

# Appellate Practice Journal

Winter 2007

Volume XXVI  
Number 1

News and Information from the Appellate Practice Committee  
Section of Litigation • American Bar Association

## STATE LINES

Redefining the reach of the commerce clause may be one of the important legacies of the Rehnquist Court

By Paul J. Watford \*

Reshaping the Supreme Court's federalism jurisprudence may be one of the central legacies of William Rehnquist's tenure as chief justice, particularly over the course of the past decade. Beginning in the mid-1990s, the Court issued a series of decisions that curtailed the power of Congress to legislate under the commerce clause<sup>1</sup> and shielded states from the enforcement of federal mandates.<sup>2</sup> These decisions have led many to credit the Rehnquist Court with bringing about a fundamental shift in the balance of power between the states and the federal government.

\* This article first appeared in the November 2005 issue of *Los Angeles Lawyer*

### Inside this issue

A Few Do's and  
Dont's of Oral  
Argument

12

The Appellate  
Practice Associate  
Survival Guide

18

The Rehnquist  
Court

20

Recent decisions, however, suggest that it is still too early to tell how lasting a legacy the Rehnquist Court has left in this area. In the latest case pining state sovereignty interests against the commerce clause powers of Congress—*Gonzales v. Raich*,<sup>3</sup> the Court dealt a decisive defeat to those advocating stronger protection of states' rights.<sup>4</sup> In *Raich* the Court held that application of the federal Controlled Substances Act (CSA) to the intrastate cultivation and possession of marijuana for medicinal purposes does not exceed the authority of Congress under the commerce clause, a ruling that effectively nullifies California's medical marijuana statute. The *Raich* decision calls into question the notion, widely accepted until now, that the Rehnquist court has initiated a dramatic realignment of the legislative powers held by Congress and those reserved to the states.

The commerce clause delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States...."<sup>5</sup> Although the clause would eventually

become a major source of federal legislative authority, it played only a limited role in defining the size and scope of the national government for the first century following the ratification of the U.S. Constitution. Its principal purpose was to ensure that Congress had the power to prevent individual states from erecting trade barriers that would hinder the formation of a unified national market, and most of the early commerce clause cases that reached the Supreme Court arose in precisely that context.<sup>6</sup> In these cases the Supreme Court was asked to invalidate state laws that allegedly

discriminated against interstate commerce.<sup>7</sup> Thus the authority of Congress to enact legislation of its own under the commerce clause was not at issue.

The first significant exercise of the "affirmative" commerce clause powers of Congress did not come until late in the nineteenth century, with the enactment of laws such as the Interstate Commerce Act in 1887<sup>8</sup> and the Sherman Antitrust Act in 1890,<sup>9</sup>

---

## The first significant exercise of the "affirmative" commerce clause powers of Congress did not come until late in the nineteenth century, with the enactment of laws such as the Interstate Commerce Act in 1878 and the Sherman Antitrust Act in 1890

---

For the next half century, the Supreme Court struggled to develop a workable standard for determining which legislative enactments fell within the power of Congress to regulate interstate commerce and which did not. The Court started from the premise that, because the Constitution created a national government of enumerated powers, the authority granted to Congress pursuant to the commerce clause had to be meaningfully constrained. Otherwise, the Court feared, "there would be virtually no limit to the federal power and for all practical purposes we should have a complete-

ly centralized government."<sup>10</sup> Acting on that concern, the Court showed no hesitation in striking down federal laws on the ground that the legislation in question exceeded Congress's authority under the commerce clause.<sup>11</sup>

By all accounts, however, the Court's efforts to develop a coherent doctrine for limiting the scope of the commerce clause powers of Congress were unsuccessful. The Court initially

attempted to distinguish between "production or manufacturing" and commerce and held that Congress had no authority to regulate activities on the production side of the line—that is, prior to the point when goods enter the stream of commerce.<sup>12</sup> When that distinction proved unworkable in subsequent cases, the Court abandoned it and adopted instead a test that attempted to distinguish between "direct" and "indirect" effects on inter-

state commerce. Under this test, those activities that had merely indirect effects on interstate commerce fell outside Congress's power to regulate.<sup>13</sup> But in time that test, too, proved unworkable.

Finally, in 1937, under pressure from President Franklin Roosevelt to uphold the major legislative components of the New Deal, the Court backed away from its earlier attempts to confine Congress's commerce clause authority within narrow channels. Beginning with *NLRB v. Jones & Laughlin Steel Corporation*,<sup>14</sup> the

# A Message from the Co-Chairs

The new ABA year is now underway, under the leadership of 2006-2007 Section Chair Kim Askew. Kim has asked each of the Section's Committees to focus on emerging issues in their respective practice areas, in particular issues raised in cases pending before the U.S. Supreme Court. That renewed emphasis on important issues pending before the Supreme Court should provide our Committee with a wealth of programming opportunities in the year ahead.

We have already proposed a plenary program for the ABA Annual Meeting in San Francisco next August, which would feature a mock argument of a hypothetical case involving important issues addressed by the Court during the current Term, as well as a panel discussion of the Term's key cases. This term, the Court is considering such important issues as the use of race in admissions for public elementary and secondary schools, the constitutional limits on punitive damages awards, and the constitutionality of the Partial Birth Abortion Act. It is also addressing key questions regarding the regulation of "greenhouse" gas emissions, and several important questions of antitrust law, patent law, and employment law. We are also planning several CLE teleconferences toward the end of the Term to address



Larry Rosenberg



Paul Watford

key Supreme Court decisions shortly after they are handed down. If you have thoughts on which Supreme Court cases would be ideal candidates for a CLE teleconference, please let us know – we'd love to hear your ideas.

We hope that many of you will plan to attend the Section Annual Conference in San Antonio this year, which will be held on April 11-14, 2007. This year, there are only a limited number of slots allocated for Committee breakfast programs, and each program will need to be

## Contents

<b>State Lines</b>	
<b>Redefining the reach of the commerce clause may be one of the important legacies of the Rehnquist Court</b>	
Paul J. Watford . . . . .	1
<b>Message From the Co-Chairs</b>	
Larry Rosenberg & Paul Watford . . . . .	3
<b>Editor's Note</b>	
Dennis Owens . . . . .	4
<b>A Few Do's and Dont's of Oral Argument</b>	
Thomas J. Donlan . . . . .	12
<b>The Appellate Practice Associate's Survival Guide: Tips for Success in a Law Firm Appellate Practice</b>	
Victoria Dorfman, Jason Renzelmann, Lawrence D. Rosenberg, and Griffin Terry Sumner . . . . .	18
<b>The Rehnquist Court: More Significant Literature</b>	
Dennis Owens . . . . .	20
<b>Appellate Committee Leadership</b> . . . . .	27
<b>Appellate Events &amp; Dates</b> . . . . .	28

The Appellate Practice Journal is published four times a year, Winter, Spring, Summer, and Fall, by the ABA Section of Litigation. Copyright © 2007, American Bar Association, 321 North Clark Street, Chicago, IL 60610. The views contained within do not necessarily reflect the views of the American Bar Association, the Section of Litigation, or the Committee. Issue: Vol XXVI, No. 1, Winter 2007.

Please send all submissions and correspondence concerning the editorial content of the Journal to: Dennis Owens, Editor-in-Chief, DeWitt & Zeldin, 7th Floor, Harzfeld's Building, 1111 Main Street, Kansas City, Missouri 64105-2116.

The telephone number is (816) 474-3000; the e-mail address is: owensappeal@aol.com.

Send changes of address to the ABA in Chicago.

approved by Section leadership. We will present a breakfast proposal on writing persuasive legal arguments for trial and appellate judges and ADR neutrals, and will let you know when that program is scheduled.

Later this year, our Committee plans to present a somewhat new form of programming that the ABA has been developing. We plan to hold several "brown bag" regional CLE programs focusing on the key techniques for

persuasive appellate brief writing and oral advocacy. These programs, which would last approximately two to three hours, would focus on key tips for both experienced and less-experienced appellate advocates. The first of these programs will be jointly sponsored by the Edward Coke Appellate Inn of Court, and is tentatively scheduled to take place in Washington, D.C. in May 2007. Additional information about these regional programs will be forthcoming shortly.

We're looking forward to another productive year, and as always welcome your suggestions as to how we can better serve the interests of our Committee's members.



## Editor's Note

We hope that you are enjoying and benefiting from our new format, particularly the focus on feature articles. In response to several (much-appreciated) inquires, yes, the Journal will continue to include book reviews. If you have read a recent book on appellate practice, legal history, jurisprudence, Constitutional Law, or writing clear English and you would like to publish a review of it, please contact us about preparing and submitting that review to the Journal.

This is the first issue of the Journal in nearly ten years that does

not reflect the contributions of our long-time Legal Assistant, Mrs. Joanne Gamm. Unfortunately for us, she and her family have moved out of Kansas City, and she has left our law firm. Her hard work, skills, and good attitude are missed. Joanne, thank you from the Appellate Practice Journal.

Elsewhere in this issue, you will find an announcement of an opportunity to be recognized for writing the best article on appellate practice, the Howard Eisenberg Prize.



Dennis Owens  
Editor-in-Chief

Consider nominating an article, including one of your own.



## Business and Commercial Litigation in Federal Courts

EDITED BY ROBERT L. HAIG



Covering the most common commercial litigation subjects, the new edition of *Business and Commercial Litigation in Federal Courts* takes readers through a step-by-step analysis of the entire litigation process. With 16 new chapters and more than 500 pages of forms and jury charges on CD-ROM, the set is an indispensable resource for the commercial litigator.

### SPECIAL SAVINGS FOR LITIGATION MEMBERS

The eight-volume set is now available at a 40% discount to Section of Litigation members.

