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Appeals

In This Issue

Introduction	1
By Solicitor General Noel Francisco	
Trial Tribulations: Protecting Your Case on Appeal	3
By Kelly A. Zusman	
Translating Courtroom Visuals for Appeal	13
By Sonja Ralston	
Adverse Decisions	21
By Patty Merkamp Stemler and David Lieberman	
In Open Court: Courtroom Closures and the Sixth Amendment Right to a Public Trial	31
By Luke Cass	
Foundations of Appellate Advocacy	55
By K. Tate Chambers	
Thinking Like a Lawyer While Writing Like a Human Being: Writing and Editing the Modern Appellate Brief	73
By Ryan D. Tenney	
Making Every Word Count: Using Strategic Editing to Increase the Readability of Your Appellate Brief	85
By Veronica J. Finkelstein and Nicole E. Crossey	
Citational Footnotes: Should Garner Win the Battle Against the In-Line Tradition?	97
By Peter M. Mansfield	

Appeals

In This Issue

- Structural Errors are Not Created Equal and
are Not All Per Se Reversible**125
By Jonathan D. Colan
- The Potential Implications of the Supreme Court’s
Decision in *Pereira v. Sessions* on Prosecutions
for Illegal Reentry Under 8 U.S.C. § 1326**141
By Jennifer Williams
- Preserving the Record for Restitution Issues**.....151
By Amy Potter
- Human Trafficking Appeals: Strengthening
Coordination with the Civil Rights Division**.....165
By Elizabeth Parr Hecker
- Uncounseled Tribal Court Convictions as
Predicate Offenses Under *United States v. Bryant***177
By Bob Bullock
- Higher Ground**.....183
By Paul Farley
- Top Ten Books for Your Legal Writing Bookshelf
(With Apologies to David Letterman)**191
By Christian A. Fisanick
- Note from the Editor-in-Chief**201
By K. Tate Chambers

Introduction

Noel Francisco

Solicitor General of the United States

As Solicitor General, I have the great honor of speaking for the United States in proceedings before the Supreme Court. But just as important is my duty to supervise the government's appellate litigation throughout the federal courts. Most decisions to take an appeal from a district court, seek rehearing en banc, file an amicus brief, or petition for a writ of certiorari cross my desk. It is a weighty and humbling responsibility. But it is also an opportunity to witness the incredible dedication, skill, and thoughtfulness that the Department's attorneys bring to bear in courts across the country.

Those qualities are on display in this issue of the Department of Justice Journal of Federal Law and Practice, which explores the Department's role in handling appeals on behalf of the United States. It includes valuable lessons about the pillars of any good appellate practice: effective written and oral communication, sound legal reasoning, and mastery of the trial record. From the nuts and bolts of legal citation to nuanced discussion of difficult doctrinal issues, this is a guidebook for seasoned and novice advocates alike.

This issue contains more than just practical tips. It highlights the unique way in which the Department balances the diverse interests of our client agencies, considers the long-term interests of the nation, and safeguards the Department's reputation for candor, credibility, and fairness in every appeal. In that way, it echoes Justice George Sutherland's exhortation that it is always the government's interest "not that it shall win a case, but that justice shall be done."¹

All of us at the Department can benefit from our colleagues' insights. I applaud the editors for compiling this volume and each of you for reading it.

¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

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Trial Tribulations: Protecting Your Case on Appeal

Kelly A. Zusman
Appellate Chief
District of Oregon

I. “Reverse me, just please don’t remand!”

Ever heard a trial judge say that? I have, many times during the years I spent as a law clerk who volunteered to help judges throughout my district. It seems that trial judges may love trial work, but they dislike retrying cases. Amen!

Retrying cases is not only unpleasant, it is also sometimes impossible. When your witnesses are heroin users who have disappeared or traumatized child victims, a retrial may not happen. And guilty defendants may walk.

So if everyone dislikes retrials, is there anything prosecutors can do to prevent them when confronted with hostile appellate judges who may not ever have tried cases themselves? The short answer is yes. Although prosecutors cannot prevent defendants from filing appeals after jury verdicts, we can take steps to protect our records thereby forestalling successful defense appeals. Appellate judges are keenly concerned about process: they do not get to decide whether defendants are guilty or innocent, and instead focus on whether the procedures employed during pretrial and trial proceedings were fair. What follows are a few highlights of areas that are ripe for successful appeals; what each topic shares is spontaneity and a gut reaction (from either us or our trial judge) that may be less than temperate.

II. Keep current

Good lawyers, like other good professionals, stay on top of new legal developments. If you’re still citing *Ohio v. Roberts*¹ for Confrontation Clause issues, please get off the bus. Right now.

Most office Appellate Chiefs regularly circulate new Supreme Court and precedential circuit court opinions relevant to criminal and federal civil cases. Read the summaries; create an Outlook folder for those summaries that affect your practice area. If your court has

¹ 448 U.S. 56 (1980).

identified an additional element required to sustain an 875 threat conviction, you don't want to rely on an outdated jury instruction. Equally important is staying on top of Department of Justice guidance memos and policies.

III. Brady, Brady, Brady

Criminal discovery violations are every prosecutor's worst nightmare. A defense attorney stands up in court and declares that he has never seen a document, video, letter—you name it. The judge turns to the prosecutor, glowers, and demands an explanation. That's why we bate stamp and document everything; everything we receive from the agents is logged, copied onto a disk, and sent with a cover letter so that we can prove precisely what we received, when we received it, what we delivered to the defense, and when we delivered it. Everything in writing. Everything.

What if you received something on the eve of trial; you immediately delivered a copy to the defense, but he's claiming prejudicial delay. Show the court your proof of when you received the material, and agree to a reasonable continuance to permit the defense to do what it needs to assess the new information. If the defense does not want a continuance, great—they've waived timeliness objections.

IV. Alternative suppression arguments

Before we dash up to Criminal Appellate seeking permission to appeal an adverse Fourth or Fifth Amendment ruling, we are looking at whether there are alternative arguments we should have raised. If so, we need to file the ever-unpopular motion for reconsideration. Far better to get those alternative arguments to the court before it rules against us and grumps at our bid for a fresh look.

But that search warrant looked so good! How could the court have found it overbroad? It is far better to anticipate the potential adverse outcome and raise severance as a way to salvage your critical evidence. Other common alternative arguments that often get missed in the glow of feeling like your case is invincible? Standing (such as, can the passenger challenge the car search) and good faith.

V. “I’m so damned smart, I want to represent myself.”

The morning your suppression hearing is scheduled to begin, defense counsel stands and announces that he has a matter for the court. His client wants to represent himself. The trial judge is not pleased. The judge knows that a client who represents himself has a fool for a client. The judge wants desperately to deny the oral motion, and get on with the suppression hearing. What, if anything, should you do?

Appellate courts have held that defendants have a Sixth Amendment right that encompasses the right of self-representation. These requests cannot be rejected out of hand; instead, the trial judge must conduct a “Faretta colloquy.”² At a minimum, the trial judge must explain the charges, the sentence expected “in concrete terms,” and the specific dangers of self-representation, which include the fact that a non-lawyer defendant will generally not be familiar with courtroom procedures, the rules of evidence, or potential defenses.³ The trial judge must provide specific cautions and not simply “dire generalizations.”⁴ The judge should also explain that she cannot give the defendant legal advice or help him through the trial.

VI. “I want to fire my attorney.”

Another popular favorite from defendants reluctant to face a jury is the last-minute request to substitute counsel. Equally popular is the trial judge who denies this motion without any inquiry. Unfortunately, summary denials will buy you a new trial.

Although circuit courts differ somewhat in their approach, most share the requirement that a trial judge make an “adequate inquiry” into the nature of a defendant’s beef with his lawyer.⁵ This inquiry

² See FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES § 1.02(C) (6th ed. 2013), <https://www.fjc.gov/sites/default/files/2014/Benchbook-US-District-Judges-6T-H-FJC-MAR-2013.pdf>.

³ *United States v. Robinson*, 753 F.3d 31, 44 (1st Cir. 2014).

⁴ *Id.*

⁵ See, e.g., *United States v. Diaz-Rodriguez*, 745 F.3d 586, 590 (1st Cir. 2014) (noting the “trial court must conduct an appropriate inquiry into the source of the defendant’s dissatisfaction with his counsel”); *United States v. Gonzalez*, 113 F.3d 1026, 1029 (9th Cir. 1997) (noting “a district judge may be

generally will mean that the prosecutor will be asked to leave the courtroom; before you go, and if you can get a word in, it would be prudent to remind the judge of the “adequate inquiry” requirement and its concomitant rule that the court assess the extent of any conflict between defendant and his lawyer. If the lawyer and client are not speaking to each other, the defendant is essentially denied his Sixth Amendment right of representation (and that’s a problem). If, however, the defendant simply does not like his lawyer’s predictions regarding the outcome of trial or sentencing, the relationship may be salvageable. The court may also take the motion’s timing into account, but timing alone will not justify denying relief. A court that makes specific fact-findings to support the denial of a motion will be in far better shape than one that doesn’t. This means, for example, that a fact/credibility finding that a defendant has filed a motion to substitute as a delay tactic will be subject to deference on appeal.

There is even a rare instance in which a trial judge will have to appoint another attorney to represent a defendant solely with respect to his motion to substitute: that is, if the defendant and his current lawyer disagree about whether a motion to substitute should be filed at all.⁶

And although the standards are somewhat more deferential, the same care should be taken with last-minute motions to continue a trial date. A trial judge who asks first, before denying the request, will provide a far better record to defend on appeal. Moreover, if the government would be prejudiced by a reset, proffer evidence of that prejudice into the record. Victim-witness coordinators may be able to address the stress or trauma that our victims experience from interminable delays, and they may be able to identify specific costs (such as travel expenses) that will be unnecessarily incurred and duplicated if the trial date is reset.

VII. Defendant won’t shut up. Or he wants to kill people.

A contumacious or violent defendant poses a special challenge for the trial judge. When a defendant has a Sixth Amendment right to be present for all critical stages of his criminal case, what can be done

reversed for denying a motion to appoint substitute counsel without holding an adequate inquiry”).

⁶ United States v. Adelzo-Gonzalez, 268 F.3d 772, 779–80 (9th Cir. 2001).

when he repeatedly interrupts with violent outbursts? Can a judge simply order that a defendant be removed from the courtroom or shackled at counsel table? The short answer is yes, but it's a process.

First, for the sassy defendant who continually interrupts, a trial judge must warn him that his conduct could result in exclusion. Next, the judge must give the defendant an opportunity to correct his behavior so that he has a clear path to return to the courtroom.⁷

For the dangerous defendant who poses a security risk in the courtroom, shackling is a viable option if the trial judge finds “compelling circumstances” needed to maintain security and that there are no less restrictive options.⁸ The concern posed by visible shackles is that they will undermine the “presumption of innocence.”⁹ Thus, any steps that the court can take to minimize a jury’s exposure to shackles (using screens, for example), is highly advisable. And the wise prosecutor will not highlight the shackles during opening, closing, or at any point during the proceedings.

VIII. If it isn’t “admitted,” it doesn’t exist

Trial exhibits may be displayed in opening statement, used with witnesses, and projected on a dozen screens. But unless you have formally moved to admit the exhibit, the judge grants admission and the clerk records it, that exhibit is dead to the Appellate Division on appeal.

Relatedly, federal trials are not videotaped. Court reporters still transcribe everything that happens on the record. “I’m handing you a photograph, can you tell the jury who this is?” “Yes, that’s Big Mix.” Your record includes 300 photographs; now which one depicts Big Mix? Without a reference to a particular exhibit number, your appellate judge has no idea which image the witness has been handed. So this testimony is also dead to us on appeal.

IX. Rules rule

The Federal Rules of Evidence have only been around for about the last 40 years and they are awesome. They give us quick, viable bases upon which we rely to admit our exhibits and preclude the defense

⁷ See *Illinois v. Allen*, 397 U.S. 337, 343 (1970); *United States v. Williams*, 431 F.3d 1115, 1119–20 (8th Cir. 2005).

⁸ *United States v. Cazares*, 788 F.3d 956, 965–66 (9th Cir. 2015).

⁹ *Id.*

from calling a “doctor” to testify that the defendant’s nasal spray made him sexually molest little girls. That would be Rule 702¹⁰ and *Daubert*,¹¹ thank you very much.

The very best trial lawyers use the rules like Charlie. Charlie Turner was the United States Attorney in Oregon from 1982–1993, and unlike most United States Attorneys today, Charlie actually tried cases. In fact, Charlie usually kept the most difficult, contentious, terrible cases for himself. As a federal district court law clerk, I got to see Charlie try a six-week heroin conspiracy trial against five defense lawyers. Charlie knew the rules of evidence and cases interpreting the rules like no one I’ve ever seen before or since; the defense team was not so fortunate. Charlie ran circles around them. He responded to objections with specific rules and case cites (that were always spot on), and he even reformulated several defense objections to protect his record: “Although the defendant argues relevance, his real objection is hearsay, and here’s why he’s wrong on both points” It was awesome.

The defense appealed on several grounds, including claimed evidentiary errors, and their objections went down in flames. The appellate court could see exactly why Charlie introduced certain exhibits and called certain witnesses and they had clear insights into how the challenged evidence fit neatly within the rules. We should all want to be like Charlie.

X. “Closed to the public.”

Courtrooms are public venues and trials are supposed to be conducted in public. There are times, however, when a trial judge may want to close the courtroom to the public; perhaps we are calling a juvenile witness, and the court is concerned that the child may find a crowd intimidating.

Because appellate courts presume that all trials will be public, the burden will be on the party seeking closure to establish an “overriding interest” that is “likely to be prejudiced” absent closure.¹² That public trial testimony may cause a child emotional harm is a legitimate reason to order at least a partial courtroom closure.¹³ But closures

¹⁰ FED. R. EVID. 702.

¹¹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

¹² *United States v. Withers*, 638 F.3d 1055, 1063 (9th Cir. 2010).

¹³ *United States v. Osborne*, 68 F.3d 94, 98–99 (5th Cir. 1995).

should be used sparingly, and not as a matter of course, even when the case involves child witnesses.¹⁴

So if your judge is inclined to close the courtroom at any point during your trial, gently remind her of the appellate presumption and the need for specific fact-findings to justify closure.

XI. Defense counsel savages your witnesses during his closing argument.

Next to discovery violations, the most popular target for Assistant United States Attorney criticism by appellate judges is closing argument. Unlike the other topics, this one is all on us. And if there is going to be a problem, it is most apt to arise during rebuttal when we have to stand up and address the defense's arguments. Some notable highlights from the case law:

First and foremost, just because a defense attorney attacks our witnesses—impugning their integrity or calling them flat liars—it does not open the door to vouching. The Supreme Court has recognized that what a prosecutor says during closing argument is different in kind from what defense counsel says because it carries with it the “*imprimatur*” of the United States.¹⁵ What we say matters more in the eyes of the law. Bottom line: we cannot vouch for our witnesses by assuring the jury that we believe that they are telling the truth.

Second, whatever we say must be supported by our trial record. This means that if you have ten wiretap recordings, but only nine were actually admitted at trial, you may only refer to the nine that were admitted.¹⁶ Best to check with the courtroom deputy to ensure that your admitted exhibit list matches the court's list. This rule also requires that we use caution with generalizations: we may believe that a defendant's entire business was permeated by fraud, but if our trial evidence focused on a dozen fraudulent transactions, our generalization will not match the evidence.¹⁷

¹⁴ See *e.g.*, *United States v. Thunder*, 438 F.3d 866 (8th Cir. 2006) (reversing a conviction when the court closed the courtroom for child witnesses without making requisite fact findings to justify the action).

¹⁵ *United States v. Young*, 470 U.S. 1, 18–19 (1985).

¹⁶ *United States v. Rojas*, 758 F.3d 61, 66 (1st Cir. 2014).

¹⁷ *United States v. Womack*, 581 F. App'x 925, 931–32 (5th Cir. 2012) (unpublished).

Next, we cannot ask the jury to “send a message” with its verdict.¹⁸ For example, the fact that a corporate defendant is still in business, and still wreaking environmental damage is not something that we should ask the jury to redress.¹⁹ Suggesting that the defendant (or his lawyer) is a bad person, a bad parent, a bad citizen, will likely buy you a new trial (or a hearty remonstrance, along with a possible Office of Professional Responsibility inquiry). The only issue properly before the jury is whether a defendant is guilty or innocent of the charges; redressability will be up to the judge.

Equally important is that we stay within the court’s limine rulings.²⁰ If certain evidence was admitted for a limited purpose (for example, Rule 404(b) evidence), then our argument must be consistent with that ruling.²¹

The Constitution also limits what prosecutors may say during a closing argument: the Fifth Amendment prohibits shifting the burden of proof to a defendant and it prevents us from commenting on a defendant’s post-arrest silence or decision not to testify. Avoiding “un” words like “uncontroverted” and “undisputed” will help avoid these constitutional landmines.

Most of us do not win our cases in closing argument. A survey conducted by jury consultants concluded that 80% of jurors make up their minds after opening statements; the remaining 20% will likely decide their vote based on the evidence and the quality of our witnesses. Closing argument may help the jury analyze the facts in our case, but it will not win the day. Errors in closing can, however, be deadly to our cases on appeal. So when in doubt, leave it out.

