November 2018

Featured In This Issue

Steve Shapiro’s Legacy in the Courtroom and Beyond, By Kathy Agonis
In Memoriam Stephen Shapiro, By Jeffrey Cole
An Interview With Steve Shapiro: The Art of Appellate Advocacy, By Jeffrey Cole
In Memoriam: A Tribute to Judge Daniel G. Martin, By Hon. Sara Ellis
Hugo Black and the Murder of Father James E. Coyle, By Kenneth P. Nolan
The Path To Trial: A Nuts And Bolts Roadmap To Federal Civil Pretrial Submissions, By Skyler Silvertrust
Answering the Call: Pro Bono Programs in the Courts of the Seventh Circuit, By Laura McNally & Margot Klein
Diversity Jurisdiction and the Citizenship of Insurers, By Jeff Bowen
A Brief Note To Mark the 50th Anniversary of Multidistrict Litigation, By Jane Dall Wilson
Book Review, By Dawson Robinson, William Howard Taft, by Jeffrey Rosen
Around the Circuit, By Collins T. Fitzpatrick

Memories
In This Issue

Letter from the President ................................................................. 1
Steve Shapiro’s Legacy in the Courtroom and Beyond, By Kathy Agonis ........................................... 2-7
In Memoriam Stephen Shapiro, By Jeffrey Cole ........................................ 8-9
An Interview With Steve Shapiro: The Art of Appellate Advocacy, By Jeffrey Cole ...................................... 10-19
In Memoriam: A Tribute to Judge Daniel G. Martin, By Hon. Sara Ellis ........................................ 20-22
Hugo Black and the Murder of Father James E. Coyle, By Kenneth P. Nolan ........................................... 23-25
The Path To Trial: A Nuts And Bolts Roadmap To Federal Civil Pretrial Submissions, By Skyler Silvertrust ........................................... 35-39
Answering the Call: Pro Bono Programs in the Courts of the Seventh Circuit, By Laura McNally & Margot Klein ........................................... 40-44
Diversity Jurisdiction and the Citizenship of Insurers, By Jeff Bowen ........................................... 44-48
A Brief Note To Mark the 50th Anniversary of Multidistrict Litigation, By Jane Dall Wilson ........................................... 49-51
Book Review, By Dawson Robinson, WILLIAM HOWARD TAFT, by Jeffrey Rosen ........................................... 52-55
Around the Circuit, By Collins T. Fitzpatrick ........................................... 56-57

Get Involved ................................................................. 1
Writers Wanted! ................................................................. 34
Send Us Your E-Mail ................................................................. 44
Upcoming Board of Governors’ Meetings ........................................... 55
Seventh Circuit Bar Association Officers for 2017-2018 / Board of Governors / Editorial Board ........................................... 58
Welcome to another edition of the *The Circuit Rider*, the first-rate publication of the 7th Circuit Bar Association. I want to thank Magistrate Judge Jeffrey Cole, the editorial board, and the contributing authors for yet another thought-provoking and excellent edition. This publication is a valuable tool for those of us who practice in the 7th Circuit, and is one of many things that make our organization so worthwhile.

Thanks to Past President Elizabeth Herrington for her leadership of our organization over the past year and for an outstanding conference in Chicago last May. Our conference was well attended with outstanding representation from the bench and bar from our three states. The topics were timely and the programs well attended and received. The Annual Dinner was a great success.

At the March 2018 meeting of the Board of Governors, Beth Herrington and Steve Molo presented an updated version of the Association’s Vision and Mission Statement. The Board unanimously approved it.

Our vision is to advocate for the fair and effective administration of justice in the Courts of the Seventh Circuit, and our mission is to promote interaction and cooperation between lawyers and judges in improving the administration of justice.

We plan to accomplish these goals by working with the Courts in planning and conducting the Judicial Conferences and Annual Meetings of the 7th Circuit Bar Association. We seek to diversify and to strengthen educational and other programs across the Circuit. We strive to promote and enhance the value of membership, and we work to generate sufficient revenue to serve our mission.

The Board of Governors is reviewing our bylaws, and we will update these bylaws as appropriate to reflect our vision for the organization.

Our treasurer, Howard Adelman, reports that our finances are in good order and that our reserves are in a prudent amount.

We have four new judges confirmed to the 7th Circuit Court of Appeals this year. Among the Association’s traditional services is our gift to the Circuit of the official portrait of each of our Circuit Judges. The portraits of Judges Barret, Brennan, Scudder and St. Eve are being painted as I write this, and will be ready for presentation at our annual meeting in May.

Plans for our annual meeting are in progress with a committed and dynamic planning committee. We will gather in Milwaukee at the Pfister Hotel from May 5 to the 7th for the 68th Judicial Conference and Annual Meeting of the 7th Circuit Bar Association.

Under the leadership of Mike Brody, our Foundation continues to present superb programs on important subjects.

I am honored to serve the Association as its president at this exciting time, and I am looking forward to a great year.

Thanks for your support.

---

**Get Involved!**

Interested in becoming more involved in the Association? Get involved with a committee! Log on to our web site at www.7thcircuitbar.org, and click on the “committees” link. Choose a committee that looks interesting, and contact the chair for more information.
The celebrated appellate lawyer Stephen M. Shapiro passed away on August 13, 2018, leaving a legacy of superlative advocacy and, as importantly, of mentorship and generosity, that made him a credit to this bar and to the profession. A former Assistant and then Deputy Solicitor General and partner at Mayer Brown LLP for 40 years, Steve argued over 30 cases in the Supreme Court of the United States and countless more in the federal courts of appeals, including the Seventh Circuit. During his years of practice, he brought his formidable intellect, unparalleled intensity, and sharp insight to every case he touched. His standard of excellence and professionalism spread to those who worked with him and those who knew him only through his briefs, arguments, and reputation. For some, though, his generous spirit, collegial work style, and ready mentorship of others will match and even eclipse his legal prowess in their memories.

I saw Steve a few weeks before his untimely death. He was riding Metra’s Union Pacific North Line, in the back-left window seat in the first car — the same seat in the same car of the same train that he took every day. Sometimes he dozed; sometimes he appeared to be pondering law or life. Oddly, I rarely saw him reading briefs or Westlaw printouts, which he nearly always did when he alighted somewhere. Often I was engrossed in Twitter or was vigorously text messaging. But sometimes we’d meet eyes and wave, or we’d be close enough to exchange a few pleasantries. That day, though, we were partnered perfectly as we exited the car, and we struck up a real conversation.

I had left Mayer Brown eight years earlier, as a mid-level associate who stayed about three years at the firm. Steve remembered the job I left to take. He remembered hearing that I had moved on once again. He asked

*Kathy Agonis is a Deputy Senior Staff Attorney for the U.S. Court of Appeals for the Seventh Circuit and former Mayer Brown associate. She can be reached at Kathy_Agonis@ca7.uscourts.gov.
about the jobs and whether I was happy. He asked about the status of the Seventh Circuit bench with our four new judges, and we talked about the confirmation of Neil Gorsuch, his acquaintance. That led to talk about the high court’s docket for the October Term and then to his family, and in particular, the news that his daughter, Dorothy Lund, had accepted a faculty position at University of Southern California’s law school. I had made the mistake of asking Steve about his “kids” — I remembered that he, about the same age as my own dad, had two. Steve gently reminded me his family had lost Michael not very long ago, and I was mortified by my memory lapse. But we talked on until our friendly parting outside Mayer Brown’s offices.

The moment I began work at Mayer Brown, Steve’s name was in the air. I knew that I wanted to work with the appellate lawyers at the firm, but Steve’s aura was something apart. It was 2008. He was fresh from major victories in Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007) (holding that securities laws implicitly precluded antitrust claims), and Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, 552 U.S. 148 (2008) (holding that there is no “scheme liability” for aiders and abettors of securities fraud without investors’ reliance on their representations). I had never spoken to someone who had argued before the Supreme Court, let alone dozens of them. I simply couldn’t fathom his reality — the Justices were just other lawyers to him; the Office of the Solicitor General a lifelong community.

Steve regularly appeared in the Seventh Circuit, too, as both a brief writer and an oral advocate. He made a mark. The cases from my era at the firm tended to involve securities class actions, but despite Steve’s reputation as a “securities lawyer,” his practice ran the gamut, and he had remarkable range. Perhaps you know some of cases that Steve worked on (which, but for the first, he argued as well as briefed), such as: McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012) (disputing the certification of a nationwide class action based on absence of commonality); Kurz v. Fid. Mgmt. & Research Co., 556 F.3d 639 (7th Cir. 2009) (interpreting the scope of the Securities Litigation Uniform Standards Act); Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000) (addressing the intersection of antitrust laws and the Telecommunications Act); AT&T Commc’ns of Illinois, Inc. v. Illinois Bell Tel. Co., 349 F.3d 402 (7th Cir. 2003) (explaining relation between federal Telecommunications Act and Illinois telecommunications statutes regulating price); Oak Brook Bank v. N. Tr. Co., 256 F.3d 638 (7th Cir. 2001) (defining when a federal reserve bank is “open to the public”); S. Austin Coal. Cnty. Council v. SBC Commc’ns Inc., 191 F.3d 842 (7th Cir. 1999) (considering the ripeness of action to enjoin a merger). Steve’s Seventh Circuit record was not 100%, but his legacy of excellence in our appellate court will not soon be eclipsed.

When Steve heard that I could write well enough, he occasionally staffed me on his appeals. The best parts of working on a brief with Steve were watching his process, hearing him think, and just being around to soak up his high standards. The ideas flowed out of his mouth faster than I could scratch them down, and I remember the margins of my legal pads being littered with case names I could only approximate and hope to locate later. Working with Steve meant keeping up with Steve. Others have described their experiences in similar terms.

Over the past few weeks, while reflecting upon Steve’s legacy, I sat down with a number of Steve’s peers, including Mayer Brown partners Timothy Bishop, another appellate star, and Joshua Yount, a longtime collaborator of Steve’s. With wistful laughter they described working with him. They spoke of his uncanny ability to become fully conversant with a case and relevant precedent within days of it coming in the door. He was already formulating a strategy as everyone else was just getting up to speed. Every time he conceived a new argument, he emailed the team, and these memos often found their way into the briefs. Or, as Bishop and Yount recounted, he would leave them thoughtful, yet also stream-of-consciousness, voicemails; if he ran out of recording time, he simply called back and continued speaking. Carter Phillips, the renowned appellate litigator at

Continued on page 4
Sidley Austin LLP, also recalled the memos he received when the two friendly competitors represented clients on the same side of the “v.” He might not have said “incessant” — I wrote “constant stream” — but his laughing description conveyed the point. Phillips said he might not have had patience for that amount of input from other lawyers, but he didn’t resent Steve’s missives; they were sent in a spirit of respectful collaboration, and they added value. Throughout the process, Steve’s energy and intensity never waned.

His mind was never far from his cases; as Bishop said, he embodied “total focus” and intensity. When he took his daily “break” to go ride the recombinant bicycle in the Hyatt Center’s gym (another example of his energy), he would call upstairs frequently to continue the conversations or ask someone to bring him cases or articles or briefs to read. He doled out sections of briefs to others to draft, and then spun them together and edited for weeks until there was a masterful finished product. Phillips remembered most vividly their collaboration in *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141 (1982). He too noted the number of drafts that Steve circulated as they polished and perfected both the arguments and their presentation.

Steve also began preparing his oral arguments far in advance, something many practitioners aspire to do but often can’t manage. Steve asked the team to prepare cards with questions and answers. He wanted them short: the answers, in particular, had to be responsive, straightforward, and tight. But his oral arguments were not an exercise in delivering lines; he simply wanted all aspects of his arguments to be tested. The noted securities class action lawyer Stanley Grossman, Steve’s opponent in *Stoneridge*, complimented Steve’s thorough preparation. (No slouch himself, Grossman recalled his own lengthy process.) Phillips, too, deemed Steve’s level of preparation “extraordinary” even among elite appellate lawyers. So did Steve’s longtime acquaintance Kannon Shanmugam of Williams & Connolly, another frequent presence in the Supreme Court. Recalling the price-fixing case *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), Shanmugam remarked upon Steve’s meticulous preparation and said he was a “master” of identifying the important themes in every case.

Judge Frank H. Easterbrook, who knew Steve since their days in the Office of the Solicitor General, also shared high praise of Steve’s oral advocacy. Steve “listened to the judges,” Judge Easterbrook said, “and answered the questions.” Having Steve — “a natural-born advocate” — before him was a “lot of fun” because, like other appellate specialists, Steve worked up a case in a way that addressed “what’s bugging” the judges. Even when a judge exposed a weak spot, Steve confronted it head-on before returning to the core themes of his argument. Phillips characterized Steve’s answers in oral arguments as consistently “strong” and “insightful.” And Shanmugam remarked that, above all, Steve sought in his arguments to assist the court. Pick any transcript from his oral arguments and you will see this.

Another accomplishment Judge Easterbrook attributed to Steve — his “greatest achievement” — was his push to adapt to private litigation the Office of the Solicitor General’s briefing style (one molded largely by the late Judge Daniel M. Friedman, a longtime pillar of the OSG). Mayer Brown had an appellate practice before Steve returned to the firm after his stint in government, and Steve always credited the late Bob Stern with pioneering the group, a first of its kind. According to Judge Easterbrook, Steve “reinvented” appellate practice by integrating the OSG approach to briefing. Specifically, Steve emphasized that a “Statement of Facts” needn’t begin with “who did what to whom and when.” One could begin with the often more important “facts”: the nature of the industry in question and the state of the regulatory framework in which it operates. Awareness of the legal landscape, Judge Easterbrook said, allows appellate judges to decide which facts matter and why. With the context established, a brief could more effectively describe the “who-what-where-when” of the case and present more cogent and helpful arguments.

*Continued on page 5*
Further, Judge Easterbrook noted, Steve played the long game. The judge highlighted an argument that he and Steve conceived while at the OSG in *Chiarella v. United States*, 445 U.S. 222 (1980). The case presented the question whether a printer who figured out an acquiring company’s target in an impending corporate takeover could violate the securities law by trading in the target company’s securities. The SEC prevailed in the Second Circuit, which broadly held that the trading was illegal simply because the printer possessed information that other market participants did not. Before the Justices, though, Steve, on behalf of the Solicitor General, defended the result on narrower grounds, but lost because that theory had not been presented to the jury. The Justices split over the new theory itself — that the nonpublic information (the identity of the target companies) was the bidder’s property, and so the printer owed a duty not to disclose it or to trade on it. As Judge Easterbrook explained, however, this theory prevailed 20 years later (in *United States v. O’Hagan*, 521 U.S. 642 (1997)), when the Court adopted the property-rights approach as “the official theory of insider trading.” He traces this progression in the law back to the argument he and Steve made in *Chiarella*.

Bishop and Yount, too, commented that although Steve’s primary concern was always his clients’ interests in the case at hand (Yount said he never saw anyone gain a client’s confidence faster), he also saw down the road to the next case and the next. In Judge Easterbrook’s words, Steve contemplated: “What should the law look like? What can’t the law look like?” Grossman, Steve’s erstwhile opponent, also remarked on Steve’s ability to explain how one case might affect a whole industry or body of law. He also admired how Steve (while adhering to the rules limiting collaboration) maximized the contributions of *amici* who sometimes flocked to his clients’ aid. And indeed, Steve did not want anyone to file what Judge Easterbrook calls a “me too” brief in his appeals; he preferred for them to discuss only the issue that affected their own interests. As always, he wanted the Justices to be presented with a full rendering of the potential impact of their decisions.

Of course, many of the readers of this journal need only to glance at their bookshelves to remember the depth and breadth of Steve’s knowledge of appellate practice. From the publication of the sixth edition in 1986, Steve was the maestro of the preeminent treatise on Supreme Court Practice — titled, appropriately, *Supreme Court Practice* (but often referred to as “Stern & Gressman” after its original editors). The eleventh edition will be published soon. Shanmugam called the treatise “essential” and told me that he was holding it as we spoke on the phone because he was filing a brief in the Court that very afternoon. He explained that although the volume exhaustively addresses every substantive and procedural aspect of practicing in the high court, it is all the more helpful for discussing the “unwritten” rules of Supreme Court practice. Personally, I enjoy reading details like how to access a wireless internet connection in the Court’s library and where advocates can find the restrooms; the book places you within the walls of One First Street as well as inside (one hopes) the minds of the Justices. Judge Easterbrook also deemed the treatise the definitive work on the Court; he lamented only, as he had complained to Steve, that it had doubled in length over the years.

The appellate bar and the legal-writing community, including those who had not worked with him directly, universally respected Steve. In the days after his death, the contributors to #AppellateTwitter (an entertaining and useful resource for all those interested the appellate field) mourned his loss. They described him as “a legend”; “supportive and kind”; “one of the greats”; “an amazing person and lawyer”; and “a masterful advocate & gracious mentor.” A former Mayer Brown associate wrote: “Watching him argue in SCOTUS was one of the great days of my career.” Other admirers said that Steve’s “writing and advocacy set the standard for decades” and that “he was one of the nicest human beings I have had the pleasure of knowing.” Ross Guberman, the author of *Point Made: How to Write Like the Nation’s Top Advocates*, paid his respects by posting three excerpts from Steve’s briefs that model effective written advocacy. Preeminent legal-writing authority Bryan A. Garner

Continued on page 6
paid tribute to his friend, “one of the greatest advocates of our day,” by using several of Steve’s briefs in his seminar, “The Winning Brief,” the day after Steve’s death. Steve’s influence and reputation emanated all the way to social media platforms that I doubt he even knew about.

In keeping with these tweets of tribute, I can report that when I asked about Steve, apart from the praise of his extraordinary intelligence and work ethic, I heard him most often described as “generous” and “gracious.” Shanmugam described Steve as a giant in the field and a mentor who, among others, set the standard for his own work. Phillips, too, had nothing but high praise for his contemporary’s “grace and decency.” Within the weeks before Steve’s death, Phillips had occasion to reminisce with three veterans of the OSG, and all of them remembered Steve as a gracious mentor and role model. Shanmugam’s and Phillips’s comments echo the refrain of many who knew and worked with Steve: he had no discernible ego. Though intimately involved in every aspect of his cases, he also gave others the opportunity to meaningfully contribute. The appellate group at Mayer Brown’s Chicago office was not “The Steve Shapiro Show.” Yount recalled Steve pumping him and other less-senior lawyers for information about judges they had clerked for and relying on those “below” him to share their knowledge of various subjects. And, as Judge Easterbrook noted, Steve “didn’t hog all the cases.” But Steve’s lack of ego and humble demeanor are not to be mistaken for modesty about his accomplishments. With great pride, he saw to it that the list of “representative” matters on his firm biography in fact veered to the exhaustive. As it should have.

I can attest personally to Steve’s much-cited generosity. Shortly after I started at the firm, I had the opportunity to work on a Seventh Circuit appeal, a pro bono criminal sentencing matter. I was to present the oral argument, my first. I needed a panel to moot my argument, and Steve agreed to participate. He and two other formidable partners put me through my paces for a couple of hours. It was probably a losing case, though there was one novel argument. Steve had read the briefs, the district court decisions, and, who knows, probably several treatises on the sentencing guidelines as well. He came loaded with questions, many of which I had not yet considered. He had some suggestions for how to open, how to pivot back to my arguments after questions, how to make my points while being responsive to the panel. It was thrilling. More thrilling, in fact, than my actual argument, which lasted all of six minutes and provided few opportunities to deploy Steve’s advice. It turned out to be the only Seventh Circuit argument I ever gave because my career took me in other directions. I barely remember the argument, but I’ll never forget the time that Steve took to dig into my case and treat my pro bono matter as though it were Stoneridge. What happened next, though, is why I can’t shake the memory of that experience. After the moot session, I received a number of emails from other partners for whom I worked. To quote one: “Not everyone gets rave reviews like this, particularly from Steve.” What followed was a forwarded email Steve had sent to the entire litigation partnership, praising my performance with specific details and encouraging them to find me courtroom opportunities because I was “ready for prime time.” I don’t relay Steve’s compliment to be self-congratulatory but because I saved that supportive email when I left the firm and for the next decade. At the lower moments in my career, I could read Steve’s words and summon the energy to move on and try to be worthy of his confidence.

