also include a short response to your opposing counsel's strongest arguments and point out where they have failed to answer your winning arguments.

This is not the place for an extended discussion of any issue, of course; save that for the body of the brief. But if your introduction helps the judges see that you have serious responses to the appellee's main points, they will keep reading. And if your case is compli-

cated and it takes two or three pages to do that, do not worry—these are the most important pages of your brief.

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### Weave The Equities Into Your Arguments

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Rarely are cases won based on bare emotional appeals to judges that “justice” requires a certain outcome. At the same time, however, the most effective advocates remind judges why the rule of law that they are advocating is sensible and fair.

Reply briefs are no exception. To continue the example above, suppose the plain language of a contract is on your side, but the other side’s brief appeals to fairness in hopes of persuading the court to depart from that language. Do not simply cede this ground to your opponent. Explain why it is important for parties to be able to rely on the plain meaning of their agreements.

Or perhaps the central issue is the meaning of an ambiguous precedent. If the other side’s reading of the precedent would create practical problems for companies attempting to comply with the law, explain why the precedent should be read to avoid such problems. Show the judges that common sense is on your side.

Remember, judges will decide your case based on their best sense of what the law requires. But they are human, and they may be influenced at some level by the equities. When they put down your reply brief, you want them to believe not only that the law is on your side, but that applying the law impartially will lead to a just result.

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### Readability, Readability, Readability.

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By the time your panel picks up the re-

ply brief, they will likely have a good idea of what your case is about and where the difficult issues lie. Thus, they are unlikely to have patience for a brief that does not jump right to the heart of the matter. This is all the more true in these days of heavy dockets, when appellate judges must decide many more cases—including many more cases without the benefit of oral argument—than in years past.

Readability is therefore at a premium in the reply brief. Keep refining and paring down your arguments until they are as short, clear, and simple as possible. Even more than in your opening brief, avoid long sentences and complicated substructures. If two different words each convey the same point, choose the simpler one. Use uncomplicated headings. Avoid clutter in all of its forms. Keep footnotes to a minimum. Ideally, your reply brief should be a page turner.

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### Less Is More

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Finally, remember that the reply brief is not the time to make lengthy arguments responding to the appellee’s every sub-theme. If you planned your opening brief carefully, you will have already addressed the shortcomings in the lower court’s reasoning and the principal cases on which your opponent relies. If an argument has the potential to sway a vote, then by all means respond to it. But some points are borderline ridiculous, and the judges will know it. Do not dignify such points with a response, and certainly not a lengthy one. Doing so will only appear defensive at a time when you want to be on offense.

Ultimately, the courts have the last word in any appeal. But the reply brief is the last written word from any party, and it should give the court everything it

really needs to decide the case in your favor.

Indeed, the most effective reply briefs in some sense function as stand-alone documents—if the judges read nothing else (and some judges read the reply brief first), they should understand from your reply brief why you win the case. Making the extra effort to re-establish your theory of the case, to refine your introduction, to highlight the equities, to make the brief as readable as possible, and to avoid extra clutter can make the difference between a reply brief that leaves the judges feeling unsatisfied and one in which your last word really counts.

# The Dynamics of Appellate Oral Argument

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Most appellate attorneys, and even most litigators, have probably read at least one treatise, article or other secondary material offering advice on the dos and don'ts of oral advocacy. These materials counsel thorough preparation ("know your case," "learn the judges' backgrounds," "update your research") and provide excellent tips for handling oneself during oral argument ("listen carefully to and answer the judge(s)' questions," "don't introduce new facts," "remind the court about the standard of review if it favors your client's case," "don't disparage the trial judge, counsel, or the court").

To be sure, the guidance offered by these materials is valuable, and all attorneys should heed it. Nevertheless, most of this advice is applicable to both a trial and an appellate court setting. Appellate advocacy, however, involves at least two unique aspects that do not exist in trial courts. First, appellate argument takes place before more than one judge. An appellate panel will consist of at least three judges, and sometimes more than three. Second, appellate judges have the time and resources to carefully

scrutinize the briefs before oral argument and, consequently, are far more familiar with the legal issues than a trial judge may be. And most disconcertingly for appellate lawyers, appellate judges will often be fully cognizant of and wish to discuss the weaknesses of your case. So how should appellate lawyers deal with these problems unique to appellate advocacy?