XII. The final act—before appeal

Sentencing is no place to lower our guard when it comes to protecting our record. The Supreme Court’s hostility to statutory enhancements for prior convictions has meant that we have to be sure to get those predicate state court judgments into our records. And our exhibits for sentencing can be pivotal.

A good example of this comes from a recent sentencing handled by one of my favorite trial attorneys. Let’s call her Leah Bolstad. Leah

¹⁸ *United States v. Certified Env’tl. Servs.*, 753 F.3d 72, 94–95 (2d Cir. 2014).

¹⁹ *See id.* at 95.

²⁰ *See United States v. Richards*, 719 F.3d 746, 761–62 (7th Cir. 2013).

²¹ *See id.*

wanted to convince the court that it should impose a four-level enhancement for using a gun in connection with another felony, namely unlawful use of a weapon. The trial judge is notoriously short on patience. At the sentencing hearing as Leah was trying to elicit testimony from her officers to establish the predicate felony, the judge suddenly declared that he'd heard enough and ordered the officer to leave the witness stand. We still had another element to go. But anticipating something precisely like this, Leah had created (and admitted) a chart showing the location of all of the spent bullet casings. The chart was our best proof that what happened was a gang-related firefight in a bar's parking lot, and not a bunch of high-spirited kids firing harmlessly into the air. The Ninth Circuit affirmed in a short, unpublished memorandum, citing the government's evidence.²²

XIII. If we build it, will you come?

The best final piece of advice for preventing appeals is to consult with your appellate folks early and often. We love questions, especially ones that precede actions that may be difficult to clean up later. I especially love evidence questions because they often end up on my final exams (I'm an evidence adjunct professor; a smart kid with a PACER account could totally figure out the final exam by tracking my cases). And whatever question you bring us is apt to be shared by several of your colleagues. It is odd but true that issues come in bunches, and I frequently find myself forwarding the same response to a half dozen Assistant United States Attorneys. So keep them coming!

And as much as I love appellate work, I hate losing appeals. Winning is better. "Affirmed" is a beautiful word.

About the Author

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²² United States v. Graham, 707 F. App'x 875 (9th Cir. 2017) (unpublished).

Law teaching Appellate Advocacy, Evidence, and Criminal Investigations.

Translating Courtroom Visuals for Appeal

*Sonja Ralston
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Trials are dynamic affairs. Live witnesses have facial expressions and tones of voice that a dry transcript never captures. In modern courtrooms, technology allows everyone to see a document simultaneously, the witness to mark-up an exhibit electronically, and audio tapes to be heard in unison. On appeal, all that nuance is lost.

Dramatic though they are, the last thing any trial attorney wants is to try the same case twice. One of the best ways to avoid that fate: make a record so clear that the court of appeals judges (and your appellate counsel) will feel like they were present in the courtroom with you. This often requires extra words and windup during your witness examination, which can feel awkward. But it's worth it in the end.

The familiar ritual of an in-court identification provides a good example. The witness points to the defendant and describes his clothing, at which point you, the intrepid prosecutor, turn to the judge and say, "Let the record reflect that the witness has identified the defendant." That statement is unnecessary for the jury, which sees the witness pointing and the defendant's clothing. But it conveys to the court of appeals that the witness identified the defendant and not, say, his lawyer.

My goal here is to help you make every visual moment in the courtroom equally clear on the record. For good reason, appellate confusion over the trial record mostly centers on the exhibits. Exhibits are like rain: used effectively, they make your case bloom; used carelessly, they make everything muddy. Effective exhibit presentation starts with how you organize and label them, proceeds to referring to them precisely, and ends with admitting every version the jury saw. And then there are some visual moments, like in-court identifications, that do not involve exhibits. For these, the best course of action is to describe what happened.

I. Organize and label exhibits with care

You want to keep your exhibit presentations as simple as possible for your audience: the courts and the jury. But this task may not be easy for you. A good rule of thumb: keep exhibits as short as possible.

For example,¹ if you have 150 defendant emails, mark each email conversation as one exhibit rather than making a single exhibit with all the emails. The latter seems easier—the agent probably obtained all the emails in a single search or in response to a single subpoena, and marking the stack as a single exhibit makes your exhibit list shorter. But using a large exhibit at trial inevitably sows confusion. For one, if you have multiple emails on the same date or among the same people, you won't be able to distinguish them easily for the record. Moreover, your omnibus exhibit will not have a uniform pagination, so you won't be able to refer to individual pages by number—and even if you add page numbers to the exhibit, they might overlap with or conflict with numbers on the originals. The single exhibit will also tempt both you and the witness to “turn to the next page” instead of identifying a particular conversation. After one or two page turns, it becomes difficult for the reader to be sure they are still with you. Accordingly, this single-exhibit approach ultimately obscures your trial presentation; your appellate counsel will not be able to tell what the witness was referencing during her testimony and will be limited to the portions of the emails read into the record. The result? Your most powerful evidence—the defendant's own words—will be neutered.

Conversely, if you make each email exchange its own exhibit, you and your witness will be forced to identify the conversation you are discussing. This will allow anyone reading the record to follow along at home, just as the jury did in court.

Marking the exhibits separately does not require hundreds of burdensome exhibit numbers. They can be marked in groups. For example, instead of being a singular “Government's Exhibit 2,” the emails can be marked as the sequential group of “Government's Exhibit 2-1 to 2-55” (or 2a, 2b, etc.). A video can be Exhibit 170 with isolated still images labeled as Exhibits 170-a and 170-b. Use the same technique for audio recording excerpts. It is much easier to say

¹ Each example herein is based on a real case.

“we are now playing excerpt 10-2” instead of “we are now playing Exhibit 10, starting at 12:35.”

But be wary of going too far in the other direction. Numbers like 9-2(10) can be difficult for the court reporter to capture and can turn into 9-210 or 9210 on the transcript, which is confusing at best and misleading at worst (if 9-210 is also an exhibit).

Along the same lines, resist the urge to group your exhibits by witness; group them by type instead. All emails go together; all company records go together; and all telephone intercepts go together. That won't make a difference in some instances. When calling a bank document custodian, all the relevant exhibits will appear in the same group. But on other occasions, you will ask multiple witnesses—say, the cooperator and the case agent—to discuss the defendant's emails. Having the email exhibits scattered about the record will make the appeal unwieldy. Placing them all in the same group will allow the court, and your appellate counsel (and probably the jury in the jury room, too), to better organize their reviews of the record.

II. Refer to exhibits precisely

Contrast the following scenarios:

<p>Witness: “This number here (indicating) is just wrong, because it . . . missed the escrow payment.”</p> <p>The exhibit, an auditing statement, contains dozens of numbers and is a key to the defendant's claim that the loss from his fraud was limited. Explaining its flaws was central to prevailing on his sentencing appeal.</p>	<p>Witness: “The blue ink that says ‘uterine cancer,’ (indicating) that's not my handwriting. The black ink, the rest of it, is mine.”</p> <p>The exhibit, a prescription, includes both the drug and a diagnosis. In this example, it matters whether the defendant, a doctor, had written the diagnosis. The doctor's defense was that the witness, a nurse practitioner, had done so.</p>
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In both examples, the witness points to an exhibit to explain something to the factfinder. In both, everyone in the courtroom understands what happened. But with the auditing statement, the testimony and exhibit will prove worthless on appeal because the record did not explain the error or identify the number to which the

witness pointed. In contrast, with the prescription, the nurse's testimony appears just as vivid on the page as it was in court.

Sometimes, a witness, like the nurse in the above example, provides this precision on her own. A case revolving around the Bosnian conflict provides another helpful example. There, the government's expert witness explained a color-coded map of the former Yugoslavia to the jury:

You can see here in the dark green that roughly 40 percent of Bosnia was Bosniak. . . . Then you have roughly 30 percent, the red, is Serbian. The yellow, slightly less than 20 percent, is Croat -- Croatians.

This off-white color depicts areas where there was not one single ethnic majority.²

You will no doubt encounter other circumstances where the witness is less than precise. When that occurs, ask clarifying questions, as in this example addressing a photograph:

Q: . . . In addition to yourself, who else is shown in this photograph?

A: Pete Delmadge. . . .

. . .

Q: What color is his shirt?

A: Red shirt. Curt Schaller is the green shirt. . . .

. . .

Q: And the fellow in the blue shirt.

A: That's me.³

Using your exhibits precisely at trial only takes a little training: as with an in-court identification, you can learn a script. When a witness points at something, ask yourself whether she has identified aloud where she pointed. If not, either clarify it yourself ("You're pointing to the third column on Exhibit 15, correct?") or ask the witness to ("For the record, what are you pointing at there?").

² Transcript of Jury Trial Proceedings Before the Honorable Amy Totenberg May 12 Through May 25, 2016 Volume IV of X at 543, *United States v. Mitrovic*, No. 1:12-cr-00311-AT-JSA (N.D. Ga. May 13, 2016), ECF No. 315.

³ Transcript of Proceedings Before the Honorable Michael H. Simon United States District Judge Volume 10 at 2024, *United States v. Harder*, No. 3:12-cr-00485-SI (D. Or. May 26, 2015), ECF No. 233.

Additionally, make sure that technology does not hinder the task of making your record. It can be almost magical to flip between exhibits on a computer or projector, but, like all magic, that trick is a visual illusion that does not translate well onto the record. If you have a paralegal helping with the technology, invite him to help you make your record—à la “Simon Says.” Tell the paralegal in advance to only respond to your commands if you verbally identify the exhibit or page you want displayed. Your desire to keep things running smoothly will quickly incentivize you to make this precision a habit.

If you—or, critically, your expert witness(es)—use a PowerPoint presentation to explain something, put slide numbers or titles in the presentation, and cite those instead of the generic “next” as you move through the slides.⁴ That will allow you to avoid the confusion that befell a government expert in a massive securities fraud trial. In that case, the expert created an eight-slide presentation to explain a series of complex corporate structures. Without the presentation, his testimony made little sense, and vice versa. Unfortunately, a glitch occurred with the computer during his testimony. In going through his eight slides, the expert asked for the “next” slide nine times (two more than necessary) and never identified the slide displayed at any given moment. Matching up the testimony and the presentation proved impossible on appeal; both became useless.

III. Admit multiple versions

A third type of confusion arises when your witness alters an exhibit during his testimony: he marks an “x” on a map or circles someone in a photograph. Again, the technology in many modern courtrooms allows the witness to make Monday Night Football-style-telestrator markings on video monitors, but the markings are usually lost for the record. The solution is to move the marked version of the exhibit into evidence as well.

You can do this in two ways. If you have the exhibits ready during your pre-trial meetings with the witness, have them make the identifying marks then. For example, in a political corruption case, the prosecution introduces a video from a campaign rally along with several screenshots. Before trial, the case agent adds digital yellow circles around the defendants and the cooperating witness. At trial,

⁴ This is unnecessary for opening statements and closing arguments, which, as you know, are not evidence.

she authenticates both the video and the screenshots, noting her addition of the circles, which helps the jury pick the defendants out of the crowd. By preparing the exhibits in advance, there are no surprises, and the court of appeals gets to see the same inculcating evidence as the jury.

Alternatively, some of the advanced courtroom systems can preserve a screenshot of the exhibit after it has been marked in court. If your system will not permit this, simply ask for the record to reflect what happened and describe the markings as best you can.

The same guidelines apply to old-fashioned paper exhibits. In a healthcare fraud case, the government wanted to show that the defendant doctor prescribed a particular drug in conjunction with payments he received from the drug's manufacturer. We had two exhibits, a list of the dates the defendant received the payments, and a graph showing his prescriptions over time. During his trial testimony, our agent marked the dates from the payment list onto a poster-sized version of the graph, merging the information in the two exhibits. This joint exhibit could have been prepared in advance, but doing it live in front of the jury created some helpful drama. Fortunately, the Assistant United States Attorney remembered to move the newly created exhibit—which made the kickbacks obvious—into evidence, and it was available for the appeal.

These same cautionary tales and preservation strategies should be used during the charge conference. The court may have prepared draft jury instructions that differ from the parties' submissions and from the final version read to the jury. That preliminary document rarely ends up in the record. The subsequent charge discussion may be very precise, referencing page and line numbers, but without the preliminary document, it is difficult to follow later. I recommend asking the court to make the draft instructions part of the record, or, at the very least, label your copy and save it—if it becomes material later on, the appellate attorney can ask to supplement the record.

IV. Describe what happened

Even when a courtroom demonstration does not address a written document, you can still make a precise record. Take this example from a RICO gang violence case. The witness was a victim of an assault perpetrated by a cooperating witness. The cooperating witness was not present in the courtroom during the victim's testimony, but the jury would see him later. When presented with a photo array, the

victim could not identify her assailant, but she did give a description. After she faltered in recounting her description, the prosecutor walked her through it step-by-step, concluding by asking about the perpetrator's hair color. When the witness could not find the words to describe his hair, the prosecutor helpfully asked her to compare his hair to her own.

For everyone in the courtroom, this was vivid. Someone reading the cold record, however, does not know whether the prosecutor is a blonde or a brunette. For that person, the witness's answer conveys no information. In this instance, the prosecutor should have asked a follow-up question seeking clarification (or, even better, asked the witness to compare the perpetrator's hair color to that in any of the dozens of identification photographs in evidence so as to avoid the necessity of descriptors altogether).

Similarly, in a political corruption case where the defendants filed campaign expenditure reports, the defense attorney wished to demonstrate how voluminous the filings were and had printed out the reports, totaling tens of thousands of pages. During trial, there were multiple references to the "stacks of binders," but no one ever testified as to how many binders there were or how big each was. On appeal, the defense was stuck with vague descriptions, like "huge," without specifics. (Of course, this redounded to the government's benefit because this line of argument was a distraction from the legally relevant question of whether the defendants lied in a small subset of entries.) If you're going to go to the trouble of printing all the records, assembling the binders, and lugging them into court, take the last step and ask a few questions to get a detailed description on the record.

This same technique—describing what happened—can be useful when the judge does something off the record. As an initial matter, you should do what you can to prevent off-the-record discussions about the case. If that fails, broach the matter with the court as soon as the court reporter is present. Ask the court for permission to make a record of the discussion and give a short description. For appellate purposes, it is particularly important to note whether or not the defendant objected, especially if the discussion relates to the jury instructions or excusing a juror (which, for some reason, seem to be two topics district courts often discuss in chambers without a court reporter). At the very least, your request to do so preserves the fact that a discussion was held.

In sum, do your appellate counsel, your court of appeals, and yourself a favor and think ahead about how your evidence will appear on a cold transcript. If you plan to use visuals, ask how you can preserve them and the accompanying testimonial descriptions for the record. And write yourself a note (perhaps, “For the record”) to keep on your binder or legal pad to jog your memory in case something unexpected comes up. Even if you forget in the moment, seeing the note at the next break can remind you to make a record as best you can when court reconvenes.

About the Author

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Adverse Decisions

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The ECF notices we all dread: “the defendant’s motion is granted,” or “the judgment of conviction is reversed.” Now what? By regulation, the Solicitor General will decide whether to authorize appeal of your adverse decision.¹ But wait! Don’t call the Solicitor General. Call your Appellate Chief instead. She will walk you through our established procedures for bringing your adverse decision to the Solicitor General’s attention. This article describes the process and explains how you can help the Solicitor General make these sometimes difficult decisions correctly and efficiently.²

I. The requirement of Solicitor General authorization

By a regulation first promulgated in 1969, the Solicitor General determines “whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing en banc and petitions to such courts for the issuance of extraordinary writs).”³ He also represents the United States in the Supreme Court.⁴ By placing a single individual in charge of appellate litigation, the Department of Justice ensures that its 93 United States Attorney’s offices and seven litigating Divisions speak with one voice.

Placing so much decision-making on the shoulders of a single official is daunting. Last year, the Solicitor General and his small staff of 4 deputies, 16 assistants, and 4 Bristow Fellows⁵ reviewed 1,506

¹ See 28 C.F.R. § 0.20.

² The article focuses on adverse decisions issued in criminal cases. Most of the described procedures also apply in civil cases.

³ 28 C.F.R. § 0.20(b).

⁴ § 0.20(a).

⁵ The four “Bristow Fellows,” all recent appellate law clerks, spend one year in the Office of the Solicitor General drafting adverse decision recommendations and assisting with Supreme Court cases.

adverse decision recommendations.⁶ Despite the volume, each recommendation receives careful attention, due in part to an established process that ensures that (1) every component or agency with an interest in the case has an opportunity to submit views; (2) the Solicitor General receives the recommendations and pertinent record materials in one focused, tidy stack; and (3) that stack lands on his desk well before the government's opening brief, en banc petition, or certiorari petition is due in court.⁷

II. Decisions that must be reported

The reporting rules for adverse decisions differ depending on the court level. Starting with the magistrate judges, prosecutors may appeal an adverse ruling to the district court without Solicitor General authorization.⁸ Likewise, a prosecutor may forgo an appeal to the district court from the magistrate's decision without reporting the loss to the Solicitor General. There is one exception to this rule. Prosecutors must always promptly report decisions invalidating a rule, statute, or regulation as unconstitutional, whether that decision is issued by a magistrate judge, a district court, or a court of appeals.⁹ Outside the rarest of circumstances, the Solicitor General will direct the government to appeal such decisions. If the Department does not appeal a court decision striking down a statute, the Attorney General must report the Department's failure to seek further review to Congress and explain his reasoning.¹⁰

In the context of adverse district court rulings, prosecutors must report, with one exception, any order that is appealable.¹¹ As a result, orders dismissing an indictment, suppressing evidence,¹² quashing a

⁶ In addition to reviewing 1,506 adverse decision recommendations, the Solicitor General filed over 600 briefs and petitions in the Supreme Court last year. To accommodate other pressing deadlines while resolving an appeal request, an Assistant or Bristow Fellow may ask the United States Attorney to seek an extension of the court of appeals briefing schedule.

