

April 2010

**Featured In This Issue**

*Judge Myron Gordon: In Memoriam,*  
By Jeffrey Cole

*Q & A with the Newest Judge on the Seventh Circuit Court of Appeals, David F. Hamilton,*  
By Brian J. Paul

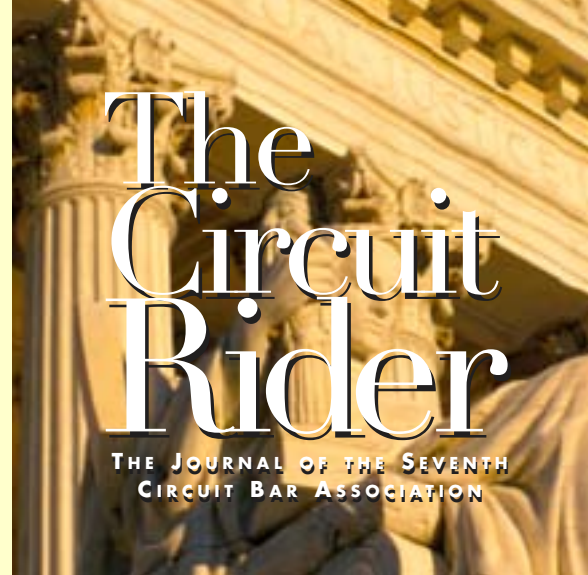
*Searching for Brother Jim: Improving Appellate Advocacy with the Internet,*  
By Charles D. Knight

*Tips from the Inside – How to Make it Easier for the Judge to Rule in Your Favor,*  
By Ellen M. Carey

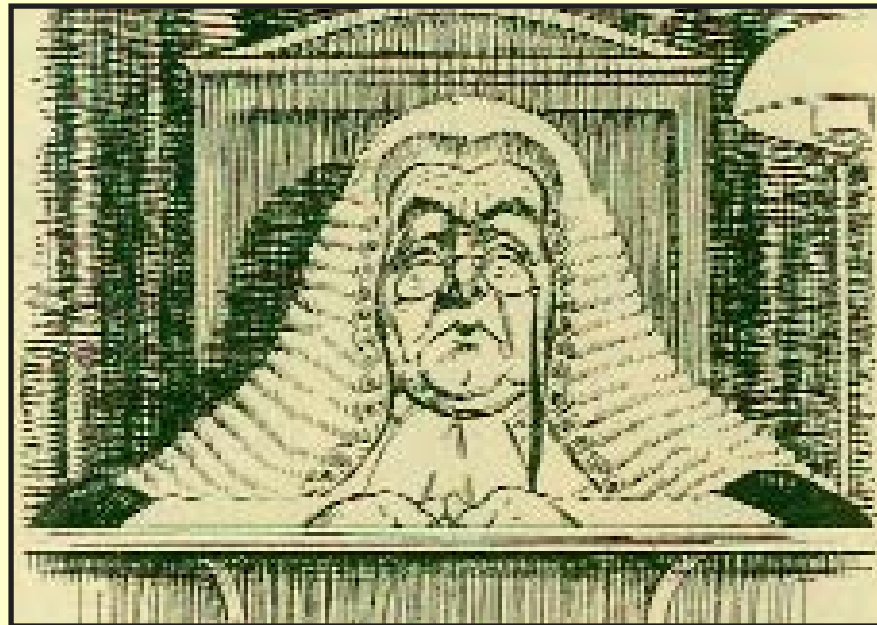
*An Overview of Removal Jurisprudence in Multi-Party Diversity Cases,*  
By Scott James Preston

*Navigating the Steep and Thorny Route of Federal Discretionary Interlocutory Appeals,*  
By Brian J. Paul

*Book Review: Gerald Goldberg, Practical Lawyering: The Skills You Did Not Learn in Law School,*  
By Jeffrey Cole



# Rules, Rewards, and Remembrances





## *In This Issue*

*Letter from the President* . . . . . 1

*Judge Myron Gordon: In Memoriam*, By Jeffrey Cole . . . . . 2-4

*Q & A with the Newest Judge on the Seventh Circuit Court of Appeals, David F. Hamilton*, By Brian J. Paul . . . . . 5-11

*Searching for Brother Jim: Improving Appellate Advocacy with the Internet*, By Charles D. Knight . . . . . 12-15

*Tips from the Inside – How to Make it Easier for the Judge to Rule in Your Favor*; By Ellen M. Carey . . . . . 16-20

*An Overview of Removal Jurisprudence in Multi-Party Diversity Cases*, By Scott James Preston . . . . . 21-28

*Navigating the Steep and Thorny Route of Federal Discretionary Interlocutory Appeals*, By Brian J. Paul . . . . . 29-36

*Book Review: Gerald Goldberg, Practical Lawyering: The Skills You Did Not Learn in Law School*, By Jeffrey Cole . . . . . 37-39

*Get Involved*. . . . . 4

*Send Us Your E-Mail*. . . . . 15

*Upcoming Board of Governors' Meeting* . . . . . 20

*Writers Wanted!* . . . . . 39

*Seventh Circuit Bar Association Officers for 2009-2010 / Board of Governors / Editorial Board*. . . . . 40

## Letter from the President

*President Michael D. Monico  
Monico, Pavich & Spevack*



There is much to report regarding the activities of the Association. Getting right to it, we announced recently the creation of the Seventh Circuit Bar Association Pro Bono/Public Service Awards, which will be given to lawyers or judges who have performed extraordinary pro bono or public service work in the Seventh Circuit, District Courts, and Bankruptcy Court. We will be presenting the first awards at the Annual Dinner on May 3.

Speaking of the Annual Dinner, our Annual Meeting Committee, headed by General Chair Mike Brody and Program Chairs Tom Wiegand and Beth Herrington, has been hard at work. Through their outstanding efforts we can look forward to an informative and entertaining Annual Conference. The conference will run from May 2 - 4 and be held at the InterContinental Hotel on Chicago's "Magnificent Mile."

The kickoff cocktail party will include a program on the Association's "E-Mentoring Project," put together by our Young Lawyer's Committee. Under the leadership of Beth Gaus and Christopher J. Esbrook, along with Second Vice President Steve Molo, the Committee has done a terrific job interviewing Judges and experienced practitioners about their careers, law practices, and issues of interest to young lawyers. We are holding the cocktail party on the 95<sup>th</sup> Floor of the John Hancock Building. Chief Judge Frank Easterbrook will speak and the Kirkland & Ellis firm will be making available examples of the mentoring videos for our review. It promises to be a great evening.

On Monday morning, May 2, Chief Judge James Holderman of the Northern District of Illinois will deliver our keynote address.

Judge Holderman has spent a great deal of time and effort dealing with the numerous issues generated by e-discovery – some of which threaten to choke litigation in the federal court system. Judge Holderman has spearheaded the Seventh Circuit E-discovery project and he will be advising us with respect to the judges who will discuss the project's results so far and what we can expect in the future. Judge Virginia Kendall, a member of our Planning Committee, will also lead a panel of judges in a discussion about the practical aspects of handling e-discovery problems.

We are very fortunate to have assembled a distinguished group of past and present Justice Department officials and high profile practitioners who will be discussing the hottest topics in criminal and civil law. Our panelists on the Criminal Law Programs include Acting Deputy Attorney General Gary Grundler and former Deputy Attorney General Hon. Mark Filip, Miguel Estrada (from the Washington D.C. office of Gibson, Dunn & Crutcher), who argued on behalf of Conrad Black in the United States Supreme Court, Robert M. Cary (from Williams & Connelly), a member of Sen. Ted Stevens' defense team, former United States Attorney Scott Lassar, and former Assistant United States Attorney Patrick Collins. Also participating will be David Yellin, Dean of Loyola University School of Law, who was counsel for the United States Senate Committee that drafted the controversial "honest services" fraud statute. A breakout session moderated by Patrick Layng from the Office of the United States Trustee will be discussing foreign bank account issues that have recently captured the interest of the Internal Revenue Service, and his panel will include Walt Pauli, an IRS Supervisory Special Agent.

On the civil side, the Honorable Diane Wood will lead a seminar discussing pleading after *Iqbal*, which will include the Honorable Barbara Crabb from the Western District of Wisconsin, Professor Richard A. Epstein from the University of Chicago and Professor Suja Thomas from the University of Illinois School of Law.

*Continued on page 11*



JUDGE MYRON GORDON:  
*in Memoriam*

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*By Jeffrey Cole \**

**O**n November 3, 2009, Judge Myron L. Gordon passed away in Palm Desert, California. He was 91 years old. His was a life full of involvement and achievement that could only have been realized in the United States. Judge Gordon’s parents came to America in 1910 from Russia. The poverty was grinding, and Jews were not the favorites of the czars.

Like so many immigrants who came into the country through Ellis Island, Judge Gordon’s father, whose surname was Yunkofsky before he anglicized it to Gordon, first settled in New York, where he was a barrel maker. He came to this country speaking not a word of English, but through sheer effort, became fluent in his new language, went to night school, and as Judge Gordon would later reflect, “did remarkably well.” Ultimately, he moved to Milwaukee where he and his older brother became jobbers for men’s caps. It was there that Judge Gordon’s father met his future wife, who had also emigrated from Russia as a young girl.

Born in Kenosha in 1918, Judge Gordon graduated from University of Wisconsin with a bachelor of art’s degree, with high honors, in 1939. He was elected to Phi Beta Kappa and was a Rhodes Scholar nominee. The Depression made times tough for everyone, and Judge Gordon was no exception.

*Continued on page 3*

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*\*Jeffrey Cole is a United States Magistrate Judge in Chicago and is the Editor-in-Chief of The Circuit Rider.*



## in Memoriam

*Continued from page 3*

To make ends meet he worked in the kitchen at the student dormitory as a dishwasher, floor mopper and other odd jobs that many of today's students would find overly demeaning. For him, they were simply the means to a desired end and the realization of a goal that he and his parents had set long ago. He went on to earn a master's degree in economics from the University of Wisconsin. As he would later recall, going to Madison was "an automatic" – after all tuition was \$33 a semester. From there he went on to the Harvard Law School on scholarship. That was not an automatic.

He had simultaneously applied for scholarships at Columbia and the University of Wisconsin law schools and for a scholarship to the Harvard School of Political Science, what is now the Kennedy School of Government. The School of Political Science carried a \$600 stipend, while the law school only offered \$400. Judge Gordon would embarrassingly admit over the years that his decision to be a lawyer or a "political scientist" could have turned on \$200. But the decision was taken out of his hands when the chairman of the Department of Economics at the University of Wisconsin concluded that Myron was better suited to be a lawyer and thus decided to recommend him for the scholarship at the Law School and to recommend another student for what was then called the Littauer School at Harvard.

After graduation he returned to Milwaukee and began clerking for Judge F. Ryan Duffy, who was then a district judge in the Eastern District of Wisconsin, and would later go on to serve on the Seventh Circuit. One of Gordon's favorite stories was how Duffy told him, after Gordon was appointed to the district court, that the best way to be nominated to the Court of appeals was to be seat mate of the future President of the United States when you were both in the Senate. Duffy related how he and Harry Truman were in a duck blind in Missouri when Truman asked Duffy whether he would be interested in a vacancy on

the court of appeals. Duffy liked the idea, Truman promised him the next vacancy, and the rest is history.

Gordon applied for a commission in the Navy and became an ensign in 1942. He served as a lawyer at Pearl Harbor on the Commandant's staff. Upon his return to Milwaukee in 1946, he spent eight years in private practice with the firm of Hersh & Morse, doing general and commercial litigation. In later years, Judge Gordon delighted in recounting how, as a young lawyer, he had visited a Mr. Balistreri, the President of the Badger Hotel in downtown Milwaukee. Part of Gordon's duties were to collect overdue bills due to clients of his firm. In short, that part of his practice involved collecting bad debts. Not being restricted by the current statutory restraints imposed by various state and federal laws, he went to visit Mr. Balistreri. He made it quite clear that if he didn't pay up and pay up immediately, the world was going to collapse around his shoulders: he would be hauled before a court commissioner, have a receiver appointed for his business and have all his assets sold. Although Mr. Balistreri was described by Gordon as a "tiny, little man, about 50 years of age," Gordon apparently wasn't particularly imposing and Mr. Balistreri politely thanked him for coming, but declined to pay the bill.

Upon his return to the firm, he lamented his failure to Mr. Morse. Horrified, Morse took the file back and told him not to worry, but under no circumstances to have anything further to do with the case. Gordon would later chuckle that unknown to him, but not to Morse, Frank Balistreri was the "top mafia man in Milwaukee." Balistreri would be convicted in the early '60s by Judge Tehan, *United States v. Balisterieri*, 303 F.2d 617 (7th Cir. 1962), and then again in 1985 for tax evasion, with Terry Evans serving as the trial judge. *United States v. Balisterieri*, 779 F.2d 1191 (7th Cir. 1985). Years later, in relating this story to Collins Fitzpatrick for his oral history program, Gordon, in an uncharacteristic piece of understatement, said "I guess I was lucky I didn't get into real trouble that time."

*Continued on page 4*

## in Memoriam

Continued from page 3

At the age of 32, he began his judicial career as a Milwaukee County Civil Court Judge, and four years later he became a Milwaukee County Circuit Court Judge. In 1961, at the age of forty-three, he was elected to a 10-year term on the Wisconsin Supreme Court. As a member of the court, he authored 203 majority opinions, 15 concurring opinions and 45 dissenting opinions. He was appointed by President Johnson to the United States District Court for the Eastern District of Wisconsin and took his seat on March 17, 1967. He served on that court, with occasional designations to the Seventh Circuit, until his retirement in 2001. Thus, his distinguished judicial career spanned more than half a century.

Judge Gordon was known as a "picturesque writer" – a phrase often used by the bar and the media alike, that referred to his fondness for literary or poetic references in his opinions – some 1,302 of which appear on Westlaw. This does not count the 53 opinions reflected on Westlaw authored by Judge Gordon while sitting by designation on the Seventh Circuit. Notably, in none of these opinions is there a single footnote. That was not by accident. Judge Gordon had an unalterable version to footnotes as he explained in an article in the American Bar Association Law Journal in 1974. See Myron L. Gordon, *Personal Viewpoint: A Note on Footnotes*, 60 ABA L.J. 952 (1974). Although at odds with the then practice of opinion writing in the Supreme Court and the Circuit Courts of Appeals, his position on footnotes ultimately has become the norm in the Seventh Circuit and in many of the Courts of Appeals.

The work of trial judges, even district judges, is ephemeral. It is important to the parties but soon forgotten by all but them. If the case contributes to the development of the law, the contributions made in the trial judge's opinion tend to be eclipsed and absorbed by what the court of appeals or the Supreme Court does in the case. Judge Gordon, however, had a number of celebrated cases that transcended the immediate interests of the parties.

He is perhaps best remembered as the judge who presided over the case of the Milwaukee 14, a group of protesters against the Vietnam War who broke into the Selective Service office in Milwaukee in 1968 and destroyed draft records. Judge Gordon dismissed the case against the defendants based upon the extensive coverage of the case by the media which he thought made selection of an impartial jury impossible. The case resulted in a national outcry for Gordon's impeachment. One of the headlines screamed, "Judge Gordon's Decision Shocks City and Nation." Unimpressed, the Seventh Circuit affirmed. Another of the Judge's celebrated decisions was his dismissal of a suit filed by the NAACP in 1996, seeking to have the judicial election system declared unconstitutional. Judge Gordon's ruling was upheld in July 1997 and the U.S. Supreme Court refused to take the case. [*Milwaukee Branch of N.A.A.C.P. v. Thompson*, 929 F.Supp. 1150 (E.D.Wis. 1996)].

Judge Evans of the Seventh Circuit, was a long time friend and judicial colleague of Judge Gordon's when they served together on the District Court in Milwaukee. He has said that Judge Gordon was the "single-most influential" mentor in his judicial career. When asked by Collins Fitzpatrick in his interview for the oral history project in 1998 what motivated him, what made him tick, Judge Gordon said: "I really don't know the answer to that. I'm just another mortal who tries to do the best he can at his job and tries to be a good husband and father." So may it be said of us all.

Judge Gordon is survived by his wife, Myra, and his three children: Wendy, John and Polly.

## 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](http://www.7thcircuitbar.org), and click on the "committees" link. Choose a committee that looks interesting, and contact the chair for more information.



