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The Voice of the Defense Bar



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REVISITING A CLASSIC

John C. Godbold, *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal: A Retrospective*

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In 1976, Judge John C. Godbold, then a member of the United States Court of Appeals for the Fifth Circuit, published an article on appellate advocacy in the *Southwestern Law Journal*: *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal*, 30 SW. L.J. 801 (1976) (hereinafter “Godbold”). Today, the article is recognized as one of the most influential writings on appellate advocacy. Simply stated, it is a “must” read for appellate attorneys. The article challenges readers to improve their skills and to stop employing techniques simply because they are the way things have always been done. Judge Godbold’s insights are invaluable and indeed, for some, are inspirational.

This article revisits Judge Godbold’s

classic work on the thirtieth anniversary of its publication. The first part of this article reviews Judge Godbold’s extraordinary career. The next part summarizes selected portions of Judge Godbold’s article. The final part examines the impact of Judge Godbold’s article on others who write about appellate advocacy.

The goal of this article is simple: to convince appellate attorneys and would-be appellate attorneys to read (or re-read) Judge Godbold’s article. Anyone who invests the time to study Judge Godbold’s teachings on the appellate process and advocacy will find the time well spent.

An Extraordinary Career

Judge Godbold’s career has been impressive, to say the least. He graduated from Auburn University in 1940.

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The Appellate Advocacy Committee had a big year in 2006, and 2007 figures to be just as active and full of accomplishments.

The biggest project right now is planning for the next appellate seminar, which will be February 28 and 29, 2008 in Miami Beach. Program chair Diane Bratvold and program vice-chair Mitch Brown are busy assembling a fabulous faculty for the committee's seventh program. I'm not at liberty to divulge any secrets just yet, but I expect this will be our best program ever, which is saying a lot. And what could be better than spend-

ing a few winter days at Miami Beach's amazing Eden Roc resort? Check out the website and see if you can resist the allure of southern Florida's turquoise water, warm sun, and sandy beaches:
www.edenroccresort.com.

You will also want to watch for the July 2007 issue of *For the Defense*, which will feature several articles by committee members. The articles will explore the science and art of effective persuasion. Indefatigable publications chair Ray Ward is coordinating that undertaking, which will be of special interest to appellate lawyers.

While these upcoming events are exciting, I would be remiss by failing to note the committee's achievements during 2006. In March the committee staged its sixth appellate program. Program chair Scott B. Smith and program vice-chair David Axelrad put

together an outstanding seminar that received enthusiastic reviews from the record-setting throng that attended. The committee also organized a presentation at the annual meeting concerning "The New Supreme Court." Committee members Michael King, Mary Massaron Ross, and Linda Coberly assembled a spectacular panel that included Seth P. Waxman, Kenneth W. Starr, Kathleen M. Sullivan, and Charles Fried. A large crowd came out early in the morning to hear the panel debate the direction of the United States Supreme Court.

Finally, special congratulations are due former committee chairs Kelly Freeman and Mary Massaron Ross. At the annual meeting, Kelly was elected as DRI's secretary-treasurer, and Mary was elected to the DRI Board of Directors. Congratulations to Kelly and Mary!

For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill.

Sun Tzu (544 BC-496 BC)

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DRI offers many opportunities to have your writing published. You're looking at one of them. *Certworthy*, our committee newsletter, is published twice a year. In each issue, we strive to present substantive articles on appellate practice and procedure, columns on legal writing and oral advocacy, reviews of interesting books, and reports from regional editors on recent developments across the country. We welcome contributions from all committee members.

Other publishing opportunities include the following:

For the Defense. FTD reaches 32,000 readers: 22,000 DRI members and 10,000 non-members, including state and federal judges. Each issue is anchored by a collection of six to eight articles produced by members of one committee. In addition, DRI welcomes committees to produce and submit smaller collections of two to four articles. Our committee will submit a smaller collection for the July 2007 issue.

In addition to these committee collections, DRI welcomes feature articles on critical decisions and litigation trends: the more current, the better. If you have an idea for an

article and are willing to commit the time and effort to write it, feel free to contact me about it, and I'll be happy to put you in touch with DRI's editorial staff.

Finally, FTD regularly features *The Writer's Corner*, a column devoted to legal writing. DRI looks specifically to our committee to supply authors for this column. Writing about writing can be intimidating — no one wants to make a spelling, grammatical, or usage error in a piece that's supposed to be about writing! But if you're up to the challenge, let me know; I'll be glad to put you in touch with FTD editor Jay Ludlam to get you on his list.

In-House Defense Quarterly. IDQ is DRI's new magazine, created to address timely and important issues of specific interest to in-house defense counsel. This magazine is complimentary for all of DRI's corporate members, and is available to other DRI members at a modest subscription cost. DRI members are welcome to take advantage of this unique opportunity to display their expertise and writing talents to an audience of in-house attorneys. For information about publishing guidelines, contact editor Jay Ludlam, jludlam@dri.org.

The Voice. This is DRI's weekly electronic newsletter, delivered by e-mail to all DRI members. Submissions should focus on a current legal

issue in a practice area of interest to DRI members. Articles should be 500 to 1,000 words long, and should include a short title along with the author's name, firm name, city and state, and e-mail address. Articles should be submitted electronically to Tracy Jurgus, in Word or WordPerfect format, to Tracy Jurgus, tjurgus@dri.org.

Defense Library Series. In 2004, DRI published our committee's contribution to the DLS: *A Defense Lawyer's Guide to Appellate Practice*, a comprehensive guide to virtually every aspect of appellate practice, from preserving issues in the trial court through *certiorari* petitions to the U.S. Supreme Court. Each DLS volume includes articles from several authors. At the moment, we don't have another DLS project on the drawing board. Because two years have passed since our last DLS publication, we are due for another. If you have an idea for a DLS volume — perhaps a collection of articles focused on one aspect of appellate practice or procedure — please let me know.

In short: if you want to write about a topic of interest to defense counsel — anything from 500 to 5,000 words long — DRI can help you find your audience.

He then began his studies at the Harvard Law School. After serving as a Major in the Army in Europe during World War II, he completed his studies and earned his law degree from Harvard in 1948. That same year, he began a law practice in Montgomery, Alabama with Richard T. Rives, who became a judge on the Fifth Circuit in 1951. Following Judge Rives' appointment to the bench, Judge Godbold became partners with Truman M. Hobbs, who was appointed a federal district judge in 1980.

In 1966, Judge Godbold was appointed to the Fifth Circuit. Two commentators who have studied the division of the Fifth Circuit have described Judge Godbold's appointment as follows:

[a]n extremely capable jurist of high integrity and with a firm, statesmanlike manner, Judge Godbold was to become one of the court's most respected leaders. Later he also became the only federal judge in history to hold the position of Chief Judge in two U.S. courts of appeals. He was such a powerful advocate of circuit division that a majority of the judges later appointed him to represent them on the subject.

Debra J. Barrow & Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform*, 135 (Yale Univ. Press 1988) (footnote omitted) (hereinafter "Barrow & Walker").

Indeed, for more than a decade, Judge Godbold was a leading force in the efforts to divide the "Old" or "Former" Fifth Circuit into two

courts. On October 1, 1981, with Judge Godbold serving as the Chief Judge, the Former Fifth Circuit divided into the new Fifth and Eleventh Circuits. That same day, he became the Eleventh Circuit's first Chief Judge.

In 1987, Judge Godbold took senior status. That same year, he became the Director of the Federal Judicial Center in Washington, D.C. The Center is the research and training unit of the Federal Judiciary. Judge Godbold served as Director for three years, returning to the Eleventh Circuit in March of 1990. That same year, he was named the Leslie S. Wright Distinguished Professor at the Cumberland Law School in Birmingham, a position he continues to hold.

When a portrait of Judge Godbold was presented to the Eleventh Circuit in 1993, the high regard with which his colleagues hold him was quite evident. At the ceremony, then-Chief District Judge Myron H. Thompson described him as "always an artist. He is always one to turn a phrase. Anyone who reads his opinions must know this man paints with words. His decisions teach that legal writing does not have to be complicated and dry, that it can be lively and simple, and yes, beautiful." (26 F.3d at LXXXII-LXXXIII).

In 1996, Judge Godbold was awarded the Edward J. Devitt Distinguished Service to Justice Award. In connection with the award, one nominator wrote that "soft-spoken and low-key as he is, John Godbold has a remarkable ability to lead groups of his peers in making difficult and often courageous decisions." "Devitt Award

Honors Judge John C. Godbold," *The Third Branch* (May 1996) (available at www.uscourts.gov/ttb/may96/devit96.htm).

