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The Journal of the Trial Practice Committee

VERDICT

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Evolution and Revolution at the Supreme Court: How the Court Became "Supreme"

By **Robert S. Peck**

When, in his 2010 State of the Union address, President Barack Obama criticized the Supreme Court's recent decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), for "open[ing] the floodgates for special interests," including foreign corporations, to spend without limit in our elections, he indirectly acknowledged both the vast authority we as a nation place in the rule of law and the uncontested authority of the Supreme Court as the arbiter of law's meaning.

Like many other decisions before it, the *Citizens United* decision exemplified the Court's power to change our nation in both profound and subtle ways. As a result of the decision, new sources of money—corporate and labor union funds—will flow into our electoral contests in potentially overwhelming ways with yet-unknowable consequences for elections, political parties, and public policy.

It should be no surprise that judicial decisions can have a broad impact on society. Supreme Court decisions have played a central role in race relations, elections, personal autonomy, and other issues that go to the heart of who we are as a people. As we have seen in the recent nominations of Chief Justice John Roberts and Justices Samuel Alito, Sonia Sotomayor, and, most recently, Elena Kagan, the Court's capacious authority explains why the nomination of a new justice generates controversy. Regardless of a nominee's objective qualifications, the individual selected becomes controversial simply because various interests fear how the nominee will line up on a particular set of issues—issues that may or may not ever come before the Court.

The Court's current stature within the pantheon of governmental power was not a given at its inception. Unlike the detail found in the Constitution's first two articles establishing the Congress and the presidency, Article III provides only the most skeletal description of a federal judiciary. Although revolutionary Americans aspired to the rights of Englishmen and made their case for independence in decidedly legal terms, the judicial branch was almost an afterthought, sold to the public by Alexander Hamilton in Federalist No. 78 as the "least dangerous branch," essentially powerless to abridge rights as compared with an executive branch that wields the sword and a legislative branch that commands the purse and writes the laws.

Early experience with the Supreme Court suggested a largely powerless institution. Despite attracting enormous press coverage by the standards of that day, the first session of the Court proved particularly inauspicious. Only three of the Court's six justices attended the opening session: Chief Justice John Jay and Justices James Wilson and William Cushing. Without either a quorum or any real business to perform, the assemblage quickly adjourned.

A day later, Justice John Blair joined the group, and the Court reached critical mass, but the Court's first session lasted only 10 days and its second only 2. After all, the new tribunal had no cases to hear. Its only business consisted of admitting lawyers to its bar.

Two of the original appointees never joined the Court. Robert Harrison resigned just five days after his appointment to become chancellor of Maryland. John Rutledge, who lusted over the office of chief justice and was later nominated for that post, quit because he regarded the office of associate justice to have significantly lesser status than another he was offered: chief justice of the South Carolina Court of Common Pleas.

Despite the arduous obligation to ride the circuits, the Court's early work seemed to require little heavy lifting. Jay

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Trial Practice Committee

Chairs

Dori Ann Hanswirth
Hogan & Lovells US LLP
(212) 918-3631
dhanswirth@hoganlovells.com

Oran Whiting
Oran F. Whiting
(773) 278-2935
oran@oranwhiting.com

Nash E. Long
Winston & Strawn LLP
(704) 350-7733
nlong@winston.com

Editorial Board

Theresa House, Editor
Hogan Lovells US LLP
(212) 918-3671
theresa.house@hoganlovells.com

Justin E. Mitchell, Editor
Thomason, Hendrix, Harvey, Johnson & Mitchell, PLLC
(901) 525-8721
mitchellje@thomasonlaw.com

James W. Shelson, Editor
Phelps Dunbar LLP
(601) 360-9724
shelsonj@phelps.com

Marlysha Myrthil, Web Editor
U.S. Department of Labor, Civil Rights Division
(202)305-3454
marlysha.myrthil@usdoj.gov

Nicole Woods, Web Editor
Schottenstein Zox & Dunn Co., LPA
(614) 462-2319
nwoods@szd.com

Richard C. Rosalez, Web Editor
Jones Day
(214) 969-4533
rcrosalez@jonesday.com

ABA Publishing

Anna Sachdeva
Associate Editor

Andrew Alcala
Designer

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Dori Ann Hanswirth

Nash E. Long

Oran F. Whiting

Message from the Chairs

We hope that you can join us at the Section of Litigation and Criminal Justice Section Annual Conference in Miami Beach, Florida, April 13–15, 2011. During this conference, we are bringing together two strong sections of the ABA to produce over 55 CLE programs and 5 fun networking events. Our headquarter location is a recently refurbished historic hotel, the Fontainebleau Resort, seen in the James Bond film *Goldfinger*. At this conference, the Trial Practice Committee will present three programs, which will all take place on April 14:

- Dos and Don'ts: When the Government Interviews Your Client
- Leveling the Playing Field: Uncovering and Rectifying Government Misconduct
- Why Can't I Tweet? Proper and Improper Use of Technology in the Courtroom

For more information on these programs, as well as materials for these and past Trial Practice Committee programs, visit the Trial Practice Committee webpage at http://apps.americanbar.org/litigation/committees/trialpractice. (Please note our new web address. Visit us today and bookmark it as one of your favorites!)

Thanks go to our program chairs for their hard work in putting together the programs, panels, and written materials for the Section Annual Conference programs: Brian Antweil, Cynthia Cohen, Dori Hanswirth, and Robert Sumner. Two of our program chairs for the Section Annual Conference are relatively new members of the Trial Practice Committee. If you have ideas and want to get involved in the work of the committee, there is no reason to wait. Join us on one of our monthly committee planning calls, held the first Tuesday of every month at 2 p.m. Eastern (11 a.m. Pacific). Contact one of the chairs or editors for the call information.

In addition to programming, our committee is also busy with its spring membership drive. Our goal is to get 400 new members for the Trial Practice Committee. With your help, we can get there. For more information, please contact Nash Long (nlong@winston.com) or Jim Shelson (shelsonj@phelps.com).

Finally, the Trial Practice Committee is now on LinkedIn. We urge you to take advantage of the networking and information-sharing capabilities of LinkedIn to communicate with other members of the committee and keep up with committee news, such as the minutes from our meetings. Just go to the Trial Practice Committee's website and follow the links to join the Trial Practice Committee Group on LinkedIn. Thanks to Rich Rosalez for setting up this service for the members of the committee.

In closing, the chairs wish to express their appreciation to vice chair Theresa House for her hard work on this journal and the committee website. For her continuing contributions, the Section of Litigation will be recognizing Theresa as an Outstanding Subcommittee Chair at the Section Annual Conference in Miami Beach in April. Congratulations, Theresa! ■

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Editors' Note

The Spring 2011 issue of *Verdict* is essentially our how-to guide for being a better lawyer. With tips and insights for practitioners of all levels of experience—whether the ink on your bar admission certificate is still drying or has begun to fade with age—these pages offer you something valuable and new that you can apply to each stage of litigation.

Sabrina Strong, Matt Powers, and Justin Mates provide insight into any lawyer's first step in any new case, namely, learning the rules—or, in this case, the new rules applicable to the United States Judicial Panel on Multidistrict Litigation. Susan Burns picks up with what she calls the five Cs of effective e-discovery. Lawrence D. Rosenberg joins Hugh S. Balsam and Patrick C. Gallagher in opining on the art of written advocacy in two critical—and endlessly challenging—areas of any litigator's practice: for Lawrence, appellate briefs, and for Hugh and Patrick, written submissions that can explain (and still advocate on) technical issues. And Margaret Lockhart tells us how, even in an era of shrinking dockets and cost cutting, firms can turn junior attorneys into seasoned trial advocates. Robert S. Peck takes a step back to ponder the evolving (and at times revolutionary) role the United States Supreme Court has played in shaping the playing field for all litigators.

This issue of *Verdict* is also significant from a historical perspective. It at once brings us one step closer to the end of an era and to the beginning of a new day. With this second-to-last issue before we join other ABA publications in transitioning from a print newsletter to a purely electronic journal, we begin the process of saying good-bye to the time when our readers would look forward to the soft thud of the print version of our publication being delivered to their mailboxes each quarter. But at the same time, we can now look forward to a new reign where digital publications are king. Although the mailbox will be replaced by the inbox, our content will be as insightful and compelling as ever and—thanks to a quicker publication schedule and a format that will take advantage of the near ubiquity of hand-held devices—we hope more timely, more dynamic, and even more widely read.

So if you're looking for a place to publish your new piece or if you're simply hoping to find a new way to become involved in our committee, act now. Email theresa.house@hoganlovells.com to submit articles for the final curtain call for our print version or to join the ranks of our first class of authors in the purely digital era. We look forward to hearing from you and hope in the meantime you enjoy this issue. ■

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How to Make Technical Briefs Understandable for Generalist Judges

By **Hugh S. Balsam** and **Patrick C. Gallagher**

Legal briefs on technical subjects don't have to be impenetrable. With some care and effort, a lawyer can reduce even the most complicated subject matter to something that generalist judges—and their clerks—can understand. Doing so is important because you want the judge to be able to write an opinion in your client's favor, and a judge isn't going to be comfortable doing so if it is impossible to understand the factual reasons why your client should win.

We know that many lawyers have spent years mastering the science that underlies their special area of practice. The poor judge reading your briefs, however, likely doesn't share your passion for and mastery of, say, the biochemistry behind the development of pharmaceutical products. This disparity in knowledge can be a problem if your case involves—to continue with the same example—a drug patent. If you expect to prevail, you're going to have to simplify the science in your brief. If you don't, you risk losing the judge—and your case.

So, it should be clear from the start that your brief is *not* the place to show off the depths of your knowledge. Rather, it is the place to educate the judge, starting with the very basics, about the science that provides the context for the legal issues raised in your case. Judges and clerks, while adept at researching the law, are unlikely to research the science and technology independently. So your job is to give them all the knowledge they need to decide your case.

This article will help you do that. It is the product of 15 years experience distilling very dense scientific matter to produce clear and understandable briefs that even a grandmother—OK, a sharp grandmother—can comprehend. We have also talked to district judges and clerks to ascertain what they view as helpful—and unhelpful—in briefs in scientific and other technical subject areas.

While we refer frequently to patent cases here, this article is not limited to patent briefs. Rather, the tips and techniques we discuss apply equally in any case where the underlying subject matter is specialized and technical. Think medical malpractice or financial fraud, or even a case that involves a complicated statutory scheme. (Have you read through the Fair Credit Reporting Act lately?)