⁷ See JUSTICE MANUAL § 2-4.110 *et seq.*; § 9-2.170 (outlining the process).

⁸ The Solicitor General's supervisory responsibilities do not encompass litigation occurring entirely within district court. See 28 C.F.R. § 0.20.

⁹ § 2-2.110.

¹⁰ See 28 U.S.C. § 530D(a).

¹¹ JUSTICE MANUAL § 9-2.170(B)(2).

¹² Orders suppressing evidence are appealable only "if the United States attorney certifies to the district court that the appeal is not taken for purpose

subpoena, granting a new trial, replacing a guilty verdict with a judgment of acquittal, or vacating a sentence on collateral review must be reported whether or not the United States Attorney wants to appeal because the decision whether to appeal belongs to the Solicitor General.¹³ Prosecutors should also report adverse rulings on forfeiture and in collateral review proceedings, which are often treated as civil matters.¹⁴

The reporting rule for sentencing is more nuanced. Prosecutors must always report a sentence outside the statutory limits or based on a prohibited factor, such as race, religion, national origin, or gender.¹⁵ But this circumstance rarely happens. Prosecutors need not report guidelines errors or a below-guidelines sentence unless requesting authorization to appeal that sentence as procedurally flawed or substantively unreasonable.¹⁶

Finally, if the district court's order is reviewable only by mandamus or other extraordinary writ, the prosecutor need not report it unless the United States Attorney (or the Assistant Attorney General) wants to seek appellate review.¹⁷ The government rarely pursues these remedies; most prosecutors will spend their entire careers without having to worry about them.

Turning our attention to the court of appeals, prosecutors must report all published adverse decisions to the Solicitor General.¹⁸ They need only report unpublished appellate decisions if (1) the appeal was taken by the government or (2) the United States Attorney or litigating Division recommends further review, either as an en banc petition to the full court of appeals, or a certiorari petition to the Supreme Court.¹⁹

One final note: these procedures do not apply in cases where a court accepts a government concession of error. Because the court agreed with our position, the decision is not "adverse" and need not be

of delay and that the evidence is a substantial proof of a fact material in the proceeding." 18 U.S.C. § 3731.

¹³ See 18 U.S.C. § 3731 (identifying the types of orders that are appealable in a criminal case); 28 U.S.C. § 2255(d).

¹⁴ JUSTICE MANUAL § 2-2.110.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See 28 C.F.R. § 0.20(b).

¹⁸ § 2-3.221(C).

¹⁹ *Id.*

reported. But before confessing error on a question of law, Assistant United States Attorneys must alert their Appellate Chiefs.²⁰ Concessions require advance consultation with the Main Justice litigating components and, occasionally, with the Solicitor General. Consultation ensures that your proposed concession accurately reflects the Department's litigating position, and will not frustrate or impair the government's other pending cases.

III. Timeliness

Assistant United States Attorneys should bring reportable decisions to the attention of your Appellate Chief and appropriate Main Justice Appellate Section as soon as possible. In criminal cases, that will usually be the Criminal Division's Appellate Section.²¹

When reporting an adverse decision, time is of the essence. In criminal cases, a notice of appeal must be filed within 30 days of entry of the adverse order, unless the adverse ruling comes on collateral review, in which case the civil, 60-day time limit applies.²² Prosecutors will often file a protective notice of appeal within the applicable time limit, thereby preserving the government's ability to appeal, to allow the Solicitor General adequate time to complete his review.²³

In civil cases, the time for filing a petition for rehearing is 45 days, but in criminal cases, it is only 14 days in most circuits.²⁴ If the decision is a possible candidate for en banc review, we recommend that the Assistant United States Attorney seek a 30-day extension of the 14-day time limit. But if everyone agrees that it is not a suitable candidate for en banc review and the decision is reported promptly to

²⁰ § 2-3.221(D).

²¹ The Criminal Division oversees the vast majority of federal crimes, but every Division prosecutes some criminal cases. For example, the Civil Division has jurisdiction over food and drug violations; the other Divisions (Tax, Environment & Natural Resources, Civil Rights, and National Security) prosecute crimes described in their titles. Although the Justice Manual identifies the offenses assigned to each Division, when in doubt, report your adverse decision to your Criminal Appellate liaison, and she will direct it to the correct Division.

²² See FED. R. APP. P. 4(a)(1)(B), 4(b)(1)(B); 18 U.S.C. § 3731 ¶ 4.

²³ JUSTICE MANUAL § 9-2.170(C).

²⁴ See FED. R. APP. P. 40(a)(1). The Eleventh Circuit (21 days) and the D.C. Circuit (45 days) have adopted more generous time limits for seeking rehearing in criminal cases.

Main Justice, the review process can often be completed within 14 days.

For every adverse decision, the package to the Office of the Solicitor General (OSG) will contain separate recommendations from the United States Attorney and from the appropriate litigating Division.²⁵ Recommendations from other affected offices or agencies are often included, especially in civil cases.²⁶ If anyone recommends appeal or en banc rehearing, the OSG will assign the recommendation to an Assistant or Bristow Fellow. A Deputy Solicitor General will add his recommendation to the pile before it hits the Solicitor General's inbox.²⁷ Because, at a minimum, three offices must provide views to the Solicitor General,²⁸ the recommendation process must begin as soon as possible. Appeal and certiorari recommendations should be sent to the Criminal Division within 30 days of the adverse decision. En banc recommendations are on a shorter fuse and should arrive within two weeks.

IV. The recommendation

The recommendation can be in the form of a letter or a formal memorandum. Often, if the United States Attorney recommends no appeal or en banc rehearing and the issue is straightforward, the recommendation can be sent in an email. Whatever the form, it must contain the essential facts. In a criminal case, that will include a description of the pending charges or counts of conviction, the judgment (if one was imposed), a summary of the facts pertinent to the issue resolved against the government, and a summary of the adverse ruling. The recommendation should contain record cites, key documents from the record, and an explanation as to why the United States Attorney does not wish to appeal. Frequently, the United States Attorney concludes that the decision is correct, that the government will not be able to overturn adverse credibility determinations or factual findings, or that the case can proceed without the dismissed counts or suppressed evidence.

When recommending appeal, the recommendation should include an objective analysis of the legal issue supported by relevant authorities

²⁵ JUSTICE MANUAL § 2-3.110.

²⁶ *Id.*

²⁷ See JUSTICE MANUAL § 2-3.221(A)(2), (B).

²⁸ § 2-3.221(B)(2).

and case law. The analysis should be candid and assess the strengths and weaknesses of the government's argument. The recommendation should also state whether we preserved our arguments, and include citations to places in the record where we did so. And the recommendation should forthrightly identify any weaknesses in the factual record and unfavorable case law. Likewise, if this case is particularly important to your office, or if this criminal defendant is particularly dangerous, the recommendation should say so and explain. That information can tip the scale favorably in a borderline case.

The Criminal or other Main Justice Division will draft its own recommendation, objectively looking at the case with a bit more distance and considering the institutional interests of the Division. The recommendations drafted in the OSG will look at the case with even greater objectivity and again consider the interests of the Department as a whole. And once all of those recommendations are finished and compiled, the Solicitor General will review them and render a decision.

Once the Solicitor General renders his decision, the Main Justice Division's Appellate Section will notify the United States Attorney. Do not file your brief, petition, or dispositive motion in the court of appeals until you hear back from the Solicitor General. If appeal is authorized, carefully review the packet of materials returned by the OSG. Those materials will inform you which arguments the Solicitor General has authorized for inclusion in your brief, and which arguments have been disapproved. Those materials will also contain helpful citations and legal analysis that bolsters the government's position. Be sure to conform your brief to the Solicitor General's analysis.

V. The criteria

The likelihood that the Solicitor General will authorize further review in your case depends on the stage of the proceedings.

The Solicitor General is fairly liberal in authorizing appeals. If we have a reasonable argument that the district court erred on a question of law, and we preserved our arguments in the district court, the Solicitor General will usually authorize appeal. On the other hand, the Solicitor General is virtually certain to decline the appeal if we did not preserve our arguments. The government routinely argues that defendants have waived or forfeited claims, and we must hold

ourselves to the same standards. In the Supreme Court, for example, the Solicitor General regularly advises the Court that it should not grant review where the defendant failed to press his claim below.²⁹ We cannot continue to make that argument if we overlook our own defaults.

The Solicitor General is also unlikely to authorize appeal if, to prevail, we must challenge factual findings. About the only time the Solicitor General will authorize a challenge to findings of fact is where nothing in the record supports the findings; otherwise, we cannot show “clear error.” The Solicitor General is also unlikely to authorize an appeal if the standard of review is abuse of discretion. For example, the Solicitor General rarely authorizes an appeal of a sentence as substantively unreasonable because the district court has broad discretion to choose an appropriate sentence if it correctly calculated the guidelines range. Occasionally, if the legal question is of nationwide importance, the Solicitor General may wait for another case with more favorable facts to enhance our likelihood of success. If your case does not present a desirable vehicle for resolving an important question, he may deny authorization.

If we lose in a court of appeals, the Solicitor General will decide whether or not to file a petition for rehearing en banc. This decision looks to the criteria in the Federal Rules of Appellate Procedure, that is, whether en banc review is necessary to resolve an intra-circuit conflict or whether the case presents a question of exceptional importance.³⁰ As the preceding statistics suggest, the Solicitor General applies these standards rigorously, and often declines to seek en banc review. Most often, he concludes that it is in our interest to read the adverse opinion narrowly, thus limiting the damage it might cause in future cases. Consequently, prosecutors should not overstate the breadth of an adverse court of appeals holding when seeking Solicitor General authorization, or in a court filing.

The Solicitor General seeks Supreme Court review quite sparingly. Before filing a certiorari petition, the Solicitor General will insist, with rare exception, on a square conflict in the courts of appeals on the issue. A primary role of the Supreme Court is to maintain

²⁹ See *United States v. Williams*, 504 U.S. 36, 41 (1992) (noting the Supreme Court’s “traditional rule” precluding a grant of certiorari when “the question presented was not pressed or passed upon below”) (citation omitted).

³⁰ See FED. R. APP. P. 35(a).

uniformity among the circuits, and the Solicitor General files hundreds of briefs opposing certiorari each year because there is no square conflict. Again, we hold ourselves to the same standard. You should not recommend certiorari unless you are certain the outcome would have been different had your case been heard in another court of appeals.

VI. Release orders

The same approval procedures apply to a district court's decision granting the defendant's release on bond under the Bail Reform Act. Because appeal of a release order falls within the Solicitor General's broad responsibility to supervise appellate litigation,³¹ you can only appeal the district court's order with the Solicitor General's approval. Such authorization is granted sparingly, recognizing the discretion afforded to district court decisions in this area. But the Solicitor General will occasionally allow such appeals where we have compiled a clear record documenting the risk the defendant poses to the community. If you anticipate the need to appeal a release order, please alert the appropriate Main Justice Appellate Section immediately, as these requests require expedited review and processing.

VII. Amicus briefs

The Solicitor General must also authorize the filing of an amicus brief by the government "in any appellate court."³² If a State Attorney General or other official or party asks the government to participate as amicus, bring that request to the attention of the appropriate Main Justice Appellate Section.

VIII. The bottom line

We are a large, robust Department with, in criminal cases, one client: the United States. The adverse decision process ensures that we represent our client professionally, zealously, and consistently across the 94 districts. It provides a unique opportunity for us to collaborate on our most important mission: to execute the laws in a fair and just manner. The process improves our advocacy and raises our credibility in the courts.

³¹ See pp.21–24, *supra*.

³² 28 C.F.R. § 0.20(c).

About the Authors

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In Open Court: Courtroom Closures and the Sixth Amendment Right to a Public Trial

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I. Introduction

Within the pantheon of constitutional liberties, a criminal defendant's right to a public trial is singularly significant. It is embedded in our fiber as Americans and synonymous with fairness for courts to be open and their proceedings transparent. Despite its seemingly obvious nature, public trial jurisprudence can sometimes feel like a dramatically unsettled area of law and presents unique, nuanced litigation challenges both at the district court and appellate levels.

This article will examine the history of this area of law, its evolution, the various types of closures, and how courts handle them. At the end, this article suggests best practices to counter courtroom closure claims and avoid reversals based on public trial right violations.

II. Origins of the right to a public trial

The public examination of witnesses was already “a common feature” of law in the Roman Empire when Hadrian served as emperor from 117–138 C.E.¹ Throughout history, however, trials, or their functional equivalent, were shrouded in secrecy. These instances show the importance of both the public's and a criminal defendant's right to an open court.

During the Spanish Inquisition, “the preliminary examination of the accused, the questioning of witnesses, and the trial of the accused

¹ Harold Shapiro, *Right to a Public Trial*, 41 J. CRIM. L. & CRIMINOLOGY 782, 782 (1950–1951).

were conducted in secret.”² In sixteenth century England, the Star Chamber and the Commission for Causes Ecclesiastical “focused its attention on uncovering Roman Catholic conspiracies against the monarchy and the Church of England.”³ While some authorities agree that Star Chamber trials were public, like the Inquisition, witnesses were examined privately as was the questioning of the accused.⁴ In sixteenth century France, King Louis XV’s monarchy employed “lettres de cachet,” literally letters stamped or embossed with the king’s signature or seal that ordered an individual to “be forthwith imprisoned or exiled without a trial or an opportunity to defend himself.”⁵ “In the eighteenth century they were often issued in blank to local police” and “Louis XV is supposed to have issued more than 150,000 lettres de cachet during his reign.”⁶

These historical examples seem bizarre now, but prove the benefits of open courts and how secrecy provides fertile ground for seeds of abuse to grow. Legal scholar Jeremy Bentham appreciated the value that publicity played in restraining judicial abuse, calling it the “soul of justice.”⁷ He wrote,

... suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other

² *In re Oliver*, 333 U.S. 257, 268 n.21 (1948).

³ *United States v. Gecas*, 120 F.3d 1419, 1448 (11th Cir. 1997) (observing that Puritans left England for Plymouth Colony in 1620 partly because of the Star Chamber).

⁴ *In re Oliver*, 333 U.S. at 268 n.21 (“The secrecy of the ecclesiastical courts and the civil law courts was often pointed out by commentators who praised the publicity of the common law courts.”), n.22.

⁵ *Id.* at 269 n.23.

⁶ *Id.*

⁷ See *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 422 (1979) (Blackmun, J., dissenting) (“Bentham stressed that publicity was ‘the most effectual safeguard of testimony, and of the decisions depending on it; it is the soul of justice; it ought to be extended to every part of the procedure, and to all causes.’” (quoting JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 67 (1825))).

checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.⁸

Although never discussed during the debate on the Sixth Amendment,⁹ Americans, hesitant to relive these historical mistakes, learned our lesson and enshrined public trials as a constitutional right.¹⁰ As of 1948, when the Supreme Court decided *In re Oliver*, it stated it was “unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country.”¹¹ *In re Oliver* dealt with a quirk of Michigan law that allowed for a “one-man grand jury” investigation to be conducted by a state circuit judge.¹² In performance of these duties, the judge summoned a witness as part of an alleged gambling and corruption investigation and questioned him, under oath, and in “secret in accordance with the traditional grand jury method.”¹³ The judge concluded that the witness’s story did not “jell” and “immediately charged him with contempt, immediately convicted him, and immediately sentenced him to sixty days in jail.”¹⁴ The Supreme Court held that this abrupt change from grand jury proceeding to trial without an abatement in secrecy violated the defendant’s right to a public trial on due process grounds.¹⁵ The Court wrote,

⁸ *In re Oliver*, 333 U.S. at 271 (quoting 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

⁹ Shapiro, *supra* note 1, at 783 (citing 1 GALES, THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 756 (1834)).

¹⁰ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . .”); *Levine v. United States*, 362 U.S. 610, 616 (1960) (holding that “due process demands appropriate regard for the requirements of a public proceeding”). The right to a public trial is incorporated to the States by the Fourteenth Amendment. *See Waller v. Georgia*, 467 U.S. 39 (1984).

¹¹ *In re Oliver*, 333 U.S. at 266.

¹² *Id.* at 258.

¹³ *Id.* at 259.

¹⁴ *Id.*

¹⁵ *Id.* at 272–73.

In view of this nation’s historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment’s guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.¹⁶

In a prescient observation on an issue that would recur frequently in future cases, the Court also noted that, “without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.”¹⁷

The benefits of having open courts are legion. Public proceedings: (1) provide an appearance of fairness;¹⁸ (2) discourage bias or partiality in judicial rulings or prosecutorial conduct; (3) discourage perjury by requiring witnesses’ assertions to be tested in public; (4) encourage witnesses who may not know they have relevant information to testify; (5) allow for rebuttal witnesses to counter false testimony; (6) provide the court, parties, and witnesses with scrutiny that fosters a stricter sense of conscientiousness in performing their duties; (7) instill confidence in the justice system; (8) educate the public about the legal system;¹⁹ (9) allow victims of the crime, family

¹⁶ *Id.* at 273.

