It's a Hard Knock Life For Us (Appellate Lawyers)

Date: January 18, 2024

Time: Noon to 1:30 p.m.

Moderator: Mary Massaron

Panel of Jurists:
Sixth Circuit Court of Appeals Judge Richard A. Griffin
Michigan Supreme Court Justice Megan K. Cavanagh
Fourth District Court of Appeals Judge Stephen L. Borrello

Michigan State Bar Appellate Practice Section Program Chair
Elizabeth Parker

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LEGAL WRITING and ORAL ADVOCACY BIBLIOGRAPHY

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Tessa L. Dysart, Leslie H, Houthwick & Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument (3rd Ed. 2017)

E. Scott Fruehwald, Think Like a Lawyer: Legal Reasoning for Law Students and Business Professionals (2020)

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Richard Wydick & Amy Sloan, Plain English for Lawyers (6th Ed. 2019)

Author: Elizabeth Parker

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN - OHIO - KENTUCKY - TENNESSEE

CHAMBERS OF
RICHARD ALLEN GRIFFIN
CIRCUIT JUDGE

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APPELLATE ADVOCACY PRACTICE TIPS

1. BE PREPARED. Know the record, the law, and the judges. We are not pleased to hear "I wasn't the trial attorney" when asking a question regarding the lower court record. Appellate counsel must know the record inside and out. Of course, counsel must also be aware of all relevant cases, both published and unpublished. Finally, after the disclosure of the panel judges, research each judge to determine whether the judge has written or been on a panel addressing any of the issues.

2. DON'T MISREPRESENT THE RECORD OR THE LAW. The judges have the resources to catch any misrepresentations of the record or the law. Your credibility and reputation will be severely diminished by any misrepresentations.

3. PROTECT YOUR REPUTATION. Reputations are easy to get and hard to lose. Judges remember the attorneys who practice before them. Keep in mind that you will likely practice before the judge again and want to return with a good impression. Always be respectful.

4. PRIORITIZE YOUR BEST ISSUES. In your brief, place your best issues first and spend the bulk of your brief on them. Same with oral argument. Spend your time with your best issues and rely on the arguments in your brief for the others.

5. RESPOND TO THE JUDGES' QUESTIONS. Give responsive answers to the questions of the judges. Evasive or nonresponsive answers are not helpful to your position. Candor is appreciated.

6. BE BRIEF WHEN WINNING. When the argument is going in your favor, don't rock the boat; let the other side go down. Never seize defeat from the jaws of victory by arguing when it is not necessary. Sit down and be quiet unless there is a question for you. There is no need to use all your time if you are winning.

7. WATCH AND LEARN FROM THE ORAL ARGUMENTS HELD BEFORE YOUR CASE. Watch and learn from the panel before your case is heard. Each presiding judge manages the time clock differently. Is the presiding judge strictly enforcing the time restraints or liberal with the time? Adjust your argument accordingly. How are the judges reacting with each other? If there appears to be a swing-judge, tailor your arguments to that judge. If your case is first on the docket, watch and learn from the panel the day before, if possible.

8. SUPPLEMENT YOUR BRIEF WITH RECENT AUTHORITY. If relevant authority is issued after your brief is filed, supplement your brief with a letter brief advising the judges of the new authority. Don't wait for oral argument to cite new authority.

9. INDIVIDUALIZE YOUR ANSWERS. When asked a question, individualize your answers to that judge, referring to his or her opinions.

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Judges Speaking Softly

What They Long for When They Read

ROSS GUBERMAN

The author is the president of Legal Writing Pro, the author of *Point Made: How to Write Like the Nation's Top Advocates*, and the creator of the legal-editing tool BriefCatch.

Do you ever stay up nights wondering what judges want? At least in briefs and motions?

I recently surveyed more than a thousand state and federal judges, both trial and appellate. Respondents ranged from state trial-court judges to U.S. Supreme Court justices.

The good news: Judges agree on much more than many litigators might think, and I found no major differences based on region or type of court. More good news: When judges are surveyed anonymously, they're blunt and sometimes even funny.

The bad news: Other than the briefs by the brightest lights of the appellate bar, almost every filing I see violates the wish lists of the judges I surveyed.

Here is some guidance, along with some choice anonymous quotations about what judges want but too often don't get.

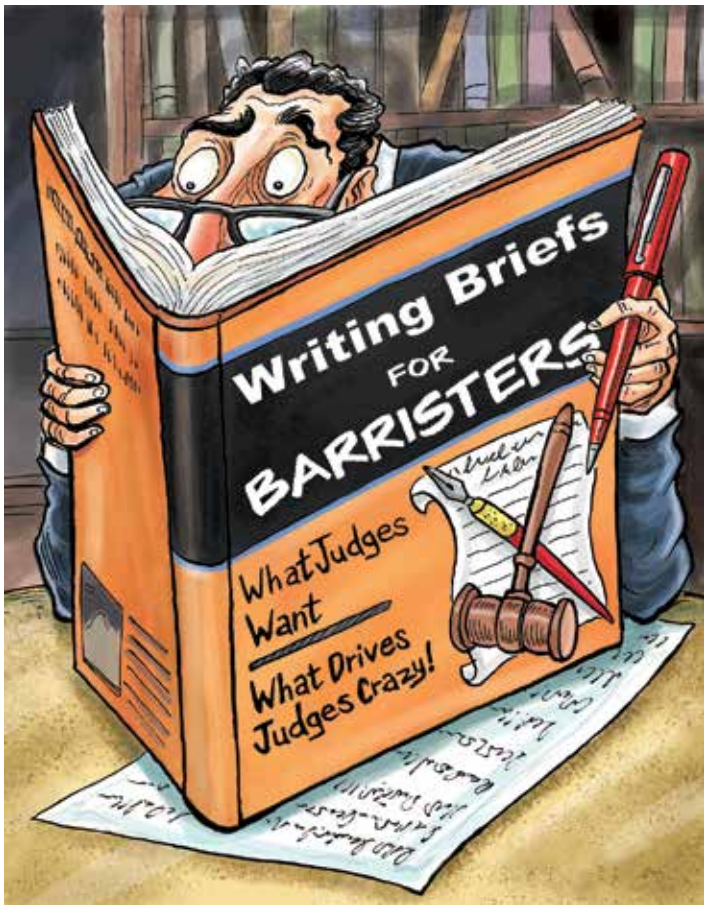
For starters, watch how you name names. Use the parties' names rather than their procedural affiliation. Prefer words to unfamiliar acronyms, even if the word or phrase is longer. Avoid defining obvious terms like "FBI" and "Ford Motor Company." And for the terms you do define, put the defined term in quotation marks and then get out of Dodge.

All four of these techniques make "legal writing" feel more like "writing."

- "I absolutely detest party labels (plaintiff, debtor, creditor, etc.). Name names, for God's sake!"
- "Don't use 'plaintiff,' 'defendant,' 'appellant,' or 'appellee' in the brief because we may forget who's who. Instead, use names for individuals and business titles for companies."
- "Avoid defining obvious terms. If a party is Apple Computer Corp., why include the parenthetical ('Apple')? If the plaintiff's name is Henry Jackson and he's the only Jackson in the case, why the need to identify him as Henry Jackson ('Jackson')? If the case is about one and only one contract, when first identifying it, why the need for (the 'Contract')?"
- "I truly dislike acronyms. I would much rather have 'North River Insurance Cooperative' referred to as 'the insurer' or 'the cooperative' or 'North River' than as 'NRIC.'"
- "'Hereinafter defined as' (or anything like it) is pretty awful."
- "Avoid defined terms ("terms") altogether."

