



SideBAR

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OPENING STATEMENTS

Chair's Message **Richard J. Pocker**

Huntsville In September: Hope Amidst Hysteria

The Federal Bar Association held its Annual Meeting and Convention this fall in Huntsville, a friendly and captivating community in Northern Alabama. The charms of Huntsville notwithstanding, the association's gathering was not immune to the haunting sense of financial insecurity drifting across the country that September weekend, as bar room television sets and newspaper headlines breathlessly recounted Wall Street's crisis, and the images of blanched and bewildered congressmen and treasury officials attempting alternately to instill concern and confidence flashed across the screen. Cab drivers could talk of little else (except for the NASA Space Camp, another frequent topic), and more than a few conversations among attendees gravitated to economic subjects. A number of last minute cancellations were attributable directly to the necessity for advising clients on the meltdown.

And yet, while the sense of economic and systemic crisis in the news was undeniable, the convention's themes and program evolved into a reassuring antidote to the potentially infectious pessimism that attends cataclysmic events. The message was one of hope and progress, and the way in which the legal profession and the judiciary have, shoulder to shoulder with the citizenry, faced and resolved far more serious and intractable problems than subprime mortgage defaults. And for those paying close attention, it was impossible not to leave in an optimistic frame of mind.

Message continued on page 2

Editor's Notes **Robert E. Kohn**

The Gavel, Passed

In this issue of *Sidebar*, new chair Rick Pocker reports from the Annual Convention in Huntsville, Ala.; Tenth Circuit practitioners update the developing law of expert witness immunity from civil lawsuits; a former judicial clerk takes shares the view from inside chambers; and we track recent proposals in Congress to limit the use of certain protective orders. The committee on Federal Rules of Procedure and Trial Practice also requests your comments on proposals to revise Rules 26 and 56 of the Federal Rules of Civil Procedure.

Future editions of SideBAR need your contributions. Please let us know if you or a colleague have written about a litigation topic, or even if you see a useful or interesting article that SideBAR readers might like to see reprinted here. And thank you for reading.



About the Editor

Robert E. Kohn litigates business and intellectual property disputes in the Los Angeles area. He also argues appeals in federal and state courts at all levels. A former clerk to the Hon. Joel F. Dubina of the Eleventh Circuit, Kohn attended Duke Law School. He is a member of the District of Columbia and California bars. Kohn co-chairs the committee on Federal Rules of Procedure and Trial Practice.

Inside this Issue

Briefing the Cause

Expert Witness Liability in the Tenth Circuit: Reading the Tea Leaves of Pace v. Swerdlow.....3

Federally Speaking

Invitation for Comment on Proposed Amendments to Rules 26 and 56 of the Federal Rules of Civil Procedure..... 4

"Sunshine" or "An Intolerable Burden" in Confidentiality Protective Orders? 6

Approaching the Bench

Inside Looking Out: What Two Years as a Litigator-Turned-Law Clerk Taught Me About the Fundamentals of Effective Advocacy in the Federal Courts7

Message continued from page 1

Part of this may have been entirely fortuitous. I doubt that the convention planners anticipated that it would coincide with a serious financial crisis, and the emphasis in the CLE offerings on government contracting issues was a reflection of Huntsville's prominence as a center of aerospace engineering rather than its significant impact in the civil rights movement. The first rate presentations and programs in the Government Acquisition Track were every bit as valuable, impressive and groundbreaking as those planners had hoped. Nonetheless, it was the content and flavor of the Civil/Criminal Track which conveyed the most encouraging message.

Keynote speaker Bobby Lee Cook set the tone. Unknown to most of us from outside the South, he is a renowned "country lawyer" with an impressive record of court room accomplishments and a refreshing faith in the American justice system. He never forgot where he came from, mainly because he never really left his hometown, managing to achieve legendary status not far from his roots in rural Georgia. Cook's oratorical tour de force was a reminder of the power of legal knowledge and a sense of one's community to level almost any playing field. In a profession sometimes seemingly obsessed with "the vanishing trial", he reminded all of us why we aspired to be litigators in the first place.

The other presentations were equally, if sometimes indirectly, inspiring. Alabama's best law firms contributed to the talented panels of presenters, displaying the quiet, courteous competence so feared by their adversaries. While the array of subjects addressed (the Fair Labor Standards Act, covenants not to compete, prison litigation, business bankruptcy issues, class actions, etc.) may not be the hottest legal topics on Wall Street, the developments recounted in all these areas are quietly shaping the society we live in, one case at a time. Markets may rise and fall, but the wheels of justice roll along.