For additional materials on Judge Godbold's career, Deborah Barrow's and Thomas Walker's monograph is a great resource. It has an extensive discussion of his involvement in the division of the Fifth Circuit. Barrow & Walker, at 130, 135, 164-65, 191, 198-99, 200-03, 243-47. Jack Bass' *Unlikely Heroes* (Univ. of Alabama Press 1990) includes a discussion of Judge Godbold's appointment and his involvement in some of the Former Fifth Circuit's civil rights cases. *Id.* at 303-04, 307, 327, 329. Also, the transcript of the proceedings of Judge Godbold's portrait presentation ceremony provides additional insights into the high regard with which he is held by his colleagues and the bar. It can be found in Volume 26 of *West's Federal Reporter, Third Series*. Finally, Judge Godbold's other publications should not be overlooked. They include: "Lawyer" — *A Title of Honor*, 29 *Cumb. L. Rev.* 301 (1998-99) and *Fact Finding By Appellate Courts — An Available and Appropriate Power*, 12 *Cumb. L. Rev.* 365 (1981-82).

[An Overview of the Article](#)

"The Appeal Process"

Before directly addressing advocacy and by way of context, Judge Godbold's article addressed the topic of the "appeal process." Godbold, at 802. Understanding the process is critical to effective advocacy because the process sets the parameters within which the advocacy occurs. In par-

ticular, Judge Godbold described the presentation of an appellate case as involving “an assembly at a formal meeting place under the rules of a highly structured system.” *Id.* Assembled at this meeting are: (1) the attorneys, (2) the record, (3) the written positions of the parties (the briefs), and (4) “a body of official deciders (the judges).” *Id.*

The role of counsel at this meeting is “communication and persuasion, first by the briefs and then by the oral argument.” *Id.* There are “two steps in counsel’s task.” *Id.* First, he must “convince the court that what he advances is correct.” *Id.* In order to convince the court, an attorney “must impress his will upon the judges so that they will find acceptable what he urges. He cannot win until he moves off dead center the deciders who read what he has written and who listen to what he says.” Godbold, at 802.

However, before an attorney can convince, “he must inform. He must cause the court to understand him.” *Id.* Judge Godbold described this “process of linguistic communication” as follows:

‘[T]he gulf that often separates sender and receiver [of communications], spanned at best by a bridge of signs and symbols, is sought to be narrowed yet further so that ultimately the intended communication may have the same meaning, or approximately the same meaning, for those on the left bank as those on the right.’

Id. at 803 (citation and footnote omitted).

Judge Godbold emphasized that “[a]ll is in vain unless the court understands.” *Id.* Nevertheless, although attorneys understand this

principle, in many cases they are so dead set upon the “ultimate aim of persuasion that [they] overleap[] the threshold step of making clear to the court what [they] complain[] of, how it came about, what [they] want[] the court to do about it, and why.” *Id.*

“The Record on Appeal”

With regard to the record, Judge Godbold challenged the accepted or standard approach taken by many attorneys. He observed that attorneys typically do not put much effort into assembling the record. Instead, without thought, they designate the sections of the record to be contained in an appendix, pursuant to Fed. R. App. P. 30. Godbold, at 806.

Judge Godbold disagreed with the standard practice and offered a few alternatives. *Id.* First, he believed that the deferred appendix was a “splendid appellate tool,” which had been “long ignored” by attorneys. *Id.* He was fond of the deferred appendix because it is only after writing a brief that an attorney knows exactly what needs to be included in the appendix. *Id.* By using the deferred appendix, “[t]he advocate’s communication with the court is consequently less cluttered, less expensive, and performed with less effort.” *Id.*

As a second suggestion, Judge Godbold pointed out that attorneys had “scarcely scratched the surface of the usefulness” of the agreed statement as the record on appeal. *Id.* He believed that the use of the agreed statement was most effective “where the relevant facts are simple and the issue precise.” *Id.* at 806. As an example, Judge Godbold recalled an appeal where the sole issue was the admissibility of a document under a

business record statute. *Id.* Everything that the court needed to know could have been set forth in a one-page agreed statement and in five-page briefs. *Id.* Nevertheless, the appendix in the case included a full trial transcript. *Id.* It was not a matter of counsel attempting to misdirect the court. *Id.* Rather, “[t]hey just wheeled up the heavy artillery, needlessly, simply because that was the familiar way to do it.” *Id.*

“Presentation of a Case”

With respect to the presentation of a case to an appellate court, Judge Godbold emphasized that judges have an interest in attorneys’ effectively performing their tasks of informing and persuading. Godbold, at 807. They want attorneys to get the most out of their briefs and oral argument. *Id.* at 807-08. Consequently, Judge Godbold explained that attorneys must focus on providing judges with the guidance and assistance they need. *Id.* at 808. In particular, he noted:

Judges need all the help they can get in identifying and understanding the issues, legal and factual, and reaching the right answer. They are neither all-wise nor all-seeing. Whether in his library or on the bench, the judge is trying with every ounce of his capacity to traverse the path from issue to answer. Every intellectual pore is opened to receive help and guidance from what the lawyers say and write. That guidance is most telling when there is a minimum of artificial obstacles and irrelevant diversions that impede communication.

Id. (footnote omitted).

Judge Godbold freely admitted that appellate advocacy is not easy. Indeed, he acknowledged that “[c]ounsel can, and often does, lose with a good performance and win with a poor one.” *Id.* At the same time, however, Judge Godbold emphasized that there are opportunities for an effective advocate to make a difference. For example, the identification and treatment of the facts and the appropriate law “are often matters of reasonable difference of opinion Also, the court’s interest is not limited to identified facts but extends to inferences drawn from those facts.” *Id.* at 808.

“Selecting and Stating the Issues”

Judge Godbold believed that one of the greatest aids that an attorney can provide to an appellate court is identifying the relevant issues. Accordingly, an attorney “must select with dispassionate and detached mind the issues that common sense and experience tell him are likely to be dispositive. He must reject other issues or give them short treatment.” Godbold, at 809. In support of his thoughts on the importance of issue selection, Judge Godbold quoted Justice Robert H. Jackson, who wrote:

‘One of the first tests for a discriminating advocate is to select the question, or questions, he will present orally. Legal contentions, like currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. Of course, I

have not forgotten the reluctance with which a lawyer abandons even the weakest point lest it prove alluring to the same kind of judge. But experience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.’

Id. (quoting Robert H. Jackson, “Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations,” in *Advocacy And The King’s English*, 193 (G. Rossman ed. 1960)).

In further support of his thoughts on issue selection, Judge Godbold cited John W. Davis’ “cardinal rule.” Godbold, at 809. Under it, an advocate must, “in imagination, change places with the court.” *Id.* More specifically, Davis believed that:

‘[t]hose judges who sit in solemn array before you, whatever their merit, know nothing whatever about the controversy that brings you to them, and are not stimulated to interest in it by any feeling of friendship or dislike to anyone concerned. They are not moved as perhaps an advocate may be by any hope of reward or fear of punishment. They are simply being called upon for action in this appointed sphere. They are anxiously waiting to be supplied with what Mr. Justice Holmes called the ‘implements of decision.’ These by your presence you profess yourself ready to furnish. If the places were reversed and you sat where they do, think what it is you would want first to know about the case. How and what order would you want the story told? How would you want the skein unraveled? What would make easier your approach

to the true solution? These are questions the advocate must unsparingly put to himself. This is what I mean by changing places with the court.’

Id. (quoting John H. Davis, “The Argument of an Appeal,” in *Advocacy And The King’s English*, 216 (G. Rossman ed. 1960)).

As an example of selecting and stating the issue properly, Judge Godbold recalled an argument where an attorney stepped to the podium and stated “my name is So & So, from Houston, Texas. The issue in this case is whether *Chambers v. Maroney* is retroactive.” Godbold, at 809. In these few words, that attorney “had laid all else aside and gone for the jugular. In two sentences he had identified himself, precisely targeted the dispositive issue on which discussion would be centered and the case decided, and had attracted the interest and attention of the court.” *Id.* As a result of his proper presentation of the dispositive issue, the “room came alive. Everyone was mentally on the edge of his chair. In seconds counsel had riveted the attention of all participants onto the question that all concerned knew was critical.” *Id.*

“Tell It Short and Plain”

With regard to writing style, Judge Godbold emphasized that attorneys must “[c]ommunicate with the court, by pen and by voice, in terms as simple as the subject matter permits.” Godbold, at 811. As the best example of short and plain writing, Judge Godbold cited Abraham Lincoln’s Gettysburg Address. *Id.* at 816. It is “immortal, and it is ten sentences long.” *Id.*

Indeed, Judge Godbold “prefer[red]

the risk of oversimplification rather than even a whisper of an unnecessary complexity.” *Id.* at 801. Thus, he urged attorneys to write in a manner that anyone would be able to understand. *Id.* at 811. He explained that all judges “want to understand, and their understanding is the condition precedent to persuasion.” *Id.* To assist attorneys with their writing, Judge Godbold strongly recommended *The Elements of Style* by William Strunk, Jr. and E.B. White. Godbold, at 811-14.