[www.abanet.org/litigation/books](http://www.abanet.org/litigation/books)

 SECTION of LITIGATION  
AMERICAN BAR ASSOCIATION

continued from page 2

Court issued a series of decisions upholding legislation that significantly expanded the size and power of the federal government.<sup>15</sup> The Court ultimately adopted a test for assessing the constitutionality of legislation enacted under the commerce clause that asked only whether Congress had a rational basis for concluding that the regulated activity "substantially affects" interstate commerce.<sup>16</sup>

### Guns and Gender-Motivated Violence

For almost 60 years after *Jones & Laughlin*, the Supreme Court did not strike down a single federal law on the ground that the enactment exceeded Congress's authority under the commerce clause. This period of more relaxed commerce clause scrutiny saw the Court sustain the validity of a wide range of federal legislation that is now largely taken for granted, such as the provisions of the Civil Rights Act of 1964 prohibiting racial discrimination in hotels, restaurants, and other places of public accommodation.<sup>17</sup>

The tide appeared to turn in 1995, however, in *United States v. Lopez*.<sup>18</sup> In that case, by a 5-4 vote, the Court struck down the Gun-free School Zones Act of 1990, which prohibited possession of a firearm within 1,000 feet of any public, parochial, or private school.<sup>19</sup> Writing for the majority, Rehnquist explained that the Gun-free School Zones Act did not regulate commercial or economic activity; it simply banned possession of a firearm within close proximity to a school - an activity that had nothing to do with commerce.<sup>20</sup> Moreover, the majority noted, the act was not "an essential part of a larger regulation of economic activity, in which the regulatory

scheme could be undercut unless the intrastate activity were regulated."<sup>21</sup>

Justices Stevens, Souter, Ginsburg, and Breyer dissented. They noted that the objective of Congress in passing the act was to reduce the prevalence of school violence, which lowers educational attainment among students and thus poses a substantial threat to economic productivity and commerce generally.<sup>22</sup> The majority, however, found the act's effects on interstate commerce too attenuated to satisfy the demands of the commerce clause.<sup>23</sup>

The Court's decision five years later in *United States v. Morrison*<sup>24</sup> sug-

ty, the civil remedy provision of the Violence Against Women Act, like the Gun-Free School Zones Act, did not regulate commercial conduct. Instead, the Court held, the Violence Against Women Act addressed noneconomic acts of violence that had no connection with interstate commerce and were therefore beyond Congress's power to regulate under the commerce clause.<sup>27</sup>

### Medical Marijuana

Lopez and Morrison set the stage for the next major test of the Rehnquist Court's apparent shift toward pre-New Deal conceptions of the commerce clause authority of Congress.

That test came in Raich,<sup>28</sup> which involved a conflict between California's desire to legalize medicinal marijuana use and the federal government's interest in establishing a uniform national drug policy.

The respondents in Raich were California residents who sought to use marijuana

for medicinal purposes in compliance with California's Compassionate Use Act,<sup>29</sup> an initiative measure passed by California voters in 1996. The Compassionate Use Act authorizes the cultivation and possession of marijuana for medicinal purposes pursuant to a doctor's, recommendation.<sup>30</sup> The federal Controlled Substances Act, however, classifies marijuana as a Schedule I controlled substance and renders essentially any possession of marijuana illegal under federal law. The CSA reflects the judgment of Congress that there are no currently acceptable medical uses of the drug.<sup>31</sup> The respondents in

---

## Lopez and Morrison set the stage for the next major test of the Rehnquist Court's apparent shift toward pre-New Deal conceptions of the commerce clause authority of Congress.

---

gested that Lopez might have marked the beginning of a dramatic reassessment of the Court's commerce clause jurisprudence. In *Morrison*, the Court struck down a provision of the Violence Against Women Act that allowed victims of gender-motivated violence to bring a civil suit against the perpetrators in state or federal court.<sup>25</sup> The Court split 5-4 along the same lines as in *Lopez*, with the chief justice again writing for the Court. The majority rejected the extensive findings Congress had compiled to show the substantial effect violence against women has on the national economy.<sup>26</sup> According to the majori-

Raich argued that Congress lacked authority under the commerce clause to extend the CSA's reach to their intrastate cultivation and possession of marijuana for medicinal use in compliance with state law. They argued that the CSA, as applied to those activities, was therefore unconstitutional. The Ninth Circuit accepted this argument, relying on the Supreme Court's earlier decisions in *Lopez* and *Morrison*.

To the disappointment of medical marijuana advocates, as well as those who hoped Raich would further limit the commerce clause powers of Congress, the Supreme Court reversed the lower court in a 6-3 decision authored by Justice John Paul Stevens. The majority was composed of the four dissenters in *Lopez* and *Morrison* - Justices Stevens, Souter, Ginsburg, and Breyer - and two defectors from the *Lopez/Morrison* majorities - Justices Scalia and Kennedy. Justice Kennedy joined the opinion of the Court in full without setting forth separate views of his own. Although Justice Scalia authored an opinion concurring only in the judgment, he appeared to articulate an even broader view of Congress's authority under the commerce clause than that embraced by the majority.

Given the ostensible similarities between *Lopez* and *Raich*, the immediate question confronting the Court was how the purely intrastate cultivation and possession of marijuana differed in any material respect from the purely intrastate possession of a gun in *Lopez*. Indeed, the respondents in *Raich* seemed to have a stronger hand,

given that they were acting in compliance with an otherwise valid state law. The defendant's possession of a gun on school grounds in *Lopez* constituted a violation of applicable state law, and thus the case did not involve a clash between competing state and federal interests.<sup>32</sup> The effect of rejecting the commerce clause chal-

*Raich*, no one disputed that the CSA was a valid exercise of Congress's commerce clause powers. The respondents contended only that, given the purely intrastate nature of their activities, Congress had no authority to sweep those activities within the reach of the CSA.<sup>34</sup> Moreover, unlike the legislation at issue in *Lopez* and

*Morrison*, which regulated a single class of activities, the CSA's ban on the cultivation and possession of marijuana was arguably part of a larger regulatory scheme whose overall effectiveness would be thwarted if particular subclasses of activities were exempted from its scope.<sup>35</sup>

After noting these distinctions, the majority concluded that *Raich* was controlled not by *Lopez* and *Morrison* but by *Wickard v. Filburn*,<sup>36</sup> in which the Court upheld federal restrictions on wheat production as applied to a small farmer who grew wheat that was used solely for personal consumption. In *Wickard*, the Court

declared that Congress's power under the commerce clause extends to purely intrastate activities if those activities, in the aggregate, will have a substantial effect on interstate commerce.<sup>37</sup> That test was met in *Wickard*, the Court held, because the regulatory scheme at issue was designed to stabilize the price of wheat by limiting output, and exempting all wheat produced for home consumption would undermine the government's regulatory objective: "[Home-grown wheat] supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes

---

In *Raich*, no one disputed that the CSA was a valid exercise of Congress's commerce clause powers. The respondents contended only that, given the purely intrastate nature of their activities, Congress had no authority to sweep those activities within the reach of the CSA

---

by the respondents in *Raich* was the nullification (or at least a substantial undermining) of California's policy judgment concerning a matter within a core area of state sovereignty - the protection of the health and welfare of the state's citizens.

Despite the strong state sovereignty interests at stake in *Raich*, the majority had little difficulty rejecting the arguments advanced by the respondents and the dissenters. The majority noted initially that the challenge asserted by the respondents in *Raich* regarding the application of the CSA differed from the facial challenges asserted in *Lopez* and *Morrison*.<sup>33</sup> In

with wheat in commerce."<sup>38</sup>

The majority in *Raich* held that the respondents stood in the same shoes as the farmer in *Wickard*. Although the respondents' own intrastate cultivation and possession of marijuana did not have a substantial effect on interstate commerce, the majority held that Congress had a rational basis for concluding that, in the aggregate, these activities could have a substantial effect on the interstate market for marijuana.<sup>39</sup> That conclusion would be open to question if the relevant subclass of regulated conduct had been defined narrowly to include only the intrastate cultivation and possession of marijuana for medicinal use in compliance with state law, as the respondents urged.<sup>40</sup> There was no evidence in the record demonstrating the impact, if any, that an exemption of this small subclass of activities from the CSA's reach would likely have on the interstate market for marijuana.<sup>41</sup> But the majority avoided this problem by defining the relevant subclass of regulated conduct more broadly—namely, possession of locally grown marijuana for personal use of any kind.<sup>42</sup> Exempting all personal use of marijuana from the CSA's general ban, the majority concluded, would clearly have a substantial effect on the interstate market for marijuana.<sup>43</sup>

Although there are similarities between *Raich* and *Wickard*, the parallels between the two cases are by no means perfect. The purpose of the regulatory scheme at issue in *Wickard* was price control, and it was thus easy to see how allowing an exemption for intrastate activities that significantly reduced demand for wheat sold in the interstate market would thwart the achievement of the broader regulatory objective. It is far less clear that the same can be said for the narrow exemption from the CSA sought by the respondents in *Raich*. The CSA's purpose is to ban the interstate market for marijuana altogether. If a State decides in limited circumstances to authorize

possession of marijuana that is not intended for the interstate market at all, it is difficult to argue that this State action undermines the entire regulatory objective of the CSA.

Thus the real conflict in *Raich* concerned the differing state and federal policy judgments as to whether medicinal use of marijuana should be permitted. The federal government, despite a long-running campaign by advocates of medical marijuana, has refused to remove marijuana from Schedule I under the CSA, reflecting the judgment of federal policymakers that marijuana has not yet been shown to have any legitimate medical uses.<sup>44</sup> The citizens of California have made the precisely opposite policy judgment, declaring that marijuana does have legitimate and acceptable medicinal uses in certain circumstances.

This conflict between state and federal legislative policies formed the principal basis for Justice O'Connor's dissent in *Raich*. She argued that California's Compassionate Use Act was an exercise of the state's cote sovereign power to "define criminal law and to protect the health, safety, and welfare of [its] citizens."<sup>45</sup> She questioned whether the federal government should be permitted to occupy this realm to the exclusion of the states. In O'Connor's view, the federalism concerns that had animated the Rehnquist Court's decisions in prior cases provided a fully sufficient justification for construing narrowly the commerce clause powers of Congress in this instance: "We enforce the 'outer limits' of Congress's Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government."<sup>46</sup> As the outcome in *Raich* reflects, these federalism concerns were simply not strong enough to hold together the five-justice majority that had successfully defended state sover-

## About the Author

Paul Watford is a partner at Munger, Tolles & Olson LLP in Los Angeles, where he specializes in appellate litigation.

Paul is co-chair of the Appellate Practice Committee of the ABA's Section of Litigation.

eighty interests from federal intrusion during much of the Rehnquist Court's tenure.

