From the chairs...

The ABA Section of Litigation Annual Conference will be held at the Marriott Rivercenter in San Antonio, Texas from April 11-14, 2007. The Trial Practice Committee again will be having its Annual Committee Dinner there. Say tuned for details.

The Trial Practice Committee will be expanding its Trial Practice Library on its website. We welcome submissions of helpful information for practitioners. To learn more about the Trial Practice Library in particular and the Trial Practice Committee in general, please visit our website at http://www.abanet.org/litigation/committees/trialpractice/.

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Articles Wanted

We are soliciting articles for the 2007 issues of the Journal. The deadlines for submitting articles and suggested themes are as follows:

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The suggested themes are not mandatory. Articles on any topics regarding trial practice are welcome. Articles should be submitted to the editors at their e-mail addresses. Articles should be submitted in MS Word format, they should be 8 to 12 pages long (double spaced) and they should contain end notes, rather than footnotes.

Section Annual Conference

Plans are under way for the annual Section of Litigation Meeting in San Antonio, Texas from April 11 to 14, 2007. We encourage you to make plans to attend the Section annual meeting. Additional information is available on the Section website at www.abanet.org/litigation/sectionannual.

Editors' Notes

The Trial Practice Journal, published four times per year, prints articles, news, and book reviews on matters of interest to trial lawyers and trial judges. Send article submissions to any one of the following editors:

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VISIT THE TRIAL PRACTICE JOURNAL ON-LINE AT:
http://www.abanet.org/litigation/committees/trialpractice/newsletter.html
Delivering oral argument can sometimes appear to be a daunting task. An advocate may experience pangs of self-doubt. He or she may wonder: What if the Judge doesn’t like me? What if the Judge thinks my case is terrible? What if the Judge is bored by what I say, or worse, falls asleep? Such concerns are natural. Oral arguments are often difficult. They are sometimes downright unpleasant. But, if you understand what is entailed in presenting an effective oral argument and with some practice, delivering an oral argument to a judge, arbitrator, or mediator can be highly effective in advancing an advocate’s position, while being very rewarding for the advocate.

This article sets forth a number of approaches, strategies and tips for presenting outstanding and compelling oral arguments to trial judges, arbitrators and mediators. It begins by turning to an old friend of oral advocates—Aristotle—for some fundamental principles for delivering effective oral arguments. It next examines the critical steps in preparing for an oral argument. Finally, it discusses a number of techniques for presenting outstanding oral arguments in today’s courts and ADR settings.

Three basic principles guide Aristotle’s advice for effective advocacy: ethos, pathos and logos.

The Basics Of Effective Advocacy As Defined In Aristotle’s Rhetoric

As college debaters and students of “rhetoric” will tell you, the original master of rhetoric was the ancient Greek philosopher Aristotle. Many of his works addressed effective methods for presenting arguments. Perhaps his most important work in this regard is his tome dedicated entirely to the subject, Rhetoric. That work goes into great detail about how a public or legal speaker can most effectively convey arguments and represent a client.

Three basic principles guide Aristotle’s advice for effective advocacy: ethos, pathos and logos. Ethos is defined as the speaker’s “power of proving a truth, or an apparent truth, by means of persuasive arguments.” Aristotle’s Rhetoric (W. Rhys Roberts Tr. 1954), available at www.iastate.edu. Each is important for an effective oral argument. And each can be cultivated by the careful actions of an oral advocate.

- **Ethos.** Looking at ethos more closely, there are a number of things that a speaker can do to enhance his or her “personal character” and “credibility”:

  - **Likeability**. First, and most obviously, it helps the advocate to be likeable. That means that the speaker should be polite to both the court or tribunal and his or her opponent, even-tempered, responsive to questions, mindful of time limits, and respectful of the concerns of all present in a courtroom or other forum. One of the quickest ways to lose the quality of likeability is to be rude or abrupt to the court or one’s opponent. Failure to answer questions or to answer them in an evasive manner can also get the advocate off on the wrong foot.

- **Preparedness.** It is critical for an effective advocate to be prepared for an oral argument. That means knowing the case, the key authorities, the record, and all of the salient facts extremely well. While a court may have never encountered a particular advocate in the past, the court will very quickly determine

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if an advocate knows the case factually and legally. Just as a rude or obnoxious advocate can be off-putting to a tribunal, an unprepared advocate will not be taken seriously, and thus will jeopardize any chance of communicating effectively.

- Honesty and forthrightness. It is also very important for an advocate to be honest and direct with a tribunal. An advocate must acknowledge the weaknesses in the record or the relevant authorities when identified by the court. And the advocate must directly answer questions, rather than evade them. This is not to say that an advocate should simply give up when confronted with troublesome cases or deficiencies in the record. Rather, the advocate should acknowledge those issues and provide the best and most persuasive responses to questions identifying case problems. Credibility is paramount, and one of the worst ways to harm your credibility is to give the impression that you are being dishonest with the court or that you are playing fast and loose with the record or facts.

- Organization. Another key to an effective argument is to appear organized as well as to deliver an organized argument. When delivering an argument, the advocate should have all necessary materials close at hand and neatly arranged. When notes are flying off the table toward the judge or when an overlarge stack of legal briefs collapses in the middle of your argument, you are likely to take a major hit to your credibility. Moreover, an advocate who presents a disjointed argument without a clear theme and progression will lose the attention of the audience, regardless of how compelling the substance of the argument actually may be.

- Clear and understandable delivery. It is very difficult to accept the resounding persuasive appeal of an argument when one can’t understand it. Therefore, it is essential that an advocate deliver the argument in a clear and understandable manner. The advocate must enunciate words clearly, speak with a moderate, easily understood pace, avoid using unfamiliar jargon or idiomatic expressions, and should use pauses and vocal inflection appropriately to emphasize the key points of the presentation.

- Professional appearance. While probably not as important as some of the other key qualities noted here, it is always helpful for an advocate to have an appropriate appearance and sense of decorum. It is rarely helpful, for example, to wear ripped or heavily wrinkled clothing when delivering an oral argument. It could be quite harmful to wear attire that is simply not appropriate. While very few prospective advocates would wear a tee shirt and jeans for such an occasion, articles of clothing such as cowboy boots, extremely loud jackets, ties or scarves may be distracting to the court and focus the judge’s attention on the advocate’s attire rather than upon the case. Such distractions are not helpful.

Pathos. Turning now to pathos, There are also a number of things an advocate can do to elicit a favorable emotional response from the court or ADR audience:

- Highlight the crucial equities favoring your client’s position. While it is always important to present the logical reasons why your client’s position is correct, it also helps to highlight why ruling in your client’s favor is the fair and just outcome in a particular case. To be sure, harping upon fairness and justice to the exclusion of a persuasive legal argument will not get you very far, but the best oral arguments convey to the audience the sense that your client’s position is not only the legally correct one, but is also fundamentally fair, reasonable and just.

- Highlight the best and most sympathetic facts favoring your client’s position. All legal cases are rooted in their key facts. In most cases, however unsympathetic, there are at least some facts that favor your client’s position or side of the story. And persuasive arguments apply the relevant authorities to the facts of your case. Thus, it is natural to highlight the most helpful facts and those suggesting that your client’s position is the most sympathetic.

- Highlight the worst and least sympathetic facts relevant to your opponent’s position. Aristotle has explained that the concept of pathos also may require stirring the passions of your audience against your opponent’s case. While you must be very careful about pushing this too far, it is certainly
reasonable and advantageous to
highlight the worst facts for your
opponent. The idea is not to make
ad hominem attacks on your
opponent or to bluntly state that
your opponent did awful things.
Rather, the skillful advocate can
mention certain pejorative facts
that will lead the audience to
conclude that your opponent has
acted improperly.

• **Tell a coherent, compelling, and consistent story.** Oral arguments
rarely permit time for lengthy factual recitations. Nonetheless, it is important
to highlight the important factual aspects that underlie the case. They provide
the essential context. It is critical that those details are packaged to
present a compelling, consistent, and reasonable explanation for
the actions taken by your client. The facts you highlight and the
language chosen to describe those facts can significantly help
convey the message you wish to communicate to your audience.

*Logos.* Arguments to juries may rely primarily on *pathos.* But *logos* is usu-
ally the key to persuade adjudicatory tribunals. Indeed, attempts to rely pri-
marily on either *ethos* or *pathos* may backfire badly. That is not to say that
professional tribunals are indifferent to either *ethos* or *pathos,* but *logos* is usu-
ally most important. It is critical to present your argument in a logical and
persuasive fashion. There are a number of things an advocate can do to accom-

** • Select your key issues.** One
of the most important steps in
preparing for an oral argument is
to select the key issues you will
focus on during your argument.
While there is no “magic
number” of exactly how many
issues you can present, in most
cases you can expect to focus
on no more than two to three
issues at oral argument. On rare
occasions four or more issues can
be coherently and persuasively
presented, but usually only when
arguments in excess of thirty
minutes per side are permitted.
If you are presenting an oral
argument of about twenty minutes
per side or less, it will be virtually
impossible to present more than
three key issues to the court.
Select your best issue for oral
argument and present that issue
first. If your first issue is complex
or particularly interesting to the
court, it may be the only issue
you have time to address in
any detail. The process of issue
selection is critical. It is the
very rare circumstance where
an advocate will win a case on
the third or fourth argument
presented orally to the court.
However, it is very common that
an advocate’s best argument gets
muddled and lost among a sea of
less persuasive arguments.

** • Carefully structure your argument.** It is critical that an
advocate has an organized and
logical argument that flows
naturally. It is very important
to have a coherent structure to
your argument. Begin with a
preview that quickly mentions
the theme or main thrust of your
argument and lists your two
or three main points. It is then
necessary to proceed quickly to
your first main point, make a
brief affirmative argument on that
point and respond to the tribunal’s
questions as they arise, and move
on to your next point or points,
if possible. It is also helpful,
although not as important,
to
quickly sum up your argument
before you conclude.

** • Develop a coherent and compelling theme.** Each oral
argument is designed to persuade
the audience to do something.
It is critical that the action you
wish your audience to take
(whether it be to rule in your
client’s favor on a dispositive
motion or to grant some specific
form of relief) be clearly stated
at the outset. Justification for
the tribunal taking the requested
action should be provided. For
equently, you may wish to urge
as your theme in an appellate
argument that the judgment below
should be reversed because the
trial court misconstrued the plain
language of the contract at issue.
Since *logos* is the primary factor
when arguing to an adjudicatory
tribunal, a theme such as “this
stale, twenty-year old case should
be dismissed under the statute
of limitations,” will generally be
more effective than a theme such as
“this is a case about refusal
to take responsibility for one’s
actions.”

** • Rely on your best and most persuasive authorities.**
Obviously, in an argument before
a court or ADR panel, you will
likely rely on key precedent and
other authorities. It is critical that
you select the most important
and most persuasive authorities
that support your position. In a
typical oral argument of twenty
minutes or less per side, you
will only have time to discuss a
few key authorities in detail.
Before your argument, you
should carefully select the cases
you want to discuss and mention

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they where appropriate in your argument. While you must be prepared to address every case cited in the briefs or other materials, you should stay away from any lengthy discussion of authorities that you don’t believe are particularly pertinent to your argument. However, that does not mean that you should ignore or sidestep adverse authority. Rather, you must directly address such authority when raised by the court or your opponent.

