Side BAR

Spring 2011 · Published by the Federal Litigation Section of the Federal Bar Association

Opening Statements

Editor's Notes
Robert E. Kohn

The Federal Rules of Civil Procedure continue to change. Substantive federal law changes too. Procedurally speaking, in this issue John McCarthy and I review a proposal in Congress to amend Rule 11 by legislating sanctions. Meanwhile, John Rabiej reviews proposals that the Judicial Conference is considering to amend Rule 26 by clarifying the duty to preserve evidence. Alex de Witt explores recent Rule 26 amendments governing the disclosure of attorney communications with experts who testify. As Lauren Godshall points out, the future of Multi-District Litigation is uncertain because of a new ruling for arbitrating disputes that might have become national class actions. And the Western District of Pennsylvania has a new pilot program for appointing special masters for e-discovery issues, as we learn from Jennifer Keadle Mason.

Substantively, Kyle Beale brings us up-to-date on the Fifth Circuit's development of an important bankruptcy litigation issue. Emile Mullick explains that the Supreme Court has changed course over applying 42 U.S.C. § 1983.

We also benefit from the practical experiences of others. From Lauren Lonergan and Tara Reese Duginske, we learn

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Chair's Message
Shelline K. Bennett

Our section lives and breathes because you, our members, make so many impressive contributions to its work. This issue of SideBAR is evidence of those contributions. Moreover, just this month—thanks to the work of Board member Collin Hite of Richmond, Va.—the section is co-sponsoring a free webinar CLE on the role that historians can play as witnesses and experts in litigation. I am sure you will find it interesting and informative. The webinar is a collaborative work with the Association of Corporate Counsel, whose members will also be invited to attend without charge on May 25, 2011.

In the months ahead, section leaders Frank Carroll (vice chair) and Rob Kohn (secretary and treasurer) are working to produce a timely and exciting CLE program as part of the upcoming FBA Annual Meeting & Convention in Chicago. With the welcome participation of Chief Judges James Holderman of the Northern District of Illinois and Gerald Rosen of the Eastern District of Michigan, the CLE will address recent Supreme Court developments in four separate cases affecting class actions in federal courts. Board members Jim Martin and Tom McNeill are also working to organize the presentation, which is

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Proposal to Amend Rule 11 of the Federal Rules of Civil Procedure: A Request for Comments

Robert E. Kohn and John G. McCarthy

Congress is now considering a proposal to modify, through legislation, the provisions of Rule 11 of the Federal Rules of Civil Procedure. The proposal is contained in H.R. 966, the proposed "Lawsuit Abuse Reduction Act of 2011." On March 11, 2011, the House Subcommittee on the Constitution received testimony concerning H.R. 966 from three witnesses supporting and opposing the bill. The Federal Litigation Section's Committee on Federal Rules of Civil Procedure and Trial Practice is currently studying the bill and other proposals to modify or retain Rule 11 as currently written or otherwise to regulate the conduct of counsel and litigants in federal litigation. We seek your comments.

Proposed Amendments in H.R. 966

The H.R. 966 bill would repeal amendments that the Judicial Conference of the United States proposed for adoption effective in 1993, thereby in part reinstating an earlier version of Rule 11 that had been in force between 1983 and 1993. It would also add a new provision for punitive monetary sanctions to be paid into court.

Under the bill, there would no longer be a "safe harbor" provision that allows an adverse party to withdraw or modify a challenged pleading or other paper before a sanctions motion can be filed or otherwise presented to the court. *See* Fed. R. Civ. P. 11(c)(2). That safe harbor clause was adopted effective in 1993.

The bill would also provide that sanctions awards would once again be mandatory, rather than discretionary, in cases where a court has found that a pleading or other paper was signed without adequate factual or legal grounds. Sanctions had been mandatory from 1983 to 1993. The bill would specify that, in addition to any other sanctions the court might impose, "the sanction shall consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the violation, including reasonable attorneys' fees and costs."

In doing so, the bill would repeal the current provision in Rule 11(c)(2) that that fees and costs "may" be awarded "if warranted." In place of that provision, the bill would further authorize punitive monetary awards, to be paid into the court, "if warranted for effective deterrence."

Testimony Supporting and Opposing the H.R. 966 Bill

According to testimony on behalf of the National Federation of Independent Business and the U.S. Chamber Institute for Legal Reform, the changes are necessary because frivolous lawsuits and staggering litigation costs are creating a climate of fear for America's small businesses. In their view, the current "safe harbor" means that preparing a motion for sanctions may serve only to increase the costs for the moving party—which is, generally, the defendant. And even if a plaintiff does not withdraw his or her claims for relief, and even if the court finds them to be frivolous, the discretionary nature of the current sanctions provision means that the court may choose not to impose any sanction other than dismissing the case. These trade associations also believe that the current version of Rule 11 discourages judges from imposing sanctions for the purpose of compensating defendants for their attorney's fees and costs.

In opposition to the H.R. 966 bill, a professor at the University of Houston Law Center has testified that the 1993 amendments of Rule 11 were adopted in the face of studies suggesting that the 1983 version of Rule 11 was deterring the filing of meritorious cases. Additionally, in practice, civil rights and employment discrimination plaintiffs were impacted the most severely under the earlier version of Rule 11 as adopted in 1983. Studies also showed that plaintiffs had been the targets of sanctions far more often than defendants, even though the terms of Rule 11 apply to all pleadings and other papers—including a defendant's answer containing denials and affirmative defenses. Scholars and practitioners had noted that the 1983 version actually increased costs and delays by encouraging "the Rambo-like use of Rule 11 by too many lawyers," and that the resulting increase in sanctions-oriented motions practice had led to a breakdown of civility and professionalism. This professor cited a 1991 study by the Federal Judicial Center, which revealed that few judges polled thought the then-current 1983 version of the rule was "very effective" in deterring groundless pleadings. In a 2005 survey of 278 district judges polled by the Federal Judicial Center, more than 80% of the judges said that "Rule 11 is needed and it is just right as it stands now."

Call for Comment and Proposals from the Federal Litigation Bar

The Committee on Federal Rules of Civil Procedure and Trial Practice seeks your comments. Comments may be submitted concerning any of the proposed revisions contained in the H.R. 966 bill; or concerning any other proposals to modify Rule 11; or concerning whether to retain the text of Rule 11 as currently in force. We also welcome any other proposals that are germane to the application or purposes of Rule 11. Upon request, we will handle any comment as confidential. Anonymous comments will also be accepted. Please comment by June 30, 2011. **SB**

Rob Kohn and John McCarthy are co-chairs of the Committee on Federal Rules of Civil Procedure and Trial Practice. Kohn is also the secretary and treasurer of the Federal Litigation Section and a member of the Los Angeles Chapter of the FBA; McCarthy is chapter president of the Southern District of New York Chapter of the FBA. Kohn may be reached at rkohn@kohnlawgroup.com or (310) 461-1520; McCarthy may be reached at jmccarthy@sgrlaw.com or (212) 907-9703.

Briefing the Cause

Proposed Federal Rules Amendments for Evidence Preservation

By John K. Rabiej

After addressing disclosure obligations in 1993, the scope of discovery in 2000, discovery of electronically stored information in 2006, and discovery of expert witness information in 2010, the Judicial Conference's Advisory Committee on Civil Rules is now confronting yet another difficult discovery-reform issue. A recent spate of significant federal court decisions has highlighted the uncertain scope of preservation obligations and uncertain standards for sanctioning a party for failing to comply with the obligations. Professor Richard Marcus, the committee's associate reporter, succinctly describes the current status: "As a very general matter, it seems clear that many are concerned that the preservation obligations may often seem too broad, and that huge expense has resulted from the overbreadth, particularly because the standard for severe sanctions is unpredictable and inconsistent across the nation."

At its April 2011 meeting, the committee considered the report of its Discovery Subcommittee, which proposed approaches to rules amendment to address preservation-obligation issues. The committee took no action, deciding to hold a mini-conference in September 2011 with individuals who are expert in ESI preservation to assist it in determining the practicability of the three approaches for possibly amending the Federal Rules of Civil Procedure. The committee will consider the three approaches at its Nov. 7–8 meeting. It is expected that the committee will recommend a rule for publication at its Spring 2012 meeting to meet the next rulemaking cycle. Under this timetable, the earliest a rule amendment could take effect under the rulemaking process is Dec. 1, 2014.

Three Categories of Rules Amendments Proposed as Illustrations

The committee's associate reporter prepared the first two approaches to possible rules amendments. They provide a comprehensive approach, establishing a rule-based preservation obligation and providing detailed sanction provisions for failing to comply with the rule-based obligation. Judge Paul Grimm and Judge David Campbell drafted the third approach. (The chief justice appointed the latter to serve as the new committee chair, effective Oct. 1, 2011.) The third approach deals solely with sanctions for failing to comply with common-law preservation obligations, offering a "back-end" solution.

The first preservation-obligation approach proposes a new Rule 26.1 of the Federal Rules of Civil Procedure. It is detailed and sets out all the elements of a party's preservation obligations, including the duty's trigger, the duty's scope, sources and types of information to be preserved, and a time frame. A proposed new Rule 37(e) provides sanctions for failing to comply with Rule 26.1, including a list of factors to be considered in determining whether the burden of proof has been met. Under this amendment, a court must consider proportionality in sanctioning a party, and it may only impose the least severe sanction necessary to redress harms. A separate culpability standard is established for imposing the most severe sanctions.

