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The Bencher®

THE MAGAZINE OF THE AMERICAN INNS OF COURT®

Practical Legal Skills

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American Inns of Court®

FROM THE PRESIDENT

Chief Judge Carl E. Stewart

Traditional legal education across the United States has principally focused on imparting abstract legal concepts to students through the case method. Learned academics consistently used the Socratic Method in their classrooms in order to stimulate students thinking about the common law, Constitutional law, rules of procedure and many other facets of the law. An overarching goal of law schools has been to invest students with a comprehensive, three-year indoctrination about legal concepts and culture such that law graduates could successfully pass bar examinations and become licensed attorneys. Over time, conversations between the academy and the practicing bar have resulted in the additions of moot court, mock trials, and law clinics as standard ingredients in law school curricula. Additionally, many practitioners and judges began teaching as adjunct professors in law schools. Those conversations continue as budding lawyers thirst for a duality of doctrine and practical legal skills.

The 21st century legal profession has been greatly affected by the myriad of legal issues spawned by societal changes, the digital age, modern economic theories, and other groundbreaking developments. Each has caused the academy and the bar to focus on the most appropriate paradigm for preparing attorneys to engage these issues in the future. Accordingly, our educational institutions and law practices have begun to build a bridge between practical legal skills (e.g., filing documents with the courts, arguing substantive law, interacting with clients and managing expectations, conducting due diligence, drafting contracts, and closing an acquisition transaction or merger) and theoretical teaching (e.g., critical and logical thinking skills, ethics, and professionalism). Additionally, the ever-increasing cost of a legal education has all-the-more stimulated budding lawyers to do more to be practice ready upon receiving a law degree.

The value of these skills extends beyond establishing a reputation as a strong advocate, prudent transactional lawyer, or skilled commercial practitioner. Experience can be the distinguishing factor between a practicing attorney or law student and another in securing a dream job. Experience may also more quickly propel one's career, as lawyering is more than successfully writing an A-worthy exam in law school. Included in many of the day-to-day responsibilities of an attorney is the need to engage and meet with prospective or current clients and amicably work with opposing counsel. These key skills may mean that an attorney is given the opportunity to appear in court or take the lead in a business transaction sooner than his or her peers.

It is paramount that included in one's career is a commitment to experiential learning and building practical skills in order to succeed as an attorney. Law schools have placed a premium on teaching students about recent developments in the law and have created multiple avenues for students to gain practical legal experience to ensure that they have a competitive advantage when entering the legal market. All the while, employers must continue to provide legal training—such as offering courses that serve as primers on litigation and transactional law, facilitating mentorship relationships, valuing in-court experience early in a litigator's career, or creating early opportunities for transactional attorneys to negotiate and draft workable business deals. While some continue to question the value of practical legal skills, it remains, increasingly so, a key part of any lawyer's practice.

This issue of *The Bencher* shares snapshots of tips offering practical insights on the significance of attaining practical legal skills. Along with this emphasis, the importance of maintaining ethical and professional conduct remains a key part of the focus and commitment of the American Inns of Court. Each, in its own way, aids in an understanding of how lifetime learning is at the heart of the excellence of a practitioner. ◆

Judge Richard Linn presents a charter to the Honorable Jimmie V. Reyna Intellectual Property American Inn of Court. In the photo, from left to right, are Rachel C. Hughey, Esq., secretary; Anthony R. Zeuli, Esq., membership chair; Hon. Richard Linn; Jeffery C. Brown, program chair; Hon. Joan N. Ericksen, president; Chaz H. De La Garza, Esq., president-elect; Hon. Jimmie V. Reyna; David B. Kagan, Esq., treasurer; and James H. Patterson, Esq., counselor.

Honorable Jimmie V. Reyna Intellectual Property American Inn of Court

Judge Richard Linn of the U.S. Court of Appeals for the Federal Circuit, was in Minneapolis, Minnesota on November 10 to present the Honorable Jimmie V. Reyna Intellectual Property American Inn of Court with its charter. The Reyna Inn is the first intellectual property Inn both in Minnesota and the Eighth Circuit, and was organized under the leadership of Judge Joan N. Ericksen, U.S. District Court for the District of Minnesota.

By vote of the Masters, the Inn was named after the Honorable Jimmie V. Reyna, U.S. Court of Appeals for the Federal Circuit. Reyna, formerly a highly accomplished international trade attorney, is a past president of the Hispanic National Bar Association and recipient of the Ohtli Award, the highest honor bestowed by the Mexican government for non-Mexican citizens. Reyna is greatly respected for his professionalism and thoughtfulness, and expressed his appreciation that the Inn bears his name.

Prior to the charter presentation, Reyna and Linn, along with Kevin H. Rhodes and Rachel C. Hughey, presented a CLE in Minneapolis on Issues and Practice Tips Before the Federal Circuit, which was moderated by Judge Peter M. Reyes, Jr., Minnesota Court of Appeals, and sponsored by the Reyna Inn.

The Reyna Inn is the newest member of the Linn Inn Alliance, which brings the total to 25 intellectual property law American Inns of Court around the country and in Japan. ◆

Nominate an Outstanding Lawyer or Judge for the 2016 American Inns of Court Professionalism Awards

The American Inns of Court Professionalism Awards are presented on a federal circuit basis, to a lawyer or judge whose life and practice display sterling character and unquestioned integrity, coupled with ongoing dedication to the highest standards of the legal profession and the rule of law. Inn members are encouraged to nominate outstanding legal professionals in their respective circuits. For more information on the nomination process, please visit www.innofcourt.org/ProfessionalismAwards or contact Cindy Dennis at cdennis@insofcourt.org or (571) 319-4703. ◆

Deadlines for Nominations:

March 21, 2016—Federal, 4th, 5th, 7th, 8th, and 11th circuits
April 18, 2016—9th and 10th circuits
May 30, 2016—2nd circuit *(limited to a senior attorney)*

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Q. Todd Dickinson IP American Inn of Court

On September 28, 2015, the Q. Todd Dickinson IP American Inn of Court in Pittsburgh, Pennsylvania, held its first program of the 2015–2016 year entitled "The Lone Star—A Conversation with U.S. District Judge Rodney Gilstrap." Gilstrap, of the U.S. District Court for the Eastern District of Texas, who is currently presiding over the largest number of district court patent cases in the United States, provided insights on various aspects of patent litigation, advocacy tips for litigators, local practices in the Eastern District of Texas, as well as his personal background and legal experience. In appreciation of Gilstrap's visit and remarks, the Inn presented him with a memento to remember his first visit to Pittsburgh—a hardhat emblazoned with the Pittsburgh Steelers logo. In addition, the Inn also welcomed 12 new members. ◆

Dickinson Inn members and special guest at the Inn's first meeting of the 2015–2016 term are, from left to right, Cecilia R. Dickson, Esq., secretary; Hon. Cathy Bissoon, immediate past president; Hon. Rodney Gilstrap; Hon. Mark R. Hornak, counselor; Kirsten R. Rydstrom, Esq., president; and Gregory L. Bradley, Esq., treasurer.

Thomas More Loyola Law School American Inn of Court

On December 12, 2015, members of the Thomas More Loyola Law School American Inn of Court in New Orleans, Louisiana, joined with CeaseFire New Orleans, the New Orleans Police Department, Friends of Louisiana's Incarcerated Children, RaisingFoundations and others to host a Holiday Bicycle Giveaway for children of incarcerated individuals in Louisiana.

The 75 bicycles, formerly unclaimed property of the New Orleans Police Department, were shipped to Angola State Penitentiary, where inmates donated their time, hard work, and in some instances their money, to repair and refurbish the bikes. They also made 80 wonderful wooden toys for children who were too young for the bicycles.

The More Inn team helped receive and prep the shipment of bicycles, procured bike lights to make the bikes safer and put bows and gift bags with each donated bike for the children. The group also staffed the giveaway. The smiles and amazed looks on the children's faces made all the work worthwhile. ◆

Members and friends of the More Inn are, from left to right, Deil LaLande; Judge Laurie A. White, Inn Vice-president; Reynard Thomas; Edward W. Trapolin, Esq., Inn President; Claire A. Noonan, Esq.; M. Vallon Hicks, Esq.; Todd R. Slack, Esq.; and Nadine Kujawa.

Colorado Intellectual Property American Inn of Court

The Colorado IP American Inn of Court of Denver, Colorado, held its opening meeting September 17, 2015. The Inn conducted a new member orientation for its new members and students. Time was also set aside at this first meeting for the Inn's pupilage teams to meet and begin making plans for their upcoming presentations.

For an ice breaker, the Inn decided to try something new. Year after year, student members have reported how hard it is to approach a senior member of a firm or a judge and initiate a conversation. As a result, Judges Phillip A. Brimmer and Kristen L. Mix along with the Inn's board of directors graciously agreed to provide unique facts about their lives that would be used as the basis for a game of People Bingo. The rules were simple:

1. Each space was uniquely associated with a particular judge or member of the board;
2. Each board member or judge remained stationary so players could find them;
3. The Inn member had to introduce themselves and obtain the board member or judge's initials on the bingo sheet;

Colorado IP Inn board member Lee F. Johnston, Esq., left answers Bingo questions from members Michael R. Henson, Esq., center, and Shannon Lynch Haen, Esq., right.

4. Five spaces in any direction was a bingo;
5. Twenty minutes was allotted; and,
6. No comparing notes.

Prizes were awarded to the bingo winners, Vanessa Otero and Gayle Strong. All had fun and participants reported that it was an opportunity to get to know the members, judges, and board members better. ◆

Justice Marie L. Garibaldi American Inn of Court for ADR

Justice Marie L. Garibaldi, the first woman to be appointed a justice on the Supreme Court of New Jersey, died on January 21, 2016 at age 81. The justice was the namesake of the Marie L. Garibaldi American Inn of Court for Alternative Dispute Resolution in Basking Ridge, New Jersey. Garibaldi was also a trailblazer as the first woman state bar president. She graduated with honors from Connecticut College. With a Columbia Law degree and NYU Master of Laws in Taxation, she quickly rose to be a partner in the prestigious law firm, Riker, Danzig, Scherer, Hyland & Perretti, LLP. She authored more than 225 Supreme Court opinions. After retiring from the court in 2000, she remained active on corporate boards and was vice-chair of the Hackensack University Medical Center Board of Governors. Her many awards include the Medal of Excellence from Columbia Law and honorary degrees from a number of universities. Garibaldi served as the first chair of the N.J. Supreme Court Complementary Dispute Resolution Committee, which created the court-annexed mediation and arbitration programs that changed the state's legal culture. Her professionalism and reputation for civility made her the natural choice as the Inn's namesake when it was formed in 1998, based on her role as a champion of court-annexed dispute resolution modalities. The Inn had the opportunity to honor Garibaldi last September at its kick-off meeting. Her influence is indelibly impressed upon our Inn culture. ◆

2016 American Inns of Court Leadership Summits

The American Inns of Court is committed to supporting local Inn leaders. American Inns of Court Leadership Summits provide an opportunity for local Inn leaders to connect, problem-solve, and learn about Inn management best practices. Through our new Program Idea Lab, small group work, and discussion of the resources and tools available, Inn leaders will be able to address the unique needs of their Inn.