I returned to the email for the first time in years on August 14. It was shortly after I heard the news of Steve’s death. Then, there were no details, no answers, no sense to be made of the events that extinguished his life. I had a feeling of emptiness and an almost unexpected realization about how deeply Steve had influenced me, if mostly by osmosis, in my formative years as a lawyer. And when I re-read his email, I cried — for myself and for the many others who had worked more closely with Steve, for much longer, and who undoubtedly cherish similar memories of his generosity and support. I doubt that when Steve pressed “send” that day he knew the impact that a single email would have on me personally; I do know that he made a point of

Continued on page 7
sending it to those who could help me professionally. (On behalf of junior lawyers everywhere, I ask the experienced among you to take note of this.)

Another anecdote has occupied my mind since I learned of Steve’s death. In my second year at the firm, I was looking for a book. The partner with whom I was working told me that Steve was sure to have it on his shelves, so I walked the five offices down the hall to Steve’s, and it was empty. Cindy, his assistant, told me I was welcome to grab the book from his shelf, and so I entered and walked past the tall file cabinet with a computer monitor on top — Steve’s improvised standing desk. I scanned his bookshelves and found what I needed, so I grabbed the tome and pulled it down. To my great horror, however, I also knocked over a very heavy crystal paperweight, which fell like an ACME anvil and landed dead center on his glass side table, shattering the top into shards of shrapnel that rained on the carpet. And there I stood alone in the office of Steve Shapiro, willing myself to wake up from what had to be an anxiety dream. I pulled myself together enough to run to Cindy and her neighbor, Debbie. Help me, help me, help me! They made calls, and maintenance workers came, and I stood there, an assassin from \textit{Pulp Fiction} watching the clean-up crew cover her tracks. They cleared away the glass, but the table still lacked a top. And so I waited in terror for Steve to come back from the gym so I could confess what I’d done. I don’t need to tell you how the story ends, though. You knew Steve, and if you didn’t, you’ve picked up by now on the tenor of my remembrance. When he arrived, and I confessed in a panic, he seemed almost confused about why I could so dread telling him about a simple accident. He started pondering how glaziers do their work — off on an intellectual exercise before I had even caught my breath. If I had to guess, Steve never told anyone what happened (let alone who had done it), because it simply was not something that mattered to him. But it mattered to me as much as anything else in my career. It’s one of the first things I think about when people normalize or even take pride in their harrowing encounters with sadistic Big Law partners. Steve is one reason that this stereotype never rang true for me.

I spoke recently to another mentor, Mayer Brown partner Howard Roin, who conveyed an anecdote that illustrates perfectly how a loss affects us in small and big ways alike. Howard and Steve had side-by-side offices for years. They had an informal pact that they would keep up with their mandatory CLE and ethics hours together, and they tried to do it exclusively at firm-sponsored events in the building — no matter the topic. Dutifully, one would collect the other, and they would trapse down to a conference room at lunchtime to hear presentations on e-discovery or maritime law. The day I spoke to Howard — also on the Metra — the firm had circulated the list of upcoming CLE events for the first time since Steve’s death. When he told me, he choked up, as he said he had when he first saw the list. A missing pal. Another loss.

I pitched this piece about Steve primarily as a retrospective of his contributions as a lawyer in this Circuit and beyond. Maybe this introduction scratches the surface of his accomplishments and his talents. But in the course of writing, I’ve realized that others have described how Steve raised the bar for appellate advocacy and articulated how his inherent brilliance and incomparable work ethic spurred decisions that have defined precedent in this Circuit and beyond. Anyone can appreciate Steve as a lawyer, and everyone should. My hope is to convey that our bar has lost something greater than a superstar attorney; we’ve lost a man so enlightening to work with, so infectious in his love for the law and advocacy, and so fundamentally decent that we will feel his absence for years to come.
In Memoriam

Stephen Shapiro

by Jeffrey Cole*

By any measure, Steve Shapiro was an extraordinary person – as decent and caring as he was staggeringly brilliant. He seemed to know everything – no matter what the topic. Not surprisingly, outpourings of affection and admiration have come from all quarters of the country in the wake of Steve’s tragic death. Kathy Agonis’s lovely Article in this issue of the Circuit Rider has hauntingly and unerringly portrayed Steve. It should be read by everyone who cares about genuine kindness and achievement not only in the practice of law – but in life, itself.

I saw Steve argue a case in the Supreme Court in 1982. He was representing the United States as amicus curiae. The petitioner’s presentation had not been especially well received by the Court. There was a good deal of tension in the air when the petitioner’s argument was completed. And then Steve rose to present the argument on behalf of the United States. I shall never forget the Court’s reaction to Steve. From the moment he began speaking, the effect he had on each of the Justices was obvious and undeniable. The atmosphere became less charged. You could feel it. It was replaced by an almost tangible feeling of

*Jeffrey Cole is a United States Magistrate Judge in Chicago and is the Editor in Chief of The Circuit Rider.
good will: here was someone to be trusted -- and admired. The Justices were almost apologetic in the way they asked questions of Steve. They were prefaced with, “Excuse me Mr. Shapiro, may I ask you...” Or “Pardon me Mr. Shapiro, what is your opinion about...” The Court did not necessarily agree with Steve’s take on the case or the precedents, but it was eager to hear what Steve had to say. It was a performance the likes of which I have never again seen – or even heard about. It was simply the effect Steve would have on every court before which he would later appear – and more importantly on everyone who knew him.

Steve would go on to become the Deputy Solicitor General of the United States, working with, among others, Frank Easterbrook. Steve described Easterbrook as having a photographic memory and being the “fastest brief writer he ever knew.” He was fond of saying Easterbrook could write a brief on any topic in a weekend regardless of the complexity of the record. Easterbrook and many others from the SG’s Office would go on to become Federal Appellate Judges – a job that Steve revered, but which he twice declined being considered for because he loved what he was doing as the creator of Mayer Brown’s successful appellate practice group – which he modeled after the Solicitor General’s Office.

In the Summer 2001 issue of LITIGATION magazine, Christine Hogan (who was not associated with Steve’s law firm) recounted what it was like to make her first argument in the United States Supreme Court. But it seemed that her Article was as much about Steve as it was about her Supreme Court experience. Among the things she said, almost reverentially, was: “One of the amici was represented by the legendary appellate attorney Stephen Shapiro, co-author of the premier treatise on Supreme Court advocacy, Supreme Court Practice.... It turned out that Shapiro, in addition to being brilliant, is one of the kindest and most generous individuals one ever could hope to meet. His insight and expertise were a wonderful resource, and working with him was our great good fortune.”

It is impossible to convey in a few words how remarkable Steve was or the extraordinary effect he had on everyone who knew him. But what Learned Hand said on the passing of Justice Cardozo also describes Steve: “He was wise because his spirit was uncontaminated, because he knew no violence, or hatred, or envy, or jealousy, or ill will.... [I]t was a rare good fortune that brought to such eminence a man so reserved, so unassuming, so retiring, so gracious to high and low, and so serene.... [I]t is well for us to pause and take count of our own coarser selves. He has a lesson to teach us if we care to stop and learn; a lesson quite at variance with most that we practice, and much that we profess.”

How we shall miss him!

In the November 2006 issue of the Circuit Rider, fittingly titled, Profiles in Achievement, Steve Shapiro shared his insights on the Art of Appellate Advocacy. What Steve had to say twelve years ago is as timely and thoughtful and applicable today as it was then. It is appropriate that a reprint of that Interview be included in this issue.
An Interview With Steve Shapiro:
The Art of Appellate Advocacy

By Jeffrey Cole*

Appellate lawyers have never achieved the kind of celebrity accorded trial lawyers. Even John W. Davis, the preeminent appellate lawyer of his time, was known to the public through his political activities, not his extraordinary career in the Supreme Court, where he argued many landmark cases – the last of which was Brown v. Board of Education. What lawyer then, if given a choice, would opt to be a modern day Davis rather than a Darrow or a Dan Webb? Steve Shapiro would. In the rarified atmosphere in which appellate lawyers live, Steve Shapiro has become perhaps the most respected appellate lawyer of his generation. For 30 years, first as Deputy Solicitor General of the United States and later as founder of Mayer, Brown & Platt’s (now Mayer, Brown, Rowe & Maw) 50-lawyer appellate group, the largest in the country, Shapiro has devoted himself to appellate practice in the United States Supreme Court and the federal and state appellate courts.

Shapiro has argued 24 cases before the Supreme Court – many are instantly recognizable to commercial lawyers: Hartford Ins. Co. v. State of California, Virginia Bankshares v. Sandberg, Edgar v. Mite Corp., Arizona v. Maricopa County Medical Society, American Society of Mechanical Engineers v. Hydrolevel, Amchem v. Windsor, and Chiarella v. United States--to name only a few. In 2004, the Supreme Court unanimously adopted Shapiro’s argument on behalf of all foreign vitamin manufacturers named as defendants in a global antitrust class action – which has been described in the ABA Journal as “the most important antitrust case in a generation” – that the federal antitrust laws do not extend to global conspiracies that injure plaintiffs in foreign markets. F. Hoffman-LaRoche Ltd. v. Empagran, S.A., 524 U.S. 155 (2004).

Continued on page 11

*Jeffrey Cole is the Editor of The Circuit Rider and a United States Magistrate Judge in Chicago. He is the former Editor-in-Chief of LITIGATION.
Art of Appellate Advocacy

Continued from page 10

Last year, arguing on behalf of the estate of the late Burt Kanter, the Supreme Court accepted the argument that taxpayers are entitled to disclosure of credibility determinations by Special Trial Judges of the Tax Court. The opinion led to an overhaul of the Tax Court’s procedural rules. Kanter v. Commissioner, 125 S.Ct. 1270 (2005).

In addition to the 24 cases he has argued in the Supreme Court, he has briefed hundreds more in that Court and in the federal and state courts of appeals across the country. Among the more well known are Parklane Hosiery v. Shore, Reiter v. Sonotone Corp., Northern Pipeline Construction Co. v. Marathon Pipeline Co., Dirks v. SEC, Celotex v. Catrett, Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp., and H.J., Inc. v. Northwestern Bell Telephone Co. His group has argued over 200 cases in the United States Supreme Court alone.

Shapiro’s clientele is as notable as it is immense and has included a cross section of major corporations in the country, the Board of Governors of the Federal Reserve System, the government of Japan, and the United States Court of Appeals for the Seventh Circuit, in a lawyer discipline case in which the court was named as a respondent after it issued an opinion from which the defendant sought certiorari. He is the author of numerous articles and publications, including the leading treatise on Supreme Court practice, Stern, Gressman, Shapiro & Geller, Supreme Court Practice, now in its 8th edition. Among the law schools at which he has lectured are Yale, Northwestern, University of Michigan and the University of Chicago, where he has served as an Adjunct Professor. He is a life member of the American Law Institute and a director of the Institute for Judicial Administration at NYU Law School.

It is difficult to accurately convey the kind of person Steve Shapiro really is. There are lots of smart lawyers. But few are blessed with both brilliance and character in equal measure. And even fewer have the kind of genuine humility possessed by Shapiro. Some years ago, LITIGATION magazine published an article by Christine Hogan, a lawyer in North Dakota, who recounted her first experience in the Supreme Court. As it turned out, one of Mayer, Brown’s clients had an interest in the issue in the case, although it was not a party. As it does from time to time, Mayer, Brown offered its assistance in preparing for the oral argument. Here is what Ms. Hogan, who had never before met Shapiro, had to say about him – and her comments reflect the feelings of literally everyone who has ever worked with him:

“... And then there are few who have the kind of genuine humility possessed by Shapiro. Some years ago, LITIGATION magazine published an article by Christine Hogan, a lawyer in North Dakota, who recounted her first experience in the Supreme Court. As it turned out, one of Mayer, Brown’s clients had an interest in the issue in the case, although it was not a party. As it does from time to time, Mayer, Brown offered its assistance in preparing for the oral argument. Here is what Ms. Hogan, who had never before met Shapiro, had to say about him – and her comments reflect the feelings of literally everyone who has ever worked with him:

“One of the most helpful components of my preparation came from an unexpected source. I found out that once a new case hits the Supreme Court’s docket, new friends start to come out of the woodwork—friends of the court, that is. Lawyers for potential amici curiae call you up and volunteer to write a brief. Two amicus groups ended up writing briefs on our side of the case. Working with the counsel for the amici turned out to be a great experience. One of the amici was represented by the legendary appellate attorney Stephen Shapiro, co-author of the premier treatise on Supreme Court advocacy, Supreme Court Practice... It turned out that Shapiro, in addition to being brilliant, is one of the kindest and most generous individuals one ever could hope to meet. His insight and expertise were a wonderful resource, and working with him was our great good fortune.

One of the things Shapiro recommends in his treatise is for arguing counsel to talk about the issues in the case with anyone who will listen and, if possible, to participate in a moot court session. I felt strongly that I would benefit from such a session, and Shapiro offered to arrange it at his Chicago law firm.”

Continued on page 12
“Although the prospect of being interrogated by a roomful of brilliant and experienced appellate lawyers intimidated me more than the thought of actually appearing before the Supreme Court, I readily agreed. The exercise Shapiro devised for me was the best possible preparation for oral argument that a lawyer could have had.”

Christine Hogan, *May It Please The Court*, 27 LITIGATION 8-9 (Summer 2001).

In this interview, Steve Shapiro talks about his formative years in the Solicitor General’s office, where he served with Judge Easterbrook and Sam (now Justice) Alito. The Solicitor General’s office would ultimately serve as the model for the practice group he later formed at Mayer, Brown, and which itself, has become the template for other appellate practice groups around the country. His insights into and thoughts on effective brief-writing and oral argument are fresh and invaluable. He also reflects on a number of the notable personalities with whom he has worked over the years including Frank Easterbrook, rex Lee, Wade McCree and others. Finally, he opines on the Supreme Court’s new Chief Justice and ventures some predictions about changes that may occur on his watch.

Q. After graduation from Yale Law School and a clerkship on the Ninth Circuit, you became a partner at Mayer, Brown & Platt in Chicago. But then, having achieved what, for many, would be the pinnacle of success, you left the firm for government service.

A. Right. I went to the Solicitor General’s office. I wanted to learn more about appellate litigation and argue cases in the Supreme Court.

Q. You started as an Assistant to the Solicitor General and later were promoted to the position of Deputy Solicitor General of the United States?

A. Yes.

Q. What makes the Solicitor General’s office unique and so desirable a place to work?

A. The Solicitor General’s office has about 20 lawyers who are responsible for briefing and argument in all cases in the Supreme Court in which the United States is either a party or an amicus. This includes petitions for certiorari and briefs in opposition. The 20 lawyers process several thousand cases each year. The SG’s jurisdiction reaches all kinds of cases coming up from the divisions within the Department of Justice and federal administrative agencies.

The office also supervises government appeals from adverse decisions throughout the country. That continual involvement in Supreme Court cases is unique in law practice. Immersion in the work of the Court gives these lawyers an understanding of what the Court thinks and requires, which is a tremendous litigation resource for the federal government.

Q. The relationship between the Supreme Court and the Solicitor General’s office is quite different from that which exists between other courts and the lawyers who appear before them, isn’t it?

A. It is. The lawyers in the Solicitor General’s office are keenly aware that the office has a long-term relationship with the Court. Preserving credibility is important. Other lawyers who appear before the Supreme Court, or any other court, are concerned with the same thing, but nobody appears in case after case the way the SG’s office does, and it makes the SG’s office something of an extension of the Court, itself.

Q. The lawyers in the Solicitor General’s office have a particular dress code when they appear before the Court, don’t they?

A. Yes. By long tradition, they wear 19th-century garb — a cut-away jacket and striped pants, morning coat and a vest. The tie itself is gray and black striped, very somber and formal. As the Chief Justice once reminded one of our lawyers, traditional attire does not include a button-down collar.

Q. A number of federal appellate judges began their careers in the SG’s office, didn’t they?

A. Yes, Charles Fahy, Thurgood Marshall, Oscar Davis, Bob Bork, Dan Friedman, Dick Posner, Frank Easterbrook, Ray Randolph, Bill Bryson, Sam Alito and Michael McConnell became circuit judges. Our new Chief Justice was, of course, a Deputy Solicitor General, and Justice Alito was an Assistant to the Solicitor General.
Q. Who was the Solicitor General when you started?

A. Wade McCree, who had been a judge on the Sixth Circuit until his appointment by President Carter.

Q. What was he like?

A. He was a wonderful gentleman, who was well respected by all his clients in the federal government. He had extraordinarily good judgment, a wonderful personal touch, and was really a joy to work for and work with. Everyone trusted his judgment completely. If he thought a matter should be handled in a particular way in the Supreme Court that was that. If he felt a case was not "certworthy," that judgment was accepted. He had a stately literary style, reflected both in his writing and in his arguments.

Q. What about Rex Lee?

A. I also worked under Rex Lee in the Reagan Administration. Rex was a much younger man. He had been a law school dean. He was a more spontaneous personality, bubbling over with humor. Everybody had a warm personal relationship with Rex Lee. Rex himself had been a Supreme Court clerk, which gave him a real understanding of the Court. He had a less formal and more humorous argument style in court. I think the Court appreciated that.

Q. You were the lawyer for the United States in the major commercial cases that were argued during your five years in the SG’s office.

A. I was the Deputy Solicitor General in charge of the commercial cases, including antitrust, securities, commodities, communications, banking, and transportation.

Q. There's a certain irony in this since your family background was decidedly anti-commercial.

A. That's right. My grandfather was a labor union organizer and a politician in Chicago at the turn of the century. My father was a labor union lawyer himself, and I find myself representing the employer in many of our labor cases today. When I worked in the government I was the advocate for the NLRB in a number of cases.

Q. When you left the SG’s office and returned to Mayer, Brown you conceived the idea of developing an appellate group modeled after the Solicitor General’s office, didn’t you?

A. Yes. It seemed to me that the Solicitor General’s office had a unique advantage because of its familiarity with the Supreme Court and its close monitoring of developments in the courts of appeals. There was nothing analogous to that in the private sector. When I left the Solicitor General’s office, I found that most of the firms felt that their litigators could handle a case in any court, and they prided themselves on not having a specialized appellate practice. I recommended that our firm hire senior people from the SG’s office who were, in my opinion, the best of the brief writers and oral advocates — these people included Paul Bator, Andy Frey, Ken Geller, Phil Lacovara, Kay Oberly, Andy Pincus, Charles Rothfeld, and Michael McConnell. And since that time we hired several more. The firm was receptive to the idea, although there was some thought that we should start small and gradually increase the staff. But we decided to take exceptional talent when the talent became available.

Q. You were head of that department?

A. I headed it, organized it and recruited the lawyers. Today we have many senior members who are their own bosses. We have coordinators in Washington, New York, Houston, Palo Alto, and Chicago.

Q. How large is your appellate department?

A. More than 50 people work on appellate projects. We also take on trial court briefs that raise issues comparable to those in appellate cases, and the group also spends time on legislative advocacy. We expanded on the Solicitor General’s model in several respects. Our group is larger than the SG’s office, and today it includes former Supreme Court clerks and a number of law school professors who work with us as “of counsel” members in particular areas such as constitutional law, tort law, federal court procedure, intellectual property, and so forth. Our senior lawyers all have substantive specialties in particular fields of law.

Continued on page 14
Q. In your system, brief writing appears to be a collaborative effort.
A. The brief writing is a collaborative effort. Most clients expect our senior lawyers to roll up their sleeves and dig into the brief, not just advise young lawyers, direct research, and fine-tune the rhetoric.

Q. You have represented some of the most powerful commercial interests in this country and even the world, haven’t you?
A. Our clients include large corporations, but the list also includes smaller companies, government units, individuals, and a number of charitable institutions including churches that have constitutional questions.

Q. You were actually asked to represent the United States Court of Appeals for the Seventh Circuit in one case, weren’t you?
A. Yes. This may surprise you, but in attorney discipline cases lawyers subject to discipline sometimes petition the Supreme Court for review and they name as the respondent not their opponent in the court below, but the court of appeals itself. A lawyer who was sanctioned by the Seventh Circuit did just that and the Seventh Circuit asked us to file a brief in opposition to the certiorari petition.

Q. Successfully?
A. Successfully, although there were three Justices who would have heard the case. So it was viewed in Washington as a close matter.

Q. How much time is devoted to argument preparation in a major case?
A. In a big case with a large record and voluminous briefing, I typically spend a month in argument preparation.

Q. What do you do that takes so much time?
A. I have always made a point of reading the entire record, which includes the transcript, the exhibits, and the pleadings. The briefs will cite multitudes of opinions, which you have to be prepared to discuss during argument. On top of this, we go through moot court sessions in which we try to anticipate questions the court might ask.