- Carefully apply the key authority to your case. It is not enough to cite and discuss key authority. Moreover, it can be quite dull. To make a compelling legal argument, the advocate must carefully apply that authority to the case at hand to show why and how that the authority prescribes a decision in your client’s favor.

“Lame”os. My college debate partner added a basic principle to Aristotle’s three, which he dubbed as “lame”os—the speaker’s power to make himself or herself look like an idiot. Obviously lameos is something to be avoided. Lameos can take many guises in presenting an oral argument. Obviously, a complete breakdown in front of the court or an inability to answer even fundamental questions about the case demonstrate a severe episode of “lame”os. However, there are many more subtle ways to practice lameos. Interrupting a judge’s question is not a way to endear yourself to the court. Moreover, failing to answer a question or series of questions or doing so evasively or with answers that simply don’t make any sense will also dramatically undermine the persuasive value of your argument. If you don’t understand the court’s question, say so up front. The court will likely respect your honesty instead of believing you to be either dense or deceitful.

I recently attended an oral argument where both advocates managed to come up with bizarre answers to the court’s questions. The case involved a criminal defendant, whose lawyer argued that the police had not waited a sufficient period of time between “knocking and announcing” and breaking down the defendant’s front door—a period of about four seconds. A particularly interesting colloquy between the court and the defense attorney went as follows:

Q. Is it typical for over thirty police officers to arrive in an attempt to arrest a criminal suspect?
A. Yes, that happens frequently.
Q. Are you serious?
A. Sure.
Q. All right, let’s talk about the rocket launcher. You concede that the police had credible information that your client possessed a rocket launcher capable of taking down large aircraft?
A. Yes. But the informant didn’t mention the presence of any ammunition.
Q. No ammunition? What, are we supposed to believe your client was doing with the rocket launcher: using it as a coffee table?
A. Possibly. He might have been a collector.
Q. Or maybe he was using it as an umbrella stand?
A. Sure. That’s possible too.

Not surprisingly, the court was having difficulty accepting these answers. However, the prosecutor also decided to liven up the proceedings. A colloquy with him proceeded as follows:

Q. So, are you saying that when the police have credible information that an individual possesses more weapons of mass destruction than we have found in Iraq, the police are justified in breaking a door down four seconds after “knocking and announcing”?
A. No. I’m not saying that at all. In this case we had other important facts.
Q. Really, the weapons of mass destruction aren’t enough? What other facts should we be considering?
A. The dog.
Q. What are you talking about?
A. The police had been informed that the defendant had a dog. But when they arrived, the dog was nowhere to be seen. Thus, the police reasonably concluded that the dog may have been warning the defendant that the police had arrived.
Q. Really. Perhaps the dog was inside arming the rocket launcher.

Needless to say, these colloquies demonstrate both that giving incredible answers to questions posed by the court are not likely to advance your client’s case and also that giving defensive answers to helpful “softball” questions is also not likely to help your client’s case.

The concept of “lame”os highlights that while an advocate is striving affir-
mately to advance the ethos, pathos and logos of his or her presentation, saying things that just don’t make sense or aren’t credible are best avoided.

The Key Steps To Preparing For An Oral Argument

How do we implement Aristotle’s fundamental concepts of ethos, pathos and logos (and avoid the associated concept of lameos) in preparing for an oral argument? Preparation is in many respects the most important process necessary for delivering a compelling oral argument. An advocate must be intimately familiar with the important issues in the case, the primary authorities relevant to the case, the record and facts of the case, and the audience before whom the case is to be argued. The advocate must also anticipate what the opponent is likely to emphasize and what questions the court or ADR panel will likely have. Moreover, most excellent oral advocates practice their argument and the answers they likely will give to the court’s or ADR panel’s questions many times before they actually deliver their argument. I suggest the following steps to preparing for oral argument; these steps already assume a very good working knowledge of the case, which is a prerequisite to serious oral argument preparation:

1. Select the key issues for oral argument. Once an oral advocate has a good working familiarity with a case, the first step is to isolate the key issues to be emphasized at oral argument. I have said that in most circumstances there should only be one, two or three key issues for oral argument. Nonetheless, at the beginning of the preparation process there can, and in some cases should, be more than this. After all, part of the purpose of preparing for an oral argument is to winnow down the issues that you will want to emphasize. With this said, there should be some initial paring down of the issues. There is no magic number, but in most cases there shouldn’t be more than five or six issues that you seriously will consider emphasizing at oral argument. Paring down the issues at this initial stage will improve the logos of your argument and will make it much easier to focus the remainder of your preparations.

Preparation is in many respects the most important process necessary for delivering a compelling oral argument.

2. Become intimately familiar with the record and the facts of your case. Once you have pared down the issues that you may emphasize at oral argument, it is critical that you carefully evaluate the record and the facts of your case, particularly with respect to those issues that you have chosen to focus upon. You should know every detail relevant to those issues and where that detail can be found in the record. Obviously, the extent of this task will depend upon the stage of the case at which your argument has arisen. If your argument relates to a motion to dismiss or to a summary judgment motion or mediation, there may be a voluminous record containing briefs, discovery responses, deposition transcripts, and other materials.

In all events, the tribunal will likely have questions about the facts of your case and how the key authorities should be applied to those facts. As Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit has put it, “The law doesn’t matter a bit, except as it applies to a particular set of facts. So you will find that judges at oral argument often have a lot of questions about the record.” Hon. Alex Kozinski, How You Too Can . . . Lose Your Appeal, 23-OCT Mont. Law. 5, at *23-*24 (Oct. 1997).

3. Become intimately familiar with the primary authorities relevant to your case. It goes without saying that an oral advocate is expected to know every primary authority very well and to be able to discuss those authorities at oral argument. Accordingly, an oral advocate should very carefully read those key authorities and note the important points from each that may be emphasized at oral argument. This is not to say that an advocate must be intimately familiar with every case cited in every pleading filed during the course of litigation. Rather, the advocate should become intimately familiar with all of the important cases pertaining to the issues that the advocate will emphasize or that may become the subject of discussion at oral argument.
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It is better to be overinclusive rather than underinclusive. Thus, if you are not sure what cases might become important at oral argument, you should become familiar with all of the cases that might be raised.

4. Carefully analyze how the primary authorities apply to the facts of your case. The real “trick” to the *logos* of your legal argument is to convey effectively how the primary authorities, when applied to the facts of your case, compel the result your client seeks. As Judge Koziński has noted, “[e]ach case is different insofar as the facts are concerned. Where the lawyer can really help the judges—and his client—is by knowing the record and explaining how it dovetails with the various precedents.” Koziński, 23-OCT Mont. Law. 5, at *24.

5. Anticipate the main arguments that your opponent will make. In most circumstances, oral argument in the United States involves both sides presenting their arguments about a particular issue. It is important to anticipate what arguments your opponent will emphasize, what authorities will be used to support those arguments, and what facts in the case your opponent is likely to highlight. By carefully thinking through what your opponent is likely to do at oral argument, you can determine how best to respond to those arguments or how to preempt them with your affirmative arguments. One way to approach this part of the preparation process is to pretend that you are delivering your opponent’s argument. By doing so, you can focus on the best authorities and facts for his or her side of the case. Some advocates even go so far as to deliver what they see as their opponent’s best arguments to colleagues who have familiarity with the case, so that those colleagues can help determine the best ways to counter those arguments.

6. Anticipate the questions your judge or panel is likely to ask. A critical component of the preparation process and to bolstering your *ethos* and *logos* is to determine what questions the tribunal will likely want answered. In one sense, this may be the most important part of the preparation process. After all, your main objective during oral argument is to satisfy the concerns of the tribunal. One way to anticipate such questions is carefully to examine the weaknesses on both sides of the case. Quite often a tribunal will seize upon such weaknesses to determine whether they are fatal to your case or to one of your arguments. Another useful tactic is to have colleagues who are familiar with your case draft a set of possible questions that they think the tribunal may ask. It also is helpful to examine any confusing or controversial aspects of your case and of the primary authorities to determine questions that such aspects may suggest.

Once you have determined what questions that the tribunal may ask, you should then attempt to craft your best answers to each of those questions. By doing so, you will gain even greater familiarity with your case and will help to prepare for the critical function of answering the questions that you actually will receive at oral argument. U.S. Supreme Court Chief Justice John Roberts emphasized this point in an article he wrote while in private practice: “Given the prevalence of ‘hot’ benches and abbreviated argument times,” “your preparation should place a premium on making points concisely; you should have at your fingertips 30-second answers to the most likely questions.” John G. Roberts Jr., *Thoughts on Presenting an Effective Oral Argument*, School Law in Review 1997, at 7-2 (available at www.nsba.org/site/docs/36400/36316.pdf).

7. Find out as much information as possible about your judge or panel. As early as possible in the preparation process, you will want to learn the composition of and proclivities of the judge or panel before whom you will be arguing. You will also want to know how the argument will be conducted, the applicable time limits, where you will stand to present argument, and the order of presentation at argument. You will also want to know whether your judge has written any decisions relevant to your case, whether the judge is likely to ask many questions or just a few, whether the judge or tribunal members have any particular academic or ideological philosophy. And you should also try to find out if the judge is personally familiar with any of the lawyers who will attend the argument. If you
are able, it is generally a good idea to observe your judge or tribunal before the day of your argument to get a feel for how the proceedings are managed. Once you have acquired all the information possible about your judge or panelists, you will want to reexamine the questions that you determine are likely to arise at oral argument to see whether you have overlooked something that is likely to be of concern to the tribunal.

8. **Prepare an oral argument outline or “cheat sheet.”** Once you have completed the prior steps, it is useful to prepare a concise oral argument outline or “cheat sheet” that includes the key points you want to address at oral argument along with the key authorities and citations to the record that you believe will likely arise at argument. As part of this process, you likely will pare down your list of key issues even further. For each issue, list your primary authorities and record citations with a one sentence description of the key points from each. From this, you can create either an outline of approximately one page for each issue, or a “cheat sheet” that is written on or fastened to a folder for which each surface corresponds to one of your main issues for argument (e.g., the front for issue 1, the inside for issue 2, and the back for issue 3). While advocates differ on the kind of outline they may prepare, it is very useful to synthesize the knowledge of your case that you have gained during the preparation process by creating such a tool.