### Post-Raich Developments

Following the Court's decisions in Lopez and Morrison, advocates relied on those cases to attack a surprisingly diverse array of federal enactments as exceeding Congress's commerce clause powers, and lower courts were at least somewhat receptive. In the wake of Raich, however, whatever momentum Lopez and Morrison had generated for curtailing the commerce

eral species of small insects that have no commercial value and live entirely within a single state.<sup>47</sup> Relying on Lopez and Morrison, the developer argued that Congress lacks authority to regulate species with no conceivable connection to interstate commerce. One week after its decision in Raich, however, the Supreme Court denied the developer's petition for certiorari without a single dissent. The case had been viewed by many as the next logical battleground in the fight over the proper scope of Congress's commerce clause authority.<sup>48</sup>

Finally, the Eleventh Circuit reversed a federal criminal conviction for production and possession of child pornography in a case involving a defendant who took sexually explicit photographs of underage girls and kept them at his home. Relying on Lopez and Morrison, the Eleventh Circuit held that "purely intrastate, noncommercial production and possession of child pornography" falls outside the regulatory authority of Congress under the commerce clause.<sup>50</sup> The Supreme Court vacated that decision as well and remanded the case for reconsideration in light of Raich.

---

A post-September 11 world, in which many have called for the national government to assume a more dominant role, may similarly influence the direction the Court's commerce clause jurisprudence takes in the years ahead.

---

As even this small sampling of cases reflects, the commerce clause powers of Congress remain highly relevant to the federal government's ability to regulate a wide range of conduct. The Supreme Court's decisions construing the power of Congress to "regulate Commerce...among the several States" thus continue to have considerable importance, despite the somewhat arcane nature of the subject. Raich has left the direction of the law very much in flux in this area, and the current changes in the Court's composition only add to the uncertainty.

clause powers of Congress seems to have been halted. At the very least, Raich will likely cause lower courts to proceed with more caution as they ponder further commerce clause challenges to federal legislation, a result perhaps foreshadowed by the cases the Supreme Court disposed of immediately after issuing its decision in Raich.

In a closely watched case from the Fifth Circuit, a developer asserted a commerce clause challenge to the Endangered Species Act on the ground that Congress had no authority to extend the act's coverage to sev-

In another closely watched case, the Ninth Circuit relied on Lopez and Morrison to reverse a criminal conviction for possession of a homemade machine gun.<sup>49</sup> Because the machine gun had not moved in interstate commerce, and because the mere possession of the gun could not be said to "substantially affect" interstate commerce, the Ninth Circuit concluded that the application of federal firearms laws in the case exceeded Congress's commerce clause powers. The Supreme Court vacated that decision and remanded the case to the Ninth Circuit for reconsideration in light of Raich.

It may be that following the intervening events of September 11, Raich signals a shift away from the curtailment of Congress's commerce clause powers that began in Lopez and Morrison. This type of shift would not be without historical precedent. In the late 1930's the Court responded to the exigencies created by the Great Depression by relaxing the limits it had earlier placed on Congress's authority to legislate under the commerce clause. A post-September 11 world, in which many have called for the national government to assume a more dominant role, may similarly influence the direction the Court's commerce clause jurisprudence takes in the years ahead.

Endnotes

<sup>1</sup> *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>2</sup> See, e.g., *Board of Trs. Of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>3</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>4</sup> Advocates of greater state autonomy also suffered a defeat in *Granholt v. Heald*, 544 U.S. 460 (2005). In *Granholt*, the Court invalidated state laws that permitted in-state wineries to ship directly to consumers but precluded out-of-state wineries from doing so. The Court held that these concededly discriminatory state laws were not saved by the Twenty-first Amendment, which grants states significant control over the regulation of liquor within their borders.

<sup>5</sup> U.S. CONST. art. I, § 8, cl.3.

<sup>6</sup> *Raich*, 125 S.Ct. at 2205.

<sup>7</sup> See, e.g., *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>8</sup> The Interstate Commerce Act, 24 Stat. 379 (1887).

<sup>9</sup> The Sherman Antitrust Act, 26 Stat. 209 (1890).

<sup>10</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935).

<sup>11</sup> See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating law that prohibited unfair labor practices in the coal industry); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>12</sup> See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895)

("Commerce succeeds to manufacture, and is not a part of it.").

<sup>13</sup> See, e.g., *A.L.A. Schechter*, 295 U.S. at 548.

<sup>14</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>15</sup> See, e.g., *United States v. Darby*, 312 U.S. 100 (1942) (upholding Fair Labor Standards Act); *Jones & Laughlin*, 301 U.S. 1 (upholding National Labor Relations Act).

<sup>16</sup> See *United States v. Lopez*, 514 U.S. 549, 559 (1995).

<sup>17</sup> *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

<sup>18</sup> *Lopez*, 514 U.S. 549.

<sup>19</sup> 18 U.S.C. § § 921(a)(25), 922(q)(1)(A).

<sup>20</sup> *Lopez*, 514 U.S. at 561.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 623-24 (Breyer, J., dissenting).

<sup>23</sup> *Id.* at 565-66.

<sup>24</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>25</sup> 42 U.S.C. § 13981.

<sup>26</sup> *Morrison*, 529 U.S. at 614-15; see *id.* at 628-36 (Souter, J., dissenting).

<sup>27</sup> *Id.* at 617-18.

<sup>28</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>29</sup> HEALTH & SAFETY CODE § § 11362.7-11362.9 (2005).

<sup>30</sup> HEALTH & SAFETY CODE § 11362.5(d).

<sup>31</sup> 21 U.S.C. § 812(c); see *Raich*, 125 S.Ct. at 2204, 2211.

<sup>32</sup> See *United States v. Lopez*, 514 U.S. 549, 552 (1995).

<sup>33</sup> *Raich*, 125 S.Ct. at 2209.

<sup>34</sup> *Id.* at 2204-05.

<sup>35</sup> *Id.* at 2210.

<sup>36</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>37</sup> *Id.* at 127-28 ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

<sup>38</sup> *Id.* at 128.

<sup>39</sup> *Raich*, 125 S.Ct. at 2206-07.

<sup>40</sup> *Id.* at 2224 (O'Connor, J., dissenting).

<sup>41</sup> *Id.* at 2208; *id.* at 2226 (O'Connor, J., dissenting).

<sup>42</sup> *Id.* at 2212.

<sup>43</sup> *Id.* at 2206-07.

<sup>44</sup> Schedule I drugs "are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment." *Id.* at 2204; see *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1133 (D.C. Cir. 1994).

<sup>45</sup> *Raich*, 125 S.Ct. at 2221 (O'Connor, J., dissenting).

<sup>46</sup> *Id.* at 2220 (O'Connor, J., dissenting).

<sup>47</sup> GDF Realty Invs., Ltd. v. Norton, 326 F. 3d 622 (5th Cir. 2003), cert. denied, 1256 St. Ct. 2898 (2005).

<sup>48</sup> The Court was presented with a somewhat similar commerce clause challenge in Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001). The case focused on whether provisions of the Clean Water Act could be

applied to non-navigable, intrastate bodies of water that provided habitat for migratory birds. The Court held that Congress never intended to extend the Clean Water Act that far, thereby avoiding the need to decide whether Congress had exceeded its authority under the commerce clause.

<sup>49</sup> United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003), vacated, 125 S.Ct. 2899 (2005).

<sup>50</sup> United States v. Smith, 402 F.3d 1303, 1315 (11th Cir.), vacated, 125 S. Ct. 2938 (2005).The Rehnquist Court: more significant literature



**Features of the Store Include:**

- E-Products
- Special Discounts, Promotions, and Offers
- Advanced Search Capabilities
- New Books and Future Releases
- Best Sellers
- Free Gifts
- CLE Books & Tapes
- Magazines, Journals, and Newsletters

Visit the  
**ABA Web Store** at  
[www.ababooks.org](http://www.ababooks.org)

**Over 50,000 customers have purchased products from our new ABA Web Store. This is what they have to say:**

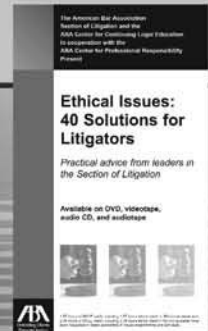
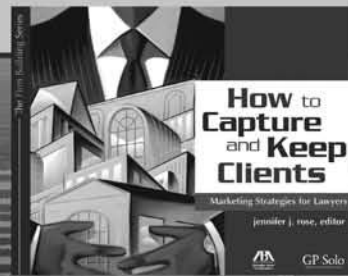
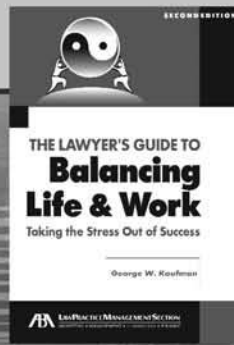
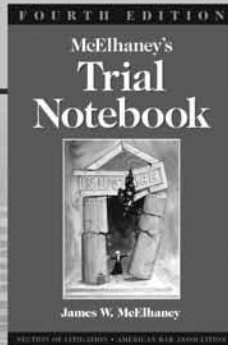
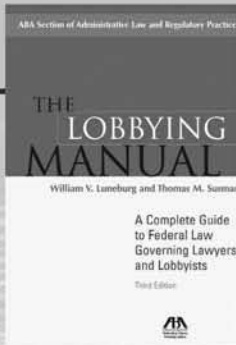
**"The site is easily manageable."**

**"I found just what I needed and obtained it quickly! Thanks."**

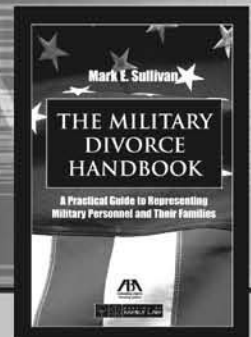
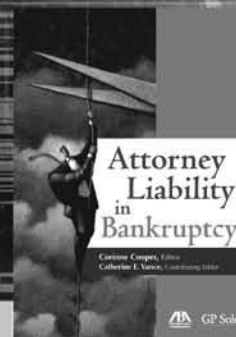
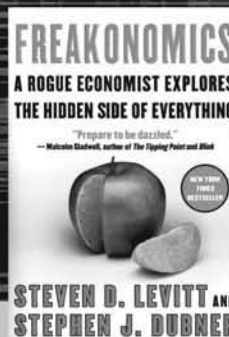
**"Easy to navigate; instructions are clear and complete."**

**"This is one of my favorite online resources for legal materials."**

**"It was easy to use."**



**Don't hesitate. With over 2,000 products online and more being added every day, you won't be disappointed!**





# A FEW DO'S AND DONT'S OF ORAL ARGUMENT

BY Thomas J. Donlan

One of those old sayings – that happens to be true – is that “experience is the best teacher.” Unfortunately, at today’s billing rates, most clients do not want to pay for you to get that experience at the appellate level. Nor can you afford to lose an appeal for a client because of a lesson you had not learned yet. Fortunately, in the words of another old saying, an inexperienced attorney can “learn from the mistakes of others.” A good way to do that is to go to an appellate court and just watch. You will be surprised at how many lawyers, even some experienced ones, make obvious mistakes during oral argument. If geography or finances makes going to the appellate court yourself unrealistic, you can talk to other attorneys who have been there. Old “war stories” have been a favored teaching tool, probably since Neanderthals were hunting mastodon. The following are some practical do’s and don’ts based on anecdotes (which are just “war stories” told somewhere other than a veterans’ bar) from appellate courts across the country.