This first approach represents a comprehensive option, which contains virtually every preservation-obligation suggestion proposed at the Duke University School of Law 2010 Litigation Reform Conference. The proposal is heavily footnoted, describing the many issues that the respective proposed revisions, if promulgated, would raise. Presenting a comprehensive option to the committee for its consideration follows a familiar historical pattern. The committee's reporters often provide a detailed proposal, containing laundry lists of factors or elements, which are often informative and useful. But the committee rarely adopts such comprehensive options in toto. Instead the committee typically whittles them down to their core, occasionally preserving the excised provisions for the accompanying Committee Note.

The second approach to rules amendment is similar to the first but not as detailed. The third approach does not establish rules-based preservation obligations. Instead, it addresses only sanctions for violating the extant common-law based preservation obligations in a new Rule 37(g). The amendment sets out a list of factors to be considered in determining the culpability standard prescribed for imposing severe sanctions.

This approach would apparently retain the present Rule 37(e) safe-harbor provision, while the first two approaches to rules amendment might not. There is no need to eliminate the current Rule 37(e) safe-harbor, because it serves a purpose separate from the proposed amendments. The Rule 37(e) safe-harbor, though shallow, should be retained.

Genuine Rulemaking Concerns Raised About Regulating Pre-Litigation Conduct

The first two approaches to amending the Federal Rules of Civil Procedure would regulate pre-litigation conduct that has, up until now, been regulated by common law. Whether the rules committees can amend those federal rules to govern pre-litigation conduct raises serious Rules Enabling Act (REA) concerns. Rules promulgated under the REA may "not abridge, enlarge or modify any substantive right" (28 U.S.C. § 2072(b)). They can only change procedural law.

The dividing line between "substantive rights" and "procedural" law is not self-evident. And whether regulating preservation obligations would affect a substantive right is not clear. What is known is that the rules committees jealously guard their credibility and propose amendments only when they believe that the amendments are important and consistent with the REA. The Supreme Court has never ruled that a rules amendment promulgated by the rules committees contravened the REA. It is right for the rules committees to care so deeply about maintaining their record intact, because the credibility of their work is at stake. If the Supreme Court strikes down one rule amendment, all future rules amendments would be on less firm ground. And satellite litigation challenging every new rule would be inevitable; an outcome no one favors.

Of course, the rules committees do not always shy away from

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proposing amendments that come close to the "substantive rights" line. But they do so only after considerable analysis, when the "risk-benefit" calculus clearly favors a change—a test proposed Rule 26.1 might not meet. The risk that proposed Rule 26.1 and its rules-based preservation obligations will be overturned as outside the REA is genuine. Credible arguments support the rules committees' authority to recommend such a rule, based principally on Rule 11 of the Fed. R. Civ. P. and its effects on pre-litigation conduct. But many prominent rules cognoscenti remain unpersuaded, convinced that the amendment would affect a substantive right.

Clarifying the preservation obligation standard would be useful. But the value of the clarification may not outweigh the risk that the committee's promulgation of Rule 26.1 might violate the REA. Whether the first two approaches to preservation-obligation rules amendment can survive the committee's careful risk-benefit analysis is unclear. The promise of a rules change that is limited solely to the proposed Rule 37 sanction provisions seems brighter, especially because it is universally sought and because it would directly affect preservation obligations without implicating REA concerns.

Rule 37 Sanction-Rule Amendment Most Promising

A stand-alone amendment to Rule 37 of the Federal Rules of Civil Procedure appears most promising because it indirectly accomplishes many of the potential benefits of the first two categories of proposed amendments without exposing the rules committees to REA challenges. The proposed Rule 37 sanction provisions directly address the heart of the preservation problem by establishing a uniform standard for the imposition of severe sanctions for failing to preserve discoverable information and limiting such sanctions only in situations when a party's culpability is substantial and prejudice is demonstrated. The proposed sanctions provisions do not establish nor modify the preservation duty. As such, they appear to be entirely consistent with the REA.

Each of the proposed rules amendments includes a sanction provision. The committee will probably begin to focus on the differences between the sanction provision proposed by the reporter and the alternative proposed by Judges Grimm and Campbell. In addition to the obvious difference in the context of both options, there are some subtle, and some not so subtle, differences between the two. In particular, the judges' proposal provides a series of factors for a judge to consider in determining whether the culpability standard has been met, while the reporter's proposal provides a series of factors for a judge to consider in determining the burden of proof. The two may overlap. It is quite possible that the committee will pick and choose among the two Rule 37 options, deciding to retain some provisions in the text of the rule amendment, reserving others for inclusion in the accompanying Committee Note, and rejecting others outright.

The Sedona Conference® Guidance on Preservation Obligations

Each of the proposed Rule 37 sanction provisions sets out standards that rely to a large extent on a party's "reasonableness" in taking measures to preserve information "proportional" to the stakes at issue. Presumably the Committee Note will expand on these two important factors. But even a lengthy Committee Note is not designed to provide a guide to best practices that is so valuable to the bench and bar in interpreting and applying proposed rule amendments.

Principle 14 of *The Sedona Principles Addressing Electronic Document Production, 2d Edition* (2007), which sets out a standard for sanctioning a party for failing to comply with its preservation obligations, is consistent in many respects to proposed Rule 37(g). (All Sedona Conference publications are available free for individual download from www.thesedonaconference.org.) Given the recent case law on sanctions for the failure to preserve electronically stored information, Working Group 1 of The Sedona Conference® is considering updating the commentary to Principle 14. Similar to the proposed rules amendments, the updated commentary to Principle 14 will likely highlight the culpability and prejudice factors in determining whether a sanction should be imposed.

In 2007, The Sedona Conference published its *Commentary on Legal Holds: The Trigger & The Process*. A second edition of the commentary was issued in 2010. The commentary sets out 11 separate guidelines that focus primarily on 'reasonableness' and 'proportionality.' Each guideline is followed by a note explaining it. Helpful real-life examples are generously provided as illustrations. The commentary provides practical guidance to the bench and bar on how to determine whether particular measures taken to preserve discoverable information are reasonable and proportional.

Guidelines 1, 3, and 4 describe factors to be considered when determining when the duty to preserve is triggered. Guideline 3, in particular, suggests a practical way a party can demonstrate that it acted reasonably under the circumstances by "adopting a process for reporting information relating to a probable threat of litigation to a responsible decision maker." Guidelines 2, 5, 6, and 7 provide guidance on determining whether the preservation conduct is reasonable and proportional.

The bench and bar have rightly criticized the uncertainties related to preservation obligations. Sedona Principle 14 and the *Commentary on Legal Holds* provide useful guidance to the committee in its consideration of a new Rule 37(g). These highlight proportionality and a party's reasonableness in taking steps to comply with its preservation obligations, and together with the proposed Rule 37(g) sanction rule, will provide the direction and much of the certainty that both the bench and bar have been seeking. **SB**

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Expert Discovery Revisited: Amended Rule 26 in Action

Alexander S. de Witt

Before Dec. 1, 2010, there was considerable debate and litigation over the scope and limits of expert discovery in federal court, particularly over the discoverability of draft expert reports and attorney-expert communications, as well as disclosure requirements for nonretained experts (like treating physicians and "hybrid" witnesses). As noted by the Advisory Committee on Civil Rules, routine discovery of attorney-expert communications had resulted in an inefficient and "undesirable" chilling effect on the way attorneys and experts tried to do their jobs.[1] Rule 26 of the Federal Rules of Civil Procedure was amended, effective Dec. 1, 2010, to address these concerns. The committee has also outlined general principles to be applied in construing the amended Rule. The new rule suggests a few key practice pointers for litigators.

The Amendments to Rule 26

Rule 26 has been amended in three significant ways that affect experts who are intended to testify. First, retained experts who will testify at trial now must prepare and sign a written report under Rule 26(a)(2)(B)(ii) which contains "the facts *or data* considered by the witness in forming" the disclosed opinions. The 1993 version of Rule 26 required that such reports disclose all "data *or other information*" considered by the expert. The 2010 amendment was "intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports."[2] The change both limits and expands the reporting requirement for retained experts, by "limit[ing] disclosure to material of a factual nature by excluding theories or mental impressions of counsel" while expanding the disclosure obligation to all "factual ingredients" considered (not just relied upon) by the retained expert.[3]

Second, amended Rule 26(b)(4)(B) expressly provides work-product protection to "drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded." This protection extends both to drafts of reports prepared by retained experts and to draft disclosures for non-retained experts (summarized below) under Rule 26(a)(2)(C). For retained experts, amended Rule 26(b)(4)(C) goes one step further and extends work-product protection to all communications between the party's attorney and the expert, regardless of the form of the communications, except to the extent that such communications:

(i) relate to compensation for the expert's study or testimony;
(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
(iii) identify assumptions that the party's attorney provided that the expert relied on in forming the opinions to be expressed.

Note the distinction between "facts or data" and assumptions provided by counsel. This is consistent with the purpose behind the 2010 amendments—to protect (and encourage) discussions between the attorney and the testifying expert that may involve strategy, trial preparation, or the mental impressions of the attorney as she prepares her case, while requiring full disclosure of all "factual ingredients" upon which the expert's opinion may be premised. The amendments draw a bright line between counsel's work product (and his ability to brainstorm freely with the expert and prepare the client's case) on the one hand, and the factual basis for the expert's opinions on the other. The former is shielded from discovery, while the latter must be disclosed.[4]

Finally, for nonretained experts who will testify, amended Rule 26(a)(2)(C) now requires that such witnesses be identified under Rule 26(a)(2)(A) with a summary disclosure of (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify.