WHO SHOULD ATTEND?

- New Inn leaders planning for future growth
- Experienced leaders hoping to get inspired
- Active members considering a leadership role

REGISTRATION

Registration is $50 per attendee. To register, please visit our website at *www.innsofcourt.org/leadershipsummits* and click the location of the summit you wish to attend.

WE LOOK FORWARD TO SEEING YOU AT A SUMMIT NEAR YOU!

FIND A SUMMIT NEAR YOU:

New Orleans, LA	April 1, 2016
Wilmington, DE	April 1, 2016
Atlanta, GA	April 8, 2016
Chicago, IL	April 8, 2016
Irvine, CA	April 8, 2016
Austin, TX	April 15, 2016
Pleasant Hill, CA	April 15, 2016
Richmond, VA	April 15, 2016
Orlando, FL	April 15, 2016
Kansas City, KS	April 22, 2016
Philadelphia, PA	April 29, 2016
Denver, CO	May 6, 2016
Pittsburgh, PA	May 6, 2016
Washington, DC	May 6, 2016
Boston, MA	May 20, 2016
New York, NY	June 3, 2016
Detroit, MI	June 10, 2016

AMERICAN INNS of COURT®

For up-to-date information visit www.innsofcourt.org/leadershipsummits

Earl E. O'Connor American Inn of Court

The Earl E. O'Connor American Inn of Court in Prairie Village, Kansas, welcomed 22 new members this year. The new associates were invited to a dinner where they heard about the history of the Inn and how the Inn operates. They introduced themselves and heard from all the board members about their roles in the Inn. At the regular dinner meeting in September, the new members were introduced to the Inn as a whole and filled out mentoring applications. Prior to the October meeting, the mentors and mentees were paired up based upon practice area and interests. A separate event was held for the mentoring pairs to meet and hear from the Inn leaders about the value of mentoring.

The October and November dinner meetings included presentations on the rule of law and the judiciary, and jury selection. Both presentations were entertaining and informative and included costumes. The mentors and mentees attended a social event in mid-November, which involved bocce, hors d'oeuvres, and beverages. The Inn year will continue with plans for additional dinner meetings and more great presentations by the pupillage teams, a community outreach project of putting on a prom for special needs kids, and an annual ethics seminar. ◆

Earl E. O'Connor AIC members are, from left to right, Kelli Breer, Esq.; Kevin J. Breer, Esq.; Mark Q. Brinkworth, Esq.; Elizabeth A. Evers, Esq.; and Kaitlin M. Marsh-Blake, Esq.

Arizona Bankruptcy American Inn of Court

Members of the Arizona Bankruptcy AIC work at St. Mary's Food Bank Alliance to create emergency food packs for families in need in Phoenix, Arizona.

For its fall community outreach project, members of the Arizona Bankruptcy American Inn of Court of Phoenix, Arizona, volunteered at the St. Mary's Food Bank Alliance on Saturday, November 7, 2015.

According to Feeding America's "Map the Meal Gap Study" of 2012, Arizona ranks third in the country for high child food insecurity. Two million Arizonians are considered working poor, with the majority of those served by the Food Bank's emergency food box program. More than 40% of the households receiving emergency food assistance have at least one person who is working. It is with good reason that approximately 45 Arizona Bankruptcy Inn members, family, and friends volunteered at St. Mary's Food Bank Alliance in Phoenix. Inn members created emergency food packages that would later be distributed to Arizona families in need.

The afternoon was a gone in a blink of an eye and by the time the afternoon was complete, the Inn helped to create, with all other volunteers at the facility, emergency food packages totaling approximately 27,000 pounds.

The Inn was honored to volunteer at St. Mary's and help in a small way with the amazing work that St. Mary's does. ◆

Honourable Society of the Inner Temple Barristers Visit Austin Inns

From October 25–27, 2015, the five American Inns of Court in Austin, Texas, were pleased to host two leading British barristers from the Honourable Society of the Inner Temple in a variety of activities and events. The participating Inns included the Robert W. Calvert AIC, Lloyd Lochridge AIC, Honorable Lee Yeakel Intellectual Property AIC, Barbara Jordan AIC, and Hon. Larry E. Kelly Bankruptcy AIC. Patrick Maddams is the Sub-Treasurer of the Honourable Society of the Inner Temple and Vivian Robinson, QC, is an Inner Temple Master of the Bench, barrister in the international law firm of McGuire Woods LLP, and one of only a handful of British lawyers to be a member of an American Inn of Court—the John Marshall AIC in Richmond, Virginia.

Patrick Maddams

Vivian Robinson, QC

The visit to Austin was in part a response to a visit five Austin Inn members made this summer as part of the Fifth Circuit Amity Visit to London, and in part to visit an Inner Temple Barrister, Kay Firth Butterfield, who lives in Austin.

The Austin Inns coordinated the arrangements for a reciprocal visit, which included a tour of the LBJ Presidential Library, a reception with Inn members at the Austin U.S. Courthouse, a presentation by Maddams and Robinson at the University of Texas School of Law, and lunch with several members of the Texas Supreme Court.

This is the second time Austin Inn members have visited the Inner Temple, and the second trip of Patrick Maddams to Austin. As he so aptly puts it, "Of all of the international jurisdictions with which the Inner Temple has links, America is one of the strongest." The five Austin Inns appreciate the relationship with the Inner Temple and plan to visit as often as circumstances permit. ◆

William 'Mac' Taylor American Inn of Court

The William 'Mac' Taylor American Inn of Court, of Dallas, Texas, which is celebrating its 25th anniversary, hosted a meeting of the nine North Texas American Inns of Court. The meeting's keynote speaker, Chief Judge Carl E. Stewart, U.S. Court of Appeals for the Fifth Circuit, spoke about his experiences serving as president of the American Inns of Court. ◆

Taylor Inn members are, from left to right, Nicole T. LeBoeuf, Esq.; Stephen W. Gwinn, Esq.; Chad M. Ruback, Esq.; Justice Douglas S. Lang; Chief Judge Carl E. Stewart, president, American Inns of Court; Justice Elizabeth A. Lang-Miers; and Anthony J. Magee, Esq..

2016 Pegasus Scholars Selected

The 2016 Pegasus Scholars were selected and Megan Beesley, Esquire, of St. Louis, Missouri, and William C. Terrell, Esquire, of Memphis, Tennessee, departed for London February 8, 2016. The Pegasus Scholarship Trust is an exchange program, wherein young American Inn of Court members visit London for six weeks to learn about the English legal system and young English barristers visit the United States for six weeks to learn about our legal system.

Megan Beesley, Esquire, is a public defender for the State of Missouri, a role she has held since 2013 and in which she represents indigent criminal defendants. She has first-chaired 29 jury trials, including multiple trials for Class A felonies. She has also worked as a public defender in DuPage County, Illinois, and Raleigh, North Carolina. She was the first lawyer in the City of St. Louis to uncover the use of Stingray technology, a technique used by law enforcement to locate cell phones, and has become a local expert on the technology and the secrecy with which it is wielded.

Beesley earned her J.D. from Duke University School of Law, and her undergraduate degree from Washington University in St. Louis, Missouri. She is an associate member of the Theodore McMillian American Inn of Court. In her work she mentors newer trial attorneys and collaborates with colleagues to make the office one of the premier jury trial offices in the country. She attended the Trial Lawyer's College in Dubois, Wyoming, in 2014, a 24-day intensive jury trial skills school. She is a lecturer in the Missouri Bar Mini Law School and an attorney speaker in the St. Louis Urban Debate League.

William C. Terrell, Esquire, is a trial attorney with the Memphis firm of Glassman, Wyatt, Tuttle & Cox. In a notable case, he successfully secured the dismissal of a legal malpractice action by presenting expert testimony that the lawyer's conduct did not fall below the applicable standard of care. Prior to joining the firm in 2013, he clerked for Judge Jerry Stokes on the Shelby County Circuit Court in Tennessee. While in law school, Terrell worked as a judicial extern for Judge S. Thomas Anderson on the U.S. District Court for the Western District of Tennessee.

Terrell earned his J.D. from the University of Memphis Cecil C. Humphreys School of Law, where he served as note editor on the law review and as president of the Black Law Students Association. He was named a Diversity Leadership Institute Fellow by the Tennessee Bar Association. He is an associate member of the Leo Bearman, Sr., American Inn of Court, and is also active within the bar associations of Memphis, Tennessee, and Mississippi. ◆

Bankruptcy Inn Alliance

The Bankruptcy Inn Alliance presented its fourth annual Distinguished Service Award at the National Conference of Bankruptcy Judges on September 29, 2015 in Miami Beach, Florida. In the photo are, from left to right, Judge Elizabeth D. Perris (Ret.); Judge Bill Glenn; Judge Judith K. Fitzgerald (Ret.); Patricia A. Redmond, Esq., 2015 Bankruptcy Inn Alliance Distinguished Service Award recipient; and Andrew R. Turner, Esq., co-founder of the Bankruptcy Inn Alliance. ◆

American Inns of Court®

National Advocacy Training Program

Join us this fall for an exclusive members-only Advocacy Training Program

The American Inns of Court is pleased to offer a national advocacy training program for Inn members within their first five years of practice. Inns are encouraged to sponsor a young member to attend this program.

Reserve your seat now—registration is limited to 16 participants.

Overview

The **American Inns of Court National Advocacy Training Program** is an intensive two-day program sponsored by the American Inns of Court in conjunction with the Advocacy Training Council of London. The Advocacy Training Council, established by the four Inns of Court in London, is comprised of leading barristers and judges who provide guidance and training in the pursuit of excellence in advocacy. The involvement of the Advocacy Training Council makes this program unlike any other offered in the United States. It is through our close relationship with the Inns of Court in London that the American Inns of Court is able to offer this truly unique opportunity to our members and further our mission to inspire the legal community to advance the rule of law by achieving the highest level of professionalism through example, education, and mentoring. All participants will receive a certificate of completion.

