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Common Traps in Making the Record for Appeal

By Thomas L. Hudson & Keith Swisher

Jury verdicts and bench rulings receive a variety of presumptions on appeal that make overturning them a challenge.[1] Although the content and quality of the record often affects whether such presumptions will carry the day, experienced trial counsel—who are quite naturally focused on the immediate concern of a favorable verdict—sometimes overlook aspects of preserving the appeal and making the record. When that happens, what would otherwise provide a powerful issue on appeal (or an effective rebuttal thereof) may go by the wayside. By the time the appeal is under way, it is generally too late, of course, to correct such oversights.[2]

This article focuses on several areas of preserving the record in civil matters that often are unintentionally overlooked by trial counsel.[3] Some of the areas addressed have become issues only recently due to changing trial practice and technology, while others have plagued practitioners for some time.

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Advisory Committee Proposes Draft Federal Rule of Evidence 502: Waiver of Privilege

By Courtney Ingraffia Barton

In April 2006 the Advisory Committee on Federal Evidence Rules recommended the further consideration of a proposed Federal Rule of Evidence 502 addressing waiver of attorney-client privilege and work product protection and related issues. This article summarizes the background for the proposal and the comments received by the Advisory Committee at an April mini-conference addressing the concept; provides in full the text of the rule as recommended by the Advisory Committee in mid-May; and summarizes the next steps for consideration of the proposed rule.

Background

For years the Advisory Committee has considered and studied a Federal Rule of Evidence addressing the attorney-client privilege and work product protection in one form or another.[1] Such consideration is complicated, particularly given that any Federal Rule of Evidence modifying an evidentiary privilege may only be enacted by an affirmative congressional act (and not, as is true for other Federal Rules of Evidence, by the U.S. Supreme Court alone).[2]

Earlier this year, the Advisory Committee considered a rule addressing, among other things, when the privilege is waived. Several factors undoubtedly prompted such consideration, including a January 2006 letter from the chairman of the House Committee on the Judiciary asking that the Federal Judicial Conference initiate such a rulemaking process.[3] The Advisory Committee's consideration of such a provision also is a logical next step given changes to the Federal Rules of Civil Procedure scheduled to become effective December 1, 2006, that address

(Continued on page 25)

Message from the Chairs

This will be my last report as a cochair of the committee. It has been a great three years. Our committee has expanded in membership and subcommittees, and our newsletter and website have improved dramatically. I wish I could take credit for these improvements, but they resulted from the hard work of many people, including my cochairs, first Roger Greenberg and then Kirk Ingebretsen, and the leaders of our newsletter and website efforts, Ian Fisher and Stacey Gottlieb, and their respective cochairs. It has been a real pleasure to work with such thoughtful and dedicated people.

To address some current topics, at the June Section Leadership Meeting, our website was recognized as the Section's best, so if you haven't been there lately, go now to see what you've been missing. Thanks to all who have contributed content to make the website the great resource that it is. With respect to Section programming, we had a standing-room-only breakfast meeting on electronic discovery at the Section Annual Conference in Los Angeles. We also have a program at the ABA Annual Meeting in Hawaii, which will cover a topic becoming more relevant all the time—how to prepare for and conduct a Rule 30(b)(6) deposition of an electronic discovery document custodian. It will be interactive, so make every effort to attend if you are planning to be in Hawaii for the meeting. It was a great honor to have the program selected, because there will be fewer programs this year than in past annual meetings. If you think you're beginning to recognize a theme, you're right. Our committee also has been asked to help with the planning of a National Institute to be held next March in Chicago, after the new Federal Rules become effective, on—guess what?—electronic discovery. This all-day event will cover many important topics, so we hope we'll see you there.

Turning to this issue of the newsletter, we have continued our efforts to produce "theme editions." This edition focuses on the end of the process that we start in discovery: how to preserve the record for appeal, and the various pitfalls associated with that delicate issue. We also have a bonus article on the

Message from the Editors

The theme of this issue of the Pretrial Practice & Discovery Committee Newsletter is preserving the record for appeal. For various reasons ably discussed in the articles, having a command of this topic is essential for both trial and appellate lawyers alike.

Edward Harmening and Craig Sandberg, in their article "Appeals in the Federal Courts: From Protecting the Record to Oral Argument," provide a terrific primer for issues any practitioner can face in appellate practice and procedure.

Two articles follow with detail and perspective on preserving the record for appeal. Andrew Flake, in "Preserving the Evidentiary Record at Trial: A Trial Lawyer's Perspective," and Thom Hudson and Keith Swisher, "Common Traps in Making the Record for Appeal," from the perspective of appellate lawyers, discuss best practices—and lessons learned—on the topic. We hope that you see substantial overlap in these two articles, based on very different and independent perspectives.

Victoria Dorfman, in her article "Statutory Construction: Lessons from Recent Supreme Court Decisions," provides valuable substantive guidance on a topic that often surfaces in appeals. And Rita Trivedi, in her article "Supreme Court Rules on Post-Verdict Motions," highlights a specific key issue that trial lawyers face in preserving issues for appeal in post-trial motions.

In "Obtaining Review of Interlocutory Orders," Laurie Webb Daniel discuses the important issue of when litigants may obtain appellate review of orders prior to entry of judgment. Such interlocutory review may be essential to obtain effective review of district court discovery, evidentiary, and privilege rulings. Finally, in her article "Advisory Committee Proposes Draft Federal Rule of Evidence 502: Waiver of Privilege," Courtney Ingraffia Barton provides background, context, and substance for a proposed new Federal Rule of Evidence 502 addressing privilege and waiver issues. This draft Rule 502 is particularly significant given changes to the Federal Rules of Civil Procedure, scheduled to become effective December 1, 2006. Stay tuned, as draft Rule 502 is a work in progress and our next newsletter will update its status.

For our next newsletter, we have lined up another star-studded group of authors to address changes being made to the Federal

current status of the efforts being considered to reform various aspects of the law associated with privilege waiver. All of these issues are very important to the practice of any litigator/trial lawyer because of the severe results that can occur if you do not recognize and react to the potential problems each can present. Other than the privilege article, the rest of this newsletter does not focus on events that occur during the pretrial process, but that does not make the subjects any less important to our efforts. In fact, because we don't usually focus on these issues, I urge you to pay particular attention to the articles. They probably cover issues that we don't consider as often as we should.

In closing, I have thoroughly enjoyed serving as cochair of this committee for the past three years. As always, if you have any ideas for articles, programs, surveys, website content, or new subcommittee activities, please contact me, Kirk, or any of our fantastic committee leadership.♦

—Richard Horwitz

Rules scheduled to become effective December 1, 2006. There is great interest in these groundbreaking changes, and the Fall 2006 newsletter will provide a practical, hands-on overview, along with important historical background, of these rules.

Remember that we are always looking for timely, helpful articles to include in the newsletter. If you want to write an article or practice tips, or if you have other information to share with PP&D, please contact Ian Fisher at (312) 701-9316 or fisher@sw.com or Sam Thumma at (602) 351-8338 or sthumma@perkinscoie.com. Finally, be sure to visit the PP&D webpage at <www.abanet.org/litigation/committees/pretrial> for past newsletters, practice pointers, and periodic updates on cutting-edge legal developments as well as general information about the PP&D Committee. ♦

—Ian H. Fisher
—Louis E. Kempinsky
—Samuel A. Thumma

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Statutory Construction: Lessons from Recent Supreme Court Decisions

By Victoria Dorfman

Questions of statutory construction are a significant component of appellate practitioners' work. In two of the last term's decisions, the Supreme Court explained, in great depth, the steps involved in a statutory construction analysis. Although the opinions for the Court in *Koons Buick Pontiac GMC, Inc. v. Nigh* and *Exxon Mobil Corp. v. Allapattah Services, Inc./Ortega v. Sun-Kist Foods, Inc.* were authored by different justices—Justice Ginsburg for *Koons Buick* and Justice Kennedy for *Exxon-Ortega*—and the majorities were not fully overlapping,[1] there are significant similarities in the method for construction adopted in those cases. Additionally, the Court in *Koons Buick* clarified the method for construction of commonly organized federal statutes.

This article discusses the interpretive problems posed by each case and emphasizes the statutory construction tools on which the Court relied in its analysis. It summarizes the rules of construction that can be gleaned from both cases, and points to some additional considerations a court may employ in interpreting a statute.

Problems and Solutions in *Koons Buick* and *Exxon-Ortega*

Koons Buick

At issue in *Koons Buick* was the meaning of a subparagraph in a section of the Truth in Lending Act, 15 U.S.C. § 1601 et seq., which imposed statutory damages for violations of TILA rules governing consumer loans. As originally enacted in 1968, the Act provided for statutory damages of twice the finance charge in connection with the transaction, except that $100 was made the minimum recovery and $1,000 was made the maximum recovery.[2] The statute provided that:

> (a) [A]ny creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount . . . of (1) twice the amount of the finance charge in connection with the transaction, except that liability under this paragraph shall not be less than $100 nor greater than $1,000.[3]

In 1974 Congress amended TILA's civil-liability provision, 15 U.S.C. § 1640(a), to allow for the recovery of actual damages in addition to statutory damages and to provide separate statutory damages for class actions.[4] Congress limited the original statutory damages provision to individual actions, moved the provision from section 1640(a)(1) to section 1640(a)(2)(A), and retained the $100/$1,000 brackets on recovery. In light of the restructuring of the statute, Congress changed the phrase "under this paragraph" to "under this subparagraph."[5] The amended statute provided for damages in individual actions as follows:

> (a) [A]ny creditor who fails to comply with any requirement imposed under this chapter . . . is liable to such person in an amount equal to the sum of—(1) any actual damage sustained by such person as a result of the failure; (2)(A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000.[6]

In 1976 Congress inserted a clause into section 1640(a)(2)(A) setting statutory damages for individual actions relating to consumer leases at 25 percent of the total amount of monthly payments under the lease. The $100/$1,000 floor/ceiling remained in place. The statute thus provided for statutory damages equal to

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000.[7]

Following the insertion of the consumer lease provision, courts consistently held that the $100/$1,000 limitation remained applicable to all consumer financing transactions, whether lease or loan.[8]

In 1995 Congress added new clause section 1640(a)(2)(A)(iii), increasing recovery for TILA violations relating to closed-end loans "secured by real property or a dwelling." As part of the amendment, Congress increased the minimum and maximum recovery of $100/$1,000 to $200/$2,000. Thus, section 1640(a)(2)(A), as amended in 1995, provides for statutory damages equal to

> (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000.[9]

"Statutory Construction: Lessons from Recent Supreme Court Decisions" by Victoria Dorfman, published in the Section of Litigation's Appellate Practice Committee "News & Developments" website at http://www.abanet.org/litigation/mo/premium-lt/articles/appellate/dorfman_0105.pdf.

The question in *Koons Buick* was whether, after the 1995 amendment, there was a $1,000 limitation on statutory damages under section 1640(a)(2)(A)(i).[10] The district court held that damages were not capped at $1,000. The Fourth Circuit affirmed, over a dissent.[11] Writing for the court, Judge Luttig recognized that the Fourth Circuit had previously interpreted the $1,000 cap to apply to both clauses (i) and (ii).[12] But the majority nevertheless held that "by striking the 'or' preceding (ii), and inserting (iii) after the 'under this subparagraph' phrase, Congress had rendered the previous construction 'defunct.'"[13] The court further explained that "[t]he inclusion of the new maximum and minimum in (iii) shows that the clause previously interpreted to apply to all of (A), can no longer apply to (A), but must now apply solely to (ii), so as not to render meaningless the maximum and minimum articulated in (iii)."[14] Thus, the plaintiff was allowed to recover the full uncapped amount of $24,192.80 under clause (i).

"The five separate writings this Court has produced demonstrate that § 1640(a)(2)(A) is hardly a model of the careful drafter's art."

Judge Gregory dissented. In his view, the new clause (iii) operates as a specific "carve-out" from the general rule establishing the $100/$1,000 liability limitation.[15] It was undisputed that before 1995 the Fourth Circuit's law was that the $100/$1,000 brackets applied to the entire subparagraph.[16] Judge Gregory found "no evidence that Congress intended to override the Fourth Circuit's longstanding application of the $1,000 cap to both (2)(A)(i) and (2)(A)(ii)."[17] He explained that if the $1,000 cap applied only to clause (ii), the phrase "under this subparagraph" in clause (ii) would be "superfluous," because "the meaning of (ii) would be unchanged by its deletion."[18]

The Supreme Court reversed. In its decision, the Court explained the method for statutory construction generally and statutory construction of legislation referring to sections, subparagraphs, and clauses.

Statutory Construction Generally

Writing for the Court, Justice Ginsburg explained that the Court had to determine the meaning of "subparagraph" in the statutory provision—whether the limitation on recovery in (ii) also applies to (i). The Court held that "[t]he $1,000 cap applies to recoveries under clause (i)."[19] The Court said that "[s]tatutory construction is a "holistic endeavor";[20] and what that means is that the relevant provision must be considered in its proper context: "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[21] The Court also observed that the statute in question was ambiguous: "The five separate writings this Court has produced demonstrate that § 1640(a)(2)(A) is hardly a model of the careful drafter's art."[22]

As part of this "holistic endeavor," the Court first looked at the text of the provision to determine the meaning of the word in question—"subparagraph." The Court examined both "the conventional meaning" of "subparagraph," and the meaning under the "standard interpretive guides"[23] by consulting legislative drafting manuals. The Court explained that the word "subparagraph" is "generally used to refer to a subdivision preceded by a capital letter, and the word 'clause' is generally used to refer to a subdivision preceded by a lower case Roman numeral."[24] Thus, reference to liability under the "subparagraph" in clause (ii) applies to subparagraph "A." The Court therefore reasoned that clause (iii) is merely a carve-out from the ceiling and floor of liability generally applicable to that subparagraph because "Congress plainly meant 'to establish a more generous minimum and maximum' for closed-end mortgages."[25] "[H]ad Congress simultaneously meant to repeal the longstanding $100/$1,000 limitation on § 1640(a)(2)(A)(i), thereby confining the $100/$1,000 limitation solely to clause (ii), Congress likely would have flagged that substantial change. At the very least, a Congress so minded might have stated in clause (ii): 'liability under this clause.'"[26]

The Court next examined the statutory history and determined that it "resolves any ambiguity whether the $100/$1,000 brackets apply to recoveries under clause (i)."[27] Prior to the 1995 Amendment, the Court explained, "clauses (i) and (ii) set statutory damages for the entire realm of TILA-regulated consumer credit transactions," including closed-end mortgages, which were covered by clause (i).[28] Clause (iii) increased both the floor and the ceiling for closed-end mortgages.[29] But, the Court continued, "clause (iii) contains no other measure of damages. The specification of statutory damages in clause (i) of twice the finance charge continues to apply to loans secured by real property as it does to loans secured by personal property."[30] Thus, "clause (iii) removes closed-end mortgages from clause (i)'s governance only to the extent that clause (iii) prescribes $200/$2,000 brackets in lieu of $100/$1,000."[31]

The Court then examined legislative history to determine whether Congress meant to alter the meaning of clause (i) when it added clause (iii).The Court concluded that "[t]here is scant indication" that Congress so intended.[32] Citing a House Report, the Court observed that "[b]y adding clause (iii), Congress sought to provide *increased recovery* when a TILA violation occurs in the context of a loan secured by real property."[33] Thus, it appeared that Congress did not intend to do anything to clause (i).

