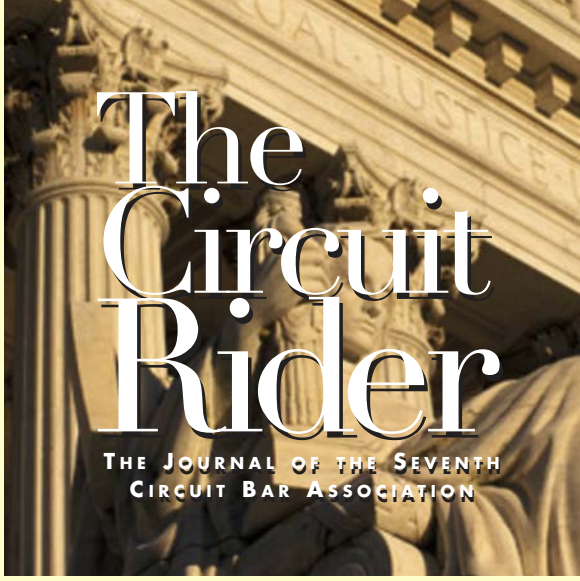
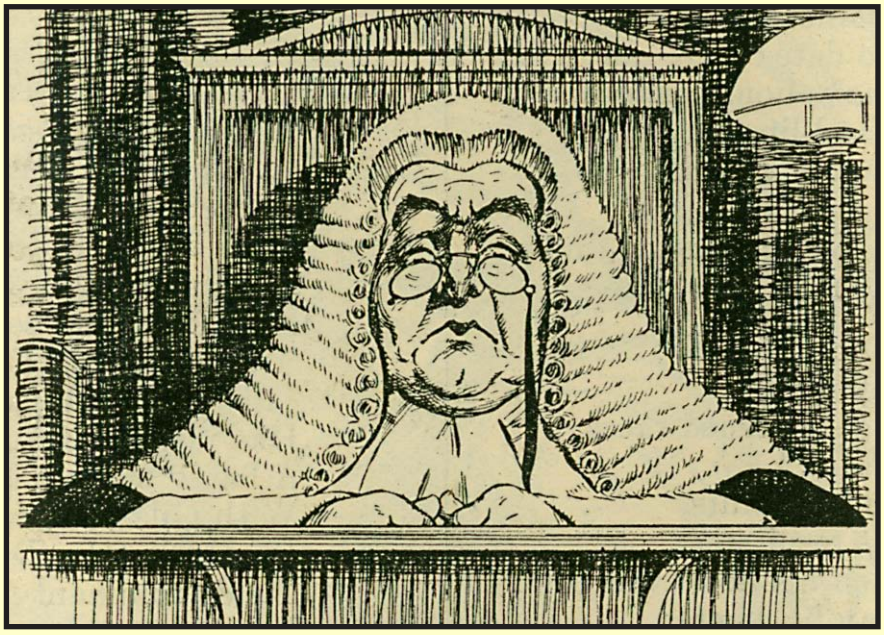
April 2018

Featured In This Issue



THE Future is Now



The Circuit Rider

In This Issue

Letter *from the* President

President Elizabeth Herrington
Morgan, Lewis & Bockuis LLP

Welcome to another edition of *The Circuit Rider.* Thanks once again to Magistrate Judge Jeffrey Cole, his committee, and the contributing authors for their efforts towards another thoughtful publication. It is truly exceptional. This edition includes a fabulous piece by Ken Nolan entitled *A Bug Flew In My Eye;* it is a truly extraordinary article about what it means to be a lawyer. Equally compelling and of enormous practical value is the article on how to communicate with clients by Judge Larry Vilardo, a United States District Judge in New York. I know that you will also enjoy other interesting articles, such as the pieces about 7th Circuit Judge John D. Tinder as a prosecutor, thoughts on the ethical landscape of litigation, 7th Circuit Rule 40(e) regarding *sua sponte* rehearings, and discovery concerning consumer devices that collect our data every day. Also included is an update about the 7th Circuit's Electronic Discovery Pilot Program and an article concerning the 7th Circuit's sexual harassment reporting policies.

It has been a very exciting year for both the 7th Circuit Bar Association and the 7th Circuit Court of Appeals. The 7th Circuit Bar Association has adopted a new strategic vision and mission, which will guide it in the years to come. We expect to continue our already fantastic programming, plan additional events, and add many new members as part of our invigorated efforts. For the 7th Circuit Court of Appeals, a lot of exciting nominations for appointments to the bench were recently made. Northern District of Illinois Judge Amy St. Eve has been nominated to replace Circuit Judge Ann Clair Williams, Attorney Michael Y Scudder will replace Circuit Judge Richard Posner on the bench, and Attorney Michael B. Brennan will fill the vacancy of Circuit Judge Terrence Evans. Several additional appointments were made for our District Courts and we anticipate more in the coming year.

The 67th Annual Meeting of the Association is now upon us. It will be held on April 29 - May 1 at the Radisson Blu in Chicago. The Sunday evening kick-off reception will take place at the Museum of Contemporary Art, complete with cocktails, food and entertainment. Programming for Monday and Tuesday will include a timely panel addressing organizational culture and sexual harassment, an informative session on protecting electronic information, and a panel discussing what to do about gun violence. Our civil breakout panel will be covering blockbuster cases from the 7th Circuit that went to the Supreme Court, the criminal breakout will address the recent NCAA bribery cases and the criminalization of private controversies through the federal fraud statutes, and our bankruptcy panel will tackle issues relating to successor liability. For our Annual Dinner, our key note speaker is Jeffrey Toobin, Senior CNN Analyst/Staff Writer for *The New Yorker.* We will again be honored to have Hon. Elena Kagan, Associate Justice of the U.S. Supreme Court address us as well.

It has been an exciting year for both the 7th Circuit Bar Association and the 7th Circuit Court of Appeals. The 7th Circuit Bar Association adopted a new strategic vision and mission, which will guide it in the years to come. We expect to continue our already fantastic programming, plan additional exciting events, and add many new members. For the 7th Circuit Court of Appeals, a lot of exciting nominations for appointments to the bench were recently made. Northern District of Illinois Judge Amy St. Eve has been nominated to replace Circuit Judge Ann Clair Williams, Attorney Michael Y Scudder has been nominated to replace Circuit Judge Richard Posner, and Attorney Michael B. Brennan has been nominated to replace Circuit Judge Terrence Evans.

We look forward to seeing you in Chicago for the Annual Meeting. And if you are not yet a member of our Association, please make it a point to join today. You will be glad that you did.

Get Involved!

Interested in becoming more involved in the Association? Get involved with a committee! Log on to our web site at www.7thcircuitbar.org, and click on the "committees" link. Choose a committee that looks interesting, and contact the chair for more information.

Communicating *with* Clients

By Hon. Lawrence J. Vilardo
*United States District Judge for the Western District of New York**

A local talk radio host recently defined *lawyer* as "someone who loves to hear the sound of his own voice." That may be a bit of an exaggeration, but the fact is, most lawyers like to talk more than they like to listen. In court, in the office, at cocktail parties, at home, lawyers — and especially litigators — like to get their two cents in.

When clients talk, though, you had better listen; otherwise, you will soon be looking for another line of work. Clients come to lawyers to be heard. In fact, when you deal with your clients, listening is the more important half of the communication equation. And, if you listen — if you *really* listen, not just *pretend* to listen — you stand a better chance of getting retained, holding on to the case, and ultimately doing a better job of getting your clients what they really want.

Litigators are cursed or blessed, depending on your perspective, with having to deal with people during their darkest hours. By the time they enter your world, your clients have problems — often very serious problems — or they would not need you. Chances are, your clients do not like visiting you or talking with you on the phone any more than they like going to the dentist. Nothing against you (or dentists, for that matter), but the reason for their visit is probably an unpleasant topic. And they know that they will get a bill for your time and their trouble.

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**Judge Vilardo is a United States District Judge for the Western District of New York. He was unanimously confirmed by the United States Senate on October 26, 2015. Judge Vilardo is a graduate of Canisius College, summa cum laude, and the Harvard Law School, magna cum laude, where he served as an Editor of the Harvard Law Review. In 1980-1981 he clerked for the Honorable Irving Goldberg of the United States Court of Appeals for the Fifth Circuit. Before becoming a federal judge, he was a Partner in Connors & Vilardo, LLP, in Buffalo, New York. He is a former Editor-in-Chief of LITIGATION, the journal of the American Bar Association, Section of Litigation. Judge Vilardo is a frequent speaker at legal seminars and a contributor to a number of law journals. The Article is reprinted with the permission of LITIGATION Magazine and Judge Vilardo.*

Communicating *with* Clients

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Keep this in mind whenever you speak with your clients. Although you cannot always tell them what they want to hear, you should use tact and sympathy, especially when you must communicate an unpleasant message.

The initial meeting with a new client or prospective client presents unique challenges. Usually, the client will be quite vulnerable at this meeting. Perhaps she has suffered a serious personal injury or has just lost a loved one. Maybe she is facing an indictment or an administrative action to revoke her professional license. Perhaps she recently learned that a trusted business partner betrayed her or accused her of betrayal.

Listen to the client's story. Your legal education and experience will make you want to cut through the irrelevant details and get to the heart of the matter. Restrain yourself from interrupting. The client has been living with this problem for a while. She wants you to understand how she feels and why she feels that way. She wants you to appreciate that what she did was the right thing to do or that she had a good reason for doing the wrong thing. She wants you to see her point of view.

You will want to impress the client with war stories of how you won similar cases. You will want to show how well you understand the issues by interrupting and restating what the client has told you. You will want to end the client's seemingly endless story so that you can get back to writing that appellate brief or preparing for next week's deposition.

Do not do it. The interview — and the case that you will handle — are not about you. Let your client tell you the unabridged story. Unless it seems as though the saga truly will go on forever, or unless your client gets so involved that she does not know how to end it, try not to pull the curtain.

There are a few reasons for this. First, listening to the full story will help you understand the client's goals. Does she believe she has done nothing wrong and deserves an apology from the prosecutor? Does she recognize that she made a mistake, and does she now want you to negotiate the best deal that you can? Is she unsure about the moral, ethical, and legal propriety of what she did? The answers to those questions will go a long way toward formulating your litigation strategy.

Sometimes, what may seem like inconsequential details will have subtle importance. Your client probably does not understand the law or how it applies to the facts of her situation. She will not organize her story as you might organize it or emphasize what you might emphasize. You need to get the picture — the entire picture — so that you can apply your knowledge and experience to it. You will sift and discard facts along the way, but you need to have all details before you can decide intelligently which ones to trash.

The client also will feel better about you if you listen to her whole grievance. Have you ever gone to a cocktail party and met someone you thought was fascinating despite the fact that you learned very little about him? You may have become enamored with your new acquaintance not because of what he said, but because he was willing to listen to what you had to say. Clients will react that way, too. You are less likely to impress them with tales of cases won than by listening to the uninterrupted version of what they want to tell you.

After the client has finished, show how well you have listened. Ask questions to clarify the story or to focus on the legal issues. Repeat parts of the story that you might not fully understand. Investigate what your instincts tell you she intentionally left unsaid.

If the case is large enough to warrant the cost, have an associate or paralegal take notes of the initial interview. If not, take notes yourself, but only if that does not distract you from listening or making frequent eye contact while your client speaks. Explain

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to the client or prospective client that you need to take notes to help you remember the facts later on. Be sure not to write when you should be listening. Slow down or stop the client if you must.

I usually prepare a detailed memorandum after the initial client interview and send it to the client to approve or correct. This process makes the client think through the story again and allows her to fill in any gaps in my notes and my understanding. It also ensures that both the client and I are on the same page from the start.

In law school and in law practice, we learn to be cautious and equivocal. Very few questions have black-and-white answers. Most problems are colored in shades of gray. Most cases have fact patterns that give both sides something to worry about.

If you are a worrywart, try not to let that show, especially at the initial interview. The client knows that she has something to worry about; that is why she came to you in the first place. She wants you to solve the problem for her.

Show some confidence. Do not give the client false hope, but let her know that virtually every legal problem has a solution and that she is in the right place to find the best solution for her problem.

The initial client interview should begin the process of keeping the client informed about the status of the case. Explain the procedures that you plan to follow. When will the complaint be drafted? How long will discovery take? What is a realistic trial date in this court or with this judge? Tell the client when her participation will be necessary. Tell her when and how often to expect communication from you.

Sometimes, it is difficult to get the client to tell the entire story to a stranger, which is what you are during that first meeting. Of course, you can talk about the attorney-client privilege and the prohibition against divulging client confidences, but the client does not know you. She does not know how seriously you take your ethical responsibility. She does not know whether she should trust you with some of her deepest, darkest secrets.

Gaining the client's complete trust during the initial interview is often impossible. Usually, trust is a bond that grows during the process of litigation. But there are a few ways to nurture that growth from the beginning.

First, and most simply, tell the client that what she tells you is sacred. I usually put it in specific terms. My wife has often said to me and others that she really does not know what I do for a living. I tell my clients and prospective clients that I will not share anything about them with anyone — not even my spouse, with whom I share everything else-outside the walls of my law firm. I explain that my partners and associates, and our paralegals and secretaries, may learn about the case. But I assure them that no one else will hear about it from me, and I invite them to ask others about my secret-keeping record.

Second, never mention a client by name or description when talking to another client. You do not need to be a brain surgeon to recognize that if you talk with client A about clients B and C, you may well talk about client A when you are speaking with someone else.

Third, try to convince the client that the two of you are in this case together. Tell her that you are different players on the same team. Explain that for purposes of this case, your interests are identical — to the exclusion of any other interests you may have. Tell her not to think of the attorney-client relationship as you assisting her in her fight against the other side but to realize that it is both of you against them.

You know how important it is to understand your audience when you are trying a case or arguing an appeal. In fact, you spend an inordinate amount of time agonizing over jury selection or learning about the philosophies and quirks of the judges on your appellate panel. Think about that when you talk to your client. If your client is a blue-collar factory worker, do not think you will impress him by using sesquipedalian words. Show off in front of your friends, your family, or your readers if you must. Speak to clients in a language they will understand.

But do not speak a language in which you are not fluent. If you cannot talk street talk, do not try. Be yourself. Trial lawyers are

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taught that jurors will see through any phony attempt to adopt someone else's style. The same can be said of clients. And no one wants a phony for a lawyer.

Do not try to sound like a lawyer. We all remember our law school days when many of us discussed course work and cases in a language that can best be described as a caricature of lawyer-talk. Some lawyers still think they sound smart if they talk "like a lawyer." But they more likely will sound full of themselves.

We all can fall victim to this. During the summer after my first year of law school, I used the word *juxtapose* in what was otherwise a perfectly normal conversation with my aunt. That nine-letter word might just as well have been four letters. Fortunately, my father got me off the hook by explaining that the word had just slipped and apologizing to her for me.

After you have gained your client's confidence and signed up the case, the cardinal rule is to keep the client informed. At the most basic level, this means giving the client periodic reports and responding promptly to any inquiries the client might make. Keep each case on a diary; every month or so, let the client know what is happening.

Return phone calls as soon as possible. If you are on trial or cannot return a call yourself because of some other pressing matter, ask your secretary or someone else from your office to return the call for you. Many clients demand prompt attention; all of them deserve it. Make sure that they get that attention. I am always amazed at the horror stories I hear from clients about their former lawyers who would not return their calls. Just a few weeks ago, an acquaintance called to tell me that his lawyer had not returned his several calls and to ask if I could try to determine the status of his case. If you let yourself become the subject of such a story, you will lose not only the client whose calls you did not return but also the prospective clients (or referral sources) who hear the story.

If a client expects your focused attention at a time when you must attend to a more pressing matter, explain that to the client. Tell her that when you are handling the trial or administrative hearing in her case, you will devote the same undivided attention to her that you now must devote to someone else. She will understand and appreciate your devotion to the case at hand.

Preparing the client for deposition or trial testimony is a topic for another day. For present purposes, suffice it to say that when you instruct the client about testifying, you need to be certain that the client understands your instructions.

For example, most of us will tell our clients not to think out loud when trying to answer a question. We explain that the client should formulate the answer in her head and not on the record. Sometimes, during the preparation session, the client will violate this rule. When you ask her where she was at 9 a.m. on the morning in question, she will say something like, "Well, it was a Tuesday, so I would have taken my children to school at 7:30, and then I'd probably stop at the coffee shop," etc. When you tell her that she has violated your instruction not to think out loud, she will say something like, "Oh, I'm just doing that *here;* I won't do that at the hearing." Do not believe her. Tell her that what she does at the preparation session is likely to be repeated when she testifies. Be sure she understands exactly what you mean by your instructions.

I often tell my client that at a deposition I may speak to her in a terse or even rude manner. I apologize beforehand, explaining that often there is not enough time to detail how she is ignoring one of my instructions or to remind her politely about what I said during the preparation session. Sometimes, an abrupt "just answer the question" is all you can do. Tell your client that if you sound unhappy or even angry, it is only because you need to impress her immediately with the importance of what you are saying.

Communicating settlement offers and demands often requires some finesse. Of course, you are under an ethical obligation to communicate any demand or offer to your client. But the client wants to hear more than the simple number or settlement proposal; she wants to know what you think about it. Communicating your advice can be a sensitive matter. Instead of directly telling the client whether you think an offer should be accepted or

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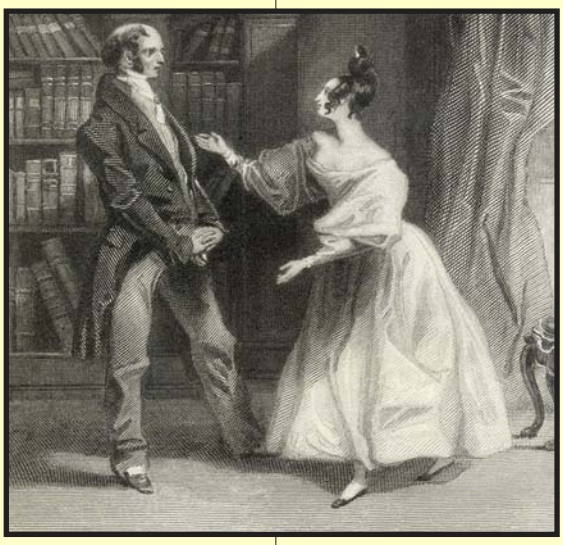
Many clients demand prompt attention; all of them deserve it. Make sure they get that attention.

rejected, you might want to consider laying out the various options and talking through the benefits of each. Through the years, I have represented a number of physicians in proceedings before our state's Department of Health. Very often, my clients will tell me that they do not want to run the risk of a license suspension or revocation that might result from a hearing. But if I tell them that opposing counsel has suggested a resolution that includes intense practice monitoring or reeducation, they immediately will reject that proposal out of hand. If I explain that they will reduce the risk — as they said they wanted to — by accepting the state's proposal, they will become more adamant in their decision. Ultimately, they may talk themselves into the very hearing that they really wanted to avoid at all cost.



So, instead of presenting the proposal and asking the client to accept or reject it, I most often start by reaffirming the option of going to a hearing. I explain to the client that this is how I make my living and that if she wants me to go to battle for her, I will gladly do so. Very often the client will want to know about the financial, emotional, and other costs associated with a hearing, and I will answer those questions as accurately and candidly as possible. Only after the client understands that a hearing is an option and recognizes the consequences of choosing that option will I address the ways of avoiding the option through the settlement proposed by the other side.

If I sense that the client really wants to pursue one option but is reluctant to admit it because of business pressure, ego, or some other concern that she may not even recognize, I will play the devil's advocate and suggest the opposite. Sometimes, clients need you to be the sounding board for their own thought processes. They need to argue against you to think through their own decisions.

If settlement is obviously the most cost-effective option, explain that to the client. Tell her that you are willing to litigate her case on principle, but make sure she realizes that it will cost her money to prove her point. Trying a $25,000 case can cost many times that. The client may want you to try the case anyway, but make sure she knows what she is buying and how much it may cost.

Putting the Client's Interests First

Several years ago, I was retained by an international corporation headquartered in Germany to handle a small piece of litigation pending in western New York. For the first several months, my sole contact was an in-house attorney whose office was in the United States. When I went to Germany to meet the company president for the first time, he immediately confronted me with the fact that this litigation was costing more than the amount at stake. I closed my binder, extended my hand, and told him that I would discontinue the litigation as soon as I arrived back in the United States. He then launched into a lengthy explanation of why we needed to continue to pursue the case because of collateral matters not directly at issue. We completed our daylong meeting and continued to litigate the matter.

I suggested the abrupt end to our meeting for two reasons. First, I wanted the company president to know that the company's interests were my most important concern. I sensed that he believed American lawyers to be selfishly focused only on how much money they could make from a piece of litigation, and I wanted to disabuse him of this notion as quickly and dramatically as possible. Second, I sensed that the client needed to verbalize why he had decided to start this litigation in the first place. After he did that, he was much more comfortable — and less ambivalent — about the course he initially had chosen.

I seldom make a specific recommendation to a client about whether to accept a settlement proposal or continue with a

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piece of litigation. I explain that although I handle many cases, this is the client's only case. I tell the client that she will have to live with this decision for the rest of her life and that it undoubtedly will have more of an impact on hers than mine. I tell her that I can analyze the risks and benefits of the various options and that I can help her think through which of those options are best for her; but I also tell her that I cannot make the decision for her.

