

November, 2006

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Chief Judge Kocoras's Address: Honoring Chief Judge Flaum

Oral Histories of Judges of the Seventh Circuit

What to do Before, During, and After Oral Argument: Averting Disaster

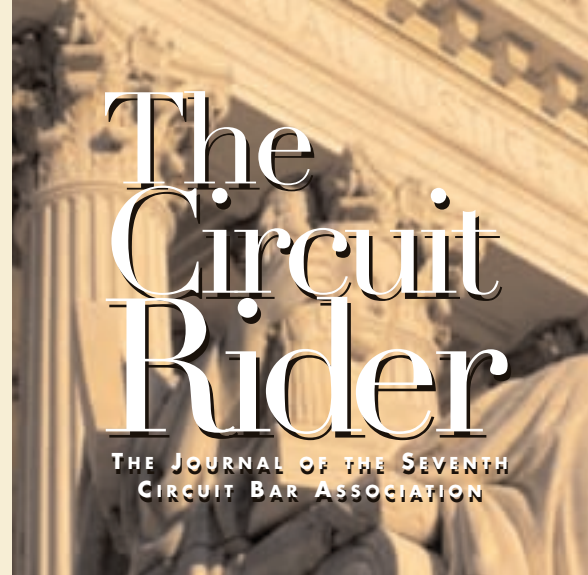
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Milwaukee's Crown Jewel

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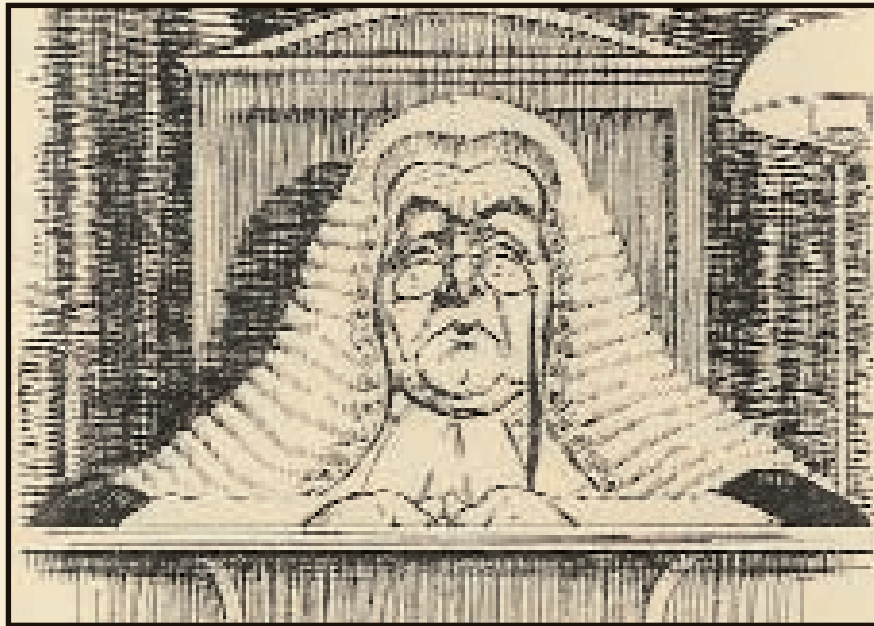
A Profile of Judge Curran



Profiles in Achievement

"[One] may live greatly in the law as elsewhere"

Oliver Wendell Holmes, Jr.





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Letter from the President

President Daniel E. Conley
Quarles & Brady, LLP



I have joked on occasion that my ascension to the lofty role of President of the Seventh Circuit Bar Association is proof of the danger of attending meetings regularly. The reality is that I am thankful for the opportunity to play a role in a unique Association whose primary purpose, as stated in its By-Laws, is "to assist the Courts of the Circuit in the improvement and the administration of justice and to make recommendations to that end."

I look forward to working with Bench and Bar on that goal in the coming year, culminating in the Joint Annual Meeting of the Seventh Circuit Bar Association and the Judicial Conference of the Seventh Circuit in Milwaukee on May 6-8, 2007. Our Meeting Committee is working hard on putting together an interesting program.

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The 55th Annual Meeting of the
Seventh Circuit Bar Association and Judicial Conference

A Review of the Annual Meeting

John J. Hamill, Jenner & Block, LLP

The 55th Annual Meeting of the Seventh Circuit Bar Association and Judicial Conference took place at the Hotel InterContinental in Chicago on May 21-23, 2006. The Annual Meeting offered pertinent programs centered on topics of current importance to the bench and bar. Outgoing Bar Association President James Figliulo spearheaded the annual meeting. Mike Monico served as the Program Chair, and I was privileged to serve as the Chair of the Annual Meeting Committee.

After the annual cocktail reception, held on May 21 at the Chicago Cultural Center, Dean Kenneth Star of Pepperdine University School of Law kicked off the Annual Meeting at breakfast on May 22 with timely remarks on the importance to our democracy of an independent judiciary. Chief Justice Michael Black of the Federal Court of Australia followed as the main speaker at the May 22 Annual Luncheon, and offered unique lessons from the development of the judiciary in his nation. The Annual Dinner on May 22 focused on a tribute to outgoing Seventh Circuit Chief Judge Joel Flaum, including the presentation to him of the 2006 American Inns of Court Professionalism Award. Daily sessions focused on the findings of the Seventh Circuit's American Jury Project as well as key topics in civil, criminal, and bankruptcy litigation. The Bar Association also offered programs for newer members of the bar to help them navigate and find opportunities for handling appeals in the Seventh Circuit.

As in years past, the Annual Meeting proved highly successful in offering members from all areas of the profession the opportunity for fellowship and dialogue on key issues. The 2007 Annual Meeting and Judicial Conference will be held on May 6-8, 2007, at the Pfister Hotel in Milwaukee.



Letter *from the* President

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Judge Charles N. Clevert, Jr. chairs the Committee, which also includes Judges Diane S. Sykes, Diane Goodstein and Margaret Dee McGarity, as well as Circuit Executive Collins T. Fitzpatrick and Attorney Mike Halfenger.

We know the meeting will get off to a good start as our opening reception will be held in the beautiful new Discovery World Museum at Pier Wisconsin, which is on Lake Michigan just south of the Calatrava Addition of the Milwaukee Art Museum. This beautiful new building exists in no small part due to the generosity and hard work of Judge Richard Cudahy's cousin, Michael, a successful and generous Milwaukee businessman who spearheaded the effort to make the new building a reality. Among other things, the Museum offers panoramic views of the Calatrava Brise Soleil, the lake and lakefront, and the City of Milwaukee. The Museum also serves as the docking station for Wisconsin's flagship, the S/V Denis Sullivan, a 137 foot re-creation of a three-masted, 19th century Great Lakes schooner, which is owned and operated by Pier Wisconsin as an educational platform and scientific research vessel.

Prior to our meeting, the Association has launched two smaller scale projects. We will be examining how our Courts deal with the challenges and demands presented by non-prisoner civil pro se litigation. We are also revisiting and updating an earlier Association project by interviewing district judges across the Circuit about their specific practices, use of local rules, and individual expectations of counsel appearing before them. As a result of the last go-around under Past President Bill Levit, the Association produced very helpful ring binders with the results of those interviews, summarizing the individual practices and expectations of our district judges. We hope to share the results of this project on the Seventh Circuit Bar Association's website, and to encourage the various courts to share that sort of information directly through their own websites.

In addition, immediate Past President Jim Figliulo, Judge Diane S. Sykes and Chief Judge James F. Holderman continue their good work chairing the Seventh Circuit Bar Association's American Jury Project Commission. We expect future reports on that Committee's work as well.

Finally, the Association and its members are uniquely positioned to and do understand the challenges the Judiciary faces in the current political environment on matters ranging from Judicial Independence to security, compensation and beyond. We recognize the role we have to play in the ongoing dialogue on those issues.

I look forward to working with you as the year passes and am genuinely interested in any ideas you may have for the Association or the Annual Meeting.

See you in Milwaukee!

Dan Conley



An Interview With Steve Shapiro:

The Art of Appellate Advocacy

*By Jeffrey Cole*¹

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).

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¹Jeffrey 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

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Last year, arguing on behalf of the estate of the late Burt Kanter, the Supreme Court accepted the argument that tax payers 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:

“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.”



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“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.

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- 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.

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- 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.** It varies from case to case, but in a large matter where a lot is at stake, we will have a moot court group that includes not only the lawyers who have worked on the case and the clients, but outside attorneys who are expert in the area.
- Q.** How do they help prepare you?
- 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.

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- 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.



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- 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.

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- 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.

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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.



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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 your 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.

Writers Wanted!

The Association publishes *The Circuit Rider* three to four times a year. We always are looking for articles regarding news from any district — judges being appointed or retiring, new courthouses being built, changes in local rules, upcoming seminars.

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



A Portrait of *Chief Judge Flaum*

By Jeffrey Cole ¹

In November, when Joel Flaum’s tenure as Chief Judge of the Seventh Circuit ends, he will have completed thirty-two years on the federal bench. When a person has achieved so high a place and served for so long, it is customary to ask, what is his legacy. That is not a question Joel Flaum would ever entertain, but it is a fair one nonetheless. There are, of course, the 1,500 plus opinions written as a circuit judge, and the hundreds more written while on the district court. But those opinions do not begin to tell the story. The work of most District and Circuit judges is, as Judge Posner has said, largely evanescent. Even Holmes, in a speech in 1900 to the Bar Association of Boston, would lament that all he had to show to represent nearly half a lifetime was a thousand opinions, “many of them upon trifling or transitory matters....”

Thus, the answer to the question of what Judge Flaum’s contributions have meant is not wholly to be found in his judicial opinions, which are but a single strand in the tapestry of his life. April Perry, who is now an Assistant United States Attorney in Chicago and who clerked for Judge Flaum on the Seventh Circuit, has captured his essence:

Spend a few minutes with Judge Flaum, and you'll immediately know that he loves people. Spend a year clerking for him, and you'll also know how much he truly loves lawyers. For inquiry we ever received. the most part, lawyers are a self-loathing bunch. Most lawyers warn young people away from law school; or, if it's too late for that, caution against the practice of law. But Judge Flaum has an unyielding pride in this noble profession. In the year I spent clerking for Judge Flaum, dozens of lawyers appeared before him, and the Judge told stories and anecdotes about dozens more. Never did he speak a negative word about any of them. His pride in his friends and colleagues and the law radiates to those around him. He encourages everyone around him to believe in themselves and their chosen careers. As the Judge is fond of saying, he appreciates lawyers so much that he married one lawyer and raised two children to be lawyers. For the hundreds of clerks, students, and interns who have spent time with Judge Flaum, he is much more than just a judge. He is also a mentor and role model. For many of us, he was the first lawyer we encountered who loved his job and inspired us to find jobs in the law that we loved as well. As a result, each of us -- as well as the legal profession -- is better because of Judge Flaum.

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¹Jeffrey Cole is a Magistrate Judge in Chicago and is the Editor of the Circuit Rider. He is the former Editor-in-Chief of LITIGATION.



A Portrait of Chief Judge Flaum

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In recognition of his dedication and contributions to the legal profession, *Chicago Lawyer* named Judge Flaum the 2005 Person of the Year. See Libby Sander, “Chicago Lawyer’s 2005 Person of the Year,” *Chicago Lawyer* (Dec. 2005).