Q. Could you describe your moot court process?
A. Initially, I present the argument without interruption to get reactions to substantive points. Then we run throughout the argument with the clock running — 30 minutes, 20 minutes or 15 minutes, depending on the time allotted for the real argument, with questions. We see how much of the argument can be delivered while responding to questions. The final session has no time limitations, and we take up every question that anyone can think of. By the way, Chief Justice Rehnquist gave a well-known speech about oral argument technique, and he made the point that the art of oral argument is spontaneity, but he added that meaningful spontaneity depends on complete familiarity with the law and the record. Chief Justice Roberts, an experienced advocate, has made the same point.

Q. Judge Easterbrook was legendary for the speed at which he worked, wasn’t he?
A. Frank Easterbrook, who will be the next Chief Judge of this Circuit, was the quickest study I ever knew. He could write a brief even in the most complex case in a day or two — often without leaving his desk because he remembered the major precedents, had a photographic memory. Frank was also able to prepare for oral argument very quickly. This is in the tradition of Robert Jackson, the Solicitor General many years before my time, who was able to prepare a major case in just a day or two.
Art of Appellate Advocacy
Continued from page 14

Q. What are the ingredients of an effective appellate argument?

A. I think the most important ingredient is thorough preparation so that all the information about the case and legal authorities is at your fingertips. After all, your main purpose for participating in the argument is to answer the court’s questions. The second ingredient is condensation and simplification of the case so that the few critical considerations that are needed to decide the case correctly can be presented in a few minutes, if the questioning is intensive. The third ingredient is flexibility in responding to the court’s questions, giving the court a full answer, but then using the question as a stepping-stone to return to the critical points in the case. One problem I see frequently in argument is that questions can cause counsel to lose any sense of direction. Effective argument means that you answer the court’s questions but use the answer as a transition to return to the winning ideas.

Q. Is it ever appropriate in responding to a question to say, “I’d like to answer that later” or “I’m going to get to that later in my argument?”

A. That is a mistake because it irritates the court. You don’t have control over what you are going to be able to say later, so you are never in a position to keep that kind of a promise. Sometimes you can get away with giving a brief response and then say that you would like to enlarge on that point later in the course of the argument with a little more background. But the best policy is to give at least a concise answer immediately.

Q. Have you ever seen a case where as a consequence of questions a lawyer does not have a chance to make any meaningful argument, and thus asks the court for additional time?

A. I see that all the time, and depending on the court, you may get a little extra time. In the U.S. Supreme Court there is no mercy. If your red light goes on, that’s the end unless a Justice is asking a question, then you can answer the question fully — until the Chief Justice stops you.

Q. In the courts of appeals?

A. In the courts of appeals, occasionally the presiding judge will enlarge your time and permit you to continue to argue because of the volume of questions. This varies from Circuit to Circuit. But when the presiding judge says “thank you, the case is submitted,” it is time to sit down.

Q. What are the elements of a winning brief?

A. The virtues of a good brief, in my opinion, are clarity, selectivity, and simplicity of writing, including the headings of the arguments. I remember the words of advice I got from so many of the outstanding people with whom I worked at the SG’s office, which I continue to use, and I recommend to others: use short sentences, use active verbs, use short paragraphs and avoid footnotes. Briefs that are written in this fashion are clear, simple and direct, and are rarely boring.

Q. One of Cardozo’s great attributes as a judge, it was said, was that he could present facts so persuasively that the legal conclusions seemed inevitable. How important is the Statement of Facts in a brief?

A. Except for those rare cases that turn on an abstract point of law, the statement of facts is generally the most important and challenging part of a brief. The facts are the one thing that the appellate judges know nothing about. The factual statement must be forceful, but not one-sided or argumentative. I think fact statements of that kind turn off appellate judges and undermine the credibility of the brief. Judge Aldisert has good advice on composition of the statement of facts in his volume, WINNING ON APPEAL. He says that the statement is “designed to inform. But a good statement does more; it engages the reader’s interest, making the judge look forward to working on the case.” Of course, in the body of the argument, it is entirely proper to elaborate on factual points and argue their legal significance. SUPREME COURT PRACTICE goes into this in some detail.

Q. What makes this so challenging?

A. It is challenging because the fact statement has to be short enough to be read and understood even if the transcript fills 40 boxes. The whole matter has to appear in a sympathetic light as a result of your statement even though you don’t hide from or disregard adverse facts or findings. It is true that the court should have a good sense about how to decide the case after finishing the statement of facts and yet the statement of facts can’t be argumentative or the court will lose confidence in the presentation. It’s a difficult line to walk.
Q. It is your view, isn’t it, that a summary of argument section, regardless of how it’s captioned, is very important in all appellate briefs?

A. It is and, of course, it is required by the federal rules of appellate procedure. It serves several purposes. If a case is complicated and there is a lengthy statement of facts and a complex set of arguments to follow, it is very hard to understand the significance of particular parts of the argument unless you see the big picture first. It is much easier to follow the details of the argument if you have an overview of where the argument is headed. Also, some judges may need that summary as a refresher before argument.

Q. One sees in briefs statements about how meritless and worthless the other side’s argument is. Does that serve any useful purpose?

A. Invective directed at the opponent and epithets characterizing the arguments as frivolous are largely wasted. I think this is too often a signal to the judges that you are in trouble.

Q. How do you deal then with arguments that indeed are frivolous and briefs that misrepresent the facts, the governing law, and the case authority that purports to support the argument?

A. Point out the mistake emphatically, but do so more in a spirit of sorrow than anger. Let the judges castigate the offender.

Q. Is oral argument important or has it become an obligatory formality with fewer and fewer cases being assigned to the oral argument calendar.

A. The Justices of the Supreme Court say it is, and so do the appellate judges. It is all the more important given the huge caseloads today. It gives the judges an opportunity to get answers to questions the answers to which remain unclear even after reading the record and the briefs.

Q. How do you capture a court’s attention in a short argument?

A. The task is to reduce the case to its bare essentials and to pick out the one or two points that the case really turns on.

With most courts being as well prepared as they are today, there is no need in a ten-minute argument to start describing the facts and the procedural posture of the case. The court expects you to turn immediately to the central consideration. And of course you need to answer the court’s questions flexibly, give them an accurate answer but return to the main affirmative points in the course of answering those questions so that your ten minutes do not disappear without any explanation of the reason why you should win.

Q. How do you deal with the judge who uses oral argument as a vehicle for his or her own amusement or to argue a point through you?

A. I think you have to recognize that this is part of the process. And sometimes it is an opportunity. If you can explain to the skeptical judge why the apparent defect is not real, you may win over that judge and you will certainly strengthen the hand of those who are on your side.

Q. Do you believe oral argument can actually change votes?

A. I do and the judges who have written on the subject acknowledge that it can. Justice Scalia has said that he will ask one or two questions that are critical to his thinking about the case, and if you satisfy him on those questions, you will have his vote. I had that experience in an antitrust case where he seemed very hostile to our position at the outset and then he asked his pivotal question. We gave the answer that he ultimately accepted. He ended up writing the opinion for the 5-4 majority in our favor.

Q. This is also an example of the worth of thorough preparation for oral argument, is it not?

A. That was a case where we had spent literally a month on argument preparation involving dozens of lawyers. We thought we had covered most of the questions that could come up. But we decided to ask one more lawyer in our group to look at the case and see if he could raise any new and significant question. He read the briefs, and he posed the very question asked by Justice Scalia, and it turned out to be the question on which the whole case revolved.

Continued on page 17
Q. Has appellate practice changed in the time since you were a young lawyer?

A. There has been a lot of change in the 30 years that I have been practicing in this field. When I first began appearing in the Supreme Court in the '70s, there was no limit on the size of briefs, and lawyers in a big case might submit 200-page briefs. Today, briefs in the Supreme Court are limited to 50 pages. Oral arguments then were a half hour per side; arguments had been one hour per side in the '50s.

Q. Before then, arguments were much longer, weren’t they? For example Martin v. Hunter’s Lessee, was argued for 3 days and McCulloch v. Maryland consumed 9 days.

A. Yes. If you go back to the 19th century, oral argument in the Supreme Court was unlimited, and it wasn’t unusual for arguments to go on for 3 days and as you say, other cases consumed even more time. Nowadays, of course, in the appellate courts arguments may be limited to 10 minutes or 15 minutes per side. Even in the largest cases, you have constraints on time and word count. All of this puts a tremendous premium on condensation, simplification, getting to the heart of the case, being able to communicate what is really telling and critical in a few words, and being able to answer questions very quickly.

Q. Given the constraints imposed on briefs is there a role for literary style?

A. I think good style is more important than ever simply because the judges and clerks have so much to read. If you want to be noticed, the brief has to be elegantly written. It has to be interesting. So I think that good writing style, just like oral argument technique, is essential.

Q. So when you talk about simplicity, you are not talking about a lack of style and art and elegance. You are simply talking about elegant simplicity?

A. Yes, that’s the idea. There is certainly room for good metaphors, for references that are colorful, and epigrams that convey important truths. On top of this I think that as the briefs get shorter, it is all the more important to convey to the reader the reason “why” your side should prevail. Recitation of case law without explanation why a particular result is consistent with statutory purpose, consistent with the needs of the judicial system, and consistent with the needs of society is going to be a dry and unimpressive presentation. That dimension of the brief is critical to making it interesting and persuasive. My main criticism of briefs today is that there is insufficient attention to that dimension. Justice Breyer commented in a speech that if he reaches a result through application of legal reasoning that is not good for society, that is an indication to him that he needs to start over again and rethink the matter.

Q. Despite your work on appellate projects, you have managed to save time for academic work, haven’t you?

A. Yes. The biggest project is our Supreme Court practice treatise which was last published in 2002 and soon to be released in a new edition. This is Stern, Gressman, Shapiro and Geller, Supreme Court Practice. It describes the procedural and jurisdictional rules, and the techniques necessary to bring a case to the Supreme Court, to brief it, and to argue it.

Q. We’ve talked about briefs and oral argument. Let’s talk about preparation of a certiorari petition.

A. The first thing to do is to get a sample of a good certiorari petition. Sample petitions are appended to our treatise, so that’s one source. The second thing you should do is to look at the Supreme Court’s rules, and our treatise discussion of the content of the certiorari petition. The Court receives thousands of certiorari petitions every year but hears less than a hundred cases, so you have to persuade the Court that your case is one of those few that really demands a national binding decision and that the time is ripe to hear this case—that it is truly “certworthy” under the Supreme Court’s own criteria. The Court usually looks for cases in which there is a pervasive conflict among the circuits that has percolated, with differences of opinion illuminating the issues, so that the matter is really ripe for Supreme Court review. Conflicts with past Supreme Court opinions are rare but they too are an occasion for a grant of certiorari.

Q. Is there any one criterion that seems to engage the Court’s attention?

A. Conflict among the circuits is usually the main focus, but the general public importance of the issue is also key. A conflict can be relatively minor in practical significance, but sometimes conflicts among the circuits create great practical problems. Although apparent error is important to the presentation, the lawyer needs to think beyond the question of whether there has been error.

Continued on page 18
The Circuit Rider

Art of Appellate Advocacy

Continued from page 17

The Supreme Court does not sit to correct errors made by the courts of appeals. The real issue is whether this is a case that calls for a nationally binding pronouncement from the Supreme Court that clears up the confusion in the lower courts.

Q. How important is the Statement of the Question Presented?

A. It may be the most important part of your petition.

Q. More than the facts?

A. I would say so in the case of a certiorari petition. Justice Brennan used to say he could decide whether a case was “certworthy” simply by reading the question presented. The object is to capture both the issue and its importance, without becoming too argumentative. Sometimes a short preceding paragraph is used to give background needed to understand the question. The whole thing may not exceed one page. Here is an example from the BMW punitive damages case [BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)] in which Andy Frey of our group represented the defendant: “Whether the $2,000,000 punitive exaction in this case, which is 500 times respondent’s compensatory damages, is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment.”

Q. What is your view on the Supreme Court’s certiorari pool?

A. Lawyers petitioning for Supreme Court review need to keep in mind, first and foremost, that the Court receives between 7,000 and 9,000 petitions every year. It hears less than 100 of these cases. Each case includes a petition, with opinions of the courts below, a brief in opposition to certiorari, and often a reply brief and amicus briefs. To deal with this flood of paper, the Justices adopted the “certiorari pool” as a screening mechanism.

This began small over 30 years ago but today includes all of the Justices except for Justice Stevens, who does his own screening. In the certiorari pool, the Justices share their law clerks, who divide up the petitions and produce a “pool memorandum” summarizing the case and recommending a grant or denial of certiorari. Each Justice’s chambers receives the pool memorandum, where other clerks may annotate the memorandum with their own comments. Individual Justices may or may not examine the underlying certiorari papers, depending on the comments of the screeners. Only a small fraction of cases make the Court’s discuss list at conference.

In a recent interview in LITIGATION, Justice Stevens criticized the certiorari pool as both inefficient and also negatively biased toward denial of certiorari because the author of the pool memorandum is institutionally committed to the most risk averse recommendation. [See Jeffrey Cole and Elaine E. Bucklo, A Life Well Lived: An Interview With Justice John Paul Stevens, 32 LITIGATION 8, 13, 15 (Spring, 2006)]. In my view, the screening process would be improved if more Justices opted out, providing more independent perspectives. Ken Starr has suggested that at least two pool memos should be prepared by different clerks to decrease the chance of overlooking an important case. I agree.

Q. What interesting cases have you argued in the Supreme Court recently, and what are you working on now?

A. I might mention Hoffmann-Laroche v. Empagran, 524 U.S. 155 (2004). In that case the Supreme Court ordered dismissal of a class action filed against my clients by consumers of vitamin products in nations outside of the United States. The Court held that it would be an act of “imperialism” to extend federal antitrust laws to the regulation of foreign markets. Of more local interest, I argued Kanter v. Commissioner of Internal Revenue Service, 544 U.S. 40 (2005), on behalf of the estate of Burton Kanter.

Continued on page 19
Art of Appellate Advocacy

Continued from page 18

In that case the Court required the Tax Court to divulge opinions of its special trial judges that had been concealed from the courts of appeals. This resulted in changes in the Tax Court’s rules, which were long overdue. I am co-counsel for the defendants in *Verizon v. Twombly*, the most recent antitrust conspiracy case. The Solicitor General filed a brief in that case a few weeks ago advocating a more exacting approach to antitrust pleading. I am waiting now for the Solicitor General’s brief in *Credit Suisse v. Billing*, an antitrust class action aimed at underwriters of initial public offerings. The SEC and the Antitrust Division filed dueling and completely inconsistent briefs in the court of appeals. We hope the SG’s office will advocate a grant of our petition for certiorari to resolve this conflict.

Q. What is your impression of the televised confirmation hearings for Supreme Court nominees in recent years.

A. I was frankly heartened by Senator Biden’s comment that it might be wise to greatly curtail the entire procedure. It is hard for me to envision anything as pointless as these debates over whether a judicial nominee’s views are within the “mainstream” of opinion. The abbreviated hearing proceedings of prior decades look very good by comparison.

Q. What are you impressions of the new Chief Justice?

A. History will record, I believe, that John Roberts was one of our best Chiefs. He is incredibly bright and personable. He was a star advocate in the Solicitor General’s office and in private practice, with a diverse docket of appeals. His questions from the bench are incisive and his opinions crystal clear. Gossip from Washington indicates that his conference style — which allows more time for discussion of cases — is popular with the other Justices. At the recent Seventh Circuit Judicial Conference, Justice Stevens spoke very enthusiastically about the new Chief. I don’t know any lawyer who ever worked with him, in the government or private practice, who has a different view.

Q. What will Justice Alito bring to the Court?

A. I remember Justice Alito when he was a new lawyer in the Solicitor General’s office. Everyone recognized that he was a brilliant lawyer. But he was very soft-spoken and courteous to a degree not common within a cantankerous office like ours. We wondered how he would stand up to the hurly-burly of oral argument. There was no reason to worry. His first argument was a huge success. I would anticipate that Justice Alito’s influence within the Court will be significant precisely because he is such a courteous, unassuming, and personable man. In brainpower he is right up there with the new Chief.

Q. Any predictions about the Court under its new leadership?

A. Over time I predict an increase in the number of grants of certiorari, something John Roberts advocated when in private practice. We may see more summary dispositions (without full briefing and oral argument), which doubled in the last Term under Chief Justice Roberts. I predict that John Roberts, while maintaining the tradition of Socratic dialogue, will find ways to allow arguing counsel more air-time during even the hottest arguments in the Court. The new Chief also has called for more unanimity in the Court’s opinions, a difficult objective to achieve but we may see some movement in that direction. Justices Roberts and Alito are both believers in concise opinions, so I expect fewer massive opinions of a kind that delight professors but confuse consumers of law — lower court judges and ordinary citizens who must comprehend and comply with it.
The Chicagoland legal community suffered a tremendous loss this October when Magistrate Judge Daniel Martin lost his courageous battle with pancreatic cancer on October 11, 2018. Judge Martin, or Danny, as he was best known, was born on March 3, 1955 as the second of six children to George and Joyce Martin. He grew up in Oak Lawn, Illinois and attended St. Laurence high school and DePaul University. He spent his youth surrounded by family and friends, making mischief wherever he went which became the fodder for many funny stories years down the road.

A turning moment in Danny’s life came when he was 17-years-old and volunteered as an attendant at Muscular Dystrophy Association of America camp. That week spent caring for his disabled camper sparked a love affair between Danny and the disability community that endured until his death. Danny helped found the Association of Horizon when the Muscular Dystrophy Association of America stopped funding a summer camp experience for adults. He served in many capacities with the Association of Horizon, not the least of which, being the most prolific ambassador for camp and encouraging all of his relatives to serve as volunteers. Because of Uncle Danny, all three of my children continue to volunteer as attendants at camp. At camp, Danny went out of his way to make every participant’s experience a positive one and the week was always full of hilarious skits, hair-raising adventures, and more fun that anyone could imagine.

Danny attended law school at Chicago-Kent where he quickly distinguished himself as part of the trial advocacy team. Danny continued his relationship with Chicago-Kent as an adjunct faculty member,
teaching intensive trial advocacy and coaching numerous trial teams throughout his career. Danny loved his students and reveled in their successes. He liked nothing better than seeing a student discover confidence in the courtroom for the first time. He looked for his students’ strengths and nurtured what he found in each student.

After law school, Danny joined the Federal Defender Program as a staff attorney where he spent the next 28 years. While at the Federal Defender Program, Danny tried more than 60 jury trials and argued 40 cases to the Seventh Circuit Court of Appeals. Danny was an excellent trial lawyer. His superb analytic and strategic skills gave him the ability to review the government’s evidence and construct a defense that often gave the government a run for its money. Danny had his fair share of acquittals which were due to his dogged preparation and precise command of the courtroom. Danny did not keep his talents as an advocate to himself. He was the consummate teacher, looking for every opportunity to share his experience, advice, and wisdom with other attorneys in the office.

Danny was a fantastic trial partner. He encouraged younger lawyers, including myself, to step outside our comfort zones and held us to the highest standard in representing our clients. My favorite trial as a lawyer was a felon-in-possession case with Danny as my partner. We had so much fun putting our case together and relying on each other’s strengths. His cross examination of the arresting officer was a thing of beauty. While Danny took our job as advocates seriously, he never took himself seriously; thus, our days were filled with laughter over inside jokes and nonsense to diffuse how difficult our jobs were and the uphill battle we faced. Because I was 9 months pregnant during the trial, Danny also had many opportunities to showcase his compassion. He constantly made sure I was comfortable and had everything I needed at arm’s reach. He offered to take over the sentencing hearing when it fell right after my daughter’s birth and successfully argued a novel approach to the sentencing guidelines that reduced our client’s sentence.

Danny’s clients universally adored him because they found a fighter in him. Danny listened deeply to his clients and was able to use his formidable gifts as a storyteller to present their life stories as compelling and deserving of attention. He saw his clients clearly as full human beings who had strengths and weaknesses and who had the potential of redemption. As with his students at Chicago-Kent and his campers at the Association of Horizon, Danny looked beyond labels or stereotypes with his clients. He observed where they needed help and nurtured their innate strengths to ensure they would be successful citizens when their time in our criminal justice system had passed.

