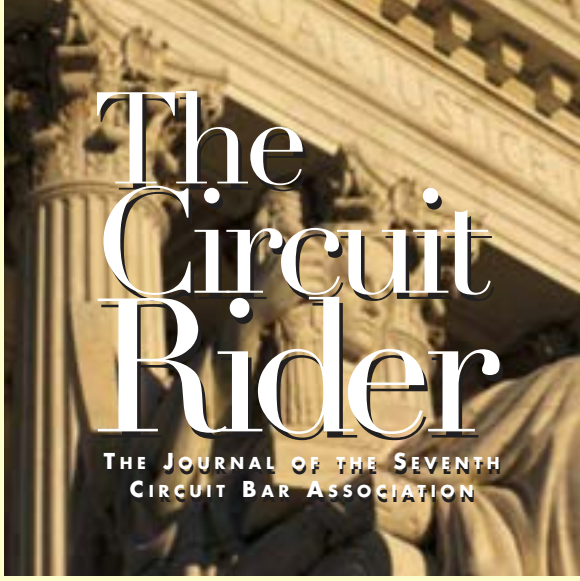
May 2023



Featured In This Issue

The Art and Craft of Judging

In This Issue

Letter *from the* President

President Thomas J. Wiegand
MoloLamken LLP

Greetings, Members of the Seventh Circuit Bar Association!

I want to start by thanking Judge Jeffrey Cole for his energy and perspective in gathering and editing *The Circuit Rider*. As an Association, we are proud of its important content and consistent quality. This edition both informs about recent happenings in the Circuit and presents important training and reflections on the practice of law. Please enjoy it.

One of the articles highlights a new moot court competition that the Association co-sponsored in March with the Anderson Center for Advocacy and Professionalism at the University of Illinois College of Law. The competition is unique in two important ways – it brings together students from the law schools within the Seventh Circuit, and it is the only moot court competition focused on issues of professional responsibility and ethics. The inaugural competition was a smashing success. The student teams brought to Chicago by the Anderson Center for two days of argument in the courtrooms of the Dirksen Building gave excellent performances. And the experience was rewarding for all of the judges and veteran appellate practitioners who judged the arguments. As an Association, we were proud to host the opening reception in conjunction with our new member reception, which we held for the first time since 2020. If you were not able to join us this year, please come next year, to see old friends, to meet new ones, and to be inspired by the talented incoming attorneys.

The Association also is finding other new ways to carry on its tradition of bringing together the attorneys who practice in the Circuit's courts. Our Young Lawyers Committee and Diversity, Equity, and Inclusion Committee meet monthly, sometimes remotely and sometimes in person, to plan CLEs and social events while sharing experiences. Our affiliate Seventh Circuit Foundation is another high-quality group of judges and attorneys that meets regularly and conducts deep dives into pressing issues. I encourage you to join the Foundation for its all-day examination of the jury system on May 19, available both remotely and in person.

Finally, I am excited for the chance for all of us to again join with the trial and appellate judges of the Seventh Circuit for the bench/bar conference being planned for Lake Geneva on August 27 – 29. This will be the first joint meeting since before COVID and its content will be as impressive as in years past.

Thank you to our members for your continuing support and engagement, I hope to see you all soon.

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.

Judge Rovner, The First Woman Appointed to the Seventh Circuit Court of Appeals,

Celebrates Over 30 Years *on* The Bench

*By the Honorable Amy J. St. Eve and Alexandra Rubinstein**

On a quiet fall day in 1992, something extraordinary happened. The Honorable Ilana Diamond Rovner, the newest judge on the Seventh Circuit Court of Appeals, took the bench for the first time. At the time, she was the only woman to do so in the Seventh Circuit. The path that led Judge Rovner to the appellate bench was one of improbability and seemingly insurmountable odds. A refugee of the Holocaust, Judge Rovner hurled herself into a world and a profession that rarely, and then only grudgingly, welcomed women. Through her strong intellect, boundless work ethic, uncommon empathy, and dedicated cultivation of professional and personal relationships, Judge Rovner forged her way to the pinnacle of the legal field. Judge Rovner's confirmation to the Seventh Circuit Court of Appeals, however, was not the final chapter but the first. That day thirty years ago, Judge Rovner stood at the forefront of a revolution, paving the way for the countless women following in her wake.

I. The Early Years

Born into a Jewish family in Latvia in 1938, Judge Rovner's earliest exposure to the legal system involved watching the rule of law collapse under the weight of the Nazi ascendancy. Many of Judge Rovner's family and community did not survive the Nazi massacre of the Jews, but sheer fortuity spared Judge Rovner and her parents, Zelig and Rasja Dimants. While on his honeymoon in 1936, Zelig grew concerned about the prospect of imminent war in Europe. Zelig applied for an immigration visa for his young family, a process that typically took years at that time because of the low quota

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** Amy St. Eve is a judge on the United States Court of Appeals for the Seventh Circuit and was formerly a U.S. District Court judge for the Northern District of Illinois.*

Alexandra Rubinstein, a Senior at Brown University, studies English with a minor in Entrepreneurship. She has five years of previous journalism experience and served as a writer and news editor for the New Trier News, *a copy editor for the* Brown Daily Herald, *and a podcast producer for the* Brown Political Review. *Alex is interested in law and worked as an extern for Judge St. Eve this summer.*

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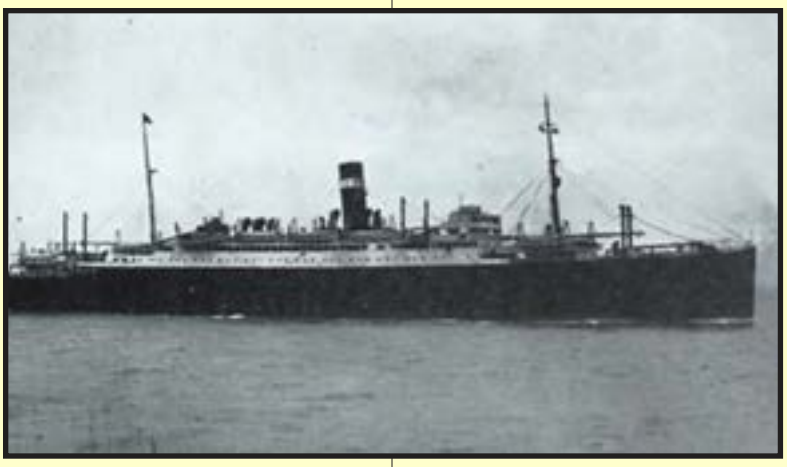
allowed to enter the United States from Latvia. Coincidentally, Zelig, an opera critic, sat next to and befriended U.S. Consul General Allan Lightner at the Opera House in Riga. General Lightner encouraged Zelig to emigrate and, upon learning Zelig had already applied to the U.S. immigration list, arranged for a VISA within a few days. Zelig left for America in 1938 while Rasja, who had extreme reservations about leaving her extended family, remained in Latvia with the six-week-old Ilana. In 1939, Rasja realized the time had come to leave Latvia and reunite with Zelig in America. Rasja initially secured passage on the SS Athenia, a transatlantic passenger liner, but ultimately once again refused to leave and sold those tickets to another family. What initially appeared a setback proved providential when, during its passage to America, Nazi submarines torpedoed and sunk the Athenia. Judge Rovner and her mother finally sailed on the Drottningholm, one of the last if not the last scheduled passenger ship to sail after the outbreak of World War II. (The Nazis had invaded Poland three weeks prior to the sailing.)



Although immigration shielded Judge Rovner and her parents from the horrors of the Holocaust and war, starting life anew in America presented its own challenges. Judge Rovner's educated, erudite father, a member of society in Latvia, packed eggs and swept floors in a dairy store in New York. Far from growing embittered, Zelig felt determined to succeed and deeply grateful for the opportunity to work and live in a country free from religious persecution and the horrific plight of the European Jewry. Zelig's humble determination paid off, and he worked his way up from an egg packer to a sales position and ultimately entered the wholesale gourmet food business. Judge Rovner credits her father with exemplifying the value of hard work and the importance of gratitude and instilling in her the resilience necessary to thrive and find joy, even when faced with adversity.

Judge Rovner attended the Philadelphia High School for Girls, a prestigious magnet school in Philadelphia, Pennsylvania, from 1952–56. Unlike other high schools, the Philadelphia High School for Girls admitted students based on their IQ. As a result, Judge Rovner spent her early academic years surrounded by other bright, driven girls from a diverse array of backgrounds. Almost twenty percent of her classmates were Black, and Judge Rovner studied alongside some of Philadelphia's wealthiest and poorest girls. The Philadelphia High School for Girl's unique student body allowed Judge Rovner early exposure to those with experiences vastly different from her own, an opportunity she considers a privilege to this day. Academically, Judge Rovner excelled. She supplemented her studies by throwing herself into various competitive academic clubs where she held leadership positions.

Upon graduating from the Philadelphia High School for Girls, Judge Rovner continued to seek out and surround herself with the brightest female minds of her generation. Judge Rovner attended Bryn Mawr College, another prestigious all-women institution. At Bryn Mawr College, Judge Rovner continued to develop her interest in the intersection of history and politics. She graduated with a Bachelor of Arts in 1960 with a major in history and a minor in political science. Immediately upon graduation, Judge Rovner attended King's College Law School of the University of London in London, England where she pursued an Intermediate LLB degree. Judge Rovner was attracted to King's College Law School because it made space for women in the law in a way the top American universities at the time did not. For that era, an unusual proportion of students at King's College Law School were women, and Judge Rovner valued the opportunity to learn alongside other bright women in a male-dominated industry.

After almost one and a half years in London, Judge Rovner returned to America in 1961 and enrolled in law school at Georgetown University. For the first time in her academic career, Judge Rovner was surrounded almost entirely by men. At 500 a class, Georgetown enrolled more students than any other law school in the U.S., yet only nine or ten of these students in a class were women. Culturally, Judge Rovner and her few fellow female classmates did not always feel welcome at Georgetown. In his introductory lecture on the first day of Property class, Judge Rovner's professor informed the five female students in the section that "the day that Georgetown accepted women, I wore a black armband. You need not worry;

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I won't call on you in this class." Judge Rovner initially felt thrilled she would not be "cold-called," but another woman in the section pointed out that the professor, in refusing to call on the women, essentially refused to engage with them as students. Ostracization did not end at the classroom door. At a law school holiday party, a professor's wife remarked to her husband, "you swore to me that they were all ugly," upon meeting Judge Rovner. Instead of becoming discouraged or angry at this treatment, Judge Rovner determined to prove she deserved a place at Georgetown by working still harder.

Despite the open resentment of a few professors, Judge Rovner found camaraderie and support elsewhere at Georgetown. Some professors recognized the unique challenges faced by female law students and took it upon themselves to act as mentors. Professor Walter Jaeger, professor of Contracts and author of *Williston on Contracts,* had a sister who had graduated from law school but was unable to find a job as an attorney because no one would hire a woman. After witnessing employers discount his sister exclusively on the basis of gender, Professor Jaeger bent over backwards to provide women with opportunities at Georgetown and became one of Judge Rovner's greatest mentors.

While professionally enriching, Judge Rovner's time at Georgetown also transformed her personal life. Judge Rovner met her future husband, Richard Rovner, a neurologist, at a dinner party in Washington during her second year of law school. Always appreciative of the importance of relationships, nowhere was this truer for Judge Rovner than in her marriage. Judge Rovner and Richard understood no one can succeed without help or support, and "one cannot be all things to all people." From the start, the young couple prioritized supporting one another and split the household tasks and childcare, a modern arrangement in an unmodern time. Judge Rovner and Richard's ability to rely upon one another and share responsibilities enabled both to work long hours and excel in their respective careers. Judge Rovner attributes much of her professional success to Richard, an incredibly supportive husband and father.

In the middle of Judge Rovner's third year of law school at Georgetown, with only a semester and a half to go before graduation, Richard accepted a job teaching at Northwestern University Medical School in Chicago, Illinois. Although moving to Chicago was unquestionably the right decision for the couple, Judge Rovner struggled to find a way to complete her legal education. In the sixties, Georgetown would not allow her to finish her degree by studying at another law school, and most Chicago law schools required her to complete two additional years of law school at their institutions to earn a degree. Chicago-Kent College of Law, however, could better accommodate her, and Judge Rovner ultimately decided to complete her studies there. Chicago-Kent, with a student body consisting of a large number of students from working-class families who were the first in their families to attend law school, proved "life-changing" for Judge Rovner. For the first time in her academic career, Judge Rovner studied with people who worked and then went to school in the evenings, or vice versa. Chicago-Kent showed Judge Rovner she certainly was not alone in facing obstacles in her pursuit of a legal degree. Judge Rovner received her J.D. from Chicago-Kent Law School in 1966.

When Judge Rovner graduated from law school, only three women had served on the federal bench in the history of the country. Judge Rovner did not realize it at the time, but she stood at the precipice of a revolution in the composition of the federal bench — a revolution in which she and a number of other women served as the vanguard for a wave of female jurists.

II. Path to the Bench

Like Professor Jaeger's sister, Judge Rovner struggled to secure employment as an attorney after passing the bar. In the 1960s, female attorneys frequently ended up working as legal secretaries instead of practicing law. During one interview, a potential employer asked Judge Rovner why she deserved a job when she would be "taking the place of a man." Judge Rovner related an experience that the late judge Patricia Wald of the D.C. Circuit often mentioned. During a law firm interview, Judge Wald was told that she should have come two weeks earlier because they had "already hired our woman." Judge Rovner persisted and ultimately secured a position as a law clerk to the Honorable James B. Parsons in the U.S. District Court for the Northern District of Illinois.

Judge Rovner thrived in Judge Parsons's chambers where her ability and dedication were apparent to all. While visiting Judge Parsons' chambers, U.S. Attorney Jim Thompson encouraged Judge Rovner to interview for a position as an Assistant United States Attorney. Judge Rovner did so successfully and started a career as a prosecutor where, in addition to her legal ability, her deep empathy distinguished her. Judge Rovner earned the honorific "The Fairy Godmother" of the U.S. Attorney's Office after trying her first case. The jury found the defendant guilty of stealing and transporting a forklift truck across state lines and at the sentencing hearing, the judge initially announced a 90-day sentence because of the defendant's age and ill health. The defendant asked for a 60-day sentence so that he could

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celebrate Thanksgiving and Christmas with his family, fearing it might be his last ones. When the trial judge ultimately left the sentencing decision up to Judge Rovner, Judge Rovner informed the court she would never beg for 30 days of a man's life and agreed to a 60-day sentence. That Christmas, Judge Rovner's co-workers gifted her a tiara, a pair of angel wings, and a wand as tokens of her uncommon compassion.

Judge Rovner's passion for civil rights, consumer fraud, and voter fraud — areas that combined her interest in the law and politics — led her to the Public Protection Unit of the U.S. Attorney's Office. There, her talent and work ethic quickly distinguished Judge Rovner, leading to her appointment as the first female supervisor in the office. Again, Judge Rovner excelled and became Unit Chief, making her the first woman to hold a leadership position within the U.S. Attorney's Office. In the role, at the beginning she exclusively supervised men but soon thereafter Judge Ann Claire Williams (who is one of Judge Rovner's closest friends) and Mary Stowell (a very successful private practitioner at present) joined the Unit. Of her experience as the first woman in such a role, Judge Rovner observed, "When you're the first at something, people don't always believe you can do it." Despite her undeniable ability, some in her office remained skeptical that a woman could serve as Unit Chief. Faced with doubt, Judge Rovner relied upon her tireless work ethic, a trait which time and again proved the best method to refute critics. Although Judge Rovner won over most of the men in her division, one could not tolerate working under a woman's supervision and transferred to a different unit.

After working at the U.S. Attorney's Office from 1973–77, Judge Rovner took a position in the Illinois Governor's office in Chicago, where she served as Deputy Governor and legal counsel for Governor James Thompson from 1977–84. The continuation of Judge Rovner's public service led President Ronald Reagan to nominate her for a seat on the U.S. District Court in the Northern District of Illinois in 1984. Before Judge Rovner's confirmation on September 12, 1984, only one other woman had served on the District Court in the Northern District of Illinois. As only the second woman to serve in the Northern District, Judge Rovner understood the importance of her role to aspiring female attorneys and she worked tirelessly to prove she deserved her place on the bench.

Even after joining the federal bench, Judge Rovner continued to draw upon her creativity and personal relationships to develop her professional network. Many of the typical spaces in which attorneys and jurists socialized were unavailable to Judge Rovner as a woman. Attorneys and male judges habitually met for lunch at private, male-only clubs between sessions of court and women were unwelcome at the private golf clubs they favored for their weekend outings. Judge Rovner found support in many of her colleagues, particularly in Judge Joel Flaum, Judge Nicholas Bua, Judge John Grady, Judge Hubert Will, Judge Frank McGarr, Judge Prentice Marshall, Judge George Leighton, Judge Abraham Lincoln Marovitz, whose chambers abutted her own, and of course Judge James B. Parsons, who bought her first robe. Over the years, Judge Marovitz and Judge Rovner developed a deep and abiding respect and friendship. Judge Rovner's proceedings frequently ran over their allotted time on Friday evenings, proceedings which Judge Rovner loathed to cut short given the responsibility of being the sole woman on the bench and her instinct to prove herself through her work. Knowing this, Judge Marovitz would come to Judge Rovner's courtroom, kiss her on the cheek, and tell the lawyers that Shabbos, the Jewish day of rest, had started and that Judge Rovner needed to go home. Judge Rovner fondly recalls Mother's Day in 1989 when Judge Marovitz, knowing he would find Judge Rovner hard at work, led a Mother's Day present into her office: singer Tony Bennett.