Methodology

Training is conducted in a courtroom with two small groups of six to eight participants. Two barristers lead each group using the six-step Hampel method of advocacy training—a best practice adopted by the Bar of England and Wales.

The training is based on a case set before the International Criminal Court (ICC) in The Hague, which involves the prosecution of a public figure for crimes against humanity under the substantive law and procedures of the court. The program features a mock trial and includes skills such as direct-examination, cross-examination, and opening and closing arguments. Participants learn methods for dealing with a hostile witness, overcoming objections to the phrasing of questions, dealing with arguments over the exclusion of evidence, refreshing memory, and other "tools of advocacy".

When and Where

The program will be held **September 22–23, 2016 from 9:00 a.m.–5:00 p.m. at the James A. Byrne U.S. Courthouse**, 601 Market Street, Philadelphia, PA 19106.

Tuition

$500 due upon registration and no later than May 2, 2016. Confirmation e-mails will be sent in early May. Cancellations received after confirmation are non-refundable.

Travel and Hotel Accommodations

Participants are responsible for their travel and hotel accommodations. Rooms are available near the courthouse at the Hotel Monaco for a special rate of $279 per night.

REGISTER NOW FOR THIS UNPARALLELED OPPORTUNITY AT WWW. INNSOFCOURT.ORG

ETHICS COLUMN

Francis G.X. Pileggi, Esquire

Prosecutorial Discretion

Over the many years that I have written this ethics column, the topics have mostly focused on court decisions applying the rules of professional conduct and other standards governing lawyers. This time, I review a ruling that addresses the concept of prosecutorial discretion.

This short article will highlight the key facts and issues published in a recent California ruling that dismissed charges against a lawyer who endured a trial based on an accusation that she failed to maintain client funds in a trust account. The post-trial decision was issued by a judge of the State Bar Court of California in the matter of Dianna Lynne Albini.

The court's opinion reviewed the evidence presented at a three-day trial. The Office of Chief Trial Counsel of the State Bar of California (State Bar) filed charges against respondent in November 2014. The trial was held in September 2015. Respondent was admitted to practice law in California in 1991. In 2007, she settled a personal injury matter. She withheld $50,000 in escrow in order to cover a lien for medical bills. After she closed her law practice, she was appointed as an administrative law judge in 2009. Apparently, California law only required her to keep her records for five years, after which time she discarded them. Her custom was to send letters to clients to give them notice prior to discarding their files. There is a factual dispute in this matter whether or not that notice was sent or received, and whether the medical bills were paid from respondent's escrow account.

In 2014, after reviewing her files in the case, the client for whom the respondent settled the personal injury matter, sent a letter to the respondent asking about the status of the $50,000 held in escrow. By that time, the respondent's law practice was closed and the respondent was an administrative law judge.

The trial revealed that the prosecutor's investigator contacted the potential lienholder and was told that there was no indication in their records of any collection efforts to collect any outstanding amounts from the client. If there were an unpaid amount or a lien, there would be an indication of collection efforts, but there were none. As far as the potential lienholder was concerned, the amount that would have been the subject of a lien, should be considered as paid in full. Likewise, it should be emphasized that neither a lien was asserted nor was the former client asked to pay the amount that one could presume was paid from the sum withheld in the respondent's trust account.

In addition, the respondent testified at trial that her recollection was that she paid the medical provider the full amount of $50,000 to satisfy and settle the slighter higher amount of medical bills for which payment was due at the time of the personal injury settlement. The State Bar had no contrary evidence that rose to the level of clear and convincing, which was the standard the prosecution had to meet at trial. The State Bar knew that it lacked such evidence prior to trial.

The records from the bank where the respondent's trust account was held were not complete. Nonetheless, the bank records that did exist demonstrated that during the relevant time period amounts equal to the sum withheld for the potential lien were paid to a third-party other than the respondent.

Respondent was charged with misappropriating client funds, which in this case, in California is a felony that, among other penalties, can lead to disbarment. The trial judge found that the State Bar did not introduce any affirmative evidence that respondent misappropriated funds. The court's opinion concluded that: "Considering this lack of proof and the documentary evidence that the charges had been paid…," there was no clear and convincing evidence to find respondent culpable of misappropriation of funds. Likewise, the trial judge found that there was insufficient evidence that respondent failed to maintain properly the appropriate client funds in her trust account. Therefore, the court dismissed with prejudice the two counts of professional misconduct.

In the meantime, respondent was removed from her position as an administrative judge. And where does she go to regain her tarnished reputation? ◆

Francis G.X. Pileggi, Esquire, is the member-in-charge of the Wilmington, Delaware, office of Eckert Seamans Cherin & Mellott, LLC. He summarizes the key corporate and commercial decisions of Delaware Courts at www.delawarelitigation.com.

PHOTO CREDIT: ©iStockphoto.com/Piotr Adamowicz

Preparing, Briefing, and Arguing Your Case with a Judicial Opinion in Mind

By Judge David W. Lannetti and Jennifer L. Eaton, Esquire

Have you ever received a judicial opinion and thought, "The judge didn't understand my position" or "Wow, the judge completely missed an issue"? If so, you probably blamed the judge. Maybe you were justified in your position, but it is also possible that there were shortcomings in your advocacy, including, quite possibly, a failure to appreciate the judge's perspective.

Thomas Jefferson believed in life-long learning and his mentality—that there is always more to learn—applies to the practice of law. Reviewing your trial practice may identify gaps that you can fill to be more prepared the next time you argue before the court. Although you can never guarantee a favorable result for your client, there are some things you can do to make it easier for the judge to rule in your favor.

Preparing: Understand Your Role in Educating the Court

Preparedness starts with understanding your audience. As the practice of law has become more specialized, it should come as no surprise that most judges—who are drawn from a pool of specialized attorneys—are not the generalists they once were. Consequently, with virtually unlimited subject matter jurisdiction, trial court judges frequently have to tackle legal issues with which they have little or no prior experience. Although legal research and judicial reflection certainly help overcome this deficiency, judges often must rely on the attorneys who appear before them to bridge precedential divides. Also, keep in mind that, like most attorneys, judges and their law clerks are busy people. They have limited time to review the contents of the file and read briefs before a hearing. You should appreciate the role you can play by offering your expertise and insight to the court.

It goes without saying that you need to understand the case—both the underlying facts and the

applicable law—better than the judge. You should view your role as educating the judge and making it easy for her to rule in your favor. Taking the time early in the case to understand the factual background and legal terrain will benefit you throughout the life of the case. You must thoroughly research the factual issues you will present to the court to fully appreciate their significance. Becoming an expert in the applicable case law will help you craft your brief, contribute to a compelling oral argument, and ultimately persuade the court. You should be familiar with the cases in favor of your position and, even more importantly, with those cases that undermine your position.

An example of a failure to properly educate the court occurred in *eBay v. MercExchange*, 547 U.S. 388 (2006). There, the Supreme Court of the United States proclaimed that "[a]ccording to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test." The problem, according to remedies scholar Douglas Rendleman, was that "there was no 'traditional' four-point test." As remedies expert Douglas Laycock pointed out, because eBay and many of its *amici curiae* focused on, among other issues, preliminary injunctive relief (which does have a four-part test), the Supreme Court established new—and arguably faulty—precedent presumably in strong reliance on the incomplete information provided. According to Laycock, "The case was litigated by an all-star cast of Supreme Court lawyers, but none of them consulted a remedies specialist."

Briefing: Connect the Legal Dots to Build Your Case

At the trial court level, filing a brief is typically at the discretion of the attorneys because most courts rarely require them, especially prior to a hearing. Although briefing may not be mandatory, there are several reasons why a brief is valuable to the court and you therefore should seriously consider filing one. A brief provides a landscape for you to identify a problem and offer a solution. As a brief writer, you have the opportunity to tell a story; although the story must, of course, be founded on legal authority, the way the story is told is almost as important as the content itself. The ultimate compliment to a well-written brief is to have the judge incorporate parts of it into her judicial opinion.

Associate Justice Antonin Scalia of the Supreme Court of the United States and attorney Bryan A. Garner write in *Making Your Case: The Art of Persuading Judges*, "The overarching objective of a brief is to make the court's job easier. Every other consideration is subordinate." With that in mind, provide the court a clear roadmap of your argument. You may think building suspense in your brief is a good idea, but it usually just frustrates the reader. Be upfront and forthright; unanswered questions are the enemy. Identify your position in the first page of your brief. Then, use each argument to persuade the reader why your position is the proper way to resolve the case and, if appropriate, to resolve future similar cases. Make sure that you recognize and distinguish counterarguments. By ignoring arguments raised by opposing counsel, you imply to the judge that they have merit.

Clarity is key. Be concise and deliberate with your word choice. Do not feel that you need to approach the applicable page limit. Avoid using big words when simple words will do, but be precise. Legalese is often unnecessary and usually undesirable, but using terms with inherent legal significance is appropriate and sometimes essential to make your point.

Recognize that the case is not over until all appellate avenues are exhausted. Tailor your arguments to make it easy for the court to rule in your favor and, at the same time, establish a clear record for appeal in case the court rules against you. Be direct and clear when you present your arguments. Keep separate arguments separate, lest the court inadvertently conflate your points.

Take the time to review and edit your brief to make it more readable for the judge. Such editing invariably will lead to elimination of words. As Dr. Seuss noted, "[T]he writer who breeds more words than he needs, is making a chore for the reader who reads." Trim the content until all that remains is the meat of your argument. For example, the background section should include only those facts necessary to frame your position, and the number of legal arguments normally should be limited. Excessive information can be confusing, and it may distract the reader from your point.

Proofread your brief before submitting it to the court. You may find it useful to set the brief aside for a day or two and look at it again with fresh eyes. Consider asking a colleague to read it and provide comments. Having someone who is completely unfamiliar with the case review your brief may elicit constructive feedback regarding whether the arguments in the brief flow logically and whether the court is likely to have any unanswered questions.

Continued on the next page.

Don't underestimate the importance of your brief to a judge. Most judges review available briefs and then use the associated hearing to focus on questions that arise. For cases assigned to a particular judge, consider sending a courtesy copy of your brief to the judge's chambers, in addition to filing it with the clerk of court. A courtesy copy serves as a friendly reminder to the judge about the upcoming hearing, notifies her that a brief has been filed, and provides her a nudge to read the brief in advance.