For Judge Godbold, the corollary to the principle of “tell it short and plain,” was “tell it once — or twice at most.” Godbold, at 816. In particular, he believed that “[e]rosion by repetition [wa]s a poor way to convince. Most judges will catch the point the first time it is developed. Almost all will understand when it is run by the second time.” *Id.*

Judge Godbold also requested that attorneys “tell it early.” *Id.* He noted that the “court blesses the lawyer who steps to the podium and, Z[ap], like an arrow to the center of a target, strikes to the heart of the controversy.” *Id.*

When it comes to finalizing a brief, Judge Godbold believed that an attorney should look it over with an editor’s eye and as dispassionately as [he] can. It should be clean and clear, as taut as a violin string and as terse as a rifle shot. It should contain not one ounce of fat or an excess word. There should be a minimum of repetition and no incorrect, unclear, or misleading statements.

Id.

“Tell It Accurately”

Next, Judge Godbold emphasized

that stating the facts and law “candidly and accurately” was an “uncompromising absolute” for every appellate advocate. Godbold, at 816. “Every sentence must shine with the whole truth.” *Id.* Judge Godbold believed that “[t]he mark of really able advocacy is the ability to set forth the facts most favorably within the limits of utter and unswerving accuracy.” *Id.* (citation and footnote omitted).

“Tell It Courteously and in Moderation”

On a related note, Judge Godbold emphasized that “[b]oth brief and argument should reflect [the] dignity and professional competence of the spokesman and respect for the courts, trial and appellate.” Godbold, at 817. Indeed, he maintained that “[i]mproper tone is a self-created impediment. The court is made uncomfortable by the lawyer who recklessly tosses out accusations that his adversary is misleading the court or misstating the facts or is guilty of improper conduct.” *Id.*

At the same time, Judge Godbold recognized that “[n]o one expects a good lawyer to roll over and play dead. But firmness, and preservation of one’s own points and rights, seldom necessitate strident accusations or even discourtesy.” *Id.* He noted that “[a]ppropriate moderation and approach keeps the court comfortable and is also persuasive.” *Id.* Judge Godbold used the term “appropriate” because he acknowledged that “a case may call for forceful hard-hitting statements.” *Id.* Nevertheless, he believed that “not every mosquito has to be killed with a sledgehammer.” *Id.*

Thus, Judge Godbold maintained that attorneys could rely on appellate

judges to discover improper tactics by an opponent. In particular, he believed that “[a] judge who has normal sensibilities and loves the law will react on his own to events that call for outrage.” *Id.* By contrast, however, that same judge might “not respond favorably to urging that he should be disturbed or outraged.” *Id.*

“The End Result”

The final words in Judge Godbold’s article are the most insightful and inspiring. In them, he leaves appellate attorneys with the standard that they should strive to satisfy. Specifically, Judge Godbold concluded as follows:

In concluding the written words in his brief, and finally his spoken words at the podium, the advocate will endeavor to leave some parting impression fixed in the minds of the judges who have read and listened. There is no better impression to leave than this composite: ‘I understood what he said. He did not say too much. I have confidence in what he said. I am persuaded by it and I am compelled to rule with him.’

Id. at 819.

The Article’s Impact

The most cursory review of articles and books on appellate advocacy confirms the strong influence that Judge Godbold’s article has had on others. It is cited and quoted extensively by those who write about appellate advocacy and legal writing. For example, Bryan A. Garner, a leading authority on legal writing, quotes Judge Godbold’s article four times in his book, *The Winning Brief: 100 Tips for Persuasive Writing in Trial and Appellate Courts*, 87, 110, 324, 341 (Ox-

ford Univ. Press 1999). Similarly, federal judges have relied on Judge Godbold's article in describing how to properly litigate cases on appeal. See Joel F. Dubina, *How to Litigate Successfully in the United States Court of Appeals for the Eleventh Circuit*, 29 Cumb. L. Rev. 1, 4 n.21 (1998-99).

Not surprisingly, both the biographical sketch for Judge Godbold on the Alabama Academy of Honor's website, (www.archives.state.al.us/famous/academy/j_godbold.html), and

his biography on the Cumberland Law School's website note that *Twenty Pages and Twenty Minutes* is "said to be the most widely reprinted law review piece printed in the United States."

Conclusion

The bench and bar will be forever indebted to Judge Godbold for taking the time to share his insights. Hope-

fully, this article achieved its goal of convincing readers to spend some time studying Judge Godbold's article and more importantly, properly paid tribute to Judge Godbold's extraordinary career and his classic article.

Liberty: One of imagination's most precious possessions.
Ambrose Bierce (1842-1914?)

If a free society cannot help the many who are poor, it cannot save the few who are rich.
John F. Kennedy (1917-1963)

Interlocutory Transfer Order Not Appealable

***Subsalve USA Corp. v. Watson Mfg., Inc.*, 462 F. 3rd 41 (1st Cir. 2006)**

Subsalve USA Corporation, a Rhode Island company, sued Watson Mfg., Inc., a Florida corporation, and Lynden C. Cox, a Watson functionary residing in Florida, for trademark and copyright infringement, unfair competition, and cybersquatting in the district court of Rhode Island. The defendants moved to dismiss for want of personal jurisdiction. A magistrate judge, after an evidentiary hearing, concluded that the defendants' contacts with the forum state were too attenuated to sustain an assertion of personal jurisdiction and recommended, inconsistently, that the motion to dismiss be allowed and that the case be transferred to the Northern District of Florida.

The district court judge overrode Subsalve's objections, explicitly finding that the decision to transfer rests within the court's discretion, but making no similar mention of the recommendation with respect to the motion to dismiss. After judgment was entered, Subsalve filed a notice of appeal asserting that the judge's order effected a final dismissal of the action on the merits. Realizing what had happened, the district judge, acting sua sponte, issued a corrective order pursuant to Rule 60(a) vacating the judgment. The next day an appeal was docketed in the First Circuit.

The First Circuit stated that a dismissed action is a nullity, so a court desiring to transfer a case under 28 U.S.C. §1631 should not dismiss the action. Although ordinarily an appellate court confronted with an internally inconsistent order would vacate the offending order for clarification, the First Circuit ruled that it was clear that the district court, in failing to make any mention of the recommendation in granting the motion to dismiss and in clarifying the original judgment, had ruled that a transfer was intended. The First Circuit joined the Fourth, Fifth, Tenth, Eleventh and D.C. Circuits in concluding that a section 1631 transfer order is not immediately appealable because it is not a "final decision" within the meaning of 28 U.S.C. §1292.

No Abuse of Discretion in Precluding Expert Testimony on Material Defects in Ladder or Refusing To Accept Late Disclosure of Expert on Inadequacy of Warning Labels

***Beaudette v. Louisville Ladder, Inc.*, 462 F. 3rd 22 (1st Cir. 2006)**

Raymond Beaudette and his wife filed suit against Louisville Ladder, Inc., seeking damages for injuries arising from an accident in which a ladder manufactured by Louisville collapsed. At the time of the accident, Beaudette was standing between eight and ten feet above the ground on scaffolding that he and his employees had constructed. Aluminum planks were attached to the ladder by a ladder jack. When the middle ladder collapsed, Beaudette fell.

The district court fixed a deadline of April 15, 2005, for the Beaudettes to designate an expert witness, and

the Beaudettes designated Wilson N. Dobson, who had a M.S. in materials engineering and B.S. in mechanical engineering and nearly 30 years of experience as a practicing and consulting engineer. Dobson filed his report on April 14 and Louisville deposed him in June. Louisville then filed a combined motion to exclude Dobson's expert testimony and for summary judgment on August 12. The Beaudettes moved on or about August 29 to designate Dobson as an expert on the inadequacy of warnings attached to the ladder. At that time, trial was to begin just five weeks later on October 4, but on September 26, the district court changed the trial date to November 5, 2005.

Dobson's report concluded that there was a manufacturing defect in the ladder based upon his visual examination which noted that the fiberglass rails of the base section of the ladder had broken. Dobson had cut samples from the ladder and observed under a microscope that there were "resin pockets in fiber free regions, folds in the fiber, fibers, [and] cracking following the resin rich pockets." *Id.* at 24. Dobson considered a standard promulgated by the American National Standards Institute (ANSI), which provides, in part, that:

The distribution of filler, additives, or glass fibers shall be free of resin-rich and resin-starved areas and there shall be no evidence of significant reinforcement shifting, wrinkles, bunching up, or density variation within a length, all in accordance with good commercial practice.