## **1. Do Know the Record**

You may think that of course the lawyer knows the record; she tried the case. However, often that is not true. There are good reasons why the lawyer who argues the appeal may not be the lawyer who tried the case. Trial advocacy and appellate advocacy often require different skills. An attorney may be dynamic at trial, able to connect with a jury, but not as comfortable or effective in the intellectual interplay with a panel of judges about pure legal issues. Some trial attorneys do not like appellate work. It doesn’t provide the rush of slugging it out with the other side, setting up the witness for the one critical question, or delivering that stirring summation. Other attorneys simply do not get enough opportunities to feel comfortable arguing an appeal.

In addition, a fresh point of view at the appellate level often benefits the client. An attorney who has lived with the case all the way up through trial develops a certain set view of the issues and evidence. This may be hard to change on appeal, particularly

when the decision went against her at trial. The new appellate attorney comes to the case without those fixed perceptions. Finally, some clients simply want a new attorney to handle the appeal because the previous one lost at trial.

Whether you tried the case below or not, however, you must master the record. Your credibility with the appellate court can be severely damaged if you do not know what the record says on a critical point. Yet this happens far more frequently than you would think.

The attorney is arguing an issue of liability. His legal arguments are well constructed and appear persuasive. Then one of the judges interrupts and asks, “Counsel, didn’t one of the witnesses say that the instrument was broken?” The attorney pauses, perhaps flips through notes furiously and then looks up at the judge, says that he is not sure and continues, “Well, you know, your honor, I did not try the case.”

Whatever the point was, odds are that the attorney just lost the judge. Remember, the appellate judge did not try the case either. However, she has prepared, read the briefs and record excerpts, and is ready to discuss how the facts influence the legal argument being made. At the very least, it shows a lack of respect not to have worked as hard as the judge. Further, such lack of knowledge certainly is a failure of the duty owed to the client. The lawyer who makes such a statement had better hope that his client is out of town, not sitting in the courtroom listening to such a telling admission.

The requirement to know the record applies equally to the attorney who did try the case below. It is frequently a long time between the end of trial and the argument on appeal. Do not think that just because you were there at trial, you will remember everything that happened – or the way it happened. (Attorneys are often surprised after trial by what actually appears in the transcript – “Did I really say that?”) Review of the record is vital

even if you were there when the trial took place.

One subset of this rule concerns the situation where the person arguing not only did not try the case, but also did not write the brief. Although this more likely involves an experienced advocate in a large firm, it can happen anywhere, depending on the division of labor. The appellate advocate has two demands now: to know the record and to know the brief. In truth, the most devastating question is not “Didn’t the record say . . .,” but rather, “Didn’t you state in your brief . . .” (something different from what you just argued to the panel). That actually happens, too.

Every rule has exceptions, of course. The appellate court usually will understand if you cannot remember some less significant point. Depending on the court, you may be able to offer to review the record after the argument and clarify the issue with the court by letter. For the most part, if the point has any importance at all, the judge rightly expects you to be prepared to discuss it at the argument. For the attorney trying to hide behind not having tried the case below, there is simply no reprieve.

## **2. Do Prepare to Answer Questions**

Another old saying is: “How do you get to Carnegie Hall? Practice, practice, practice.” It is the same for oral argument. You must be prepared not only for questions about the record but also for questions about your argument. The best way to prepare for questions is to practice answering them. Do not write a speech. This is not a trial where you get to present an eloquent closing and the jury has to sit there. Unless you have an ice cold bench, you will get questions – and be

expected to answer them. The judges already have your brief (and in most cases have read it). Oral argument, as the experts constantly remind us, is intended to be a dialogue. Whether or not you think a judge has already made up her mind, this is your last chance to convince her. So you need to be ready with the answer that persuades her (or at least tries to disguise the hole in your argument).

The best form of preparation involves others. You have lived with this case, perhaps since trial. You have developed your arguments, refined them, and now, as the date for oral argument

---

Involving other attorneys, especially ones who have not been working on the case, allows you to get ready for the unexpected

---

approaches, you feel pretty good about them (except for those cases where the client demands to take an appeal after you tell him that he has no chance). The problem is that you may be wearing blinders as to problems with your argument.

Involving other attorneys, especially ones who have not been working on the case, allows you to get ready for the unexpected. What is it that even your opponent might not have focused on, which can threaten or

even derail your argument? Once again, a fresh set of eyes is a benefit.

How you involve others is a matter of individual preference. Many attorneys like to do a moot court. Go to a conference room with two or three attorneys and the clock running, and have the attorneys fire questions at you. Afterward you can get feedback on your answers and refine and improve them. Repetition is important, so depending on the importance of the case, doing more than one moot court can be a great tool. One prominent attorney in a CLE program explained that he was unable to craft a

satisfactory answer to a question until his third moot court. But when he appeared before the U.S. Supreme Court and got the same question he was prepared – and won.

Other appellate advocates prefer brainstorming sessions to moot courts. A group of attorneys joins with the advocate and tosses out ideas, issues, and potential questions. Charles Fried, a former U.S. Solicitor General

used this approach. Before a Supreme Court argument on an important issue of military law, he gathered together both civilian attorneys from the Department of Justice as well as active duty military lawyers. For a couple of hours, Fried led a spirited discussion sitting on the couch in his office overlooking the Mall in Washington, D.C. Fried’s subsequent impressive – and successful – argument was a tribute not only to his skill as an advocate but also to the depth of his preparation.

The method you choose is up to you. Perhaps it could even be a combination, moot court followed by brainstorming. However, take the time and prepare for the court's questions.

### **3. Do Answer the Judge's Questions**

Oral argument is not a presidential debate. The judge has not asked a question merely so that the lawyer can go off on a tangent to make a scripted statement. A good, experienced advocate can use an answer to a question as a springboard to make a point she wishes to get in. However, first you need to answer the judge's question.

Every attorney has a question she dreads and hopes to avoid. But when the question comes, it is far better to give the best answer that you came up with during all of that preparation – and then take the heat, if necessary. If you try to avoid answering, you could end up like an unfortunate lawyer appearing before Judge Posner of the Seventh Circuit. Judge Posner asked a question, and the lawyer danced around the answer. Undeterred, Judge Posner asked the question again. The lawyer once more sidestepped the question, perceiving, quite correctly, that there was no good answer for the argument he was making. Judge Posner then told the attorney to stop and answer the question, “yes” or “no.” The lawyer tried again to avoid answering, claiming that the question could not be answered “yes” or “no.” Finally, a visibly exasperated Judge Posner said: “Counsel, just answer yes or no.” The result; the lawyer ended up

aggravating the judge and still had to give an answer that was damaging to his argument.

At an oral argument, the judges are in charge. They get to ask the questions. Whether you like the question or not, whether there is an answer that helps your case or not, you need to answer the question. Every case has weaknesses or issues you wish were not there. The skill of an advocate is addressing them in such a way that the

---

Whether you like the question or not, whether there is an answer that helps your case or not, you need to answer the question.

---

rest of your argument remains standing. Trying to dodge and weave occasionally may look like it's working, but the judge knows whether her question received an answer. At best, dodging a question hurts your effort to be persuasive. At worst, you can be publicly embarrassed, like the attorney before Judge Posner.

You should never be afraid to answer a question. This is your opportunity to persuade. No appellate case is perfect. Every one has some weakness, large or small. Your job as an appellate advocate is to convince the members of the panel that, on the whole, your arguments are the better ones. If you have prepared, the question

should not be a surprise, and you can give your best answer. Your candor with the court will help your presentation, even if you do not succeed on that particular point.

Answering a question is not the same as conceding an issue. You may perceive that a line of questioning is focused on forcing you to surrender part, or all, of your argument. The way out of this trap is not avoiding the question but, instead, standing up for your position by saying no to the requested concession. Again, you may not win the point, but you will not antagonize the court or appear evasive, which is detrimental to your credibility on other points.

### **4. Do Not Make Sweeping Statements That Make Your Job Harder**

Most lawyers long for the chance to strike a blow for justice, to stand up for the little guy, to make a real contribution to the law. In practice, few cases offer that opportunity and even fewer often a chance to make an impassioned argument to an appellate court.

Most appeals turn on rather narrow issues of law (or less frequently, of fact). Yet you will see lawyers include in their argument grand proclamations, which are far broader than necessary to win an appeal. The problem with such statements is that they are often more difficult to defend than the essential point. Moreover, sweeping generalizations invite tougher questions from the bench.

In a case before the U.S. Supreme Court, an advocate began his argument with such an expansive statement concerning jurisdiction. He barely finished the sentence when Chief Justice Rehnquist demanded, “Where in our case law do you find

support for that, counsel?” The problem was that none of the prior cases had ever gone as far as the lawyer was stretching the law. The attorney was on the defensive and stayed there throughout his argument. The sad point was that there was good case law supporting the attorney’s central argument. Clearly Chief Justice Rehnquist was hostile to the attorney’s position and unlikely to vote in his favor. However, by reaching too far, the lawyer opened himself up to the Chief Justice’s attack and an entire range of questions, with no good answers, on ground he did not have to defend.