A quick read-through of the *Almanac of the Federal Judiciary* reflects the extraordinary esteem in which Judge Flaum is held by the Bar. He is universally regarded as a fair, thoughtful and dedicated judge. He is always direct and courteous in his questioning during oral argument. Judge Bauer has said “Joel’s questions are never designed to show off how smart he is or to humiliate you or bring out your ignorance.” They are always designed to elicit information he thinks necessary to informed decision-making. But that does not mean that his questions are any less probing or effective. In fact, many lawyers feel this style of questioning is best suited to getting to the heart of an issue.

But make no mistake about it, Judge Flaum’s deep respect for lawyers is subordinate to his reverence for the Court on which he serves and his insistence on honesty, without which the system would ultimately flounder. His approach is perhaps best exemplified by his separate opinion in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 802 F.2d 217 (7th Cir. 1986). Judge Flaum was deeply disturbed by a petition for reconsideration that accused Judge Posner of having in the original opinion “seized an opportunity to preempt a ruling of the United States Supreme Court and emasculate its principles while purporting to give the case careful and respectful consideration” and of “advanc[ing his] individual legal/economic views.”

Judge Flaum’s response was devoid of rancor. Indeed, it was “with regret and reluctance” that he found it necessary to write on behalf of himself and Chief Judge Bauer, but “the inappropriate tone of the petition for rehearing” compelled his comments. Judge Flaum unhesitatingly recognized that the court, in any given opinion, can make a mistake – even a serious one. It is the job of a lawyer to call those mistakes to the court’s attention. But that cannot, Judge Flaum stressed, condone the kind of attacks made in the petition for rehearing. And here is the *coup de grace* – characteristically courteous and restrained, yet withering: “Substantial, indeed spirited, disagreement can reasonably exist over the treatment of the legal questions in this matter and how they are to be addressed. In fact, despite the deficiencies in the civility of the petition,

these arguments are to be found. What is not to be found is justification for counsel of the professional stature and accomplishment of the attorneys for the appellees to be signatories to a brief of such a disrespectful nature.” *Id.* at 719-720.

Consistent with his genuine humility and awareness that even the most brilliant judge is not God, Judge Flaum has recognized the symbiotic relationship that necessarily exists between bench and bar. The truth, whether one openly admits it or not, is that judicial accuracy for most judges in any given case – and especially over time – is affected by the quality of the presentations of the lawyers in the case. Justice Brandeis said it best: “A judge rarely performs his functions adequately unless the case before him is adequately presented.” Brandeis, *The Living Law*, 10 Ill.L.Rev. 461, 470 (1916). See also Holmes, *The Law*, In Collected Speeches, 16 (1931) (“Shall I ask what a court will be, unaided? The law is made by the Bar, even more than by the bench.”).

Son of a Country Grocer

Judge Flaum’s abiding sense of humility comes from his early upbringing. His life is truly the embodiment of the American dream. He was born into modest circumstances in Hudson, New York, a small town of 8,000 people, 120 miles north of New York City. In storybook fashion, he started working at his father’s grocery store at the age of 7 and helped his father deliver bread and pastries to local farmers. In 1958, Flaum became the first member of his family to earn a college degree when he graduated from Union College in Schenectady, New York, with a degree in history. A year later, he moved to Chicago, where he started work as a salesman at the Merchandise Mart. But there was, he concluded, more to life than sales, and in 1961 he enrolled at Northwestern University School of Law. After graduating, he stayed on for another year under a Ford Foundation fellowship to earn an LL.M. in criminal law. Unable to secure what was then the necessary sponsorship to get a job in the States Attorney’s office, Flaum went to work at the firm of Schimberg, Greenberger, Krauss & Jacobs.

Early Career As A Prosecutor

For many reasons, private practice was not sufficiently satisfying to Flaum, who wanted not only to be a trial and appellate lawyer, but to be involved in public service. It took Flaum 15 months to come to the attention of Dan Ward and land a job in 1965 as an Assistant States Attorney for Cook County in the Criminal Appeals Division. He was 29 years old.



A Portrait of Chief Judge Flaum

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One of his early assignments was as a member of the team prosecuting Richard Speck. Jim Zagel was his colleague on the case. Bill Martin, the lead prosecutor, likes to say that he picked them “to be the legal brains of our team.” From there, he moved on to prosecuting felony cases on his own – a tribute to the growing recognition of his abilities.

Flaum’s next career decision would affect his entire life. He took a nine month leave of absence to help create a police advisory program at Northwestern Law School at the request of a young, obscure professor, James R. Thompson. The rest is, as they say, history. When Thompson was asked by then Attorney General Bill Scott to start a criminal division in the Attorney General’s office, Thompson took Flaum with him. Flaum excelled at the Attorney General’s office, arguing three cases in the United States Supreme Court despite only being in his early 30s. One of those cases, *Allen v. Illinois*, 397 U.S. 337 (1970), is known to every judge and every law student. The Court unanimously held that a disruptive criminal defendant could be removed from a courtroom or gagged or shackled while his trial was in progress. The *Chicago Tribune* and the *Chicago Sun-Times* featured articles about the young lawyer, and he received letters from judges nationwide thanking him.

When Thompson became the United States Attorney in 1971, he persuaded Flaum to give up his job as the First Assistant Attorney General to become the First Assistant United States Attorney. Flaum served in that capacity from 1972 to 1975. It was a time of extraordinary activity in the U.S. Attorney’s office, and Flaum was as responsible as anyone for fostering the spirit of purpose and camaraderie that animated the unique group of talented, young lawyers, including Dan Webb, Ty Fahner, Rob Martin, Tony Valukas, Jim Holderman, Chuck Kocoras and Ilana Rovner. They all looked to Joel Flaum not only for guidance, but, (and having been there at the time, I can honestly say), for inspiration. Everyone in that office thought themselves better in every respect for having had the opportunity to work with him on a daily basis. He was smart, accessible, immediately responsive to any inquiry on any topic (whether it came from a judge, from one of his Assistants or was a complaint from a defense lawyer). He was able effortlessly (or so it seemed) to resolve any problem; nothing ruffled him, and he was great fun to be around.

Only Bill Bauer had more stories. All-in-all, the perfect First Assistant-- and the perfect judge.

The Youngest Federal Judge In The Country

Given Flaum’s temperament, intellect, and record of public service, there was only one thing that was surprising about President Ford’s nomination in late 1974 of Flaum to be a District Judge in the Northern District of Illinois – his age. After all, he was only 38. Neither his age nor the fact that he had had no real legal experience other than as a prosecutor mattered. There was a spontaneous outpouring of support from all segments of the legal community for the appointment. Three months after the nomination was announced, Joel Flaum was confirmed by the Senate as the then youngest federal judge in the United States. (Joel was always quick to point out that Story was 32 when he was appointed to the Supreme Court, Taft was 34 when he went on the Sixth Circuit, and Learned Hand was 37 when he was appointed to the district court in New York).

What struck lawyers appearing before him over the next nine years on the district court was his uncompromising fidelity to courtesy and equal treatment. It did not matter how antagonistic the parties were toward each other, how pitched the battle between the lawyers, or how great or small the case. Judge Flaum was always the same, and no one left his court unmoved by the experience of being before him. Everyone has a story about Judge Flaum. Here is mine. In 1982, Alan Dorfman, who was reputed to be an intimate of Jimmy Hoffa and labor’s link to organized crime, was convicted in the district court in Chicago, along with Joey (the Clown) Lombardo, Joe (Doves) Aiuppa, Jackie Cerone, Maishe Rockman, and Teamster President, Roy Williams, for using the Teamsters Pension Fund to try to bribe Nevada Senator Howard Cannon. I had been hired to represent Dorfman in the Seventh Circuit in the criminal case. The Department of Labor then attempted to take over Dorfman’s company, Amalgamated Insurance Agency Services. The case was assigned to Judge Flaum, and Dorfman asked me to participate as part of his team of lawyers, which included Albert Jenner, Ed Foote and Harvey Silets.

When the case began, Dorfman’s view of Judge Flaum was as unflattering as his view of the legal system generally, and that was as bad as can be imagined. Dorfman’s bitterness at the government spilled over to Judge Flaum. On January 6, 1983, Judge Flaum refused to allow Labor Department attorneys to play certain tape recordings between Dorfman and former pension fund trustee, Thomas O’Malley. However, he ruled that Dorfman had to testify and that his lawyers could only assert the Fifth Amendment on a question by question basis. The hearing went on for some days, with Judge Flaum conducting the case as he conducted every other case – with perfect fairness and courtesy and patience.

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A Portrait of Chief Judge Flaum

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At the end of the last day of the hearing, Dorfman took me aside and was full of unqualified praise for Judge Flaum. He said that he wasn't going to be happy if he lost, but he could accept it because he had never been treated with such decency or fairness by a judge, and he was convinced that Judge Flaum had given him "a fair shake." It was a remarkable testament to Judge Flaum's uncompromising sense of fairness. Two weeks later, Alan Dorfman was killed in gangland fashion in a motel parking lot in Lincolnwood, IL.

Appointment To The Seventh Circuit

In 1983, Present Ronald Reagan nominated Judge Flaum for a seat on the Seventh Circuit. Since then, Judge Flaum has distinguished himself as a judge who is keenly intelligent, impartial, infinitely patient and tolerant, some might say to a fault—all the qualities he manifested as a district judge. In 2000, he succeeded Judge Posner as Chief Judge. By then, there were those who thought that the Court was the equal of the Second Circuit in its heyday. Its members were brilliant (some blindingly so) and fiercely independent. Presiding over such a court and dealing with the intractable problems of judicial security, changing technology, and judicial independence was no easy task. Yet Judge Flaum performed in his new job with the same dexterity and skill he had shown in all his others.

When Judge Easterbrook becomes Chief Judge in November, Joel Flaum will have been a federal judge for 32 years. That in itself is *not* an accomplishment. It is merely a testament to the good luck of an early appointment and to good genes. (It is very disconcerting that he looks at 70 like he did at 38). What *is* an accomplishment is that Judge Flaum has performed so long with such consistency and excellence, and all the while being devoted to his family, his friends, his staff, and the Nation he loves so dearly.

He has never had an agenda beyond deciding the case at hand correctly and in accordance with the rules of the game, with an eye toward the feelings of others, and with the recognition that even the most brilliant judges have their limitations. These are measures of judicial achievement as meaningful as any others, and perhaps better than most. It is enough to qualify for the "Society of Jobbists" – a "guild" to which not even Learned Hand could gain admission, as he confessed in a speech at the Harvard Law School on the occasion of Justice Holmes' 89th birthday:

Are you a member of the Society of Jobbists, or do you know the guild? If not, let me tell you of it. All may join, though few can qualify. Its president is a certain white-haired gentleman, with a keen blue eye, and a dangerous turn for dialectic. But the other members need not and do not fear him, if they keep the rules, and these are very simple. It is an honest craft, which gives good measure for its wages, and undertakes only those jobs which the members can do in proper workmanlike fashion, which of course means no more than that they must like them.... It demands right quality, better than the market will pass, and perhaps it is not quite as insistent as it should be upon standards of living, measured by radios and motor-cars and steam-heat. But the working hours are rigorously controlled, because for five days alone will it labor, and the other two are all the members' own. These belong to them to do with what they will, be it respectable or not; they are nobody's business, not even that of the most prying moralists.