Our recommendations fall in a few general categories. The first is selection. Don't pack your brief with everything including the kitchen sink and let the overwhelmed judge try to sort it out to figure out what's important to your argument. Your job is to include only what's important and, most critically, to leave out what isn't. The second general subject area is organization. Just as every section needs to have a place and purpose, every paragraph and sentence do too. This sounds elementary, but it's probably the hardest thing to do in a brief. The final general subject area is simplification. This is particularly important in briefs in technical areas, where the arguments, by their nature, are anything but simple. Your goal is to make them less dense, and thus, more inviting, for the judge to understand and ultimately rule in your favor.

A fourth recommendation is to give your brief (before you finalize it) to a lawyer who has no knowledge of the particular field you are writing about. If that lawyer can't understand what you are arguing and why, then you need to go back and improve your work. One of the authors of this article has no scientific background, yet a major portion of his practice consists of writing and improving briefs in technical subject areas. Such nontechnical lawyers can be a significant asset to the briefing process.

Step One: Select

The product—or an illustration of it—is quite helpful. In selecting what information to give the judge, don't forget the product itself. Every one of the judges and clerks we interviewed said that it is extremely helpful for them to be able to look at the article or invention in question. In fact, if possible, you should leave the article or invention in the judge's possession for the duration of your lawsuit so that the judge or clerk can refer to it as desired. Then, when writing your briefs, you don't have to spend time explaining what the article looks like because the judge will already have a basic, macro-level understanding of the context. In this way, you can sooner get to the heart of the issues in your brief.

Of course, sometimes it is not practical to give the judge the article itself. Your case might involve an earth-moving machine or an element of nanotechnology. In those instances, you can still be helpful by giving the judge a three-dimensional model or a picture or diagram—anything that illustrates the particular piece of technology in question and gives context to the technical issues.

And don't stop there. Early on in your case, whether orally or in one of your early briefs, be sure to tell the judge about the real-world application of the article or invention. In particular, be sure to explain what problem this invention solves or addresses and how it does so. This advice holds just as true if you represent a patentee or an accused infringer. For instance, if you are trying to establish that the invention was obvious, you can describe the real-world application in such a way that simplifies the problem such that the "solution" appears to be easily attained. On the other hand, if you represent the patentee, you can describe the inventor's spark of genius in such a way that the subject matter being claimed seems truly inventive.

Be selective about your arguments. It is crucial that you resist the temptation to raise every issue for which you think you have a non-sanctionable argument. This

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is all the more important in cases involving complicated technology because the more you dispute, the more technology you're going to have to explain, and the greater the chance the judge will become confused. The failure to circumscribe arguments is such an acute problem that some courts have issued rules presumptively limiting the number of claim terms that the parties can dispute or that the court will construe. *See, e.g.*, N.D. Ill. Local Patent R. 4.1. To be sure, you have to raise an argument to preserve it for review. But if an argument is marginal in the district court, it is not likely to improve with age. So select wisely in the first instance and you, your client, and the judge will be better off for it in the long run.

That having been said, when you feel you must give the court flip-side or alternative arguments (or if your client insists on it), be sure you make it clear that you are arguing in the alternative. Lawyers sometimes overlook this, and it can be thoroughly confusing to read a brief whose arguments seem irreconcilable with each other. Further, alternative arguments should be as precise and focused as possible so as not to detract from your more important primary point.

Select only the technical facts necessary to support the arguments in your brief. The most important thing you can do in a brief involving a really technical subject is to withhold information from the judge. No, we are not advocating withholding important facts. Rather, you should strive to withhold technical information that isn't necessary to your argument or to an understanding of the general scientific context. The best way to accomplish this goal is to try to generalize the scientific or technical concepts rather than including every last supporting fact.

Consider an example. In a brief we edited recently, our client was challenging the validity of a patent that claimed to have solved the problem of a noxious black smoke forming when a certain chemical reaction occurred. There was, however, a scientific article from the 1950s that described the same type of chemical reaction and did not mention any black smoke—and the article surely would have mentioned the smoke had it occurred. Thus, the article tended to show that the "problem" the inventors purportedly solved in the patent was not a problem at all.

The draft brief we received to work on laid out, in mind-numbing detail, the type of chemical reaction the old article described, complete with chemical diagrams and impenetrable scientific language. When we finished, however, all of that was gone. We cut it out because it was sufficient to mention the old article and tell the judge merely that it showed that the black smoke was not a problem to begin with. And we simply cited and attached the article so that the judge could go back and look at it to obtain more in-depth detail. That way the brief was not clogged up with a maddening level of science that the judge was never going to understand in the first place. Further, in editing the excessive level of detail out of the brief, we were able to elevate, front-and-center, the excellent take-away point that the drafters of the brief were trying to make all along.

> *The best briefs tell a story, and this is so even when the subject matter is technical.*

In other words, you must always keep your take-away point in mind and present it clearly enough—which often means generally enough—that it doesn't get buried and lost in your recitation of the applicable science. Yes, you must educate the judge—but only enough for the judge to understand and resolve the issues in dispute.

Don't repeat arguments needlessly in successive briefs. The time to educate the court about the technology is your first brief where a mastery of the technology is required. Say that is your brief in support of your motion for summary judgment. If that's the case, you do not need to reeducate the court in your reply brief in support of summary judgment. Even though there might be a span of several months between when you write your initial brief and your reply brief, rest assured that the judge is not waiting for the daily mail delivery to rip open every envelope and read everything that comes in the door that day. The judge and clerks generally will wait until briefing is complete, and only then will they sit down and read the full set of briefs at once. Thus, long explanations from the initial brief need not and should not be repeated in the reply brief. Your reply brief can be more pointed and direct, because you need not waste space reeducating the court about the basic points.

That said, there is likely a need to refamiliarize with each round of new briefing. Thus, if you educated the court primarily during a motion to dismiss, you need not repeat the whole background again in your reply brief, but you might need to give a refresher course in a later brief in support of a motion for summary judgment.

Don't waste time reciting boilerplate law. The judges and clerks we interviewed advised strongly against larding briefs up with a lot of standard boilerplate law. They know that law already. It is more helpful to focus on any recent decisions that might have developed or changed the area of law you are dealing with and on cases you believe are closely analogous to the facts of your case.

Step Two: Organize

Don't forget to tell a story. The best briefs tell a story, and this is so even when the subject matter is technical. A patent case presents the same opportunity to narrate a story and develop a theme as any other case. Say, for example, the issue is obviousness of a patent claim. If your client is the patentee, you have the opportunity to relate how novel the claimed invention is and how surprising it was that the inventors came up with it. If your client is the alleged infringer, you can set forth a parade of prior-art references in such a way that the invention seem inevitable,

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The Five Cs of Effective E-Discovery Management

By **Susan Burns**

We all know the ballooning scope of e-discovery poses a growing problem for trial attorneys. You are no doubt inundated on a daily basis with invitations to participate in webinars about the latest and greatest technological innovation to make the e-discovery nightmare go away. Although it is true that you should have technology that is appropriate to the scope of your case, focusing on other significant elements will also help you streamline the process, reduce costs of review and production, reduce stress, and free yourself to focus on your winning trial strategy. How do you draw this line? Just look to the five Cs of effective e-discovery management—(1) cooperation with opposing counsel in defining the scope of discovery; (2) culling data; (3) creating a winning discovery team; (4) communicating effectively with the entire trial team; and (5) capturing and promoting best practices.

Cooperate

Cooperation can result in tighter focus and less interruption to your client's business. Many of us view toughness as a critical element of success. Granted, a certain amount of tenacity is in order in the world of trial lawyers, and toughness has its place. But what does that mean in the context of discovery negotiations? Toughness here means knowing your case, knowing the discovery rules, and, within that context, cooperating with opposing counsel to the greatest extent possible on discovery matters. There are plenty of things to fight about, and eliminating some of the fights at this stage allows you to get to the merits more efficiently and to save your battles for where they count.

Cooperation at this stage does not mean you should cede to unreasonable demands of opposing counsel or be a pushover, or that you are not a zealous advocate. It does mean you should work with opposing counsel to negotiate and define the scope of discovery. More is not always better. Be willing to cede scope for effective focus. You can zealously advocate for cooperation in discovery and save your energy (and expense) for summary judgment rather than motions to compel. Negotiating a tighter focus means less data to collect, process, review, or produce and, consequently, less expense. It is entirely possible to enter into an agreement with opposing counsel to stipulate to locations, custodians, search terms, and strategies.

However, to effectively negotiate, you do need to do your homework and thoroughly understand your case before you start. To identify the useful electronically stored information (ESI) at issue requires an early understanding of the case, including issues, players, time frames, and possible ESI sources involved. Define what you actually want from the other side so that your side doesn't have to sift through terabytes of irrelevant ESI. Remember that an over-aggressive refusal to cooperate drives up the cost of e-discovery for everyone. It also creates more confusion and can cloud the issues and slow down your prospects for early case assessment.

Your opposing counsel may not always be agreeable to cooperating in defining the scope of discovery, in which case you can only do your best, document your efforts, and move on. None of your efforts toward cooperation are wasted as they impact the rest of the process. There are additional steps you can take to manage your expenses and keep your eye on the winning strategy.

Cull Your Data

Culling data means fewer data, fewer documents, and, consequently, lower costs. After defining the focus of your case, regardless of whether you are able to reach agreement with opposing counsel, you want to fine-tune and test your search methodology and use it strategically. You should be strategic about maximizing the search capabilities of the document review or case management software you are employing. The groundwork you laid in the cooperation stage will be useful. Your thorough understanding of the case will help you to hone in on search terms and pare down the universe of documents. This will help you avoid the expense (and embarrassment) of missed documents.

Again, you can effectively maneuver through this stage only if you are very strategic about your search terms. And that is only possible if you understand the case first. Regardless of whether you are using a keyword search, Boolean search, fuzzy logic, conceptual searches, or a myriad of other not-yet-known search products, if you are not doing a straight-line review of all available documents, it is imperative that you spend time focusing on your search and come up with a really good set, stop and review initial searches (i.e., check your results by sampling), and continue to refine searches until you get the search right.

If you cull too much, you can miss key documents and suffer the consequences. And, of course, if you don't cull enough, you run up unnecessary expenses in processing, review, and production. Document your efforts here as well to avoid adverse inferences and other undesirable consequences, such as *Zubulake*-sized verdicts.