The federal district judges appointed Danny a magistrate judge in June of 2012. I remember speaking to Danny on the phone when he received the call from Judge Holderman informing him of his selection. Danny was ecstatic when he heard the news. Becoming a judge was a dream come true for Danny. The federal district judges could not have made a better selection. Danny’s skills were a perfect match for the requirements of the magistrate judge position. Just as Danny did not take himself seriously as an advocate, he likewise did not take himself seriously as a judge. Danny used all of the tools at his disposal to engage the attorneys who appeared before him and focus them on the task at hand. I vividly remember one day when I was watching Danny in his courtroom shortly after my own confirmation but before I had taken my oath. Danny had two lawyers before him who were beginning to argue with each other over a discovery dispute rather than directing their comments to Danny. As their voices rose, the tension in the courtroom grew and they started interrupting each other. Danny quietly looked at them from over the bench and stood up without saying a word. He pushed in his chair and walked to the edge of the bench. He stopped and looked at the lawyers again, who, by this time, had fallen silent and were watching him. Danny started strutting behind
The Circuit Rider

inMemoriam:
A Tribute to Judge Daniel G. Martin

Continued from page 21

the bench in full Mick Jagger mode saying, “People, people, why are we fighting?” The tension in the room immediately evaporated as everyone roared with laughter at the image of a federal judge doing his best Mick Jagger impression. Once he reached his chair, Danny sat down, looked at the lawyers again, and said, “Now, can we focus on why we are here? Obviously, you don’t agree on the scope of discovery but I think with some effort and good faith negotiating, we can come to an agreement. Don’t you think?” Of course, the lawyers agreed with his assessment and proceeded to work out compromise in short order. Without losing his temper or losing control of the courtroom, Danny was able to redirect the attorneys with humor and respect. This was yet another example of Danny’s grace and humility that he showed time and again as a judge.

Similarly, Danny’s expertise shone through in settlement conferences. Danny could bring the most contentious parties together and within a short period of time, they would find areas of agreement and be working toward an amicable settlement. Danny used his analytical skills to examine the strengths and weaknesses of the parties’ respective cases and conveyed the weaknesses in a manner that was respectful of the parties. He used his ability to think creatively to fashion settlements that the parties could accept. The parties believed that Danny would listen to their positions and find a resolution that was fair.

Danny was beloved as judge because he radiated how much he loved being a judge and being able to promote justice. He was respected because he was respectful of all those who came before him. He was always prepared and provided rulings that were thoughtful, considered, and legally sound. Our legal community could not have asked for a better judge.

One cannot speak of Danny without mentioning his love for his family. Danny came from a tightknit family, of which I am so happy to be a member. Danny was the proud father of three fantastic girls, Azalea, Kayla, and Brianna. There wasn’t a conversation with Danny where he would not slip in a reference to his girls and how much he loved them. Danny adored his partner, Mary, his siblings, and his many nieces and nephews. Danny was the godfather to my eldest son. After his cancer diagnosis, Danny sat on my dining room floor and spoke to Freddy, telling him how much Danny loved him and how special Freddy would always be to him. Danny’s first thought was to comfort Freddy and reassure him of the endless nature of Danny’s love. As an uncle, Danny was a constant source of fun. Danny would often sneak up on my youngest son, whisper a cackling laugh in his ear, and ask, “Luke, what does that sound mean?” In response, Luke’s eyes would widen, he would grin from ear to ear, and he would shout, “Fun is around the corner! Yahoo!” With Danny, it always was.

As a young man, Danny boxed with the Catholic Youth Organization in many bouts. His cousin, Fred Martin, recalled one match where Danny faced an opponent almost twice his age and definitely, twice his size. As the 32-year-old bricklayer rained down punches on Danny, Danny never retreated, never gave up, and continued to get in a punch here and there until the referee called the match. Danny relished the telling of this tale because it revealed his tenacious nature and unending optimism in the face of a daunting opponent. Many years later, Danny confronted a different opponent who came at him with a similar brute force – pancreatic cancer. Yet, in spite of all the odds, Danny steeled himself and met the challenge head on. He was tenacious and optimistic in his battle against cancer. While Danny lost this last fight, he maintained his grace, humor, and optimism through the end. Toward the end of his life, Danny expressed to me how grateful he was for his many opportunities to serve our legal community, particularly as a judge. He said that he has lived a wonderful life and fully appreciated every aspect of it. We have suffered an immense loss as a legal community and were made all the better for having Danny in our midst. As Danny would say in the immortal words of the Irish classic song The Parting Glass, “But since it falls unto my lot that I should rise and you should not. I’ll gently rise and I’ll softly call: Good night and joy be with you all. Good night and joy be with you all.” Good night dear Danny until we meet again. Thank you for the joy you brought to our lives.
In the early evening on August 11, 1921, Edwin Stephenson, a Methodist minister, walked to the porch of the rectory of St. Paul’s Cathedral in Birmingham, Alabama, and shot Father James E. Coyle three times, killing him. He then turned himself in to the sheriff. Stephenson’s reason for the shooting was simple: Earlier that day at St. Paul’s, Coyle had married Stephenson’s daughter, Ruth — a Catholic convert — to Pedro Gussman, a Catholic.

Stephenson retained Hugo L. Black, a young, ambitious, and skilled trial lawyer who would six years later be elected senator from Alabama and in 1937 be appointed by President Franklin D. Roosevelt to the Supreme Court, where he served until 1971. One of the most influential justices, a protector of individual liberties and civil rights, Black is revered for his intelligence, insight, and integrity. His representation of Stephenson, however, included appeals to racism and anti-Catholic prejudice. Black’s legacy should be tarnished, maybe even destroyed, by his actions during this trial and this time of his life. Like many national figures we admire, Black was flawed, even cowardly, yet he is celebrated with the U.S. courthouse in Birmingham named for him and a U.S. stamp with his portrait issued in 1986 as part of the “Great Americans” series.

Stephenson’s trial was a sham. The date was changed to accommodate Judge William Fort, a friend of Black and later law partner. Almost every ruling favored the defense. The prosecution called five

Continued on page 24

*Mr. Nolan, is Counsel to Speiser, Krause, (formerly Speiser, Krause, Nolan & Granito) in New York. He has been counsel in literally scores of major aviation cases around the country, as well as in countless major medical malpractice, auto, construction, and product liability cases. He is the author of the book, “A Streetwise Guide to Litigation” (American Bar Association 2013). Mr. Nolan is a former Editor-in-Chief and current Senior Editor of LITIGATION, the journal of the Section of Litigation of the American Bar Association. Mr. Nolan was an Editor for the New York Times where approximately 50 of his articles have been published, along with a number of his photographs. He has also written editorials and was make-up Editor for the editorial and op-ed pages of The Times. For anyone who appreciates sparkling and insightful writing, Ken’s book – and his numerous articles in LITIGATION – should be at the top of their reading list. Mr. Nolan’s article is reprinted with his permission and that of LITIGATION magazine, where it originally appeared in Spring 2018.
Murder of Father James E. Coyle

Continued from page 23

witnesses; Black called 44 and attacked Catholic witnesses as “Siamese twins” or “brothers of falsehood as well as faith.” His final question to some prosecution witnesses was “You are a Catholic, are you not?”

During the early 1920s, the Ku Klux Klan ruled Birmingham. Catholics were considered un-American and, frequently, anti-American. Every Catholic employed by the city was fired, and by 1922, all workers were Protestants. Businesses that employed Catholics were boycotted, and, for a time, Baptist Hospital refused to admit Catholics. At Stephenson’s trial, the judge, the police chief, four of the five defense attorneys, the foreman of the jury, and most of the jurors were members of the Klan, as was Stephenson. The Klan even paid for Stephenson’s defense.

Yet, even though an acquittal was never in doubt, Black took no chances. He emphasized not only the religious aspect but also race before the all-male, all-white jury. Later, on September 13, 1923, Black joined the Klan, marching in parades, addressing meetings in full attire. He resignation letter, dated July 9, 1925, ended with “Yours, I.T.S.U.B. [In The Sacred Unfailing Bond], Hugo L. Black.”

In 1927, Black, then a senator, defended a friend, George (Chum) Smelly, who shot and killed Lucas Ware, a black, after Ware was acquitted of manslaughter of Will Smelly, Chum’s brother. An acquittal by an all-white jury of a black for killing a white in that era was most rare. As in the Stephenson trial, Black’s defense was self-defense even though Ware was shot in the back. Black had 15 witnesses testify as to Smelly’s exemplary character and 10 testify that Ware was dangerous and violent. After the acquittal — the jury deliberated for a mere 20 minutes — Smelly was congratulated.

I don’t know many saints other than my wife, who was canonized by my mother for marrying me. But our nationwide debate over Columbus, Confederate generals, even Washington and Jefferson has raised the issue as to how we judge people, not only historical figures, but friends, relatives, neighbors. Is it over a lifetime, weighing good against bad? Or are some acts so heinous or disgusting that they can never be ignored or forgiven? Should monuments to slave-owning Washington and Jefferson be tossed into the Potomac?

Continued on page 25
Murder of Father James E. Coyle

Continued from page 24

What about the statue of Christopher Columbus that overlooks the state courthouse in Brooklyn? Or the Eastern District of New York courthouse named for Teddy Roosevelt, accused of believing white people and culture superior? Or John Jay High School, where I taught, named for our first chief justice, who argued that Catholics shouldn’t be permitted to hold elective office. What do we do with anti-Catholics like Peter Stuyvesant, John Quincy Adams, Thomas Nast? And let’s be honest, prejudice against Catholics pales when compared with slavery or segregation. Let’s not ignore the Chinese Exclusion Act of 1882, the internment of Japanese-Americans during World War II, or the denial of entry in 1939 of the St. Louis, a ship loaded with Jewish families, a quarter of whom later died in Nazi death camps. Our glorious history is replete with such depraved acts, especially against Native Americans.

No doubt Black’s trial tactics were immoral and, perhaps, evil. Yet, do we overlook, even excuse, those transgressions of a relatively young, very ambitious attorney who while on the Supreme Court later rationalized his Klan membership to a law clerk: “Why, son, if you wanted to be elected to the Senate in Alabama in the 1920’s, you’d join the Klan too.” See Roger K. Newman’s Hugo Black — A Biography (Pantheon Books 1994).

I focus on Hugo Black not only because he allowed his ambition to overwhelm decency but also because he was, in later life, such a positive force for equality. His vote on Brown v. Board of Education (1955), which desegregated schools, cost him personally. Friends and political allies abandoned him, and the furor was such that his son, Hugo Black Jr., had to move to Florida from Birmingham. Justice Black joined a unanimous court in United States v. Price (1965) to overturn the trial court’s dismissal of a case brought against 18 members of the Klan for the murders of James Chaney, Andrew Goodman, and Michael Schwerner in Mississippi during the struggle for civil rights. Other decisions — for example, on prohibiting prayer in public schools — also led to a firestorm of criticism. These protests never swayed Black from his convictions.

How do we evaluate Black’s life and legacy? Do we accept that in those times, in that place, racist, anti-Catholic, and anti-Semitic beliefs were the norm? Do we justify malevolence by simply acknowledging that many at that time owned slaves, supported segregation, believed Catholics’ loyalty was to the pope, not the president?

We are all sinners, I was always taught. And phonies, too. Are you an ardent environmentalist, as I am, yet have Amazon products delivered regularly with the resulting bubble wrap and cardboard packaging, via trucks using fuel and spewing fumes? Heck, my UPS guy doesn’t even ring our bell. He just looks for our cars (yes, plural), and if he doesn’t spot one, just walks to the back door. Do you favor income equality yet live in an exclusive neighborhood and send your children to private schools — or economically segregated public schools — and expensive colleges? Do you advocate racial and ethnic diversity but dismiss the economic component, ignoring the poor whatever the color? The list is endless.

I wouldn’t have named a courthouse for Hugo Black and I hope I never used his stamp. Yet, if we erase his name, who should we enshrine? Who is so virtuous, so perfect? Rather, we should insist on teaching the truth — that our nation’s founders, our presidents, artists, religious leaders, and citizens were and are deficient, inadequate individuals. Their hatred and bigotry should be broadcast with the same fervor as their beauty and courage.

More than 90 years after Father Coyle’s death, a Methodist Church service in Birmingham brought both congregations together in a spirit of compassion and reconciliation. Father Alex Steinmiller said it best: “There is no statute of limitations on forgiveness.”

Our glorious history is replete with depraved acts, especially against Native Americans.
In August 2018, the U.S. Court of Appeals for the Seventh Circuit raised eyebrows and caused some amusement when it became the first federal appellate court to embed a “poop” emoji in a published judicial opinion. In a ruling written by Judge Sykes and joined by Chief Judge Wood and Judge Hamilton in the employment-discrimination case Emerson v. Dart, the court affirmed the district court’s decision to sanction the plaintiff-employee for threatening, while litigation was pending, to sue any witnesses who testified against her. Setting forth the facts supporting the sanction, the court reproduced the employee’s Facebook post containing the threat, which ended with the statement: “SO GLAD THAT THE ARROGANCE OF THIS EMPLOYER HAS THEM BELIEVING THEIR OWN 💩.” The court concluded that the district court did not abuse its discretion in granting the employer’s motion for sanctions and ordering the employee to pay nearly $17,000.

Although the Seventh Circuit’s inclusion of the “poop” emoji surprised some readers, attorneys and courts have in fact been grappling with emojis — along with their cousins, emoticons — for years in a wide variety of complex substantive legal contexts. This trend has been growing substantially: in 2004 only two court opinions mentioned emoticons (none mentioned emojis), whereas the first ten months of 2018 have already seen 43 court opinions mention emojis or emoticons. In addition, legal scholars have begun producing rich insights into the relationship between emojis, emoticons, symbolic language, linguistics, and the law.

Both case law and legal scholarship identify a host of topics relating to emojis and emoticons about which attorneys and judges should be aware. These topics are increasingly important because, as one...
Emojis, Emoticons, and the Law

Continued from page 26

commentator noted, “it’s exceedingly rare — maybe unprecedented — for a phonetic alphabet to suddenly acquire a big expansion pack of ideograms.”7 Another scholar concurred, “A major development in human communication like this will have many far-reaching effects on society — including the law.”8 This article provides a broad overview of the legal issues — both concerning substantive areas of law and in legal communication — currently relating to emojis and emoticons.

I. What are Emojis and Emoticons?

Emojis and emoticons supplement email, text and instant message, social media posts, and other electronic communications with visual imagery and thereby play similar functions in such communications. As a result, they are sometimes confused or treated as synonymous, despite their technical differences.9

The Oxford English Dictionary defines an “emoji” as “[a] small digital image or icon used to express an idea, emotion, etc., in electronic communications.”10 Several courts have adopted this definition.11 Emojis are often used as small pictographs (pictorial symbols) that are included in text messages and that are about the same size as the text characters they accompany.12 Emojis range from cartoonish faces to human and animal figures, food icons, country flags, and more. By incorporating visual imagery into text-based communications, emojis can efficiently convey emotions, jokes, and other information. Some of the most popular emojis are:

- a face with tears of joy 😂
- a face with heart-shaped eyes 😍
- a red heart ❤
- a face giving a kiss 😘
- a loudly crying face 😭

Around the world, it is estimated that 2.3 trillion mobile messages incorporate emojis in a single year, and 92% of the online population uses emojis.14 Indeed, the use of emojis exploded in the last several years after characters were added to an international character standard called Unicode Standard, which is “a character coding system designed to support the worldwide interchange, processing, and display of the written texts of the diverse languages and technical disciplines of the modern world.”15 Since that development, smartphone software platforms (such as Apple Inc.’s iOS and Google Inc.’s Android) added built-in support for emoji characters that users can activate easily through different virtual keyboards.16 Today, there are thousands of different emojis available across the Unicode Standard, the Apple emoji character set, and other sources.17 This number will continue to grow; indeed, the Unicode Consortium (a non-profit organization that promotes the Unicode Standard) is currently evaluating a list of 179 “emoji draft candidates” to include in a future version of the standard.18

Emoticons are closely related to emojis, but instead of using pictures they use keyboard text characters. One dictionary defines emoticons as a “group of keyboard characters” that “typically represents a facial expression or suggests an attitude or emotion and that is used especially in computerized communications (such as e-mail).”19 The Seventh Circuit and other courts have adopted that definition.20 Some of the most popular emoticons are:

- a smiley face :-)  
- a winking face ;-
- a sad face :-(
- a tongue sticking out :-P and
- a heart <3.21

Despite their technical differences, both emojis and emoticons raise similar interpretive issues in substantive areas of law and in legal communication.

Continued on page 28
II. Substantive Legal Issues involving Emojis and Emoticons

Emojis and emoticons have been involved in a variety of substantive legal areas including investigations and discovery, evidentiary issues, and intellectual property disputes.

A. Investigations and Discovery

With the explosion of nonverbal electronic communications in the form of emojis and emoticons, and with more communications occurring over text and instant-messaging platforms instead of email, attorneys cannot ignore the role that emojis and emoticons might play in supporting or defeating a cause of action. At present, standard e-discovery rules do not address nonverbal digital communications, and current off-the-shelf e-discovery tools are not designed to handle data involving emojis and emoticons. Accordingly, attorneys must consider how they will investigate and detect evidence underlying a cause of action where the written communications at issue contain emojis and emoticons instead of (or in addition to) verbal messages. To confront the issue of nonverbal written communications, an attorney should consider all of the electronic programs and platforms on which the relevant actors may have communicated with both internal and external parties (e.g., text and instant message), as well as the specific types of nonverbal mechanisms supported within those programs (e.g., emojis, emoticons, or other icons). Comprehensive custodial interviews are of increasing significance here, as an attorney will need to understand why and how extensively the witnesses may have used emojis in the facts underlying a particular dispute. An attorney should consider the technical issues surrounding how emojis are presented and preserved in these messages — for example, whether the emojis are still or animated — as this may be another issue that needs to be addressed during document collection, conversion, and production. In addition, an attorney should assess whether a customized e-discovery tool is needed to analyze emojis, emoticons, and other icons, along with sentiment analysis and keyword searches of verbal communications. A customized coding tool might be needed to translate nonverbal messages into readable text; for example, some programs note a text description of the emoji (e.g., “smile,” “anger,” or “thumbs-up”) in place of the relevant image in the back-end data. If the cost of preservation, analysis, and production of emojis and emoticons is high, however, a proportionality analysis under Federal Rule of Civil Procedure 26(b) will likely be in order, considering the potential relevance of the emojis and emoticons in the case against the discovery cost. Attorneys should stay informed about developments in this area of e-discovery to ensure that they are using the most modern tools available to them to uncover potentially relevant nonverbal written communications such as emojis and emoticons.

B. Evidentiary Issues

Scholars studying the relationship between emojis and emoticons, linguistics, and the law have determined that emojis and emoticons “are progressively recognized, not as joke or ornament, but as the first step in nonverbal digital literacy with potential evidentiary legitimacy to humanize and give contour to interpersonal communications.” Indeed, due to the communicative function of emojis and emoticons, courts have started to grapple with evidentiary issues involving them in substantive legal areas including contract, fraud, tort, and criminal law. Some of the complex linguistic and interpretive questions now or soon-to-be confronted by courts include:

- Should emojis and emoticons be presented to factfinders as evidence in the first place?
- When is evidence of emojis and emoticons admissible?
- What is the meaning of a particular emoji or emoticon in isolation?
- Is the meaning of a particular emoji or emoticon static or subject to change based upon the community, culture, or country in which it is used or upon other contextual factors?

Continued on page 29
Emojis, Emoticons, and the Law

Continued from page 28

• When do emojis or emoticons convey something other than the plain meaning of the pictorial image?
• Does the meaning of an emoji depend upon its sequencing with other emojis or in relation to proximate text?
• Can an emoticon or emoji change the meaning of a communication in which it appears (by providing irony, innuendo, and so forth)?
• When does an emoji placed after text provide evidence that the preceding words do not mean what they seem to mean? When does an emoji confirm or clarify the meaning of preceding text?
• What happens when an emoji contradicts the text?
• Does it matter that emoji character sets may display differently on different platforms? For example, the “grinning face with smiling eyes” emoji looks different across different devices for each of these platforms, as illustrated below: ?26

These are all the same emoji!

This is what the “grinning face with smiling eyes” emoji looks like on devices for each of these platforms:

Apple  Google  Microsoft  Samsung  LG  HTC  Twitter  Facebook  Mozilla  Emoji One

• Which version of an emoji did the sender mean to convey? What version did the recipient see? Similarly, what did the sender mean to send or did the sender mistakenly send the wrong emoji (as they are small and easy to misidentify)? What did the recipient understand or interpret?
• Which version of an emoji should be shown to a jury?
• Do emoticons and emojis reveal something about the author’s mental state or intent?
• Is an expert witness required to testify as to the meaning of an emoji?
• How does one qualify to become an expert on the meaning of emojis?
• When the meaning of a given emoji or emoticon is in dispute, who should resolve the conflict (i.e., the judge or the jury)?27

The answers to these questions are unsettled, but the following examples illustrate how these evidentiary issues arise in a variety of substantive legal contexts.