I confess that I have often applied for admission and have been always rejected, though I still live in hope. The membership is not large, at least in America, for it is not regarded with favor, or even with confidence, by those who live in chronic moral exaltation, whom the ills of this world make ever restive, who must be always fretting for some cure.... Its members have no program of regeneration; they are averse to propaganda; they do not organize; they do not agitate; they decline to worship any Sacred Cows....But none the less, you must be careful how you thwart them. They are capable of mischief; for you must not suppose, because they are amiable and gay and pleasure-loving, because they are not always reverent... that they do not suppose themselves to have embarked upon a serious enterprise when they began to breathe. You may go far with them in amity and fellowship...but do not interfere with the job, and do not ask for quarter [:] if you do – you will not get it....

The Society goes along quiet jauntily; the jobs and the two days off are all a good deal like play. When you meet a member, you are aware of a certain serenity that must come from being at home in this great and awful Universe, where man is so little and fate so relentless. *Fais ce que voudra* will do as well for their legend as it did for the Abbey of Theleme. But they study to find out what they really do want; they remember what Goethe said: "Let the young man take care of what he asks in his youth, for in his age he shall have it."

In his youth, Judge Flaum dreamed of becoming a judge. How lucky he was that his dream was realized. How even luckier are we.



The 55th Seventh Circuit Judicial Conference

Chief Judge Kocoras's Address:

Honoring Chief Judge Flaum

By Jeffrey Cole

On May 22, 2006, Chief Judge Kocoras addressed the Seventh Circuit Judicial Conference. The purpose of the speech was to honor Chief Judge Flaum. It was an exquisite speech that deserves a wider audience than the necessarily limited one that attended the conference. It was, of course, a deeply moving, highly personal tribute to Judge Flaum. Judge Kocoras captured and portrayed in lambent prose, as only a gifted writer and a dear friend of three decades possibly could, the essence of what Joel Flaum is as a person. That alone makes the speech worthy of reading. Here is a sample: "For those of you who don't know him, I have this great fear that my words, however descriptive they may seem, will not adequately convey what a human treasure he is. But I will try. Joel the person is possessed of a joyful spirit; he has a tender heart; his smile is infectious and is always at the ready."

But there is another dimension to the speech. In its praise of Judge Flaum there is an expression of the values that have animated the life of its author no less than those of its subject – values that sadly do not have the same meaning to many in our profession and in society at large as they should. Judge Kocoras does not ask anyone to be better or to adopt his value structure. But there are lessons to be learned if we pay heed to his words – "lesson[s] quite at variance with most that we practice, and much that we profess." L. Hand, Mr. Justice Cardozo, *In the Spirit of Liberty*, 133 (1963). On every level, the speech is a work of art.

Here is the speech in its entirety:

Justice Stevens, Judge Tacha, my judicial brothers and sisters, members of the Seventh Circuit Bar Association, friends and families.

It is an honor and privilege to have been asked to speak tonight on the occasion of Chief Judge Joel Flaum's receipt of the American Inns of Court Professionalism Award. Especially is that so because I know a number of distinguished judges, lawyers, and friends of Joel's requested the opportunity to do so. So it falls to me to make sure that the voices and thoughts of all of those who volunteered for the opportunity to address you, people special to Judge Flaum, are presented here tonight. While their collective eloquence may be difficult to match, my own passion for the role, and my affection for Joel, would not have been exceeded.



Honoring Chief Judge Flaum

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I first met Joel when I was a relatively young Assistant U.S. Attorney in Chicago in the early 1970's. One of the great fortunes of my life was to be hired in that office by the U.S. Attorney, now Judge, William Bauer. After a year or so, Judge Bauer was appointed as a United States District Judge and was succeeded as U.S. Attorney by Jim Thompson. In short order, Joel was importuned to join the office as Jim Thompson's first assistant and did so in March 1972.

Those were heady times for all of us. Our days were filled with long hours, hard work, trials against worthy adversaries, and lessons learned on a daily basis. There were many triumphs and some occasional losses. We had been led by three of the finest people, and lawyers, the office had ever employed – Bill Bauer, Jim Thompson, and Joel Flaum – and all of us benefitted in ways neither describable nor limited. Joel's hand was placed on my shoulder over thirty years ago, often directing, and sometimes pushing, but ever present. Even today, as Chief of his court and me of mine, I still feel his gentle touch and continue to be guided by it.

Joel's legal abilities and personal qualities were quickly recognized and, in 1974, he was nominated to be a United States District Judge for the Northern District of Illinois. He assumed office in January 1975. Jim Thompson won the first of four elections as Governor of the State of Illinois in the fall of 1975. Another terrific lawyer and good friend, Sam Skinner, became the U.S. Attorney and asked me to serve as his first assistant in 1975. It was a daunting prospect for many reasons, not the least of which was the still fresh memory of Judge Flaum's brilliant service only a year before.

Judge Flaum was still in his thirties when he went on the bench, and he acquired the nickname "boy judge." His youth and good looks were often disarming to those who didn't know him, for they masked the depth of his intellect, the breadth of his experience, and his poise and maturity. His brilliance as a district judge became well established, and his reputation for superior performance made its way to Washington, D.C. In 1983, Judge Flaum was appointed to the Circuit Court of Appeals, and on August 1, 2000, he became Chief Judge.

It has been a remarkable legal and judicial career, and just the highlights take up a full single spaced page to summarily list.

But there is simply no way to know or measure a person by looking at a résumé and counting the number of entries on it or looking at the job descriptions typed thereon. They can tell you what a person did and what offices they held, but they cannot tell you the quality of the work performed or the integrity of the character represented. Those of you who know Joel need no words from me to demonstrate his worthiness as a recipient of this award. For those of you who don't know him, I have this great fear that my words, however descriptive they may seem, will not adequately convey what a human treasure he is.

But I will try. Joel the person is possessed of a joyful spirit; he has a tender heart; his smile is infectious and is always at the ready. He is a respecter of all persons, and the fortuitous characteristics of color, ethnicity, and religion, like height and weight, do not play a part in his assessment.

When it comes to Joel, the lawyer and judge, we need to add his extraordinary intelligence, his allegiance to fundamental fairness, and his unlimited patience and tolerance. He is loyal to the rule of law, faithful to the fortunes of the nation, and respectful of the common good. Joel abides no preconceptions when analyzing issues and judging cases. His analyses focus on the merits of every party's positions, adherence to applicable precedent, and reasoned consideration of the facts and law. His civility to all is legendary, and his friendship is enduring and unconditional.

In the abstract, it may sound like I am describing a perfect person, without a single blemish. We all know that cannot be, but I represent this to you: he comes mighty close. It is no secret that our society and its citizens are becoming coarser in manner and conduct. Whether examining political relationships, social discourse, sporting events, or sometimes even the conduct of lawyers and judges, there is a harder edge to much that we see and do. This trend stands in stark contrast to the grace of manner and civility of treatment of others that is the principal feature of Joel Flaum's entire life.

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Honoring Chief Judge Flaum

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One of the greatest jurists America has ever produced was Benjamin Cardozo. We are fortunate for all that he contributed to the law. Included among those valued contributions was Justice Cardozo’s discourse on judges in “The Nature of the Judicial Process.” This is what, in part, he said:

The judge, even when he is free, is not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the ‘primordial necessity of order in the social life.’ Wide enough in all conscience is the field of discretion that remains.

From the first day he became a judge to the present, Joel Flaum has been as faithful to those beautiful expressions as anyone could ever be. And in the end, when judicial discretion is to be exercised in the course of duty, I cannot think of a better conscience to guide the outcome than Judge Joel Flaum’s.

At this time, I would like to read to you a portion of the letter I wrote to the American Inns of Court in support of Jim Figliulo’s nomination of Joel for the Professionalism Award. Here is what I said:

“As the Chief Judge of the United States District Court for the Northern District of Illinois for the past three and a half years, it has been necessary for me to have had a number of professional contacts with Chief Judge Flaum during that period by virtue of our respective positions. In addition to the fact that my court lies within the boundaries of the Seventh Circuit, it is also the case that his court and mine are based in the same building in Chicago, Illinois. Our contacts and meetings have, therefore, covered diverse topics and subjects which affect our respective courts in some form or other.

To say that it has been a pleasure to deal with Joel and meet with him regularly is to understate the relationship. Not only does he offer reasoned and wise solutions to mutual issues and problems, but he does so in the friendliest way one can imagine.

Although the boundary lines of the two courts are always respected, there have never been material disagreements between the two of us on approaches or solutions to issues we have faced.

For me, the beauty of practicing law in some form or other has always been its enriching qualities of the mind. Equally pleasurable are the friendships made. One comes to know many people who supply the joy and pleasure which always characterizes true friendships. Being associated with Joel Flaum for these many years has produced a level of fulfillment in both of the dimensions I have described. He is a special lawyer, judge, person and friend. Joel would be most worthy of the award.”

When I became a lawyer, I became enriched in many ways. As the last paragraph of my letter suggests, the joy and pleasure provided by the close friendships made is one of the riches of our profession. I have been blessed with the friendship of Joel Flaum as part of that experience, and I have treasured it from the beginning. Joel’s is a life worth emulating, and he is most worthy of the prestigious award we give him tonight.

Thank you very much.

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.



A tribute to: Chief Judge Flaum

By Judges Bauer, Evans and Kanne

By William J. Bauer

The ideal public servant is one who loves his work and brings to it intelligence, diligence, compassion and kindness. The more powerful the position, the more necessary it is to maintain the constant knowledge that public service means to use power wisely and to serve kings and paupers with the same diligence and honesty.

It has been my good fortune to have served with – and under – some truly wonderful people who meet the description above; none more completely than Joel Flaum. He has served his country, his state and his profession with an absolute commitment to excellence.

The jobs he has had have all required a careful use of power; a prosecutor, state and federal, a judge, a teacher, and a military officer. While it would be unfair to say that he has achieved perfection – that would deny his humanity, it is fair to say he has come as close to the ideal public servant as I have ever seen.

Above all the great things Joel has accomplished, he has succeeded in making himself both admired and loved. Those of us who have worked with him are particularly lucky; he is an unwavering friend and a man of unbelievable kindness. He gives of himself freely and without a bit of selfishness.

It is a wonderful thought to remember that his completion of his tenure as Chief Judge will still leave him here with us, providing us with his brains, his hard work and his enormous affection. I won't have to miss him; he'll still be here to prove that there is still a life after being Chief Judge. But hasn't he given us a wonderful ride so far?

By Terence T. Evans

“He’s an excellent judge.” “His legal ability is outstanding.” “He has an excellent judicial temperament.” “He treats lawyers with respect.” “He is beloved by everyone.” “He epitomizes judicial temperament.” “He’s a lawyer’s judge.” “He has very solid judgment.” “He is very charming.” “He’s a breath of fresh air.” And so it goes, on and on, in the yearly lawyer review of judges conducted by the Almanac of the Federal Judiciary.

I first met Joel Flaum in 1979, when we were both district court judges. For the last eleven years, I have been his colleague on the Seventh Circuit. To the long list of superlatives that appropriately flow to Chief Judge Flaum in the Almanac, let me add, from personal experience, another: he’s a mensch.

To be a mensch has nothing to do with success. It has nothing to do with wealth. It has nothing to do with social status. As Leo Rosten reports, in *The Joys of Yiddish*, a king can be a bulvon (oaf), a millionaire can be a momzer (bastard), and a doctor can be a zhlub (jerk). But it takes real character – a sense of what is right or ethically imperative – to be a mensch. And Joel Flaum, along with all his admirable traits, has real character.