It is important before the argument to decide just what you need to win. While it may be exhilarating to deal with big issues, it may not be necessary. Focusing in on the central elements of your case also helps define the other limit to your argument – what you cannot concede. When pressed by a judge to abandon certain arguments, you will know what you must preserve and not be trapped into giving away your crucial points. Careful selection will ensure that your argument is aimed at what is really important for your client to succeed rather than what makes you feel important.

Obviously, there are cases that you cannot win without expanding the scope of prior decisions. That is better done openly, rather than by appearing to claim that the prior case law has gone farther than it has. Attorneys too frequently mischaracterize the scope of existing decisions to make it appear that their point is included. While occasionally an overworked trial judge may accept such a misrepresentation, a panel of appellate judges is all too likely to see through it.

There are those cases where great principles are at issue, where the advocate is indeed striving for a tectonic shift in the law. If you are priv-

ileged to argue one of those rare cases, cherish the opportunity. Yet even there, the rule applies – do not reach or claim more than you must to win for your client.

### **5. Do Know When to Sit Down**

One of the hardest things, once the argument begins, is knowing when to stop. You have prepared for a long time, you have waited during the arguments before yours, you have waited for your opponent – finally it is your turn. So far, things have gone well; the panel really hammered opposing counsel. In fact, the judges have made most of your points. You launch into your argument and notice that you are not getting any questions. What a great opportunity to make your highly polished points without interruption – or is it?

Perhaps, instead, it is time to ask the panel if they have any other questions and, if not – sit down. This is a difficult decision and only the most experienced and accomplished advocates are comfortable when the situation arises. Solicitor General Fried, in arguing the military law case to the U.S. Supreme Court, gave a stunning demonstration of how less can be more. The Solicitor General was arguing that the Supreme Court should overrule a precedent. After a little more than twenty minutes of dialogue with the Court, the justices appeared to run out of questions. So Fried politely said “If the Court has no further questions, I will relinquish my remaining time” – and he sat down, with almost ten minutes of time remaining.

Most advocates before the U.S. Supreme Court would not even consider giving up some of their precious time, but that may be the best choice. If the panel gives a clear signal that you are winning, do not risk changing their mind by saying anything more. It is not about your moment in the sun, but the best result for your client. You

## About the Author

Tom Donlon is of counsel to the firm of Robinson & Cole LLP in its Stamford, Connecticut office. He focuses his practice on appellate and civil litigation. Tom is co-chair of the Programming Subcommittee of the Appellate Practice Committee

need not fear that the court has secret questions you will fail to address by stopping before your full time has expired. If the court has additional questions, they will inevitably tell you, if you politely ask them, before sitting down. You only have to see one lawyer snatch defeat from the jaws of victory by talking long after she should have sat down to realize that silence can be golden.

at the lights above the bench – and his glasses immediately darkened. There he stood, arguing for his drug-dealing client wearing the equivalent of Hollywood shades.

A set of do's and don'ts is not intended to double as fashion advice, merely to pass on experiences. Perhaps in thinking about your appearance, you might consider that the judges you will argue before are dressed in black

Looking in the mirror involves more than what you are wearing. It includes what you are saying and how you are saying it. Appellate advocacy requires heightened self-awareness and a willingness to change. No one style of dress or presentation is appropriate to all cases. While you must ultimately be comfortable with the approach in a given case, you should always be checking the mirror to see how that approach looks from the outside.

Appellate advocacy is challenging, rewarding, and on occasion nerve-racking. There is much to be learned by watching the masters, lawyers who regularly appear before the appellate courts. They provide a model to which to aspire. However, for many attorneys, better lessons can be learned by watching or hearing about the lawyers who really foul up. You may not be blessed with the special ability to argue with the very best, but by paying attention to the basic do's and don'ts, you can easily avoid being thought of as among the worst.

---

## Appellate advocacy requires heightened self-awareness and a willingness to change

---

### **6. Do Look in the Mirror**

Personal appearance is a delicate issue in today's American society. It is tied up in issues of self-expression, popular culture, conformity, and tradition. Few attorneys would show up to argue an appeal in jeans and a flannel shirt, regardless of what is acceptable at Microsoft. However, you occasionally see strange sights in the courtroom. You need to keep in mind who you are representing and what you are trying to say.

Once an attorney appeared in the U.S. Supreme Court to argue a search and seizure issue. His client, whom the lawyer had represented at trial and before the Ninth Circuit, had been convicted on a drug charge involving a substantial amount of money. The attorney appeared in a striking silver grey suit and photogray glasses. Being from a warm climate, the attorney's glasses were designed to deal with very sunny days. As the attorney approached the lectern, he looked up

robes that go back centuries and have not been seen elsewhere in modern society, outside of choirs and graduations, in almost that long.

Whatever you decide to wear, it is best to keep it on. In another courtroom, on a warm sunny day, a lawyer was sitting at counsel table while his opponent argued. Apparently affected by the heat, the lawyer rose and – while the panel looked on in amazement – removed his coat, hung it on the back of his chair, loosened his shirt and sat down again. Nothing was said by the judges at the time or when the attorney arose to present his argument. However, one of the judges was heard to remark, at a subsequent social event, that he had never seen such a disrespectful display in his entire time on the bench. While the judge never said the attorney's actions affected the decision, when the opinion came out, the undressed attorney lost.





Successful litigators understand the importance of lifelong learning. But with research, client meetings, and the everyday work of litigation practice, it can be difficult to find time for professional development. With Litigation Series Teleconferences, discussing the latest issues with nationally known faculty is as easy as picking up the phone.

## Litigation Series TeleConferences

THE CONVENIENT WAY TO STAY CURRENT  
ON TRENDS IN LITIGATION PRACTICE

Join leading lawyers and judges on the second Tuesday of the month for a lively and balanced discussion of hot issues and litigation fundamentals. As a member of the Section, you qualify for special pricing on each program.

#### Recent teleconference topics

- Witness preparation and Rule 615
- Inadvertent document production
- Email management
- Successful oral argument
- Sarbanes-Oxley update
- Class certification

Get connected today at  
[www.abanet.org/litigation/teleconferences/](http://www.abanet.org/litigation/teleconferences/)



# The Appellate Practice Associate's Survival Guide:

## Tips for Success in a Law Firm Appellate Practice

BY Victoria Dorfman, Jason Renzelmann, Lawrence D. Rosenberg, and Griffin Terry Sumner

The following are tips for success as an associate or junior lawyer in a firm appellate practice. While these suggestions are not meant to be exhaustive, we feel that by following them, you will put yourself in position to do very well in a firm appellate practice:

### **Keep lines of communication open.**

Make sure that you discuss in detail the assigning partner's expectations for any project or work that you perform. It is usually helpful to create an outline of any brief or motion that you draft and to have strategy and evaluation sessions as your research and drafting progress. It is not a good idea simply to have a short initial session with the partner where you get your assignment, disappear for weeks, and then return with a proposed "final product." It is much easier to revise your work in earlier stages; it will save you time and will save your clients money.

### **Know the rules of procedure, particularly local rules.**

As a junior appellate lawyer, you are likely to be in charge of filing briefs. You do not want to be embarrassed before your more senior colleagues or jeopardize your client's case by failing to follow all of the varied applicable rules. Some state courts require affidavits by a lawyer stating that there is support for every proposition set forth in the brief; other courts have esoteric rules about service, font, or electronic filing. Make sure that you comply with all of the applicable rules. It is usually critical that you are the "go to" person on such procedural issues.

**Follow the deadlines.** Some courts set a briefing schedule, others do not; for the latter jurisdictions, you need to follow their local rules to calculate when your brief is due. Make sure

your calculations follow rules on counting the days (whether they are calendar days or business days). While this seems simple, we have heard stories of even the best and most well-regarded junior lawyers who have made a mistake with a confusing deadline that has made life very difficult for the senior lawyer on a case.

**Take initiative.** It is a given that you should comply with the expectations of the assigning partner, but do take the initiative. If you are pursuing a certain research trail or are suggesting a certain strategy for the brief, anticipate the next logical question and be prepared with answers.

### **Be very careful in your research.**

Do not limit yourself to computer searches; you may be able to find good cases, but always double-check treatises and practice digests to make sure that you are indeed finding the most relevant and direct authority on the question in your case. It is too easy to miss an important or factually similar case with computerized searches if you don't come up with the right search terms.

### **Develop the appropriate legal rule.**

Understand the law controlling your issue very well. Read the seminal cases and cases with analogous facts. Then, try to figure out, first, at the most general level, what is the rule governing your case. Based on your research into controlling caselaw,

refine that rule as it applies to the facts of your case. Make sure that the rule you propose is consistent with the controlling authority and will result in the victory for your client.

### **Don't be afraid to be creative.**

Too often, young attorneys are afraid of making any arguments unless the exact same argument has been accepted in a case. They fear that they are missing something and will be embarrassed when the partner quickly identifies a hole in the argument. While it is true that argument need to be tied to the case law, a young lawyer can really make an impression by coming up with a creative argument that the partner has not thought of or seen before, which sometimes is one that cannot be quoted directly from a case. To be sure, sometimes such arguments don't pan out, but that is what drafts are for.

### **Read the facts of the relevant authority carefully.**

So much of what young appellate lawyers do is distinguish contrary caselaw and trying to explain why the logic underlying a seemingly adverse case really supports your position. Oftentimes, the best fodder for this kind of argumentation is not found in the legal "discussion" of the authority you will cite, but can be developed from the procedural posture or specific facts of that authority. Opposing lawyers often will cite a case that strongly states a favorable legal rule without paying close attention to facts that clearly distinguish the case. Pointing

out those critical differences is often the best way to make a persuasive argument in an opposing brief.