Create a Winning Discovery Team

A finely tuned review team provides faster access to critical information. In a case of any size, you will be delegating a lot of the behind-the-scenes discovery work. It is, therefore, important to pay attention to creation and management of this critical team, including a discovery leader and experienced document reviewers. Your first step (and this should be done at the time the case commences) is to appoint an experienced lawyer to manage the overall process, the review in particular, and make sure

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that he or she is dedicated to your case. This can be someone internal, or you can affiliate with specialized discovery counsel. The review team is responsible for overall discovery management and acts as team liaison for all things discovery-related.

Don't be tempted to assign as review point person a junior associate so that person can get some experience. This is one job that is solely suited for seasoned veterans. The lawyer leading the review should meet with the trial team and the review team—ideally before search protocol and document collection have been determined. Make sure to include the review leader in all trial update and strategy meetings. The expense you incur here will be saved later in improved communication during review. It is important that this person also be dedicated to the case and not be juggling numerous other tasks. Don't allow the review team to drift on without guidance for days (or weeks) while the review leader is pulled off to write briefs, handle depositions, or do other work. It is critical that the review team have a point of contact should new issues emerge.

Another important cost-effective step is to use experienced contract lawyers. Their hourly rate is substantially lower than law-firm billing rates for comparable lawyers, and you avoid paying the salary, benefits, and other overhead of full-time employees. Contracting with review lawyers also gives you the flexibility to bring enough people on board on short notice and not be overstaffed when the project ends. Directly contracting saves the expense of the intermediary and rebilling. Using experienced review lawyers also gives you a better quality product. A higher-quality review makes you more effective and has a positive impact on your trial strategy.

A lot can be done to use the talents of your review team effectively. This will also save you time and money. Define clear roles and responsibilities for reviewers. Assign review responsibilities strategically by custodian, priority, topic, or concept; for example, keeping the reviewer's background and experience in mind will yield more effective results. If your collection contains information that requires specific knowledge or skills, improve the accuracy and efficiency of your review process by creating specialized review teams. While you may spend a little more up front on tools and reviewers with specialized skills, you will likely save over the long term in reduced resource costs.

Finally, this point may seem elementary, but it is overlooked most of the time: Make sure your reviewers are sufficiently trained in the law at issue and the review software technology being used. The money you spend on training will be more than offset by greater efficiency and accuracy as well as potential for a more positive case outcome. After all, document review attorneys are the first (or only) attorneys to see factual information pertinent to the case. Their ability to review and decipher the relevance of the facts to the substantive law is critical to your success.

Combining technology's benefits with human expertise is the best way to design a large-scale document review. Every hour saved through effective use of technology allows you to focus time and money where it is most needed: responsive and privilege-protected documents that require a human's subjective expertise. Ineffective training can leave reviewers unable to find and review relevant document groupings, retrieve previously reviewed documents, and carry out other essential review work.

It is also very important to take the necessary time to present your attorneys with an overview of the case and follow up with regular (weekly) meetings to respond to their questions and provide feedback. Insufficient training in the law means that reviewers will not have the background to assess the degree of document relevance and will miss critical documents (both positive and negative). Do not underestimate or undervalue the intelligence of your attorneys. Their understanding of the bigger picture enables them to think about the documents—instead of mindlessly coding—and makes them feel part of a team. Imagine the quality of work you'd be able to provide if a partner asked you to write a memo but refused to tell you what the case is about or what you are trying to achieve.

If the case involves pharmaceuticals or another industry with highly technical terms, provide some background on the industry and its terminology. Depending on the case, consider having an industry expert on hand for the first couple of weeks and on call thereafter to answer reviewers' questions. Investing in up-front training is less expensive than having a team of reviewers spending time trying to decipher complex technical jargon on their own.

Communicate with the Entire Team

Effective team communication results in a more effective trial strategy. One thing that is frequently missing in the discovery process is a method for effective communication between the trial team and document review team and ensuring that both the trial team and the review team get the information they need when they need it. This two-way communication helps ensure (1) regular and consistent updates to the trial team on key factual findings to support early case assessment and incorporation into litigation strategy, and (2) timely communication about changes in case strategy to the reviewers, allowing them to better identify key facts, witnesses, and potential challenges to litigation strategy. Reviewers are often the first or only people to see a document and, if properly used, they can provide updates for keywords and additional searches that need to be conducted. Be sure that reviewers have a method of communicating emerging issues that can have an impact on case strategy, and be open to adding new tags if the situation warrants. If you have done your job correctly and have appointed discovery counsel to lead the team, these steps will all be taken care of, relieving much of the burden and confusion that sometimes goes along with the territory.

In addition to the communication

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Amended Rules for Multidistrict Litigation Take Effect

By **Sabrina Strong, Matt Powers,** and **Justin Mates**

The newly amended Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation took effect on October 4, 2010. The amendments substantially reorganized the Rules and made a number of substantive changes, which are summarized in detail below.

Electronic Filing

The amended rules officially adopt the Electronic Case Filing system (ECF), bringing proceedings before the panel in line with proceedings in most other federal courts. As of October 4, 2010, pleadings before the panel must be filed electronically. Pro se litigants are exempted.

Corporate Disclosure

The rules now require broader disclosure for nongovernmental corporate parties. Under Rule 5.1(a), corporate disclosure statements must disclose all parents, subsidiaries, and other affiliates as well as any publicly held company that owns 10 percent or more of the party's stock. In addition, Rule 5.1(a) requires that a party disclose "any publicly owned corporation, not a party to the matter, that has a financial interest in the outcome of the matter (e.g., by reason of insurance, a franchise agreement, or an indemnity agreement) and [] the nature of that interest." The most obvious impact of this change is that defendants may need to disclose any insurance carriers that issued policies covering the claims at issue.

Motion Practice

The procedures governing motions and panel orders have been reorganized. Before the recent amendments, the rules were arranged generally by the three principal proceedings of the panel: transferring actions for consolidated or coordinated pretrial proceedings, transferring "tag-along" actions, and remanding actions to the transferor court. In the amended rules, the provisions governing motion practice are now designated and organized by the method used to initiate these proceedings (i.e., by a litigant or by order of the panel). The rules now also expressly account for a variety of other motions—Rule 6.3 governs "motions for miscellaneous relief," such as requests for extensions of time, exemptions from ECF requirements, page limit extensions, and expedited consideration of motions.

Revised Deadlines

Several deadlines have been adjusted, including those for notices of appearance (Rule 4.1), corporate disclosure statements (Rule 5.1), motion responses and replies (Rule 6.1), notices of opposition and motions to vacate in response to conditional transfer orders and conditional remand orders (Rules 7.1 and 10.2), and responses and replies to show cause orders (Rule 8.1). Practitioners are advised to double-check applicable deadlines in light of the recent amendments.

Tag-Along Actions

While the prior version of the rules defined tag-along actions as actions sharing common questions of fact with actions previously transferred under section 1407, the definition now also includes actions that share common questions of fact with actions subject to a pending motion to transfer to create a multidistrict litigation. Rule 1.1(h).

Miscellaneous Changes

The rules no longer require parties to list and respond to factual averments in numbered paragraphs in all motions. Rules 3.2 and 6.1.

There are new provisions related to motions to transfer for coordinated or consolidated pretrial proceedings, including a provision that allows interested parties (such as an amicus curiae) to file a response and a provision that establishes a procedure for amending a motion to transfer. Rule 6.2.

The prior version of the rules provided that the panel could issue a show cause order (rather than a conditional transfer order) in response to a notice of a potential tag-along action if the panel had "reasonable anticipation" of opposition to the transfer. That provision has been deleted from the new rules, and the special procedures (and shorter deadlines) governing conditional transfer orders will apply. Rules 7.1 and 7.2.

The provisions governing remand no longer expressly require that actions transferred only for coordinated or consolidated pretrial proceedings be remanded to the transferor district for trial. Rule 10.1.

For parties urging the court not to hold oral argument on a motion, the page limit for statements of "Reasons Why Oral Argument Should [Need Not] Be Heard" has now been extended from one page to two. Rule 11.1(b). In addition, the Rules now expressly allow parties to agree to waive oral argument on motions to transfer, and the panel will consider any such agreement in determining the need for oral argument. Rule 11.1(b)(i). ■

Sabrina Strong and **Matt Powers** are partners with O'Melveny & Myers LLP. **Justin Mates** is an associate with O'Melveny & Myers LLP.

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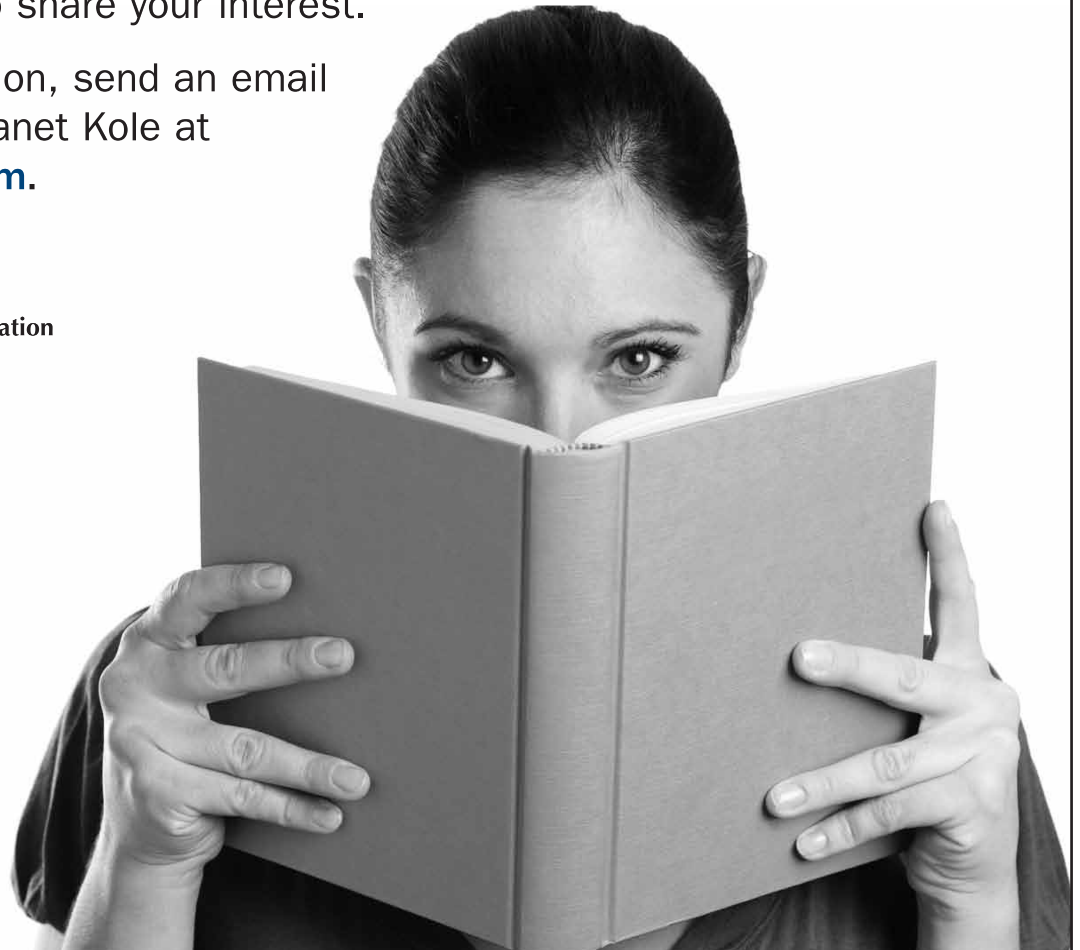

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Writing to Win: The Art and Science of Compelling Written Advocacy, Part Three

By **Lawrence D. Rosenberg**

As noted in prior installments of this article, writing a winning legal argument can often be the most important single element in a case. In part one of this article, we discussed the key steps in preparing for writing a winning argument. Part two discussed how to put together a winning legal argument and addresses several components of an excellent brief: the statement of issues, statement of the case and facts, and the introduction and/or summary of argument. This third installment addresses the meat of your brief—the argument—and suggests how to write a compelling and winning legal argument.