Judge Flaum will step down as our circuit’s Chief Judge on November 27, just a few days after we celebrate Thanksgiving Day. And that’s quite fitting because he has given his colleagues much to be thankful for. I’m sure all of the judges on our court join me in offering thanks to Chief Judge Flaum as he draws the curtain on seven wonderful years as our chief. He’s one-of-a-kind. I will miss his keen, kind, and strong leadership. Please join me in saying “mazel tov” to a real mensch.

By Michael S. Kanne

If there is a quintessential judge, it is Joel Flaum. He is universally respected in the judicial community of this circuit and highly regarded around the nation, not only by members of the judiciary, but also the bar. Judge Flaum is the classic example of the federal judiciary at its best.

In my many years on the bench, I know of no other judge – if I were a litigant – I would rather have deciding my case than Joel Flaum. He is scrupulously fair, thoughtful and compassionate.

Chief Judge Flaum is the product of a small town upbringing with urban sensibilities developed after Northwestern University law school brought him to Chicago. He combines big city savvy with the reserve and lack of pretension that comes from small town life. He is a strong leader, yet with humility.



The Judges *of the* Seventh Circuit: *Oral Histories*

*By Collins Fitzpatrick*¹

When I was a boy growing up, my father who was a lawyer used to tell me stories from the old country about the Collinses and the Fitzpatricks. I, being a fairly normal young boy, was bored out of my mind. My dad used to also read state appellate decisions and I had no understanding of that either. It is rather ironic as I have read all of the Seventh Circuit decisions since I came to the court as a law clerk. Until law school I never appreciated why my father read Illinois Appellate and Illinois Supreme Court decisions and why he told me stories about the ancestors. By that time my Dad had been dead for ten years and I had very little memory of the family history that he had tried to share with me.

One of the Judiciary's ways to celebrate the Bicentennial of our country was the funding of court histories. The Court of Appeals hired Rayman Solomon, a former law clerk with a doctorate in American legal history, to author the History of the Seventh Circuit, 1891-1941. Mr. Solomon is now Dean at the Rutgers Law School.

Ray taught me about oral histories from which sprung our capitalist idea of making video family histories. We decided to test the idea by starting with my mother's history of the Nash side of the family. I had for years been trying to get my mother to write a family history, but even though she had been a high school history and English teacher, she never seemed to get very far with it. I did not want that part of our family history to be lost. We also did a video history of our cameraman's aunt. Although neither tape would ever be purchased by anyone else, they were invaluable to the respective families.

We were ready to advertise our business. Something that the bankruptcy bench and bar can appreciate is that our Video Family History business never got any customers. About six months after we gave up on it, a friend asked if we were still doing family histories. That was the only inquiry we ever received.

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¹Collins Fitzpatrick is the Circuit Executive of the United States Court of Appeals for the Seventh Circuit.



Oral Histories

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That background set the stage for suggesting to then Chief Judge Luther Swygert to record the oral histories of some of the senior judges whose background would help whoever was to write the sequel to the History of the Seventh Circuit, 1891-1941. The idea was to collect information about the judges so that when the sequel history was written, there would be more information about the judges who sat on the court.

As readers of the History of the Seventh Circuit know, the history in that book really ends with the outbreak of World War II with an epilogue listing subsequent judges and staff. The outbreak of World War II was used as the cutoff date because of its historical significance and because District Judge William J. Campbell and Circuit Judge Luther M. Swygert were still sitting on the Court of Appeals. Northern Illinois District Judge Campbell had been appointed by President Roosevelt in 1941 and Luther M. Swygert had originally been appointed to the Northern District of Indiana in 1943 by President Roosevelt and then to the Court of Appeals by President Kennedy. The court's view was that histories should not be written when major participants are still alive. In that way the historian does not have to worry about how the subjects will react.

The first judge selected for an oral history was Judge Campbell whose high level of activity in the Democratic Party locally and nationally and the Catholic Church led to his appointment to the bench. We decided to use audio tape rather than video tape because it is a lot easier. We did Luther Swygert next. He had been somewhat active in Democratic Party politics in Northern Indiana, but really worked his way into the judgeship from being a prosecutor in the United States Attorney's Office in Northern Indiana. It was fascinating for Ray and me to learn about their history and get their thoughts on judicial issues.

When Ray left the courts for academia, I started doing the oral histories on my own. We had developed a chronological format in which we started by asking the judge about where their ancestors came from on the paternal and maternal sides as far back as they knew and then continuing through their birth, childhood, right up to the present. We would usually ask what impact world events had on them and their families such as the World Wars and the Depression.

The histories in my opinion are more thorough when there are two persons asking questions as your questions and the

answers often trigger good follow-up questions by the other interviewer. I have had some help from staff and family members over the years but because this is sort of an extra that is sandwiched into other work, often that has not been possible. The court librarians have greatly aided the process by providing biographical materials, newspaper articles, and important case information about the judge and in proofing the transcribed history and adding case citations and other information.

Many judges have to be sold on the concept of doing their oral history as they do not see what they do being of historical significance. I tell them that it is done so that future historians will have some meat on the biographical and case decision bones when they write the history of the courts. For example it is helpful to know about Judge Swygert's family anti-Klan view when he grew up as a rural Protestant on an Indiana farm and the would be fight between his

fellow Notre Dame students and Klan supporters in downtown South Bend. This influenced not only his judicial philosophy but also his recruitment of women and minorities to work in the courts. District Judge James B. Parsons of the Northern District of Illinois's grandmother was snatched by his white grandfather from the slave auction block in Missouri. Judge Parsons was a great raconteur who came from a very educated background, was discriminated against in Illinois and the Navy, and had the distinction and the burden of being the "first" in many of his career positions.





Oral Histories

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Northern Illinois District Judge Abraham Marovitz's oral history tells the story of what immigrants can accomplish in our great country and the true meaning of ecumenism. Circuit Judge Thomas Fairchild's oral history gives some of the history of the post World War II rebuilding of the Democratic Party in the State of Wisconsin and leaves one wondering what would have happened if Judge Fairchild had beaten Senator Joe McCarthy in the election as United States Senator. Northern Indiana District Judge Robert Grant's oral history includes information on his voting as a Congressman to declare war on Japan and the other Axis powers and his service during World War II on the Naval Affairs Committee. Hopefully these tidbits will whet your whistle to read some of these oral histories which are on file in the Courts Library in Chicago.

If the importance to future historians does not convince the judge of the need for doing an oral history, then I point out the value of oral history to the judge's children and grand children. This usually clinches the deal. I always explain the chronological format to the judge and ask that the judge collect all the material that they know about their ancestors. For example as an appendix to District Judge James Moran's Oral History, there are a series of letters from his ancestors who fought in the Civil War. The letters are particularly ironic as the slander of the Irish soldiers in one letter certainly does not predict that the letter writer's kin would include the chief district judge of one of the largest federal district courts in the country and that judge would have Irish genes.

Doing oral histories is pure fun except for the transcription process. Recording the oral history is like taking a very friendly deposition. I have done these in offices, but my preference is to do them while I and the judge are driving somewhere or at the judge's house. In this way there are less interruptions and the judges are much more relaxed. Although I usually follow a chronological format, I will record the information however I can get it. If something triggers a judge into talking about something that is out of chronological order, that is fine. I continue to develop that thought but always return to the chronological order.

The overall object that I have is to collect the information. For that reason I always encourage the judge to add things when the judge is reviewing the transcribed recordings. Retired Bankruptcy Judge Dale Ihlenfeldt improved on the draft of his oral history by doing a much more complete autobiography. Judge Ihlenfeldt is now working on biographies of District

Judges Tehan and Grubb for whom he worked as a law clerk, clerk of court, and bankruptcy referee.

While doing these oral histories, you quickly realize the rich heritage of the judges that are on the bench. As I have a limited amount of time now and obviously in the future, I am interested in institutionalizing the oral histories. Former law clerks should be naturals to do this with their judge. I have concentrated on judges but there are others such as attorneys and clerks who have a rich memory about judicial activities and those oral histories need to be collected. A history of the court without information from those sources would be incomplete.

My limited time is seen in the unfinished oral histories of District Judges Hubert Will and Robert Warren who died before I could complete them. There have been a number of judges who, like my father, died before I could even start. We need to institutionalize doing oral histories so that this important information on the judiciary is not lost to future generations.

Below is a list of the oral histories which are complete.

- Honorable William L. Beatty, U.S. District Court, Southern District of Illinois*
- Honorable Gene E. Brooks, U.S. District Court, Southern District of Indiana*
- Honorable William J. Campbell, U.S. District Court, Northern District of Illinois*
- Honorable Basil H. Coutrakon, U.S. Bankruptcy Court, Central District of Illinois*
- Honorable S. Hugh Dillin, U.S. District Court, Southern District of Indiana*
- Honorable Thomas E. Fairchild, U.S. Court of Appeals for the Seventh Circuit*
- Honorable James L. Foreman, U.S. District Court, South District of Illinois*
- Honorable Myron Gordon, U.S. District Court, Eastern District of Wisconsin*
- Honorable Robert A. Grant, U.S. District Court, Northern District of Indiana*
- Honorable Abraham Marovitz, U.S. District Court, Northern District of Illinois*
- Honorable Prentice Marshall, U.S. District Court, Northern District of Illinois*
- Honorable Richard H. Mills, U.S. District Court, Central District of Illinois*
- Honorable James B. Parsons, U.S. District Court, Northern District of Illinois*
- Honorable Wilbur F. Pell, Jr., U.S. Court of Appeals for the Seventh Circuit*
- Honorable John W. Reynolds, U.S. District Court, Eastern District of Wisconsin*
- Honorable Robert K. Rodibaugh, U.S. Bankruptcy Court, Northern District of Indiana*
- Honorable William E. Steckler, U.S. District Court, Southern District of Indiana*
- Honorable Luther M. Swygart, U.S. Court of Appeals for the Seventh Circuit*
- Honorable Robert W. Warren, U.S. District Court, Eastern District of Wisconsin*
- Honorable Hubert L. Will, U.S. District Court, Northern District of Illinois*
- Honorable Harlington Wood, Jr., U.S. Court of Appeals for the Seventh Circuit*



What *to do* Before, During, *and* After Oral Argument: Averting Disaster

By Joshua Yount ¹

Presenting an oral argument in the Seventh Circuit (or any other court of appeals) can be a challenging task: in the Seventh Circuit, the composition of the panel is not disclosed until the morning of argument; you frequently receive only ten minutes to argue, and even then, questions from the panel can consume most of that time. You often cannot predict the questions and sometimes not even the areas of questioning. And if that is not bad enough, sometimes a judge will ask a question that reveals the central weakness in your arguments, or worse, ask a question you simply do not know how to answer. Just averting disaster at oral argument can be an achievement. Fortunately, there are a few techniques that can you help not only avert disaster but advance your case.

Getting Prepared

Thorough preparation, of course, is essential to a successful oral argument in the Seventh Circuit. The judges, with the assistance of their clerks, will have read the briefs, examined the record, and independently researched the merit of both sides' arguments.

Your preparation should also include reading every case cited in the briefs, for it is usually difficult to predict which case will be the outcome-determinative precedent for each judge or which cases opposing counsel will raise at argument. And you cannot restrict yourself to the cases cited in the briefs; the judges certainly do not. Especially important is a search for new authorities from, at a minimum, the Seventh Circuit and the Supreme Court. You should submit any new authorities before oral argument by way of a letter under Fed. R. App. P. 28(j), and must do so if you intend to argue from them (*see* Cir. R. 34(g)). Similarly, when you review the record, do not just familiarize yourself with the appendix materials, also go through the entire appellate record at least once. You should aim to be expert in both the law and the facts pertinent to your case. Indeed, a good way to approach your task at oral argument is to think of yourself as an expert brought in to inform a group of generalists about the specifics of your case.