"Frequent examples" of witnesses who fit within this disclosure requirement "include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony."[5] Under amended Rule 26, "it is now clear where non-retained treating physicians and other care providers fit in the Rule 26(a)(2) expert disclosure scheme—under the summary disclosure requirement in Rule 26(a)(2)(C)."[6]

For experts or consultants who won't be testifying, the general rule of non-discoverability remains the same under amended Rule 26(b)(4)(D), which "provide[s] an even higher barrier to discovering attorney-expert communications."[7] Cases will be rare in which a party can show "exceptional circumstances" warranting such discovery under amended Rule 26(b)(4)(D)(ii).[8]

Principles of Construction for Applying Rule 26

The Advisory Committee sent a clear message that the amendments to Rules 26(a)(2)

and (b)(4) should be interpreted and applied in a realistic, pragmatic manner. For non-retained experts (like treating physicians),[9] for example, the committee explains that the new Rule 26(a)(2)(C) disclosure requirement is "considerably less extensive" than the Rule 26(a)(2)(B) report for retained experts, noting as a practical matter that "these witnesses have not been specially retained and may not be as responsive to counsel as those who have."[10]

Another example relates to the rule's renewed focus on communications between retained experts and "the party's attorney." The Committee has stated that the work-product protection provided by Rules 26(b)(4)(B) and (C) "should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm."[11] The committee has endorsed a pragmatic application of "'the party's attorney' concept" (and the attendant work-product protections extended by amended Rule 26), and provides two illustrations in the 2010 Committee Notes.[12]

Under Fed. R. Civ. P. 82(a)(2), the amendments to Rule 26

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apply to all pending civil actions unless applying them "would be infeasible or work an injustice." The amended rules "govern proceedings that are pending at the time the amendments become effective, as long as the Supreme Court does not specify otherwise and the application would not be infeasible or work an injustice."[13] The U.S. Supreme Court Order that adopted the amendments to Rule 26 directed "[t]hat the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on Dec. 1, 2010, and shall govern all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending."[14]

Practice Pointers

1. Be Mindful of Exceptions to the General Rule of Nondisclosure.

As recently noted by one court, the amendments to Rule 26(b)(4) "restrict, but do not eliminate entirely, the discovery of privileged material considered by experts" and "still allow discovery of draft reports or attorney-client communications upon a showing of substantial need, and also freely allow discovery of attorney-client communications concerning (a) compensation, (b) facts or data provided by counsel and considered by the witness in forming opinions, and (c) assumptions provided by counsel and relied upon by the expert."[15]

2. Expert Report Must Be "Prepared"—and Signed—"By The Witness."

The amendments to Rule 26 acknowledge a common, accepted practice in civil litigation: attorneys often assist testifying experts with preparing Rule 26(a)(2)(B) reports. Typically, this is to ensure that the report satisfies each of the disclosure requirements of Rule 26(a)(2)(B). Because expert reports routinely are revised at least once, drafts of the reports may contain editorial comments, questions, etc. between the attorney and expert. Under amended Rules 26(b)(4)(B) and (b)(4)(C), these draft reports, and communications between the attorney and expert relating to draft reports, are provided work-product protection.

Keep in mind, however, that amended Rule 26(a)(2)(B) (like the 1993 version) requires that the report be "prepared and signed" by the expert. "[I]t is improper for counsel to prepare the expert's opinion from 'whole cloth,' and then have the expert sign the drafted report as his own."[16] The report may not be "ghost-written" by the attorney. "It is not improper for counsel to assist in the drafting of an expert report; it is only improper where counsel has prepared the report from 'whole cloth' with little or no input from the expert."[17]

3. Make a Privilege Log.

The work-product (trial preparation) protections built into amended Rules 26(a)(2) and (b)(4) should be read in conjunction with Rule 26(b)(5)(A), which requires any party who "withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material" to "expressly make the claim" and describe the withheld information "in a manner that, without revealing information itself privileged or protected, enable other parties to assess the claim"—i.e., a privilege log.[18]

4. Request an In Camera Inspection.

Consider requesting an *in camera* inspection in appropriate cases. This is "a 'commonly-used procedural method for determining whether information should be protected or revealed to other parties.'"[19]

Conclusion

Courts have acknowledged a "significant divergence between the 1993 version (and related case law) and the 2010 version of Rule 26."[20] With these changes came clarity. As summarized above, the amendments to Rule 26 established clear parameters for expert discovery, effectively ending much of the uncertainty that followed the 1993 version of the rule, particularly with respect to discovery of draft expert reports, attorney-expert communications, and non-retained experts. **SB**

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Endnotes

[1]Fed. R. Civ. P. 26 Advisory Committee Notes, 2010 Amendments; *see also Sara Lee Corp. v. Kraft Foods Inc.*, --- F.R.D. ---, 2011 WL 1311900, at *2 (N.D. Ill. April 1, 2011).

[2]Fed. R. Civ. P. 26 Advisory Committee Notes, 2010 Amendments, Subdivision (a)(2)(B).

[3]*Id.*

[4]Fed. R. Civ. P. 26 Advisory Committee Notes, 2010 Amendments, Subdivision (b)(4).

[5]Fed. R. Civ. P. 26 Advisory Committee Notes, 2010 Amendments, Subdivision (a)(2)(C); *see also Meredith v. International Marine Underwriters*, 2011 WL 1466436, at *7 (D. Md. Apr. 18, 2011).

[6]*Crabbs v. Wal-Mart Stores Inc.*, 2011 WL 499141, at *1 (S.D. Iowa Feb. 4, 2011).

[7]*Sara Lee Corp. v. Kraft Foods Inc., supra*, at *3; *see also National Western Life Ins. Co. v. Western National Life Ins. Co.*, 2011 WL 840976, at *2 (W.D. Tex. March 3, 2011); *Adams v. United States*, 2011 WL 39139, at *1, n. 1 (D. Idaho Jan. 4, 2011).

[8]Fed. R. Civ. P. 26 Advisory Committee Notes, 2010 Amendments, Subdivision (b)(4).

[9]*See Perkins v. United States*, 626 F. Supp. 2d 587, 590-91 (E.D. Va. 2009); *Hare v. Opryland Hospitality LLC*, No. DKC 09-0599, 2010 WL 3719915, at *5 (D. Md. Sept. 17, 2010); *Brenner v. Consolidated Rail Corp.*, 2011 WL 1474296, at *3, n.4 (E.D. Pa. Apr. 18, 2011).

[10]Fed. R. Civ. P. 26 Advisory Committee Notes, 2010 Amendments, Subdivision (a)(2)(C).

[11]Fed. R. Civ. P. 26 Advisory Committee Notes, 2010 Amendments, Subdivision (b)(4).

[12]*Id.*

[13]*Kimura v. Decision One Mortg. Co. LLC*, 2011 WL 915086, at *1 (D. Nev. Mar. 15, 2011).

[14]*See Civix-DDI LLC v. Metropolitan Regional Information Systems*, 2011 WL 922611 (E.D. Va. March 8, 2011); *see also Meredith v. International Marine Underwriters*, *supra* at note 7.

[15]*Adams v. United States*, *supra* at note 7.

[16]*Minnesota Lawyers Mut. Ins. Co. v. Batzli*, 2010 WL 670109, at *2 (E.D. Va. Feb. 19, 2010).

[17]*Id.*, 2010 WL 670109, at *3.

[18]*See Estate of William I. Allison v. Scoggins*, 2011 WL 650383 (W.D.N.C. Feb. 10, 2011).

[19]*Adams v. United States*, *supra* at note 7.

[20]*Graco Inc. v. PMC Global Inc.*, 2011 WL 666066, at * 13 (D.N.J. 2/14/2011).

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the ropes of using foreign-language evidence. To help us navigate electronic litigation issues, David Donoghue and Anna Krasinski provide ten useful tips. Jeff Justman provides pointers for appellate advocacy.

As always, this issue of *SideBAR* benefits from the contributions of you: the federal litigation bar. I encourage you to write the varied and insightful articles that Federal Litigation Section members enjoy each time this newsletter is published. Thank you. **SB**

About the Editor

Robert E. Kohn litigates entertainment, business, and intellectual property disputes in the Los Angeles area. He also argues appeals in federal and state courts at all levels. A former clerk to the Hon. Joel F. Dubina of the Eleventh Circuit, Kohn attended Duke Law School. He is the secretary and treasurer of the Federal Litigation Section and co-chairs the committee on Federal Rules of Procedure and Trial Practice. He can be reached at rkohn@kohnlawgroup.com.

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scheduled for Thursday afternoon on Sept. 8, 2011.

Our section has enjoyed tremendous encouragement from the Chicago organizers of this year's Annual Meeting & Convention, including FBA President Elect Fern Bomchill and Maria Vathis. With their help, and the support of FBA Executive Director Jack Lockridge and his team, the section has planned to continue the tradition of hosting another friendly and sociable hospitality suite. I hope you will stop by the Columbus Room, just off the main hotel lobby, to visit with other section members early on Thursday evening during the convention.

The section continues its active role in policy and public advocacy concerning federal court litigation. As co-chairs of the Committee for Federal Rules of Civil Procedure & Trial Practice, Rob Kohn and John McCarthy seek your comments on proposed amendments of Rule 11 of the Federal Rules of Civil Procedure, currently pending before the House Subcommittee on the Constitution. See H.R. 966, the proposed "Lawsuit Abuse Reduction Act of 2011." Our section is collaborating with the FBA's Government Relations Committee and the FBA Professional Ethics Committee, under the leadership of FBA President Ashley Belleau, to develop a unified response to these proposals. Rob and John have summarized the proposals in this issue of SideBAR. Please read page 2 of this issue of SideBAR to learn more, and please let them know of your views.