1. Contract Law

The use of emojis and emoticons in electronic communications has the potential to introduce ambiguity into the determination of whether someone has intended to make pre-contractual inquiries, agreed to enter into a contract, or breached an agreement.28 This quandary arose, for example, in a case decided by an Israeli court that involved a couple looking for an apartment.30 The couple sent a text message to the landlord with an expression of interest in the unit, a request to set up a viewing time, and a string of emojis including a hand forming a peace sign, several dancers, a smiley face, a champagne bottle, a chipmunk, and a comet:

The landlord believed, based in part on these emojis, that the couple had agreed to rent the apartment; subsequently, he removed the listing based on his belief that a contract had been formed. Later, when the couple stopped responding to his messages, the landlord sued, claiming that he had relied on their optimistic text messages including a smiley face emoji to indicate agreement.

Applying Israeli law, which imposed a statutory obligation of good-faith bargaining, the judge found in favor of the landlord, determined that the couple had negotiated in bad faith, and fined the couple a month’s rent as damages. Although the application of U.S. common law likely would have yielded a different outcome (given that the text messages indicated interest but did not establish essential terms of the apartment rental agreement) and other complexities were at issue, this case nonetheless illustrates the central role that emojis played in the court’s interpretation of pre-contractual communications.31

2. Fraud Detection

Lawyers, investigators, judges, and juries may confront challenges when analyzing electronic communications containing emojis and emoticons to detect fraud and fraudulent intent. Consider a scenario in which one individual proposes to another to collude in a fraud scheme, and the second person responds via an electronic communication with an emoji (such as a smiley face or thumbs-up sign). The person analyzing the message for fraudulent intent must interpret both the sender’s and receiver’s
intentions with, and perceptions of, these messages. Moreover, fraudsters may attempt to use unrelated emojis to conceal their actions, for example, by creating emoji-based symbolic codes in which incriminating words and fraudulent schemes are represented by pictorial symbols. In such a situation, a fact-finder would need to determine that the evidence provided a full context to discern the “true” meaning behind an emoji message.

3. Tort

Courts have assessed the inclusion of an emoji or emoticon in an electronic communication when analyzing tort claims for intentional infliction of emotional distress (IIED) and defamation. In one IIED case, for example, an employer was charged with sexual harassment because he sent a job applicant a picture of his private parts, but when the applicant responded with sexual innuendos and emojis of blowing a kiss and three winking emojis, the trial court determined that the applicant presented insufficient evidence to establish a claim for emotional distress. In another case, a trial court determined that no reasonable jury could conclude that an employee found a CEO’s conduct to be “undesirable or offensive in the Title VII sense” and that the conduct constituted sexual harassment where, among other flirtatious behaviors, the employee had added smiley face emojis to messages that she had sent to the CEO. In a defamation case, the meaning of an emoticon was at issue where a comment on an internet message board appeared to accuse a local official of corruption. The comment concluded with the “tongue sticking out” (: P) emoticon. The appellate court determined that the online comment could not be taken seriously and was not defamatory because, in the context of the online comment, that emoticon “is used to represent a face with its tongue sticking out to denote a joke or sarcasm.”

4. Criminal Law

The inclusion of emojis in electronic communications also has played a central role in a number of criminal cases. In one high-profile criminal trial, the federal district court judge required that all Internet communications be shown to the jury — not read aloud — and instructed that “the jury should note the punctuation and emoticons” when assessing the defendant’s criminal intent.

In particular, emojis have been key to the question whether an electronic communication containing emojis represented a true threat and established a criminal defendant’s specific intent. For example, in one Virginia case, a minor student posted a social media message that included the word “killing” next to a gun emoji and the phrase “meet me in the library Tuesday” next to emojis of a gun, a knife, and a bomb. Police intercepted the message and determined that it conveyed a credible threat to be performed in the student’s school library. Authorities charged the student with computer harassment and threatening school personnel. According to a report by the Washington Post, the role of emojis in charging the student in this case is part of a growing trend “where authorities contend the cartoonish [emoji] symbols have been used to stalk, harass, threaten or defame people.” The newspaper reported that “[p]olice are trying to judge just how serious to take threatening messages using emoji, which are most often deployed in a light-hearted manner.” Further complexities arise in this judgment when one considers that the pistol emoji on many platforms was changed from a revolver-type gun to a water gun in recent years due to public outcry over gun violence. This change indicates additional nuances in interpreting the threat from that type of emoji. It also shows how emoji developers are involved in these emerging issues.

These examples from contract, fraud, tort, and criminal law illustrate some of the challenges that attorneys and judges currently are confronting when interpreting the evidentiary value of emojis and emoticons. As one scholar has urged, “because of
Emojis, Emoticons, and the Law

Continued from page 30

the novelty of emoji and their susceptibility to misinterpretation, attorneys and judges should realize their limitations when addressing this language and tread cautiously.”

C. Emojis and Emoticons in Intellectual Property Disputes

In addition to the substantive legal issues raised by emojis and emoticons in discovery and evidentiary matters across various areas of law, emojis and emoticons have been at the center of complex intellectual property disputes. These disputes have involved, for example, a suit against Apple Inc. claiming willful trademark infringement of an app that is used to animate emojis; a suit against Research in Motion Corp. and Samsung Electronics Co. Ltd. claiming willful patent infringement of technology used to convert emoticons of facial expressions into emojis of faces; a suit against Samsung Electronics Co. Ltd. claiming willful patent infringement of technology that enables users to send emojis over wireless internet; and a suit brought by Gap Inc. and a designer’s fashion company against a children’s product startup claiming preemptively that clothes featuring a heart emoticon <3 do not infringe the startup’s logo because the symbol is too frequently used. Attorneys practicing intellectual property law should monitor developments in this area, as more of their cases may involve issues concerning emojis and emoticons in the future.

III. Legal Communication Issues involving Emojis and Emoticons

Beyond these substantive legal issues, attorneys and judges should consider issues raised by emojis and emoticons in legal communication, including in briefs, judicial opinions, court presentations, and communications with colleagues, clients, and opposing counsel.

A. Presentation of Emojis and Emoticons in Briefs and Judicial Opinions

To date, most briefs and judicial opinions that reference an emoji do so by including a bracketed description of the emoji and indicating the placement of the emoji in the text. For example, a court will write that a social media post contained “[five laughing emojis].” In fact, the opening sanctions brief in Emerson v. Dart followed that practice, writing “[symbol or ‘emoji’ of feces]” and also including a copy of the Facebook post. Indeed, one reason why the Seventh Circuit’s reproduction of the “poop” emoji in Emerson v. Dart attracted attention is because the words “poop” and “emoji” do not appear in the opinion. The emoji image is embedded in the text rather than described verbally. This raised the question by one observer “whether Westlaw, Lexis, and similar legal search engines will implement some method of searching for emojis in a judicial opinion.”

To be sure, at present, a Westlaw search for all cases containing the word “emoji!” does not locate Emerson v. Dart. And a search for Emerson v. Dart across several research platforms (PACER, Westlaw, Lexis Nexis, Bloomberg Law, and Fastcase) reveals that the “poop” emoji is not represented the same across them. (It is noteworthy that the emoji in the Facebook post was a “poop” emoji with eyes and a smile whereas the emoji embedded by the Seventh Circuit lacked those features.) These disparities caused one commentator to note, “If courts continue to embed rather than describe emoji in opinions, emoji are likely to join this category of visual components whose online display will vary widely by research service.” Other commentators have urged, however, that courts “should be encouraged to include actual emojis and emoticons in their opinions when possible” because with the thousands of emojis now available across various character sets, “noting the presence of emoji conveys very little information,” and “describing it conveys some more but can still lead to confusion with this many options.”

In light of these challenges, the best practice at present may be for courts to: (1) embed into the judicial opinion the actual emoji at issue; (2) identify the specific Unicode Standard (or other character set) emoji identification number; and (3) include a detailed bracketed description of the emoji in the text of the opinion. This practice would enable research platforms such as Westlaw to avoid unhelpful current defaults such as “<Unknown Symbol>” when they cannot translate or import an emoji. Litigants who present emojis in support of their arguments should be prepared to present this same detailed information in their filings.

Continued on page 32
Emojis, Emoticons, and the Law

Continued from page 31

B. Emojis and Emoticons in Written and In-Court Advocacy

As a society, we are becoming more visual and less reliant on text. Some say we have entered a “post-textual” age.57 Given the ubiquity of emojis and emoticons in our modern electronic communications, it is inevitable that such icons will be used in legal briefs and in court proceedings (such as in PowerPoint presentations used in oral arguments or graphics used at trial). Indeed, the Council of Appellate Lawyers has advised that appellate courts should adopt rules or guidelines of embedding visual images in briefs because such images “can communicate important information and improve reading comprehension.”58

A savvy attorney, when trying a case that may be heavy with emoji or emoticon evidence, should address the use of such symbols with potential jurors during voir dire. Such an attorney may want to know which potential jurors do and do not regularly use emojis and emoticons in their communications if such symbols play a significant evidentiary role in a case.

In addition, the use of emojis and emoticons in court presentations can assist attorneys in telling the story of their clients’ cases and connecting with their audiences of judges and jurors. As one trial consultant noted, “if jurors are constantly relying on pictures to connect outside the courtroom, it is time to begin speaking to them in this new language.”59 An attorney can communicate quickly, accurately, and efficiently with judges and jurors by using emoticons and emojis that immediately convey a story; make it easier for the audience to recall key messages; help the audience visualize concepts; and develop common associations that can be used to the client’s advantage.60 When selecting whether and how to use emojis, emoticons, or other icons in court proceedings, the trial consultant advised that attorneys should select icons that have “strong, universal connotations” rather than ambiguous or subjective meanings.61 For example, a “red flag” can effectively communicate caution, warning, and concern. A “handshake” can signify that the parties entered into a contract. A “checkmark” can signify a list of actions taken by a party. Icons can also be used effectively in timelines and flowcharts.62 Modern, innovative, and creative attorneys should experiment with emojis, emoticons, or other icons in their court presentations to communicate effectively with judges and jurors in today’s visual world.

C. Emojis and Emoticons in Professional Communications

As the use of emojis and emoticons becomes commonplace in our society, some lawyers may seek to use such icons in communications with colleagues, opposing counsel, and clients. Indeed, an attorney may be tempted to include an emoji or emoticon in an attempt to soften the tone of an email or to establish positive intentions behind a message.63 Attorneys may attempt such techniques in an effort to show a sense of humor and relate more closely to a colleague or client.64 Such practices are risky, however, and it is crucial for attorneys to exercise caution when attempting such strategies in casual communications because, as one commentator noted, “[s]martphone-sent emails beget uncapitalized emails beget abbreviations beget emojis beget casually dropping the F-bomb.”65

An attorney must never cease to exercise good judgment, civility, and professionalism in this regard, especially because electronic communications can be retained indefinitely and can be copied or forwarded without the author’s knowledge.

IV. Conclusion

As we are spending more time on our “smart” devices and communicating more than ever via text and instant-messaging platforms, our use of emojis and emoticons will only grow. As a result, emojis and emoticons will continue to take on increasing legal significance. Attorneys and judges should strive to understand the nuances involved in these modes of communication, which simultaneously launch us into the future and find their roots in symbolic communication systems of our ancient past.

Continued on page 33
Emojis, Emoticons, and the Law

Continued from page 32

Notes:


2. Emerson v. Dart, 900 F.3d 469, 471 (7th Cir. 2018).

3. Id. at 472.

4. Id. at 473.

5. Author’s Westlaw Search, All State & Federal cases, (emoticon! emoji!) (Oct. 11, 2018); see also Mike Cherney, Lawyers Faced with Emojis and Emoticons Are All “\(’(’)/’(’\)”, WALL ST. J. (Jan. 29, 2018), https://www.wsj.com/articles/lawyers-faced-with-emojis-and-emoticons-are-all-1517243950.


9. Id.


12. Goldman, supra n.6, at 6–7.


14. Goldman, supra n.6, at 3.


17. Id.


21. Goldman, supra n.6, at 11–12.


23. Holderness Jr. et al., supra n.22.

24. Kirley & McMahon, supra n.6, at 517–18.


27. Henry & Harrow, supra n.16.

28. These examples are not exhaustive; interested readers are urged to consult the footnotes in this article, which cite scholarship cataloguing case law relating to how emojis have been treated in these substantive areas of the law.


30. Kirley & McMahon, supra n.6, at 556-57.


32. Holderness Jr. et al., supra n.22.

33. Id.


37. Id. at 549, 845 N.W.2d at 145; see Kirley & McMahon, supra n.6, at 558.

38. Kirley & McMahon, supra n.6, at 549–56 (collecting cases from American and European jurisdictions).


41. Kirley & McMahon, supra n.6, at 553–54.

Continued on page 34
Emojis, Emoticons, and the Law

Continued from page 33

Notes (continued):


45 See also, e.g., Enjataan v. Schlissel, No. 14-CV-13297, 2015 WL 3408805, at *6 (E.D. Mich. May 27, 2015) (determining that the single text message used as the basis for the search warrant for allegations of harassment was not materially changed by the addition of an emoticon); In re L.F., 2015 WL 3500616 (Cal.App. 1 Dist.) (illustrating that where a court views the questioned threatening language as unequivocal, the use of light-hearted emojis or emoticons may not change the meaning of the message).

46 Geneus, supra n.40, at 440.


51 Henry & Harrow, supra n.16.

52 Emerson v. Dart, Case No. 14 C 5898, (Dkt. 60) at 2 (N.D. Ill).


54 Author’s Westlaw Search, All State & Federal cases. (emoticon! emoji!) (Oct. 11, 2018).


56 Henry & Harrow, supra n.16; see also Milott, supra n.22, at 67.


60 Id.

61 Id.

62 Id.


Even for seasoned litigators, the final 30-day run-up to trial is unquestionably one of the most demanding phases in any complex case. From preparing witnesses for the challenges of direct and cross examination, to developing a coherent and thematic opening presentation, to preparing examination outlines for opposing witnesses, there is much to accomplish in this small window of time.

Some lawyers think of trial preparation as simply planning for events that will occur in the courtroom, but one should be careful not to undervalue the substantial amount of time and energy that must be devoted to preparing the vast array of written disclosures and submissions that must be completed well before the first day of trial. These critically important pretrial submissions include the witness list, designations of deposition testimony, the exhibit list, the pretrial order, motions in limine, jury instructions, proposed voir dire, and a host of other related documents. Preparing these materials requires significant skill and a firm understanding of the intricate set of rules governing them.

This article focuses on the three core pretrial disclosures mandated under Federal Rule of Civil Procedure 26(a)(3) — the witness list, the deposition designations, and the exhibit list — and unpacks the many considerations, big and small, that one must bear in mind when preparing these submissions in advance of a federal civil trial. It explores the relevant requirements that apply to these disclosures and offers some strategic suggestions about how best to

Continued on page 36

*Mr. Silvertrust is an Associate in the litigation department of Jenner & Block LLP in Chicago. Previously, he clerked for Judge Harry Leinenweber of the United States District Court for the Northern District of Illinois (2014 – 2015) and Magistrate Judge Frank Maas of the United States District Court for the Southern District of New York (2012 – 2013). He is a graduate of Lawrence University, B.A. magna cum laude and Phi Beta Kappa. He received his J.D. degree, summa cum laude, from the John Marshall Law School where he was a member of the law review. The views reflected in this article are his own, not those of any of his current or former employers.
handle difficult issues that may arise along the way. Following these basic rules of the road can help ensure that you are well prepared for the challenges these submissions pose on the path to trial in any case.

**Rule 26(a)(3) Generally**

Rule 26(a)(3) provides that, unless the court specifies otherwise, a party must, within 30 days before trial, provide all other parties with (1) a list of witnesses the party expects to present or may call if the need arises, (2) a designation of any testimony that may be presented at trial by deposition, and (3) a list of all exhibits that the party expects to offer or may offer if the need arises. Each of these disclosures must be served on all parties and then “promptly file[d]” with the court. See Fed. Civ. P. 26(a)(3)(A); Fed. Civ. P. 26(a)(4).

**The Witness List**

The witness list is the most straightforward of the Rule 26(a)(3) disclosures. Each party must simply prepare a list separately identifying the witnesses the party expects to present at trial and the witnesses the party may call if the need arises. Fed. R. Civ. P. 26(a)(3)(A)(i).

Although the witness list is not technically difficult to prepare, one must take care to ensure that all witnesses who one may potentially wish to call at trial are accounted for in this submission. That includes any witness who the party intends to call by designation of deposition testimony, which is discussed in greater detail below. Failure to list a witness can result in exclusion of the witness under Rule 37(c), unless the failure to disclose was substantially justified or harmless. See 8A Charles Alan Wright, et al., Fed. Prac. & Proc. § 2054 (3d ed.).

The witness list should be broken out into two sections. Any witness who the party anticipates calling at trial should be listed in the “expects” to present category. Any other witness who the party does not anticipate calling, but wishes to reserve the right to call, should be listed in the “may call” category, although witnesses who will be used solely for impeachment purposes need not be listed. Fed. R. Civ. P. 26(a)(3)(A) (exempting from the required disclosures evidence that would be used “solely for impeachment”); see also, e.g., Design Strategies, Inc. v. Davis, 228 F.R.D. 210, 211 n.1 (S.D.N.Y. 2005) (“the discovery rules do not require pretrial disclosure of impeachment witnesses”).

The reason for requiring this subdivision of witnesses is not entirely clear, since there is no apparent penalty under the rules for calling a “may call” witness in one’s case-in-chief and neither is a party strictly required to produce all of the witnesses who the party has indicated that it “expects” to present. See 8A Charles Alan Wright, et al., Fed. Prac. & Proc. § 2054 (3d ed.); cf. United States v. Hunter, 714 F. App’x 582, 585 (7th Cir. 2017) (“a witness list is not a binding contract; the government was free to cut off its presentation of evidence when it believed it had met its burden”); Othman v. City of Chicago, No. 11-CV-5777, 2016 WL 612809, at *7 (N.D. Ill. Feb. 16, 2016) (“Defendants were not required to call every person on their pretrial list”). Moreover, Rule 26 would not bar even an unlisted witness from testifying if that witness is called based upon “developments during trial that could not reasonably have been anticipated.” Fed. R. Civ. P. 26, Advisory Committee Notes (1993 amend.). Notwithstanding the flexibility that the Rules provide, however, requiring parties to indicate which witnesses the party either “expects” to present or “may call” if the need arises does offer at least some basic clarity with respect to the universe of potential witnesses and scope of the upcoming trial.

The witness list must include the name of each witness and, if not previously provided, their address and telephone number. Fed. R. Civ. P. 26(a)(3)(i). If the case involves contested documentary evidence of a company or organization, it is a good practice to list the “Custodian of Records” of the relevant company or organization or to include a catch-all designation of “any witness for purposes of authenticating and/or laying the foundation for any document at trial.” It is not required, however, to disclose the order in which the party intends to call each of the witnesses listed.
Designation of Deposition Testimony

The second disclosure required by Rule 26(a)(3) is the designation of any testimony the party expects to present at trial by deposition. Fed. R. Civ. P. 26(a)(3)(A)(ii). Deposition testimony is most classically used at trial as a defensive mechanism to impeach an opposing party’s witness who has testified inconsistently with his or her prior deposition testimony. However, there are numerous situations in which a party may wish to affirmatively present deposition testimony at trial in lieu of the witnesses’ live direct testimony. To understand how and when deposition designations may be made requires navigating several interconnected procedural and evidentiary rules.

Federal Rule of Civil Procedure 32 governs the permissible circumstances under which a party may use deposition testimony at a hearing or at trial. A deposition may be used against a party if (1) the party was present or represented at the taking of the deposition or had reasonable notice of it, (2) the deposition is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying, and (3) the use is allowed under Rule 32. Fed. R. Civ. P. 32(a)(1).

The wide range of permissible deposition uses may come as a surprise to lawyers less familiar with Rule 32. For example, Rule 32 allows a party to use “for any purpose” any portion of an adverse party’s deposition or the deposition of that party’s officer, director, or corporate designee under Rule 30(b)(6). Fed. R. Civ. P. 32(a)(3). Rule 32 also permits for any purpose the use at trial of the deposition of any “unavailable witness” — even a witness who is uniquely within the party’s control, such as employees or former employees. See Carey v. Bahama Cruise Lines, 864 F.2d 201, 204 (1st Cir. 1988) (party’s employees may be deemed “unavailable” under Rule 32 so long as the party did not itself “procure[e]” the unavailability). Importantly, the unavailability standard under Rule 32 is significantly less onerous than the related unavailability standard under the Federal Rules of Evidence. Cf. Fed. R. Evid. 804(a). A witness may be declared unavailable under Rule 32 for a variety of reasons, including if the witness is located more than 100 miles from the courthouse or if the witness’ trial appearance cannot be procured by subpoena. Fed. R. Civ. P. 32(a)(4). So, to the extent a party’s witnesses — even those that the party controls — reside more than 100 miles from the place of trial, the party may choose to present those witnesses solely by deposition testimony.