Keep your language choices classy. As if on cue, almost all litigators and appellate lawyers are happy to endorse a ban on emotional or hyperbolic rhetoric. The problem is that those same lawyers often grant themselves an exemption, as if their opponents are so singularly awful or imbecilic that even the snarkiest

Published in *Litigation*, Volume 44, Number 4, Summer 2018.



tone is warranted. In fact, lawyers often tell me that they absolutely must point out how disingenuous their opponent is, because otherwise the court won't see it. Solution: Show, don't tell.

- "'Disingenuous' is a perfectly fine word that the legal profession has turned into the wild card disparagement of the other side's argument."
- "Don't use 'specious.'"
- "Avoid phrases and sentences that reflect a lack of civility. Don't belittle the other side's arguments but rather focus on your own strengths."
- "I hate 'speciously,' 'frivolously,' 'disingenuously,' and other shots at counsel or the other party."
- "Don't write 'ridiculous.'"
- "I hate 'laughable.'"
- "Words such as 'clearly,' 'plainly,' 'obviously,' 'absurd,' 'ridiculous,' 'ludicrous,' 'baseless,' and 'blatant' are crutches intended to prop up arguments that lack logical force. They can never make a weak argument credible or a strong argument even stronger. So why bother with them?"

Oliver Wendell Holmes Jr. once said that you should strike at the jugular and let the rest go. If you write motions and briefs for a living, you can manifest Holmes's maxim many times a day. Start by cutting stuffy introductory formulas beset with such archaic language as "by and through undersigned counsel." Reduce well-trodden standards and tests to their essence. Hack away at needless procedural detail. And then, at the sentence level, slash windups and throat-clearing.

- "Avoid long introductions such as 'Plaintiff, by and through undersigned counsel, hereby submits its Reply Memorandum in response to _____. This Reply is accompanied by the following Memorandum of Points and Authorities.' I know that counsel is filing the brief on behalf of his or her client. I can see in the caption that the filing is a reply, and I can also see that there is a memorandum of points and authorities."
- "Avoid grammatical expletives ('there is,' 'it is')."
- "'It should be noted that,' 'it is beyond doubt that,' and the like waste space."
- "Writing numbers out twice seems particularly useless."
- "Is it really necessary to devote a page or more or even half a page to discussing the standard of review for summary judgment or a motion to dismiss for failure to state a claim?"
- "The procedural history does not need to go back to the Creation. Just summarize what is relevant to the issue specifically before the court."
- "Most sentences are dramatically improved by omitting testimony references: 'Smith [testified that he] went to the scene the following day.' While some discussion of trial testimony is necessary when you are talking about hearsay or impeachment, those discussions are best left to highlight after you've told the story the reader needs to understand."
- "There's a real danger in stuffing factual sections with crud."

With judges becoming ever more impatient readers, looks do matter. Out: long, uninterrupted blocks of text. In: timelines, maps, graphs, diagrams, tables, headings and subheadings, and generous margins.

- "Sometimes a timeline is clearer than an essay format."
- "I ALWAYS appreciate a clear timeline of events and I am happy to have that in the text of the fact section or as an exhibit. I want one place where I can see when everything happened in the case if it's not a singular event."
- "Just as I don't like scrolling down to find authority in a footnote, I don't like flipping through clerks' papers or exhibits to find a key piece of documentary evidence that is discussed in a brief. The use of pictures, maps, and diagrams not only breaks up what can be dry legal analysis; it also helps us better understand the case as it was presented to the trier of fact (who undoubtedly was permitted to see an exhibit while it was discussed)."

Illustration by Chad Crowe

Published in *Litigation,* Volume 44, Number 4, Summer 2018.

- "When a case involves analysis of a map, graph, or picture, I would like to see attorneys include a copy of the picture within the analysis section of the brief."
- "I like fact sections broken down with headings and even subheadings. Define chapters in the facts or the 'next' relevant event."

I was surprised that the judges I surveyed were more open to bolding and italics than judges used to be. Perhaps this evolution stems from their desire not to wade through paragraphs that look and feel the same. Or maybe the internet has accustomed all of us to formatting bells and whistles. That said, even judges who don't mind emphasis want it in small doses. And although the judiciary may be split on emphasis, every judge in the country appears to hate all caps, and few are fans of underlining.

- "Party names should not be in all caps."
- "Headings in all caps are difficult to read."
- "All caps are completely beyond the pale."
- "If a lawyer feels that emphasis is needed, I always prefer italics to boldface type. Boldface signals to me 'Just in case you're too stupid to recognize what's important.'"

Let's move on to specific language choices. One question on my survey simply asked judges to list words and phrases they dislike. Few responses surprised me, but it was amusing to see how easily many judges could rattle off language choices that drive them crazy. They must have lots of exposure!

As the list below suggests, many lawyers are unaware of how often they use these words and phrases. Never confuse knowing that you should avoid a term with actually implementing that knowledge in your writing.

- "Death to modifiers!"
- "I don't like any clunky legalese like 'For the foregoing reasons,' 'heretofore,' etc."
- "'Wherein,' 'heretofore,' 'aforesaid,' 'to wit': they all should go the way of the dodo bird."
- "Don't use 'at that time' for 'when.'"
- "Don't use anything like 's/he.'"
- "I dislike formalistic terms that people don't really use in ordinary life like 'wherefore' and 'arguendo,' unnecessary phrases like '[party] submits,' and derogatory terms like 'asinine' used to describe the opposing party's argument."
- "Don't use 'prior to' for 'before' or 'subsequent to' for 'after.'"
- "I dislike 'notwithstanding,' 'heretofore.'"
- "Don't use words like 'wherefore,' 'heretofore,' 'hereinafter' that aren't commonly used in everyday language."
- "Don't write 'Pursuant to.'"
- "I believe 'hereby,' 'hereinafter,' 'foregoing' and other arcana have no place in modern legal writing."
- "I do not care for 'the instant' anything."
- "Tell them to stop writing 'In the case at bar'!"
- "I don't like unnecessary Latin phrases like 'inter alia.'"
- "Get rid of the formalisms from the Middle Ages such as 'Comes now Plaintiff, by and through his undersigned attorneys.'"
- "'Aforesaid,' 'heretofore,' etc. are all pretty much empty and add nothing. Same with 'said,' as in the 'said contract was signed at the said meeting.'"
- "I loathe the word 'utilize.'"
- "I do not like when lawyers tell me what I 'must' do. Just say that the court 'should' do something."
- "'Unfortunately for appellee' (or for any party) should never appear in briefs."

Another category of language irritation: Many lawyers are surprised when I tell them that judges really don't find "respectfully submits" and "respectfully requests" to be, well, respectful. Cloying is more like it. And my survey results were right in line with my anecdotal experience.

- "Don't write 'Defendant respectfully requests.' I prefer it if you just say what you want to say. I'll know if it's respectful or not!"
- "'Respectfully submits' or 'it is our position that' are wasted words: they communicate nothing, except potential insecurity about the argument that follows."
- "Avoid 'with all due respect.'"
- "Avoid phrases such as 'respectfully submits that' that can be stated in one word like 'contends.'"

On the less-is-more theme, you'll rarely if ever hear judges complain that sentences or briefs are too short. And yet, sometimes short is, in fact, too sweet. Two offenders: random "this" and "that" references such as "this proves" or "that explains." Also, especially for traditionalist judges in the Justice Scalia mold, avoid contractions.

- "I do not like indefinite references and see the word 'this' used too often. It should be used in conjunction with another word such as 'this argument' or 'this logic.'"
- "I REALLY dislike contractions. They make the argument sound like casual conversation and they give the writer an arch voice."