Id. The ANSI standard did not define "resin-rich" or "resin-starved," and provided no objective criteria to mea-

sure how a variation in the resin will affect the strength of a fiberglass material. The standard also did not define what constitutes “good commercial practice.”

At a *Daubert* hearing, Dobson testified that he knew of no testing or literature that supported his opinion, and that he had no information as to what constituted “good commercial practice” in the ladder manufacturing business. Dobson also stated that he was “not an expert in the pultrusion process,” the process by which the ladder was manufactured. *Id.* at 25. Hearing this, the district court ruled that Dobson’s expert testimony was inadmissible because he did not have a sufficient basis for his opinion. The district court denied Beaudette’s untimely motion to designate Dobson as an expert on the inadequacy of warning labels attached to the ladder, and granted summary judgment. The First Circuit affirmed, finding no abuse of discretion with respect to either ruling.

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Second Circuit

Motion To Amend Judgment Does Not Toll Time to Appeal

***Feldberg v. Quechee Lakes Corp.*, 463 F.3d 195 (2d Cir. 2006) (per curiam)**

Plaintiffs appealed from a judgment of the district court dismissing their complaint under Rule 12(b)(6). (All rules cited herein are Federal Rules of Civil Procedure, unless otherwise noted.) The complaint was dismissed on February 10, 2005, and a final judgment was entered on March 8,

2005. On February 15, plaintiffs filed a timely but “skeletal” Rule 59(e) motion. It provided no grounds for altering or amending the district court’s order dismissing the complaint. Instead, plaintiffs’ counsel sought, for personal reasons, an extension of time to April 8, 2005, to support the motion. Specifically, counsel sought additional time to “perform a proper review’ of the district court’s ... Order ‘before deciding whether to bring certain issues to the Court’s attention.’” The district court received the supplemented motion on April 7 and denied it on June 27, 2005. Plaintiffs filed a notice of appeal on July 20, 2005.

On October 20, 2005, a motions panel of the Second Circuit held that the court had jurisdiction to consider the appeal of the March 8 judgment because plaintiffs’ Rule 59(e) motion triggered the tolling provision of Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure. However, a merits panel decided to revisit the issue of appellate jurisdiction. In particular, it noted that Rule 7(b)(1) requires that a motion “state with particularity” the grounds on which it is based. Although, under the standard of Rule 7(b)(1), a Rule 59(e) motion need not be comprehensive, it must apprise the court and the opposing party of the grounds upon which reconsideration is sought. In this case, the plaintiffs’ motion failed to comply with Rule 7(b)(1). Moreover, under Rule 6(b), courts may not extend the time for taking any action under Rule 59(e).

The merits panel concluded that permitting the plaintiffs to supplement their timely yet inefficient “placeholder” Rule 59(e) motion

from February 15 with their augmented filing on April 7 would afford them an easy way to circumvent Rule 6(b)’s prohibition on granting an enlargement of time for filing motions under Rule 59(e). Consequently, the merits panel held that the Rule 59(e) motion did not toll the time to appeal the dismissal of the complaint.

There were two consequences from the merits panel’s holding. First, because the plaintiffs’ notice of appeal was only timely with respect to the district court’s denial of their motion for reconsideration, the Second Circuit only had jurisdiction to review that ruling. Second, because the plaintiffs’ Rule 59(e) motion was improperly filed and was not supplemented until after the 10-day time limit for filing Rule 59 motions, the merits panel construed the plaintiffs’ Rule 59(e) motion as a Rule 60(b) motion for relief from judgment. In a separate summary order, the merits panel held that that Rule 60(b)(1) motion should be denied.

Jurisdiction to Hear Qualified Immunity Defense after Case Is Tried

***Britt v. Garcia*, 457 F.3d 264 (2d Cir. 2006)**

Plaintiff, a prisoner, brought a suit against several correction officials alleging that they violated his rights under the Eighth Amendment by failing to protect him from assault by other inmates. He further alleged that defendants conspired to violate his civil rights. He also asserted state-law claims. The case proceeded to trial, and a jury found two defendants liable for conspiracy to violate plaintiff’s civil rights under 42 U.S.C. § 1985(3) and for negligence under

New York law. The jury assessed both compensatory and punitive damages. Subsequently, the district court granted defendants' post-verdict motion to dismiss the negligence claim. The court also ordered a new trial on the issue of punitive damages. The district court, however, denied defendants' renewed motion for judgment as a matter of law, rejecting their claim of qualified immunity and their contention that the evidence presented at trial was insufficient for the jury to find them liable under section 1985(3).

Defendants appealed from the denial of their renewed motion for judgment as a matter of law based on qualified immunity. They also urged the Second Circuit to exercise pendent appellate jurisdiction to review the district court's decision that the evidence presented at trial was sufficient to support liability under section 1985(3).

At the outset of its analysis, the Second Circuit noted the rather unusual procedural posture with which the case came before it. Typically, an interlocutory appeal from a district court's denial of qualified immunity is brought after the court denies the defense at the pleading stage or upon denial of a defendant's motion for summary judgment. In this case, however, defendants appealed from a post-verdict denial of their claim of qualified immunity. This atypical history meant that the court of appeals was in the somewhat unusual position of considering the qualified immunity question after the case had already been tried.

The Second Circuit concluded that the unusual procedural posture did not affect the viability of the qualified

immunity defense. It held that insofar as defendants' argument raised a legal issue, the appeal was appropriate and appellate jurisdiction existed. Indeed, in this case, the retrial of the case against defendants as to punitive damages was pending. One of the principle reasons for permitting an interlocutory appeal of a denial of qualified immunity in the summary judgment setting is to vindicate a defendant's right, if he or she is entitled to such immunity, not to be subjected to a trial. In this case, although it was too late to protect defendants from standing trial, it was not too late to vindicate their right, if they were entitled to immunity, not to undergo a second trial on the issue of damages.

Ultimately, however, the Second Circuit held that defendants' qualified immunity argument failed on the merits. Moreover, it would not exercise pendent appellate jurisdiction to address defendants' challenge to the sufficiency of the evidence presented at trial.

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Third Circuit

Failure to Verify EEOC Charge: Waiver

***Buck v. Hampton Township School District*, 452 F.3d 256 (3rd Cir. 2006)**

Title VII and its regulations require a plaintiff to verify the charge before an employer is required to respond.

However, verification is not jurisdictional, and an employer waives the lack of verification by responding to

the merits of the charge without raising the plaintiff's failure to verify.

Collateral Order Appeals: Appeal from Denial of Statute of Repose Defense

***Robinson v. Hartzell Propeller, Inc.*, 454 F.3d 163 (3rd Cir. 2006)**

An appeal cannot be taken under the *Cohen* collateral order doctrine from the denial of summary judgment under the General Aviation Revitalization Act (49 U.S.C. § 40101, *et seq.*) statute of repose. First, the statute of repose is more similar to a statute of limitations than to a grant of qualified immunity. Second, an immunity granted to a public official differs from an immunity granted to a private defendant. Third, the statute of repose is not a "pure immunity." Finally, the applicability of the statute of repose was factually intertwined with a decision on the merits.

Requirements of Appealable Order: Separate Document; Factual Recitations

***In Re: Cendant Corporation Securities Litigation*, 454 F.3d 235 (3rd Cir. 2006)**

To decide whether the notice of appeal was timely filed the court addressed two significant aspects of an appealable order under Federal Rule of Civil Procedure 58: (1) whether a district court must issue two distinct documents when disposing of a case, and (2) whether a lengthy recitation of facts and procedural history prevents an order from complying with the rule. The court held that the rule's separate-document requirement did not mandate entry of both an order and a judgment, but a lengthy discussion of facts and procedural his-

tory precluded the order from complying with Rule 58. Because the final order did not comply, the appeal was timely.

Diversity Jurisdiction: Burden of Proof to Establish Change in Citizenship

McCann v. George W. Newman Irrevocable Trust, 458 F.3d 281 (3rd Cir. 2006)

The district court held that plaintiff had to prove an alleged change in citizenship by clear and convincing evidence, reasoning that plaintiff not only had the burden to establish diversity jurisdiction, but also had to overcome the presumption against a change in citizenship. However, the court of appeals held that presumption would disappear once plaintiff produced sufficient evidence to withstand a motion for summary judgment, and thus did not elevate plaintiff's burden of proof beyond the preponderance of the evidence standard.