Nonetheless, there was no greater reminder of the power of litigation at the grass roots to strengthen our society than the panel of distinguished African-American federal judges, all from districts in the South, addressing the U.S. Supreme Court's recent treatment of civil rights issues. Each of those judges traveled a challenging and determined path to their present position, with biographical sketches that in and of themselves demonstrate the progressive potential of combining legal education with a sense of purpose. While again perhaps seeming to address topics with little connection to complex financial controversies, the judges know better and emphasized the bedrock importance of the ongoing legal debate over educational opportunities and opportunity in the work force. It was a thoughtful and timely reminder that the foundation of our awe inspiring economic system is composed of students with dreams, employees seeking a fair share, and citizens who believe in the system with a surprising lack of cynicism.

I seldom leave CLE programs inspired or reassured. Usually I'm barely awake, or terrified about the malpractice I've just learned that I may have been inadvertently committing. But this time was different. Not that I'm some 19th century populist romantic, either—I am a card-carrying Republican, a partner in a large New York based law firm, and am known to have defended

allegedly predatory corporations from time to time. Nor am I easily impressed. Nonetheless, just as "affliction is a good man's shining time" (to quote English poet Edward Young), the same can be said for our profession. Though times are tough and we haven't even begun to see the end of this crisis, what I saw and heard in Huntsville gives me confidence that lawyers have much to contribute through training, judgment and optimism to seeing the county through the storm. After all, we've seen and faced down worse.

Meet the Chair

Richard J. Pocker is the new chair of the Federal Litigation Section. A former assistant U.S. attorney who later served as the U.S. attorney for the District of Nevada during the administration of President George H.W. Bush, he was also a Ninth Circuit Lawyer Representative for that district from 2004 to 2007. He is currently the administrative partner for the Nevada office of Boies, Schiller & Flexner, LLP.

Pocker began his legal career in the public sector after completing his military service with the 7th Infantry Division. He joined the U.S. Army Judge Advocate General's Corps and later became a federal prosecutor. Pocker returned to federal service in 1996 as chief counsel to the Select Subcommittee of the U.S. House of Representatives International Relations Committee. He also served for nine years on the Disciplinary Board of the State Bar of Nevada, which he chaired from 1999-2002. Pocker also participated as a member of the Community Advisory Board for the Nevada Test Site from 2000 to 2002. Prior to joining Boies, Schiller & Flexner, he was a partner in Dickerson, Dickerson, Consul & Pocker, specializing in civil litigation and employment law.

A graduate of the University of Virginia Law School, Pocker is admitted to practice law in Nevada, California, Arizona and Ohio.

BRIEFING THE CAUSE

Expert Witness Liability in the Tenth Circuit: Reading the Tea Leaves of Pace v. Swerdlow

By Peter Krumholz and Aaron Solomon

The Tenth Circuit recently weighed in on the question of expert witness immunity. The majority opinion did not have much to say on the subject, simply remanding the issue to the district court for consideration under Utah law. In a dissent, however, Judge Gorsuch indicated a strong hostility to claims against experts to the extent that they are based on the failure to deliver a specific opinion.

The plaintiffs in *Pace* filed a medical malpractice action in Utah state court arising from the death of their daughter. They hired Dr. Swerdlow as an expert witness in the case, and he concluded in his expert report that the defendants' care of the decedent was substandard and had likely caused her death. In his deposition testimony, however, Dr. Swerdlow backed off a bit and admitted that he could not state within a reasonable degree of medical probability that she would not have died but for the defendants' actions. If that weren't damaging enough to the plaintiffs' case, Dr. Swerdlow then drafted and faxed to all of the parties a two-page "addendum" to his deposition completely reversing course and stating that he now considered defendants' actions to have been within the standard of care. Not surprisingly, the plaintiffs lost the case on summary judgment. There was apparently some suggestion by the plaintiff that Dr. Swerdlow was intimidated into changing his opinion out of concern that the defense counsel would cause problems with his license. Dr. Swerdlow argued that he changed his opinion after reading additional depositions for the first time.

The plaintiffs then sued Dr. Swerdlow for, among other things, professional malpractice. The district court granted a Rule 12(b)(6) motion to dismiss, on the basis that Swerdlow's initial affidavit was so defective that it would have failed to defeat summary judgment in the underlying action, and therefore that his change of opinion did not damage the plaintiff. The Tenth Circuit reversed in a decision that, technically, was extremely limited. The decision held that the issue of proximate cause was not dispositive, and remanded to the district court to consider, under Utah law, the applicability of expert witness immunity. Judge Gorsuch dissented based on

the higher pleading standard set forth by the Supreme Court in last year's *Twombly* decision, but he also noted the policy implications of allowing the case to proceed:

Allowing this claim to march along sends the message to would-be expert witnesses: Be wary—very wary—of changing your mind, even when doing so might be consistent with, or compelled by, the standards of your profession. Neither can there be any doubt this is exactly the message plaintiffs wish to send, candidly explaining, as they do, that their real beef with Dr. Swerdlow was his failure to “deliver[] the expert liability opinion he had promised the Paces all along.” ... In our legal system, demanding that experts “deliver” a specified opinion, as opposed to their honest judgment, is supposed to be ethically out-of-bounds—not the basis for a cause of action.