Arguing: Persuade the Judge to Rule in Your Favor

The first step to any successful hearing is arriving prepared. Bring extra copies of your brief and any cited cases so that you can offer them to the judge if necessary. Note, however, that it is usually not a good idea to rely on cases you did not cite in your brief. Many judges will view this as a shortcoming of your brief and as a form of sabotage on your opposing counsel and the judge's law clerk, as opposing counsel and the judge understandably may be ill-prepared to respond to such new cases. Once in a while, you will come across a particularly persuasive case after your brief is filed and prior to the hearing; when this occurs, provide a copy to opposing counsel and the court as soon as possible.

Once at the hearing, start by introducing yourself to the judge and identifying whom you represent. Note that judges in many jurisdictions are not assigned specific cases and therefore may not see briefs until the day before the associated hearing. Recognize this limitation and look for clues during the hearing to determine whether the judge is familiar with your brief. If you determine that the judge has reviewed your brief, avoid parroting the brief's language when arguing. Oral argument is a time to fortify your position, not bore the judge with information she already has before her.

Use the hearing to ensure the judge understands your position and why you are entitled to the relief sought. When you argue, be methodical. Recap your points, and provide clarification and additional explanation as needed. Spend most of your time on your strongest issues, and avoid, to the extent possible, arguing more than three points. Make sure you stay on track; don't waste valuable time during oral argument on tangential issues. The only thing worse than an unnecessarily long brief, is an unnecessarily long oral argument.

If a judge asks you a question, answer it. Judges don't take time during a hearing to ask questions unless they are seeking clarification on a specific issue. By using evasive measures and not responding to the judge or arguing that "those are not the facts present here," you lose an opportunity to bolster your position by addressing her concern. The judge may be concerned about the effect of a ruling beyond the case at bar and therefore purposefully is probing beyond the facts of the present case.

The reality is that you should welcome questions. As Scalia and Garner point out, "Only when you are responding to a question from the bench can you be sure that you are not wasting your time—pounding home a point on which the court is already entirely convinced or clarifying an issue on which the court is in no confusion." If it becomes clear—as a result of questioning or other clues during the hearing—that the judge does not intend to rule from the bench, and if you believe that it would be helpful to answer unanticipated questions that arose during the hearing, offer to submit a post-hearing brief.

Trial court judges have a great deal of discretion in ruling, which they apply to the facts and law as they understand them. Your job, to the extent possible, is to convince the judge that your version of the material facts and substantive law deserves the benefit of her discretion. In doing so, try to determine in advance how your particular judge thinks. Talk to other attorneys who have appeared before her and, if available, read the judge's prior opinions to gain an appreciation for how she approaches legal issues. Although some judges look to limit their holdings to the particular facts, others focus on precedent and the concomitant future societal ramifications. The insights you glean about the judge may reveal what she found persuasive in the past and help you tailor your arguments.

It is always difficult to anticipate how a judge will rule, but approaching all aspects of the case with the judge's perspective in mind will help ensure that the judge understands your position. Such a clear understanding should increase the likelihood that if there is a resultant judicial opinion, it will be favorable to you and your client. ◆

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Making Mediation Work

By Christina Magee, Esq.

What makes mediation succeed? While the list below does not purport to be exhaustive, and each mediation presents its own unique circumstances, here are a few insights from a mediator's point of view into the characteristics present in successful mediations. If the mediations you are involved in are not resolving to your satisfaction, consider whether any of the items below are missing.

Choose the Right Mediator for Your Case

This statement is not as self-serving as it seems. Picking a mediator may not be as simple and straightforward as it might appear. You need to know your mediator, his or her background and experience, and the mediator's "style." For example, in a mediation involving a contract dispute between a manufacturer and a selling agent over distribution and promotion rights for a product, one of the ways to resolve the dispute may be to modify the contract so that the formerly exclusive sales rights of the agent become non-exclusive. In that context, there is value to promoting and preserving the parties' relationship with one another, and thus, looking at interests that are not purely financial makes sense.

Contrast that scenario with a typical auto accident, where an insurance representative appears for the defendant driver, who neither has nor wants a long-term relationship or interest in the injured party. The insurance company wants to close the file, the injured party wants to resolve the damages claim, and the bulk of the discussions that take place in caucus will be about money, not other interests of the parties. A mediator who understands this process and knows when to advance discussions about financial interests and when to direct the discussion to non-financial interests is more likely to get you to a settlement result than a mediator who does not.

Of course, style also includes a mediator's ability to project optimism and the ability to solve problems, especially when the parties see no way to bridge the chasm between the offer and the demand. Tenacity and patience are two other hallmarks of a mediator who will get you to a result.

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Be Prepared

It's accepted wisdom that the party who is best prepared usually "wins" the day—a concept no less true in mediation. Just knowing your case and analyzing risk may not be enough.

Here are some other aspects of mediation preparation that you should be considering:

- In a complex case where multiple defendants are involved or multiple plaintiffs have individual claims, how will each of those interests be satisfied? Where do the interests between the parties on each side of the case align and where do they diverge? Does the area of divergence present an opportunity to leverage settlement?
- What are the "hidden" interests of the parties? What factors other than the mere resolution of the lawsuit are driving the parties' positions? Is plaintiff wedded to a certain net number because of plans for how to use the settlement?
- In a catastrophic case involving serious bodily injury, have structured settlements been explored? Has the information been provided by plaintiff to allow the defense to get an annuity where the plaintiff has been "rated up"?
- Are all the necessary and correct players in place and on board to settle? From the defense side, this may mean ensuring that adequate authority is available to settle the case. From the plaintiff side, this may involve pre-settlement negotiations with lien holders who must release their claims as a condition to settlement.
- What local rules, statutes, or judicial orders govern the mediation process? Ensure that your process is being conducted accordingly, so that the end result is not subject to attack for failing to adhere to the governing law.

Know Your Clients

How will your client respond to the cold, hard, dollars-and-cents evaluation that the defense offers? Comments such as "I can't believe that is all they think my wife's life is worth" are natural and expected from a plaintiff in an injury case. To resolve the case, someone in the plaintiff's room has to be thinking about the compensable aspects of the case and be able to move beyond the genuine emotion caused by the injury.

On the defense side of the case, know how your client will respond to the "stratospheric demand" that plaintiff will present. Will your client want to impasse immediately or back up from a prior offer? How will your client respond to the mediator's request that the defense consider splitting the difference between the plaintiff's $100,000 demand and the defense's best offer of $50,000, where there is consensus that the litigation costs would exceed $15,000?

Have a Strategy for the Mediation

Another obvious point, but one that bears repeating. What is the endgame? Do you have a second-to-last number before you go into the session? Considering in advance your "best alternative to a negotiated agreement" and your "worst alternative to a negotiated agreement" is a useful preliminary step to formulating a strategy.

So much more can be implemented to make your mediation a success. What are the non-monetary "deal-breakers" that have to be resolved? For example, in an employment case, it may be a "no rehire" provision when a former employee sues for discrimination, or from the plaintiff's perspective, a guarantee that only a neutral reference will be provided to any future employer. Are confidentiality concerns present and how do they get resolved?

Think Creatively

You should expect a mediator to have some capacity to facilitate creative solutions to problems, and being able to do this to some degree with your clients before mediation is helpful. Does the plaintiff have a credit problem? Is the defendant a manufacturer of equipment that the plaintiff could use if it were provided as a part of the settlement?

Define Your Successful outcome

Usually this is a settlement or resolution of the claim. In some cases that appear in the civil context, an outcome short of settlement can be the goal. For example, in a case involving a product that is the subject of multiple, unconsolidated actions, a mediation outcome could be an agreement to establish a "test case" that would be outcome-determinative on issues in several of the other cases. Defining the goal allows you to assess whether you are close to achieving it.

Be Tenacious and Focus on the Goal of the Settlement

Usually, about four hours or so into a mediation day, the parties begin to despair of settlement. Possibly, there has been a joint session and several rounds of caucuses. Demands and offers, and subsequent demands and subsequent offers, have been put on the table. The numbers seem to be too far apart, no progress is being made, and the mediator is spending all her time with the other party.

Be ready for this dynamic. Mediators are typically attuned to the time issue, and try to keep the parties

on both sides feeling equally well-served with the mediator's attention. It is also the case that where a "professional defendant" appears at the mediation—namely, an insurance representative who is clearly well-versed and experienced in the process—the mediator necessarily has to spend less time with that party to explain what's going on and what it might mean. Use brackets or other conditional offers to test whether the gap can be closed and to uncover what the parties' true ranges for settlement might be. Stay alert to the idea that the parties will usually settle a case once they reach a mediation session and the longer you stay at the table, the more likely it is that settlement can be achieved.

Make the Money Talk

Have a reason for the numbers being offered or demanded. When the mediator is reduced to sending numbers back and forth between the parties, not much can be accomplished. What is the basis for the number? Where do you want to go to resolve the case? How can you signal effectively to the other side where you want to end up with your number?

Force the Opposite Side to Make a Hard Choice

Having done a lot of preparation, including having a strategy, clients and counsel will know when their offer/demand to the other side makes the other side think twice before simply walking away. Unless there is some risk, it is too easy to abstain from further offers and continue to play out the litigation.

Be Patient

The last, and perhaps most significant, technique that aids in mediation is to be patient. Parties come to mediation prepared to settle but also prepared to go to war. Uncoupling advocacy from the process can and does take time. Witness the number of cases that settle after the mediation day has concluded. Transforming expectations from an advocate's all-out win to a compromise result is not always an easy or quick process. ◆

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PHOTO CREDIT: ©iStockphoto.com/Anthia Cumming

Effective Written Advocacy

Judge John R. Stegner

What is effective written advocacy? While I can explain what I think is effective, other judges might not agree with me. Judges are idiosyncratic. What appeals to me may not appeal to another; however, these are the things that I think are important.

"First seek to understand, then to be understood."—Dr. Stephen R. Covey

Have you ever tried to explain something you didn't fully understand? If you are like I am, it didn't go very well. You had to go back and learn more about your topic before you could explain it.

Dr. Stephen Covey, in his *Seven Habits of Highly Effective People*, writes that this adage is the pinnacle of interpersonal communication. What is written advocacy other than interpersonal communication between a lawyer and a judge?

In order to understand your topic, you must first know the facts and understand the law.