Judge Rovner enjoyed and made use of unique skills and experiences which made her an uncommonly able jurist. Judge Rovner cites motherhood as an unexpected but profound source of professional development. She laughs that nothing hones dispute resolution skills quite like convincing a recalcitrant toddler to do something he does not want to do. In raising her son, Judge Rovner learned to "deal with squabbles" and develop all those skills necessary to motherhood and judging alike, such as patience, empathy, and managing a unit. She found "being a parent is an incredible way to learn to deal with human anger, tragedy, and emotions" and allowed her to exercise compassion for the lawyers and parties in her courtroom.

Judge Rovner stresses empathy as one of the most important skills of a judge. Her formative experiences made Judge Rovner uniquely positioned to empathize with the attorneys and parties who appeared before her. She fled her home — and her family's

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life of luxury and affluence — at the tender age of thirteen months after the Nazi regime marked the Jews for extermination. Upon her arrival in America, Judge Rovner's family struggled as refugees, finding that people looked at them as "outsiders" and did not always treat them with kindness. Judge Rovner never forgot the challenges of being an outsider and sought out people with experiences different than her own. Judge Rovner believes that breadth in human experience distinguishes a good judge from a great one: "If you're really fortunate, you have a lot of different experiences and know a lot of different types of people."

Judge Rovner jokes that people are her main hobby and this empathy and love for others radiated throughout her courtroom. When asked what she adored about serving on the district court, she responded, "everything." However, Judge Rovner's capacity for love and her ability to recognize herself in others did not come without cost. Judge Rovner remarks that the job takes its toll in many ways and that "judging people can be a burden, a joy, a privilege, and a heartache." Judge Rovner observes, "we're all ants in life, and some are luckier ants." After witnessing so much cruelty as a young child, although her role required her to pass judgment on others, Judge Rovner never wanted to be "cruel to another ant."

III. Changing the Court

Judge Harlington Wood Jr., who served on the Seventh Circuit Court of Appeals beginning in 1976, took senior status in 1992. Although she did not know it at the time, this decision would alter the course of Judge Rovner's life. Judge Wood Jr. wrote a letter to President H.W. Bush in which he said, "there has never been a woman on my bench, and it is time." Judge Rovner considers Judge Wood Jr. a hero for advocating for women on the federal bench. Judge Rovner, a star on the Northern District of Illinois, rose to the top of then-President H.W. Bush's shortlist. During the process, President Bush called Judge Rovner twice to discuss her experience as an American refugee who witnessed evil as a young child, spoke English as a second language, and achieved the pinnacle of success in her field. President Bush nominated Judge Rovner to take Judge Wood Jr.'s seat on the Seventh Circuit Court of Appeals.

Judge Rovner's work ethic, eight years of experience on the district court, and compassion made her the perfect candidate for the Seventh Circuit. Although this would be her second time appearing before the United States Senate Judiciary Committee, Judge Rovner was awed at the realization she was the first woman nominated for the Seventh Circuit Court of Appeals. The United States Senate Committee on the Judiciary held Judge Rovner's confirmation hearing on August 4, 1992. Judge Rovner recalls her hearing as a joyous event. Though Judge Rovner recommends that one should "never believe your press — bad or good," the Chicago Tribune agreed and described her hearing as a "love fest." The Senate thereafter unanimously confirmed Judge Rovner, and she received her commission on August 17, 1992. Then-Senator Paul Simon, a strong supporter of Judge Rovner's, commented on her "reputation for fairness and compassion."

When Judge Rovner assumed her role on the court of appeals, her colleagues proved "welcoming, wonderful, and courtly." Chief Judge Bauer even pulled out a chair for Judge Rovner on her first day on the bench. While the other judges welcomed Judge Rovner, the appellate bench was not entirely prepared for a woman. She found one logistical obstacle, the lack of a women's restroom, and although the male appellate judges hung their robes in the robing room lockers, Judge Rovner preferred to keep hers in her chambers. When asked about the quirk, Judge Rovner joked that "all of the male judges' robes are in there and my robe doesn't want to hear about sports and other topics men enjoy discussing from the other robes after the judges leave." Just as one of the physical spaces in the Seventh Circuit Court of Appeals was not quite ready for Judge Rovner, some appellate advocates needed convincing. A few parties who lost cases in front of her blamed their loss on the fact a woman sat on the panel.

Of those early days, Judge Rovner recalls "being the first of anything is terrifying." She worried she would fail, and thus she worked "like a madwoman." Judge Rovner recalls that one of the most difficult aspects of being first is worrying about whether you are "cutting the mustard" and doing a satisfactory job like everyone else. In order to succeed in spite of adversity, Judge Rovner notes that "you have to have the raw desire – a desire so strong that nothing would stop you if it was in your control." At this point in her career, Judge Rovner knew the feeling of being the first and the lone woman in the room well.

Beyond breaking the mold and blazing the trail for others, Judge Rovner's contributions to the Seventh Circuit include the joy and levity she brings to appellate oral arguments. Drawing upon her previous work as a prosecutor, Judge Rovner "understands the paralyzing fear that the lawyers feel when they argue" before someone in a robe. Judge Rovner strives to make the litigants in front of her feel at ease. When she first started as a district judge, "there were no women in sight." She would ask jokingly, "what have you done with all the women…you can all come out now" to make that point to those in the courtroom. While she joked, she intentionally highlighted the lack of diversity. The Judge recalls her utter excitement when four female lawyers appeared in her courtroom for a case, and she said to them, "You cannot imagine how good it is to see you standing there," to which one of them responded, "it looks pretty good from where we're standing too, Judge."

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Just as Judge Rovner opened the door for female appellate judges and advocates, she uses her position to help those behind her — women, parents, and people of modest means alike — to overcome the obstacles they face. Judge Rovner did have a few female mentors — including Teddy Gordon, Esther Rothstein, Bea Fox, Kay Agar, and Jeanne Simon. They were all incredible women. Now, at the pinnacle of her career, she strives to be that female mentor. Judge Rovner makes a conscious effort to provide women with the opportunities that she constantly had to fight for. Colleagues refer to Judge Rovner as "a network," and she always attempts to act as that network for women in the law. When Judge Rovner first was on the district court, she called her chambers "Ilana's Angels" because her entire chambers — all the law clerks, the courtroom deputy clerk, and her Judicial Assistant — were women. She contends that everyone should support others "with a good heart and pay it forward."

Judge Rovner has not forgotten the challenges facing young women in law balancing families. She continues to use her resourcefulness to fix the structures in place that inhibit women and working parents. Judge Rovner created her job-sharing program — in which two people share one position, each working two or three days per week and spending the remainder at home with their children — when she served as Deputy Governor. Although many were sure the program would fail, "it worked tremendously," and she continues the practice to this day. One of her present law clerk's husband was at one time a law clerk who shared a job with another parent in the judge's chambers. Judge Rovner appreciates the importance of family and, given how much her family supported her, feels strongly that nobody — man or woman —should need to choose between a family and a successful career. Judge Rovner seeks to reconcile parental and professional expectations, giving parents with young children the option to advance their careers by working for her.

Judge Rovner is also free with her advice and experience. She loves to see others succeed and maintains that one of the most important legal skills is treating others with respect and empathy. She finds this especially important for young lawyers, cautioning that "being kind to the people you meet along the way is important because you'll meet them again." She also advises that young lawyers and law students must learn to disagree without being disagreeable. Learning to politely and professionally disagree will prove vital to one's success in the legal field. Judge Rovner also finds joy in the fact that "every day you learn something new." As such, she recommends that young people pursuing legal careers should look for "anything that broadens their horizons, such as a chemistry course." Judge Rovner cites a present law clerk, Mary Cameli, as a prime example of the value of diverse knowledge and experience. Mary Cameli has a background in engineering, and this knowledge and unique skillset proved invaluable in patent cases when the Judge was on the district court. Young students should pursue "the broadest experiences they possibly can" and "study, study, study." Judge Rovner adds that "nothing worth achieving is a walk in the park."

Succeeding and serving as the first woman on the Seventh Circuit Court of Appeals certainly was no easy feat. As such, Judge Rovner dedicates this article to her "brilliant, loyal, and wonderful" law clerks and judicial assistant — Mark Dupont, Mary Cameli, Peggy Healy, Lauren Raphael, Mariah Christensen, and Julie Diaz — who "are so important in a judge's life." Judge Rovner lost the majority of her family in World War II, and thus her law clerks and judicial assistant have "become part of her family." She loves them with every fiber of her being, and she regards them as family.

* * *

To the casual observer, Judge Rovner's lasting contribution to the legal profession is marked by instances in which she stood alone — the rare woman in the law school classroom, the first female supervisor in the U.S. Attorney's Office in the Northern District of Illinois, the first woman to serve as Unit Chief, the second female district court judge in the Northern District of Illinois, and the first woman to join the bench on the Seventh Circuit Court of Appeals. Judge Rovner does not mark her success by these resume lines. Instead, she measures her success by moments of companionship and camaraderie, moments in which she was not singular. Above all, she is grateful to her parents, her brother who is a physician, her son who is a lawyer and physician, her late husband, and her husband of over nine years (who is also a physician and has been steadfast in supporting her in every possible way, along with the two daughters and two grandchildren he brought into her life).

On May 25, 2022, almost 30 years after she took her place on the Seventh Circuit Court of Appeals, Judge Rovner presided over a courtroom adorned by four portraits of other women appellate judges. The court has now had seven women serve as judges. As she heard oral argument in the final case of the day, presented by a female appellate attorney, young female law clerks watched intently from the wings. While Judge Rovner took that first step alone almost 30 years ago, that first step paved the way for the countless women following closely behind her. Thank you, Judge Rovner, for trailblazing the path for the generations that will follow you, and for doing it with such grace and dignity.

What *Pleases* the Court?

Views on Oral Argument from the Bench: Interviews of Judges Michael Scudder, Amy St. Eve, and Kenneth Ripple

*By Annie Kastanek**

Searching for oral argument tips? A Google search will yield hundreds, perhaps even thousands, of practice pointers, typically authored by lawyers who have never been judges. An appellate lawyer like me can suggest that you prepare for argument by brainstorming 80 questions, even if the panel will only have time to ask eight. We can suggest how best to integrate answers to anticipated questions into your affirmative argument, and direct that you absolutely never interrupt a judge. But our perspective is inherently limited by our position at the podium instead of on the bench.

Thus, when the opportunity arose to compile tips for appellate argument for the Seventh Circuit bar, I decided to go to the source: Seventh Circuit judges with a collective 50 years of experience on the bench.

In the below set of interviews, three Seventh Circuit judges — Judges Michael Y. Scudder, Amy J. St. Eve, and Kenneth F. Ripple — kindly entertained my questions on oral argument. Shaped by their experiences on and off the bench, the judges shared their views on oral argument: its importance, shifts in the styles of judges and advocates over time, and where things can go wrong for the advocate. They provided insights on how best to prepare for argument, how advocates can help the court reach the right decision, and judges' use of questioning to dialogue with fellow members of the panel.

Below I include transcripts of my discussions with these three distinguished jurists, who have developed well-earned reputations amongst the Seventh Circuit bar for their intelligence and insight.

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* *Annie Kastanek is a partner in Jenner & Block LLP's Appellate & Supreme Court Practice. From 2010 to 2022, Annie was an Assistant U.S. Attorney at the U.S. Attorney's Office for the Northern District of Illinois. She served as the Chief of Appeals for the Criminal Division, supervising the Office's litigation in the Seventh Circuit. She clerked for Justice Anthony M. Kennedy at the U.S. Supreme Court and Judge Kenneth F. Ripple of the Seventh Circuit.*

What *Pleases* the Court?

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Judge Michael Y. Scudder was nominated in 2018 by President Donald J. Trump to the Seventh Circuit, after a decade as a partner at Skadden, Arps, Slate, Meagher & Flom LLP. Judge Scudder was previously an Assistant U.S. Attorney, counsel to the National Security Team at the Department of Justice, and a clerk on the U.S. Supreme Court for Justice Anthony M. Kennedy.

Q: Judge Scudder, thank you so much for meeting with me to discuss oral advocacy. The Seventh Circuit bar appreciates it. I'll start with what I think is the most important question from the perspective of an appellate attorney. What do you wish lawyers would do more of, or less of, during argument?

Judge Scudder: Get right to the core of the most difficult issue faster. We hear a lot of unnecessary wind-up and table setting. Start from an understanding that we have read the briefs, have thought about the issue, and are coming into the argument ready to concentrate on how to resolve the issue presented.

Lawyers who take several minutes to recount the facts and procedural history are letting valuable time go by. A little table setting is appropriate, sure, but then get to it. And if you are the appellee, it is often effective to step to the podium and pick up with the discussion that just concluded. Providing background on the case as an appellee is rarely necessary.

Q: Those are great tips. You have been a judge now for almost five years. What has surprised you the most about oral arguments during that time?

Judge Scudder: Overall, I have been impressed with the quality of advocacy in the courtroom. In fact, sometimes lawyers who may not be the best brief writers — it is not their core skill or, for one reason or another, they were not able to devote the time they wished to their brief — can be quite articulate in the courtroom. This is not uncommon.

Brief writing may not be someone's strongest suit for all kinds of reasons, but they can make their points very well in the courtroom.

The important point, though, is one of balance. Effective brief writing goes a long way, so my suggestion is to double down on the writing if it is not your strong suit, because waiting until oral argument to win the appeal can be too late.

Q: In those situations, do you find that able articulation and effective advocacy at the argument moves the needle for you in some significant way?

Judge Scudder: Yes. It may not move the needle insofar as changing my position, but it can move the needle by providing confidence in a conclusion. If the lawyer is able to confirm or clarify something left unclear in the briefs, and it is on a material point, that clarity can translate to confidence in a particular judgment or perspective. In other words, it may not move the needle in terms of shifting the outcome, but it may move it in a way that affects my task as a judge, and the task of the court, which is to get to the right outcome.

Q: Got it. Do you find oral argument valuable?

Judge Scudder: I think oral argument is very valuable. It is an opportunity for us to get clarification on something that is not clear from the briefs or record. It is also a great opportunity to confirm our understanding of a particular fact, a legal principle, or the application of the principle to the facts. And it is a great opportunity to define and test the legal principle at play in the case.

All of those things are valuable and inform the proper reasoning, and scope of the reasoning, that will define an opinion.

Q: The Seventh Circuit is unique in that it holds argument in almost every counseled case. Do you think the court should pull back on the number of arguments it holds, or do you find the arguments in all the cases to be valuable?

Judge Scudder: I find our practice is very valuable for a few different reasons. Oral argument can really matter in cases that are very close and you are not certain of how you will vote.

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As much as or more than that, though, our tradition of holding argument in all counseled cases is valuable for institutional reasons — for reasons that are important to our justice system and the role courts play in our country. Even in a case that may be very straightforward and a difficult appeal for a party to win — take for example a criminal appeal where a defendant is challenging the substantive reasonableness of a within-Guidelines sentence where everyone agrees the Guidelines were properly calculated — that appeal is hard to win but the consequences for the defendant serving the time as enormous.

There is institutional value, and broader value within the justice system, in the court of appeals giving its undivided attention to defense counsel for 10 or 15 minutes, considering the argument, and making sure that there was no legal error. I would give any defendant that time eight days a week because of the consequences and ramifications to individual liberty in a case like that.

Q: Such a great perspective. Changing the subject slightly, you and I were fortunate to clerk for Justice Kennedy, and one of my key memories from clerking was having a front-row seat to appellate advocacy at the Court, getting to know the approaches of the various Justices to questioning and the styles of frequent oralists before the Court.

How would you describe the differences between oral argument at the Seventh Circuit versus that before the Supreme Court, including with respect to how the Justices relate to each other on the bench?

Judge Scudder: You would have noticed this, too, but when you're talking about the Supreme Court bar, you are talking about the very top appellate advocates in the country — individuals who are very comfortable standing in the well of a courtroom and having a dialogue with the Justices.

In our court, like all the circuit courts around the country, we do not always have lawyers with that experience. That is not a criticism; it is just a reality. I would very much encourage people who appear in front of us to go through moot courts, to get more practice and experience standing at a podium and having a legal dialogue with judges.

The more that you are able to advocate for your client in a context where you are trying to have a dialogue, or a discussion, with the bench — as opposed to delivering a speech or being beholden to a particular script of points you need to make — the better off you will be. The lawyers who do best in our courtroom are those who approach the podium, are able to quickly frame the issue, and partake in a dialogue and discussion. The more you think in terms of dialogue and less in terms of argument, the better you are going to do.

Q: I remember Judge Ripple saying, when I was clerking for him, that he wanted it to feel like he was sitting at a table with the advocate and having a conversation. And I remember being surprised by that approach as a recent law graduate. But, of course, after you do this for a while, the more comfortable you get with that model.

Judge Scudder: Yes, and you hear people describe Supreme Court arguments as the Court having a discussion with itself — one Justice having a discussion with her or his colleague through the intermediary of a lawyer. That is often a fair way to think about what is going on in front of a three-judge panel as well.

The nature of the appeals and some of the questions we get are different, so the type of dialogue at the court of appeals will be different. We might need to confirm facts or need to get into the nitty-gritty of the procedural path a case took. But the need for dialogue and discussion remains the same.

Q: Any other tips you have for advocates we haven't talked about?

Judge Scudder: At times, I am surprised that certain questions seem to surprise a lawyer in the courtroom. I believe that often happens because lawyers are very good at thinking about and planning how to make their strongest points in oral argument. Almost all lawyers can tell you, without scripting or practice, why they should win.

But all too often lawyers seem less prepared to have a spotlight put on the weakest cards in their hand and the vulnerabilities of their positions, whether of fact or law. The more advocates can prepare by thinking about the hardest formulations of questions about the weaknesses in their case, the more prepared they will be. It is easy and tempting to think about affirmative points you want to make, but that is not often what judges are focused on. We are often not asking you to summarize your affirmative argument that way. We are asking questions that target the weaker cards in your hand, to test the persuasiveness of the position you're presenting. So that's where to devote most of your time.