Rick Pocker, my predecessor as chair, worked tirelessly and effectively to advance the needs of our section and the views of its members on matters affecting federal courts and federal litigation. Last year, he presented our section's comments to the Administrative Office of the U.S. Courts concerning proposed legislation that, in its original form, would have significantly altered federal statutes regarding diversity jurisdiction, the process for determining proper venue, and the removal standards and process. A revised version of the bill has now passed the House and is pending in the Senate Judiciary Committee as H.R. 394, the proposed "Federal Courts Jurisdiction and Venue Clarification Act of 2011."

Also during Rick's tenure as chair, we enjoyed a steady increase in the number of FBA members who choose to receive the benefits of belonging to the Federal Litigation Section. We now count over 3,000 members across the nation who share in concern for advocacy and the administration of civil justice in federal courts. Please let your litigator colleagues know about the important work we do, and encourage them to join us online at fedbar.org/Sections/Federal-Litigation-Section.aspx. In turn, I encourage each of you to write articles, weigh-in on legislative proposals forwarded to our section for comment, and consider joining the board. It gives me great pleasure to announce that Tom McNeill of Detroit and Jesse Maddox of my own firm in Fresno, Calif., have become board members. **SB**

About the Chair

Shelline Bennett is the managing partner of Liebert Cassidy Whitmore's Fresno, Calif., office, where she focuses on representing management in labor and employment law matters.

Federally Speaking

E-Discovery Special Masters Pilot Project in the Western District of Pennsylvania

Jennifer Keadle Mason

A little over a year ago, the Western District of Pennsylvania began the development of a pilot project for using special masters to help resolve e-discovery issues. The project was developed by the court's Alternative Dispute Resolution Implementation Committee, chaired by Judge Joy Flowers Conti and its subcommittee on e-discovery Special Masters, led by Judge Nora Barry Fischer. The intent of the project is to help the court and litigants address the specific and specialized needs of cases involving e-discovery. The project aims to provide litigants with options to resolve e-discovery disputes in a cost effective and efficient manner, or in the alternative, to provide litigants with a person who specializes in e-discovery who can assist with resolving disputes concerning the same.

The subcommittee established criteria for the qualifications of an e-discovery special master (EDSM). The requirements include: 1) training, education and experience in e-discovery; 2) training, education and experience in mediation; 3) specific training to be provided by the court; and 4) active bar admission. Special masters seeking approval were required to submit applications. On Nov. 16, 2010, the Board of Judges approved the establishment of a list of qualified attorneys to serve as EDSMs. Those special masters attended training in February/March 2011. The pilot program will become active effective May 1, 2011. New applications will be accepted after the conclusion of the pilot project in May 2012.

By way of background, in 2006, the discovery rules in the Federal Rules of Civil Procedure were revised to require that parties must disclose the location of electronically stored information at the time of their Rule 26 initial disclosures. Further, parties may seek the discovery of electronically stored information in the discovery process, excluding that which is not reasonably accessible. Although the rules were helpful, issues persist. Judges sitting in the Western District Court continue to address disputes related to the preservation, collection and production of ESI, many of which are very technological in nature. As a result, the Court determined that EDSMs may be useful in appropriate cases. In the event the Court determines that the appointment of an EDSM is appropriate, the parties can seek information on the Court's website and the links provided therein to select an EDSM from among the approved candidates.[1] The Court will then set forth the scope of the EDSM's appointed duties, which may include, by way of example, developing protocols for the preservation, retrieval or search of potentially relevant ESI; developing protective orders to address concerns regarding the protection of privileged or confidential information; monitoring discovery compliance; resolving discovery disputes; etc.

The appointment of special masters is governed by Rule 53 of the Federal Rules of Civil Procedure. The original role of special masters in Courts was limited and appointments were rare.[2] The Courts continued to expand the role of special masters on a case by case basis[3] until the current Rule 53 changes were adopted in 2003. The current rule permits the appointment of special masters when: 1) an exceptional condition requires appointment, 2) pre-trial and post-trial matters cannot be effectively and timely addressed by an available district judge or magistrate, and 3) the parties consent.[4] The roles of a special master include facilitating the process, monitoring discovery compliance, adjudicating legal disputes and adjudicating technical disputes. Not every special master will have specific training in each area. Therefore, in the Western District of Pennsylvania, the training, qualifications, and experience of each special master will be maintained as part of the Western District website on which parties can search for the knowledge base of each of the special masters and select one with knowledge related to their own case.

Important considerations in the appointment of a special master include: a) whether the special master would be disqualified pursuant to 28 U.S.C. §455, b) the duties of the special master both general and specific, c) confidentiality, d) time limitations upon the performance of the duties, and e) compensation. First, pursuant to the U.S. Code, a person may, for example, not serve as a special master if they have a relationship to one of the parties. Next, the Court must provide the special master with the duties and obligations they will have. General duties of a special master might include resolving a discovery dispute, questions of privilege, and relevancy. Whether the special master may have ex parte communications with the parties, the ability of the special master to impose non-contempt sanctions and the authority to issue subpoenas should also be addressed. Specific duties might include investigation of the computer systems and backup systems that exist, whether electronically stored information has been destroyed, deleted or withheld, when a party was on notice of the litigation, whether a litigation hold was instituted properly, whether preservation is complete and defensible, authentication issues, and proportionality. The fees for special masters will be born by the parties. The Court will determine the allocation of those fees. Further, there is some suggestion through recent Court opinions that the costs associated with e-discovery may be included within the Court costs at the end of a case.[5]

E-discovery special masters are not new to the Western District of Pennsylvania or the federal courts. Judge Conti first appointed an e-discovery special master in the *Hohider v. UPS*, (No. 04-363) case in 2008. In that matter, the court needed guidance from someone with specific technological background in a particular kind of storage media to decide whether a litigant had properly stored backup tapes and/or erased, copied over, destroyed or altered the same. As early as 2004, Judge Shira Scheindlin appointed a special master to

E-Discovery continued on page 17

Historians as Consultants, Experts, & Testifying Corporate Designees: Help for Your Litigation

Wednesday, May 25, 2011

12:30–2:00 p.m. (ET) | 11:30 a.m.–1:00 p.m. (CT) | 9:30–11:00 a.m. (PT)

Complimentary Webinar; CLE Credit Pending

The Federal Bar Association's Litigation Section invites you to participate with our distinguished panelists in this dynamic webinar addressing the use of historians in litigation. With lawsuits seeking to impose liability on an ever-increasing array of long tall exposures, using historians can be a critical component of case preparation.

Topics

- Using historians to collect documents from archives, libraries, and museums;
- How historians can develop appropriate document collection protocols;
- Use of historians as testifying experts and corporate representatives under FRCP 30(b)(6).

Speakers

MCGUIREWOODS

Collin Hite
Partner, Toxic Tort & Environmental Litigation
McGuireWoods LLP

Christian Henneke, Ph.D.
Partner, Toxic Tort & Environmental Litigation
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Keith Zahniser, Ph.D.
Associate Historian
Historical Research Associates, Inc.

Emily Greenwald, Ph.D.
Associate Historian & Vice President
Historical Research Associates, Inc.

Patrick O'Bannon, Ph.D.
Senior Manager, History/Architecture
Gray & Pape, Inc.

Registration

Early online registration (https://event.on24.com/eventRegistration/EventLobbyServlet?target=registration.jsp&eventid=302292&sessionid=1&key=2813E68B3A2B2DE77884F4938CB2DB06&sourcepage=register) is recommended due to limited space. Approximately one week prior to the webinar, you will receive registration confirmation, a web address access link, and dial-in instructions. For additional information, please contact Bridget Light at blight@mcguirewoods.com or David Bellamy at dbellamy@mcguirewoods.com.

Ten Tips for Federal Litigation Practice in a Digital World

R. David Donoghue and Anna Krasinski

In many ways, federal district court litigation practice has remained unchanged as computers and the Internet have evolved around it. But there are also critical changes to the practice. Your first reaction may be that you know how to use ECF to check dockets and file documents. Most federal court litigators have at least rudimentary knowledge of electronic filing, but these ten tips will improve your practice and likely your results:

1. Check the Judge's Website. A judge's website will have a wealth of helpful information about the particular procedures the judge follows. Judges may have specific rules for certain kinds of motions and filings, or how draft orders are to be submitted. The webpage may also provide approved samples for forms for initial status reports or other filings. Checking the judge's webpage, and following the judge's procedures, are easy and quick ways to put your best foot forward. And check the webpage frequently as the information can change.

2. Use the Online Transcript System. Take advantage of the online transcript ordering systems. Prior to these systems, getting transcripts was difficult, but now getting a hearing transcript is as easy as buying a book on Amazon.com. It is a great advantage for litigators preparing motions that relate to prior hearings.

3. Deliver Prompt, Correct Courtesy Copies. Most local rules require delivery of courtesy copies to the court within one day of filing. But some judges require same day courtesy copies if at all possible. For those judges, if you cannot deliver same day you should at least deliver early the next morning. Also, make sure you format the copies correctly. For example, most judges prefer and some require exhibits to be separated by tabs. And for many judges, you must include copies of any unpublished cases cited in your papers. Again, check the judge's website for courtesy copy requirements.

4. Learn How to Seal or Redact Filings Early. The Seventh Circuit frowns upon sealing court filings unless absolutely necessary. As a result, many districts, for example, judges are particular about filing under seal, as are many clerk's offices. Some protective orders give you a blanket right to file under seal, but others require specific permission. That permission would ideally be sought in advance of filing, but at least concurrent with the filing. Either way, it is critical to know before the evening of a major filing deadline when the clerk's office may be closed, and you may not have much time to begin with. Additionally, some circuits require that briefs be filed in a redacted form instead of under seal. Many judges have adopted the same requirement. Ask the judge's chambers or counsel who has experience before the particular judge. Knowing how to file sealed documents or exhibits through ECF is equally important. The court's website often has step-by-step guides for filing both sealed civil and criminal documents.