I have, on occasion, at a hearing for summary judgment, asked counsel to identify the jury instruction I would give based on the plaintiff's cause of action. I have heard lawyers say that it is too early to be worried about jury instructions. If a lawyer does not know the specific elements of a particular cause of action prior to a motion for summary judgment

being heard, then he doesn't understand his case. If you want to be understood, you must know your case inside and out. You must be able to describe in cogent terms both the facts and the law and be able to convey how they relate to one another.

Before you Begin, Draft an Outline

We have all been taught to write an outline in advance of writing something substantial. But how many of us actually draft an outline before we write? Briefs sometimes appear to be stream-of-consciousness submissions, rather than careful analysis with logical progression. In order to improve your writing, think about what you want to say and draft an outline. Abraham Lincoln once wrote, "I am sorry to write such a long letter. I didn't have time to write a short one." Shorter submissions, as noted by Lincoln, require organization and time. **Use simple declaratory sentences**.

Many years ago I read an advertisement that made a lasting impression on me. It is the epitome of what I mean by simple declaratory sentences. I have carried it around for years. My wife, Laurie, an English teacher, has a copy hanging in her classroom. The ad, *Keep It Simple,* appeared in *The Wall Street Journal* in 1979, and is reprinted here in its entirety:

Strike three. Get your hand off my knee. You're overdrawn. Your horse won. Yes. No. You have the account. Walk. Don't walk.Mother's dead.

Basic events require simple language. Idiosyncratically, euphuistic eccentricities are the promulgators of triturable obfuscation.

What did you do last night? Enter into a meaningful romantic involvement or fall in love?

What did you have for breakfast this morning? The upper part of a hog's hind leg with two oval bodies encased in a shell laid by a female bird or ham and eggs?

David Belasco, the great American theatrical producer, once said, "If you can't write your idea on the back of my calling card, you don't have a clear idea."

The acronym for *Keep it Simple, Stupid*, KISS, is a good way to think of legal writing. If you can distill an idea to its essence and then communicate that essence, you will have distinguished yourself as a writer. According to Antoine de Saint Exupery, "It seems that perfection is reached, not when there is nothing left to add, but when there is nothing left to take away."

There is, however, a warning about keeping it simple and it comes from Albert Einstein, who said, "Everything should be made as simple as possible, but no simpler." I have seen briefs in opposition to a motion for summary judgment that are under two pages in length. In those cases, when summary judgment is denied, it is because I have done my job, not because the lawyer did his.

Avoid Legalisms

We are all familiar with the phrase: "Comes now the plaintiff by and through his counsel of record and prays for a cause of action as follows." Isn't it clearer and better to say, "The plaintiff claims the following"? My daughter, Sarah, had a friend in college who had a bumper sticker that read, "Eschew Obfuscation." While it is funny, it is also apt (as long as you don't use eschew or obfuscate in your legal writing). I know lawyers who use legalisms as a badge, as if to show membership in the legal fraternity. I, on the other hand, prefer common, ordinary language. It is hard to employ simple declaratory sentences through legalisms. (Think: "party of the first part," "hereinafter," "heretofore.")

"Use a high-powered rifle, not a scattergun."

—Judge Ronald D. Schilling, Idaho Supreme Court

In law school I was taught that no issue, even if it was small or seemingly unimportant, should be conceded. The thought was that you could never tell which issue a judge might seize upon to side in your favor, so you should include every possible issue in whatever you do. If you don't learn anything else from reading this article, learn this: That concept is pure hogwash. Every issue is not equally important. Some are critical to your case. Focus on those, not the minor ones. As Judge Ronald D. Schilling of the Idaho Supreme Court used to say, "Use a high-powered rifle, not a scattergun." If you use a shotgun to address all the issues, you will dilute those that are pivotal. You may think all the issues you are dealing with are equally important. I can assure you, they are not.

Here's an example. In the first case, I get a brief in which one issue is addressed; in the second, I get a brief in which ten are addressed and each is given an equal amount of attention. In the former, I know that one issue is important. In the latter, I cannot tell which are truly important and which are incidental. I will do my best to decide all ten correctly. Nevertheless, the writer of the second brief has not helped me identify what is essential to the case. I think this adage is especially apt on

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appeals. Focus on what is really important and let the minor issues go.

I practiced with a lawyer who used the phrase, "knee-jerk adversarial reaction." In the practice of law, we are reactionaries. We oppose a motion merely and solely because our adversary wants it. Our rationale is that if our adversary wants it, we not only can, but should, oppose it. My former partner said you should ask yourself two questions before you fall prey to the "knee-jerk adversarial reaction." The first question is: Does it hurt my client? The second question is, Can I oppose it and win the motion? If your answer to either question is no, then ask yourself, why oppose the motion? If you cannot come up with affirmative answers to both questions, you ought to focus on something important. The message I'm trying to get across is that even though this is an article about written advocacy, sometimes your best choice is to not file a written response.

Write in Your Voice

My daughter, Elizabeth, recently traveled to Cuzco, Peru, to do some volunteer work. Here is an excerpt of one of her emails to her mother: "Hannah and I went on a walk earlier to find water and a bank and went through the market where there was a basket of chicken heads. For sale. To eat. Well, I think that is about it." My daughter broke a cardinal rule of writing in this email. She used sentence fragments instead of complete sentences. Yet, her writing is vivid. Most legal writing is formulaic. Subject, verb, object. Don't be afraid to use the power of your voice when writing. Don't be afraid to violate the conventional to make an impact.

Pay Attention to Details

I routinely see misspellings and grammatical errors in pleadings and other documents. I even see some in my own written opinions. Do I like it when I see them? No. Does my blood pressure increase when I do? Yes. Would I prefer never to see an error? Absolutely. Do I strive to issue opinions (and letters, for that matter) that are error-free? Unquestionably. Take pride in your written work. Strive to submit only that which is error-free. If you don't pay attention to the details, it will be obvious to everyone who reads your work that you are a sloppy lawyer. Much of what we do as lawyers is detail-oriented. Crossing "Ts" and dotting "Is" is not scut work. It is how we distinguish ourselves from other lawyers.

Rewrite, Revise, Edit

A writer I admire once told me that all good writing is rewriting. Take that admonition to heart. While it is critical to have a first draft, it is in revising that draft that the murky becomes clear, and the obtuse becomes pointed.

Enlist Others to Read and Critique Your Work

I sometimes ask my wife, the English teacher, to read my writing. (In fact, she read this document for me and I am indebted to her for her assistance.) When you ask others to read your work, the chances are it will improve. Sometimes I think something I have written is clear until it is read by someone on my staff. I hope everyone in my office feels comfortable telling me when something isn't clear. If they don't, I have missed out on an opportunity.

We, as lawyers, sometimes feel as if we are the only members of the club and the language we use is only for our benefit. The best writing I see is accessible to a broad range of people, not only lawyers and judges. I don't mean you should dumb down your submissions (although you might improve your odds by doing so). Effective prose is not something unique to our profession. When you have your work edited by others—especially those not in the legal profession—the chances that it will be understood by your audience go up.

Use the Active Voice

I think we have all had drilled into us the advice to use the active voice. I now infrequently see the passive voice when the active should be employed. Nevertheless, I think it's important to remind lawyers that use of the active voice is more compelling. In order to write in the active voice, the subject of the sentence performs the action. In the passive voice, the subject does not perform the action. An example of the passive voice is the following sentence: "The letter was mailed by John." To transform the sentence to an example of the active voice, the subject, John, and the direct object, the letter, are reversed and the verb is modified to reflect the change: "John mailed the letter." Normally, you should choose the active voice over the passive. ◆

Judge John R. Stegner, of the Idaho Second Judicial District Court in Moscow, Idaho, is a member and past president of the Ray Nichols AIC.

The View from WAY Behind the Bench

By Gabriela Acosta, Caitlin Barnes, Bren Chambers, Caitlin Wain, and Tessie Smith

The following list of lawyer "Dos and Don'ts" was compiled from the professional experiences of several judicial clerks who are members of the Robert Van Pelt AIC in Lincoln, Nebraska.

Credibility is Important

- Proofread your briefs, using correct pronouns and grammar. Even if the argument is well reasoned, typos and poor grammar can detract from the message.
- Check the accuracy and completeness of citations, and make sure quotes are correctly reproduced and attributed.
- Accurately cite to relevant cases and to the record. Assume a judicial clerk will read everything you cite. Nothing ruins an attorney's credibility faster than citing a case for a proposition it does not support or arguing statements made in the case but out of context.
- Do not omit key facts. Acknowledge any obvious weaknesses and explain why your argument still has merit.
- Do not invent law. If there is no existing law on point, use any relevant and available legal reasoning.

Write and Speak Plainly

Judges and their judicial clerks want to understand what you are saying or writing the first time they hear or read it. Few things are more frustrating than having to read a paragraph more than once in order to understand it. Plain-language writing is particularly important in pro se cases, as pro se litigants will rarely have your education or legal training.

Present Your Position and Know Your Audience

Do not assume the court knows the facts of your case as well as you do. Clearly state the relevant statutory/case law framework before delving into the finer points of your argument. Judges and clerks appreciate not having to spend a long time learning about an unfamiliar area of the law because the attorney has laid out the basics in a brief.

Once you reach appellate oral argument, lead with your strongest argument. The appellate court is familiar with the record and your briefs, and if you have briefed your arguments well, you need not re-hash everything at oral argument. Start with

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your strongest points to avoid running out of time if the court has questions that divert attention from your prepared statements.

Be Nice
Be civil and professional to the judge and court personnel, especially the courtroom deputy or bailiff. Be equally civil and professional to opposing counsel, even if an opposing attorney is the most difficult person you have ever had the displeasure of meeting. Nothing tests a judge's patience faster and more completely than attorney spitting matches. When an attorney is difficult to work with and unwilling to be flexible to accommodate requests from opposing counsel or the court, it leaves a negative impression that tends to permeate all interactions between the attorney and the court.

Professionalism also applies to brief writing. If you are inclined to take shots at opposing counsel, draft two versions of the brief; one with all of the nasty things you would like to say to opposing counsel, and one without. Read the first brief and pat yourself on the back for all of the wonderful zingers you have directed at opposing counsel—then delete it and submit the second one.

Be civil and respectful to the parties, even when you are dealing with a pro se litigant who is not civil and respectful. Some pro se litigants are personally offended by the contents of motions, briefs, and orders, and they respond with insults and obscenities. A snarky retort to such displays of emotion will not benefit you and will likely undermine your credibility.