¹⁷ *Id.* at 271–72.

¹⁸ *Offutt v. United States*, 348 U.S. 11, 14 (1954) (“[J]ustice must satisfy the appearance of justice.”).

¹⁹ *See Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979); *United States v. Cianfrani*, 573 F.2d 835, 847, 852–53 (3d Cir. 1978) (citing legal commentators Blackstone and Wigmore).

members, or others effected to observe and speak;²⁰ and (10) have “significant community therapeutic value.”²¹

The Sixth Amendment right to a public trial is a misnomer since the right is not limited to trials; it applies to suppression hearings²² and voir dire,²³ which as discussed below, is the stage where closures and exclusions often occur. Moreover, while the Sixth Amendment right to a public trial is “personal to the accused,”²⁴ several Supreme Court justices observed that the public has a separate, societal interest in open proceedings.²⁵ Therefore, while a defendant has a firmly rooted right to a public trial, “there is no constitutional guarantee of a closed trial at the defendant’s request”²⁶ and both Justices Powell and Blackmun discussed the burdens that a defendant must show to obtain a closed trial.²⁷

Public trial rights are also grounded in the First Amendment. In *Richmond Newspapers, Inc.*, the Supreme Court expanded the scope of the public trial right doctrine by holding that “the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and ‘of the press

²⁰ *Gannett*, 443 U.S. at 428 (Blackmun, J., dissenting); *see also* 18 U.S.C. § 3771(a)(2)–(4) (affording crime victims the rights, *inter alia*, to “timely notice of any public court proceeding,” to “not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding,” and “to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding”).

²¹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570 (1980).

²² *Waller v. Georgia*, 467 U.S. 39, 42 (1984).

²³ *Presley v. Georgia*, 558 U.S. 209 (2010); *Press-Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501 (1984); *United States v. Gupta*, 699 F.3d 682, 685 (2d Cir. 2012).

²⁴ *Gannett*, 443 U.S. at 380 (Blackmun, J., dissenting); *see also* *Faretta v. California*, 422 U.S. 806, 848 (1975) (Blackmun, J., dissenting); *Estes v. Texas*, 381 U.S. 532, 583 (1965) (Warren, C.J., concurring).

²⁵ *Gannett*, 443 U.S. at 380 (Blackmun, J., dissenting); *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“A trial is a public event. What transpires in the court room is public property.”).

²⁶ *United States v. Powers*, 622 F.2d 317, 323 (8th Cir. 1980).

²⁷ *See Gannett*, 443 U.S. at 400 (Powell, J., concurring); *see id.* at 440–43 (Blackmun, J., dissenting).

could be eviscerated.”²⁸ The Supreme Court reasoned that included in the freedom of speech was “some freedom to listen” since part of the First Amendment was to receive information and ideas.²⁹ The Court explained, “[w]hat this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.”³⁰ The Court noted that its holding “does not mean that the First Amendment rights of the public and representatives of the press are absolute” and “a trial judge, in the interest of the fair administration of justice, [may] impose reasonable limitations on access to a trial.”³¹ In a concurring opinion, Justice Stewart observed that “every courtroom has a finite physical capacity, and there may be occasions when not all who wish to attend a trial may do so.”³² He noted that, on those occasions, “the constitutional demands of a fair trial” may “sometimes justify limitations upon the unrestricted presence of spectators in the courtroom.”³³ In those circumstances, however, “representatives of the press must be assured access.”³⁴

The First and Sixth Amendments confer constitutional rights to the public and the defendant, respectively. Whether these rights are mutual or exclusive is unclear. The Supreme Court observed, “[t]he extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or in what circumstances the reach or protections of one might be greater than the other.”³⁵

III. Courtroom closures

The balancing of how this plays out in real-time, at trial, with our backs to the public gallery, presents a potential minefield on appeal where the court is often deprived of an accurate record of what transpired in court. This has led to muddled and varying accounts of

²⁸ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

²⁹ *Id.* at 576.

³⁰ *Id.*

³¹ *Id.* at 581 n.18.

³² *Id.* at 600 (Stewart, J., concurring).

³³ *Id.*

³⁴ *Id.* at 600 n.3.

³⁵ *Presley v. Georgia*, 558 U.S. 209, 213 (2010).

whether a closure actually occurred, whether it was partial, complete, constructive, trivial, or whether only certain individuals were excluded from court.³⁶ Our role, however, is clear—federal prosecutors may not move for, or consent to, the closure of any judicial proceeding without the express prior authorization of the Deputy Attorney General.³⁷

In *Waller*, the Supreme Court held that “the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.”³⁸ *Waller* arose from a Georgia state RICO prosecution involving wiretaps.³⁹ The prosecutor requested that the suppression hearing be closed since playing the wiretaps could taint evidence for use in future prosecutions.⁴⁰ The court granted the government’s request over objection and the seven-day suppression hearing was “closed to all persons other than witnesses, court personnel, the parties, and the lawyers.”⁴¹ Only two and a half hours of wiretap recordings were played during the course of the suppression hearing.⁴²

The Supreme Court found the trial court’s findings to be “broad and general” and did not “justify closure of the entire hearing.”⁴³ The trial court was faulted for: (1) not considering alternatives to closure of the entire hearing; (2) not directing the government to provide additional details about its need for the closure; and (3) not closing only those parts of the hearing that jeopardized the interests advanced.⁴⁴ The

³⁶ “Whether a closure is total or partial . . . depends not on how long a trial is closed, but rather who is excluded during the period of time in question.” *United States v. Thompson*, 713 F.3d 388, 395 (8th Cir. 2013). A complete closure involves excluding all persons from the courtroom for some period while a partial closure involves excluding one or more, but not all, individuals for some period. *See Judd v. Haley*, 250 F.3d 1308, 1316 (11th Cir. 2001).

³⁷ JUSTICE MANUAL § 9-5.150; *see also* 28 C.F.R. § 50.9.

³⁸ *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

³⁹ *Id.* at 41.

⁴⁰ *Id.* at 42.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 48.

⁴⁴ *Id.* at 48–49.

case was remanded for a new suppression hearing and to decide what portions of the proceeding, if any, must be closed.⁴⁵

Waller set the standard for all future courtroom closure cases, providing a roadmap for courts to follow when addressing whether proceedings should be closed to the public.

A. The Gordian Knot: review of public trial violations

There are several applicable standards of review for Sixth Amendment public trial right violations. In *Waller*, the Supreme Court agreed that a defendant is not required to prove specific prejudice in order to obtain relief for a public trial right violation.⁴⁶ This makes a violation of the right to a public trial, a “structural error, *i.e.*, an error entitling the defendant to automatic reversal without any inquiry into prejudice.”⁴⁷ The “defining feature of a structural error is that it ‘affect[s] the framework within which the trial proceeds,’ rather than being ‘simply an error in the trial process itself.’”⁴⁸ Structural errors are rare and found “only in a ‘very limited class of cases.’”⁴⁹ These include: (1) the complete denial of counsel;⁵⁰ (2) a biased trial judge;⁵¹ (3) racial discrimination in grand jury selection;⁵² (4) denial of self-representation at trial;⁵³ (5) a defective reasonable doubt instruction;⁵⁴ and (6) the right to a public trial.⁵⁵ Despite the importance of this class of errors, “the term ‘structural error’ carries with it no talismanic significance as a doctrinal matter” and “means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was ‘harmless

⁴⁵ *Id.* at 50.

⁴⁶ *Id.* at 49.

⁴⁷ *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905 (2017).

⁴⁸ *Id.* at 1907 (alteration in original) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

⁴⁹ *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

⁵⁰ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵¹ *Tumey v. Ohio*, 273 U.S. 510 (1927).

⁵² *Vasquez v. Hillery*, 474 U.S. 254 (1986).

⁵³ *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

⁵⁴ *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

⁵⁵ *Waller v. Georgia*, 467 U.S. 39 (1984).

beyond a reasonable doubt.”⁵⁶ Therefore, if the error is structural, preserved, and the issue is raised on direct appeal, a defendant is “generally [] entitled to ‘automatic reversal’ regardless of the error’s actual ‘effect on the outcome.’”⁵⁷

This is only true, however, if the violation is objected to at trial; otherwise, the claim is forfeited and plain error applies.⁵⁸ Under this standard, there must be an “error” that is “plain” and that “affects substantial rights.”⁵⁹ Even if these three prongs are met, “the decision to correct the forfeited error [rests] within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’”⁶⁰ “[T]here is a question as to whether the third prong of the plain error test is met automatically in cases of structural error,”⁶¹ but it often is met in the context of courtroom closures. Several courts have applied plain error review to unpreserved claims of a public trial violation.⁶² This deprives a defendant of the temptation to remain silent at trial hoping for a guaranteed automatic reversal⁶³ and incentivizes contemporaneous objections.⁶⁴

⁵⁶ *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

⁵⁷ *Id.* (citing *Neder v. United States*, 527 U.S. 1, 7 (1999)).

⁵⁸ *Johnson v. United States*, 520 U.S. 461, 466 (1997) (applying plain error standard to unpreserved claims of structural error); *see also* FED. R. CRIM. P. 52(b).

⁵⁹ *United States v. Olano*, 507 U.S. 725, 732 (1993).

⁶⁰ *Id.* (alteration in original) (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)).

⁶¹ *United States v. Anderson*, 881 F.3d 568, 573 (7th Cir. 2018).

⁶² *See, e.g.*, *United States v. Negrón-Sostre*, 790 F.3d 295, 301 (1st Cir. 2015); *United States v. Cazares*, 788 F.3d 956, 966 (9th Cir. 2015); *United States v. Gomez*, 705 F.3d 68, 74–75 (2d Cir. 2013).

⁶³ *Anderson*, 881 F.3d at 572 (observing that plain error “prevents the subversion of the trial process that would result if an unpreserved structural error were interpreted as guaranteeing an automatic reversal. In such a scenario, defense counsel would have an incentive to ignore the error and allow the trial to proceed to conclusion, with the knowledge that the defendant has a free pass to a new trial if the outcome is not favorable”).

⁶⁴ *Puckett v. United States*, 556 U.S. 129, 134 (2009) (“And of course the contemporaneous-objection rule prevents a litigant from “sandbagging” the

The waiver doctrine may also apply to claims of public trial right violations. If forfeiture is the failure to make the timely assertion of a right,⁶⁵ waiver is the “intentional relinquishment or abandonment of a known right.”⁶⁶ Aside from structural and plain error review, courts have applied waiver to public trial right claims.⁶⁷

On collateral review, a petitioner raising a public trial right must demonstrate prejudice.⁶⁸ Therefore, although the right to a public trial is fundamental and structural, it is not absolute and “subject to exceptions.”⁶⁹ Even in *Waller*, the Supreme Court cautioned that “the remedy should be appropriate to the violation.”⁷⁰

B. Excluded individuals, partial and constructive closures

“[T]he benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance.”⁷¹ Whereas *Waller* dealt with a complete courtroom closure, on some occasions only certain individuals are excluded. In *Presley*, prior to jury selection the court noticed a lone spectator who was the defendant’s uncle.⁷² The judge told Presley’s

court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.”)

⁶⁵ *United States v. Olano*, 507 U.S. 725, 733 (1993).

⁶⁶ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

⁶⁷ *See, e.g., United States v. Candelario-Santana*, 834 F.3d 8, 21 n.3 (1st Cir. 2016); *United States v. Christi*, 682 F.3d 138, 142 (1st Cir. 2012); *Levine v. United States*, 362 U.S. 610, 619–20 (1960) (“Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal.”); *Singer v. United States*, 380 U.S. 24, 35 (1965) (noting that a defendant can waive the right to a public trial); *United States v. Hitt*, 473 F.3d 146, 155 (5th Cir. 2006) (finding waiver of Sixth Amendment right to a public trial); *United States v. Agosto-Vega*, 617 F.3d 541, 554 (1st Cir. 2010) (Howard, J., concurring) (finding waiver of the closure a “close call”).

⁶⁸ *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910–11 (2017); *see also*

Bucci v. United States, 662 F.3d 18, 30 (1st Cir. 2011); *Owens v.*

United States, 483 F.3d 48, 63 (1st Cir. 2007).

⁶⁹ *Weaver*, 137 S. Ct. at 1909.

⁷⁰ *Waller v. Georgia*, 467 U.S. 39, 50 (1984).

⁷¹ *Id.* at 49 n.9.

⁷² *Presley v. Georgia*, 558 U.S. 209, 210 (2010).

uncle that he was not allowed in the courtroom and had to leave that floor of the courthouse entirely.⁷³ Defense counsel objected to “the exclusion of the public from the courtroom.”⁷⁴ The judge said that there was no space for them to sit in the audience.⁷⁵ When Presley’s counsel pressed for “some accommodation,” the judge repeated that there was insufficient space and stated that there was “really no need for the uncle to be present during jury selection” and “his uncle cannot sit and intermingle with members of the jury panel.”⁷⁶ Presley was ultimately convicted and he moved for a new trial based on the exclusion of the public from voir dire.⁷⁷ Presley was able to show that there was space; 14 prospective jurors could have fit in the jury box and the remaining 28 would have only taken up one side of the courtroom gallery.⁷⁸ The trial judge denied the motion and based his closure ruling on his “discretion,” which both the Court of Appeals of Georgia and the Supreme Court of Georgia affirmed.⁷⁹ The Georgia Supreme Court held that trial courts need not consider alternatives to closure absent an opposing party’s proffer of some alternatives,⁸⁰ effectively shifting the *Waller* burden from the court to the parties.

In a rare summary disposition,⁸¹ the United States Supreme Court reversed and found the issue “well settled under *Press-Enterprise I* and *Waller*.”⁸² According to the Supreme Court, the Georgia trial court did not heed the Court’s repeated admonitions to consider alternatives to closure and “to take every reasonable measure to accommodate public attendance at criminal trials.”⁸³ The Supreme Court found nothing in the record that showed that “the trial court could not have

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 211.

⁷⁹ *Id.*

⁸⁰ *Id.* at 214.

⁸¹ *Wyrick v. Fields*, 459 U.S. 42, 50 (1982) (Marshall, J., dissenting) (noting “summary reversal is an exceptional disposition” and “should be reserved for situations in which the applicable law is settled and stable, the facts are not disputed, and the decision below is clearly in error”).

⁸² *Presley v. Georgia*, 558 U.S. 209, 213 (2010).

⁸³ *Id.* at 215.

accommodated the public at Presley's trial."⁸⁴ Several "possibilities" included "reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members."⁸⁵ The Court seemed to take umbrage with the trial court's vague references about the possibility of the venire overhearing prejudicial remarks from Presley's uncle: "[i]f broad concerns of this sort were sufficient to override a defendant's constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course."⁸⁶ Although not explicitly referenced in the opinion, the fact that the defendant's uncle was excluded during the closing *was* particularly troublesome.

Presley spawned a number of cases in its wake, including several in the First Circuit, which presented both familiar and unique public trial right claims.

In *Agosto-Vega*, the defendant's family members were stopped by court security officers when they attempted to enter the courtroom during jury selection.⁸⁷ When defense counsel raised the issue with the court, the judge replied that "the benches" were "full of jurors."⁸⁸ Defense counsel suggested that the jury box be used to seat jurors, which would then open a bench for family members.⁸⁹ The court expressed concern about "family members touching potential jurors" during selection and indicated that it wanted to keep all of the venire together.⁹⁰ The court also stated that there would be no evidence or argument during selection, which indicated the judge's sentiment that "jury empanelment was not part of the process in which it particularly

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* Justices Thomas and Scalia dissented in *Presley*. See *id.* at 216–19. They took issue with the summary disposition handling of the case and did not find that *Waller* and *Press-Enterprise I* expressly held that jury voir dire was covered by the Sixth Amendment's Public Trial Clause. See *id.* at 218–19.

⁸⁷ *United States v. Agosto-Vega*, 617 F.3d 541, 544 (1st Cir. 2010).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

mattered whether Agosto's relatives were present."⁹¹ The courtroom was closed and no one was permitted entry during jury selection.⁹²

The First Circuit began by commending the district court for "trying to insulate the jury from improper influences," but noted that "there are higher constitutional values which cannot be overlooked absent exceptional circumstances."⁹³ The court found that the trial judge could have taken a number of measures to shield the jury while allowing members of the public in the courtroom, including allowing spectators in as jurors were excused or admonishing members of the venire about improper contacts.⁹⁴ If these remedies remained insufficient, the judge "was required to substantiate its actions by specific findings in support thereof," the court wrote before vacating the defendants' convictions and remanding the case for a new trial.⁹⁵

The *Agosto-Vega* decision included three other noteworthy issues. First, it rejected the government's efforts to distinguish the case from *Presley* based on the size of the courtroom.⁹⁶ Courts will likely continue to find arguments about insufficient space for the public unpersuasive. Second, the court reaffirmed the importance of family attendance at criminal trials, as observed by the Supreme Court 62 years earlier in *In re Oliver*,⁹⁷ by cautioning trial judges not to "minimize the importance of a criminal defendant's interest in the attendance and support of family and friends" since "[t]o say the least, this support is ineffective in absentia."⁹⁸ Third, and perhaps most importantly, the court upbraided the government for remaining silent while the events unfolded and stated that its suggestion of "alternatives to this extreme outcome might very well have saved us all the need for repeating this exercise."⁹⁹ Federal prosecutors would

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 547.