As a fourth and final step, the Court confirmed that its reading made sense: "It would be passing strange to read the statute to cap recovery in connection with a closed-end, real-property-secured loan at an amount *substantially lower* than the recovery available when a violation occurs in the context of a personal-property-secured loan or an open-end, real-property-secured loan."[34]

Justice Stevens, joined by Justice Breyer, concurred, emphasizing that "it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product."[35] Such evidence should include legislative history[36] and common sense.[37]

Construction of Hierarchically Organized Statutory Schemes

In the course of ascertaining the meaning of "subparagraph," the Court examined how Congress, as a general matter, subdivides its statutory sections. The Court noted that "Congress ordinarily adheres to a hierarchical scheme in subdividing statutory sections."[38] This hierarchy is set forth in drafting manuals prepared by the legislative counsel's offices in the House and the Senate. The House manual states:

> To the maximum extent practicable, a section should be broken into –
>
> (A) subsections (starting with (a));
>
> (B) paragraphs (starting with (1));
>
> (C) subparagraphs (starting with (A));
>
> (D) clauses (starting with (i)). . . . [39]

The Court further emphasized that the Senate manual makes similar provisions:

> A section is subdivided and indented as follows:
>
> (a) SUBSECTION.—
>
> (1) PARAGRAPH.—
>
> (A) SUBPARAGRAPH.—
>
> (i) CLAUSE.—[40]

The Court concluded that "Congress followed this hierarchical scheme in drafting TILA."[41] The Court explained that the word "'subparagraph' is generally used to refer to a subdivision preceded by a capital letter, and the word 'clause' is generally used to refer to a subdivision preceded by a lower case Roman numeral."[42] Applying that hierarchy to TILA, the Court held that limitations on recovery apply to both clauses (i) and (ii) because both are contained in the subparagraph (A) and that part of the statute provides that "liability under this subparagraph shall not be less than $100 nor greater than $1,000." Clause (iii) is merely an exception to or carve-out from that limitation.[43] Thus, clause (i) is subject to the $100/$1,000 floor/ceiling limitation on recovery.

Exxon-Ortega

At issue in *Exxon-Ortega* was whether a federal court in a diversity action may exercise supplemental jurisdiction under 28 U.S.C. § 1367 over additional plaintiffs whose claims do not satisfy the minimum amount-in-controversy requirement, provided the claims are part of the same case or controversy as the claims of plaintiffs who do allege a sufficient amount in controversy. In answering that question, the Court consolidated two cases arising from the Eleventh and First Circuits.

In the Eleventh Circuit case, about 10,000 Exxon dealers filed a class action lawsuit against the Exxon Corporation, alleging a systematic scheme by which they were overcharged for fuel. The district court allowed the case to go to a jury verdict and then certified an interlocutory appeal, asking whether it properly exercised supplemental jurisdiction. The Eleventh Circuit held that a court has supplemental jurisdiction under section 1367 over claims of class members who do not meet the jurisdictional minimum amount in controversy "as long as the district court has original jurisdiction over the claims of at least one of the class representatives."[44]

In the First Circuit case, a nine-year-old girl sued Star-Kist in a diversity action seeking damages for injuries she received when she sliced her finger on a tuna can. Her family joined the suit. The district court granted summary judgment to Star-Kist, finding that none of the plaintiffs met the minimum amount-in-controversy requirement. The First Circuit held that the injured girl, but not her family members, had made the requisite allegations of damages. The court then held that section 1367 authorizes supplemental jurisdiction only when the district court has original jurisdiction over the action, and that in a diversity case there is no original jurisdiction if any plaintiff fails to satisfy the amount-in-controversy requirement.[45] Although the court made its ruling in a non-class action context, its analysis was inconsistent with that of the Eleventh Circuit.

By the time the Supreme Court granted certiorari in these cases, the courts of appeals were split 5-5 on the relevant question.[46] Previously the Supreme Court split 4-4 on the same question.[47] This time, the Court held that "where the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount-in-controversy requirement, section 1367 authorizes supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy."[48] The Court thus affirmed the Eleventh Circuit and reversed the First Circuit.

Section 1367 provides in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.[49]

Writing for the Court, Justice Kennedy set forth the steps of the inquiry into the meaning of section 1367: "In order to determine the scope of supplemental jurisdiction authorized by § 1367, then, we must examine the statute's text in light of context, structure, and related statutory provisions."[50]

Before embarking on that determination, however, the Court discussed at considerable length the legal landscape in 1989,

when section 1367 was enacted, because the answer to the question presented hinged at least in part on whether the current version of section 1367 did anything more than simply overrule *Finley v. United States*. In *Finley*, the plaintiff brought claims under the Federal Tort Claims Act in federal court, which had original jurisdiction under section 1346(b). The plaintiff then sought to add related claims against other defendants, invoking the district court's supplemental jurisdiction over so-called pendent parties. The Court held that the district court lacked a sufficient statutory basis for exercising supplemental jurisdiction over these claims: "[A] grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties."[51] As the Court in the *Exxon-Ortega* case explained, "*Finley* held that in the context of parties, in contrast to claims, 'we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly.'"[52]

Those urging reliance on legislative history in *Exxon-Ortega* proffered the House Judiciary Committee Report on the Judicial Improvements Act.

The Court in *Exxon-Ortega* then proceeded to construe section 1367. First, the Court examined the text of the relevant provision. Concentrating on section 1367(a), the Court explained that while the section provides that sections 1367(b) and (c), or other relevant statutes, may provide specific exceptions, section 1367(a) is "a broad jurisdictional grant, with no distinction drawn between pendent-claim and pendent-party cases."[53] "In fact, the last sentence of § 1367(a) makes clear that the provision grants supplemental jurisdiction over claims involving joinder or intervention of additional parties."[54] The Court emphasized that neither "the terms of § 1367 . . . acknowledge any distinction between pendent jurisdiction and the doctrine of so-called ancillary jurisdiction," nor does the current approach to jurisdiction, which views both pendent and ancillary jurisdiction "as species of the same generic problem."[55] The Court then examined section 1367(b) and concluded that it "does not withdraw supplemental jurisdiction over the claims of the additional parties at issue here."[56]

Second, after examining the text, the Court then considered jurisdictional theories relevant to determining the meaning of the provision. It discussed and rejected the view that "a district court lacks original jurisdiction over a civil action unless the court has original jurisdiction over every claim in the complaint."[57] In connection with that discussion, the Court examined the "indivisibility" and "contamination" theories of jurisdiction, which are predicates for that view.[58] It explained that this view "requires assuming either that all claims in the complaint must stand or fall as a single, indivisible 'civil action' as a matter of definitional necessity—what we will refer to as the 'indivisibility theory'—or else that the inclusion of a claim or party falling outside the district court's original jurisdiction somehow contaminates every other claim in the complaint, depriving the court of original jurisdiction over any of these claims—what we will refer to as the 'contamination theory.'"[59] The Court noted that "[t]he indivisibility theory is easily dismissed, as it is inconsistent with the whole notion of supplemental jurisdiction."[60] The Court also explained that, while the contamination theory may "make sense" in certain contexts, it "makes little sense with respect to the amount-in-controversy requirement, which is meant to ensure that the dispute is sufficiently important to warrant federal court attention."[61]

Third, the Court inquired into how the proposed arguments have been treated in a related context—that of removal jurisdiction. It considered the validity of the argument that "a district court has original jurisdiction over a civil action only if it has original jurisdiction over each individual claim in the complaint" and noted that "we have already considered and rejected a virtually identical argument in the closely analogous context of removal jurisdiction."[62]

Fourth, the Court evaluated policy considerations. It rejected the argument that the adopted construction "creates an anomaly regarding the exceptions listed in § 1367(b)."[63] The Court concluded by declaring that "[n]o other reading of § 1367 is plausible in light of the text and structure of the jurisdictional statute."[64]

Having reached its conclusion as to the meaning of section 1367(a), the Court, in a separate section, explained why, in *Exxon-Ortega*, it did not give much weight to legislative history as part of its interpretative process. The Court reiterated its view that section 1367 "is not ambiguous"[65]; thus, no legislative history need be considered.[66] The Court also briefly summarized the most frequently voiced criticism of legislative history—that it may be manipulated by select legislators or staffers.[67]

Finally, upon delving into legislative history, the Court emphasized that "in this instance" criticisms of legislative history "are right on the mark" and, thus, legislative history should not be accorded significant weight in that instance. Those urging reliance on legislative history in *Exxon-Ortega* proffered the House Judiciary Committee Report on the Judicial Improvements Act. The Report explained that section 1367 would "authorize jurisdiction in a case like *Finley*, as well as essentially restore the pre-*Finley* understanding of the authorization for and limits on other forms of supplemental jurisdiction."[68] The Report then remarked that section 1367(b) "is not intended to affect the jurisdictional requirements of [§ 1332] in diversity-only class actions, as those requirements were interpreted prior to *Finley*," and cited, without further elaboration, *Zahn v. International Paper Co.* and *Supreme Tribe of Ben-Hur v. Cauble*.[69] The Report noted that the "net effect" of section 1367(b) was to effect only "one small change" in pre-*Finley* practice with respect to diversity actions: section 1367(b) would exclude "Rule 23(a) plaintiff-intervenors to the same extent as those sought to be joined as plaintiffs under Rule 19."[70] The Supreme Court

explained that "[i]t is evident that the report here meant to refer to Rule 24, not Rule 23."[71] This Report was the chief basis for the argument that section 1367 did not allow exercise of jurisdiction over plaintiffs who cannot independently satisfy the requirements of § 1332.

The Court first observed that the legislative history of section 1367 "is far murkier than selective quotation from the House Report would suggest."[72] In fact, as the Court explained, the "distinguished jurists who drafted" the paper that became the basis for the statute as well as three of the participants in drafting that provision all agreed that section 1367, on its face, overrules *Zahn*, which held that any plaintiff without a claim alleging the jurisdictional amount must be dismissed from the case, even though other plaintiffs alleged jurisdictionally sufficient claims. The Court noted that the text of section 1367 "is based substantially on a draft proposal contained in a Federal Court Study Committee working paper, which was drafted by a Subcommittee chaired by Judge Posner."[73] The Subcommittee explained in a footnote that its proposal would overrule *Zahn* and that doing so would be beneficial.[74] The Federal Courts Study Committee did not expressly disagree with the Subcommittee's conclusion regarding *Zahn* or modify the text to avoid that conclusion. Critically, three law professors who participated in the drafting of section 1367 believed that on "its face" it overrules *Zahn*.[75] The professors conceded that, apart from legislative history, one has no choice but to "conclude that section 1367 has wiped *Zahn* off the books."[76] In fact, they conceded that the legislative history attempted to "correct the oversight."[77] Finally, the Court noted that overruling *Zahn* would not have been controversial.[78] Thus, given this evidence of the understandings of section 1367's drafters that it overruled *Zahn*, the Court refused to alter the meaning of the statute based on a sentence in legislative history inserted to change the meaning of the actual statutory text.

Justice Stevens, joined by Justice Breyer, dissented. His primary observation concerned legislative history: "Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted. Indeed, I believe that we as judges are more, rather than less, constrained when we make ourselves accountable to all reliable evidence of legislative intent."[79]

Essential Steps in Statutory Construction

Despite certain differences in the approaches to statutory construction in *Koons Buick* and *Exxon-Ortega*, there are numerous similarities. In addition, there are other tools that may be useful in statutory construction that the Court did not rely upon but that may be relevant in other cases.

Components of the Holistic Approach

In both cases, the Court clearly embraced the "holistic" approach to statutory construction. The steps of the analysis generally include the following:

The text of the statute. The Court examines the plain language of the provision to ascertain the meaning of the phrase or the key statutory term.[80]

The context of the statute. The Court examines other statutory provisions because the relevant phrase is not viewed in isolation but as part of the statutory scheme.

The history of the provision. The Court examines statutory history, as in *Koons Buick*, or the background legal landscape at the time of the enactment, as in *Exxon-Ortega*.

Related areas of the law. The Court looks to the related areas of the law presenting analogous questions, such as the removal context that was examined in *Exxon-Ortega*.

Applicability of various theories and consistency with common practices. The Court ascertains whether suggested theoretical approaches to the question presented are relevant to its decision, such as the role of the contamination and indivisibility theories of jurisdiction in *Exxon-Ortega*, or whether the decision is consistent with common practices, such as those codified by legislative manuals, as in *Koons Buick*.

Legislative history. Legislative history, if reliable, is a useful tool in statutory construction, as it was, for example in *Koons Buick*. However, legislative history is not likely to be helpful where, as in *Exxon-Ortega*, statements were inserted in the legislative history to *contradict* the text of the statute.

Policy arguments. The Court often checks whether the construction it reaches produces an "anomalous" result, an analysis it performed in both *Koons-Buick* and *Exxon-Ortega*.[81]

While on the surface it seems that policy considerations enter into the Court's calculus only at step (7), it is crucial to note that pragmatic concerns are also relevant to steps (3), (4) and (5). For instance, in step (3), the Court asks what problem Congress was seeking to remedy by passing the legislation—an inquiry that leads to the question of whether the construction the Court is adopting furthers congressional purposes. In fact, there are at least two scholarly approaches to such an inquiry. First, "intentionalism" requires the court to "give the statute the meaning most consistent with the intentions of the enabling legislature."[82] By contrast, "purposivism" "posits that the court's role is to attribute to the statute the meaning most consistent with the general reasons why the enacting legislature believed the statute should be adopted."[83] The choice between the two (or their harmonization) may also arise in other steps, but is particularly relevant to step (3). In step (4), by examining related areas of the law, the Court implicitly makes a judgment that the same policies governing removal, for instance, are applicable in the pendent jurisdiction context. In step (5), by, for example, refusing to give effect to certain theoretical approaches, the Court also refuses to further the policies that underlie those theories. Thus, in sum, in a statutory construction case, it may be helpful to weave policy considerations throughout the analysis—varying the explicitness of these matters depending on the step of the analysis.