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Like Judge Scudder, Judge Amy J. St. Eve joined the Seventh Circuit in 2018. Prior to her elevation to the appellate court, Judge St. Eve served for more than 16 years as a federal district court judge in the Northern District of Illinois. Before joining the bench, Judge St. Eve worked in-house at Abbott Laboratories, served as an Assistant U.S. Attorney in Chicago, and was a prosecutor on the Whitewater independent counsel team. Judge St. Eve started her legal career at Davis Polk & Wardwell in New York City.

Q: It's nice to see you, Judge St. Eve. I appreciate you taking the time to speak with me about effective oral advocacy for *The Circuit Rider.*

I would like to start off with a question that I also asked of Judge Scudder. The lawyer's job, ultimately, is to help the court reach the right result. What should lawyers be doing more of — or less of — during argument to help you and the court?

Judge St. Eve: It would greatly aid the court if more advocates endeavored to directly answer the questions the panel asks. It is not uncommon to have lawyers try to work around our questions, which either does not provide a satisfactory answer or wastes a fair amount of the lawyer's allotted time. The court's questions are intentional. It is important to attempt to directly respond to them and give them the attention they deserve.

It is also important for the advocate to do more than simply restate the law and facts as provided in the briefing. We receive a lot of high-quality briefs that inform us of the legal issues. The panel is well-acquainted with the briefing by the time of oral argument. We do not need that information repeated. Instead, use the facts and law in the briefing as the backdrop and build on it, using the court's questions as a guide.

Q: With that in mind, could you share how you prepare for argument and select the questions you ask?

Judge St. Eve: Of course. I typically start with the lower court's opinion, in conjunction with reviewing the briefs. This helps me understand from the beginning what happened in the lower court that the appellant is challenging.

Likely due to my 16 years on the district court bench, I tend to be sensitive to the issues raised before the district court and the accuracy of the parties' representations regarding what occurred there. I therefore meticulously review relevant filings in the district court and orders issued by that court, as well as the relevant transcripts. For example, if the appeal presents a *Daubert* issue regarding the district court's admission of expert testimony, I will read the district court's opinion, but I also will review the expert's testimony and reports. The specific materials I review may form the basis of questions I ask at argument.

Another critical part of my preparation is the process of identifying gaps in the applicable law. This is a very case-specific process. It's hard to generalize, but as a general matter, I conduct research and I ask questions at argument based on the applicability of, or limits in, our case law or conflicts between our case law and that of other circuits.

Q: As you mentioned, you spent many years on the district court bench, where you also held oral arguments on important issues. What do you see as the differences, if any, between arguments in the district court and those in the federal courts of appeals?

Judge St. Eve: Most importantly, as an appellate advocate, you are constrained by the record — as am I. At the district court level, the parties are engaged in making the record. This makes the district court's task more fact- and case-specific, and it includes everything from ruling on the admissibility of evidence to making credibility findings.

But the appellate court does not decide issues on a blank slate. We review the district court's decisions against the backdrop of the appropriate standard of review and in the context of the record. For example, if an appeal challenges the district court's admission of evidence, we review the ruling for abuse of discretion. That constrains the role that I play as a judge, and it should also inform the arguments of the attorneys.

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As an appellate judge, more so than I did on the district court, I consider the impact of a particular legal ruling on other cases, and this consideration may drive some of my questions at argument. For example, I may ask questions about the limiting principles of a particular argument.

Q: I would like to turn to discuss a few issues of style. What are your views on whether an attorney should provide a roadmap at the start of an argument?

Judge St. Eve: I do not have strong views about whether appellants should provide a roadmap. Typically, the first few minutes of an argument are more for the advocate than for the court — simply for the lawyer to get comfortable being before the court. As a result, do what gives you, as the advocate, comfort and gives you confidence to proceed. The judges come in extremely prepared, knowing where we want to probe and the strengths and weaknesses of the arguments. My planned questioning is generally unaffected by you starting with a roadmap.

For the appellee, however, it is generally more effective to start with the key issues. You likely can glean from questioning during the appellant's argument where the court has concerns and what the court would like to focus on. Go there. It will be most effective to jump to where the court's focus is.

Q: I typically try to organize my points during oral argument by reference to what I want the judges to consider before casting their vote in deliberations. Can you speak to how your deliberations work, and whether there are situations in which your or a colleague's vote on a case might change as a result of oral argument?

Judge St. Eve: Yes. Immediately after oral argument, the three-judge panel conducts what we call a "conference," where we discuss each of the cases from that morning. For each case, the judges cast their votes, starting with the most junior member. This is the opposite of the order used by the Supreme Court in its deliberations, which starts with the vote of the most senior Justice. On complicated cases, or if there is a split vote, our discussions may be more detailed. The length of the discussions necessarily varies by case and the nature of the disagreement.

My experience is that events at oral argument can, at least in a small number of cases, shift my vote. If I go into the oral argument uncertain about an issue of fact or law, the argument can make a significant difference — particularly if the briefs were not clear on a particular issue. The questioning of my colleagues also can be very informative.

Q: Do you ever discuss during deliberations points made by advocates?

Judge St. Eve: Yes, definitely.

Q: Any last tips for the oral advocates who appear in front of you?

Judge St. Eve: The most important opportunity to persuade the court is not at oral argument but is in your brief.

Judges preparing for argument read your briefs in detail, and it serves as the lens through which the court then views your arguments. As a result, do not miss the opportunity to write an effective brief. Make sure that you write clearly, and make sure to preserve necessary arguments.

And it never hurts to call upon someone who can edit your brief with a fresh pair of eyes — someone who may not be familiar with your case but is a skilled writer. That process is often indispensable to crafting a brief that will be persuasive to the court. We are fortunate with the high quality of briefs we see in the Seventh Circuit. It is always a pleasure to read a well-written and well-reasoned brief in advance of arguments.

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Judge Kenneth F. Ripple is the veteran of this group. He was nominated to the Seventh Circuit by President Ronald Reagan in 1985 after serving in the U.S. Navy, including in the Judge Advocate General's Corps. He also was a legal officer of the U.S. Supreme Court, an assistant to Chief Justice Warren Burger, and a law professor at Notre Dame.

This year marks Judge Ripple's 38th year on the Seventh Circuit, and I was privileged to spend one of those years with him in South Bend as his law clerk.

Q: Judge, my favorite memory from my clerkship with you was sitting down after arguments to discuss the arguments together. I felt then and continue to believe today that this was invaluable to my development as an attorney and an oral advocate. You always seemed drawn to arguments that felt more like a conversation than a speech. Can you comment on that and any other recommendations for making the most of the 10 or 20 minutes a lawyer has in front of you?

Judge Ripple: Discussing oral arguments with my law clerks certainly remains one of the best parts of oral argument day.

In my view, "oral *argument*" is really an inaccurate description of what takes place — or should take place — in the modern American appellate courtroom. It is much more accurate to call it a conversation: a frank interchange among professionals about how best to resolve the case before them. The "conversationalists" all have particular roles to play in this conversation, but, in the end, the process must shed significant light on the path to decision.

As in any conversation, the participants need to treat each other respectfully and to take pains not to monopolize the conversation. Sometimes, although fortunately not very often, I have played the role of a football referee and given a time-out hand signal just to get a word in edgewise when counsel begins to "hydroplane" and ignores an attempt to ask a question. On other occasions, excessive questioning from the bench prevents counsel from presenting a complete picture of the client's argument. When that happens, I often think of Justice Brennan's comment that at oral argument the whole case often "comes together" for the first time. For that "coming together" to occur, we judges need to allow counsel sufficient time and latitude to let us grasp the totality the party's position. In short, restraint on everyone's part makes the conversation more fruitful.

Counsel also needs to appreciate that, oftentimes, there is a second "conversation" taking place simultaneously. Many of the questions asked by a judge are intended primarily for other members of the panel. The questioning judge may well be primarily interested in "educating" a fellow judge to a particular perspective on the case and is enlisting counsel in this "educational" effort.

Q: You have had a distinguished career as a judge on the Seventh Circuit, having served on this court for more than 37 years. How would you describe your approach towards argument and your questioning style, and has it changed over time?

Judge Ripple: There have been significant changes. Over the past few decades, there has been an increase in the number of questions asked by the bench and, in my view, less judicial sensitivity to the legitimate needs of counsel to present a full picture of the client's case. We need not bother ourselves attempting to trace the origins of this trend, but we must acknowledge that the practice has led, in some instances, to a new rawness in the entire oral argument enterprise. Some judges, and I suspect more than a few lawyers, leave oral argument feeling that they were deprived of full participation.

When finding myself caught in this situation, I tend to refrain from asking questions in order to give counsel the time to recalibrate and to get as much of the client's argument as possible before the court. Given Justice Brennan's observation, my primary concern is to ensure that counsel leaves the courtroom satisfied that the client's case has been presented fully.

Q: What about on the other side of the bench: Have you witnessed any evolutions in lawyers' oral argument styles, or in the field of appellate advocacy, over time?

Judge Ripple: A lawyer's "style" is, in one sense, very individual to the particular lawyer, and that is the way it should be. But some members of the bar take pains to cultivate special attitudes of mind and expression that make them outstanding. I really look forward to hearing these advocates because I know that they will be helpful. They understand that, compared to a lawyer who has lived with a case for some time, a generalist judge does not have the same familiarity with the background of the case. They take

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the time to educate me about that background in the brief and, to the extent time permits, at oral argument.

I also look forward to hearing these advocates because their rendition of the law is fulsome and accurate. They frankly address the weak aspects of their case and help me see it from the perspective of their client. I really appreciate a lawyer who anticipates where I might have difficulty with a point and then takes the time to get me through that rough spot.

In short, I appreciate lawyers who take the time and expend the effort to put themselves in my shoes and anticipate the problems that I may have with the case. That is the lawyer I point out to my law clerks as worthy of imitation. The great appellate advocate is the lawyer who takes the time to appreciate the judicial task and tries to be *helpful.*

Q: From my perspective as an appellate attorney, one of the most important ways to prepare for argument is to anticipate questions and incorporate answers to those questions into your affirmative presentation, so that you preempt the judges' concerns. Do you agree, and do you have other tips for lawyers preparing for argument?

Judge Ripple: I agree. It is especially helpful to me if a lawyer begins an oral argument with a brief outline of the proposed presentation and then signals where in the argument's particularly nettlesome points will be addressed. With that assurance, I'll be inclined to hold my questions until counsel gets to that point in the argument.

With respect to your broader inquiry, I think that it is important for appellate lawyers to know that, at least in federal court, the judges now have finger-tip access to the electronic record and, consequently, have the time to review it far more thoroughly prior to argument. The advocate can expect far more record-based questions than in earlier times. We also have fingertip access to every case cited in the briefs and are far more able, before oral argument, to separate the wheat from the chaff. Nothing destroys an oral argument faster than a mischaracterization of the record or over-blown reliance on a case that is of negligible importance.

It is also important to anticipate a question on whether a trial court's misstep is "error" or "reversible error." Needless to say, if the case involves an important issue concerning the standard of review, you also can expect that the panel will dwell on it. These issues involve fundamental questions about the institutional responsibilities, and capacities, of trial and appellate courts.

Q: Do you have any tips for advocates making choices of arguments — where they should focus their attention during oral argument?

Judge Ripple: Focus on what really counts. Demonstrate forcefully why the case needs further work by the district court or, if you prevailed in that court, why the judgment should be affirmed. Disregard "brush fires," which perhaps seemed important at the time but are inconsequential in the case's present appellate posture. Ask whether a matter is really important to a client or whether it is just a matter of "lawyer ego."

Educate the judges to the facts and to the context in which those facts arose. Tell the judges *why* your view of the law ought to prevail. Why is your view compatible with the heartland of cases in the Nation? If you are asking for a change in law, say so frankly and then argue *why* that change is justified.

Q: There have been a lot of changes in personnel on the Seventh Circuit recently, with Judges Wood and Hamilton taking senior status, Judge Kanne's death, and additions of Judges Jackson and Pryor. Have these changes affected the dynamic of argument?

Judge Ripple: Even one change in membership on a collegial court has the potential to destabilize the collegial chemistry of the bench. We recently have had many changes. Yet, we have had no destabilization. The dynamics of oral argument and, indeed, the dynamics of all our work together has remained exceptionally stable. Judge Wood and Judge Sykes have provided outstanding leadership. Our new colleagues, moreover, are all very good and seasoned lawyers who have been remarkably sensitive to our traditions. Over time, they will no doubt leave their mark on how the court conducts its proceedings. But I am optimistic, enthusiastically optimistic, that the changes they make will be in the best traditions of the American judiciary.

Petitions *for* Rehearing
IN THE SEVENTH CIRCUIT

*By J. Timothy Eaton, Elizabeth E. Babbitt and T. Hudson Cross IV**

I. INTRODUCTION

Petitions for a panel rehearing or rehearing *en banc* are sometimes filed reflexively after an unsuccessful outcome in the Seventh Circuit as if one is entitled to a second bite of the apple. But that "second bite" is rarely allowed and is subject to rigorous standards, which if not followed, could lead to repercussions. For example, in *Crenshaw v. Antokol,* after the appellant filed a meritless petition for rehearing, the Court sanctioned the appellant with a monetary fine, ordering that if the fine was not timely paid, the appellant would be precluded from conducting civil litigation in all courts in the Seventh Circuit until the fine be paid in full. 206 F. App'x 560, 565 (7th Cir. 2006). The sanction in that case may be extreme but is fair warning that filing a post-opinion petition is subject to certain requirements. What those requirements are and how the process works is the subject of this article.

A petition for panel rehearing is governed by Federal Rule of Appellate Procedure 40 ("FRAP 40"), and a petition for rehearing *en banc* is governed by Federal Rule of Appellate Procedure 35 ("FRAP 35"). In either scenario, the party must strictly adhere to the Federal Rules of Appellate Procedure, as well as any applicable Seventh Circuit Local Rules. Even when those rules are followed to the letter, the likelihood of success under FRAP 40 or FRAP 35 is remote. The Seventh Circuit's Practitioner's Handbook for Appeals reiterates that both types of rehearing petitions are very rarely granted. *See* Practitioner's Handbook for Appeals to the U.S. Court of Appeals for the Seventh Circuit at 207, 210 (2020 ed.). The proverbial

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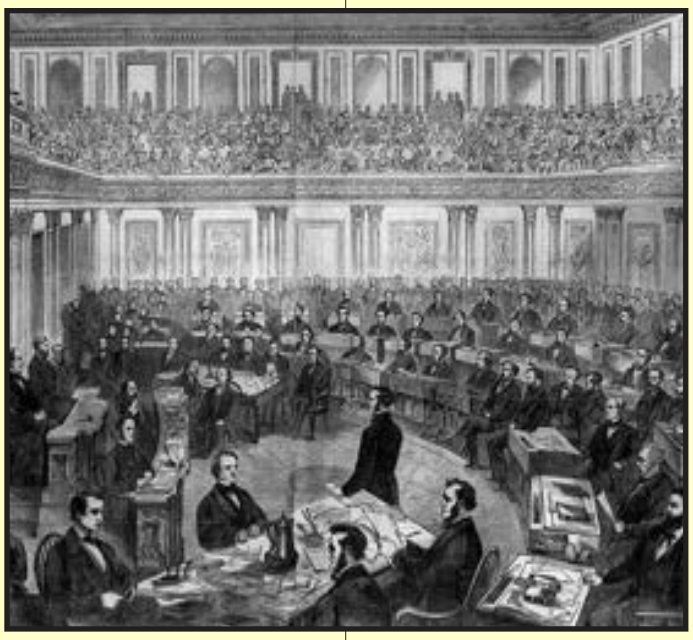
second bite of the apple is very limited.

II. Petitions for Panel Rehearings



The most common type of petition an unsuccessful party files is a FRAP 40 petition for panel rehearing. A petition for panel rehearing "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." Fed. R. App. P. 40(a)(2). The Seventh Circuit is very clear what a panel rehearing is *not.* "Panel rehearing is not a vehicle for presenting new arguments, and, absent extraordinary circumstances, we shall not entertain arguments raised for the first time in a petition for rehearing." *Easley v. Reuss,* 532 F.3d 592, 593-94 (7th Cir. 2008) (*per curiam*). A panel rehearing is expressly intended to address a genuine error of fact or law or to consider an issue presented to the court that the panel did not address. "Panel rehearings are designed as a mechanism for the panel to correct its own errors in the reading of the factual record or the law." *Id.* at 594. As a practical matter, a petition for panel rehearing is more likely to be granted if there was a dissent in the panel's original decision. This is because a litigant must persuade at least two of the three judges on the panel to grant a rehearing, and a litigant may already have one vote from the dissenting judge in the original decision.

III. Petitions for *En Banc* Rehearings

The litigant may also file a FRAP 35 petition for rehearing *en banc.* Unlike panel rehearings, which "are designed as a mechanism for the panel to correct its own errors in the reading of the factual record or the law, rehearings *en banc* are designed to address issues that affect the integrity of the circuit's case law (intra-circuit conflicts) and the development of the law (questions of exceptional importance)." *Easley,* 532 F.3d at 594.

FRAP 35 makes it clear that *en banc* requests are "not favored" and "ordinarily will not be ordered" unless the petitioner demonstrates that: (1) the underlying panel decision creates an intra-circuit conflict or Supreme Court precedent; or (2) the proceeding involves a "question of exceptional importance." Fed. R. App. P. 35(a).

A petitioner seeking an *en banc* rehearing must back up the claim that the original panel decision creates a conflict with Seventh Circuit or Supreme Court authority: the petitioner is obligated to provide "citation to the conflicting case or cases" which demonstrate the need for the full Court to maintain the uniformity of its decisions. Fed. R. App. P. 35(b)(1)(A). The *en banc* petition must state in a concise sentence at the beginning of the petition why the appeal satisfies the requirement of either exceptional importance or to avoid a conflict.