The argument is the heart of your brief or motion. It is obviously critical, and it is likely to be the portion of your document on which you will spend the most time, drafting and redrafting. While constructing an excellent argument section of a brief may appear daunting, there are several fundamental principles to follow.

Use Point Headings

The point headings in your argument present an opportunity to persuade and focus the court. They should always be argumentative.

> Headings should always be argumentative rather than topical or even assertive. For instance, say "This suit is barred by laches because brought twenty-five years after the issuance of the original certificate" rather than "This suit is barred by laches." The first gives the argument in a nutshell, the second does not—though certainly the second assertive heading is infinitely more effective than the merely topical "The question of laches."

Frederick Bernays Wiener, *Effective Appellate Advocacy* 54 (Christopher T. Lutz & William Pannill eds., ABA 2004) (1950). This rule applies even to subheadings describing the governing legal rule. It is remarkable to see an otherwise excellent brief with a subheading that says "The law regarding laches" or "The standard for summary judgment." It is much more effective to say "Laches bars a suit when the plaintiff has unjustifiably delayed in asserting a claim" or "Summary judgment is appropriate when no reasonable jury could find that the defendants conspired to fix prices."

In our hypothetical (previously described in part two of this series), it would be much better to say "II. The District Court Correctly Concluded That Pharma And Dr. Evil Possess No Market Power Because There Are Many Economic Substitutes For Happynol and Euphorizem That Relieve Depression" than to say "II. Defendants Have No Market Power." Moreover, as these examples show, it is important to have point headings that, while concise, actually state your argument in a persuasive manner.

Lead with Your Best Argument

If you have carefully selected your issues, you will likely have three or fewer issues to present to the court. In the event that you have more than one issue, it usually is most effective to present your strongest argument first. You want to lead with the argument that is most likely to grab the attention of and persuade the court. Certainly, if you feel you have a slam-dunk winner, lead with that argument. The only exception to this rule is where you have a procedural argument that you feel really has to be made first, even if it is perhaps a bit weaker than your best substantive argument. It does look rather obvious to make a jurisdictional or standing argument at the end of your brief. That said, I have seen briefs (and even written some) that have made a jurisdictional argument such as mootness at the end of the argument, particularly where a substantive argument was very strong and the client would prefer to win on the substantive argument, but where the procedural argument was also strong and obvious.

Use the "IRAC" Structure

We are not talking about the war in the Middle East here. It is generally very effective to use the Issue-Rule-Analysis-Conclusion (IRAC) structure for each issue that you address in your argument. Under this convention, include at least one sentence that states and defines the issue you are addressing, a paragraph or more setting forth the governing legal rule, a paragraph or more applying the legal rule to the particular issue, and at least a sentence concluding with the outcome that you seek with respect to that issue. It will often make sense to divide a main section of the argument into a subpoint that sets forth and describes the legal rule and a subpoint that applies that rule to the issue involved.

The reason that this structure is usually the most effective to employ is that it is the most logical way to construct a legal argument. Identifying the issue at the outset orients the reader and sets the stage for your analysis. Defining and explaining the legal rule gives the court the criteria for decision and in many ways limits the possible analytical outcomes with respect to a given issue. Applying the rule to the issue provides the logical impetus for the court to rule in your favor. And explaining the outcome that you contend the law compels makes plain the result that you urge the court to order. Many legal writers discuss the key facts regarding an issue and then set forth the legal rule. Such an approach can be effective in very unusual circumstances, but it usually is not. A much more analytically compelling approach is to establish the rule of decision first and then to apply that rule to the case and its key facts,

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rather than to list a number of facts and expect the court to draw the proper conclusions from the legal rule that you subsequently set forth. And it is unnecessarily repetitive to describe the salient facts, set forth the legal rule, and then apply that legal rule to the facts that you will have to redescribe, at least in part.

When establishing the legal rule, it is also helpful to start with general statements of the legal rule from cases and then demonstrate how that stated rule has been applied to the facts of the most relevant cases. While statements of the law are important, it is how those statements have been applied in analogous circumstances that will most effectively persuade a court.

Particularly if the relevant legal rule is not well established, it is also important to explain why the legal rule is logical and compelling. Such an explanation may reside in helpful quotations from cases, treatises, or even law review articles. Or you may have to craft such an explanation by using analogies, logic, and policy arguments. An example of such development of a legal rule is the following:

> As a corollary to the exception to the work-product privilege and attorney-client privilege for materials that shed light on a "crime" or "fraud," there is also an exception to those privileges for materials that themselves constitute or evidence "other type[s] of misconduct fundamentally inconsistent with the basic premises of the adversary system." *In re Sealed Case*, 676 F.2d at 812 (citing, *inter alia*, *Moody v. IRS*, 654 F.2d 795, 799–800 (D.C. Cir. 1981)); *see also In re Sealed Case*, 754 F.2d at 399. Just as the exception for an actual crime or fraud serves the salutary purpose of requiring disclosure of materials that shed light on the elements of nefarious conspiracies or enterprises, so does the closely related exception for other types of gross misconduct. It is plainly inconsistent with the basic premises of our adversary system to protect work product or attorney-client communications that are themselves violations of rules established by law or principles of ethics, or that evidence such violations. It simply makes no sense to protect such materials merely because those materials involve an attorney. Such materials indicate "abuse" of the attorney-client relationship sufficient to deny the protection of privilege.
>
> Accordingly, the relevant misconduct "is not limited to criminal or fraudulent conduct, but may also encompass other 'misconduct fundamentally inconsistent with the basic premises of the adversary system.'" *Tri-State Hosp. Supply Corp. v. United States*, 238 F.R.D. 102, 105 (D.D.C. 2006) (quoting *In re Sealed Case*, 676 F.2d at 812); *Jinks-Umstead v. England*, 233 F.R.D. 49, 51 (D.D.C. 2006). This exception to the work product protection applies when a party seeking discovery shows a violation "sufficiently serious to defeat the work-product privilege" and a "valid relationship between the work product [at issue] and the prima facie violation." *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 133 (D.D.C. 2005) (quoting *In re Sealed Case*, 676 F.2d at 814–15).
>
> Thus, in *Moody v. IRS*, the D.C. Circuit held that the work-product privilege would likely not apply to a document detailing an allegedly improper ex parte meeting between an attorney and a judge that had previously taken place. The Court noted that the purpose of the privilege is "to protect the adversary trial process itself," and explained that "a lawyer's unprofessional behavior may vitiate the work product privilege," as it would be "perverse" "to exploit the privilege for ends [such as covering up improper ex parte communications] outside of and antithetical to the adversary system." 654 F.2d at 800. Accordingly, the court remanded to the district court to determine whether the ex parte communication described in the document was in fact improper and whether the document should be disclosed. *See id.* at 801.
>
> Similarly, in *Jinks-Umstead v. England*, the court recognized that the "crime-fraud exception to the work product doctrine" would apply where there exists a prima facie case of government misconduct. 233 F.R.D. at 51–52. The plaintiff there alleged that government attorneys had conspired with the Navy to cover up instances of intentional discrimination. *See id.* The court upheld the government's claims of work product and attorney-client privilege only after examining the disputed documents in camera and determining that "[e]ven if plaintiff had established a prima facie case of a cover-up, which I found she did not, the documents would have negated such a finding." *Id.* at 52.

State Your Affirmative Case

While employing the IRAC methodology, it is important to state your affirmative case first.

> Always write your brief in such a way as to set out and make the most of your affirmative case. This admonition is perhaps most to be borne in mind when you are appellee or respondent; don't content yourself, in that situation, with a point-by-point reply to appellant or petitioner. Accentuate the affirmative features of your case; don't let the other side write your brief or even shape it.

Wiener, *supra*, at 98. There are several ways to implement this precept. If your opponent disagrees with your statement of the governing rule, it is most effective to set forth and describe the legal rule you advocate (including showing how that rule has been applied in the most relevant cases), and then to respond to your opponent's argument. It is more persuasive to establish the legal rule as the point of comparison before attempting to demonstrate the flaws in your opponent's proposed rule. Similarly, if your opponent disagrees with your application of the governing rule, it is most effective to set forth fully your application and then to critique your opponent's attempted application.

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There are also likely to be many circumstances in which your opponent makes an argument that neither directly conflicts with your statement of the governing rule nor your application, but nonetheless counsels for a different outcome. In such circumstances, it may be effective to subdivide your argument on the issue with a subpoint as to the governing law, a second subpoint as to its application, and a third subpoint that directly responds to your opponent's arguments that are not in direct conflict with your statement of the law or your application of it. You could use a point heading such as "C. Plaintiffs' Contrary Arguments about Market Power Are Unsupported and Erroneous."

Cite Similar Cases

As has been noted previously, the most persuasive cases are usually those that set forth or adopt the legal rule that you advocate and then apply that rule in analogous circumstances in the same way that you advocate the rule should apply in your case. It may be helpful to cite or quote cases that set forth the legal rule that you advocate but that apply that rule in different circumstances or cases that apply a different rule in a way that supports your argument. But, if possible, you want to rely primarily on cases that are as similar in all respects as possible to your case. In defining the legal rule that you advocate, you want to show how that rule was applied in those cases and compare the application in those cases with your case.