Other Tools for Statutory Construction

In addition to the steps identified above, statutory construction may be undertaken from a variety of vantage points. One approach is the economic theory of statutory construction. Following that approach, a court construing a statute asks, from an *ex ante* perspective, whether the construction will be desir-

able for an average case (not necessarily the case before the court) and whether it will provide the correct incentives for those affected by it.[84] A second perspective is based on the public choice theory, which applies economic principles to actions by the state. Proponents of the theory believe that much legislation is interest-group driven, and thus produces too many statutes that bestow benefits on a select group while dispersing the burdens on the population at large.[85] Thus, if in doubt, a court may interpret such a statute narrowly to minimize a windfall to a small group.[86]

The theory of statutory construction recognizes that the process of construction is complex and often cannot be reduced to one factor.

A third example is the pragmatic theory of statutory construction. That theory recognizes that the process of construction is complex and often cannot be reduced to one factor, such as textualism, intent, or purpose. Rather, drawing on hermeneutics, the pragmatic theory acknowledges that "construction is a dynamic process, and that the interpreter is inescapably situated historically."[87] Thus, "the text lacks meaning *until* it is interpreted."[88] For instance, the meaning of a command not to "discriminate" may depend on the era in which a statute was adopted, and the ultimate outcome may depend on how much the Court wishes to expand or contract that understanding given today's reality. Furthermore, statutory interpreters can be "driven by multiple values"—a web of "intertwined beliefs" that interpreters hold, if only by virtue of the complex nature of human reasoning. "Decisionmaking is, therefore, polycentric, and thus cannot be linear and purely deductive. Instead, it is spiral and inductive: We consider the consistency of the evidence of each value before reaching a final decision, and even then check our decision against the values we esteem most."[89] Indeed, even though a court breaks its analysis down into sequential steps, the ultimate decision reached in reviewing materials is most likely the result of mutually reinforcing indications from the text, the statutory history, and common sense.

In sum, when confronted with a statutory construction case, one should consider following all the steps that the Court enunciated in its recent opinions. While frequently some of these steps, such as consideration of theories in the relevant area or in a related context or examination of legislative history, only confirm the conclusion that the text itself suggests, they are important tools for ascertaining the meaning of a provision. Knowing a particular judge's jurisprudential bent also can better enable one to present analysis consistent with the values inherent in his or her jurisprudential approach.♦

Endnotes

1. The majority in Koons Buick Pontiac GMC, Inc. v. Nigh, 125 S. Ct. 460 (2004), consisted of Justice Ginsburg, joined by Rehnquist, C.J., Stevens, O'Connor, Kennedy, Souter, and Breyer, J.J. The majority in Exxon Mobil Corp. v. Allapattah Servs., Inc./Ortega v. Sun-Kist Foods, Inc., 125 S. Ct. 2611 (2005), consisted of Justice Kennedy, joined by Rehnquist, C.J., Scalia, Souter, and Thomas, JJ.
2. *Koons Buick*, 125 S. Ct. at 463.
3. Pub. L. No. 90-321, § 130, 82 Stat. 157.
4. Pub. L. No. 93-495, § 408(a), 88 Stat. 1518.
5. *Koons Buick*, 125 S. Ct. at 464.
6. § 408(a), 88 Stat. 1518.
7. Pub. L. No. 94-240, § 4(2), 90 Stat. 260, codified in 15 U.S.C. § 1640(a) (1976 ed.).
8. 125 S. Ct. at 464.
9. 15 U.S.C. § 1640(a)(2)(A).
10. 125 S. Ct. at 463.
11. 319 F.3d 119, 126–29 (4th Cir. 2003).
12. *Id.* at 126.
13. *Id.*
14. *Id.* at 127.
15. *Id.* at 130, 132.
16. *Id.* at 130.
17. *Id.* at 131.
18. *Id.* at 132. Moreover, Judge Gregory added, limiting the $1,000 cap to recoveries for consumer leases under clause (ii) would create an inconsistency within the statute: The damage cap in clause (ii) would include the "under this subparagraph" modifier, but the cap in clause (iii) would not. *Id.* Judge Gregory also observed that the phrase "under this subparagraph," as it appears in § 1640(a)(2)(B), covering statutory damages in class actions, "indisputably applies to all of subparagraph (B)." *Id.* at 132. "[T]he most logical construction of the statute," then, "is to read the phrase 'under this subparagraph' as applying generally to an entire subparagraph, either (A) or (B), and to read (2)(A)(iii) as creating a specific carve-out from that general rule for real-estate transactions." *Id.*
19. Koons Buick Pontiac GMC, Inc. v. Nigh, 125 S. Ct. 460, 467 (2004).
20. *Id.* at 466 (citations omitted).
21. *Id.* at 467 (citations omitted).
22. *Id.* at 468 n.7.
23. *Id.* at 467.
24. *Id.* at 467–68.
25. *Id.* at 468.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 468 (*Cf.* Church of Scientology of Cal. v. IRS, 484 U.S. 9, 17–18 (1987) ("All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill.")).
33. *Koons Buick*, *supra* note 19 (*citing* H.R. REP. NO. 104-193, p. 99 (1995)) ("[T]his amendment increases the statutory damages available in closed end credit transactions secured by real property or a dwelling. . . . ").
34. *Id.* at 469. The Court observed that a contrary reading would "lead to the anomalous result of double-the-finance-charge liability, uncapped by the fixed dollar limit, under clause (i) for an open-end loan secured by real property, while liability would be capped by clause (iii) at $2,000 for a closed-end loan secured by the same real property." *Id.* at 469 n.10.
35. *Id.* at 470 (Stevens, J., concurring).
36. *Id.* (disagreeing that legislative history should only be used for "resolving textual ambiguities or to avoid absurdities").
37. *Id.* ("Common sense is often more reliable than rote repetition of

(Continued on page 20)

Preserving the Evidentiary Record at Trial: A Trial Lawyer's Perspective

By Andrew B. Flake

Trial does not always bring finality: "Disappointed litigants and losing lawyers like to have another go at it," Justice Frankfurter once remarked.[1] There are, of course, many good reasons for appeal. Trial judges do not always get it right, and the complexity of the trial process certainly leaves room for error.

Recognizing that error may occur, this article focuses on how to posture evidentiary presentations at trial so that an appellate court is both willing and able to intervene. This is called making the record or "preserving error," and it gives parties and their counsel the keys to the appellate castle. If such preservation does not occur, the ability to claim error on appeal may be waived or a more favorable standard of review may be forfeited, leaving an appellant to struggle with the exceedingly difficult "plain error" standard.[2]

Assuming that error exists that affects a party's substantial rights,[3] an appellate court will need and expect to find two conditions satisfied: (1) a definitive ruling by the trial court, and (2) appropriate corresponding action by the trial attorney, be it an objection, an offer of proof, or a motion to strike.[4]

Obtaining a Definitive Ruling

Although the requirement of a definitive ruling may seem obvious, a trial judge often will decline to rule on an issue, perhaps because it is premature, because context is important, or because other matters intervene. A trial judge's ruling also may be qualified or provisional. In the case of a motion in limine, a judge may take a "wait and see" approach in order to more fully understand the evidence in context. Or a judge, without ruling, may offer a general viewpoint on, for example, whether certain evidence is admissible: "It seems to me that we need to be very careful with discussions of the Acme merger, because the transaction you are litigating is an entirely different business transaction." In all of these circumstances, the risk exists that an evidentiary issue is not preserved for appeal.

To monitor evidentiary rulings amidst the rough and tumble of trial, trial counsel can have someone on the trial team assist in keeping track of the judge's rulings. A list of reserved or deferred rulings, reviewed periodically (ideally before each trial day), allows trial counsel to remind the judge before the relevant witness, or, for example, after evidence comes in that makes a ruling more timely or necessary, that a definitive ruling is needed but has not yet been made.

A trial judge often will want to discuss certain issues with the parties informally. Especially in complex trials, a number of pretrial conferences will occur to determine the course and conduct of the trial as well as the final pretrial conference.[5] Informal discussion among the parties and the trial judge can be of great benefit. But such discussions are no substitute for a definitive ruling on the record. The same danger presents itself in sidebar conferences or meetings in chambers, if the court reporter is not present.

Stated simply, an "off the record" ruling is not a ruling for purposes of appeal. Counsel needs to be aware that a record is necessary for any rulings that emerge as well as for any required exception or objection.

Trial counsel—not the trial judge—is charged with obtaining a clearly articulated ruling on the record. Trial counsel can seek, in sidebar, to have the judge clarify or may restate the ruling in a respectful way for the record. If a ruling is deferred, the technique for doing so may be a gentle reminder: "Your Honor, we do still need a ruling on the issue of whether the alleged settlement discussions are excluded." Especially where the judge believes she has already ruled, it may seem awkward to risk appearing to reargue a point. Yet, to preserve the issue for appeal, the issue must be raised on the record. Unless the trial judge is clear and definitive in granting or denying a motion or objection, or in ruling that specified evidence is admitted or will not be allowed, a basis for appeal may be waived.[6]

Objections, Motions, and Offers of Proof

The second requirement to preserve error is a timely and specific objection, motion, or other submission to the trial judge. Generally a party cannot challenge a ruling or other trial event as error for the first time on appeal. Because a court of appeal is constrained in its ability to evaluate a case by the "cold" record, it defers to the trial judge's superior opportunity to evaluate facts and referee the litigation. If the trial judge was not aware of the error, and thus was unable to undertake such an evaluation, an appellate court generally will not intervene.

Objections

Objections, under Federal Rule of Evidence 103(a), must be both timely and specific.[7] The requirement of timeliness means that the trial judge has an opportunity to address the objection in a prompt fashion, and the requirement of specificity means that opposing counsel and the trial judge need to understand the basis for the objection to frame a response and a ruling. Trial counsel should state the objection, its grounds, and its specific application: "Objection, improper hearsay. Mr. Smith is about to testify to what another board member told him during the meeting, which is inadmissible hearsay."[8] "Objection, improper" is an insufficient basis to preserve such an objection for appeal.

Because objections interrupt the flow of a trial, consider requesting a running or standing objection. If the trial judge will

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permit it, a running or standing objection to certain testimony obviates the need to object each time to the same type of testimony and thus minimizes disruption. Even then, however, trial counsel must be cognizant of waiver rules and ensure that the scope and recognition of a running or standing objection is clear.

For more complex or especially important objections, a short bench brief may be appropriate. Supplying the trial judge with applicable authority emphasizes on appeal that the trial judge had the means and opportunity to correct a claimed error at trial.

Offers of Proof

When the trial judge excludes evidence a party proffered, it likely is not sufficient merely to object. The appellate court will need to understand what the evidence is that was excluded. An offer of proof accomplishes this via a showing, preferably made outside the presence of the jury,[9] of the substance of the evidence that was excluded. This may mean having counsel summarize the testimony or having the witness provide the testimony in question-and-answer format.[10]

For documentary evidence, a court reporter or bailiff, who may not be focusing on the record for appeal, often will return an excluded exhibit to offering counsel. If an exhibit is excluded, trial counsel should file it to preserve the record. An evidence checklist, reviewed at the end of each trial day and again at the close of the party's case or of a particular phase of trial, is helpful for keeping track of excluded exhibits or testimony and to designate where an offer of proof may be needed.

Motions to Strike

Testimony may come in too quickly for a timely objection. If a witness succeeds in testifying improperly, even after objection, counsel should couple an objection with a request to strike the offending testimony. Although at times this may seem like a futile attempt to "unring the bell," a party must request and obtain a trial judge's ruling to preserve the issue for appeal, which can be accomplished by a motion to strike.

Another less obvious use for a motion to strike is when an opposing party puts on testimony that lacks a proper foundation and, upon objection, commits to later "connect up" that testimony through another witness. If the opposing party then fails to deliver, a motion to strike the previously allowed evidence may result in that testimony being stricken and should also preserve the issue for appeal.[11] As with other aspects of error preservation, trial counsel must take affirmative action to preserve the issue for appeal.

Managing Prior Rulings on Changed Circumstances

What if, following a timely objection and ruling by the trial judge, something occurs that changes or alters the basis for the ruling? For example, if the trial judge sustained an objection and excluded evidence of discussions at a board meeting, but, when testifying after that ruling, one of the board members disavows knowledge of that meeting, such testimony may have "opened the door" to the previously excluded evidence. In that instance, to preserve the issue, trial counsel should ask the trial judge to modify the prior ruling. If the trial judge refuses, counsel needs to make a new objection (or offer of proof or motion to strike, as applicable).[12] Similarly, should circumstances change such that an in limine ruling should be or is modified, counsel has the responsibility to again take affirmative action to exclude or to admit evidence. And if the opposing party goes beyond the in limine boundaries set by a ruling, trial counsel must object and move to strike; otherwise, counsel risks waiving the protection of the in limine ruling.[13]

Trial and Pretrial Hearing Transcripts

Without a transcript, the trial judge generally is presumed to have ruled correctly. To maximize transcript clarity, trial counsel should talk with the court reporter in advance of trial and learn of any preferences for pace and treatment of exhibits. In addition, court exhibit worksheets and trial transcripts should be monitored to ensure that exhibits are marked correctly and put into the record and that testimony properly is recorded. On occasion, trial counsel may find that, despite best efforts, the transcript does not accurately reflect certain rulings or events and should request a correction or make the record in a timely fashion.

Trial counsel can facilitate and promote accuracy in transcription by giving the court reporter a list of names and a listing of relevant and recurring terms.

By virtue of keeping in mind how the record looks, trial counsel can improve its clarity and completeness. Appellate courts are limited to the record, and some trial events are not susceptible to recordation. Objectionable or other gestures or tones by a witness, opposing counsel, or others are examples and trial counsel needs to make a special effort to have such events, when relevant, reflected on the record. Trial counsel also can facilitate and promote accuracy in transcription by giving the court reporter a list of names and a listing of relevant and recurring terms (particularly in cases involving complex fields like technology, or which employ unique terms, acronyms, or other jargon).[14]

Trial counsel is also wise to consider, before the close of evidence for each party's case and again before the case goes to the jury, whether the list of exhibits is complete. Demonstrative exhibits, in particular, often are not included in the record. If they need to be, reduced-size proofs of the exhibits can be filed. Or counsel can photograph any demonstrative exhibit for inclu-

sion in the record. The goal is to be certain that all that needs to be in the record is there, including deposition transcripts and hearing or trial transcripts. Appellate rules typically provide for requesting permission to supplement the record on appeal,[15] but it is simpler and provides greater certainty to make sure that the right materials are included in the first place.