And that goes for more than just settlement decisions: Like physicians, lawyers have an obligation to obtain an "informed consent." Just as a patient has the right to make medical decisions based on the diagnosis, prognosis, and available options, so your clients have the right to make informed decisions about litigation strategy. That does not mean that you should let your clients micromanage their cases by deciding everything from whether to extend your opponent's response time to the topic headings in your appellate brief. But it does mean informing your clients of the big-picture options, the risks and potential benefits of each option, and your recommended strategy. It means involving your client in the decision-making process.

When you talk to clients about the risks and benefits of alternative courses, let them know what you are doing. Otherwise, your litany of risks will make you seem too pessimistic, or your list of potential benefits will make you seem like a cheerleader. I usually use the medical analogy to make the point: Just as the client can decide what medical treatment to pursue, so she should decide what legal course to follow. I will be part of that process, I say, by using my experience and judgment to help map out a strategy. I explain that I will do that by laying out various options, outlining the risks and potential benefits of each, and recommending a strategy. I tell her that the strategy we take may well depend on her aversion to risk or on what is at stake.

When you invite your client to participate in the decision-making process, be careful not to let her think that you are passing the buck on a tough call. The decision to have surgery may be the patient's, but the physician lets the patient know when, in her judgment, conservative medical treatment will no longer suffice. Be sure your client understands that she will have the benefit of your judgment, and that the two of you will decide together.

There is no wrong way to communicate good news to a client. She will be thrilled to learn that you have found the smoking-gun document that will increase settlement value tenfold or the impartial witness who can win your case for you at trial; she will not even notice — let alone remember — how you communicated the news. Not so with bad news, however. Telling the client that her case is going nowhere or that a crucial pretrial motion has been decided against her can be a terrifying prospect for a litigator.

Do not sugarcoat bad news, but use empathy when you deliver it. If there are creative ways to deal with the problem, explain them. Tell the client that this may make the odds of winning longer, but there is still a chance. Explain that all cases have their ups and downs and that until the case is finally decided or settled, the highs should not make her too high and the lows should not make her too low. Tell her that keeping an even keel is usually the best way to remain sane during a contentious piece of litigation.

If the bad news is truly the death knell for your case, be honest with your client about that. But do it in a gentle — and perhaps gradual — way. Deliver the bad news in person. Take the time to explain what happened and why. Patiently answer your client's questions until she has no more.

When all is said and done, the most basic principle of client communication is a corollary of the Golden Rule. Listen to the client's story with the same attention that you like to be given. Treat the client with the same respect that you expect from others. Keep the client informed about matters that you would want to know about. Be the kind of counselor and advocate that you would want to have.

Do that, and you will have clients who understand and appreciate what you do and how you do it. They will tell others about you. And that will ensure that you will be communicating with clients for a long time to come.

A Bug Flew *in* My Eye

*By Kenneth P. Nolan**

Sometimes I just love being a lawyer. And not just the times when the jury asked for six cups of coffee and a calculator, or when the judge granted my summary judgment motion which made me look invincible in the admiring eyes of influential clients. Occasionally it's the ordinary events that cause a smile, that are so absurd they're priceless.

In law school, I interviewed with a small, respected firm which specialized in corporate and estate work. The senior partner was a bit stuffy--probably like I am now--so I wasn't surprised when I received a "we'll keep your resume on file" letter. After litigating for a few years, I cringed whenever I pictured myself in a hushed office writing generation skipping trusts or calmly suggesting to the handsome, wealthy couple that perhaps relocation to Florida would avoid hundreds of thousands paid to useless New York politicians. It really wasn't the work I feared, but the solitude, the drafting of documents, the silent study of tax or Medicare regs. I dreaded the lack of interaction with people — all sizes, all shapes, all human.

I've always lived among too many people — in my bedroom with my two brothers, in school where 50 students per class was the norm, even at Ebinger's bakery where a line always ran out the door. Heck, my Congressman, Hugh Carey, won election because he plastered his campaign literature with photos

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*Mr. Nolan has been lead counsel in literally scores of major aviation cases around the country, as well as in enumerable medical malpractice, auto, construction, and product liability cases. He is the author of the book, "*A Streetwise Guide to Litigation*" (American Bar Association 2013). Mr. Nolan is a former Editor-in-Chief of LITIGATION, the journal of the Section of Litigation of the American Bar Association. He is presently Senior Editor of LITIGATION. For anyone who appreciates sparkling, witty, effervescent and truly insightful writing, Ken's book – and his numerous articles in LITIGATION -- should be at the top of their reading list. Mr. Nolan is presently Counsel to Speiser, Krause (formerly Speiser, Krause, Nolan & Granito) in New York City. He was an editor for the* New York Times *where approximately 50 of his articles have been published, along with a number of his photographs. In addition, he has written editorials and was make-up editor for the editorial and op-ed pages of* The Times. *Mr. Nolan's article is reprinted with his permission and that of LITIGATION magazine, where it originally appeared.*

A Bug Flew *in* My Eye

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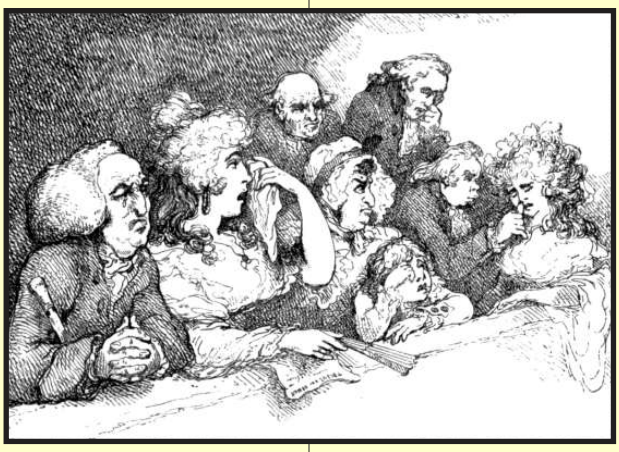
of his 14 children. Others who were raised on these same sidewalks fled the overflowing trash cans, the stinking subways, the noisy neighbors. The suburbs were "so peaceful," they'd brag. "You don't even see anyone." They were content in their seclusion with tranquil days, serene nights. Only warbling birds — not grinding garbage trucks--disturbed the stillness of their morn.



To me, peace and quiet is torture. I don't enjoy intimate dinner parties where the merits of Obamacare or gun control are calmly debated. I prefer gatherings of 30 where venom toward the morons running the country is freely and profanely stated. A long walk along a deserted beach is fine if you're Whitey Bulger on the lam, but I prefer the chaos of Riis Park when, during my teen years, thousands sought refuge on the crowded hot sand.

Yet always being among people is wearing. Most everyone is annoying. You know the kind--your kids, spouse, siblings, partners. Those you adore, but sometimes can't stand. Occasionally, you have to take a walk, go to a movie, read a book. Alone. For me, however, after an hour sitting on Shelter Island watching seals sun themselves or osprey dive for fish, I'm ready to swipe my Metro Card and elbow that elderly gent with the cane in order to board the 4 train to court.

That's why I enjoy litigating — people. With all their faults and sins. Sure I wish everyone was perfect, but who doesn't think Al Gore is a hoot. So concerned about the carbon footprint and global warming that he sells his company, Current, to one of the largest oil producers in the world. Then allegedly tries to close before the 2013 tax increases take effect. Or like married South Carolina Governor Mark Sanford who championed pro-family positions, but went missing when he traveled to Argentina with his girlfriend. And now wants to return to office. As is said, you can't make this stuff up.

A friend was injured when a panel truck crossed the double yellow line and slammed into her car which was traveling in the opposite direction. The police report stated that the driver of the truck admitted he lost control and flew into oncoming traffic. Photos and witness statements confirm the report. Pretty straight forward. The evening before depositions we received the defendant driver's statement in which he wrote that he lost control because a bug flew in his eye. This was during a New York winter where the temperature was just above freezing, yet the defendant drove with his window open. Roaches, rats, even raccoons abound in bucolic Brooklyn, but flying bugs in the harsh cold of winter — not so much.

How do you deal with a defendant or witness whose story is so outrageous that if defies belief? How do you handle it at deposition, trial? Do you move for summary judgment? What is your strategy when handed a gift?

When I first started trying cases, I equated effectiveness with length. In a medical malpractice trial, guys would boast of cross-examining the defendant physician for days. I figured that a few hours would never be enough, so in my second med mal trial, I kept the doctor on the stand all morning, going over the same issues. At lunch, the judge asked to see me. I'm trying to get you some more money, he yelled, but you're screwing up. I was shocked. You're just going over and over the same stuff. The jury's angry.

I quickly ended the cross and for the rest of the trial, asked my questions, made my points and sat down. Though I improved my trial skills, the judge never obtained the money and the jury's defense verdict stung but, in retrospect, was not surprising.

Even on a direct examination, be succinct. Obtain the needed testimony and get out of the way. In the obstruction of justice trial of Vice President Cheney's aide, Lewis "Scooter" Libby, Special Prosecutor Patrick Fitzgerald's direct examination of Tim Russert lasted all of 11 minutes. Have a goal. When you reach it, shut up.

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A Bug Flew *in* My Eye

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I believe in less is more. It's certainly fun to beat someone up at deposition or trial. But be careful. Being a wiseass, a snarling sarcastic bully can turn the jury from hostile to sympathetic. Jurors like underdogs and loathe lawyers so if you unnecessarily humiliate the witness, you can alienate the jury and turn an overwhelming victory into a disappointing result.

My defendant driver wasn't a horrible person. A working stiff who was driving his employer's truck. Hence the tale. Even during his deposition, the temptation was to show off — you opened the window while driving because you were sweating, right? It was so hot out that everyone was wearing shorts and sandals, correct? Now let's talk about this bug. What did it look like? Was it big? Small? A mosquito? A Gnat? A flying squirrel? And on and on.

The desire to parade your skill by winking and grinning at your young adversary or the cute court reporter is overwhelming. Look at me. I'm so funny; I should be on Letterman. If you act that way, you've gone too far. Your adversary will know you care more about your ego than the case, and the court reporter will despise you for your cruelty toward the hapless driver.

A better strategy is to simply have the witness describe what happened, in detail — what was the temperature? Was it cold? What were you wearing? Highlight the inconsistencies, but in a respectful manner. Even though it was cold, you had the window open? How cold was it? You always drive with the window open in winter? Had a bug ever flown into your eye in winter before this incident? Did the bug land in both eyes or just one? So when it flew into only one eye, why didn't you just close the one eye and slow to a stop? Didn't you say you were only going 30 mph? Let the defendant talk and talk and talk. The more he tries to explain, the more unbelievable the account. Save the theatrics for the courtroom.

If defendant admits fault — yeah, I was texting and not looking at the road — the plaintiff shouldn't move for summary judgment on liability. Trying damages without the jury learning of the reckless behavior sterilizes the case. In slam-dunk liability cases, shrewd defendants admit liability to remove emotion from the verdict. In aviation disasters, this is usual strategy. Tough to rouse the anger of a jury if at the start of a damages only trial, the judge announces: You don't have to worry about how the crash occurred. Your job is only to determine how much the Smith family is entitled to. Defendant Airline agrees it's responsible. We won't hear any testimony about how and why it happened. That's why the trial will only last 4 days and not 12 weeks.

The jurors nod and smile at the neatly groomed attorneys at the defense table. Instead of hearing about the pilot's inadequate training and repeated proficiency test failures, the jury has been partially co-opted and will focus on such monumental issues of whether decedent would have retired at 62, 65 or 70. Much better to resist the defense concession of liability and allow the jury to become indignant which often results in an extra zero or two in the award.

At trial, the gloves are off. Some sarcasm, disbelief and all sorts of body language would be appropriate. How much, for how long is determined by a million other factors — judge, venue, composition of jury, extent of injuries, how your adversary deals with the story…

And after you win, don't forget to say thank you.

Writers Wanted!

The Association publishes The Circuit Rider twice a year. We always are looking for articles on any substantive topic or regarding news from any district — judges being appointed or retiring, new courthouses being built, changes in local rules, upcoming seminars.

If you have information you think would be of interest, prepare a paragraph or two and send it via e-mail to: Jeffrey Cole, Editor-in-Chief, at Jeffrey_Cole@ilnd.uscourts.gov or call 312.435.5601.

The *Changing* Ethical Landscape

*By Robert A. Clifford**

I became a litigator just when the uniform Federal Rules of Evidence were enacted in 1975. Before the promulgation of the Federal Rules of Evidence, law governing civil matters, on which I focus my practice, could be gleaned from federal statutes, federal case law or even state evidentiary law.

And now trial attorneys find themselves in an age of technology with courts trying to keep up with the changing ethical landscape of what the digital era means in a courtroom and as one prepares cases for trial as well as the increased competition for business.

In the past 40 years, the Rules have been amended by the Supreme Court of the United States many times in an effort to clarify and simplify their application. Electronic discovery is one of these areas of recent change. In 2015, amendments to the Federal Rules of Civil Procedure went into effect that largely dealt with the need to reduce the time and expense connected to the discovery of electronic data.

Effective Jan. 1, 2016, Illinois, my home state, changed the rule regarding lawyers' knowledge of technology and how it impacts their clients. Rule 1.1, Comment 8, requires that every practicing lawyer must keep abreast of the benefits and risks of relevant technology as part of its competency requirement. The American Bar Association's House of Delegates adopted this amendment in 2012, and now 30 states have followed this model rule with Missouri and Kentucky being the latest to adopt it in 2018.

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** Robert A. Clifford is the Founder and Senior Partner of Clifford Law Offices, Chicago, Illinois. Mr. Clifford is one of the most well known and successful tort and aviation lawyers in the United States. He is routinely listed as one of the Best Lawyers in America and is a member of the American College of Trial Lawyers, the International Academy of Trial Lawyers and is a Trustee of the National Judicial College. A former Chairman of the Section of Litigation of the American Bar Association, Mr. Clifford is the author of several hundred legal articles, and was ranked the number one attorney in the state of Illinois by Super Lawyers in its 2016 Edition.*

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Courts and trial lawyers also are grappling with the hearsay rule, which has been described by Professor Edmund Morgan as "resembl[ing] an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists." Edmund Morgan, *Practical Difficulties Impeding Reforms in the Law of Evidence,* 14 Vand. L. Rev. 725 (1961). *See also, Jeffrey Cole, The Continuing Riddle Of The Federal Hearsay Rule,* 25 LITIGATION 15 (1999). Effective Dec. 1, 2017, the ancient documents exception to the hearsay rule was modified, and the list of self-authenticating documents was expanded to again address the introduction of electronically stored information (ESI).

These changes prompted my firm to sponsor a free two-hour webinar in February, "The Changing Ethical Landscape of Litigation," to help lawyers keep up with all of the new and amended rules. We offered two hours of professional responsibility continuing legal education credit. It is a testament to this need that more than 3,000 lawyers registered for the event.

I moderated the program with three experts fielding hypotheticals and questions: Jayne Reardon, Executive Director of the Illinois Commission on Civility; Thomas Burns, Professor of ethics at Northwestern University School of Law; and retired Judge Deborah Dooling who served on the bench of the Cook County Circuit Court for decades.

The response from the audience following the program was overwhelmingly positive:

- "Excellent in all three ways (intellectual, education and practical content)."
- "Always makes ethics interesting."
- "Excellent knowledge of the materials and clearly explained the application of the Rules."
- "Always a good resource of ethical information!!"

Illinois has once again changed its MCLE ethics requirements to include two hours of diversity/inclusion and mental health/substance abuse or mentoring every two years. With the amendment of Rule 794(d), Illinois became the fourth state to require diversity-related CLE and one of three states to require mental health and substance abuse education.

Another area that many states are grappling with is the issue of lead generation companies that call into question rules governing fee-splitting, safeguarding client fund and referral of cases. The Virginia State Bar Association's Standing Committee on Legal Ethics petitioned the Virginia Supreme Court in November to adopt a rule that bars online legal referral services due to these concerns. The link to the Standing Committee's Petition to the Virginia Supreme Court on Proposed Legal Ethics Op. 1885 can be found at:

vsb.org/docs/LEO1885_SCV_petition111717.pdf.

Virginia's proposed rule comes after similar actions in New York, New Jersey, Ohio, Pennsylvania and South Carolina. All are struggling with the activities of lead generation companies, such as Avvo Legal Services, that directly charge the client a flat rate for a defined legal service and hold the fee until the potential client selects a lawyer from a list of participating lawyers in a certain geographical area. Avvo then passes the fee along to the attorney after the legalwork is completed, charging what it calls a "marketing fee" in a separate transaction that some states have characterized as inappropriate client fee-splitting.

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Courts ultimately will be deciding this issue on a state-by-state basis as a Washington federal district court did when it recently dismissed a putative class action lawsuit against Avvo's claim and ruled in favor of defendant Avvo that its rating service of lawyers should be afforded First Amendment protection. *Davis v. Avvo, Inc.,* 2012 WL 1067640 (W.D. Wash. 2012). That court also concluded that defendant, as the prevailing party, was entitled to costs of litigation and reasonable attorney's fees incurred in connection with each successful motion, together with a statutory award of $10,000 under Washington state law. If other jurisdictions reach the same result, it is certain to open the way for lead generation companies to continue their rating and marketing practice.

When I was a student at DePaul University College of Law, Watergate was in full swing. Aside from the daily front-page headlines (mind you, no Internet then!), all lawyers were eventually impacted by those events, which led to professional ethics becoming a required class in law schools along with a requirement of passing a professional responsibility exam.

Although specific rules may have changed over the years, the deep-down feeling of doing what is right has not or should not have changed a bit.

Upcoming Board *of* Governors' Meetings

Meetings of the Board of Governors of the Seventh Circuit Bar Association are held at the East Bank Club in Chicago, with the exception of the meeting held during the Annual Conference, which will be in the location of that particular year's conference. Upcoming meetings will be held on:

Tuesday, May 1, 2018*

**at the annual conference at the Radisson Blu Aqua Hotel, Chicago, Illinois*

Saturday, September 8, 2018

Saturday, December 1, 2018

All meetings will be held at the East Bank Club, 500 North Kingsbury Street, Chicago at 10:00 AM

#MeToo *and the* Courts:

The Seventh Circuit Tackles Sexual Harassment Reporting Policies

*By Lindsey Ruta Lusk**

"Everybody knew. This is the problem with a system of 'open secrets.'"[1] In December 2017, the #MeToo movement arrived at the doorstep of the judiciary when allegations of years of sexual harassment and lewd conduct in the Ninth Circuit came to light.

Numerous clerks accused Judge Alex Kozinski of sexual misconduct spanning decades, including unwanted advances.[2] Kozinski, who served on the federal appellate bench for thirty-two years, eventually stepped down.[3] This case was not an outlier. Just as the allegations against many in Hollywood continued to roll in, so did allegations across the judiciary.[4]

Approximately two weeks after Judge Kozinski stepped down, the Seventh Circuit became one of the first federal circuits to form a judicial committee for the purpose of reviewing policies the Circuit follows in handling reports of sexual harassment.[5] Chief Judge Diane Wood appointed Judge David Hamilton to chair the committee.[6] The six other committee members include Judges Diane Sykes, Tanya Walton Pratt, Gary Feinerman, Nancy Rosenstengel, Bankruptcy Judge Jacqueline Cox, and Circuit Executive Collins Fitzpatrick.[7]

While there have not been formal complaints of sexual harassment in the Seventh Circuit, the committee was established to ensure that appropriate internal controls are "in place [so that sexual harassment] issues can be properly raised."[8] Specifically, the committee will review the Equal Employment Opportunity and Employment Dispute Resolution Plan, which is the model plan the Seventh Circuit follows.[9]

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* *Lindsey Ruta Lusk is a Complex Commercial Litigation associate at Jenner & Block in Chicago. She graduated* magna cum laude *from the University of Illinois College of Law in 2017, where she was Editor-in-Chief of the* University of Illinois Law Review.

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Days after the Seventh Circuit announced the creation of this committee, Chief Justice John Roberts directed the Administrative Office of the U.S. Courts to form an investigative body aimed at reviewing how federal courts handle internal allegations of sexual misconduct.[10] The announcement came after nearly 700 law professors and current and former clerks sent Chief Justice Roberts a petition requesting revisions to the judiciary's harassment policies.[11]

The Current Reporting Process

The Equal Employment Opportunity and Employee Dispute Resolution Plan ("the Plan") prohibits "[d]iscrimination against employees based on race, color, religion, sex, national origin, age (at least 40 years of age at the time of the alleged discrimination), disability and sexual harassment . . . ."[12]

Under the Plan, harassment complaints brought by federal court employees, including judges and chambers staff, are subject to a dispute-resolution process. First, the complainant is required to request counseling, which generally is concluded within thirty days.[13] Second, if counseling is unsuccessful, the complainant must proceed to mediation, which also is generally concluded within thirty days.[14] Finally, if mediation fails, the employee may file a formal complaint against the employing office.[15] A hearing is then held before the Chief Judge (or another designated judicial officer) of the court in which the allegations occurred.[16] The ruling of the reviewing judge is final.[17] While final decisions are available to the parties, the record is confidential and only available to the public at the Chief Judge's discretion.[18]

Problems Under the Current System

Some former clerks have expressed concern about the difficulties of reporting misconduct in an environment that can often foster a relationship of "worshipful silence."[19] This is because, in part, it is not clear whether reports of sexual harassment are subject to the confidentiality requirements that govern clerks.[20]

The Code of Conduct for Judicial Employees prohibits current and former clerks from disclosing any information obtained during the course of their official duties.[21] While it might seem as though sexual misconduct would be excepted from this rule, the Committee on Judicial Conduct and Disability and the Judicial Conference of the United States' Committee on Codes of Conduct have not provided clear guidance on whether clerks and former clerks are allowed to publicly disclose instances of sexual harassment, especially if tied to an investigation of a judge's conduct.[22] While ethics experts maintain that sexual misconduct is not covered,[23] this uncertainty may dissuade current and former clerks from reporting harassment. Additionally, some judges require clerks and externs to sign confidentiality agreements, which may create additional impediments to reporting sexual misconduct.[24]

What's Next?