When it comes to usage as opposed to word choice, American judges fall into three categories: (1) those who understand the finer points of usage and care (these are the judges who ask me in workshops about "pleaded" versus "pled," predicate nominatives,

and the counterfactual subjunctive); (2) those who understand the finer points of usage but either don't notice or don't care, and (3) those who don't know enough about usage to notice mistakes.

- "I despise the use of 'impact' as a verb."
- "Learn to differentiate between 'that' and 'which.'"
- "I cannot stand 'As such' used as a synonym for 'Therefore.'"
- "Learn to use the subjunctive!"

Now let's talk about fact sections, and in particular dates. Whenever I relay judges' irritation with needless dates, someone in the audience retorts that some dates really matter. Well, that's why judges object to *needless* dates. And it's not as if you face a binary choice between a full date and nothing at all. Sometimes a word or phrase will do the trick.

- "It helps to vary how the passage of time is described. Instead of 'on May 26, 2016,' it's refreshing to read 'the next week' or 'two months later.'"
- "Dates are rarely essential and often overused. If I see a date, I assume it is important. If it's not, you have interrupted the flow of your argument for no good reason."
- "I HATE specific dates that have no relevance. I keep thinking the 24th day of September must really be important, for example, and then when it isn't, I'm unhappy I've spent brainpower waiting for writer to tell me why it was critical!"
- "Sometimes it's enough to refer to an event as 'mid-2015' rather than a specific date."
- "If two parties entered into a contract, and it makes no difference to the claim whether they did so on January 22, 2014, or March 6, 2015, leave the date out."

Now let's talk a bit about the beginning of motions and briefs. Don't short the introduction. Judges find strong introductions invaluable. They help lawyers hone their theory of the cases, and they help shape the fact section and legal argument to come.

- "Explain why you should win on the first page. 'The Court should deny Defendant's Motion for Summary Judgment for the following three reasons.'"
- "I've had briefs in fairly involved cases without executive summaries. I've likened reading them to putting together a jigsaw puzzle without having the cover of the box to know what the puzzle is supposed to look like when it's done."
- "I do appreciate a good 'statement of the case' section, particularly in complex civil appeals, in which, in a non-argumentative manner, the lawyer sets the stage for what issues the court is called upon to decide. That helps me focus on what facts and portions of the record will be most relevant to those issues."

How about cases and other authorities? Busy judges have become increasingly irritated with the way many litigators handle case law. Facile shorthand: "Too many and too much." But it's a bit more complicated than that. One common complaint is that many litigators appear to search case law databases for choice language even if a given case doesn't quite fit and even if the case doesn't come down procedurally the way the lawyer wants the current case to.

- "The main issue I run across is probably a function of Boolean searches: citations to 'blurbs' or quoted phrases within published decisions where the actual ruling, or the analysis, or the posture of the case is completely distinguishable (or even adverse) to the point the party is trying to make. I am much more persuaded by one or two authorities that are carefully analyzed and applied than by a sprinkling of quotations lifted from a dozen cases that are strung together."

It's also surprising how many cases some lawyers cite for a proposition that their opponents would never challenge, such as the summary judgment standard, the *Daubert* standard, or the standard of review.

- "For well-established law, such as the standard of review, I prefer only a single cite."
- "Cite just enough cases and not all cases. One controlling case is enough. For non-controlling cases, if there aren't any contrary or many contrary cases, cite two or three non-controlling cases, preferably the two or three most recent. If there are two contrary groups of cases and none is controlling, then it might be appropriate to cite one from each jurisdiction supporting the writer's side."

Once you know which cases to cite and how many, what should you do with them? On the one hand, most judges rail against including too many facts and too many quotations when it would be more effective to use a concise parenthetical or a pithy quoted phrase merged into a sentence about your own case. On the other hand, for complex or dispositive cases, some judges find that lawyers use a parenthetical when a fuller textual description would be more apt. Ask yourself this question: "If I were being asked to endorse proposition X, what would I need to know about case Y to be comfortable doing so?" And then don't write one more word.

- "Skip the long description. Just state the damn proposition, cite the damn case, and be done with it."
- "Long discussions of the facts of cited cases are often not helpful."
- "For the most important case, cover the important points in text, not in an explanatory parenthetical. But it's okay to use

explanatory parentheticals for the cases that support the main one."

- "I prefer citation to one or two cases with a short, pertinent explanation in a parenthetical. I prefer a full paragraph for distinguishing an adverse authority. I don't prefer distinguishing adverse authority in a footnote."
- "I prefer that briefs directly address contrary authority organized by argument, not by case name."

That brings me to the block-quote question. Most lawyers defend block quotes by insisting that they convey pivotal information that can't be paraphrased. That may be true, but here's the bad news about that "pivotal information": If it's presented in a block quote, judges are likely to skip it entirely. So meet judges halfway: Use block quotes only when the language of the text itself adds value. Use block quotes as little as possible. And introduce block quotes substantively and persuasively, focusing less on who said what and more on why the reader should care.

- "Do not block quote more than three lines. After that, I may stop reading."
- "Don't write 'As follows:' before quotes. Just use the colon; the 'as follows' is implied."
- "Fold quotes into text if possible."
- "Huge block quotes are terrible. It's much more persuasive to paraphrase the reasoning and then quote only the crucial language."
- "When quoting, do not overuse brackets—I call them punctuational potholes. If you're quoting from a case, start the quote after the part of the sentence that makes you want to use a bracket. The same for quotes from the record. For example, instead of 'The officer stated, "[i]f [we] catch [you] in [the area] again, if [you] don't have something, [I]'ll make sure [you] have something," put 'The officer said that if Smith were ever caught in the neighborhood again and did not "have something," the officer would make sure he did have something.'"

One last issue. Even after Justice Scalia's passing, the debate over where to put citations rages on. But with so many judges reading briefs on iPads or on other devices that require scrolling to see footnotes, 78 percent of the judges in my survey prefer to see citations in the text, the old-fashioned way. You should still try to avoid putting citations at the beginning or in the middle of your sentences. And, of course, some judges (12 percent in my survey, with the other 10 percent neutral) do love to see citations in footnotes, but those judges nearly always make their views known.

- "This is a show-your-work gig, and I need to see your work there—not go hunting for it. This is a bigger deal now, I think, since we all read electronically."
- "We want to process the citation as we read. When a litigant makes a point, it matters if he or she is citing to a Supreme Court case, a circuit opinion, a treatise, etc. I don't want to have to stop reading and look down and find the citation in the footnote or endnote. I understand the reasons some endorse it, but it is not practical for briefs and opinion writing, and everyone I work with hates that style of writing."
- "I find citations in footnotes to be distracting. It also makes the case more difficult to read online such as in Westlaw."

Shoot for strong, compelling, yet concise introductions; a restrained use of case law; and modern diction.

Here's the bottom line: Just as many associates in law firms think that knowing individual partner preferences is all there is to writing, many seasoned litigators think the same about knowing the preferences of individual judges.

Sure, there's something satisfying about finding out whether a given judge likes the Oxford comma. (Since I brought it up, 56 percent of the judges I surveyed said they do, 21 percent said they don't, and 23 percent said they don't care). And it's all too tempting to make brief writing mostly about rules and formatting preferences. But I suggest that both litigators and appellate advocates spend most of their energies developing the core persuasive writing skills that would make almost all judges much happier.

So shoot for strong, compelling, yet concise introductions; a restrained use of case law, with quality over quantity; a readable treatment of party names and industry lingo; helpful lead-ins to block quotations; a confident and professional tone; modern diction; and more white space, headings, and visual aids.

In a word, show empathy for the reader. And for those of you thinking that judges should practice in their opinions what they preach to lawyers about their briefs, that topic will have to be for another article! ■

Published in *Litigation,* Volume 44, Number 4, Summer 2018.