To answer this question, it is necessary to consider the communicative dynamics of the appellate oral argument. To get a complete picture of the dynamics, however, we must first set the stage. Before oral argument, the appellate judges have been presented with and have at least partially digested the parties' briefs. One or more research attorneys have thoroughly perused the briefs, read the record, conducted independent research, and prepared written bench memoranda or draft opinions. These written memoranda or opinions may have been circulated among the panel, pre-argument conferences may have been held, written comments may have been exchanged, and informal discussions may have taken place. As a result, one or more of the judges may have arrived at a tentative opinion, the judges may be divided in their opinions, or there may be varying degrees of differences of opinion as to the result or the reasoning.

As the appellate advocate, you enter the arena of the oral argument only after all of these events have taken

place. At the outset, you are faced with multiple judges with different perspectives and varied levels of understanding. Some or all of these judges may ask questions. Often, a question is only a question—a judge may be seeking information, clarification or an explanation. Sometimes, however, the reason a question is being asked is at least as important as the question itself, if not more. For example, a judge may pose a question hoping that your response will persuade one of his or her more skeptical colleagues, or that it will defeat an argument made by your opposing counsel. Perhaps a judge may throw you a "softball" question, hoping for an answer that bolsters that judge's opinion. On occasion, two judges may utilize oral argument to continue their pre-argument disagreements about the case.

You, of course, have entered the picture unaware of what went on behind the scenes and can only guess at what may be motivating a question. For this reason, your first task as an advocate is to listen carefully to the judges' questions and comments and take careful note of their demeanor and body language with an eye to determining a question's meaning and purpose. Although discerning the underlying purpose of a question may be akin sometimes to reading tea leaves, by doing so, you can focus your argument to deal with the concerns of the judges who may be unfavorably inclined toward your case.

And you can take advantage of the help that is being proffered by a judge disposed to your position. In this manner, you have at least a chance of persuading the skeptical judges to your viewpoint.

More problematical is the situation where two judges use oral argument to attack each other's position.

When this happens, you may find yourself in a situation where you will not yet have had an opportunity to address one judge's question when the second judge interposes a countervailing one. As an advocate, you may feel pinned between two opposing forces. Under these circumstances, you should take a deep breath, make every effort to hide your frustration, and politely and firmly attempt to regain control. It may be useful to redirect the argument by explaining that you will answer Judge Smith's question first and then you will respond to Judge Jones's question. Or it may be possible to combine the two questions and answer them together.

In addition to using oral argument

to persuade their brethren or reinforce their own positions, judges often will take the opportunity to aggressively probe the weaknesses of a party's case. Contrary to what some appellate attorneys might think, the tendency of appellate judges to focus on the Achilles Heel of a case is not motivated by some morbid desire to torment counsel during oral argument, but rather by a desire to reach the right and just result. This is particularly so when dealing with issues of first impression that will be resolved in published opinions.

The subjection of your case to critical scrutiny can help or hurt you, depending on how you handle the questions. Naturally, your task is to honestly evaluate and identify the truly weaker aspects of your case and formulate arguments as to why your client should prevail *despite* the existence of those problems. Ignoring, dismissing or refusing to acknowledge the weaknesses in response to questions from the bench may give the impression not only that you are ignoring the judges' concerns, but that

you believe you cannot win with those weaknesses. It is therefore better to deal with the problems head on.

These are just some illustrations of the intricacies of the communicative dynamics of appellate advocacy. But although the process may be complex, it offers the skilled oral advocate a great deal of room to maneuver. You should always keep in mind that, ultimately, you are there to persuade the court, particularly to do the persuading that your briefs did *not* do. Although the number of judges, their familiarity with the problems of your case, and the behind-the-scenes happenings may make things more difficult for you, they also inject a wild card into the oral argument that you can exploit to increase your client's chances of success.