Exceptional importance does *not* mean that the case happens to be exceptionally important to your client. For example, in *HM Holdings, Inc. v. Rankin,* the Seventh Circuit denied a petition for rehearing en banc after the petitioner (who failed to identify any conflict or split created by the underlying decision) utterly failed to demonstrate exceptional importance. 72 F.3d 562, 563 (7th Cir. 1995) (*per curiam*). The *HM Holdings* matter involved a claim by a land buyer that they did not receive "merchantable title," because the defendant contaminated the land. *Id.* In the petition, the appellant sought a petition for rehearing *en banc* "because in today's environmentally sensitive world the issue of 'merchantable title' to real estate and how it is practically affected by the presence of contamination on that real estate is of great importance . . . ." *Id.* The Seventh Circuit, noting the "overwhelming workload of federal courts," summarily rejected the petition, concluding that "[t]he only basis for the petition is that Rankin prefers this Court to find in her favor." *Id.* The Court further cautioned that it would impose sanctions on parties or counsel who file "similarly irresponsible petitions." *Id.*

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Cases that satisfy the requirements of FRAP 35, by their nature, tend to be matters of great consequence. For example, *Hope v. Commissioner of Indiana Dep't of Corr.,* 9 F.4th 513, 519 (7th Cir. 2021), was a case brought by six sex offenders residing in Indiana, who challenged Indiana's Sex Offender Registration Act because they had to register upon moving to Indiana despite already registering in other states previously. The Southern District of Indiana had entered summary judgment in plaintiffs' favor. *Id.* The Commissioner of the Indiana Department of Corrections appealed, and the Seventh Circuit affirmed the district court's ruling, with Judges Rovner and Wood affirming the decision and Judge St. Eve dissenting.

The Commissioner then filed a petition for rehearing en banc, on the grounds that the majority decision raised a question of exceptional importance: whether the Privileges or Immunities Clause prohibits all state laws that have a disparate impact on newer residents. *Hope,* Case No. 19-2523, Dkt. 35, Petition for Rehearing *En Banc.* The Commissioner further maintained that the panel decision conflicted "with precedents of the Supreme Court, [the Seventh Circuit], and at least one other circuit court — and threatens to invalidate scores of longstanding state laws." *Id.* Amicus curiae briefs were filed on behalf of seventeen other states, urging the court to grant *en banc* review.

The Seventh Circuit granted the *en banc* petition and vacated the panel's opinion and judgment. Ultimately, the case was heard *en banc,* and the Seventh Circuit reversed and remanded the judgment entered by the district court, with Judge St. Eve writing the majority opinion. A case of such importance and potentially broad impact, as well as the risk for conflict, undoubtedly played a role in the *en banc* petition being granted.

Typically, the granting or denial of a petition for rehearing *en banc* is a one-line order, with little indication of the thinking beyond the ruling. However, last year in *Pierre v. Midland Credit Management, Inc.,* the Seventh Circuit voted 6-4 to deny a petition for panel rehearing and *en banc* rehearing, and the four judges who voted in favor of granting the petition published a dissent. 36 F.4th 728 (7th Cir. 2022). Writing for the dissent, Judge Hamilton opined that the case (which involved whether a plaintiff who claimed she suffered emotional distress and anxiety after facing a false debt collection) presented an "important question on the extent of Congress's power under the Constitution to regulate interstate commerce [through] its power to authorize private civil remedies for statutory violations." *Id.* at 729. Judge Hamilton concluded that "the Supreme Court may need to revisit the subject," in light of the Seventh Circuit's treatment of it. *Id.* at 736. Nevertheless, the plaintiff's petition for writ of certiorari was denied. 143 S. Ct. 775 (2023).

IV. The Timing and Length Requirements for Rehearing Petitions

The deadline to file a petition for panel rehearing or rehearing *en banc* is 14 days after entry of judgment, unless that time is shortened or extended by the Court's order or local rule.[1] Fed. R. App. P. 40(a)(1); Fed R. App. P. 35(c). Although disfavored, you can file a motion to extend the time for filing either rehearing petition, which must be supported by an affidavit. 7th Cir. R. 26. If the petition for panel rehearing or rehearing *en banc* is not timely filed, then the Court will issue its mandate within 7 days after expiration of the time period. Fed. R. App. P. 41(b).

Either type of rehearing petition is not to exceed 3,900 words except by leave of the Court. Fed. R. App. P. 35(b)(2)(A); Fed R. App. P. 40(b)(1). If you decide to file both a petition for panel rehearing and a petition for rehearing *en banc,* the requests will be considered a single document for purposes of the word limit even if filed separately. Fed. R. App. P. 35(b)(3). The effect is that you will not be able to skirt the word limit by filing two separate rehearing petitions.

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V. The Petition Has Been Filed – Now What?

Once your petition is filed, the Court may request an answer to the petition in making its determination whether to grant a petition. No answer to a petition for panel rehearing or rehearing *en banc* shall be filed unless the Court requests one. *See* Fed. R. App. P. 40(a)(3); Fed. R. App. P. 35(e).

If a petition for rehearing *en banc* is filed, any Seventh Circuit judge in regular active service, or any member of the original panel that issued the decision sought to be reheard, may request for an answer to be filed. 7th Cir. Oper. Proc. 5(a). The judge must make this request within 14 days after the *en banc* petition is filed. *Id.* Within 14 days after the answer is filed, any judge entitled to request an answer may then request a vote on whether to grant the petition for rehearing *en banc. Id.*

Typically, an answer is requested prior to a request for a vote on the petition for rehearing *en banc.* 7th Cir. Oper. Proc. 5(b). However, sometimes a request for a vote on the petition is made prior to a request for an answer. *Id.* In such instances, any Seventh Circuit judge in regular active service, or any member of the original panel that issued the decision sought to be reheard, may request a vote on the petition within 14 days after the petition is filed. *Id.*

Voting on the Petition for Panel Rehearing

The Seventh Circuit handles panel rehearing petitions expeditiously. Once a petition for panel rehearing is filed, and the petition does not suggest rehearing *en banc,* it is circulated solely to the panel that issued the original decision. *See* Practitioner's Handbook for Appeals to the U.S. Court of Appeals for the Seventh Circuit at 208; 7th Cir. Oper. Proc. 5(h). The same three judges vote on the petition (without any hearing), and a majority rules. Practitioner's Handbook for Appeals to the U.S. Court of Appeals for the Seventh Circuit at 208.

Voting on the Petition for Rehearing *En Banc*

Petitions for rehearing en banc are distributed to all regular active members of the Court, including the panel that initially heard and decided the appeal. Practitioner's Handbook for Appeals to the U.S. Court of Appeals for the Seventh Circuit at 210; 7th Cir. Oper. Proc. 5(h). At this point, either a judge in regular active service or a member of the initial panel may request for a vote to be taken on the en banc request. Practitioner's Handbook for Appeals to the U.S. Court of Appeals for the Seventh Circuit at 210. If no request for a vote is made, the petition for rehearing *en banc* will be denied, and the panel's order denying the petition will reflect that. *See, e.g., Great Divide Ins. Co. v. McGee,* No. 22-1725, 2023 WL 1770451 (7th Cir. Feb. 3, 2023). If there is a request for a vote, then the petition for rehearing *en banc* will be granted only if a majority of the voting active judges vote in favor of granting the petition. Fed. R. App. P. 35(a); 7th Cir. Oper. Proc. 5(d)(1).

Once the vote is completed, the authoring judge prepares the appropriate order. 7th Cir. Oper. Proc. 5(e). If a petition for panel rehearing or petition for rehearing *en banc* is denied, minority positions will be noted in the order unless the judges in the minority request otherwise. 7th Cir. Oper. Proc. 5(e); *see, e.g., Hildreth v. Butler,* 971 F.3d 645 (7th Cir. 2020) (*per curiam*) (Hamilton, J., dissenting). However, minority positions on orders granting rehearing petitions will not be noted in the order unless requested otherwise. 7th Cir. Oper. Proc. 5(e); Notably, an order granting a petition for rehearing *en banc* will vacate the original panel's decision. *Id.*; *see, e.g., Schmidt v. Foster,* 732 F. App'x 470, 471 (7th Cir. 2018).

In the rare instance a petition for rehearing *en banc* is granted, only the Court's active members, and any Seventh Circuit senior judges who were members of the original panel, are allowed to participate in the rehearing *en banc.* 7th Cir. Oper. Proc. 5(f). Because an order granting rehearing *en banc* vacates the panel's decision, if the *en banc* Court is equally divided on the merits,

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Petitions *for* Rehearing

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then the judgment of the lower court is affirmed rather than the judgment of the original panel. Practitioner's Handbook for Appeals to the U.S. Court of Appeals for the Seventh Circuit at 210.

Oral Argument

A panel rehearing does not necessarily mean the case will be reargued. Rule 40 provides that the panel can make a final disposition of the case without re-argument, restore the case to be reargued or submitted, or issue any other appropriate order. Fed. R. App. P. 40(a)(4). Oral arguments are generally held if a petition for rehearing *en banc* is granted. The *en banc* panel may either rely on the existing briefs or order new briefing before the oral argument is held.

VI. Amicus Briefs

When submitting (or opposing) a petition for panel rehearing or rehearing *en banc,* you might find it useful to solicit amicus in support of the petition. For instance, amicus might assist in presenting new ideas, arguments, or theories not found in the petition. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC,* 976 F.3d 761, 763 (7th Cir. 2020). However, a litigant filing a rehearing petition must keep in mind important timing considerations if it wishes to have amicus support a petition. The default rule under Fed. R. App. 29(b) provides that amicus taking a position on the panel rehearing or *en banc* request must file its brief (and motion when necessary) no later than seven days after the petition is filed. *See* Fed. R. App. P. 29(b)(5). However, the Rule allows Circuit Courts to set different deadlines, and the Seventh Circuit has done so. *See* Fed. R. App. P. 29(b)(1). In *Fry v. Exelon Corp. Cash Balance Pension Plan,* the Seventh Circuit held that an amicus brief in support of a petition for panel rehearing, or rehearing en banc, must be filed on the same day as the petition. 576 F.3d 723, 725. In doing so, the Seventh Circuit noted that it has the discretion to accept an untimely filing if "the value of the potential *amicus* brief justifies the inconvenience of requiring the judges to review a case multiple times." *Id.* Parties should ensure that their petition and any potential amicus briefs in support of their petition be filed on the same day. Note, though, that this timing requirement does not apply for an amicus motion to file a brief on the merits after the Court already grants the petition for rehearing.

VII. Conclusion

Petitions for rehearing may, on some occasions, be useful to the Court. The Court wants to "get it right." But filing a petition for rehearing because you did not like the result is not going to advance your client's cause or its resources.

Notes:

[1] In civil matters involving the United States, a United States agency, or a United States officer or employee sued in an official capacity, the time to file a petition for a panel rehearing or rehearing *en banc* is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1)(A)-(C); Fed. R. App. P. 35(c).

Writers Wanted!

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

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

Preparing *to* Prepare *to* Mediate

By Thomas J. Wiegand[*]

An associate in my office was tasked with drafting an opening statement for a mediation in one of her cases. I overheard her discussing it with another attorney in the office and stuck my nose in – "You have to prepare in order to prepare." Litigators understand the legal and factual issues of their cases, and how those are marshalled to force an outcome onto the opponent. Mediation, as one form of settlement process, cannot force an outcome, and some of our honed skills are counter-productive if used reflexively. Before deciding whether to start a mediation with an opening statement, much less what you want to convey or how best to do that, you need to understand the broader negotiation landscape. Here is your guide, based on the comprehensive set of seven basic elements of any negotiation made famous by Professor Roger Fisher in *Getting to YES:*

BATNA. The first rule of any agreement that you reach, whether by mediation or negotiation, is that it must be better than what your client can achieve on its own -- Roger called this the "Best Alternative to a Negotiated Agreement," or BATNA. These are self-help options. Can your client build a product with a different technology, avoiding the need for a license going forward? Can it seek out new customers, and what will that cost? Might it help to issue a press release or garner other media attention?

The pending (or threatened) lawsuit is one piece of the self-help initiatives – and you want to know what it is worth to your client in order to know whether to give it up in a settlement. If you could run the trial 100 times, what would be the average outcome? Decision tree analysis is a good structure for estimating this expected value. Build a model of the lawsuit, through final appeal. To start, there is a damage claim and a probability. If you represent a plaintiff with a $10 million damage claim and a 50% chance of

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winning, the gross "expected value" of the lawsuit is $5 million. If the defense offers a competing damage theory, then there are three foreseeable outcomes -- $0, the defense number, and $10 million, each with a percentage chance of occurring. You can then add other issues. If there is a chance of a significant motion ending or limiting the lawsuit, that is a chance event that precedes the trial on the flow diagram. At each juncture factor in legal fees and costs, including expert fees. There are many articles and books discussing decision tree analysis. When you are finished, do you feel it fairly predicts how the lawsuit might proceed? If not, tweak it further, but recognize that precision is impossible and close is all you need.

Now create a chart as you believe the other side sees it – not just altering the estimates on the chart you created for your side, but submerse yourself and create an entirely new chart that illustrates how you, enrolled as your opponent, see the case moving forward. The more honest you are in this exercise the more you can be surprised by better understanding where your opponent is coming from – which is invaluable knowledge.

With these final models in hand, toy with the effects of changing the percentages and amounts for each branch – some changes have much larger effects on the outcome. This exercise exposes either a flaw in your structure or estimates, or it reveals what are and are not the critical events for the lawsuit. Throughout this exercise you will be surprised by facts, legal issues, or areas of expert analysis that are either more or less important than you had previously assumed, or that you had been ignoring altogether.

Interests. In a complex commercial case the main controversy involves money. Parties nevertheless also have other interests -- money now versus money later; being protected from how an award is taxed; or avoiding a public judgment that encourages others to file claims. What else is your client interested in? And again, perform the same exercise for your opponent – what motivates it? This is a creative exercise, think expansively. Some of your opponent's interests you know, but you will also generate a list of *possible* interests with question marks after each one. Continue looking for surprises.

Options. For each interest, think of different ways to satisfy it. Settlement offers the chance to accomplish acts that courts cannot achieve – warning labels, charitable donations, or funding an education initiative. How does each side see the post-lawsuit future and how might that be improved? Could a company's product line be limited or expanded? Could a trusted neutral, respected by both sides, decide a sticking issue that has been a road block? Is adverse publicity a risk, but a joint press release a potential benefit? Don't ignore the list of possible interests with question marks – for each, if this is one of their interests, what are different ways you might appeal to it? Don't be quick to evaluate ideas as they arise, list them all and evaluate later, remembering that many good ideas start as bad ones that need nurturing. Think in terms of structures at first, they can grow specificity later.

Legitimacy. Using a decision tree to value a lawsuit not only helps to clarify the case strategy on your side of the case – it also helps sharpen the legitimacy of your perspective. Gather substantive support for your views – from key documents, from the most relevant caselaw, from decisions to date in your lawsuit, from previous actions against your opponent. And understand where the support is weak or does not exist. Pounding the table and insisting your view is right does not go far in the world of sophisticated litigators and their clients. At least it shouldn't. But provide a reasoned analysis and gravity gathers around it. If the $10 million claim is seeking a royalty for past infringement of a patent, can

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you show it is calculated using the average royalty in similar recent cases? A response to the demand can of course be $0, but now your opponent will feel compelled to give a reason because it is difficult to stick to a position without reason. Is the offer $0 because of a defense? Good, get it on the table and discuss it – your opponent might be relying too heavily on it, this is a chance to educate. But $0 without a reason – simply because one strongly believes in his case -- has no ability to influence anyone. Be creative and find other legitimate bases – creative use of experts, admissions of your opponent in other cases – you are looking for things that are hard to ignore.

Often the parties will arrive at equally legitimate positions – reasoned approaches that are roughly equally supported, but are on the high or low side depending on which party is advancing it. If there is no further data or analysis that can narrow the range, then maybe you have two positions that can serve as bookends for a discussion. At some point splitting the difference is fine, but you get there by encouraging reason rather than difficult behavior.

Communication. The above five points are largely substantive, these last two are focused on process, but are equally important to consider before developing strategy for the mediation. Assess how the parties (and their attorneys) have communicated to date, and consider what you might change. In litigation your goal is to be heard by the judge or jury, and to have *them* communicate with your opponent through an adverse judgment. But in mediation your goal is to be heard by your opponent – so the first thing you do is listen. Not for a moral or philosophical reason, but pragmatism – someone who thinks they haven't been heard speaks louder and more insistently, and is even less likely to hear you. Is there a point your opponent doesn't think you understand? This often happens with lawyers in the adversarial process. So listen to them, and let them know you listened by mirroring it back to them and checking that you have stated it correctly. You clear away the block without giving up anything, and now they are more able to hear you – "The reason that does little to influence us is because …" This increases the chance of moving the conversation beyond an opponent's positional mantra.

Another reason to listen is because you have developed that list of possible interests with the question marks – you are zeroing in on what matters in this discussion, which increases your ability to imagine possible solutions. Being truly curious about those question marks makes it easier to listen. Listen for what is new to your analysis, even if only a different emphasis or priority. Don't be surprised if your opponent has not thought about its interests in as much detail as you have. You will think this through thoroughly, and sometimes find that pieces of their positions ignore their interests.

Relationship. You want to create a good *working relationship* with your opponent. Regardless of how your opponent behaves, you will be better able to achieve a settlement that meets your interests if you can be trusted, are respected, and are heard. Plan to do that by being trustworthy, by being credible and legitimate, and by listening. A bad relationship is characterized by being sloppy on the problem and hard on the people. When your opponent offers a legitimate point, recognize it – you might not agree because of facts or law that they are ignoring, but engage in a reasoned discussion. When your opponent does respond with a legitimate criterion – respond to it, you are ready because you prepared.