It is natural to think that such testimony might ultimately be barred by the hearsay rule, but Federal Rule of Evidence 802 allows the admission of hearsay so long admission of the evidence is authorized by any “other rules prescribed by the Supreme Court,” of which Rule 32 of the Federal Rules of Civil Procedure is one. Fed. R. Evid. 802, Advisory Committee Notes (1972). Thus, although not often cited as such, Rule 32 itself operates as a “freestanding exception to the hearsay rule.” Ueland v. United States, 291 F.3d 993, 996 (7th Cir. 2002); Bone Care Intern. LLC v. Pentech Pharmaceuticals, Inc., No. 08-CV-1083, 2010 WL 3894444, at *11 (N.D. Ill. Sept. 30, 2010). Accordingly, the use of deposition testimony that might otherwise be barred as hearsay may be allowed under Rule 32.

From a strategic perspective, deciding whether to present a witness by deposition is a tactical choice that turns upon a variety of case-specific dynamics. In making that determination, one should consider the relative importance of the witness’ testimony to the claims or defenses in the case, the facts of the particular case, whether the case will be heard as a jury or bench trial, whether the deposition transcript is sufficiently clear, whether other portions of the deposition that may be cross-designated by the opposing party are likely to be misleading, whether the witness is liable to crumble under the pressure of cross-examination but performed adequately at his or her deposition, whether the witness will appear personable and credible when presented live, and whether the amount of testimony needed from the witness justifies the time and cost of presenting him or her live at trial. Each of these factors should be carefully weighed before committing to one path or the other.
As a general matter, conventional wisdom counsels against presenting witnesses by deposition in jury trials unless it is absolutely necessary to do so or the witnesses are peripheral to the main issues in the case and the designations may be presented quickly. Deposition testimony designated for trial use is often read or, in the case of a video-taped deposition, played at the end of the trial day. Unfortunately, that is a time when the jury’s attention is most likely to wander. It is easier to tune out a lengthy video-clip than it is to ignore a live witness. For this reason, it is almost always preferable to call a witness live unless there is a compelling justification to do so. On the other hand, if a witness within one party’s control but who is located more than 100 miles from the courthouse will give mixed testimony, the party can sometimes limit the impact of any damaging testimony by electing not to call the witness live and forcing the opposing party to introduce the unfavorable testimony through deposition.

With regard to the written disclosure itself, the most straightforward method is to create, for each deposition designated, a four column table with columns for (1) the party’s designations, (2) the opposing party’s objections to those designations, (3) the opposing party’s counter-designations of any portions of the same transcript, and (4) any objections to the opposing party’s counter-designations. The first column should be completed by listing the relevant excerpts of deposition testimony, identified by page and line number, the party wishes to introduce. The remaining columns, which will be completed later, should be left blank. A sample chart is set out below:

<table>
<thead>
<tr>
<th>Deposition of John Smith – August 13, 2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff’s Designations</td>
</tr>
</tbody>
</table>

Unless the court sets a different time, affirmative designations of deposition testimony that will be used for any purpose other than impeachment must be disclosed at least 30 days before trial. Fed. R. Civ. P. 26(a)(3)(A). If a designated deposition was not recorded stenographically, the designating party must also provide the opposing party with a transcript of pertinent parts the testimony. Fed. R. Civ. P. 26(a)(3)(A)(ii).

Within 14 days after a party serves its designations, the opposing party must serve and promptly file a list of objections. Fed. R. Civ. P. 26(a)(3)(B). The opposing party may also choose to counter-designate additional portions of the designated deposition that “in fairness should be considered” with the portions of the transcript the offering party seeks to introduce. See Fed. R. Civ. P. 32(a)(6); Fed. R. Evid. 106 (allowing introduction of the remainder of portions of writings or recorded statements that “in fairness ought to be considered at the same time”).

Objections and counter-designations can be made using the same method and format described above. In doing so, it is vital to carefully review the designated testimony and ensure that all relevant objections are appropriately preserved. Any objection not made in response to a designation, except for an objection under Federal Rule of Evidence 402 or 403, will generally be waived unless excused by the court for “good cause.” Fed. R. Civ. P. 26(a)(3)(B).

Many judges will require that the parties provide the court with transcript copies of any designated depositions in advance of trial, with the parties’ respective designations and counter-designations highlighted in different colors and with objections noted in the margins. To the extent the designating party has any objections to the opposing party’s counter-designations, those should be noted on the transcript as well. It is customary for the party who affirmatively designates testimony to prepare the highlighted transcript pertaining to that witness. To the extent both parties have affirmatively designated the same witness’ deposition testimony, only a single copy of the transcript should be provided and the parties should coordinate to decide which party will prepare the transcript.

The Exhibit List

Preparing the exhibit list is generally the most time-consuming of the three Rule 26(a)(3) disclosures. Much of the leg-work in compiling this list can be done with the assistance of paralegals or project assistants, but it takes significant attorney input to identify and ensure that all of the exhibits necessary for trial are properly accounted for in the party’s disclosure. Exhibits that are not listed on a party’s disclosure may be excluded at trial. See 8A Charles Alan Wright, et al., Fed. Prac. & Proc. § 2054 (3d ed.).

The exhibit list must identify each document or other exhibit, and separately indicate which of those exhibits the party “expects to offer” and which of those it “may offer if the need arises.” As with the deposition designations, it is easiest to compile this information in a table format. Because of its sorting abilities and spreadsheet functions, Excel is particularly well-suited to this task.

Continued on page 39
A good place to start in compiling an exhibit list is with the exhibits that you expect to use with witnesses on direct and cross examination at trial, the exhibits used with witnesses during depositions, the materials relied upon by expert witnesses, the exhibits attached to summary judgment briefing or other relevant court filings, and the written discovery responses of the opposing party. These sources are likely to contain 80-90% of the core documents you will need for trial.

Summaries of evidence that may be offered at trial must also be identified on the exhibit list. Fed. R. Civ. P. 26(a)(3)(A)(iii); see also Fed. R. Evid. 1006 (permitting admission of summaries and charts to “prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court”). Likewise, any demonstrative aids that the party intends to offer as evidence must be listed, although it is unclear whether demonstrative aids that a party does not intend to introduce as evidence must also be identified. Rule 26 itself is silent on the issue, but some courts and judges require parties to identify all demonstratives prior to trial. See, e.g., N.D. Ill. L.R. 16.1 & Form N.D. Ill. L.R. 16.1.4. Because demonstrative aids are typically finalized closer to trial, it is in most cases sufficient to identify them on the exhibit list under a general placeholder for “Demonstrative Aids Pertaining To [Topic].” E.g., Logistec USA, Inc. v. Daewoo Int’l Corp., No. 2:13-CV-27, 2015 WL 3767564, at *14 (S.D. Ga. June 17, 2015) (permitting a “general catch-all for demonstrative aids” on a party’s exhibit list “with the understanding that any demonstrative aid presented at trial must depict only matters already admitted into evidence and cannot introduce any new material”). At some point before trial, it is helpful to meet and confer with opposing counsel to agree upon a schedule for the mutual exchange of any demonstratives prior to their use at trial.

In preparing the exhibit list, it is important to provide sufficient detail for the opposing party to identify each exhibit. Failure to adequately identify exhibits can potentially lead to the imposition of sanctions. See Flood v. Owens-Illinois, No. 86 C 8947, 2003 WL 21466934 (N.D. Ill. June 24, 2003). At a minimum, the exhibit list should provide a date and narrative description of each exhibit (such as “E-mail from James Green to John Brown”). To the extent possible, exhibits may also be identified by bates range.

Any objections to exhibits identified on an opposing party’s exhibit list must be served and then promptly filed within 14 days after the parties’ initial exchange. Fed. R. Civ. P. 26(a)(3)(B). As with objections to deposition designations, any objections to exhibits that are not raised, other than those under Federal Rule of Evidence 402 or 403, can be deemed waived. Ibid.

To prepare the list of objections, simply convert the opposing party’s exhibit list into a table (to the extent it is not already in that format) and add a column for objections. However, it is not uncommon for exhibit lists in complex civil cases to include hundreds, and sometimes thousands, of potential exhibits, which can take significant time to review and analyze. It is helpful if the parties can agree to an electronic exchange of exhibits together with their respective lists. This will save each side from having to spend time independently locating and collecting the opposing party’s exhibits for review.

Objections must be particularized, but typically need not contain a narrative explanation. For example, it is generally acceptable to simply object on the basis of “Fed. R. Evid. 802” or “Hearsay,” without additional explication. Any objections that may apply under the Federal Rules of Evidence and Federal Rules of Civil Procedure should be raised. The most common objections are, of course, relevance (Fed. R. Evid. 402), unfair prejudice, confusion, or waste of time (Fed. R. Evid. 403), improper character evidence (Fed. R. Evid. 404), hearsay (Fed. R. Evid. 802), and authenticity (Fed. R. Evid. 901), but a host of other objections may be relevant as well. Before heading down the warpath, however, it is useful to meet and confer with the opposing party to see if an agreement can be reached as to the admissibility of certain documents or categories of documents. For instance, in most cases it is silly to stand on authenticity objections when neither side has reason to believe that any of the exhibits are forgeries. Mutual agreement not to challenge each other’s exhibits as being inauthentic under Federal Rule of Evidence 901 can go a long way to easing the burden of these objections and streamlining the eventual presentation of the case at trial.

*  *  *

No matter the size of the case, many tasks compete for attention in the month before trial. Few are as important — or as overlooked — as the Rule 26(a)(3) disclosures. Failure to comply with the Rule can result in exclusion of witnesses or exhibits; failure to preserve objections to the opposing party’s disclosures can result in waiver. Understanding Rule 26(a)(3) and its requirements is thus one of the most critical aspects of ensuring a successful trial. At least until you enter the courtroom, and the real work begins.
The ability to help those in need through the provision of pro bono service is one of the greatest gifts of a legal education. This article summarizes the programs in our Circuit that enable attorneys to provide critical legal services to those in need while sharpening their own skills and assisting the Court.

Some pro bono programs require only a few hours a month. Others ask for a greater commitment. Some programs provide in-court experience, while others focus on negotiation and counseling. What they all have in common is the opportunity to get involved and change lives.

We hope that you will find something in this article that catches your eye.

Seventh Circuit Court of Appeals

Attorneys looking for appointed appellate work, whether civil or criminal, can simply reach out to the Clerk’s office. For criminal matters, lawyers may represent clients on direct appeal or in post-conviction proceedings. On the civil side, lawyers represent pro se parties in cases involving social security appeals, prisoner rights, and employment matters. Absent unusual circumstances, the court will hear oral arguments in appointed cases.

Florina Yezril, an associate at Mayer Brown, represented a client in an appeal involving a petition for a certificate of innocence. “Professionally, this pro bono work presented the rare opportunity for a second-year associate to manage a case, take the lead in crafting legal and persuasive arguments, work

Continued on page 41

Laura McNally is Co-Chair of the Retail and Consumer Brands Group at Loeb & Loeb and an editor of The Circuit Rider. She serves as the Chicago chair of Loeb & Loeb’s Pro Bono Committee.

Margot Klein is a law clerk in the Northern District of Illinois and chairs the Seventh Circuit Bar Association Pro Bono & Public Service Committee.
directly with a client, and ultimately argue at the Seventh Circuit. Personally, this project was very rewarding because our client expressed tremendous gratitude, stating that he could never have successfully appealed without my hard work on his behalf.”

For more information, contact Don Wall, Counsel to the Circuit Executive, at don_wall@ca7.uscourts.gov.

Northern District of Illinois

The William J. Hibbler Memorial Pro Se Assistance Program:
The William J. Hibbler Memorial Pro Se Assistance Program provides a free help desk for pro se parties in federal civil cases. Most commonly, the Help Desk’s visitors are plaintiffs in civil rights and employment cases. Volunteer lawyers do not undertake representation of any parties. Instead, they act as a resource to help analyze claims, draft pleadings, review documents, and understand rulings. Oftentimes, a volunteer’s most important service is providing guidance to non-lawyers who feel aggrieved but don’t know how (or whether) to proceed with a claim. Volunteers work in 3-hour shifts, scheduled a month in advance at the lawyer’s convenience.

Margot Klein, one of the authors of this article, served as the inaugural staff attorney for the program, and says its critical role cannot be underestimated. “This program provides pro se litigants with the tools they need to better litigate their cases – and that helps everyone concerned.”

This program is best for practitioners who have had at least 3-5 years of federal court experience in civil matters. Long-time volunteer Brad Lyerla, a partner at Jenner & Block, explains what draws him to this pro bono opportunity. “Gratitude and service to others are keys to happiness. I think the main kick that I get out of Hibbler is that I feel like I am helping real people with real problems. I also like the fact that Hibbler work is under the radar. At my firm, we do a lot of high profile pro bono, and I have done that myself. But Hibbler has no glory attached to it, and at this stage of my life, I prefer personal and low key pro bono service.”

For more information, contact the Legal Assistance Foundation, (312) 229-6060, or complete an online questionnaire at http://lafchicago.org/volunteer/volunteer-opportunities-sign-up

Civil Case Appointment:
Members of the Northern District of Illinois’ Trial Bar are probably aware that they may be randomly assigned to represent an indigent client. For lawyers looking for a rewarding pro bono opportunity in federal court, there is no need to wait to be randomly selected. The clerk’s office is happy to accept volunteers under Local Rule 83.35. The most common cases involve prisoner civil rights, social security, and employment matters. The clerk’s office will work with volunteer counsel to match the specific type of case with their preferences. Assignments can be made at any stage of the case, from initial pleadings to post-dispositive motions.

Rami Fakhouri, a partner at Goldman Ismail Tomaselli Brennan & Baum, represented his client from initial discovery, through Seventh Circuit en banc review, and then back on remand to the district court. In 2018, Rami was awarded the Seventh Circuit Bar Association’s Pro Bono Service award for his outstanding service to his client. Of this experience, Rami says, “The most rewarding aspect of my work on the Petties matter was getting my client his day in court, and being part of a new and important development in Seventh Circuit case law in the process. It was truly exhilarating. The case also brought a range of experiences that ultimately laid the foundation for me to take on increasing responsibility for other clients. From taking and defending depositions to arguing motions and negotiating settlements, I can trace many of the skills I now use regularly to my time on the Petties case. To me, it speaks to the power and importance of pro bono work — both as a worthy contribution to society and as a crucial means of young attorney development.”

For more information on accepting a civil appointment, contact Annette Panter, Assistant to the Clerk of Court, annette_panter@ilnd.uscourts.gov.
Settlement Assistance Project:
It is a maxim of modern legal practice that nearly all cases settle. The Settlement Assistance Project has turned that maxim into mission. The program pairs volunteer lawyers with pro se litigants for limited representation during settlement conferences before magistrate judges. If the case does not settle, the volunteer lawyer is under no obligation to continue with the representation. The work involves client counseling, drafting settlement demand letters, and advocating for the client at the settlement conference. If the case settles, the volunteer is also involved in drafting the settlement agreement.

John Cotiguala, an associate at Loeb & Loeb, found his Settlement Assistance Project work highly rewarding: “Overall, the experience made me feel more connected to the legal community. First, it was rewarding to give the client an opportunity to be heard and taken seriously in the legal process because of the importance of the claim to the client. It was also rewarding to get experience in a different area of the law and the opportunity to take the lead on a settlement conference. Finally, as a young attorney, it was rewarding to interact with a judge on the merits of a case in an informal setting, which gave me more confidence in future court appearances.”

For more information, contact Cunyon Gordon, Director of the Settlement Assistance Program, the Chicago Lawyers’ Committee for Civil Rights, cgordon@clccrul.org, (312) 202-3662.

Bankruptcy Help Desk:
Like the Hibbler Pro Se Assistance Program discussed above, the Bankruptcy Help Desk provides a resource for pro se parties navigating the bankruptcy system. While they do not undertake representation of help desk clients, they are available to answer questions, review forms, and draft motions. Volunteers work in 3-4 hour shifts and receive training from the Legal Assistance Foundation. For this role, volunteers must have at least one year of experience practicing bankruptcy law.

Dan Zazove, of counsel at Perkins Coie, admits that he was very nervous when he started at the help desk, having not done many chapter 7 cases in recent years, but he quickly found that he was more than equipped to assist the help desk’s visitors. He notes the enormous need for this service, saying “[t]here are an awful lot of people who come to the help desk every time it is open. More people sign up than there are available slots and Rock Bendix and I go early and stay late so we try not to turn anyone away. For the most part it’s very rewarding and the people we serve are very appreciative.”

For more information, contact the Legal Assistance Foundation, (312) 229-6355, or complete an online questionnaire at http://lafchicago.org/volunteer/volunteer-opportunities-sign-up

Bankruptcy Volunteer Panel:
Through the Bankruptcy Volunteer Panel, attorneys represent indigent parties in adversary proceedings and contested matters. Panel members are not expected to file bankruptcy cases, complete bankruptcy forms, or attend creditor meetings, and panelists need not be bankruptcy practitioners.

Laura McNally, one of authors of this article, represented a defendant in an adversary action filed by the U.S. Trustee. “Although I’m not a bankruptcy practitioner, I had familiarity with adversarial actions, and I felt comfortable assisting my client negotiate a resolution with the Trustee. Like nearly all of our pro se clients, my client was overwhelmed with the bankruptcy court process before she had a lawyer. My greatest reward was watching the fear slowly recede from her face as we worked toward a positive resolution.”

For more information, visit this page: https://www.ilnb.uscourts.gov/us-bankruptcy-court-volunteer-attorney-panel

Central District of Illinois

The Central District of Illinois’ Plan for Appointment of Counsel was designed to facilitate the recruitment of pro bono counsel for indigent pro se litigants in civil cases, while enabling attorneys to gain trial experience. Under the Plan, a volunteer panel is created and administered by the court’s designated Pro Bono Coordinator, Denise Koester, (217-492-4027, or Denise_Koester@ilcd.uscourts.gov). Volunteers interested in joining the panel can register through the Pro Bono Attorney Information page of the court’s website, http://www.ilcd.uscourts.gov/pro-bono-attorney-information.
To assist pro bono counsel, the court provides online access to prisoner litigation resource material as well as the contact information of various IDOC Legal Services Litigation Coordinators. The court also provides for attorneys and eligible law students to be reimbursed certain costs and fees associated with their work.

Physician/attorney Dr. Thomas J. Pliura took his first volunteer assignment shortly after signing up, and obtained a substantial trial verdict for his prisoner client. Since then, he has handled numerous prisoner cases involving medical issues in the district, and he has facilitated obtaining volunteer expert medical assistance in still others. Using his unique blend of medical and legal expertise, Dr. Pliura says he volunteers for the hardest cases because he is privileged to be able to provide the help. The judges are uniformly appreciative of the pro bono assistance, he says, consistently doing whatever they can to accommodate busy schedules or otherwise aid in the appointments. The time commitment for each case varies depending on its complexity. Mr. Pliura encourages junior attorneys to undertake pro bono work. “It’s a great opportunity to develop your skills and get trial experience,” he says, “while helping those truly in need.”

Southern District of Illinois

Pro se litigation makes up more than 50% of this District’s docket, the vast majority of which involve prisoner civil rights. To address the heavy caseload, the court formed a Pro Bono Panel, consisting of attorneys who are eligible to undertake pro bono cases. 175 such placements were made in the last year and the court is extremely appreciative of the assistance. The Southern District of Illinois enables attorneys to volunteer to take a case through an online registration form, found at https://www.ilsd.uscourts.gov/AttyProBono.aspx. Attorneys can also get involved by contacting the Clerk of Court and Counsel to the Chief Judge, Meg Robertie. (618-482-9106 or meg_robertie@ilsd.uscourts.gov.)

To assist with pro bono work, the court makes prisoner litigation materials available online, facilitates informal mentoring, provides CLE trainings, and administers a fund to enable reimbursement of certain expenses. The Court also recently launched its Prisoner Litigation Task Force to address recurring issues and strategize on efficient case management.