Parties already exert substantial influence over expert witnesses, often paying them handsomely for their time, and expert witnesses are, unfortunately and all too frequently, already regarded in some quarters as little more than hired guns. When expert witnesses can be forced to defend themselves in federal court beyond the pleading stage simply for changing their opinions—with no factual allegation to suggest anything other than an honest change in view based on a review of new information—we add fuel to this fire. We make candor an expensive option and risk incenting experts to dissemble rather than change their views in the face of compelling new information. The loser in all this

is, of course, the truth-finding function and cause of justice our legal system is designed to serve.

Liability for expert witnesses makes perfect sense in some circumstances. For example, in *Pollock v. Panjabi*, the plaintiff contracted with the defendant to conduct certain experiments designed to show the cause of his neck injury, which he alleged was the result of excessive force used in an arrest. After giving the expert multiple opportunities to correct his work, the court in the underlying action found that the experiments had not been conducted correctly and were not reliable. The court thus refused to admit the experiments as evidence. As the court in the derivative action noted in refusing to grant immunity to the experts:

This is not a case in which the right of a witness to

There was apparently some suggestion by the plaintiff that Dr. Swerdlow was intimidated into changing his opinion out of concern that the defense counsel would cause problems with his license.

Dr. Swerdlow argued that he changed his opinion after reading additional depositions for the first time.

Liability continued on page 10

FEDERALLY SPEAKING

Invitation for Comment on Proposed Amendments to Rules 26 and 56 of the Federal Rules of Civil Procedure

Earlier this year, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States approved for publication proposed amendments to the Federal Rules of Civil Procedure. These amendments, if adopted, will impact most civil cases in the federal courts—the proposed amendments to Rules 26 and 56 would change certain aspects of expert discovery practice and summary judgment practice in the federal trial courts. This article provides a brief outline of the proposals; a complete report of the Judicial Conference’s Civil Rules Advisory Committee is available at: www.uscourts.gov/rules/Reports/CV_Report.pdf.

The Federal Litigation Section intends to participate in the public comment period by submitting comments on the proposed amendments and would like your help in that process. Please send your comments to the co-chairs of the section’s Federal Trial Practice and Procedure Committee, John McCarthy and Rob Kohn, by Jan. 15, 2009. The public comment period for the proposed amendments ends on Feb. 17, 2009.

Rule 26(a)(2) and (b)(4): Expert Trial Witness Discovery

A combination of factors, including the complexity of the world in which we live, has made the use of experts in civil litigation increasingly important. Today, expert testimony is presented in a large percentage of civil cases pending in the federal courts. The proposed amendments seek to address issues that have arisen in recent years that have made collaboration between experts and trial counsel more difficult to eliminate these problems. The amendments also address the expert who is not specially retained, such as treating physicians and the employee expert.

The core changes would extend work-product protection to (a) drafts of Rule 26(a)(2)(B) expert reports; (b) drafts of Rule 26(a)(2)(C) party disclosures; and (c) attorney-expert communications. The purpose of this rule change is to avoid the pitfalls of allowing discovery of draft reports and communications between the attorney and the expert witness in formulating and testing opinions that will be expressed at trial. The new rule would provide for three exceptions: it would allow discovery as a matter of course concerning (1) attorney-expert communications relating to compensation; (2) facts or data the attorney provided to the expert and the expert considered in forming the opinions to be

expressed; and (3) assumptions that the attorney provided to the expert and that the expert relied upon in forming the opinions to be expressed. A parallel change is proposed for Rule 26(a)(2)(B)(ii), directing that the expert’s disclosure report include only “the facts or data considered by the witness.” The Judicial Conference hopes that these amendments will make it easier for counsel and expert witnesses to collaborate.

A second set of changes would address the differences between two types of experts who are called at trial—specially retained experts and those that are not specially retained for litigation purposes. Many times experts in the latter category are employees of a party who will give fact and opinion testimony or they are treating physicians. The current rule was designed to avoid placing on these experts the burden of drafting the detailed reports required of specially retained experts. Some courts, however, have required that these experts prepare reports or be precluded from testifying at trial. Generally, when courts have required these reports, they have done so to try to avoid unfair surprise to the adverse party at trial. In order to strike a balance between these competing concerns, the first proposal creates in Rule 26(a)(2)(C) a new obligation of disclosure concerning the expected expert testimony. If a report is not required from the expert pursuant to Rule 26(a)(2)(B), then the party has an obligation to provide a summary of the facts and opinions of the

trial-witness expert. The new rule would provide adverse parties with the information they need without imposing on the non-professional expert witness.