5. Lean On the ECF Hotline. I am routinely surprised by how many people never think to call the clerk's ECF number for assistance. The clerks' staffs are uniformly knowledgeable and eager to help. In particular, call them immediately if you made an ECF-based error while filing. The clerk's office can almost always fix it, and it is usually easier for everyone if you have not added to the problem by "fixing" it yourself. One note of caution though: as with calling chambers, give the clerk's office the courtesy of reviewing the ECF webpage first to make sure they have not already answered your question there.

6. Calculate Your Hearing Date. Courts and judges often have different minimum notice period for motions. This is one more important reason you need to check the judge's webpage before filing your motions.

7. Meet and Confer. Wherever you practice you are likely aware of some version of a local rule requirement to meet and confer regarding at least discovery motions. Generally, you do not need to meet and confer for dispositive motions, but you must for discovery motions as well as motions for extensions. Most judges will not hear a motion without a meet and confer, and some will deny the motion with prejudice for failing to meet and confer. If you are not sure whether your motion requires a meet and confer, err on the side of having one.

8. Tell the Court About Your Meet and Confer. Do not forget to tell the court in your motion that you met and conferred, and describe the outcome. If you do not, you risk denial of your motion, and always identify agreed or stipulated motions in the title and the docket entry.

9. Know the Proper Order for Filing Documents. One way to get your electronic filings kicked is by not filing the documents in the proper order. For example, in some courts, motions must be filed before the corresponding notice of motion may be filed. Avoid the extra work of having to re-file your documents by filing them in the proper order in the first place.

10. Know What Documents Should Not Be Filed. Not every pleading must be filed with the court. Many documents, such as discovery requests or Rule 26 disclosures should not be electronically filed, so make sure you know what documents should simply be served on your opponent via snail mail. **SB**

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A Wrench in the Works: Dealing with State Court Suits During Multidistrict Litigation

Lauren E. Godshall

Airplane crashes, medical device recalls, oil spills. Big cases like these call for big solutions. More and more frequently, the solution to resolving complex, multi-state issues and consolidating hundreds or thousands of individual lawsuits into something manageable is through a motion to transfer and consolidate, filed before the Judicial Panel on Multidistrict Litigation.

A Brief Introduction to Multidistrict Litigation

The Judicial Panel on Multi-District Litigation was formed in 1968, when Congress enacted 28 U.S.C. § 1407. The JPML is made up of seven sitting federal judges from either the district or appellate levels, appointed by the Chief Justice of the Supreme Court. The panel meets six times a year to hear and rule on "motions to transfer and consolidate." These motions to transfer and consolidate can be filed by any party—plaintiff or defendant—interested in getting numerous federal matters heard together for all pretrial proceedings. Interestingly, both plaintiffs attorneys and defense attorneys are filing motions to transfer and consolidate before the JPML with increasing frequency over the last decade.

The panel's purpose is to consolidate matters where such consolidation would be helpful to all parties, in order to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties and of the judicial system. Then, if a matter merits consolidation, the panel decides on a "transferee court"—the federal district court that will handle all of the related matters for all pretrial purposes. In the Deepwater Horizon explosion and oil spill, for example, the JPML decided that consolidation into a single multidistrict litigation (MDL) was appropriate, and further determined that Judge Carl Barbier, who already was handling dozens of Deepwater Horizon related matters in his own court in the Eastern District of Louisiana (located in New Orleans) was the right man for this particular job.

The transferee judge who gets the MDL matter in his or her court does not necessarily try the actual cases that are transferred to him or her. Instead, the transferee judge directs all pretrial proceedings, such as evidentiary motions, depositions, motions to dismiss or for partial summary judgment, and any global settlement negotiations. Section 1407 then directs the panel to remand all cases not resolved in the pretrial stage back to their home courts for trial—although in some cases the transferee court may conduct a "bellwether trial" of a matter originally filed in that court, or the parties will voluntarily agree to remain in the transferee district for trial. As most matters are resolved in pretrial stages, and as many matters will end up resolved in the transferee court, the JPML's decision about consolidation is a major defining step for big litigation matters.

But what to do about state court actions?

The JPML only has jurisdiction over federal lawsuits. Once a federal action is filed anywhere in the country, the JPML may determine whether it should be consolidated with the MDL and transferred to that court. About pending state court actions—even state court actions in the same district as the MDL itself, however, the JPML can do nothing.

This inability to affect relevant and simultaneously pending state court actions has been described as the "singular weakness" of the JPML statute.[1] Without the ability to consolidate these simultaneous, similar matters, many of the advantages of the MDL system are lost—the state court actions can move forward on their own schedule, with separate discovery requirements, scheduling orders, and rulings that could all be wildly inconsistent with the consolidated MDL proceedings. Indeed, for example if a state court rapidly begins making decisions about evidence and allows the disclosure of arguably privileged documents, or allows for certain contested depositions to go forward, such a decision will have the effect of deciding the disclosure question for every related action in the country.

Options for resolving this issue are limited. Defendants in a state court action hoping to get out of the state court and into the consolidated MDL proceeding should explore options for filing a notice of removal immediately upon receipt of service or notice of a new suit. Removals, however, are only available if federal jurisdiction exists—and if only state laws are pled, savvy attorneys will know to add appropriate in-state defendants and destroy diversity.

Even once a matter is removed, however, that may not be the end of the story. Plaintiffs can voluntarily dismiss the removed matter and, so long as there are no problems with the statute of limitations, re-file the same or substantially similar suit back in state court. There is no legal bar to proceeding like this. In *Stipanovich. v. AstraZeneca Pharm.*, No. 06-1754, 2006 WL 2529474 (N.D. Cal. Aug. 31, 2006), the judge ruled himself unable to prevent the voluntary dismissal of a claim about to be transferred to the MDL despite the fact that the plaintiff was plainly forum shopping. The MDL judge can craft court management orders that prevent this from happening before the fact, and counsel worried about this possibility should urge the court to adopt such language sooner rather than later. *See In re FEMA Trailer Formaldahyde Products Liability Litigation*, 628 F.3d 157 (5th Cir. 2010) (ruling that unusual court order regarding motions for voluntary dismissals of proposed bellwether plaintiffs was not an abuse of discretion).

Beyond removing, treatises on complex litigation suggest that the parties attempt to work with the state judge to coordinate those proceedings with the MDL—or even to stay all proceedings until the pretrial decisions made by the MDL judge are complete.[2] This only occurs through the goodwill and cooperative spirit of the state court judge involved, as there are no statutes or regulations that give any "teeth" to this suggestion, but there are numerous examples where state court judges have in fact recognized the advantages of working in conjunction with the MDL court. If removal is not an option, counsel for defendants should try to make their case for unofficial consolidation with the MDL proceedings as strongly as they can.

Parties can also request that the MDL court take action for

Multidistrict Litigation continued on page 13

Reserving a Debtor's Claims for Litigation After Reorganization Under Chapter 11

J. Kyle Beale

The Fifth Circuit has redefined the standard for how a debtor may validly reserve its pending adversary and preference claims so that litigation of those claims can continue after confirmation of the debtor's plan of reorganization under Chapter 11. The new standard, articulated in the case of *In re United Operating LLC*,[1] requires a "specific and unequivocal" reservation of such claims. To be certain of meeting that standard, the plan must expressly (and specifically) state:

(1) The putative defendant(s),
(2) The basis on which the putative defendant(s) will be sued, and
(3) That the suit will definitely be filed post-confirmation.

The debtor in *Union Operating* did not preserve its standing to bring misappropriation claims or other adversary actions because the plan of reorganization did not *specifically and unequivocally* reserve those claims before confirmation. Therefore, the debtor and/or the litigation trustee lack standing post-confirmation to bring any litigation action not *specifically and unequivocally* reserved within the plan.

The Fifth Circuit made this determination notwithstanding the fact that such a requirement is not contained in the text of Section 1123 (b)(3)(B) of the Bankruptcy Code.[2] In response, two bankruptcy decisions out of the Northern District of Texas have raised concerns that the "bright-line" test articulated in *United Operating* can lead to unjust results. In the recent case of *In re Tex. Wyo. Drilling Inc*,[3] Judge Lynn expressed his concerns about the test: "The bright line test rule announced by the Fifth Circuit in *United Operating* operates to cause injustice to creditors in many cases though it was intended to operate for their benefit." He continued, "Taken to its logical conclusion, *United Operating* would seem to require that counterclaims and affirmative defenses, to say nothing of claims identified through discovery (common law or statutory tort claims) after confirmation of the plan, be identified (specifically and unequivocally) in the plan or lost forever." Another judge, in the case of *In re Manchester, Inc.*, expressed that "This judge respectfully urges the Fifth Circuit to reconsider the *United Operating* holding because such a holding works a severe injustice under the facts of the present case." (Houser, J.).[4] The injustice was that the bankruptcy estate lost its ability to pursue common law claims that would ultimately benefit the creditors of the estate.