<sup>1</sup> Editor's note: Before joining Reed Smith in 2005, Margaret Grignon spent 14 years as a justice on the California Court of Appeal, Second District.

*The degree of civilization in a society can be judged by entering its prisons.*

*Fyodor Dostoevsky (1821 - 1881)*

*The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.*

*Anatole France (1844 - 1924)*

# Sandra Day O'Connor: How the First Woman on the Supreme Court Became its Most Influential Member, by Joan M. Biskupic

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Getting a glimpse into the mind and maneuvers of a retired justice may not help you prepare for a case before the currently-constituted Supreme Court. But then again, it just might.

Through detailed interviews with Justice Sandra Day O'Connor's friends, relatives and fellow justices, comprehensive historical research, and sound legal commentary, author and lawyer Joan Biskupic has chronicled the professional life and legacy of Justice O'Connor. O'Connor's experience in all three branches of government, plus some input from the court of public opinion, ultimately combined to mold her views, her written decisions, and almost a quarter-century of Supreme Court precedent.

As with most biographies, the book is presented in chronological order, beginning with O'Connor's roots on the family ranch in Arizona. Her early life on the ranch was fairly isolated, but both parents were forceful, determined personalities who pushed Sandra to find her own strengths. The oldest of three children, she left

the ranch to attend grade school and high school in El Paso, because her parents felt the city offered her a better education. At age 16, O'Connor started undergraduate work at Stanford. At 19, she entered law school at Stanford, where she met and briefly dated William Rehnquist. She finished in the top ten percent of her class as a law review editor. As school ended, she married a classmate and Army lawyer John O'Connor. The couple eventually had three sons, but for most of the boys' youth, O'Connor was a working mom.

Biskupic's book traces O'Connor's early years as a prosecutor, a community activist, and an Arizona legislator. In those roles, O'Connor was already a consensus builder.

In 1971, while O'Connor was serving in the state senate, President Reagan nominated her old friend and former Arizona lawyer, William Rehnquist, to the Supreme Court seat being vacated by Justice Harlan. On her own initiative, O'Connor took up the charge to garner support for Rehnquist's nomination. She made a few political gaffes at this first effort in national affairs, as Biskupic recounts, but wound up getting herself noticed by Republican higher-ups. The les-

sons she learned about mobilizing a judicial campaign would later pay big dividends.

After completing five years in the state senate, including several as majority leader, O'Connor then ran for superior court judge. Following four years on the trial bench, she was appointed to the Arizona Court of Appeals in 1979. It was there that Ronald Reagan found her two years later, when Justice Potter Stewart announced his retirement and Reagan aimed to make good on his promise to appoint a woman to the Supreme Court.

The overall premise of the book casts O'Connor as negotiator and bridge builder, tracing her shift over time from the right side of the judicial spectrum to more or less center, from a polite joiner to a firm leader.

Once O'Connor arrives at the Court, the book remains chronological, with a topical overlay. Several chapters address evolving rulings on abortion issues, and O'Connor's inner tension between strong support of states' rights versus an unwillingness to reverse years of reliance on *Roe v. Wade*. In chapter 16, *Open Files*, the topic is release of personal files by individual justices. O'Connor and

Rehnquist advocated strict limits on release of a justice's papers, in large part to protect the writings (and freedom) of other active colleagues. For example, the book describes how the *Washington Post* got the scoop before any other media outlet on the Library of Congress' release of Thurgood Marshall's papers. The *Post* explored those documents in a four-part series, and the release created quite a furor at the Court. Author Biskupic was half of the *Post* duo that first obtained the Marshall papers, thus deepening her perspective on O'Connor's relationship with the brethren.

Biskupic's book not only accurately recounts the facts behind high profile cases, but by meticulously describing O'Connor's approach to her work, sheds light on Supreme Court decision-making generally.