For The Defense™

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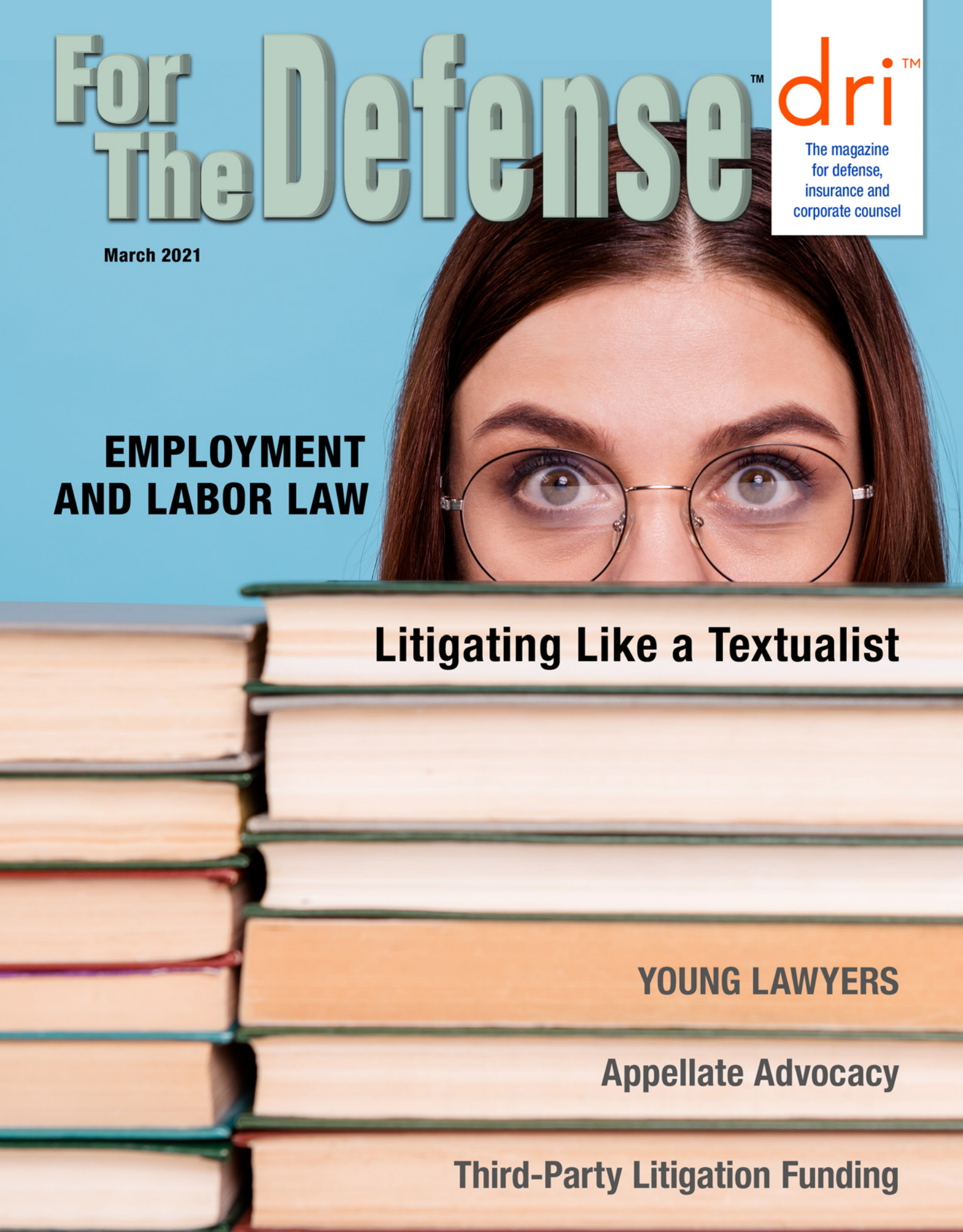
March 2021



EMPLOYMENT AND LABOR LAW

Litigating Like a Textualist

YOUNG LAWYERS

Appellate Advocacy

Third-Party Litigation Funding

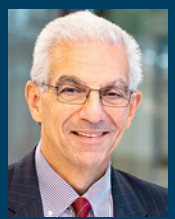
The First Law of Appellate Advocacy

Know Your Audience and Be Able to Think Like the Judge and Court

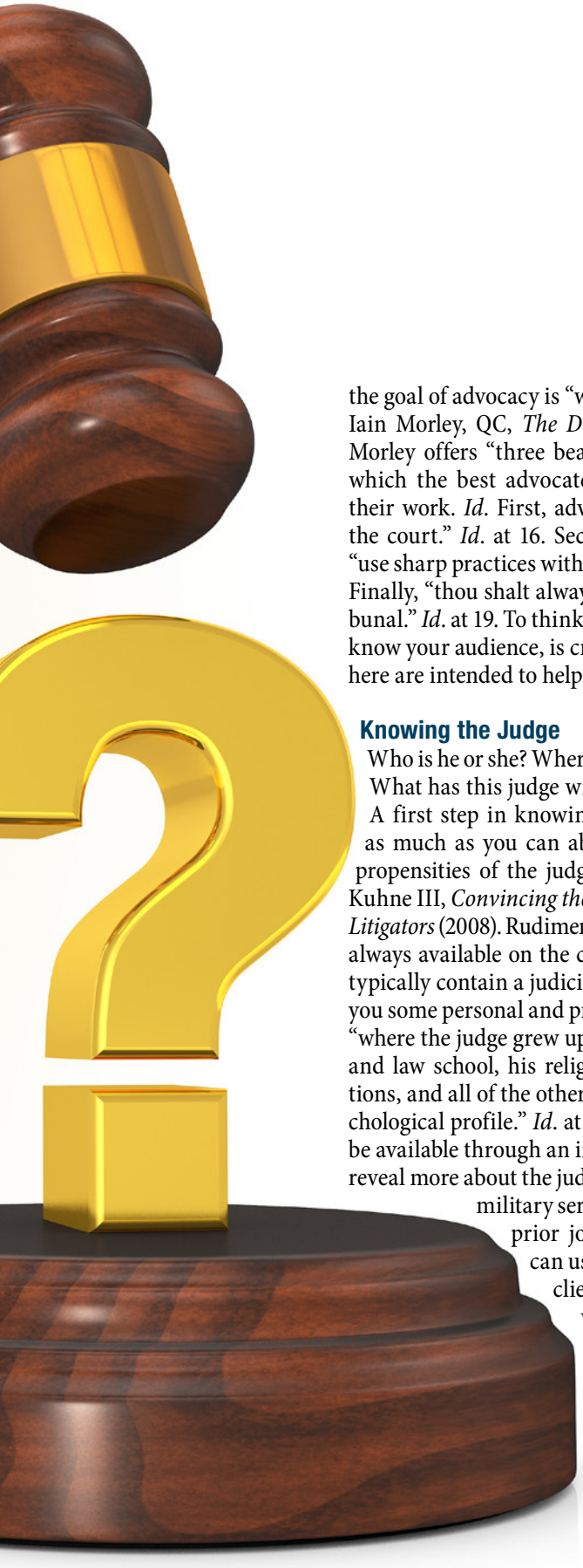
By Mary Massaron and Henry Saad

A compelling argument is one crafted with the intended audience in mind. Take the time to research *whom* to persuade to understand better *how* to persuade.