After the Close of Evidence

Following the close of evidence and before closing argument, judges will conduct a charge conference to settle jury instructions. Consider whether a transcript of this proceeding is necessary. A helpful trial checklist should include a reminder to check that a full set of proffered jury instructions appears in the record, particularly including those that were rejected or modified. Moreover, trial counsel must make specific objections to jury instructions or the refusal to give a certain instruction to preserve the issue for appeal.[16]

Because inconsistencies in a verdict may provide an additional basis for appeal, trial counsel can use special interrogatories.

Finally, trial counsel should pay particular attention to proposed and final verdict forms. Because inconsistencies in a verdict may provide an additional basis for appeal, trial counsel can use special interrogatories. Special interrogatories require the jury to be more specific, can bring error to the surface, and can reveal inconsistencies. Absent such specificity, the appellate court may be limited to determining whether the verdict rendered, on its face, is supported by the weight of the evidence—a standard very deferential to the jury.[17]

Conclusion

Success on appeal begins with awareness, before the trial court, of possible appeal points. The pretrial phase, and certainly the trial itself, require trial counsel to keep in mind how an appellate court will view the proceeding, and continually to ask what the appellate court will see in the record. By asking those questions, trial counsel will assemble a complete evidentiary record that contains definitive rulings by the trial judge and specific, timely requests or objections by counsel. Such a record not only preserves the client's ability to appeal but also increases the chances of success on appeal.♦

Endnotes

1. Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 524 (1957) (Frankfurter, J., dissenting).
2. "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." FED. R. EVID. 103(d).
3. The "harmless error" rule is expressed in 28 U.S.C. § 2111: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."
4. Although this article focuses on evidentiary appeal, the basic requirements of error preservation are the same for nonevidentiary issues. *See* FED. R. CIV. P. 46 ("[I]t is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor."); *see also* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 174 (1988) (litigant should comply with FED. R. CIV. P. 46 and the Rules of Evidence to preserve evidentiary error).
5. FED. R. CIV. P. 16(d).
6. In one case, the Third Circuit found that counsel was on notice of the need to clarify where, even though "the district court told plaintiffs' counsel not to reargue every ruling," the court never changed "its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done." Walden v. Georgia-Pacific Corp., 126 F.3d 506, 520 (3d Cir. 1997) *cited in* FED. R. EVID. 103 advisory committee notes.
7. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." FED. R. EVID. 103(a)(1), (2).
8. FED. R. EVID. 103(a)(1).
9. "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." FED. R. EVID. 103(c).
10. FED. R. EVID. 103(b).
11. To avoid this scenario entirely, a better practice is to respond to the promise to "connect up" with a request that opposing counsel (a) explain prior to going forward how the evidence will connect up or (b) change the order of proof to put forward the foundation evidence immediately.
12. "If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike." FED. R. EVID. 103 advisory committee notes (*citing* Old Chief v. United States, 519 U.S. 172, 182 n.6 (1997)).
13. *See, e.g.*, United States Aviation Underwriters, Inc. v. Olympia Wings, Inc., 896 F.2d 949, 956 (5th Cir. 1990) (objection required if court or opposing counsel transgresses previously granted motion in limine) *cited in* FED. R. EVID. 103 advisory committee notes.
14. *See* James F. Hewitt, *Preserving and Assembling the Record for Appeal: Getting Through the Mine Field*, *in* THE LITIGATION MANUAL: SPECIAL PROBLEMS AND APPEALS (John G. Koeltl & John Kiernan eds. 1999).
15. *See, e.g.*, FED. R. APP. P. 10(e)(2).
16. "A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection." FED. R. CIV. P. 51(c). Counsel, in addition to submitting a request, should object to the failure to give the request in order to preserve the error for appeal, unless the trial court, on the record, definitively rejected the request. FED. R. CIV. P. 51(d)(1).
17. For additional information and guidance on preserving the record for appeal, *see, e.g.*, www.uscourts.gov/rules/index.html; lii.law.cornell.edu/wex/index.php/Evidence; www.abanet.org/tips/home.html.

Obtaining Review of Interlocutory Orders

By Laurie Webb Daniel

Determining whether an interlocutory order is appealable can be something of a metaphysical exercise. In general, the final judgment rule conditions appellate jurisdiction upon entry of a final judgment.[1] While there are exceptions, there is no easily identifiable pattern applicable to the cases that have been exempted from the final judgment rule. Fortunately, some guidelines are available. While not a catalog of every exception to the final judgment rule, this article presents a framework for analyzing the appealability of orders and the various statutory and common law avenues for seeking interlocutory review.

Is the Ruling an Interlocutory Order?

If final judgment has been entered, a party can obtain appellate review as a matter of right by filing a notice of appeal in compliance with the applicable rules and statutes.[2] If the order or judgment is not final, appellate review is not available unless the case fits within one of the exceptions to the final judgment rule discussed below. The first step in the analysis, therefore, is to determine whether the court has entered a final judgment or only an interlocutory ruling.

In federal court, 28 U.S.C. § 1292(a) grants appellate jurisdiction for appeals from orders involving injunctions, receivers, and admiralty decrees.

A judgment is considered "final" if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[3] A ruling that leaves any pending claim or central relief is nonfinal or "interlocutory." For example, a liability judgment that does not resolve damages issues is not final and ordinarily is not appealable.[4] A sampling of other nonfinal orders that are not directly appealable includes orders denying summary judgment;[5] ruling on discovery disputes;[6] disqualifying counsel; granting a new trial;[7] dismissing with leave to amend or dismissing some but not all claims or defendants;[8] transferring the case to another venue;[9] compelling arbitration;[10] opening a default; or awarding sanctions pursuant to the Federal Rules of Civil Procedure.[11]

Dismissals without prejudice require a closer look to determine appealability. Parties cannot create a final, appealable judgment by dismissing without prejudice claims remaining after a grant of partial summary judgment.[12] On the other hand, if the partial dismissal without prejudice occurred prior to entry of summary judgment on the remaining claims, the summary judgment ruling is a final, appealable order.[13]

If you decide that the order is interlocutory, the next step is to see whether it is covered by a statutory exception to the final judgment rule.

Does a Statutory Exception to the Final Judgment Rule Apply?

Several statutes allow direct appeals as a matter of right from certain types of nonfinal orders. In federal court, 28 U.S.C. § 1292(a) grants appellate jurisdiction for appeals from orders involving injunctions, receivers, and admiralty decrees despite their interlocutory nature:

> [T]he courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3) Interlocutory decrees of such district courts . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

Although 28 U.S.C. § 1447(d) expressly prohibits appeals from most remand orders, it allows direct appeals from remand orders in certain civil rights cases covered by 28 U.S.C. § 1443. In addition, in *Quackenbush v. Allstate Insurance Co.*, the Supreme Court held that the section 1447 prohibition does not apply to remands that are not based on a lack of subject matter jurisdiction or a defect in the removal procedure specified in section 1447, such as an order based on the abstention doctrine.[14] For example, a remand based on a forum selection clause is directly appealable because it was not based on subject matter or procedural deficiencies.[15]

Because the federal arbitration statute embraces a policy that encourages arbitration, it permits appeals of interlocutory orders that interfere with arbitration.[16] Appeals of orders that advance the arbitration process, however, are prohibited.[17] Thus, under 9 U.S.C. § 16, a party can directly appeal orders refusing to stay

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actions pending arbitration; denying petitions to order arbitration; or confirming, denying, or vacating an arbitration award or partial award. On the other hand, an order compelling arbitration will not be directly appealable.[18]

Can You Invoke the Collateral Order Doctrine?

Some orders that do not terminate the litigation nonetheless are considered final under the collateral order doctrine, which originated in *Cohen v. Beneficial Industrial Loan Corp.* This doctrine covers orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review, and too independent of the cause itself to require that appellate consideration be deferred until the whole cause is adjudicated."[19]

To obtain review under the collateral order doctrine, you must pass a four-step test:

- There must be a judgment that "conclusively determines" a disputed question.
- The issue must be "completely separate from the merits" of the action.
- The order must be "effectively unreviewable" if it waits for the litigation to terminate.
- The issue must be "too important to deny review."

It is a rare case that satisfies the requirements for review under the collateral order doctrine, and the Supreme Court "has expressly rejected efforts to reduce the finality requirement of 28 U.S.C. § 1291 to a case-by-case appealability determination."[20] If you do not have clear precedent on point supporting a direct appeal under the collateral order doctrine, it is advisable to pursue alternative avenues for seeking review, such as an appeal by permission, in addition to filing a notice of appeal even if you believe the order falls under the collateral order doctrine.

Nonetheless, there are a number of identifiable categories of cases that do qualify for direct review as final, appealable collateral orders. For example, orders rejecting a public official's motion to dismiss or for summary judgment based on qualified immunity are appealable under this doctrine, unless there is a fact question regarding whether the official was a policy maker.[21] Claims of sovereign immunity under the Eleventh Amendment also fall under the collateral order doctrine.[22]

Although most discovery orders are not immediately appealable, an order holding a nonparty witness in civil contempt for failing to obey a discovery order is appealable under the collateral order doctrine.[23] An order denying nonparty discovery that is issued from a different district outside the circuit of the pending action also is appealable under the collateral order doctrine.[24] And a discovery order "directed to a person who has custody of materials as to which another person may claim a privilege of nondisclosure" is immediately appealable,[25] as are orders compelling witnesses to turn over documents to the IRS or the EEOC.[26]

Appealability under the collateral order doctrine is not always a two-way street with respect to certain types of orders. For example, an order granting a stay under the abstention doctrine is an appealable collateral order,[27] but an order refusing to stay or dismiss under the abstention doctrine is not.[28] An order denying a motion to intervene as a matter of right is an appealable collateral order,[29] although an order granting intervention is not.[30]

Does the Case Satisfy the Criteria for an Appeal by Permission?

There are mechanisms for seeking immediate review by permission of an otherwise nonappealable interlocutory order under certain circumstances. Rule 54(b) of the Federal Rules of Civil Procedure allows trial courts to "direct entry of a final judgment as to one or more but fewer than all of the claims or parties" if "there is no just reason for delay." Keep in mind that this rule is meant for orders that resolve an entire claim or similarly severable partial determination.[31] To fit this rule, the action must involve multiple parties or multiple claims, the issue sought to be reviewed must be final and separable, and there must be no good reason for delaying the appeal of the issue. In sum, the ruling should be able to qualify as a final judgment under 28 U.S.C. § 1291 if the claim had been brought as a separate action.[32] Further, even after a trial court directs entry of a final judgment, appellate review under Rule 54(b) still is subject to the agreement of the court of appeals that the order satisfies the criteria of that Rule.[33]

If your order cannot meet the finality or severability prerequisites for review under Rule 54(b), you can still seek review under 28 U.S.C. § 1292(b) if it involves an important, controlling issue. As with Rule 54(b), this procedure requires an initial order from the trial court determining that an appeal is warranted, and is subject to the further discretion of the appellate court.

Because of the high standards required for review under section 1292(b), a party seeking immediate appeal under this provision should present detailed findings showing how each of the statutory requirements is met, and should submit a proposed order with the detailed findings to make sure that the order certifying

Resources on the Web

- http://www.abanet.org/litigation/committees/appellate/home.html—This website provides access to the article bank compiled by the Section of Litigation's Appellate Practice Committee.
- http://www.law.ualr.edu/japp/toc.html—The Journal of Appellate Practice and Process website, hosted by the William H. Bowen School of Law of the University of Arkansas at Little Rock, provides online scholarly articles on issues, practices, and procedures of appellate court systems.
- http://www.greenbag.org/—This website is an entertaining and informative appellate blog.

appellate review contains the findings necessary to satisfy the statute. Once the order certifying an immediate appeal has been entered, the party has 10 days within which to apply to the appellate court for immediate review.[34] If the appellate court grants permission to appeal, a notice of appeal should be filed within the statutory time limit. Significantly, because this avenue for review allows an appeal of an order and not a "question," the scope of review may be as broad as the order.

Courts have held that the petition should be filed not "more" than seven days after entry of the remand order.

Class action litigants have two special discretionary appellate opportunities. The recently enacted Class Action Fairness Act (CAFA) allows a defendant to petition for review of an order remanding a removed class action back to state court.[35] CAFA provides that "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order."[36] Although CAFA states that application to the court of appeals shall be made not "less" than seven days after entry of the remand order, this appears to be a typographical error. Courts, therefore, have held that the petition should be filed not "more" than seven days after entry of the remand order.[37]

Under Rule 23(f) of the Federal Rules of Civil Procedure, a class action litigant can petition for an appeal of orders granting or denying class certification. The application is filed directly with the court of appeals without having to obtain an order from the trial court authorizing the appeal. The Seventh Circuit was the first court to interpret Rule 23(f) and determine that a ruling appealable under this Rule should be the equivalent of the "death knell."[38] Other courts have followed the Seventh Circuit's lead in establishing standards for determining the appealability of orders under Rule 23(f).[39]

Would a Mandamus Petition Be Appropriate?

A petition for a writ of mandamus is an extraordinary procedure for obtaining appellate relief from an interlocutory order that is not appealable by other means. It should be reserved for those cases where postponement of review would be the equivalent of denial of review.[40] One example of an appropriate mandamus petition is when a district court has compelled a party or witness either to disclose privileged information or to suffer contempt.[41] Another is where a district court has grossly disregarded its duty to rule on pending motions or manage litigation.[42] The Ninth Circuit has instructed that a writ of mandamus may be appropriate in a civil case where

- There is no adequate remedy by appeal or otherwise.
- The petitioner will be damaged in a way not correctable on direct appeal.
- The order sought to be reviewed is erroneous as a matter of law.
- The issue is likely to recur.
- The order raises an issue that is important or of first impression.[43]

Not every condition need be present in order to merit review by writ of mandamus; however, the more that you can point to, the better. If you are unsure whether you have a right to a direct appeal or whether your only means of review is through a mandamus proceeding, it is advisable to pursue both courses. The appellate court will clarify the appropriate procedure and you will not have waived any rights.