* * *

Now you are ready to start scripting how a mediated settlement discussion might proceed. What options might be possible, and how do you get there jointly? You are still an adversary, but you need a strategy that maximizes the chance of enticing your opponent to agree to a result that beats your BATNA. If you decide to offer an opening statement, it will be for the purpose of moving toward a goal, not because it mimics an opening statement at trial.

Ephemeral Messaging:

Understanding Key Preservation Issues in Civil Litigation

By Philip J. Favro, ed.[*]

Consider the following scenario. You are representing an organization in a business litigation dispute where the client's representative ("client") regularly communicates with you by text message. You have repeatedly advised the client to stop sending text messages and stick to email for written communications. The client — a younger lawyer and your primary in-house contact — is apologetic, yet persists on texting counsel. One day, you receive a message from the client asking that you start using the mobile phone application Signal for messaging. You have heard of Signal, but are not really acquainted with its functionality. You read in the description that Signal has "end-to-end encryption," though you are not entirely sure what that means. After lecturing the client again about using email, you relent, download the application, and begin corresponding with the client over Signal.

After some time, you notice that Signal offers a "disappearing messages" feature, which seems alarming. You begin pondering the precise import of such a feature: "Whose messages are disappearing and how? If this feature is enabled, will our discussions vanish? Am I the only person with whom the client is communicating on Signal? What if the client is messaging witnesses in the litigation and those messages disappear?"

Reacting to these questions, you conduct an internet search to find out more about Signal. After learning that Signal is an "ephemeral messaging" application, you recall that motions *in limine* and jury

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instructions must be filed in the next few hours in an unrelated matter. Sighing, you think to yourself, "I'll get back to this, maybe in a few days or next week when things 'calm down.'"

Ephemeral Messaging: Why Does it Matter?

Following up on the scenario above, consider taking the following self-test on your knowledge of the issues in play:

- Have you heard of Signal?
- Have you heard of ephemeral messaging or disappearing messages?
- Do you know what end-to-end encryption is?
- Do you know if your organizational or individual clients you use these apps?
- Do you know if your adversaries are using these apps?
- Do you think waiting "a few days" or a week will make much of a difference in ensuring that relevant information is preserved for a lawsuit?

This article examines issues surrounding the preservation of relevant ephemeral messages in civil litigation. In particular, I discuss what is ephemeral messaging, why organizations and individuals use this technology, and what are some key issues regarding the preservation of ephemeral messages of which counsel should be aware.[1]

What is Ephemeral Messaging?

Ephemeral messaging refers to messaging applications that allow users to delete message content — including text, media, and metadata — within a brief time. While application developers may offer other features with their technologies, the hallmark of ephemeral messaging is the use of end-to-end encryption ("E2E Encryption"), together with the ability to delete message content both from the sender's and the recipient's applications after a short time. Although messages are colloquially characterized as being "deleted," technically the encryption keys that are required to decrypt and read message content (as part of the E2E Encryption process) are what is actually destroyed. Eliminating the ability to access message content for all parties to a communication by wiping the encryption keys after a set period of time — particularly through automated means — is where ephemeral messaging differs from traditional text messaging.

E2E Encryption also helps prevent the distribution of message content beyond the sender and recipient. E2E Encryption (with each point of a communication known as an "endpoint") safeguards message content, allowing only the sender (the initial endpoint) and the recipient (the other endpoint) to view the message. With E2E Encryption, users can more readily shield messages from third parties, including the provider of the ephemeral messaging service.

Ephemeral messaging applications are not homogenous; they offer a variety of features that impact the effectiveness of eliminating message content and protecting user confidentiality. The following five categories delineate some of the principal features associated with these applications.

1. "Always Ephemeral" Applications

Applications whose messages are always set to disappear and be protected by E2E Encryption can be categorized as "Always Ephemeral." Users may not disable the automated "deletion" countdown clock after the message is sent. Nor do they have the option of communicating without E2E Encryption enabled.

Another feature of "Always Ephemeral" applications is the automated deletion of message content, *i.e.,* the encryption key required to access the message. Once a message is sent, neither the sender nor the recipient may modify the scheduled deletion of the key or the ability to subsequently access the exchanged message. It is worth noting that external devices such as screenshots or cameras may be used to capture an image of the message and thereby circumvent the automated deletion feature.[2]

Examples of "Always Ephemeral" applications include Wickr and Confide.

2. "Enabled Ephemerality" Applications

Another class of applications includes those whose ephemerality features may be enabled. The default feature of these applications — including Signal, WhatsApp, and Telegram — is to indefinitely

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retain exchanged messages like a traditional messaging provider. While messages exchanged by these applications may (Signal and WhatsApp) or may not (Telegram) have E2E Encryption always enabled, they — once the E2E encryption and ephemerality features are selected — will automatically "delete" just like those exchanged through "Always Ephemeral" applications.

3. Applications with "After the Fact" Ephemeral Functionality

Certain messaging applications allow users to recall or delete messages after they have been sent. These applications — such as Facebook Messenger, iMessage, and WhatsApp —differ from "Always Ephemeral" and "Enabled Ephemerality" applications because they do not automate the disposition of encryption keys at a predetermined time. Instead, depending on the application, the sender may be able to "unsend" a previously sent message and thereby make it unavailable to the recipient (Facebook Messenger, iMessage), or delete the message from the sender's and the recipient's devices (Facebook Messenger, iMessage, WhatsApp).[3]

4. Applications Whose Ephemerality Features May Be Bypassed or Disabled

To a certain extent, users can circumvent any application's ephemeral features by capturing message content through external devices. Nevertheless, there are particular applications — Snapchat and WhatsApp, for instance — that permit users to disable or bypass ephemerality features. Users may disable ephemerality features with Snapchat by saving images and video to Snapchat's servers.[4] WhatsApp users may bypass ephemerality features by saving media including images and videos to their device's photo application or backing up messages in cloud storage.

5. Applications with Enterprise Grade Functionality

Ephemeral messaging applications are generally built with consumers in mind. However, certain developers — most prominently Wickr, but also others including Confide and DingTalk — offer enterprise grade functionality for corporate users. With enterprise functionality, organizations can set message retention times, customize and stagger deletion periods for different groups and users, and provide legal hold functionality. All of which should enable an organization to more readily control enterprise-sponsored uses of ephemeral messages.

Who Uses Ephemeral Messaging?

Organizations have turned to ephemeral messaging given the technology's security features. With E2E Encryption and automated deletion, companies can offer a work-sanctioned, digital environment for discussions that stand a greater chance of remaining confidential than they would over email or traditional text messaging. These features make ephemeral messaging particularly useful for companies subject to data protection regimes that require employee and consumer personal information found in communications to be minimized and protected.

While organizations have good faith reasons for asking employees to use work-sanctioned ephemeral messaging, employees often use unapproved consumer ephemeral messaging applications for back-channel discussions hidden from company officials. Those communications may range from innocuous exchanges about extracurricular activities and logistics to substantive work and unlawful conduct.

Outside of work, individuals have turned to ephemeral messaging so they can speak in confidence about any number of items, from politics to romance to illicit activities. Further to that last

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point, ephemeral messaging users include terrorists, drug traffickers, and sexual predators.

What are the Key Issues Regarding the Preservation of Ephemeral Messages in Civil Litigation?

Beyond the realm of criminal proceedings, the use of ephemeral messaging has obvious implications in civil litigation. While there are collection and production challenges with this source of data, the key issues for lawyers to consider in connection with ephemeral messaging focus on preservation.

Do Relevant Ephemeral Messages Need to be Preserved for Discovery?

The first issue lawyers must consider is whether a duty even exists to preserve relevant ephemeral messages for anticipated or pending litigation. That this is even an issue may be surprising. Some commentators have asserted that ephemeral messages should fall outside the ambit of discovery because as a practical matter, they have a short duration and are akin to in-person conversations or telephone calls.[5] Nevertheless, ephemeral messages that are stored even temporarily fall within the "expansive" definition of "electronically stored information."[6] When a party — be it an individual or an organization — retains a relevant ephemeral message even for a short period after a duty to preserve attaches, that message generally should be preserved for litigation.

Nevertheless, preservation decisions may need to be tempered by notions of reasonableness and proportionality. Counsel — and courts — should consider whether *every* relevant message should be preserved, particularly where corporate parties use ephemeral messaging to comply with data protection regimes.[7] This issue will turn on the circumstances involved in a particular matter.

Key Considerations Affecting Preservation Issues

This leads into a discussion of factors that can affect a party's preservation of relevant ephemeral messages. Understanding these factors can help lawyers better advise their clients on the issues.

As an initial matter, courts should not reflexively conclude that a party spoliated relevant evidence simply because it used ephemeral messaging. Instead, courts should explore when a party began using ephemeral messaging and the existence of policies (if any) demonstrating a legitimate business need for such use. Understanding the "when" and "why" regarding ephemeral messaging use will help courts determine whether a party had a good faith reason for adopting the technology or whether it was implemented for some nefarious purpose. For example, courts may reasonably infer culpable intent when parties allow custodians on legal hold in a lawsuit to begin using ephemeral messaging, or fail to either disable automated deletion or otherwise keep relevant messages for custodians on legal hold.[8]

In contrast, a party can better justify its use of ephemeral messaging if it has deployed the application well before a duty to preserve affects certain custodians of relevant information. A party can further strengthen its position if it previously implemented a use policy for ephemeral messaging and formulated actionable risk mitigation measures to address issues regarding its use. All of which can help guard against the perception that ephemeral messaging was implemented for an improper purpose.

Another key inquiry regarding preservation issues focuses on the features the application offers. Parties should examine whether the technology at issue allows for retention of ephemeral messages once a legal hold is in place. For organizations, enterprise grade technologies may help them meet legal hold requirements while concurrently satisfying data protection standards such as data

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minimization. Individual parties that use "Enabled Ephemerality" applications may disable the automated deletion feature once a duty to preserve ripens so they can continue to communicate while retaining relevant messages.[9] These respective applications stand in sharp contrast to "Always Ephemeral" consumer technologies that do not allow users to circumvent automated deletion to preserve relevant messages.

A final issue to consider is the timeliness of a party's actions in pausing the automated deletion of relevant communications. Because ephemeral messages are often dynamic — *i.e.,* they may be quickly deleted by the technology or its users — lawyers should advise clients to promptly disable features that affect the retention of relevant messages. This does not mean that either individual or corporate parties must eliminate *all* aspects of their ephemeral messaging use. Notions of proportionality caution against overly broad preservation measures, particularly for parties who are obligated under regulatory schemes to observe data minimization principles. Nevertheless, a party's ability to quickly cease the automated disposition of encryption keys causing relevant messages to disappear will be able to demonstrate more readily that it has taken "reasonable steps to preserve" relevant information pursuant to Federal Rule of Civil Procedure 37(e).

Conclusion

Preservation issues surrounding ephemeral messaging will not remain static. As technology continues to develop, applications will likely offer different features that may affect the preservation of relevant content. Nor is preservation the only issue impacting the discovery of such information. Counsel should also anticipate issues with collection, form of production, and authentication. Even as case law develops on those issues, the paramount inquiry on ephemeral messaging will likely remain focused on exploring answers to the "when," "why," and "what" issues regarding preservation. Lawyers who proactively counsel clients on these issues, together with the key considerations discussed herein, will be better situated to handle the complexities of ephemeral messaging preservation.

Notes:

[1] The *FMJA Bulletin* published an earlier, modified version of this article in the September 2022 issue.

[2] *See United States v. Engstrom,* No. 2:15-cr-00255-JAD-PAL, 2016 WL 2904776 (D. Nev. May 16, 2016) (noting that the ephemeral messaging application's screen protection feature in that case could be sidestepped by taking "pictures of texts with a camera to document them.").

[3] *See Fast v. GoDaddy.com LLC,* 340 F.R.D. 326 (D. Ariz. 2022) (imposing sanctions on plaintiff after finding she used Facebook Messenger's "unsend" feature to eliminate a critical message relevant to her claims).

[4] *Doe v. Purdue Univ.,* No. 2:17-CV-33-JPK, 2021 WL 2767405 (S.D. Ind. July 2, 2021) ("Snapchat allows users to save content to their Memories folder in the application, and that these files are saved in both the Memories folder and on Snapchat's servers indefinitely — unless, of course, they are otherwise deleted by the user.").

[5] *See, e.g.,* Agnieszka McPeak, *Self-Destruct Apps: Spoliation by Design?,* 51 Akron L. Rev. 749, 760-61 (2018).

[6] Fed. R. Civ. P. 34, committee note to 2006 amendment ("Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. The rule covers . . . information 'stored in any medium,' to encompass future developments in computer technology").

[7] *See* The Sedona Conference, *Commentary on Ephemeral Messaging,* 22 Sedona Conf. J. 435, 485 (2021).

[8] *See, e.g., WeRide Corp. v. Kun Huang,* No. 5:18-cv-07233, 2020 WL 1967209 (N.D. Cal. Apr. 24, 2020) (imposing terminating sanctions for defendants' use of ephemeral messaging after the court's issuance of a preliminary injunction).

[9] *But see Pable v. Chicago Transit Auth.,* No. 19 CV 7868, 2021 WL 4789028 (N.D. Ill. Sept. 13, 2021) (refusing to order plaintiff to disable the automated deletion feature on his Signal application since those messages would disappear anyway if nonparties with whom plaintiff communicated had activated that feature).

Cyber-*Liability for the* C-Suite:

Mitigating the Risks of Senior Management (and Potentially Directors) Being Held Personally Accountable for Data Breach Incidents

*By Charles R. Ragan and Martin T. Tully**

Introduction

In the field of data protection and cybersecurity, there are Givens and there are Probabilities. Among the Givens are that information has value and that bad actors will continue to attack organizations that are rich in data. Another Given is that laws and regulations that set penalties for organizations and individuals if personal data is lost in a cyberattack have expanded recently, and it is probable that litigation stemming from and relating to data breaches will escalate in this and coming years.

In 2022, two cases eliminated all doubt that the C-suite was not exempt from personal accountability for inadequate data protection and security measures. And it is highly probable that regulators and counsel for consumers will target and seek to hold senior management accountable for security lapses that expose personal information.

There are a variety of tactics and techniques to reduce (but not eliminate) the probability and impact of a successful cyberattack. This article discusses a different issue – the evolving risks to senior management and potentially even directors of being held personally accountable in the event of a successful cyberattack – and explores some strategies to mitigate those risks.

I. Recent Cases Assessing Personal Responsibility for an Organizational Data Breach

The Cover-up Is Sometimes Worse Than The Crime

In October 2022, a federal jury convicted Joseph Sullivan, the former Chief Security Officer of Uber, of obstructing Federal Trade Commission (FTC) proceedings and misprision of felony. The facts were extreme, and some might be inclined to dismiss the case as one of bad facts making sensationalized law.

The evidence at trial established that Sullivan participated in a presentation to the FTC in March 2016 about a then-recent hack and testified in November 2016 before the FTC about that incident and Uber's data security practices. Ten days after that testimony, Sullivan learned of another hack of Uber involving

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records of approximately 57 million Uber users. In response to the second hack, Sullivan, who was an attorney, had served as a federal prosecutor, and was a founding member of the Computing Hacking and IP Unit in the Northern District of California, did not alert federal authorities as required. Instead, while Sullivan's team's analysis of the second breach included a comment that it "may also play very badly based on previous assertions" to the FTC, Sullivan told his team that they needed to keep information about the second hack tightly controlled and that they should act as if their investigation did not exist.

Sullivan also arranged to pay the hackers a $100,000 ransom and have them sign nondisclosure agreements promising that they had not and would not disclose anything about the company's technology vulnerabilities. The court in January 2023 denied Sullivan's motion for acquittal or a new trial.[1] He faces a maximum of five years in prison for the obstruction charge, and a maximum three years in prison for the misprision charge.[2]

A Sobering Outcome For Drizly's CEO

The second recent case involving personal accountability in the C-suite was the FTC proceeding involving Drizly, LLC, an online company that facilitates the delivery of alcohol from local retailers to customers, and its CEO, James Cory Rellas ("Rellas"). In that proceeding, the FTC alleged that the company's security failures led to a data breach exposing personal information of about 2.5 million consumers, and that Rellas "formulate[d], direct[ed], or control[led]" the policies and practices of Drizly.

The matter concluded in January 2023 with the entry of a consent Decision and Order with the usual non-admissions but imposing extensive obligations requiring the company to maintain a comprehensive information security program, have biennial information security assessments from an independent third party, limit data retention, file periodic compliance reports and annual certifications, and keep certain records for 20 years.

The consent decree also requires Rellas to file compliance reports – even if he leaves Drizly. Moreover, the consent decree obligates Rellas for 10 years to ensure that any business of which Rellas is a majority owner, or functions as a CEO or other senior officer with direct or indirect responsibility for information security have a comprehensive information security program equivalent to that mandated in the decree.

Ill Winds Blow For Some Officers and Directors

A third recent case seeking to hold officers and directors liable stemmed from the cyber breach at SolarWinds Corporation that occurred when the Russian Foreign Intelligence Service injected a malicious code into the company's software, which impacted approximately 18,000 Solar Winds customers. The breach was discovered in late 2020. Securities class actions alleging fraud and naming CEO Kevin B. Thompson and Chief Information Security Officer (CISO) and VP for Security Architecture Timothy Brown ensued and were consolidated in the Western District of Texas. The complaint alleged that defendants made materially false and misleading statements about SolarWinds' cybersecurity measures, including the company's efforts to ensure the security of its software products and customers' data.

In March 2022, the court found that plaintiffs had failed to allege Thompson's scienter but allowed the case to proceed against other defendants, including the CISO. A proposed $26 million settlement

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has been preliminarily approved with a final hearing scheduled for July 28, 2023.[3] In an 8-K filing with the SEC filed November 3, 2022, the company stated its expectation that the settlement payment would be funded entirely by applicable directors' and officers' liability insurance.