Q & A WITH THE NEWEST JUDGE ON THE  
SEVENTH CIRCUIT COURT OF APPEALS,

## David F. Hamilton

*By Brian Paul \**

**O**n November 23, 2009, David Hamilton was commissioned as the newest member of the Seventh Circuit Court of Appeals, filling the seat that had been vacated by now Senior Judge Kenneth Ripple. Judge Hamilton had been the Chief Judge of the U.S. District Court for the Southern District of Indiana, a court on which he had served since 1994. Before that, between stints at a private law firm in Indianapolis (Barnes & Thornburg), he served as counsel to then Governor Evan Bayh.

Judge Hamilton is a native of Southern Indiana. He graduated from Haverford College in 1979 and Yale Law school in 1983. He also performed graduate work as a Fulbright Scholar at the University of Tübingen in Germany. Following law school, Judge Hamilton served as law clerk to Judge Richard D. Cudahy, also of the Seventh Circuit Court of Appeals. Among his long list of accomplishments, he is an associate director and advisory board member of the Center for Constitutional Democracy in Plural Societies, and he is founding member of the Sagamore Inn of Court.

*Continued on page 6*

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*\*Mr. Paul is a partner in the appellate practice group at Ice Miller LLP in Indianapolis and an associate editor of The Circuit Rider.*



## Q & A with: Judge David F. Hamilton

Continued from page 5

### 1. You were President Obama’s first nominee to the federal bench. How did you find out that you had been nominated for a seat on the court of appeals? Did you know you were being considered?

The vacancy on the Seventh Circuit was on the list that President Obama’s transition team was considering before the inauguration. I knew I was being considered and that Senator Evan Bayh and Senator Richard Lugar were both supporting me, but I did not know what information the transition team had about me. They moved fast, for the new White House Counsel’s Office contacted me in late January 2009 to say that President Obama wanted to nominate me to the vacancy. After a few weeks of filling out many forms, gathering notes from old speeches and press clippings, and going through a round of background checks, Indiana Senator Evan Bayh and the White House Counsel’s Office notified me in early March that they wanted to make an announcement soon. I visited the White House on March 16<sup>th</sup> and met with Counsel to the President Greg Craig and members of his staff, and then briefly with President Obama. I was told that day that the nomination would be announced the next day. The strong support of Indiana’s Republican Senator, Richard Lugar, was critical at every step, including the White House decision to announce my nomination first in the hope of showing that judicial nominations could be handled in a less controversial and more bipartisan manner.

### 2. How do you anticipate your experience as a district court judge will influence the way you approach your job as a judge on the court of appeals?

In lots of ways. After fifteen years as district judge, I appreciate the value of receiving clear guidance from the

appellate courts, and that’s something I try to take into account when I write opinions. I also understand why a district court’s case management decisions, findings of fact, and credibility determinations deserve deference on appeal, and how appellants sometimes try to morph the case on appeal into something the district judge would not recognize as the same case. By the time the typical case has made its way to the appellate court, we know that at least one other federal judge has given the case thoughtful consideration. The vast majority of those cases, including

the majority that are not appealed, are decided correctly and fairly. Also, I worked in the Southern District of Indiana, which is one of the busiest districts in the country in terms of case filings per judge. I understand the pressures district court judges face and how well they do their work under these conditions. I expect that all of this cannot help but shape my work on the court of appeals.

### 3. You wrote a lot of orders in your tenure on the district court bench. I’m sure you are particularly proud of some of them. Can you give us a few cites?

Sure. I’ll describe four cases, and they are reminders that a lot of a district judge’s best work is not reviewed on appeal. The first is *Watkins v. Anderson*, 92 F. Supp. 2d 824 (S.D. Ind. 2000). Watkins was wrongly convicted of the rape and murder of a young girl. After the trial, early DNA tests showed it was nearly impossible for Watkins to have committed the crimes, but state courts rejected the conclusions from those tests. In the federal habeas proceedings, Watkins showed (a) that the DNA test results undermined the conviction and (b) that the prosecution had violated his constitutional rights under *Brady v. Maryland* by failing to disclose the statement of an eyewitness who described the girl’s abduction by a man who did not fit Watkins’ description and at a time when time-clock records showed that Watkins was at work.

Continued on page 7





## Q & A with: Judge David F. Hamilton

Continued from page 6

That meant that Watkins therefore met the stringent standards for habeas relief under the Anti-terrorism and Effective Death Penalty Act of 1996, and that the real killer had gone free. The state filed an appeal, which it later dismissed after a newer, more sophisticated DNA test confirmed the results I had relied upon. The State of Indiana did not attempt to re-try Watkins.

The second case is *Eckles v. Consolidated Rail Corp.*, 890 F. Supp. 1391 (S.D. Ind. 1995), *aff'd*, 94 F.3d 1041 (7th Cir. 1996). The issue was whether the Americans with Disabilities Act required an employer to provide a “reasonable accommodation” to one employee by violating the seniority rights of other employees under a collective bargaining agreement. The statutory language of the ADA did not address the issue. The legislative history showed that Congress had recognized the issue but had not reached any definite conclusion about it. I granted summary judgment for the defendants, finding that the ADA did not require the employer to violate the collective bargaining rights of the other employees. I reasoned that rights under collective bargaining agreements were so well established under federal law that they could not be limited without explicit limitation by Congress. The Seventh Circuit agreed and affirmed, and other circuits have since followed the lead of *Eckles*.

The third case is *Henderson v. Irving Materials, Inc.*, 329 F. Supp. 2d 1002 (S.D. Ind. 2004). Plaintiff Henderson was the first African-American cement truck driver at the defendant’s facility. He sued for race discrimination under Title VII of the Civil Rights Act of 1964, alleging that co-workers and one supervisor had created a racially hostile work environment. I denied the employer’s motion for summary judgment on the key claim, finding that the cumulative effect of the harassment was sufficient to allow a finding of a racially hostile work environment. I also found that some forms harassment that were not necessarily racial could be viewed as racial when taken in context of other harassment and historic forms of violence directed against African-Americans. The case settled before trial.

Finally in, *Eco Mfg. LLC v. Honeywell Int’l, Inc.*, 295 F. Supp. 2d 854 (S.D. Ind. 2003), *aff’d*, 357 F.3d 649 (7th Cir. 2003), I denied a preliminary injunction sought by Honeywell to block Eco from manufacturing and selling a round thermostat. Honeywell had a registered trademark that it claimed gave it exclusive rights to sell its classic round thermostats. The problem was that Honeywell had originally obtained a utility patent for the round design, which had expired decades earlier, and then a design patent, which had also expired years ago. I found that Honeywell was improperly trying to extend indefinitely the limited monopoly its utility patent had given it. Honeywell had obtained the utility patent by showing that the round design was functional, meaning it could not be protected by trademark, and the decision of the Trademark Trial and Appeal Board granting the trademark in an ex parte proceeding with incomplete and even misleading information was not entitled to deference.

A few other cases that I’m particularly proud of include: *Doe v. Prosecutor*, 566 F. Supp. 2d 862 (S.D. Ind. 2008); *MCI, LLC v. Patriot Eng’g & Envtl., Inc.*, 487 F. Supp. 2d 1029 (S.D. Ind. 2007); *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812 (S.D. Ind. 2000); *Williams v. Humphreys*, 125 F. Supp. 2d 881 (S.D. Ind. 2000); *Sakhrani v. Brightpoint, Inc.*, 78 F. Supp. 2d 845 (S.D. Ind. 1999); and *Zehner v. Trigg*, 952 F. Supp. 1318 (S.D. Ind. 1997), *aff’d*, 133 F.3d 459 (7th Cir. 1997).

### 4. When you were a district court judge, did you ever sit on the court of appeals as a visiting judge? Was that experience helpful to you? If you didn’t sit as a visiting judge, do you think it would have been helpful to have done so?

I did not sit on the court of appeals when I was a district court judge, but I think it would have been helpful to have done so. In the last couple of years, Chief Judge Easterbrook has reinstated the practice of inviting district judges from within the Seventh Circuit to hear cases at the court of appeals, and I think it’s been great. Among other benefits, the practice helps to break down an “us” versus “them” barrier that can develop between judges at different levels of the same court system. The more constructive communication there is between district and appellate judges the better.

Continued on page 8



## *Q & A with: Judge David F. Hamilton*

*Continued from page 7*

### **5. I know that you clerked for Judge Cudahy from 1983 to 1984. Has the court of appeals changed significantly since then?**

One thing that strikes me is that there are many more judges who reside outside of Chicago today than in the early-to-mid 1980s. Only about half of the active and senior judges now live in the Chicago area and have their principal office there. I'm one of the judges who lives elsewhere. As a result, there is less face-to-face communication and a lot more electronic communication with colleagues.

### **6. Some of the judges on the court of appeals are known for applying the methods of economics to legal problems. Do you subscribe to a particular judicial philosophy or approach? If so, what is it; if not, why not?**

Some may think I am naïve for saying this, but I do not consciously subscribe to any particular philosophy or approach. I try to take each case on its own terms and try to resolve it in a way that is consistent with governing law. If I have to be labeled, the labels I would prefer are probably pragmatic, keeping in mind that we try to apply and shape the law in ways that work for people and institutions, and respectful of other branches of government, who have the principal responsibility for making public policy.

I do, however, want to make a point about a related issue that played prominently in the debate over both my nomination and the nomination of Justice Sotomayor to the Supreme Court. I believe empathy does have an important role to play in judging. Federal judges take an oath to administer justice "without respect to persons," and to do "equal right to the poor and to the rich." Empathy – to be distinguished from sympathy – is important in fulfilling that oath. Empathy is the

ability to understand the world from another person's point of view. A judge needs to empathize with all parties in the case – plaintiff and defendant, crime victim and accused defendant – so that the judge can better understand how the parties came to be before the court and how legal rules affect those parties and others in similar situations. The public criticism of President Obama's "empathy standard" seems to have confused empathy and sympathy. They are not the same things. An emotional response of sympathy toward one or both sides is not a legitimate basis for deciding a case. But empathy – the effort to understand the perspectives of others – is essential.

Let me give you an all-too-common example. Suppose an employee claims that she has suffered sexual harassment by a fellow employee who denies all allegations of wrongdoing. It's not easy for an employee to bring a complaint to management. And then a manager confronted with this situation may face a difficult choice. She has to decide whom to believe and what to do about the complaint, difficult though it may be. If the issue in a later lawsuit is whether the manager's response was reasonable and appropriate, the judge's role is not to feel "sorry" for one side or the other, but the judge needs to try to understand how both sides saw the case and the choices they faced. Appellate courts should try to develop rules that recognize different perspectives like this and resolve each case fairly in a way that gives the clearest possible guidance to the public, the bar, and other courts.

### **7. What areas of the law interest you the most?**

I'm interested in many areas of the law, but if I had to pick just a few, I'd say sentencing law, constitutional law, and methods of statutory interpretation. In terms of state law, I'm particularly interested in the law governing non-competition agreements and trade secrets.

*Continued on page 9*



## Q & A with: Judge David F. Hamilton

Continued from page 8

### 8. Name one judge (living or dead) that you admire and explain why?

With the ground rule that you asked me to name only one judge, I would say Justice Stevens. I admire his fairness, his independence, and his craftsmanship. I'll give you an example of the last quality. The standard for granting writs of habeas corpus is very difficult to meet. Yet, time after time, when I was working on the Watkins case (see my answer to question 3), I'd come across an opinion by Justice Stevens in which he had been very careful to leave the door open for district court judges to grant habeas relief in cases as compelling as the one I faced. I was grateful for the guidance and for the care Justice Stevens took in drafting those opinions, because it allowed me to help right the wrong that had been done.

### 9. Is there a book or an article that you reread regularly that is important to you?

No, there really isn't. I do however find myself reading a lot of different works on the same eras in history, whether it's the New Deal or the founding era or the Civil War. I enjoy reading history from different perspectives. Right now I'm listening to an audio book called *THE SUMMER OF 1787* by David O. Stewart. It has a fascinating discussion of the political give and take that took place in the course of the constitutional convention. I also enjoy a wide variety of fiction, including mysteries, spy thrillers, and the writings of Robertson Davies and Wallace Stegner, among many others.

### 10. If you weren't a judge or a lawyer, what would you be?

An architect or a surveyor.

### 11. In learning a new case, how do you read the appellate briefs? Do you read them in the order in which they were filed, starting with the appellant's brief and finishing with the reply brief? Do you read them front to back, or do you start with, say, the summary of argument?

No secrets here. I generally pick up the appellant's brief, check the table of contents and/or summary, so that I know what the issues are. I then go to the short appendix and read the decision under review. After that I'll read the briefs in order. Along the way I'll read key portions of the record and research the law as necessary.

### 12. What are three things lawyers could do to improve the quality of their written advocacy?

First, proofread. I know this is basic, but you'd be amazed at how many briefs we get that don't seem to have been proofed.

Second, I know it's tempting to cite cases simply because the opinions say something you like, but pay attention to what the court actually *did* in each case. For example, if you're opposing a summary judgment motion and you want to argue that your client was entitled to submit an affidavit that either explains or conflicts with his prior deposition testimony (depending on one's perspective), look for cases that reversed a district court decision because the judge disregarded a legitimately explanatory affidavit. (And put that information in a parenthetical or the body of the brief.) Similarly, take note of the procedural posture of the case you want to cite. If you're arguing that the district court should have entered judgment as a matter of law for the plaintiff, a case that merely denied a motion to dismiss may not be very helpful to you no matter how good the language in the opinion.

Finally, remember federal judges are generalists. Judge Posner has made this point recently, in *Indiana Lumbermens Mut. Ins. Co. v. Reinsurance Results, Inc.*, 513 F.3d 652, 658 (7th Cir. 2008), and I agree. We have to decide cases in many different areas, and we can't possibly be experts in all of them. Don't assume that we know your area of the law as well as you do. The acronyms and jargon you use everyday in your practice may well be lost on us. Try to avoid the jargon and alphabet soup and use clear English to explain your case.

Continued on page 10



## *Q & A with: Judge David F. Hamilton*

*Continued from page 9*

### **13. How do you go about writing opinions?**

Following oral argument, I'll sit down with one of my clerks and go over generally what happened at the panel conference. We'll draw up an outline of some sort, and then, if I am the writing judge, that clerk will take a run at the first draft of the opinion, which I'll work with extensively.

I'm still getting used to the fact that I have to take into account the thoughts of two other judges. As a district judge, when I made a decision, I could write it up however I thought best, but now things are not quite that easy. Your goal as an appellate court judge has to be to write an opinion that captures the thinking of the court as whole. I'm still trying to get into that frame of mind, and I'm enjoying working with my colleagues as I do that.

### **14. When you were in private practice, did you ever argue in front of the court of appeals, and if so, what do you remember about that experience?**

I did. One of the things I remember was how Judge Ripple questioned lawyers in a polite but firm manner. He said in effect, "Here's my problem with your case. Now, give me your best shot." I appreciated that approach when I was in private practice, and I try to emulate it now.

### **15. How do you prepare for oral argument as a judge?**

Well, the best way I can describe it is to contrast it with how I did things as a district judge. Then, after hearing argument in a case, I had plenty of time to think about the issues before reaching a decision. Now, after a day of oral argument on the court of appeals, the panel immediately has its conference and each judge is expected to express his or her views on each case, tentative though they may be, starting with the junior-most judge. Knowing that I will be required to voice my initial vote right after the argument has forced me to prepare to make an immediate decision.

After a law clerk and I have both read the briefs, we will sit down a few days before the argument. We'll discuss the cases, share impressions, and see what we still need to learn about the facts and the applicable law in each case, including questions to ask at oral argument. I'll then outline my thoughts, usually by hand, and bring that outline to the argument and the conference that follows.

### **16. If you only had one minute to tell a lawyer how to prepare for oral arguments in your court, what would you say?**

The first thing I'd say is to be ready for anything, including jurisdictional questions. Think through federal subject matter jurisdiction and appellate jurisdiction, and be ready to discuss both.

Also, be practical. We want to decide cases in a way that offers clear, workable guidance to people in the real world. Remember that in making your arguments.

Think in terms of the key points you want to make, not as you would if you were writing a speech. Identify the two or three things you feel you absolutely must say, and organize your thoughts accordingly. Be prepared to let the lesser issues fall by the wayside.

Consider mooting your case (both when drafting briefs and preparing for oral argument) with two or three colleagues who are not specialists in the area of law at issue. They can help you eliminate the unnecessary jargon and decide how to communicate most effectively to generalist federal judges.

Last, take advantage of your strengths, such as your knowledge of the record. It's okay to quote critical portions of testimony and key documents at oral argument. I personally find it helpful.