Address Controlling or Significant Contrary Authority

In most circumstances, your opponent will cite one or more cases that are troublesome for you. If a case is controlling and clearly undermines your argument, you have an ethical obligation to address it. Often, such a case can be distinguished or can be shown to be no longer effective, or at least can be plausibly argued to have been wrongly decided. If a case is not controlling, but undermines your argument and has been or is certain to be cited by your opponent, it likely will make sense to address it, particularly if you have a good answer. If a case is not controlling, only arguably undermines your argument, and has not been or may not be cited by your opponent, it is usually best to avoid it unless your opponent cites it (in which case you can address it in reply, at oral argument, or in a letter to the court if you have no right of reply and there will be no argument).

Avoid String or Unnecessary Citations

It is important to use legal authority to its best effect. If you are stating an obvious or well-settled proposition, cite only to one or at most two cases; the court will realize that the proposition is well-supported and will only be irritated or distracted by numerous citations. If you are citing several cases for a single, less well-established point, you should include either a sentence or more of discussion of each case in the text, or at least a parenthetical containing a helpful quote or showing why the case is useful or both. In almost all circumstances, a case citation without discussion of the case or a parenthetical is useless.

String cites of numerous cases for a proposition should virtually never be used. The only exception to this rule is where you want to show that several other jurisdictions agree with the novel or less

Example of a Poor Argument Section

Using our hypothetical, one can conceive of an argument such as this:

> Plaintiffs' assertion that defendants possess market power does not take into account the realities of competition and interchangeable or substitute products. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); accord *Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994). Just because Happynol is more expensive does not necessarily mean that it so unique that has its own distinct market or that it truly possesses a significant market share. *See Global*, 960 F. Supp. at 705; *Shaw v. Rolex Watch, USA, Inc.*, 673 F. Supp. 674, 679 (S.D.N.Y. 1987). Plaintiffs do not account for the public recognition of older drugs similar to Happynol as well as evidence that most consumers are unwilling to pay substantially more for a somewhat more effective anti-depressant. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Just like other federal courts have granted summary judgment to plaintiffs under similar circumstances, so was it appropriate here. *See, e.g.*, *Bogan v. Hodgkins*, 166 F.3d 509, 516 (2d Cir. 1999).

This example conflates the legal rule and the application of that rule. It does not discuss the application of the legal rule in analogous circumstances, and only superficially applies the legal rule.

Example of an Improved Argument Section

The following is greatly improved:

> Plaintiffs have failed to show that defendants have sufficient market power to restrain trade. The alleged product market "must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes—analysis of the interchangeability of use or the cross-elasticity of demand." *Todd v. Exxon Corp.*, 275 F.3d 191, 200 (2d Cir. 2001). Thus, plaintiffs must include all reasonably interchangeable or substitutable products, *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), taking into account "the realities of competition." *Grinnell Corp.*, 384 U.S. at 572–73. Accordingly, a relevant market is determined not only by the prices of its products but also by their use and other qualities. *See AD/SAT v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999). A relevant market definition must account for industry or public recognition; the products' peculiar characteristics and uses; unique production facilities; distinct customers; distinct prices; sensitivity to price changes; and specialized vendors. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325

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well-established point that you are making. Such a string cite should either come at the end of a paragraph or be placed in a footnote. Long block quotes should never be used. While I don't agree with some practitioners that block quotes should never be used, they should only be employed when they are used infrequently, are helpful, and are limited to about 5–10 lines in length.

Avoid Defensive Reply Briefs

The subject of writing compelling reply briefs could justify a book of its own. My limited advice is to write reply briefs that generally comply with the principles for opening briefs. The structure I recommend is to use your introduction/summary of argument to summarize the key arguments that you made in your opening brief and either briefly address the most important of your opponent's arguments (if you have the room and it's justified) or simply state that your opponent's contrary arguments are unpersuasive.

In the substantive sections of the reply, briefly restate your specific argument from the opening brief and then address your opponent's responses one by one. Follow the general structure of *your* opening brief, not your opponent's brief, and use responsive, but argumentative headings. For example: "Defendant's definition of market power is wrong because it entirely relies on far-fetched substitutes and ignores more important economic considerations such as product features and price maintenance." Be sure to address the primary authorities cited by your opponent and explain why your authorities are more persuasive. You may also be able to fold in affirmative points that you made in your opening brief as responses to your opponent's arguments. For example: "Defendant's argument ignores the principal component of market power: 'the ability to maintain prices higher than those charged for potential substitutes.' *Brown Shoe*, 370 U.S. at 324."

Finally, do not feel compelled to address every point raised by your opponent. You must address all of the significant arguments and authorities and correct any material misstatements of fact or mischaracterizations of the record. But you need not address points that are trivial, clearly inappropriate, or facially implausible.

Conclusion

Your conclusion should be succinct and should state clearly the relief you seek. For example: "For the foregoing reasons, this Court should reverse the district court's grant of summary judgment and remand for a trial on the merits."

Writing a winning legal argument takes applying these principles as well as focus, hard work, and a bit of experience. With significant effort, you can write excellent briefs and motions that have a great chance to persuade any judge or panel. ■

Lawrence D. Rosenberg is a partner at Jones Day in Washington, D.C. He is former chair of the Trial Practice Committee and currently serves as cochair of the ABA Annual Meeting.

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(1962). A product that is unique in some ways does not necessarily fall into a market by itself. *See Global*, 960 F. Supp. at 705. Rather, "it is the use or uses to which the commodity is put that control." *E. I. du Pont de Nemours & Co.*, 351 U.S. at 396.

Thus, an antitrust plaintiff's failure to account for interchangeable substitutes requires dismissal of or summary judgment against the plaintiff's claim. For example, in Bogan v. Hodgkins, 166 F.3d 509, 516 (2d Cir. 1999), the court affirmed a grant of summary judgment to defendant where plaintiffs confined their definition of the relevant market to experienced National Mutual Life insurance agents without considering the cross-elasticity of demand with regard to other sales agents in New York, and failed to produce factual evidence distinguishing potential substitutes in the insurance companies market.

Plaintiffs here have plainly failed to properly define the relevant product market. Their expert, Dr. Know-It-All, never provided any specific evidence as to why joynols, which are widely-accepted therapeutic substitutes for Happynol, are not reasonably interchangeable on the bases of price, use and other therapeutic qualities. Although he recognized that many therapeutic alternatives overlap one another with respect to efficacy, tolerance, range, as well as price, Expert Rep. at p. 6, he failed to make any mention of the potential clinical interchangeability of therapeutic substitutes for Happynol and Euphorizem. That is directly contrary to the expert testimony below of psychiatrists and managed care organizations, which consider them to be essentially fungible. Instead, Dr. Know-It-All looked only at price competition, even though "significant price differences do not always indicate distinct markets." *AD/SAT*, 181 F.3d at 228. Dr. Know-It-All also could not explain why many studies documented the robust competition between Happynol and other joynols and Happynol's recent decline in market share. Thus, Dr. Know-It-All failed to take into account the "realities of competition" as he was required to do. *See Brown Shoe Co.*, 370 U.S. at 325–26 (emphasizing that it is "unrealistic" to divide markets on price alone). In this case, as did the plaintiffs in Bogan, plaintiffs have made the critical mistake of proffering flawed market-definition analysis that fails to account for reasonably interchangeable substitutes for Happynol and Euphorizem. *See Bogan*, 166 F.3d at 516. Therefore, plaintiffs' proposed market definition is incorrect and insufficient as a matter of law, and this Court should affirm the grant of summary judgment for that reason.

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Developing Trial Lawyers in an Age of Shrinking Trial Dockets

By **Margaret Lockhart**

Ask law students what they want to do after law school, and many will tell you they want to be trial lawyers. The bold emphasize that they are not interested in being mere litigators; they want to be on their feet in the courtroom, telling their client's story to a jury. They have aced trial advocacy, participated in mock trials and moot court, and assisted clients through legal clinics or pro bono projects. They have that "fire in the belly" that law firms seek.

When these students become law firm associates, they want to hit the ground running. They know they will spend considerable time on research and writing, and they accept that they may be drafted for large, sometimes tedious, document projects. But they long to be questioning witnesses, cross-examining experts, and arguing evidentiary objections.

Unfortunately, fewer cases now go to trial, and there are fewer opportunities for associates to learn and practice trial skills. And when opportunities arise, clients want experienced trial lawyers to try their cases. Although they recognize the value of training, clients do not want their trial to be a lawyer's first.

Paradoxically, six or seven years later, when these associates are eligible to become partner or shareholder, many firms expect them to have had trial experience. Yet, many senior associates have not had the chance even to second-chair a bench or jury trial. Some have never even been in a courtroom.

The dilemma is troubling for everyone. Motivated associates are frustrated with the lack of opportunity and often disillusioned with their practice. Clients are concerned about young lawyers' lack of trial experience. And partners are trying to address the concerns of both while maintaining their own practices.

Trial Advocacy Training Programs

How do law firms develop trial lawyers when there are fewer and fewer trials? Many rely on training programs sponsored by outside providers. The National Institute for Trial Advocacy and the International Association of Defense Counsel are among the many groups that sponsor intensive trial advocacy programs. Participants work with a faculty of experienced trial attorneys on a fictional case, practicing witness exams, arguments, evidentiary objections, and other trial skills. Sponsors create comprehensive case files for the training and often use real witnesses to make the experience more realistic.

Other firms develop their own in-house trial advocacy programs. Greenburg Traurig, LLP, has developed a comprehensive trial advocacy program for its mid-level associates. The firm has partnered with a litigation training consultant to develop and conduct this training. Working with the consultant, the firm creates a case file for the program, and 24 associates participate each year at an off-site location that permits the participants to focus on the training. Many of the firm's best trial lawyers serve as faculty, working with associates in small groups for three days on the variety of trial skills, and providing one-on-one feedback and video review of "on their feet" performances. On the fourth day, the associates conduct a mock trial in a real courtroom. Local actors serve as witnesses, community members serve as jurors, and former or retired judges preside. After the trial is complete, the associates watch the jury deliberate and have an opportunity to speak with the jurors. Then, the presiding judge and a Greenburg Traurig faculty member critique the associates' trial performance. The associates also receive a videotape of the trial for later review.

Ruth Bahe-Jachna, a Greenberg Traurig shareholder who helped to develop and now teaches the trial advocacy program, says that the program has been instrumental in giving associates both the skills and the confidence they need to try cases. Clients familiar with the program are more comfortable having associates involved in trying their cases. As an added benefit, the participants develop professional and mentoring relationships that continue long after the program ends. According to Bahe-Jachna, this has boosted both associate retention and morale.