In the same 8-K filing, however, the company announced that, on October 28, 2022, the enforcement staff of the SEC provided SolarWinds with a "Wells Notice," stating that the staff had made a preliminary determination to recommend an enforcement action against the company alleging violation of the securities laws with respect to its cybersecurity disclosures and public statements, as well as its internal controls and disclosure controls and procedures.

Also, a separate derivative action was filed in Delaware state court naming Thompson and 12 SolarWinds directors, alleging they failed to exercise their oversight duties so as to avert the breach – a so-called *Caremark* claim, stemming from a 1996 Delaware case.[4] The Vice Chancellor dismissed the SolarWinds derivative complaint in September 2022, finding that plaintiffs had failed to present credible allegations that defendants allowed the company to violate the law or ignore any red flags indicative of scienter. Rather, the court noted that the company had established two subcommittees of the board of directors with responsibility for overseeing corporate governance risks including cybersecurity, one of which received a cybersecurity briefing in February 2019.[5]

The derivative plaintiffs have appealed to the Delaware Supreme Court, arguing in part "[t]he nominal delegation to board committees of oversight concerning a 'mission critical' risk does not constitute a 'reporting system' if neither of those committees actually do anything for years on end" and that the board as a whole "did absolutely nothing to monitor or ensure reporting on cybersecurity issues."[6]

In support, they relied upon the 2019 Delaware Supreme Court opinion in *Marchand v. Barnhill,* which stemmed not from a cybersecurity incident but from a listeria outbreak at an ice cream company. There the Supreme Court reversed a Chancery Court dismissal, stating that a *Caremark* claim could succeed "when 'the directors [completely] fail[ ] to implement any reporting or information system or controls[,] or … having implemented such a system or controls, consciously fail[ ] to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.'" 212 A. 3d 805, 821.

Similar arguments led to a 2021 Delaware court-approved settlement requiring Boeing to make a $237.5 million payment and adopt corporate governance enhancements. In that case, the claim was that the Boeing board of directors had failed in its oversight responsibilities regarding the mission-critical aircraft design and development aspects of Boeing's business.[7]

* * *

These recent cases heighten the probability that future cases will allege boards should be held accountable for failure to perform appropriate oversight responsibility over mission-critical cybersecurity measures, and the possibility that courts may impose such liability.

Perhaps more significant, given the extent to which imminent new state and federal regulations and newly revised international standards (which we discuss below) increase senior management's responsibility for adequate cybersecurity protections, it is possible that courts may look to the recent developments as establishing a standard of care and impose liability based on failure to meet legal obligations and not the higher burden required to prove a *Caremark* claim.

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II. New Regulations and International Standards Present New Risks for Organizations and Senior Management

State Legislation and Regulations

We have written elsewhere about comprehensive data protection and cybersecurity legislation enacted in five states and corresponding regulations taking effect at different times during 2023.[8] More states are expected to follow suit. Some of these statutes include rights of private action, so litigation alleging failure to meet the requirements of these laws and the regulations adopted under them – and naming senior management – is possible if a cyber incident results in the exposure of personal information.

At least one of the regulations expected to take effect in 2023 will increase the scope of an organization's required cybersecurity oversight. Specifically, California's Privacy Protection Agency will require that an organization enter into new agreements – having specific provisions – with service providers and contractors to which personal information the organization collects is disclosed and take reasonable and appropriate steps to ensure that those providers and contractors adhere to the revised act, which may include permitting scans of the provider's systems, assessments by an independent third party, and operational testing every 12 months.[9] In February 2023, the agency requested public comment on content to be included in further regulations it may issue regarding such monitoring activities.

NYS Department of Financial Services Regulation

Among regulations of administrative agencies scheduled to take effect this year are those of the New York State Department of Financial Services, whose authority extends broadly to all entities with a New York state license under banking, insurance, or financial services laws. As proposed, the regulations would require each covered entity to implement and maintain a written policy or policies, approved at least once annually by a senior officer or the company's board or an appropriate committee thereof, setting forth the entity's policies and procedures for the protection of its information systems and nonpublic information stored on those systems. The policies and procedures must be based on the entity's risk assessment covering more than a dozen specified items.

Specific duties are imposed on a CISO (*see* 23 NYCRR 500, section 500.4) and, if the entity has a board of directors or equivalent, the board (or an appropriate committee) must exercise oversight of and provide direction to management on the entity's cybersecurity risk management, require the development, implementation, and maintenance of a cybersecurity program, and have sufficient expertise and knowledge (or advice from qualified persons) to exercise oversight over cybersecurity risk management.

Cybersecurity programs must ensure a complete, accurate, and documented asset inventory to include a method to track information for each asset covering owner, location, classification of sensitivity, support expiration date, and recovery time requirement (section 500.13), a detailed business continuity and disaster recovery plan (section 500.16(a)(2)), and notification of certain cybersecurity events which must be given **no later than 72 hours** from determination of the occurrence (section 500.17(a)). Some observers have posited that other agencies will issue similar regulations.

SEC Regulations

The most highly anticipated (and broadly applicable) regulations to take effect in 2023 are the SEC's revised regulations regarding cybersecurity disclosures required of public companies. The SEC proposed those rules in March 2022 (and in February 2022 published rules applicable to registered advisers and funds). Final action on both of these proposals is expected in April 2023.[10]

Some early articles about the proposals pertaining to public companies focused on the requirement to file an SEC Form 8-K **within four business days** after a company determines that it has experienced a material cybersecurity incident (where cybersecurity incident is broadly defined). Public companies will also have to submit an 8-K if and when cybersecurity incidents become material in the aggregate.

More pertinent for current purposes, the proposals expand on the substance of cybersecurity disclosures that an organization must make in 10-Ks and 20-Fs, to include (among others):

- Whether the company has policies and procedures: to identify and manage cybersecurity risks and threats (including operational risk,) and for risk assessment

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of third-party service providers (including cloud providers), incident response, disaster recovery, and improvements in response to incidents;

- Whether the company engages assessors or other third parties in connection with any cybersecurity risk assessment program and whether it has policies and procedures to oversee and identify cybersecurity of third-party providers that have access to the organization's employee or customer personal information;
- Management's expertise in cybersecurity issues, including its role in assessing risk and implementing appropriate policies and procedures;
- Details on the organization's chief information security officer and internal lines for communications with the CISO;
- Whether, how, and how frequently the board is informed of and considers cybersecurity risks, and how those risks relate to or may impact the organization's business strategy, financial outlook, or financial planning; and
- Identification of board members with cybersecurity expertise with "such detail as necessary to fully describe the nature of the expertise." The proposed rules also include factors potentially applicable regarding whether a board member has cybersecurity expertise.

These revised regulations clearly portend that the agency will scrutinize the roles of senior management – including particularly the CISO if there is one – with regard to cybersecurity protections when it investigates a company following a cybersecurity breach that exposes personal information of the company's customers or employees.

Updated ISO 27001 regarding Information Security Management Systems

One final recent development that may have considerable impact on future court and regulatory actions seeking to hold senior management (and board members) accountable for inadequate data protection and cybersecurity policies and procedures was the October 2022 update to ISO 27001. While companies seeking ISO 27001 certification need not have in place until 2025 all the new controls included in this standard, it is probable that the adequacy of cybersecurity oversight will soon be measured against the standard if for no other reason than that ISO "was founded with the idea of answering a fundamental question: 'what's the best way of doing this?'"[11]

The revised standard adds controls for managing data in the cloud, data masking, enhanced monitoring, and deleting information to align with data minimization requirements. As with its predecessor, revised ISO 27001 requires top management, which the parent ISO 27000 defines as the "person or group of people who directs and controls an organization at the highest level," to review the organization's information security management system (ISMS) at planned intervals to ensure its continuing suitability, adequacy, and effectiveness.

The revision adds a requirement that top management's review include consideration of changes in the needs and expectations of interested parties relevant to the ISMS, which the parent ISO 27000 defines as persons or organizations "that can affect, be affected by, or perceive [themselves] to be affected by a decision or activity."[12]

I. Takeaways from Recent Developments

The new state and agency regulations, and the revised ISO 27001 align around an important phenomenon: the evolution and explosion of organizational use of cloud service providers to store important personal information that organizations collect.

All these recent pronouncements recognize and require that an

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organization's data protection and cybersecurity policies and procedures should be extended to cloud service providers and third parties holding the personal information an organization collects. They also dictate data minimization, and expect that senior management (including boards of directors) will take steps to ensure the organization implements, monitors, and maintains a comprehensive data protection and security program with appropriate improvements over time.

These expectations are extensive. If a cyber incident results in exposure of customer or employee personal information, members of senior management and in some cases directors may expect that private parties or regulators will seek to hold those senior personnel accountable for the security failures. And, as the *Drizly* order demonstrates, the remedies imposed may follow the executives for many years. Lastly, officers and directors should not assume insurance will cover such risks: As the CEO of Europe's Zurich Insurance recently observed, as cyberattacks grow, they will become "uninsurable."[13]

II. Strategies to Mitigate the Increasing Risks of Personal Liability

There are several strategies an organization may consider and pursue now to mitigate these risks. For example, to achieve compliance with the recent spate of state legislation and prepare to make rapid notifications regulators will require, an organization could:

- Conduct an **assessment** to determine the systems (on-premises and in the cloud or with other contractors) that hold personal information the organization collects and evaluate vulnerabilities and controls of those systems;
- Evaluate the organization's current state of its data protection and security policies and procedures in comparison to what these recent developments require, and the comprehensive program mandated in the *Drizly* order;
- Update policies and procedures as appropriate in light of the evaluative comparison; and
- Provide cybersecurity awareness training for all personnel as well as training about the organization's data protection and security.

To prepare to meet the quick-notification requirements of the new regulations, an organization could:

- Develop (or update as appropriate) a Playbook for responding to a cybersecurity incident, and include among other things clear duties and responsibilities, decision and notification trees, and timelines for all steps in the response; and
- Provide enhanced training including tabletop exercises for all personnel with responsibilities for responding to a breach, including senior management.

To help mitigate the risk of senior management or directors being held individually accountable for the consequences of data breaches, the organization should:

- Identify who among senior management and on the board of directors (or equivalent) has expertise in cybersecurity measures or look to add or affiliate with a resource with such expertise;
- Clearly define within the organization which individuals have what responsibilities for developing, implementing, monitoring, and maintaining the information security system, and who has oversight responsibilities;

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- Ensure that the board of directors (or equivalent) receives regular briefings on cybersecurity risks and requirements and the organization's policies and procedures for meeting its legal obligations with respect thereto;

- Task one or more board committees with responsibility for overseeing the organization's data protection and cybersecurity policies and procedures, and for reporting to the board as a whole periodically on cybersecurity issues;

- Stay abreast of relevant trends and developments in the cybersecurity space with an eye toward reasonably tracking to industry standards; and

- Review directors' and officers' insurance policies to ensure that cyber risk exposure is adequately addressed. Insurers can also incentivize better cybersecurity measures by pricing policies based on the effectiveness of cybersecurity programs.

* * *

For more information on the matters discussed in this article, please contact Martin Tully at mtully@redgravellp.com or Eliza Davis at edavis@redgravellp.com.

Notes:

[1] 3:20-cr-00337-WHO, Dkt. No. 250 (N.D. Cal. Jan. 11, 2023)

[2] *See* https://www.justice.gov/usao-ndca/pr/former-chief-security-officer-uber-convicted-federal-charges-covering-data-breach.

[3] Dkt. 102, Case 1:21-cv-00138-RP, filed Feb. 7, 2023.

[4] *In re Caremark Int'l Inc. Derivative Litig.,* 698 A.2d 959, 967-68 (Del. Ch. 1996).

[5] *Construction Industry Laborers Pension Fund v. Bingle,* Case No. 2021-0940, 2022 WL 4102492 at *3-4 (Del. Chan., Sept. 6, 2022) (unpublished).

[6] https://www.law360.com/articles/1562965/solarwinds-shareholders-challenge-toss-of-data-hack-suit.

[7] https://www.law360.com/articles/1467870/chancery-oks-record-237-5m-boeing-737-max-damage-deal.

[8] *See* https://www.redgravellp.com/consumer-privacy-laws-taking-effect-2023.

[9] §7051(a)(7) of the regs. Cal. Code Regs., title 1, §7051(a)(7).

[10] *See* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=3235-AM89 and https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=3235-AN08.

[11] *See* https://www.iso.org/benefits-of-standards.html.

[12] For more information about the revised ISO 27001, see "Updated ISO Standards Require Enhanced Information Governance."

[13] *See* https://www-pymnts-com.cdn.ampproject.org/c/s/www.pymnts.com/cybersecurity/2022/zurich-insurance-ceo-cyberattacks-will-be-uninsurable/amp/.

Upcoming Board *of* Governors' Meetings

Upcoming meetings of the Board of Governors of the Seventh Circuit Bar Association will be held on:

Friday, September 8
4 P.M. Central

Lingering *Implications*

OF THE *USA GYMNASTICS* CASE

By Jeff Bowen[*]

In recent years, courts around the country have faced significant numbers of claims arising out of sexual abuse, including historical abuse in which survivors have been granted statute-of-limitation "windows" to bring claims for abuse suffered years ago, as well as institutional scandals involving patterns of abuse by individuals in positions of power over vulnerable individuals. These claims also give rise to complex insurance coverage issues, as survivors seek compensation for the abuse they suffered, and the institutions accused of failing to prevent the abuse turn to their insurers. Last year, the Seventh Circuit made a significant contribution to insurance coverage cases addressing sexual abuse claims in *USA Gymnastics v. Liberty Insurance Underwriters, Inc.,* 27 F.4th 499 (7th Cir. 2022). Not only did it expand the discussion with respect to different types of insurance coverage for these claims, but it also addressed several critical issues that frequently arise in these cases, including the nature of "wrongful acts" on the part of the relevant institutions, how different instances of abuse are "related," and when congressional investigations can trigger insurance coverage. While Insurance coverage practitioners should review this case, of course, it also has significant implications for other areas of law, including holdings on relatedness and the nature of governmental investigations.

I. Background

At this point, the underlying allegations involving Larry Nasser and USA Gymnastics are well known. Nasser was a professor and physician at Michigan State University who became heavily involved with USA Gymnastics over the course of several decades beginning in 1987. *Id.* at 507-08. He spoke at conferences, treated many athletes, and traveled with the team. He used his position to gain access to female athletes, and he sexually assaulted hundreds of victims, often under the guise of providing medical

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care. In 2016, following governmental investigations in response to athlete complaints and a story in the *Indianapolis Star* detailing allegations by two athletes, MSU fired Nasser. He was arrested in December and convicted the following year in federal court of possessing child pornography. He also pled guilty to ten counts of criminal sexual abuse in two Michigan state court cases. *Id.* at 508.

USA Gymnastics faced several lawsuits and governmental investigations arising out of the Nasser abuse. As a result, the organization sought insurance coverage and in 2018 sued several insurers to enforce their duty to defend and to cover other expenses arising out of the Nasser-related claims. After USA Gymnastics filed for bankruptcy, the insurance coverage issues were addressed in an adversary proceeding before the bankruptcy court.

II. Coverage for Sexual Abuse Claims

The *USA Gymnastics* case illustrates several important issues regarding insurance coverage for sexual abuse claims. Coverage cases involving sexual abuse claims have increasingly appeared on the dockets of federal courts in recent years, often in the context of religious or educational institutions that employed individuals who engaged in abuse. While insurance coverage claims may be filed in state court, insurers are often able to remove to federal court on the basis of diversity jurisdiction, and claims may also wind up in federal court when, as here, the institution has been forced to file for bankruptcy. *See, e.g., In re Boy Scouts of America and Delaware BSA, LLC,* No. 20-10343-LSS, --- B.R. ----, 2023 WL 2662992 (D. Del. Mar. 28, 2023) (affirming confirmation of Chapter 11 plan over objections of various insurers); *Roman Catholic Diocese of Rockville Centre, N.Y. v. Arrowood Indem. Co.,* No. 1:20-cv-11011 (JLR), 2022 WL 17593312 (S.D.N.Y. Dec. 13, 2022) (granting insurer motion to compel discovery after withdrawal of reference from bankruptcy court).

Although different insurance policies may apply to these claims, including recently developed specialized coverage for sexual abuse, most institutions seek coverage under commercial general liability (CGL) policies, particularly when facing claims for abuse that happened long ago. These policies generally cover claims for bodily injury caused by an accident or occurrence that happened during the policy period, subject to certain exclusions. Coverage for the acts of the individual abusers themselves is generally not available, whether because intentional abuse does not constitute an "accident" or because of a specific exclusion barring coverage for expected or intended injury. The institutions themselves, however, often face claims for negligent hiring or negligent supervision, for which coverage may be available. *See, e.g., Interstate Fire & Cas. Co. v. Archdiocese of Portland,* 35 F.3d 1325, 1329 (9th Cir.1994) (holding that a negligently supervised priest's repeated molestations constituted one "occurrence" per policy period). Coverage in these cases often may turn on the level of awareness within the institution of the abuse and, in effect, whether the institution knew or should have known that it was likely to recur. *Diocese of Winona v. Interstate Fire & Cas. Co.,* 89 F.3d 1386, 1394 (8th Cir. 1996) (noting evidence that the "Diocese knew or should have known that Adamson's continued sexual abuse was highly likely to reoccur" and holding that, as a matter of Minnesota law "there was no occurrence within the meaning of the Diocese's insurance policies"). Many cases dealing with historical abuse also turn on the ability of the parties to locate a copy of a many-decades-old policy. Because a policyholder has the initial burden to establish the terms of the policy, these "lost policy" cases often focus on whether the insured can provide sufficient circumstantial evidence of insurance, such as evidence of premium payments and standard insurance industry policy forms from the period. *In re Catholic Bishop of N. Alaska,* 414 B.R. 552, 553-54 (D. Alaska. Bankr. 2009) (concluding the insured had not "produced sufficient evidence of the existence, terms and conditions of liability coverage to carry its burden of persuasion").