*Continued on page 11*



## *Q & A with: Judge David F. Hamilton*

*Continued from page 10*

### **17. Finally, I know that you have assisted reformers in Burma draft a constitution. Tell us a little bit about that work.**

A few years ago I heard about the work that Professors David and Susan Williams were doing on behalf of the Burmese democracy movement through the Center for Constitutional Democracy in Plural Societies, and I decided to get involved. (Both teach constitutional law at the Maurer School of Law at Indiana University in Bloomington.) Burma is one of the most oppressive governments in the world today, but there is an opposition both within the country and in exile around the world. These heroic people are committing their lives and risking their liberty to build a foundation for a free and peaceful future. The Williams and others are working with the Burmese opposition in their efforts to draft federal and state constitutions for a democratic and peaceful future. It's not easy. There is a long history of ethnic division and even conflict in Burma.

The opposition leaders are working toward a federal system of government that will retain substantial autonomy for regional governments. They find themselves struggling with many of the same problems that confronted our own framers in 1787. Balancing regional and national governments, forming and maintaining an independent judiciary (which has been the focus of my work), and structuring the legislature are all issues that are very much up in the air right now for a future democratic Burma. We have been able to draw upon American history in the course of our work, as well as more recent learning in political science and comparative constitutional studies. We know that what worked in eighteenth-century America may not work in twenty-first century Burma. We also take some comfort in knowing that our own country didn't get it right the first time around. The Articles of Confederation proved unworkable, but Americans eventually devised an extraordinary system of government. I hope the Burmese will do so as well.

## *Letter from the President*

*Continued from page 1*

Bankruptcy Judges from all three states in the Circuit, the Honorable Robert Grant, Hon. Susan Kelly, Hon. Thomas Perkins, Hon. Eugene Wedoff, and Hon. Basil Lorch, III, will be participating in two separate breakout sessions discussing hot topics in consumer and Chapter 11 bankruptcies. Elizabeth Herrington from McDermott Will & Emery in Chicago will conduct a panel discussing law firm management and hiring in these challenging economic times.

On Monday evening May 3 we will have our Annual Dinner in the Grand Ballroom of the InterContinental Hotel. Our featured speaker will be the Solicitor General of the United States Hon. Elena Kagen. It has been another interesting year in the Supreme Court and we look forward to the Solicitor's remarks. Justice John Paul Stevens, always one of the most delightful speakers at any function, has also agreed to address us and we can't wait to hear what he will have to say as well.

These are but a sampling of the distinguished speakers and panelists and of the topical programs that will be featured at the 59<sup>th</sup> Annual Meeting of the Seventh Circuit Bar Association Judicial Conference of the Seventh Circuit. Our circuit is unusual in that our Bar meeting occurs in conjunction with the Seventh Circuit Judicial Conference. This affords us a unique opportunity to confer with the Judges of the Seventh Circuit, District Bench and Bankruptcy Courts. We look forward to seeing all of you there.

In closing I once again must thank Magistrate Judge Jeffrey Cole for yet another excellent issue of the Circuit Rider. The Association owes Magistrate Judge Cole a huge debt of gratitude for the many days and hours that he has donated to making the Circuit Rider the excellent publication it has become.



## Searching *for* Brother Jim:

IMPROVING APPELLATE ADVOCACY WITH THE INTERNET

By Charles D. Knight \*

Circuit Judge Richard Posner bemoaned the lackluster quality of much legal writing at the last annual meeting of the Seventh Circuit Bar Association. His remarks during a panel discussion on good legal writing created a small stir<sup>1</sup> in the audience when he seemed to recommend going outside the record and including sources from the Internet to improve appellate writing. Posner cited as an example of using the Internet to enliven legal writing an opinion he authored in the appeal of an itinerate preacher who sought to speak on the grounds of Vincennes University.

Posner's opinion, *Gilles v. Blanchard*, 477 F.3d 466 (7th Cir.), *cert. denied*, 552 U.S. 820 (2007), is indeed engaging. Written with characteristic Posner style, the opinion starts with a thumbnail history of Vincennes University. It then describes how the plaintiff, James Gilles ("Brother Jim"), experienced his epiphany at a Van Halen concert and became the itinerant preacher with the mission of bringing the gospel to college campuses across the country.<sup>2</sup> Judge Posner found many of the facts for that story on Brother Jim's website, <http://www.the-campusministry.org>, or in another case in which Brother Jim was denied the forum of his choice at Virginia Tech, *Gilles v. Torgersen*, 1995 U.S. Dist. LEXIS 8502 (W.D. Va.), *vacated for want of standing*, 71 F.3d 497 (4th Cir. 1995). And before turning to the legal analysis, Judge Posner's opinion graphically illustrates the area of Vincennes University in dispute with a satellite photo of the campus downloaded from the Internet. 477 F.3d at 469.

*Continued on page 13*

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\*Charles D. Knight is an attorney practicing in Chicago.

## Searching for Brother Jim

Continued from page 12

None of this information appears to have come from the parties' briefs or from the record. Judge Posner's recounting of Brother Jim's story was from Brother Jim's home page which was visited less than two weeks before the release of the opinion. The downloaded image of the university campus in the opinion bears the date 2007, the year after the appeal was docketed, briefed, and argued.

In his written follow-up to the panel presentation, Judge Posner again urges appellate advocates to do background research online, just "as judges and their law clerks (and jurors!) increasingly are doing." R. Posner, *Remarks on Appellate Advocacy*, The Circuit Rider 17, 18 (November 2009). He explains:

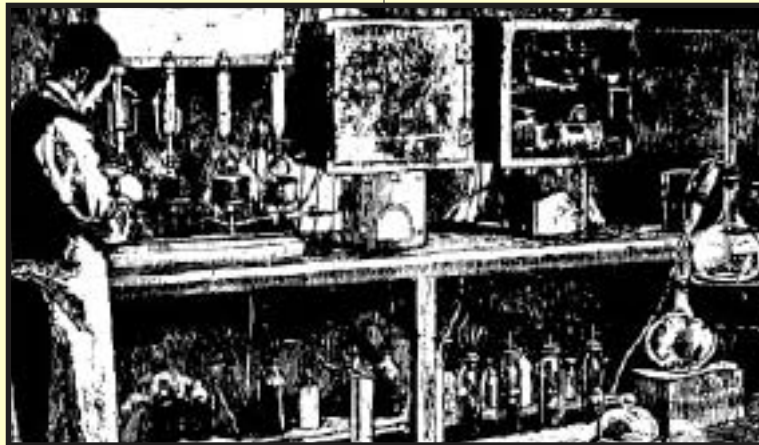
I have been doing this in some of my cases of late and have been criticized that in doing so I have been "going outside the record." It would be a just criticism if I were looking for adjudicative facts on the Web, the kind of facts that benefit from being tested in an adversary proceeding governed by the rules of evidence. But I am not.

*Id.* Judge Posner is referring to "nonadjudicative facts." He provides further explanation in *Hart v. Sheahan*, 396 F.3d 887, 894-95 (7th Cir. 2005):

To present new evidence at the appeal stage is improper and in appropriate cases sanctionable. . . . But a party is free to cite academic or other studies that may be factual in nature, provided the facts are "legislative" rather than "adjudicative" in character, that is, provided they are facts that help a court formulate a rule, as distinct from facts specific to the case that help the trier of

fact decide whether the rule applies to the case. . . . [O]nly proof of adjudicative facts is governed by the rules of evidence. . . .

These "background facts (sometimes called 'legislative' facts) . . . lie outside the domain of rules of evidence yet are often essential to the decision of a case." *Wiesmueller v. Kosobucki*, 547 F.3d 740, 742 (7th Cir. 2008) (Posner, J., in chambers) (citations to constitutions, rules, or statutes, law review articles, and "other materials drawn largely from the websites of various bar authorities").



The line between adjudicative facts and nonadjudicative facts can be devilishly hard to discern, and it can be fairly debated whether Judge Posner stayed on the right side of that line in *Gilles*. One authority, for example, states that the elusive distinction between legislative facts and adjudicative facts "rapidly fades when one tries to apply it." 21B Wright & Graham, *Federal Practice*

and Procedure § 5103.2 (2d ed. 2005). One widely cited formulation is that "adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses." 2 K. Davis, *Administrative Law Treatise* § 15.03 (1958). "Legislative facts are ordinarily general and do not concern the immediate parties."<sup>1</sup> Weinstein's *Federal Evidence* § 201.51[1] (2d ed. 2009). Even though Judge Posner's opinion in *Gilles* dismisses most of the background facts that he gleaned from the Internet as unimportant, didn't the facts he recounted quite clearly relate to "the parties, their activities, [or] their properties"? Wouldn't the decisional process have been improved had the parties had the opportunity to comment on those facts and the district judge an opportunity to evaluate their significance before the Seventh Circuit ruled? See *Henn v. National Geographic Society*, 819 F.2d 824, 831 (7th Cir. 1987).

Continued on page 14



## Searching for Brother Jim

Continued from page 13

This is not the place to add to the considerable ink that has been spilled on distinction between adjudicative facts and nonadjudicative facts. Suffice it to say that with the line between adjudicative and nonadjudicative facts so uncertain, many attorneys are understandably reluctant stray beyond the confines of the familiar record to find and deploy fresh ammunition from the Internet in their appellate briefs. How can the appellate advocate employ, as Judge Posner urges, the "underutilized resource" of the Web to improve an appellate brief while avoiding accusations of, and conceivably sanctions for, going outside the record?

First, change your attitude. Many lawyers are justifiably skeptical about content found on the Internet. There is a wealth of information, but there is also a lot of garbage. But the Internet is just the medium, not the message. As with any source and authority cited to the court, an advocate will want to be certain of the reliability and reputation of the source. Citation to a reputable Internet source should be no more risky than citation to an encyclopedia or standard dictionary. A small and by no means comprehensive sampling of the case law shows that many circuit judges, not just Judge Posner, cite information from the Internet in their judicial opinions. *Moranski v. General Motors Corp.*, 433 F.3d 537, 540 (7th Cir. 2005) (Williams); *United States v. Sloan*, 505 F.3d 685, 697 (7th Cir. 2007) (Coffey); *United States v. Tockes*, 530 F.3d 628, 630 (7th Cir. 2008) (Rovner); *United States v. Hicks*, 531 F.3d 555, 559 (7th Cir. 2008) (Flaum); *Manez v. Bridgestone Firestone North American Tire, LLC*, 533 F.3d 578, 588 (7th Cir. 2008) (Wood). This is a pretty clear indication that in appropriate cases appellate advocates may cite similar sources in their briefs. And neither the information nor the source needs to be unimpeachable. Nonadjudicative facts need not meet the standards required for judicial notice of adjudicative facts. See Fed. R. Evid. 201(a)&(b); 1 Weinstein's Federal Evidence § 201.51[3] (legislative facts relied upon by the courts may be

"neither indisputable nor easily verifiable" and "might not be easily susceptible to either proof or disproof.")

Second, be clear about your use of nonadjudicative facts. In most cases nonadjudicative facts will not have been presented to the district court and, therefore, will not appear anywhere in the formal record on appeal. Citing them in the appellate briefs, therefore, will, therefore, literally qualify as going "beyond" or "outside" the record. In employing these facts, the brief should make clear to the appeals court what is being cited. The facts and their sources should be clearly identified. Their presentation should not be confused with the facts of the specific case at hand. It may be prudent to specifically alert the court that the facts cited are not in the record and are intended only to assist the court in formulating the desired rule of decision and provide argument why those facts are nonadjudicative. The court may not agree, of course, but it is unlikely to find you engaged in sanctionable practice in bringing the facts to the court's attention.

Third, do not mix adjudicative facts with nonadjudicative facts in your statement of facts. The appellate rules do not make a clear distinction between adjudicative (or record) facts and nonadjudicative facts. A good argument can be made that nonadjudicative facts do not belong in the brief's statement of facts at all. They are not facts of the case. Usually they cannot be supported by specific citation to the record. See Circuit Rule 28(c) (requiring that each fact stated in the statement of facts be supported by a reference to the page or pages of the record or the appendix where that fact appears). Therefore nonadjudicative facts more properly belong in the argument. The court, however, appears to permit the presentation of both adjudicative and nonadjudicative facts in the statement of facts as long as they are clearly and separately presented, not misleading, and not argumentative.

Continued on page 15

## Searching for Brother Jim

Continued from page 14

*Wiesmueller v. Kosobucki*, 547 F.3d 740, 742 (7th Cir. 2008) (Posner, J., in chambers) (Nonadjudicative "facts and the sources from which they are derived could be incorporated in the argument section of the brief, but they can with equal propriety be set forth in the statement of facts, provided that the brief clearly separates them from the facts peculiar to the case. . . ."). Never attempt to pass off nonadjudicative facts as if they were in evidence or part of the record. See *Fuesting v. Zimmer, Inc.*, 421 F.3d 528, 533-34 (7th Cir. 2005), vacated on other grounds on rehearing, 448 F.3d 936 (7th Cir. 2006), *cert. denied*, 549 U.S. 1180 (2007) (Quotations from medical journal articles that were not in the record violate Circuit Rule 28(c)'s requirement that the statement of facts be a fair summary: "misleading factual assertions and citations violate Rule 28(c)").

Fourth, although in most cases citing an Internet address should be a sufficient method of directing the court's attention to the source of nonadjudicative facts, in some cases it may be appropriate to include a hard copy downloaded from the Internet in an appendix. In such a case, the table of contents to the appendix as well as the accompanying brief should make it clear that the document is not in evidence and not part of the record. See *United States v. Raymond*, 228 F.3d 804, 809 n.5 (7th Cir. 2000) (Inclusion of two documents which were not in the record before the district court in the appendix was "improper" and the documents would not be considered.)

Judge Posner reminds us that most judges are generalists and want to learn more about the context and background in order to gain a realistic understanding of the cases that come before them. Appellate advocates must, of course, master and effectively communicate the records of their cases, but effective appellate briefs should also inform the court about the larger environment out of which the claims arose, the reasons for the laws we ask the court to apply, and the likely real world consequences of the legal rules we suggest the court should fashion. The Internet is a rich resource for that purpose. Because we now know (for Judge Posner has told us) that the judges and their clerks are looking to the Internet to get that information, it would be unwise to ignore this resource and not to explain to the court how the information available on the Web supports our case.

### Endnotes

1. The judge's remarks received nothing like the media attention devoted to comments of his fellow members of the federal bench about the courtroom attire of some members of the bar. See H. Gunnarsson, *Dress for Courtroom Success, Not Distress*, 97 Ill. B.J. 402, 405 (2009) (citing articles and blog entries discussing the Illinois breakout session).
2. Brother Jim's preaching style is aggressive. See *Gilles v. State of Indiana*, 531 N.E.2d 220 (Ind. App. 1989) (affirming Gilles's conviction for disorderly conduct). "He preaches against what he calls the 'big four' – 'drugs, sex, booze, and rock and roll.'" *Gilles v. Davis*, 427 F.3d 197, 201 (3d Cir. 2005) (arising out of an incident at the Indiana University of Pennsylvania, a state university). One aspect of his ministry is bringing suit against university officials who interfere with what he believes are his rights to preach on their campuses. See *Gilles v. Garland*, 281 Fed. Appx. 501 (6th Cir. 2008) (arising out of an incident on the campus of Miami University in Oxford, Ohio). Brother Jim's home page claims:  
Hundreds Saved  
Successfully Won Dozens of Court Battles  
Legally Opened Over 50 Closed Campuses  
<http://www.thecampusministry.org>.

## 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](mailto:changes@7thcircuitbar.org).



# Tips from the Inside:

HOW TO MAKE IT EASIER FOR THE JUDGE TO RULE IN YOUR FAVOR

By Ellen M. Carey \*

“An advocate’s job is to make it easier for the judge to rule in his client’s favor...”

*Dal Pozzo v. Basic Machinery Co., Inc.*, 463 F.3d 609, 614 (7th Cir. 2006).

As a former long-term clerk for a magistrate judge in the Northern District of Illinois, I can attest to the fact that at all times, there were at least a handful of cases on the judge’s docket that made all of us – the judge, the courtroom deputy and the law clerks – want to tear our hair out. It was not that these cases presented complex fact patterns or novel questions of law. To the contrary, those were the cases we truly enjoyed. Rather, it was the conduct of the lawyers that could turn a garden variety breach of contract case into one that made everyone in chambers cringe at its very mention.

Naturally, we all want to avoid being associated with one of these cringe-worthy cases. At the same time, practitioners should be aware of the inherent value in maintaining a good relationship with chambers. If you are professional, courteous and consistently follow the Local Rules and the judge’s requirements, the judge and his or her staff are much more likely to accommodate you when something comes up on one of your cases. For instance, the judge may be willing to give you an extra week or two on a briefing schedule or additional time to finish discovery. The courtroom deputy may be willing to reschedule a settlement conference or a status hearing on the date you request, squeeze you in for an early morning hearing, or put you first or last on the call.