9. **Craft your introduction, conclusion and argument structure.** Once you have completed your oral argument outline (or as part of that process), it is helpful to craft your introduction and the structure of your argument. Your introduction should include a statement of the main theme of your oral argument as well as a short preview of the points you wish to emphasize at oral argument. Typically it should be 30-90 seconds in length, depending on your judge or panel and how likely you are to be able to speak uninterrupted for a given period of time. Your theme can be something very simple such as “under the controlling law, plaintiffs have failed to state a claim for relief, and thus their complaint should be dismissed,” or “my client is entitled to summary judgment because the defendant has, as a matter of law, violated the federal antitrust laws in two independent ways.” Your introduction should include a very brief statement of the main two or three points you want to emphasize in the order that you intend to present them. Your best and most persuasive point should go first. Your introduction should also include a very brief statement of the relief you seek. You should also craft a very short conclusion—of perhaps ten to fifteen seconds in length—that summarizes your argument and restates the relief you seek. It could be something such as “accordingly, defendant’s expert is unqualified and has not used an appropriate methodology in his analysis; his testimony should be excluded at trial.”

10. **Determine whether you wish to use any demonstratives or visual aids.** The topic of using demonstratives or visual aids during oral arguments is one that could merit pages of discussion. It engenders severe disagreement among experienced advocates. Certain advocates (in my experience, a minority) believe that visual aids are critical whenever an advocate is communicating orally and attempt to use visual aids in arguments before trial and even appellate courts. They may use boards with documents, charts, graphs or argument points, more complicated computer presentations, or even play video clips when a tribunal will permit such visual aids. Other advocates believe that oral argument (especially on legal motions before trial courts and on appeals) primarily represents an opportunity to answer the questions troubling the judge or panel. Such advocates usually avoid visual aids except in compelling circumstances such as very technical cases were one or two visual aids can demonstrate a complex machine, computer algorithm, chemical compound, or the like. My advice is to consider carefully your audience, the complexity of the case, and the focus of your argument when determining whether to use visual aids. I have used them and seen them effectively used in trial court arguments and presentations to ADR panels when the case involved complicated facts that had to be understood by the judge or tribunal. On the other hand, I have also talked with and argued before a number of appellate...
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judges who very much dislike such visual aids, particularly in cases that primarily involve a legal issue. Similarly, I have seen trial court judges refuse to permit such visual aids, even after they have been set up in the courtroom. While visual aids are often essential for presentations to juries and may be very useful in certain oral arguments before judges or ADR panels, an advocate must make a careful decision whether to use them at all and must carefully choose any visual aids to use at oral argument.

11. Perform a moot court or practice argument. After you have put together your oral argument outline and determined whether to use any visual aids, it is usually very helpful to perform a moot court or practice argument. You could convene a formal moot court with a number of “judges,” or simply perform a practice argument before one or two colleagues, who are familiar with your case and who will be able to ask pertinent questions. While excellent oral advocates differ with respect to how they perform such practice arguments (some prefer to treat them much like an actual argument in court, others may prefer simply to have colleagues ask them questions), most generally perform moot courts or practice arguments at least before important or difficult oral arguments. This process can be very important in further paring down your issues for oral argument, examining the weaknesses of your case, and building your confidence as you approach your oral argument. It can also help you to tailor your arguments and your delivery in a manner that will likely achieve the most favorable response from the tribunal. Therefore, this process can strengthen the ethos, pathos and logos of your advocacy. It also can uncover any tendencies you have that are likely to annoy or offend your audience (such as raising your voice when answering a question that you think is stupid), and therefore can help eliminate lameness.

12. Revisit your issues for argument and make your final selection of the one, two or three that you wish to emphasize. Once you have completed the prior steps, you are ready to choose the issues to emphasize at argument that are most likely to result in a favorable disposition of your case or motion. As explained by Justice Thomas R. Fitzgerald of the Illinois Supreme Court “[t]he lawyers who seem to give the best arguments are [those] who are able to find the most important issues in the case and argue those issues. . . . I think there is a real art in identifying the issues that are the ones that give them the best chance of success.” Daniel C. Vock, Appellate lawyers’ version of high wire act: Oral argument, 150 Chicago Daily Law Bulletin 81.

13. Practice your argument again. As your final step in preparing for an oral argument, you will probably want to practice your argument some more. This can be done in a formal setting with one or more colleagues who are familiar with the case. It could also be done at home before your spouse or child. Or, it could be done alone in front of a mirror or a wall. The idea is to become as verbally fluent as possible with the key points you wish to emphasize, the authorities and record cites you wish to rely upon, and the structure of your argument including your introduction and conclusion. You should not attempt to memorize a prepared “speech” because the most important part of your argument will be your responses to the questions you receive. Rather, you want to become as familiar as you can with your affirmative argument and the responses you want to give to the questions you have anticipated.

Now that you have completed the preparation for oral argument, it is time to actually deliver your argument. Good luck!

Key Tips For Delivering An Outstanding Oral Argument

Having completed your careful and extensive preparations for argument, it is now time to actually present your oral argument. There are a number of things that you can focus upon to present the best argument possible:

Answer the judge’s or panel’s questions directly and honestly. The most important element of compelling oral advocacy is to be as responsive to the judge’s or panel’s questions as possible. This is effectively the “prime directive” of oral advocacy. If an oral advocate is evasive or incomplete in his or her answers to the judge’s questions, that advocate will lose credibility with the court, thus harming the advocate’s ethos. The advocate will appear to lack
answers to the questions the court or panel is concerned with, thereby harming his or her logos. And the court or panel may become annoyed with the advocate, leading to an episode of lameos. As Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit has noted “[s]ome lawyers are terribly afraid of answering questions, because they’re afraid it’s a trap and that their answer is going to be treated as a fatal concession. So they fence and they evade, and that, of course, annoys the judges.” Vock, 150 Chicago Daily Law Bulletin 81. Similarly, Judge Kozinski has noted the dangers of interrupting a judge’s question or evading it: “Once the judge starts to ask a question, raise your hand in a peremptory fashion and say, ‘Excuse me, your honor, but I have just a few more sentences to complete my summation and I’ll be happy to answer your questions.’ This will give the judge a chance to dwell on the question, roll it around in his mind and brood about it.” Kozinski, 23-OCT Mont. Law. 5, at *24.

Quickly deliver your introduction and attempt to adhere to your argument structure. Because you may get little uninterrupted time to deliver your introduction, do so as quickly as you can and move on to your first point. Once your first point has been covered fairly well and there are no questions pending, move on to your second point. But always be mindful of the prime directive that you must answer the tribunal’s questions directly and completely. Even if doing so will destroy the structure of your argument, it is more important to answer the panel’s questions than it is to retain the structure of your argument at the cost of addressing the panel’s concerns. Therefore, it may make sense to move on to another point when there is a lull in the questioning or when your answer to a question presents a natural opportunity to move to do so. This process is more art than science. It is often very difficult to transition from one point to another when your tribunal is particularly interested in your first point. However, that is not usually a bad thing. If you have structured your argument effectively, your first point should be your strongest. Thus, to the extent that the tribunal is focusing on that argument, it should mean that the tribunal is seriously considering it. I think the best advice here is to be flexible. If the tribunal really wants to take up your entire argument time with your first point, let that happen. If you can skillfully move on to your next points, do so, but not to the exclusion of answering the tribunal’s questions.

Always be mindful of the prime directive that you must answer the tribunal’s questions directly and completely.

Weave your key message into your answers to the tribunal’s questions. An important tactic for delivering an outstanding oral argument is to weave your key theme, message or points into the answers to the questions you are asked. As Judge Posner has stated, the “critical skill” for effective oral advocates is to build connections between your answers and your message: “If the lawyer, having answered the question briefly, then elaborates his answer in order to bring another point he wants to make, that’s not going to bother the judge.” Vock, 150 Chicago Daily Law Bulletin 81. One technique for doing this is to respond to a question by saying “I have two responses.” The first response can directly answer the question, while the second response can reiterate your theme or make an additional point you believe important. Another technique is to answer the question directly and then conclude by explaining that the question underscores the important point you made earlier—at which time you can then reiterate your theme.

Do not under any circumstance disrespect the court or belittle the questions asked. As a corollary to the prime rule of answering the judge’s or panel’s questions, you should never disrespect the court or panel. Doing so will significantly reduce the ethos and dramatically increase the lameos of your presentation. Judge Kozinski has noted that if you really want a seemingly insignificant question to take on “monstrous significance,” “[a] good way to start is by ridiculing the question: ‘I was afraid the court would get sidetracked down a blind alley by this red herring.’ Mixing metaphors by the way, is always a good idea; it makes it look like you’re spinning your wheels after you’ve missed the boat because you went off on a wild goose chase.” Kozinski, 23-OCT Mont. Law. 5, at *24-*25. Furthermore, Judge Kozinski warns of the dangers of “cutting off the judge in the middle of a question”:

First, it’s rude . . . . [b]eyond that, cutting off the judge mid-question sends an important message: Look here your honor, you think you’re so clever, but I know exactly what is going on inside that pointed little head of yours. Then again, cutting off the judge gives you an opportunity to answer the wrong question. When I pointed this out to a lawyer one time, he told me, ‘Well, if that’s not the question you were asking, it should be.’

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Lessons of Aristotle...
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*Id.* at *25. How’s that for a advanced case of lameos?

Accurately portray the relevant authorities and facts of your case. It is critical to be direct, honest and forthright with the tribunal. If the tribunal gets the sense that you are misstating the authority or the facts of your case, you will lose great credibility and your *ethos* will suffer. Moreover your ability to present an argument appealing to either the audience’s sense of justice or logic will be dramatically reduced. Thus, the *pathos* and *logos* of your presentation will suffer as well. It is also extremely unlikely that a misstatement will go unnoticed. Most judges prepare for oral argument and are relatively well versed in the key authorities and facts of your case by the time of the argument. It is possible that if an authority or fact is trivial, the court may not be aware of it and may not follow up on your misstatement at oral argument. But if the authority or fact is trivial, why misstate it in the first place? If the authority or fact is significant, it is very likely that the tribunal will realize that you have misstated or inaccurately portrayed that authority or fact.

A corollary to the rule against misstatements is the principle that you should not overclaim the strength of your case. As Judge Kozinski has explained (*Id.* at *24):

A good way to improve your chances of losing is to overclaim the strength of your case. When it’s your turn to speak, start of by explaining how miffed you are that this farce—this travesty of justice—has gone this far when it should have been clear to any dolt that your client’s case is ironclad. If you overstate your case enough, pretty soon [the judge] will take the bait and ask you a question about the very weakest part of your case. And, of course, that’s precisely what you want the judges to be focusing on—the flaws in your case.

*But an advocate must be very careful using such devices at oral argument.*

It is very easy to have a seemingly excellent analogy fall apart under questioning, or worse, be turned by one’s opponent.