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¹ Mr. Yount is an Associate at Mayer, Brown, Rowe & Maw LLP. He was Law Clerk to Judge Ann Williams in the Seventh Circuit and was a Staff Attorney in the United States Court of Appeals for the Seventh Circuit. Mr. Yount is an Associate Editor of the Circuit Rider.



Averting Disaster

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Two additional pieces of preparation are vital. You absolutely must ensure that the jurisdictional statements establish that both federal subject matter jurisdiction and appellate jurisdiction exist (*see* Fed. R. App. P. 28(a)(4) and Cir. R. 28(a)). And you must double-check that the appendix contains the required items, especially the lower court orders and opinions (*see* Fed. R. App. P. 30(a) and Cir. R. 30(a), (b)). If you find a problem, submit a revised brief or appendix post haste. The Court not infrequently takes lawyers to task for deficient jurisdictional statements and appendices (*see BondPro Corp. v. Siemens Power Generation, Inc.*, 463 F.3d 702 (7th Cir. 2006) (sanctioning lawyers on both sides of the case \$1000 jointly for violating Circuit Rule 28)). Nothing will disrupt an argument more than an accusation that you have failed to comply with the jurisdictional statement and appendix rules. And, at least with respect to a deficient jurisdictional statement, being the appellee does not protect you from the same treatment (*see* Cir. R. 28(b)).

Getting Started

When the day of oral argument arrives, get to the courthouse early and stay in the courtroom. Not only will this give you a sense of your panel (assuming yours is not the first case), it will ensure that you are present when the presiding judge calls your case. Sometimes, prior arguments conclude sooner than expected, and even a short wait for counsel will likely bother the panel members. When you come to the podium, bring a copy of the briefs and appendices, in addition to your notes. Although you probably will not need them, the briefs and appendices can help you if you get a question about where something is in your brief or appendix.

So where do you start your argument? Many attorneys start with the facts or the lower court decision or proceed seriatim through the arguments in their brief. This is generally a mistake and, depending on your panel, will arouse varying degrees of annoyance. You will be met with a variation of the, “we’ve read the briefs counsel and know the facts” repudiation. This is an inauspicious way to start and can throw a lawyer so off track that he or she never quite recovers. In most cases, the better practice is to start with your very best argument. Although lawyers are constantly told not to burden the briefs with make-weight arguments, they continue to do so. The practice is not only not helpful, it is harmful.

As the appellee, you should normally start with your best argument unless the appellant has failed to satisfactorily or

correctly answer a question that the panel plainly appears to consider important or outcome-determinative. If you have the answer, do not make the Court wait to hear it. The same goes for the appellant on rebuttal. Indeed, rebuttal time should be used only to clarify any previous, unsatisfactory answers of your own and to respond to queries inadequately answered by the appellee.

In arguing, avoid reciting the facts. They are in your brief, which the judges have read. Most cases in the courts of appeals are straightforward applications of precedent and principle. Of course, the key facts must be brought to the panel’s attention – but when you discuss them it should be in the context of demonstrating how the facts show that the lower court did or did not commit reversible error. Do not read at length (more than a sentence) from a brief, a case, a script, or any other material. Not only does Circuit Rule 34(g) forbid such a practice, it is unpersuasive and wastes everyone’s time. The Seventh Circuit wants a conversation, not a speech. Restrict yourself to the high-points of your arguments. Not only is this sound advocacy, but the inevitable constraints of time require that you be selective. Save the details for responses to questions from the panel members. Consider also focusing your argument on the precedent or two that you believe provides the best promise for victory. Sometimes it is helpful to feature an attack on your opponent’s theory of the case. Doing so can shift attention away from problems on your side and put your opponent on the defensive.

Getting Out Of Trouble

Frequently, you do not have a chance to make much of a presentation in the Seventh Circuit before the questions start flying. The hypotheticals, counterfactuals, and leading questions often quickly follow. It should be noted parenthetically that it is unwise to tell a judge that his hypothetical does not match the facts of the case and then to try to move on. Judges want answers to their questions, and a sound answer to a hypothetical that, to you may have no relationship to the case, can win you a vote. Be prepared for exploratory questions that have little direct connection to the case or ask about some decision, statute, or doctrine not briefed. How do you do this? Prepare, prepare, prepare! Handling such sustained questioning can be difficult, but approaching the questions as an expert on the facts and law of your case can often help you retain or regain some control of the argument.

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Averting Disaster

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You also should not assume that seemingly hostile questions from one or more judges mean that you cannot persuade either the judge or the panel. You cannot necessarily tell a judge's view. Many of the Seventh Circuit's judges will slip into the Socratic method to test the limits and implications of your arguments. And hostile questions, even if they fairly bespeak a dim view of your position, may not represent the views of the other panel members. For precisely such reasons, do not assume that, because your opponent is having a tough time, you have won the case or will have an easy time when you stand up. Sometimes aggressive questioning of your opponent only signals that judge's concerns either about a particular point or the correct outcome of the case.

When you are under tough questioning, be alert for the friendly softball question from another panel member. Sometimes a judge will give you a question that supplies the answer, in his or her view, to a question another judge is pressing you to answer. Look for these questions and do not fight them. They can provide an excellent springboard for moving away from a difficult subject.

More frequently, of course, no help will be forthcoming when you are having trouble answering a question. In such circumstances, do not dodge the question. Answers like "my client should prevail on another ground" or "those facts are not the facts in this case" are not responsive, will frustrate the questioning judge, and may be treated as conceding that the answer is unfavorable to your client. Just collect your thoughts and give your best answer. If you truly do not have an answer—for example, when you are unfamiliar with the legal

authority on which the question is based—say you do not know and ask for leave to submit a short supplemental brief or letter on the question following the argument. Such a response will often put an end to the unproductive line of questioning and, if you are granted leave to file a brief, will give you time after argument to figure out your position. A supplemental brief or letter is also a potential solution if you make an improvident concession or other material mistake at oral argument and do not realize it until after the argument (audio recordings of which are posted on the Seventh Circuit's website within one day). But with respect to post-argument supplemental briefs or letters, keep in mind that the Court is not obligated to grant leave to file the brief or letter and your opponent will have a chance to respond.

Keep in mind that F.R.A.P. 28(j) also permits a party to advise the Circuit Clerk by letter of pertinent and significant authorities that come to a party's attention after oral argument but before decision. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited. Prior to the 2002 amendments to the Rules, Rule 28(j) prohibited any argument in the letter. Enforcement of the restriction was lax because of the difficulty of distinguishing statement of the reasons for the supplemental citations from argument about them. As amended, Rule 28(j) leaves it to the author of the letter to decide what to say about the cited supplemental authorities. Note, however, that the 350 word limitation – which was increased from 250 – will be strictly enforced.

Following these tips cannot promise an easy oral argument, much less victory on appeal. But they will help you avoid common pitfalls that can make oral argument a disaster.

Upcoming Board of Governors' Meeting

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 2, 2006
Saturday, March 3, 2007

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



Mediation of Civil Cases

In the United States Court of Appeals for The Seventh Circuit

By Joel Shapiro¹

Chances are you know that the Court of Appeals requires litigants in a large number of civil appeals to participate in court-sponsored mediation. But did you know that nearly half the cases scheduled for mediation in the Seventh Circuit are voluntarily disposed of by the litigants. These mediations are referred to as “Rule 33 conferences” because they are conducted pursuant to Federal Rule of Appellate Procedure 33. If you have not participated in a Rule 33 conference, you may not know how the process works and how successful it can be in resolving cases that the parties had assumed would have to be decided by the Court. This article briefly describes the settlement procedure in the Seventh Circuit and suggests how advocates can most effectively represent their clients in Rule 33 conferences. For further information, you are welcome to contact the Settlement Conference Office.

Every federal court of appeals has a settlement program. The Seventh Circuit’s program differs from some of the others in that it is mandatory. Litigants cannot opt out. The Court requires parties to make every reasonable effort to resolve appeals before they relinquish that responsibility to the Court, with all the attendant uncertainty and expenditure of resources.

Most types of civil appeals are eligible for mediation, so long as all parties are represented by counsel. Because so many appeals are eligible, Rule 33 conferences are not scheduled in every one. Nonetheless, any party may *request* that a Rule 33 conference be conducted. Such a request is made directly to the Settlement Conference Office and is kept confidential unless the requesting party prefers that it be disclosed to the other parties. The Settlement Conference Office accommodates such requests to the extent its calendar permits.

Whether a conference has been scheduled at the Court’s initiative or a party’s request, attendance is compulsory. In the Court’s discretion, clients may or may not be required to attend. Litigants are not required to settle, but they *are* required to fully explore possibilities of settlement and make reasoned, informed judgments about what sort of settlement could be mutually acceptable to them.

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¹ Joel Shapiro is a Senior Conference Attorney for the United States Court of Appeals for the Seventh Circuit.

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This is a mandate that many parties and counsel welcome but that others are initially skeptical about. After all, how likely is it that a case can be settled on appeal, when one side has “won” and the other “lost”? when previous settlement efforts have failed? when months or years of litigation have exacerbated the antagonism and mistrust between parties and between counsel?

Notwithstanding such doubts, experience shows that the program does work, and that almost 50% off the cases scheduled for mediation in the Seventh Circuit are in fact disposed of by agreement of the parties. So, the requirement to participate in appellate mediation is not so much a burden as it is an opportunity – to substitute a certain and mutually acceptable result for the delay, expense, and uncertainty of a decision by the Court of Appeals.

Rule 33 conferences in the Seventh Circuit are conducted by attorneys on the Court’s staff who devote their full time to assisting counsel and their clients with settlement. As settlement facilitators – in this circuit they are called “settlement conference attorneys” or simply “conference attorneys” – they play no part in deciding appeals on the merits nor do they discuss the merits of appeals or the substance of Rule 33 conferences with judges in the district or appellate court. Their sole responsibility is to help the parties arrive at a settlement they can agree on – or conclude with regret, after diligent efforts by all concerned, that no such settlement is possible.

Appellate mediation in this circuit might be described as a hybrid between private mediation and a judicial settlement conference. At the initial meeting – which is generally

conducted in person when the participants are in the Chicago metropolitan area and by phone if they are located elsewhere – the conference attorney typically asks each side to speak about the issues on appeal and the background of the parties’ legal dispute. The conference attorney is not, of course, a trier of fact or an arbiter of legal issues. Argument is out of place. But it is important that the issues be clearly defined so that each side is in a position to assess its prospects if the litigation were to go forward. In due course, the conference attorney meets privately with each side to learn more about its needs and interests, probe its assessment of the case, and explore alternatives to proceeding with the appeal. Often the conference attorney conducts “shuttle negotiations” to bring



the parties closer together on terms of settlement. If the appeal is not resolved at the initial session and additional conversations are warranted, a follow-up conference may be arranged for all participants, or the conference attorney may conduct further discussions, in person or by phone, with one side at a time. He or she tries to be scrupulously neutral, while at the same time encouraging each side to be realistic in its assessment of the case and its expectations of settlement. If a settlement is reached,

counsel prepare and finalize the settlement documents. If intractable issues arise in documenting the settlement, the conference attorney may be called upon to assist in resolving them.