Providing Trial Opportunities Through Case Selection

Other firms develop trial advocacy skills by taking on specific types of cases. Many firms recognize that insurance-defense and subrogation cases provide opportunities for trial in smaller matters, which often can be delegated to associates with supervision. Other firms encourage associates to take criminal appointments or pro bono matters that will get them into the courtroom. Firms view the reduced rates on these matters as an investment in training. Partners must also invest time to supervise these cases, both to protect client interests and to ensure that associates do not develop bad habits.

Cooper & Walinski, LPA, an Ohio litigation firm, has volunteered to take all domestic-violence referrals from the local bar association's pro bono program. The firm's associates represent victims of domestic violence in civil-protection hearings and appeals. Those cases routinely give associates limited time to complete their investigation, prepare their witnesses and their cross-examination of adverse witnesses, organize exhibits and evidentiary issues, and try the case. The firm also volunteers associates' assistance to the local public

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defenders' office. Each associate spends three months working part-time defending indigent clients in municipal court. Combined, these programs give associates an appreciable amount of courtroom experience as well as exposure to local judges and attorneys.

Jury Trials Are Not the Only Trials

Many law students—and even associates—aspiring to become trial lawyers believe that the only real trials are jury trials. They are wrong. Lawyers can develop important trial skills outside the courthouse.

As a young lawyer, I represented a health-care provider who faced union-organizing campaigns. The campaigns spawned many representation and unfair labor practice hearings across the country. These hearings, at which a National Labor Relations Board administrative law judge presided, gave me the opportunity to examine and cross-examine witnesses, use and admit exhibits, argue evidentiary and other legal issues, and make opening and closing arguments. Labor and other arbitration proceedings provided similar experience. These experiences made my first jury trial far less daunting. And they occur far more often than jury trials.

Developing Trial Lawyers Requires Commitment

The common element among all training methods is commitment. The commitment is, in part, financial. The best outside training programs are expensive. Effective in-house programs necessarily require significant non-billable time from some of the firm's best and most productive lawyers. And the time that associates devote to criminal or other reduced-rate or non-billable cases can be a drain on firm resources.

But the more important commitment is lawyers' day-to-day time. Even the best and most rigorous classroom training program cannot teach trial strategy. To understand trial strategy, associates must be involved in a case from the very beginning. Associates learn how to structure a case with an eye toward trial only if they are included—at the firm's expense, if necessary—in meetings with the client and in pretrial conferences. Associates who are involved in strategy discussions better understand how pleadings, discovery, experts, and pretrial motions shape the eventual trial. And by participating in or observing the eventual trial, they see how those strategy decisions influence the evidence and the trial's outcome.

Regularly involving associates in the development of cases gives them a bigger picture and better equips them to handle a trial when they have the chance. And the additional client contact will likely give the client confidence in the associates' ability to handle a trial when the opportunity arises.

Conclusion

The best trial lawyers will tell you that they learned most from their mentors by tagging along, watching, absorbing, and questioning, and then being thrown into the courtroom where they were critiqued by their mentors. Today, there are fewer opportunities for courtroom observation, and seemingly fewer lawyers are available and willing to mentor associates. But there are far more opportunities for classroom and practical training. An effective program for developing trial lawyers should include both training and mentorship. ■

Margaret Lockhart is the president and a shareholder of Cooper & Walinski, LPA, in Toledo, Ohio.

"Developing Trial Lawyers in the Age of Shrinking Trial Dockets" by Margaret Lockhart, 2010, *The Woman Advocate*: 16:1. Copyright © 2010 by the American Bar Association. Reprinted with permission.

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Evolution and Revolution at the Supreme Court

Continued from page 1

spent a full year of his six-year tenure as chief justice in London as a special minister. He resigned to become governor of New York. A successor, Oliver Ellsworth, similarly spent a year as a diplomat in France. When health issues forced Ellsworth to leave office, President Adams submitted Jay's name to Congress, obtained his confirmation, and happily wrote Jay that he had appointed him to his old office. Jay declined the appointment, because, he said, the Court was "so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of a nation, it should possess."

That gravity was soon supplied through the leadership of John Marshall, who became chief justice only because Jay had refused the post. Marshall transformed the Court, not just through landmark rulings that provide the foundation of our constitutional law but also through the way the Court issued its opinions. Before Marshall, the justices expressed their views on a case seriatim, through separate opinions, as was the practice in Europe. Under Marshall's leadership, a single "Opinion of the Court" became the decision in the case, with the chief justice as author in nearly all important cases.

Marshall's stature, as the leader and voice of the Court, grew along with the Court's own authority, so much so that that Professor David Currie has referred to the Court of that era as "John Marshall and the Six Dwarfs." Of course, Marshall's magisterial opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), secured the concept of judicial review with an exercise of political deftness that also served to establish the Court's status as the arbiter of the Constitution's meaning. The power of judicial review confirmed in *Marbury* provides the foundation upon which all modern battles in the Court develop.

The Marshall Court also served as the main instrument for securing the status of the national government against a philosophy of Jeffersonian localism. To President Jefferson, who saw his own election and those of his supporters in Congress to be "as real a revolution in the principles of our government as that of 1776 was in its form," the Marshall Court was a counterrevolutionary force, attempting to defeat Americans' democratic voice by giving permanence to the staid policy preferences of the Federalist Party, which Jefferson called the "Anglican monarchical aristocratical party."

> ***The Court got ahead of the nation, the population embraced the values animating the Court's decisions, and then the nation moved on in a new direction, leaving the Court behind for a time.***

The Marshall Court's more muscular image as an institution of government that could withstand prevailing political winds was not a permanent transformation or even a guarantee that the Court had truly achieved co-equal status in more than word. President Andrew Jackson proved more confrontational with the Court than Jefferson was and prevailed in demonstrating the limits of judicial power. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Marshall Court ruled that the Cherokee Indian nation was an independent sovereign not subject to the laws of Georgia, the state in which it was located. Legend has it that Jackson reacted to the decision by declaring, "John Marshall has made his decision; now let him enforce it!" The comment, whether apocryphal or not, underscores that the Court's power derives from acceptance of its decisions, rather than any ability to engage compelling force. While Georgia conformed to the Court's decision, Jackson's government refused to recognize the Cherokees' sovereignty, using federal troops to expel the Cherokees and two other tribes from their lands, which were supposedly secured by treaty. Seventeen thousand Cherokees were sent on a forced march to relocate in the West to a part of what became Oklahoma. Four thousand perished in the course of that journey, a trek that became known as the "Trail of Tears."

Marshall may have outmaneuvered and outlasted the Jefferson administration, but he despaired over what Jackson had brought. He told Justice Joseph Story that "the present is gloomy enough; and the future presents no cheery prospects." He feared that the secure nation he had helped create through his decisions would come undone under Jacksonian democracy, which became the prism through which the Court viewed all issues under his successor, Roger B. Taney. The appointment of Taney, who as attorney general had questioned the authority of the Court to supersede decisions of the other two branches, caused Daniel Webster to write that Marshall ally "Judge [Joseph] Story . . . thinks the Supreme Court is gone and I think so too."

Yet, despite his previously expressed misgivings over the exercise of judicial review and his fervent devotion to Jacksonian principles, Taney is remembered primarily for what was only the second time the Court invalidated a congressional enactment, in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), a decision that proved to be one of the percussion caps that set off the Civil War. The decision's broader import proves again the vast impact that Supreme Court decisions can have. *Dred Scott*, as Chief Justice Charles Evans Hughes later wrote, was the first of a series of "self-inflicted wounds" from which the Court suffered a tremendous loss of prestige. Even so, the Taney Court's many other decisions demonstrate a far more populist approach to decision making and a reaction to the nationalist aspirations of the Marshall Court.

At the end of his tenure, Taney tangled with President Abraham Lincoln. The chief justice's patent enmity for the president and the oppositionist stances

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it took to Lincoln's policies caused the president to remark that the judiciary "seemed as if it had been designed not to sustain the government but to embarrass and betray it."

Unquestionably, the Marshall and Taney Courts reflected the ascendant political values of their times and then remained tethered to those values as new ones displaced them. In both instances, the Court got ahead of the nation, the population embraced the values animating the Court's decisions, and then the nation moved on in a new direction, leaving the Court behind for a time. While the country set off on a new path, the Court stubbornly remained entrenched in precedents based on values that may have seemed out of sync with the popular political outlook.

For a Court that values its countermajoritarian exposition of the rule of law, the disconnect between political popularity and timeless constitutional values seems appropriate. Still, when a new Court is constituted, it inevitably explores new issues and inexorably moves into the foreground of the nation's political life once again. Thus, it is not too much to describe the repeating pattern we experience as a judicial adventure, journeying into territory, of necessity, where precedent provides little guidance, followed by a period of relative complacency where Court and popular will seem in tune and the Court's pronouncements appear less momentous. Finally, the Court's backbench role in the polity yields to a role in which the public may view it as an obstacle to what now is regarded as progress, where public policy has moved aggressively in a new direction and the Court's importance is measured in negative terms. It is a pattern that has repeated itself.

Following the Marshall and Taney eras, the Civil War brought nothing if not a revolution that permanently altered the relationship of the "sovereign" states to the federal government. Powerful political forces reacted strongly to the war's radical aftermath, seeking to win back some of what had been lost. The Court, though still held in low esteem, became an instrument of that retrenchment, while demonstrating a new and more voracious appetite for the exercise of judicial review. After having invalidated only 2 congressional acts as unconstitutional, the new Court struck some 10 laws in an 8-year period, while engaging in a reflexively narrow reading of the Fourteenth Amendment and its promises of privileges and immunities and due process in *The Slaughterhouse Cases*, 83 U.S. 36 (1872).

The Court unquestionably revolutionized our views of criminal procedure, free speech, religious freedom, political representation, and privacy.

The decision marked a turn, as the Court transformed equal protection and due process, enacted to ensure basic civil rights, into instruments for the protection of private enterprise. The decisions both anticipated and accommodated the Industrial Revolution, embodying the economic views that propelled the nation into the new century. Substantive law dealing with negotiable instruments and large-scale manufacturing had to be invented. At the same time, safety considerations and a new populism brought new demands for regulation to which the Court remained hostile. Regulation, in the Court's view, inhibited the engine of commerce that it found endorsed by the Constitution, as evidenced by Justice Oliver Wendell Holmes's memorable dissent in *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting), where he protested that this

> case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.