Don’t make a jury speech. Oral argument presents a wonderful opportunity to focus the court or panel on the critical points, authorities and record citations you wish to emphasize. Don’t waste that opportunity by making an unbridled appeal to *pathos* in the manner that an effective trial lawyer may do before a jury. Adjudicatory tribunals are much less likely to be swayed by one party’s bad conduct, ad hominem attacks on the opposing party (even if justifiable), or blunt arguments that a certain outcome would just be “wrong.” Such tribunals are usually much more interested in how the key authorities apply to the facts of your case and whether that application prescribes the outcome your client desires. As Judge Kozinski has explained in the analogous context of appellate argument:

When a lawyer resorts to a jury argument on appeal, you can just see the judges sit back and give a big sigh of relief. We understand that you have to say all these things to keep your client happy, but we also understand that you know, and we know, and you know we know, that your case doesn’t amount to a hill of beans, so we can go back there in the conference room and flush it with an unpublished decision. (*Id.* at *25)

*Be very careful using analogies or maxims in your argument.* Aristotle believed strongly that the use of analogies or maxims could be very helpful in persuading a court or judge to act as an advocate desired. He was right. An analogy, maxim or story that fits well can enhance your argument and help your chances of winning your case or motion. One of my colleagues recently argued a statutory-interpretation case before the U.S. Supreme Court. He argued that his opponent’s interpretation, while possibly supportable by the language of the main sentence itself, could not be reconciled with the language of the rest of the statutory provision in which it was located. To conclude his argument, my colleague referred to the parable of the blind man who comes upon two thick trees, unable to understand that the soft tube between them was really the trunk of the elephant that he stood before. My colleague’s use of that parable was extremely effective, and he won his case. But an advocate must be very careful using such devices at oral argument. It is very easy to have a seemingly excellent analogy fall apart under questioning, or worse, be turned by one’s opponent. In an argument several years ago, an advocate used a baseball analogy to describe his case for the court, only to have his opponent quickly co-opt that analogy to describe how the advocate had swung and missed with each of his three major arguments and had “struck out” with his case. The point here is not that you can never use an analogy, maxim or parable. But
you must be very careful. It may make more sense to use such a device to conclude an argument, rather than earlier when it might be more exposed to attack or co-option. If you think there is any risk that your analogy or maxim could be turned against your position, don’t use it.

Deliver your argument clearly and at a moderate pace. When we get nervous, many of us speak very quickly, our voices raise, or we may garble certain words. Keep these possibilities in mind. Speak too quickly, and you will lose your audience (unless your audience is a group of college cross-examination debate coaches). Speak too slowly, and you will annoy your audience. Enunciate clearly. Avoid monotones. But avoid excessive drama as well in your manner of speaking. It is also a helpful technique to use pauses to underscore important points as well. The goal is to have a conversation with the court. In doing so, an effective advocate may often use very short or clipped sentences. You may wish to answer a question by saying “No, for two reasons” or “Let’s look at the legislative history.” The point is to communicate effectively, not produce a beautiful transcript. If you are comfortable doing so, you may wish to use slow, smooth (rather than hard and choppy) hand gestures to emphasize a point. But do so only if you naturally use such hand gestures. It may help to speak as if you are having a conversation with a good friend. Use a conversational tone and approach and you should be able to communicate with your audience.

Be very careful with use of any visual aids. If you have decided to use visual aids during your argument, be very careful with them. If the judge or panel seems irritated or is not following your use of the visual aids, abandon them. If using your visual aids is bogging down the argument, seriously consider only using a few of them. Most importantly, do not allow your use of visual aids to hamper your responsiveness to the court’s or panel’s questions. There was a recent argument in which the advocate used a significant number of PowerPoint slides during an extended presentation of over one hour in length. While the advocate’s use of the slides was mostly effective, at one point, the judge stated that he would like the advocate to “take a break” from his presentation to answer questions that were troubling him. It is very important when using visual aids is to do so without creating the appearance that the presentation is more important than responding to the court’s or panel’s concerns. Otherwise both your ethos and logos could suffer substantially.

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courts of his locale. As a general rule, understated and conservative business attire is usually appropriate. But it always helps to speak with local counsel if you have never appeared in court in a particular area to learn the local practice and customs.

Be very careful in using humor. As a character in a Star Trek movie once remarked, “humor is a difficult concept.” Most experienced oral advocates would likely advise never to use humor at oral argument. That may be too stringent. On rare occasions, a judge or panelist with a good sense of humor may make a joke that could effectively be responded to with a humorous statement. Also on rare occasions, a line of self-deprecating humor might be effective. In such circumstances, the use of humor can improve the ethos of your presentation by lightening the mood and showing that you have a sense of humor. But you do have to be very careful. The use of humor in an inappropriate circumstance or before a judge or panelist who does not appreciate the use of humor, or does not appreciate your sense of humor, can do great damage to your credibility.

Watch and listen carefully to the arguments that precede yours. You can often learn a great deal about the approach and demeanor of the judge or panel by listening to arguments which precede yours. You can also learn if there are any special procedures or courtroom etiquette of which you are unaware. If you are fortunate, you may also be able to determine whether there are any special characteristics of your judge or panel that you should bear in mind—the judge hates to be interrupted or prefers to be called “your honor”; the judges seem to have a good sense of humor; or the judge is exhausted and looks ready to fall asleep.

Conclusion

Oral argument presents a great opportunity to focus your audience on the key points of your case. By bearing in mind Aristotle’s time-honored principles of ethos, pathos and logos and the associated concept of lumeos, you can deliver a credible, logical and emotionally compelling oral argument. If you also prepare carefully and thoroughly, you can become an outstanding oral advocate and significantly advance your clients’ interests. Speak up. The legal world is listening. 🎤
Asserting The Fifth Amendment Privilege Based On The Act Of Production

By Harry Laxton, Jr.

If a client is subpoenaed to produce documents during trial and has reason to believe that those documents might support or lead to other evidence that supports criminal charges, the Fifth Amendment privilege against compelled self-incrimination should be considered. However, the content of the documents might not support a basis for assertion of the privilege. If the client was not compelled by the government to create the documents but rather the client had voluntarily created the documents, then the privilege is not applicable to the content of the documents.1

However, the Fifth Amendment privilege might be applicable based upon the compelled act of producing the documents in response to the subpoena.2

The Fifth Amendment protects a person from being compelled to incriminate himself by testimonial communications.3 The act of producing subpoenaed documents communicates that:

1. Responsive documents exist;
2. The responsive documents are in the person's possession or control; and
3. The documents produced are those that are described in the subpoena (i.e., authentication of the produced documents).4

It does not matter that such communication itself would not support a criminal charge. The privilege afforded not only extends to communications that would in themselves support a conviction under a criminal statute but also includes those which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime.5

If your client possesses corporate documents in a custodial capacity, the Fifth Amendment privilege is not applicable even if the records may be personally incriminating.6 However, a records custodian cannot be compelled to testify as to the location of nonproduced records nor as to the identity of the persons possessing the records.7

It is arguable that that the privilege and the relevancy requirement, considered together, will generally render any documents protected from production, if there are no legal issues involved in the lawsuit other than the issue(s) which create a reasonable apprehension of criminal incrimination and if, as discussed more fully below, the communicative aspects of the act of production are not readily able to be established by other means. Under such circumstances, documents sought to be produced either: (1) will tend to, in however minor a manner (including providing a link in the chain of evidence), incriminate the person, (2) will tend to exonerate the person, or (3) will have no bearing at all upon the issue.

Under the first situation (i.e., the documents indicate incrimination), the act of production is prohibited by the privilege. Under the second situation (i.e., the documents indicate exoneration), the party seeking the documents can generally be expected to be attempting to establish the client's guilt on the issue (not his innocence) and thus the party will not have pleadings to support the desired discovery nor to support the introduction into evidence of such documents (i.e., if the party has plead that your client has committed fraud, the party does not have pleadings to support a subpoena and introduction into evidence of documents that indicate fraud was not committed).

In the final situation (i.e., the documents have no bearing on the issue at all), then the documents are not relevant and, thus, the documents are neither properly subject to subpoena, nor admissible into evidence.

If your client possesses corporate documents in a custodial capacity, the Fifth Amendment privilege is not applicable even if the records may be personally incriminating.6

Thus, arguably when documents are neither relevant to other legal issues nor readily established by other means, such documents are protected from production because they are necessarily either: (1) incriminating and, thus, privileged (by the act of production), (2) non-incriminating and therefore the discovery is not supported by the pleadings of the party seeking the documents, or (3) irrelevant and thus not subject to subpoena.

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Asserting the Fifth Amendment Privilege...

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However, the act of producing potentially incriminating documents is not privileged when the communicative aspects of the production (existence, possession/control, and authentication) can be readily established by other means such that they are foregone conclusions. 8

The communicative aspects may be a foregone conclusion under different circumstances. For instance, when a party has previously admitted that the documents exist and are in his possession, those matters are foregone conclusions. 9 If the documents can be authenticated by comparison means, such as comparison with a previously produced copy or by handwriting comparison, then authenticity is a foregone conclusion. 10 Therefore, in considering whether to advise your client to invoke the privilege, it is prudent to determine whether your client has previously produced the documents in other contexts or otherwise admitted to his possession or control of the documents.

If another person's testimony can establish the client's existence and possession of the documents, then existence and possession are foregone conclusions. 11

On a related note, requiring a person to sign a form consenting to disclosure of bank account records that does not acknowledge that any such accounts or documents exist and reads that the directive shall be construed as consent is not a testimonial communication and therefore does not implicate the Fifth Amendment. 12

One court has stated that subpoena language pertaining to any and all documents relating to the purchase and sale of certain stock reflects a breadth that fails to demonstrate that the existence and possession of the requested documents are foregone conclusions. 13 In representing a client that has been served with a subpoena, look for similarly broad language for support that the existence and possession are not foregone conclusions. Similarly, when preparing a subpoena, draft the subpoena in such narrow form that the fact that the existence and possession are foregone conclusions will be more readily apparent.

It is prudent to determine whether your client has previously produced the documents in other contexts or otherwise admitted to his possession or control of the documents.

To be foregone conclusions, existence, possession, and authenticity must be shown with specificity. 14 Evidence of general financial information does not necessarily support a finding that the existence, possession, and authentication of specific financial documents are foregone conclusions. 15

The argument that a businessman will always possess general business and tax records that fall within broadly stated subpoena categories does not establish that the existence, possession, and authenticity of specific documents are foregone conclusions. 16

However, the existence of brokerage firm documents and the branch manager's possession of the documents have been held to be foregone conclusions when two other branch managers had produced parallel documents relating to their offices and generated in the normal course of business and the brokerage firm admitted that such documents existed at the branch offices and were within the custody and control of the branch managers. 17 The authenticity of such documents were likewise held to be a foregone conclusion when the records could be compared to those already produced by other branch managers to demonstrate their authenticity. 18

A criminal attorney's possession and control of his own records pertaining to his representation of a criminal defendant are foregone conclusions. 19

In evaluating a subpoena served upon a client, consider the client's temporal relationship to the documents in question. Evidence that three to seven years earlier a person had signed corporate tax returns that identified the person as the corporation's resident agent and indicated that the corporation's books were under the person's care is not evidence that the person still possesses such documents or remains connected to either corporation. 20

Summary

Inform your subpoenaed clients that any out of court admissions or production of document will prevent assertion of the Fifth Amendment privilege because the existence, possession/control, and authentication of the documents will likely be foregone conclusions.