⁹⁴ *Id.*

⁹⁵ *Id.* at 547.

⁹⁶ *Id.* at 547 n.3.

⁹⁷ *In re Oliver*, 333 U.S. 257, 271–72 (1948) (observing that the "accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged"); see also *Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir. 1994) (observing the Supreme Court's "special concern" for ensuring family attendance at criminal trials).

⁹⁸ *Agosto-Vega*, 617 F.3d at 548.

⁹⁹ *Id.* at 547.

do well to take these last words as a harbinger if ever confronted with a courtroom closure issue. In the context of closed courtrooms, government silence is not golden.

Negrón-Sostre is an example of how unintentional courtroom closures—those never explicitly ordered by a court—can result in a new trial even under plain error review.¹⁰⁰ *Negrón-Sostre* dealt with the trial of 5 individuals that were part of a 74-person drug trafficking conspiracy that operated a full-time “drug marketplace” called “La Quince.”¹⁰¹ La Quince sold cocaine, heroin, crack cocaine, marijuana, oxycodone, and alprazolam within 1,000 feet of a public school using a defined hierarchy of leaders, runners, and sellers.¹⁰² La Quince even marketed its wares by distributing “free samples of new drug batches.”¹⁰³ As the First Circuit aptly described, “[i]n short, Walmart had nothing on La Quince.”¹⁰⁴

After a three-month trial, which the court described as “doomed before it started,” the convictions were vacated and the case was remanded for a new trial because of the exclusion of the public during jury selection, an alleged “longstanding practice” by the district court.¹⁰⁵ Several family members and friends of the defendants testified at a post-trial evidentiary hearing along with a court security officer, a deputy U.S. marshal, and defense attorneys.¹⁰⁶ One defendant’s sister testified that when she attempted to enter the courtroom during jury selection an unidentified person standing by

¹⁰⁰ See, e.g., *Owens v. United States*, 483 F.3d 48, 63 (1st Cir. 2007) (“[E]ven if the courtroom was closed because of inattention by the judge, courts have expressed concern in the past where a court officer’s unauthorized closure of a courtroom impeded public access.”); *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004) (“Whether the closure was intentional or inadvertent is constitutionally irrelevant.”); *Martineau v. Perrin*, 601 F.2d 1196, 1200 (1st Cir. 1979) (noting Sixth Amendment concern where marshals locked courtroom doors without authorization); *United States v. Keaveny*, 181 F.3d 81 (1st Cir. 1999) (per curiam) (unpublished table decision) (“[C]onstitutional concerns may be raised even by a court officer’s unauthorized partial exclusion of the public.”).

¹⁰¹ *United States v. Negrón-Sostre*, 790 F.3d 295, 299 (1st Cir. 2015).

¹⁰² *Id.* at 299–300.

¹⁰³ *Id.* at 299.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 302–03.

the door told her that family members were not allowed entry until jury selection was finished.¹⁰⁷ Another defendant's wife testified that a court security officer denied her entry. Her husband's attorney confirmed "only the lawyers, prosecutors, judge, defendants, and potential jurors were allowed inside," as "usual."¹⁰⁸ Five defense attorneys testified that it was the district court's practice to close the courtroom for voir dire and some admitted they did not object because it was "common practice" and "standard operating procedure."¹⁰⁹ One defense attorney even "admitted that he raised the issue of sealing the room to prevent jurors from leaving."¹¹⁰ The district court, however, never ordered the courtroom to be sealed.¹¹¹ A deputy U.S. marshal testified that the courtroom doors were unlocked and he never told anyone that they could not enter.¹¹² But a court security officer testified that the court's "tendency" was not to allow family into the courtroom during jury selection due to "space and security."¹¹³

The district court made five specific factual findings following its evidentiary hearing:

- (1) all available seats were taken by the 75 members of the venire;
- (2) the courtroom was not locked by order of the court or by the deputy U.S. marshal;
- (3) family and friends were at the courthouse, but no members of the public entered the courtroom although "those who attempted to look through the windows in the courtroom door were told to step away from the door;"¹¹⁴
- (4) neither the court nor the deputy U.S. marshal ordered that the courtroom be closed; and
- (5) none of the attorneys objected to the courtroom closure.¹¹⁵

¹⁰⁷ *Id.* at 302.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 303.

¹¹⁰ *Id.* at 303 n.11.

¹¹¹ *Id.* at 303.

¹¹² *Id.* at 302 (A Deputy U.S. Marshal testified, "we didn't have space, so I didn't have to tell anybody.").

¹¹³ *Id.*

¹¹⁴ *Id.* at 303.

¹¹⁵ *Id.*

The district judge also added that the failure of the family members to enter the courtroom was because the defense attorneys informed them that entry was not possible during jury selection.¹¹⁶

The First Circuit conceded that the case presented a “peculiar posture” since “no party affirmatively sought to close the courtroom,” “the district court erroneously found that there was no closure,” and the defense attorneys “were partly at fault.”¹¹⁷ The court found that since the *Waller* test was “never applied,” the first two prongs of plain error were met.¹¹⁸ The court also found that the error affected the defendants’ substantial rights and the fairness, integrity, or public reputation of judicial proceedings.¹¹⁹ The court noted that the “ultimate responsibility” for ensuring public access to the courtroom rested with the district court, which failed to “properly police the public’s access.”¹²⁰

In *Candelario-Santana*, defendants were members of a violent drug trafficking conspiracy that murdered or arranged the murder of at least a dozen individuals.¹²¹ The defendants were charged in a 52-count indictment that included VICAR¹²² and RICO¹²³ offenses.¹²⁴ During trial, a witness failed to appear, was arrested, and brought to court.¹²⁵ At trial, a witness expressed fear for himself and his family if he testified against the defendants.¹²⁶ After suggestions to use an alias, prohibit the press from releasing the witness’s name, or enlisting Witness Security Program measures, the district judge settled on a ruse—“a plan where the court security officers would announce to the public that the court was adjourning for the day. The court, however, would then resume with the witness’s testimony once

¹¹⁶ *Id.* at 304.

¹¹⁷ *Id.* at 304–05.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 305–06.

¹²⁰ *Id.* at 306; *cf.* *United States v. Al-Smadi*, 15 F.3d 153, 154 (10th Cir. 1994) (“The denial of a defendant’s Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom.”).

¹²¹ *United States v. Candelario-Santana*, 834 F.3d 8, 15 (1st Cir. 2016).

¹²² 18 U.S.C. § 1959 (Violent Crimes in Aid of Racketeering Activity).

¹²³ 18 U.S.C. §§ 1961–63 (Racketeer Influenced and Corrupt Organizations).

¹²⁴ *Candelario-Santana*, 834 F.3d at 16.

¹²⁵ *Id.* at 20.

¹²⁶ *Id.*

the courtroom was vacated.”¹²⁷ The plan proceeded over the objection of one defense counsel and the agreement of the other.¹²⁸ Like in *Agosto-Vega*, the judge’s gambit doomed the proceedings before the witness’s testimony began. The First Circuit found that the judge’s plan “effected a closure” deliberately, despite the fact that the courtroom doors remained unlocked and the courthouse itself remained open.¹²⁹ The problem identified by the circuit court was not necessarily with the stratagem employed by the district judge, but rather the dearth of identifying and making findings under *Waller*.¹³⁰

The courtroom closure cases of *Agosto-Vega*, *Negrón-Sostre*, and *Candelario-Santana* demonstrate how Sixth Amendment errors can arise precipitously, exacting extreme outcomes on criminal proceedings, or be based on creative arguments.¹³¹ Fortunately, however, not all courtroom closure claims are created equally. Some are of so little moment as to be characterized as “trivial.”

C. Triviality doctrine

The Second Circuit has observed that “in the context of a denial of the right of public trial, as defined in *Waller*, it does not follow that every temporary instance of unjustified exclusion of the public—no matter how brief or trivial, and no matter how inconsequential the proceedings that occurred during an unjustified closure—would

¹²⁷ *Id.* at 21 (The court’s procedure also allowed the witness “to face away from [the defendant], and to identify him using a photograph.”).

¹²⁸ *Id.* at 21 n.3 (finding waiver of Sixth Amendment right to public trial claim where defense counsel stated, “I don’t mind.”).

¹²⁹ *Id.* at 23.

¹³⁰ *Id.* (“While we can imagine a scenario with somewhat similar facts in which the district court instead acknowledged and inquired into the witness’s concerns, formally found an ‘overriding interest’ likely to be prejudiced, explored alternatives to closure in full, and narrowly tailored some form of closure to protect that overriding interest, resulting in a constitutionally permissible closure, that is not what occurred here.” (citing *Waller v. Georgia*, 467 U.S. 39, 48 (1984))).

¹³¹ See, e.g., *United States v. Murillo*, No. 17-30129, 2018 WL 6262459, at *1 (9th Cir. Nov. 29, 2018) (finding that a brief, non-public hearing related to juror selection did not rise to a Sixth Amendment violation); *United States v. Rivera-Rodriguez*, 617 F.3d 581, 603 (1st Cir. 2010) (observing that ex parte communications between a judge and jury may raise Sixth Amendment public trial right concerns as a potential constructive courtroom closure).

require that a conviction be overturned.”¹³² Therefore, although harmless error does not apply and structural error presumes prejudice to preserved public trial right claims, according to the Second Circuit, “[i]t does not necessarily follow, however, that every deprivation in a category considered to be ‘structural’ constitutes a violation of the Constitution or requires reversal of the conviction, no matter how brief the deprivation or how trivial the proceedings that occurred during the period of deprivation.”¹³³ The court gave the example of the public’s exclusion after a hearing that lasted only a few minutes on a matter of no consequence with the judge re-opening court after realizing the mistake.¹³⁴ “The contention that such a brief and trivial mistake could require voiding a criminal trial of many months duration seems to us unimaginable,” wrote the court.¹³⁵ The court went on to observe:

Whether the explanation would be that so trivial an exclusion did not constitute a violation of the Sixth Amendment, or that there was a violation but too trivial to justify voiding the trial, we do not know. But we believe that, regardless of which explanation would be given, the result would be to allow the conviction to stand. We must speculate because the Supreme Court has never ruled on such a question.¹³⁶

Wherever the doctrine’s limits lie, triviality has been repeatedly used to stave off reversals of criminal convictions based on minor (and sometimes more lengthy) courtroom closures on Sixth Amendment grounds. In *Gibbons*, a section 2255 appeal, the defendant’s mother was the sole spectator present during jury selection in a state court prosecution. But she was excluded due to the small size of the courtroom, the large size of the venire, and the risk of tainting the jury pool.¹³⁷ She was allowed entry the next day where the defendant was tried and convicted of rape, incest, and child welfare endangerment.¹³⁸ The court held this “event was too trivial to warrant

¹³² *Gibbons v. Savage*, 555 F.3d 112, 120 (2d Cir. 2009).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 114.

¹³⁸ *Id.* at 113–15.

the remedy of nullifying an otherwise properly conducted state court criminal trial.”¹³⁹

The triviality doctrine made its debut in an earlier Second Circuit section 2255 case, *Peterson v. Williams*, where the court declined to vacate a conviction based on a temporary courtroom closure during an important part of the proceedings.¹⁴⁰ Peterson was on trial for a drug sale made to an undercover officer.¹⁴¹ The prosecutor requested that the courtroom be closed before the officer that witnessed the transaction testified for security reasons since he was still doing undercover work.¹⁴² The court agreed, but after the conclusion of the undercover officer’s testimony, courtroom personnel neglected to unlock the courtroom door, and it remained locked during the defendant’s testimony.¹⁴³ The Second Circuit acknowledged that the harmless error standard did not apply, but nonetheless held that the closure was too trivial to require that the conviction be vacated.¹⁴⁴ “A triviality standard, properly understood,” the court wrote,

does not dismiss a defendant’s claim on the grounds that the defendant was guilty anyway or that he did not suffer “prejudice” or “specific injury.” It is, in other words, very different from a harmless error inquiry. It looks, rather, to whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment.¹⁴⁵

The court delineated that its holding was not based on the fact that the closure was brief, inadvertent, or that “what went on *in camera*

¹³⁹ *Id.* at 121.

¹⁴⁰ *Peterson v. Williams*, 85 F.3d 39 (2d Cir. 1996). A Tenth Circuit case preceded *Peterson* by two years, but there the court cited to Peterson’s Court of Appeals of New York opinion and held that the “brief and inadvertent closing of the courthouse and hence the courtroom, unnoticed by any of the trial participants, did not violate the Sixth Amendment.” *United States v. Al-Smadi*, 15 F.3d 153, 154–55 (10th Cir. 1994).

¹⁴¹ *Peterson*, 85 F.3d at 41.

¹⁴² *Id.*

¹⁴³ *Id.* at 41–42.

¹⁴⁴ *Id.* at 41–44.

¹⁴⁵ *Id.* at 42.

was later repeated in open court.”¹⁴⁶ It also stated circumspectly that not even a “combination of all three necessarily compels a finding of constitutionality.”¹⁴⁷ Rather the court held that the defendant’s Sixth Amendment rights were not violated on the facts of the case, where the closure was “extremely short,” “followed by a helpful summation” by the trial judge, and “entirely inadvertent.”¹⁴⁸

In evaluating whether a closure is trivial, the Second Circuit assessed “the values the Supreme Court explained were furthered by the public trial guarantee, focusing on (1) ensuring a fair trial, (2) reminding the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury.”¹⁴⁹

A number of our circuits, besides the Second, have adopted the triviality doctrine.¹⁵⁰ During the trial in *Anderson*, the judge held court past the time when the courthouse doors were locked for the evening. The defendant claimed his Sixth Amendment rights were violated because the public could not access the closed courthouse.¹⁵¹ The Seventh Circuit did not agree. It held that the impacted proceedings “were minor in the trial as a whole” and the ability of spectators to attend trial was “limited in scope and short in duration, and at no time did it present a total prohibition on the ability of either the public as a whole or any individual to attend.”¹⁵² “We simply cannot conclude that the partial closure of only the outside doors in this case, with the trial still accessible to those in the building and with relatively minimal proceedings after closure, implicated the values of the Sixth Amendment such as ensuring a fair trial, reminding the prosecutor and judge of their responsibility,

¹⁴⁶ *Id.* at 44.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Gibbons v. Savage*, 555 F.3d 112, 121 (2d Cir. 2009) (citing *Peterson*, 85 F.3d at 43).

¹⁵⁰ *See, e.g.*, *United States v. Anderson*, 881 F.3d 568, 576 (7th Cir. 2018); *United States v. Greene*, 431 F. App’x 191, 195 (3d Cir. 2011) (unpublished); *United States v. Perry*, 479 F.3d 885, 890 (D.C. Cir. 2007); *United States v. Ivester*, 316 F.3d 955, 959–60 (9th Cir. 2003); *Braun v. Powell*, 227 F.3d 908, 918–19 (7th Cir. 2000).

¹⁵¹ *Anderson*, 881 F.3d at 570.

¹⁵² *Id.* at 576.

encouraging witnesses to come forward, and discouraging perjury,” wrote the court.¹⁵³

While the triviality doctrine may seem like a second cousin to harmless error, the two approaches differ in that analysis of the former “turns on whether the conduct at issue ‘subverts the values the drafters of the Sixth Amendment sought to protect.’”¹⁵⁴

IV. Concluding thoughts

“Bad men, like good men, are entitled to be tried and sentenced in accordance with law.”¹⁵⁵ A prosecutor’s responsibility is not to simply win cases, but to ensure that justice is done.¹⁵⁶ This means ensuring a fair process, which includes a constitutional right to a public trial. Absent Deputy Attorney General approval, or exempt statutory grounds like the interests of a child,¹⁵⁷ prosecutors should ordinarily oppose courtroom closures.¹⁵⁸ In advocating that position, prosecutors should vociferously educate courts about the perils of taking precipitous action on a defendant’s and the public’s constitutional right to a public trial and the necessity for handling this potentially structural error with care. Great attention to the record for a subsequent court of review, either directly or collaterally, will seldom be regretted. Prosecutors should have *Waller* and a handful of other cases in their trial box at the ready to edify the court about these issues and the fact that the trial judge will bear ultimate responsibility for public access to her courtroom.

The court should also evaluate, consider, and discuss the *Waller* factors on the record, including:

- (1) the overriding interest that is likely to be prejudiced advanced by the party seeking to close a public hearing;

¹⁵³ *Id.*

¹⁵⁴ *Gibbons*, 555 F.3d at 121 (quoting *Smith v. Hollins*, 448 F.3d 533, 540 (2d Cir. 2006)).

¹⁵⁵ *Green v. United States*, 365 U.S. 301, 309 (1961) (Black, J., dissenting).

¹⁵⁶ *See Berger v. United States*, 295 U.S. 78, 88 (1935).

¹⁵⁷ 18 U.S.C. § 3509(e); *see also* *United States v. Yazzie*, 743 F.3d 1278, 1290 (9th Cir. 2014) (finding no public trial right in the context of section 3509(e) because the court complied with the *Waller* factors before ordering closure during the children’s testimonies).

¹⁵⁸ JUSTICE MANUAL § 9-5.150; *see also* 28 C.F.R. § 50.9(e)(5) (stating that the guidelines do not apply to child victims or witnesses).