One of the best books on advocacy, *The Devil's Advocate*, which was written by an English barrister, offers multiple rules for being a competent—maybe even great—advocate. According to Mr. Morley,



■ Mary Massaron, a former DRI President, is a senior shareholder at Plunkett Cooney, where she has practiced appellate law for more than three decades in state and federal appellate courts throughout the country. Mary belongs to the American Academy of Appellate Lawyers and the American Law Institute. A past president of Lawyers for Civil Justice, she currently chairs its amicus committee. Henry Saad, a former chief judge of the Michigan Court of Appeals, is an of counsel attorney with Plunkett Cooney and a member of the firm's appellate practice group, where he works with firm clients on high-level appeals, participates in moot courts to prepare lawyers for oral argument, and handles complex litigation. During his over forty-year legal career, Judge Saad's experience includes twenty years in private practice, where he built a national reputation as a leading attorney specializing in complex drug liability litigation, media, libel law, labor and employment law, and school law. During his time on the court of appeals, Judge Saad taught evidence, ethics, and labor law as an adjunct professor at Wayne State University Law School and University of Detroit Mercy Law School.



the goal of advocacy is "winning within the rules." Iain Morley, QC, *The Devil's Advocate* at 15. Mr. Morley offers "three beacons" for doing so, all of which the best advocates employ as a guide for their work. *Id*. First, advocates shall "not mislead the court." *Id*. at 16. Second, advocates shall "not "use sharp practices with their colleagues." *Id*. at 17. Finally, "thou shalt always try to think like the tribunal." *Id*. at 19. To think like the tribunal, that is to know your audience, is critical, and the tips offered here are intended to help you do so.

Knowing the Judge

Who is he or she? Where did he or she come from? What has this judge written while on the bench? A first step in knowing the tribunal is to learn as much as you can about "the personality and propensities of the judge before you…." Cecil C. Kuhne III, *Convincing the Judge: Practice Advice for Litigators* (2008). Rudimentary information is almost always available on the court's website, which will typically contain a judicial biography. This will tell you some personal and professional data, including "where the judge grew up, where he went to college and law school, his religious and political affiliations, and all of the other factors that go into a psychological profile." *Id*. at 7. Other information may be available through an internet search, which may reveal more about the judge's personality, his or her military service, social acquaintances, prior jobs, and hobbies. *Id*. You can usually learn "what kinds of clients the judge represented while he was in private practice, and which cases he won or lost." *Id*.

Except for newly appointed or elected judges and justices, research will disclose prior opinions, a fertile source for understanding more about the judge. The decisions will not only provide insight into substantive and procedural issues that the judge has decided but will offer a window into the judge's values, judicial philosophy, and general approach to judging. The judge's dissents will tell you some principles and values in decision making that the judge deems important enough to disagree with his or her colleagues. And if it is an intermediate appellate court, the judge's reversal rate is a useful barometer.

Extent of the Judge's Relevant Knowledge

A judge's expertise or lack thereof in the specialty involved in your case, including the substantive private or public sector knowledge and/or legal arena, can be crucial. For example, consider how the judge might approach a complex labor matter involving a case of first impression that implicates how a city's police department may deal with the use of deadly force as set forth in the collective bargaining agreement. If the judge has never dealt with public sector bargaining—had no law school training or real life experience as a labor lawyer or any experience in managing a police department—your argument may be tailored differently than if you know your judge practiced in the area and taught public sector labor law prior to his or her tenure on the bench. Judge Posner, for example, wrote one opinion that reflected his knowledge of union grievance processes and procedures, explaining that "[m]ost of the union officers who process grievances and commit the gaffes that propel the Grafs [the plaintiff in the case] of this world into court are not professional advocates" but hourly workers. *Graf v. Elgin, J. & E.R. Co.*, 697 F.2d 771, 779 (7th Cir. 1983). Based on this knowledge of the factual backdrop of the dispute, Judge Posner considered whether the standard of care for untimely filing a grievance should be lower. Likewise, your knowledge of the judge's experience in labor law and union grievance handling will help you decide how to present the case.

Or consider a contractual dispute between a gas station and the entities supplying gas. That industry is complex and abstruse to those who have not dealt with it. The interrelationships between national oil and gas producers, distributors, jobbers, and retail gas stations are complicated. A regulatory overlay exists that affects many aspects of the industry. And unless the judges on the panel deciding your case have experience with it, you may need to provide an extensive backdrop to give the current dispute context and to explain the interests and actions of your client. Judge Posner explained the importance of having "a general acquaintance with commercial practices" to decide a case involving a commercial contract. "This doesn't mean that judges should have an M.B.A. or have practiced corporate or commercial law, but merely that they should be alert citizens of a market-oriented society so that they can recognize absurdity in a business context." *Beanstalk Group, Inc. v. AM General Corp.*, 283 F.3d 856, 860 (7th Cir. 2002). And as the advocate in such a dispute, you will surely want to know whether the judges or justices deciding the case did have an M.B.A. or commercial law or business background. If not, you will want to educate them to the ordinary commercial practices as they illuminate the issues in the case.

These overarching world views—about what is and what ought to be—shape decisions. Great advocates learn these histories at a deep level—and then carefully evaluate how they might be accepted or rejected by the jurists on the tribunals before which they appear.

Will you have to conduct a mini tutorial without being obvious—will you go to the heart of the complex matter because you know that one or more of the judges will demand that you cut to the chase? If the judges on the panel deciding your case have little or no experience in the area of law, you will want to educate them at some point in the appellate process. The brief should provide the foundation for this, but the argument may involve questions or amplifications of what you have included in the brief.

Understanding the tribunal's "psychology" can be helpful here. Iain Morley argues that advocates should strive to "ensure that the tribunal sees them as assistance," that is, a source of help. Morley at 22. He offers this insightful advice:

> A great advocate is not one who argues loudly and with noticeably great intellect. Rather, it is the one who says things which seem right. Simple. Easy. Just plain right.

Morley at 25. Offering a straightforward explanation of the factual setting and its legal framework to assist the judges or justices on the court is highly effective. You don't want to condescend—or sound arrogant. You want to offer a concise primer of facts and principles that illuminate the issues before the court. Your research into and knowledge of the judges will help you evaluate how extensive this needs to be. Your openness to cues the judges give you during argument will help you modify your presentation in light of the additional knowledge you gain from watching carefully and listening closely to their reactions as you speak.

The Judge's Ideological Preferences, Values, and Judicial Philosophy

American intellectual Susan Sontag explained that ideologies create "representative images, which encapsulate common ideas of significance, and trigger predictable thoughts, feelings." Susan Sontag, *Regarding the Pain of Others*, **https://www.goodreads.com**. Volumes have been written on ideologies of countries, past presidents, lawyers, and jurists. These overarching world views—about what is and what ought to be—shape decisions. Great advocates learn these histories at a deep level—and then carefully evaluate how they might be accepted or rejected by the jurists on the tribunals before which they appear. You will want to choose images and ideas that trigger support for your client's position and avoid those that may cause a knee-jerk reaction against it. Judge Aldisert, a former federal appellate judge, wrote that a "primary responsibility of the appellate advocate is the identification of the interests being weighed by the courts." Ruggero Aldisert, *Opinion Writing*, at 47 (West Publishing Co., 1990). He argues that too little attention is paid to this step in the briefing, and it is insufficiently adverted to in judicial decisions although it is often "compelling or even decisive." *Id.* at 37.

Legal scholars, media gabs, and the justices on the United States Supreme Court endlessly debate the role of ideological preferences, values, and judicial philosophy in their decisions. Reading the many books written by Supreme Court justices in modern times, from Justices Scalia to Breyer to O'Connor and beyond, will give you some insight into these questions and how they can shape the analysis and outcome of a judicial dispute. Past decisions also reflect this. Thus, Justice Holmes' dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905) attacked "Mr. Herbert Spencer's Social Statistics" as a basis for interpreting the Fourteenth Amendment. Justice Scalia's dissented from *United States v. Virginia,* emphasizing the importance of the First Amendment to allow "the people over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly." *Id.* Scalia, acerbic as ever, attacked "this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law." In his view, changes to a same-sex military academies entrance criteria should have come from the legislature, not the judiciary. Justice Scalia believed that those changes based on policy preferences about how best to educate young men and women should be based on changes in the electorate's views over time.