Both judges Lynn and Houser determined that the "specific and unequivocal" standard did not require the debtors to *specifically and unequivocally* name each individual defendant in the litigation reservation language to preserve the post-confirmation claims against them. A general identification of the defendants would therefore suffice. In contrast, in the Southern District of Texas, Judge Jeff Bohm disagreed and held that a litigation trustee did not have standing to prosecute the adversary proceedings he had filed against various defendants post plan confirmation, because the actions were not "specifically and unequivocally" reserved in the plan according to the Fifth Circuit's standard. In the case of *In re MPF Holdings Inc. LLC*,[5] Judge Bohm determined that the Fifth Circuit standard for reservation of adversary actions requires mentioning the defendant by name in the plan of reorganization. The litigation trustee had identified about $25 million in preferences that he was going to pursue for the trust and the benefit of creditors, but which the court held he lacked standing to pursue because the reservation language in the plan failed to do mention the defendants by name:

> The 5th Circuit is telegraphing to debtor's attorneys (and necessarily to creditor committees and their lawyers) that they must devote more time prior to confirmation of a Chapter 11 bankruptcy plan to identifying those parties who will be sued and the (legal) basis of the suits. Plan proponents must then make specific and unequivocal disclosures of this information in the plan prior to sending ballots to those creditors who will be casting their votes.

Judge Bohm acknowledged that "[t]his will delay confirmation and increase administrative costs on the debtor's bankruptcy." However, "[t]he 5th Circuit seems to be suggesting that it is incumbent upon the debtor's bar to take the time and resources to do the investigation that the bar would have expected the post confirmation litigation trustee to perform."

In *In re United Operating*, the Fifth Circuit had emphasized that, "the reservation of claims should be sufficient to give creditors proper notice to determine whether a proposed plan resolves matters satisfactorily before they vote to approve the plan. Absent specific and unequivocal retention language in the plan, creditors (inherently) lack sufficient information regarding their benefits and potential liabilities to cast and intelligent vote." *Do they really?* What if the claim is against a third-party who is not a party to the reorganization? What about a patent dispute, trademark infringement, business tort, or a commercial trade secret claim? Does the debtor have to send a copy of the proposed plan to any future defendant, in advance, *specifically and unequivocally* identifying them as future litigation defendant although they have no vote on the plan? Maybe so, according to the analysis in *In re MPF*.

What happens if the plan discloses *specifically and unequivocally* that a claim against a particular defendant will be pursued but the action cannot or is not viable to purse after confirmation of the plan? What would the consequences be if the litigation trustee decides *not* to pursue a cause of action after the plan discloses that it *will* be pursued? What is the consequence to the debtor's attorney if a cause of action is not reserved because it was overlooked, or was not identified because the debtor's attorney is not familiar with litigation? What if a definitive decision cannot be made on whether to pursue a claim, because of the uncertainty of the expense involved in pursuing the case post-conformation? Is every case clear cut enough to know in advance whether or not it can be pursued, prior to send the ballots out for creditors to vote? Maybe yes—maybe no.

Hopefully, the Fifth Circuit will clear all these questions up by taking *In re MPF* on appeal. Judge Bohm would seemingly agree, as he also stated "The Court agrees that the *United Operating* test is a bright-line rule; the Court declines to comment on the correctness of this test and instead, will only apply it to the facts of the case at bar." However, one thing is clear; if you are in the Fifth Circuit, you better develop a strategy to *specifically and unequivocally* identify what claims can and will be pursued and against whom; and, you would be well-advised to do so prior to plan-confirmation. Unless the debtor's attorney wants to be on the hook for making definitive determinations about post-confirmation litigation, he must get the litigators involved early in the case—perhaps even pre-petition—to determine which causes of action can and will be pursued on behalf of the estate, in order to avoid losing them in post-confirmation. **SB**

J. Kyle Beale is a senior litigation attorney with the Lanier Law Firm in Houston, handling commercial matters, personal injury cases, coverage issues, business torts, personal torts, toxic torts, breach of contract, trade secret and trademark, patent, FELA, and white collar crime, among many other areas of law.

Endnotes

[1]*See In re United Operating, LLC*, 540 F. 3d 351 (5th Cir. 2008).

[2]11 U. S. C. § 1123 (b)(3)(B).

[3]*See In re Tex. Wyo. Drilling, Inc.*, 422 B. R. 612 (Bankr. N. D. Tex. 2010).

[4]In another case, Judge Houser held that the common law claims were not *specifically and unequivocally* reserved according to the Fifth Circuit standard, and therefore, the litigation trustee did not have standing to bring those claims for the benefit of the creditors. *In re Manchester, Inc.*, 2009 Bankr. Lexis 2003 (Bankr. N. D. Tex. 2009). Although, she did determine that the preference claims had been properly reserved in that case.

[5]*See In re MPF Holdings Inc. LLC*, 2011 WL 489597 (Bankr. S. D. Tex. 2011).

Multidistrict Litigation continued from page 11

itself through the All Writs Act, 28 U.S.C. § 1651(a). Several district courts have determined that a federal court's inherent power under the All Writs Act allows it to enter an injunction which would have preclusive effect on a state court's action, particularly in *In re Lease Oil Antitrust Litigation*, 48 F. Supp. 2d 699 (S.D. Texas 1998); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, (7th Cir. 2002). This is a narrowly applied power, subject to numerous exceptions and further circumscribed by the Anti-Injunction Act,[3] but it is another possibility to explore.

What does the Future Hold?

Recently, the Supreme Court decided the case of *AT&T Mobility v. Concepcion*, No. 09-893, 2011 WL 1561956 (April 27, 2011). The opinion, which held that the Federal Arbitration Act preempts a state rule regarding the unconscionability of class arbitration waivers in consumer contracts, has been described as a "death blow to consumer class actions."[4]

In light of this decision, it is interesting to note that from 2000 to 2009, the number of dockets in the JPML has doubled—and a large part of that increase is due to an explosion in petitions related to deceptive marketing or sales practices, as well as a dramatic increase in matters of pharmaceutical liability and other products liability.[5] If the "death blow" predictions surrounding the *AT&T Mobility* decision do manifest themselves in a marked decrease in the availability of big consumer class actions, it is not unreasonable to expect a reflecting increase in the JPML filing numbers, as the JPML has already been widely adopted by both sides of the bar as the means to consolidate major consumer actions without the necessity of a class action.

Given the combination of decreased ability to file state court class actions and the increased interest in both plaintiffs and defense attorneys in utilizing the MDL mechanism, it would be useful for almost any litigator to become familiar with the procedures and practices of the JPML, as well as the complex and more nebulous issues that can arise when state court cases cannot be joined with consolidated MDL proceedings in federal court. **SB**

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Endnotes

[1]David Herr, Multidistrict Lit. Man. § 6:13 (2011); William W Schwarzer, Alan Hirsch & Edward Sussman, *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 Tex. L. Rev. 1529 (1995).

[2]*See* David Herr, Multidistrict Lit. Man. § 6:13 (2011); Manual for Complex Litigation (4th) §§ 10.123, 20.313.

[3]*In re Managed Care Litigation*, 236 F. Supp. 2d 1336, 1339-40 (S.D. Fla. 2002).

[4]New Orleans City Business, "U.S. Supreme Court deals death blow to consumer class actions," May 5, 2011.

[5]*See* www.jpml.uscourts.gov/Statistics/statistics.html.

Approaching the Bench

Don't Get Lost in Translation: Obtain an Interpretation Protocol Order

Lauren E. Lonergan and Tara Reese Duginske

Civil litigation in federal courts increasingly involves testimony and documents in languages other than English. Translation of testimony and documents, however, is time consuming, expensive and fraught with problems. For example, disputes may erupt during depositions over the proper translation of a question or an answer; interpreters may not literally translate what counsel or witnesses say; or interpreters may clarify a question for a witness without translating the exchange, therefore preventing counsel from addressing the witness' issue with the question. And due to disputes over the translation of documents, courts may (erroneously) conclude that fact issues preclude summary judgment.

Federal courts have substantial discretion with regard to the use of interpreters in depositions and trial proceedings. This includes the authority to adopt protocols regarding translation of testimony and documents. Such translation protocols—especially when adopted early in the case or as part of a pre-trial order—can substantially reduce issues and costs.

Appointment of Neutral Interpreters

The most critical provisions of a translation order are that only the designated interpreter may translate during the deposition and that the translation by the designated interpreter will constitute the sole translation. Certainly some risk attends such provisions. First, counsel deposing the witness may not be apprised of a problem with a translation that could have been remedied during a deposition. The witness may then try to claim mistranslation as a basis for a change when she "reads and signs" the transcript. Nonetheless, a party may be able to re-depose a witness who makes material changes based on an alleged mistranslation. Similarly, a party defending a deposition may forego an objection they might otherwise have. But the order will not prevent counsel from having their own translator present who can advise counsel off the record so that any problems can be later addressed. The significant impact of the translation order is, therefore, that it curtails interruptions by opposing counsel purportedly based on an alleged mistranslation but which are really designed to improperly coach the witness. Especially in contentious cases, the benefits of such an order are likely to far outweigh the risks.

The order should also require that the parties agree upon a limited roster of court interpreters for use in depositions, typically selected from the federal and state court interpreter lists. This will avoid later disputes about the interpreter's identity. For instance, a woman may claim that given her cultural background she was intimidated by a male interpreter. Agreeing on a roster ahead of time will minimize the possibility of such allegations. Also, to further minimize any allegations of cultural biases between the interpreter and the witness, only interpreters who have received formal translation ethics training should be considered. Any interpreter who is appointed should be required to state under oath that they will comply with the Standard for Performance and Professional Responsibility for Contract Court Interpreters in the Federal Courts (Federal PR Standards), provide honest and truthful translations and otherwise abide by the court's order regarding the interpretation protocol.

Describe How the Interpretation Will Be Performed

The federal judiciary subscribes to the theory that the "proper role of an interpreter is to provide a literal word-for-word translation without subtracting or adding anything to the matters translated." Accordingly, the order should specify that appointed interpreters are prohibited from elaborating on what is asked by the attorney or answered by the witness. The interpreters must also be barred from any direct non-translation communication with the witness—regardless of the purpose of such communication—and should instead simply convert the words of the attorneys and the witness from their respective languages into those of the listening party. If clarification or additional explanation is requested by either the witness or the attorney, the appointed interpreter should relay to counsel the witness' statements regarding any confusion and then translate counsel's clarification. In other words, the interpreter should not do more than convey the word-for-word translation from one side to the other.