The Court insists that all communications during the course of Rule 33 proceedings, whether oral or in writing, be kept strictly confidential. They are for the ears and eyes of the parties and their counsel only. The conference attorney, likewise, does not disclose to the Court or to the public what has been discussed among the participants.



Mediation of Civil Cases

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Thus, litigants are assured that they may speak freely and make every effort to settle the case without fear that their candor could later be used to their detriment.

How can advocates use the opportunities presented by Rule 33 proceedings to best advantage? *First*, they can acknowledge to themselves that settlement is no less worthy a litigation goal than “victory”; that skill at settlement is no less important to a lawyer’s reputation and attainments than skill at “winning”. A case that is settled on terms consistent with the client’s interests is a case that ends well, reflecting credit on the lawyer who guided it to a successful conclusion. *Second*, attorneys can counsel their clients forthrightly on the risks and costs (emotional as well as financial) of continuing to litigate, and on the benefits of settlement. If this means acknowledging to the client that his case is not as strong as it may once have appeared, so be it. If it means telling the client what he *needs* to hear instead of what he *wants* to hear, that is why lawyers are called “counselors”. *Third*, attorneys can pay close attention to the other parties’ interests (because a settlement has to work for everyone or it will not work at all) and think about how to provide sufficient value to all parties to make settlement possible. *Fourth*, attorneys can make a point of acting respectfully toward one another and one another’s clients. Even if that were not the *right* thing to do, it would be the smart thing to do. In mediation, as elsewhere, goodwill is a valuable asset.

If “success” is measured only by reaching an agreement, then appellate mediation is not always successful. But settlements do result in a surprising number of cases. What is more, mediation can justly be regarded as successful even when the parties fail to reach agreement if they have seriously explored all options of settlement; learned what they and their opponents are willing and not willing to do to resolve the case; and made reasoned decisions about what would serve their respective interests. That is what the Court of Appeals requires of litigants in Rule 33 conferences: Before asking the Court to decide *for* them how their case should end, they must make an honest effort to conclude the case themselves.

An important reason for the success of the Seventh Circuit’s mediation program is that most lawyers who participate in

Rule 33 conferences recognize the value of compromise and pursue it. Without ceasing to advocate for their clients – indeed, because they *are* advocates for their clients – they become advocates of settlement. On behalf of my fellow Seventh Circuit conference attorneys, Rocco Spagna and Jillisa Brittan, I want to thank all of those lawyers for their zealous efforts in mediation.

I also want to thank the Seventh Circuit Bar Association for supporting appellate mediation and giving me the opportunity to speak about it in these pages.

Continuing to Have Trouble Creating PDF Documents?

As many of you know, the Seventh Circuit encourages parties to file copies of their briefs in electronic format, either by uploading the brief online (the preferred method), or by submitting the brief on disk. In order to submit an electronic copy of the brief, however, you must be able to produce the brief in PDF, or “portable document format.” Many practitioners and their staff members remain mystified about how to create PDF documents out of their trusty Word or WordPerfect texts. To help, the Seventh Circuit has provided on its web site information about several different ways to convert documents to PDF. To learn more, log on to www.ca7.uscourts.gov, and click on the “FAQs” link at the bottom of the home page.



December 2005 Amendments to the Federal Rules of Appellate Procedure

By Joshua Yount ¹

Several amendments to the Federal Rules of Appellate procedure took effect on December 1, 2005. The amendments address the requirements for reopening the time to file an appeal, cross-appeal procedures, the number of votes necessary to grant en banc hearing or rehearing, the format of motion papers, and erroneous references to President’s Day as a federal holiday.

Reopening The Time To File An Appeal

Rule 4(a)(6) allows a district court to reopen the time to file a notice of appeal if (1) the party seeking to appeal did not receive notice of the judgment or order within 21 days after it was entered; (2) the party seeking to appeal moves to reopen within 180 days after the judgment or order was entered and within 7 days after receiving notice that the judgment was entered; and (3) no party would be prejudiced. Under the prior wording of the rule, the courts of appeals had divided over the type of notice Rule 4(a)(6) required (the Seventh Circuit had not spoken to the question). The amended rule clarifies that only notice “under Federal Rule of Civil Procedure 77(d)” counts as “notice” for purposes of Rule 4(a)(6). Civil Rule 77(d) requires service in accord with Civil Rule 5(b).

Washington’s Birthday

1998 revisions to the Appellate Rules substituted “Presidents’ Day” for “Washington’s Birthday” in the lists of “legal holidays” in Rules 26(a)(4) and 45(a)(2). That was a mistake, for a federal statute designates the holiday in question, the third Monday in February, as “Washington’s Birthday.” The amended rule corrects that mistake by replacing references to “Presidents’ Day” with references to “Washington’s Birthday.”

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¹ Mr. Yount is an Associate at Mayer, Brown, Rowe & Maw LLP. He was Law Clerk to Judge Ann Williams in the Seventh Circuit and was a Staff Attorney in the United States Court of Appeals for the Seventh Circuit.

Federal Rules of Appellate Procedure

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Format Requirements For Motion Papers

New Rule 27(d)(1)(E) commands that motion papers now must conform to the typeface requirements of Rule 32(a)(5)—which demands a proportionally spaced face of at least 14-point or a monospaced face of no more than 10 1/2 characters per inch—and the type-style requirements of Rule 32(a)(6)—which demands a plain roman style, except where bold or italics are used for emphasis or where case names are italicized or underlined—that apply to briefs. By requiring that motions use a 14-point typeface, the new Rule might cause some confusion in the Seventh Circuit.



Circuit Rule 32 allows briefs to use a 12-point typeface in the text and an 11-point typeface in footnotes notwithstanding the 14-point requirement of Rule 35(a)(5). There is no similar exception for motion papers. But if the Seventh Circuit is willing to accept 12-point face in briefs, it is hard to see why it would insist on 14-point face in motion papers. And, in fact, the Clerk’s office has indicated that it will accept motion papers in 12-point face. Perhaps the Seventh Circuit will consider amending its Rules in the near future to clarify that the Circuit Rule 32 typeface exception extends to motion papers.

Cross-Appeals

Historically, the federal courts of appeals employed different procedures for handling cross-appeals. The 2005 amendments to the Appellate Rules added a new Rule 28.1 that adopts uniform cross-appeal procedures. Under the new Rule, the first party to appeal is the appellant, although appellate party designations may be changed by agreement or court order. The new Rule also establishes the following requirements for the briefing of a cross-appeal:

- (1) Appellant’s Principal Brief – blue cover; may not exceed 30 pages, 1,300 lines of monospaced text, and 14,000 words; due 40 days after record is filed
- (2) Appellee’s Principal and Response Brief – red cover; may not exceed 35 pages, 1,500 lines of monospaced text, and 16,500 words; due 30 days after service of appellant’s principal brief
- (3) Appellant’s Response and Reply Brief – yellow cover; may not exceed 30 pages, 1,300 lines of monospaced text, and 14,000 words, due 30 days after service of appellee’s principal and response brief
- (4) Appellee’s Reply Brief – gray cover; may not exceed 15 pages, 650 lines of monospaced text, and 7,000 words, due 14 days after service of appellant’s response and reply brief

Rule 28.1 also specifies the required contents of each of the four cross-appeal briefs. Notably, by providing for four briefs, Rule 28.1 abrogates the Seventh Circuit’s prior practice of allowing only three briefs in a cross-appeal. *See* Cir. R. 28(d)(1)(A).

Voting To Hear or Rehear a Case En Banc

Formerly, Rule 35(a) provided that a “majority of the circuit judges who are in regular active service” could order en banc hearing or rehearing. In applying that Rule, the courts of appeals had divided over whether disqualified judges counted as judges “in regular active service.” Seven circuits required an absolute majority of the active judges, no matter how many judges were eligible to participate. Six circuits—including the Seventh Circuit (*see* Operating Procedure 5(d)(1))—required only a majority of judges not disqualified from participating. Amended Rule 35(a) resolves this dispute by expressly providing that en banc rehearing can be ordered by a “majority of the circuit judges who are in regular active service and who are not disqualified.”



The Certainty of “Rehearing” in the Seventh Circuit

By Gino Agnello ¹

Everyone knows that rehearings are disfavored. But there are rehearings, and there are “rehearings.” The “rehearing” I have in mind involves access to recordings of oral arguments in the Seventh Circuit.

The United States Court of Appeals for the Seventh Circuit has started a new service designed to provide case information to the public in an easy, efficient and economical manner.

By taking advantage of a relatively new internet technology called “RSS” (Real Simple Syndication) the Court of Appeals now provides automatic internet delivery of many court documents as well as audio recordings or “podcasts” of oral arguments. An RSS “feed” (i.e., content) is analogous to a subscription service. The user accesses the documents or oral arguments by using either a RSS reader built into the “browser” (internet viewing and navigation software) or a stand alone RSS reader program. The “reader” is software that does all of the behind the scenes work of gathering and delivering information to you via your pc and internet connection.

You can subscribe by simply copying a hyperlink from the Court’s web page to your browser. (A hyperlink is an element in an electronic document that links to another place in the same document or to an entirely different document.) When you select the RSS hyperlink on your screen, all of the most recent available documents will be listed for you.

Although the court currently provides only opinions and oral arguments in this area, soon there will be listings for briefs, motions and many other documents. Oral arguments in the Court of Appeals are now available as “podcasts” which can be accessed on the Court’s website and via the Apple “I-tunes” website.

The term “podcast” is derived from the words “broadcast” and “IPOD.” You subscribe to the podcast service exactly the same way you do an RSS feed - just drag the descriptive icon to your RSS reader.

The oral arguments are provided in MP3 format. MP3 refers to a format for digitizing and compressing audio files to make them transportable - remember the Sony Walkman for cassette tapes? MP3 files are today’s version of transportable audio. To listen to the podcast of an oral argument, you need a computer equipped to play back MP3 audio files or any MP3 player like the IPOD device made by Apple Corporation.

The podcast allows the user to listen to the audio program immediately or download and save the file to play back later - just like your VCR. Oops! Make that your TIVO - VCR technology just went the way of the blacksmith!

Although these services allow one to check for the latest judicial opinions and oral arguments available, case specific information is available as well. Therefore, if you want updates on documents relating to a particular case, you can get “personalized” content feed that only sends the information for that case.

Lets review!

“RSS” (Real Simple Syndication) just copy the link and the opinions are delivered to your browser or RSS reader.

Podcast - (“Ipod + Broadcast”) a downloadable “MP3” (audio file format) which allows you to listen to pre-recorded oral arguments at you convenience.

This service is FREE and Easy! Get rid of your Walkman, VCR and blacksmith.

A guide on how to do all of this is available on the court’s website: www.ca7.uscourts.gov

¹ Gino Agnello is the Clerk of the United States Court of Appeals for the Seventh Circuit.



On Judges

By Jeffrey Cole

We live in a time of political correctness. Lawyers, however, don't seem to be a protected species. Since before the Revolutionary War, they have been fair game for all sorts of calumnies. See *Symposium on Public Mistrust of the Law*, 66 U.Cin.L.Rev. 805, 809 (1998). They are not alone. Judges historically haven't fared much better. Here, for your amusement, is a sampling from 1872:

22 JUNE, 1872]

ZOZIMUS.

73

ON JUDGES.