ADA Applies to Renovations Triggering Statutory Compliance in Fire Insurance Coverage

Regents of the Mercersburg College v. Republic Franklin Insurance Co., 458 F.3d 159 (3rd Cir. 2006)

Lightning ignited a fire which caused extensive damage to the dormitory floors of a building at privately owned secondary and college preparatory boarding school. The lower floors of the building had classrooms. The school's fire insurance policy contained provisions which covered the costs of upgrades required under governmental laws or regulations. The issue was whether the ADA applied to the dormitory, thus triggering the

compliance coverage. The court of appeals held that ADA did apply. First, Mercersburg is a "secondary school," which by definition makes it a "place of education," and, accordingly, a "public accommodation." Second, ADA regulations established that the repairs were "alterations." Finally, private-school dormitories are "transient lodging" as defined by the regulations, and dormitories are part places of education under the act.

Timeliness of Appeals from Removal Remand Orders: "Less" Means "More"

Morgan v. Gay, 466 F.3d 276 (3rd Cir. 2006)

Under 28 U.S.C. § 1453(c)(1), a federal appellate court "may accept an appeal" from a remand order "if application is made to the court of appeals not less than 7 days after entry of the order." Literally construed, that provision would bar petitions filed in the first six days after the remand order, but it would also allow an unlimited time thereafter to file for review. Because that interpretation posed unacceptable consequences, and because the uncontested legislative intent was to impose a seven-day deadline, the court concluded that the statute contained a typographical error and should be read to mean "not more than 7 days."

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School District Cannot Use Viewpoint-Based Discrimination in Allowing Use of Facilities

Child Evangelism Fellowship of South Carolina v. Anderson School District Five, 470 F.3d 1062 (4th Cir. 2006)

A non-profit religious organization brought suit against its local school district, claiming it was unlawfully requiring plaintiff to pay for the after-hours use of school facilities, while other organizations used the facilities for free. The district's policy authorized administrators to waive usage fees in accord with the "best interests" of the schools. The trial court entered judgment for the district after a bench trial. The Fourth Circuit reversed.

In an opinion by Judge Wilkinson, the court held that the district's fee-waiver rules created a limited public forum. The "best interest" policy provided no specific standard for deciding when to charge fees, and therefore adherence to the rule could not prevent unconstitutional discrimination. The court rejected the district's argument that the school's longstanding practice narrowed the discretion under the policy, particularly since the evidence of the district's practices was inconclusive. The court also found unlimited discretion in the policy's provision that allowed a fee waiver for "school organizations," when there was no limitation on what makes an organization a "school organization."

The court rejected as insufficient changes made to the school's policy during the pendency of the litigation that allowed fee waivers for groups that had been for many years the beneficiaries of the old, invalid policy.

The court concluded that to the extent current decisions were based on the results of viewpoint-based decisions made in the past, they remained unlawful.

Governor Not Immune to Civil Rights Action for Retaliation

***Blankenship v. Manchin*, 471 F.3d 523 (4th Cir. 2006)**

West Virginia Governor Joe Manchin III sought dismissal based on qualified immunity of the section 1983 claim brought against him by a coal company executive and political rival who claimed that the governor made explicit threats at a press conference that the state government would subject plaintiff's activities, including the funding for his political contributions, to heightened scrutiny. The coal operator sued, claiming that the governor's threatened acts of retaliation for his speech on matters of public concern would violate his rights under the First Amendment. The governor claimed that his remarks, properly understood, meant no more than that by making himself a public figure, plaintiff could expect to receive heightened scrutiny from the media and the public.

On appeal, the Fourth Circuit in an opinion by Judge Gregory held that the governor's motion to dismiss should be denied because, construing plaintiff's allegations in the light most favorable to him, including his allegations that some level of actual retaliation had followed the governor's alleged threats, plaintiff had stated a claim for imminent regulatory retaliation. The court also concluded from the facts alleged that a similarly situated person of "ordinary firmness" reasonably would be chilled by the

governor's actions, even though as a matter of fact plaintiff was not chilled into discontinuation of his high-profile intervention in West Virginia public affairs.

Finally, the court concluded that the governor was not entitled to qualified immunity for his alleged threats because the constitutional claim alleged by plaintiff was for the violation of rights that are clearly established. Judge Gregory concluded that the specific right at issue here, the right to be free of threats of imminent, adverse regulatory action due to the exercise of the right to free speech, was clearly established in the Fourth Circuit by the decision in *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676 (4th Cir. 2000), another retaliation claim against a statewide officer holder in West Virginia.

No Administrative Deference in Calculating Medicare Reimbursement Allowed

***A.T. Massey Coal v. Holland*, 2006 WL 3746139 (4th Cir. 2006)**

The \$26 million dollar question in the latest litigation under the Coal Industry Retiree Health Benefits Act of 1992 (the "Coal Act") is a matter of statutory construction: whether the word "reimbursement" as used in the statute that sets forth the manner of calculating premiums under the Coal Act should be based on the \$182.3 million Medicare paid to the United Mine Workers of America Combined Benefit Fund (the "Funds") or the \$156.3 million in expenses incurred by the beneficiaries of the Funds.

In 1990, the Funds and Medicare struck a deal by which the Funds would be reimbursed on a "capitation" basis for the medical bills it paid that were subject to reimbursement from Medicare, in-

stead of dollar-for-dollar, medical bill-for-medical bill reimbursement. The capitation agreement proved to be a good deal for the Funds, and it continued in effect through the time when the Coal Act was passed.

The Commissioner of Social Security, in her interpretation of the Coal Act, applied the term "reimbursement" in different ways at different times. One issue on appeal was the extent to which her views were entitled to deference under the administrative law principles of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Similarly, prior federal court decisions from the D.C. Circuit and the Eleventh Circuit were split on the meaning of "reimbursement."

In a split decision, the Fourth Circuit concluded that the premiums charged to companies under the Coal Act should be reduced to reflect the higher sum actually received from Medicare, even though the reimbursement exceeded the actual expenses incurred by the beneficiaries. Judge Niemeyer, writing for the majority, insisted that proper meaning of "reimbursement" was to be found not in dictionaries but rather in the context of the history of the Funds, and that the commissioner's views were entitled to no administrative deference, because the statute conferred no discretion on the commissioner. In dissent, Judge Traxler agreed with the appellant that the commissioner's position was entitled to deference and that there could be no "reimbursement" within the meaning of the Coal Act as to expenses that were never incurred.

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Mandate/Law of the Case Doctrine

Hall v. White, Getgey, Meyer Co., LPA, 465 F.3d 587 (5th Cir. 2006)

In this legal malpractice case, the jury awarded Hall \$675,000 in damages against his attorneys based on a negligence finding. The district court applied a dollar-for-dollar settlement credit of \$270,000, reducing the judgment to \$405,000, and awarded prejudgment and post-judgment interest. Both parties appealed.

On appeal, the Fifth Circuit reduced the settlement credit to \$80,000, otherwise affirmed, and remanded for further proceedings “in accordance with the opinion of this Court.” The mandate, however, was silent as to the award of interest. When the district court amended its judgment to include the adjusted damages amount with interest, the defendants filed a motion opposing the order under Federal Rule of Appellate Procedure 37(b), which precludes a trial court from including interest on remand absent appellate court instruction.

Hall moved to enforce the amended judgment in the district court, and filed a petition for writ of mandamus in the Fifth Circuit, seeking enforcement of the amended judgment and clarification in the mandate as to interest. The Fifth Circuit denied mandamus relief, holding the mandate was sufficiently clear. Thereafter, the district court entered a second amended judgment, stating it had no authority to award interest since the Fifth Circuit provided no instruction for it, and also concluding that Hall’s

remedy lay in moving the Fifth Circuit to recall and reform the mandate.

Hall appealed the second amended judgment, petitioned for mandamus relief, and moved to recall and reform the mandate. The Fifth Circuit denied the mandamus petition, but entertained the appeal to address the motion to recall and modify the mandate. The defendants contended that the law of the case doctrine, which prohibits re-examination of a prior appellate court decision, precluded any modification of the mandate because the Fifth Circuit had already ruled on the issue when it previously held the mandate was sufficiently clear.

The court disagreed, holding that the doctrine did not apply because it had not ruled on the merits of the request to modify the mandate. The court acknowledged that Hall had diligently pursued his interest claim and the defendants did not complain or contest the validity of the interest award until after remand. The court held it had authority to modify the previous mandate to clarify that it did not intend to preclude the recovery of interest. Accordingly, the court modified the mandate to include instructions on calculating interest.

Mandate/Review of Prior Panel Decision

Energy Management Corp. v. City of Shreveport, 467 F.3d 471 (5th Cir. 2006)

Louisiana transferred Cross Lake, the primary source of water to Shreveport, Louisiana, to the city, but reserved the mineral rights, including the right to drill wells. Subsequently, Louisiana passed a law empowering the Louisiana Office of Conservation (“LOC”) to grant drilling permits. Louisiana

also leased the right to drill wells near Cross Lake to Energy Management Corp. (“EMC”), a Mississippi company that owned state-granted mineral interests under and around Cross Lake. Later, Shreveport passed an ordinance regulating drilling near Cross Lake. EMC then brought a suit challenging Shreveport’s right to regulate drilling, and the district court held that the city acted reasonably within its authority. The Fifth Circuit reversed, holding that the city’s ordinance was preempted by state law and was invalid in so far as it conveyed authority granted exclusively to the LOC.