Chief Judge Wood's establishment of the Seventh Circuit committee strongly suggests that changes are on the horizon. Similar changes are taking place throughout the judiciary. In response to a bipartisan letter from the leaders of the Senate Judiciary Committee, the federal courts' Administrative Office announced that it will now track sexual harassment data,

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and will make that data available to the public.[25] The Administrative Office is also "considering ways to remove 'barriers' in the complaint process," though exactly how those changes will be implemented is unclear.[26]

The Federal Judicial Center has also revised its clerk handbook to clarify that

> nothing in this handbook, or in the Code of Conduct, prevents a clerk, or any judiciary employee, from revealing misconduct, including sexual or other forms of harassment, by their judge or any person. Clerks are encouraged to bring such matters to the attention of an appropriate judge or other official.[27]

The Administrative Office has also formed a working group aimed at improving and clarifying policies regarding the reporting of workplace misconduct.

The Seventh Circuit is on the leading edge of these changes. While the Court's committee has not yet released its recommendations, Chief Judge Wood has said that she hopes the formation of the committee will empower clerks and others to report misconduct by clarifying existing rules and policies.[28]

Notes:

[1] Dahlia Lithwick, *He Made Us All Victims and Accomplices,* Slate (Dec. 13, 2017, 3:11 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/12/judge_alex_kozinski_made_us_all_victims_and_accomplices.html (hereinafter Victims and Accomplices).

[2] Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct,* Washington Post (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.651bd397886e; Matt Zapotosky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior, Including Four Who Say He Touched Or Kissed Them,* Washington Post (Dec. 15, 2017), https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html?utm_term=.b427db39efb1.

[3] Ed Beeson, *Kozinski To Retire In Wake of Sexual Misconduct Allegations,* Law360 (Dec. 18, 2017), https://www.law360.com/articles/995857.

[4] John Biskupic, *CNN Investigation: Sexual Misconduct By Judges Kept Under Wraps,* CNN (Jan. 26, 2018, 12:35 PM), https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html (hereinafter CNN Investigation).

[5] *Committee Announcement,* Seventh Circuit (Dec. 29, 2017), http://www.ca7.uscourts.gov/human-resources/committee_announcement_2017.pdf (hereinafter *Committee Announcement*).

[6] *Id.*

[7] *Id.*

[8] Diana Novak Jones, *7th Cir. Forms Committee To Examine Sexual Harassment,* Law360 (Jan. 4, 2018, 7:52 PM), https://www.law360.com/articles/998774/7th-circ-forms-committee-to-examine-sexual-harassment.

[9] *Committee Announcement, supra* note 5.

[10] Aebra Coe, *Justice Roberts Orders Review of Sexual Harassment Policies*, Law360 (Jan. 2, 2018, 12:41 PM), https://www.law360.com/articles/997773.

[11] *Id.*

[12] *Equal Employment Opportunity Plan and Employment Dispute Resolution Plan For The United States Court of Appeals For The Seventh Circuit, Seventh Circuit,* http://www.ca7.uscourts.gov/hr/EEOC.HTM.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Victims and Accomplices, supra* note 1.

[20] Dahlia Lithwick, *What Has The Judiciary Learned Since Judge Kozinski?,* Slate (Jan. 29, 2018, 1:41 PM), https://slate.com/news-and-politics/2018/01/after-kozinski-court-employees-cant-get-clarity-on-how-to-report-judicial-abuse.html (hereinafter *What Has The Judiciary Learned?*).

[21] *Guide to Judiciary Policy—Ch 3: Code of Conduct for Judicial Employees,* U.S. Courts, http://www.uscourts.gov/sites/default/files/vol02a-ch03_0.pdf.

[22] *What Has The Judiciary Learned?, supra* note 20.

[23] Alison Frankel, *Breaking The Law Clerk's Code of Silence: The Sexual Misconduct Claims Against Judge Kozinski,* Reuters (Dec. 13, 2017, 3:36 PM), https://www.reuters.com/article/us-otc-kozinski/breaking-the-law-clerks-code-of-silence-the-sexual-misconduct-claims-against-judge-kozinski-idUSKBN1E72YX.

[24] *What Has The Judiciary Learned?, supra* note 20

[25] Joan Biskupic, *Federal Courts Say They'll Now Track Sexual Harassment Data,* CNN (Feb. 20, 2018, 4:19 PM), https://www.cnn.com/2018/02/20/politics/courts-sexual-harassment-data/index.html.

[26] *Id.*

[27] *What Has The Judiciary Learned?, supra* note 20.

[28] Diana Novak Jones, *Judge Wood Talks to Law360 About Rooting Out Harrassment,* Law360 (Jan. 9, 2018, 4:17 PM), https://www.law360.com/articles/1000314/judge-wood-talks-to-law360-about-rooting-out-harassment.

Hey Alexa,

Can I Introduce Your Evidence at Trial?

*By Alan L. Farkas and Ashley Koda**

"Sorry, I don't know that," Alexa[1] replies. Evidently, Alexa is not poised to take the place of Westlaw anytime soon. But the answer is "yes" – digital evidence mined from consumer devices is admissible. In fact, amendments to Federal Rule of Evidence 902 have made it easier than ever to introduce Fitbit[2] data, social media postings and Google Maps images. Such data can be extremely useful to attorneys in developing their cases, and to judges and juries in understanding and weighing the facts.

In our increasingly Orwellian world, it has become commonplace for our gadgets and apps to understand us better than we understand ourselves. The wealth of information contained in the Amazon Echo, Fitbits, GPS trackers and social media applications is enough to make any litigator giddy. The possibilities are limitless – a tech-savvy defense attorney might discover that a plaintiff's Fitbit data shows her running three miles a day despite her allegedly debilitating injury. A prosecutor might discover that an Amazon Echo is the star witness in a murder trial by revealing the defendants' most recent shopping list. Social media postings may shed light on a claim for emotional distress. Progressive's Snapshot tool can prove the speed at which the defendant was traveling when striking a pedestrian.

Social media can prove that sworn representations by a lawyer to the court are untrue or exaggerated. *See, e.g., FTC v. Advocate Health Care Network*, 162 F.Supp.3d 666, 671 (N.D.Ill. 2016); *Tellabs*

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**Alan L. Farkas is a Partner at SmithAmundsen in Chicago where he is Co-Chair of the Aerospace Practice Group, where he also concentrates on commercial litigation.*

Ashley S. Koda is an Associate at SmithAmundsen working in aerospace, insurance defense, and commercial litigation. Ashley is recognized for her creative and innovative approach to discovery.

[1]Alexa is the name for the Amazon Echo, a hands-free speaker you control with your voice. To activate the Amazon Echo, you say "Hey, Alexa," and then you can ask Alexa to order an item off Amazon, play music, call a friend, or ask about the weather. Other similar voice activated devices include Siri (installed on iPhones) and Cortana (the Google version of Alexa).

[2] Fitbits are electronic bracelets that track how many steps a person walks, along with related fitness and health data such as heartbeat, sleeping patterns, calories burned and distance walked. The Apple Watch has similar features but also includes traditional smartphone capabilities like calling, messaging and online shopping.

Hey Alexa . . .

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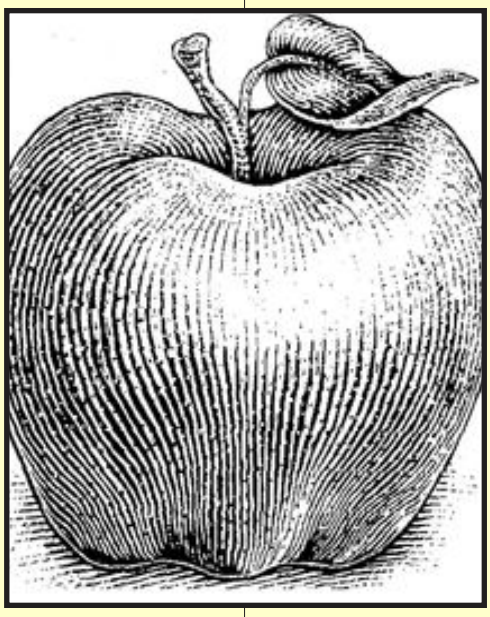
Operations, Inc. v. Fujitsu Ltd., 283 F.R.D. 374, 379 (N.D.Ill. 2012). And a review of a properly authenticated website can yield material that significantly contravenes representations made by counsel to the court. *See, e.g., Silversun Industries, Inc. v. PPG Industries, Inc.,* _F.Supp.3d_, 2017 WL 5127321 at *5 (N.D.Ill. 2017).

I. Current Trends

a. Cases

In the early years of connected devices, much of the case law dedicated to admissibility of electronic evidence revolved around GPS data. Navigational data proved to be particularly valuable in criminal trials where a defendant's location at the time of a crime is (obviously) of paramount importance.



More recently, prosecutors in Arkansas sought data from an Amazon Echo in connection with a murder investigation. There, prosecutors theorized that the defendant murdered his friend in his home, and that Alexa may have been a witness. While the defendant willingly handed over the data from his smart speaker, it is unclear from news reports what information was obtained from Alexa; but ultimately, prosecutors dropped the charges.

Meanwhile, in Canada, a plaintiff's attorney used his client's Fitbit data to prove to the jury that her exercise level was below that of the average Canadian – all because of the defendant's negligence. Alternatively, a defense attorney can request a plaintiff's Fitbit data to impeach the plaintiff's alleged injuries.

While cases involving wearable electronics (e.g., Fitbits, Apple Watches) are just starting to come online, cases analyzing the admissibility of social media evidence are available and useful.

In *Reid v. Ingerman Smith LLP,* plaintiff sued defendants alleging damages for pecuniary, physical and emotional damages as a result of defendants' sexual harassment. 2012 WL 6720752 (E.D. N.Y. 2012). There, the court held that plaintiff's Facebook posts were relevant because they may contain "information that contradict[s] plaintiff's claims of mental anguish resulting from the alleged sexual harassment by defendant." *Id*. at * 1. That court noted, "some courts have found that 'Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting.'" *Id.* quoting *Bass v. Miss Porter's School,* 2009 WL 3724968, * 1 (D. Conn. 2009).

The applications for evidence mined from consumer electronics is limitless, and establishing the threshold of "likely to lead to the discovery of admissible evidence" is quite straightforward. In fact, a New York court found that plaintiff's Facebook information was discoverable because "Plaintiff's public profile page on Facebook shows her smiling happily in a photograph outside the confines of her home despite her claim that she has sustained permanent injuries and is largely confined to her house and bed." *Romano v. Steelcase Inc.,* 30 Misc. 3d 426, 430 (Sup. Ct. N.Y. 2010). With this type of analysis, it appears that any photo of a plaintiff posted on Facebook, Instagram or Snapchat would be admissible to refute (or prove) a claim for personal injuries, and there is no reason to believe that consumer electronics will receive any more stringent standards.

One creative attorney obtained plaintiff's chats with an online psychic. *Glazer v. Fireman's Fund Ins. Co.,* 2012 WL 1197167, * 1 (S.D. N.Y. 2012). There, plaintiff alleged reverse employment discrimination. *Id.* Apparently, plaintiff chatted with her psychic about her "work performance, relationships with co-workers, views regarding her treatment by [defendant], efforts to mitigate damages, and personal beliefs about African-Americans." *Id.* The court found that all of that information was relevant to plaintiff's claim. *Id.* at * 3.

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Hey Alexa . . .

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b. Authentication & Hearsay

At the dawn of the internet age, courts were initially hesitant to accept information from the web as true. In 1999, just two weeks before the Y2K bug was set to destroy the world, a federal court in Texas wrote disparagingly of the internet:

> While some look to the internet as an innovative vehicle for communication, the Courts continue to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. . . . Anyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the court holds no illusions that hackers can adulterate the content on *any* web-site from *any* location at *any* time. For these reasons, any evidence procured off the internet is adequate for almost nothing…

St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp. 2d 773, 774-75 (S.D. Tex. 1999) (emphasis in the original).

The world has changed dramatically in the years since Judge Kent's scathing analysis of the internet, and the new amendments to Federal Rule of Evidence 902 reflect this shift. As of December 2017, electronic evidence such as Google Maps street images, social media postings, and Fitbit data are on the fast-track to authentication:

> **(13) Certified Records Generated by an Electronic Process or System.** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person . . . . The proponent must also meet the notice requirements of Rule 902(11).
>
> **(14) Certified Data Copied from an Electronic Device, Storage Medium, or File.** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person . . . . The proponent also must meet the notice requirements of Rule 902(11).

Previously, litigants were required to authenticate electronic data through testimony of a witness with the knowledge that an item (or website) is what it is claimed to be. Fed. R. Evid. 901. *See generally* Jeffrey Cole, *Admissibility of Internet Evidence Under the Federal Rules of Evidence,* The Circuit Rider 22 (April 2015); Jeffrey Cole, *The Brave New World of Internet Evidence, It's Not as Brave or New as it Seems,* 43 LITIGATION 37 (Summer 2016).

Despite streamlined authentication, attorneys must still be cognizant of hearsay issues arising in the digital context. For example, in a case in New Jersey, the court permitted a defendant to introduce his E-ZPass tollway records as proof that he could not have committed the crime at issue. *S.S.S. v. M.A.G.,* 2010 WL 4007600, ** 3-4. Plaintiff argued that the tollway records were hearsay; the judge permitted them under the business records exception, reasoning that "each entry is compiled at the precise time the vehicle passes through the E-ZPass toll location…and such record is compiled in the ordinary course of the system E-ZPass uses to collect toll revenue." *Id.* at * 4.

In other cases, however, courts have held that certain types of computer-generated data could not be hearsay because there is no "declarant." In a case involving toxicology data generated by lab machines, the Fourth Circuit held that "raw data generated by the machines do not constitute 'statements,' and the machines are not 'declarants.'" *U.S. v. Washington,* 498 F. 3d 225, 231 (4th Cir. 2007). In almost every state (including Illinois), a "declarant" is defined as a person. While computer-generated data is programmed by people, many types of data are self-generated records. For example, a Fitbit that tracks how many steps a person walked is not being monitored by a live individual counting steps. Once the code has been written, the device monitors and generates the data itself. The E-ZPass data discussed above would likely fall within this category.

Hearsay problems arising from social media and blog posts are identical to those that arise through the spoken word. For example, a defendant may have posted a status to Facebook as he was running a red light, which resulted in a car accident. In that case, plaintiff would not introduce the Facebook post for the truth of the matter asserted, but to show that a Facebook post was created at that exact time – and therefore, no hearsay problem exists. Fed. R. Evid. 801(c)(2). A plaintiff might post an optimistic status about their recovery from injury, which defendant can then use at trial under the exception of "then-existing mental, emotional, or physical condition." Fed. R. Evid. 803(3).

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Hey Alexa . . .

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c. Judicial Notice

Recently, judges have become more inclined to take judicial notice of information cited from the internet. Under Federal Rule of Evidence 201, a court has the discretion to take judicial notice of a "fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Courts typically take judicial notice of information posted to government websites, including court and agency websites; online versions of standard reference works (e.g., the Merriam-Webster Dictionary); and web mapping services (e.g., Google Maps). *See Judicial Notice and the Internet: Defining a Source Whose Accuracy Cannot Reasonably Be Questioned,* Erin G. Godwin, 46 Cumb. L. Rev. 219.

Therefore, judges are likely to take judicial notice of distances between places, or the direction of a litigant's travel, based off Google Maps data; salary and employment information taken from a city or county website; and definitions of words from online websites.

One interesting question for the future is whether a court would take judicial notice of a Google Maps image purporting to show the scene of an intersection on (or near) the day of an accident. For example, if a car accident occurred at an intersection that was undergoing construction, and a Google street maps view depicted that same intersection on the very same day of the incident, would the court take judicial notice? Even if the answer is no, this is a situation where electronic data can prove to be extraordinarily useful. The image might show construction debris negligently thrown to the side of the intersection, blocking a driver's view. The image would obviously be relevant as to what the intersection looked like on the day of the accident; is self-authenticating under the new Federal Rule of Evidence 902; and does not pose any hearsay issues because there is no "declarant" and no "statement."

II. Social Media Discovery

Because of social media and related gadgets and applications, the world of discovery is broader than ever before. Savvy attorneys will be well-equipped to take advantage of the wealth of information waiting to be discovered. The smoking gun may no longer be a gun, but a health tracking app. Attorneys aware of these new avenues will be ahead of their peers in terms of acquiring potentially useful knowledge through interrogatories and requests for production.

Full and complete discovery requests should include a probe into any and all social media accounts the opposing party possesses; whether that individual has a Fitbit or other health tracking application; GPS data information; cell phone records; emails; and potentially a list of all applications on that person's smartphone. According to the technology information website, Lifewire, the Apple iPhone App Store has more than 2,200,000 applications. Many of these applications could harbor useful information regarding your case.

While attorneys should anticipate objections to these requests, rest assured courts across the country have held that social media posts, GPS tracking devices, and other forms of digital evidence are relevant to a variety of issues.

III. Conclusion

Every day, technology becomes more and more useful for lawyers in the courtroom. A Fitbit can track a person's day *step-by-step*. Alexa offers glimpses into an individual's state of mind and daily events. Facebook, Instagram and Snapchat reflect present sense impressions and existing mental and physical conditions. The combination of all of these applications can paint an eerily accurate picture of a person's life and habits.

People are self-surveilling themselves without realizing they could actually be making a record that harms them in future litigation. A shrewd lawyer should discuss these issues with his or her client at the beginning of a case, to ensure that their client does not accidentally incriminate themselves. It is also important for lawyers to remember what types of digital information is available when drafting preservation letters, so as to prevent any spoliation issues.

It is too soon to see the lasting effects these types of data sources will have on litigation. But it is not difficult to imagine that it will leave less room for litigants to lie. It may also further early resolutions (either through settlement or dispositive motions) because the evidence will be more accurate and less susceptible to reasonable dispute. As technology rapidly advances in the 21st century, only time will tell if the law can keep up.

Tomorrow's Appellate Lawyers

*Alexandra L. Newman and Logan A. Steiner**

What will the legal industry look like 20 years from now? The answer to this question is the subject of an important book that was recently re-released by Professor Richard Susskind titled *Tomorrow's Lawyers* (Oxford Univ. Press 2d ed. 2017). In the book, Susskind — a lawyer and legal-technology futurist — claims that legal institutions and lawyers are currently "at a crossroads," and that they "will change more radically in less than two decades than they have over the last two centuries."[1] Indeed, evolving client expectations mean that lawyers and law firms must change. As Susskind argues, "[i]n-house lawyers have tolerated law firms' old-fashioned ways of working," but now "[c]lients don't just want professionals; they want the outcomes they bring, and different ways of delivering them."[2]

As discussed below, Susskind identifies several factors that will drive significant changes within the legal market in the next two decades. His analysis is brilliant and wide-ranging, but he does not address the changes that appellate lawyers in particular must confront in the upcoming decades. This article fills that gap by offering a Susskindian thought experiment as to the practice of tomorrow's appellate lawyers. The goal of this article is to inspire appellate lawyers to embrace new options and opportunities in the upcoming decades, rather than remain on the "cutting edge of tradition."[3]

I. Background — Transformation Of Law From Profession To Industry

"What will the legal industry look like 20 years from now?" might have sounded like a strange question several decades ago, when law was still widely regarded as a profession rather than an

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**Alexandra L. Newman (J.D., Northwestern University School of Law; B.A., Yale University) is an Associate Counsel at the audit, tax, and advisory firm Grant Thornton LLP. She is also an Associate Editor of, and frequent contributor to, The Circuit Rider. Contact: alexandra.newman@gmail.com.*

Logan A. Steiner (J.D., Harvard Law School; B.A., Pomona College) is a law clerk for the Honorable Thomas M. Durkin in the Northern District of Illinois. Contact: logan.ann.steiner@gmail.com.