You can easily find your own examples of majority opinions and dissents that embody similar statements of constitu-

tional or other values. Don't slide past them when you read a decision—perhaps thinking they are simply a rhetorical flourish. Often, they are indispensable clues to discerning how to frame an issue so that the outcome you seek becomes irresistible. The judge who holds the values you base your argument on will feel compelled to vindicate them in the decision.

All cases present policy questions. They may arise from the competing values of early dismissal or meritless claims versus the longstanding right of a plaintiff to have facts decided by a jury. Or they may raise into question the judicial goal of ensuring finality versus the desire to protect the interests of a litigant whose case was wrongly decided. They may require consideration of an individual's liberty interests or property rights as opposed to the need of the public through government to protect the public health and safety. Think deeply about the issues that your dispute presents and the values that may give rise to different outcomes.

If you have a case where the public policy issue is one that carries great ideological consequences (gun control), expansion of individual constitutional rights especially on social issues (abortion rights or questions of sexual orientation), or political campaign finance issues, to cite a few examples, you will need to know the judge's ideological and political preferences in addition to his or her history and background. Often, in addition to looking at their biographies and prior decisions, you can learn about the judges by searching out their past writings, speeches, and public positions. Many judges have written articles for bar journals or magazines or books in which they set forth their approach to judging, their philosophy, and the judicial values they hold dear. Don't overlook YouTube as a source of past speeches at legal functions, commencements, and other public events. Judges may be far more candid in a speech at a friendly bar organization or law school commencement than in a judicial opinion. Does the judge or justice belong to the Federalist Society or the American Constitutional Society? Speeches made at the many conferences and meetings of these groups can often be found through an internet search or on these and other groups' websites. Search out these sources of information. Once you have gained insight into the judges' or justices' ideologies, philosophies, and values, you can tailor your argument to explain why your position fits, and you can avoid making points in language that will cause the judge to react viscerally against your client's position.

Judicial Experience on the Appellant Bench, the Trial Bench, or in a Regulatory Agency

A judge or justice's prior judicial experience has important implications for how he or she may view disputes. Did the appellate judge come from the trial bench or an administrative agency? Does the appeal come from the appellate judge's circuit where the judge had colleagues? Is the judge you wish to overrule a former colleague or friend of the appellate judge? Is the judge's spouse someone who works with the trial judges in the circuit from which your case on appeal derives? Knowing the nature and extent of personal relationships is quite important, often at least if not more important than the appellate judge's former role as a trial judge. Or, did the trial judge come from a federal administrative agency, such as the NLRB or the IRS or SEC, or a state regulatory agency? This background informs the judge or justice's thinking about the issues presented on appeal. A jurist with experience in a regulatory agency or state or federal environmental entity will view regulatory issues differently. It may indicate a strong preference to grant increased deference to administrative agency rulings. A jurist who has served as a trial judge for many years often defers to a trial judge's evidentiary rulings and disfavors appeals challenging a trial judge's decisions about procedural and evidentiary matters. A jurist who has previously struggled to interpret and apply the law during a trial or at a busy motion call may be more inclined to accept even erroneous decisions as harmless error or to give the trial judge the benefit of the doubt.

Past Involvement in or Future Aspirations for Political Office or Government Service

A judge or justice's past political experience or involvement in government can shape his or her view of the law. Justice Sandra Day O'Connor served in the state legislature before her elevation to the United States Supreme Court. That experience had an abiding effect on her decisions. In one opinion, for example, Justice O'Connor wrote:

> State legislatures and administrative offices are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is a sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes.

Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 776 (1982), O'Connor, J., concurring in part, dissenting in part. Her vehement defense of state sovereignty was no doubt informed by her experience as a part of state government.

A jurist who has served as a trial judge for many years often defers to a trial judge's evidentiary rulings and disfavors appeals challenging a trial judge's decisions about procedural and evidentiary matters.

In state and federal appellate courts, the questions of politics and government may play a role, yet one that is not often spoken about and may not be readily visible. Has the judge been counsel to the Governor or Chief Counsel to the House Judiciary Committee, on either side of the political spectrum? Does he or she have continuing relationships with former colleagues or aspirations to run for higher office within the judiciary or within the political realm? A judge's political aspirations may make a difference as he or she

eyes the next opening for an appointment to the Supreme Court or contemplates a run for a political office. In judicial systems in which judges are elected—or as in Michigan where supreme court justices are nominated at political parties' partisan conventions and then run for election on a non-partisan ballot—subtle and not-so-subtle political influence may be at play. Who is the judge's intended audience? In a farming-related/zoning case, one appellate judge was heard to say that he didn't care what the law said, he was going to rule in favor of the farmer because in his next election he needed the Farm Bureau's endorsement. While we might all wish that jurists would be entirely unencumbered by such questions, the political overlay matters. And even though most jurists work faithfully to set aside considerations that are outside the law, their backgrounds and experiences will likely reverberate in how they understand the legal and factual issues, particularly on close questions.

The justice Ms. Massaron clerked for on the Michigan Supreme Court was a former prosecutor and a former trial judge. That experience undoubtedly affected how she viewed the cases that came before the court. Her knowledge of the trial process, the potential gamesmanship, and other real-world influences colored her view of how the court should decide cases. Her deep understanding of the difficulties that courts and practicing lawyers have in applying the law when judicial decisions are written poorly prompted her to push for clarity in the holdings of the court's decisions and language explaining how they could be applied. When that was not forthcoming by the majority, she sometimes wrote a concurrence to offer that guidance.

Language, Public Sentiment, and Stare Decisis

Determine how the judge interprets language, how narrowly or broadly the judge decides issues, how the judge views trying to keep in step with the public consensus on an issue, and how strongly the judge adheres to stare decisis.

Some fundamental tools of judicial decision making arise repeatedly. These tools provide the foundation for much of the judge's thinking about a case. Figuring out where the judges or justices on your panel are on the continuum of these questions will allow you to concentrate your argument based on their approach.

Over the last thirty years, appellate courts have focused more carefully on how to interpret written texts. Whatever you think of Justice Scalia, his emphasis on textualism has altered judicial decision making and law school education. Justice Kagan commented several years ago that "w[e are] all textualists now." Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube at 08:28 (Nov. 25, 2015), **https://youtube.com**. Legal scholars have written countless articles and books explaining various methods for interpreting the Constitution, the language of statutes, or the words in a contract or will. *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law* (2012); Adrian Vermeule, *Judging under Uncertainty* (2006); Tara Leigh Grove, *Which Textualism?*, 134 Harv. L. Rev. 265, 307 (2020); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788, 793 (2018); John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 11 (2001); Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 Harv. L. Rev. 370, 370-71 (1947); John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2474 (2003); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 160-63 (2010). This scholarship—and its evolving nature—is important for any appellate advocate to study and master. Any good appellate advocate must take the time to understand at a deep level the tools that different jurists recognize as legitimate and those they may reject.