On remand, the district court’s declaratory judgment did not track the Fifth Circuit’s opinion that state law preempted the city ordinance. Instead, the district court declared, “Ordinance 221 is hereby declared invalid to the extent that it purports to prohibit the drilling of oil and gas wells in an area within the state of Louisiana.” Fearing the court’s order permitted Shreveport to regulate drilling de facto, EMC appealed the order and requested that the Fifth Circuit’s preemption language be included in the order.

On appeal, another panel of the Fifth Circuit conducted a limited review to determine the intent of the prior panel’s opinion, but did not reconsider issues that panel had already decided. Shreveport argued that EMC lacked standing to contest the entire ordinance, and that an opinion from the court declaring the ordinance entirely preempted would be an advisory opinion. The Fifth Circuit rejected both arguments, noting that the prior panel had found that EMC had standing to contest the en-

tire statute, and that any opinion of the court would not be advisory because EMC originally brought suit contesting the entire statute.

The court further held that the prior panel intended to hold that state law preempted Shreveport's ordinance in its entirety. In reaching this determination, the Fifth Circuit examined the mandate from the first appeal and noted that the previous panel had consistently held state law superior to the ordinance and expressed the "far-reaching" authority of the LOC. The statute creating the LOC expressly forbade any political subdivision of the state from interfering with drilling of a permit holder. The prior panel also relied on the Louisiana Attorney General's opinions that consistently concluded that state law preempted local attempts to regulate drilling. The Fifth Circuit acknowledged that the prior opinion contained some ambiguous language, but when taken as a whole, the prior panel clearly intended state law to preempt Shreveport's ordinance in its entirety. The court therefore vacated the district court's judgment and remanded for entry of judgment containing language in accordance with the prior panel's expressed intent that the ordinance be preempted in its entirety. Charles T. Frazier, Jr.
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Pregnancy Discrimination Claim – Nexus Between Pregnancy and Adverse Employment Action
Asmo v. Keane, Inc., 471 F.3d 588 (6th Cir. 2006)

The Sixth Circuit reversed a grant of summary judgment for an employer in a pregnancy discrimination case, holding that the employee presented sufficient evidence of a causal nexus to put forth a prima facie case and survive summary decision.

Asmo was a pregnant employee selected for layoff. Her employer learned of her pregnancy in October 2001, and she was laid off in December 2001. The Sixth Circuit held that two months was sufficient temporal proximity between those two events to create a causal nexus. The court did not decide whether a pregnancy discrimination plaintiff needed to meet the additional evidence requirements for the causal nexus in a reduction-in-force case, pursuant to *Barnes v. Gencorp, Inc.*, 896 F.2d 1457 (6th Cir. 1990). However, the court held that if Asmo needed to meet the *Barnes* requirement, the two-month time proximity was enough.

Further, the Sixth Circuit reversed the district court's decision and held that Asmo presented enough evidence of pretext to survive summary judgment. Her evidence of pretext included the fact that her supervisor was silent after she announced that she was pregnant with twins at a meeting, news that was met with congratulations from her other colleagues. Her supervisor did not mention the pregnancy again until he terminated Asmo. The panel also found it perti-

nent that Asmo's job required a lot of travel, and her supervisor never spoke with her about how she planned to deal with this with the impending arrival of her twins. Finally, when Asmo told a management employee at her employer who had nothing to do with her termination that she was considering consulting a lawyer, he told her, "I don't blame you, Susan. You do what you need to do." Remarks from a non-decisionmaker are not categorically excludable when considering pretext; they can be circumstantial evidence of discrimination directed at an individual, the court held.

No Qualified Immunity for Use of Excessive Force
Baker v. City of Hamilton, Ohio, 471 F.3d 601 (6th Cir. 2006).

The Sixth Circuit reversed a grant of summary judgment and held that a police officer was not entitled to qualified immunity in two separate incidents, where the same officer allegedly violated the arrestees' rights to be free of excessive force. Viewing the facts in the light most favorable to the arrestee, the officer ordered the first arrestee to stop after he initially ran away but then slowed and announced he was stopping. The officer then struck the arrestee on the back of the head with his baton, tackled him, sat on his back, and held him in a choke hold. Use of force on an arrestee after he is subdued is excessive force as a matter of law, which was "clearly established" at the time of these incidents.

As to the second arrestee, the same officer was accused of acting similarly – striking him on the head after the arrestee stopped for the arrest. The panel found it significant that the of-

ficer struck the arrestee on the head, since the Sixth Circuit has found repeatedly that a blow to the head may constitute excessive force. The Sixth Circuit remanded both cases for trial.

Complaint for Accounting – Expert Testimony

***Thompson v. Doane Pet Care Co.*, 470 F.3d 1201(6th Cir. 2006)**

The Sixth Circuit reversed the lower court and ordered a new trial where the district court excluded an accounting expert's testimony because his report did not mention that he relied upon generally accepted accounting principles ("GAAP"). The Sixth Circuit held that, in the absence of the mention of another standard used, it can be assumed that an accountant's conclusions were made pursuant to GAAP. Moreover, the Sixth Circuit reversed the lower court's holding that the accountant's testimony was limited to reading his report, and held that Federal Rule of Civil Procedure 26 contemplates that an expert will "supplement, elaborate upon, explain and subject himself to cross-examination upon his report."

Trademarks – Internet Usage

***Audi AG v. D'Amato*, 469 F.3d 534 (6th Cir. 2006).**

The Sixth Circuit affirmed a grant of summary judgment for Audi, who sued a website operator on trademark infringement and anti-cybersquatting claims.

The automaker took issue with D'Amato's website, which posted information generally about Audi products, but then began to sell advertising space to websites that sold Audi merchandise. At various points in time, the website displayed Audi

logos and claimed to be affiliated with Audi when D'Amato, in fact, had no agreement with Audi or its dealers. D'Amato claimed he was negotiating for permission with authorized agents (who Audi denied were authorized), and claimed that those agents gave him sufficient permission via e-mail. However, Michigan law requires that each party to an electronic transaction agree to conduct the business electronically, so even assuming that the alleged agents' e-mail would have been otherwise enough to give permission, Michigan law barred that here.

Notably, the Sixth Circuit also reviewed the district court's refusal to give D'Amato more time in discovery and found no error. The Sixth Circuit relied on the fact that D'Amato's counsel had conceded that D'Amato had known of the issue on which he wanted further discovery – Audi's alleged abandonment of a trademark – for two and a half months prior to the close of discovery.

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Eighth Circuit

Electronically-Filed Affidavits Must Be Signed and Notarized ***Elder-Keep v. Aksamit*, 460 F.3d 979 (8th Cir. 2006)**

In affirming judgment for the defendants, the Eighth Circuit Court of Appeals held that electronically-filed affidavits that "b[ore] no signatures or evidence of having been executed before a notary public" were inadmissible for purposes of deciding summary judgment.

Sharon Elder-Keep maintained a

section 1983 action against two city police officers, who moved for summary judgment based on qualified immunity. In opposition, Elder-Keep electronically filed two affidavits. *Id.* at 982. *Sua sponte*, the district court excluded the affidavits because they were not signed or notarized and sometimes contradicted the amended complaint. *Id.* at 982-83. Elder-Keep moved for reconsideration, which the court denied. After other dispositive motions resulting in a defense judgment, Elder-Keep appealed, arguing the district court erred in excluding the affidavits, denying the motion to reconsider and resolving other issues.

The court of appeals began its analysis of the affidavits by examining the requirements of Federal Rule of Civil Procedure 56, which governs summary judgment. Rule 56(e) requires that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." *Id.* at 984. "While Rule 56(e) only states that papers referred to *in* the affidavit must be 'sworn,' an affidavit, by definition, is 'a statement reduced to writing and the truth of which is *sworn* to before someone who is authorized to administer an oath.'" *Id.* (citing *Pfeil v. Rogers*, 757 F.2d 850, 859 (7th Cir. 1985) (emphasis added by 8th Circuit)).

Furthermore, 28 U.S.C. § 1746 requires the affiant to declare, under penalty of perjury, that the facts contained in the affidavit are true. Here, the court of appeals held that the district court properly rejected the unsworn documents from consideration because they were not signed and

lacked attestation before a notary public

Finality of Partial Summary Judgment Orders after Voluntary Dismissal of Remaining Claims

Hope v. Klabal, 457 F.3d 784 (8th Cir. 2006)

The Eighth Circuit Court of Appeals recently clarified that the voluntary dismissal of claims that have survived earlier partial summary judgment orders is sufficient to make those orders final for purposes of appeal.