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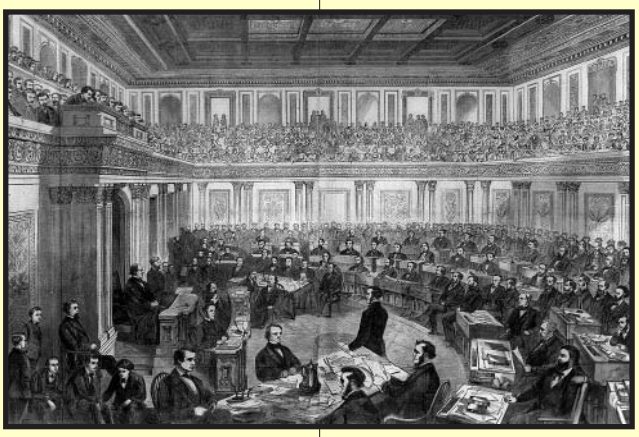
industry.[4] Some lawyers fondly recall a time when they considered themselves to be in the "service business," not the "money-making business."[5] According to one senior lawyer, lawyers 50 years ago served as community leaders and enjoyed their personal lives without experiencing 24/7 emails and filings; practiced as generalists instead of specialists; placed a greater premium on treating one another with collegiality, civility, and courtesy; took pride in observing ethical codes; enjoyed a greater sense of camaraderie and community within their city or region; and prioritized mentoring junior lawyers through apprenticeship training.[6]



Over the past few decades, a number of factors shifted law from a profession to an industry. These factors included the sharp increase in lawyer headcounts and mergers between firms to create "BigLaw"; the *American Lawyer* magazine's ranking of profits-per-partner and lawyers' competitive desire to maximize profits; the pressure for lawyers to specialize narrowly within their practice areas; the demanding minimum-billable-hour requirements in firms; the sky-high hourly billing rates for both associates and partners; the creation of two-tiered partnership structures; a highly leveraged partner-to-associate ratio in large firms; the increasing competition between global firms for corporate-client work; the constant communications and demands for responsiveness through 24/7 email; and the increasing expense of law-school tuition and accompanying student debt.[7] These trends have had a number of unfortunate effects, including rising rates of dissatisfaction, mental-health problems,[8] and substance abuse among lawyers,[9] and an access-to-justice problem whereby legal services are largely unavailable to low-income and middle-class people.[10]

II. Susskind's Predictions For The Changing Practice Of Law

Despite the significant changes that have occurred within the culture of legal practice over the past several decades, law is, as Susskind observes, still practiced in much the same way it was in "the time of Charles Dickens."[11] Legal advice, Susskind notes, "is handcrafted by lawyers in a partnership, delivered on a one-to-one basis, the output is documentation (often voluminous), and since the mid-1970s charging has generally been on an hourly-billing basis."[12] In particular, dispute resolution largely retains the structure that has endured for decades, in which "parties congregate before an impartial arbiter on a purpose-built courtroom where the procedure is formal, the process is steeped in tradition, and the language is largely arcane."[13]

In 2018, however, the legal industry is on the brink of significant and long-lasting change. Several major trends — reported by Susskind and impossible for any practicing lawyer to ignore — have recently emerged that point the way toward a new ordering of the legal market. These trends (or "disruptions," to use modern parlance) include the explosion of legal-tech startups and legal technology, including applications for artificial intelligence ("AI") and distributed-ledger technology (*e.g.,* Blockchain); the emergence of alternative legal services providers; and the expansion of large accounting firms into areas previously reserved for traditional law firms.[13] The legal industry is beginning to undergo what Susskind calls a "massive upheaval"; he foresees "discontinuity over time and the emergence of a legal industry that will be quite alien to the current legal establishment."[15]

In *Tomorrow's Lawyers,* Susskind identifies three primary "drivers of change" underlying these trends that will radically change the way lawyers work in the future. These are:

1) the "more-for-less" challenge (delivering more legal services at less cost);
2) liberalization (relaxing the laws and regulations that govern who can offer legal services and from what types of businesses); and

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3) information technology (applying pervasive, exponentially growing, innovative technologies that will disrupt and radically transform the way that lawyers and courts operate).[16]

Susskind argues that together, these three drivers create "a perfect storm" that will cause "immense and irreversible change in the way that lawyers work."[17]

III. Application Of Susskind's Three Drivers To Appellate Lawyers

Susskind's analysis in *Tomorrow's Lawyers* is wide-ranging, but he does not address how the three drivers apply specifically to appellate lawyers. To assess this, we first must consider what appellate lawyers do. At its core, the job of an appellate lawyer is to identify whether and how a lower tribunal (generally the trial court or an administrative agency) erred in reaching a decision in a case. Appellate lawyers handle the process of appealing the lower tribunal's decision. To accomplish this, they perform a number of tasks: (1) careful review of the entire record — including trial transcripts, evidentiary materials, and motions — to determine which grounds, if any, exist as a basis for the appeal; (2) legal research; (3) legal analysis; (4) appellate tactics, judgment, and strategy; (5) brief drafting; (6) brief editing; and (7) oral advocacy.[18] In performing these tasks, appellate lawyers are expected to navigate the appellate rules, select the right issues and arguments to advance, write briefs that focus on what matters to the judicial audience, and craft oral arguments that meets judges' needs.[19] What appellate lawyers do falls squarely within the category of what Susskind describes as "bespoke" legal work — *i.e.,* work that addresses a client's unique circumstances and requires "the handcrafting or fashioning of a solution, honed specifically for the individual matter at issue."[20]

As Susskind observes, it is tempting to distinguish "bespoke" legal work from "commoditized" work.[21] Whereas "bespoke" work addresses problems that are "so distinctive that they could require the attention of the Supreme Court," commoditized work is considered repetitive and susceptible to mass-production and mass-customization techniques.[22] But Susskind predicts that, in the upcoming decades, "[t]he bespoke specialist who handcrafts solutions for clients will be challenged by new working methods, characterized by lower labour costs, mass customization, recyclable legal knowledge, pervasive use of advanced technology, and more."[23]

What does this prediction mean for tomorrow's appellate lawyers? More precisely, how will Susskind's three drivers apply to the specific tasks traditionally undertaken by appellate lawyers? The next sections of this article address those questions.

A. The "More-For-Less" Challenge

The "more-for-less" challenge refers to clients' increasing expectations for lawyers to deliver more legal services at less cost. This development will inevitably impact the practice of appellate lawyers. Although the most elite appellate lawyers at the U.S. Supreme Court have been rumored to command hourly rates of up to $2,000 per hour,[24] lawyers across all practice areas are under pressure to reduce their hourly billing rates and to offer discounts in order to compete for and retain clients. Susskind reports that general counsel now recognize that they "have a high level of buying power and are increasingly exercising that either by establishing panels of preferred firms and/or demanding fixed prices or discounted hourly rates in return for representation."[25] In order to meet these client demands and control costs, appellate lawyers can engage in decomposing, alternative sourcing, and multi-sourcing.

i. Decomposing

As Susskind describes, "decomposing" involves disaggregating or unbundling legal work into various tasks and determining who should undertake each task in the most efficient manner possible.[26] Litigators can be particularly resistant to the concept of decomposing; they tend to "maintain that every dispute is unique."[27] Yet appellate work, like other litigation, can be decomposed. Most appellate work involves some combination

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of the following tasks:

- Review of the Record
- Legal Research
- Legal Analysis
- Strategy
- Judgment
- Tactics
- Brief Drafting
- Brief Editing
- Oral Advocacy

Clients should ask their appellate litigators, "Which of these tasks are you uniquely qualified to undertake?"[28] Increasingly, tasks that the appellate specialist is not uniquely qualified to undertake — at the very least, initial record review, legal research, and legal analysis, and in some cases brief drafting and editing — can now be performed by alternative providers at a lower cost and arguably a higher quality than at a traditional law firm. For tasks involving strategy, judgment, tactics, and oral advocacy, clients may continue to seek "the direct advice and guidance of skilled lawyers."[29]

ii. Alternative Sourcing and Multi-Sourcing

Susskind envisions that in the future, not only will legal work be priced more efficiently through decomposing, but the work will be performed by sources that are located in lower-cost locales or structured in more cost-efficient manners. For example, Susskind identifies "in-sourcing" (work performed in-house); "relocating" (work performed in a less-costly location); "outsourcing" (work performed by a third-party provider); "subcontracting" (work performed by a smaller firm); and "home-sourcing" (work performed by home-based lawyers), among other types of alternative sourcing and multi-sourcing options.[30] Forward-thinking appellate lawyers should consider how alternative sourcing and multi-sourcing apply to their practices.

B. Liberalization

In the U.S., the "practice of law" is defined by state statute for each of the 50 states; these statutes also prohibit the "unauthorized practice of law."[31] By restricting who has the privilege of practicing law, states construct a guild that arguably shields lawyers from free-market competition. Consequently, many people who require legal services are prevented from obtaining those services at an affordable price. Indeed, statistics show that in some U.S. jurisdictions, over 80 percent of the civil legal needs of lower-to-middle income individuals go unmet.[32] Yet one commentator described the question of "whether alternative business structures — most notably nonlawyer ownership of law firms — should be permissible" as the "most contentious issue" confronted by the ABA's Commission on the Future of Legal Services.[33]

Resistance to alternative business structures is the antithesis of what Susskind calls "liberalization." According to Susskind, liberalization is the international trend of relaxing the laws and regulations that govern who can offer legal services and from what types of businesses.[34] Through liberalization, Susskind argues, providers and new competitors in the legal market place will break away from the "constraints of narrow thinking about the way in which legal services can be delivered,"[35] thereby allowing the expanded offering of legal services at a wider variety of price points.

Appellate lawyers have good reason to care about liberalization. In the U.S. Courts of Appeals, the percentage of *pro se* appeals has been on the rise. In 2000, *pro se* litigants filed 25% of all federal appeals (totaling over 50,000 appeals), whereas in 2016 they filed over 52% of such appeals (totaling over 60,000 appeals).[36] These striking figures compel the conclusion that there is an increasing volume of unmet needs for professional appellate-lawyer services. By embracing liberalization, appellate lawyers can experiment with alternative business models that will enable them to undertake the representation of litigants — often poor and uneducated — who would otherwise represent themselves *pro se.* Liberalization should improve the appellate legal outcomes for those who would newly have access to legal services, as it is widely understood that litigants represented by lawyers on appeal fare better than *pro se* litigants.[37]

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C. Information Technology

The exponential growth of information technology has touched every aspect of legal practice over the past few decades. Both sustaining and disruptive technologies will continue, in Susskind's words, to "transform the entire legal landscape" in upcoming years.[38] Disruptive legal technologies include, but are not limited to, document automation, online legal guidance, online dispute resolution, document analysis, machine prediction, and legal question answering.[39] Lawyers — including appellate lawyers — must adopt new legal technologies to remain competitive and to meet client demands.

In addition, the rules of lawyers' professional responsibility (*e.g.,* the ABA's Model Rules of Professional Conduct) require all lawyers to (1) deploy current legal technology in order to provide competent representation (Model Rule 1.1) and (2) efficiently use technology to avoid overbilling and consequently collecting an unreasonable fee (Model Rule 1.5).[40] Appellate lawyers are not exempt from these requirements. The following discussion highlights some of the ways that appellate lawyers can — indeed, must — incorporate legal technology into their modern practices.

i. Litigation Prediction

Legal technology tools are becoming available to assist lawyers in predicting the chances of success in litigation. These tools use developing technologies, including: AI (an area of computer science focused on developing software that can make decisions and problem solve); machine learning (the capability of algorithms and software to learn from data and adapt with experience); predictive analytics (predicting chances of success based on a judge's handling of similar cases); algorithms (formulas or sets of rules for performing a task, which AI software use to make predictions); deep learning (a type of AI that attempts to mimic the activity of neurons in the human brain in order to recognize complex patterns in data sets); and natural language processing (the capability of algorithms and software to structure, interpret, understand, and generate human languages, focusing mostly on written text).[41] One study concluded that, using these technologies, computers can do a better job than legal scholars at predicting U.S. Supreme Court decisions, even with less information.[42] Given these technological advancements, it is incumbent upon appellate lawyers to leverage litigation-prediction tools to advise their clients about the efficacy of different appellate strategies and potential outcomes.

ii. Legal Research

Long gone are the days when appellate lawyers conducted legal research in case reporters and treatises found only in law libraries. Today, all modern appellate litigators must be familiar with online legal-research databases and resources such as WestLaw Next, Lexis Advance, Google Scholar, Bloomberg Law, Thompson Reuters, Casetext, Fastcase, ROSS Intelligence, and so forth. These technologies have the capability — through keyword searches and natural language processing, among other techniques — to quickly unearth on-point cases and to extract key points of law. For example, Bloomberg Law advertises its product, "Points of Law," as a tool that "uses AI and machine learning to get to the heart of a court opinion and pull out all of the important and relevant aspects of what a judge says."[43] According to Bloomberg Law, this product "helps legal researchers unearth documents that they could not have found previously and more easily identify similarities between court opinions. Built over five years across 13 million court opinions and counting, this application of AI can minimize the number of errors or missed documents that a user might face."[44] Another new Bloomberg Law product, "Smart Code," is advertised to

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use "machine learning to identify sections of court opinions that reference various laws, rules, and regulations."[45] It is essential that appellate lawyers use modern legal-research tools like these to efficiently locate controlling cases, statutes, and regulations, and to spend their remaining time engaging in more strategic work.

iii. Drafting Briefs

Appellate lawyers tend to take great pride in their brief-writing abilities. Many books have been written on the subject of how to write outstanding legal briefs. Some books focus on how to write briefs "in plain English,"[46] whereas others claim to teach lawyers to write like "the Nation's Top Advocates"[47] or "the World's Best Judges."[48] There are organizations that give awards for "best briefs" to reward excellence in the art of appellate advocacy; the effective marshalling of authorities and facts, organization, clarity, and persuasiveness are some of the criteria under which a "best brief" is judged.[49]

To date, writing appellate legal briefs has been largely beyond the reach of AI. Currently, it is difficult to imagine that a computer will ever be able to draft any appellate brief, let alone a brief showcasing the rhetorical flourish, style, creativity, and persuasiveness of a top appellate advocate. There are, however, companies such as ROSS Intelligence that are testing AI-assisted brief writing.[50] Already there are products designed to use technology to draft contracts, answers to complaints, responses to interrogatories, requests for production, form interrogatories, and special interrogatories.[51] It seems possible that technology will advance to a point where essential components of a trial-court record can be uploaded into a computer program that can generate the first draft of an appellate brief or, at the very least, certain procedural or background sections of the brief. Of course, a skilled advocate will need to oversee the creation and revision of such a brief. But given the advancements in other legal-document-drafting software, the day may arrive where the initial draft of an appellate brief is produced by a machine and is revised by the human advocate.

iv. Editing Briefs

Just as technologies are being created to assist with researching and drafting appellate briefs, there are technologies already on the market to assist with editing briefs. For example, a product called "BriefCatch" is marketed as a "first-of-its-kind, sophisticated editing tool that will improve any legal document by generating instant feedback and suggestions."[52] BriefCatch advertises a number of benefits designed to improve the quality of legal documents. For example, the product is advertised to: "apply thousands of algorithms instantly to help you shorten words, sentences, and documents"; "punch up your verbs"; "improve and vary your transitions"; and flag passive voice, inconsistent spellings, inconsistent serial comma usage, and language that judges don't like.[53] A tool like this, which is designed to improve flow and readability of written legal work, could serve as an efficient method to identify typical changes that a thoughtful editor would seek to make to a draft appellate brief. Appellate lawyers should investigate whether the use of such technologies can benefit their practices.

v. Multimedia Briefs

Commentators have determined that, as a society, we are becoming more visual and less reliant on text — perhaps we are even becoming "post-textual."[54] Social media, hand-held devices, and the Internet encourage us to read less text and to consume more imagery, video, and audio media. As the New York Times recently reported, "The defining narrative of our online moment concerns the decline of text, and the exploding reach and power of audio and video."[55] What implications does this post-textual experience have for tomorrow's appellate lawyers?

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In a nutshell, appellate lawyers should learn to embrace multimedia elements in their briefs. As Hon. Richard A. Posner (ret.) advised, "Wherever possible, use pictures, maps, diagrams, and other visual aids in your briefs. Some lawyers seem to think a word is worth a thousand pictures. The reverse, of course, is true. *Seeing* a case makes it come alive to judges."[56] This sentiment is echoed in a report from the Council of Appellate Lawyers, which offers a host of recommendations and options for appellate courts to improve the functionality and readability of electronic briefs ("e-briefs").[57] In that report, the Council expressly recommends that appellate courts "[a]dopt rules or guidelines for embedding visual images, such as videos, photos, and maps, in briefs."[58] Such multimedia, the Council urges, "can communicate important information and improve reading comprehension," and visual elements can also "break up blocks of text, enhancing the overall reading experience."[59] With the abundance of multimedia resources available today, appellate lawyers would be remiss not to include such aids in their briefs.

vi. Online and Virtual Courts

Not only will appellate briefs of the future morph into "e-briefs" replete with multimedia elements, but such briefs will be filed with virtual or online courts. Susskind maintains that, in light of the near ubiquity of video-calls and video-conferencing, there is "enormous scope for virtual courts" in which "judges can sit in their chambers and all participants can attend remotely."[60] Online courts have the benefit of reducing costs, increasing access, and accelerating the resolution of a case.[61] Indeed, many courts already broadcast videos of appellate oral arguments live over the Internet — and some appellate judges participate in oral argument through broadcast videos — so taking the entire appellate process online is merely the next step in that direction.

By the 2020s, Susskind predicts, appearance in physical courtrooms will become a rarity, virtual hearings will become the norm, and "new presentational and advocacy skills will be required."[62] Although these developments may sound far-fetched to today's appellate lawyers, Susskind points out that future generations of attorneys, "for whom working and socializing online will be second nature, may feel differently. Indeed, for tomorrow's clients, virtual hearings, online courts, and ODR [online dispute resolution] together may improve access to justice and offer routes to dispute resolution where none would otherwise be available."[63] Tomorrow's appellate lawyers should devise multimedia brief presentation and oral advocacy techniques that effectively communicate to judges via the online and virtual courts of the future.

vii. Oral Advocacy

Making an appellate oral argument in court certainly seems like a task that must be performed by a human lawyer. A lawyer's demeanor, timing, cadence, rhetorical flourish, and quick-wittedness are all qualities that contribute to the overall impact of an oral argument. Oral argument, however, is subject to biases that risk impacting the quality of justice that is delivered. Scholars have determined, for example, that during oral arguments at the U.S. Supreme Court, female lawyers are interrupted earlier, allowed to speak for less time between interruptions, and subjected to more and longer speeches by the justices compared to their male counterparts.[64] These scholars conclude that their "most novel and significant theoretical finding is that gender negates the well-documented positive effect of being on the winning side of a case."[65]

Tomorrow's appellate lawyers may be able to mitigate such biases by using computers that, in the future, will pass the Turing test. The Turing test is the threshold at which a machine that mimics human conversation and behavior can be said to be thinking or intelligent because a human being interacting with the machine thinks that she is interacting with another human.[66] In the future, it is conceivable that appellate lawyers will program their Turing machines to respond to questions raised by judges during oral arguments. Certainly, we would expect that the Turing machine could be programmed to respond directly to "Yes or No" questions during oral arguments.[67] Besides being able to squarely answer questions without hedging, an effective Turing machine should also be able to answer in a way that clarifies rather than confuses the record; communicates a thorough understanding of the legal landscape; picks up on

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and addresses opposing counsel's arguments; and articulates a reasoned path, supported by facts and law, for the court to reach the desired result.[68] A Turing machine also could be programmed to avoid the common mistakes of less-effective advocates, such as talking over judges, being overconfident, failing to recognize when a judge's question benefits the client's position, and being overly emotional.[69] Although a Turing machine for oral advocacy may sound outlandish today, in 20 years appellate lawyers may depend upon such machines to achieve the fairest and best results on appeal, which is the appellate lawyer's purpose.

viii. Exercising Judgment

All lawyers are expected to exercise judgment. Indeed, Model Rule 2.1 requires that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[70] And the exercise of legal judgment is considered to be among the most important skills for an appellate lawyer.[71]

Is the exercise of judgment — along with other traits of effective appellate lawyers such as creativity and empathy — immune from the impact of technology? Susskind thinks not. He provocatively argues that the claim that the legal profession (among other professions) is immune to displacement by technology is usually based on two assumptions: (1) that computers are incapable of exercising judgment or being creative or empathetic, which are capabilities indispensable to the delivery of professional services; and (2) that the only way for machines to outperform the best human professionals is to copy the way these professionals work.[72]

Susskind argues that the first problem is empirical; according to his research, "when professional work is broken down into component parts, many of the tasks involved turn out to be routine and process-based. They do not in fact call for judgment, creativity, or empathy."[73] The second problem, he argues, is conceptual; it is a fallacy, he maintains, to insist that the "outcomes of professional advisers can only be achieved by sentient beings who are creative and empathetic."[74] He urges that the problem with this fallacy is that it fails to recognize that "human professionals are already being outgunned by a combination of brute processing power, big data, and remarkable algorithms. These systems do not replicate human reasoning and thinking."[75] When, for example, computer systems "predict the likely decisions of courts more accurately than lawyers," we are "witnessing the work of high-performing, unthinking machines."[76] It would seem, then, that under Susskind's analysis, even the most cherished and humanistic of lawyerly traits are susceptible to usurpation by the technology of the future.