Northern District of Indiana

The Northern District of Indiana faces a significant amount of pro se litigation and works to recruit pro bono counsel where appropriate. Members of the Robert A. Grant American Inn of Court have been quick to volunteer on cases ranging from prisoner litigation to employment disputes. Attorneys interested in volunteering can reach out to the Inn of Court to learn more about getting involved. http://www.innsocourt.org/Content/InnContent.aspx?Id=1534. The time commitment varies based on the complexity of the case, and volunteers are provided case materials before making a decision about whether to accept a matter.

Southern District of Indiana

It’s easy for an attorney to get involved with the Southern District of Indiana’s pro bono program. Under Local Rule 87, the court maintains a volunteer attorney panel of attorneys willing to volunteer to represent indigent litigants in civil cases and an obligatory panel from which the court will recruit if no volunteer attorney is available. Attorneys can volunteer by completing an online application, found at: https://ecf.insd.uscourts.gov/ejuror/probono.html. They will then receive emails twice a month with information about new opportunities.

Sarah MacGill Marr, an attorney with Riley Bennett Egloff, LLP, has undertaken several limited purpose appointments, successfully resolving each through mediation. Just recently, she resolved not only the case in which she had been recruited, but also two others that had been brought by the same prisoner litigant. “The mediation assistance program helps guide people through the resolution of their cases,” she explained. “There are people with valid claims that need to be heard. Volunteering with the program is my chance to help them to do that.”

The court provides information online in the Pro Bono Assistance Opportunities & Resources pages of its website, http://www.insd.uscourts.gov/pro-bono-opportunities. Materials include handbooks on Section 1983 and prisoner litigation, sample motions, HIPAA and other information release forms, and publications celebrating pro bono work. The court also describes the cases for which it is seeking the assistance of counsel: http://www.insd.uscourts.gov/pro-bono-cases.
In order to enable pro bono work, the court reimburses certain expenses, and helps obtain professional liability insurance coverage if needed. It also allows volunteers to enter into fee arrangements with their clients where appropriate. The District has designated Kristine Seufert (317-229-3954, or kristine_seufert@inds.uscourts.gov) and Jordan Davison (317-229-3986, or jordan_davison@inds.uscourts.gov) as Pro Bono Coordinators, and makes mentors available for consultation on pro bono work.

In 2017, 1,480 civil cases were filed by pro se litigants in the District, and counsel was recruited to assist in 70 cases. Approximately 120 attorneys participated. In response to the Court’s 2018 Pro Bono Survey, attorneys reported spending an average of 20 hours on an appointment limited to assisting with settlement and an average of 60 hours for an unlimited appointment.

**Eastern District of Wisconsin**

The Eastern District of Wisconsin operates a vibrant pro bono program, involving prisoner and nonprisoner civil rights cases, Title VII cases, and other discrimination cases. The court recruits attorneys to assist with trial appointments, as well as limited purpose undertakings like representing a civil litigant in a mediation, and other discrete matters. Volunteers may register to join the court’s Pro Bono Attorney Panel, and be among the first to know of volunteer opportunities. Panel membership is not a commitment to undertake a particular case, and volunteers are able to review case files before deciding whether to accept the court’s request for pro bono assistance.

To enable pro bono work, the court provides online access to several manuals, sponsors CLE trainings on pertinent topics, and makes seasoned attorney volunteers available as informal mentors to attorneys handling pro bono cases. The State Bar of Wisconsin provides free malpractice coverage for pro bono legal services, and the District Court Pro Bono Fund is available to assist with reimbursement or prepayment of certain out-of-pocket expenses. During National Pro Bono Week each year, the court and the Eastern District of Wisconsin Bar Association recognize the significant contributions of pro bono attorneys through their Pro Bono Attorney Honor Roll.

**Western District of Wisconsin**

About 350 cases are filed per year in the Western District of Wisconsin by pro se litigants. The majority are brought by prisoners alleging denials of their civil rights. Quarles & Brady partner Emily M. Feinstein has handled a number of those cases, and has supervised associates on still others. “One of the things we like about these cases is that they are great learning tools for our associates. The chance to get into court, call witnesses, work with experts, take depositions, and have direct client contact is invaluable.” At the same time, she says, volunteering helps the litigant and the court.

The court provides resource materials to pro bono attorneys, and a pro bono committee administers a fund that enables attorneys to recoup certain out of pocket expenses. As co-chair of the Pro Se/Pro Bono Committee of the Western District Bar Association, Ms. Feinstein also offers guidance and assistance to other attorneys taking on pro bono matters.

Volunteers can enlist to take a full case or to handle a limited appointment for a specific purpose by signing up online at: https://www.wiwd.uscourts.gov/sites/default/files/Pro_Bono_Registration.pdf. Descriptions of the cases in which the court is seeking volunteers are also available online at: https://www.wiwd.uscourts.gov/available-pro-bono-cases.

The court recognizes the critical contributions of pro bono counsel on the Pro Bono Representation page of its website, https://www.wiwd.uscourts.gov/pro-bono-representation. In addition, pro bono attorneys can claim up to six CLE credits per reporting period for pro bono work pursuant to Wisconsin SCR 31.05(7).

**Send Us Your E-Mail**

The Association is now equipped to provide many services to its members via e-mail. For example, we can send blast e-mails to the membership advertising upcoming events, or we can send an electronic version of articles published in The Circuit Rider.

We are unable to provide you with these services, however, if we don’t have your e-mail address. Please send your e-mail address to changes@7thcircuitbar.org.
Earlier this year, the Seventh Circuit heard an appeal from a fairly typical insurance coverage action arising out of an automobile accident. *Hyland v. Liberty Mutual Fire Insurance Company*, 885 F.3d 482 (7th Cir. 2018). The insurance company of the car’s owner declined to defend the driver, contending she was not an authorized user, and the injured automobile passenger received a $4.6 million judgment. The passenger obtained an assignment of whatever insurance rights the driver had against Liberty Mutual, the insurer, and sued in federal court under diversity jurisdiction, as she was a resident of Illinois while Liberty was based outside the state. The trial court found the insurer had breached its duty to defend and was liable for the entire judgment. The appellate court vacated the judgment, finding that the failure to provide a defense did not meaningfully increase the insured’s liability so that, under Illinois law, the insurer was not responsible for the entire judgment. The case raises several critical insurance issues regarding the duty to defend, but the appellate panel also raised a question that had not been addressed by the district court or the parties: did the court have diversity jurisdiction in the first place, or did the insurer assume the citizenship of the insured under the diversity jurisdiction statute, defeating diversity?

Litigators are generally quite familiar with the diversity jurisdiction rule that a corporation is deemed to be a citizen of both its state of incorporation and its principal place of business. 28 U.S.C. § 1332(c)(1). They may be somewhat less familiar with the exception to that rule set forth later in the same paragraph, which provides that “in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant,” the insurer shall also be deemed a citizen of “every State and foreign state of which the insured is a

*Jeff Bowen is the Wisconsin Chair of The Circuit Rider and is a partner at Perkins Coie LLP. He is a graduate of Boston University, summa cum laude, and a graduate of Yale Law School, where he was an Editor of the Yale Law Journal. He clerked on the Ninth Circuit for Judge Sidney Thomas and on the Eleventh Circuit for Judge Rosemary Barkett. He is also an Adjunct Professor at the University of Wisconsin Law School (LLM Program).*
Diversity Jurisdiction

Continued from page 45

citizen.” Id. § 1332(c)(1)(A). In other words, a direct action against a liability insurer that does not name the insured as a defendant confers additional citizenship upon the insurer that could defeat diversity jurisdiction. In this case, if Liberty assumed the Illinois citizenship of its insured, there would be no federal jurisdiction.

The Seventh Circuit panel concluded that a lawsuit based on assigned insurance rights was not a “direct action” against the insurer under the terms of § 1332(c)(1), and federal jurisdiction therefore existed. The case, however, illustrates the potential importance of the insurer citizenship question, particularly for states like Wisconsin that have a strong direct action statute or otherwise permit direct actions against liability insurers.

History of changes to § 1332(c)(1)

As the Hyland panel recognized, relatively few appellate cases have addressed the meaning of “direct action” in § 1332(c)(1), and federal jurisdiction therefore existed. The case, however, illustrates the potential importance of the insurer citizenship question, particularly for states like Wisconsin that have a strong direct action statute or otherwise permit direct actions against liability insurers.

Scope of § 1332(c) treatment of insurer citizenship

Many states permit some form of action against liability insurers of third parties, but relatively few permit direct action against a third party’s liability insurer without joining the third party or obtaining a judgment against that party. In those states that do permit such an action, courts have routinely found that an insurer assumes the citizenship of its insured, potentially defeating diversity of citizenship. For example, Puerto Rico’s direct action statute permits “any individual sustaining damages” to bring “a direct action against the insurer under the terms and limitations of the policy, which action he may exercise against the insurer only or against the insurer and the insured jointly.” 26 L.P.R.A. § 2003. In Torres v Hartford Ins. Co., 588 F.2d 848 (1st Cir. 1978), a Puerto Rican resident suffered direct lawsuits against out-of-state insurers, thus avoiding expansive review despite raising ordinary state law tort claims. Id. (citing Federal Practice and Procedure § 3629). Justice Felix Frankfurter noted the issue in 1954 and effectively called for legislative change. Lumbermen’s Mut. Cas. Co. v. Elbert, 348 U.S. 48, 56 (1954) (Frankfurter, J., concurring) (“Here we have a Louisiana citizen resorting to the federal court in Louisiana in order to avoid consequences of the Louisiana law by which every Louisiana citizen is bound when suing another Louisiana citizen.”) See also Northbrook Nat. Ins. Co. v. Brewer; 493 U.S. 6, 9-10 (1989) (discussing legislative history of § 1332(c)(1).

The Hyland court concluded that “in 1964 no one knowledgeable about insurance law would have used the phrase ‘direct action’ to mean anything other than a suit, by the purported victim of a tort, that omitted the supposed tortfeasor as a defendant.” Hyland, 885 F.3d at 484. The Eleventh Circuit added that courts and treatises have “uniformly” defined the term “direct action” to refer to cases in which a party suffering damages is entitled to bring suit against the insurer “without joining the insured or first obtaining a judgment against him.” Kong, 750 F.3d at 1300 (collecting citations). While “uniformly” may be an overstatement, the Hyland and Kong courts accurately identified the dominant perspective on the scope of § 1332(c)(1): courts apply the insurance provisions to claims brought against an insurer under a direct action statute in the absence of a judgment against the tortfeasor. This general approach, however, merits closer attention as it raises several important issues for litigators bringing tort claims in federal court.
injuries from a collision with a car driven by a North Carolina resident working for a Puerto Rican company. The victim sued the Connecticut-based liability insurer of the corporation, and the court dismissed for lack of jurisdiction, finding that the Puerto Rican residence of the insured corporation was deemed to apply to the insurer regardless of the foreign citizenship of the tortfeasor himself. Id. at 850. Similarly, a New Jersey resident sued the Puerto Rican insurer of the agency that rented a car to another New Jersey resident who struck the plaintiff in a car accident. Alvarez-Pisanelli v Hertz Puerto Rican Cars, Inc., 786 F. Supp. 150 (D.P.R. 1992). Because the New Jersey driver fell within the broad definition of Insured under the policy sold to the agency, the court deemed the insurer to be a citizen of New Jersey and dismissed the lawsuit for lack of subject matter jurisdiction. See also Narvaez v British Am. Ins. Co., 324 F. Supp. 1324 (D.P.R. 1971) (dismissing lawsuit against Canadian insurer brought under direct action statute by Puerto Rican citizen arising out of accident with another Puerto Rican citizen).

Louisiana also permits “a right of direct action against the insurer within the terms and limits of the policy,” subject to certain conditions. La. Stat. § 22:1269. Thus, when an injured Louisiana resident sued the foreign insurer of her husband under the direct action statute, and that insurer removed the case, the district court remanded to state court, citing § 1332(c)(1). Carpenter v Ill. Cent. Gulf R. Co., 524 F. Supp. 249 (M.D. La. 1981). See also Newsom v Zurich Ins. Co., 397 F.2d 280 (5th Cir. 1968) (rejecting jurisdiction over direct action lawsuit against foreign insurer arising out of accident involving two Louisiana parties); Johansson v Nunez, 473 F. Supp. 1270 (W.D. La. 1979) (rejecting direct action lawsuit by Swedish citizen against insurer of another Swedish citizen).

Wisconsin law permits a direct action against a liability insurer, stating that any “bond or policy of insurance covering liability to others for negligence makes the insurer liable, up to the amounts stated in the bond or policy, to the persons entitled to recover against the insured for the death of any person or for injury to persons or property.” Wis. Stat. § 632.24. Relatively few cases have addressed the application of § 1332(c)(1) to this statute, though courts have implicitly recognized its potential application in cases involving other facts. For example, a Wisconsin district court denied a motion to remand a lawsuit by an insurer seeking to clarify that it owed no more than policy limits. Spence v Regions Hosp., No. No. 04-C-0756-C, 2005 WL 79013 (W.D. Wis. Jan. 5, 2005). The court described the potential impact of § 1332(c) on claims brought under the Wisconsin statute but held that the phrase “direct action against an insurer” did not include that particular litigation, which had been initiated by the insurer. Id. at *2. Similarly, Wisconsin courts have held that the insurance specific provision of § 1332(c) does not apply to an action brought against an insurer by its own insured. Thus, in Ingram v State Farm Mutual Auto Insurance Co., No. 10-C-1108, 2011 WL 1988442 (E. D. Wis. May 19, 2011), the plaintiff claimed that he was bringing a direct action against an out-of-state insurer, negating the potential for removal. The court, however, noted that the lawsuit raised claims for bad faith and negligence against the plaintiff’s own insurer. Those claims could not be brought against the underlying tortfeasor and therefore carried the case outside the ambit of Wisconsin’s direct action statute. Id. at *1. See also Shalock v State Farm Mutual Auto. Ins. Co., No. 13–C–0538, 2013 WL 12180081 (E. D. Wis. Sep. 3 2013) (describing Wisconsin’s direct action statute and finding claims against one’s own insurer did not trigger § 1332(c)(1).

Consistent with these cases, courts around the country have routinely held that an action against an insurer for the insurer’s own conduct cannot trigger the special jurisdictional provisions of § 1332(c), regardless of the state statutory scheme. In Searles v Cincinnati Insurance Co., 998 F.2d 728 (9th Cir. 1993), the district court dismissed a complaint by an Arizona resident against an out-of-state insurer for lack of jurisdiction, but the court of appeals reversed, holding that § 1332(c)(1) did not apply. The court stressed that “unless the cause of action urged against the insurance company is of such a nature that the liability sought to be imposed could be imposed against the insured, the action is not a direct action.” Id. at 729 (quoting Beckham v Safeco Ins. Co., 691 F.2d 898, 902 (9th Cir. 1982)). Applying similar reasoning, the Eleventh Circuit held that a trial court had erred in applying § 1332(c)(1) to a lawsuit against
Diversity Jurisdiction
Continued from page 47

a malpractice insurer by the husband of a woman who died as a result of complications from the administration of anesthesia. Fortson v St. Paul Fire & Marine Ins. Co., 751 F.2d 1157 (11th Cir. 1985). The court emphasized that it was not the relationship of the insurer to the insured that determined the applicability of the provision but rather the cause of action asserted against the insurer. Thus, where a suit is “based not on the primary liability covered by the liability insurance policy but on the insurer’s failure to settle within policy limits or in good faith, the section 1332(c) direct action proviso does not preclude diversity jurisdiction.” Id. at 1159. See also Carpentino v Transport Ins. Co., 609 F. Supp. 556 (D. Conn. 1985) (rejecting application of § 1332(c)(1) because the “gravamen of the plaintiff’s complaint here concerns the conduct of the insurer and not the insured”).

In addition, courts have generally held that a state statute permitting a lawsuit against a third party liability insurer after obtaining a judgment against the insured tortfeasor cannot trigger application of § 1332(c)(1). Thus, a Florida statute barring lawsuits against a liability insurer by an injured party prior to obtaining a settlement or verdict against the tortfeasor meant that suits against insurers did not fall within the direct-action exception. Kong. 750 F.3d at 1301. On similar grounds, a Mississippi district court declined to apply the exception in § 1332(c)(1) to a garnishment action against an insurer following judgment against an insured for an automobile accident. Freeman v. Walley, 276 F.Supp.2d at 597 (D. Miss. 2003). The court contrasted a “true direct action,” in which “the insurer stands united with the insured in an adversarial posture against the injured plaintiff” with a post-judgment collection action, in which the insured and the plaintiff “have a united interest in securing payment of the judgment from insurance proceeds.” Id. at 601. See also Hayes v. Pharmacists Mut. Ins. Co., 276 F. Supp. 2d at 985, 987 (W.D. Mo. 2003) (finding that a garnishment proceeding is not a direct action because the plaintiff is not suing the insurer in order to establish the tortfeasor’s liability but rather is litigating claims against the insurer itself over payment).

This view, however, is not universal. Despite the relatively consistent perspective taken by federal courts addressing § 1332(c)(1), some courts have offered a more expansive reading of the statute. For example, a district court in Maryland deemed a Pennsylvania insurer to be a citizen of Maryland in a lawsuit brought under a Maryland statute permitting an action against an insurer to recover a final judgment. Sherman v. Penn. Lumbermen’s Mut. Ins. Co., 21 F. Supp. 2d at 543 (D. Md. 1998). The court found that neither the plain language of § 1332(c)(1) nor the legislative history barred its application following a final judgment. Instead, the court concluded that the Maryland statute raised many of the same issues as the Louisiana statute that prompted the change. Id. at 545. A district court in Missouri reached a similar conclusion with respect to a statute permitting equitable actions against insurance companies based upon unsatisfied judgments. Prendergast v. Alliance General Ins. Co., 921 F. Supp. 653, 654 (D. Mo. 1996) (“Missouri’s equitable garnishment statute essentially does in two steps what the Louisiana statute that lead to the change in § 1332(c)(1) did in one step, and provides to the suing plaintiff the same remedy that a direct action against the insurance company would have provided, were that allowed under Missouri law.”) This remains a minority perspective, but litigators should be aware of these possibilities as well.

Other issues arising out of § 1332(c)(1)(A) are beyond the scope of this short note but also merit attention for litigators contemplating direct actions against insurers. For example, courts in some states consider a lawsuit against an automobile insurer for no-fault or related coverage as a direct action potentially triggering these jurisdictional issues, while others take the opposite position. Compare Rosa v. Allstate Ins. Co., 981 F.2d 669, 677 (2d Cir. 1992) (rejecting application of direct action exception because “the configuration of the parties in a no-fault action, realistically viewed, differs substantially from the ‘direct action’ scenario) with Ford Motor Co. v. Insurance Co. of North America, 669 F.2d 421, 425-26 (6th Cir. 1982) (applying direct action exception to no fault insurance and remarking that “[g]iven Congress’ reaction to earlier state legislation which permitted direct actions, no-fault should not be held to expand the jurisdiction of federal courts.”)

Overall, then, courts are more likely to apply § 1332(c)(1)(A) to a claim rooted in the conduct of an insured party but directed against that party’s insurer based on a direct action statute that permits a lawsuit without obtaining a prior judgment against the tortfeasor. The specific contours of this application may vary, however, and litigators should be mindful not only of the specific state statute but also of any unusual approaches to the citizenship of insurers in diversity cases.
Fifty years ago Congress enacted Public Law 90-296, signed by President Lyndon B. Johnson on April 29, 1968, and codified as 28 U.S.C. § 1407. The act provides “for the temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact, and for other purposes,” thus creating multidistrict litigation and the Judicial Panel on Multidistrict Litigation. Multidistrict litigation has since become one of the most significant tools for handling mass litigation.

The statute requires that “transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.” As noted on the website for the Judicial Panel for Multidistrict Litigation, the purposes of pretrial centralization are to “avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary.” At or before the conclusion of the pretrial proceedings, “[t]ransferred actions not terminated in the transferee district are remanded to their originating transferor districts by the Panel.” This process results in the “transferee district” having significant authority over the course of the litigation.

The process for seeking centralization through multidistrict litigation is rather simple: Parties wishing to have cases transferred for centralization file a motion to transfer with the Judicial Panel along with a brief of 20 pages or less explaining why consolidated or coordinated pretrial proceedings are appropriate. The Panel has no filing fee. To seek transfer for centralization, two or more actions must be filed in more than one federal judicial district.