Conclusion

Although, as a general rule, interlocutory orders are not immediately appealable, there are a number of possible courses for seeking review of orders that have a significant impact on the litigation. If in doubt about the correct procedure to follow, do not hesitate to combine approaches if you think that your case fits more than one exception to the final judgment rule. It is advisable, however, to begin with the statutory provisions and common law doctrines that afford a direct appeal as a matter of right. Moreover, in general, it is a good idea to frame your issue as a challenge to an erroneous ruling of law that is important to similarly situated litigants. If you do so, you just might be surprised at how many times you can obtain interlocutory review.♦

Endnotes

1. *See* 28 U.S.C. § 1291; Cobbledick v. United States, 309 U.S. 323, 325 (1940).
2. *See* FED. R. APP. P. 4.
3. Catlin v. United States, 324 U.S. 229, 233 (1945).
4. *See* Apex Fountain Sales, Inc. v. Kleinfeld, 27 F.3d 931 (3d Cir. 1994).
5. Swint v. City of Woodley, 5 F.3d 1435 (11th Cir. 1993).
6. Pac. Union Conference of Seventh Day Adventists v. Marshall, 434 U.S. 1305 (1977).
7. Allied Chem. Corp. v. Daiflon, Inc., 534 F.2d 221 (10th Cir. 1976).
8. Van Poyk v. Singletary, 11 F.3d 146 (11th Cir. 1994); Howard v. Wilkes, 382 S.E.2d 434 (Ga. Ct. App. 1989).
9. Van Dusen v. Barrack, 376 U.S. 612 (1964).
10. 9 U.S.C. § 16.
11. Cunningham v. Hamilton County, 572 U.S. 198 (1999).
12. State Treasurer of State of Mich. v. Barry, 168 F.3d 8 (11th Cir. 1999).
13. Schoenfeld v. Babbitt, 168 F.3d 1257 (11th Cir. 1999).
14. Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).
15. Autoridad de Energia Electria de P.R. v. Ericsson Inc., 201 F.3d 15 (1st Cir. 2000).
16. 9 U.S.C. § 16.
17. *Id.*
18. *Id.*
19. Cohen v. Beneficial Ins. Loan Corp., 337 U.S. 541, 546 (1949).
20. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994).
21. Swint v. Chambers County Comm'n, 514 U.S. 35 (1995); Mitchell v. Forsyth, 472 U.S. 511 (1985).
22. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993).
23. U.S. Catholic Conference v. Abortion Rights Mobilizaton, Inc., 487 U.S. 72, 76 (1988).

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NUTS & BOLTS

Appeals in the Federal Courts: From Protecting the Record to Oral Argument

By Edward S. Harmening and Craig M. Sandberg

Although most practitioners have experience drafting pleadings in trial courts, not many have extensive experience drafting appellate pleadings. Still fewer have had an opportunity to file and argue an appeal in federal court. The nature of litigation is such that most of our collective time as attorneys is spent in the lower courts. It is likely that issues concerning appellate practice, however, come front and center when you lose in the trial court (or where your opponent believes your win in the lower court is tenuous).

Possibly due in part to our law school training, which is more heavily focused on litigation and core legal analysis, trial lawyers sometimes fail to appreciate that appellate practice requires unique preparation, superior brief writing, and trained appellate advocacy. Many attorneys seem to believe that no special talent or training is needed to write a good brief on appeal. Unfortunately for such lawyers, what worked before the jury or the busy trial judge is not adequate or, in many cases, not appropriate before the appellate court.[1]

Advocacy in the appellate court requires a unique approach. In addition to familiarity with the Federal Rules of Appellate Procedure (FRAP) and any applicable local appellate rules, the practitioner must seize the opportunities available in presenting an appellate brief and arguing to an appellate panel. The written submissions cannot be formulaic;[2] rather, attorneys should take advantage of the flexibility that an appellate brief writer has in packaging arguments to meet the needs of a particular case. Additionally, while thorough preparation is a prerequisite to delivering a winning oral argument, the practitioner must appreciate that the framework of an appellate argument requires flexibility, not rigid adherence to a prepared outline. The oral presentation to the panel is the opportunity to address issues significant to that panel.

This article discusses the issues that the practitioner faces with regard to appellate practice and procedure. Considerations addressed include protecting the record in the lower court (thereby preserving issues for appeal), deciding when to appeal, drafting the brief, preparing for argument, and presenting the case to the panel.

Whether the appellant will succeed on appeal is directly related to the record below. Consequently, the appeal process starts in the trial court. In this regard, trial counsel needs to ensure that all rulings (pretrial and otherwise) are on the record, that timely objections are made, offers of proof are presented, and objections to improper instructions are properly stated.

When It Matters, Put It on the Record

The trial starts at or even before the pretrial motions. In many instances, the court will invite the attorneys into chambers to address any pretrial motions. For whatever reason, a court reporter is sometimes not present. Even though the pretrial motions have been filed with the court and are part of the record, it is still advisable to have the court reporter present for argument and ruling. In many cases, the court's oral ruling and stated basis for the ruling will be significant in the reviewing court. Additionally, the appellant will almost always be hampered in pursuing an appeal where the record is silent. The trial attorney has the opportunity and obligation to preserve the record. As a practical matter, it may be difficult to ensure that every ruling, comment, or basis stated by the court is on the record, and it would be unwise to continually badger the court about every off-the-record statement. Consequently, where it matters, counsel should politely advise the court of the need to put the court's ruling on the record.[3] In most cases, the court will understand and appreciate counsel's need to preserve the record.

Object at Trial Despite the Denial of a Motion in Limine

Although some courts disfavor motions in limine and prefer to deal with questions of admissibility of evidence as they arise during the course of trial, in those courts that do permit them, a motion in limine can be a very useful tool for the trial lawyer. The purpose of the motion is to ask the court to address the admissibility of perceived objectionable evidence before that evidence is introduced at trial. After presentation of the issue, the court will enter an order with respect to the contemplated

As noted in the article by Thomas L. Hudson & Keith Swisher, a rule change will likely take effect on December 1, 2006, that removes the requirement under Rule 50 that a party renew at the close of the evidence a motion for judgment as a matter of law. The text of the new rule is available at http://www.uscourts.gov/rules/newrules6.html (Civil Rule 50).

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evidence. "An *in limine* order protects the moving party from any prejudicial impact that might result simply from asking questions and making objections before the jury."[4] A motion in limine is a preliminary ruling that the court may change as the evidence is presented and developed during the trial.[5]

Attorneys present their motions in limine in writing prior to the presentation of evidence. In this manner, the court has the opportunity to contemplate an evidentiary issue and the supporting legal analysis without the pressure of making a quick ruling from the bench during trial.

This alone, however, does not necessarily protect the record for appeal. A potential problem may arise in those instances where the court denies a motion in limine and the attorney fails to object later at trial when the contemplated evidence is presented to the jury. "Some appellate courts have adopted a strict rule that, notwithstanding a district court's categorical denial of a motion *in limine*, evidentiary error is not preserved absent a contemporaneous objection."[6] Know the rule in your jurisdiction.

Many practitioners fail to timely object to trial testimony or evidence that is inconsistent with any ruling in limine entered in their favor. Although Rule 103 of the Federal Rules of Evidence (FRE) does not specifically require that an objection be interposed to preserve the issue for appeal, a timely objection during the trial would prevent any misunderstandings. The objection must be made contemporaneously with the proffered evidence; otherwise, courts of appeals may consider the failure to timely object a missed opportunity and, therefore, a forfeiture of that right.

In understanding this principle, it is necessary to consider the difference between waiver and forfeiture. The Seventh Circuit has explained it this way:

> Waiver is the intentional relinquishment or abandonment of a known right. It differs from forfeiture, which is simply the failure to make a timely assertion of a right. Waiver extinguishes the error and precludes appellate review. Forfeiture permits plain error review. A common distinction we draw between waiver and forfeiture is that waiver comes about intentionally whereas forfeiture occurs through neglect.[7]

More succinctly, the court has said that "[w]aiver occurs where either a defendant or his attorney expressly declines to press a right or to make an objection."[8]

Seek Judgment as a Matter of Law

Rule 50 of the Federal Rules of Civil Procedure (FRCP) allows the court to take a case from the jury and enter judgment for a party where there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.[9] Be mindful of the importance of the record: "A motion for judgment as a matter of law may be made orally or in writing, but must be made on the record."[10]

To preserve an issue for appeal as to the sufficiency of the evidence, one must "seek a judgment as a matter of law pursuant to FRCP 50(a) before submission of the case to the jury [i.e., a motion for directed verdict], and then (if the Rule 50(a) motion is not granted and the jury subsequently decides against that party) a motion pursuant to Rule 50(b)."[11] Indeed, as pointed out by one commentator, "several courts have taken the strict view that post-trial motions for judgment are limited to the grounds urged at the close of evidence."[12] However, Justice Stevens, in a recent dissenting opinion, stated that "[a]rguments raised for the first time on appeal may be entertained, for example, if their consideration would prevent manifest injustice."[13]

Object to Jury Instructions

All trial lawyers recognize the importance of jury instructions and those instructions often form the basis of appeals. Some judges have made the task of preparing jury instructions easier by posting the preferred instructions on their individual web pages. The problem from an appeal standpoint will likely involve nonpattern instructions. Counsel objecting to such improper nonpattern instructions must object and, where appropriate, offer a substitute instruction. "To preserve a challenge for the failure to instruct on a particular principle, counsel must both tender a proposed instruction that accurately states the principle and object when the judge fails to give it."[14] In all cases, objecting counsel should place the objection and its basis on the record.[15]

The rule of thumb should be that if the proffered evidence or statement is not proper and is likely to be prejudicial, counsel must object to allow the trial court to cure the problem. Where the evidence or statement is so prejudicial that a curative instruction by the court would be insufficient, it may be appropriate and in certain cases necessary to seek a mistrial. The failure to object will almost always result in forfeiture for purposes of the appeal.

Deciding to Take an Appeal

The decision to take an appeal should be contemplated immediately following ruling on any unsuccessful post-trial motions. In those cases where the client, after consulting with counsel, has decided to take an appeal, the first order of business is to act in a timely manner. The party seeking review of the district court decision perfects the right to appeal by filing a notice of appeal in the district court. Pursuant to FRAP 4(1)(A), except in those cases where the United States or its officer or agent is a party, the notice of appeal must be filed with the district court within 30 days after the date of judgment or the date on which the order appealed from is entered. Importantly, the court may not extend the time to file a notice of appeal.[16]

Attorneys contemplating an appeal must review the rulings made in the lower court to determine whether there is a basis to proceed. The record made by the trial attorney and the court will be determinative and the potential areas of appeal should be thoroughly researched to evaluate the likelihood of success. Regardless of the decision to appeal, the client must understand your recommendation and, in particular, the ramifications and alternatives flowing from any recommendation not to take an appeal.

Hope is not entirely lost for a litigant that has lost its appeal. Following a defeat in the court of appeals, a litigant may request rehearing or rehearing en banc before the appellate court, or further review in the U.S. Supreme Court by seeking a writ of certiorari. Petitions for rehearing should be limited to situations in which the appellate panel has overlooked or misunderstood a fact or legal precedent.[17] Rehearing en banc is for dealing with situations in which the appellate panel's decision has created a conflict within the circuit or with Supreme Court precedent, or otherwise presents an "issue of exceptional importance," such as an inter-circuit split.[18] Attorneys considering this route should under-

stand that "[a] petitioner for certiorari bears a heavy burden to persuade the Court to select its case for review out of the many thousands of petitions filed. Understanding the nature of that burden is crucial to writing a successful brief urging denial of certiorari (called a 'brief in opposition')."[19] It is widely recognized that, "[i]n practice, only a small handful of the many thousands of requests for Supreme Court review are granted each year."[20] The considerations in granting certiorari include whether there is a conflict on an important matter among the federal circuits, whether there is a conflict between the federal court of appeals and the highest court of the state on an important federal question, whether a ruling has so far departed from the accepted and usual course of judicial proceedings that the Supreme Court's supervisory power is called for, whether a ruling by the highest court of a state conflicts with another state's highest court, or whether a ruling by a state court or federal court of appeals decides an important question of federal law that has not been settled by the Supreme Court.[21]

Writing a Good Appellate Brief

"The virtues of a good brief, in [our] opinion, are clarity, selectivity, and simplicity of writing, including the headings of the arguments,"[22] a commentator notes. It is recommended that counsel "use short sentences, use active verbs, use short paragraphs and avoid footnotes. Briefs that are written in this fashion are clear, simple and direct, and are not dull because the verbs are active and the words are carefully chosen."[23] A brief should be straightforward and concise, leaving out unnecessary verbiage; nonetheless, "[t]here is certainly room for good metaphors, for references that are colorful, and epigrams that convey important truths."[24] Attorneys should never lose track of the fact that they are presenting an argument: "As the briefs get shorter, it is all the more important to convey to the reader the reason 'why' your side should prevail. Recitations of case law without explanation why a particular result is consistent with statutory purpose, consistent with the needs of the judicial system, and consistent with the needs of society is going to be a dry and unimpressive presentation."[25]

Good advice to bear in mind is that the statement of facts is of critical importance:

> Except for those cases that turn on an abstract point of law, the statement of facts is generally the most important and challenging part of a brief. The facts are the one thing that the appellate judges know nothing about. It is very important that the factual statement be forceful, but that it not be a one-sided or argumentative presentation. Statements of facts of that kind turn off appellate judges and undermine the credibility of the brief. The same point applies to discussion of legal authorities.[26]

The summary of argument section is also very important:

> It serves several purposes. If a case is complicated and there is a lengthy statement of facts and a complex set of arguments to follow, understanding the significance of particular parts of the argument can be difficult unless the reader sees the big picture first. The reader will find the details of the argument much easier to follow if the reader has an overview of where the argument is headed. Also, some judges may need that summary of argument as a refresher before the oral argument.[27]

Attorneys are cautioned that "[i]nvective directed at the opponent and epithets characterizing the arguments as frivolous are largely wasted."[28] Such language might be construed by the court of appeals as a signal that the brief's author is in trouble and, therefore, its use is counterproductive.[29]

Despite the occasional sentiment expressed by trial lawyers that "no special talent or training is needed to write a good brief on appeal,"[30] many appeals are lost, or at least made harder to win, because of ineffective briefs. Part of this problem is the result of the infrequency with which many lawyers write appellate briefs. Also, many practitioners fail to appreciate that the job of preparing an effective brief is different from much other lawyering as it pertains to advocacy.

It has been observed that "[t]he most common mistake made by trial lawyers is using the same strategy in appellate court as they would use in the trial court."[31] An appellate brief is not a closing argument to a jury; nor is it an exercise in "irrelevant detail and empty rhetoric."[32]

An effective brief requires practice within the Rules of the Supreme Court of the United States, Federal Rules of Appellate Procedure, and any applicable local circuit rules. Those rules will provide guidance for everything from brief length (word count versus page count) to formatting the brief.

Preparing and Delivering Oral Argument

To represent clients properly, appellate practitioners must understand the goals of oral argument from both sides of the bench. They can then tailor their arguments to meet these goals.