IV. New Opportunities For Tomorrow's Appellate Lawyers

Susskind predicts that, because of the three drivers discussed above, clients in the future will "not be inclined to pay expensive legal advisers for work that can be undertaken by less expert people, supported by smart systems and standard processes."[77] This trend, in turn, means that there will be "a need for fewer traditional lawyers."[78] Susskind anticipates an array of new jobs that he expects lawyers to undertake in the future. These jobs will involve the analysis and management of legal processes, knowledge, data, technology, and risk.[79] Although these jobs will be different from traditional legal work, Susskind predicts that they will "be intellectually stimulating and socially significant occupations nonetheless."[80]

Many appellate lawyers likely consider themselves to fall into one of the categories of legal jobs that Susskind predicts will remain in the foreseeable future — the "Expert Trusted Adviser" providing "bespoke" services.[81] The Expert Trusted Adviser is

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an "intelligent, creative, innovative" lawyer who can "fashion and articulate new solutions and strategies for clients who have complex or high-value legal challenges."[82] Such an adviser can communicate guidance "not just with integrity and in a confidential manner but in a highly tailored, customized, and personalized way."[83]

Although Susskind predicts that there will continue to be a market for Expert Trusted Advisers, he also predicts that this market will shrink over time. He expects that there will be an increased demand for alternative, reliable, and less costly services for work that does not truly require expert and trusted advice.[84] Accordingly, tomorrow's appellate lawyers should consider how they can use their strengths in other applications. For example, appellate lawyers who prize their writing and advocacy skills may consider how they can participate in policy or legislative work, multimedia journalism (including journalism focused on legal commentary), teaching, or other similar roles. Appellate lawyers also should consider how they can carve out new positions and specializations for themselves in law firms and as in-house counsel, including by using their sound judgment, persuasive writing, and creative advocacy to facilitate change and innovation.

V. Tomorrow's Appellate Lawyers: Benevolent Custodians

Susskind's view of the future of legal practice — including appellate practice — may sound threatening. After all, the implications of the three drivers lead to the inevitable conclusion that tomorrow's appellate lawyers will practice law very differently than it is practiced today. Lawyers may fear that in the future they will lose the tradition, culture, or nobility of appellate advocacy.

Yet Susskind's vision contains its own nobility. As he correctly points out, legal services — and especially appellate legal services provided by highly competent advocates — are "increasingly unaffordable, opaque, and inefficient, and they fail to deliver value evenly across our communities."[85] There is a significant lack of access to justice.

Not only can cost-reduction, liberalization, and technology help to alleviate the access-to-justice problem, but such developments are arguably morally required. According to Susskind, all professionals — including appellate lawyers — should consider the technique developed by political philosopher John Rawls in his famous book *A Theory of Justice.* That technique asks us to place ourselves behind a "veil of ignorance" by imagining a "hypothetical situation in which nobody knows his or her personal and social circumstance."[86] Only when we are behind this veil of ignorance can we impartially consider what constitutes a just society.[87] Susskind concludes that from behind this veil, most people would choose to live in a society in which legal advice (and other professional services) is widely available, at the lowest cost that innovation allows (or at no cost to those who cannot afford it).

Appellate lawyers are in the best position to understand the immense value they add to the resolution of complex disputes. In constructing a more just society, it only makes sense that appellate lawyers would choose a world in which more people have access to valuable appellate-lawyer services. By choosing to embrace instead of resist advancements that promote access, efficiency, and effectiveness, tomorrow's appellate lawyers can, in Susskind's words, become "benevolent custodians" of their profession.[88]

Notes:

[1] Richard Susskind, Tomorrow's Lawyers: An Introduction to Your Future xvii (Oxford 2d ed. 2017).

[2] Anna Ward, *Susskind urges in-house lawyers to stop 'tolerating' old-fashioned law firms,* LegalWeek.com (Jan. 25, 2018), http://www.legalweek.com/sites/legalweek/2018/01/24/susskind-urges-in-house-lawyers-to-stop-tolerating-old-fashioned-law-firms/?slreturn=20180225223602.

[3] Susskind, Tomorrow's Lawyers, *supra* n.1, at 165.

[4] For a fascinating theoretical discussion on the question of what constitutes a "profession," see generally Richard Susskind and Daniel Susskind, The Future of the Professions: How Technology Will Transform the Work of Human Experts (Oxford 2015).

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[13] *Id.*

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[17] *Id.* at 15.

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[19] Am. Acad. of App. Law., *Why Do Appellate Lawyers Make The Difference,* https://www.appellateacademy.org/about/appellate_lawyer.cfm (last visited Mar. 7, 2018).

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[22] *Id.*

[23] *Id.* at xix.

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[81] *Id.* at 134-35.

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[83] Susskind, Tomorrow's Lawyers, *supra* n.1, at 135.

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Contention Interrogatories

*By Jordan Rice**

Contention interrogatories — requests that the opposing party state the basis for a particular claim or defense — frequently elicit reflexive objections. Typical among them are assertions that a contention interrogatory is premature or that it improperly calls for a legal conclusion. These stock objections, without more, are generally without merit. Nevertheless, targeted objections that focus on whether the information sought is available to the responding party given the stage of the ligation, the breadth of the interrogatory, or the interrogatory's inquiry into purely legal analysis may prove effective.

The common knee-jerk objections to contention interrogatories are perhaps a throwback to a bygone era. Before a 1970 amendment to Federal Rule of Civil Procedure 33, courts often rejected contention interrogatories, concluding that parties could not seek an opposing party's legal theories, its view of the law as applied to the facts of a case, or its specific contentions related to particular elements of a claim. *See* 8B Charles Alan Wright et al., *Federal Practice & Procedure* §2167 (3d ed. 2017). Thus, for example, a party was not required to respond to an interrogatory in a negligence case asking "whether or not it is the duty of the railroad to keep railroad crossings clear of objects which would obstruct one's view on approaching said crossings." *Richards v. Maine Cent. R.R.,* 21 F.R.D. 590, 591-92 (D. Me. 1957).

In 1970, however, Rule 33 was amended to clarify that "[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete,

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* *Jordan Rice is an Associate at MoloLamken LLP in Chicago. His work focuses on complex civil litigation, white collar matters, and appellate litigation. From 2015-2016, Jordan clerked for Judge Albert Diaz on the United States Court of Appeals for the Fourth Circuit. From 2016-2017, he clerked for Judge Amy J. St. Eve on the Northern District of Illinois. He is a graduate of Stanford Law School and served as Notes Editor on the Law Review, and a* magna cum laude *graduate of Duke University,* Phi Beta Kappa.

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or until a pretrial conference or some other time." Fed. R. Civ. P. 33(a)(2). The contention-interrogatory provision originally fell under a different subsection of Rule 33. Additionally, its language has been modified somewhat since 1970.

Accordingly, the Federal Rules of Civil Procedure "expressly authorize[]" contention interrogatories. *Am. Needle, Inc. v. New Orleans,* No. 04 C 7806, 2012 WL 4327395, at *2 (N.D. Ill. Aug. 17, 2012).

Attorneys must therefore face the reality of Rule 33, putting aside any longings for the contention-interrogatory-free past. But that does not mean that attorneys should forego targeted objections where they are effective.

Improving Common Objections

Timing. Lawyers frequently turn to contention interrogatories early in discovery. After all, the simplest way for a lawyer to find out the bases for an opponent's contentions is to ask. But contention interrogatories are often more easily asked than answered, particularly early in a litigation when discovery has barely begun. So, Rule 33(a)(2) contemplates courts ordering delayed responses to contention interrogatories. *See* Fed. R. Civ. P. 33(a)(2) (permitting a court to "order that the interrogatory need not be answered until designated discovery is complete ... or some other time"). Indeed, the key question with respect to contention interrogatories is usually not whether a party must respond at all, but rather "whether [the interrogatory] should be answered now or later." *In re Peregrine Fin. Grp. Customer Litig.,* No. 12 C 5546, 2015 WL 1344466, at *4 (N.D. Ill. Mar. 20, 2015).

Objections to contention interrogatories based on timing are therefore common, but parties sometimes have no compelling reason for delay. Litigants often fear being locked into a theory too early in a case, but interrogatory responses can generally be supplemented or amended. Ordinarily, responding to a contention interrogatory will not forever "chain" a party to its answer. *United States ex rel. Tyson v. Amerigroup Ill., Inc.,* 230 F.R.D. 538, 541 (N.D. Ill. 2005); *see also* Fed. R. Civ. P. 33 (Advisory Committee Notes to 1970 Amendment) (explaining answers to interrogatories "ordinarily ... do not limit proof," although in certain "exceptional circumstances reliance on an answer may cause such prejudice that the court will hold the answering party bound to his answer").

Consequently, objections based solely on the possibility that a party's theory may change are insufficient, particularly where the contention interrogatory calls for information that a party must have already developed in order to comply with Federal Rule of Civil Procedure 8's pleading requirements as well as Federal Rule of Civil Procedure 11. *See, e.g., Rusty Jones, Inc. v. Beatrice Co.,* No. 89 C 7381, 1990 WL 139145, at *2 (N.D. Ill. Sept. 14, 1990) (concluding that a party had sufficient information to answer a contention interrogatory because it "certainly investigated the case before filing [its] complaint in order to have some factual basis upon which to base its allegations, in compliance with Fed. R. Civ. P. 11."); June 9, 2017 Hearing Tr., *Viamedia, Inc. v. Comcast Corp.,* No. 16-cv-5486, Dkt. 149 (N.D. Ill. June 20, 2017) (ordering responses to contention interrogatories in part because the responding party had alleged facts concerning the requested information in its complaint).

But that is not to say that timeliness objections always lack merit. If there is nothing to be gained from responding to an interrogatory at the current stage of the litigation in terms of efficiency, courts will likely not require a response. *See* Fed. R. Civ. P. 33 (Advisory Committee Notes to 1970 Amendment) (noting that the a key purpose of interrogatories is to "narrow[] and sharpen[] the issues"). Parties objecting on the basis of timing therefore should explain specifically why responding would be premature (*e.g.,* the information requested depends on

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expert discovery) or why responding to the contention interrogatory will not narrow the issues or streamline discovery. *See Tyson,* 230 F.R.D. at 541.

Overbreadth. While contention interrogatories are permissible under the Rules, they are not an opportunity to force the responding party to send a draft-version of its summary judgment brief. Proper contention interrogatories focus on specific aspects of the case rather than simply demanding "virtually every factual basis for all of [a party's] contentions." *Gregg v. Local 305 IBEW,* 08-CV-160, 2009 WL 1325103, at *8 (N.D. Ind. May 13, 2009).

Successful objections therefore will focus on broad language in the interrogatory (*e.g.,* "all facts" or "all bases") and will make the case that the requesting party is tossing a net out to sea rather than casting a targeted line. *See Ritchie Risk-Linked Stategies Trading (Ireland), Ltd. v. Coventry First LLC,* 273 F.R.D. 367, 369 (S.D.N.Y. 2010) ("Defendants' requests, insofar as they seek every fact, every piece of evidence, every witness, and every application of law to fact — rather than, for example, certain principal or material facts, pieces of evidence, witnesses and legal applications — supporting the identified allegations, are overly broad and unduly burdensome."); *see also Aldapa v. Fowler Packing Co.,* 10 F.R.D. 583, 591 (E.D. Cal. 2015) (explaining that contention interrogatories that ask for each and every fact and application of law supporting a party's claims are unduly burdensome). A responding party is far more likely to succeed, for example, in objecting to a request for "all facts supporting your §1983 claim" than a request for "the time period during which you allege defendants violated plaintiff's constitutional rights.

Purely Legal Contentions. Rule 33 expressly permits contention interrogatories concerning the application of law to fact. Fed. R. Civ. P. 33(a)(2). But where an interrogatory crosses the line into posing a "purely legal" question, courts will sustain an objection. *Tragoszanos v. City of Algoma,* No. 09-C-1028, 2011 WL 2650852, at *1 (E.D. Wis. July 6, 2011) ("Though contention interrogatories should not ask for pure legal conclusions, they may be used to ferret out a party's legal theories."). Accordingly, a contention interrogatory asking a government defendant whether one of its alleged policies violates *Brady v. Maryland,* 373 U.S. 83 (1963), is improper. *See Barnes v. Brown County,* No. 13-CV-607, 2016 WL 126748, at *7-8 (E.D. Wis. Jan. 11, 2016). Likewise, an interrogatory asking a union why its constitution was not superseded by federal law is also objectionable. *See* Wright, *supra,* at §2167 n.25 (citing *O'Brien v. Int'l Bhd. of Elec. Workers,* 443 F. Supp. 1182, 1187 (N.D. Ga. 1977)).

In contrast, courts will require responses to interrogatories if they call for legal conclusions if they are a predicate to answering a relevant question about the case. In *Milwaukee Electric Tool Corp. v. Snap-On Inc.,* for example, the defendant served an interrogatory asking for the priority date for various patent claims. No. 14-CV-1296-JPS, 2017 WL 3130414, at *1-3 (E.D. Wis. July 24, 2017). To answer the interrogatory, the plaintiff would have to "assess[] the legal standards governing conception and reduction to practice." *Id.* at *3. The court concluded that assessing such a "complex" issue was no barrier to responding to the contention interrogatory. *Id.*

Accordingly, a well-formed objection to a contention interrogatory will differentiate between a permissible request involving an application of law to fact and an improper request concerning questions of law divorced from the facts of the case.

Conclusion

Although the Federal Rules of Civil Procedure have expressly permitted contention interrogatories for nearly fifty years, courts all too frequently have occasion to remind parties of this fact. Parties may, however, successfully assert focused objections explaining how answering an interrogatory will not narrow the issues, why the interrogatory is overbroad, and how the interrogatory targets purely legal information.

The Seventh Circuit Electronic *Discovery* Pilot Program

Approaches Its Second Decade with a Renewed Commitment to Service

*By Hon. Iain Johnston**

Next year, the Seventh Circuit Electronic Discovery Pilot Program celebrates its tenth year. Now is a good time to discuss the Pilot Program's current priorities, which focus on education for the bar and addressing the impact on electronic discovery issues of the Mandatory Initial Discovery Pilot Program (MIDP). We will also review some of the accomplishments of the organization.

First, let us provide a little background on the Pilot Program, for those less familiar with its activities. The Pilot Program's mission is "to assist the parties, their counsel, and the courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information ("ESI") without Court intervention." In 2009, Chief Judge James Holderman and Magistrate Judge Nan R. Nolan assembled a large and diverse group of lawyers from every sector of the bar, including from attorneys from large firms, small firms and sole practitioners from "both sides of the 'v'," corporate in-house counsel, federal and state regulators, the U.S. Attorney civil and criminal divisions, and the federal public defender, as well as technology specialists from major electronic discovery service and solution providers. A number of federal district courts have now created electronic discovery programs and committees, but we believe the Pilot Program was the first. Subcommittees were formed and everyone got to work. As one member of multiple Subcommittees said "When the Chief Judge looks you in the eye and asks you to do something, you say 'yes' and get it done on time." Its activities included the following:

- Principles: Drawing upon the diverse perspectives of its membership, the Pilot Program published its Principles Relating to the Discovery of Electronically Stored Information in the fall of 2009. The Principles have been cited to and relied upon in over two dozen decisions

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* *Judge Johnston is a United States Magistrate Judge for the Northern District of Illinois in Rockford, Illinois.*

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from the Seventh Circuit, the district courts and one state court, as well as in numerous secondary sources.

- Model Orders: The Pilot Program has created a model ESI protocol titled "Discovery Plan for Electronically Stored Information" as well as a model standing order addressing the efficient management of privilege issues. Both model orders are available for free download from discoverypilot.com.

- discoverypilot.com: The Pilot Program's primary means of delivering its high-quality content remains its Web Site, discoverypilot.com. Made possible by a generous donation of services from the Pilot Program's technology partner, justia.com, discoverypilot.com offers links to dozens of court rules, guidelines, articles and other secondary sources, including publications of the influential Sedona Conference, all at no cost, as well as news about the Pilot Program's activities.

- Educational Programs and Webinars: One of the Pilot Program's primary goals is to provide quality, free education. The Pilot Program has organized and sponsored numerous Webinars and in-person programs, many of which offered CLE credit and all of which are free. There are currently sixteen Webinars available for download from discoverypilot.com. The CLE programs routinely "sell out" and have drawn nearly a thousand listeners each.

- Free ESI Mediation Services: The Pilot Program offers free mediation services to mediate discovery disputes in cases where one or both of the parties lack the resources or expertise to resolve the issues themselves. The ESI Mediation program has a panel of nearly a dozen trained electronic discovery attorney-practitioners who have volunteered their time to be of service to the judiciary, the bar and litigants in the courts of the Seventh Judicial Circuit. More information about ESI mediation services is available at: https://www.discoverypilot.com/content/e-mediation-committee.

- Surveys: To measure its impact and help shape its future offerings, the Pilot Program has conducted multiple surveys of Judges and practitioners. For more information, please visit https://www.discoverypilot.com/surveys.

Based in part upon input from its members, the Pilot Program underwent a major reorganization in 2016. A Steering Committee was formed whose membership mirrors the diversity of the full Pilot Program Committee. Chief Judge Rubén Castillo is now a Co-Chair of the Pilot Program, providing guidance, resources and support. As the other Co-Chair, I currently lead the Pilot Program with the able assistance of the Steering Committee. The Pilot Program's activities are carried out through our Standing Subcommittees and Project Teams. Here are the major initiatives that the Pilot Program currently is working on:

Educational Programs: The Pilot Program promotes education as its primary activity to accomplish its mission. The Education Subcommittee expects to continue to offer at least two major programs per year. Webinars and other programs are announced to the public through emails sent by the clerks of the district courts of the Seventh Circuit to registered e-filers.

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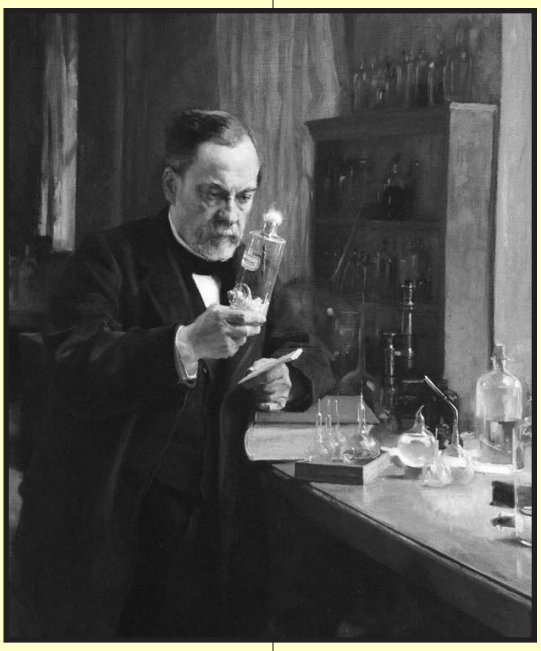
Principles Second Edition: In January, 2018, the Pilot Program published the Second Edition of its Principles. Several of the original Principles were revised to conform to changes in the law, primarily the 2015 amendments to the Federal Rules of Civil Procedure, and other developments in the law and technology.



MIDP: As dedicated readers of these pages know from our recent issues, the Northern District of Illinois is one of two districts in the country piloting new Mandatory Initial Discovery procedures. The MIDP includes rules that significantly accelerate the schedule of production of ESI. The Pilot Program is hard at work to create practice pointers and guidelines to help practitioners manage electronic discovery in cases under the MIDP. The Pilot Program is delighted to be working with members of the Federal Bar Association on these initiatives. Watch for MIDP-related materials later this year. The Pilot Program also believes that the MIDP may create an increased need for the electronic discovery mediation services it offers.

Criminal Procedure Project Team: The Pilot Program continues to provide prosecutors and members of the criminal defense bar with a platform for the informal exchange of ideas. Just last summer, Magistrate Judge Nolan and I presented at the Federal Defender Program Annual CJA Seminar. The Criminal Procedure Project Team's page on discoverypilot.com contains links to a number of resources that are valuable to criminal law practitioners. Though it operates for the most part "under the radar," the Criminal Procedure Project Team continues to work to improve the criminal justice process in our districts.

Other Topics of Currency: Also watch for developments later this year in the areas of patent, privacy and data security, and the dreaded "GDPR" (General Data Protection Regulation).

Although electronic discovery is now woven into the fabric of our judicial process in ways it was not when Chief Judge Holderman and Magistrate Judge Nolan formed the Pilot Program, we believe the Pilot Program remains the most active court-affiliated program of its kind, and has many new ways to be of service. The Pilot Program also continues to seek to expand its membership and programs beyond the Northern District of Illinois. Anyone with questions about the Pilot Program or suggestions for our future activities, should visit discoverypilot.com or contact our Steering Committee co-chairs, Chris King of RedgraveLLP or Megan Mathias of Stahl Cowen Crowley Addis LLC.

The First Year *at the* Helm:

An Interview of Chief Judge Magnus-Stinson, Southern District of Indiana

*Conducted by Jane Dall Wilson and Adriana Figueroa**

*On November 23, 2016, Chief Judge Jane Magnus-Stinson began her seven-year appointment as Chief Judge of the U.S. District Court for the Southern District of Indiana. During her first year, she faced several unexpected challenges — from devastating losses of members of the judicial family to an increase in filings in a district court that, at the time of her appointment, was already one of the busiest in the nation. We sat down with Chief Judge Magnus-Stinson for an overview of her first year as Chief Judge. She shared her thoughts on the tremendous influence of the late Judge McKinney, Magistrate Judge LaRue and offered thanks to many who are helping her and the District maintain its extraordinary caseload.***

Q: How would you describe your first year at the helm as Chief Judge?