In this case, by contrast, USA Gymnastics sought coverage under a D&O policy issued in 2016, which provided coverage for a Claim for a Wrongful Act first made during the policy period, subject to certain exclusions. Public company D&O policies may limit coverage for entities to securities claims and similar claims, but private D&O policies, like the one here, tend to cover a much broader range of claims. Coverage turned on three issues: (1) whether the claim was first made in the policy period; (2) whether coverage was excluded as "any way related to" a dishonest act or willful violation of law; and (3) whether some of the government's investigations at issue qualified as "Claims" under the policy. Each of these issues has implications for future cases in the Seventh Circuit.

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III. When the Claim was Made and the Request for Additional Discovery

The Court first addressed insurer's demand for additional discovery under Federal Rule of Civil Procedure 56(d) in order to challenge the timing of the Claim. Liberty's policy required that the Claim be made during the policy period, and Liberty had argued that a pair of interviews conducted by the FBI prior to the policy period amounted to a Claim. The bankruptcy court disagreed, as did the Seventh Circuit, noting that the policy stated that a Claim would be "deemed made" when the insured first received a written demand, complaint, indictment, notice of charges, or order of formal investigation." *Id.* at 513. Here, the Court held, FBI interviews did not involve any of those documents.

More significantly, in a section relevant for general practitioners as well, the Court rejected the insurer's argument that it should have been entitled to additional discovery under Rule 56(d) to explore the nature of the FBI's activities before the policy period. The Court noted that Liberty had failed to file an affidavit under Rule 56(d) before the bankruptcy court, which independently justified the district court decision not to permit additional discovery, regardless of whether it had been requested. *Id.* at 514 (citing *Kallal v. CIBA Vision Corp., Inc.,* 779 F.3d 443, 446 (2015)). Liberty argued that it could not have filed such an affidavit because the parties never held the required Rule 26(f) discovery conference before the bankruptcy court issued its decision, but the panel held that Liberty could have pushed for such a conference or filed an affidavit anyway. *Id.* at 514. Liberty also argued that the bankruptcy rules *required* the district court to consider additional evidence when reviewing bankruptcy court recommendations, given Liberty's objections and its request for additional discovery. The Court acknowledged that the Seventh Circuit had not yet addressed whether Bankruptcy Rule 9033(d) relating to review of bankruptcy court recommendations, or the parallel Federal Civil Procedure Rule 72(b) relating to magistrate judge recommendations, required a district court to consider additional evidence or arguments not expressly considered by the bankruptcy judge or magistrate when an objecting party makes that request. The Court, however, concluded that in both cases a district court has discretion whether or not to hear new evidence or argument.

The lesson, therefore, for any practitioners facing a bankruptcy or magistrate judge, regardless of whether insurance coverage is involved, is to make an express request for additional discovery under Rule 56(d) and to file the required affidavit explaining why the lack of discovery prevents an adequate response to a summary judgment motion, regardless of whether a Rule 26 conference has been held or there may be other perceived reasons not to file the affidavit.

IV. The Wrongful Conduct Exclusion and the Phrase *"In Any Way Related To"*

The Liberty policy excluded "any Claim made against any Insured" that was "based upon, arising from, or in any way related to … any deliberately dishonest, malicious or fraudulent act or omission or any willful violation of law by any Insured; provided, however, this exclusion shall only apply if it is finally adjudicated that such conduct in fact occurred." *Id.* at 516. Liberty argued that this exclusion barred all of the Nasser claims, as they all related in some way to the conduct for which he pled guilty. The Court considered at length several aspects of this exclusion, and some of the Court's reasoning has implications not only for insurance coverage cases but also for contract cases in general.

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First, the Court noted that wrongful conduct exclusions in a D&O policy are significantly narrower than the equivalent intentional conduct exclusions in a typical CGL policy. Normally, as in the Liberty D&O policy, an insurer must show that the conduct was *deliberately* malicious or criminal and that the facts of the act were *finally adjudicated.* In a CGL policy, by contrast, the exclusion may apply to predictably harmful conduct (assuming it meets certain standards) and with no final adjudication requirement. As a consequence, if other policy conditions can be met, a D&O policy offers a potentially broader opportunity for coverage of sexual abuse claims.

Second, the Court rejected the argument that the exclusion applied only when the *same* insured that engaged in the malicious or unlawful conduct also sought coverage. USA Gymnastics argued that, yes, Nasser had engaged in conduct triggering the exclusion, but only as to him, not the claims of negligent hiring or supervision aimed at the institution. The Court concluded, however, that sophisticated parties had used the word "any Insured" throughout the exclusion, indicating that conduct by *any* insured that triggered the exclusion could apply to claims involving *any* other insured.

Third, the Court held that the exclusion only applied to the specific wrongful conduct to which Nasser actually pled guilty, not the larger pattern of conduct with which he had been charged. The Court noted that he pled guilty to ten counts of first degree criminal sexual assault and that another twenty-nine counts were dismissed with an agreement not to prosecute. Moreover, the plea agreements had included a non-prosecution agreement for other sexual abuse charges reported to the MSU Police Department and had attached a list of another 115 reported cases. The Court held that both the dismissed counts and the additional cases had not been finally adjudicated, so the conduct referenced in those counts could not form the basis for application of the exclusion.

Finally, and most significantly, the Court considered whether other claims involving Nasser were "based upon, arising from, or in any way related to" the wrongful conduct referenced in the ten guilty pleas. The Court held they were not. The panel agreed that the phrase "in any way related" did not require a causal connection between the adjudicated wrongful conduct and the other conduct at issue, but the panel advised that, at some point, "a logical connection may be too tenuous reasonably to be called a relationship and the rule of restrictive reading of broad language would come into play." *Id.* at 524 (quoting *Gregory v. Home Ins. Co.,* 876 F.2d 602, 606 (7th Cir. (2007)). The panel stressed that, while the abuser and the use of his medical role were consistent, there were dozens of different victims and thousands of assaults, with each victim experiencing individual pain and consequences that were not measurable through a common currency like money. The panel also noted that a broad reading of "in any way related to" could lead to complete exclusion of coverage for hundreds of claims. Because the insurer and the insured both offered reasonable constructions of the language, the court construed the provision in favor of the insured, finding that "*only* a common wrongdoer, or *only* a common victim, or only a common modus operandi by different wrongdoers against different victims, is not enough to establish a sufficient relationship" that would trigger the exclusion. *Id.* at 525.

The panel then canvassed Seventh Circuit cases on relatedness and concluded that each of them involved a more straightforward connection across potentially related events, such as a single financial transaction or a cluster of related transactions. The Court explained that "insurers and insureds understand that

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an accounting scandal or a corrupt merger is likely to generate related lawsuits," while "multiple sexual assaults are a different category entirely." *Id.* at 528. Judge Brennan dissented on this point after reviewing the same case law and concluding that "related to" was not ambiguous. Nassar's abuse satisfied the criteria developed in that case law, he argued, because the same perpetrator used the same purported "treatment" to abuse a large number of young women, all of whom were gymnasts, and all of whom were abused while Nasser volunteered for USA Gymnastics. *Id.* at 536.

Both the per curium decision and Judge Brennan noted the implications of this ruling could be significant. In addition to the impact on exclusions for intentional acts or wrongful conduct, "relatedness" questions also occur when considering the appropriate policy year in claims-made policies, such as D&O or other professional liability policies. In those policies, claims arising out of "related" wrongful acts" are often deemed to be made at the time of the earliest such claim. The *USA Gymnastics* decision might point to a different outcome for a series of claims involving financial transactions than a series of claims involving physical abuse. Similarly, many insurance policies of all types apply exclusions such as "prior knowledge" or "prior notice" to related claims. Again, the nature of the claims may point to different results, though the Court was careful to distinguish D&O policies from general liability policies.

Furthermore, while *USA Gymnastics* dealt with an insurance policy and insurance construction rules, the phrase "in any way related to" is also used in many other contexts. For example, a settlement and release may apply to matters "arising out of or in any way related to any matters that were alleged or could have been alleged in the lawsuit." *See, e.g., Cook Inc. v. Endologix, Inc.,* No. 1:09–cv–01248–TWP–DKL, 2012 WL 2682749 (S.D.Ind. July 6, 2012). Indemnification agreements may define obligations in terms of claims "arising out of or in any way related to" the subject of the contract or the performance of a party's services. *See, e.g., Beneficial Franchise Co., Inc. v. Bank One, N.A.,* No. 00 C 2441, 2001 WL 290366 (N.D. Ill. Mar. 22, 2001). An arbitration clause may compel arbitration of disputes "arising out of or in any way related to" the contract. *Gillette v. Service Intelligence LLC,* No. 19-C-275, 2019 WL 5268570 (E.D. Wis. Oct. 17, 2019). Practitioners should therefore consider whether any of the reasoning in *USA Gymnastics* has implications for other types of "relatedness" claims.

V. Coverage for Investigations

USA Gymnastics also addresses several other issues that often arise in insurance coverage cases. For example, Directors & Officers policies generally cover a "Claim" made for a "Wrongful Act," and many cases involving governmental investigations turn on whether a particular action by an agency rises to the level of a "Claim" and whether the agency alleges or implies a "Wrongful Act" on the part of the insured. While specific policy language controls, of course, some courts have concluded that an agency subpoena or investigative demand is a covered claim, while other courts have disagreed. *Compare Nat'l Stock Exch. v. Fed. Ins. Co.,* 2007 WL 1030293 (N.D. Ill. Mar. 30, 2007) (finding coverage for an SEC investigative order) with *MusclePharm Corp. v. Liberty Ins.,* 712 Fed. Appx. 745 (10th Cir. 2017) (finding no coverage for an SEC order and related subpoenas).

The *USA Gymnastics* panel concluded that both the Congressional and United States Olympic and Paralympic Committee investigations constituted Claims because they were "formal proceedings" or "formal investigations," with adversarial claims and the possibility for findings of misconduct. *Id.* at 532. The Court held that "the fact that the request for information was technically voluntary says little considering that subpoenas were almost certain to follow any refusal to cooperate. The Congressional letters were coercive, and USAG effectively had no choice but to cooperate, either voluntarily or by force of law." *Id.* Insurance coverage lawyers should consider whether the discussion of investigations and allegations of Wrongful Acts in *USA Gymnastics* has implications for disputes over coverage of governmental investigations.

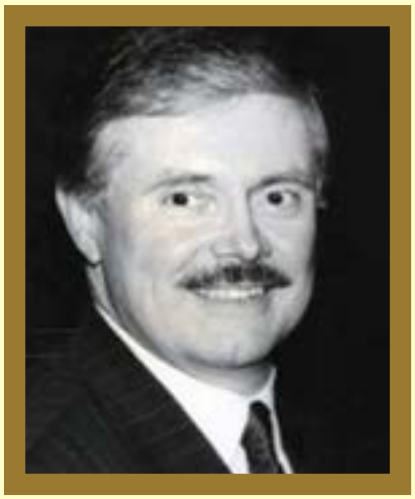
VI. Conclusion

USA Gymnastics discusses at length several important issues surrounding insurance coverage for sexual abuse claims but also contains important passages addressing common issues in insurance coverage and general contract law such as the relatedness of different claims. The Court's distinction between relatedness in the context of sexual abuse claims and relatedness in other types of financial or malpractice claims provides useful language for practitioners on both sides of insurance coverage disputes as well as general commercial litigators.

The *Gentleman* Judge *from* Indiana:

Remembering the Honorable Michael S. Kanne

By Charles Redfern[*]



The Honorable Michael S. Kanne, Judge of the United States Court of Appeals for the Seventh Circuit, passed away on June 16, 2022, at the age of 83. He died at his home in Rensselaer, Indiana, with his wife, Judy, by his side. He was a proud and loving father to his daughters, Anne and Katherine. The Judge passed six days short of his 59th Wedding Anniversary. The tenure of the Kanne's marriage is followed closely by the Judge's 50 years of judicial service. Ten years as a state trial judge in Jasper County (Rensselaer is the county seat), followed by five years on the United States District Court for the Northern District of Indiana, and finally thirty-five years on the Seventh Circuit.

A few years ago, a clerkship applicant reached out for insights about the Judge. At one point in the conversation, I came upon a phrase that stuck with me through the years. I explained, "Judge Kanne is the Gentleman Judge from Indiana."

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[*]*Charles Redfern is a staff attorney at the United States District Court for the Northern District of Illinois. He served as a law clerk to the Honorable Michael S. Kanne from 2006-2007.*

The *Gentleman* Judge *from* Indiana

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At the end of the summer of 2006, my co-clerks, Lindsay, Matt, and I descended upon Lafayette, Indiana, where the Judge had his main Chambers (in addition to his secondary Chambers in the Dirksen Building in Chicago), to start our clerkships. In getting to know the Judge, I was struck by his tendency towards listening. Most lawyers speak as if they are paid by the word. I can talk the horns off a Billy goat.

Not so with the Judge. He was brilliant and personable, but listening was his default setting. When discussing a case, his standard response was a one or two word answer such as "sounds good," or "okay" in a rising intonation to show approval. Sometimes the Judge would flash an "okay" sign without saying a word. When the Judge disapproved of our analysis, he would scrunch up his face like he had bitten into a sour apple. If we did not catch the first nonverbal clue, he might interject with an "um" while shifting in his seat showing his discomfort.

The Judge did not resolve cases dogmatically. It is true that the Judge was more conservative than some (but also less so than others). He was both raised and lived his adult life in Rensselaer, a small Indiana town of 6,000 people 80 miles southeast of Chicago. President Reagan appointed him to the district court and later elevated him to the court of appeals. He came of age in the early 1960s, serving as a lieutenant in the United States Air Force between college and law school. The Judge spoke very little of his military service, but it clearly was important to him as there was a black and white picture of the Judge as a young man in his Air Force uniform prominently displayed in his Chicago Chambers. I can only imagine how this background shaped his world view and approach on the bench.

But, the Judge brought an open mind and willingness to follow where the law and facts took him in each case. To me, his judicial philosophy was to "call them as he saw them." Recalling cases from that year, the Judge affirmed death penalty sentences in some cases, but also ruled for criminal defendants when the government overstepped. His decisions sided with consumers and employees, but also with big business. He did his work to the best of his ability without fanfare and then went home to his family when the day was done.

This open mindedness extended to his hiring of law clerks. He never asked about my personal views (political or otherwise) during my hiring interview, my clerkship, or years afterwards. Over the years, the Judge hired law clerks from all walks of life, many with views far different from his own, seamlessly integrating them into his Chambers family. The only apparent litmus test was that the Judge was looking for good, smart people to work for him. He embraced all of us equally regardless of our backgrounds, views, interests, personalities, or career paths.

The Judge also believed in congeniality. As wet-behind-the-ears law clerks, we naturally wanted to leave our mark. We quickly learned that snark and venom were verboten when assisting him on a case. If a hard blow was required, it would be a fair blow based on an honest assessment of the law and facts. There was no punching below the belt.

His congeniality extended to his interactions with his fellow jurists on the Seventh Circuit. Of the many fond memories I have from that year, three involving Judge Kanne and Judges Bauer, Flaum, and Evans quickly come to mind.

Judge Bauer often engaged us with one of his stories when we came across him in Chicago. My minds' eye sees Judge Kanne bellowing in laughter as Judge Bauer waved his arms midstory like a master conductor before an orchestra. Judges Bauer and Kanne seemed to be a great match --- they both loved a good story with Judge Bauer a great storyteller and Judge Kanne a happy listener.

With Judge Flaum, you could see the great admiration Judge Kanne had for him. Judge Kanne sat on a death penalty habeas corpus case with Judge Flaum. It was legally very complex, and, of course, the highest of stakes. The case was well argued by the attorneys on both sides. The prisoner's attorney, arguing as appellant, used almost all of her time in her opening argument leaving her little for rebuttal. She started her rebuttal with a bit of sheepish humor explaining that her friends and family accused her of always talking quickly, but she would put that skill to good use with the small amount of time left. Judge Flaum, who was then in his last few months as Chief Judge and presiding over the argument, quickly and quietly intervened explaining she should make her argument without concern to time pressure. Everyone in the courtroom noticed Judge Flaum's act of judicial grace.

I remember the red light on the podium, signifying the time expired, going on and remaining on for several minutes during rebuttal. At one point, the court staff member operating the light looked over for instruction. Judge Flaum motioned him to turn off the light as the lawyer continued with her argument uninterrupted until she finished. She probably took no more than five minutes beyond her allocated time.

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The *Gentleman* Judge *from* Indiana

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Sitting here writing this 16 years later, I can barely recall the details from any of the oral arguments during my clerkship. The classic fading of memory with the passage of time. I do, however, vividly recall Judge Flaum's actions during that oral argument. In working on this article, I went back and found the moment in the oral argument recording and it was exactly how I remembered.[1]

Following the argument, Judge Kanne and I discussed the case back in Chambers. I remarked about what Judge Flaum had done. Judge Kanne nodded seemingly unsurprised. He expressed that Judge Flaum had the gift of wisdom to know the right thing to do at the right time.

As for Judge Evans, he and Judge Kanne appeared to be kindred spirits. They both loved a good story, had a wonderful sense of humor, were dedicated to their families and the law, were passionate sports fans, and arose from humble beginnings. The only difference I could deduce was that Judge Evans was a diehard Wisconsin sports fan while Judge Kanne was loyal to Chicago teams.[2]

Judge Kanne used one of Judge Evans' jokes to play a small practical joke on me. All case materials were kept in Chambers in manila folders. As a special project arose, the Judge walked into the law clerk's office and dropped the folder on the clerk's desk. He looked down at the folder and then the law clerk, gave a wry smile, and walked out of the clerk's office without saying a word. The clerk opened the file to find some horribly complex legal issue needing to be untangled.