- (2) the scope of the closure to assure it is no broader than necessary to protect that interest;
- (3) any reasonable alternatives to closing the proceeding, even if none are suggested by the parties; and
- (4) specific findings must be made adequate to support the closure.¹⁵⁹

“*Waller* did not distinguish between complete and partial closures of trials.”¹⁶⁰

Generalized concerns about insufficient space, potential taint of a venire, or reliance on the judge’s unbridled discretion are likely to present issues on appeal. As one court has noted, “[f]ailure to comply with this procedure will, in nearly all cases, invite reversal.”¹⁶¹

The triviality doctrine presents a potential lifeline, however, as its name suggests, it has a “narrow application.”¹⁶² It should be used sparingly for those incidents that are truly minor. It is unlikely courts will find exclusions of the public for significant portions of the trial to be trivial, particularly on direct review.¹⁶³

Lastly, trial judges seeking to continue criminal proceedings beyond courthouse closing hours “should ensure that members of the public have a means of access to that courthouse”¹⁶⁴ and special concerns and accommodations should be made to ensure access by a defendant’s family and friends. An attendant loss of liberty inevitably follows criminal convictions, however, that does not mean fellowship or support should be deprived earlier, while the defendant remains presumed innocent.

¹⁵⁹ *Waller v. Georgia*, 467 U.S. 39, 48 (1984); *Presley v. Georgia*, 558 U.S. 209, 214 (2010).

¹⁶⁰ *United States v. Simmons*, 797 F.3d 409, 413–14 (6th Cir. 2015) (“All federal courts of appeals that have distinguished between partial closures and total closures modify the *Waller* test so that the ‘overriding interest’ requirement is replaced by requiring a showing of a ‘substantial reason’ for a partial closure, but the other three factors remain the same.”).

¹⁶¹ *United States v. Gupta*, 699 F.3d 682, 690 (2d Cir. 2012).

¹⁶² *Id.* at 688.

¹⁶³ *Id.* at 689 (“Whatever the outer boundaries of our ‘triviality standard’ may be (and we see no reason to define these boundaries in the present context), a trial court’s intentional, unjustified closure of a courtroom during the entirety of *voir dire* cannot be deemed ‘trivial.’”).

¹⁶⁴ *United States v. Anderson*, 881 F.3d 568, 576 (7th Cir. 2018).

About the Author

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Foundations of Appellate Advocacy

K. Tate Chambers
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DOJ Journal

You have been in the United States Attorney's Office for only a few months. You recently won your first trial and a couple of weeks ago handled the sentencing of the defendant. You are sitting in your office still basking in the glory of your win when your Appellate Chief walks in and tells you that the defendant has filed a notice of appeal and she expects you to handle it. You have never handled an appeal. You immediately wish you had taken that appellate advocacy course in law school. But how hard can this be? Everyone said you were great during the trial. You tore the defendant's witnesses apart on cross, and your rebuttal argument was so sharp you think the jury secretly wanted to applaud when you finished. Isn't this appellate stuff simply more of the same? You will write one of the most impassioned briefs that the court has ever read, and your oral argument will be a tour de force repeat of your rebuttal argument. Right?

Wrong! If you follow that path, this may be the last appeal you ever handle for the office. Effective appellate advocacy requires an entirely different skill set than trial work. You can be both a successful trial attorney and a successful appellate attorney, but you must first understand certain foundational aspects of appellate advocacy. This article will explore those foundations: the importance of appellate work; the differences between trial work and appellate work; the proper relationship between the advocate and the court; the importance of credibility with the court; the necessary preparation before you begin writing the brief; and the appropriate tone that should be employed in writing the brief and crafting your oral argument. In it, you will hear from the top appellate writers inside and outside of the Department. Finally, this article will provide the secret to becoming an effective appellate advocate.

There are dozens, if not hundreds, of excellent books, articles, monographs, and other aids to help you write and argue the appeal. But before you begin to write the brief and prepare the oral argument, you need to understand the foundational skills of the appellate advocate. Those skills are the focus of this article.

I. The importance of appellate work

First, you need to understand the importance of appellate work. It is not simply another adjunct step in the process that comes after the trial. Kelly Zusman, in her monograph *Federal Appellate Advocacy for DOJ and USAO Attorneys*, writes that appellate work is important because the outcome is determinative.¹ You have just spent considerable time and effort to effectively prosecute the defendant. If the appeal is done sloppily, you are less likely to convince the court of your position and the hard work put in at trial may have been in vain. Furthermore, the impact of an appellate opinion goes far beyond the parties of a specific case.² As Zusman points out “outcomes [of an appeal] have the potential to create binding, circuit-wide precedent and even affect the direction of a particular issue for the entire nation.”³ Appellate work is important because the outcome is determinative in your case and has potential ramifications in the legal field.⁴ It deserves your full time and attention.

II. The difference between trial and appellate work

Next, you must understand and appreciate the difference between trial work and appellate practice. As a government trial attorney, the

¹ KELLY A. ZUSMAN, *FEDERAL APPELLATE ADVOCACY FOR DOJ & USAO ATTORNEYS* 7 (2017), <https://www.scribd.com/document/401246698/Federal-Appellate-Advocacy-Handbook-2017-by-Kelly-A-Zusman>. Zusman is widely recognized as one of the leading experts on appellate practice in the Department. Her monograph should be required reading for every government attorney handling appellate work. She writes, “Appellate work is fun and rewarding because it matters.” *Id.*

² *Id.* at 6–7; Joseph J. Karaszewski, *Rule 28 Brief Writing Basics*, 61 U.S. ATT’YS BULL., no. 1, 2013, at 24.

³ Kelly A. Zusman, “*May it Please the Court*,”—*Appearing on Behalf of the United States in Federal Appellate Courts*, 61 U.S. ATT’YS BULL., no. 1, 2013, at 1.

⁴ The vast majority of appeals handled by the United States Attorneys’ Offices are as appellee. For an explanation of the process to determine when the United States files as appellant, see Malcolm Stewart, *United States Appeals: Strategic and Policy Considerations*, 61 U.S. ATT’YS BULL., no. 1, 2013, at 13–17; Patty Merkamp Stemler & Barbara C. Biddle, *Adverse Decisions*, 61 U.S. ATT’YS BULL., no. 1, 2013, at 18–23.

facts and the law are your two largest weapons—at appropriate times however, drama, emotion, and passion are also useful tools. Not so much, however, in appellate practice. In her article in the American Bar Association’s *Appellate Practice*, Belinda Mathie points out, “remember that appellate judges are not jurors or trial-court judges. Certain tactics that might be effective at trial can come across as theatrical on appeal, are rarely persuasive, and can even be counterproductive.”⁵ Never make an argument based on sympathy. As Judges Mark Davis and Donna Stroud of the North Carolina Court of Appeals write in *Do’s and Don’ts at the Court of Appeals: A View from the Bench*, “[a]ppellate judges pride themselves on making decisions based on the law rather than based on sympathy for the parties to the case.”⁶

In appellate practice, logic carries the day. In their book on advocacy, *Making Your Case*, Justice Scalia and Bryan Garner explain why logic works and an appeal to emotion fails: “Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions. And bad judges want to be regarded as good judges. So either way, overt appeal to emotion is likely to be regarded as an insult.”⁷ That does not mean you cannot appeal to the judges’ sense of justice, fairness, and common sense, but you must do so through the logic of your argument.⁸ Justice Scalia and Garner believe that logic is so central to appellate argument that they devote an entire section of their book to legal reasoning.⁹ Judges Davis and Stroud emphasize the importance of framing each issue in your case as a syllogism, “convert each issue in your appeal to a logical syllogism in which you state . . . the major premise, the minor premise, and then the conclusion that logically follows.”¹⁰ On appeal, logic wins the day.

⁵ Belinda I. Mathie, *Writing Appellate Briefs, for Young Lawyers*, 29 APPELLATE PRAC., no. 2, 2010, at 2.

⁶ JUDGE MARK A. DAVIS & JUDGE DONNA STROUD, *DO’S AND DON’T’S AT THE COURT OF APPEALS: A VIEW FROM THE BENCH* 7 (Oct. 2015).

⁷ JUSTICE ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 32 (Thomson/West ed. 2008).

⁸ SCALIA & GARNER, *supra* note 7, at 26, 30–32.

⁹ *Id.* at 41–55.

¹⁰ DAVIS & STROUD, *supra* note 6, at 5.

III. The relationship between the advocate and the bench

It is also important that you understand and appreciate the nature of the relationship between the appellate advocate and the bench. Several writers have attempted to explain that relationship. “A posture of respectful intellectual equality with the bench” is Justice Scalia and Bryan Garner’s characterization, which “requires you to know your stuff, to stand your ground, and to do so with equanimity.”¹¹ They suggest “the best image of the relationship you should be striving to establish is that of an experienced junior partner in your firm explaining a case to a highly intelligent senior partner.”¹² If that image works for you, fine. You may also consider the relationship of a senior law clerk to their judge. It is your job to make sure the judge understands the law, the facts, and the correct application of the law to those facts in order to reach the right result. Your presentation to the judge is rational, logical, and must be persuasive. There is ample give and take, but keep a respectful posture and remember that while it is your job to persuade, it is the judge’s job to decide.

One of the most interesting characterizations of the relationship is by Harold Hongju Koh, who advises, “use the tone that you would use when you’re initiating conversation with an elderly relative from whom you seek a large bequest. It is very important to make your presentation informal and conversational—like a seminar, not a lecture.”¹³ In their article *Tips for Becoming a Better Appellate Advocate—The Oral Argument*, Donald Capparella and Amy Farrar recommend seeing yourself as an invaluable resource to the judges and that your role is to help them understand the facts, the law, and your position.¹⁴ In his article *The Art of Oral Argument According to Some of the Best*, William Robinson quotes Mark Greenberg’s characterization of the relationship, “talk to the justices as though

¹¹ SCALIA & GARNER, *supra* note 7, at 33.

¹² *Id.*

¹³ Harold Hongju Koh, *Ten Lessons About Appellate Oral Argument*, 71 CONN. BAR J. 218, 222 (1997), *reprinted in* Harold Hongju Koh, *Ten Lessons About Appellate Oral Argument*, in Yale Law School Faculty Scholarship Series (Paper 2099, 1997).

¹⁴ Donald Capparella & Amy J. Farrar, *Tips for Becoming a Better Appellate Advocate—The Oral Argument*, NASHVILLE BAR J. (2007).

they are fair, honest, intelligent, and, most of all, in charge.”¹⁵ Whichever characterization of the relationship works for you, you must keep that understanding of the relationship in the forefront of your mind as you write the brief and prepare the oral argument.

IV. Establish your credibility with the court

It is impossible to be an effective appellate advocate unless you appreciate the importance of establishing your credibility with the court. The court must trust you. Without trust, no amount of legal writing skills or oral advocacy talent will carry the day. Justice Scalia and Bryan Garner make the point that your objective in every brief and argument is to show yourself worthy of the trust of the court.¹⁶ Judges Davis and Stroud write, “As a practitioner, the most important quality you have is your credibility. Never do anything that will diminish your credibility in the eyes of the judges before whom you are appearing.”¹⁷

In their comprehensive review of the factors that build trust between appellate attorneys and appellate judges, Timothy Johnson, Paul Wahlbeck, and James Spriggs, II, write:

It is widely recognized that for information to be effective decision makers must perceive the source of the information to be credible or reliable. The credibility of an information source hinges in part on whether the recipient believes the sender to be well informed and candid on the subject of the communication. The reason why is intuitive: if the receiver considers the sender to

¹⁵ William M. Robinson, *The Art of Oral Argument According to Some of the Best* 21 (May 2007),

<http://www.sdap.org/downloads/research/criminal/oralarg.pdf>.

¹⁶ SCALIA & GARNER, *supra* note 7, at xxiii–xxiv. In his book, *Nino and Me: My Unusual Friendship with Justice Antonin Scalia*, Bryan Garner credits Justice Scalia with saying during a Commencement Speech at the College of William and Mary, “Bear in mind that brains and learning, like muscle and physical skill, are articles of commerce. They are bought and sold. You can hire them by the year or by the hour. The only thing in the world not for sale is character.” BRYAN A. GARNER, *NINO AND ME: MY UNUSUAL FRIENDSHIP WITH JUSTICE ANTONIN SCALIA* 107 (Threshold Editions 2018).

¹⁷ DAVIS & STROUD, *supra* note 6, at 4.

be ill-informed then any information conveyed is likely to be discounted as being possibly inaccurate or misleading.¹⁸

While Johnson, Wahlbeck, and Spriggs found that experience is one of the most important facts in establishing trust between advocate and judge, there are equally important methods for inexperienced counsel to start developing that trust. Justice Scalia and Bryan Garner provide an excellent summary of not only how to win that trust, but also how to lose it. “Trust is lost by dissembling or conveying false information—not just intentionally but even carelessly; by mischaracterizing precedent to suit your case; by making arguments that could appeal only to the stupid or uninformed; by ignoring rather than confronting whatever weighs against your case.”¹⁹ They continue, stating that “[t]rust is won by fairly presenting the facts of the case and honestly characterizing the issues; by owning up to those points that cut against you and addressing them forthrightly; and by showing respect for the intelligence of your audience.”²⁰ They then summarize how the court develops the affection of trust for the advocate: “you show yourself to be likable by some of the actions that inspire trust, and also by the lack of harsh combativeness in your briefing and oral argument, the collegial attitude you display toward opposing counsel, your refusal to take cheap shots or charge misbehavior, your forthright but unassuming manner and bearing at oral argument—and, perhaps above all, your even-tempered good humor.”²¹

Let’s dive a little deeper into a few of these interrelated factors that establish credibility and trust—candor, concession, civility.

A. Candor

As Deputy Solicitor General Michael Dreeben writes, “The ethic of candor is a norm applicable to any appellate lawyer. . . . Government appellate advocates are held to an especially exacting standard: appellate courts expect lawyers for the United States to obey ‘higher

¹⁸ Timothy R. Johnson et al., *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99, 101 (2006).

¹⁹ SCALIA & GARNER, *supra* note 7, at xxiii–xxiv.

²⁰ *Id.*

²¹ *Id.* at xxiv.

standards' than the private bar."²² Dreeben continues, "This obligation is at its zenith in the criminal law."²³ While it may be difficult to define that higher standard, Dreeben quotes former Chief Judge Patricia Wald of the D.C. Circuit, who suggests that the standard of candor has five aspects: "competence, candor, credibility, civility, and consistency."²⁴ Zusman characterized the higher standard, "As true servants of the law, we must vindicate the interests of the United States while keeping candor and fairness at the forefront of everything we write and say."²⁵ Zusman continued, "The courts can and should trust that what we tell them is truthful, what we argue is helpful, and that our positions are well-considered. Win or lose, our goal is and should always be to leave the court with the impression that the United States was well-represented."²⁶

An important part of candor is accuracy. As a government attorney, no one believes that you would ever purposefully misstate the facts or the law. But you must be extremely careful to not mistakenly misstate the facts or the law. Making such mistakes is a cardinal sin. You will lose credibility with the court. As Judge Jane Roth and Mani Walia point out in their article *Persuading Quickly: Tips for Writing an Effective Appellate Brief*, accuracy is of utmost importance: "Never—we repeat, never—make inaccurate representations to a court. Your task . . . is to persuade and you cannot do that if the judge does not believe you."²⁷ As Justice Warren Wolfson notes, "lawyers must be intimately familiar with the record and the cases they cite. Honesty and sincerity are imperative. If a lawyer miscites authority or misrepresents the record, all is lost."²⁸ As Judges Davis and Stroud write:

It is not unusual for attorneys to exaggerate the applicability of a precedent. This is a mistake for two

²² Michael R. Dreeben, *The Role of the Solicitor General in the Department of Justice's Appellate Process*, 61 U.S. ATT'YS BULL., no. 1, 2013, at 9–10.

²³ Dreeben, *supra* note 22, at 5.

²⁴ *Id.* at 10.

²⁵ Zusman, *supra* note 3, at 4.

²⁶ *Id.*

²⁷ Judge Jane R. Roth & Mani S. Walia, *Persuading Quickly: Tips for Writing an Effective Appellate Brief*, 11 J. APP. PRAC. & PROCESS 443, 448–49 (2010).

²⁸ Justice Warren D. Wolfson, *Oral Argument: Does it Matter?*, 35 IND. L. REV., 451, 454–55 (2002).

reasons: First, both the judge and the judge's law clerks will read the cited case carefully and then realize you have overstated its importance to the appeal. . . . Second, you will have reduced your credibility with the judges both in the appeal at hand and in future appeals.²⁹

They note that hyperbole can also destroy your credibility with the court, "While all appeals are important to [the judges] and are taken very seriously, it is a mistake for lawyers to exaggerate the jurisprudential effect of the case or the magnitude of the issue involved. Excessive exaggeration only diminishes your credibility."³⁰ When you are asked a question by the court, answer the question asked. If it is a yes or no question, answer "yes" or "no." You will often have an opportunity to proceed with an explanation of the answer, if necessary. If you do not know the answer to a question, be prepared to admit you do not know. As Judges Davis and Stroud point out, "it is far better to admit your lack of knowledge on that question than it is to try to bluff your way through the answer. You will also gain credibility with the judges by admitting you do not know the answer."³¹ Your goal at the end of oral argument is to leave the judges with a lasting impression of your integrity and trustworthiness.