June is a difficult month at the Court, as it may well be at many state supreme courts; it is the month when all opinions are to be completed. Early in O'Connor's tenure, most of the Court's easier cases would all be decided by June, but the thorniest ones remained. Justices constantly negotiated over broad lines of legal

reasoning as well as the detail of particular paragraphs and footnotes. Votes switched at the last minute, causing other switches. Such dynamics may explain why some opinions come out much later after argument than others. Such dynamics may also explain the voting on a few cases. Biskupic describes an instance where Justice Rehnquist sent a note to Justice Marshall and the rest of the Court regarding a majority opinion circulated by Marshall: "If this were November rather than June, I would prepare a masterfully crafted dissenting opinion exposing the fallacies of your . . . discussion. Since it is June, however, I join." The decision was unanimous.

According to Biskupic's research, Justice O'Connor made a habit of showing her draft opinions to certain justices, for a variety of purposes. Sometimes she showed a draft to solicit interest; sometimes she shared a draft with the specific hope that the other justice would be prepared to circulate a memo of approval once her draft was distributed to the entire panel. While it's likely that other justices have adopted similar persuasive

approaches (see the growing list of books by former Supreme Court clerks), in Biskupic's view O'Connor was the most effective at pre-release persuasion. O'Connor was able to urge particular viewpoints by alluding to her own experiences as a legislator and as a state-court judge. She could adeptly put the other justices "in the shoes" of the decision-makers whose work they reviewed.

The book also shares a few stories as to the personalities and bents of a number of current justices with whom O'Connor served. For instance, Justice Scalia, now 70 years old, and Justice Ginsburg, 73, had served together on the District of Columbia Circuit for four years, and with their spouses have shared a number of New Year's Eves together. Ginsburg bases their friendship particularly on Scalia's "engaging wit."

This book is heavily annotated, with over 40 pages of footnotes and bibliographic references. Its thoroughness probably disqualifies it as "beach reading," but it is a timely retrospective on the career of a historic figure whose legacy can't yet be fully quantified.

*Words, as is well known, are the great foes of reality.*  
*Joseph Conrad (1857-1924)*

## Amicus

Since its inception two years ago, the Appellate Advocacy Amicus Subcommittee continues to grow. Thanks in part to the extremely successful Appellate Advocacy Seminar in Phoenix in March 2006, the subcommittee now has more than 35 members, with a vast array of appellate experience. Our members' court admissions cover 27 state courts, the District of Columbia, the United States Supreme Court and all Circuit Courts of Appeal. Subcommittee members remain willing to work with DRI's Amicus Committee to identify important cases and select authors ready to assist in preparing amicus briefs so that DRI's voice is heard in important appeals throughout the country.

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## Publications

It's been a while since our committee has tackled a big project. In 2004, we produced *A Defense Lawyer's Guide to Appellate Practice*, a major undertaking comprising 24 chapters and almost 400 pages, covering every aspect of appellate practice. In the same year, we produced a fine collection of substantive articles for the April 2004 issue of *For the Defense*. In 2005, we took a breather. It's now time to turn our attention to our Next Big Project. One possibility is another collection of six to eight substantive articles to be published in *For the Defense*. Another possibility is a contribution to DRI's Defense Library Series—perhaps focused on some specific aspect of appellate-related defense practice. Yet another possibility is a web-based project in conjunction with our Web Page subcommittee.

I'd like to hear your ideas for our

Next Big Project. Do you have an idea for an article you'd like to write, and are you willing to invest substantial time in your idea? Do you have an idea for an overall project, and are you willing to take a leading role in making your vision a reality? If so, please tell me about your idea, preferably by e-mail to [ray.ward@arlaw.com](mailto:ray.ward@arlaw.com).

The time for planning will be autumn 2006; the time for carrying out the plan will be 2007. Our committee has abundant energy, legal knowledge, and writing talent. With a commitment from about a dozen members, we can put together something to be proud of.

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*[N]othing is more hurtful to a perfect knowledge of the law than reading it.*  
Henry Fielding (1707-1754)