Rule 56: Summary Judgment

Summary judgment practice has not been changed on a national level since the Supreme Court decided its trilogy of cases in 1986. At the local level, however, the federal courts have experimented with many ways to improve the procedure. The proposed amendments to Rule 56 represent a national effort to improve the procedures for presenting and deciding summary judgment motions and to make them more uniform throughout the country. The Judicial Conference hopes to achieve national uniformity in the procedure for summary judgment motions while leaving the standard for deciding those motions unchanged. The report states that “[t]he aim is a better Rule 56 procedure that increases the likelihood of good motions and good responses, and deters bad motions and bad responses.”

The proposed Rule 56(c) is the portion of the amended rule that will have the greatest impact on summary judgment motion practice throughout the country. This subdivision establishes a comprehensive procedure for presenting and opposing motions for summary judgment. The amended rule provides that the mo-

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tion be presented to the court in three stages with certain required materials. The movant must submit a motion, a separate statement of material facts, and a brief. The written motion must specifically identify the claims or defenses (or parts thereof) to which the motion is addressed. The statement of material fact must identify, with citations, those facts that cannot be genuinely disputed and entitle the movant to summary judgment in separately numbered paragraphs. A party opposing a motion for summary judgment must file its own statement responding to the movant's statement of material facts and a brief. The responsive statement must address each fact identified in the movant's statement in correspondingly numbered paragraphs and may state additional facts that preclude summary judgment. Like the movant's statement, the opposing party's statement must also contain citations. In the final round, the movant must respond to any additional facts presented by the opposing party and may file a reply brief.

This subdivision also contains requirements for supporting factual statements with citations. In practice, most factual statements will be supported by citation to admissible evidence supporting the statement. Under the new procedure, however, a party could also demonstrate in its statement that the fact does not constitute a genuine dispute as to a material fact. A party could also demonstrate that the adverse party cannot produce admissible evidence to support the fact. The amendments would allow, but not require, that a court to consider other materials in the record that were not presented in the summary judgment motion papers.

Proposed Rule 56(a) would make a slight change to the familiar standard for summary judgment. The phrase "genuine issue" would be replaced with "genuine dispute." The new rule would provide, "The court should grant summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law." A footnote in the report states that some observers believe that "must grant" should be used rather than "should grant" in this sentence. This subdivision also includes an explicit direction that the court should state on the record the reasons for granting or denying summary judgment.

The new rule would contain different procedures concerning the time for making summary judgment motions. The proposed rule contains a deadline, 30 days after the close of all discovery, for filing a motion for summary judgment, and also allows the opposing party 21 days to respond and the movant 14 days thereafter to file any reply materials. Unlike the current rule, which prohibits certain early motions for summary judgment, the proposed rule does not contain a similar prohibition.

Subdivision (f) would codify certain well-established practices by which courts have granted summary judgment outside of a motion. The rule provides that after notice and a reasonable time to respond, the court can grant summary judgment to a non-movant. The court can also grant or deny a motion for summary judgment on grounds not raised in the party's submissions. Finally, the court can consider summary judgment on the court's own after having identified to the parties material facts that may not be in genuine dispute.

Another significant proposed change to summary judgment

practice involves affidavits submitted in bad faith. The proposed provision would allow the court to order sanctions if it is satisfied that an affidavit under this rule is submitted in bad faith or solely for delay.

Conclusion

If approved, these proposed rule changes will impact the practice of our section's members. The members of the Judicial Conference have obviously spent a great deal of time, effort, and thoughtful consideration in drafting these new rules. Comments from practitioners will no doubt prove valuable in polishing the proposed amendments that will improve practice in the federal courts of this country.

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“Sunshine” or “An Intolerable Burden” in Confidentiality Protective Orders?

Robert E. McKnight

The job of amending the Federal Rules of Civil Procedure is usually committed in the first instance to the committee process established under the authority of the Rules Enabling Act. Two bills pending in Congress, S. 2449 and H.R. 5884, both with the anodyne title “Sunshine in Litigation Act of 2008,” would accomplish an end-run by Congress around the process that Congress that set up.

Both bills—though S. 2449 appears to have advanced farther, having been reported favorably out of the Senate Judiciary Committee on Aug. 1, 2008—would prevent federal courts from entering protective orders under FRCP 26(c) concerning discovered information, from approving settlements that would restrict the disclosure of discovered information, and from entering an order that would restrict access to court records in any civil case absent certain mandatory findings. These findings are: either (1) the order would not restrict the disclosure of information “which is relevant to the protection of public health or safety, or (2) the public interest in disclosure is “outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question”; and, in addition to (1) or (2), a finding that “the requested protective order is no broader than necessary to protect the privacy interest asserted.”

Both bills specify that even if all parties stipulate to the order, the court must make the necessary findings.