Continued on page 50

Jane Dall Wilson is a partner at Faegre Baker Daniels in Indianapolis. She is a summa cum laude graduate of both Hanover College and the University of Notre Dame Law School, and she clerked for Judge Kenneth Ripple on the Seventh Circuit. She is an Associate Editor of The Circuit Rider and the Indiana co-chair.
Actions made part of multidistrict litigation, or “MDLs” as they have come to be known, now constitute approximately one third of the federal docket.7 A few select facts and figures reflect the evolution over the last fifty years and the current significance of the MDL process:

• The first Judicial Panel was chaired by Chief Judge Alfred Paul Murrah from 1968-1974. Chief Judge Murrah also served as Chief Judge of the Tenth Circuit from 1959 to 1970 until taking senior status, and as a director of the Federal Judicial Center from 1970-1974.8 Judge Edwin A. Robson of the Northern District of Illinois served on the initial panel.9 The Panel is currently chaired by the Hon. Sarah S. Vance, Eastern District of Louisiana.10

• In its first year, the Panel transferred 367 cases originally filed in 48 different federal courts to nine different federal district courts for coordinated or consolidated pretrial proceedings. The types of cases transferred primarily involved airline crashes and antitrust litigation.11

• Over the years, the Panel has considered motions for centralization in more than 600,000 cases involving millions of claims.12

• At year-end 2017, there were 221 pending MDLs involving multiple different types of cases; over fifty percent involved either product liability or antitrust matters:

• As of October 15, 2018, there were 211 pending MDLs in 49 transferee districts being heard by 171 transferee judges.14

• The Seventh Circuit is home to 18 of these pending MDLs, with 10 in the Northern District of Illinois, 1 in the Central District of Illinois, 1 in the Southern District of Illinois, 3 in the Northern District of Indiana, 2 in the Southern District of Indiana, and 1 in the Eastern District of Wisconsin. Ten of these MDLs involve product liability claims and/or sales practices claims, and 4 involve antitrust claims. There is one case each involving patent litigation, personal injury, data breach, and employment practices.15 Fourteen of the Circuit’s district judges are handling these MDLs. Two of the product liability MDLs each involve more than 4,500 pending actions.

• As the MDL process has evolved, it has become common for transferee courts to conduct “bellwether” trials to give the parties information about the strengths and weaknesses of their claims and to provide real-world information about how juries may value the claims to facilitate global settlement negotiations. The term “bellwether” originally referred to the male sheep (wether) given a bell to lead the flock and is commonly used today to refer to an indicator or predictor.16 Bellwether trials may be controversial in certain respects but have become an integral part of the MDL system.

Last year, the Judicial Panel granted MDL status to the prescription opioid litigation, a matter that has captured national headlines.17 On the other hand, one of the most recent decisions of the Judicial Panel denied transfer for cases related to the October 1, 2017 mass shooting in Las Vegas at the Harvest Festival.18 Various MGM entities had moved under 28 U.S.C. § 1407 to consolidate pretrial proceedings in thirteen actions pending in eight federal district courts.19 Noting that nine of the actions involved declaratory judgments brought by MGM asserting a bar to liability under the SAFETY Act of 2002, 6 U.S.C. §§ 441-444, the Panel observed that the desire to have a single court decide a legal issue is usually insufficient to warrant centralization under § 1407.20 As to the other four pending cases, in which MGM also raised a defense under the SAFETY Act, three were pending in one district and one in another with significant overlap of parties and counsel.21 The Panel reflected that “voluntary cooperation

Continued on page 51
and coordination among the small number of parties and involved courts appears feasible.\textsuperscript{22} It declined to speculate on the future of the litigation and decided that centralization was not appropriate at this time.\textsuperscript{23} Even where centralization is not granted, the Judicial Panel is actively evaluating and affecting some of the highest profile litigation pending in our nation.

The golden anniversary of multidistrict litigation is not universally celebrated as the system is not without its critics.\textsuperscript{24} Some question the threat to individual rights of plaintiffs.\textsuperscript{25} Others argue that multidistrict litigation has expanded beyond the initial congressional intent and become too protracted.\textsuperscript{26} Still others question whether the MDL process permits non-meritorious claims to linger to force higher settlements.\textsuperscript{27} Given the substantial volume of federal cases funneled through the MDL system, these and other issues, as well as potential changes to the system, will almost certainly garner increased attention in years to come.\textsuperscript{28}

Notes:

4. Id. As a practical matter, many cases are resolved without remand.
7. One scholar has reported that “from 2002 to 2015, multidistrict proceedings leapt from sixteen to thirty-nine percent of the federal courts’ entire civil caseload.” Elizabeth Chamblee Burch, Monopolies in Multidistrict Litigation, 70 Vand. L. Rev. 67, 72 (2017).
15. Id. at 2, 5.
19. Id. at 1.
20. Id. at 1-2.
21. Id. at 2.
22. Id.
23. Id. at 2-3.
24. In 2017, in anticipation of the fiftieth anniversary, George Washington University hosted an invitation-only roundtable regarding the MDL process, involving professors, practitioners, and federal judges. GWU has also made certain submitted essays available online, which raise various criticisms, concerns, and suggestions, but several are designated as not-for-citation purposes. See Multi-district Litigation Roundtable, https://www.law.gwu.edu/multi-district-litigation-roundtable (last visited Oct. 28, 2018).
William Howard Taft has never been one of our country’s deified Chief Executives. Among historians, Taft’s legacy is relegated to the middle of the presidential pack: his tenure consistently fills the overlooked space between the nation-making of Washington, Roosevelt, or Kennedy and the dereliction of Buchanan, Pierce, or Hoover.1 Within non-academic circles, Taft fares no better: a dinner-table discussion of the twenty-seventh President is rarely completed without someone reciting the unconfirmed account of Taft — 340 pounds and all — getting stuck in his White House bathtub.2 But in a recent addition to The American Presidents Series, Jeffrey Rosen makes a compelling case for the “Big Chief.”3 It is a mistake, Rosen suggests, to assess Taft based on the criterion that so often dominates the presidential conversation: the ability to generate popular support for a policy vision. Rather, we should evaluate Taft’s presidency “as he himself understood it: in constitutional rather than political terms.”4 When we look through a legal lens, Rosen argues, we uncover the truth about Taft — the man, the President, the Chief Justice — and his influence on the United States.

The story of William Howard Taft begins in Cincinnati, Ohio. “Will,” as he was called in his early years, was born there to Alphonso and Louisa Taft on September 15, 1857. The son of an Ohio Superior Court judge, Will grew up in a house filled with conversation about law and the Constitution. It was only fitting then, that after graduating from Yale (his father’s alma mater), Taft returned home and enrolled at Cincinnati Law School. Legal degree in hand, Taft quickly inserted himself into public life, spending the early years of his career as Cincinnati’s assistant prosecutor, collector of internal revenue, and assistant solicitor. In 1887, at the tender age of twenty-nine, Taft enthusiastically accepted an appointment to his father’s old seat on the Ohio Superior Court. Taft’s wife Nellie, whom he had married the year

Continued on page 53
prior, did not share Taft’s excitement: she had high political aspirations for her new husband — aspirations that did not include “sett[ling] for good in the judiciary.”

But Nellie did not sulk for long. In 1889, President Benjamin Harrison nominated Taft to serve as Solicitor General of the United States, a position that allowed his wife to “escape Cincinnati and to consort with a group she lionized as the Washington ‘bigwigs.’” Taft’s two-year tenure as the government’s top advocate was successful, if short-lived. Taft won sixteen of the eighteen cases he argued before the Supreme Court. His most lasting mark on the position, however, came from the cases he chose to lose. Taft instituted the practice of “confessing error”: admitting to the Supreme Court that the government’s position taken in a lower court should not have prevailed. The practice, utilized by solicitors general to this day, reflected Taft’s “fervent belief that all conduct by the executive should conform to the Constitution and laws of the United States.”

To the dismay of his wife, Taft chose to return to Cincinnati in 1892, where he occupied a newly created seat on the U.S. Court of Appeals for the Sixth Circuit. A man who, according to Rosen, had always “preferred the bench to the bigwigs,” Taft relished the next eight years he spent in the judiciary. In 1900, however, Taft set out for different, and distant, shores. At President William McKinley’s urging, Taft accepted a position as the leader of a United States commission to oversee civil government in the Philippines, which had been annexed at the end of the Spanish-American War. Taft, ever a scholar of the law, found such satisfaction in his role as a “constitution maker” that he turned down his dream-job — Supreme Court Justice — during the first year of his commission, citing a duty to the Filipino people. His loyalty did not go unnoticed or unappreciated. When President Theodore Roosevelt offered Taft a Supreme Court judgeship again two years later, the Filipino people caught wind and took to the streets, pleading “Queremos Taft!” — “We Want Taft!” Taft again deferred his dream job, but only remained in the Philippines for a little less than one year. In December of 1903, he returned to Washington to replace Roosevelt’s Secretary of War.

Four years later, Roosevelt declared that he would not seek a second full term, opening the door for Taft. At the behest of his wife, and with Roosevelt’s endorsement, Taft courted the Republican nomination, which he officially secured in June of 1908. Taft campaigned as Roosevelt’s progressive heir: he promised to continue — but to place onto firmer constitutional footing — the President’s policies on “protecting the environment, prosecuting the trusts, and keeping the peace.” The country embraced his platform. On November 3, 1908, Taft became the twenty-seventh President of the United States, defeating Democrat William Jennings Bryan by an electoral college vote of 321 to 162.

But if Taft campaigned as Roosevelt’s younger brother, he governed as his second cousin. Taft began his presidency by calling upon Congress to enact sweeping tariff reform (a subject Roosevelt had thought too controversial to engage), which was enacted in August of 1909. Taft ramped-up Roosevelt’s Sherman Antitrust Act prosecutions, bringing nearly 70 cases during his presidency (Roosevelt brought 44 during his nearly eight years). Abroad, Taft continued Roosevelt’s “dollar diplomacy” — the idea that U.S. investment abroad would create economic benefits for both nations involved — but took a more restrained tack. In March of 1911, Taft was forced to mobilize twenty thousand American troops along the Mexican border to protect American assets during...
uprisings against President Porfirio Diaz. Notably, however, Taft rejected his party’s (and Roosevelt’s) fierce calls to invade, maintaining that he “lacked the authority as commander in chief to act unilaterally.”

These political diversions from Roosevelt’s platform were enough to sow tension between Taft and his former boss. It was a cabinet dispute, however — now known as the Ballinger-Pinchot controversy — that turned the once-close friends into fierce political rivals. The controversy began when Taft replaced Roosevelt’s pro-conservation Secretary of the Interior, James Garfield, with Richard Ballinger, who quickly returned to private use much of the land Roosevelt had protected. Gillford Pinchot — director of the U.S. Forest Service and close ally to Roosevelt — responded by enlisting the help of Louis Glavis, chief of the Portland division of the General Land Office. Together, the two hurled various accusations at Ballinger, including negligence and endangering public lands. In the end, Taft exonerated Ballinger, fired both Pinchot and Glavis for insubordination, and completed a borderline coverup of his investigation of the matter. The political fallout would leave an indelible mark on Taft’s presidency and irreparably damage his relationship with Roosevelt.

In February of 1912, Roosevelt decided that he had had enough. During a speech entitled “A Charter for Democracy,” Roosevelt extolled the idea of pure democracy — a concept Taft abhorred — and attacked judicial independence — a cornerstone of Taft’s constitutional republic. The “fight [wa]s on,” and this fight, a battle for the Republican nomination, quickly turned into a bare-knuckle brawl. The former allies chose nicknames for each other — including “puzzlewit,” “megalomania[c],” “fathead,” and “flubdub” — that make “Lyn’ Ted” seem downright cordial. Taft eventually secured the nomination during the convention in June, but his win fractured the Republican party. Roosevelt and his supporters, feeling that the nomination had been stolen by Taft and his party-boss allies, walked out of the convention. The Bull Moose Party was born.

In the general election that followed, Taft’s constitutional vision was overshadowed by the political debate between “[Woodrow] Wilson’s New Freedom and Roosevelt’s New Nationalism.” On election day, Taft received the fewest electoral votes ever won by an incumbent President. Roosevelt received the most ever won by a third-party candidate. It was Wilson, however, who claimed victory in an electoral college landslide, securing 435 votes. Though Taft had been fierce in competition, he was “gracious, and relieved” in defeat. Shortly after the election, Taft accepted a legal professorship at Yale, a position that he said would allow him to help his students “appreciate the Constitution of the United States, under which we must work out our political and economic salvation.”

Relieved from the stresses of the presidency, to which he had never truly acclimated, Taft thrived. He returned to his pre-presidency paleo diet and, in a single year, lost the 75 pounds he had added to his frame as Commander in Chief. He wrote a series of books and lectures on government, in which he celebrated the “limitations . . . in the Constitution.” Most importantly, however, he fervently pursued the job that had always eluded him: Chief Justice of the U.S. Supreme Court.

On June 30, 1921, President Warren G. Harding nominated Taft to be the tenth Chief Justice. Taft was confirmed the same day (imagine that) with only four dissenting votes (imagine that). The former President brought to his new post the vision for judicial supremacy he had carried as Chief Executive. He “aspired to nothing less than reform of the administrative structure of the entire federal judiciary, making it equal in independence, power, and dignity to the White House and Congress.” Through three key reforms, Taft shaped the federal judiciary we know today. Taft convinced Congress to establish a judicial conference of roving federal appellate judges, which allowed the judiciary to “mass [its] force . . . where the arrears [were] greatest.” Taft lobbied for passage of the 1925 Judiciary Act, which gave the Supreme Court discretion to limit its docket to cases that raised important questions. Finally, Taft secured funding for the construction of a Supreme Court building that put the Justices’ previous home — a deserted Senate chamber — to shame. The nearly $10 million Roman-style behemoth was “the architectural embodiment of [Taft’s] vision of the federal judiciary as fully equal in structure and dignity to the legislative and executive branches.”

In chambers, Taft was a happy consensus builder. Oliver Wendell Holmes observed, regarding Taft’s tenure as Chief, that the Justices had “never before . . . gotten along with so little jangling and dissention.” Taft’s penchant for unanimity,
however, did not stop him from asserting his constitutional vision. On the Court, Taft solidified himself as “a nationalist who broadly construed the powers of Congress and the President, as they were clearly defined in the text of the Constitution,” and he defended property rights against threats of demagogic populism posed by state legislatures and juries. Unfortunately, Taft would not make it ten years on the Court. His health began to decline towards the end of the 1920s, and, after suffering two hallucinations in January of 1930, the Chief resigned from his post. One month later, on March 8, 1930, William Howard Taft died.

Taft may not be one of our country’s most celebrated Presidents. But, as Rosen demonstrates, he surely ranks among our most consistent. From the Sixth Circuit to the Philippines — from the oval office to the Chief Justice’s chambers — a single thread runs throughout the career of our twenty-seventh President: his commitment to a vision of the Constitution. The Constitution was, as Rosen observes, President Taft’s “great religious faith,” and to him, every day was Sunday. Though Taft did not have Washington’s power or Roosevelt’s gravitas, he made his mark without them. Taft once remarked that judges and courts were his “ideals on earth of what we shall meet afterward in heaven under a just God.” If we think of Taft’s life as a pursuit of that angelic vision, as Rosen convincingly argues we should, then its success is undeniable.

Notes:

5 HELLEN HERRON TAFT, RECOLLECTIONS OF FULL YEARS 22 (1914).
6 ROSEN, supra note iv, at 27.
7 Id.
8 Id. at 28.
9 Id. at 37.
10 Id. at 38.
11 Id. at 70.
12 Id. at 87.
13 Id. at 95.
14 Id. at 97.
15 Id. at 99.
16 Id. at 105.
17 Id. at 106.
18 Id. at 108.
19 Id. at 113.
20 Id. at 115.
21 Id. at 119.
22 Id. at 117.
23 Id. at 120.
24 Id. at 113.

Upcoming Board of Governors’ Meetings

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

Saturday, December 1, 2018
Saturday, March 2, 2019
Tuesday, May 7, 2019 at the Pfister Hotel in Milwaukee, WI

All meetings will be held at the East Bank Club, 500 North Kingsbury Street, Chicago at 10:00 AM
Attorney Michael B. Brennan was appointed to succeed Circuit Judge Terrence Evans and was sworn in on May 14, 2018.

Attorney Michael Y. Scudder was appointed to succeed Circuit Judge Richard Posner and was sworn in on May 21, 2018.

Northern Illinois District Judge Amy St. Eve was appointed to succeed Circuit Judge Ann Claire Williams and was sworn in on May 23, 2018.

Northern District of Illinois

Retired District Judge George N. Leighton passed away on June 6, 2018.

Magistrate Judge Daniel Martin passed away on October 11, 2018.

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

Attorney Steven C. Seeger has been nominated to replace District Judge James B. Zagel who took senior status in October of 2016.

Attorney Martha M. Pacold has been nominated to replace District Judge John W. Darrah who passed away on March 23, 2017.

Magistrate Judge Mary M. Rowland has been nominated to replace District Judge Amy J. St. Eve who was recently elevated to the Court of Appeals.

There are no nominees to succeed District Judge Samuel Der-Yeghiayan who retired on February 16, 2018.

Jeffrey Cummings of Miner Barnhill & Galland, PC has been selected as a Magistrate Judge.

Sunil Harjani, an Assistant United States Attorney, has been selected as a Magistrate Judge.

Chief Bankruptcy Judge Pamela S. Hollis will retire on January 2, 2020.

Federal Defender Carol Brook has retired and her successor is John Murphy.

Central District of Illinois

Interim Clerk Denise Koester has been replaced by Shig Yasunaga effective October 1, 2018.

Thomas W. Patton has been reappointed as the Federal Public Defender to a new four-year term.

Southern District of Illinois

Chief District Judge Michael J. Reagan announced that he will retire on March 31, 2019. There is no nominee.
District Judge David R. Herndon will retire on January 9, 2019. There is no nominee.

Attorney Gilbert C. Sison has been selected to replace Magistrate Judge Donald Wilkerson who retires on March 1, 2019. Judge Wilkerson is recalled through January 4, 2020.

Attorney Mark Beatty has been selected to replace Magistrate Judge Stephen Williams who retires on January 1, 2019.

Tom Galbriath has replaced Justine M. Flanagan as Acting District Court Clerk. The Court will be seeking applicants for the position.

Northern District of Indiana

District Judge Rudy Lozano passed away on July 11, 2018.

Attorney Damon R. Leichty has been nominated to replace District Judge Robert L. Miller Jr. who took senior status on January 11, 2016.

Attorney Holly A. Brady has been nominated to replace District Judge Joseph Van Bokkelen who took senior status on September 29, 2017.

Magistrate Judge Paul R. Cherry will retire on December 13, 2018. Assistant United States Attorney Joshua P. Kolar has been selected as his successor.

Southern District of Indiana

Attorney James R. Sweeney has been confirmed by the Senate to replace District Judge Sarah Evans Barker who took senior status in June of 2014. Judge Barker continues to serve as a senior judge.

Attorney James P. Hanlon has been nominated to replace District Judge William T. Lawrence who took senior status on July 1, 2018. Judge Lawrence will continue to serve the court as a senior judge.

Bankruptcy Judge Basil Lorch will retire in 2019. A committee is reviewing applicants to succeed him.

Eastern District of Wisconsin

Attorney Gordon P. Giampietro has been nominated to replace District Judge Rudolph T. Randa who passed away on September 5, 2016.

Chief Bankruptcy Judge Susan Kelley will retire on February 1, 2019. The Court of Appeals has tentatively selected a person but no announcement will be made until the FBI and IRS investigations are complete.
2018-2019
Seventh Circuit Bar Association Officers

President
Randall D. Crocker
Milwaukee, Wisconsin

First Vice President
Michael A. Scodro
Chicago, Illinois

Second Vice President
Brian Paul
Indianapolis, Indiana

Secretary
Thomas McQueen
North Barrington, Illinois

Treasurer
Howard L. Adelman
Chicago, Illinois

Immediate Past President
Elizabeth Herrington
Chicago, Illinois

Board of Governors

Illinois Governors

Stephen R. Kaufmann
Springfield

Steven J. Roeder
Chicago

David Saunders
Chicago

Beth Jantz
Chicago

Christopher Esbrook
Chicago

Margot Klein
Chicago

Indiana Governors

Brian J. Paul
Indianapolis

Martin Kus
Indianapolis

Mark Stuaan
Indianapolis

Wisconsin Governors

Eric Wilson
Madison

Eric Pearson
Milwaukee

Freya Bowen
Madison

Some of the woodcut illustrations used in this issue were obtained from the Newberry Library with the assistance of John Powell, iStock Photography, and from Wikimedia Commons.