If you are seeking compelled production against a person asserting the Fifth Amendment privilege, investigate whether the party has previously admitted such matters by out of court production, e-mails, or other communications and whether such matters can be established by testimony of other
individuals. Argue that authenticity of the documents can be established by handwriting or document comparison, if applicable.

When opposing a subpoena, bring to the court’s attention broad categories and subpoena language such as any and all documents relating to a matter. Such breadth may reflect that the existence and possession of the requested documents are not foregone conclusions. Conversely, in drafting a subpoena use as narrow language as possible to reflect that the existence and individual’s possession are already known.

When seeking production, introduce evidence of possession of similar documents by other individuals as closely similarly situated as possible to the individual from whom compelled production is being sought. Likewise, consider whether a statutory or other legal duty exists for the individual to maintain the documents.

For information arguably indicating that the individual once possessed the documents, consider how much time has passed since the precise time period indicated by the evidence. If the indicated time period was recent, it should assist in establishing that the individual’s current possession of the documents is a foregone conclusion. Conversely, if an extended period of time has passed, it will be more difficult to establish that current possession is a foregone conclusion.

Endnotes
4 Id. at 410.
7 Curcio v. U.S., 354 U.S. at 122, 125, 128.
10 U.S. v. Teeple, 286 F.3d at 1050; In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992, 1 F.3d at 93.
15 Id. at 572.
17 S.E.C. v. First Jersey Securities, Inc., 843 F.2d 74, 76 (2d Cir. 1988):
18 Id. at 76.
The Appropriate Withdrawal Rate: Comparing a Total Return Trust to a Principal and Income Trust

by Edward A. Moses, J. Clay Singleton and Stewart Andrew Marshall III

Editor’s Note: Modern Portfolio Theory, which is inextricably intertwined with the Prudent Investor Rule, has become widely used by investment professionals and, as such, is a tool that, if understood, can be of substantial assistance to a trial lawyer in preparing to and cross-examining an opposing party’s expert, or in proving or disproving a damages claim. Below is the fourth and final installment of a four part series of articles that we hope will prove useful and informative to our readers on this complex subject. The first article, “Modern Portfolio Theory and the Prudent Investor Act”, which appeared in the ABA Trial Practice Journal, Vol. 20, No. 1, provided the groundwork for this series of articles. The second article, “Using a Trust’s Investment Policy Statement to Develop the Portfolio’s Appropriate Risk Level”, which appeared in the TPC Journal Vol. 20, No. 2, discussed the individualized Investment Policy Statement and the development of an appropriate risk tolerance for the trust portfolio. The third article, “Computing Market Adjusted Damages in Fiduciary Surcharge Cases Using Modern Portfolio Theory”, which appeared in the TPC Journal Vol. 20, No. 3, described the evolution of market adjusted damages and the appropriate methods to assess damages. In connection with this article, the reader is invited to refer back to those three articles as published in the print editions of the Trial Practice Journal or on-line by logging on to the Trial Practice Committee’s Website.

I. Introduction

Tom Harold swiveled his desk chair so he could look out the window from his office on the 33rd floor. Tom did this often when he was troubled. The city skyline view allowed him to put into perspective any of his concerns.

Earlier in the week, Tom had a telephone conversation with Doris Winthrop, the widow of his best friend, Jared Winthrop. Jared had died unexpectedly at a relatively young age. Prior to his death, Jared had appointed Tom, with his concurrence, as successor trustee for his then revocable trust. The trust named his current wife, Doris, as income beneficiary and two sons from his first marriage as remainder beneficiaries. The trust language was rather standard and Tom, given his background in the investment industry, was comfortable with his ability to manage the trust in a professional manner. He was quite conversant with the requirements of Restatement (Third) of Trusts, the Prudent Investor Rule (Rule), the Uniform Prudent Investor Act (Act), and the Uniform Principle and Income Accounting Act (2001) (UPIAA).

During their conversation in early April 2005, Doris had complained bitterly about her most recent quarterly income distribution and the income she received during 2004 from the $15 million in trust assets. Under the trust’s terms, her income disbursements were limited to traditional fiduciary accounting income. Given the interest rate downturn and relatively low dividend yield generated by equities, the trust’s income had been declining since Jared’s death three years ago. Currently the income from interest and dividends was approximately three percent of the trust’s asset value. In their conversation, Doris indicated a strong desire for the trust’s portfolio to be reallocated heavily toward debt, allowing for a larger dollar income distribution.

Adding to Tom’s concern was the attitude of Jared’s two sons toward their stepmother. Their relationship with Doris could be described as dysfunctional at best. He knew they would oppose vigorously any portfolio reallocation that increased Doris’ income at the expense of their remainder interest upon her death— which, according to actuarial tables, was approximately twenty years hence.

Tom believed the trust’s current asset allocation served the interests of both income and remainder beneficiaries reasonably well as required by his fiduciary duty of impartiality. He realized the portfolio’s allocation was weighted somewhat toward income producing assets (debt and real estate investment trusts or REITs) to provide income for Doris and he thought any further weighting in that direction would be unfair to the remainder beneficiaries.

As Tom pondered the situation, he contemplated “total return investing” as a possible solution. Under the total return...
concept, he could invest the portfolio without concern as to whether the return came from income or appreciation. Upon advice of counsel, Tom understood in his jurisdiction he had available two alternative approaches: the power to adjust income and principal; and, conversion to a unitrust.

Based on §103 and §104 of UPIAA, Tom was confident that he had the power to make equitable adjustments and he decided to investigate this total return approach. However, he had always been a little unsure about the “Coordination with the Uniform Prudent Investor Act” section of UPIAA’s Prefatory Note. Because he kept a copy of UPIAA on his desk, he picked it up and began to read a portion of that section:

The law of trust investment has been modernized. See Uniform Prudent Investor Act (1994); Restatement (Third) of Trusts: Prudent Investor Rule (1992) (hereinafter Restatement of Trusts, 3d: Prudent Investor Rule). Now it is time to update the principal and income allocation rules so the two bodies of doctrine can work well together. This revision deals conservatively with the tension between modern investment theory and traditional income allocation. The starting point is to use the traditional system. If prudent investing of all the assets in a trust viewed as a portfolio and traditional allocation effectuate the intent of the settler, then nothing need be done. The Act, however, helps the trustee who has made a prudent, modern portfolio-based investment decision that has the initial effect of skewing return from all the assets under management, viewed as a portfolio, as between income and principal beneficiaries. The Act gives the trustee a power to reallocate the portfolio return suitably. To leave a trustee constrained by the traditional system would inhibit the trustee’s ability to fully implement modern portfolio theory.1

Tom understood the intent of the section and had a reasonably sound understanding of Modern Portfolio Theory (MPT). However, he did not have a good grasp on how to determine the appropriate withdrawal rate for the current beneficiary and comport with his impartiality duty.

Tom decided to consult with John Dowd, a financial expert. During their conversation, John requested Tom send to him a copy of the current portfolio’s holdings, the year-end statements for the past three years, a copy of the trust document, and the trust’s investment policy statement (IPS). John promised to provide Tom an analysis within the next three weeks. That analysis is the subject of the remainder of this article.

Section II presents the feasible set of assets from which the Efficient Frontier was constructed as of the end of March 2005. The development of a proposed portfolio is discussed and the proposed and current trust portfolios are examined relative to the Efficient Frontier. Section III describes the simulation results of the current and proposed portfolios under the assumption of different withdrawal rates. Section IV identifies the crossover rate as the withdrawal rate that matches the ending expected values of the current and proposed portfolios. Section V discusses the need for periodic review of the trust portfolio and the withdrawal rate. Section VI summarizes an approach for determining the appropriate withdrawal rate for a total return trust.

II. The Efficient Frontier and the Financial Expert’s Proposed Portfolio2

A. The Feasible Set. Upon receiving and reviewing the information from Tom, John created an Efficient Frontier as of the end of March 2005. He determined the asset classes and their corresponding benchmark indexes, shown in Chart II.1, which John determined to be appropriate under the circumstances, as the feasible set for constructing the Efficient Frontier.

<table>
<thead>
<tr>
<th>Asset Class</th>
<th>Benchmark</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Large Cap Growth</td>
<td>S&amp;P/BARRA 500 Growth</td>
</tr>
<tr>
<td>U.S. Large Cap Value</td>
<td>S&amp;P/BARRA 500 Value</td>
</tr>
<tr>
<td>U.S. Mid Cap Equities</td>
<td>S&amp;P MidCap 400</td>
</tr>
<tr>
<td>U.S. Small Cap Equity</td>
<td>Russell 2000</td>
</tr>
<tr>
<td>International Equities</td>
<td>MSCI EAFE</td>
</tr>
<tr>
<td>Emerging Markets</td>
<td>S&amp;P/IFC Composite</td>
</tr>
<tr>
<td>Real Estate</td>
<td>NAREIT – Equity</td>
</tr>
<tr>
<td>Bonds</td>
<td>Bonds</td>
</tr>
<tr>
<td>U.S. Short Term Gvt</td>
<td>Ibbotson Associates US 1 yr</td>
</tr>
<tr>
<td>Bonds</td>
<td>Treasury</td>
</tr>
<tr>
<td>U.S. High Yield Bonds</td>
<td>Lehman Bros. High Yield Index</td>
</tr>
<tr>
<td>U.S. Long Term Gvt</td>
<td>Ibbotson Associates US LT Gvt</td>
</tr>
<tr>
<td>Bonds</td>
<td>Bonds</td>
</tr>
<tr>
<td>Municipal Bonds</td>
<td>Lehman Bros. 20 yr Municipal</td>
</tr>
<tr>
<td>Bonds</td>
<td>Bonds</td>
</tr>
<tr>
<td>International Bonds</td>
<td>Solomon Bros. Non-US 1 yr Gvt</td>
</tr>
<tr>
<td>U.S. Cash Equivalent</td>
<td>Solomon Bros. 90 Day T-Bills</td>
</tr>
</tbody>
</table>

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B. The Efficient Frontier.

The Efficient Frontier that results from the feasible set is shown in Chart II.2.3

![Chart II.2 Feasible Set of Indexes and Their Efficient Frontier as of March 2005](image)

C. Actual and Proposed Portfolios.

John examined the current trust portfolio as of March 2005 and assigned each of the assets in the portfolio to a specific asset class. The composition of the current trust portfolio, in terms of dollars and percentage of the total portfolio, is shown in Chart II.3. He noted the portfolio asset allocation had not changed significantly over the past three years and he was comfortable using the current allocation.

After reviewing the IPS and assessing the required return contained in the policy statement, John located a portfolio on the Efficient Frontier containing an expected return, and thus expected risk, higher than the level indicated in the current IPS.4 John deemed increasing portfolio expected return and risk as consistent with the concept of total return investing. If the trust was allowed to distribute income and principal to the income beneficiary, the portfolio would no longer be constrained to invest a large percentage of its assets in low-return, income-producing securities. After examining the composition of the proposed portfolio, its location relative to the Efficient Frontier, and its associated expected risk, John was comfortable in selecting the proposed portfolio shown in Chart II.3.