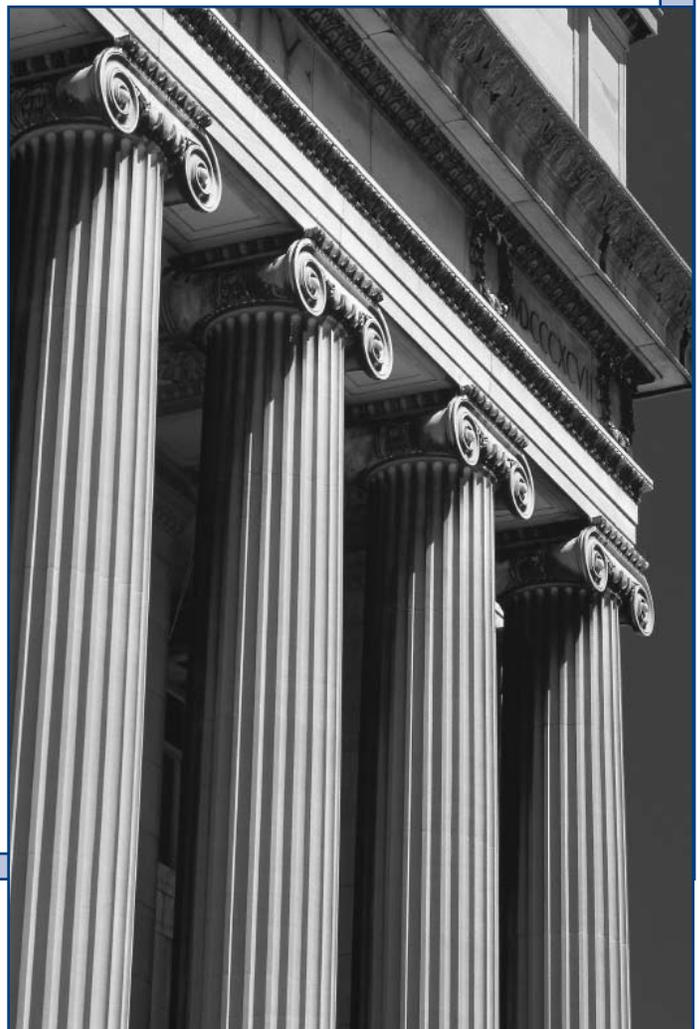
Both bills even prohibit courts from enforcing parties’ agreements to restrict disclosure of the kind of information discussed above absent the necessary findings.

According to the Senate Judiciary Committee’s report on S. 2449, the proposed law’s purpose “is to protect the public from potential health or safety dangers that are too often concealed by court orders restricting disclosure of information.” It continues: “Over the past 20 years, we have learned about numerous cases where court-approved secrecy, in the form of protective orders and sealed settlements, has kept the public in the dark about serious public health and safety dangers... This problem most often arises in product liability cases.” Due to confidentiality agreements reached in settlement, “the public and regulatory agencies are left in the dark about a dangerous product.”

The day before the Senate Judiciary Committee favorably reported on S. 2449, a House subcommittee considering H.R. 5884 heard testimony on July 31, 2008, from Mark R. Kravitz (D-Conn.) on behalf of the Judicial Conference of the United States. Judge Kravitz explained amendments to FRCP 26 that would have an effect similar to that of H.R. 5884 have subjected to “years of careful and thorough study through the Rules Enabling Act process.” The Rules Committee decided not recommend the amendments because they were deemed “unnecessary,” “an intolerable burden on the courts,” and likely to have “significant adverse consequences on civil litigation.” He stressed that the Rules Committee was unaware of no empirical evidence—despite “careful study conducted through the lengthy and transparent process of the Rules Enabling Act”—suggesting that either protective orders or sealed settlement agreements were a problem.

It would be unfortunate for Congress to begin ignoring such work.

Bob McKnight is the editor of Fifth Circuit Civil News, which Sidebar thanks for his contribution.



APPROACHING THE BENCH

Inside Looking Out: What Two Years as a Litigator-Turned-Law Clerk Taught Me About the Fundamentals of Effective Advocacy in the Federal Courts

Edward A. Marshall

In the summer of 2004, I gave up my place in the offices of a large Atlanta law firm for the largely anonymous desk just to the left of the bench. The next two years—spent working as a law clerk for the U.S. District Court for the Northern District of Georgia—imparted regular and, at times, counterintuitive lessons about effective advocacy in the federal courts. The experience fundamentally altered my approach to the practice of law.

As any former law clerk will tell you, becoming an employee of the court demystifies the litigation process. It takes some of the opaqueness away from what, to the newly initiated, can be the enigmatic “black box” of the courts—that venerable institution where arguments are submitted, time passes, and, miraculously, decisions emerge. It provides the rare opportunity to sit as an impartial spectator as two (or more) litigants attempt to advance diametrically opposed positions, and to evaluate, dispassionately, what techniques further a client’s cause and which undermine it.