The Court thus embraced the prevailing economic theory of the time to the issues before it, a laissez-faire approach in which the Court imagined a constitutional liberty of contract that was sufficient to defeat most forms of government regulation. Doggedly adhering to that approach even in the face of the Great Depression and the promise of a "New Deal" by President Franklin Delano Roosevelt, the Court reliably struck down one economic recovery statute after another. On one particular day, known as "Black Monday," the Court unanimously struck down as an unconstitutional taking a law that put a five-year moratorium on farm foreclosures as long as the debtor paid a reasonable rent. Another decision handed down the same day invalidated FDR's attempt to remove a dissident member of the Federal Trade Commission. And a third decision, popularly known as the "Sick-Chicken Case," declared the National Industrial Recovery Act unconstitutional as a delegation of legislative power to an administrative agency.

FDR reacted to "Black Monday" by declaring that the Court had relegated the nation to a "horse-and-buggy definition of interstate commerce." A Court that had been at the forefront of the nation's industrial growth was now badly out of tune with the felt necessities of the new era. The sharp clash between that long-lasting Court of "Nine Old Men" and the New Deal so infuriated President Franklin Delano Roosevelt that he gave in to a rare instance of tone-deafness by seeking public and congressional support to pack the Court. While his tactic of proposing extra help for the aged justices by adding new seats to the Court was so transparent that his power grab failed, FDR's own long tenure provided him with the opportunity to appoint justices supportive of the idea that the Commerce Clause power subordinated nearly all other constitutional concerns. Liberty of contract thus gave way to the growth of federal regulation and the administrative state.

When making his appointments to the Court, FDR looked for individuals likely to support the New Deal. With the new Court being of one mind on the

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validity of the New Deal, issues of governmental regulatory authority quickly faded from the Court's docket, only to be replaced with a new series of civil rights and personal liberty questions upon which his appointees had no singular perspective.

A change was in the offing. Perhaps no case marked the revolutionary role of the Court as a forerunner and shaper of public opinion as did the landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954). When the case was first argued, Fred Vinson, a Truman appointee, was chief justice. In conference, he made it clear that he was not prepared to overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896), which had established the prevailing "separate, but equal" rule. Not ready to see civil rights progress stymied by a reticent Court, Justice Felix Frankfurter convinced his brethren to put the case over for reargument on the question of the intent behind the Fourteenth Amendment. Before the case could be reargued, Vinson died, causing Frankfurter, uncharitably, to declare that "Now, I know there is a God."

The appointment of California Governor Earl Warren as chief justice and the exercise of his unique political skills led to the celebrated unanimous result in *Brown*. Still, Justice Hugo Black recognized that it produced a "storm over this Court." *Brown* set off a long period of massive resistance in the South and previously unimagined confrontations as federal troops were called in to escort African American children to newly desegregated schools. The Court's leadership on the issue dovetailed well with the developing broad-based movement for civil rights. The Warren Court, unbowed by the defiance its decision caused, also set out in a new direction, breathing life into inert phrases in the Constitution that had never been used, to strike state laws and practices quite as regularly. The Court unquestionably revolutionized our views of criminal procedure, free speech, religious freedom, political representation, and privacy. Not all students of the Supreme Court were pleased by these landmark developments. Professor Philip Kurland wryly declared, "if the road to hell is paved with good intentions, then the Warren Court is the greatest roadbuilder of all time."

Still, despite subsequent presidents seeking justices who would not be as activist as the Warren Court was accused of being and who would reverse many of those decisions while restoring the Court to a more limited role on the political questions of the time, the expected retrenchment was limited and long in coming. Whereas Professor Alexander Bickel once described the Warren Court as "seized of a great vision," then-justice William Rehnquist wondered aloud whether its successor, the Burger Court, had "any sense of mission at all." Although the Burger Court cut back on some Warren Court trends, it extended others as it addressed sexual equality, access to court proceedings, abortion, and the right to counsel. Thus, it fell behind the public on some issues while forging ahead on others.

The Rehnquist Court that followed saw a reemergence of federalism as a basis for invalidating congressional actions and little hesitancy in exercising judicial review. The Court took on a far more conservative tilt, restricting congressional authority and recognizing a good-faith exception to the exclusionary rule. Still, the Rehnquist Court was not the counterrevolution that conservatives hoped for, as the *Miranda* warnings survived and other cases were decided with a liberality that even the Warren Court could not have imagined.

Today, the Roberts Court appears far more conservative than the Rehnquist Court. Dean Erwin Chemerinsky has called the Roberts Court the most conservative this nation has had since the "Nine Old Men" of the mid-1930s. Whether that is true or not, the Roberts Court is more willing to achieve a far-reaching result where the Court appears sharply divided than prior courts that gave greater value to consensus. The Roberts Court's determination to right what it sees as earlier courts' excesses may indeed reflect today's advantage-oriented national legislative politics. Where politics was once associated with the art of compromise, those who cross party lines to work with their opponents are ostracized today. In nonjudicial politics, those who have the votes on their side impose their will and seek no compromise to enlarge the tent. A similar approach characterizes a significant number of decisions today.

Thus, the Roberts Court has treated us to a large number of 5–4 decisions that rework or undo seemingly settled precedent. For instance, the case that set up this year's gun control case, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), held by a 5–4 vote for the first time that the Second Amendment, a part of our Constitution since 1791, guaranteed an individualized right to bear arms and that federal laws that ban handguns in the home violate that right. The decision plainly departed from the Court's view expressed in *United States v. Miller*, 307 U.S. 174, 178 (1939), and hundreds of decisions that relied on *Miller*, that the fulcrum of any Second Amendment decision depends on whether the right asserted "has some reasonable relationship to the preservation or efficiency of a well regulated militia." Whether *Heller*'s approach or *Miller*'s is right, the willingness of the majority to change precedent on the basis of a single vote is noteworthy.

Similarly, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007), also by a 5–4 vote, invalidated a desegregation plan because the majority opined that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race." In dissent, Justice Stevens found irony in the majority's invocation of *Brown v. Board of Education*, 349 U.S. 294 (1955), to support their result, and lamented that "no Member of the Court that I joined in 1975 would have agreed with today's decision." *Parents Involved*, 551 U.S. at 799, 803 (Stevens, J., dissenting).

The majority applied the same muscular approach to the right to remain silent in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), in which it held that an

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affirmative and vocal assertion of the right was necessary to assert that right. Speaking for the dissenters, Justice Sotomayor wrote that the majority's reasoning marked "a substantial retreat from the protection against compelled self-incrimination that *Miranda v. Arizona*, 384 U.S. 436 (1966), has long provided during custodial interrogation." *Berghuis*, 130 S. Ct. at 2266 (Sotomayor, J., dissenting).

Finally, to give one more example, in *Citizens United*, a 5–4 Court overturned *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and partially overruled *McConnell v. FEC*, 540 U.S. 93 (2003), to hold that no limits may be placed on independent electioneering communications by corporations consistent with the First Amendment's free-speech guarantee. The dissenters complained that the decision went further than necessary to decide the case, violating a cardinal rule of constitutional decision making that advises that the Court should only decide as much as must be decided to dispose of the case. To the minority, the anti-Hillary Clinton movie at issue was not an "electioneering communication" and thus not subject to restriction under the regulation the Court invalidated. The majority countered that the chilling effect of the regulation required a constitutional decision.

It is still too early in the tenure of the Roberts Court to determine whether its approach to the key legal issues of our time will be evolutionary or revolutionary. Political scientist Robert Dahl may have been right to argue that the Supreme Court is "never out of line for very long with the views prevailing among the lawmaking majorities of the country." Robert A. Dahl, *Democracy and Its Critics,* 190 (1989).

It is perhaps for that reason that as keen an observer of the 19th-century American scene as Alexis de Tocqueville could state a truism that remains an article of faith today: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Regardless of new controversies that will undoubtedly arise, the Court's status at the pinnacle of law's empire in the United States is undeniable, whether it acts as a prod to move the electorate in a particular direction or an obstacle to policies supported by the people.

American politics will undoubtedly continue to take the Court into new territory. Traditional issues, such as the debate over when personal liberty must yield to the demands of national security, undoubtedly will confront the justices with increasing urgency and in new, unexpected forms. What the Court does to resolve those dilemmas, will not dispose of the issues nor settle them for all time, but will instead determine the contours of our constitutional debates well into the future. Such is the life cycle of evolution and revolution at the Court. ■

Robert S. Peck is president of the Center for Constitutional Litigation, PC. He also teaches constitutional law as an adjunct professor at American University's Washington College of Law.

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How to Make Technical Briefs Understandable for Generalist Judges

Continued from page 5

and certainly not the result of some inventive spark. In most cases, therefore, you can further your argument by telling a compelling story rather than getting mired in scientific drudgery.

Build the technology piece by piece. When presenting scientific or technical subjects in your background section or your statement of facts, start with a few basic principles and then build on those principles step by step. The judge likely does not know as much as you do about the technology, but you do not know how much the judge already knows. Therefore, you should start with the very basics (probably more basic than you think you need). The judges we interviewed said that they would never complain if a lawyer spent a paragraph or two on scientific fundamentals, even if they already understand those fundamentals. Far better to err on that side than to start your explanation in the middle and use terms and concepts that you might incorrectly assume the judge understands.

For instance, if your case involves deicing technology, do not fear reminding the judge at the outset that, in the normal course, water freezes at 32°F. While it is likely that the judge already knows this fact, when you set it out at the beginning, it establishes a common baseline of knowledge. You can then spoon-feed the judge by slowly building on that knowledge step by step until you have given the judge enough science necessary to understand your legal arguments. Be sure not to skip steps, even if they appear self-evident. And it is best (as in all writing) that when you explain the steps, each sentence clearly relates to the sentence before it and the sentence after it.

Be sure your facts and argument present the science in a consistent manner. The best statements of facts are those that make it clear what the legal argument will be. This should also be your aim when writing a brief on a technical subject. To achieve this goal, it is important to use the same technical facts in the same way in both the statement of facts and the argument. It does your case no good to painstakingly teach the science in the statement of facts only to use, in the argument section, a different vocabulary or more advanced concepts than you set forth in your fact statement. Be sure your brief is a unified, harmonious whole.

> *A technology tutorial is a session where the parties educate the court about the science and technology involved in the case.*

Use headings liberally. All the advice we offer in this section is easier to apply if you make liberal use of headings and subheadings, especially in your statement of facts. While most lawyers know to break up their argument using section headings, fewer lawyers use headings in their statements of facts. That is the reader's loss, because a logically thought-out statement of facts lends itself perfectly to headings and subheadings that not only make the brief look less intimidating but actually make it easier to understand.