Follow the Rules
How much time do you have to file your reply brief? Does your motion need an accompanying brief? Do you need to submit a proposed order to the judge? Is there a page limit or other formatting requirements for briefs? Answers to all of these questions and more may be found in the court's published rules, often available on the court's website. Attorneys who elect not to read those rules run the risk of blowing through deadlines or subjecting themselves to otherwise unnecessary motion practice, the consequences of which may affect the outcome of the case. If you cannot meet a deadline, file a request for an extension of time *before* the deadline has passed.

Most judges enforce the rules and orders of the court without regard to whether the party is represented or pro se. Pro se litigants face the daunting task of prosecuting a case without the benefits of schedulers, assistants, and associates, and their failure to prosecute a case diligently often results in dismissal of their claims and defenses. If the court allows lawyers to blow deadlines without consequence or sanction, equal justice for all, or the appearance of equal justice, is compromised.

Remember the Liberal Construction Afforded to Pro Se Cases
The court must liberally construe the pro se party's pleadings and filings. Construing pro se documents is like taking a law school exam. Because pro se litigants lack legal expertise, they may not be able to articulate specific legal principles. The court must decipher what the plaintiff is trying to say, spot issues based on the pro se party's version of the facts, and decide the case based on the facts and law. While lawyers always have a duty to inform the court of all relevant and binding law (even when it appears adverse), the importance and purpose of that duty is pronounced when dealing with a pro se party who lacks the ability to cite relevant law to the court.

Practicing Before the Trial Court

Clearly Identify Evidence Cited in Support of Your Motions
Sifting through evidentiary submissions takes a lot of time. So put yourself in the court's shoes and implement any methods (within the rules) to streamline the presentation of evidence.

- If a brief relies heavily upon deposition testimony, direct the court's attention to the relevant evidence by providing a separate listing of the deposition portions actually cited.
- Submit only the evidence the court needs to see; e.g., if only two pages of a deposition are relevant, submit only those pages.

Submit Briefs in the Most Useable Format
If the court requires paper briefs, also send electronic copies to the judge's chambers. Particularly in fact-intensive cases, submitting a brief in an electronic format can eliminate the need to retype a large portion of the statement of facts and/or law when drafting a written decision. If reasonably possible, add hyperlinks to the cases cited within the electronic filing; this creates an efficient way for lawyers to check their citations, and it makes the court's review easier and faster.

Use Motions to Compel Sparingly
Talk more; file less. Many attorneys make a cursory effort to resolve discovery disputes prior to filing a motion to compel. But the attorneys know far more about their case than the court ever will, and the court has limited time to become familiar with the details of a case. By spending additional time

talking to each other and eliminating as many extraneous issues as you can, you are doing the court and your clients a substantial favor.

The same principle applies to cases with pro se litigants. Make every effort to communicate with pro se parties about discovery and other issues that may be resolved without involving the court. Many attorneys are reluctant or unwilling to speak directly to pro se parties, but do not ask the court to supervise communications or mediate disputes that could be resolved by a phone call between you and the pro se litigant.

Finally, if you must file a motion to compel, remember that the court cannot make parties produce something they do not have. Once a party represents that it does not possess certain documents and/or other tangible items, absent an evidentiary showing to the contrary, the court has no ability to force production of those materials.

Use Motions for Sanctions Even More Sparingly
Nothing is more depressing to the court than motions for sanctions, especially when filed early in the case. Once sanctions are requested, the litigation usually becomes combative. And particularly in the context of a motion for sanctions for perceived discovery indiscretions, requests for sanctions often lead to finger-pointing and the recitation of every perceived bad act by all parties involved. As much as you may be annoyed, enraged, or otherwise displeased with opposing counsel, please save motions for sanctions for the most egregious behavior.

Talk about Electronic Discovery at the Outset
Lawyers often avoid this topic in the beginning, or have only a cursory discussion of what electronic discovery may be necessary or reasonable. Then, when problems arise over alleged deleted emails, missing attachments, the proper document custodian, which party will bear the costs associated with imaging hard drives, etc., the court is left to sort through the mess and attempt to create an equitable plan going forward.

Issues such as the location of ESI, its accessibility, the parties' need for information, whether the parties can agree upon search terms, whether predictive coding is necessary, and who bears the cost of converting ESI into a useable format are topics that should be discussed in the beginning. However painful those discussions may be initially, they will be more so in the middle of case progression and with court involvement.

Prepare Proposed Orders with Content and that Comply with the Court's Rules

- If the judge asks for a proposed order, submit a proposed order that frames the issues, states the court's findings, and explains the reasoning behind those findings. A proposed order stating, e.g., "The court finds in favor of the plaintiff/defendant" helps no one.
- Make sure your proposed orders are consistent with the court rules. For example, a proposed protective order that contemplates submitting sealed documents to the court in an envelope marked "confidential," along with returning of all such filings once the case is over, makes no sense in a court that accepts all filings electronically.

Comply with Ethical Rules and Use Common Sense When Contacting Chambers
If you need to contact the judge's chambers about a substantive issue, all parties (including any pro se parties) must be included in the discussion or copied on the e-mail or letter. Absent the consent of all other counsel or parties, attempting to speak with a judicial clerk about substantive issues in a case without all parties included in the communication is an unethical ex parte communication.

When contacting the court on a ministerial issue (e.g., the scheduled time of a hearing), have all of the identifying information about your case—especially the case number—handy. From the court's perspective, finding a court file based on only the name of a party can be difficult. Providing the court with the case number allows for an expeditious response to your question.

Generally speaking, do not call chambers to ask when you will receive a ruling on your motion. The answer to your question is this: The court will get to it in its normal course of business (whenever that is).

Often, it is not only a judge who will be looking over your work, but also a judicial clerk. Judicial clerks provide another set of eyes to make sure cases are progressing and a just decision is ultimately reached. To provide professional and effective advocacy before the court, be mindful of these tips—provided to you by judicial clerks who have viewed (and reviewed) your work from **way** behind the bench. ◆

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Endgame at the Witness Stand

By Michael Cavendish, Esquire

Perhaps the greatest chess teacher of all time, Siegbert Tarrasch (1862–1934), theorized that victory in chess depends on three factors: force, space, and time. *Force* means the pieces, how they can move, their strengths and weaknesses. *Space* incorporates the idea of the chess board, the changing geometries among the pieces as they move and shift, and the static rules that restrict how quickly those spaces grow or shrink. *Time* has a double meaning, directed at both how far along the player is in her progress within a game, and her relative tempo toward the condition of victory.

Discuss these with a litigator, and he will quickly agree that lawsuits have known analogs to these decisive factors of chess. Force exists in lawsuits and their trials; it is the different modules of law and fact used to build the prima facie case.

Time certainly is a litigator's element—one side can progress faster than the other, thus establishing a favorable momentum against the opponent. Translating Tarrasch's concept of space into lawsuits requires nuance. It is the differences in what we call the "weight" that a judge or jury will assign to a given discrete finding.

The variable weight, this variable importance of unique legal things depending upon how they are situated amidst other legal things, is analogous to the reality in chess that identical pieces can be more or less powerful, depending on where they sit on the board.

Tarrasch also demonstrated that his three factors are *mutable*; any of the three can be traded for another, usually for strategic purpose. In chess, one might trade a pawn (force) for the chance to move the bishop one turn sooner (time). In trials and lawsuits, the lawyer's analogs to these factors are also mutable. The litigator as chess master might forego the chance to strike an affirmative defense (a missed transaction of force) for the opportunity to set a trial date sooner—thereby establishing a shorter motions period than might be ideal for the opposite side (a transaction of time). Significantly, Tarrasch

also proposed that the advantage gained through strategic exchanges of the three factors is never lost, for the remainder of a game. The advantage gained through exchange of the mutable becomes immutable, a desirable state of affairs.

Because of mutable factors and the immutable advantage of their exchange, Tarrasch championed the strategic goal of retaining as much force—the factor easiest to exchange—as possible into the endgame. Tarrasch's proposal was not just bound up in the theoretical. He translated his philosophy of mutability between force, space, and time into practical skills that could disrupt a chess match at a decisive moment. Consider his instruction on the chess skill known as the "fork."

A fork is activated when the player's piece can attack more than one of the opposing pieces from its current square. An example is when the knight piece can reach either the opponent's knight or the opponent's rook at the next turn.

Translated from chess to trial law, a fork can arise when the lawyer is prepared to attack the key witness's answer to a binary question, regardless of whether the answer will be "yes" or "no." The witness wants to be wily, keeping both options open if a key question might establish the cross-examining lawyer's case. The lawyer treats the answers "yes" and "no" as two cherished chess pieces the witness wants to retain, and he positions his questions between them like the knight piece that can threaten both simultaneously.

Imagine this witness is a general contractor. His claim is that he was never paid for a valid invoice at the end of the construction project. After viewing some business records in discovery, the lawyer suspects the math behind the invoice does not sum well with the rest of the project. Using the business records, the lawyer plans to trap the contractor at the witness stand with the legal equivalent of Tarrasch's fork, to reveal the fatal inconsistency, like this:

Q: This is your invoice?
A: *Yes.*

Q: It states an amount owed of $100,000?
A: *Yes.*

Q: You prepared it?
A: *It was prepared at my direction.*

Q: So you know what the sum stated represents?
A: *Yes.*

Q: It represents monies owed to the subcontractors?

The fork is in place.

A: *Yes.*	**A:** *No.*
Q: Which subcontractors? **A:** *I have a list.*	**Q:** It was money owed to you, then? **A:** *Yes.*
Q: ElectroCo? **A:** *Yes, that's one.*	**Q:** Money for what? **A:** *Profit, overhead.*
Q: But you disclosed a ledger showing this sub was paid months before this invoice issued? **A:** *Let me see that.*	**Q:** Look at your project budget. I see $50,000 in profit? **A:** *Yes.*
Q: Was your ledger falsified? **A:** *No.*	**Q:** And $25,000 in overhead? **A:** *Yeah, that's right.*
Q: Did this invoice misstate the final amount amount due? **A:** *No.*	**Q:** Your previous invoices show that these amounts were billed and paid months before? **A:** *Um.*
Q: Your records seem contradictory, don't they? **A:** *Maybe.*	**Q:** You were not entitled to double profit or double overhead on this job, were you? **A:** *No.*

The chess instructor might explain here that the lawyer is starting by placing his piece squarely within the reach of his opponent's pieces, by asking questions *(This is your invoice? You know what the sum stated represents?)* that seem to assume that the witness's document, akin to the space in which the witness's pieces are positioned, is defensible.