The experience of having practiced litigation before stepping, albeit briefly, into the role of the observer adds clarity to this perspective. You recall how strategic decisions are made, and what likely preceded the final manifestation of an argument before the court. What is more, that experience intensifies your reaction to the successes, and the missteps, of fellow members of the bar. You wince. Often. You wince because you have made the same misstep. You wince because you too have summoned all the indignation you could conceivably muster to combat trifling matters, and have clumsily employed tired (and invariably unavailing) techniques to direct the court’s attention away from the ineluctable weaknesses of your argument.

At the end of that sometimes-painful process, you leave with the profound recognition that what so many sitting and former occupants of the bench have told you is true. All those pleas for professionalism, clarity, and straightforward argument are not merely designed to ameliorate the occupational stress of judicial administration. Rather, they are just what they purport to be—insightful observations of seasoned jurists that being respectful to your opponent, intellectually honest with your advocacy, and direct in your presentation actually serves your client.

That is what my tenure with the court taught me: Of all the tools in the litigator’s arsenal, some of the most effective are also the most fundamental—civility, clarity, and credibility.

Civility

I recall vividly the first time I became incensed by the job of opposing counsel. It was an unusually contentious civil dispute, and correspondence between counsel had frequently employed nasty rhetoric and accusations of litigation abuses. In response to one of our motions, which I had drafted as a first year associate, my opponent concluded her recitation of legal authorities—case law she asserted contradicted our position—by positing that the principles these authorities embodied reflected something “opposing counsel should have learned in law school.” That patronizing flourish left me livid. With quiet rage, I sat down at my computer and wrote a reply brief that singled the toner in the printer as it came of the press. It was delightfully cathartic. But then, to my dismay, the supervising attorney removed the stinging vitriol from my papers and submitted a far more subdued brief to the court. I was convinced that he had lost his mind. Surely, this calm, measured retort was not how real litigators responded when their core legal competence had been impugned!

It did not take me long as a law clerk to realize that the cathartic response and the effective one are rarely the same. Indeed, my experience with the court persuaded me that incivility is not only unnecessary and unprofessional, it is a meaningful detraction from effective advocacy.

From my time in practice, I appreciated the inclination to ascribe nefariousness to an opponent over every mistake made in litigation. Although virtually every practitioner has at one time encountered the unfortunate circumstance where some key documents were quite legitimately overlooked in discovery, or some cited legal principle was inaccurately characterized, an opponent’s similar misstep will almost always be deemed purposeful, deceitful, and/or a “misrepresentation” of the law or the facts. Sometimes that will be true. Often times, it will not. But, in either event, railing against such mistakes does not make the court more likely to see things from your enraged point of view.

To borrow from Judge Godbold, “[a] judge who has normal sensibilities and loves the law will react on his own to events that call for outrage. He may not respond favorably to urging that he should be disturbed or outraged.” Excoriating accusations, even about your opponent’s lack of professionalism, cause the listener to raise his or her guard in response to such overt attempts to stir judicial disdain. They cause the court to look even more critically at the alleged bases for your accusations. Ultimately, both sides’ credibility and professionalism are called into question by impassioned mud-slinging.

Likewise, abusing an adversary for his lack of understanding of certain legal principles or overall legal acumen can have an unintended and disadvantageous side effect. Contrary to the unstated expectation I had upon leaving law school, cases are not decided solely, or even principally, based on who has the smarter lawyer. The judge will not hand back your brief

Fundamentals continued on page 8

Fundamentals continued from page 7

at the conclusion of oral argument and give you a letter grade, assigning victory to those having A's and denying C-students relief.

While a certain level of incompetence can doom a client's otherwise meritorious position, there seems to be a commendable judicial resolve to look past bad lawyering and render the correct result based on the record and the merits of a case. If you succeed in convincing the court that your adversary is an ill-informed buffoon, then it may prompt the judge or the law clerks (who, incidentally, enjoy unlimited Westlaw access) to dig deep into pertinent authorities or the record, doing the research that, by your own argument, your opponent clearly neglected to do. After all, the court has no assurance that their incompetence will persist on appeal. At the end of that research, the court is often as likely to discover fault in your position as in that of your allegedly inept adversary.

Finally, as the disinterested spectator forced to read and/or listen to such upbraided attacks between counsel, I realized that a lack of civility inadvertently betrays a masked desperation about the merits of your case. Nearly all of us have encountered the tongue-in-cheek advice, "If the facts are on your side, bang on the facts. If the law is on your side, bang on the law. If neither the facts nor the law is on your side, bang on the table." More likely than not, the court is likewise aware of this old litigator's adage, as well as the truths that underlie it. By "banging on the table"—trying the professionalism, competence, or veracity of your opponent, rather than the underlying merits of the case—an adverse inference is warranted, and may well be drawn: there would be no need to bang the table if either the facts or the law could sustain your position.

Clarity

My education and first years in practice instilled in me two principles that would guide my early approach to case presentation. The first was a commendable lesson imparted by respected law professors and skilled advocates: prepare, prepare, prepare. Master the facts of your case and the nuances of the law. Know your case inside and out.