Translation Costs: Who Pays?

The party seeking to depose the witness generally bears the costs associated with the use of interpreters. If the deposing party prevails on the merits, the costs incurred for the interpreters may be taxed pursuant to 29 U.S.C. § 1920(6). But the pre-trial order should provide one important caveat: if the party seeking discovery can demonstrate that the deponents do not really need interpreters and that, as a result, such costs were needlessly incurred by the deposing party, the court has the power to require the non-deposing party to pay the costs of an interpreter regardless of which party ultimately prevails in the litigation.

In addition, each party should bear its own translation costs other than during depositions because any required translation would clearly be for the benefit of the party having the translation performed. Thus the pre-trial order should make it clear, for example, that the cost of producing a translated transcript of a deposition in order to permit the deponent to read and sign the transcript should be borne by the party making the request to read and sign.

Other Considerations

Request Additional Time. The federal rules limit the duration of depositions to seven hours. The need for translation during depositions, however, can easily require twice as much

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Defending the Constitution and Entity Liability in Civil Rights Cases: Monell *to* Connick

Emile M. Mullick

By tradition going back to English common law, government entities and their officials are immune from suit by individuals who were harmed by their official acts. The Civil Rights Act of 1871 (42 U.S.C. § 1983) changed that by providing that "persons" acting under color of law are liable for damages flowing from a deprivation of rights secured by the Constitution. Until the Supreme Court decided the 1978 case of *Monell et al. v. Department of Social Services*,[1] no liability of government entities was provided for by § 1983 because "persons" was construed as not including state or municipal government bodies.

The Monell *Case*

Entity liability began with the landmark *Monell* case where the Court re-examined the history of §1983 and held that Congress intended that municipalities be liable for certain violations of constitutional rights. This holding, written by Justice Brennan, was driven by changing interpretations of §1983 that reflected an ideology that emphasizes Bill of Rights protections to individuals against government.

The facts of *Monell* were not particularly compelling from a constitutional rights perspective because the loss suffered was mainly financial. Pregnant employees of the Department of Social Services of the City of New York were compelled to take unpaid leave of absence from their jobs before any medical need existed. Employees sued as a class and sought injunctive relief and monetary damages against the department and its commissioner, the board and its chancellor, and the city of New York and its mayor. The suit was grounded on 42 U.S.C. § 1983. That trial court held that the Supreme Court's earlier rejection of municipal liability in *Monroe v. Pape*[2] barred recovery of back pay from the department, the board, and the city, and that natural persons sued in their official capacities enjoy the immunity conferred on their employer local government. Therefore plaintiffs had no actionable claims.

In *Monell*, the Court held that local governing bodies and local officials sued in their official capacities can be sued directly under § 1983 for monetary, declaratory, and injunctive relief if it can be shown that the acts alleged "implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy." In addition, it was held that local governments may be sued for constitutional deprivations based upon "custom", even if the custom has not received formal approval. These powerful words and phrases have been the standard for pleading and finding municipal liability.

Monell held that § 1983 was "unquestionably" intended to be broadly construed to provide a remedy against all forms of official violation of federally protected rights. And as to municipal liability, it was held that there is no justification for excluding municipalities from "persons" covered. In emphasizing the reach of § 1983 to local governments, *Monell* held that if it were otherwise, local governments would be entitled to absolute immunity, and the Court's holding would be "drained of meaning." This was a prophetic statement. For more than 30 years the *Monell* holding has provided a basis for municipal liability, with refinements which clarified the scope of "policies and customs" to establish liability. The broad scope originally described has been narrowed by requirements as to the number of acts to establish a policy or custom, and the types of acts compared with the acts complained of. In the 1989 case of *City of Canton v. Harris*,[3] the Court held that a single prior incident might be sufficient to show a policy or custom, but the test for a such a single prior incident is stringent. The *Canton* court also recognized a cause of action grounded on "failure to train" as a basis to find entity liability by "policy or custom."

The vision of a broadly construed § 1983 to provide a remedy against all forms of official violation of federally protected rights has been diminished with the passing of time. In the 2011 decision of *Connick v. Thompson*,[4] the Court has put to rest any doubts about the "draining of meaning" warning by Justice Brennan in 1978.

The Connick *Decision*

Thompson was convicted for attempted armed robbery and murder and spent 18 years in prison, including 14 years on death row. Shortly before his scheduled execution, his own investigator discovered undisclosed evidence which the reviewing court determined was exculpatory, and both of Thompson's convictions were vacated. It was conceded that the prosecutors had possessed but failed to disclose the evidence, which should have been turned over to the defense under *Brady v. Maryland*.[5] A civil suit for damages based on § 1983 was brought and the trial court jury held for plaintiff and awarded $14 million damages based on a theory of failure to train. The jury rejected "policy and custom" as a basis for recovery. In hindsight we see it was fatal for the jury to choose "failure to train" rather than "policy and custom" as a basis for recovery of damages.

The facts in *Connick* were egregious and morally compelling, even if perhaps legally difficult. The financial impact alone dwarfed *Monell*, and the man faced death for 14 of his 18 years in prison. All reviewing courts split on what to do with Thompson. In the Supreme Court, the majority opinion (Justice Thomas) found insufficient prior acts to prove a policy or custom of deficient training, and reversed the jury verdict for award of damages to Thompson. The dissent (Justice Ginsburg) disagrees and makes a finding that "long-concealed prosecutorial transgressions were neither isolated nor atypical." A vast divide in ideology is made clear by Justice Scalia in his concurring opinion mocking the review of the trial record by Justice Ginsburg; "The dissent's lengthy excavation of the trial record is a puzzling exertion." The record Justice Ginsburg found was not factually disputed, and supports her dissenting opinion. The opening comments of Justice Scalia, colorfully penned and prominently positioned, ignore the obligation of a reviewing court to review all the evidence before the lower court, and an obligation to uphold jury verdicts when there is sufficient

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evidence to support them.

It is difficult to imagine the Brennan Court struggling with the facts in *Connick*. Thirty-three years and changing ideology have brought profound changes. Changing ideology on the Court has increased the number and narrowed the types of prior events needed to provide notice of "policies and practices," such as specifically failing to disclose evidence of blood type rather than more broadly accepting other types of Brady violations as evidence of "policies and practices." And to show an actionable lack of training, the Court holds that Thompson needed to show that Connick was on notice that, absent additional specified training, it was "highly predictable" that the prosecutors in his office would be confounded by those gray areas and make incorrect Brady decisions as a result. In fact, Thompson had to show that it was so predictable that failing to train the prosecutors amounted to conscious disregard for defendants' *Brady* rights.

The bar has been set very high to show entity liability by training custom and policies of a district attorney, and defense attorneys will find in *Connick* a large body of law to defeat entity liability that is based on "custom and policies" of government defendants.

The Court accepts a self fulfilling argument as to prosecutorial misconduct, that is: since they are lawyers, and all lawyers are highly trained in the law and how to find the law, training as to Brady violations is not necessary. The Court accepts the fanciful argument that a district attorney is entitled to rely on a prosecutors' professional training and ethical obligations to defend the Constitution and prevent *Brady* violations. Of course, regardless of compliance with ethical obligations or defending the Constitution, prosecutors have absolute immunity,[6] and even deliberate wrongful acts are protected under the umbrella of initiating and presenting the state's case.

Justice Thomas boldly declares "The role of a prosecutor is to see that justice is done" in support of his holdings. A more liberal perspective might reach the conclusion that by the conceded act of withholding exculpatory evidence justice was not done, and the Court refuses to provide a remedy. The concern of the *Monell* Court highlighted by its intent to dismantle the shelter of absolute immunity formerly available to government entities and their officials for Section 1983 violations has been redirected by the *Connick* Court. Concern for protecting the rights of individuals against the government has been replaced by a concern for protecting government entities. The *Connick* Court revived the *Monell* holding that denies imposing de facto *respondeat superior* liability on government entities, but effectively blocks the *Monell* Court's holdings as to § 1983 entity liability, thereby restoring de facto government entity immunity. SB

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Endnotes

[1]*Monell v. Department of Social Services*, 436 U.S. 658 (1978).
[2]*Monroe v. Pape*, 365 U.S.167 (1961)
[3]*City of Canton v. Harris*, 489 U.S. 378 (1989).
[4]*Connick v. Thompson*, 131 S. Ct. 1350 (2011).
[5]*Brady v. Maryland*, 373 U.S. 83 (1963).
[6]*Imbler v. Pachtman* 424 U.S. 409 (1976).

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time to ask the same questions of an English speaker. The party requesting the deposition should, therefore, ask for more than seven hours if translation is required.

Avoid Idiomatic Expressions. Because interpreters are required to provide a literal translation, be mindful of problems that may arise from the use of idiomatic expressions that are not readily translatable from its grammatical construction or from the meaning of its component parts. For example, in a case deciding whether an employer had reasonably accommodated its employees' Muslim prayer obligations, counsel questioned the deponent about his "window" for prayer. This phrase was intended to reference the time during which Islam required that prayers be performed. The word "window," however, did not accurately translate into the same word in the Somali language. Attorneys should avoid words and idiomatic phrases that are difficult to interpret to ensure that communication is accurate.