B. Concession

One important aspect of credibility is your willingness to concede when the facts or law weigh against your position. If possible, you will want to explain why the facts or law do not control, but if that is not possible then you need to admit it. As Robert Stumpf, Jr., Karin Vogel, and Guylyn Cummins write, "[n]othing builds credibility more than conceding a point that is not reasonably in dispute or acknowledging a weak point in your case."³² This is what Judge Roth and Walia call "embracing the unpleasant fact."³³ If this is your first appeal, discuss your concessions with your Appellate Chief. As Capparella and Farrar write, you must take the long view, which is,

²⁹ DAVIS & STROUD, *supra* note 6, at 5.

³⁰ *Id.* at 9.

³¹ DAVIS & STROUD, *supra* note 6, at 11.

³² Robert J Stumpf et al., *Your Skills: Top 10 Tips to Prepare for Oral Argument*, THE RECORDER (2013).

³³ Roth & Walia, *supra* note 27, at 448.

“All you have is your credibility, you must live to fight another day, so always be credible[.]”³⁴

C. Civility

Not only should you not make emotional arguments to the bench, you must learn to keep your own emotions in check. Do not respond in kind to harsh personal attacks by your opponent. Do not respond angrily to false, misleading, or bad-faith arguments. Refute them with civility—“calmly and dispassionately.”³⁵ Justice Scalia and Bryan Garner suggest “[y]our poker-faced public presumption must always be that an adversary has misspoken or has inadvertently erred—not that the adversary has deliberately tried to mislead the court.”³⁶ Judges Davis and Stroud note, “While [judges] recognize the fact that some unreasonable lawyers are out there, judges hate to see fighting among the lawyers.”³⁷ They suggest that if you must respond to an unfair attack, “do so in a professional manner rather than as a personal attack.”³⁸ Michael Robinson summarizes civility: “As a government lawyer, you want to be sure that [you take] an appropriate tone. Courts expect you to remain above the fray and to present the facts and your argument in a manner befitting your special role as advocate of the United States.”³⁹ Again, you want to leave the court with a lasting impression of your credibility. If you attempt to leave the court with a disfavorable impression of opposing counsel, you will only undermine your own credibility.

V. Preparation: know the rules, the standards of review, the law, and the facts

One essential foundation before you begin writing the brief and preparing for oral argument is preparation. Before you place pen to paper or finger to keyboard, you need to prepare. You prepare by

³⁴ Capparella & Farrar, *supra* note 14, at 5.

³⁵ SCALIA & GARNER, *supra* note 7, at 34.

³⁶ *Id.*

³⁷ DAVIS & STROUD, *supra* note 6, at 6.

³⁸ *Id.*

³⁹ Michael E. Robinson, *Editing the Appellate Brief*, 61 U.S. ATT'YS BULL., no. 1, 2013, at 44.

reading the appellate rules, determining the standards of review, becoming very familiar with the law, and reviewing the record.

A. Read the rules of appellate procedure

This step may seem obvious: read the rules. But many attorneys do not take the time or effort to read the rules, especially if this is not their first appeal. Do not make that mistake.⁴⁰ Take the time to read the Federal Rules of Appellate Procedure, as well as your circuit's rules.⁴¹ It is time well spent.⁴² Your memory is unlikely to contain the nuances of every rule, some of which are critical to the appeal. Sit down with the rules and refresh your memory. After doing so, when issues arise in the process, you are more likely to recall relevant rules and their ramifications. At that point, go back to the language of the rule. Most circuits provide a handbook to guide you through those rules.⁴³ For example, the Seventh Circuit publishes a Practitioner's Handbook for Appeals, which covers the entire appellate process.⁴⁴ Keep these resources on your desk so they are readily accessible. The Handbook will make frequent reference to the rules seem less like a chore.

B. Determine the standards of review

As Brad Elward writes in his article, *Thoughts on Writing More Effective Appellate Briefs*, “[t]he importance of the standard of review cannot be over-emphasized. The appellate court evaluates the issues presented based on the standards of review, not whether the lower court's ruling was correct.”⁴⁵ Elward continues by stating that “[u]sing the standard of review helps you focus on the questions the court will

⁴⁰ Raymond P. Ward, *Preparing to Write an Appellate Brief*, CERTWORTHY, 1998, at 3.

⁴¹ Brad A. Elward, *Thoughts on Writing More Effective Appellate Briefs*, 20:4:29 IDC Q. 1, 1 (2010).

⁴² Joseph J. Karaszewski, *Rule 28 Brief Writing Basics*, 61 U.S. ATT'YS BULL., no. 1, 2013, at 25.

⁴³ Mathie, *supra* note 5, at 3.

⁴⁴ UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (2017); *see also* Jean-Claude André & David E. Hollar, *Appellate Motion Practice*, 61 U.S. ATT'YS BULL., no. 1, 2013, at 49–50 (explaining the handbook).

⁴⁵ Elward, *supra* note 41, at 2.

ask when analyzing your appeal issues.”⁴⁶ As Judge Roth and Walia write, “you must first understand that the standard of review controls the argument. . . . you must develop your arguments . . . within that standard.”⁴⁷ They characterize the benefit of knowing and using a favorable standard. “A favorable standard of review is like the home stadium in a football game: It does not mean that the advocate is going to win, but that she is advantaged.”⁴⁸ In his article *Rule 28 Brief Writing Basics*, Joseph Karaszewski provides an excellent outline on the various standards of review and how to use them to frame your argument. He also points out that the standard of review “is the most important legal concept to understand and embrace if your brief is to be effective. Without exaggeration, the various standards of review should inform the manner in which you address each aspect of your appellate task.”⁴⁹ For an additional resource on the standards of review, Zusman’s monograph is a great place to turn.⁵⁰

C. Become conversant with the law

It is absolutely necessary that you become intimately familiar with the cases you cite and those cited by your opponent.⁵¹ As Judge Roth and Walia write, “you must spend as much time as possible researching and understanding the case law. No matter how time-consuming and challenging, this step is indispensable.”⁵²

In her article *Twenty Tips from a Battered and Bruised Oral-Advocate Veteran*, Sylvia Walbolt advises to “know each crucial case backwards and forwards. You must know its facts, the actual holding, and what relief was granted. Read every case either party

⁴⁶ *Id.*

⁴⁷ Roth & Walia, *supra* note 27, at 449.

⁴⁸ *Id.*

⁴⁹ Karaszewski, *supra* note 42, at 25; see also Sylvia Walbolt, *Twenty Tips from a Battered and Bruised Oral-Advocate Veteran*, 37 LITIGATION 1 (2011) (“One federal appellate judge told a group of experienced appellate lawyers that one thing he discovered after going on the appellate bench was how seriously the judges take the standard of review.”).

⁵⁰ ZUSMAN, *supra* note 1.

⁵¹ Wolfson, *supra* note 28, at 451, 454.

⁵² Roth & Walia, *supra* note 27, at 452.

cited, and read it in its entirety, not just the head note that helps your case.”⁵³

In a different article, Walbolt recommends printing out the dispositive cases and reading them on paper instead of on the computer screen.⁵⁴ She contends that by doing so there is “far less misunderstanding or mischaracterization of cases”;⁵⁵ lawyers absorb the case better when reading a printed copy as compared to an electronic copy.⁵⁶ She further states that, “The lawyer caught caveats to the holding. The lawyer picked up compelling points leading to the holding for use in reinforcing the argument.”⁵⁷ Walbolt notes, however, that “a careful lawyer can do all of this on a computer. But all too often the speed and ease of use of a computer word search results in poor comprehension of the decision and its underpinnings.”⁵⁸

An essential part of knowing the law is knowing the relative weight of precedents. Justice Scalia and Bryan Garner separate precedent into two types, governing and persuasive, and then list them by descending priority.

- Governing cases: (1) opinions by the court before which you are appearing; and (2) opinions by the court immediately superior to the court before which you are appearing.
- Persuasive cases: (1) dicta of governing courts and holdings of governing courts in analogous cases; (2) holdings of courts coordinate to the court of appeals whose law governs your case; (3) holdings of trial courts coordinate to your court; and (4) holdings of courts inferior to the court before which you are appearing and courts of other jurisdictions.⁵⁹

⁵³ Sylvia Walbolt, *Twenty Tips from a Battered and Bruised Oral-Advocate Veteran*, 37 LITIGATION 1, 3 (2011).

⁵⁴ Sylvia H. Walbolt, *Tried-and-True Practices for Today’s Generation to Try*, AM. BAR ASS’N, Nov. 28, 2018.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ SCALIA & GARNER, *supra* note 7, at 52–54.

They also point out that, with a few exceptions, freshness is also an important consideration: “the more recent the citation the better.”⁶⁰ Furthermore, they highlight that holdings of inferior courts “will almost never be persuasive.”⁶¹ While this may seem like a basic review, get in the habit of classifying each case as you read it. If you skip this step or identify the weight of the case incorrectly, the negative effect on your analysis may be substantial.

D. Review the record

This next step in your preparation is often the hardest one for less experienced advocates. They believe that they know what happened below. They tried the case. They created the record. Why should they expend the enormous amount of time it takes to carefully comb the record now? That is exactly the wrong approach to take. As discussed, memories are not perfect. And they are especially lacking when clouded by the smoke of battle in the courtroom. Every trial attorney has had the experience of reviewing a day’s testimony and disagreeing with co-counsel and the agents as to whether a particular witness actually gave specific testimony. Do not rely on your memory. Take the time to carefully go through the record and refresh your memory on what actually was said and take an objective look at the record. As Raymond Ward writes in his article *Preparing to Write the Appellate Brief*, “Studying the record is absolutely vital even if you were trial counsel. Do not depend on your memory of what happened at trial. Human memory is flawed.”⁶² He continues by stating that, “The appellate court will decide the case on the record, not on your adversary’s or your memory of what happened at trial. You must be intimately familiar with the record evidence to do an adequate job as appellate counsel.”⁶³ Judges Davis and Stroud make the point that “it is crucial that the appellate attorney be totally familiar with the record on appeal. . . . It is frustrating for the judges on your panel when they ask a question about the record and the lawyer making the argument does not know the answer.”⁶⁴ William Robinson, quoting Mark Greenberg, recognizes the importance of knowing the record:

⁶⁰ *Id.* at 54.

⁶¹ *Id.* at 52–54.

⁶² Ward, *supra* note 40, at 3.

⁶³ *Id.*

⁶⁴ DAVIS & STROUD, *supra* note 6, at 7.

“the most important expertise needed for effectively arguing your case is for you to be the ‘biggest expert in the room on the record in your case’ noting that your storehouse of knowledge about the record is essential for the moment during the argument in which ‘the judges finally reveal their ignorance.’”⁶⁵ Also, remember that you will need to support every fact in your brief with a record cite and be able to provide a record cite for every fact you state during oral argument.⁶⁶ Now is a good time to develop those record cites.

VI. Crafting your argument: clear, concise, and certain

The final foundational element to aid with preparation is learning to write and argue like an appellate attorney. As Zusman points out, “Judges are a generally impatient reading audience. The volume of appellate work is immense.”⁶⁷ Consequently, judges do not have the time to wade through pages and pages of material or waste precious minutes of oral argument with anything that is not essential to deciding the appeal. Remember, as Meir Feder points out “there are real limits to what information readers can absorb, particularly busy and impatient readers.”⁶⁸ Judge Roth and Walia quote one chief judge as seeing the words “Loser, Loser,” in bold letters, stenciled across the front cover of every verbose brief he receives.⁶⁹ Judges Davis and Stroud emphasize the benefits of conciseness: “Judges appreciate lawyers who fully address the issues but do so in a concise way. Doing so also signals to the judges your confidence that your position is meritorious.”⁷⁰ As Garner reports, Justice Scalia once told an audience during a speech before the State Bar of Texas, “Treasure simplicity. You don’t get any extra credit for eloquence. Just make it simple and

⁶⁵ Robinson, *supra* note 15, at 8–9.

⁶⁶ Walbolt, *supra* note 55, at 4.

⁶⁷ ZUSMAN, *supra* note 1, at 8 (“You are, in a very real sense, competing for the judges’ attention. That means your written work product has to be as concise as possible, absolutely accurate (and thus, reliable), clear, and well-reasoned.”).

⁶⁸ Meir Feder, *Key to Appellate Brief Writing; Keeping Your Reader in Mind*, 28 APP. PRAC. 1 (2009).

⁶⁹ Roth & Walia, *supra* note 27, at 444.

⁷⁰ DAVIS & STROUD, *supra* note 6, at 6.

tell us your point.”⁷¹ Justice Scalia continued, “Your job is to make a complex case simple, not a simple case complex.”⁷²

Many new appellate advocates worry about their command of the English language. Justice Scalia and Bryan Garner point out the importance of working on your language skills, “You would have no confidence in a carpenter whose tools were dull and rusty. Lawyers possess only one tool to convey their thoughts: language. They must acquire and hone the finest, most effective version of that tool available. They must love words and use them exactly.”⁷³ In order to hone those skills they recommend that the first step is to read good prose because “[a]s you read, so will you write.”⁷⁴ They quote Judge Frank Easterbrook of the Seventh Circuit Court of Appeals who directs advocates, “The best way to become a good legal writer is to spend more time reading good prose. . . . write your document like a good article in *The Atlantic*, addressing a generalist audience. That’s how you do it: get your nose out of the law books and go read some more.”⁷⁵ Former Assistant Attorney General for the Office of Legal Counsel Jack Goldsmith wrote a primer on how to effectively write online.⁷⁶ While directed to students, his pointers for successful online writing transfer to brief writing. He states:

One challenge for online writing is to be concise while also being complete. You need to walk the reader through the contextual and factual and legal details that will enable it to understand the stakes and your analysis, but without going on and on needlessly. The sweet spot is an analysis that is true to the topic but that presents the material succinctly and gets into the doctrinal weeds only to the extent that it necessary (and *it is* sometimes necessary) to make your points.⁷⁷

⁷¹ BRYAN A. GARNER, *NINO AND ME: MY UNUSUAL FRIENDSHIP WITH JUSTICE ANTONIN SCALIA*, *supra* note 16, at 121.

⁷² *Id.*

⁷³ SCALIA & GARNER, *supra* note 7, at 61.

⁷⁴ *Id.*

⁷⁵ *Id.* at 62.

⁷⁶ Jack Goldsmith, *Successful Student Online Legal Writing*, *LAWFARE* (Oct. 27, 2016), <https://www.lawfareblog.com/successful-student-online-legal-writing>.

⁷⁷ Goldsmith, *supra* note 76; *see also* ZUSMAN, *supra* note 1, at 3 (“Writing—a lot—is the best way to become an effective, successful legal writer.”).

In his article *Writing Better, Attention-Grabbing Appellate Briefs*, Howard Bashman recommends studying the opinions of the best legal writers among the appellate judiciary and provides several suggestions.⁷⁸ He also suggest reading some of the best appellate briefs being written today. Again, he makes several suggestions, including the briefs filed by the Office of the Solicitor General, which he notes are “uniformly of very high quality.”⁷⁹

The second way to develop your language skills is to write and write often.⁸⁰ Take every opportunity you can to write articles, letters, and bar journal pieces. The more you write, the better you will write.⁸¹ While geared towards law students, Goldsmith’s reasons to write online apply to lawyers as well:

(a) to generate writing samples for various audiences (including judges and employers), (b) to develop expertise, (c) to signal interest and expertise in a topic to a community of scholars or practitioners, (d) to practice and thus improve one’s writing, (e) the joy of discovery, or of figuring something out, or (f) to have influence (even if that means nothing more than someone reading your work).⁸²

As you read through the articles in this issue of the Journal, you will note that many of our authors have written numerous articles for the Journal and other publications. Google them and you will learn that many of them have written extensively for publications outside of the Department and that several of them have even published books. Good writers read, and good writers write.

Another path to good writing is to invest in books on style and English grammar and usage. And as Justice Scalia and Garner point out, every legal writer should invest in a good thesaurus.⁸³ Will simply having these books on your desk make you a good legal writer? No, of course not. But using them every time you write will undoubtedly improve your writing.

⁷⁸ Howard J. Bashman, *Writing Better, Attention-Grabbing Appellate Briefs*, THE LEGAL INTELLIGENCER, Mar. 11, 2014.

⁷⁹ *Id.*

⁸⁰ SCALIA & GARNER, *supra* note 7, at 62.

⁸¹ *Id.*

⁸² Goldsmith, *supra* note 76.

⁸³ SCALIA & GARNER, *supra* note 7, at 64.

One final note, when Justice Scalia received the Lifetime Achievement Award from the organization Scribes, in August 2008, he shared the secret of good legal writing during his acceptance speech.⁸⁴ The secret of turning writing into good writing is simple, “time and sweat.”⁸⁵ It takes both to produce a quality appellate product. As Zusman points out in her monograph, appellate work takes time.⁸⁶ To become an effective appellate advocate you need to be willing to spend that time. That is the secret of appellate advocacy.

VII. Conclusion

Now that you have the foundations in place, you can turn to writing a successful appellate brief and making a successful appellate argument. Again, there are dozens of excellent resources out there that will coach you through those processes. Take advantage of them. And as you write and prepare for argument, remember to reflect back on these foundations. They will guide you through each step of your appeal. Good luck.