After nearly four years on the inside, I returned to private practice with a better understanding of how to build and maintain a good relationship with the judges in the Northern District of Illinois and the value in doing so. The purpose of this article is to share some practical tips for achieving that goal.

*Continued on page 17*

\* Ms. Carey is a litigation associate at Mayer Brown LLP in Chicago, Illinois.

## Tips from the Inside

Continued from page 16

### Read The Judge's Website And Follow All Standing Orders

Each judge in the Northern District of Illinois has a website that explains the judge's case management procedures and contains links to any standing orders. These websites provide critical judge-specific information on a wide variety of topics including the judge's motion schedule, initial status conferences and reports, procedures for settlement conferences, requirements for discovery motions and summary judgment motions, requirements for final pretrial orders and guidelines for jury instructions. For instance, some judges require motions to be filed and courtesy copies to be delivered to chambers at least three days in advance of a hearing. In fact, your motion may be stricken for failure to deliver courtesy copies. This is the type of information that can be found on each judge's website.



Furthermore, a few of these websites have links to helpful articles and other reference materials. In particular:

- Chief Judge Holderman's website provides links to jury instructions that have been given in representative civil jury trials before him.
- Judge Kennelly's website provides links to examples of jury instructions for cases with claims that are not covered by the Seventh Circuit Model Jury Instructions.
- Judge Kendall's website contains helpful information for litigants seeking entry of a protective order. The Seventh Circuit strongly embraces the presumption that the public will have access to all court filings. As a result, all proposed protective orders, even if agreed, must comply with the requirements set forth by the Seventh Circuit. Judge Kendall instructs parties to file: (1) a proposed order which specifies the categories of documents or other matters which may be subject to the order, and (2) a motion which sets forth why a protective order is necessary as to each category.
- Judge Denlow's website attaches articles relating to effective settlement conferences and the retention of federal jurisdiction to enforce the terms of a settlement agreement.

- Judge Cole's website refers litigants to decisions in a number of areas. For example, it cites cases that discuss: the requirements for a comprehensive and appropriate privilege log; the need for and reasons underlying the requirement that a motion be supported by memorandum containing principled argument and relevant authority; the consequences of advancing skeletal and unsupported arguments; protective orders; compliance with Local Rules 37.2 and 56.1 and the consequences of non compliance.

- Quite a few judges in the Northern District of Illinois have endorsed and attached to their websites The Sedona Conference Cooperation Proclamation. The Proclamation suggests methods for accomplishing cooperation in discovery, particularly in light of the fact that discovery of electronically stored information has become so burdensome and costly.

### Follow The Local Rules

Read them. Know them. Follow them. It is that simple. Yet so many lawyers repeatedly violate the Local Rules of the Northern District

of Illinois. A few specific rules bear mentioning because failure to follow them could result in an adverse ruling for your client. At the very least, blatant disregard for these rules is likely to aggravate the judge.

**Local Rule 5.2** – Subsection (f) requires a paper copy of all electronic filings (other than an appearance form or return of service) to be provided to the judge within one business day, unless the judge determines that a paper copy is not required. Subsection (d) requires the judge's paper copy to be bound on the left side, with protruding tabs for exhibits and a list of exhibits for each document containing more than one exhibit. Do not ignore the tabs. They are an important aid to the judge.

Many attorneys who file documents electronically fail to deliver a paper copy to the judge within one business day in accordance with Local Rule 5.2(f). Failure to comply is so commonplace that Judge Shadur has adopted a policy of imposing a moderate fine on counsel who violate this rule.

Continued on page 18



## Tips from the Inside

Continued from page 17

Furthermore, while the rule requires delivery of a courtesy copy within one business day, several judges actually require motions and other pleadings to be delivered on the date of filing. Again, this underscores the importance of reviewing each judge’s website.

In addition, note that the line spacing requirements for judge’s copies and all documents filed in paper format recently changed from 1.5 to 2.0. See Local Rule 5.2(e).

**Local Rule 7.1** – Without prior leave of Court, briefs in support of or in opposition to any motion and objections to orders of a magistrate judge are limited to 15 pages. Any brief or objection that does not comply with this rule may be stricken by the Court.

**Local Rule 37.2** – All discovery motions require a statement that: (1) after consultation in person or by telephone and good faith attempts to resolve differences, the parties are unable to reach an accord, or (2) counsel’s attempts to engage in such consultation were unsuccessful due to no fault of counsel’s. Letters don’t count.

Judges will not hear or consider any discovery motion unless the movant has complied with the “meet and confer” requirement of Local Rule 37.2 and the motion includes a detailed explanation what occurred. Moreover, from time to time, judges will impose additional requirements because of the frequency of the parties’ disputes. See e.g., *See Autotech Technologies Ltd. Partnership v. Automationdirect.com, Inc.*, 2007 WL 2713352 (N.D.Ill. 2007); *Autotech Technologies Ltd. Partnership v. Automationdirect.com, Inc.*, 2007 WL 2736681 (N.D.Ill. 2007). Furthermore, counsel’s efforts to comply with this rule must be genuine. For example, if you file your discovery motion 45 minutes after leaving a voicemail for opposing counsel, you have not complied with the letter or spirit of Local Rule 37.2. Opposing counsel is sure to have other commitments and those commitments could prevent him or her from returning your phone call in short order. A good rule of thumb is to wait at least twenty-four hours and then try again. If opposing counsel still does not respond, you can legitimately claim that your efforts to engage in a meet and confer were unsuccessful due to no fault of your own.

While Local Rule 37.2 by its terms only applies to discovery motions, some judges apply the meet and confer requirement to all motions that a party wishes to file. Check the judge’s website for such a requirement.

**Local Rule 56.1** - Motions for summary judgment and responses must comply with Local Rules 56.1(a) and 56.1(b). Statements of undisputed material fact and responses must be filed separately from the memoranda of law and must include

specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in each paragraph. Absent prior leave of Court, no statement filed pursuant to Local Rule 56.1(a)(3) may contain more than 80 statements of uncontested facts, and no statement filed under Local Rule 56.1(b)(3)(B) may contain more than 40 statements of additional facts.

The Seventh Circuit repeatedly has held that a district court is entitled to expect strict compliance with Local Rule 56.1. *See, e.g., Ammons v. Aramark Unif. Servs.*, 368 F.3d 809, 817 (7th Cir. 2004). Failure to abide by the Local Rules may result in the Court striking briefs, disregarding statements of fact, deeming statements of fact admitted, or denying summary judgment. *See, e.g., Cichon v. Exelon Generation Co.*, 401 F.3d 803, 809-10 (7th Cir. 2005); *Ammons*, 368 F.3d at 816-18; *Smith v. Lamz*, 321 F.3d 680, 682-83 (7th Cir. 2003).

Each District Court in the Seventh Circuit has its own Local Rules, some of which may differ from those discussed above. Check the District Court’s website for the applicable Local Rules.

### Be Prepared And Efficient

The judges and their staff spend a significant amount of time reading motions and pleadings, preparing for hearings, holding settlement conferences, drafting opinions, presiding over trials and juggling a packed schedule with more than three hundred plus cases on their docket. Lack of preparation shows disrespect for the time and effort the judge and his or her staff expend on your case.

For instance, it is a complete waste of time for a lawyer who knows absolutely nothing about the case to attend a status hearing. This happens on a regular basis yet it easily can be avoided. If you are the primary lawyer on a case and you cannot attend a status hearing, you have two good options: (1) take the time to educate your colleague about the facts and the status of the case so he or she is prepared for the status hearing, or (2) call opposing counsel and jointly contact chambers to ask if the status can be rescheduled.

In addition, it is important to remember your case is not the only case on the judge’s docket. Here are a few suggestions to help promote efficiency and lessen the burden on chambers:

- You do not need to file twenty discovery motions in a six- month period of time. If you think this is necessary, “compromise” is a word you should learn. Concentrate your efforts on the discovery motions that truly could affect your case.
- If you call chambers, always have your case number in hand. They will ask for it every time in order to look up your case. After all, it is impossible to remember every case by name.



## Tips from the Inside

Continued from page 18

- Read the docket sheet before calling the courtroom deputy. The vast majority of questions can be answered by reading the docket.
- Check for judicial absences on the judge's website and CM/ECF before filing any motion. Otherwise, the courtroom deputy will have to reschedule your motion when the judge returns.
- If you are scheduled to appear before two different judges at the same time, let the courtroom deputy know. He or she may be able to move you to first or last on the call. At the very least, the judge will know where you are if you are late.
- If you know your motion is unopposed, state that in the motion. Depending on the judge (and the type of motion), it might be granted without having to appear.

### Conduct Yourself In A Professional And Courteous Manner

The lack of civility in the legal profession has been the subject of many recent articles and water cooler conversations. Rightfully so. I was shocked to witness some of the conduct that transpired during my clerkship and I quickly started a mental list of these outrageous practices. While most of the behavior discussed below is both rare and extreme, I witnessed each of these examples.

- Do not stomp your feet, roll your eyes or sigh loudly if the judge rules against you. If you think the judge does not notice these things, you are mistaken.
- Do not interrupt or talk over the judge or opposing counsel. Not only is it rude, but it also makes the court reporter's job much more difficult.
- Do not scream at opposing counsel during a status or motion hearing. I know at least one judge who will banish you to the attorney-witness room until your differences are resolved. You might sit there all day.
- Do not approach the bench without permission. The podium is there for a reason.
- Do not tell the judge he or she does not know how to run a settlement conference. Especially if you are a second-year lawyer. Especially if a partner at your firm has a half-billion-dollar case pending before that judge. It will come back to haunt you.

### Choose Your Battles

In the words of Kenny Rogers, "you got to know when to hold 'em, know when to fold 'em." While we all seek to zealously advocate for our clients, we must temper ourselves in order to avoid excessive strain on the judicial system. In other words, lawyers need to know when enough is enough. For example:

- You do not need to file twenty discovery motions in a six-month period of time. If you think this is necessary, "compromise" is a word you should learn. Concentrate your efforts on the discovery motions that truly could affect your case.
- In the current issue of LITIGATION, an article by Magistrate Judge Cole explores in detail the rules regarding appeals to the district court from a magistrate judge's decision, the standards for review (which are technical and will depend on the kind of decision rendered), the consequences of failing to appeal both in the district court and later in the court of appeals when review is sought, the considerations that factor into a decision of whether to appeal, and all the other myriad elements that help you to overturn or support a magistrate judge's decision. *See* Jeffrey Cole, *Reversing the Magistrate Judge*, 30 LITIGATION 8 (Winter 2010).
- You do not need to file a motion to reconsider and then an objection to every order the magistrate judge enters. The procedure for objections is not there to give you a second bite at the apple. Furthermore, the standard of review for nondispositive decisions is clear error. *Weeks v. Samsung Heavy Indus. Co.*, 126 F.3d 926, 943 (7th Cir. 1997). It is highly unlikely that the magistrate judge committed clear error every time he or she ruled against you. Plus, you may have more credibility with the district court judge if you object to one or two of the magistrate judge's orders rather than every single one. *See* Jeffrey Cole, *Reversing the Magistrate Judge*, 30 LITIGATION 8-9 (Winter 2010) ("Indiscriminately appealing virtually every decision – and it happens, *see e.g., Sommerfield v. City of Chicago*, 813 F.Supp.2d 1004 (N.D.Ill. 2009) – is imprudent and ultimately may affect your credibility with both the Magistrate and District Judges. It most assuredly undercuts the very purpose of and the efficiencies sought to be achieved by the Magistrate Judge system, which was to provide assistance to District Judges faced with ever expanding dockets. In short, you must be selective in picking your fights.").

Continued on page 20



## Tips from the Inside

Continued from page 19

- Quit while you are ahead. Lawyers often argued themselves out of a win because they did not know when to stop talking.
- It is a rare case when a sur-reply, a response to a sur-reply, or a reply in support of a sur-reply is necessary. Unless requested by the Court, litigants should avoid burdening the judge with these excessive filings. Plus they may not be filed without leave of court.
- The Illinois Institute for Continuing Legal Education has just released the 2010 edition of **Federal Civil Practice**. The chapter, **“Practicing Before United Magistrate Judges,”** by Magistrate Judge Jeffrey Cole, expands upon the above themes and offers valuable suggestions in a number of other areas including brief writing.

### Common Sense

- When you file a motion to compel, attach the discovery requests at issue.
- Regardless of the length of your motion or brief, include citations to authority in support of all arguments. Issues raised perfunctorily without citation to authority are deemed waived. *Ordover v. Feldman*, 826 F.2d 1569, 1576 (7th Cir. 1987). And sometimes the unsupported brief will be rejected. The reasons for the requirement that briefs be supported is explained in such cases as *Kyles v. J.K.*

*Guardian Sec. Services*, 236 F.R.D. 400 (N.D.Ill.2006) and *McWilliams v. McWilliams*, 2006 WL 3775952 (N.D.Ill.2006).

- If you have filed twenty or more discovery motions before the same judge, each motion does not need a lengthy background section explaining the facts of your case. Unfortunately for the judge and his or her clerks, they know your case all too well.
- If your brief is riddled with highly technical or scientific language, consider including a glossary of terms. It can be a particularly helpful tool when the judge and the law clerks are wading through unfamiliar territory.
- If you file a response or reply brief at 10:00 p.m. the night before an early morning hearing, the judge is not going to have time to read it. Allow the judge sufficient time to review your filing before a hearing.

Finally, it is important to remember that each judge in the Northern District of Illinois has his or her own rules, procedures and practices. Therefore, experience is the best way to gauge how a particular judge will react to a particular situation. Getting to know your judge is essential to developing a strong rapport with chambers. The tips I have described do not amount to a comprehensive accounting of everything you should do to stay in the good graces of your judge and they certainly will not promise you victory. However, they do identify the most common pitfalls practitioners in the Northern District of Illinois encounter. If you can avoid these pitfalls, you should be able to build and maintain a good relationship with chambers.

## Upcoming Board of Governors’ Meeting

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

**Tuesday, May 4, 2010** *at the annual conference*

**Saturday, September 7, 2010**

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



AN OVERVIEW OF  
REMOVAL JURISPRUDENCE IN  
**Multi-Party  
Diversity Cases**

By Scott James Preston \*

**T**his article begins with the well-known rule that removal is proper over any action that could have been filed originally in federal court. *See* 28 U.S.C. § 1441; *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972). What follows is a discussion of the myriad of issues surrounding removal in multi-party actions based on diversity jurisdiction, 28 U.S.C. § 1332.<sup>1</sup>

**Amount in Controversy**

It is commonly known that before a district court can exercise federal subject matter jurisdiction in diversity, the plaintiff’s claim must be worth more than \$75,000 exclusive of interest and costs. *See* 28 U.S.C. § 1332(a); *LM Ins. Corp. v. Spaulding Enters. Inc.*, 533 F.3d 542, 548 (7th Cir. 2008) (recognizing that “it is the case, rather than the claim, to which the \$75,000 minimum applies” under Section 1332(a)). The “amount in controversy is the amount required to satisfy the plaintiff’s demands in full on the day the suit begins, or in the event of removal, on the day the suit was removed.” *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 511 (7th Cir. 2006). When the amount in controversy is contested, “the parties asserting federal jurisdiction must come forward with competent proof that they have established the jurisdictional threshold and not simply point to the theoretical possibility of recovery for certain categories of damages.” *McMillian v. Sheraton Chicago Hotel & Towers*, 567 F.3d 839, 845 (7th Cir. 2009). *See also Chase v. Shop ‘N Save Warehouse Foods, Inc.*, 110 F.3d 424, 427 (7th Cir. 1997) (defendant must offer “competent proof” that the jurisdictional requirements are met, i.e., evidence which proves “to a reasonable probability that jurisdiction exists”).

*Continued on page 22*

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## Multi-Party Diversity Cases

Continued from page 21

When the complaint does not establish the amount in controversy, “a good-faith estimate of the stakes is acceptable if it is plausible and supported by a preponderance of the evidence.” *Oshana*, 472 F.3d at 511. The Seventh Circuit has suggested several ways to accomplish this: “by contention interrogatories or admissions in state court; by calculation from the complaint’s allegations; by reference to the plaintiff’s informal estimates or settlement demands; or by introducing evidence, in the form of affidavits from the defendant’s experts, about how much it would cost to satisfy the plaintiff’s demands.” *L.D. ex rel. Deter v. Meijer, Inc.*, No. 1:09-cv-45-RBC, 2009 WL 1191694, at \*2 (N.D. Ind. 2009) (citing cases). “Once the defendant in a removed case has established the requisite amount in controversy, the plaintiff can defeat jurisdiction only if it appears to a legal certainty that the claim is really for less than the jurisdictional amount.” *Oshana*, 472 F.3d at 511.