**Read the legal propositions of the relevant authority carefully.**

Just as opposing counsel may cite a case that is plainly inapposite on its facts, it is not infrequent for lawyers to cite a case that contains a helpful quote on some marginal proposition, but which has otherwise devastating analysis either on that point or on others that are raised in your case. Therefore, just because your opponent cites a case, it does not mean that you cannot cite it as well and use it to your advantage. Also, needless to say, be sure to check whether all cited authority is still valid or if it has been overruled or undermined by subsequent cases from that court or higher courts. Be attentive to other courts that have disagreed with cases cited by your opponent – they provide both formal and substantive support for you, and they can suggest new lines of reasoning to be used in the brief

**Use the IRAC method.** Although the IRAC method is not the absolute rule for brief writing, it is usually a very effective method of communicating to judges. Lay out the argument section by identifying the issue (I), stating the applicable rule (R), applying that rule to the facts of your case (A), and providing a conclusion (C). When developing the rule, it is usually helpful to start with general statements of the rule and then to show how that rule has been applied in specific factual contexts that are analogous to the factual context of your case. When applying the rule, it is also highly advisable to state your affirmative case – why you win under the identified rule, before responding to your opponent’s arguments or

anticipating what your opponent may state in a response brief.

**Minimize or avoid footnotes altogether.**

As a general rule, briefs

---

many young associates feel embarrassed or upset when they get a draft back from a senior attorney, and it is covered in red marks. They shouldn't.

---

should not rely on footnotes to make their point. Footnotes may sometimes be appropriate to set forth additional citations or to address a point that would otherwise be distracting but is not really part of your argument. But footnotes themselves are distracting and many appellate judges dislike them. They should usually be eliminated, or at least minimized.

**Be meticulous about your work product.**

As a young appellate lawyer, your work is almost entirely comprised of drafts of briefs and written memoranda. So, your written work is the primary means by which you make an impression on the partners. Obviously, well reasoned and supported arguments are the most important factor in making an impression, but also important is avoiding careless grammatical or spelling errors, or the like, that may jump out and annoy or distract the reader. It is worth your time to thoroughly proof-read any written product before delivering it to a senior attorney.

**Embrace editing.** Too many young associates feel embarrassed or upset when they get a draft back from a senior attorney, and it is covered in red marks. They shouldn't. A thorough

editor teaches you how to be a better writer. It is very difficult to edit one's own writing, since you obviously chose what seemed to you the best way to write it. When you work for a senior attorney who is an aggressive editor, you can see how your writing sounds to another reader and how it might be changed to be clearer, more concise, and more persuasive. Even if you don't agree with every change, at least make the effort to understand what the senior attorney perceived to be weaknesses in your writing, so you will be more conscious of them when you write in the future. Regular back and forths with a good editor will make your writing dramatically better, if you let it.

**Learn from the varied styles and skills of more senior lawyers.**

It is very likely that within a very short period of time, you will be exposed to different writing styles of the senior lawyers with whom you work. Some will be more aggressive in their arguments, others will use colorful language to great effect. Learn from all these various approaches and incorporate elements of these approaches into your own writing, so long, of course, as they are consistent with your own personality and basic writing style.





# The Rehnquist Court:

## More Significant Literature

BY Dennis Owens

In the last issue, we commented on several recent books on the Supreme Court during the tenure of William H. Rehnquist as Chief Justice of the United States. A number of other important books have been published on the topic, and we review them for you now.

After the highly significant decisions of the Warren Court, and the promises of presidential candidates to appoint more restrained judges, the political commentators predicted a “counter-revolution” or a judicial Thermidorian Reaction with each new appointment by Republican presidents. The Burger and Rehnquist Courts never fulfilled the political science professors’ predictions. Indeed, one of the best books on that era was entitled *The Warren Court: the Counterrevolution That Wasn’t*, by Vincent Blasi (Yale University Press).

An early study of Rehnquist’s philosophy is Donald E. Boles, *Mr. Justice Rehnquist, Judicial Activist ? the Early Years* (Iowa State University Press). Boles’s point is that any conservative judge is an “ideologue” and that Rehnquist fits his bill. Any anecdote of his life, even those the author admits are “perhaps apocryphal,” is included if it serves Boles’s purpose of pigeon-holing his subject. He gleefully brings up the memo, one and a half pages long, which Rehnquist wrote to Justice Jackson when he was his law clerk. The memorandum states the school district’s position in court in *Brown v. Board of Education of Topeka*. Rehnquist said, many years later, that he wrote it for the justice’s purposes as a devil’s advocate and that it was not his personal view. Rehnquist was not a racist. (John Davis, the great appellate advocate, represented the school districts, and no one labeled him a racist.) Of course, Rehnquist has no shortage of critics for one to quote. But, Boles’s treatment is extreme. When

Rehnquist said he tried to stay connected with the world outside the court’s building by taking an evening class on painting, Boles concludes that this was “a remark suggestive of the fact that the old political activism still burns” (pages 115-116). We are not making this up.

David Savage, the newspaper reporter, wrote *TURNING RIGHT: the Making of the Rehnquist Court* (John Wiley & Sons) in 1992. It is a well-written book, maybe the most entertaining of the literature on this court. It covers the court’s work from 1986 to 1991. The author is able to create suspense as to the outcome of cases in his term-by-term narrative. Savage precisely conveys the facts and issues presented with each case and what the justices each brought to the decision. But, his theme is wanting: that Rehnquist’s goal was to dismantle civil rights. Savage’s handling of the opinions does not support his contention. For instance, in *Cruzan v. Director*, the court did *not* undercut any previously-recognized right to die. So, how did that case demonstrate that under this “edict” of Rehnquist, “the Bill of Rights is shrinking in significance”? And what “edict”?

David Kairys wrote *WITH LIBERTY AND JUSTICE FOR SOME: a Critique of the Conservative Supreme Court* (New Press) back in 1993. His book is quite interesting, in part because he chose to study a number of cases which are not so famous. His imaginative example of “fighting words” is “Your mother is a whore” or

“Your father is a liberal.” Kairys’s style is lively and crisp. His viewpoint is liberal, but his treatment of the cases is consistently even-handed. We enjoyed this feisty book and learned from it.

An interested study from 1994 is *BRENNAN VS. REHNQUIST: the Battle for the Constitution* (Alfred A. Knopf) by Peter Irons. Irons immediately admits that his book is not objective and that “readers will soon discover my preference for Justice Brennan’s approach to the Constitution.” This is plainly true. Brennan served thirty-four years on the bench, nineteen of them with Rehnquist. Irons argues that their respective approaches could be boiled down to two single words: “dignity” for Brennan and “deference” for Rehnquist. He studies one hundred cases (in ninety-eight of which they were on opposite sides). Irons presents Brennan’s views fairly but appears to distort Rehnquist’s interpretation of the Constitution. Neither man’s philosophy could ever be reduced fairly to one word. Irons’s choice of cases sets up his analysis: Brennan was just interpreting the Constitution with admirable social goods, while that means Rehnquist was pursuing his agenda. The author’s approach is that Rehnquist sought to “narrow” liberty, ignored the text of the law, and tried to shut the courthouse door. If this partisan viewpoint is what you want, then you will like this book.

A more specialized study is the 1991 book by Derek Davis entitled *Original*

Intent: Chief Justice Rehnquist and the Course of American Church-State Relations (Prometheus Books). Davis is a strong advocate of the separation of church and state. As a scholar at Baylor University, he is a true purist on this issue. He concludes that Rehnquist's views portend a serious departure from the tradition of separation. Much of the book is given over to the history of the religious clauses in the First Amendment and Ed Meese's original intent jurisprudence. This is an astute and brisk treatment. The author's study of Rehnquist's opinions in Establishment cases is edifying and even-handed. We learned a lot by reading this book. Davis is critical of Rehnquist's historical approach as being too limited (to the record of the Congress which passed the Bill of Rights) and not encompassing the broad sweep of the entire history of the struggle for religious freedom. Nevertheless, Davis respects Rehnquist's jurisprudence and integrity.

In the twenty-first century, we have had a number of efforts to sum up the Rehnquist era (all written a bit before its end). Tinsley E. Yarborough, a political scientist, had previously written very fine books on John Marshall Harlan the elder and John Marshall Harlan the younger, which we reviewed quite favorably in this *Journal*. We were grievously disappointed with his *THE REHNQUIST COURT AND THE CONSTITUTION* (Oxford University Press), because of his newly-revealed and stridently liberal slant. He begins by suggesting that, by campaigning in 1980 in Philadelphia, Mississippi, Ronald Reagan was somehow endorsing the 1964 murders there of three civil rights workers. It goes down hill from there. Nevertheless, we trudged on through to the end of the book. It has two compartments which did not function together. The first two chapters con-

cern the history of the selection, nomination, and confirmation of each of the members of the court as of 2000. Also examined are the role of law clerks, oral argument, and lack of television cameras in the building. Some of the allegations seem improper, particularly the attacks on the character of Clarence Thomas. These misstatements either lack footnote authority or refer only to highly adversarial literature. It appears that every critic of every Republican nominee is respectfully quoted, while every Clinton nominee got a free pass from such criticism.

---

Davis is a strong advocate of the separation of church and state. As a scholar at Baylor University, he is a true purist on this issue. He concludes that Rehnquist's views portend a serious departure from the tradition of separation.

---

The second compartment is the chapters which follow pertaining to seven areas of law, ranging from the religious clauses to equal protection. The famous footnote in *Carolene Products* which refers to "exacting scrutiny" for Bill of Rights issues is called by Yarborough "the Double Standard," a phrasing which we had not heard before. These chapters discuss seminal decisions in each of the subject areas. Albeit with the now-expected bias of the author, these discussions are com-

prehensive and factually reliable. They often presume a lawyer's or political scientist's knowledge of the state of the law before these cases arose. There is one very clear exception to the liberal lean of these recitations. The discussion of *Bowers v. Hardwick* and *Romer v. Evans* in the chapter on Unenumerated Rights is exceptionally objective. The entire book is well written.

Yarborough's normative arguments are strongly stated. For instance, the belief that (as Harlan the elder wrote in his famous dissent in *Plessy*) our Constitution is color-blind is addressed

this way in the chapter on Equal Protection: According to Yarborough, the Rehnquist Court's "unduly wooden commitment to a color-blinded (or 'gender-blind') Constitution in the near term [is] combined with a naïve faith in the adequacy of negative" remedies for discrimination (page 253). Both compartments are interesting. They just do not relate well with each other as we hoped.