Forks in witness examinations work because they begin with a usually innocuous binary question—*Was X for Y?* —and then, just like with the linear, logical nature of chess, use the linear nature of the witness's desire to maintain a consistent story against the opposing linearity of the partially impeaching evidence, to show the jury or judge that the story is contradicted and has credibility problems.

Forks can be put into place any time a witness—just like an opposing chess player trying to use two pieces in the same area—wants to have things both ways, wants to have an escape route to switch to. Forks at the witness stand are devastating. They target both of the witness's potential stories, and force the witness to commit to only one. This removes, like an abandoned chess piece, the unchosen option as an escape route when the lawyer proceeds to impeach the option chosen.

Or consider another tactic Tarrasch taught, known as the "pin." A pin is like a fork, in that the player's single piece threatens two opposing pieces. But pins activate when a player's piece is aligned to attack an opposing piece *and also the opposing piece behind the first target*, once the first target

Continued on the next page.

is removed. Visualize a rook facing down, along an empty row, a bishop on a black square and a queen on the white square just behind.

In chess, pins do not unleash the same minor chaos upon the opponent that forks do. However, a pin enjoys the added benefit of trapping the opponent's pieces—the queen with the bishop in front— for an inconvenient span of time, again creating a favorable asymmetry.

To create Tarrasch's pin at the witness stand, the lawyer plots out a series of questions where the witness will be led into affirming a minor premise. This minor premise will be some piece of shared human experience with which almost everyone, judge and jurors included, would agree. Then, as soon as the minor premise is affirmed, the lawyer moves it away and unfurls the major premise, which is a position material to the witness's theory of the case that is the opposite of and contradicts the minor premise.

The same lawyer who made the fork against the testifying contractor might deploy a pin upon the same witness, like this:

Q: You wrote this e-mail?
A: *Yes.*

Q: To your subcontractor?
A: *Yes.*

Q: On this same project we are talking about today?
A: *Yes.*

Q: Your e-mail says that his installations were defective?
A: *Yes, but we made him fix them.*

Q: You go on to say that if the sub doesn't finish the work correctly, you won't feel moved to get him the rest of his money, right?
A: *Yes, I wrote that.*

Q: And you were right to say that, weren't you?
A: *[Getting nervous] Yes.*

Q: That's how it works in construction, isn't it?
A: *[Confused] How what works?*

Q: You don't perform your contract, you don't get paid, right?
A: *[Cautious] Um.*

Q: That's why you were correct in what your e-mail said to this sub, right?
A: *Yes, that's right.*

Q: And there was nothing wrong with you coming out and taking that position, right?
A: *Nothing wrong with what I did.*

The minor premise is fully committed. Now the minor premise is removed to expose the major premise.

Q: So why should your failure to complete your own contract with my client not end in the exact same result you rightly imposed on your subcontractor?

Once the minor premise is removed and the pin's threat to the major premise is revealed, there is usually little the witness can do to escape the attack inhering in the pin. The witness can capitulate and agree that the commitment to the minor premise contradicts the major premise.

The witness can disagree, arguing that he should be treated differently than the subject of the minor premise he just committed to, an argument that will create immediate dissonance in the factfinder's mind. Or the witness can stand mute, allowing the forceful logic, the brutally linear nature of the pin against his position on the major premise to sit there, hanging in the air, as the lawyer allows time to tick by.

None of these three possible responses favor the witness; all favor the lawyer—an immutable advantage that will last the rest of the trial. And the lawyer has not played a trick. After all, the witness's discredited position was contrary to a fair, generally held view that the witness himself affirmed. The lawyer's pin merely exposed that contradiction in a way that the witness did not see coming. In effect, the lawyer merely forced the witness to face his own contradiction, without leaving an avenue for escape.

Law works something like chess. Chess theory and chess strategy find analogs in lawsuits, both in theory and at practical times, such as at the witness stand.

Chess thinking, of the sort the great teacher Tarrasch developed, transfers well to practical lawyering because of its concern with diligent timing, careful use of material, and a sensibility about relative space, which lawyers would call "weight." Chess thought is useful to rooting out and overcoming even the most onerous aspects of trials and lawsuits—liars, equivocators, procrastinators, and delayers. It can introduce useful rigor and helpful contingency planning into many of the litigator's tasks, but especially the endgame, the cross-examination of the key witness at trial. ◆

Michael Cavendish, Esquire, practices commercial litigation as a partner with Gunster, Yoakley & Stewart, P.A in Jacksonville, Florida. He is an alumnus of the Chester Bedell American Inn of Court.

PROFILE IN PROFESSIONALISM

Judge Robert J. Bryan

2015 Professionalism Award for the Ninth Circuit

By Jennifer J. Salopek

Robert J. Bryan has been involved with the American Inns of Court movement since 1987, when he served as founding member and first president of the Puget Sound American Inn of Court. The 25th Inn in the United States, it was closely affiliated with the University of Puget Sound Law School. A group of colleagues, including law school dean Jim Bond, encouraged Bryan to get involved. At first, he was reluctant.

A U.S. district judge for the Western District of Washington, Bryan had been appointed to the Court by President Reagan only the year before. "I was new to the federal bench, and very busy. I was aware of the Inns of Court movement but not immersed in it. The other founding members wanted the prestige of the federal court associated with the new Inn, and convinced me that they would do all the work, so I agreed," Bryan says. "It has been a great success."

Although his involvement was tentative at first, the relationship has lasted and deepened. The Puget Sound Inn was renamed the Honorable Robert J. Bryan American Inn of Court in 2004. Nearly two decades after its founding, Bryan continues to hold its monthly meetings in his courtroom.

"It is an extension of what I have always done and believed in—an extension of my bar and law practice, and principles of the judiciary," he says. "I appreciate the opportunity to have continuing education programs on topics of interest, and to discuss common issues with other lawyers."

Bryan's professional destiny may have been predetermined: He is the third generation in a family of lawyers, following in the footsteps of his father and grandfather. Bryan and Bryan was founded in Bremerton, Washington, by his grandfather in 1904; Bryan joined the firm in 1959 after earning his JD at the University of Washington law school. Although he says he never wanted to be a judge, once he had worked to get a third seat on the county superior court approved by the state legislature, he realized that he might be a viable candidate for the seat. He was appointed by Governor Dan Evans in 1967 at the age of 32.

"I discovered I liked neutrality better than advocacy," he says, as he handled accident cases, boundary line disputes, wills and probate, and the like. Despite his relative youth, he was well prepared to establish the kind of court atmosphere he sought, having been sent by the state to the National Judicial College for a month of training. He developed a basic philosophy: to be fair, to follow the law, to be polite, and to control the courtroom.

"I tried not to be results-oriented, but rather to let facts and the law drive the decisions," he says.

Bryan retired from county court in 1984 and joined the firm of Riddell, Williams, Bullitt and Walkinshaw in Seattle as a partner. Upon his appointment to the federal bench in 1986, he saw firsthand the differences in the courts. "The body of law is different in the issues we deal with, although there is some overlap. But methods and behavior don't change," he says. With the federal appointment came the opportunity to employ two law clerks, whom Bryan tries to teach by example and discussion.

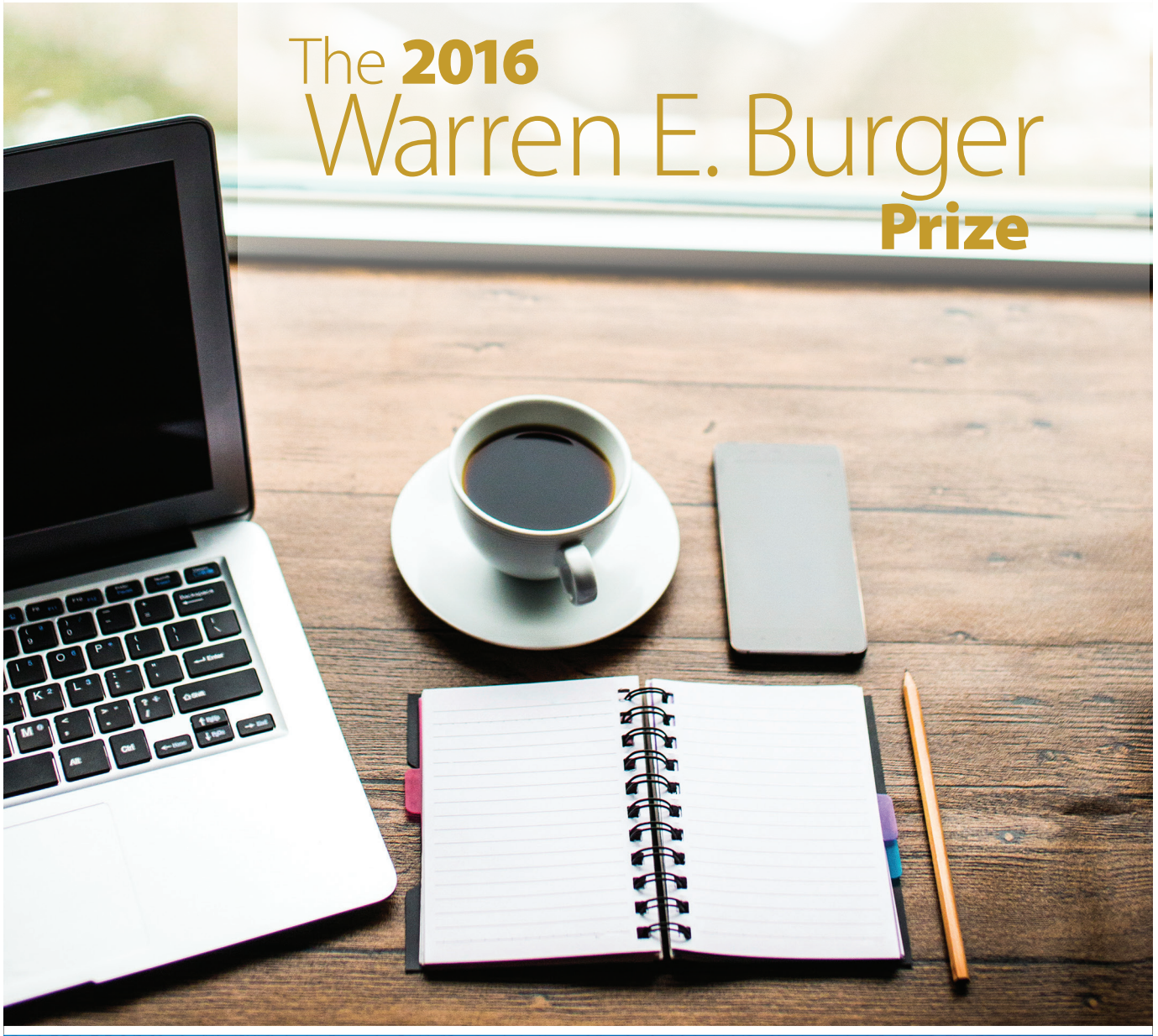
In a letter of nomination for the Ninth Circuit Professionalism Award, one of those clerks, John Butler, wrote:

From my first day, Judge Bryan's interactions with others embodied his high standards of ethics and professionalism. [He] invited me into his office and stressed the importance of professionalism and ethics for him and his chambers… [He] passed on to me advice given to him by his father, also an attorney: 'If you have to ask if something is ethical, it is too close to the line.' Judge Bryan also required that I read the Code of Judicial Conduct as soon as possible. This adherence to the highest ethical standards typifies Judge Bryan's conduct in all things.