Successful appellate practitioners spend time considering the judges' purpose(s) in approaching the oral argument. Judges use oral argument to accomplish one or more of the following goals: (1) to clarify issues; (2) to clarify factual or procedural points; (3) to clarify the scope of claims; (4) to examine the logic of claims; (5) to examine the practical impact of claims; and (6) to lobby for or against particular positions.[33]

Equally important to successful oral appellate advocacy is having a clear sense of purpose in oral argument. Lawyers should use oral argument to: (1) ensure that the judges understand and focus upon the claims; (2) correct misimpressions of fact or law that the judges may have about the case; (3) demonstrate the soundness of the position; (4) assuage the judges' concerns; or (5) impress the judges positively and memorably.[34]

The most important aspect of an effective appellate argument is thorough preparation so that all the information about the case and legal authorities is at the front of one's mind, or at least one's fingertips. After all, the main purpose of participating in the argument is to answer the court's questions. The second aspect is condensation and simplification of the case so that the critical considerations that are needed to decide the case correctly can be presented in a few minutes if the questioning is intensive. The third aspect is the display of flexibility in responding to the court's questions and giving the court a full answer, but then using each question as a stepping stone to return to the critical points in the case. One problem that often arises in oral argument is that questions cause counsel to lose their sense of direction. Effective argument means providing direct answers to the court's questions and

The mechanics of proper oral argument technique are well described in Andrew Frey's article on this subject:

- Maintain eye contact and talk to the judges, not at them.
- Have an outline or some list of important points to keep you from rambling and overlooking pivotal points.
- Do not unnecessarily delay getting to the argument. Simply walk to the lectern, set down any papers, wait for the presiding judge to recognize you, and begin.
- Stand upright and still, but don't be rigid.
- Control nonverbal communication.
- Be courteous and respectful.
- Enunciate clearly.
- Control volume.
- Keep cadence.
- Address the judges correctly.
- Do not simply read a prepared statement to the judges.
- Avoid long sentences, numbers, and citations.
- Limit reliance on help from others at the counsel table.
- Remember the forum.
- Be prepared to modify the argument.
- Use the written format that works best for you.
- Be well armed with the material you need.
- Tab important parts of the transcript and the appendix for quick reference.
- Don't use distracting exhibits or physical evidence.
- Manage your time effectively.[35]

using the answers as transitions to return to the winning ideas.

What should the substance of an oral argument be? Every moment granted to counsel to address the panel must be used effectively, and wise appellate practitioners will begin positioning themselves immediately. The introduction should tell the judges in a couple of sentences how the case reached them, the type of case it is, the position, and what points the oral argument will cover. Limit time addressing the facts unless there is specific tactical goal in doing so. Limit oral recitation of the straightforward statement of the brief to the three or four most critical points to prevent judges from missing subtle or rhetorical comments. When discussing cases, the oral argument should be used to convey the logic and common sense of counsel's position. Know the record on appeal. Be prepared to answer questions about relevant parts of the record.

If appellate argument did not involve answering questions from the panel, it would just be persuasive speech. So do not dread receiving questions from the bench—embrace them. As noted above, judges may have multiple purposes in interrogating counsel. Listen carefully to the question asked to discern its purpose. Answer the question directly without evasion. The court is looking for credible responses to its questions. The panel reasonably expects the attorney to be prepared to answer any question posed. Therefore, do not postpone the answer because the case may suffer. Do not attempt to bluff about authorities. If a case mentioned by the court is unfamiliar, the best course may include making an offer to the court to provide a supplemental response on that limited citation and its applicability. Be both nimble and flexible in successfully navigating oral argument. Avoid a regimented format of critical points.

Be careful with concessions. It is one thing to concede something to gain credibility with the court, but another one altogether to be led astray by a judge who may be lobbying the panel for a certain position. Also, be aware that a verbal admission made by counsel at oral argument is a binding judicial admission, the same as any formal concession made during the course of the proceedings.[36] When answering questions, always use the greatest care in answering those that test the principles underlying the argument. Finally, beware of the relentless judge.[37]

Although much of the aforementioned information is equally applicable to appellees' oral argument to the courts of appeals, there are some differences of note. First, appellee counsel should keep in mind that they prevailed in the lower court, and, therefore, it may be reasonable for them to feel differently about the appeal. Nevertheless, keep the following in mind: (1) Bring prepared notes that key the main points. Those points must make an affirmative case and give the judges the emotional and intellectual basis for affirming; (2) Draft an outline as the appellant speaks and note the main points to add that are responsive to the opponent's argument and the judges' comments; and (3) Correct only the opponent's critical misstatements.[38]

As the appellant, do not forget to save time for rebuttal. Because of the dynamic nature of oral argument, never attempt to prepare the rebuttal in advance. One cannot rebut what has not yet been argued. The sole advance preparation of rebuttal consists of an intimate knowledge of the relevant, dispositive authority. Consider waiving rebuttal if the court has no questions and it would add no value to your argument.[39]

Some courts enforce the time limitations stringently; others allow lawyers to keep speaking so long as they are answering the court's questions. Remember to manage time properly because poor clock management is one of the easiest mistakes to make.[40] "In the end, all the lists of all the rules in all the books on appellate advocacy can be distilled into one word: preparation."[41]♦

Endnotes

1. Andrew L. Frey & Roy T. Englert Jr., *How to Write a Good Appellate Brief*, 20 LITIG. No. 2, at 6 (Winter 1994).
2. *Id.*
3. Evan M. Tager, *Tips on Preserving Arguments for Appeal*, INS. L. WKLY. (Mealey) (Dec. 1, 1997).
4. 1 ROBERT S. HUNTER, TRIAL HANDBOOK FOR ILLINOIS LAWYERS § 4.4, 89 (7th ed. 1997).
5. *Id.*
6. Tager, *supra* note 3.
7. United States v. Sumner, 265 F.3d 532, 537 (7th Cir. 2001) (internal citations omitted).
8. United States v. Cooper, 243 F.3d 411, 416 (7th Cir. 2001).
9. FED. R. CIV. P. 50.
10. STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, FEDERAL CIVIL RULES HANDBOOK 761 (2003).
11. Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 126 S. Ct. 980, 983, 2006 U.S. LEXIS 916 (2006).
12. Tager, *supra* note 3.
13. *Unitherm*, 126 S. Ct. at 990 (Stevens, J., dissenting).
14. *Id.*
15. STEPHEN RACKOW KAYE & RONALD S. RAUCHBERG, BUSINESS AND

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Statutory Construction

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canons of statutory construction. It is unfortunate that wooden reliance on those canons has led to unjust results from time to time.") (citing cases).
38. *Id.* (citing L. FILSON, THE LEGISLATIVE DRAFTER'S DESK REFERENCE 222 (1992)).
39. *Id.* at 467 (citing HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE, HLC NO. 104-1, p. 24 (1995)).
40. *Id.* (citing SENATE OFFICE OF THE LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL 10 (1997)).
41. *Id.*
42. *Id.* at 467–68.
43. *Id.*
44. Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248, 1256 (11th Cir. 2003).
45. Ortega v. Star-Kist Foods, Inc., 370 F.3d 124, 143 (1st Cir. 2004).
46. *Exxon-Ortega*, 125 S. Ct. at 2616.
47. Free v. Abbott Labs., 529 U.S. 333 (2000) (per curiam).
48. *Exxon-Ortega*, 125 S. Ct. at 2615.
49. 28 U.S.C. § 1367.
50. *Exxon-Ortega*, 125 S. Ct. at 2620.
51. *Id.* at. 2619 (quoting Finley v. United States, 490 U.S. 545, 556 (1989)).
52. *Id.* (quoting *Finley*, 490 U.S. at 549).
53. *Id.*, 125 S. Ct. at 2621.
54. *Id.*
55. *Id.* ("Nothing in § 1367 indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between the jurisdictional categories we have historically labeled pendent and ancillary.").
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 2622.
62. *Id.* at 2623.
63. *Id.* at 2624.
64. *Id.* at 2625.
65. Given (1) the lengthy discussion of various jurisdictional theories in the context of § 1367 and of the removal jurisdiction; (2) several dissenting opinions in this case; (3) prior Supreme Court opinion on the same issue with the Court split 4-4; and (5) the sharp split (5-5) between circuits prior to the Supreme Court review, the emphatic declaration that the statute is unambiguous is surprising, to say the least.
66. *Id.* at 2625 ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.").
67. *Exxon-Ortega*, 125 S. Ct. at 2626.
68. *Id.* at 2625 (quoting H. R. REP. NO. 101-734 (1990) at 28).
69. H.R. REP. NO. 101-734 at 29, and n.17 (citing Zahn v. Int'l Paper Co., 414 U.S. 291 (1973) and Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921)).
70. *Id.* at 29, and n.16.
71. *Exxon*-Ortega, 125 S. Ct. at 2625–26.
72. *Id.* The Court also rejected the argument that the Class Action Fairness Act, PUB. L. 109-2, 119 STAT. 4, has any bearing on the case. *Id.* at 2627–28.
73. *Id.* at 2626.
74. *Id.* (citing SUBCOMMITTEE WORKING PAPER, at 561, n. 33).
75. *Id.*
76. *Id.* at 2627 (citing Rowe, Burbank & Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943, 960, n. 90 (1991)).
77. *Id.*
78. *Id.*
79. *Id.* at 2628 (Stevens, J., dissenting) (citing *Koons Buick*, 125 S. Ct. at 463 n.1 (Stevens, J., concurring).
80. With increasing frequency, the Court consults dictionaries to ascertain the meaning of the key statutory terms. Some examples from the past term include Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2779 (2005) (consulting BLACK'S LAW DICTIONARY for the meaning of inducement of unlawful act by another); Dodd v. United States, 125 S. Ct. 2478, 2482 (2005) (consulting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY for the meaning of the word "if"); Johnson v. California, 125 S. Ct. 2410, 2416 n.4 (2005) (consulting BLACK'S LAW DICTIONARY for the meaning of "inference"). In *Koons Buick*, the Court used the Legislative Drafting Manual as a sort of dictionary to ascertain the technical meaning of "subparagraph."
81. Several scholars, including those endorsing textualism, have noted the inconsistency of the "plain meaning" rule, which purports to remove normative considerations from the act of statutory construction, and the "absurd" result exception to it, which invites such considerations through the back door. *See, e.g.*, Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2419–24 (2003). As William Eskridge points out, Justice Scalia's test for absurdity—"whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny"—depends in large part on one's social setting. WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION 86 (3d ed. 2001) (2004 Supp.) (citing Johnson v. United States, 529 U.S. 684, 718 (2000) (Scalia, J., dissenting)). Indeed, Eskridge's observation reinforces the strength of pragmatic theories of construction borrowing hermeneutics' insights, *see supra* Part (II)(B), that the meaning does not exist in a vacuum but instead the interpreter's background and understanding provide words with their meaning. Despite this criticism, the "absurd" result check continues to be used by those professing to be textualists.
82. *See* ESKRIDGE, *supra* note 81, at 813.
83. *Id.*
84. *Id.* at 772 (citing Judge Posner's dissent in United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990) (en banc), aff'd sub nom. Chapman v. United States, 500 U.S. 453 (1991)).
85. *Id.* at 784.
86. *Id.* at 785 (citing, inter alia, Perez v. Wyeth Labs., Inc., 734 A.2d 1245 (N.J. 1999)).
87. *Id.* at 800–01 (citing W. Eskridge Jr. & Philip Frickey, *Statutory Construction as Practical Reasoning*, 42 STAN. L. REV. 321, 345–53 (1990)).
88. *Id.* at 801.
89. *Id.* at 802.

YOUNG LAWYER

Supreme Court Rules on Post-Verdict Motions

By Rita B. Trivedi

The U.S. Supreme Court has held that, under Federal Rule of Civil Procedure 50, if a party files a motion for judgment before the case goes to the jury but fails to renew the motion after judgment is entered, the omission precludes an appellate court from ordering a new trial on grounds of insufficient evidence.[1]

In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, the Court concluded that the defendant had failed to comply with Rule 50 and therefore reinstated the plaintiff's judgment. "This decision illustrates the principle that a lawyer's slip in etiquette may be the client's ruin," warns Sheldon M. Finkelstein, Newark, NJ, Co-director of the Section of Litigation's Division VII—Task Forces.

Rule 50(a) provides that if a party in a jury trial has been fully heard on an issue and no legally sufficient evidentiary basis exists for a reasonable jury to find for that party on a claim or defense, the district court may enter judgment for the moving party as a matter of law. The motion, however, must be made before the case goes to the jury. Rule 50(b), in turn, provides that if the court denies the motion, the movant may renew its motion for judgment within 10 days after the entry of judgment, and may alternatively seek a new trial.

In *Unitherm*, a patent and antitrust dispute, the defendant moved for judgment under Rule 50(a) before the case went to the jury. The defendant did not, however, renew its motion as to liability once the jury found (and judgment was entered) for the plaintiff on its patent and infringement claims. Nor did the defendant move for a new trial.

The Court of Appeals for the Federal Circuit, applying Tenth Circuit precedent on Rule 50 motions, concluded there was insufficient evidence to sustain the plaintiff's antitrust claims, and ordered a new trial on those issues. The Tenth Circuit had previously held that making such a motion during trial was sufficient to preserve a post-verdict challenge to the sufficiency of the evidence, but that a new trial was the only appellate remedy that could be ordered in such circumstances.[2]

"This decision illustrates the principle that a lawyer's slip in etiquette may be the client's ruin."

The Supreme Court, however, ruled that a party's failure to bring a Rule 50 motion for judgment during and after trial is fatal to appellate review for insufficient evidence and precludes a court of appeals from either entering judgment for the losing party or ordering a new trial. The Court further held that although 28 U.S.C. § 2106 allows a federal appellate court to affirm, modify, or reverse a judgment, a party seeking relief under that statute must still comply with the two-step process of Rule 50.♦

"Supreme Court Rules on Post-Verdict Motions" by Rita Trivedi, published in *Litigation News*, Volume 31, No. 4, May 2006. © 2006 by the American Bar Association. Reprinted with permission.

Endnotes

1. Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 126 S. Ct. 980 (2006).
2. Cummings v. Gen. Motors Corp., 365 F.3d 944 (10th Cir. 2004).