**MORALITY IMPOSED:** the Rehnquist Court and Liberty in America (New York University Press) appears to be a work of advocacy, rather than objective analysis, by Stephen E. Gottlieb, a professor at a law school in Albany, New York. Its central thesis is this: Forget reading the law in question, learning the facts, and applying precedent. Supreme Court judges simply impose their personal views on the country. Period. Discussions of the judicial process are smoke screens. Forget

reading the reasoning in opinions. Find out about the judges' personal philosophy, life history, predilections, and, most importantly, what sort of country they are working to create. Judges are conscious public policy-makers pretending to be mere conflict resolvers.

Further, Gottlieb contends that the Rehnquist majority has rejected the bedrocks of Anglo-American jurisprudence: freedom of conscience and freedom to do anything that does not unnecessarily harm others.

The original Constitution, including the Bill of Rights, did not mention a "right to vote."

Voting rights were to be decided by each state. Amendments XV (race), XIX (women), XXIV (poll tax), and XXVI (18, 19, and 20 year olds) ended the denial of the vote to certain groups, but did not establish a federal right to vote. Gottlieb argues that the court's ultimate role is as protector of the individual right to vote. He never mentions any weakness of his arguments, such as the text of the Constitution lending him no support whatsoever.

Gottlieb apparently believes that he can see into the court majority's evil minds. He glibly imputes motives. He ascertains their rejection of "liberal tolerance, realism, and functionalism" (page 197). This was a most unconvincing exercise in projection and speculation. Every justice and every law clerk who has written on

their experience refutes his theories of how and why cases are decided by the Supreme Court. Gottlieb writes that he expected his approach "to be controversial." He concludes that there are no liberals on the court to satisfy him; the "liberals" are conservatives

---

**Gottlieb writes that he expected his approach "to be controversial." He concludes that there are no liberals on the court to satisfy him; the "liberals" are conservatives and the so-called "conservatives" are radicals.**

---

and the so-called "conservatives" are radicals.

Herman Schwartz gathered together over a dozen of his left-wing colleagues to produce his *THE REHNQUIST COURT: Judicial Activism on the Right* (Hill & Wang). Robert Drinan noted the tilt was "too one-sided. There are no voices that are conservative or even moderate" (book review, *National Catholic Reporter*, February 7, 2003). A version of this material appeared in an issue of *The Nation* magazine. The various authors relentlessly insist that the great civil rights victories had been reversed. By reversed, they apparently mean "not expanded in a manner that suits us." The arguments are dogmatic. Every court decision is the "imposing of their viewpoint," not the resolution of a dispute. Of course,

*Roe*, *Brown*, and *Miranda* are still with us and as vital as ever. But, they don't let those stubborn facts distract them.

Of course, the reference to "activism" is peculiar, since no liberal ever thought it was a bad thing when it was

Warren or Brennan doing the "acting." An objective reader will admit that some chapters are more balanced than others. Indeed, they address issues which most political science teachers do not bother with: antitrust law, environmental law, and securities regulation. The book is comprehensive. Interestingly enough, many of the essayists admit that there have been recent decisions that contradict their contentions. For instance, after complaining about the court's respect for state law on the death penalty, one writer refers to *Atkins v. Virginia*, a 2002 case which overturned precedent and stopped the execution of a mildly retarded person. The argument that the Rehnquist Court is hostile to free speech is completely undercut by the cross-burning, flag-burning, and other similar cases. Likewise, the gay rights cases undercut this liberal critique. If one is looking for a liberal attack on all things conservative, Schwartz's book would be that cup of tea.

A highly partisan attack on the Rehnquist Court has the intriguing title of *THE MOST ACTIVIST SUPREME COURT IN HISTORY: the Road to Modern Judicial Conservatism* (University of Chicago Press). It was written by Thomas M. Keck after *Bush v. Gore*. He calls it "the O'Connor Court" and admirably so. He sees her and Justice Kennedy as "saving" the Warren Court legacy. His primary concern is the role and favor of what he calls "the political elites." He acknowledges that the confidence in the Supreme Court as

an institution rose after *Bush v. Gore* (including a rise from 44 to 46 percent among Democrat voters). He believes that the Court is tempered by the “nation’s ever-firmer commitment to rights-based activism.” The nation’s commitment to activism? Or, does he mean the political elite’s commitment?

Keck finds evidence of judicial activism in the fact the court has struck down thirty-three federal statutes since 1995. For him, activism is “assertion of power against other branches of government.” Usually, the term “judicial activism” has meant the willingness of judges to legislate from the bench and to find rights for which there is no basis in the text or tradition of the Constitution. His definition more readily fits the term “judicial review.”

Keck claims that “anyone who takes over the courts is going to try to use judicial power to their own ends.” This makes little sense. Courts are not “taken over” by ideologies. The conservative justices have noted and written opinions which establish that they are deciding cases and not using their power to reshape the country to their own ends. Keck cites as evidence of the crime of activism the *Roe, Romer*, and *Lawrence* decisions, which, of course, constitute the liberal activism that the conservatives decry.

The author is very careful and fair in his restatement of the court’s opinions. He faithfully and ably reports the subtle differences in concurring and dissenting opinions. But, his political analysis is clearly not objective, and we found it unpersuasive.

There is no end of books about the Rehnquist Court, but several others deserve mention here. We previously reviewed Kenneth Starr’s *FIRST AMONG EQUALS: the Supreme Court in American Life* (Warner Books). This is one of the best sketches of the jurisprudence of the nine members of the Rehnquist Court over

its last ten years. It is intelligent, accessible, very fair, and highly knowledgeable in its grasp and clear exposition of the approach of each of the justices.

Cass R. Sunstein of the University of Chicago law school is one of the most quoted and influential writers in law and politics. His most recent book is *RADICALS IN ROBES: Why Extreme Right-Wing Courts are Wrong for America* (Basic Books). He begins by rejecting the “liberal” and “conservative” labels for judges as being inadequate. He prefers four terms of his own devising: perfectionism, majoritarianism, minimalism, and fundamentalism. The perfectionists want the Supreme Court to find in the Constitution what they believe *should be* in it, even if it is not really there at all. The majoritarianists wish to defer to elected leaders for the sake of democracy. He places Oliver Wendell Holmes in this stream.

The third class, the minimalists, want to decide each case on its own merits without reference to a theory of interpretation or ideology. They are “living Constitution” advocates. Sunstein examined this position in an earlier (1999) book, *ONE CASE AT A TIME: Judicial Minimalism on the Supreme Court* (Harvard University Press). The patron saint of minimalism is Justice O’Connor. She has denounced what she calls “Grand Unified Theories” (using the term of theoretical physics), meaning schools of jurisprudence. Sunstein argues for minimalism which he says, in contrast to the first two positions, has strong representation on the bench and strong support from the public.

Ascendant is the fourth position, which he calls fundamentalism. Its followers are – you guessed it – radicals in robes. The critical flaw with Sunstein’s approach is that the term fundamentalist, as he defines it and applies it, is a grossly inaccurate and unfair description of the Rehnquist-

## About the Author

Dennis Owens practices appellate law in Kansas City, Missouri. He is a Fellow of the American Academy of Appellate Lawyers and has been the editor of this journal since 1982.

Scalia jurisprudence. No one can seriously expect that Justice Scalia or Thomas would strike down a child labor law because the Founders did not mention it in the Constitution of 1787. No one except Professor Sunstein, that is. If you must misstate your adversaries' position, you have a weak case yourself. Why did Sunstein choose his term "fundamentalism"? Was it the pejorative tone it has for intellectuals and secularists?

Sunstein is remarkable in his wide range of mastery of the law and the fertility of his imagination. But, he is consistently unfair in his extrapolations from the actual holdings of cases to nonsensical speculations. "If the radicals hold A, that means they favor A2 and AxBxC." Well, no, it does *not* necessarily mean that at all.

The *ying* to Sunstein's *yang* would be PLAYING IT SAFE: How the Supreme Court Sidesteps Hard Cases and Stunts the Development of the Law (New York University Press) by Lisa A. Kloppenberg, a law teacher. As one can tell from the title and subtitle, Kloppenberg believes that the function of the court is not to resolve real disputes between persons with a real stake in the outcome. Rather, she wants the oracles to announce wise, liberal decisions upon every demand for a right. And, she wants it now. Much of her book is devoted to the stories of persons who pursued claims but were unable to obtain their desired result just because their claims were

not ripe or not justiciable, were moot, or because they lacked standing. This jurisprudence is called "perfectionism" by Sunstein. It seems to owe more to Oprah than to Holmes or Cardozo. "It is, like, just so frustrat-

the courts' resources. There would be no end to the courts' work if they were required to give binding advisory opinions. Dr. Newdow did, indeed, lack standing. This book is filled with learning and passion, but it is silly at its core.

---

The very latest book to be published on this period of legal history is The Rehnquist Legacy, edited by Craig Bradley and published by the Cambridge University Press. This is a superb collection of essays by a diverse cast of law professors of varying stripes and a few others such as Linda Greenhouse. This is a scholarly work of uniformly high quality and depth.

---

The very latest book to be published on this period of legal history is THE REHNQUIST LEGACY, edited by Craig Bradley and published by the Cambridge University Press. This is a superb collection of essays by a diverse cast of law professors of varying stripes and a few others such as Linda Greenhouse. This is a scholarly work of uniformly high quality and depth. Even after absorbing all the volumes already described in this essay, one will find in this collection new and interesting ideas about the Rehnquist Court and its impact on future jurisprudence. This book is highly recommended. (As far as we can determine, it is available only in paperback.)

Robert H. Bork is the editor of our last volume to be reviewed. His book of essays is entitled "A COUNTRY I DO NOT RECOGNIZE": the Legal Assault on American Values (Hoover Institution Press). The quote is from Justice Scalia's dissent in *Board of County Commissioners v. Umbehr*: "Day by day, case by case, [the Supreme Court] is busy designing a Constitution for a country I do not recognize."

ing when I can't get the Supreme Court to decide for my cause." The author is frank about her position: the Rehnquist Court "has refused to expand the Warren Court's Constitutional vision" (page 1), and the result in *Bush v. Gore* was unsatisfactory to her. She certainly appears to be anti-majoritarian.