A great deal of an appellate judge's docket is taken up with interpreting words, figuring out what the Constitution means in the context of law enforcement's use of force or as to a shopkeeper's personal religious views when faced with the equal protection claims of a potential customer. The outcome of these questions may turn on the interpretative methodology of the court. *See, e.g.*, *Bostick v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020), Likewise, appellate courts regularly decide appeals resolving what this legislation means as applied here, or what this contract requires as it governs this dispute. Courts also interpret words when considering regulations or local ordinances. A complex high exposure tax appeal may be decided by the interpretative methodology of the court as applied to an IRS regulation. An insurance contract may be decided on the basis of whether the judges on the panel adhere closely to the policy language as controlling or kick the decision to a jury (with all of the potential problems of fact-finding when an industry often disliked by the public is litigating against a catastrophically injured, sympathetic plaintiff).

Past judicial decisions by the judges or justices who will decide the case will offer insight on this very important point. So, too, will study of the abundant scholarship that attempts to explain the nuances of textualism and other approaches to the interpretation of language.

The judges on the panel may also face a decision about whether to embrace a broad or narrow rule, and whether the rule should be a bright line or provide a standard with multiple criteria. Once again, legal scholarship provides a seemingly endless supply of articles discussing these topics and advocating for one or another approach. As an advocate, you need not decide the "best" approach. But you do need to figure out if the judges or justices who will decide your appeal have views on these subjects. To do so, you will want to at least dip into the abundant literature on the subject. *See, e.g.*, Ian Ayres, *Narrow Tailoring*, 43 UCLA L. Rev. 1781, 1786 (1996); Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 Rutgers L.J. 543, 555 (1996); R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do,* 31 Loy. L.A. L. Rev. 167, 212 (1997); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1199–1200 (1992); Emily Cauble, *Safe Harbors in Tax Law*, 47 Conn. L. Rev. 1385, 1389 (2015); Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. Davis L. Rev. 1385, 1391 (2016); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith,'* 43 U. Pitt. L. Rev. 307, 330 (1982). A quick Westlaw search for "bright line" rule or "balancing" may help you find decisions of the judges or justices who will decide your case that reveal whether they lean toward one or the other.

Courts also consider how their opinion will be received by the public. Alexander Bickel wrote about the tension that appellate jurists experience between their role as independent jurists and the problem of imposing counter-majoritarian decisions on the public in the context of a democracy. *See* Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2d ed. 1986); Barry Friedman, *The Will of the People: How public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (2004); Jeffrey Rosen, *The Most Democratic Branch: How the Court Serve America* (2006); Cass R. Sunstein, *A Constitution of Many Minds* (2009). *See also* Joseph Landau, *New Majoritarian Constitutionalism*, 103 Iowa L. Rev. 1033 (2018). In consequential decisions of constitutional law or dramatic changes in common law that may result in broad societal changes, jurists are forced to grapple with the public reaction. As the "least dangerous branch" with no independent source of funds and no independent way to enforce their rulings, jurists must, at some level, consider the limits to their power and the effect a dramatically unpopular opinion will have on their institutional credibility. If you are handling such a case, search out the voluminous literature on the varied approaches to decision making and study the past decisions of the judges or justices who will be deciding your case for guidance.

The role of stare decisis also comes into play regularly. Judicial research can tell you whether the judges or justices who will decide your case are firmly committed to stare decisis or are regularly persuaded that a past precedent has proven unworkable and or simply wrong. Knowing this in cases in which you are relying on or urging reversal or limiting of past precedent is important.

Collecting and Sharing Information about the Tribunal and Its Decisionmakers

As an active labor lawyer in the arena then called traditional or hard labor law (union labor negotiations/ unfair labor practices/ grievance arbitration), Judge Saad worked on many disputes in which arbitrators would be the final decision makers. They decided disputes that arose under the collective bargaining agreements. And by hard and fast law, their decisions were final and virtually unappealable. Thus, he learned that knowing your arbitrator was essential and could be taken to a fine art. The best labor lawyers each had a "book" on every major arbitrator. The arbitrators generally belonged to the National Academy of Arbitrators (an arbitrator who was not a member was automatically suspect in those days).

The "book" included a biographical section, followed by a section on how the arbitrator had ruled on a list of past cases. The "book" discussed whether the arbitrator was skilled in this or that industry, and, most importantly, described the arbitrator's propensities for dealing with discharge and discipline cases versus handling interpretation of labor agreement matters. Some arbitrators never sustained a discharge from employment. Some always gave back pay, while others never did so. The arbitrators were remarkably consistent in their outlook and orientation. The "book" also had comments from other labor lawyers in the firm and fellow lawyers from other firms handling matters for employers in the legal marketplace. These comments gave important insights into the arbitrators' habits and customs in various types of cases. And, generally, a lawyer supplemented the information captured in the "book" by talking directly with lawyers inside and outside the firm with the recent experience with the arbitrator. This assured that the information was current and reliable. Often, clients had in-house labor lawyers who would share similar information from their files. And, when the matter was completed, the expectation from Judge Saad's then-senior partners was unmistakable—the "book" better have his entry, dated and signed, to add to the collective information about the decisionmakers for their arbitrations.

This method of working together to capture information about the tribunal decisionmaker is entirely transferable to appellate judicial decisionmakers or trial judges. Appellate lawyers, as all lawyers, will benefit from taking the time to learn about every judge before whom he or she regularly practices in the state or federal courts in which he or she practices. Lawyers working in firms would do well to emulate this information-sharing—formally or informally. Many good reasons exist for belonging to the various bar organizations that are open to membership of those practicing in the same areas of law, and this is one of them. Membership in DRI and its many substantive committees or in the state or local defense bar groups in your area is invaluable for many reasons, including this one. The sharing of vital information is instructive. It is also useful for maintaining client confidence, since they often ask about the propensities of the trial and appellate bench when making decisions about where and when to litigate an important matter.

Jurists as Sphinx or Inquisitor

Preparation for oral argument requires thinking about the judges or justices who will decide the case. Of course, on a court of last resort, you will know who the justices are at the outset. On many intermediate appellate courts, you may learn their identity when the argument is scheduled, and you are notified of the date and time and place to be. But some courts, such as the United States Court of Appeals for the Seventh Circuit, do not disclose the names of the judges until the morning of argument. To the extent possible, you will want to consider how the jurists who will decide your case typically conduct themselves at oral argument.

Do the members of your panel pepper the oralist with a series of questions and follow up repeatedly in typical Socratic fashion? Do members of your panel listen without any suggestion of how they view your argument? Some judges are naturally combative while others are very deferential to counsel. If you know that a combative judge is on a panel, particularly in a court where time is strictly limited, you will need to figure out ways to answer the questions quickly and move on. An inquisitor may be pushing for a concession that you can't give. Knowing this might occur, you have time to decide upon a strategy. This is a delicate art, but a necessary one. If you are appearing before a panel that asks no questions and offers no insight into its concerns, you will need to consider the length of your pre-

sentation, the points to make, and those to leave to the briefs. One particularly tricky aspect of arguing to the sphinx is whether to raise and try to respond to the weakest points in your argument—without knowing whether these weaknesses are actually matters of concern to the panel.

Some judges are low-key, relaxed, and informal. Others are highly ceremonial and even ritualistic in their demeanor and expectations of the advocates. Anyone who has argued or observed oral argument before the United States Supreme Court knows how formal the proceedings are, with the solicitor general's office still sending advocates in morning coats and anxious courtroom deputies directing everyone to their assigned areas of the courtroom before the argument begins. At one argument that Ms. Massaron attended, the courtroom deputy motioned her to shake the person sitting next to her because he was nodding off. No sleeping before the U.S. Supreme Court; no reading books or newspapers while the court is in session; no noise at any time. In contrast, a presiding judge in a state appellate courtroom once paused during his opening remarks to those in the courtroom to ask about the birth of a grandchild. And another appellate judge once directed the court clerk to bring her coffee at a break in proceedings while she was sitting in the empty courtroom on a cold snowy winter day. In other courtrooms, such informality would be anathema. Learning the likely atmosphere and culture of the court when it is in session is important—and never more so than if you are appearing in an unfamiliar court. You can quickly brand yourself as an outsider, and likely lessen your credibility, if you do not take the time to learn these aspects of the court.