One day towards the end of the clerkship, the Judge walked up to me with a manila folder. My shoulders reflectively slumped as I awaited my task. He handed me the folder and I opened it to find a short email from Judge Evans joining the Court's opinion in *United States v. Are,* 498 F.3d 460 (7th Cir. 2007). The joining of an opinion by the other members of the panel was often a routine task with the approving Judge sending a perfunctory email. Judge Evans, as he demonstrated in his judicial opinions, used available opportunities to deploy his considerable wit. The *Are* case involved the timeliness of an indictment for the crime of being "found in" the United States following deportation. *Id.* at 461. Judge Evans's email in the manila folder stated he was joining (now Chief) Judge Sykes's opinion and informing his fellow Judges that he could be "found in" a sand trap at his local golf course that upcoming Saturday.

I was greatly confused. Where was the complex legal assignment I always received in these folders? I looked up at Judge Kanne befuddled, back down at Judge Evans's email, and then got both jokes --- Judge Evans's and Judge Kanne's. Judge Kanne flashed me the same wry smile and walked away without saying a word. I think it was the Judge's way of saying good job as I was finishing up my clerkship a few days later. I never asked Matt and Lindsay about it, but I bet that they, and many a Kanne Clerk over the years, received a similar send off from the Judge. The Judge cared for his law clerks, but as a man of few words, he had no need for long goodbyes.

Judge Evans died unexpectedly from a lung condition in the summer of 2011. Lindsay's wedding was a few weeks later and Judge Kanne officiated the ceremony. The Judge and I talked about Judge Evans during the reception. He mentioned more than once about how surprised he was by Judge Evans's sudden passing. You could see the Judge was sad that he had lost his friend.

Any discussion of Judge Kanne is incomplete without a recounting of his recurring lunches with his law clerks. Lunch seems like a mundane topic, but it was central to our relationship with the Judge. As the late Anthony Bourdain, noted chef and author, once wrote, "You learn a lot about someone when you share a meal together."

Lunches with the Judge is a touchstone among his law clerks. It is common for law clerks from different eras meeting for the first time to discuss it as a means of establishing their bona fides. The law clerk who proudly proclaimed that she introduced the Judge to Indian food, the law clerks who applied game theory to their food suggestions to the Judge, the law clerks whose goal was to eat as much BBQ as possible during their clerkship, the law clerks whose clerkship coincided with the opening of a local Chick-Fil-A resulting in them eating so much chicken they thought they were grow feathers, and so on.

The Judge had two standing orders for his law clerks when he was in Chambers: (1) the law clerks would wear a business suit; and (2) the law clerks, *without fail,* would eat lunch with the Judge. The Judge *never* ate by himself.

One time, I was in Chicago with the Judge for an oral argument. I had (incorrectly) thought the Judge would be going to lunch with the other members of the panel, which was customary, so I left for lunch with a friend. I returned to find a rather upset (and hungry) Judge waiting for me as there had been no lunch with his colleagues. The Judge would hear none of my confusion

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The *Gentleman* Judge *from* Indiana

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or that I had just eaten. Under penalty of contempt, I ate back-to-back lunches that day.

The Judge would summon Lindsay, Matt, and me from our desks and the four of us rode together in his car --- an older model domestic sedan that could have doubled as a police cruiser. As we settled into the car, the Judge would sometimes ask for lunch suggestions. Other days, the Judge put the car into gear without saying a word and away we went.

The experience was made even quirkier by the time difference between the Judge and the law clerks. Indiana is one of the few states in the Union straddling two time zones. The Judge's home in Rensselaer is in the Central Time Zone. Lafayette, where the Judge had his Chambers, and the law clerks lived, is in the Eastern Time Zone. It is common for Hoosiers to remain on their home time when commuting into a different time zone for the day, and the Judge followed this practice. As such, the Judge often did not summon us to eat lunch until 12:30 or 1:00 p.m. his time, but, of course, that would be 1:30 or 2:00 p.m. for us. Eating very late was a working condition for the clerkship.

The Judge had an encyclopedic knowledge of Lafayette's culinary scene. The traditional Americana you would expect from a midwestern college town. Pork tenderloin sandwiches, Cajun meatloaf, and salads that were more cheese and bacon than vegetables, were some of the local delicacies. We spent an inordinate amount of time our year at the El Rodeo --- "a hole in the wall" type place with festive décor and traditional Mexican classics served on plastic plates located in a strip mall next to the interstate on the edge of town.

As the Judge was a listener, it fell to the law clerks to start conversations at lunch. We brought up various topics --- sports, current events, Court personalities, etc., --- until we came upon something that caught the Judge's interest. At the start of our clerkship, our attempts to engage the Judge were stilted and clumsy. We got to know him better as the year progressed allowing us to select topics he enjoyed more easily. The conversations grew more personal. I do not think the Judge ever intended to provide wisdom via our lunches, it happened organically, and through it our bond with him strengthened.

The Judge kept in touch with us after our clerkships finished. Gathering us for annual holiday and summer parties. Catching up over a meal. Officiating weddings and providing career advice. Cheering us on and encouraging us as needed throughout the years.

The Covid-19 Pandemic, of course, put much of that on hold. In retrospect, the last time I saw the Judge in person was before the Pandemic started. The Judge prudently cancelled his annual holiday and summer parties explaining that we would assemble again when it was safe to do so. Unfortunately, there was never a "next year," as the first time we were all together again was at the Judge's funeral. I know it was correct to separate as we all did during the Pandemic, but sitting at the Judge's funeral, I found myself mourning not only the loss of the Judge, but also the loss of the chance to connect with him during that time. Zoom calls, although indispensable during the Pandemic, are a second-rate substitute for a gathering of family and friends over a festive meal.

On a warm summer day, the Judge was laid to rest in Rensselaer in the same cemetery as his parents. The weather was beautiful with clear blue skies and abundant sunshine. As I drove from my home in Chicago through the endless rolling green fields of corn and soybeans heading to Rensselaer that morning, I reflected how the Judge, a person of great ability, who could have gone anywhere in the world with his life, always chose Rensselaer as his home. It was impossible to not think of John Mellencamp's song *Small Town,*[3] a love note to small towns like Rensselaer, and the people who choose to live their lives there.

Following the service, the Judge's funeral procession snaked through Rensselaer by his home and the county courthouse where he roamed as a small boy and later presided as a Judge. After the burial, I thought to myself that it was right for him to be at rest in Rensselaer, in his native soil, at home, in Indiana. I realized that my thoughts had inadvertently referenced the song, *Back Home Again in Indiana,* and in turn, Jim Nabors's annual rendition at the Indianapolis 500[4] started playing in my mind. As I left Rensselaer that day returning home through the Indiana summer sunset, I listened to both songs in remembrance and appreciation of my favorite Hoosier.

Notes:

[1] The lawyer's comment and Judge Flaum's response begin at 26:57 in the oral argument recording. http://media.ca7.uscourts.gov/sound/2006/migrated.aimsb.05-2747_09_15_2006.mp3.

[2] Rensselaer is in the Chicago television market, and St. Joseph's College in Rensselaer was the preseason training home of the Chicago Bears from 1944 to 1974.

[3] https://www.youtube.com/watch?v=0CVLVaBECuc.

[4] https://www.youtube.com/watch?v=OX43VZi7UKQ.

University of Illinois College of Law Hosts Inaugural Anderson Center for

Advocacy *and* Professionalism

Moot Court Competition

*By Anthony J. Ghiotto and Thomas J. Wiegand**

The University of Illinois College of Law successfully hosted a first of its kind law school moot court competition on March 10 and 11, 2023, at the Dirkson Federal Courthouse in Chicago. Co-sponsored by the Seventh Circuit Bar Association, the inaugural Anderson Center Moot Court Competition had students competing by briefing and arguing an issue of legal ethics inspired by a real-life complex litigation. The University of Chicago Law School team took home the championship trophy.

"We were pleased to provide this opportunity not only for our students, but also for students from other law schools in the 7th Circuit – those in Illinois, Indiana, and Wisconsin," said Vik Amar, Dean of the University of Illinois College of Law. "The Profession has recognized a need for students to graduate with better practical training and this is a step toward doing that, with an emphasis on professionalism and ethics," Amar added.

The competition was funded through the Kimball R. and Karen Gatsis Anderson Center for Advocacy and Professionalism, established through a $5 million gift from the Andersons, both Alumni of the College of Law. Kimball Anderson, the Competition's Co-Chair commented, "this is precisely the type of effort we hoped our investment in the future of the legal profession would spark. It's exciting to be a part of it."

This year's competition included teams from the University of Chicago Law School, the University of Illinois College of Law, the University of Illinois-Chicago School of Law, Indiana University McKinney School of Law, Northwestern University Pritzker School of Law, and the University of Wisconsin Law School.

All the schools competed with professionalism and enthusiasm. The championship round pitted the University of Chicago Law School against the University of Illinois College of Law, with the University of Chicago Law School prevailing. Logan Kirkpatrick of the University of Chicago Law School was recognized as best advocate while the University of Chicago Law School team also won the award for best appellant brief.

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**Anthony J. Ghiotto is an assistant teaching professor of law at the University of Illinois College of Law and the Director of the Kimball R. and Karen Gatsis Anderson Center for Advocacy and Professionalism. Thomas J. Wiegand is a partner at MoloLamken LLP and the President of the Seventh Circuit Bar Association.*

Moot Court *Competition*

Continued from page 44

This is the only moot court competition focused on advocacy, professionalism, and ethics grounded in issues litigators actually face in a courtroom. The experience for students was enhanced profoundly by the participation of a stellar group of federal court judges, state court judges, and leading appellate practitioners judging each round. The Championship round featured the Honorable Thomas Kirsch of the U.S. Court of Appeals for the Seventh Circuit, the Honorable Pamela Pepper, Chief Judge of the U.S. District Court for the Eastern District of Wisconsin, and the Honorable Jay Tharp of the U.S. District Court for the Northern District of Illinois, presiding. The Anderson Center and the Seventh Circuit Bar Association extend their sincere thanks to the full panel of esteemed judges:

Hon. Thomas L. Kirsch
U.S. Court of Appeals for the Seventh Circuit

Hon. Pamela Pepper
Chief Judge, U.S. District Court for the Eastern District of Wisconsin

Hon. Jay Tharp
U.S. District Court for the Northern District of Illinois

Semifinal Rounds

Hon. Jonathan Hawley
U.S. District Court for the Central District of Illinois

Hon. John F. Kness
U.S. District Court for the Northern District of Illinois

Hon. Sidney I. Schenkier (ret.)
U.S. District Court for the Northern District of Illinois

Hon. James E. Shadid
U.S. District Court for the Central District of Illinois

Hon. Andrea R. Wood
U.S. District Court for the Northern District of Illinois

Hon. Staci M. Yandle
U.S. District Court for the Southern District of Illinois

Preliminary Rounds

Hon. William E. Duffin
U.S. District Court for the Eastern District of Illinois

Hon. Thomas Durkin
U.S. District Court for the Northern District of Illinois

Hon. Gabriel A. Fuentes
U.S. District Court for the Northern District of Illinois

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Gretchen Harris Sperry
Gordon Rees Scully Mansukhani, LLP | Past President, Illinois Appellate Lawyers Association

The moot court competition is open to all accredited law schools in the Seventh Circuit. The Anderson Center and the Seventh Circuit Bar Association look forward to continuing to present this opportunity to bring together law students, judges, and veteran practitioners from the three states within the Seventh Circuit for many years to come.

NEWS AND EVENTS OF INTEREST

Around *the* Circuit

*By Sarah Schrup**

Seventh Circuit Bar Association Report on the Seventh Circuit

Court of Appeals

District Judge John Z. Lee of the Northern District of Illinois was nominated on April 25, 2022, to succeed Circuit Judge Diane P. Wood. The Senate confirmed Judge Lee on September 7, 2022, and he was sworn in on September 12, 2022.

Judge Diane P. Wood assumed senior status on September 7, following Judge Lee's confirmation.

Magistrate Judge Doris L. Pryor of the Southern District of Indiana was nominated on May 25, 2022, to succeed Circuit Judge David F. Hamilton. The Senate confirmed Judge Pryor on December 5, 2022, and she received her commission on December 9, 2022.

Judge Hamilton assumed senior status on December 5, 2022.

Circuit Judge Michael S. Kanne passed away on June 16, 2022. There is no nominee for his seat.

Senior Circuit Judge William Bauer assumed inactive senior status on September 30, 2022.

Senior Circuit Judge Dan Manion assumed inactive senior status on December 31, 2022.

Circuit Judge Diane Wood was named Director Designate of the American Law Institute on January 19, 2023. She assumes this role in May 2023.

Central District of Illinois

Senior District Judge Harold Baker retired on January 2, 2022.

Magistrate Judge Jonathan E. Hawley was reappointed for another term of eight years which began on March 1, 2022.

On April 1, 2022, Karen L. McNaught was appointed as United States Magistrate Judge to fill the seat vacated by Judge Tom Schanzle-Haskins.

Magistrate Judge Eric I. Long was reappointed for another term of eight years beginning on May 4, 2023, when his current term expires.

Senior District Judge Richard Mills retired on September 1, 2022, after 35 years of federal judicial service and 55 years on the bench.

Colleen Lawless was confirmed on March 2, 2023. She is assuming the vacancy created by Judge Myerscough.

District Judge Sue E. Myerscough assumed senior status on March 9, 2023.

Peter W. Henderson was appointed to a 14-year term as Chief Bankruptcy Judge for the Central District of Illinois. He took the oath of office on April 1, 2023, and succeeds Chief Bankruptcy Judge Thomas L. Perkins, who retired on March 31, 2023.

Northern District of Illinois

Nancy L. Maldonado was nominated on April 25, 2022, to replace District Judge Matthew Kennelly, who took senior status on October 7, 2021. Her nomination was confirmed on July 19, 2022, and she began at the court in October 2022.

Lindsay Jenkins was nominated on September 19, 2022, to replace District Judge John Z. Lee, who was elevated to the Seventh Circuit Court of Appeals. Her nomination was confirmed by the Senate on February 14, 2023, and she started in the court that same month.

On October 3, 2022, Chief Justice Roberts appointed District Judge Robert M. Dow, Jr., as the new Counselor to the Chief Justice, succeeding Jeff Minear, who retired. Judge Dow assumed his position at the Supreme Court on December 5, 2022.

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*Sarah Schrup is the Circuit Executive for the Seventh Circuit. She assumed this role in 2021, after spending a year as Deputy Circuit Executive. Prior to that she served as the founder and director of the Appellate Advocacy Center at the Northwestern Pritzker School of Law, a role she held since 2006. Before becoming a law professor, she clerked in the Seventh Circuit and in the Northern District of Illinois. She began her career as a litigation associate at the Chicago office of Kirkland & Ellis.

Around *the* Circuit

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District Judge Charles R. Norgle, Sr., assumed inactive senior status on October 4, 2022.

District Judge Gary Feinerman resigned from the bench effective December 31, 2022.

Senior District Judge William T. Hart passed away on January 17, 2023. He retired on June 22, 2022, after 40 years of federal judicial service.

On January 18, 2023, United States Magistrate Judge Jeffrey Cummings was nominated for a new district judgeship in the Northern District of Illinois.

On January 18, 2023, United States Bankruptcy Judge LaShonda A. Hunt was nominated for a district judgeship in the Northern District of Illinois to fill the vacancy created by Judge Norgle.

On March 20, 2023, Jeremy C. Daniel was nominated for a district judgeship in the Northern District of Illinois to fill the vacancy created by former District Judge Gary Feinerman.

District Judge Thomas M. Durkin announced that he will assume senior status on December 26, 2023.

Magistrate Judge Susan E. Cox has announced that she will retire on August 9, 2023.

On April 27, 2023, the Court selected Keri Holleb Hotaling as United States Magistrate Judge for the Northern District of Illinois. Ms. Hotaling will be sworn in to the magistrate judge vacancy that will be created when Magistrate Judge Susan E. Cox retires on August 9, 2023.

The full court of the Northern District of Illinois voted to designate United States Bankruptcy Judge Jacqueline P. Cox as Chief Bankruptcy Judge for a period of four years, commencing January 1, 2024, and continuing through December 31, 2027. Outgoing Chief Judge A. Benjamin Goldgar will complete his term as Chief Judge on December 31, 2023.

Southern District of Illinois

Chief Bankruptcy Judge Laura K. Grandy of the United States Bankruptcy Court for the Southern District of Illinois has announced that she will retire on March 11, 2024. A search is underway for her replacement.

Northern District of Indiana

District Judge Jon E. DeGuilio announced on September 12, 2022, that he will assume senior status on July 17, 2023.

Southern District of Indiana

Magistrate Judge Debra McVicker-Lynch retired on October 31, 2022. Her successor, Kellie M. Barr, assumed her new duties on November 1, 2022.

M. Kendra Klump was sworn in January 6, 2023, as United States Magistrate Judge. Judge Klump fills the vacancy created by the recent elevation of the Honorable Doris L. Pryor from Magistrate Judge of the Southern District of Indiana to Circuit Judge of the United States Court of Appeals for the Seventh Circuit.

On March 29, 2023, the Senate confirmed United States Magistrate Judge Matthew P. Brookman to a district judgeship in the Southern District of Indiana. He took the oath of office on April 3, 2023, and succeeds Judge Richard L. Young, who assumed senior status.

Western District of Wisconsin

District Judge Barbara B. Crabb assumed inactive senior status on October 1, 2022.

Send Us Your E-Mail

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

We are unable to provide you with these services, however, if we don't have your e-mail address. Please send your e-mail address to changes@7thcircuitbar.org.

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