The case or controversy requirement of Article III is a wise and necessary provision. Standing is not an "avoidance technique" employed to avoid hard cases or cases in which a party passionately wants an answer. Standing is a rule utilized to conserve

The contributors to this particular publication all have sterling credentials as scholarly conservatives. (This is sort of like the right-wing version of Herman Schwartz's collection of *The Nation* essays.)

Bork's long introduction is a strong argument for the merits of Rehnquist jurisprudence and against the flaws of the court's minimalist decisions on abortion, and the religious clauses. Bork is indeed brilliant and an excellent writer, but we believe that while he reassures conservatives, he likely does not convert any liberals. The five essays are surprisingly short, but all are well-written and very well

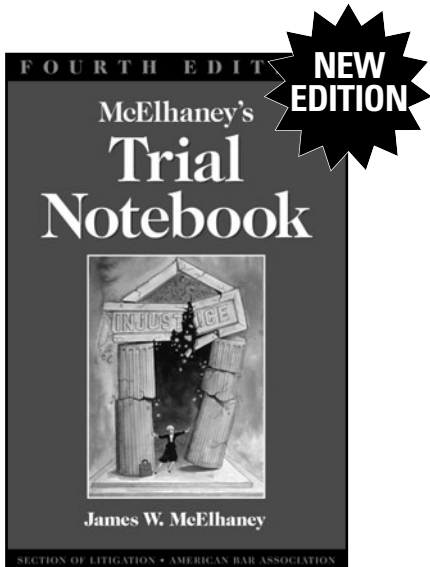
informed. We learned a great deal reading it. There are no real moderates among these voices. These views are challenging and worth examining.

We predict that there will be a large number of new books in the next year or two with the phrase "Rehnquist Court" in their title or subtitle. We doubt that they will add any brilliant new insight or knowledge to the liter-

ature we have reviewed. That will not stop the law professors and political scientists from trying.



## McElhaney is back – and better than ever



A new edition of the ABA's all-time best-selling book on trial practice.

Expanded, updated and revised by the author, this new edition of *Trial Notebook* includes 30 years of James McElhaney's clear, lively and memorable prose from *Litigation Journal*. Nearly a third larger than the previous edition, the book now includes 90 chapters that cover everything from discovery through rebuttal and provides you with techniques, tactics and strategies for every stage of trial. James McElhaney knows his subject better than anyone, as a practitioner and as a professor. The result is information, grounded in actual courtroom experience, that you will understand, enjoy and use daily in court. Used again and again by thousands of trial lawyers, *Trial Notebook* is certain to make your trial work more effective.

**Bulk discounts available.**

2005 • 792 pages • 6 x 9 • paper  
ISBN: 1-59031-503-0 • Product Code: 5310348  
\$54.95 Litigation member price • \$64.95 Regular price

SECTION of LITIGATION  
AMERICAN BAR ASSOCIATION

To order, call the ABA Service Center  
at 1-800-285-2221  
or visit our website at [www.ababooks.org](http://www.ababooks.org)

Up-to-date and helpful case summaries from our dedicated Circuit Editors are located on the Appellate Practice Committee's website:  
<http://www.abanet.org/litigation/committees/appellate/circuitnotes.html>

#### First Circuit

- Argument that Business Risks Exclusions Rendered Coverage Illusory Was Not Preserved for Review (B & T Masonry Const. Co. v. Pub. Serv.)

#### Second Circuit

- Nelson v. Unum Life Insurance Co.; Honeywell International, Inc. v. Purolator Products Co.

#### Third Circuit

- Court of Appeals Can Address Any Issue Fairly Included Within Order Certified for Interlocutory Appeal (Santana Products, Inc. v. Bobrick Washroom Equipment, Inc.)

#### Fourth Circuit

- Explaining the "Complete Preemption Doctrine" (Lontz v. Tharp)

#### Fifth Circuit

- Outside Counsel Can Bolster Class Representative's Adequacy (Electronic Data Sys. Corp. v. Dep't of Treas. of N.J.)

#### Sixth Circuit

- Plain Error" Review of Rule 11(b)(1)(N) Error Precludes Dismissal of Appeal Despite Waiver in Plea Agreement (United States v. Murdock)

#### Seventh Circuit

- Substantial Question For Federal Jurisdiction (Greater Chicago Combine & Center, Inc. v. City of Chicago)

#### Eighth Circuit

- Court of Appeals Lacks Subject Matter Jurisdiction Over Remain to State Court (Whittley v. Burlington Northern Santa Fe Railroad Company)

#### Ninth Circuit

- FRAP Rule 5 Applies to Appeals from Remand Order Under Class Action Fairness Act (Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services, Inc.)

#### Tenth Circuit

- Court of Appeals Lacks Jurisdiction to Hear Appeal from a Magistrate Judge's Discovery Order (In re Application of Jonathan Guy Anthony Phillips v. Beierwaltes)

#### Eleventh Circuit

- Eleventh Circuit Clarified Standards for Discretionary Appeals Under the Class Action Fairness Act (Tmesys, Inc. v. Eufaula Drugs, Inc.)

#### District of Columbia Circuit

- SEC's Reliance on Materials Not in Rulemaking Record and Without Public Comment Violated APA § 553(c) (Chamber of Commerce of the United States of Am. v. SEC)

#### Federal Circuit

- Federal Circuit Holds District Court Cannot Exercise Discretion to Enlarge Time If No Motion to Enlarge Is Made (IPXL Holdings, L.L.C. v. Amazon.com)

#### Supreme Circuit

- Marshall v. Marshall

# Appellate Practice Committee

## Leadership

### Committee Co-Chairs

Lawrence D. Rosenberg, Co-Chair  
 Telephone: (202) 879-7622  
 E-mail: ldrosenberg@jonesday.com

Paul J. Watford, Co-Chair  
 Telephone: (213) 683-9172  
 E-mail: paul.watford@mto.com

### Appellate Rules and Statutes Subcommittee

Elaine J. Mittleman, Co-Chair  
 Telephone: (703) 734-0482  
 E-mail: elainemittleman@msn.com

Karen S. Precella, Co-Chair  
 Telephone: (817) 347-6620  
 E-mail: karen.precella@haynesboone.com

### Bar Liaison Subcommittee

Eric Kane, Co-Chair  
 Telephone: (404) 688-2600  
 E-mail: Kane@OG-Law.com

Fred Rowley, Jr., Co-Chair  
 Telephone: (213) 683-9259  
 E-mail: Fred.Rowley@mto.com

### Diversity Initiative Subcommittee

Henry G. Gyden, Co-Chair  
 Telephone: (727) 821-7000  
 E-mail: hgyden@cartonfields.com

Rasha Gerges, Co-Chair  
 Telephone: (213) 243-2810  
 E-mail: rgerges@jonesday.com

### Membership Communications Subcommittee

Sonia E. O'Donnell, Co-chair  
 Telephone: (305) 347-6848  
 E-mail: SEO@jordenus.com

Sanford Hausler, Co-Chair  
 Telephone: (212) 953-6633  
 E-mail: hausler@cpslaw.com

### Membership Recruitment Subcommittee

David F. Johnson, Co-Chair  
 Telephone: (817) 420-8223  
 E-mail: dfjohnson@winstead.com

Steven M. Richman, Co-Chair  
 Telephone: (609) 631-2426  
 E-mail: smrichman@duanemorris.com

### Pro Bono Appeals Subcommittee

Joseph H Lang, Jr., Co-Chair  
 Telephone: (727) 821-7000  
 E-mail: jlang@cartonfields.com

Lori R. E. Ploeger, Co-Chair  
 Telephone: (650) 843-5123  
 E-mail: ploegerle@cooley.com

### Programming Subcommittee

Thomas J. Donlon, Co-Chair  
 Telephone: (203) 462-7549  
 E-mail: tdonlon@rc.com

Todd Holleman, Co-Chair  
 Telephone: (313) 963-6420  
 E-mail: Holleman@MillerCanfield.com

### Publications Subcommittee

Victoria Dorfman, Co-Chair  
 Telephone: (202) 879-3487  
 E-mail: vdorfman@jonesday.com

Warrington S. Parker, III, Co-Chair  
 Telephone: (415) 772-6176  
 E-mail: wparker@hewm.com

### Special Projects Subcommittee

Theodore C. Hirt, Co-Chair  
 Telephone: (202) 616-8202  
 E-mail: theodore.hirt@usdoj.gov

Anne Lofaso, Co-Chair  
 Telephone: (202) 273-2985  
 E-mail: alofaso@cox.net

### Young Lawyers Subcommittee

Cristina Alonso, Co-Chair  
 Telephone: (305) 539-7339  
 E-mail: calonso@cartonfields.com

Alfred J. Saikali, Co-Chair  
 Telephone: (305) 960-6923  
 E-mail: asaikali@shb.com

### Appellate Practice Journal Board of Editors

Dennis Owens, Editor-in-Chief  
 Telephone: (816) 474-3000  
 E-mail: owensappeal@aol.com

Victoria Dorfman, Editor  
 Telephone: (202) 879-3487  
 E-mail: vdorfman@jonesday.com



Griffin Terry Sumner, Editor  
 Telephone: (502) 568-0326  
 E-mail: gsumner@ftlaw.com

Warrington S. Parker, III, Editor  
 Telephone: (415) 772-6176  
 E-mail: wparker@hewm.com

# AppellateEvents & Dates

San Antonio Litigation  
Section Annual Conference  
April 11-14, 2007

“Brown Bag” Regional CLE  
program sponsored by the  
Edward Coke Appellate Inn  
of Court  
May 2007  
Washington, D.C.

CLE “Hot Topics”  
Teleconferences  
Spring and early Summer 2007

ABA Annual Meeting  
August 9-14, 2007  
San Francisco, CA

ABA Book Publishing Board  
to release *A Practitioner’s  
Guide to Appellate Advocacy*  
Late 2007

# NextIssue

Special Issue  
addressing  
California Appeals.

**Appellate**Practice**Journal**



American Bar Association  
321 N. Clark Street  
Chicago, IL 60610



LITIGATION PRACTICE SOLUTIONS  
Sponsor of the ABA Section of Litigation



NONPROFIT  
ORGANIZATION  
U.S. POSTAGE  
PAID  
AMERICAN BAR  
ASSOCIATION