In this case, Hope purchased hundreds of pieces of art through Klabal, who held himself out to be an art expert and told her he had obtained the art below market value. When Hope sold some of the art years later, she discovered that she had purchased them at prices significantly above market value and actually lost money in the sale. Alarmed, Hope had her remaining art appraised and discovered that she had also paid above fair market value. Hope filed suit against Klabal and a companion based on several theories. Relying on the statute of limitations, the district court granted summary judgment on most claims, except those arising out of the final sale between Hope and Klabal. The district court denied Hope's request for Federal Rule of Civil Procedure 54(b) certification. In a stipulation with Klabal, Hope voluntarily dismissed her remaining claims without prejudice. Following an order of dismissal by the district court, Hope appealed.

The court of appeals first recognized that this circuit has been "less than clear in establishing the rules for finality" when parties dismiss claims without prejudice to make partial

summary judgment orders appealable. *Id.* at 789. Although the court has assumed jurisdiction over appeals under similar circumstances, it also has expressed concern in other decisions that parties may use voluntary dismissal without prejudice "as an 'end-run' around Rule 54(b)." *Id.* at 789. This concern has caused the court to hold in some cases that the voluntary dismissal was with prejudice, and, in other cases, to dismiss claims for lack of finality.

The court of appeals held that after the voluntary dismissal of the remaining claims, "there was nothing left for the district court to resolve." *Id.* at 790. "The suit had ended as far as that court was concerned, thereby creating a final judgment." *Id.* Therefore, appellate jurisdiction was proper.

Order Remanding to State Court Not Appealable

Carlson v. Arrowhead Concrete Works, Inc., 445 F.3d 1046 (8th Cir. 2006)

The Eighth Circuit dismissed an appeal and held that a district court's order to remand a case to state court is not appealable as a final or collateral order. A former employee sued his employer for retaliatory discharge and failure to recall in violation of state OSHA and whistleblower statutes. The employer removed the case to federal court and moved to dismiss. The district court denied the motion to dismiss and remanded to state court after concluding it lacked subject matter jurisdiction. *Id.* at 1048-49. The employer appealed.

The Eighth Circuit first held that it did not have appellate jurisdiction over the decision to remand, as such orders are not reviewable "on appeal

or otherwise" where the district court has done so within 30 days of removal based on a procedural defect. 28 U.S.C. §1447(d). The court clarified that the scope of appellate review is limited to verification of the basis for remand. *Carlson*, 445 F.3d at 1051.

The Eighth Circuit agreed with the district court's analysis that it lacked subject matter jurisdiction under the Labor Management Relations Act. Federal preemption did not apply because adjudication of the employee's claims would not necessarily involve the collective bargaining agent. *Id.* The appellate court also rejected jurisdiction under the collateral order doctrine. Such an application of the doctrine "would virtually eviscerate §1447(d) by allowing review of essentially any remand order if it were framed by the appealing party as a collateral order." *Id.* at 1054.

The employer also argued that the order denying the motion to dismiss was severable from the remand order and appealable as a final decision under 28 U.S.C. §1291. *Id.* at 1052. To be reviewable separately from a remand order, the court of appeals explained that the dismissal must precede the order of remand "in logic and in fact" and must be "conclusive." *Id.* Here, the district court had denied the employer's motion to dismiss prior to remanding the case back to state court. The Eighth Circuit held, however, that the dismissal was not conclusive because it did not affect the parties' substantive rights and the employer was entitled to raise the same issues in state court.

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When Not to Appeal a Verdict

Frunz v. City of Tacoma, 468 F.3d 1141 (9th Cir. 2006)

When the facts against your clients are very bad, the law is strongly against you, and the jury not only unanimously votes against you but also awards punitive damages, think twice before appealing to the Ninth Circuit. The City of Tacoma (Washington) apparently did not – and Judge Alec Kozinski delivered a powerful lecture on frivolous appeals and ordered financial sanctions against the city as a result.

The case involved a civil rights action under 42 U.S.C. § 1983 against the city after three police officers surrounded plaintiff's house, broke down her door, entered without a warrant, slammed plaintiff and two visiting friends to the floor, handcuffed them and kept them on the floor, at the point of a gun, for about an hour before plaintiff convinced them it was her own home, "at which time they said 'never mind' and left." *Id.* at 1142. The Ninth Circuit noted, "As the officers doubtlessly knew, physical entry into the home is the 'chief evil against which the wording of the Fourth Amendment is directed.'" *Id.*, citing *United States v. United States District Court*, 407 U.S. 297, 313 (1972).

The city appealed the jury verdict, only to have the Ninth Circuit ask, "Why is this case here?" *Id.* at 1147. "We have found no authority even remotely supporting the notion that officers confronting the situation here were entitled to ignore the constitutional requirement of a warrant and probably cause, or to conduct them-

selves as the jury must have found they did once they were inside the house," the court stated, adding, "No reasonable lawyer would have advised the defendants otherwise." *Id.* Noting that the jury not only voted against the city unanimously but awarded punitive damages for a "reckless and malicious disregard of plaintiff's constitutional rights," the court concluded that "Only the most misguided optimism would cause defendants, and those who are paying for their defense, to appeal the verdict under these circumstances." *Id.*

Noting that the citizens of Tacoma would surely not want to be treated in their own homes as the plaintiff was in hers, the court's final observation was that a "prompt payment of the verdict, accompanied by a letter of apology from the city fathers and mothers, might have been a more appropriate response to the jury's collective wisdom." *Id.* The court then ordered the city and its counsel to show cause why they should not be assessed double costs and fees for filing a frivolous appeal.

Attorney General's "Lapses" Criticized as Jeopardizing Jurisdiction on Interlocutory Appeal

Adams v. Speers, 2007 WL 60386 (9th Cir. (Cal.))

While Judge Kozinski was lecturing the attorneys for the City of Tacoma, above, his colleague on the Ninth Circuit, Judge John T. Noonan, was taking the California State Attorney General to task in another 42 U.S.C. § 1983 action.

In this case, brought by parents of a driver fatally shot by a California Highway Patrol officer, the court

readily affirmed the lower court's ruling that the officer was not entitled to the defense of qualified immunity because of the lack of a warning to the victim and the absence of danger to the officer or others at the scene. The importance of this decision to appellate lawyers, however, is the discussion the court placed at the beginning of its opinion, before moving to the facts or the law, concerning how an interlocutory appeal (here, an appeal from the denial of a summary judgment motion on the immunity defense) should be briefed and argued.

The court began by stating that the officer can pursue an interlocutory appeal from the ruling on immunity "only if he accepts as undisputed the facts presented by the appellees." *Id.* at *1. The court noted that the officer's briefs show that "he is familiar with this maxim," but that at times his briefs lapsed into disputing plaintiffs' versions of the facts and even into offering his own versions. This triggered the reprimand to the officer's counsel: "We regret these lapses and, as they are made by the Attorney General of the State of California defending [the officer], we take this occasion to advise the Attorney General that such practice could jeopardize our jurisdiction to hear the interlocutory appeal."

The court reminded the attorney general that an interlocutory appeal is an "exceptional remedy" and "is available only if the issue of immunity is presented as a question of law." *Id.*, citing *Johnson v. County of Los Angeles*, 340 F.3d 787, 791, n.1 (9th Cir. 2003). The court explained that, "As an appellate court, we are in no position to adjudicate disputed facts that have not gone through the crucible of

trial. Still less are we in a position to accept as true something asserted to be a fact by the appellant that has not been tested in any judicial process. The exception to the normal rule prohibiting an appeal before a trial works only if the appellant concedes the facts and seeks judgment on the law.” *Id.*

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Tenth Circuit

Appeal Dismissed because Notice Was Filed Six Minutes Late ***Alva v. Teen Help*, 469 F.3d 946 (10th Cir. 2006)**

The Tenth Circuit held that, pursuant to Fed. R. App. P. 4(a) and 28 U.S.C. § 2107(a), the filing of a timely notice of appeal in a civil case was a jurisdictional prerequisite to review and was not merely a “claim-processing rule” subject to forfeiture for failure to object.