One particularly tricky aspect of arguing to the sphinx is whether to raise and try to respond to the weakest points in your argument—without knowing whether these weaknesses are actually matters of concern to the panel.

Today most appellate courts release audio or video recordings of past arguments. You can search out past arguments, including arguments before the specific judges assigned to the panel that will hear your appeal. You can also search out arguments involving substantive topics that are at issue in your case. In a very important case that is consequential to your client and the industry you represent, the wise lawyer may attend a session of the relevant court when the identical panel is in session to observe the patterns of questions and the demeanor of the judges. Of course, an experienced appellate lawyer in the jurisdiction will have often appeared before these very judges and likely knows them well. But it always helps to be the most prepared lawyer in the room.

Tribunal Case Management and Processing

Different appellate courts handle appeals differently. This seems obvious but has relevance for your preparation and presentation of an appeal. In some appellate courts, the entire record and briefs will go directly to chambers for each judge and his or her law clerk(s) to examine and research. In other courts, the entire case goes to a central research staff for preliminary work intended to save the judges time and assist them in their review and decision making. In Michigan's intermediate appellate court, for example, staff attorneys in a central research department provide all the judges on the panel with a report on the case that analyzes the lower court record, the trial court's decision, the briefs, and the legal issues raised on appeal. These attorneys often prepare a proposed opinion for the judges' consideration. This places a premium on the briefing process and lessens the advocates' ability to change the judges' minds during oral argument.

You will want to learn how opinion-writing is determined. On the United States Supreme Court, the chief justice decides who will write an opinion if he is in the majority, and the senior member of the dissenting justices assigns the dissent. When Ms. Massaron clerked for the Michigan Supreme Court, opinion-writing was assigned on a rotating basis so that each justice ended up with an equivalent number to write. Generally, in courts of last resort, opinion writing is not assigned until after briefing and after argument. This heightens the importance of oral argument and enhances the active involvement of all justices in the decision-making process.

Today, in most state courts and in many federal intermediate appellate courts, opinion-writing is assigned to one judge before oral argument. In our view, this is a pernicious practice because it "encourages one-judge decisions and one-judge opinions." *Aldisert*, supra, at 34. Judge Aldisert explains why it's troubling:

> It has the unfortunate tendency to encourage individual judges on a multi-judge court to concentrate only on cases assigned to them, and conversely, to give too much deference, consciously or unconsciously, to the judge who has been assigned the opinion.

Id. He invited bar groups concerned with this practice to take issue with it and try to persuade the courts to make a change, an invitation we reiterate to those of you reading this article.

In many appellate courts with preassignment, the "writing judge" circulates his or her opinion before oral argument. And in some cases, the judges on a panel will discuss the cases in person or by email. They may agree and tentatively decide the cases before the argument even takes place. In some jurisdictions, the appellate court may circulate a proposed opinion to the lawyers to alert them to how the judges are inclined to rule. Other jurisdictions may not circulate a decision, but they may agree on questions that are provided to litigants before the argument takes place so they can better prepare.

The lesson here is not only to know your judge, but to know your court. You need to learn as much as you can about how your court conducts its research, how the judges typically confer, who writes the opinion and when they are selected, when opinions are circulated, and generally how your

court regards oral argument as a part of the appellate process. You can find this information from searching the court's website for its internal policies and procedures and for other information about how the court functions. Of course, former law clerks, court staff attorneys, and judges are potent sources of information about the court's operations and culture.

The Attention Your Judge Gives Each Case

Figure out whether the judges or justices assigned to your case are the "A" team—or not so much! Judges and justices are people; and like all people, some are hard-driving, focused, and brilliant. Others are easy-going and affable. Occasionally, as with all people, judges are slackers, skimming along on the surface of cases where they often miss the deep issues or underlying facts and law. This, too, makes a difference in your presentation of an appeal to the panel of decisionmakers.

Is the judge on your panel bright, dedicated, hardworking, thorough in reading everything in the record, willing to extend the time for oral argument by asking searching questions, willing to read not only the briefs but the key authorities, and maybe to do independent research? Does the judge on your panel enjoy brainstorming a case with his or her staff to get the benefit of different views and test his or her conclusions? Is your judge dedicated to the rule of law and the importance of trying to set aside his or her own preconceptions and leanings? Does the judge reason to conclusion? Or does this judge issue opinions in which critical material facts are left out of an opinion in order to paper over a problem with the law and get to a desired result? Is the judge always prepared when on the bench, or has he or she come without reading the briefs or looking at any portion of the record? Will the judge confront another judge on the panel and stand up against distortions of the facts or law?

In appellate litigation as in life, the process does not always work well. Most judges and justices take their oath of office seriously and try to adhere to the professional norms that require neutral decision making based on the facts and law. But sometimes, that is not the case. In a complex case that is consequential in terms of the issue or dollars at stake, we all want the "A" team. Advocates who have practiced extensively in a jurisdiction will get a feel for the judges and justices before whom they appear. They can't change a judge who isn't doing the job—but they can try to modify their presentation to best persuade that judge. And they can advise their clients of the potential difficulties that may be created by that judge. In some cases, they may advise settlement to avoid a predictably adverse decision.

Your Judge outside the Courtroom

One of the great joys of the legal profession is the opportunity to meet and become professional friends with other lawyers, judges, and all those working in the judicial system. This can be an important step to take before you ever step foot in the courtroom. Many judges are active in local, state, and national bar associations. The American Bar Association's appellate judges' division has as part of it, a Council of Appellate Lawyers, which is a great avenue to meet lawyers and judges and justices from all over the country. Many judges are deeply involved in court-appointed committees to study and revise rules of evidence or procedure. Many of these committees and study groups have as members distinguished lawyers and judges, from your state and other states. Other judges may be active in community, charitable, and nonprofit organizations, participating as board members of these non-profit organizations.

If you are also involved, you will meet the judges and other important community leaders outside of the courtroom. We all know that law firms value lawyers who have distinguished themselves and established their reputations as fine lawyers of character and integrity by giving back to the community and to the profession. Indeed, the "best and brightest" in law firms, working in-house or on the bench, tend to be very involved in the entire business of law and business and community development. These efforts and activities are instrumental to establishing the kind of reputation that builds your credibility with clients and enhances trust between the bench and the bar. Just as important as knowing your judge as a judge is to know your judge as an active member of his or her community and to have the judge see you in a similar light.

Concluding Thoughts

To be thoroughly prepared for game-time decisions, a dry run is incredibly helpful. Before a big performance, the artists play or sing their parts in rehearsals. Before a Broadway musical opens, there is always a dress rehearsal and, often, out-of-town runs. And in a big case, where much hangs in the balance, the client should be advised that it advances their interest to have oral advocates participate in a mock argument with mock appellate judges who bring experience as appellate advocates or as appellate jurists. We have participated in moot courts—as advocates and as mock appellate judges, and have seen first-hand how it can improve the odds of success. A real-world simulated experience can dramatically sharpen the advocate's presentation during the actual argument and hone answers to the most difficult questions. While multiple moot court practice sessions are common in arguments before the United States Supreme Court, they are less often used before intermediate appellate arguments in state or federal courts. Yet, they offer real value that cannot be obtained from an advocate's solitary study of the record and briefs. We plan to write another article soon about the ways in which to make mock arguments most effective. But in the meantime, we hope the points we have offered here are helpful.

Just as important as knowing your judge as a judge is to know your judge as an active member of his or her community and to have the judge see you in a similar light.