### Diversity of Citizenship

Complete diversity of citizenship generally means that “none of the parties on either side of the litigation may be a citizen of the state of which a party on the other side is a citizen.” *Howell v. Tribune Entm’t Co.*, 106 F.3d 215, 217 (7th Cir. 1997). For diversity purposes, a defendant who is a natural person “is a citizen of a state, with such citizenship being determined ... by the state where the person is domiciled, that is, physically present with an intent to remain in that state indefinitely.” *Ball v. Ball*, No. 09-405-GPM, 2009 WL 1515299, at \*1 (S.D. Ill. June 1, 2009). See also *Tylka v. Gerber Prods. Co.*, 211 F.3d 445, 448-49 (7th Cir. 2000) (reversing summary judgment in favor of defendant because counsel failed to correct the notice of removal which indicated individual’s “residence,” not “citizenship,” and remanded the case with instructions to further remand the case to state court for lack of subject matter jurisdiction).



A corporation is considered a citizen of its state of incorporation as well as its “principal place of business.” 28 U.S.C. § 1332(c)(1); *Thomas v. Guardsmark, LLC*, 487 F.3d 531, 534 (7th Cir. 2007). Where citizenship of the corporation is disputed, courts must apply the “nerve center” test to determine the corporation’s principal place of business. See *Hertz Corp. v. Friend*, --- S.Ct. ---, 2010 WL 605601 (Feb. 23, 2010) (“[w]e conclude that ‘principal place of business’ is best read as referring to the place where a corporation’s officers direct, control and coordinate the corporation’s activities ... called the corporation’s ‘nerve center’”); *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986)

(“[t]he test in this circuit for principal place of business is ‘nerve center’”). In practice, the nerve center is normally “the place where the corporation maintains its headquarters -- provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the ‘nerve center,’ and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).” *Friend*, --- S.Ct. ---, 2010 WL 605601, at \*11.

With respect to limited liability companies and limited partnerships, alleging the state of registration and principal place of business is not sufficient. Instead, the removing party must trace the lineage of these non-corporate entities to each member or partner to determine the citizenship of each. See *Hukic v. Aurora Loan Svcs.*, 588 F.3d 420, 427 (7th Cir. 2009) (“for diversity jurisdiction purposes, the citizenship of a limited liability company is the citizenship of each of its members”); *Cosgrove v. Bartolotta*, 150 F.3d 729, 731 (7th Cir. 1998) (“[t]he citizenship of a partnership is the citizenship of the partners, even if they are limited partners, so that even if one of the partners (general or limited) is a citizen of the same state as the plaintiff, the suit cannot be maintained as a diversity suit”); *Guaranty Nat’l Title Co. v. J.E.G. Assocs.*, 101 F.3d 57, 59 (7th Cir. 1996) (“there is no such thing as ‘a [state name] limited partnership’ for purposes of diversity jurisdiction. There are only partners, each of which has one or more citizenships”).

Continued on page 23



## Multi-Party Diversity Cases

Continued from page 22

Finally, citizenship of a trust is determined by the citizenship of the trustee or trustees, *see America's Best Inns, Inc. v. Best Inns of Abeline, L.P.*, 980 F.2d 1072, 1074 (7th Cir. 1992) (“no trust is a ‘resident’ of [state]. The citizenship of a trust is the citizenship of the trustee or trustees”), unless the law under which the trust is organized permits the trust to sue and be sued in its own name. In such a case, the citizenship of the trust includes both the trustee and the beneficiaries of the trust itself. *See Yount v. Shashek*, 472 F. Supp. 2d 1055, 1058 n.1 (S.D. Ill. 2006) (“[a] trust is not treated as a corporation for diversity purposes, and instead the citizenship of a trust is the citizenship of its trustee or trustees, unless the law under which the trust is organized permits the trust to sue and be sued in its own name, in which case the citizenship of the trust for diversity purposes [includes] its beneficiaries”).

### Diversity Destroying Defendants

While it is true that a plaintiff may choose its own forum, it may not join a nondiverse defendant simply to destroy diversity jurisdiction. *Hoosier Energy Rural Elec. Coop., Inc. v. Amoco Tax Leasing IV Corp.*, 34 F.3d 1310, 1315 (7th Cir. 1994) (“[d]iversity jurisdiction cannot be destroyed by joinder of nondiverse parties if such joinder is fraudulent”). Thus, under the “fraudulent joinder” doctrine,<sup>2</sup> the court may “disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction.” *Shur v. L.A. Weight Loss Ctrs., Inc.*, 577 F.3d 752, 763 (7th Cir. 2009) (citations omitted).

A defendant is fraudulently joined when “there is no possibility that a plaintiff can state a cause of action against [the] nondiverse defendants in state court, or where there has been outright fraud in plaintiff’s pleading of jurisdictional facts.”<sup>3</sup> *Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir. 1993). Notably, the standard for demonstrating fraudulent joinder is considered more exacting than a motion to dismiss

under Federal Rule 12(b)(6). *See Shur*, 577 F.3d at 764 (noting that “district courts within this circuit ... have suggested that the burden is even more favorable to the plaintiff than the standard that applies to a motion to dismiss”); *Simmons v. Norfolk S. Ry. Co.*, 324 F. Supp. 2d 914, 917 (S.D. Ill. 2004) (finding that a diversity-defeating defendant had not been fraudulently joined where “at a minimum [the plaintiff] has stated a cause of action under state law” against that defendant); *Valentine v. Ford Motor Co.*, No. 03-cv-090-JDT, 2003 WL 23220758, at \*4 (S.D. Ind. Nov. 21, 2003) (explaining that “[t]he test for fraudulent joinder ... is a less searching test than the test under Rule 12(b)(6)” and that “a federal court may find that a nondiverse defendant is not fraudulently joined for the purposes of jurisdiction, and later a state court may find that the plaintiff failed to state a claim against the same nondiverse defendant, who will then be dismissed from the suit”) (citations omitted).

A defendant seeking removal based on alleged fraudulent joinder shoulders a “heavy burden” of proving there is no possibility that the plaintiff can establish a cause of action against a non-diverse defendant in a state court. *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992). Unlike a motion to dismiss, however, the court may go beyond the pleadings and consider extrinsic evidence to establish fraudulent joinder. *See Ingersoll-Rand Mining & Mach. Co.*, 960 F.2d 653, 654-55 (7th Cir. 1992) (in an action for strict products liability and negligence, finding that the plaintiff had fraudulently joined a co-worker, in light of the non-diverse defendant’s “uncontradicted affidavit, essentially stating that he has had absolutely nothing to do with” the machine alleged to have caused the plaintiff’s injury); *Siegal v. H Group Holding, Inc.*, No. 07-C-6830-JWD, 2008 WL 4547334, at \*3 (N.D. Ill. Apr. 9, 2008) (“there is substantial authority permitting a court to pierce the pleadings and consider summary judgment-type evidence such as affidavits and deposition testimony”) (citations omitted).

Continued on page 24

## Multi-Party Diversity Cases

Continued from page 23

Fraudulent joinder may be found in cases where the claim lies beyond the limitations period, *see LeBlang Motors, Ltd. v. Subaru of Am., Inc.* 148 F.3d 680, 690 (7th Cir. 1998) (finding no possibility of success because the statute of limitations had run); where state law failed to impose liability on the fraudulently joined defendant, *see LeJeune v. Shell Oil Co.*, 950 F.2d 267, 271 (5th Cir. 1992) (holding that a claim against a plant manager or supervisor was fraudulently joined because state law did not impose liability on those parties); where the plaintiff's allegations were conclusory or generic with respect to "defendants" collectively, *see In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 294-95 (S.D.N.Y. 2001) (court finding it was "impossible to determine from the face of the complaint" that the fraudulent joined defendant was even a physician and he was simply included in all of the generic allegations against "defendants"); or where the plaintiff failed to conduct a reasonable investigation prior to naming the fraudulently joined defendant, *see Gabrielle v. Allegro Resorts Hotels*, 210 F. Supp. 2d 62, 67 (D.R.I. 2002) ("[e]ven where a plaintiff is mistaken about the factual basis for his claim, a court may infer wrongful joinder where the plaintiff failed to conduct a reasonable investigation).

### The Forum Defendant Rule

A different scenario arises when an out-of-state plaintiff files suit naming multiple defendants, at least one of which is a citizen of the forum state. This scenario implicates the forum defendant rule and will defeat diversity jurisdiction unless the removing defendant can demonstrate that the in forum defendant has not been "properly joined and served." *See* 28 U.S.C. § 1441(b) (providing that actions are removable "only if none of the parties in interest *properly joined and served* as defendants is a citizen of the State in which such action is brought") (emphasis added). Thus, by implication, it is possible for one defendant to successfully remove a case prior to service on the forum defendant. *See Massey v. Cassens & Sons, Inc.*, No. 05-cv-598-DRH, 2006 WL 381943, at \*1 (S.D. Ill. Feb. 16, 2006) (holding that service of process is not a prerequisite to removal).

Courts are more reticent to allow pre-service removal in cases where none of the defendants has been served viewing such conduct as suspicious gamesmanship. *See Vivas v. Boeing Co.*, 486 F. Supp. 2d 726, 734 (N.D. Ill. 2007) ("to allow a resident defendant to remove a case before a plaintiff even has a chance to serve him would provide a vehicle for defendants to manipulate the operation of the removal statutes"); *Holmstrom v. Harad*, No. 05-C-2714, 2005 WL 1950672 \*2 (N.D. Ill. Aug. 11, 2005) (remanding case to state court, finding that the "joined and served" requirement applies only "when one defendant has been served but the named forum defendant has not. . . . When no defendant has been served, however, the non-forum defendant stands on equal footing as the forum defendant"). *But see Massey*, 2006 WL 381943, at \*3 (rejecting policy-based arguments and holding that "the Court is constrained" by the plain language of the statute requiring the forum defendant to have been "properly joined and served" when ascertaining whether the court has jurisdiction). For similar reasons, courts are more receptive to pre-service removal where the plaintiff has been afforded the opportunity to effect proper service. *See Test Drilling Svc. Co. v. Hanor Co.*, 322 F. Supp. 2d 953, 956-57 (C.D. Ill. 2003) (upholding pre-service removal where all other defendants had been served), *Maple Leaf Bakery v. Raycem Corp.*, No. 99-C-6984-GWL, 1999 WL 1101326 \*2 (N.D. Ill. Nov. 29, 1999) ("[h]ere Lakeshore and Northtown were not served at the time of removal, so their status as resident defendants cannot be construed to defeat removal").

Additionally, some courts have held that the forum defendant rule will not preclude removal if the forum defendant has been fraudulently joined. Courts following this rationale have generally determined that a defendant who has been fraudulently joined was not, by definition, "properly joined" as that term appears in section 1441(b). *See e.g., Bova v. U.S. Bank, N.A.*, 446 F. Supp. 2d 926, 932-33 (S.D. Ill. 2006) ("where a resident defendant has been fraudulently joined the forum defendant rule is irrelevant"). *Accord Carman v. Bayer Corp.*, No. 5:08-cv-178, 2009 WL 1974307, at \*2 (N.D. W.Va. July 7, 2009) (court noting that the judicially-created fraudulent joinder doctrine

Continued on page 25



## Multi-Party Diversity Cases

Continued from page 24

is an exception to the forum defendant rule notwithstanding out-of-state plaintiffs); *Maldonado v. Hartmann*, No. 4:07-cv-853-CDP, 2007 WL 1862763, at \*2 (E.D. Mo. June 28, 2007) (in case filed by citizen of Mexico, court finding that in forum defendants were fraudulently joined, dismissing both under Federal Rule 21, and assuming jurisdiction: “[t]he fraudulent joinder of these defendants does not trigger the forum-defendant rule, and does not prevent removal”).

Conversely, other courts have rejected the fraudulent joinder doctrine on the basis that the doctrine applies only to *non-diverse* parties and in forum defendants are *diverse* from out-of-state plaintiffs. *See e.g., Yount v. Shashek*, 472 F. Supp. 2d 1055, 1059 (S.D. Ill. 2006) (holding that, in case where plaintiff was a citizen of a different state outside the forum, “the exception to the forum defendant rule for fraudulently joined Defendants has no relevance”); *Brooks v. Merck & Co.*, 443 F. Supp. 2d 994, 1004 (S.D. Ill. 2006) (“[t]o show fraudulent joinder, defendants must show a flaw specific to the joinder of [a] non-diverse party” as opposed to a flaw that applies to all defendants, diverse or otherwise). Thus, whether the fraudulent joinder doctrine is a viable exception to the forum defendant rule remains an open and contested issue in the Seventh Circuit.

Though the forum defendant rule can require remand of a removed case to state court, the rule is not jurisdictional; the ability to seek remand is waived if the plaintiff does not raise the issue within thirty days of removal. *See Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 380 (7th Cir. 2000) (“we join the longstanding line of authority that holds that the forum defendant rule is nonjurisdictional”); *Gragg v. Alfa Laval, Inc.*, No. 09-773-GPM, 2009 WL 4110389, at \*2 (S.D. Ill. Nov. 20, 2009) (“a removal in violation of the forum defendant rule is procedurally defective, not jurisdictionally defective, and a failure to object to the removal on the basis of the forum defendant rule within thirty days after the removal waives the defect”). Thus, because the forum

defendant rule is considered non-jurisdictional, the court may retain jurisdiction despite subsequent service of the in-forum defendant (provided, as noted above, that the plaintiff in the action does not also reside in the forum). Because the forum defendant rule is a rule of procedure, immediate appellate review is not available. *Holmstrom v. Peterson*, 492 F.3d 833, 838 (7th Cir. 2007) (noting that “the failure to comply with the forum defendant rule is ... a defect in the removal that bars this court’s review”).<sup>4</sup>

### Fraudulent Misjoinder

Fraudulent misjoinder, or procedural misjoinder, can be argued where diversity jurisdiction would otherwise be present but for multiple named plaintiffs, some of which destroy diversity. Fraudulent misjoinder finds its genesis in the decision *Tapscott v. MS Dealer Svc. Corp.*, 77 F.3d 1353 (11th Cir. 1996), where the Eleventh Circuit held that the egregious misjoinder of viable, non-fraudulent claims of multiple plaintiffs may nonetheless be tantamount to fraudulent joinder designed to defeat diversity. *See Tapscott*, 77 F.3d at 1360 (finding complete diversity of citizenship where a group of plaintiffs with claims against a diverse defendant had “egregious[ly]” misjoined their claims with the claims of a group of plaintiffs against a non-diverse defendant). *See also Willingham v. State Farm Ins. Co.*, No. 2:09-CV-59-SA, 2009 WL 2767679, at \*2 (N.D. Miss. Aug. 27, 2009) (identifying *Tapscott* as the origin of the doctrine that misjoinder can be a form of fraudulent joinder to defeat diversity).

Neither the Seventh Circuit Court of Appeals nor the Supreme Court has addressed the fraudulent misjoinder doctrine. Those district courts within this Circuit to have addressed the doctrine have flatly rejected it. *See Lecker v. Bayer Corp.*, No. 09-991-GPM, 2010 WL 148627, at \*6 (S.D. Ill. Jan. 13, 2010) (“[i]n the Court’s view, the issue of whether or not to enlarge the scope of diversity jurisdiction through a device like the fraudulent misjoinder doctrine is one that is best left to resolution by Congress; as already has been noted, it is not the province of federal courts to enlarge their jurisdiction by decision”);

Continued on page 26

## Multi-Party Diversity Cases

Continued from page 25

*Livingston v. Hoffmann-La Roche, Inc.*, No. 09-C-2611-MEA, 2009 WL 2448804, at \*8 (N.D. Ill. Aug. 6, 2009) (noting that the doctrine “has been highly criticized and rejected by other courts in the Northern District of Illinois and by courts in other districts of the Seventh Circuit”);

*Wolf v. Kennelly*, 540 F. Supp. 2d 955, 962 (N.D. Ill. 2008) (approaching the doctrine with “caution” and declining to invoke it because “it is the state court, and not this court, who should determine whether [fraudulent] misjoinder exists here”); *Robinson v. Ortho-McNeil Pharm., Inc.*, 533 F. Supp. 2d 838, 842 (S.D. Ill. 2008) (declining to adopt the doctrine of fraudulent misjoinder because “jurisdiction must be strictly and narrowly construed” and only Congress may “enlarge the scope of federal jurisdiction,” while the doctrine is a judicial “innovation” that enlarges the scope of federal jurisdiction); *Rutherford v. Merck & Co.*, 428 F. Supp. 2d 842, 854-55 & n.2 (S.D. Ill. 2006) (noting that “those courts that test fraudulent misjoinder under state procedural rules likely are upsetting the balance of federalism by needlessly inserting themselves into the judicial business of construing those rules, which is a matter of uniquely state concern”).