Obtaining Review of Interlocutory Orders

(Continued from page 15)

24. Ariel v. Jones, 693 F.2d 1058 (11th Cir. 1982); Periodical Publishers Serv. Bureau, Inc. v. Keys, 981 F.2d 215 (5th Cir. 1993).
25. *In re* Int'l Horizons, Inc., 689 F.2d 996, 1001 (11th Cir. 1982).
26. *See* Robinson v. Tanner, 798 F.2d 1378, 1380 n.3 (11th Cir. 1986).
27. Moses H. Con Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).
28. Gulfstream Aerospace Corp. v. Mayacamus Corp., 485 U.S. 271 (1988).
29. Sam Fox Publ'g Co. v. United States, 366 U.S. 683 (1966).
30. Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987); *see also* Lucas v. McKeithen, 102 F.3d 171 (5th Cir. 1996) (denial of intervention as of right was appealable, but court had limited jurisdiction to review denial of permissive intervention).
31. Curtiss-Wright Corp v. Gen. Elec. Co., 446 U.S. 1, 3 (1980).
32. Seatrain Shipbldg. Corp. v. Shell Oil Co., 444 U.S. 571, 583 n.21 (1980).
33. *Curtiss-Wright*, 446 U.S. at 9–10 (1980); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956).
34. 28 U.S.C. § 1292(b).
35. 28 U.S.C. § 1453(c)(1).
36. *Id.*
37. Miedema v. Maytag Corp., F.3d, 2006 WL 1519630 (11th Cir. 2006).
38. Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (7th Cir. 1999).
39. *See* Carter v. West Publ'g Co., 225 F.3d 1258, 1261 (11th Cir. 2000); Newton v. Merrill Lynch, Pierce, Fenner & Smith, 259 F.3d 154 (3d Cir. 2001); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138 (4th Cir. 2001).
40. Kerr v. U.S. Dist. Ct., 426 U.S. 394 (1976).
41. *In re* Fink, 876 F.2d 84 (11th Cir. 1989).
42. Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1366 (11th Cir. 1997).
43. Bauman v. U.S. Dist. Ct., 557 F.2d 650, 654–55 (9th Cir. 1997). *See also In re* United States, 903 F.2d 88 (2d Cir. 1990).

Common Traps in Making the Record for Appeal

(Continued from page 1)

Deposition and Video Excerpts

Skilled trial counsel often use depositions to supplement live trial testimony, impeach witnesses, refresh witnesses' recollections, and provide context for witness testimony. Increasingly, lawyers also play videotaped depositions at trial.[4] Used wisely, depositions can provide some of the best evidence at trial by demonstrating specific facts and revealing severe credibility issues.

But using depositions creates a record trap. Keep in mind that the mere listing of deposition designations in a joint pretrial order does not mean that they were read in evidence, and thus does not make the excerpts part of the record. To be of use on appeal, the record must (1) indicate precisely which portions of a particular deposition were read in evidence and (2) include the particular deposition text actually read. However, some court reporters, unless requested, will not note such information, which can result in an incomplete record. The following examples, taken from actual trial transcripts used on appeal, powerfully make this point:

- "(A segment of a videotape was played for the jury.)"
- "(Portions of the deposition of [WITNESS] taken on January 21, 2002, were read to the jury.)"
- "(Whereupon portions of the videotaped deposition of [WITNESS] were played to the jury.)"

Suffice it to say that such a transcript makes it impossible to ascertain the substance of the testimony, and thus makes for a nearly useless record.[5]

Ensuring that the record correctly reflects the deposition excerpts admitted in evidence requires some vigilance—and assistance from the court reporter. At a minimum, provide the court reporter designations for the read or played portions (by deposition, page, and line number), and ask the court reporter to include the designations in the trial transcript (again by deposition, page, and line number) to ensure the trial transcript reflects precisely the read deposition designations.

Also make sure to file the pertinent original transcripts (with the signature page, corrections, or affidavit of nonsignature) so that the read text is in the record. Alternatively, ask the court reporter if he or she would stenographically record read portions directly into the transcript. To ensure the accuracy of the read portions, provide the court reporter the deposition transcript along with the designations. Although some court reporters (and judges) discourage this method, it creates the cleanest record because the appellate court (and appellate counsel) need not locate the deposition transcript to ascertain the testimony. As a last resort, supplement the record with a filing that indicates precisely (by deposition, page, and line number) any read portions, along with the pertinent deposition transcripts.

A series of rulings may gain significance when considered collectively, even though each individual sidebar ruling is innocuous.

Sidebar Rulings and Discussions; Courtroom Noises and Gestures

Some newer courtrooms include microphones that feed to the court reporter so that the reporter may transcribe any sidebar conversations with the judge that occur during trial. But courtrooms that lack this newer technology create another record trap. Unless the court or counsel puts something on the record (or unless the court reporter is particularly vigilant and close enough to hear and transcribe the conversation), there will be no record of what was said at the sidebar.

In many instances nothing of significance is lost, but that is not always the case. For example, a series of rulings may gain significance when considered collectively, even though each individual sidebar ruling is innocuous. Other sidebar rulings gain significance long after they have been made. As with deposition transcripts, a transcript that says "(A discussion was held at the bench between the Court and counsel out of the hearing of the jury)" is of no use on appeal.

Accordingly, you should make sure that the transcript reflects all sidebar conversations and other pertinent events, or create a record concerning any significant sidebars (by letting the court know as soon as practicable after the event, including during the next recess or at the beginning or end of the day, that you need to make a record).

You should also ensure that potentially favorable or prejudicial courtroom behavior makes its way into the record. When the opposing party laughs and points at your client, for instance, you must ensure that the court reporter describes the behavior for the record; ask the judge to do so or describe it yourself on the record.[6] Many lawyers maintain a separate list of "make record" items during the trial to make certain the record is made.

Failing to Comply with Rule 50 Pre- and Post-Verdict

Avoid the Rule 50 trap. To challenge the legal insufficiency of the evidence pre-verdict, you must file a Rule 50(a) motion for judgment as a matter of law.[7] Despite that it probably will be denied, you must renew your motion (Rule 50(b)) after the ver-

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dict. Otherwise, you may join the likes of ConAgra—a company that, according to a recent U.S. Supreme Court opinion, lost its ability to appeal the evidentiary insufficiency by failing to heed Rule 50.[8] The result must have been particularly troubling to ConAgra because the Federal Circuit Court of Appeals below had considered the merits and agreed that the other side had presented insufficient evidence. The Supreme Court nevertheless reversed because failure to file both motions for judgment as a matter of law barred consideration on appeal.

Furthermore, treat your Rule 50 motions with care. Because Rule 50(a) is designed to alert the nonmoving party to alleged defects in the evidence (so they may be corrected if possible), "[a] party cannot raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion."[9]

Therefore, to preserve your challenge for another day, you must carefully file a Rule 50 motion pre- and post-verdict that includes all issues you plan to raise on appeal.

Unsuccessful Summary Judgment Motions

This Rule 50 procedure also should be followed to preserve issues presented in an unsuccessful summary judgment motion. Technically, if the summary judgment issue involves a pure "error of law that, if not made, would have required the district court to grant the motion," Rule 50 motions need not be filed to preserve the issue.[10] But the far better (and safer) practice is to move for judgment as a matter of law during trial per Rule 50 and include all reasonable grounds asserted in the unsuccessful summary judgment motion (as well as any other grounds). No matter how psychologically difficult, re-urge these grounds even though the court previously rejected the theories, and even though the trial court has not indicated that it would change its position.[11] Fortunately, however, it is likely that after December 1, 2006, a rule change will take effect pursuant to which Rule 50 will no longer require you to re-urge your prior motion at the close of the evidence.[12] Nevertheless, make sure that your prior motion is comprehensive of all issues before you decide that a subsequent one is superfluous.

Detailing Excluded Evidence in Offers of Proof

If the trial court excludes some important evidence, either by a ruling on a motion *in limine* or otherwise, one must generally make an offer of proof indicating the nature of the evidence that would have been presented had the court ruled differently.[13] A failure to make an offer of proof generally precludes appellate review of the exclusion.[14] The trickier part is making the offer of proof complete. A proper offer of proof allows the trial court to determine whether it should revise its decision and allows the appellate court to determine whether the exclusion of the evidence requires reversal. It therefore must include sufficient detail concerning what facts the evidence would establish and demonstrate why the evidence should be admitted. Unfortunately, the adequately detailed offer of proof is the exception rather than the rule.

Common methods for making an offer of proof include submitting it in writing, orally summarizing the expected witness testimony on the record, or indicating that the witness will testify with respect to a particular issue consistently with the witness's deposition (which should then be included in the record). The far better practice from an appellate perspective, however, is to have the witness testify outside the presence of the jury. On significant issues, insist on this method to guarantee an adequate record. Either way, the key is to be thorough and complete.

Jury Instruction Issues

Properly preserving jury instruction issues is another area that raises record traps. Typically, both sides submit instructions, and in all but the simplest cases disagreements arise between the parties, requiring the court to settle the instructions. But failing to detail the basis for an objection, failing to specify all bases for an objection, and failing to provide written alternatives to objectionable instructions may, absent plain error,[15] result in a waiver of the objection.[16]

Rule 51 of the Federal Rules of Civil Procedure sets forth the procedures governing jury instructions:

> A party may, at the close of the evidence . . . file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests. . . . After the close of the evidence, a party may . . . file requests for instructions on issues that could not reasonably have been anticipated at an earlier time. . . . A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection. An objection is timely if . . . a party . . . objects . . . before the instructions and arguments are delivered.

But the Rule is more difficult to apply than its language suggests. In practice, complying with Rule 51 requires at least four steps.

First, submit written jury instructions on every anticipated issue before the close of evidence or as the court directs. As the Rule notes, failure to do so will waive any other instructions except those involving "issues that could not reasonably have been anticipated at an earlier time. . . ."[17]

Second, object to the objectionable instructions submitted by other parties. Ideally, submit objections in writing to create a clean record, and remember that clarifications that occur during informal conferences between the court and counsel should be put on the record. Also, make a record with respect to any requested instructions that the court refuses to give,[18] and make the objections concerning instructions specific—general objections simply will not do.[19] Thus, an objection that an instruction is "an incomplete statement of the law" will not suffice to preserve the issue for appeal.[20] Instead, counsel must identify the particular portion of the instruction that is objectionable, and must state why it is objectionable, that is, how it misstates the law. Similarly, if the instruction is objectionable for more than one reason, counsel must specify each of the reasons in detail.

Third, when challenging the wording of an instruction—for example, if the instruction inaccurately describes the "willful and wanton" misconduct necessary for an award of punitive damages—submit a proposed alternative.[21] But keep in mind when submitting alternatives that submitting an erroneous instruction on a claim may invite error.[22] If no instruction should be given at all—because, for example, the facts do not warrant a

consequential damages instruction—that threshold objection should be made clear.

Fourth, make any final objections after the court settles the instructions. Under the rules, the court may modify the instructions submitted by the parties. To the extent the court incorporates suggestions from both sides (or provides its own input) and the instructions remain objectionable, an objection to the revised instructions should be made. Do not assume that an objection to an earlier version of an instruction carries over to the final form of the instructions given to the jury. In addition, while the "pointless formality" doctrine or some other exception could, in theory, rescue your failure to object, do not count on it.[23]

Make sure that the appellate record includes the refused jury instructions; otherwise, there will be nothing to argue about on appeal.

In making the record on the jury instructions, also keep in mind the governing standards of review. An appellate court will "review the instructions in their entirety de novo to determine whether the jury was misled in any way."[24] And it is reversible error to refuse a correct instruction, not otherwise incorporated into the instructions given, that is "integral to an important point in the case."[25] One final, but important, note: Make sure that the appellate record includes the refused jury instructions; otherwise, there will be nothing to argue about on appeal.[26] In sum, although the courts overturn comparatively few verdicts on the basis of a challenge to jury instructions, the standard of review on appeal for refused instructions is favorable and deserves extra vigilance.

Conclusion

If it is not in the record, it does not—for appellate purposes—exist. The appellate courts place the burden on the "appealing litigant [to] ensure that sufficient facts are developed at trial to support a challenge on appeal."[27] It thus is critical to take steps throughout the course of litigation to ensure that a proper record is being developed. Accordingly, before the notice of appeal is filed, be sure to take the time to review the record index and reflect on whether anything additional is needed on appeal. Remember it is your responsibility to do "whatever else is necessary" to guarantee that a complete record makes its way to the appellate court.[28] Whatever your trial skills, you never know when you will wind up as an appellant, when making the record for appeal may be case-dispositive.♦

Endnotes

1. *See, e.g.*, Patrick v. Burget, 486 U.S. 94, 98 n.3 (1988) (noting that an appellate court must review the evidence in the light most favorable to upholding the jury verdict); Venegas v. Wagner, 831 F.2d 1514, 1517 (9th Cir. 1987) (same).
2. *See, e.g.*, Inland Bulk Transfer Co. v. Cummins Engine Co., 332 F.3d 1007 (6th Cir. 2003) (noting that appellate courts rarely allow parties to supplement the record and denying the motion to supplement).
3. By far the most common record preservation issue concerns failing to make appropriate and timely evidentiary objections. This article concerns only inadvertent failures, however, recognizing that counsel often intentionally do not object because of the effect of such objections on the jury.
4. *See* FED. R. CIV. P. 32; *see also* FED. R. EVID. 106.
5. *Cf.* Andersen v. Cumming, 827 F.2d 1303, 1305 (9th Cir. 1987) (noting that appellate court cannot decide issue without a sufficiently developed factual record); *see also* FED. R. APP. P. 11(a) (placing burden on appellant to procure appellate record).
6. *See, e.g.*, United States v. Schuler, 813 F.2d 978, 980 (9th Cir. 1987) (noting difficulty of reviewing claim based on defendant's courtroom laughter when counsel failed "to ask the trial court to have it included in the record").
7. *See, e.g.*, Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003).
8. Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 126 S. Ct. 980 (2006).
9. *Freund*, 347 F.3d at 761.
10. Banuelos v. Constr. Laborers' Trust Funds for S. Cal., 382 F.3d 897, 902 (9th Cir. 2004).
11. *See* FED. R. CIV. P. 50(b).
12. The text of the new rule, effective December 1, 2006, is available at http://www.uscourts.gov/rules/newrules6.html ("Civil Rule 50").
13. *See* FED. R. EVID. 103(a) ("Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.").
14. Walden v. Georgia-Pac. Corp., 126 F.3d 506, 518 (3d Cir. 1997).
15. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2558 (Supp. 2005).
16. FED. R. CIV. P. 51; Voohries-Larson v. Cessna Aircraft Co., 241 F.3d 707, 714–15 (9th Cir. 2001).
17. FED. R. CIV. P. 51(a).
18. *See, e.g.*, Kirschner v. Uniden Corp. of Am., 842 F.2d 1074, 1077–78 (9th Cir. 1988) (striking documents not presented to the district court before judgment or order).
19. Palmer v. Hoffman, 318 U.S. 109, 119 (1943); *Voohries-Larson*, 241 F.3d at 715 ("Here, as stated above, the record reveals that the district court did not know the specific constitutional and statutory grounds on which the appellants now object.").
20. *Voohries-Larson*, 241 F.3d at 713–14.
21. *Cf. id.* at 715.
22. *See* Parker v. Champion, 148 F.3d 1219, 1222 (10th Cir. 1998).
23. Thornley v. Penton Publ'g, Inc., 104 F.3d 26, 30 (2d Cir. 1997); *Voohries-Larson*, 241 F.3d at 714–15 (quoting Glover v. BIC Corp., 6 F.3d 1318, 1326 (9th Cir. 1993)) (listing elements of doctrine: "(1) throughout the trial the party argued the disputed matter with the court; (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction; and (3) the party offered an alternative instruction").
24. Townsend v. Lumbermen's Mut. Cas. Co., 294 F.3d 1232, 1237 (10th Cir. 2002) (*quoting* Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 552 (10th Cir. 1999)).
25. Seahorse Marine Supplies v. P.R. Sun Oil, 295 F.3d 68, 76 (1st Cir. 2002) (*quoting* United States v. DeStefano, 59 F.3d 1, 2 (1st Cir. 1995)).
26. *See, e.g.*, Sabari v. United States, 333 F.2d 1019, 1021 (9th Cir. 1964) (refusing to infer error when counsel failed to include the proposed jury instructions in appellate record).
27. Andersen v. Cumming, 827 F.2d 1303, 1305 (9th Cir. 1987).
28. FED. R. APP. P. 11(a).