JUDGES are men with shaven faces and short legs. In ordinary life they wear striped trousers, black vests, and tall hats. They drive in carriages, and lean back, and poke their hats over their eyes, and turn their heads slowly from side to side. This makes them look like wax-works. A man once told me, that the difference between Judges and wax-works is, that Judges can bite, and wax-works can't. When Judges aren't in ordinary life, they are either in Court or in bed. As no one ever saw a Judge in bed, there is no use in saying anything more about that part of their lives. When they are in Court they wear large wigs, and white neckties like

the cap-strings of a monthly nurse, long sleeves, and long black or red gowns. A man once told me that the reason why Judges wear all these things is to hide as much of themselves as possible, for the less we see of Judges the better.

Judges are made of the wisest and most honourable men that can be for ready money. It is sometimes hard to get men with much honour for Judges. The Government have then to try everywhere for men. Sometimes they take men who have learned brass instruments, and such clever musicians that, although they have been playing only tune all their lives, they can, at a moment's notice, play any other for hire. The great talent, which is so much admired, is called "versatility," and, if concealed up to the last moment, always produces the most amusing results. One great danger besets those clever musicians, and this is, that when they commence to play the new tune they think they never can give it long enough or loud enough, and people get very much annoyed with it, and say unfeeling things about the musicians.

A few men are now and then made Judges although they possess no such ability. This is done for the sake of contrast, and the way that the others shouldn't completely forget themselves, and become worse than ever by the force of each other's example. As soon as one of these men is made a Judge, all the others grow very unhappy, and make up their minds to do a lot of rash things, such as paying their debts, and being just and fearing not, and a lot of other weak-minded things.

Judges sit in Courts and try cases when they are in good humour, but when they are in bad humour they get jurors to try the cases for them. Sometimes when the jurors are not quick in trying the cases, the Judges order them to be imprisoned and kept without food for a while, because imprisonment and fasting sharpen the mind, and makes it more lively in the finding out of guilt. They are often so displeased with the jurors that they won't even give the jurors characters, but send them out on the world without any honourable means of earning a livelihood.

When a man is tried for murder, and the jurors say they think he did the deed, the Judges become awfully affected, and grow very sorry for having anything to do with the matter, even for ever so much a year. They suffer so much in their feelings from being connected with the thing at all, that in spite they often order the unfortunate prisoner to be hanged. When they order a man to be hanged, they

put a large black cap on, and take out their handkerchiefs, and rub their eyes. This is done to make the people in the Court moan, and the reporters use the words, "deeply affected."

Sometimes Judges grow very fond of being famous just like prizefighters or rope-dancers. They then make long speeches about all they knew and could tell if they liked, and all the learning they have forgotten which would be most useful to other people, and such like things. Then they say that the men who make the laws don't know anything about the matter and ought to be sent about their business, and a couple of respectable earls and a marquis ought to get the contract for making all the laws. This causes everyone to admire such Judges very much, and walk down to the Court when they are going to speak. A man once told me that it is only, however, while Professor Anderson is out of town that people prefer to see him making a goose out of a portfolio to seeing a wise man like a Judge making a goose of himself in a public court.

But there is one Judge in Ireland more celebrated than any other. His name is spread all over the country, and whenever the people hear it they smile. He is known by a number of pet names such as "Billy," and "Cromwell," and "Napoleon the Little." This great Judge has been always remarkable for keeping his word, even when he swore it. Some people say that he came originally from Carthage, and that when he arrived in this country he had a reputation. Other deny this, but say that he is a Carthaginian beyond all question. Others ask how can he be a Carthaginian, for were not all Carthaginians Pagans; to this some say that it does not effect the statement much; I think it does, for the Pagans worshipped false gods, and this Judge does not. Is there not a difference here between him and a Pagan?

MY BOOTS.

My boots they cost me half-a-crown,
I simply bought them on the cheap,
They would not let me walk to town,
Or dance, or ride, or stride, or leap.
Each morning, when the foggy star,
Beamed through the cloudy petulance
Of Dublin, I'd to take a car,
Which chariot cost me eighteen-pence.
Even now, in these tormenting things,
I'm forced to take my daily rounds,
I'd almost swear, if oaths had wings,
Those boots have cost me fifteen pounds.

FROM LIFE.

Shrieking Swell (to picture dealer) – I've called to look again at that picture.
P.D. – What picture, sir?
Shrieking Swell – It was a female drawn in a sort of oyster-shell by four birds, you know.
P.D. – Oh? Venus drawn by the doves?
Shrieking Swell – Probably.
P.D. That's sold.
Shrieking Swell – Sold? To be sure, simply awful (and retires).

PUBLIC NOTICES – The male swells of Grafton-street.
"CLUSTER DIAMONDS" – Your sweetheart's eyes.



The Historic United States Courthouse *and* Federal Building Milwaukee's *Crown Jewel*

By Hon. J. P. Stadtmueller ¹

One of the most striking examples of Landmark buildings in the United States is to be found in the Historic United States Courthouse and Federal Building located in Milwaukee, Wisconsin. Originally authorized for principal use as a United States Post Office, Court, and Customs House, Congress, through a series of acts approved beginning in 1889, acquired the land located just three blocks from Lake Michigan in downtown Milwaukee. The parcel, consisting of an entire block bound by Wisconsin Avenue on the north, Michigan Street on the south, Jackson Street on the east, and Jefferson Street on the west, was secured through condemnation with an award of \$388,354 on October 31, 1890.

Construction of the picturesque five-story, 302,000 square foot, edifice began in 1892 and was completed seven years later at a total cost of \$1,432,210.81. The architect for the building is listed as Willoughby J. Edbrooke, Supervising Architect of the Treasury Department, whose design was inspired by H. H. Richardson's Allegheny County Courthouse in Pittsburgh, Pennsylvania (circa 1883). Edbrooke also modeled nearly identical post office buildings constructed in Washington, D.C. (Also completed in 1899), St. Paul, Minnesota, and Omaha, Nebraska.

The building exterior is a pale gray Mount Waldo granite from Frankfurt, Maine. The rich exterior facades are carved with Romanesque leaf ornamentation that includes intricate faces and gargoyles. The exterior walls are constructed with blocks of granite that are alternatively rough and smooth-dressed and rise to a steeply pitched hipped slate roof punctuated with a variety of gabled projections along the fifth floor roof line. A soaring tower framed by pinnacles rises from the center of the facade, terminating in an arched belfry and a high pyramidal roof. It is noteworthy that the original drawings called for a four-sided clock to be incorporated in a 190 foot tower; however, this segment was eliminated during construction, apparently owing to economic considerations.

The building facade is broken into recesses and projections, creating a dynamic composition punctuated by an arcaded entrance on the first level and Roman arches over the second and third story fenestration. The massive stone forms are relieved with fine decoration including Romanesque carved moldings and detailed stonework which surrounds the arcaded main entrance and second floor portico.

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¹ J.P. Stadtmueller is a United States District Judge for the Eastern District of Wisconsin. This article originally appeared in the February 28, 2006 Federal Judges Association Newsletter.

Milwaukee's Crown Jewel

Continued from page 34

The corners of the original structure are rounded with tall pinnacles that again include alternating bands of smooth and rough-faced granite and are capped with conical roofs of copper and slate. Like the facade, the east and west elevations are ornamented an symmetrically balanced, prominently featuring a projecting gable with a variety of arched fenestration.

Interior space on each of the five floors is arranged around an expansive central atrium surrounded by wide corridors and capped with massive arched-steel roof trusses covered with a glass skylight. The building's corridors, stairways, and lobbies are adorned with inlaid multicolored marble mosaics, raised-panel oak doors and jambs, and decorative plastered ceilings.

When the building opened, the entire first floor was occupied by its largest tenant, the U.S. Post Office. The third floor was occupied principally by the U.S. Courts and later included offices for the United States Attorney and U.S. Marshal. The second, fourth and fifth floor tenants included the Bureau of Animal Industry, Civil Service, Customs, Internal Revenue, Lighthouse Inspector, Locomotive Inspector, Oleomargarine Department, Pension Examiner, Postal Inspectors, Railway Mail Service, Steamboat Inspectors, U.S. Engineer, Weather Bureau, and the Wine and Spirit Department.

The court's third floor court space included two chambers and courtrooms. The smaller of the two facilities was assigned to the district court and included a modest-sized, marble lined courtroom that included a mahogany bench, trim, and frescos. The second, much larger facility, included a magnificent 2,200 square foot courtroom fitted with raised-panel doors and jambs, floor-to-ceiling raised-panel walls which rise 27 feet to a coffered wood panel ceiling, all constructed in select quartersawn white oak. Intricately carved decorative accents and trim are to be found throughout, including a Federal

emblem, State of Wisconsin and City of Milwaukee seals, positioned behind the judge's bench, which itself is a work of art. In addition, a large marble faced clock with black Roman numerals is positioned high on the wall at the rear of the courtroom. The courtroom and adjacent chambers remain essentially intact, making it one of the most magnificent courtrooms in the United States.



So as not to confuse the circuit court of the 1800s with the current regional circuit court structure, a bit of history is in order. As the country grew and the population began to move westward throughout the 1800s, so also did the Federal court system, and by 1899 it entered its final stages of development. During this phase, district courts held jurisdiction

to adjudicate petty federal crimes, forfeitures, penalties, and admiralty cases. At the same time, the circuit court entertained all major federal civil and criminal cases as well as those related to citizenship. Congress provided the circuit court with very limited appellate jurisdiction, and in actuality served as a second trial court. Moreover, during this development phase,



there were no separate circuit court judges; rather, two of the nine Supreme Court justices were assigned to each circuit and traveled from circuit to circuit where they were joined by the resident district judge for purposes of conducting court proceedings. The intention was to save money, expose the justices to the various state laws that they may be called upon to

interpret, and at the same time expose citizens to the highest judicial authority, all in the interest of nation-building. During this same period the Supreme Court itself heard very few cases, allowing justices to travel to the various circuits. Beginning in 1901, a single judge was permitted to convene the circuit court, and most often it was the resident district judge. The circuit court was obliged to convene twice a year, whereas the district court convened four times a year. The circuit court of appeals as it is known today was created in 1891, resulting in the district court becoming the primary trial court in the federal system. Finally, in 1911 the old circuit court system was formally abolished.

Milwaukee's Crown Jewel

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The building remained under the control and management of the U.S. Postal Office Department until 1939 when it was taken over by the Public Building Administration (PBA), and the following year the PBA became a branch of the Federal Works Agency which in 1949 was absorbed by the General Services Administration (GSA). The building is currently maintained by the Public Buildings Service (PBA), a service of GSA.

Two additions, the first of which was completed in 1932, added five stories, a basement and sub-basement on the south side of the original structure, and a second, completed in 1941, added two additional floors. Like the 1899 structure, the exterior is clad in granite and includes some arched fenestration to replicate the original design. However, owing to both architectural and economic considerations, the addition lacks both the gable and steeply hipped slate roof as well as much of the ornamentation found in the original design. The interior corridors and lobbies are marked with much less ornamentation which includes steel doors and frames rather than traditional raised-panel wood doors and frames, terrazzo floors rather than marble, as well as more limited ornamentation in the plastered ceilings.

Formal recognition of the building's significance as an architectural and history structure came in 1972 when it was accorded Landmark designation and added to the list of Historical Buildings in the United States.

In 1983, following the lead and the results obtained in the restoration of the Old Post Office at 12th and Pennsylvania Avenue, Washington, D.C., Wisconsin Senator Robert W. Kasten, Jr. And Terry Golden, then Administrator of GSA, secured \$18.4 million in initial prospectus funding from Congress to restore the Courthouse and Federal Building in Milwaukee. In the 20 years that followed, more than \$35 million has been expended in extensive restoration work that included restoring all of the building's original interior finishes, replacement of much of the building's infrastructure, including a new 100-year slate roof along with energy efficient glass panels in the skylight, new elevators and heating and ventilation equipment, and a host of security initiatives.