A: It was very sad and very stressful. It began with Judge Denise LaRue's illness; we learned about it in early 2017. At that point, it had been many years since the Court had had a judicial officer with a serious illness. With the help of District Clerk Laura Briggs, we had to navigate an uncharted territory. As a consequence of this loss, we had caseload, personnel, and morale issues to handle. As the year went on, we not only lost Judge LaRue, but then, suddenly, we lost

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**Jane Dall Wilson is a partner at Faegre Baker Daniels in Indianapolis. She is a* summa cum laude *graduate of both Hanover College and the University of Notre Dame Law School, and she clerked for Judge Kenneth Ripple on the Seventh Circuit. She is an Associate Editor of The Circuit Rider and the Indiana co-chair.*

Adriana Figueroa is an Associate at Faegre Baker Daniels in Indianapolis.She is a graduate of Indiana University and Indiana University Robert H. McKinney School of Law. Before joining Faegre Baker Daniels, Ms. Figueroa clerked for Chief Judge Jane Magnus-Stinson of the U.S. District Court for the Southern District of Indiana.

**According to statistics from the U.S. Courts Administrative Office, the Southern District of Indiana is one of the busiest courts in the Circuit and in the country. It ranks first in the Circuit and second amongst all district courts in terms of both total filings per judgeship and weighted filings per judgeship. For additional information, visit the U.S. Courts Administrative Office's National Judicial Caseload Profile for the Southern District of Indiana found on page 51: *http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2017.pdf.*

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Judge Larry McKinney. Sadly, we had recent experience with the loss of a judicial officer, so from a process and case reassignment perspective, we knew what to do. But, we had two heartbreaking blows to the Court. In response, the Court family did what we always do — we kept pedaling as fast as we could. And you know, we're very mindful of two things on our Court. First, we support each other not only professionally, but personally, too. Second, we're serving the public, and our product is decisions, and we have to keep producing. So, we do what we have to do. There were people, like law clerks, who suddenly lost their boss, their sponsor, their caseload, in essence, their Court home. We found ways to assimilate them into the Court's functioning just as the cases had been assimilated. It has worked out pretty well.

This would not be the way that I would have chosen to spend my first year as Chief Judge, or that I would have anybody spend in their first year as Chief Judge. I really thought it was going to be great, because we have a very talented, experienced District Clerk, Laura Briggs. But both of us were "whelmed" at least, if not, overwhelmed at times.

I would add that, in this role, I have enjoyed getting to work with District Clerk Briggs. Laura is a smart, organized, fair, and fun person. She has been with the Court over 20 years. I'd also like to acknowledge Chief Judge Wood and Circuit Executive Collins Fitzpatrick. They have been very supportive of this Court. In addition, the Court received generous help from other district and magistrate judges to help us weather the storm.

Q. How did Magistrate Judge Denise LaRue and Senior District Judge Larry McKinney influence the district?
A. Judge McKinney was a force. He had been here for decades. One of the main ways that he influenced us is that he showed respect for all people, and not just in his work and opinions. For instance, he chose to stay in Edinburgh, Indiana, and be part of the Edinburgh community. He was working with young people through the We the People program to engender respect for the rule of law. Of course, with Judge McKinney, you cannot talk about him without talking about his sense of humor. And I would say probably his lasting legacy for the Court is the REACH Re-entry Program. Judge McKinney showed great respect for the people who are coming back into the community after serving a sentence. He was willing to put in his time and invest in them on both a personal level and a professional level. He also partnered up with the IU McKinney School of Law through the REACH Re-entry Program. The students' involvement has given them the opportunity to see the hardships that people from prison face when re-entering the community. That is a terrific legacy that is still continuing.

Having been a plaintiffs' lawyer, Judge LaRue equally and certainly shared that quality of respecting people. She was more of a quiet, mighty force, I would say. She, too, had gotten involved in REACH. She also had a grace with which she handled all the adversity that came her way. It was remarkable to me, and also to Judge Pratt, in particular. Her faith, her love of her family; she just accepted what happened. She fought as hard as she could, but she accepted it. It's good for the Court to have judicial officers with different perspectives. Judge LaRue's perspective was very valuable to us, given that she had represented litigants who believed they had been wronged.

So on a personal level, we deeply miss them. Some of my colleagues who served with them longer were devastated. We were a little more prepared with Judge LaRue, because she'd been ill for about six months. But, it didn't make things any easier.

Q. Memorial tributes were held last year for those judges. Are there any additional opportunities to recognize their memory?

A. We just had a tribute in Terre Haute, Indiana, in March. Both of them had Terre Haute duties. When Judge McKinney was the Chief Judge, he faced the prospect of losing the court house in Terre Haute, because the old court house was transferred over to Indiana State University. Through his force of will, and with assistance of Clerk Laura Briggs and Doria Lynch, and

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some support from our senators, we were able to keep it open. Judge McKinney was honored there. Judge LaRue had jurisdiction there, too. She also made a difference and did good work there, particularly with the prisoner cases that we had coming out of the federal facility.

The Indiana Bar Foundation has started a scholarship in Judge McKinney's name. Before Judge LaRue passed, the Court determined that, instead of sending flowers, we wanted to leave a legacy gift. She chose the Just the Beginning Foundation, which is a pipeline organization for underrepresented students who may be interested in pursuing law school.

Q. Those back-to-back losses were certainly staggering, and the district was already operating under a judicial emergency, as defined by the United States Courts Judicial Conference, after District Judge Barker took senior status in June 2014. How is the court coping with its workload?

A. First of all, I want to thank Judge Barker for staying on. She has a 75% caseload, and for any other district in our circuit, that might mean 75% of approximately 400 cases. She completed or closed well over 500 cases for our Court in 2017, and so her continued commitment and work is invaluable to this Court. Judge McKinney had a 50% caseload. We have also been blessed with assistance from other judges throughout the circuit. Right after Judge McKinney passed away, Judge Miller from the Northern District of Indiana agreed to keep a 50-case caseload. He constantly has 50 cases — when one case closes, we give him another one. Judge Griesbach and Judge Adelman from Wisconsin also carry a constant, modest caseload. Magistrate Judges Jones and Callahan from Wisconsin were also terrifically helpful to our magistrate judges during Judge LaRue's illness. They covered criminal duty a week at a time and helped with settlement conferences. Judge Pallmeyer from Northern District of Illinois, Judge Shadid from Central District of Illinois, and Judge Reagan from Southern District of Illinois have also handled trials for the Court.

I would also like to add that not only are our judges handling this tremendous caseload, but every single district judge on this Court serves on a national committee. We are not only doing our work, but we are also participating in the advancement of the judiciary on a national level.

Finally, the Clerk's office staff, under the capable leadership of District Clerk Laura Briggs, has gone above and beyond to be proactive, supportive, and flexible. The Court is very grateful for their dedicated efforts.

Q. What concerns do you have with managing the caseload moving forward?

A. Judge Young has a multi-district litigation case which has over 4000 cases in it, and, even without those cases, the Southern District of Indiana weighted caseload is several hundred cases above the circuit average. By adding those cases, it triples the caseload here, compared to the other districts. Laura Briggs did a calculation and found that it would take five additional judgeships for us to be pulled in line with both the circuit and national average. With respect to the multidistrict litigation case, in many circumstances, cases are filed throughout the country and transferred to the MDL. In our case, the vast majority of the cases are being filed directly here in our district. They are not being transferred in. It could well mean that those cases filed here do not go anywhere when the MDL gets out of the MDL phase. That means those cases will be absorbed into our docket. That is a serious concern.

Q. Statistics available from the Judicial Conference indicated that filings were up thirty percent (30%) last year. Does the MDL play a role in that?

A. The MDL does play a big role. It accounts for the most significant increase. We did receive increases in two other categories of cases: Our prisoner petitions are up. Civil rights litigation is up by several hundred cases. Those totals increase our total case numbers by 300, excluding the MDL.

Q. Is there anything that members of the bar can do to assist the Court at this particularly busy time?

A. I would encourage lawyers to take a long, hard look at the motions they are filing. We received a noticeable increase in motions to dismiss and challenges to complaints in 2016 and 2017. Some of them are of a quality that if I were to grant, I know I would be reversed. I would assume a good lawyer would look at the motion and know it's not going to carry the day. I am not saying that all motions to dismiss do not have merit. Some of them do.

The other thing that is concerning to me is the tone in the writing. Maybe that has to do with the level of discourse nationally, but people are presenting their issues in a negative, personal way, which is distracting and completely unhelpful. The law intends that discovery be a self-managed process. We

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seemed to hit a stride around 2015 when attorneys were following that intention. They were working their cases and filing appropriate motions. Since 2016 and into last year, the nature and tone of the motions has rejected a decade's worth of civility emphasis in the law. I find that unfortunate. We have to plow through all that clutter to get to the meat of the issue and to understand the merits of the case. It takes time that we obviously do not have. That is something lawyers should ask themselves: Do I really need to file this motion or can I work it out with my opponent?

Q. Is there a role the bar associations can play to help ease the burden of the court?

A. Bar associations could start conversations about over-filing and filing in the right tone. I think honest, good-spirited, good-faith communication can be helpful — lawyers can be very good at that when they put their mind to it. I also note that the bar associations do currently help us. For example, the IndyBar lets us borrow their facilities when we do *pro bono* lawyer training. We offer free CLEs for people who are willing to take cases for us. Their willingness to partner with us permits Court staff to focus their efforts on managing the day-to-day operations of the Court. We are grateful for this partnership. And of course, putting on these types of programs helps us when individuals are willing to assist litigants who do not otherwise have counsel. It helps the courts just as much; it also helps opposing counsel when a once *pro se* litigant gets counsel because lawyers are much happier to work with each other.

Q. Do you believe newly implemented Local Rule 87, related to volunteer recruitment of counsel to represent *pro se* litigants, has helped to ease the burden of the court? And if so, how?

A. I think it has helped. We recruited counsel in 70 cases. Of those, 42 were recruited for limited appointments and 28 were for full appointments. That is down a bit from 2016 when we had 107 appointments, 67 settlements and 40 full appointments. In 2015, it was 42. So, it is up from 2015, but down from 2016. I do not know how we are trending this year, but it is not bad that we have not had as many full appointments because it may mean that not as many cases are going to trial. If lawyers can settle the case, in terms of judicial resources and systemic resources, it is very helpful, not only to the client, but also the Court. I do think we are seeing an increase in settlements, so the role of a lawyer is really important. One role is to advocate, but the other is to explain and counsel the former *pro se* litigant, who is oftentimes a prisoner. That two-fold role can increase the number of settlements.

Although it does ease the Court's burden, the rule was really borne out of the desire that individuals have a fair shake in their cases. I hope lawyers understand that we are rigorous in screening who gets a lawyer. We do not recruit a lawyer for every case. We look for cases with a complex issue, with some type of disability, or a legal issue that would require an in-court hearing. In 2017, we had 1,317 prisoner petitions, and we only recruited counsel on 70 of that type of case. We exercise good discretion in seeking counsel for the right cases.

Q. Do you have a vision for the District Court in the future?

A. My vision, my dream, would be that this Court is able to get additional judicial resources on a more permanent basis. Second, Judge Lawrence is taking senior status starting July 1, 2018, and I hope our nominee for Judge Barker's vacancy, Jim Sweeney, will be confirmed by then. He is through the whole process except for the actual Senate vote. My other hope is that we get Judge Barker's and Judge Lawrence's successors to overlap with those two while they are still senior judges. This would give this Court some relief for a period of time.

Another vision is that we continue to work with the Department of Corrections and the Federal Bureau of Prisons so that we can use technology to provide increased opportunities for communication with prisoner litigants. Communication helps the prisoners feel heard and gives their attorneys access. And I think that when they feel heard, the cases get resolved better.

I also hope to have more naturalization ceremonies in locations where members of the public can observe them, not just the friends and family who usually fill the courtrooms to capacity when we do those ceremonies. Although it is a very positive experience for a judge, it is an even more positive experience for our new fellow citizens and their families. I think the public would feel the same.

Q. Anything else you'd like to share?

A. I am part of a really terrific court, and I think we run about as lean and mean as an operation can. I am confident we will continue our high level of performance no matter the circumstances.

Judge John Tinder

AS COUNTY PROSECUTOR

*By Daniel E. Pulliam**

From an early age, and long before he became a Judge on the United States Court of Appeals for the Seventh Circuit, John Tinder knew risks came with serving as a prosecutor. At the age of six, his father, then the Marion County (Indiana) Prosecutor, eluded an assassination plot involving a contract killer hiding in bales of alfalfa about a football field's distance from the family home with a .22 caliber rifle and a box of soft-nosed bullets. The murder attempt was prompted by a revengeful Chicago gambler who wanted to kill some "punk prosecutor" who cost him $50,000 after "Honest John Tinder" took down his gambling syndicate.[1]

Yet less than twenty-five years later, a still-young Tinder was serving as the chief trial deputy in the same office that his father once ran. The Marion County Prosecutor faced down similar threats that continued to vex the office,[2] yet Tinder was undaunted in his determination to bring justice to murder and rape victims.

Tinder's career as a public servant started a few years before becoming a deputy prosecutor when U.S. Attorney John E. Hirschman named him an Assistant U.S. Attorney in August 1975.[3] Less than ten years later, President Ronald Reagan would appoint Tinder to the top job of that office — the U.S. Attorney for the Southern District of Indiana. Tinder's rise from a line attorney to head of the office was interspersed with multiple roles, but none so highly charged as his role as Marion County Prosecutor Stephen Goldsmith's chief trial deputy.

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**Daniel Pulliam is an associate in the business litigation group at Faegre Baker Daniels LLP, where he is actively involved in federal investigatory matters, anti-trust matters, and appellate litigation. He is a* cum laude *graduate of Butler University and a* magna cum laude *graduate of Indiana University Robert H. McKinney School of Law where he was the Editor-in-Chief of the Indiana Law Review. He clerked for Judge John Tinder on the United States Court of Appeals for the Seventh Circuit from 2010-2012. A number of his articles have been published in the Indiana Law Review and other publications. He has currently been named as an Indiana Super Lawyer rising star and is an active participant in various pro bono activities.*

Judge John Tinder *as* County Prosecutor

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The Marion County Prosecutor's jurisdiction encompasses the State capital of and largest city in Indiana — Indianapolis.[4] Goldsmith, later elected Mayor of Indianapolis for two terms, held the position for twelve years. During this period, the number of serious felony convictions increased by 400 percent, from 480 per year to an average of 1,200 per year. A record number of 125 white-collar and public corruption cases were prosecuted. Crime dropped from 54,384 major crimes a year to less than 46,757 a year for the last five years of Goldsmith's tenure.[5] Leading the charge for Goldsmith was John Tinder, not yet 30 years old, but a disciplined trial lawyer with a sharp mind and a determination to punish crime.

Upon being announced Goldsmith's chief trial deputy, his priorities were "prosecution of violent and repeat offenders."[6] The staff, according to the press accounts, would be leaner, but higher paid than under the predecessor, Democrat James F. Kelley.[7] Not even a month into his new job, Goldsmith upgraded Tinder to the "No. 2." position to "ride herd on the trial deputies as" a chief deputy because a number of major prosecutions were headed to trial.[8] Tinder formed Goldsmith's "Brain Trust" who handled all the "difficult trial cases," and the habitual offender program[9] although Tinder hardly knew Goldsmith before taking office.[10]

Although he was deputized to go into any part of the office and work on any case of his choosing, Tinder sought out cases that would demonstrate the seriousness of the office's polices. For example, he tried paternity cases with then-novel DNA evidence, which quickly became "the gold standard."[11] He also sought the extradition of Joseph Paul Franklin, the shooter of civil rights activist Vernon Jordan, for committing sniper killings in the Indianapolis area.

He prosecuted with then-Deputy Prosecutor Ann DeLaney an emotion-packed three-day jury trial of a defendant charged with a robbery-slaying of a pizzeria manager.[12] As described in *The Indianapolis Star,* in closing arguments Tinder gripped the small-caliber gun used in the murder and described how the manager died. "Slowly and repeatedly he pulled the trigger of the now empty revolver" as Tinder told the jury that the victim "was helpless, at the mercy of the bandit, and he was killed in cold blood. Then he slowly turned to" the defendant and said "this man is the killer."[13]

Tinder's hard-charging prosecutions attracted attention. Just a few years into his role as Goldsmith's number two, Tinder was considered a strong candidate for the position of U.S. Attorney upon the election of Republican President Ronald Reagan.[14] By then, Tinder was known for prosecuting three major death penalty cases[15] and the increasing number of rape case prosecutions in an effort by the prosecutor's office to show the seriousness of that crime.[16] Tinder made it to the final four with a reputation as a trial lawyer with stern determination and a quick mind,[17] and then to the final three along with Sarah Evans Barker of the Bose and Evans law firm, and former first-assistant U.S. Attorney and Hamilton County Prosecutor Steven R. Nation.[18]

Tinder ended up being passed over in favor of Barker as his time as a Marion County prosecutor wound down and he shifted his focus to private practice. Yet he maintained part-time work with the prosecutor's office to focus on white-collar crime and other special projects.[19] He was known as a "dedicated public servant" committed to pursuing corruption in municipal and State government by uncovering and taking public corruption cases to trial.[20] He testified against an alleged corrupt police officer before a merit board,[21] investigated the Indianapolis Fire Department for misuse of city property,[22] indicted local bondsmen for illegal practices,[23] and investigated the former head of Indiana's Department of Administration for alleged corruption.[24]

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Judge John Tinder *as* County Prosecutor

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The early years of Tinder's career show the determination and dedication to public service that embodied his later appointments as a the U.S. Attorney for the Southern District of Indiana in 1984, U.S. District Court Judge for the Southern District of Indiana in 1987, and the U.S. Court of Appeals for the Seventh Circuit in 2007. He eschewed politics in favor of focusing on becoming a good attorney. He emphasized public corruption and violent crime prosecutions while chief trial deputy, and after President Reagan passed over him for the U.S. Attorney position, he maintained his commitment to public service by continuing to work in the prosecutor's office on special projects such as white collar crime and ultimately leaving private practice for what ended up being a thirty-plus year tenure in public service.

Notes:

[1] *Ex-Convict Says Chicago Gambler 'Contracted' Job,* Indianapolis Star, Aug. 26, 1955. Gambling was illegal in Indiana at the time. The bookie ended up with only a six-month sentence probably due to Indiana's then-weak conspiracy laws.

[2] Joe Jarvis, *Script is Same in Prosecutor, Drama,* Indianapolis Star, May 16, 1979.

[3] *U.S. Attorney Names Tinder,* Indianapolis Star, Aug. 5, 1975.

[4] Most famously, the office prosecuted and convicted boxer Mike Tyson for the rape of Desiree Washington resulting in a six-year prison sentence under the tenure of Goldsmith's successor Jeff Modisett.

[5] *See Marion County Prosecutor's Office Accomplishments During the Stephen Goldsmith Administration (1979-1990) available at* http://uindy.archivestree.com.

[6] *Goldsmith Names Chief Trial Deputy,* Indianapolis Star, Dec. 5, 1978.

[7] *Id.*

[8] *Tinder Gets Boost to Chief Deputy,* Indianapolis Star, Dec. 14, 1978. Tinder characterized this time as an opportunity to "jump into any sort of case" he wanted as a way of giving an example to newer lawyers or even judges or opposing counsel. Excerpts of C. Fitzpatrick interview with J. Tinder ("Fitzpatrick Interview").

[9] William F. Anderson, *5-Man Brain Trust Advises Prosecutor,* Indianapolis Star, May 28, 1979.

[10] William F. Anderson, *Prosecutor's Office Could Well Be Call A Real 'Tinder' Box,* Indianapolis Star, May 13, 1979. The press took note that Tinder served as acting prosecutor while Goldsmith took a four-day vacation to Florida, but Goldsmith's job was safe as Tinder wanted his service in that roll to be temporary — "I want to be a good attorney, to do the legal work . . . To be prosecutor you must be politically inclined and I'm not." *Id.* Yet in 1979, Tinder confessed that he had not yet decided what he wanted as a career. *Id.*

[11] Interview with Collins Fitzpatrick.

[12] William E. Anderson, *Baldwin Found Guilty in Pizzeria Murder,* May 10, 1980.

[13] *Id.* DeLaney was described by Goldsmith as a "tiger in the courtroom" by Goldsmith, a remark that was later used against Goldsmith when DeLaney ran against Goldsmith for the office in 1982.

[14] R. Joseph Gelarden, *12 Lawyer Candidates for U.S. Attorney Post,* Dec. 24, 1980.

[15] *Id.* In his interview with Collins Fitzpatrick, Tinder estimated that his office tried about ten death penalty murder cases during his time as chief trial deputy, four of which he was personally involved. Fitzpatrick Interview.

[16] *Rape Cases Comes to Trial,* Indianapolis Star, Apr. 3, 1979. Tinder also attracted the attention of four teenagers while on a jog near his home. Deputy Prosecutor Beaten, *The Indianapolis Star,* Jan. 17, 1979. These youths struck him to the ground and kicked him multiple times before fleeing. Tinder reported to work the next morning disappointed that he had not outrun his assailants. Although he was working multiple violent crime cases at the time, including a similar incident that resulted in a murder a few years earlier, no connection between his position and his attackers was ever made.

[17] *4 in Race for U.S. Attorney post,* Indianapolis Star, Jan. 22, 1981.