<table>
<thead>
<tr>
<th>Asset Class</th>
<th>Current Portfolio</th>
<th>Proposed Portfolio</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Large Cap Growth</td>
<td>1,500,000</td>
<td>-10</td>
<td></td>
</tr>
<tr>
<td>U.S. Large Cap Value</td>
<td>4,500,000</td>
<td>16</td>
<td>-14</td>
</tr>
<tr>
<td>U.S. Mid Cap Equities</td>
<td>2,874,000</td>
<td>19</td>
<td>+19</td>
</tr>
<tr>
<td>International Equities</td>
<td>1,500,000</td>
<td>10</td>
<td>-3</td>
</tr>
<tr>
<td>Emerging Markets</td>
<td>2,554,500</td>
<td>17</td>
<td>+17</td>
</tr>
<tr>
<td>Real Estate Investment Trust</td>
<td>3,000,000</td>
<td>20</td>
<td>+5</td>
</tr>
<tr>
<td>U.S. Long Term Gvt Bonds</td>
<td>3,000,000</td>
<td>20</td>
<td>-20</td>
</tr>
<tr>
<td>International Bonds</td>
<td>2,358,000</td>
<td>16</td>
<td>+16</td>
</tr>
<tr>
<td>U.S. Cash equivalent</td>
<td>1,500,000</td>
<td>10</td>
<td>-10</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>$15,000,000</th>
<th>100%</th>
</tr>
</thead>
</table>

*Note: Percentages are rounded.
The current and proposed portfolios relative to the Efficient Frontier John created are displayed in Chart II.4.

Chart II.4
Actual and Proposed Portfolios Relative to the Efficient Frontier as of March 2005

D. Preparing for the Simulation.

John’s next step was to compare the current and proposed portfolios by simulating returns over a twenty year investment horizon - Doris’ life expectancy. In preparing the simulation John noted the trust had passed all income to Doris. Tom had also managed the trust such that historically all capital gains had been offset by capital losses and the portfolio did not incur capital gains taxes. Though perhaps slightly unrealistic, for illustrative purposes John assumed the trust would continue not to be liable for capital gains taxes. Neither would it be liable for income taxes as it was expected all net income would be distributed within the anticipated withdrawal amount. He also gathered statistics (expected returns, standard deviations, and correlations) on the performance of the asset classes in Chart II.3 for the period 1991 through March 2005.5

III. Simulation of Investment Returns

A. Purpose of the Simulation.

John used a simulation to help him compare the current and proposed trust portfolios and to determine a new withdrawal rate that balanced Doris’ need for current distributions with her stepsons’ desire for capital growth. Towards this end, John’s simulation was designed to identify the maximum withdrawal rate, or crossover rate, such that the remainder beneficiaries’ expected ending value of the proposed portfolio is not less than the expected ending value of the current portfolio at its current 3% withdrawal rate. John realized that to generate a crossover rate the proposed portfolio must offer a higher expected return and, thus, risk than the current portfolio. John’s proposed portfolio, shown in Chart II.3, met this criterion.

B. Inputs to the Simulation.

Because an investment return simulation requires values for each constituent asset class to describe a portfolio’s future path, John used the historical asset class statistics to build forecasts. He knew asset class returns should not be forecast independently, however, because MPT recognizes the importance of the relationships between them.6 John simulated short-term interest rates and used the relationship between those short-term rates and the asset classes in the feasible set to build scenarios of returns for the actual and proposed portfolios over twenty years.7

C. Simulation Results.

John’s simulation produced 500 return scenarios.8 Chart III.1 summarizes these scenarios by listing the 95th through the 5th percentile of the returns to the two portfolios over the 500 scenarios. As John expected, the proposed portfolio outperformed the current portfolio at every level.

<table>
<thead>
<tr>
<th>Percentile</th>
<th>Current</th>
<th>Proposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>95th</td>
<td>14.07%</td>
<td>17.68%</td>
</tr>
<tr>
<td>75th</td>
<td>11.38</td>
<td>14.10</td>
</tr>
<tr>
<td>67th</td>
<td>10.74</td>
<td>13.13</td>
</tr>
<tr>
<td>50th</td>
<td>9.59</td>
<td>11.67</td>
</tr>
<tr>
<td>33rd</td>
<td>8.45</td>
<td>10.29</td>
</tr>
<tr>
<td>25th</td>
<td>7.82</td>
<td>9.33</td>
</tr>
<tr>
<td>5th</td>
<td>5.17</td>
<td>6.16</td>
</tr>
</tbody>
</table>

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D. Withdrawal Rates.

Chart III.2 compares the distribution of the ending values for the two portfolios at the current 3% withdrawal rate.

<table>
<thead>
<tr>
<th>Percentile</th>
<th>Current</th>
<th>Proposed</th>
</tr>
</thead>
<tbody>
<tr>
<td>95th</td>
<td>$113,422,505</td>
<td>$211,678,496</td>
</tr>
<tr>
<td>75th</td>
<td>70,393,831</td>
<td>114,043,398</td>
</tr>
<tr>
<td>67th</td>
<td>62,761,548</td>
<td>96,165,775</td>
</tr>
<tr>
<td>Expected</td>
<td>57,937,192</td>
<td>91,984,784</td>
</tr>
<tr>
<td>50th</td>
<td>50,933,540</td>
<td>74,116,761</td>
</tr>
<tr>
<td>33rd</td>
<td>41,300,823</td>
<td>57,806,309</td>
</tr>
<tr>
<td>25th</td>
<td>36,759,138</td>
<td>48,599,335</td>
</tr>
<tr>
<td>5th</td>
<td>22,346,198</td>
<td>26,966,459</td>
</tr>
</tbody>
</table>

In reviewing Chart III.2, John observed that with a 3% withdrawal rate the simulation produced an expected ending value of $60.6 million. With a 6% withdrawal rate it produced an expected ending value of $49.1 million. The current portfolio’s ending expected value is $57.9 million with a 3% withdrawal rate. Therefore, a withdrawal rate between 5% and 6% from the proposed portfolio would provide Doris with additional income while leaving the stepsons no worse off in terms of the expected ending portfolio value twenty years hence. Thus, the crossover rate is between 5% and 6%.

E. Target Expected Ending Values.

John’s targets for the simulation were a series of expected ending values for the proposed portfolio at different withdrawal rates that bracketed the expected ending value of the current portfolio ($57,937,192) at the 3% withdrawal rate. He knew that as the withdrawal rate increased the expected ending value naturally falls. Chart III.3 shows John’s simulation results with different withdrawal rates.

<table>
<thead>
<tr>
<th>Percentile</th>
<th>4%</th>
<th>5%</th>
<th>6%</th>
</tr>
</thead>
<tbody>
<tr>
<td>95th</td>
<td>$172,054,770</td>
<td>$139,544,962</td>
<td>$112,927,348</td>
</tr>
<tr>
<td>75th</td>
<td>92,695,815</td>
<td>75,180,909</td>
<td>60,840,467</td>
</tr>
</tbody>
</table>

At a withdrawal rate of 5.215% the expected ending value of the proposed portfolio was equal to $57.9 million, the targeted ending value. He elected to recommend to Tom that he propose a 5% withdrawal rate to the beneficiaries. John had a number of reasons for recommending a withdrawal rate slightly less than the crossover rate. First, the increase in the withdrawal rate from 3% to 5% represented a significant, immediate increase in annual income for Doris of $300,000 or 67% from her current level. Second, Doris’ stepsons would realize that...
the expected value of the proposed portfolio in twenty years would be almost $2.7 million ($60.6 - $57.9) larger at a 5% withdrawal rate than the expected value of the current portfolio with a 3% withdrawal rate. Although John recognized the proposed portfolio carried more risk, he thought the stepsons would agree to the change in withdrawal rate because their interest in terms of expected value would be increased. Finally, the 5% withdrawal rate was within the 3% - 5% range often considered reasonable by some fiduciaries and, perhaps, a safe harbor in some jurisdictions.

B. Another Advantage of the Proposed Portfolio.

John noted that Chart IV.1 also underscores one of the advantages of moving to the proposed portfolio. If the current portfolio is maintained and the withdrawal rate increased to 5%, the expected value twenty years hence falls to $38.2 million from $57.9 million, almost a $20 million decline. Changing the portfolio composition avoids the problem of increasing the withdrawal rate to satisfy the income beneficiary without regard to the ultimate impact on remainder beneficiaries.

V. Periodic Review

A. Annual Reviews.

John realized implementation of the proposed portfolio and new withdrawal rate should not be put into practice and forgotten. Over time capital markets change. What appears to be appropriate policy given currently available information may not hold into the future. Therefore, he planned to recommend a formal review of the portfolio's asset allocation and the withdrawal rate be undertaken, preferably each year.10

B. Potential Adjustments to the Withdrawal Rate.

John also intended to stress to Tom the importance of explaining to the trust's beneficiaries what might happen in the future. For example, if capital markets declined for an extended period, then to maintain impartiality among the beneficiaries either a) Doris would have to accept a lower withdrawal rate, b) the remainder beneficiaries would have to accept a lower ending expected value, c) the trust portfolio's composition would have to be reconstructed resulting in a higher level of expected return and risk, or d) a combination of the above.

VI. Conclusions

A. Impartiality.

Tom finished reading John's report and was somewhat relieved it provided support for his total return investing solution. The problem of balancing Doris' current distribution requests and the stepsons' interest in maximizing their remainder value would always remain. Though he was confident about implementing John's recommendation for the portfolio's allocation, his concern was getting the beneficiaries to agree so as to avoid potential acrimony and possible litigation. Because the proposed portfolio carried more risk than the current portfolio, Tom was concerned that a 5% withdrawal rate might be perceived as favoring unfairly the current beneficiary at the remainder beneficiaries' expense.

B. Return and Risk.

Tom began to formulate how to present the new investing and withdrawal approach to the beneficiaries. He was particularly pleased that the charts in John's report were, for the most part, formulated in terms of dollars. Tom had always found that in explaining outcomes to financially unsophisticated people dollar figures had much more meaning than percentages. He wanted to present his recommendation as a potential win-win situation for all parties, but he was not certain the stepsons would believe they benefited from the proposed portfolio allocation and a 5% withdrawal rate. Tom was concerned the stepsons would not perceive much gain to themselves, particularly in light of higher risk in the proposed portfolio.

C. Withdrawal Rates, Fairness, and Compromise.

The withdrawal crossover rate determination of 5.125% was extremely helpful to Tom in setting an upper limit to the new withdrawal rate. But, to pursue his win-win strategy the proposed withdrawal rate would have to be, as John suggested, less than the crossover rate. In examining Chart IV.1, Tom was pleased John had presented a 4.5% withdrawal comparison of expected portfolio values. At a 4.5% withdrawal rate, Doris would receive a substantial increase in annual income, at least initially, from $450,000 to $675,000. The expected value of the portfolio in twenty years would be $67.4 million as compared to the expected value under the current portfolio allocation and 3% withdrawal rate of $57.9 million. Tom planned to explain to the beneficiaries that this arrangement was subject to change depending upon an annual review. Nevertheless, he was hopeful both sides would agree to compromise and accept his proposed changes.
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Endnotes

1 Uniform Principal and Income Act, Prefatory Note (amended last 2001).

2 A discussion of the underpinnings of Modern Portfolio Theory and its connection to the Prudent Investor Act appears in the first article in this series.