Videotaping Translated Depositions. When a witness requests an interpreter, counsel typically asks the witness at the beginning of the deposition—under oath—whether they speak English well enough to testify without an interpreter. Though the witness may say "no", frequently the witness does not really need the interpreter. Opposing counsel may nonetheless request an interpreter because translation provides witnesses with additional time to consider a question. It also makes it far more difficult for the deposing party to "control" the witness because counsel must wait until the interpreter finishes to ask another question. Witnesses, however, often indicate through body language that they understand the question by doing things such as nodding their head and even beginning to answer the question before the translation ends. In the right case, videotaping this conduct can be used to demonstrate lack of credibility.

Translation Protocols for Documents.

Courts cannot easily decide which of two competing document translations is correct. A pre-trial order requiring that the parties agree on a single document translator whose translation is final will simplify the case. For example, in an insurance coverage dispute concerning the limits of an underlying German policy, the parties agreed to have one official translation of the policy. When that translation did not favor the carrier, that party offered affidavits from German lawyers quibbling with the translation. The court ignored the affidavits, read the translated policy for itself and granted summary judgment to the insured. Had there not been an official translation, the court may well have denied summary judgment because a factual dispute existed regarding the translation.

Conclusion

Establishing translation ground rules through a pre-trial order can dramatically reduce the additional complexity and costs inherent in cases involving foreign witnesses and documents. To avoid unnecessary disputes—while still ensuring accuracy and fairness—the parties should involve the court early and establish an interpretation protocol. **SB**

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resolve discovery disputes in the United States District Court for the Southern District of New York.[6] The current pilot project, however, represents a new and concerted effort by the court to systematically select and train them. **SB**

Jennifer Keadle Mason is the managing partner of the Pittsburgh office of Mintzer, Sarowitz, Zeris, Ledva & Meyers and founder of the firm's E-Discovery Group. Her practice currently is in commercial, professional and catastrophic loss litigation. She is a member of the Sedona Conference and Working Group 1 on Electronic Discovery.

Endnotes

[1]www.pawd.uscourts.gov/

[2]*Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, Scheindlin, Shira, Redgrave, Jonathan, Cardoza L. Rev. 30(2): 348-405, citing E-Discovery Amendments and Committee Notes, Amendments t othe Federal Rules of Civil Procedure (proposed April 2006), www.uscourts.gov/rules/E-discovery_w_Notes.pdf

[3]*Agent Orange Product Liability*, 94 F.R.D. 173 (E.D.N.Y. 1982).

[4]Fed. R. Civ. P. 53(a)(1).

[5]*Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, Case No. 2:07-cv-1294 (W.D. Pa. Jan. 24, 2011).

[6]*In Re: Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, Case No. MDL No. 1358 (SAS) (S.D.N.Y. June 18, 2004).

Persuading with POWER: Five Tips for Improving Appellate Advocacy

Jeff Justman

Of the many benefits of serving as an appellate law clerk, the opportunity to observe the best appellate advocates ranks near the top. This article distills qualities that distinguish the most compelling appellate attorneys.

1. Preserve Issues for Appeal

The best legal argument will fail if it has not been preserved. Good appellate lawyering, therefore, begins in the district court. Attorneys must preserve an issue before an appellate court may consider it. Law clerks observe with distressing frequency attorneys who offer potentially winning legal arguments, but failed to identify the errors to the district court. Appellate courts refuse to consider such unpreserved arguments for good reason: if the attorney deprives the district court of the chance to rule correctly, he should not be rewarded—and the district court should not be sandbagged—with a subsequent reversal. Three steps will ensure an issue is preserved:

First, attorneys should scrupulously follow the rules governing appellate review. Federal Rule of Appellate Procedure 10(a) lists three categories of information that an appellate court may consider: papers and exhibits filed in the district court, transcripts of proceedings, and a certified copy of the district court's docket. Any document or other information not covered by these categories cannot be considered. "Exhibit A" means nothing to an appellate court if it was not filed in the district court first, and an appellate court cannot consider information obtained in an untranscribed telephone call!

Second, attorneys ought to respectfully emphasize potential district court errors each time they occur even when the district court may disagree. Consider the repeat player: after losing an argument in the first case, he might be disinclined to raise the identical point in a similar, later proceeding, even though the appellate court could later agree. Instead, the repeat attorney should respectfully object to the district court's ruling while mentioning that the objection is simply to preserve the argument for appellate review. Some of the most compelling arguments involve attorneys who acknowledged previous adverse rulings but who respectfully objected to them.

Finally, an issue is only preserved when it is done so with specificity. All too frequently a lawyer believes she is preserving an argument with a generic or "running" objection to a judge's oral ruling. To the contrary, an objection to a district court's overall jury instructions doesn't suffice. The better practice is to specifically identify and object to the problematic language. Even if the district court disagrees, the attorney has preserved the issue.

2. Organize the Appellate Record

Organizing an accessible, user-friendly appellate record is a second practice of good appellate lawyers. Not only does a well-organized record endear its creator to appellate judges and their clerks, but it also enhances the presentation and overall understanding of the case.

There are both substantive and procedural components to a well-organized appellate record. Substantively, the record should include an addendum and an appendix. Physically attached to the appellant's brief, the addendum includes the most important document to the appellate court: the order(s) or opinion(s) being appealed. The appendix, on the other hand, includes any other necessary documents created as the case has developed. Joint appendices are usually more accessible than separately prepared appendices since they eliminate redundancies. Lengthy documents not relevant to the appellate issues should be omitted or excerpted, as long as the district court's docket sheet describes the case's procedural history.

Procedurally, good appellate advocates create an appellate record with "access points" common to many reference sources. Tables of contents, indices, and tabs dramatically increase a law clerk or judge's ability to find the needle in the appellate record's haystack. When possible, successful appellate attorneys file their documents electronically with their courts. In federal court, many districts have the CM-ECF system that allows attorneys to submit electronically searchable "PDF" files. These documents are immensely helpful when searching for a specific word or legal phrase crucial to a case's disposition. In short, good appellate advocates craft the record for maximum accessibility.

3. Write Concisely

Concision persuades. Convoluted briefs do not. A third quality of successful appellate lawyers, therefore, is concise writing with clear, plain language.

Successful appellate lawyers selectively choose issues for appeal. While it is tempting to raise every potential district court error, such a scattershot approach may undermine one's credibility. District judges are intelligent and only rarely make numerous reversible errors in one case. The best appellate lawyers identify their one or two strongest arguments, knowing the likelihood of success on appeal is often inversely proportional to the length of one's brief. In short, selectivity breeds credibility and persuasiveness.

More basically, good appellate attorneys do not use twelve words when five will do. Avoid lengthy metaphors and string cites. Active verbs (describes, explains, asserts) communicate meaning better than passive verbs (was, existed). And especially, eschew lengthy footnotes. They usually detract from, rather than enhance, an appellate lawyer's presentation. The rules for concise writing are almost too many to count, but a concerted effort to use short, clear sentences will invariably enhance the appellate lawyer's ability to persuade.

4. Edit the Brief

Though one of the last steps of writing an appellate brief, the editing process remains one of the most important. Good editing only enhances the organization, accessibility, and persuasiveness of the final product, especially when done with an eye towards technical and substantive accuracy.

Most obviously, good editors remove all technical mistakes. This involves more than simply using the spellchecking application in a word processing program, for computers will miss some of the more embarrassing typographical mistakes. (Consider

how a sentence involving a “public” employee would look if the letter “l” were omitted from the word). Instead, good editing requires multiple layers of peer review, both by those familiar with the case and with utterly no connection. Good editing involves paper printouts with red pen markings and multiple drafts. Finally, good editing simply requires time to ensure that all mistakes are corrected before a brief is submitted.

More than just avoiding typographical errors, the persuasive appellate attorney will also edit to increase the appellate brief's substantive accuracy. This requires citations to recent binding and persuasive authority and explanations of how those authorities parallel the facts of one's case. Substantive accuracy requires proper formatting and pin-cites. And perhaps most importantly, substantive accuracy requires an indication of contrary authorities. Taking these steps will only enhance the attorney's credibility as well as the brief's organization, accessibility, and concision.

5. *Respond Directly to Questions at Oral Argument*

The lucky appellate attorney will have the opportunity to advocate orally on the client's behalf. In a small but significant number of cases, the decision is swayed, one way or another, by an appellate attorney's performance at oral argument. The last suggestion for persuading with power, therefore, is to respond directly to questions at oral argument.

This practice is simple yet all too uncommon. When a judge asks a question, an appellate attorney's first answer should almost invariably be “yes” or “no.” These responses tell judges that the attorney is serious about engaging in a frank discussion of the critical legal issues. All too often, however, appellate attorneys will respond to such questions with quips like, “that's not this case, your honor.” Such nonanswers unfortunately convey that the attorney is not interested in discussing the nuances of the legal problem her case presents. Good appellate attorneys will not succumb to a tough judge's questions, but rather, will answer them directly and then explain why their clients should win anyway.

Pre-argument preparation for commonly asked questions enhances an attorney's ability to respond directly. Judges often ask appellants what error the district court committed below and where the appellant preserved that error. Appellees, on the other hand, must be prepared to support or justify the district court's decision. Both parties should be prepared to cite to the record and to any on-point legal authorities supporting their positions. In the unusual case, a direct response to a judge's question with a supporting citation could turn a losing case into a winning one!

Good appellate advocates have many different attributes, but from my limited experience, they all persuaded with “POWER:” they all preserved issues for appeal, organized user-friendly appellate records, wrote concisely and carefully, edited with substantive and technical accuracy, and responded directly to judges' questions at oral arguments. **SB**

Jeff Justman served two one-year terms as a law clerk to Hon. James B. Loken and Hon. Diana E. Murphy of the U.S. Court of Appeals for the Eighth Circuit.

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