### Timing Issues Related to Multi-Party Removal

The defendant must file its notice of removal “within thirty days after receipt by the defendant, through service or otherwise, a copy of the initial pleading setting forth the claim for relief...” 28 U.S.C. § 1446(b) (emphasis added). In 1999, the United States Supreme Court clarified that the thirty-day removal period begins to run not when the defendant receives a courtesy copy of the complaint but, rather, when the defendant has been properly

served with the summons and complaint.<sup>5</sup> *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354, 119 S.Ct. 1322, 1329, 143 L.Ed.2d 488 (1999).

Removal in a multi-party case is governed by the rule of unanimity. Thus, “all defendants in a case that have been properly joined and served when the case is removed to federal court must join in or consent to the removal.” *Northern Ill. Gas Co. v. Airco Indus. Gases, Div. of Airco, Inc.*, 676 F.2d 270, 272 (7th Cir. 1982). See also *Welch v. Norfolk S. Ry. Co.*, No. 09-209-GPM,

2009 WL 2365596, at \*2 (S.D. Ill. May 27, 2009) (under the rule of unanimity, “removal is procedurally defective unless all defendants properly joined and served when a case is removed consent to the removal”). Unserved, nominal<sup>6</sup> or fraudulently joined defendants need not consent to removal. See *Pruitt v. Kelly Moore Paint Co.*, No. 07-768-GPM, 2007 WL 4226068, at \*3 (S.D. Ill. Nov. 13, 2007) (“the fact that a defendant has not been served with summons when a case is removed excuses a removing defendant from seeking the unserved defendant’s consent to the removal under the ... ‘unanimity rule’”); *Ryan v. State Bd. of Elections of State of Ill.*, 661 F.2d 1130, 1134 (7th Cir. 1981) (consent of nominal parties not necessary for removal); *Ellis v. Hansen & Adkins Auto Transp.*, No. 09-677-GPM, 2009 WL 4673933 at \*3 n.3 (S.D. Ill. Dec.

4 2009) (“the consent of a fraudulently joined defendant to removal is not required”). See also *In re Bridgestone/Firestone Inc. Prods. Liab. Litig.*, 204 F. Supp. 2d 1149, 1152 (S.D. Ind. 2002) (noting that “[i]n the Seventh Circuit, ... a notice of removal need not declare that every defendant actually consents to removal,” and holding that because the removing defendants properly explained in their notice of removal why a co-defendant had not consented in the removal, the notice was facially sufficient).





## Multi-Party Diversity Cases

Continued from page 26

Although section 1446(b) requires a defendant to file its notice of removal within thirty days, the rule does not address what to do when all defendants are not served within a thirty-day window. One view, which plaintiffs generally favor, is that the notice of removal must be filed within 30 days of the date of service on the first defendant entitled to remove, and later-served defendants must consent within that 30 days. *See Phoenix Container, LP v. Sokoloff*, 83 F. Supp. 2d 928, 932 (N.D. Ill. 2000) (“[a]llowing a later-served defendant to remove after the first-served defendant has waived his removal rights would be futile, because the first-served defendant would be unable to join that petition and the case therefore would be unremovable”). The other view, favored by defendants, is that the last served defendant is entitled to remove a case within thirty days regardless of whether earlier served defendant declined to do so within their thirty-day window. *See Save-A-Life Foundation, Inc. v. Heimlich*, 601 F. Supp. 2d 1005, 1009 (N.D. Ill. 2000) (“each defendant in a case is entitled to remove an action from state to federal court, regardless of whether earlier served defendants declined to do so, so long as all defendants consent to removal”). To date, neither the Supreme Court nor the Seventh Circuit has decided whether the first-served, or later-served rule applies.<sup>7</sup>

### Moving for Remand

Under the rules of removal jurisdiction, “[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a).” 28 U.S.C. § 1447(c). Thus, the thirty-day period for removal is predicated on whether the defect is jurisdictional or procedural. If the defect is procedural, objections are waived if they are not raised by the plaintiff within thirty days. While removals based on the forum defendant rule are considered procedural and are waived if not raised within thirty days, *see Hurley*, 222 F.3d at 380 (Seventh Circuit concluding that the forum-defendant rule is non-jurisdictional), removals based on fraudulent joinder – where the forum defendant is a citizen of the same state as the plaintiff – are jurisdictional and can be raised at any time. *See Murphy v. Guideone Mut. Ins. Co.*, No. 01-247-DFH, 2004 WL 503800, at \*1 n.1 (S.D.

Ind. Feb. 24, 2004) (“[b]ecause the underlying issue of fraudulent joinder goes to subject matter jurisdiction ...there is no time limit on this court’s examination of the propriety of the removal”); 5B Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350, n. 39 (2009) (when a Rule 12(b)(6) motion is joined with a motion to remand on the ground of fraudulent joinder, the court should consider the claim of fraudulent joinder first since it is a jurisdictional issue). *Accord Sprowls v. Oakwood Mobile Homes, Inc.*, 119 F. Supp. 2d 694, 696 (W.D. Ky. 2000) (“[b]ecause fraudulent joinder goes to the very existence of this Court’s subject matter jurisdiction, the thirty day time limit of section 1447(c) does not apply”); *Horton v. Scripto-Tokai Corp.*, 878 F. Supp. 902, 904-05 (S.D. Miss. 1995) (holding that motion to remand on theory that District Court lacked subject matter jurisdiction due to lack of complete diversity after defendant removed on fraudulent joinder theory was not subject to thirty-day limitation in section 1447(c)).

Finally, while Section 1446(b) mandates that a “case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action,” the Fifth Circuit has found an equitable exception to the one-year limitation. In *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 426-27 (5th Cir. 2003), the Fifth Circuit affirmed the district court’s denial of motion to remand, finding that the plaintiff’s inclusion of fraudulently joined defendants justified “application of an equitable exception in the form of estoppel.” The Fifth Circuit held that “where a plaintiff has attempted to manipulate the statutory rules for determining federal removal jurisdiction, thereby preventing the defendant from exercising its rights, equity may require that the one-year limit in 28 U.S.C. § 1446(b) be extended.” *Tedford*, 327 F.3d at 428-29. To date, the Seventh Circuit has not addressed whether it would consider the equitable exception. *See Omi Custard Co. v. Relish This, LLC*, No. 04-cv-861-DRH, 2006 WL 2460573, at \*5 (S.D. Ill. Aug. 24, 2006) (declining to apply the exception and noting that “there exists no binding case law for the Court to follow that aligns with the equitable exception approach applied by the Fifth Circuit in *Tedford*”).

Continued on page 28



## Multi-Party Diversity Cases

Continued from page 27

### Conclusion

There are a myriad of issues surrounding removal jurisprudence in multi-party diversity actions, many of which remain unresolved in this Circuit. While this article has attempted to highlight those issues (both resolved and unresolved), many of the district court opinions cited above were decided relatively recently, and therefore the law in this area is still very much in flux. Accordingly, counsel should always check the latest case law when presented with any issues concerning removal.

### Endnotes

1. Removal under the “Mass Action” provision of the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d)(2)(5) is outside the scope of this article. CAFA Mass Action Removal was addressed by the Seventh Circuit in *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 761 (7th Cir. 2008) (matter of first impression for Seventh Circuit, finding suit warranted removal as mass action under CAFA), as well as the Southern District of Illinois in *Gilmore v. Bayer Corp.*, No. 09-986-GPM, 2009 WL 4789406, at \*4 (S.D. Ill. Dec. 9, 2009) (denying plaintiff’s motion to remand in case removed under mass action provision of CAFA).
2. Numerous courts have noted that the term “fraudulent joinder” is a misnomer because the doctrine requires neither fraud nor joinder. *See e.g., Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir.1992) (a procedural term of art, “fraudulent” is shorthand for “a claim against an in-state defendant that simply has no chance of success, whatever the plaintiff’s motives for joining the defendant”); *Mayes v. Rapoport*, 198 F.3d 457, 461 n.8 (4th Cir. 1999) (noting that the doctrine requires “neither a showing of fraud ... nor joinder”); *Cobb v. Delta Exports, Inc.*, 186 F.3d 675 678 (5th Cir. 1999) (“the district court’s confusion likely resulted from the fact that the term fraudulent joinder is a bit of a misnomer...”). While it is true that actual fraud in jurisdictional allegations will suffice to invoke the doctrine, the more typical ground is that a plaintiff brought a claim against a nondiverse defendant “that simply has no chance of success, whatever the plaintiff’s motives.” *Poulos*, 959 F.2d at 73. and “joinder” is also misleading because it is irrelevant whether a nondiverse defendant was actually “joined” or simply named in the original complaint before the state court. *Mayes*, 198 F.3d at 461 n.8.
3. The Seventh Circuit’s fraudulent joinder standard has arguably vacillated from the more stringent “no possibility” test to the more lenient “no reasonable possibility” test. *See e.g., Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 878 (7th Cir. 2009) (“joinder is considered fraudulent ... if the out-of-state defendant can show there exists *no reasonable possibility* that a state court would rule against the in-state defendant) (citations, quotations omitted) (emphasis added); *Hoosier Energy Rural Electric Coop., Inc. v. Amoco Tax Leasing IV Corp.*, 34 F.3d 1310, 1315 (7th Cir.1994) (“[f]raudulent joinder occurs either when there

is *no possibility* that a plaintiff can state a cause of action against nondiverse defendants in state court, or where there has been outright fraud in plaintiff’s pleading of jurisdictional facts”) (emphasis added); *Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir.1993) (same); *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992) (“[a]t the point of decision, the federal court must engage in an act of prediction: is there *any reasonable possibility* that a state court would rule against the non-diverse defendant?”) (emphasis added). Not surprisingly, district courts have also varied in their interpretation of the appropriate standard for determining whether a defendant has been fraudulent joined. *Compare Pietras v. Sentry Ins. Co.*, No. 06-C-3576-MFK, 2006 WL 5631804, at \*2 (N.D. Ill. Nov. 3, 2006) (formulating standard as whether claim “has *no chance* of success”) (emphasis added) *with Sheffer v. Cottrell, Inc.*, No. 08-0791-DHR, 2009 WL 1231037, at \*3 (S.D. Ill. Apr. 30, 2009) (to prove fraudulent joinder the defendant must “show there exists *no reasonable possibility* that a state court would rule against the [in-state] defendant”) (emphasis added).

4. It is also possible for a plaintiff to request leave to file an amended complaint, add a diversity-destroying defendant and then file a motion to remand under 28 U.S.C. § 1447(e). In that case, the district court may either deny joinder and retain jurisdiction or permit joinder and remand the action to state court. “These are the only two options; the district court may not permit joinder of a nondiverse defendant and retain jurisdiction.” *Schur v. L.A. Weight Loss Ctrs., Inc.*, 577 F.3d 752, 759 (7th Cir 2009).
5. The Court summarized the possibilities as follows: “First, if the summons and complaint are served together, the 30-day period for removal runs at once. Second, if the defendant is served with the summons but the complaint is furnished to the defendant sometime after, the period for removal runs from the defendant’s receipt of the complaint. Third, if the defendant is served with the summons and the complaint is filed in court, but under local rules, service of the complaint is not required, the removal period runs from the date the complaint is made available through filing. Finally, if the complaint is filed in court prior to any service, the removal period runs from the service of the summons.” *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354, 119 S.Ct. 1322, 1329, 143 L.Ed.2d 488 (1999) (citing *Potter v. McCauley*, 186 F. Supp. 146, 149 (D. Md. 1960)).
6. The Seventh Circuit has explained that a nominal defendant “is a person who can be joined to aid in the recovery of relief without an assertion of subject matter jurisdiction only because he has no ownership interest in the property which is the subject of the litigation. A nominal defendant holds the subject matter of the litigation in a subordinate or possessory capacity as to which there is no dispute. Because the trustee, agent, or depository, who has possession of the funds which are the subject of the litigation, he must often be joined purely as a means of facilitating collection.” *SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991) (citations, quotations omitted).
7. Some courts have suggested that the Seventh Circuit has signaled through implication that it would apply the “later-served” rule if presented with the issue. *See, e.g., Schillinger v. 360Networks USA, Inc.*, No. 06-138-GPM, 2006 WL 1388876, at \*7 n.7 (S.D. Ill. May 18, 2006) (citing cases). Note, however, that the Seventh Circuit has frequently cautioned that opinions of the court which decide issues by implication are not to be treated as precedential with respect to those issues. *See, e.g., United States v. Daniels*, 902 F.2d 1238, 1241 (7th Cir. 1990) (“[j]udicial assumptions concerning, judicial allusions to, and judicial discussions of issues that are not contested are not holdings”).

# Navigating *the Steep and Thorny Route* OF FEDERAL DISCRETIONARY INTERLOCUTORY APPEALS

By Brian J. Paul\*

**T**he touchstone of federal appellate procedure is the final-decision rule of 28 U.S.C. § 1291, which holds that an appeal will not lie until the district court has entered a decision that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Catlin v. United States*, 324 U.S. 229, 233 (1945). Postponing appellate review until entry of final judgment serves a number of important purposes. It encourages respect for the rulings of the district courts. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). It allows valid claims to proceed without the harassment and expense that would otherwise accompany a succession of separate appeals. *Id.* And it promotes judicial efficiency. *Id.* Occasionally, however, there is a case where strict adherence to the final-decision rule makes little sense, and where other equally worthy goals—alleviating parties from unnecessarily protracted litigation, avoiding waste of judicial resources, and managing the development of the law—could be furthered by immediate appellate review. Enter 28 U.S.C. § 1292(b).

Section 1292(b) creates a two-step, two-level procedure for obtaining review in civil actions of nonfinal interlocutory orders. It says in its entirety:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

*Continued on page 30*

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## Navigating *the Steep and Thorny Route...*

*Continued from page 29*

On the surface, the procedure seems straightforward enough; in practice, however, obtaining 1292(b) certification is a “steep and thorny route,” *Weir v. Propst*, 915 F.2d 283, 285 (7th Cir. 1990). The statute is not as clear as it might be. *Ahrenholz v.*

*Bd. of Trustees of the Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000). Plus, there is the challenge of persuading a district court to effectively concede that it might have made a mistake (after all, there’s no point in certifying an order if there isn’t a reasonable chance it will be reversed), and then if you are successful at that, of convincing an already overburdened court of appeals to take on yet another case—and all in the headwind of the final-decision rule. So obtaining 1292(b) certification of even the most important of interlocutory rulings is a formidable task indeed. Let us see if we can’t sharpen our understanding of the statute and figure out some ways to increase our odds of success.

### Step 1 — District Court

The first step under the statute is to obtain certification from the district court. While section 1292(b) permits a district court to certify an order for immediate appeal *sua sponte*, that is often not the way it happens in practice. A petition to certify is usually necessary. But when to file it? Section 1292(b) is silent on the issue, as are the appellate rules. See *Richardson Elecs., Ltd. v. Panache Broadcasting of Pa., Inc.*, 202 F.3d 957, 958 (7th Cir. 2000); *Weir*, 915 F.2d at 287. Wright and Miller contend that this makes it possible to “defer[] the question of [interlocutory] appeal until it is clear that prompt appeal is apt to be useful,”

16 CHARLES ALAN WRIGHT, ARUTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3929,

p. 394 (2d ed. 1996), but not all courts agree. The Seventh Circuit requires that the petition be filed within “a *reasonable time* after the order sought to be appealed.” *Ahrenholz*, 219 F.3d at 675-76 (emphasis original). And so while in one case the Seventh Circuit countenanced a gap of slightly more than a month, *Nuclear Eng’g Co. v. Scott*, 660 F.2d 241, 245-48 (7th Cir. 1991), it thought a two-month delay in another case “inexcusably dilatory,” *Richardson Elecs.*, 202 F.3d at 958, and a six-month delay in still another case “gratuitous” and “protracted,” *Weir*, 915 F.2d at 286. Courts in at least four other jurisdictions have

followed the Seventh Circuit’s lead on this issue. *Gagan v. Sharer*, 2006 WL 3736057, at \*2 (D. Ariz. Nov. 6, 2006); *Scholl v. United States*, 68 Fed. Cl. 58, 60 (Fed. Cl. 2005); *Martens v. Smith Barney, Inc.*, 238 F. Supp. 2d 596, 601 (S.D.N.Y. 2002); *Fabricant v. Sears Roebuck & Co.*, 2001 WL 883303, at \*1 (S.D. Fla. Jan. 29, 2001). At least one court in one jurisdiction has not. *Lutch v. Huffly Corp.*, 2006 WL 2546945, at \*5 n.2 (W.D. Pa. Sept. 1, 2006). The question of timing is therefore very much an open one.