3 Other than the two end point asset classes, Cash and Emerging Markets, the asset classes in the feasible set are not labeled in Chart II.2. This was done to avoid clutter in the chart. The unlabeled boxes in the chart represent the remaining 12 asset classes considered as part of the feasible set.

4 The use of the trust's investment policy statement to assist in determining the appropriate risk level for a trust is presented in the second article in this series.

5 The historical record of the indexes varies from 80 to 13 years. In this case the shortest index began in 1991.

6 For example, the simulation assumes small cap stocks will have a higher expected risk and return than large cap stocks. Though large cap stock returns might be higher than small cap stock returns in any one period, they should not be systematically higher over time. Similarly bonds are assumed to have a lower average expected risk and return than stocks. The simulation also assumes that all assets have correlations that are stable on average.

7 Many possible simulation techniques exist to take account of all these relationships. Most of the investment-oriented simulations use a variation of the Monte Carlo approach, so named because it uses a random number generator (like a Roulette wheel) to create investment scenarios. Our goal is not to explain the detailed calculations of the simulation different experts may very well come to different results because they use different inputs but to show how the results could be used.

8 In general the more scenarios the more accurate is the simulation in terms of reducing the variability of results. The number of scenarios used here is reasonable for expository purposes and should be determined on a case-by-case basis.

9 The expected value, the probabilistic expectation of all the possible ending values, is not equal to the median because the empirical distribution is not symmetric.

10 This recommendation is consistent with the need for a periodic review of the IPS suggested in the second article of this series.

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Understanding Appellate Lawyers
A Brief Guide For Trial Lawyers

Kelly J. Kirkland

Trial lawyers have much in common with appellate lawyers. They are, after all, members of the same species—Homo arguensis. But trial lawyers sometimes find it frustrating to work with appellate lawyers. This is because a trial lawyer often views an appeal from a different perspective than an appellate lawyer.

The heart of most appeals is the appellate brief; indeed, an increasing number of appeals are disposed of without oral argument. Appellate lawyers have a maxim—in an appellate brief, three strong arguments are better than three strong arguments and seven weak ones. That ought to resonate with trial lawyers, who have a similar maxim about cross-examination—three strong points are better than three strong points and seven weak ones. But maxims aside, many trial lawyers find it difficult on appeal to shift out of the “argue everything” mentality that served them well at trial. In contrast, appellate lawyers think in terms of a brief that makes two or three of the best arguments as simply as possible and then stops.

And what are the best arguments? Trial lawyers tend to re-live the trial, figuring out where the trial was lost (or won) and trying to tie each turning point to a ruling by the trial judge. Appellate lawyers, on the other hand, tend to read the record with an eye towards the relevant standards of appellate review. This is baffling behavior to many trial lawyers, who come away believing that appellate lawyers just do not understand how trials work. But appellate lawyers know that other things being equal, challenging a decision of the trial judge is reviewed for abuse of discretion.

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A good example is raising evidentiary points on appeal. In fact, this is probably the most common area where trial lawyers and appellate lawyers butt heads. Trial lawyers care deeply about whether evidence is admitted or excluded at trial. Not surprisingly, trial lawyers often want to keep arguing about this on appeal. But appellate lawyers know that the trial court is almost always the court of last resort when it comes to admitting or excluding evidence.

Appellate lawyers do not focus on why a trial was lost (or won). An appellate lawyer focuses on how to change that result (or keep it unchanged) on appeal. That is not necessarily the same thing.

Trial lawyers often ask appellate lawyers, “You say that we want to keep our appellate brief short and sweet. But our opponent raises (or is going to raise) 30 arguments in its appellate brief. So what do we do - just ignore most of them?” That would take nerves of steel, particularly with your client looking over your shoulder. [“Of course we lost the appeal, you blockhead. You didn’t even respond to most of what the other side said!”] But there are ways of responding concisely to a large number of arguments. For example, an effective way to use a couple of pages in an appellate brief is to construct a table with two columns—your opponent’s less dangerous arguments summarized briefly in the left column, your concise response to each in the right column.

This is an application of a broader principle. An experienced trial lawyer would not spend three straight days in trial reading (or playing video of) deposition excerpts to a jury. Assuming she needs all this deposition evidence in the first place, she knows to break it up with live testimony, probably accompanied by computer animations, blow-ups, or other demonstrative evidence - anything to keep the jury awake and focused. Similarly, experienced appellate lawyers look for opportunities to break up the monotony of page after page of prose by inserting tables, charts, or diagrams. These can be efficient ways to cover a lot of ground very quickly.

Finally, appellate lawyers often do something before filing a brief that puzzles trial lawyers—they give the brief to another appellate lawyer to read, preferably one who has had no prior involvement in the case. This is nothing more than an appellate lawyer’s version of a mock trial. An appellate judge—or her law clerk—comes to every appeal cold. The learning process begins when she opens the briefs. So once the brief is written, but before it is filed, appellate lawyers often give it to someone in the firm who comes to the case equally cold. What arguments are not crystal clear on first reading? Which arguments sound unconvincing? At what point in the brief did he first feel like tossing it aside and moving on to something else? Does the brief ever sound childish or petty? To an appellate lawyer this kind of feedback can be priceless.

In the final analysis, trial lawyers will understand appellate lawyers much better once they understand that appellate lawyers do not focus on why a trial was lost (or won). An appellate lawyer focuses on how to change that result (or keep it unchanged) on appeal. That is not necessarily the same thing.
Effective Utilization Of Civil Juries In Federal Court

By Erin C. Asborno, Esq.

This article is intended to be a brief overview of the effective utilization of civil juries in federal court, including a discussion concerning courtroom persuasion.

Selection of Jurors

Each United States District Court is required to devise and place into operation a written plan for the random selection of jurors. Among other things, the plan must:

1. Either establish a jury commission, or authorize the clerk of the court, to manage the jury selection process;
2. Specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division;
3. Specify detailed procedures to be followed by the jury commission or clerk in selecting names to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes;
4. Provide for a master jury wheel (or a device similar in purpose and function) into which the names of those randomly selected shall be placed;
5. Specify those groups of persons or occupational classes whose members shall, on individual request, be excused from jury service only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience;
6. Specify that volunteer safety personnel, upon individual request, shall be excused from jury service;
7. Specify that certain persons are barred from jury service on the basis that they are exempt, including members in active service in the Armed Forces of the United States; members of the fire or police departments of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession; and public officers in the executive, legislative, or judicial branches of the Government of the United States, or of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession, who are actively engaged in the performance of official duties;
8. Fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public, although the plan may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require;
9. Specify the procedures to be followed by the clerk or jury commission in assigning persons whose names have been drawn from the qualified jury wheel to grand and petit jury panels.

Challenging Compliance With Selection Procedures

The Jury Selection and Service Act is the statutory scheme for jury selection in the district courts. 28 U.S.C.S. § 1861, a broad declaration of policy, states: “all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community.”

In civil cases, a party may move to stay the proceedings on the ground of substantial failure to comply with the Jury Selection and Service Act before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the basis for the stay, whichever is earlier.

Voire Dire Examination

The district court has broad discretion concerning the voir dire examination of prospective jurors. That discretion is abused, however, if “the scope of voir dire is inadequate to discover bias or deprives a party of an opportunity to make reasonably intelligent use of his peremptory challenges.”

Fed. R. Civ. P. 47(a) controls the content of the voir dire examination and such content is not subject to the dictates of any contrary state law. The principal purpose of voir dire examination is to afford the parties a trial by a qualified and impartial jury. The examination allows the trial judge to determine actual bias and counsel to assess suspected bias or prejudice.

Under the Federal Rules of Civil Procedure, the parties, their counsel, or the court may conduct the voir dire examination of prospective jurors. If the district court conducts the voir dire examination, the parties must be permitted to ask additional questions which the court deems proper, or the court itself must submit the parties’ or their attorneys’ additional questions.

A trial judge’s refusal to permit question-
ing by counsel is not prejudicial where the judge asked all the questions requested. In a civil case, neither party has any complaint concerning limitations on voir dire, as long as an impartial jury is selected.

**Peremptory Challenges**

The sole objective of peremptory challenges is to obtain an impartial jury. In civil cases, each party is entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and allow them to be exercised separately or jointly.

All challenges for cause or favor are determined by the court. While the court is judge of actual bias, in challenges for cause or favor, counsel is judge of which jurors she will peremptorily challenge for suspected bias or prejudice against her client’s cause.

The right of challenge includes the incidental right that information elicited on voir dire examination must be true.

**Effective Courtroom Persuasion**

The three interrelated aspects of courtroom persuasion are: (1) ethos, which is a combination of a lawyer’s image and the trust the jury confers upon that lawyer, including credibility, which is comprised of competence and trustworthiness; (2) pathos, which is emotion; and (3) logos, which is logic. While some jurors are more susceptible to be persuaded by a single aspect of courtroom persuasion, ideally, each will balance the other and work together for a compelling case.

For a case to be successful, the display of evidence must be accompanied by compelling delivery techniques that guide jurors to develop trust in the lawyer. In an era widely influenced by the media, particularly television, jurors make quick judgments about lawyers and clients; and often have great trouble concentrating during long opening statements and closing arguments.

Jurors are alert to the fact that lawyers are compensated for their bias. They also have a keen eye for half-truths, misstatements, and misrepresentations. They unconsciously examine each lawyer, and base their level of trust, in part, on the lawyer’s perceived ethics.

Persuasiveness is not manipulation nor is it coercion. Persuasion differs from manipulation in that persuasion changes the action of juror because her basic belief and thoughts on a subject are changed by what she has seen or heard, not due to force or overcoming reluctance to agree with the manipulator. Jurors are adept at detecting sincerity, credibility, and truthfulness. While employing the three aspects of courtroom persuasion, the trial lawyer’s goal should be to first understand the jurors, and to act with only the highest standards of justice, integrity, fairness, morality, and truthfulness in persuading them.

**Endnotes**

1 See 28 U.S.C.S. § 1863(a).
13 See 28 U.S.C.S. § 1867(c).
14 Cimino v. Raymark Indus., 151 F.3d 297, 323 (5th Cir. 1998).
15 Id.
16 Smith v. Vicorp, Inc., 107 F.3d 816, 818 (10th Cir. 1997).
17 Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981).
18 Id.
21 Stephan v. Martin Firearms Co., 353 F.2d 819, 822 (2nd Cir. 1965).
24 Id.
25 Id.
26 Photostat v. Ball, 338 F.2d 783, 786 (10th Cir. 1964).
27 Id. at 787 (granting new trial where prospective juror in course of voir dire examination failed to disclose pertinent facts which had effect of substantially impairing right of peremptory challenge).
29 Id.
30 Id. at § 2.
31 Id. at § 3.
32 Id. at § 6.
33 Id. at § 7.
34 Id. at § 9.
35 Id.
The American Bar Association recommends that attorneys spend fifty hours each year providing legal services to persons of limited means or charitable, religious, civic, community, governmental and educational organizations in matters which are primarily designed to address the needs of persons of limited means. As associates, we are repeatedly reminded of our obligations to the community and the bar itself. From countless podiums, we are cajoled by senior members of the profession to give back to our communities and to the legal profession.