Use topic sentences. It is always a good practice to use a topic sentence for each paragraph, and never more important than when you are writing an argument based on complicated technology. When the writer fails to use a topic sentence, the reader begins reading the paragraph unsure of the point the writer is trying to make. And a writer who fails to use topic sentences probably hasn't thought out the structure of the brief and how the various paragraphs fit together. Just as one sentence should build on the previous sentence, each paragraph should build on the paragraph before it. In this way, the argument has a logical structure and readers aren't at a loss for what point they are supposed to be getting from the paragraph.

While lawyers often start their paragraphs by talking about a case and its facts, this doesn't help their arguments, because their readers don't know how the facts fit into the overall argument. Thus, a very bad first sentence to a paragraph is something like: "In *Smith v. Jones*, the defendant sped through a red light and hit the plaintiff's car." A far better practice is to tell the reader at the start of the paragraph what the point of the paragraph is. Then the case discussion will make more sense. Thus, it is more effective to start the paragraph by saying "Courts in this jurisdiction consistently hold that a defendant's violation of a traffic law is persuasive evidence of negligence," and then proceed to explain how *Smith v. Jones* illustrates that point. In other words, don't assume the court knows where you are going when you start reciting the facts to *Smith v. Jones*. The court might be able to guess, but it might not.

Step Three: Simplify

Offer a technology tutorial. Even if the court does not ask for one, you should consider offering the court a technology tutorial. This is a session where the parties educate the court about the science and technology involved in the case. If you hold a tutorial, you can refer back to the concepts and terminology used at the session in your briefs to jog the judge's memory. That said, don't assume that the judge has automatic and immediate recall of complicated concepts introduced months or years earlier. Further, there is turnover among the judge's clerks, so a clerk who sat in on a tutorial might no longer be working for the judge when you are submitting your briefs. There may be a new clerk who hasn't had the benefit of your tutorial. In this regard, it might also be helpful for you to offer to videotape the tutorial if the judge does not beat you to the punch and suggest it in the first instance.

Eliminate or define technical terms. Becoming proficient in a technical area like engineering, chemistry, or medicine entails learning a new vocabulary, much like learning a foreign language. But, just as you wouldn't write a brief in French, so you shouldn't write a brief in the technical language of the field you are dealing with. Rather, you should try your best to strip your brief of as many technical terms as possible.

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Of course, it will usually not be possible to parse *all* the technical jargon out of your brief; it is likely that some technical terms will be necessary to your argument. That's OK—the court is an intelligent audience. But they may not have the technical background and scientific understanding that you have—or that your client has. You should tell the court what the technical terms mean, and you should take a step back and explain how these terms relate to your argument and the larger scientific context.

Say, for example, you are dealing with a patent that claims a faster way to release a drug from a tablet so it gets into the body more quickly. A key concept in this area is dissolution testing, which, in the pharmaceutical context, consists of dropping a pill into a solution and measuring how fast it dissolves. It will probably be unavoidable for you to refer often to dissolution testing. So, you just need to be sure that the first time you mention this potentially off-putting phrase, you explain it in a manner that is friendly enough that the judge can capture a mental image and be comfortable with the concept each time you use the term.

Don't try to obscure a bad argument in a thicket of impenetrable science. If your argument is weaker than you would like it to be, resist the temptation to obscure your position in a morass of unexplained science. First of all, a judge who can't understand your position is unlikely to rule in your favor. Judges are aware of the obfuscation trick, and they do not reward it. Second, your opponent might well explain the science and take the time to translate your argument into something understandable, exposing its flaws. In that event, you will simply wind up looking foolish and unhelpful.

Avoid acronyms and odd specially defined terms. Acronyms frequently make a brief more difficult to follow and should generally be avoided unless the acronym is universally known (e.g., IBM). A brief we recently were asked to edit had the following sentence: "During this time period, FIE compensated ZSC for the PPO access provided and its other bill-review services, and ZSC paid CCN for access to the PPO." Huh? Some lawyers think acronyms are a convenient shorthand, but if you use more than just one or two of them in a brief, they quickly wear out their welcome and become overwhelming. If a party's name is Zippo Service Corporation, call it Zippo in your brief, not ZSC.

Similarly, there is no need to ascribe shorthand nicknames to selected terms you use in a given brief. Say your case involves a certain seven embezzled checks. You might be tempted to define these initially as "the Checks" and then invariably refer to them in this artificial manner throughout the rest of the brief. Avoid the temptation. There are many other perfectly natural-sounding ways in which you can refer to the checks and still leave no doubt in the judge's mind which checks you are referring to—"the checks at issue" or "the embezzled checks," and so on. Better to use these general terms interchangeably (making sure the context makes it clear you mean the seven checks) than to set forth made-up terms of art that you have endowed with special meaning for purposes of this one brief only.

Along these same lines, you should avoid the practice of advising the judge that Sarah Smith will henceforth and forevermore be known in your brief as "Smith." Or that Honda Motor Co. will be referred to as "Honda." Provided there are no other Smiths or Honda entities in your case, you can safely just go ahead and use the person's surname, or the shortened form of the company's name.

Don't forget to simplify the non-science, too. Not only is it important to simplify the science in your brief, but you must also strive to pare down or eliminate unnecessary nonscientific details. This is another fix that is important in technical briefs because you plainly cannot remove *all* the science. Therefore, eliminating other unnecessary details becomes that much more important. These unnecessary details come in a variety of different forms—all equally disagreeable.

You can start with dates. Lawyers love to include them, not just in procedural histories, but in any and all other factual recitations. Sometimes, of course, exact dates are important—as in a case involving the statute of limitations or any number of patent-invalidity defenses—and we are not advocating eliminating those dates from your brief. But most other dates are truly superfluous. Unless relevant to some issue, no one really cares what date you filed your answer or the date so-and-so moved for summary judgment. If you feel compelled to use dates, general mileposts are usually fine, e.g., "a few months later" or "in 2007."

Lawyers also obsess about setting forth precise dollar figures, right down to the cents. In some contexts, of course, you need to be precise. But if not, it is much more reader-friendly to write more than $89 million instead of $89,235,708.55. And it is always preferable to write $89 million instead of $89,000,000.00. The judge knows that $89 million is a lot of money, so including all the zeroes—especially the .00—to try to puff it up further is transparent piling-on. And while we're talking about numbers, it is insulting—and unnecessary—to put a numeral in parentheses after writing out a number. There seems to be little doubt that the judge will understand what the word "thirty" means even if you don't put "(30)" after it.

There are also certain lawyerisms that you should avoid in any brief, and especially in a technical brief that is already difficult for the reader to plow through. It makes for far more pleasant reading if you write in plain English, and not in legalese. So, do your judge a favor and avoid not only the usual suspects, such as hereinbefore, hereinafter, and their many ugly cousins, but also other more innocent-sounding words and phrases that only lawyers use, like prior to ("before" is preferable), pursuant to (use "under" instead), attempt ("try" works better), and instant ("this").

Also, it is almost always preferable to call a party by its name, or at least a reasonable shorthand of its name. The use of party labels like "plaintiff" and "defendant" can be confusing in intellectual property cases, because sometimes the plaintiff is the party accused of infringing and is seeking a declaratory judgment that exonerates it from liability.

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Avoid footnotes. As long as you have read this far, we will stay on our soapbox just a moment longer and exhort you to avoid footnotes in your brief. Many judges don't read them, and many courts hold that substantive arguments presented only in footnotes are waived. Thus, our briefs are generally devoid of footnotes. If the material you wish to put in a footnote is substantive, there should be a logical place for it in your argument. Sticking it in a footnote is just lazy and risks disrupting the logical organization you have worked so hard to create. If, on the other hand, the material you propose to include in the footnote is not substantive, you and your reader can probably do quite well without it.

And last, always have a conclusion. You have done a lot of work to select the important facts, organize your brief in a logical manner, and simplify the complicated concepts to the best of your ability. When you are finished with all that, don't forget to tell the court precisely what you want. We hope that if you follow the advice in this article, you stand a better chance of getting it. ■

Hugh Balsam is a partner at Locke Lord Bissell & Liddell LLP in Chicago. **Patrick Gallagher** is an associate at Locke Lord Bissell & Liddell LLP in Chicago. They can be reached at hbalsam@lockelord.com and pgallagher@lockelord.com, respectively.

The Five Cs of Effective E-discovery Management

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flow, it is important at the outset to supply reviewers with a manual that provides easy-to-understand instructions for tagging email chains or families, duplicates, annotations, and redactions, as well as other crucial information. Make sure that the review protocol is very clear: Identify review calls related to responsiveness, privilege, confidentiality, significance, and issues. Delegate and provide sufficient training for first-round privilege review so that review lawyers can make the cuts on their own. Attorneys tend to overanalyze, so stay a step ahead of them by crafting a protocol that will answer as many potential questions as possible.

Failing to be clear and consistent in your instructions renders sometimes tedious—but important and expensive—tasks meaningless. Also, no team, no matter how brilliant, ever thinks of everything in the beginning of the case. No matter how thorough you are, ambiguities will arise. Have a clear path for communication to resolve any ambiguities. Also define a protocol for resolving problems. A decision matrix provides a clear path for issue resolution and dramatically improves consistency in problem solving and review, which can decrease downtime and alleviate bottlenecks. Finally, formalize a process for regularly disseminating information with the review team. For example, when a decision is made, update the team at the weekly Friday meeting. Don't wait weeks to get a decision and then send out a mass email that everyone ignores.

This is not rocket science, but very few attorneys actually make sure these steps are implemented and followed on their cases. Following these steps will make a world of difference in your ability to handle your case and represent your client effectively.

Capture and Promote Best Practices

There are no mistakes, only failures to learn. Like anything else, effective discovery is a learning process, and the rules and technology are constantly changing. Nonetheless, tried, tested, and true procedures should be documented and incorporated as part of the process. If you have established an effective communications process, the easiest way to document and incorporate it is to encourage ongoing and continuous dialogue with your review attorneys and document the systems and processes that are effective as you go along. In addition, have a "lessons learned" review after project termination to identify practices for training, software selection, organization, and quality control that should be duplicated going forward. Take time to capture processes you want to repeat.

Conclusion

In spite of all the dramatic changes due to the information explosion, changes in technology and discovery rules, and their impact on your litigation practice and trial strategies, there are some basic rules that still apply. Use the five Cs to effectively manage discovery and reduce costs and stress so that you can focus on the merits of the case and your winning trial strategy. ■

Susan Burns is founder and president of Dynamical Discovery in Minneapolis, Minnesota.

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