There is no point in tempting fate: file the petition within 10 days of the order if at all possible. The virtue of this approach is that it tracks the ten-day deadline for filing

1292(b) petitions with the court of appeals (more on this step in a moment); if it is acceptable to take 10 days to file a petition for interlocutory appeal at the appellate court level, it ought to be acceptable to take 10 days to file a petition for interlocutory appeal at the district court level. The bane of this approach is that 10 days is not a lot of time, and so if a 1292(b) petition is contemplated in the event of a loss, it may not be a bad idea to begin working on the petition before the ruling is even handed down. Cross-petitions should be filed within the same ten-day period. See *Tranello v. Frey*, 962 F.2d 244, 247-48 (2d Cir. 1992).



*Continued on page 31*



## Navigating the Steep and Thorny Route...

Continued from page 30

A district court can accomplish certification of a previously issued order in one of two ways: by amendment of the order itself, Fed. R. App. P. 5(a)(3), or by entry of a separate order, see, e.g., *In re Hamilton*, 122 F.3d 13, 14 (7th Cir. 1997); *Marisol by Forbes v. Giuliani*, 104 F.3d 524, 527-29 (2d Cir. 1996); *In re Benny*, 812 F.2d 1133, 1136-37 (9th Cir. 1987). Both methods are acceptable, although a literal reading of the statute might suggest otherwise. *Weir*, 915 F.2d at 285-86.

What a district court cannot do is merely recapitulate the statutory criteria; it must explain why 1292(b) certification is appropriate. *In re Hamilton*, 122 F.3d at 14 (citing cases). “An unadorned recital that the criteria are satisfied is,” at a minimum, “less likely to prompt the court of appeals to accept the appeal . . . .” 16 WRIGHT & MILLER § 3930, p. 419. Worse, the court of appeals may conclude that the district court has failed to consider the criteria altogether, scuttling any chance for an interlocutory appeal from the get go. See, e.g., *White v. Nix*, 43 F.3d 374, 377 (8th Cir. 1994). The court of appeals needs assurance that the district court has thoroughly vetted the issue. Doing so “serves the dual purpose of ensuring that [discretionary interlocutory] review will be confined to appropriate cases and avoiding time-consuming jurisdictional determinations in the court of appeals.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474-75 (1978). A certification in the proper form might even get deference. See, e.g., *In re Coordinated Pre-Trial Proceedings in Petrol. Prods. Antitrust Litig.*, 761 F.2d 710, 712 (Temp. Emer. Ct. App. 1985). But see *Davis v. Hall*, 375 F.3d 703, 710 (8th Cir. 2004) (the court of appeals must exercise its own discretion). So it may be wise (depending on the jurisdiction and judge) to submit a proposed order along with the petition, even if it isn’t required by local rule. The proposed order does not need to be long, but it ought to be structured around the four statutory criteria. For a good example, see *In re Ocwen Federal Bank FSB Mortgage*

*Servicing Litigation*, 2006 WL 1371458 (N.D. Ill. May 16, 2006), *aff’d*, 491 F.3d 638 (7th Cir. 2007).

### Step 2 — Court of Appeals

The next step under Section 1292(b) is to file a petition with the court of appeals “within ten days after the entry of the order . . . .” This deadline runs from the date of the certification, not the date of the underlying order itself. 16 WRIGHT & MILLER § 3929, p. 394; see also Fed. R. App. P. 5(a)(3). Responses and cross-petitions are due within ten days after the petition is served. Fed. R. App. P. 5(b)(2).

Appellate Rule 5(b) governs the contents of the petition. It must include four things: (1) the facts necessary to understand the question presented, (2) the question presented itself, (3) the reasons why the appeal should be permitted, and (4) a request for relief. Fed. R. App. P. 5(b)(1)(A)-(D). Attached to the petition must be a copy of the underlying order and, if separate from the underlying order, a copy of the district court’s certification. Fed. R. App. P. 5(b)(1)(E).

The court of appeals is not bound by the statutory criteria that guide the district court. 16 WRIGHT & MILLER § 3929, p. 378. Section 1292(b) simply says that the court of appeals “may . . . in its discretion, permit an appeal to be taken” from the certified order. The upshot is that even when the statutory criteria are met, the court of appeals “may, but need not, exercise jurisdiction.” *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982); see also *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004). Indeed, “[t]he appellate court may deny the appeal for any reason, including docket congestion.” *Coopers & Lybrand*, 437 U.S. at 475. This discretion has been likened to the discretion the Supreme Court has in controlling its certiorari docket. See, e.g., *In re Convertible Rowing Exerciser Patent Litig.*, 903 F.2d 822, 822 (Fed. Cir. 1990); *Parcel Tankers, Inc. v. Formosa Plastics Corp.*, 764 F.2d 1153, 1156 (5th Cir. 1985); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974); see also *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883 n.9 (1994) (“the discretion to hear an appeal [under section 1292(b)] is broad”).

Continued on page 32



## Navigating the Steep and Thorny Route...

Continued from page 31

This is not to say, however, that the statutory criteria shouldn't be argued in the appellate court petition. On the whole, the advantages of immediate appeal increase with the extent to which proceedings in the district court will potentially be saved by an immediate appeal and the significance of the burdens imposed on the parties by an erroneous ruling. 16 WRIGHT & MILLER § 3920, p. 416; *accord Vereda, Ltda. v. United States*, 46 Fed. Cl. 569, 570 (Fed. Cl. 2000); *Lipsett v. Univ. of Puerto Rico*, 740 F. Supp. 921, 923 (D. P.R. 1990); *Gen. Dynamics Corp. v. Am. Tel. & Tel. Co.*, 658 F. Supp. 417, 418 (N.D. Ill. 1987). On the flip side, the disadvantages of an immediate appeal increase with the probability that continued district court proceedings without an appeal will moot the issue, or that a reversal will not alter the course of the proceedings or relieve the parties of any substantial burden. *Id.* These considerations go to the "controlling" legal question and "advance termination" requirements, and therefore it makes sense to discuss these criteria at the appellate level.

The advantages of immediate appeal also rise with the probability for prompt reversal. *Id.* There are no current statistics available on the reversal rate for interlocutory appeals, but it seems a fair bet that, after all of the others factors have been weighed and considered, an appellate court is more likely to take a case if it doubts the correctness of lower court's ruling. This suggests that an argument on the merits should be worked into the petition. It does not suggest, however, that it is a good idea to rehash your summary judgment brief. *See, e.g., Ahrenholz*, 219 F.3d at 676. The merits can be interwoven with a discussion of the statutory criteria, or, following a showing that the case is ripe for interlocutory review, it can be effective to make a merits argument in a separate section at the end of the petition.

Particular care should be taken in framing the question presented. Although the jurisdiction of the court of appeals is not tied to

the question identified in the petition or, for that matter, to the "controlling question of law" identified by the district court in its certification order—it's tied to the underlying order, *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 204-05 (1996)—like the Question Presented in a petition for certiorari, the question presented in a petition for interlocutory appeal gives the reviewing court critical and immediate insight into whether to exercise jurisdiction. *Cf. Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992) (discussing the function of the issue statement in petition for certiorari). Justice Brennan once said that in most cases he could decide whether certiorari should be granted based on the Question Presented alone. Justice William J. Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973). Given the caseloads of the courts of appeals these days, we shouldn't be surprised if not a few appellate court judges feel the same way about their ability to decide petitions for interlocutory appeal. The importance of properly framing the question presented thus cannot be overemphasized.

The federal rules of appellate procedure prescribe no guidelines for framing the question presented, and there are any number of effective methods from which to choose. Whatever the method used, however, petitioners would do well to heed Supreme Court Rule 14.1(a). That rule requires the Question Presented in a certiorari petition to be "expressed concisely in relation to the circumstances of the case, without unnecessary detail." It must also be "short" and not "argumentative or repetitive." *Id.*

If the case is accepted by the court of appeals, a notice of appeal need not be filed. Fed. R. App. P. 5(d)(2). The various deadlines that run from the filing of the notice of appeal in a typical case (the deadline for filing a disclosure statement, to designate the record, and so on) run from the date the court of appeals entered the order granting permission to take the interlocutory appeal. *Id.*

Continued on page 33

## Navigating the Steep and Thorny Route...

Continued from page 32

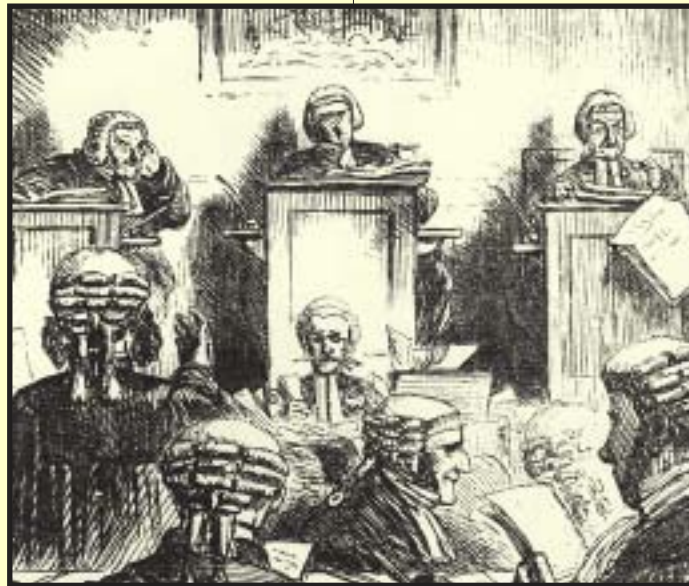
### The Statutory Criteria

Now let's go back to the language of section 1292(b) and talk about the statutory criteria in more detail. It is commonplace for courts to say that section 1292(b) is meant to be used "sparingly," or that the statute is reserved for "big" or "exceptional" cases, limits purportedly based on congressional intent. *See, e.g., Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996); *Klingman v. Levinson*, 114 F.3d 620, 628 (7th Cir. 1997); *Koehler v. Bank of Bermuda, Ltd.*, 101 F.3d 863, 865-66 (2d Cir. 1996); *White*, 43 F.3d at 376; *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989); *In re Cement Antitrust Litig.*, 673 F.2d at 1027. But actual practice belies this narrow construction; section 1292(b) is often used in cases that are neither "big" nor "exceptional." *See* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1196-1201 (1990); 16 WRIGHT & MILLER § 3939, pp. 368-69. And in any event, in reading the case law, it becomes apparent that what matters most to the courts is not oft-repeated catchphrases, but whether the actual statutory criteria are satisfied. There are four of them: the underlying order must involve a (1) "controlling" (2) "question of law" (3) as to which there is a "substantial ground for difference of opinion" and (4) whose immediate resolution "may materially advance the ultimate termination of the litigation." We'll take each in turn.

#### 1. Controlling

At the very least a "controlling" question of law is one which, if decided incorrectly, would be reversible error on final appeal, *Katz*, 496 F.2d at 755, or, if incorrectly decided and appealed immediately, would bring an end to the action, *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990). Jurisdictional questions (both subject matter and personal) fall into this category, *id.*, as do questions of

whether a claim exists as a matter of law or, if a claim does exist, whether a defense is available to defeat that claim, *see, e.g., Lewis v. Intermedics Intraocular, Inc.*, 56 F.3d 703, 706 (5th Cir. 1995) (whether state-law claim exists in light of federal law reviewed); *Pillsbury Co. v. The Port of Corpus Christi Auth.*, 66 F.3d 103, 104 (5th Cir. 1995) (11th Amendment defense reviewed); *United States v. Barnette*, 10 F.3d 1553, 1554-55 (11th Cir. 1994) (double-jeopardy defense in civil RICO case reviewed); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1090 (2d Cir. 1993) (whether loss-of-society claim exists under maritime law reviewed). Standing questions likewise fit the bill. *See, e.g., Harris v. Evans*, 20 F.3d 1118, 1120 (11th Cir. 1994); *Lamont v. Woods*, 948 F.2d 825, 829 (2d Cir. 1991); *Schact v. Brown*, 711 F.2d 1343, 1344-45 (7th Cir. 1983).



At the other end of the spectrum are cases where the litigation would continue on as before, no matter how the court of appeals were to rule. Such questions are not "controlling." This was the problem in *In re Cement Antitrust Litigation*. There, the district court judge recused himself on the defendants' motion, and the plaintiffs petitioned for interlocutory review. 673 F.2d at 1022. Given that a trial before an impartial judge would effectively moot the

recusal order, and believing that the order would "neither affect the ability of the district court to render a binding decision nor materially affect the outcome of the litigation in the district court," the court of appeals concluded that recusal was not a "controlling" question of law and declined to exercise jurisdiction accordingly. *Id.* at 1026-27.

In the vast middle are questions that, if resolved on interlocutory appeal, are likely to head off expensive and protracted litigation. These questions are also considered "controlling." *See, e.g., Ahrenholz*, 219 F.3d at 677; *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 318-19 (9th Cir. 1996). As one court has put it, it is enough that the question is "serious to the conduct of the litigation, either practically or legally."

Continued on page 34



## Navigating the Steep and Thorny Route...

Continued from page 33

*Katz*, 496 F.2d at 755; accord *Johnson v. Burken*, 930 F.2d 1202, 1205, 1206 (7th Cir. 1991); see also *In re Cement Antitrust Litig.*, 673 F.2d at 1026 (“[A]ll that must be shown in order for a question to be ‘controlling’ is that resolution of the issue on appeal could materially affect the outcome of the litigation in the district court.”); *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002) (ditto). Whether federal law preempts state law is an example. See *Ahrenholz*, 219 F.3d at 677 (citing *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000)); *In re Ocwen Fed. Bank*, 2006 WL 1371458, at \*1-2.

For cases that fall into this middle category, it important to be specific in the petition: state as best you can the amount of money and time that is likely to be saved by an interlocutory appeal. How many depositions won’t have to go forward? How many of those depositions would need to be taken out of state? Abroad? About how many days would they take? Approximately how many fewer pages of documents will need to be reviewed and produced? If discovery were to go forward on the issue, would you be forced to hire an electronic discovery firm? Contract lawyers? About how much would that all likely cost? Can a jury trial be avoided? If so, how long of a jury trial? A court is much more apt to be receptive to a 1292(b) petition that is backed by specifics than one premised on breezy generalizations. Stating only that an interlocutory appeal is likely to result in “substantial” savings won’t cut it.

### 2. “Question of law”

This second criterion might seem self-explanatory, but the term “question of law” has a narrower meaning for purposes of section 1292(b) than it does in the law generally. An appeal from a summary judgment ruling presents a question of

law, namely, whether there is a genuine issue of material fact. *Ahrenholz*, 219 F.3d at 676. “A denial of summary judgment,” however, “is a paradigmatic example of an interlocutory order that normally is not appealable” under section 1292(b). *Id.* (citing cases from other jurisdictions); see also 16 WRIGHT & MILLER § 3930, p. 428 n.28 (citing cases).

As used in section 1292(b), “question of law” refers to “pure” questions of law—something the court of appeals can decide “quickly and cleanly without having to study the record . . .” *Ahrenholz*, 219 F.3d at 677; accord *McFarlin*, 381 F.3d at 1258. So while questions of statutory construction and constitutional interpretation qualify, questions of contract interpretation do not. *Ahrenholz*, 219 F.3d at 676. And although questions about the meaning of a regulation or the scope of a common-law doctrine also qualify as “questions of law” under section 1292(b), questions involving the application of settled law to the facts (even when undisputed) generally do not. *Id.* at 677; accord *McFarlin*, 381 F.3d at 1258; see also, e.g., *Richardson*, 202 F.3d at 958 (whether the legal and factual questions common to a certified class predominated over the individual questions so as to justify class treatment considered to be “too fact-specific”).

This does not mean that summary judgment rulings are never right for interlocutory review. Those that ride more on a question of law than on an investigation of the record can be quite amenable to immediate appeal. 16 WRIGHT & MILLER § 3930, p. 428; § 3931, p. 460 n.49 (collecting cases). The procedural posture of the case matters less than the nature of the issue in play. If the issue’s resolution is fact-bound, it’s probably not a good candidate for interlocutory review. Think, for example, of cases where the issue is whether an individual’s procedural due process rights were violated, or whether a punitive damage award is unconstitutionally high, or whether a statute is discriminatory in effect. If, however, the issue’s resolution has little-to-no dependence on the facts of the case, it is more likely to be of interest to the court of appeals.