And, in truth, we are inspired. For the most part, we leave these rubber-chicken lunches with fresh resolve. This year, we'll take on a habeas petition. This year we'll volunteer to do intake at the local legal clinic. This year—will be different.

But then, the buzz fades and reality comes crashing in. The next thing you know, another year has passed and you have yet to make a significant contribution. Why is that? Most associates genuinely want to help others, make a difference, or just feel better about their profession. So why is it that so often, we fail to make time for pro bono activities?

Pro bono is a great tool, one endorsed by the ABA and probably by your firm's management, which you can use for your own professional development and personal benefit.

The simple answer is usually this—lack of time and competing priorities. At big firms, associates are expected to bill a significant amount of hours in addition to serving on firm committees, recruiting and meeting continuing legal obligations. At smaller firms and in solo practices, young attorneys have even bigger responsibilities—bringing in and retaining clients. These duties, combined with having an occasional dinner with your family (or drinks with the girls), going to the gym and picking up the dry cleaning, can feel like they take every waking hour.

So what's in it for you? Let's set aside the rhetoric, the inspirational pep talks and our obligations as privileged individuals. Those arguments have been made repeatedly. And if these themes haven't inspired you to pick up a pro bono matter by now, another article reiterating them isn't going to do the trick. Instead, let's talk associate to associate. Pro bono is a great tool, one endorsed by the ABA and probably by your firm's management, which you can use for your own professional development and personal benefit. In short, let me show you why it's worth your time.

Develop Your Skills. It's no secret that litigation associates at Big Firms, especially those staffed on Big Cases, will spend a significant part of their junior years doing document review and other relatively low-level discovery tasks. The opportunities to take on depositions, argue substantive motions, and examine witnesses at trial are limited on Big Cases. Sometimes, the client specifically requests that the name partner argue the substantive motion that you drafted. Other times, you may end up competing with five other associates for the same opportunities.

By taking on a case of your own, you will be responsible for drafting all of these motions, arguing them to the Court and managing all aspects of discovery including the elusive deposition. Further, by working one-on-one with a supervisor, you can get access to skills coaching and strategy decisions that you may not receive on larger cases. You also have the chance to prove yourself and show off your skill set. This often leads to increased responsibilities on billable cases.

Erin Bradham, an associate in the Phoenix office of Steptoe & Johnson, has been actively involved in the Florence Immigration and Refugee Rights
Project as a pro bono attorney for several years. Through the program, she represents people seeking asylum in the United States. Erin has been able to successfully translate the skills she gained through her asylum and immigration work to her billable cases.

My pro bono cases allow me to do a different kind of work than in my normal litigation practice, but many of the experiences and skills cross over. For example, as a young associate, my pro bono cases were the first cases where I had primary responsibility for managing the case and moving it forward. This experience helped me once I began to have more responsibility for managing my non-pro bono cases. The pro bono cases have also helped me hone my skills as a litigator. For example, my ability to do a direct examination and to think on my feet in a courtroom context have improved dramatically through using those skills in pro bono cases.

The possibility of professional growth through an active pro bono practice is not just limited to your substantive skill sets. Kenzo Kawanabe, a partner in the Denver office of Davis Graham & Stubbs LLC, speaks of the soft skills he developed through his pro bono practice.

My pro bono work makes me a better attorney. Dealing with people in different situations allows me to better understand relationships and emotions, which enables me to become a better litigator whether I am participating in settlement discussions, deposing a witness, or arguing in court. Pro bono work teaches empathy, and how to communicate. Because of my pro bono work, I am better able to understand and communicate with a witness whether she is the CEO or helps sweep the floor. This ability to communicate is crucial in obtaining information and giving advice in any case.

While your day to day existence may be focused on interpreting and applying the law as it stands, as a pro bono attorney, you have the opportunity to change the law.

Leverage Your Experience. In the age of diminishing trials in civil litigation, pro bono can provide the best trial experience for associates at large firms working on bet the company cases. As a first year, Christopher O’Connor, now a senior associate at Jenner & Block’s Chicago office, defended a man accused of first-degree murder and criminal drug conspiracy in a four-week jury trial. After the first trial resulted in a partial acquittal and hung jury, he retried the case in a second four-week trial. As a result of these two trials, Chris conducted direct and cross-examinations of twenty-one witnesses. That alone was a phenomenal experience for a young lawyer, he said.

What’s more interesting is how Chris’s firm responded to his experience. After demonstrating his ability to perform under pressure at trial, partners were eager to give Chris significant responsibilities on billable cases. Not long after his second trial, he was deposing the Senior Vice President of a major insurance company and later, Wall Street investment bankers in a high profile litigation matter. Since then, Chris has also second-chaired another criminal trial in which he gave the opening statement and examined several witnesses and the firm took key cross and direct exams. Perhaps more important, they recently asked him to work for nine months as an in-house counsel at one of the firm’s largest clients. Chris notes pro bono matters build not only partners’ and clients’ confidence in your skills, but your own self-confidence as a young litigator.

Diversify Your Practice. Pro bono allows you to try out new practice areas. There are not that many opportunities for pro bono work in the field of securities litigation or reinsurance, for example, but pro bono will allow you try out other areas that may interest you: civil rights, employment discrimination, immigration, criminal law, family law or constitutional law.

David Prohofsky, who practices at a large firm in Chicago, has a predominately administrative and transactional practice. Yet, he has taken on a number of pro bono appeals relating to constitutional questions. Currently, he is working on post-conviction petition in a death penalty matter before the Supreme Court of Mississippi. In the past, he has taken appeals before the Sixth and Seventh Circuits involving First Amendment and Due Process claims.

Outside of the traditional practice areas, advocacy and policy work can also be done on a pro bono basis. While your day to day existence may be focused on interpreting and applying the law as it stands, as a pro bono attorney, you have the opportunity to change the law. In addition to her general litigation practice, Martina Vandenberg of Jenner & Block, a young associate, my pro bono skills cross over. For example, as a young associate, my pro bono cases were the first cases where I had primary responsibility for managing the case and moving it forward. This experience helped me once I began to have more responsibility for managing my non-pro bono cases. The pro bono cases have also helped me hone my skills as a litigator. For example, my ability to do a direct examination and to think on my feet in a courtroom context have improved dramatically through using those skills in pro bono cases.
Block has worked with a Washington, D.C. think-tank and NATO to change the law on human trafficking, specifically trafficking of women for forced prostitution. Martina and her colleagues provided expert commentary on a proposed NATO anti-trafficking policy at a high-level meeting in Europe. Back in the United States, she and her client succeeded in expanding U.S. criminal jurisdiction to cover American civilian agency contractors engaged in trafficking crimes while serving abroad.

As lawyers, particularly those in private practice, we don’t often have the luxury of seeing the effect and the power that our education and time gives us and our clients.

Take Up A Cause. Pro bono can also be an opportunity for you to contribute to a cause you are passionate about. Are you an amateur artist? Donate your time to organizations that assist artists in protecting their copyrights. Feel strongly about stopping domestic violence? Provide legal advice at a shelter about child custody, divorce and criminal charges against battering spouses. Fired up about immigration rights? Take on an asylum petition.

While in law school in 1997, Martina Vandenberg worked in Israel documenting the trafficking of women for forced prostitution. As a volunteer for a local women’s rights organization in Jerusalem, she met and interviewed women trafficking victims held in an Israeli prison awaiting deportation. Before joining Jenner & Block, she worked with the Human Rights Watch reporting on human trafficking in post-conflict Bosnia and Herzegovina. When she went into private practice, she brought these experiences and passions with her. Martina has used her litigation background to bring civil cases on behalf of trafficking victims exploited in the United States and to lobby for policy changes that would impact human trafficking.

Susan Quinn, an associate in Morrison & Foerster’s New York office, focuses her practice on securities and other complex commercial litigation. Following September 11th, Susan got involved with victim compensation rights. She helped the family of one of the victims on September 11th navigate the procedures of the federal September 11th Victim Compensation Fund and ultimately presented her client’s case at a hearing before the Fund. Susan says, “I found the experience to be profoundly rewarding, both personally and professionally. I will never forget it.”

Josh Grabel, a senior associate in the Phoenix office of Snell & Wilmer, says that pro bono work has allowed him to represent those who in many cases would not be able to represent themselves. Though his practice focuses primarily on complex commercial litigation, Josh recently took a federal court appointment to represent a prisoner who was brutally beaten by guards at the facility. Josh says, “We were able to obtain a very favorable settlement for the client, which will give him a chance to start a new life when he is released. For me, it was a chance to use my legal training to assist someone who needed help and make a difference.”

Wade Thomson, another associate from Jenner & Block, combined his interests in media law and human rights in taking on the asylum case of a Ugandan journalist. “I found a case in which I was able to advance the cause of free press, help a deserving man escape persecution, and befriend a remarkable human being.” Such cases are precisely why many of us went to law school in the first place; pro bono allows you to seek out the types of cases you have always wanted to do.

In talking about his work with community organizations, David Prohofsksy spoke specifically about incorporating his values into his professional experiences through the pro bono matters he chooses. “It’s very fulfilling to be able to incorporate into my practice the values my parents taught me in a concrete way. Beyond the [lawyer] jokes, my pro bono work is something concrete, referenceable and public that bridges the gap between our profession and my family.”

Warm Fuzzies. All right, we promised not to employ any do the right thing rhetoric in this article. But, really, did you think we could close out an article trying to convince you to do pro bono without mentioning the psychic benefits?

As lawyers, particularly those in private practice, we don’t often have the luxury of seeing the effect and the power that our education and time gives us and our clients. How many of your paying clients write Thank You notes? Did the General Counsel of your corporate client hug you after the last hearing? More importantly, did that contract dispute you finished last year change someone’s life; did it prevent them from being deported to a country they no longer call home; did it save someone from an unjust execution; did it restore your client’s belief that the system...
and our government could protect them
and redress their wrongs?

As Kenzo Kawanabe puts it, *pro bono*
work gives me perspective. For exam-
ple, a few thousand dollars to someone
on disability is just as important to the
millions at stake in one of my commer-
cial cases. Then, compare the millions
at stake in a commercial case to a client
refugee who, if we are not able to ob-
tain asylum, will be returned to the
country where he was brutally tortured
and his friend was murdered. I perform
*pro bono* work because I believe our
profession has a duty to give back to
the communities in which we live and
practice; however, the benefits of *pro
bono* and other community work pay
me back ten-fold. 🌟

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