[18] *Field for U.S. Attorney Position Narrowed to 3,* Indianapolis Star, Jan. 23, 1981. In the end, Judge Barker was nominated as President Reagan's first pick for the U.S. Attorney of Southern District of Indiana from 1981 to 1984. Rather than maintaining the traditional prerogative as the senior Indiana senator to make such selections, then-Senator Richard Lugar appointed a nine-member merit commission to choose the finalists, including former Indiana Governor Otis R. Bowen and Indiana Chief Justice Richard M. Givan. *Id.*

[19] *Goldsmith Staff Changing,* Dec. 21, 1981.

[20] Ernest A. Wilkinson, *Violating Public Trust,* Indianapolis Star, Dec. 1, 1982. Tinder recalls prosecuting a "Chemscam" case involving local and State officials accepting kickbacks for road maintenance supplies and questionable purchasing practices by the State prison system and the Department of Administration. Fitzpatrick Interview.

[21] Myrta Pulliam, *Jury to Probe Gambler, Policeman,* Indianapolis Star, Feb. 1, 1981.

[22] *Probe Uncovers City Property Misuse,* Indianapolis Star, May 8, 1981.

[23] *Bondsmen Indictments Near; Probe To become More 'Active,'* Indianapolis Star, Oct. 10, 1979.

[24] *Prosecutor Plans Another Talk with State Official,* Indianapolis Star, Nov. 24, 1982.

A Fresh Look
At Seventh Circuit Rule 40(e)

By Jed Glickstein[*]

Seventh Circuit Rule 40 is a curious hybrid. Primarily, like its counterpart in the Federal Rules of Appellate Procedure, the Rule addresses the procedures for petitioning for rehearing after a panel's decision is published. But tacked on to these anodyne instructions is a rather different provision. Entitled "Rehearing Sua Sponte before Decision," Rule 40(e) provides:

> A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear *en banc* the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:
>
> This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or, A majority did not favor) a rehearing *en banc* on the question of (e.g., overruling *Doe v. Roe.*)

As the text indicates, Rule 40(e) applies in three different scenarios: when a panel overrules circuit precedent; when a panel creates a circuit split; and when a panel exercises its supervisory power to promulgate appropriate procedures for the circuit. In these cases, the Rule requires — or, in the third scenario, permits — the panel to circulate its opinion to the full court *prior* to publication, thus giving the full court an opportunity to take up the matter *en banc* before the panel issues its decision. This procedure has been called an "informal *en banc,*" a "mini *en banc,*" and (per Judge Kanne) a "non-banc *en banc.*"[1]

No other federal circuit provides by rule for a pre-circulation procedure. Nevertheless, other than a few academic articles and a 2008 assessment by Judge Kanne, Rule 40(e) has operated largely behind the

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[*]*Jed Glickstein is an associate in the Chicago office of Mayer Brown LLP. Prior to joining the firm, he clerked for Judge Joel Flaum on the U.S. Court of Appeals for the Seventh Circuit and Judge Gary Feinerman on the U.S. District Court for the Northern District of Illinois. Mr. Glickstein is a* magna cum laude *graduate of Yale University, and a graduate of Yale Law School, where he was the Essays Editor for the Yale Law Journal. The opinions in this piece are his own.*

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scenes to shape Seventh Circuit law. To bring some light to bear on this unique procedure, this article outlines the development and use of Rule 40(e) and makes a few suggestions for its improvement.

I. A Brief History of Rule 40(e)

The exact origins of Rule 40(e) are murky, but it appears to have emerged from a general ferment regarding *en banc* power in the middle of the twentieth century. Prior to 1941, it was unclear whether appellate courts had the authority to sit *en banc* at all. Under the then-prevailing Judicial Code, Congress had specified that "[t]here shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established."[2] In 1938, the Ninth Circuit concluded that this language required the court of appeals to sit in panels of three, and thus that there was "no method of hearing or rehearing by a larger number" that could be used to resolve intracircuit splits.[3] A few years later, the Third Circuit reached the opposite conclusion.[4] In 1941, the Supreme Court sided with the Third Circuit, holding that the Judicial Code did not preclude "all the circuit judges of the circuit in active service, more than three in number," from "sitting *en banc*."[5] Congress later ratified the appellate courts' en banc authority in 28 U.S.C. §46(c), providing that "[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service."

In 1953, the Supreme Court revisited the en banc issue, this time with respect to the standards courts of appeals should use to convene an *en banc* hearing. The Court concluded that § 46(c) largely left the details of *en banc* procedure to the appellate courts themselves. So long as the court of appeals made its *en banc* criteria known, the Supreme Court held, the courts had substantial discretion: courts "may . . . adopt a practice whereby the majority of the full bench may determine whether there will be hearings or rehearings *en banc,* or they may delegate the responsibility for the initiation of the *en banc* power to the divisions [*i.e.,* panels] of the court."[6]

Writing separately, Justice Frankfurter reiterated that appellate courts had substantial discretion in designing *en banc* procedures. Thus, he said, "[a] court may decide that it will act under §46(c) only *sua sponte* . . . by the process of having each panel circulate its opinions, before they are emitted, to all the active members of the court." This, he continued:

> was the practice of the Court of Appeals of the District [of Columbia] under Chief Justice Groner. It accomplishes what is essential to the achievement of the purposes for which the power to sit en banc exists, since it acquaints all active judges on the court with the proposed opinion that is coming down, so if they do have an opportunity to point out any conflict, or something of the kind, it may be done.
>
> To be sure, the nonsitting judges have not heard the argument nor read the briefs, and have no vote as far as the opinion of the panel is concerned. Presumably, however, an opinion states the issues and gives the grounds for its conclusion and thereby sufficiently alerts the minds of experienced judges to what is at stake. It taps their knowledge of legal considerations that may lead, on the initiative of a nonsitting or of a sitting judge, to a determination by the entire court of whether or not a rehearing *en banc* is called for.[7]

Based on Justice Frankfurter's description, Chief Justice Groner would have felt at home in today's Seventh Circuit.

The first Seventh Circuit opinion to mention pre-circulation, *United States v. Brown,* appeared in 1969. The defendant in *Brown* argued that a supplemental charge given by the trial court to a deadlocked jury had violated his fair-trial rights. Although the Seventh Circuit found no constitutional violation, it still

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took the opportunity to criticize the district court's instruction. Exercising its supervisory power, the Court ordered future district courts to use a different instruction proposed by the American Bar Association when charging deadlocked juries. In a footnote, the Court explained that its opinion "ha[d] been circulated to the full court" and "[n]o judge ha[d] requested a hearing *en banc.*"[8]

One year after *Brown,* the Seventh Circuit issued its first pre-circulated opinion overruling circuit precedent. In *Chicago & North Western Railway Co. v. United Transportation Union,* the court approved of an injunction pending appeal issued by the motions panel in a case arising under the Norris-LaGuardia Act. This outcome, the court observed, was "inconsistent with this court's decision in *Elgin J. & E. Ry. Co. v. Brotherhood of Railroad Trainmen.*" "Since this opinion overrules *Elgin,*" the *Chicago & Northwestern* court noted, "we have circulated it to the full active court" and "[n]o judge has requested a rehearing *en banc.*"[9]

The court first employed the pre-circulation procedure in relation to a circuit split in 1973's *United States v. Smith.* There, the Seventh Circuit sided with the Fifth and Ninth Circuits and against the Tenth Circuit by refusing to read 18 U.S.C. § 641's prohibition on stealing or converting property "of the United States" to require proof that the defendant knew that what he was stealing was *government* property. In so doing, the court stated that the opinion "ha[d] been circulated among all judges of this court in regular active service and no judge ha[d] voted that the matter of adopting a position concerning which a conflict exists between the circuits or of modifying existing rules be reheard *en banc.*"[10]

Around 1976, the Seventh Circuit codified its informal pre-circulation practice in Circuit Rule 16(e). The Rule limited the procedure in one respect: It applied only to opinions "creating" a conflict between the circuits, not (as in *Smith*) opinions merely "concerning" a conflict. Rule 16(e) was re-designated as Rule 40(f) in 1987, and re-designated again in 1996 as Rule 40(e). The language of the Rule has remained consistent throughout.[11]

II. Rule 40(e) in Context

The Seventh Circuit is the only circuit to provide for pre-circulation by circuit rule, but similar practices exist in other circuits. For example, the D.C. Circuit has issued a "policy statement" that permits a panel to seek the *en banc* court's "endorsement" of an opinion overruling circuit precedent; several other circuits allow pre-circulation by custom, but have not promulgated rules or guidance governing its use.[12] However, the Seventh Circuit is by far the most active in employing the procedure. Between 1969 and 2007, the Seventh Circuit pre-circulated 272 opinions, an average of over nine opinions a year. By comparison, the Seventh Circuit heard only 196 cases *en banc* in this stretch. The next most active court — the Second Circuit — pre-circulated a mere 71 opinions. Indeed, during this period, the Seventh Circuit pre-circulated its opinions "more often than all other circuits combined."[13]

Unsurprisingly, given these numbers, the judges of the Seventh Circuit speak highly of Rule 40(e). Judge Kanne has defended it as "an efficient means of rendering decisions in dynamic and controversial areas of the law" and on subjects "about which this circuit and others have seldom spoken."[14] Judge Ripple has called it "a salutary mechanism" that "ensure[s] stability and certainty in the development of law by assuring the bench and bar that the entire court approves of the holding."[15] And Chief Judge Wood has said that the Rule makes sure that the Seventh Circuit "respects the views of [its] sister circuits" by "proceeding carefully when we find ourselves about to create a conflict in the circuits.[16]

As Judge Kanne has noted, moreover, the Seventh Circuit has even employed the pre-circulation procedure in circumstances that are outside the literal text of Rule 40(e). For instance, panels have circulated opinions that did not overrule precedent, but instead limited it in an unexpected way, or that merely put undesirable dictum to rest.[17]

Judge Easterbrook has invoked the Rule to explain "how precedent works" in the Seventh Circuit: "In this circuit it takes a circulation to the full court under Circuit Rule 40(e) for one panel to overrule another."[18] Indeed, as a result of Rule 40(e), judges on the Seventh Circuit "will hesitate to interpret" an opinion that has not been circulated and footnoted in compliance with the Rule "in a manner that conflicts with an earlier case."[19]

Interestingly, district courts in the Seventh Circuit, for whom the proper interpretation of Seventh Circuit opinions is understandably very important, have divided over how to understand Rule 40(e). Many district courts will not interpret Seventh Circuit panel opinions that lack a Rule 40(e) footnote as overruling established

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law.[20] Others disagree, concluding that arguments about compliance with the Rule "are properly addressed to the Court of Appeals" and that "it would not be appropriate to ignore" Seventh Circuit decisions "based on speculation about the Seventh Circuit's implementation of its rules."[21]

III. Three Areas For Improvement

Rule 40(e) has not been the subject of extensive commentary — perhaps a sign that it is working well. For example, no one appears to take issue with pre-circulation of opinions that establish a new rule or procedure for the circuit. Nor does there appear to be any commentator who believes the Seventh Circuit should not pre-circulate opinions creating a split among the courts of appeals. To the contrary, in 1992, Solicitor General Ken Starr wrote the Advisory Committee to the Federal Rules of Appellate Procedure regarding the Department of Justice's "knowledge of techniques used by the circuits to prevent inter-circuit conflicts."[22] He praised the Seventh Circuit's rule as "best suited" to prevent such conflicts, because by "key[ing] the conflict to the possibility of in banc review" Rule 40(e) "highlights that a conflict between the circuits is a major matter" "equivalent to an overruling of a prior decision of the circuit."[23]

To the extent Rule 40(e) has drawn criticism from those outside the court, it has been with respect to its precedent-overruling function. Professor Amy Sloan, for example, has argued that "informal *en banc*" practices like Rule 40(e) raise a host of concerns. Among other things, she contends that these procedures may deny parties the right to participate and reduce the quality of judicial decision-making.[24] These concerns are shared, to some extent, by D.C. Circuit Judge Karen LeCraft Henderson, who has written that her own court's procedure has become "a summary method of overruling unambiguous circuit precedent, without any of the safeguards or formalities attending the *en banc* process."[25]

In essence, both Professor Sloan and Judge Henderson worry that procedures like Rule 40(e) allow panels to get around valid precedent without sufficient oversight. This worry seems largely overblown, but in any event can be addressed with a simple modification. The Seventh Circuit should consider amending Rule 40(e) to provide that, unless the panel deems it unnecessary, prior to circulating a proposed opinion to the full court the panel should notify the parties of the panel's intentions and invite the adversely affected party to file a short position statement on the need for *en banc* review. As the Supreme Court has said, "if the *en banc* power is to be wisely utilized, there is no reason to deny the litigants any chance to aid the court in its effective implementation of the statute."[26] So too with Rule 40(e).

This proposed mechanism would be particularly useful when the parties did not comprehensively address the contested issue in their briefing before the panel. Even where the parties had already briefed the issue, however, inviting a position statement would ensure that the nonsitting judges — who, in Justice Frankfurter's words, may "have not heard the argument nor read the briefs"[27] — see both sides of the issue, not just the panel's conclusion alone. Allowing limited pre-circulation briefing also would bolster Rule 40(e)'s function of showing respect for the court's sister circuits, and potentially strengthen Rule 40(e)'s signaling function in cases destined for the Supreme Court. Indeed, one could see a potential pre-circulation brief as a kind of mini-petition for *certiorari,* helping the full court to decide whether an emerging intra- or inter-circuit split is sufficiently important to merit *en banc* review.[28]

There would not seem to be a need for the prevailing party to file a response statement in most cases, as the panel's opinion should ordinarily make the case for discarding the prior in-circuit precedent or breaking with the contrary out-of-circuit position. Furthermore, the party that prevailed before the panel would recover a full opportunity to state its position in the event that the court did grant *en banc* review. Nevertheless, one can imagine cases in which a response at the Rule 40(e) stage would also aid the court, and there is no reason the court should not be able to call for a response if one would be useful. In this sense, the procedure would be analogous to Federal Rule of Appellate Procedure 35, which gives the losing party the right to petition for rehearing *en banc,* but allows the prevailing party to file a response only if the court orders it.

Another possible area for improvement is highlighted by the recent, and admittedly rather unusual, decision in *Rubin v. Islamic Republic of Iran.*[29] There, the panel held that plaintiffs

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seeking to enforce a default judgment against the Republic of Iran could not attach and execute on Iranian antiquities held by the University of Chicago. In the course of its opinion, the panel overruled two prior precedents holding that 28 U.S.C. § 1610(g) created an exception to execution immunity for foreign states. In the process, the panel created a conflict with the Ninth Circuit on the issue. The case therefore presented a paradigmatic scenario for circulation under Rule 40(e).

When the panel dutifully circulated its opinion to the full court, however, a wrinkle arose. Five of the nine active members of the court were disqualified from participating in the case.[30] As a result, it was mathematically impossible for a majority of the court to vote to take the case *en banc,* and the panel appeared to overrule the prior precedents by default. Judge Hamilton authored a solo dissent from denial of *en banc* review, observing that, "[i]n this rare situation, the panel apparently has the *power* to overrule circuit precedent and to create a circuit split without meaningful Rule 40(e) review."[31]

In opposing *certiorari,* the University of Chicago argued that "the decision of the court below cannot be regarded as having finally settled" the question that divided the Seventh and Ninth Circuits because the "the panel's disapproval of the earlier Seventh Circuit decisions . . . has not yet been accepted by the *en banc* court."[32] The petitioner responded that the University "misunderst[ood]" Rule 40(e), which supposedly did not "undermin[e] the force of decisions" overruling prior precedent when a majority of judges on the active court were disqualified from hearing the case *en banc.*[33] The Supreme Court ultimately resolved the *Rubin* case, but without addressing the force of the Seventh Circuit's opinion.[34]

A slew of disqualifications similar to those seen in *Rubin* is unlikely to recur in the future, but similar problems might arise in cases where recusals or vacancies result in tie votes under Rule 40(e). Absent a simultaneous circuit split, moreover, the Supreme Court might not be inclined to step in to resolve the uncertainty. To address these kinds of situations, particularly in cases involving dueling lines of intracircuit authority, the court might analogize to equally divided votes on the merits by an *en banc* court. When the *en banc* court affirms by an equally divided vote, the panel opinion is affirmed but no opinion has precedential significance.[35] Similarly, when a majority of the court is disqualified from voting on a Rule 40(e) circulation or when the court is equally divided on the need for *en banc* review, the panel's decision should issue but the contested point should be treated as nonprecedential by future panels.

Finally, one cannot help but wonder: Why should a rule governing *sua sponte* rehearing *en banc* appear in a Circuit Rule governing post-opinion petitions for panel rehearing? Here, Professor Sloan has a point. As she notes, it "seems unusual that a provision authorizing informal *en banc* review to overrule prior precedent would be included with a rule on panel rehearing instead of being included with 7th Circuit Local Rule 35, governing *en banc* review."[36] Happily, there is nothing sacred about "Rule 40" — its placement in the Rules has changed before and may do so again. Perhaps it is time for "Rule 35(b)"!

Nomenclature aside, one can certainly imagine other changes to Rule 40(e) that the Seventh Circuit might consider — pre-circulating all opinions that concern, rather than just create, a circuit split, for example; or pre-circulating all published opinions generally.[37] On the whole, however, the Rule has worked well for the court and for litigants, and there is no sense in tinkering too much with a procedure that is not broken.

IV. Conclusion

Rule 40(e) formalizes a significant procedure for an appellate court. The Rule allows the court to speak efficiently and coherently about major issues, and to update the law without undermining its stability. From time to time, however, it is worthwhile to think about how the Rule can best serve these goals. Indeed, given the Seventh Circuit's willingness to "give fair consideration to any substantial argument that a litigant

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makes for overruling a previous decision," it is especially important that the court's process for reconsidering precedent be workable and fair.[38]

Notes:

[1] Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals,* 78 Fordham L. Rev. 713 (2009); Michael S. Kanne, *The Non-Banc En Banc: Seventh Circuit Rule 40(e) and the Law of the Circuit,* 32 S. Ill. U. L.J. 611 (2008); Steven Bennett & Christine Pembroke, *Mini in Banc Proceedings: A Survey of Circuit Practices,* 34 Clev. St. L. Rev. 531, 532 (1986).

[2] Act of Mar. 3, 1911, Ch. 6, § 117, 36 Stat. 1087, 1131.

[3] *Lang's Estate v. Comm'r,* 97 F.2d 867, 869 (9th Cir. 1938).

[4] *Comm'r v. Textile Mills Sec. Corp.,* 117 F.2d 62, 70-71 (3d Cir. 1940).

[5] *Textile Mills Sec. Corp. v. Comm'r,* 314 U.S. 326, 327-35 (1941). For an excellent account of the evolution of *en banc* procedure, see Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review,* 84 Wash. L. Rev. 213, 220-32 (1999).

[6] *W. Pac. Rr. Corp. v. W. Pac. Rr. Co.,* 345 U.S. 247, 261 (1953).

[7] *Id.* at 271 (Frankfurter, J., concurring) (citations omitted and line break added for clarity).

[8] *United States v. Brown,* 411 F.2d 930, 934 n.5 (7th Cir. 1969).

[9] *Chi. & N. W. Ry. Co. v. United Transp. Union,* 422 F.2d 979, 985 n.11a (7th Cir. 1970).

[10] *United States v. Smith,* 489 F.2d 1330, 1135 n.2 (7th Cir. 1973).

[11] Sloan, *supra* note 1, at 732-33 & n.115. The Seventh Circuit first invoked the new rule in *Ziegler Coal Co. v. Local Union No. 1870,* 566 F.2d 582, 585 n.** (7th Cir. 1977), overruling *Inland Steel Co. v. United Mine Workers of America,* 505 F.2d 293 (7th Cir. 1974).

[12] For the D.C. Circuit's procedure, see U.S. Court of Appeals for the D.C. Circuit, Policy Statement on *En Banc* Endorsement of Panel Decisions (Jan. 17, 1996), available at https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Irons%20Footnote/$FILE/IRONS.PDF. Opinions circulated pursuant to this policy contain an "*Irons* footnote," so-called because of *Irons v. Diamond,* 670 F.2d 265, 268 n.11 (D.C. Cir. 1981). On pre-circulation procedures in the circuits generally, see Bennett & Pembroke, *supra* note 1. These procedures can sometimes be found in the appellate court's internal operating procedures rather than the court rules. E.g., 11th Cir. R. 36 I.O.P. 4 ("In special cases, … a panel or member thereof may circulate a proposed opinion to other members of the court.").

[13] Sloan, *supra* note 1, at 738-41 & n.150 (cataloguing instances of informal review).

[14] Kanne, *supra* note 1, at 623.

[15] *Deppe v. Tripp,* 863 F.2d 1356, 1368 n.* (7th Cir. 1988) (Ripple, J., dissenting from denial of rehearing *en banc* pursuant to Rule 40(f)).

[16] *Walker v. O'Brien,* 216 F.3d 626, 634 (7th Cir. 2000); see also Diane P. Wood, *Judges of All Trades: Further Thoughts on Specialized Courts,* 99 Judicature 11, 14 (Winter 2015) ("The courts of appeals pay close attention to one another's rulings. In the Seventh Circuit, we never create a conflict with another circuit before circulating the proposed conflicting opinion to every active judge on the court and ensuring that the proposed position reflects the full court's considered decision."). The Circuit Executive also has credited Rule 40(e) with making the court's work more efficient by "minimiz[ing] *en banc* rehearings." Collins T. Fitzpatrick, *Changes to the United States Court of Appeals for the Seventh Circuit Over a Third of a Century,* 32 S. Ill. U. L.J. 627, 628 (2008).