On December 17, 2003, the district court issued a written order granting defendants’ motion for summary judgment dismissing plaintiffs’ various tort claims. Plaintiffs did not file their notice of appeal until January 17, 2004, at 12:06 a.m., apparently using a 24-hour drop box. Although the defendants did not contest the timeliness of the notice of appeal, the Tenth Circuit required plaintiffs to show cause why the appeal should not be dismissed for lack of jurisdiction and permitted the defendants to file a brief. The Tenth Circuit directed each party to discuss *Eberhart v. United States*, 546 U.S. 12 (2005) (in a criminal case,

the time limits for filing a motion for a new trial were merely inflexible “claim processing rules” and not jurisdictional), and *Kontrick v. Ryan*, 540 U.S. 443 (2004) (determined bankruptcy time limit rules were “claim processing rules” and not jurisdictional), two recent Supreme Court cases which suggest that time prescription rules are not always jurisdictional.

Initially, the Tenth Circuit explained that time constraints in *Eberhart* and *Kontrick* were not expressly derived from a statute. The Tenth Circuit recognized that Federal Rule of Appellate Procedure 4(a) implements 28 U.S.C. § 2107, in which Congress set a time limit on filing an appeal, limiting a court of appeal’s jurisdiction. Moreover, for nearly sixty years, the Tenth Circuit has treated the timely filing of a notice of appeal in both criminal and civil actions as mandatory and jurisdictional. However, despite the statute’s plain meaning and consistent application, two recent Supreme Court cases have cast doubt on the notion that the timeliness of notices of appeal generally are jurisdictional.

Having not decided this issue previously, the Tenth Circuit found that neither *Eberhart* nor *Kontrick* affects the jurisdictional nature of the timely filing of a civil appeal. The Tenth Circuit’s analysis found that *Kontrick* specifically mentioned 28 U.S.C. § 2107 as an example of a jurisdictional provision containing a built-in time constraint. Moreover, while the *Eberhart* Court’s discussion of *United States v. Robinson*, 361 U.S. 220 (1960) appears to suggest superficially that the timely filing of a notice of appeal is not jurisdictional, the

Tenth Circuit’s close reading of *Eberhart* and *Robinson* together suggests the filing of a notice of appeal *is* a jurisdictional prerequisite. The Tenth Circuit’s analysis revealed that the Supreme Court was not questioning the holdings of previous decisions regarding whether or not the timely filing of a notice of appeal was jurisdictional; rather, the Supreme Court was merely noting the confusion those decisions have had on non-jurisdictional time prescription rules resulting in courts erroneously concluding other time prescription rules are also mandatory and jurisdictional when in fact they are not.

Consequently, the Tenth Circuit found that when a statute unambiguously constrains its jurisdiction, rules implementing that constraint have passed muster with Congress, and nearly sixty years of precedent exist that the jurisdictional nature of timely filing a notice of appeal has been cemented.

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Oral Argument Can — and Should — Make a Difference

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All too often oral argument is superfluous. Some estimate that ninety percent or more of appellate cases are won or lost on the briefs—and in many cases that is probably true. But in some cases, this is a failing on the part of the appellate advocate—not the court or the system.

If judges are not receiving important points or nuances from oral argument, then the argument is indeed superfluous. Oral argument can be so much more than superfluous, if you recognize the distinctions between fact-finding in trial advocacy, legal advocacy in appellate brief writing, and the unique opportunity that is presented in an oral argument on appeal. Oral argument is unique because it presents the only opportunity to actively engage the judges in an open discussion about the issues.

If treated properly, this opportunity can tip the balance on any points of law with which an appellate panel may grapple. You should seize this opportunity and be extremely versed on close distinctions in the law anticipating every possible question. If you can do that, then after oral argument, each judge will understand those close distinctions too.

You want the very best two or three

sentences on the points you want to cover. Then you want to reserve your time for answering questions of the court or preventing your opponent from confusing the court or moving off point. Anything more elaborate than that runs the risk of boring the court, wastes the court's time, and runs the risk of obfuscating those one or two key points you must make crystal clear in order to win. Think of yourself as underline, bold and italics keys for your brief and highlight what should grab the court's attention.

You should invite the judges to question your position. Seek out and address the points made by an opponent. Frame issues in a manner that allows you to answer questions about those issues positively. Anticipate the weakest link in an argument presented in your brief and use oral argument to meet the anticipated court's difficulty with that weak link. Get the appellate panel members to articulate what problem prevents any of them from going along with your position and seize that opportunity to explain why an articulated problem is not a problem at all for your position.

The judges want to decide the case and at the same time make certain that the position is in harmony with current precedent, or make a conscious decision that a break with precedent is truly warranted. You must remember that judges are attempting

to clarify both their own thinking and sometimes perhaps that of their colleagues on the panel. You are most effective when you present yourself as a resource to the court, rather than as an inflexible orator.

You should therefore be happy to receive questions from the bench. Preparation, rehearsal and more preparation is the way to provide crisp, informed responses. Assume from the beginning that some of the judges will present tough questions. Tough questioning may merely test the soundness of your position, and do not automatically reflect a rejection of it.

When presented with a tough question, give respond politely and interweave positive contentions about your position. A poor or unprepared appellate advocate can easily fall into a "cross-examination" by the judges, being forced to concede negative matters without stating positive considerations.

Some judges may ask positive questions or even a restate your position in order to place the case in a favorable light. You should acknowledge and emphasize such help. If a judge asks a favorable question that is not quite accurate, accept the help but politely point out the mistake. You should not merely to accept a favorable but mistaken premise; the other judges will identify the fallacy back in cham-

bers after the argument and the “friendly” judge will not have the benefit of your answer.

Never let your emotions get the best of you, and never speak out of turn. You are most effective when

you make the case simple rather than rely on long-winded explanations or too-fine points of distinction. Preparation helps a great deal with simplicity—familiarity with the record and

the pertinent law permits you to tell the story, rather than fall back on recitations already found in the brief.

*To see victory only when it is within the ken of the common herd is not the acme of excellence.
Sun Tzu (544 BC-496 BC)*

*Knowledge without justice ought to be called cunning rather than wisdom.
Plato (427 BC-347 BC)*

Amicus

Since its inception two years ago, the Appellate Advocacy Amicus Subcommittee continues to grow. Thanks in part to the extremely successful Appellate Advocacy Seminar in Phoenix in March 2006, the subcommittee now has more than 35 members, with a vast array of appellate experience.

Our members' court admissions cover 27 state courts, the District of Columbia, the United States Supreme Court and all Circuit Courts of Appeal. Subcommittee members remain willing to work with DRI's Amicus Committee to identify important cases and select authors ready to assist

in preparing amicus briefs so that DRI's voice is heard in important appeals throughout the country.

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Membership

DRI's Appellate Advocacy Committee continues to grow. Now totaling 435 members, this committee has increased more than 150% over the past five years. Undoubtedly, the successful seminars, writing opportunities, and networking prospects have

prompted many appellate practitioners to join. We envision continued membership increases, with members actively participating in the many worthwhile projects at DRI and within our appellate committee.

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Program

It's time to save the date for the next appellate advocacy seminar. The seminar will be held on February 28-29, 2008 at the Eden Roc Resort in Florida. Eden Roc is located on prime oceanfront property overlooking world-renowned Miami Beach and the spectacular Intracoastal Waterway. The location is exceptional, not just as an escape from winter, but because of the recreational opportunities all year round. For more details, go to the resort web site at <http://www.edenroccresort.com>.

Planning for the next seminar has begun in earnest. The program committee was graced by record attendance at the town-hall style conference call in December 2006. The conference call included more than 50 participants and generated a lot of ideas for topics and speakers. The seminar will include fresh ideas on brief writing, oral advocacy, and other special topics of interest to appellate and trial lawyers. DRI is known for excellence in education and the next appellate advocacy seminar will follow in that tradition.

If you have any ideas for topics, or otherwise want to join in planning, please contact Diane Bratvold, program chair, at dbratvold@riderlaw.com, or Mitch Brown, vice-chair, at cmb@nmrs.com. (If you've already indicated your interest, no need to respond again. We'll be in touch for volunteers as our planning continues.)
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Teleconference

In the summer of 2006, the Appellate Advocacy Committee Chair R. Daniel Lindahl appointed me to the Teleconference Chair position. Our goal is to create an appellate teleconference that will interest not only appellate attorneys but trial-court litigators too. Since the appointment, I have been sifting through numerous ideas for

topics. Within the next month, we hope to set a target date for our first appellate teleconference.

Because I am also on the steering committee of DRI's Young Lawyers Committee, I plan to reach out the Young Lawyers Committee's substantive liaison of the Appellate Advocacy Committee and other Committee

members to help brainstorm and plan the teleconference. If you would like to be involved in planning the teleconference, please contact me.

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Democracy... is a charming form of government, full of variety and disorder; and dispensing a sort of equality to equals and unequals alike.

Plato (427 BC-347 BC)

We can have democracy in this country, or we can have great wealth concentrated in the hands of a few, but we can't have both.

Louis Brandeis (1856-1941)