Beginning with the U.S. Post Office relocating its main operations to a new postal facility in 1968, and continuing over the next 20 years, virtually every law enforcement agency housed in the building has been relocated to other federal or leased facilities, for the most part, to accommodate additional space needs for the court.

Indeed, today the building's principal tenant is the *United States Courts*, including chambers for 3 circuit judges, circuit library, chambers and courtrooms for 6 district judges, 3 full-time magistrate judges, 4 bankruptcy judges, and the tax court, clerks' offices for the district and bankruptcy courts, jury assembly room, probation office, and federal defender's office, which taken together account for approximately 70% of the available building space.

To be sure, the United States Courthouse and Federal Building in Milwaukee, Wisconsin has endured the test of time as an architectural "Crown Jewel" and will continue to be treasured as a functional part of our nation's history.

Written January 26, 2006 for publication in the February 2006 issue of the Federal Judges Association electronic newsletter, *In Camera*.





Some Effects *of the* Bankruptcy Abuse Prevention *and* Consumer Protection Act *of* 2005

*By Pamela Pepper*¹

In April 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, often referred to as “BAPCPA.” These amendments made a number of changes to the Bankruptcy Code—some dramatic, others less so. The bulk of the amendments went into effect on October 17, 2005. In the months between their date of passage and date of implementation, pundits and scholars made varying predictions about the impact the amendments were likely to have on the bankruptcy universe. Almost a year after the amendments went into effect, one thing is clear—consumer bankruptcy filings have decreased substantially.

In an August 2006 white paper, the Administrative Office of U.S. Courts indicated that since the effective date of BAPCPA, bankruptcy filings have decreased to less than one-half of the 1.6 million average annual filings from the three prior years. As of the date of the white paper, monthly filings were less than one-half of the pre-2005 filing levels. While the dramatic nature of this decrease may be less than it appears due to the fact that most of the filings that normally would have taken place from November 2005 through June 2006 likely were “pre-filed” in the days before October 17, 2005, the fact remains that bankruptcy filings a year after the effective date of BAPCPA remain lower than they have been in recent years.

In the September 4, 2006 issue of the National Law Journal, reporter Peter Geier writes that some bankruptcy lawyers speculate that the drop in filings is the result of the higher filing fees and more rigorous filing requirements mandated by BAPCPA. Among these more rigorous filing requirements are the requirement that debtors obtain a credit briefing from an approved non-profit agency before filing a bankruptcy petition and the requirement that debtors pass a “means test” in order to be eligible to file for an immediate discharge of their debts.

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¹ Pamela Pepper is a Bankruptcy Judge in the Easter District of Wisconsin.



Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

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Some speculate that misinformation about the new law—rumors that the new law prohibits some consumers from filing for bankruptcy protection, for example—may have contributed to the drop in filings. Others, Geier reports, expect that filings will increase due to a number of economic factors, including a declining housing market and increases in interest rates. *See, Speculation Up on Why New Filings Are Down*, Geier, Peter, National Law Journal, September 4, 2006.

Others have concluded that economic factors may explain the drop in filings. In the August 28, 2006 issue of the *Chicago Daily Law Bulletin*, practitioners offered the opinion that a healthy economy and widely-available credit might explain the decrease in filings. These lawyers argue that struggling businesses which might otherwise consider filing for bankruptcy remain able to pursue the alternative of obtaining credit assistance. If financial liquidity dries up, however, these lawyers predict that the filing decrease will reverse. *See, Bankruptcies Off 9 Percent in Fiscal '06*, Lash, Steve, *Chicago Daily Law Bulletin*, August 28, 2006.

Some have speculated that the numbers indicating a dramatic drop in filings after October 17, 2005 may be distorted by

the inordinate number of filings that took place just prior to BAPCPA's effective date. Certainly the bankruptcy courts of the Seventh Circuit saw a dramatic increase in filings in 2005 over 2004. Filings increased in 2005 over 2004 levels anywhere from 31.5% in the Southern District of Illinois to 51% in the Northern District of Indiana. This increase did not occur uniformly across all types of bankruptcy filings. The Chapter 7 bankruptcy petitions—petitions filed by debtors who sought an immediate discharge of their debts without

attempting to pay their creditors over time—increased in the bankruptcy courts in each district, while Chapter 13 petitions— involving debtors who sought to establish a plan to repay creditors over time—rose in some districts and fell in others.

While courts are seeing fewer consumer cases filed, the number of new issues requiring court decisions has increased with BAPCPA. Practitioners are challenging and questioning numerous provisions in the statute, and courts are finding themselves construing statutory provisions for which there is no precedent and often little or no

legislative history. One year after BAPCPA's effective date, issues are beginning to rise to the district court and appellate court levels for resolution. It appears that it will be some time before there is a body of "settled law" on the meaning of various BAPCPA provisions, and time will tell whether bankruptcy filings will rise to their pre-BAPCPA levels in the near future.





Profile

United States District Court Judge Thomas J. Curran

By Pamela Pepper

A short time ago, United States District Court Judge Thomas J. Curran announced his retirement from the Eastern District of Wisconsin bench after almost 23 years of service. Judge Curran’s career demonstrates his deep commitment to public service, as well as his belief in the federal court system.

Judge Curran hails from Mauston, a small town of some 3,700 residents in central Wisconsin, northwest of Madison. Judge Curran left Mauston to attend Marquette University and to serve for three years—from 1943 to 1946—in the U.S. Navy. Despite this extended service, he managed to complete his undergraduate education and earn his law degree from Marquette in 1948. He returned to Mauston after graduation, and opened his own practice there.

To know Judge Curran is to know the critical role that his home town played in his career. Growing up in Mauston, Judge Curran played sports with his Native American classmates. When he returned to Mauston after law school and established a private practice, he represented many of those same classmates, earning the nickname, “The Indian Lawyer.” Judge Curran considered that nickname a compliment—he represented clients in an under-served community, and was proud to be able to help.

During his years in private practice, Tom Curran the lawyer distinguished himself in numerous ways. His work took him to courts all over the state, as well as to courtrooms in other states. He had the opportunity to appear before many judges, and to form opinions about what characteristics made a good judge. He was elected president of the State Bar of Wisconsin, and during his term he worked closely with the state judiciary. He was invited to become a member of the American College of Trial lawyers, which had a hand in recommending judicial appointees.

All of these experiences created in Curran an interest in seeking appointment to the bench himself. He submitted his appli-

cation for the seat vacated by Eastern District of Wisconsin judge Myron L. Gordon, and was interviewed by a screening committee. Judge Curran remembers the committee asking him whether he thought an appointed judiciary or an elected judiciary was the more appropriate model for selecting judges. He answered, he recalls, that he thought there were good, plausible arguments in favor of both. He noted, however, that without the appointed federal judiciary, figures such as former Arkansas governor Orval Faubus and former Alabama governor George Wallace still might be standing at schoolhouse doors, denying access to education to whole groups of American citizens due to their race or ethnicity.

His answers must have impressed the committee, because on September 20, 1983, President Ronald Reagan nominated Judge Curran to the seat vacated by Judge Gordon. The Senate confirmed the nomination on November 4, 1983, and Judge Curran received his commission three days later.

Judge Curran was known for maintaining a relatively formal courtroom. He knew he had this reputation, but felt that setting a formal tone reminded parties that they were in a place where grave and serious matters were resolved. Federal court was different, Judge Curran felt, from the workaday world, and the tone of the court should remind litigants of that fact.

Over the course of his service, Judge Curran presided over numerous cases. While it is difficult for him to point to any one case as the most memorable, several stand out. In 1987, he presided over a trial in which the Milwaukee Public School system sued the state and several surrounding suburban school districts, seeking to encourage suburban integration by forcing suburban schools to encourage minorities to live and go to school in those suburbs. The magnitude of the case existed on several levels. At a practical level, there were seven plaintiffs and twenty-seven defendants.

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Profile

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The number of motions was mind-boggling—hundreds were filed after the trial date alone. There were some 5,700 exhibits and numerous discovery disputes. To facilitate the trial, the benches and railings had to be removed from the courtroom to accommodate lawyers and clients. Closed-circuit television had to be set up in a separate room to accommodate the public. Judge Curran had to decide where to put the press and the sketch artists—he ended up placing them in the jury box.

At an emotional level, Judge Curran was keenly aware of the impact the case had on society. The parties had very volatile positions—everyone had an emotional stake in the outcome. The parties eventually settled the case, with both the state and the suburban schools agreeing to implement measures to increase suburban integration.

He recalls the high dramatic tension surrounding another civil case over which he presided—a section 1983 suit filed by the family of Thomas Monfils. Monfils was a Green Bay paper mill worker who was found dead at the bottom of a drained two-story pulp vat, a 50-pound weight tied around his neck. Six employees of the paper mill were convicted for the murder. Judge Curran presided over the civil lawsuit alleging that the city of Green Bay and its police officers violated Monfils’ constitutional rights after he anonymously reported a co-worker’s planned theft of an electrical cord. After hearing graphic and emotionally-charged testimony, the jury returned verdicts against the city and the individual defendants.

Judge Curran also had a number of memorable criminal trials. He particularly recalls cases involving defendants who professed to be members of an organization known as “Posse Comitatus.” These defendants held beliefs that led them to resist paying taxes. Judge Curran recalls that some of these defendants believed strongly that they were more knowledgeable in the law than the court or their lawyers. This required Judge Curran to consider carefully his methods of dealing with each defendant. He also remembers a case involving members of a Chicago gang, in which a witness refused to testify even after Judge Curran granted him immunity from prosecution. It was sobering, Judge Curran remembers, when the witness informed him that he was not refusing to testify out of fear of prosecution—he was refusing to testify out of fear for his life.

With a career on the bench spanning two decades, Judge Curran has seen many changes in the judiciary. He recalls with admiration former Seventh Circuit Chief Judge William

Bauer’s emphasis on civility from the bench, and worries that judges today sometimes forget the need to treat lawyers and parties with respect and dignity. He sees no need for judges to belittle lawyers or parties from the bench or in opinions. He sees cause for great concern in the increasing encroachments of the legislative branch into the independence of the courts, and feels that the current legislative effort to create an inspector general for the judiciary is both offensive and unconstitutional. He also worries that the administrative constraints on federal courts are encroaching on their independence.

Despite these concerns, Judge Curran has an abiding respect and love for the federal court he leaves behind, and encourages young lawyers to practice here. For those lawyers starting out their practices, he has a unique piece of advice—don’t overlook the practice opportunities available to a “small-town” lawyer. Unlike many lawyers in large, metropolitan firms, the small-town lawyer deals directly with clients. The small-town lawyer learns that a client is a real person, not a “case.” Whether the small-town lawyer wins or loses for a client, he or she still has to see that person in the grocery store, in church, at school, which makes the lawyer accountable. Small-town lawyers also, Judge Curran says, garner respect and credibility in the community. Citizens in small towns listen when lawyers talk, and appreciate their input in a way that urban citizens may not.

Certainly Judge Curran’s experiences as a small-town lawyer in Mauston served him well, and made him the respected, valued federal judge he became. The lawyers and judges of the Eastern District and the Seventh Circuit will miss his presence on the bench.

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