The second lesson was decidedly less commendable, but familiar to anyone who has spent any time in the courtroom or the classroom: "When you can't dazzle 'em with brilliance, baffle 'em with bull****." If the facts or the law are unhelpful to your case, bluster, obfuscate, and convolute until your audience becomes so disoriented that the weaknesses in your argument will no longer be so glaring.

Through my tenure as a clerk, I learned that steadfast adherence to either of these tenets of case presentation—which I imagine will not be unfamiliar to most young litigators—have the potential to frustrate effective advocacy by destroying one

of its central pillars: clarity.

With respect to the first, intrinsically commendable lesson, I learned that preparation, without distillation into a clear message, results in extraordinarily ineffective advocacy. As a clerk, I witnessed time and again otherwise able litigators lose the force of their argument by inundating the court with the minutiae of their case, failing to educate the court as to why these abstract bits of legal or factual trivia were material to the question before it. After becoming immersed in their case, they presented their argument, whether in briefs or at a hearing, with the apparent presumption that the court was equally conversant in every nuance of the legal subject matter, completely apprised of every fact and contradiction elicited in discovery, and entirely familiar with the volumes of inter-counsel colloquy that preceded the motion or argument in question. It taught me that spewing "advocacy" into the ethos, untethered to any concrete proposal or established legal or factual relevancy, does little to advance a case.

An effective advocate must be mindful of the oppressiveness of the federal courts' caseloads and the immense diversity of the cases appearing on that docket—ranging from criminal matters to social security appeals to patent disputes. The unavoidable truth is that the court will never grasp the intricacies of your case and its complex factual history as deeply or completely as you do. Flawless institutional knowledge and unaided mastery of every legal nuance are unrealistic expectations, even for the caliber of jurists you find on the federal bench.

Likewise, attempting to "baffle" the court with purposeful convolution and obfuscation is a usually unavailing and always precarious endeavor. The one skill judges are forced to develop immediately upon their ascension to the bench is the ability to filter noise from substance. While an attempt to muddy the waters may temporarily cloud the court's perception of a particular flaw in your case, it makes larger truth imminently clear: your case has serious holes you don't want the court to see.

My realization of the importance of clarity to effective advocacy prompted me to focus on how skilled advocates achieve a clear message. Through this evaluation, a few elementary and relatively constant techniques emerged.

First, focus on laying the legal and factual predicates of your argument before you begin your "advocacy." Educate the court on the law, going back to the hornbook legal doctrines at issue to make sure the context is properly set for legal relevancy. Summarize the factual contentions at issue, establishing the nexus between each point of fact and the substantive and procedural standards that govern the question before the court. Do all of this, moreover, without infecting this phase of your statement with argumentative tone. Injecting aspersions against your opponent or statements as to why certain principles "clearly"

Nearly all of us have encountered the tongue-in-cheek advice, "If the facts are on your side, bang on the facts. If the law is on your side, bang on the law. If neither the facts nor the law is on your side, bang on the table."

mandate a favorable result as you try to educate the court not only calls into question the accuracy of your statement of the law and facts, it clouds the picture the court will want to see in making its determination. And if you—rather than your opponent—present the clearer window into the core of the issue before the court, then it is all the more likely that the court will drift towards that unobstructed perspective in rendering its decision. A clear story invites reliance.

In addition, in moving past these preliminary matters and entering into the “meat” of one’s advocacy, avoid the temptation to let tired litigator’s clichés litter the argument. The court has no doubt become so desensitized to hyperbolic indignation that it long ago lost its potential to persuade. Bemoaning your opponent’s “blatant” and “flagrant” acts of wrongdoing or damning their positions to be “utterly without merit,” “wholly meritless,” and “devoid of truth whatsoever” (or, worst yet, taking the position that an opponent “cannot have their cake and eat it, too”) is lost on the court as distraction—“white noise,” static on the screen. For the dispassionate observer, it is all too tempting to skim quickly over paragraphs laced with such rhetoric, thereby missing whatever persuasive nugget of useful information existed beyond the smoke screen of indignation.

Credibility

Finally, there is credibility. The single most important lesson I learned as a law clerk is that you should never lose your credibility before the court. Credibility is bigger than any one argument or, indeed, even one case. It is the lubricant that permits an attorney to grind the gears of the Article III machine to produce the result his or her client seeks. It takes an exponentially greater degree of legal ability and work to move those same gears once credibility has been lost.

The importance of earning the court’s trust is self-evident. Sitting in the disinterested chair of the law clerk, however, I was amazed at how many facets of prevailing practice—including those techniques I had frequently employed as a litigator in the name of “advocacy”—unwittingly cleave away at counsel’s credibility in the eyes of the court.