Continued on page 35



## Navigating *the Steep and Thorny Route...*

Continued from page 34

Think here, for example, of cases where the issue is whether a statute operates retroactively, or whether there is a right of action under a federal statute, or whether a statute is facially discriminatory.

What has been said so far might seem to bar interlocutory review of all discovery-related issues, but not necessarily. It is true that matters committed to the discretion of the district court (as most discovery matters are) ordinarily are not proper for review under section 1292(b). *White*, 43 F.3d at 377; *In re City of Memphis*, 293 F.3d at 351. But to the extent the issue is whether certain documents are shielded from discovery, whether by the work-product doctrine, the attorney-client privilege, or by some other privilege, the case may well present a controlling question of law. *White*, 43 F.3d at 378 n.3; see, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 293 (6th Cir. 2002); *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 339 & n.2 (9th Cir. 1996); *Cox v. Adm’r U.S. Steel & Carnegie*, 17 F.3d 1386, 1395 (11th Cir. 1994); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 162 (2d Cir. 1992); *In re San Juan Dupont Plaza Hotel Fire*, 859 F.2d 1007, 1010 n.1 (1st Cir. 1988); *Garner v. Wolfenbarger*, 430 F.2d 1093, 1097 (5th Cir. 1970). This is because the application of a privilege is reviewed *de novo*. See, e.g., *Ross v. City of Memphis*, 423 F.3d 596, 600 (6th Cir. 2005); *In re Impounded*, 241 F.3d 308, 312 (3d Cir. 2001); *In re Sealed Case*, 223 F.3d 775, 778-79 (D.C. Cir. 2000); *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999); *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997); *Simon v. G. D. Searle & Co.*, 816 F.2d 397, 399-400 (8th Cir. 1987). The underlying factual findings are not, however; they are reviewed for clear error. See, e.g., *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1112 (10th Cir. 2001). It is important, then, when seeking interlocutory review of a privilege ruling, to

emphasize (if possible) that the key facts are not in dispute, and what’s really at issue is a question on which the district court gets no deference.

### 3. “Substantial ground for difference of opinion”

There is not much to be said for allowing a litigant to circumvent the final-decision rule if the order sought to be appealed involves a question of law, which, while controlling, is already settled. See, e.g., *White*, 43 F.3d at 378 n.3. Hence the requirement that the question of law be one as to which there is a “substantial ground for difference of opinion.”

A division of authority on the question presented provides solid evidence that a substantial ground for difference of opinion exists, see *id.* at 378, but not if the issue has been resolved in the controlling circuit, see, e.g., *In re City of Memphis*, 293 F.3d at 351; see also *Caraballo-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005) (“[T]he proposed immediate appeal [should] present[] one or more difficult and pivotal questions of law *not settled by controlling authority.*” (emphasis added)). Courts of appeals do not lightly overrule their prior decisions—indeed, they can’t if they follow the rule that only the court *en banc* can overrule panel precedent—and so there will have to be special impetus (beyond the division of authority itself) for an appellate court to take the case. Perhaps other courts have reversed course since the controlling circuit last ruled on the question. Or maybe the split has widened in recent years, relegating the controlling circuit to outlier status. Or perhaps the Supreme Court has decided a case that suggests circuit precedent should be reconsidered. These are the types of considerations that could cause a court of appeals to take a case even when it has previously ruled on the matter.

Note, however, that there need not be an actual difference of opinion; substantial *grounds* for difference of opinion will suffice. Contestability is key. See *Ahrenholz*, 219 F.3d at 675. Vigorous disagreement among the parties alone, however, does not satisfy this requirement.

Continued on page 36



## Navigating the Steep and Thorny Route...

Continued from page 35

*Iridium Operating LLC v. Motorola, Inc.*, 2003 WL 21507196, at \*1 (S.D.N.Y. June 30, 2003). Just what might we point to, then, short of a division of authority? Maybe the Supreme Court has decided a case that puts the answer to the question in doubt. If so, that should be pointed out. The evolution of circuit precedent over time can also create grounds for differing opinions. If the matter is one of first impression, that too can satisfy this requirement, *see, e.g., Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000, 1007-09 (7th Cir. 2002), although not inevitably, *see White*, 43 F.3d at 378. At a minimum, though, it seems there ought to be a reasonable chance that the appellate court will reverse, *see McFarlin*, 381 F.3d at 1258, and so here again, the merits of the district court’s ruling come into play.

### 4. “May materially advance the ultimate termination of the litigation”

With the last requirement we come full circle, for it is closely tied to the requirement that the order involve a controlling question of law. 16 WRIGHT & MILLER, § 3930, p. 432. To “materially advance the ultimate termination of the litigation,” the Seventh Circuit has said that immediate appeal “must promise to *speed up* the litigation.” *Ahrenholz*, 219 F.3d at 675 (emphasis original). Similarly, the Eleventh Circuit has interpreted this requirement to mean that immediate appeal “would serve to avoid a trial or otherwise substantially shorten the litigation.” *McFarlin*, 381 F.3d at 1259. And Wright and Miller likewise say that “[i]f present appeal promises to advance the time for trial or to shorten the time required for trial,” the “advance termination” requirement is satisfied and interlocutory appeal appropriate. 16 WRIGHT & MILLER, § 3930, p. 432; *accord Primavera Familienstiftung v. Askin*, 139 F. Supp. 2d 567, 570 (S.D.N.Y. 2001). Regardless of its precise meaning, however, “[w]hen litigation will be conducted in substantially the same manner regardless of [the ultimate decision], the appeal cannot be said to materially advance the ultimate termination of the litigation.” *White*, 43 F.3d at 378-79; *accord In re City of Memphis*, 293 F.3d at 351.

This requirement was satisfied in one case where a reversal would have resulted in dismissal of 20 counts of the plaintiffs’ 23-count complaint. *In re Ocwen Fed. Bank*, 2006 WL 1371458, at \*3. It might be satisfied in another case where the putative appellant is able to show that an immediate reversal would eliminate 20 of 23 plaintiffs (for example, by application of the statute of limitations). In both instances, it seems probable that pretrial proceedings could be condensed, and the trial simplified and shortened.

Here again it helps to be laser-beam specific when discussing this requirement. How many fewer witnesses would be called at trial if the ruling were reversed? How many fewer exhibits would there be? Have the parties been holding off on certain discovery pending the district court’s ruling? If so, would a reversal render that discovery unnecessary? Could the case then proceed immediately to trial? Would a reversal eliminate the need for a preliminary evidentiary hearing? Talk about how an appeal will likely result in a net reduction in the duration and complexity of the proceedings. But don’t just tell the court that an immediate appeal will accelerate the disposition of the matter — *show* the court that it will.

\* \* \* \* \*

A typical district court is reluctant to grant litigants permission to take an interlocutory appeal. A typical court of appeals perhaps more so. This means that a petition for interlocutory appeal cannot be treated as an afterthought. It needs to be as carefully thought out and executed as if it were a brief on the merits. Get started early then, read the case law on section 1292(b), and tailor your presentation accordingly. Moreover, be concrete. Show the court why resolution of the appeal now will help to avoid protracted and expensive litigation later, and how it will shorten the overall duration of the case. Explain not only that the order presents a question of law, but that it presents the right kind of question of law. Demonstrate that, while the matter is contestable, a reversal is likely. And finally, frame the question in such a way that it alone conveys that the case is appropriate for interlocutory review. Doing just these few things will increase your odds of success under section 1292(b), giving you the opportunity to transform an unfavorable ruling into but a momentary setback.



GERALD GOLDBERG, PRACTICAL LAWYERING:  
THE SKILLS YOU DID NOT LEARN IN LAW SCHOOL

## Book Review

*By Jeffrey Cole\**

Lawyers, it seems, can't resist the urge to write a book. Some, like Lloyd Paul Stryker, Louis Nizer, and David Boies, have written about their lives in the law. Others like Francis L. Wellman's (*The Art of Cross Examination*) and Jim Figliulo and Steven Molo (*Your Witness*), or Professor Steve Lubet, deal with a particular aspect of lawyering. Even Chief Justice Rehnquist and Justices Scalia and Breyer have come within the gravitational pull exerted by publishing houses. And of course, there is Judge Posner. Enough said. Eclipsing these luminaries are the contemporary lawyer/authors like Scott Turow and John Grisham and their predecessors, people like Meg Gardiner, John Mortimer, Richard North Patterson, Earl Stanley Gardner, Wallace Stevens, John Buchan, Louis Auchincloss, and Henry Fielding. And let's not forget a fellow named Obama.

And so, another book by another lawyer is nothing unusual. But one recent book does stand out. Chicago lawyer, Gerald Goldberg's, *Practical Lawyering: The Skills You Did Not Learn in Law School* is, in its way, something of a small masterpiece. In just under 200 pages, Mr. Goldberg incisively and entertainingly canvasses the entire landscape of the practice of law from the initial client contact, to whether one will be dissatisfied with a career as a lawyer. As the title reveals, this is not a book about the rule against perpetuities, the interaction between Rules 703 and 801 of the Federal Rules of Evidence, or any other arcane principle of law. Rather it is a book about all of those things that are not part of any law school curriculum, but about which one needs to know to succeed and be fulfilled in the practice of law.

The book is the product of Mr. Goldberg's highly successful 40 year career as a lawyer. His style is simple, direct, straightforward, engaging, and charming. The reader is drawn into the stories that illustrate the points he is making. And the book is full of insights and approaches that provide new ways of looking at issues that most lawyers, no doubt, think they know all about.

*Continued on page 38*

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\* Jeffrey Cole is a United States Magistrate Judge in Chicago and the Editor-in-Chief of *The Circuit Rider*.

## Book Review

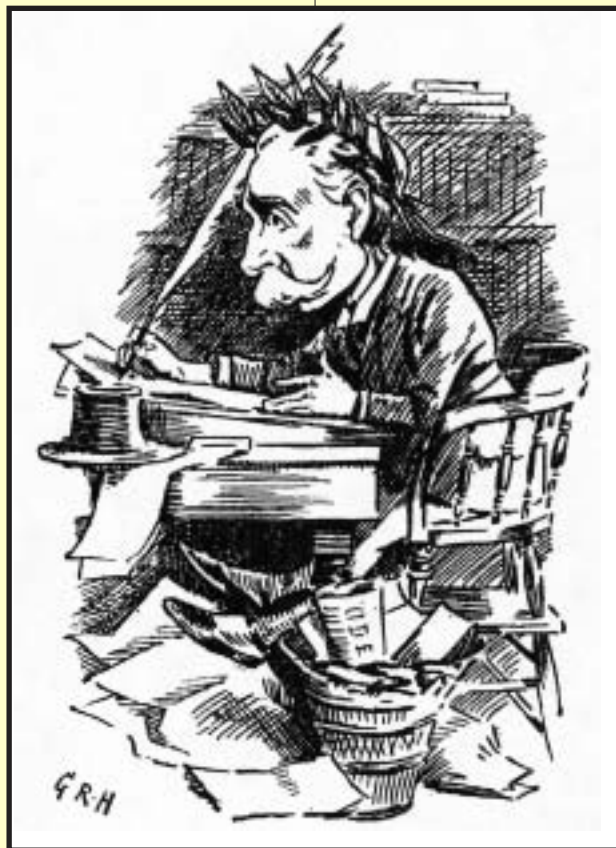
*Continued from page 37*

That is the genius and value of the book. And that is what makes the book not only ideal for lawyers who are beginning their careers – and for them it is a must read – but also for lawyers who have been at the bar for years.

Mr. Goldberg’s initial observation and what drives the balance of the book is the inadequacy of current, mainstream, legal training, which focuses exclusively on teaching students how to think like lawyers in the academic sense. But the case-book approach has its obvious limitations. His thesis is that there is infinitely more to being a successful lawyer and to building a satisfying career in the law than knowing “the law.” As Goldberg points out, a study by the Carnegie Foundation has found that legal education would be more meaningful if students, in addition to those analytical skills that are the mainstay of current legal education, received training in interpersonal and other communications skills. If those skills were taught, young lawyers would be far better prepared to deal with the anxiety and stress that are inherent in the practice of law, but which come as such a surprise to young lawyers and may well account for the enormous degree of dissatisfaction expressed by so many young lawyers so early in their careers.

The design of Mr. Goldberg’s book is to give, in 23 topical chapters, “how- to information” regarding attracting clients, interviewing clients, self-promotion, networking, the importance of reputation and what not to do to sully that reputation, the opportunities of

government employment, practicing law in smaller communities, women in the law, alternate careers for lawyers, midstream career changes, the importance of listening, the economics of law practice, billing clients, the importance of self-awareness and self-assessment, how to confront and overcome the inevitable strife and incivility that is part of modern law practice, and how to deal with difficult judges in an effective way. No matter how much any lawyer may have thought about these topics, Mr. Goldberg offers novel approaches to old problems.



From the opening pages, Mr. Goldberg makes clear that he genuinely likes people and how vitally important harmonious relationships with other lawyers are to a happy and successful career in the law. And he shows how these relationships can be fostered even in the face of provocation. Even a confirmed misanthrope cannot read Mr. Goldberg’s book and be unmoved. If one gets nothing out of “practical lawyering” beyond reaffirming the importance of interpersonal relationships and how to promote them, the book will have been worth the reading.

Everyone knows that preparation is important. But Mr. Goldberg’s book teaches that proper preparation has many facets and requires attention to details that are often overlooked.

Be sensitive to the judges before whom you appear and the lawyers who are your opponents. How to do that and what additional steps can be taken so that one is truly prepared upon entering the courtroom – or the negotiation room – are explained carefully by Mr. Goldberg. Sit in a judge’s courtroom and observe how he or she functions. Read their opinions and law review articles. Talk with lawyer who have appeared before them.

*Continued on page 39*



## Book Review

*Continued from page 38*

Research parties online and find out about them and their history and businesses. Make inquiries about your opponents and talk with them. As Mr. Goldberg points out, “The more you can engage and listen, the more comfortable you will feel working against them.” And don’t make the common mistake of regarding your opponent as a “Mope.” The oldest ruse in the legal world is to pretend you’re a country bumpkin. Mr. Goldberg’s book, throughout its chapters, penetratingly examines the various kinds of lawyers that one encounters - and he has cleverly and amusingly placed them into categories (the “egomaniac,” the “Rambo,” the “liar,” the “mope,” the “movie star” and “everyone’s friend” to name a few) – and explains how to deal with them and even how to win them over.

Lawyers become enamored of their own positions and their own words. It’s a huge mistake to be insular, as Mr. Goldberg shows. Devote as much time to the analysis of your opponent’s case as you do to yours. That realistic assessment is essential to effectively dealing with clients and ensuring that they don’t have unrealistic expectations. Only by devoting as much time to your opponent’s case as your own can you effectively perform as a lawyer either at a trial or in a negotiation. Mr. Goldberg shows how to become an effective negotiator, and how to nurture relationships within the legal community and how to attract referrals from fellow lawyers by establishing a presence in the broader legal community. This is but an aspect of the broader theme discussed throughout the book of creating and maintaining relationships with colleagues and opponents. This is not some base or tawdry endeavor, but rather as Mr. Goldberg compellingly illustrates throughout the book, it is the path to a fulfilling professional life.

It is undeniable that the number of young lawyers who find the practice of law unfulfilling is greater today than ever before. Some studies place it at 40% or more. Ours is an adversarial profession, and hence, conflict and strife are inevitable. We fool

ourselves if we think otherwise. The lack of civility about which so many complain is just one manifestation of the inevitable and inherent tensions in the practice of law. Others, as Mr. Goldberg points out, are overeating, substance abuse, gambling, sexual compulsion and erosion of self-esteem. Mr. Goldberg does not pretend to have the anodyne, but he has some very interesting and novel strategies to cope with the stressors that are so significantly affecting the practice of law and the lives of lawyers. He also has a chapter in winning and losing and the lessons that should be learned from each. And as he shows, the lessons are not always apparent.

*Practical Lawyering: The Skills You Did Not Learn in Law School* is indispensable for young lawyers. It is overflowing with valuable tips, insights and life lessons. I cannot think of another book like this that has put together so much information in so compact, stimulating, and thought provoking a way. But the book is more than a primer for neophytes. While it is true that much – but not all – of what Mr. Goldberg writes about will not be foreign to experienced lawyers, his approach to the problems and the ways in which he suggests those problems can be dealt with are fresh and insightful. And the book is fun reading. But most of all, it recalls the possibilities we all saw and rekindles the excitement we all felt as young lawyers.

## 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](mailto:Jeffrey_Cole@ilnd.uscourts.gov) or call 312.435.5601.



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