[17] Kanne, *supra* note 1, at 614.

[18] *Iqbal v. Patel,* 780 F.3d 728, 729 (7th Cir. 2015).

[19] Kanne, *supra* note 1, at 613. Judge Kanne lists examples regarding purported intra-circuit conflicts, but the court displays the same skepticism regarding opinions that purportedly create a circuit split. E.g., *Turley v. Gaetz,* 625 F.3d 1005, 1012 (7th Cir. 2010) ("Notably, we do not believe that the *George* and *Boriboune* panels intended their remarks about § 1915(g) to serve as pronouncements on the general application of the three-strikes rule to all prisoner cases because neither opinion was circulated under Circuit Rule 40(e) despite the contrary precedent then existing in our sister circuits.").

[20] E.g., *Niazi v. St. Jude Med. S.C., Inc.,* 2017 WL 5159784, at *2 (W.D. Wis. Nov. 7, 2017); *Gupta v. City of Chicago,* 2017 WL 2653144, at *4 (N.D. Ill. June 20, 2017); *Cain v. Burge,* 897 F. Supp. 2d 714, 719 (N.D. Ill. 2012); *Licciardi v. Kropp Forge Div. Employees' Ret. Plan,* 797 F. Supp. 1375, 1385 n.19 (N.D. Ill. 1992).

[21] *Nehan v. Local Union No. 1-Bakery,* 2015 WL 5722372, at *2 (N.D. Ill. Sept. 29, 2015); *United States v. Pierotti,* 2013 WL 2634403, at *2 (E.D. Wis. June 12, 2013).

[22] Letter from Kenneth Starr to Carol Ann Mooney, dated Oct. 15, 1992, at 1, available at http://www.uscourts.gov/sites/default/files/fr_import/AP1992-10.pdf.

[23] *Id.* at 5.

[24] Sloan, *supra* note 1, at 744-64.

[25] *In re Sealed Case,* 181 F.3d 128, 146 n.5 (D.C. Cir. 1999) (Henderson, J., concurring).

[26] *W. Pac. Rr. Corp. v. W. Pac. Rr. Co.,* 345 U.S. 247, 262 (1953).

[27] *Id.* at 271 (Frankfurter, J., concurring).

[28] Judge Easterbrook has drawn parallels between the *certiorari* process and the *en banc* process in other respects. See *Brown v. Caraway,* 719 F.3d 583, 596 (7th Cir. 2013) (statement of Easterbrook, J., concerning the circulation under Circuit Rule 40(e)).

[29] 830 F.3d 470 (7th Cir. 2016).

[30] *Id.* at 487 n.6.

[31] *Id.* at 489.

[32] Brief in Opposition for Respondent the University of Chicago, *Rubin v. Islamic Republic of Iran,* No. 16-534, 2016 WL 9776625, at *14-15.

[33] Reply for Petitioners, *Rubin v. Islamic Republic of Iran,* No. 16-534, 2016 WL 7157102, at *3.

[34] *Rubin v. Islamic Republic of Iran,* 138 S. Ct. 816 (2018).

[35] See, e.g., *Del Marcelle v. Brown County Corp.,* 680 F.3d 887 (7th Cir. 2012) (*en banc*).

[36] Sloan, *supra* note 1, at 733 n.119.

[37] The Third Circuit follows the latter practice. See 3d Cir. IOP 5.5.4 ("Drafts of precedential opinions and not precedential opinions that are not unanimous are circulated to all active judges of the court . . . . Non-panel active judges must notify the authoring judge within 8 calendar days if they desire *en banc* consideration.").

[38] *Colby v. J.C. Penney Co.,* 811 F. 2d 1119, 1123 (7th Cir. 1987).

Judicial Gatekeepers *at the* House of Rule 23(b)(3)

By Jason Stiehl[*]

But Mousie, thou art no thy-lane,
In proving foresight may be vain:
The best laid schemes o' Mice an' Men
Gang aft agley,
An' lea'e us nought but grief an' pain,
For promis'd joy

-- To a Mouse, On Turning up in Her Nest with the Plough (Burns, R. (1785))

Introduction

Federal Rule of Civil Procedure 23 was indeed a best laid scheme, designed as a procedural vehicle to allow smaller claims a forum to resolve bigger issues. It was revised in 1966, under the naïve belief that the outcome would produce, perhaps, "an average of some ten class actions a year in federal court…",[1] and that the largest class would be about 100 people injured by an airplane crash or fire.[2] Instead, an entire market has been created for "class-action" lawyers, resulting in a handful of lawyers ultimately shepherding millions of claims through the Rule 23 grinder. Practice then "gang aft agley" from the original intent of the rule, and efforts to constrain the inequities through rule changes or legislative efforts have been ineffective. Paths exist, however, for the courts to increase their role as a gatekeeper to return Rule 23 to its original procedural box.

This article proposes three tools federal courts could utilize immediately, within the confines of the current federal rules, to corral class action litigation, all of which could and should occur within the time

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[*]*Mr. Stiehl is with Loeb and Loeb in Chicago. His practice focuses on consumer class action defense and complex commercial disputes. He has represented clients in numerous nationwide class action matters, including multi-district cases involving claims of consumer fraud and alleged violations of the TCPA, the EFTA and state and federal antitrust laws throughout the Country. Mr. Stiehl counsels clients related to the protection of trade secrets and corporate assets in a wide range of industry sectors, including pharmaceutical and medical equipment, banking, manufacturing, advertising, real estate, technology, transportation and automotive.*

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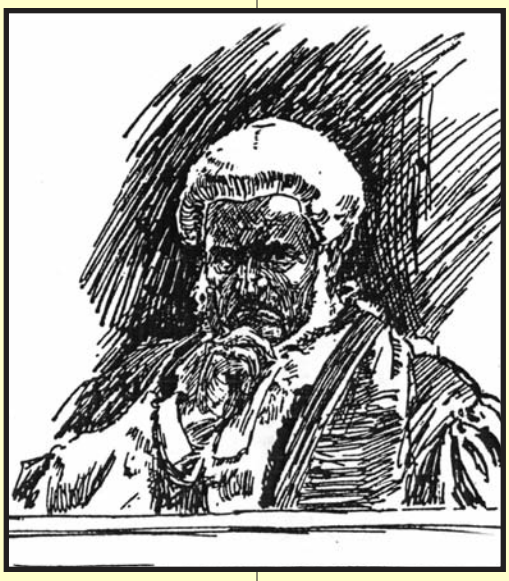
frame of the first case management hearing. The **first** would be that each side submit a brief position statement on the merits of their case, citing applicable case law, in line with the spirit of Rule 26(f). The **second** would be to require plaintiffs to submit a trial plan, detailing the evidence they anticipate acquiring and how a trial adjudicating the rights of all class members would be conducted, and offering the option of the "test case" approach to the defendant as the "superior" method. **Third,** the court should conduct an in-chambers conference to provide guidance, and preliminary rulings, as appropriate.[3]



The History of Rule 23 and Where it Gang Aft Agley

Under English law, the concept of "representative" litigation arose when a certain event violated local town or parish law, thereby affecting citizens in the same manner. The remedy, typically, was akin to the type of injunctive relief found under the modern Federal Rule of Civil Procedure 23(b)(2). As feudal structures broke, group litigation in England waned and, eventually, died, only having recently been reborn in the past decade. As such litigation faded across the ocean, it gained new life in the United States. In 1842, the Supreme Court promulgated Equity Rule 48 which acknowledged the concept of representative suits, but did not go as far as to bind absent parties. In 1912, the rule was rewritten as Rule 38 and began allowing, under certain circumstances (such as a common fund), for judgments to bind absent class members. This concept was further codified in the rewriting of Rule 38 into Rule 23, but it was not until the 1966 revisions to Rule 23 that the modern concept of class actions was borne, moving from what was termed a "spurious" lawsuit requiring class members to "opt-in" to the "most adventuresome"[4] innovation, Rule 23(b)(3), now binding class members unless they affirmatively "opt out".[5]

Over the past 50 years, this "most adventuresome" provision has created a cottage-industry, allowing plaintiff's counsel to leverage the threat of certification, while returning, arguably, little benefit for their clients. In 2013, the Institute for Legal Reform commissioned an empirical study by Mayer Brown to evaluate a random sample of 149 class action cases filed in 2009. Of those, while 86% had reached a final resolution, **none** of them resulted in a judgment on the merits, and not a single one had gone to trial. Of the six cases where information was publicly available as to the benefit derived by the class, the percentages were as follows: .000006%, .33%, 1.5%, 9.66% and 12%. Conversely, the study found that insurance class actions, attorneys' fees amounted to an average of 47% of the total class-action payouts.[6] In another recent study of every reported "no injury" class action settlement between 2005-2015 (2158 cases), the report revealed that of the approximately $4 billion made in available funds, 38% (or $1.52 billion) went to the lawyers, whereas, at most, $360 million made it into the pockets of the class members.[7] Moreover, unlike the "10 cases a year prediction", a recent study found that companies spent $2.17 billion on class actions in 2016, accounting for 11.2% of all litigation spending in the United States.[8]

Giving Class Actions a "Closer Look" as Originally Contemplated

While recent efforts have been made to further amend Rule 23, or to pass legislature, the most effective constraint on class action litigation run amok would be for judges to utilize the tools of the federal rules to strengthen their gatekeeper role. Utilizing Rule 26 would allow courts to operate under the current constructs of Rule 23 that a class be certified at "an early practicable time", while also adhering to the original Reporter of Rule 23's guidance that courts must take "a close look at the case before it is accepted as a class action…."[9] Recent jurisprudence instructs as much.

Step One: ***Requiring More from Litigants in their 26(f) Planning Conference***

Many judges in the Northern District of Illinois have utilized Rule 26(f) to require litigants to flesh out the legal and factual bases for their claims and defenses. *See, e.g.,* Initial Status Report Template for Manish S. Shah, http://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/shah/Initial%20Status%20Report%20Template.pdf. Unfortunately, all too often parties are allowed to put forth minimal effort, utilizing boilerplate case law references or shorthanded notes in defense. For example, in a TCPA action, plaintiffs may cite one case defining liability under the TCPA, and a defendant will respond with one case setting forth the defense of consent, without either having conducted any factual investigation of the applicability of the law to their own clients.

Under this article's proposal, each party would be required to identify the application of its own actual, or expected, facts, based upon a reasonable investigation of its client's position.

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The documents should be contemporaneously submitted, with the clear understanding that the positions taken were preliminary and would not be binding or limiting on the parties in any manner.

Step Two: *Submission of a Trial Plan and the Option of a "Test Case"*

While the reality is that almost no class action lawsuit, especially in the consumer context, goes to trial, a plaintiff should be required to explain to the court how it would propose trying its claims if a class were to be certified. This limited burden provides two benefits. First, it requires a plaintiff to evaluate the governing law and jury instructions for its case, and set forth how it would proceed in satisfying its obligations under governing practice and law. Second, it would quickly identify any potential issues related to proving a particular element of a cause of action — e.g., damages — on a class-wide basis, and how the plaintiff would propose handling that issue.

In addition, it would allow a defendant a platform to consider whether allowing for a "test case" procedure would be superior to proceeding as a class action. In *Katz v. Carte Blanche Corp*[10], the lower court offered the option of allowing the case to proceed individually, and then allowing for one-way intervention if a party wanted to opt-in (or out) of the subsequent decision. As one district court pointed out, when utilizing a "test case":

> the postponement of class action determination does not prejudice potential class members. If the named Plaintiff loses on liability, potential plaintiffs will not be bound but are discouraged from wasting time and effort pursuing claims against Fifth Third because of *stare decisis*. If liability is established, then a class member's decision to opt-in will be a more informed one.[11]

Moreover, the recent decisions in *Wal-Mart Stores v. Dukes* and *Comcast Corp. v. Behrend* almost demand such an early consideration, both looking forward to the likelihood (and, in the case of Comcast, inability) for the plaintiff to meet its burden of proof at trial.[12]

Step Three: *Active Case Management*

In recent years, courts have been encouraged to take a more active role in case management, and the recent Mandatory Initial Discovery Pilot Program in the Northern District of Illinois is illustrative. Indeed, the Manual for Complex Litigation ("Manual") encourages courts to use "… the numerous grants of authority that supplement the court's inherent power to manage litigation."[13] The Manual continues, suggesting active management to allow identifying crucial issues before they arise, rather than "await passively for counsel to present them."[14]

If courts were to require in-chambers presentations on the above-two steps (summary position statement and trial plan), it would present an opportunity for the court to discovery and identify the strength and weakness of the claims, and mandate a particular course of action suitable for the case *sub judice*.

For example, if a defendant in a Telephone Consumer Protection Act ("TCPA") claim were affirmatively raising the defense of either consent or lack of an ATDS ("Automated Telephone Dialing System"), then it might behoove both parties to dedicate time early in the proceeding to confirm or reject those defenses, or identify that such defenses could not be determined on a class-wide basis.

Conclusion

Rule 23(b)(3) class actions present unique challenges and require unique solutions. Even a cursory review of the history and underlying purpose of Rule 23 makes clear how far adrift modern practice has come from the intentions of the drafters. While rule changes and legislative drafting have attempted to curb the misuse of the rule, active case management by judges will have a more immediate and positive effect on reviving the original goals of Rule 23.

Notes:

[1] Letter from Charles Alan Wright, Professor of Law, Univ. of Texas, to Benjamin Kaplan, Reporter to the Advisory Committee on Civil Rules & Professor of Law, Harvard Law Sch., 5 (Feb. 6, 1963).

[2] *See* Statement of John P. Frank to Courts Subcommittee on Senate S.B. 353, May 4, 1999, p. 52.

[3] To the extent these suggestions seem radical, on two occasions, before two separate jurists in the Northern District, the court took steps to quickly call out questionable claims. In one, the court utilized a strong affirmative defense pleading to dismiss a claim without prejudice and require the plaintiff's counsel 30 days to include in its pleading how the affirmative defense could be avoided. In the second, the court dismissed, *sua sponte,* three of the four causes of action, greatly limiting the scope and time period of the class.

[4] *See* Kaplan, A prefatory Note, 10 B.C. Ind. & Com. L. rev. 497, 497 (1969)

[5] For a more detailed history, *see In re Joint Eastern & Southern Dist. Asbestos Litigation,* 129 B.R. 710, 803 (E.D.N.Y. 1991), *judgment vacated,* 982 F.2d 721 (2d Cir. 1992).

[6] *See* "Do Class Actions Benefit Class Members?" An Empirical Analysis of Class Actions, Mayer Brown LLP (2013).

[7] An Empirical Survey of No-Injury Class Actions, Shepherd, Joanna (2016).

[8] Class Action Survey 2017, Carlton Fields LLP, https://classactionsurvey.com/pdf/2017-class-action-survey.pdf.

[9] *See Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997).

[10] 496 F.2d 747 (3d Cir.) (*en banc*), *cert. denied,* 419 U.S. 885 (1974).

[11] *Corum v. Fifth Third Bank of Ky, Inc.,* No. 99-cv-268, 2004 U.S. Dist. LEXIS 4651, *11-12 (W.D. KY March 3, 2004)

[12] 564 U.S. 338 (2011) (noting plaintiff will "surely have to prove [class-wide liability] at trial in order to make out their case on the merits"); 569 U.S. 27 (2013) (reversing certification where plaintiffs had not demonstrated they could carry their burden of proving class-wide damages at trial).

[13] Manual for Complex Litigation, Fourth § 10.1

[14] *Id.*

Seventh Circuit Annual Report Summary

By Gino Agnello, Clerk
Seventh Circuit Court of Appeals

Statistical Report Summary for the Year 2017

This report will briefly discuss the number of cases commenced, terminated and pending for the time period of January 1, 2017 to December 31, 2017. Statistics for the United States Circuit, District and Bankruptcy Courts will be reviewed, with a special focus on case loads in the Seventh Circuit.

Courts of Appeals

Nationally, appellate case filings have decreased 18.8%. (49,345 new cases filed) In the Seventh Circuit, the 2,730 new cases filed represent a decrease of 17% compared to last year. In the appellate courts, new case filings for 2017 reflect a return to the numbers we saw in the years before the increased filings caused by the United States Supreme Court decision in *Johnson v. U.S.* Therefore, the hundreds of *Johnson* cases filed in 2016, where a temporary new case filing increase seen in all the circuits.

The percentages of criminal, prisoner and bankruptcy case appeals heard in the Seventh Circuit are all very close to the national average. However, the Seventh Circuit hears less civil appeals. Across the country, about 50% of last year's appellate filings were pro se cases. The Seventh Circuit's pro se caseload was 58% of all new filings. The national average oral argument rate is 20.3%, the Seventh Circuit's rate is 36.1%. Nationally, 13% of opinions are published compared to 31% in the Seventh Circuit.

The median time for a case progressing from the initial filing in the lower court to the final disposition in the 12 federal courts of appeal is 30.1 months. In the Seventh Circuit, the median time for a case to go from trial through the appeal is 30.5 months.

District Courts

In the nation's District Courts, civil case filings decreased 6% below last year's numbers to 274,547 new cases. The "cases terminated" numbers were up about 6% and the number of pending cases were down 5.9% to 338,013.

In the Seventh Circuit, civil case filings decreased 2% to 23,784 total new cases. The number of "terminated" cases increased 4.5% (22,701 total cases) and "pending" civil cases went up 3.7 % to 30,684 total cases.

Criminal case filings were up 4.7% nationally (61,454 total new cases) compared to a 11.2 % increase in the Seventh Circuit. (1,971 new cases)

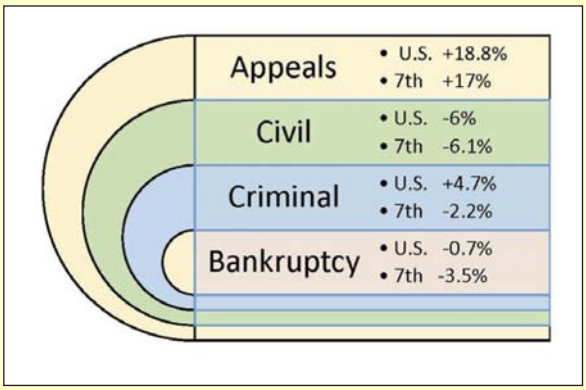
Bankruptcy Courts

Bankruptcy new case filings have dropped for many years and fell again slightly in 2017. (789,020 cases) However, this was the lowest decline (0.7%) since year 2010.

In the Seventh Circuit, total bankruptcy case filings dropped 3.5% to 91,918 cases. Bankruptcy case terminations dropped 9.1% (94,286 total cases) and pending cases were down 2% (116,681 cases) from 2016 totals.

Statistics for the first half of 2017 indicate that caseload levels continue their slight downward momentum from the numbers we saw in 2016.

Summary - New Case Filings:



NEWS AND EVENTS OF INTEREST

Around *the* Circuit

*By Collins T. Fitzpatrick**

Court of Appeals

Northern Illinois District Judge Amy St. Eve has been nominated to replace Circuit Judge Ann Claire Williams who retired on January 16, 2018.

Attorney Michael Y. Scudder has been nominated to replace Circuit Judge Richard Posner who retired on September 2, 2017.

Attorney Michael B. Brennan has been nominated to replace Circuit Judge Terrence Evans who took senior status in January of 2010.

Circuit Judge Michael Kanne announced on January 17, 2018 that he will take senior status upon the confirmation of his successor.

Northern District of Illinois

Senior District Judge Milton Shadur who retired in September 2017 passed away on January 15, 2018.

Senior District Judge Paul Plunkett passed away on March 21, 2018.

District Judge Samuel Der-Yeghiayan retired on February 16, 2018.

There are still no nominees to succeed District Judge John Darrah or District Judge James Zagel.

District Judge Frederick Kapala will take senior status effective May 10, 2019 and will continue to serve the court as a senior judge.

Magistrate Judge Michael Mason will retire effective January 31, 2019.

Federal Defender Carol Brook will retire effective May 31, 2018. Her successor will be John Murphy, the current deputy director.

Southern District of Illinois

Chief Probation Officer John Koechner retired on December 30, 2017 and was succeeded by Barbra Zarrick.

Northern District of Indiana

There are no nominees to succeed District Judge Robert Miller, who took senior status on January 11, 2016 or for District Judge Joseph Van Bokkelen, who took senior status on September 29, 2017.

Magistrate Judge Paul Cherry will retire effective December 31, 2018 and will continue to serve the court as a recalled magistrate judge.

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*Collins T. Fitzpatrick is the Circuit Executive for the federal courts in the Seventh Circuit. He began work at the U.S. Court of Appeals for the Seventh Circuit in 1971 as a law clerk to the late Circuit Judge Roger J. Kiley. He served as administrative assistant to former Chief Judge Luther M. Swygert before his appointment as Senior Staff Attorney in 1975 and Circuit Executive in 1976. He is a Fellow of the Court Executive Program of the Institute for Court Management, a Master of the Bench in the Chicago Inn of Court, a member of the Seventh Circuit, Chicago, and American Bar Associations, and a Fulbright Specialist. He has an undergraduate degree from Marquette, a law degree from Harvard, and a graduate degree from the University of Illinois at Chicago.

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