Bryan took senior status in 2000, and has since served on the board of trustees of the Federal Judicial Center, as president of the Ninth District Judges' Association, and on the Ninth Circuit Judicial Council. Despite many other professional honors, he was especially pleased to receive this award.

"Judges don't know how other judges hold court," he says. "It made me feel good that my experience is appreciated by my peers." ◆

Jennifer J. Salopek is a freelance writer based in McLean, Virginia.



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PROFILE IN PROFESSIONALISM

Larry A. Hammond, Esquire

2015 Professionalism Award for the Ninth Circuit

By Jennifer J. Salopek

One of the country's most esteemed criminal defense practitioners began his legal career because of a stutter. Many defendants in capital cases who would not otherwise have had legal representation have that small fact to thank for their access to justice.

Raised in El Paso, Texas, by his traveling salesman dad and his church organist mom, Larry A. Hammond had no attorneys among family or friends, and no plans to attend law school. Having discovered that his severe stutter didn't appear when he spoke languages other than English, Hammond had found himself a Spanish-speaking summer job and a college degree program in Russian. But when he transferred from the University of New Mexico to a more competitive department at the University of Texas, he began to stutter in Russian as well.

"Talking was very difficult for me," Hammond says. "Many things in my early life were defined by the fact that I tried to avoid speaking in English. When I began to stutter in Russian, I decided to go to law school in order to address the challenges head on.

"I loved every minute."

At UT law school, Hammond served as editor-in-chief of the *Texas Law Review* and was inducted into the Order of the Coif. Influential faculty such as federal courts professor Charles Allen Wright and torts professor Leon Green were instrumental in helping Hammond get his first clerkship, with Judge Carl E. McGowan of the U.S. Court of Appeals for the DC Circuit. Green was a particular influence:

"I loved him," Hammond says simply. "Professor Green espoused the defense of the little man over the interests of government and corporations. He taught me that it was important for lawyers to help those without access to civil justice." Although Hammond had "no interest in criminal justice," Green's influence would have a profound effect on Hammond's career.

So did Justices Hugo L. Black and Lewis F. Powell, Jr., Supreme Court of the United States, for both of whom Hammond clerked from 1971 to 1973, an experience he describes as "like dying and going to heaven—an extraordinary pleasure." He regards Powell, for whom he clerked two years, as the "father of professionalism."

Hammond has been with the Phoenix firm of Osborn Maledon since 1974 after spending a year serving as an Assistant Watergate Special prosecutor. Hammond took a leave during the Carter Administration, to serve as First Deputy Assistant Attorney General in the Office of Legal Counsel where among other things he assisted with the task force negotiating for the release of American hostages in Iran. He began his death penalty work in 1981, and currently is involved 10 capital cases.

Hammond has served as chair of the Arizona Justice Project since 1998. The project has faculty coordinators at the law schools at Arizona State University and the University of Arizona, and at any given time has 20 to 40 students working on cases. The project has screened applications for assistance from more than 5,000 inmates and in recent years has secured the release of more than 20 individuals.

"It is a huge part of my firm, my law practice, and my life. The Project helps to ensure that the poorest of the poor have someplace to go if they have a legitimate claim of innocence," Hammond says. Some of his most notable criminal defense cases include those of John Henry Knapp and Ray Girdler.

Although not a member of an American Inn of Court, Hammond embraces similar principles, and says that this Professionalism Award aligns with the goals he has had for his career. "I believe in doing things the right way and am mindful of lawyers' ethical responsibilities at all times," he says. Frequently an adjunct professor teaching law school courses on death penalty cases and claims of wrongful conviction, and working closely with students on the Justice Project, Hammond tries to pass those principles down.

"We must demand a high level of professionalism in this work," he says. "So many of these [wrongful conviction] cases are built on the ineffectiveness or inappropriate conduct of other lawyers. While it is sometimes necessary to be critical of other lawyers, we take it very seriously and do it very carefully."

Hammond attended the Celebration of Excellence in October with his grandson, a Marine who was then serving at the White House. "It was an unforgettable experience to return to the Supreme Court with him," Hammond says. "It was profoundly moving." ◆

Jennifer J. Salopek is a freelance writer based in McLean, Virginia.

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TECHNOLOGY IN THE PRACTICE OF LAW

Kevin F. Brady, Esquire

Is Achieving Competence in Technology a Pipe Dream!

By all accounts, lawyers do not meet standards of ethical competency in technology. The sophistication and complexities surrounding technology are significant and evolving at breakneck speeds.

In August 2012, the American Bar Association's House of Delegates voted to amend the comment to Rule 1.1 of the Model Rule of Professional Conduct noting that lawyers "should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology…**." Rule 1.1 Commentary (emphasis added). Unfortunately there has been no further guidance as to how competence in technology should be achieved, maintained, or measured. Technology is not taught in law school or tested on the bar examination and no CLE requirements exist regarding technology.

While many lawyers understand the case law and the procedural rules regarding technology in discovery, we are also charged with understanding the "relevant technology." Litigators, who try to understand the technology, struggle to appreciate the benefits and risks of the evolving technology used to manage digital information. The challenge is compounded when factoring in the personal privacy and data security issues associated with those "relevant technologies."

Personal injury lawsuits, family law matters, and employment lawsuits can be won or lost based on evidence from Facebook, Snapchat, Fitbit, e-mail, voicemail, and text messages. Even discussions of keyword searches or file format can challenge the technical capacity of many attorneys. An example of just how little the technology needle has moved is Federal Rule of Evidence 502, which was specifically enacted to eliminate the risk of privilege waiver in handling digital information as well as reducing the cost. Despite being enacted in 2008, Rule 502 remains largely ignored by the bench and bar today.

While many jurisdictions have amended their rules of professional conduct to reflect the ABA's language in the commentary of Rule 1.1, very few have taken steps to address the technology problems lawyers face in the practice of law. In 2009, the Seventh Circuit Electronic Discovery Pilot Program Committee developed guidance relating to eDiscovery "to provide the bar with educational information about the various technologies that are available and how they can be effectively used to improve efficiency and quality in electronic discovery." In 2013, after discussions with the Richard K. Herrmann Technology American Inn of Court in Delaware, the Delaware Supreme Court formed the Commission on Law & Technology consisting of judges, lawyers, and IT professionals, and charged it with developing and publishing technology guidelines and best practices. Educational programs exist for lawyers to understand the law surrounding technology, but none addresses the challenge the technology presents.

The State of California Standing Committee on Professional Responsibility and Conduct issued a Formal Opinion No. 2015-193 on June 30, 2015 which addressed a number of issues regarding an attorney's ethical duties in the handling of discovery of digital information. While the California opinion helps to raise awareness of the numerous "legal rules and procedures" regarding eDiscovery, it fails to provide guidance on the specifics of the technology involved and what steps attorneys should take to meet the required minimum level of competence in understanding the "benefits and risks" associated with that technology.

The California opinion does note that "[c]ompetency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI." While this is also an option under the Commentary to ABA Model Rule 1.1, it is not a solution. The "associate or consult with a lawyer of established competence in the field in question" approach is very helpful for targeted or sophisticated technological challenges, but it was meant to address the issue of a lawyer involved in an area of the law that he or she normally does not practice. The rule was not meant to be a safe harbor for a core competency such as discovery.

What is the Answer?

If a teacher gives a test and an overwhelming majority of the students fail the exam, the problem lies not with the students, but the test. We need to change the test. Keeping up with changes in technology is not a viable option—so what should the test be for minimal competence in technology? How do we provide realistic and practical guidance for lawyers to handle the challenges that technology raises?

Kevin F. Brady, Esquire is of counsel in the firm of Redgrave LLP in Washington, DC. He is the president of the Richard K. Herrmann Technology AIC in Wilmington, DE, and a former member of the American Inns of Court Board of Trustees.

Lawyers in Transition

Program No.: **P13290**

Presented By: The Wray Ladine AIC, Modesto, CA
Presented On: 11/12/2015
Available Materials: Script, Articles, Handouts, DVD
CLE: 1.0

Summary

The focus of the program was to discuss the various ethical issues surrounding situations where lawyers find themselves in "transition." We discussed retirement, leaving the practice of law due to a disability or other forms of incapacity, selling a law practice, and leaving the practice of law to become a judge. The set-up of the program involved a bar scene where lawyers gathered together to celebrate the retirement of their colleague "Bill." The audience participated as patrons of the bar who were also there to celebrate. Bill and his fellow colleagues had a lot of questions about finding themselves in "transition" in their careers.

Roles

Moderator: Disposal of Files ..... Master/Judge

Moderator: Retirement and Exit Consideration ..... Master

Moderator: Fee-Splitting ..... Barrister

Moderators: Selling Practice ..... Barrister and Master

Introduction and Closing ..... Master

Party Attendees and Colleagues of "Bill" ..... Audience

Agenda

Introduction and Opening Scene ..... 5 minutes

Retirement Considerations and Discussion ..... 10 minutes

Disposal of Files, Exit Considerations, and Discussion ..... 10 minutes

Fee-Splitting and Discussion ..... 10 minutes

Selling Practice and Discussion ..... 10 minutes

Becoming a Judge and Discussion ..... 15 minutes

Recommended Physical Setup

Projector, Screen, Laptop, Props to resemble party set

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The Bencher

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The Bencher

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