Advisory Committee Proposes Draft Federal Rule of Evidence 502

(Continued from page 1)

inadvertent production of privileged documents as well as "claw-back" and "quick peek" agreements designed to preserve the privilege in federal court cases.[4]

By March 2006 the Advisory Committee had drafted and circulated a proposed Federal Rule of Evidence 502 addressing various privilege issues, including waiver of the attorney-client privilege and work product protection as well as inadvertent production.[5] The Advisory Committee's stated intention in doing so was to address some of the issues raised by the inadvertent production of these materials, given the increasing costs of reviewing the enormous volumes of electronic information more and more frequently relevant in litigation. The Advisory Committee also addressed the concern that any disclosure of protected information will operate as a subject matter waiver and several other related issues, including those set forth in *Hopson v. Mayor*.[6]

The Advisory Committee accepted written comments to the initial draft and scheduled a public hearing in New York on April 24, 2006, in what turned into a miniconference on the proposal.

Miniconference Participants and Comments[7]

The April 24 miniconference was moderated by Judge Jerry E. Smith (5th Cir.), chair of the Advisory Committee, and Professor Dan Capra of Fordham Law School, who is the reporter for the Advisory Committee. Presenting at the miniconference were judges, practitioners, regulators, and law professors. The presentations addressed a wide array of topics of importance to the Advisory Committee, including the scope of waiver and inadvertent disclosure and selective waiver.

Scope of Waiver and Inadvertent Disclosure

The Advisory Committee's March 2006 draft provided that in federal court the subject matter of a disclosed attorney-client privileged or work product protected communication is waived only if the undisclosed communication ought in fairness to be considered with the disclosed communication or information. The draft also provided that the disclosure of attorney-client privileged or work product protected material does not operate as a waiver in a state or federal proceeding if the disclosure was inadvertent and made in connection with federal litigation or administrative proceedings, and if the holder of the privilege took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, following the procedures in Fed. R. Civ. P. 26(b)(5)(B) (scheduled to become effective December 1, 2006).[8]

Almost all of those presenting were in favor of these two provisions. The judges in particular stated that these provisions furthered the purposes of both the Federal Rules of Evidence and the Federal Rules of Civil Procedure. Judge Paul W. Grimm (D. Md.), author of the *Hopson* opinion, stated that the proposed amendments furthered the objective to "promote the fast, fair, and economical resolution of disputes" in light of the fact that "pre-production review of information to ensure against privilege waiver or work product protection can cost easily hundreds of thousands of dollars, and in some instances millions [of] dollars."[9] Dissenting was practitioner Stephen D. Susman, Susman Godfrey, who "oppos[ed] the idea of embodying the proposed rule 502 or any rule of evidence or procedure in a federal statute."[10] Although supporting a few portions of the proposal, he said that in his view "one of the biggest discovery abuses remaining is the attempt to hide documents as privileged which are not really privileged."[11]

Court Orders and Agreements of the Parties

The Advisory Committee's March 2006 draft further provided that in federal court an order concerning preservation or waiver of privilege governs in federal *and* state proceedings, even as to third parties. This provision was designed to resolve an anomaly created by the amendments to the Federal Rules of Civil Procedure scheduled to become effective December 2006, which authorize "clawback" and "quick peek" agreements that have become so popular due to the volume of material to be reviewed for privilege during discovery, and preserving the privilege as to the parties to such agreements but likely not binding nonparties to such agreements.[12]

The majority of those presenting on April 24 supported these provisions, which incorporate from an evidentiary perspective the procedures for validating "claw back" and "quick peek" agreements being authorized in changes to the Federal Rules of Civil Procedure. Judge John G. Koeltl (S.D.N.Y.) stated that these provisions "strike the right balance" between the prevailing and conflicting authority on waiver of privilege by binding third parties if an agreement on the effect of disclosure is incorporated into a court order.[13] Judge Grimm noted that, although the authority to bind third parties is an issue, "with subject matter waiver being the price tag," he "would hope that those who express reservations or doubts about proposed rule 502 will say how they would propose to address this problem in its absence."[14] Practitioner Ariana J. Tadler, Milberg Weiss Bershad & Schulman, expressed concern about "how these provisions, when read in an interactive way, will ultimately apply" and "will have certain consequences."[15] David Stellings, speaking on behalf of the Association of Trial Lawyers of America, also opposed the concept, stating that "federal law should not supersede that of the states in substantive areas such as privilege, absent a compelling reason," which he thought had not been shown.[16]

Selective Waiver

A third key component of the Advisory Committee's March 2006 draft was a provision stating that in federal or state proceedings a disclosure of attorney-client or work product privileged material, when made to a federal public office or agency in the exercise of its regulatory authority, does not operate as a waiver of the privilege in favor of nongovernmental persons or entities, with such disclosure to state or local government agencies being governed by applicable state law.[17] This concept of selective waiver—that disclosure of protected information to a government agency con-

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ducting an investigation does not constitute a general waiver of attorney-client privilege or work product protection—has been quite controversial. Perhaps not surprisingly, this provision generated by far the most attention at the April 24 miniconference.

Those in favor of selective waiver were of the view that it encourages cooperation with government investigations. Richard M. Humes, from the Securities and Exchange Commission, and Peter B. Pope, from the New York Attorney General's Office, favored these provisions. Mr. Humes stated that the proposed rule "serves the public interest" and, responding to criticism of the concept, stated that under the rule "private litigants could still argue that they are entitled to discover that work product from the company by demonstrating sufficient need under the work product doctrine."[18] Mr. Robinson, although acknowledging concerns with the concept, favored the proposal, stating that "what the rule allows you to do is, in a mutually beneficial way, share information with the enforcers of the law, and as a consequence, minimize the damage that will occur to a waiver to the entire world."[19]

Most of the testimony, however, opposed the selective waiver concept, for a variety of different reasons. David M. Brodsky, Latham & Watkins, argued that the selective waiver procedure contemplated by the draft "continues an alarming trend threatening the viability of the corporate attorney-client privilege," adding that the proposed rule codified and promoted a "culture of waiver."[20] Stephen Susman and Ariana Tadler also opposed the concept, and stated that they were surprised to find themselves in agreement with Mr. Brodsky on this issue.[21] Mr. Susman said that the proposed rule seemed "designed to make it impossible for plaintiffs to obtain privileged materials already disclosed voluntarily to the government."[22] David Stellings of ATLA added that "the rule unnecessarily and indefensibly would weaken the attorney client privilege and the work product doctrine."[23]

Advisory Committee Action

In light of the written comments received and the presentations at the April 24 miniconference, the Advisory Committee made several modifications to the prior draft. In a May 16 report to the chair of the Federal Standing Committee on Rules of Practice and Procedure, the Advisory Committee submitted a revised rule with a recommendation that it be published for public comment.[24] In doing so, the Advisory Committee unanimously agreed on five basic principles:

1. A subject matter waiver should be found only when privilege or work product has already been disclosed, and a further disclosure "ought in fairness" to be required in order to protect against a misrepresentation that might arise from the previous disclosure.
2. An inadvertent disclosure should not constitute a waiver if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error.
3. A provision on selective waiver should be included in any proposed rule released for public comment, but should be placed in brackets to indicate that the Committee has not yet determined whether a provision on selective waiver should be sent to Congress.
4. Parties to litigation should be able to protect against the consequences of waiver by seeking a confidentiality order from the court; and in order to give the parties reliable protection, that confidentiality order must bind non-parties in any federal or state court.
5. Parties should be able to contract around common-law waiver rules by entering into confidentiality agreements; but in the absence of a court order, these agreements cannot bind non-parties.[25]

The Advisory Committee also unanimously approved a revised draft Federal Rule of Evidence 502 for public comments, which reads in its entirety as follows:

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

(a) Scope of waiver. In federal proceedings, the waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.

(b) Inadvertent disclosure. A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

[(c) Selective waiver. In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.]

(d) Controlling effect of court orders. A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.

(e) Controlling effect of party agreements. An agreement on the effect of disclosure of a communication or informa-

tion covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

(f) Included privilege and protection. As used in this rule:

(1) "attorney-client privilege" means the protection provided for confidential attorney-client communications, under applicable law; and

(2) "work product protection" means the protection for materials prepared in anticipation of litigation or for trial, under applicable law.[26]

The proposed Committee Notes are detailed and instructive and state that the rule will provide a uniform set of standards under which parties can determine the consequences of a disclosure of information, and provide that subject matter waiver is reserved for those situations where fairness requires a further disclosure of related protected information. They add that the rule does not attempt to alter federal or state law on whether a communication is protected as attorney-client privilege or work product as an initial matter. In addition, given the controversy surrounding selective waiver, that provision of the revised draft was placed in brackets to indicate that the Committee has not yet determined whether a provision on selective waiver should be included in the rule.[27]

Considering Draft Fed. R. Evid. 502

At its June 22–23, 2006, meeting, the Federal Standing Committee on Rules of Practice and Procedure approved the recommendation of the Advisory Committee and approved publishing the draft for public comment.[28] Beginning in August 2006, proposed Rule of Evidence 502 will be published for comment for several months. As noted above, given that the draft rule is an evidentiary rule addressing privilege, the rule cannot take effect through the ordinary rulemaking process; instead, Congress would need to enact it directly through its legislative authority, including under the Commerce Clause.[29]♦

Endnotes

1. *See* www.uscourts.gov/rules/evdocket.pdf at 9 (summarizing Advisory Committee's consideration of such provisions from 1996 to the present).
2. 28 U.S.C. § 2074(b) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.").
3. *See* www.uscourts.gov/rules/Reports/EV05-2006.pdf at 2.
4. *Id.* at 15–16.
5. The text of the rule as originally published can be found at www.lexisnexis.com/applieddiscovery/lawLibrary/ProposedRuleEvidence502.pdf.
6. *Id.* at 3–10. *See also* Hopson v. Mayor, 232 F.R.D. 228 (D. Md. 2005).
7. A transcript of the April 24, 2006, miniconference, a list of presenters, and other related information can be found at www.uscourts.gov/rules/advcomm-miniconference.html.
8. *See* www.lexisnexis.com/applieddiscovery/lawLibrary/ProposedRuleEvidence502.pdf at 1–2.
9. www.uscourts.gov/rules/advcomm-miniconference.html "Transcript of the [April 24, 2006] Proceeding" at 9.
10. *Id.* at 29.
11. *Id.* at 30.
12. *See* www.lexisnexis.com/applieddiscovery/lawLibrary/ProposedRuleEvidence502.pdf at 2, 7–8.
13. www.uscourts.gov/rules/advcomm-miniconference.html "Transcript of the [April 24, 2006] Proceeding" at 4–8.
14. *Id.* at 12.
15. *Id.* at 35.
16. *Id.* at 52.
17. *See* www.lexisnexis.com/applieddiscovery/lawLibrary/ProposedRuleEvidence502.pdf at 2.
18. www.uscourts.gov/rules/advcomm-miniconference.html "Transcript of the [April 24, 2006] Proceeding" at 55.
19. *Id.* at 28.
20. *Id.* at 14, 18.
21. *Id.* at 31–32.
22. *Id.* at 31.
23. *Id.* at 47.
24. www.uscourts.gov/rules/Reports/EV05-2006.pdf.
25. *Id.* at 3.
26. *Id.* at 6–16 (including Committee Notes). Updates on the progress of the draft can be found at www.uscourts.gov and www.lexisnexis/applieddiscovery.com.
27. www.uscourts.gov/rules/Reports/EV05-2006.pdf at 9–16.
28. www.uscourts.gov/rules/newrules2.html.
29. www.uscourts.gov/rules/#standing0606.

Appeals in the Federal Courts

(Continued from page 19)

COMMERCIAL LITIGATION IN FEDERAL COURTS § 51:8 (2d ed. 2005).
16. FED. R. APP. P. 26(b).
17. FED. R. APP. P. 40.
18. FED. R. APP. P. 35.
19. Timothy S. Bishop, *Opposing Certiorari in the U.S. Supreme Court*, Mayer Brown Rowe & Maw, www.appellate.net/articles/oppcertinsc.asp (accessed June 5, 2006).
20. BAICKER-MCKEE, JANSSEN & CORR, *supra* note 10, at 1118.
21. *Id.* at 1119.
22. Jeffrey N. Cole, *An Interview with Steve Shapiro*, 23 LITIG. No. 2, at 23 (Winter 1997).
23. *Id.*
24. *Id.* at 24.
25. *Id.*
26. *Id.* (Steve Shapiro, responding to now-Judge Jeffrey Cole's suggestion that one of former Supreme Court Justice Benjamin N. Cardozo's greatest attributes as a judge was that "he could present facts so persuasively that the legal conclusions seemed inevitable").
27. *Id.*
28. *Id.*
29. *Id.*
30. Frey & Englert, *supra* note 1.
31. *Id.*
32. *Id.*
33. Andrew L. Frey, *Preparing and Delivering Oral Argument*, Mayer Brown Rowe & Maw, www.appellate.net/articles/prepdel799.asp (accessed June 5, 2006).
34. *Id.*
35. *Id.*
36. McCaskill v. SCI Mgmt. Corp., 298 F.3d 677, 680 (7th Cir. 2002).
37. Frey, *Oral Argument*, *supra* note 33.
38. *Id.*
39. *Id.*
40. Daniel C. Vock, *Appellate Lawyers' Version of High Wire Act: Oral Argument*, 15 CHI. DAILY L. BULL. No. 81 (April 24, 2004).
41. Christine Hogan, *May It Please the Court*, 27 LITIG. No 4, at 8 (Summer 2001).

Committee Information

Pretrial Practice & Discovery Committee's Home Page:

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