First, euphemism and hyperbole, whether in the statement of facts or description of legal principles, frequently undercut credibility within the first minutes of an oral argument or the first paragraphs in a brief. “When you overstate, the reader will be instantly on guard, and everything that has preceded your overstatement as well as everything that follows it will be suspect in his mind, because he has lost confidence in your judgment or your poise.” Allegations of an “egregious and pervasive fraud” or of “an evil and discriminatory motive,” where the record fails to substantiate the seriousness of the allegation, instantly undercut credibility and cause the court to examine each aspect of your argument with greater scrutiny and skepticism. Deliberate

euphemism has the same effect.

Second, credibility requires that even a zealous advocate accept those aspects of his case that are beyond his ability to change. Every case has certain weaknesses, whether factual or legal. It is far better to appreciate such weaknesses from the outset than to waste energy and credibility before the court denying what is obvious. When you candidly acknowledge weakness but nevertheless claim entitlement to prevail, it shows the court or the jury that you, presumably a reasonable person, can integrate that weakness into the overall calculus of a case and continue to perceive a chance for success. Conversely, if you steadfastly refuse to accept certain shortcomings, then it suggests to your audience that the only way for you to win is to eschew reality. If

that is an invitation your audience is unwilling to accept, then your position becomes untenable.

This lesson, in my experience, is most often breached in the presence of difficult precedent or difficult arguments presented by your opponent. Virtually without fail, litigants take these inconvenient obstacles to success, repackage them as something conveniently less threatening to their case, and then dismissively plow them over, typically in a footnote. In other words, they argue past their adversary, not with their adversary. It shows a remarkable lack of confidence to tackle a straw man when the real argument is quite discernibly ten yards away. It is unlikely the court will fail to appreciate the difference. Rather, take precedent and dangerous arguments head on, present them fairly, and then do your best to defeat them. Refusing to confront the realities of case is the loudest admission that the obstacle is insurmountable.

There is a corollary to this principle, which is, admittedly, even harder to implement, but more essential to the maintenance of credibility before the court: Do not be afraid to back down. Sometimes, even careful counsel find themselves out on a ledge with the precedent or the record clearly dooming a position to failure. Again, almost without fail, the cornered advocate will take a “never say die” attitude and take a final, futile swing in support of their position. That swing does little to damage your opponent’s case, but it deals a decided blow to the credibility of all your remaining arguments. On the other hand, taking the supremely difficult step of admitting failure and attempting to salvage what is left of one’s case builds enormous credibility.

Finally, be wary of dubious alternative grounds for a position. The mediocre, “even assuming” argument—the specious position with little genuine chance of success—carves multiple fissures into an advocate’s credibility. As an initial matter, asserting an untenable position itself detracts from one’s standing in the eyes of the court. It leaves the court to assume that either (1) you perceive it to be imperceptive, or (2) you fail to

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Fundamentals continued on page 10

Fundamentals continued from page 9

appreciate the logical flaw in your approach. Neither impression will endear counsel to the court. In addition, the feebly asserted alternative position suggests insecurity in other, independent bases calling for the same result. If, after all, your first and second arguments are meritorious, then there would be no need to include a safety net—especially one so weak. The inclusion itself suggests that you have discovered fatal flaws in your initial positions. It places all your arguments on the same unstable footing as the least tenable of them. As Justice Jackson explained in the context of appellate advocacy:

Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. Of course, I have not forgotten the reluctance with which a lawyer abandons even the weakest point lest it prove alluring to the same kind of

judge. But experience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.

IV. Conclusion

Departing from the role of the advocate into the role of a dispassionate observer of advocacy provides a singular perspective on litigation. The lessons it taught me were invaluable, and deceptively simple. Civility, clarity and credibility—all too often overlooked in the name of zealous “advocacy”—are some of the most critical, and difficult to attain, skills of effective case presentation.

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*Liability continued from page 3*

speak freely, in or out of court, is involved. While conduct, objects and experiments may have communicative aspects; the plaintiffs do not complain about what ... [the experts] said or communicated. Rather, the plaintiffs complain of the defendants’ failure to perform work, as agreed upon, according to scientific principles as to which there are no competing schools of thought.

In other circumstances, witness immunity clearly extends to experts. For example, in *Griffin v. Summerlin*, the Seventh Circuit, applying Indiana law, held that a non-retained treating physician deposed in a medical malpractice case had absolute immunity to testify in a manner damaging to his patient’s legal claim.

Judge Gorsuch’s comments suggest that the Tenth Circuit will think long and hard before allowing expert witness suits that rest on a theory other than the sort breach of contract/technical incompetence set forth in *Pollock*. These are, at heart, no dif-

ferent from a legal malpractice action. But, as Judge Gorsuch observes, if one cannot legally or ethically contract with an expert to give a certain opinion (literally buying an expert’s opinion) one ought not to be able to state a claim for the breach of such an agreement as a pleading matter, regardless of the substantive law governing expert witness immunity.

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