About the Author

K. Tate Chambers graduated from the Southern Illinois University School of Law, after which he clerked for United States District Court Judge Richard Mills when Judge Mills was serving on the Illinois Appellate Court. Tate joined the United States Attorney’s Office for the Central District of Illinois in 1984 and has served there in several capacities, including Associate United States Attorney, Appellate Chief, OCDETF Lead Task Force Attorney, and Branch Chief, as well as in the Coordinator positions for Project Safe Neighborhoods (PSN), Violent Crime, Gangs, and Community Outreach. Tate also served as the National PSN Coordinator in the Executive Office for United States Attorneys (EOUSA) at Main Justice in Washington, D.C. from 2007–2010 and on the Evaluation and Review Staff in EOUSA as a Criminal Program Manager from 2010–2011. Currently, he serves as an Assistant Director of the Office of Legal Education (OLE), EOUSA, at the National Advocacy Center in Columbia, South Carolina, where he is the Editor-in-Chief of the Department of Justice

⁸⁴ ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL-LIVED 57–60 (Crown Forum 2017).

⁸⁵ *Id.* at 59.

⁸⁶ ZUSMAN, *supra* note 1, at 50.

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Thinking Like a Lawyer While Writing Like a Human Being: Writing and Editing the Modern Appellate Brief

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In the summer of 2008, I received a phone call from a friend who runs the legal writing program at a nearby law school. One of her adjuncts had left for health reasons, and she wondered if I could help out for the year. I said yes, and one year of adjunct teaching has since turned into ten.

Over the years, I've encountered a persistent and particular tone in student writing. It's formal (sometimes excessively so), a little artificial, and wordy.

When I ask the students where this comes from, they often explain that they're trying to "sound like a lawyer." But since they're not yet lawyers, they do the only thing they can do: they start mimicking. They mimic the cases they read in the casebooks, they mimic the motions they read in their summer jobs, and they mimic what they hear from law professors in lectures.

These are sometimes not the best models. The cases reprinted in textbooks "are selected for their substantive meaning, not for their quality of expression."¹ And students sometimes fare no better when mimicking the writing they see from attorneys. The former chief judge of the Second Circuit believed that the "[i]nability to communicate afflicts all segments of the profession and is now pervasive enough to be classified as a crisis."² Other judges have expressed similar concerns about the state of legal writing by practicing attorneys.³

¹ TOM GOLDSTEIN & JETHRO K. LIEBERMAN, *THE LAWYER'S GUIDE TO WRITING WELL* 32 (Univ. of Cal. Press, 3d ed. 2016).

² Roger J. Miner, *Froessel Award Acceptance Address: Confronting the Communication Crisis in the Legal Profession*, 34 N.Y. L. SCH. L. REV. 1, 1 (1989).

³ See, e.g., TESSA L. DYSERT, HON. LESLIE H. SOUTHWICK & HON. RUGGERO J. ALDISERT, *WINNING ON APPEAL* 20–21 (3d ed. 2017).

This creates something of a feedback loop—poor student writers often become poor attorney writers. But poor attorney writing can cause real problems, particularly when done on appeal. Most appeals are decided on the briefs alone.⁴ And even in those cases that do receive oral argument, argument time is limited by circuit rule—usually to 15 or 20 minutes.⁵ For these and other reasons, it is widely understood that the appellate briefs are “more important” than the oral argument.⁶

Because of this, one of the most important skills in an attorney’s toolkit is the ability to write well. Attorneys who do not write well “waste[] the valuable time of judges,” and they also “give adversaries who are better writers the opportunity to portray their own positions more persuasively and sympathetically.”⁷

A few years ago, a friend recommended a short book that best-selling novelist Stephen King wrote about the art of writing. King’s book—*On Writing: A Memoir of the Craft*⁸—is geared toward writing fiction. But much of his advice resonated with me, both as an appellate attorney and as a legal writing professor. Three pieces of advice stand out.

⁴ The percentages vary between the circuits, but on average, the court hears oral argument in less than 20% of federal appeals. See DYSERT, *supra* note 3, at 12–13.

⁵ See 1ST CIR. R. 34.0(c)(1) (limiting oral arguments to 15 minutes); 2D CIR. R. 34.1(d) (identifying no specific time limitations); 3D CIR. I.O.P. 2.1 (limiting oral arguments to 20 minutes per side, absent approval for extended time as determined by panel majority); 4TH CIR. R. 34(d) (limiting oral arguments to 20 minutes in most cases); 5TH CIR. R. 34.11 (limiting oral arguments to 20 minutes in most cases); 6TH CIR. R. 34(f)(1), (3) (limiting oral arguments to 15 minutes generally, 20 minutes when oral arguments heard en banc); 7TH CIR. R. 34(b)(1) (stating “[t]he amount of time allotted for oral argument will be set based on the nature of the case.”); 8TH CIR. R. 34A(b) (stating “[c]ases screened for full oral argument usually will be allotted 10, 15, or 20 minutes per side. Extended argument of 30 minutes or more per side occasionally will be allotted.”); D.C. CIR. R. 34(b) (typically allotting 15 minutes per side for oral arguments).

⁶ Shaun B. Spencer & Adam Feldman, *Words Count: The Empirical Relationship Between Brief Writing and Summary Judgment Success*, 22 LEGAL WRITING 61, 108 n.7 (2018).

⁷ GOLDSTEIN & LIEBERMAN, *supra* note 1, at 5.

⁸ STEPHEN KING, *ON WRITING: A MEMOIR OF THE CRAFT* (2000).

1. Tone and word choice

King stresses the value of simplicity, particularly in terms of word choice. He cautions that “[o]ne of the really bad things you can do to your writing is to dress up the vocabulary, looking for long words because you’re maybe a little bit ashamed of your short ones.”⁹ He suggests that you should “use the first word that comes to your mind, if it is appropriate and colorful. If you hesitate and cogitate, you will come up with another word—of course you will, there’s always another word—but it probably won’t be as good as your first one, or as close to what you really mean.”¹⁰

The last insight in this passage is critical. In King’s view, sticking with the more ordinary words that instinctively come to mind is not just a stylistic preference. Rather, it provides substantive benefits as well, because those words most accurately convey your intended meaning. King elaborates:

This business of meaning is a very big deal. If you doubt it, think of all the times you’ve heard someone say, ‘I just can’t describe it’ or ‘That isn’t what I mean.’ Think of all the times you’ve said those things yourself, usually in a tone of mild or serious frustration. The word is only a representation of the meaning; even at its best, writing almost always falls short of full meaning. Given that, why in God’s name would you want to make things worse by choosing a word which is only cousin to the one you really wanted to use?¹¹

This insight holds true in legal writing.

As a profession, attorneys have long been known for their use of technical and idiosyncratic language. Eighteenth century novelist Jonathan Swift, for example, faulted attorneys for developing “a peculiar Cant and Jargon of their own, that no other Mortal can understand.”¹²

Thomas Jefferson recognized this as well. Writing to a friend about a bill that he had drafted, he said:

⁹ *Id.* at 117.

¹⁰ *Id.* at 118 (emphasis omitted).

¹¹ *Id.*

¹² GOLDSTEIN & LIEBERMAN, *supra* note 1, at 15.

You, however, can easily correct this bill to the taste of my brother lawyers, by making every other word a ‘said’ or ‘aforesaid,’ and saying everything over two or three times, so that nobody but we of the craft can untwist the diction, and find out what it means; and that, too, not so plainly but that we may conscientiously divide one half on each side.¹³

Judges and legal writing experts have increasingly been pushing back on this, arguing that such lawyer-speak is a bug, not a feature, of our craft.

Ten years ago, Justice Antonin Scalia and Bryan Garner (the editor of Black’s Law Dictionary and a prolific legal writing scholar) wrote *Making Your Case: The Art of Persuading Judges*.¹⁴ Scalia and Garner cautioned attorneys to “[b]anish jargon, hackneyed expressions, and needless Latin.”¹⁵ They asked attorneys to avoid “the words and phrases used almost exclusively by lawyers in place of plain-English words and phrases that express the same thought.”¹⁶ They counseled attorneys to “[t]reasure simplicity” and to “[e]xpress . . . ideas in a straightforward fashion” using “plain words.”¹⁷

In his other writings, Garner has similarly suggested that attorneys should express themselves “honestly, clearly, unpretentiously,” using a “natural voice.”¹⁸ He recommends that attorneys use a “literate, precise, but relaxed style.”¹⁹

Others have agreed. One commentator, for example, suggested that attorneys “avoid any word that does not command instant understanding. Your words should be transparent vehicles that let the reader see your ideas without straining to grasp the meaning.”²⁰ Another commentator pointed to the problems that can come with excessively formal language, suggesting that this “does more than

¹³ *Id.* at 16.

¹⁴ ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (Thomson/West ed. 2008).

¹⁵ *Id.* at 113.

¹⁶ *Id.*

¹⁷ *Id.* at 182.

¹⁸ Bryan A. Garner, *An Approach to Legal Style: Twenty Tips for the Legal Writer*, 2 SCRIBES J. LEGAL WRITING 1, 1 (1991).

¹⁹ *Id.*

²⁰ James W. McElhaney, *Writing to the Ear—Clarity and Simplicity Help Readers to Hear What You Have to Say*, 81 AM. BAR ASS’N J. 74, 77 (1995).

make” an attorney’s “prose affected and clumsy.”²¹ “It also conveys an unfortunate *ethos*, because it suggests that you rely too much on the superficial aspects of your language to demonstrate your professionalism.”²²

This is where my students often err. The goal of a brief is not to demonstrate the attorney’s intellect, nor is it to impress the court. Rather, the goal is to persuade the court to do something. As explained by late Third Circuit Judge Ruggero Aldisert, “[p]ersuasion is the only test that counts. Literary style, massive displays of scholarship, citations that thunder from the ages, and catchy phrases are uniformly pointless if the writing does not persuade.”²³

Writing that is simpler and easier to read will often be more persuasive. “To be sure,” legal writing “must be technical in the sense of being supported by appropriate legal authorities. But writing works best when it is clear and to the point.”²⁴ “Without clear writing, communication is lessened. To the extent that we complicate communication, we dilute our powers of persuasion.”²⁵

This runs contrary to the instincts that many students mistakenly develop in law school, as well as the style then employed by many practicing attorneys. But judges and scholars alike have embraced it, thus recognizing that “[g]ood legal writing does not sound like it was written by a lawyer.”²⁶ Thus, “[t]he difficult task, after one learns how to think like a lawyer, is relearning how to write like a human being.”²⁷

Consider the following example, written by Chief Justice John Roberts in an appeal to the United States Supreme Court while he was still a practicing attorney. The issue on appeal was how to determine what the “best” technology for controlling air pollution was

²¹ STEPHEN V. ARMSTRONG & TIMOTHY P. TERRELL, THINKING LIKE A WRITER: A LAWYER’S GUIDE TO EFFECTIVE WRITING & EDITING 277 (PLI, 3d ed. 2009).

²² *Id.*

²³ DYSERT, *supra* note 3, at 15.

²⁴ *Id.* at 126.

²⁵ *Id.*

²⁶ ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION’S TOP ADVOCATES 188 (Oxford Press, 2d ed. 2014) (quoting former Wisconsin Court of Appeals Chief Judge William Eich).

²⁷ GOLDSTEIN & LIEBERMAN, *supra* note 1, at 3.

for purpose of the Clean Air Act. In a passage that has since “become famous in brief-writing circles,”²⁸ Roberts wrote:

Determining the “best” control technology is like asking different people to pick the “best” car. Mario Andretti may select a Ferrari; a college student may choose a Volkswagen Beetle; a family of six a mini-van. A Minnesotan’s choice will doubtless have four-wheel drive; a Floridian’s might well be a convertible. The choices would turn on how the decisionmaker weighed competing priorities such as cost, mileage, safety, cargo space, speed, handling, and so on.²⁹

Much can be said about this passage—for example, it’s an excellent illustration of how to proactively use analogies in a brief. But consider it here in terms of its tone and word choice. This doesn’t sound like it was written to sound distinguished. Rather, it sounds like it was written to convey an idea as simply and naturally as possible. If Roberts had tried replacing the words in this passage with more distinguished sounding words—or, in King’s parlance, if Roberts had used the “cousin[s]” to the words he “really wanted to use”³⁰—the passage may have sounded smarter, but it likely would have been less effective as a persuasive tool.

So how do we accomplish this? One effective editing tool is to try to align the written word with the spoken word. Second Circuit Judge Jerome Frank observed that “the basic appeal of language is to the ear.”³¹ Bryan Garner similarly contends that “[g]ood writing is simply speech heightened and polished.”³²

Garner thus recommends the following as a “good test of naturalness: if you wouldn’t say it, then don’t write it.”³³ He advises

²⁸ GUBERMAN, *supra* note 26, at 212.

²⁹ Brief for Petitioner at 24, *Alaska v. United States Env’t Prot. Agency et al.*, 540 U.S. 461 (2004) (No. 02-658), <https://www.findlawimages.com/efile/supreme/briefs/02-658/02-658.mer.pet.pdf>.

³⁰ KING, *supra* note 8, at 118.

³¹ Jerome Frank, *The Speech of Judges: A Dissenting Opinion*, 6 SCRIBES J. LEGAL WRITING 97, 99 (1998).

³² BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH* 63 (Univ. of Chicago Press, 2d ed. 2013).

³³ *Id.* at 64.

attorneys to “try reading your prose aloud” during editing “to see whether you’d actually say it the way you’ve written it.”³⁴ A Colorado Court of Appeals judge agreed, cautioning that if “neither you nor anyone you know would ever utter a sentence like the one you have written, head back to the drawing board.”³⁵ Others have made similar suggestions.³⁶

Consider again King’s key insight: the words that first come to mind will usually convey the author’s intended message most clearly. What Justice Scalia, Garner, and others are suggesting is that this holds true for legal writers as well. Plain language promotes clarity, and clarity increases persuasiveness. We should take them at their word.

2. The value of brevity

As a high school student, King once submitted a story to a magazine in hopes that it would be published. The story wasn’t published—but the editor “scribbled [a] comment” in the rejection notice that “changed the way” King “rewrote [his] fiction once and forever. Jotted below the machine-generated signature of the editor was this *mot*: ‘Not bad, but PUFFY. You need to revise for length. Formula: 2nd Draft = 1st Draft – 10%. Good luck.’”³⁷

King credits “the Formula” with much of his success as a writer. It taught him “that every story and novel is collapsible to some degree. If

³⁴ *Id.*

³⁵ GUBERMAN, *supra* note 26, at 188 (quoting former Colorado Court of Appeals Judge Robert Kapelke).

³⁶ *See, e.g.*, JOHN R. TRIMBLE, *WRITING WITH STYLE* 75 (3d ed. 2011) (“If you’ve written a paragraph that sounds labored, back off and ask yourself, ‘How would I say this to a friend?’ Then go ahead and talk it out loud. Afterward, write down as nearly as you can recall what you said. Chances are, most of your talked-out sentences will shame your earlier, written versions of them.”); BRYAN A. GARNER, *THE WINNING BRIEF* 226 (Oxford Univ. Press, 3d ed. 2014) (“Try to get your speaking voice in your writing. . . . In talking, you tend to use short sentences, plain words, active voice, and specific details.” (quoting DANIEL McDONALD, *THE LANGUAGE OF ARGUMENT* 238 (5th ed. 1986))); *id.* at 222 (“When words such as *whereby*, *thereby*, *heretofore*, and *wherein* creep into your vocabulary, put down your pen, take a few deep breaths, and read your work aloud. Your ear will soon tell you just how awkward and antiquated these phrases are.” (quoting GARY BLAKE & ROBERT W. BLY, *THE ELEMENTS OF TECHNICAL WRITING* 73 (1993))).

³⁷ KING, *supra* note 8, at 222.

you can't get out ten per cent of it while retaining the basic story and flavor, you're not trying very hard."³⁸

This has obvious application to our work as attorneys—particularly when writing an appellate brief. The Federal Rules of Appellate Procedure impose strict word limits on briefs,³⁹ and appellate courts rarely grant word-count extensions. Because of this, attorneys are often forced to do what King's would-be editor simply recommended.

But trimming excess words from a brief is not just an act of rules-compliance; it's also an effective tool of advocacy. Judge Richard R. Clifton of the Ninth Circuit observed that “[j]udges are human, too, and [their] attention spans are finite.”⁴⁰ He suggested that “[m]ost lawyers don't appreciate the volume of reading that judges have to do. I confess that when I was a lawyer writing briefs, I didn't think about that. But now that I'm on the other side of the bench, I have learned that a brief that is concise and to the point has more impact than briefs that seem to end only because they hit the limit.”⁴¹

Tenth Circuit Judge Carlos Lucero expressed a similar sentiment:

[T]ake a look at the work of typical circuit judges across America. Typically, we'll hear twenty-four cases in one week of oral argument—six cases a day for four days. If the appellant's brief is fifty pages, the response is always fifty pages, and the reply is twenty-five. That's 125 pages of reading on that case. Multiply that by six and that equals 750 pages. Multiply that by four and you are now approaching 3,000 pages of reading.⁴²

The judges' workloads—or, more accurately, their reading-loads—thus create a dynamic in which attorneys are “competing for the [judges'] time.”⁴³ D.C. Circuit Judge Patricia Wald wrote candidly about the psychological impact that a brief's length can have on a judge: “Many judges look first to see how long a document is before reading a word. If it is long, they automatically read fast; if short, they read slower. Figure out yourself which is better for your

³⁸ *Id.* at 223.

³⁹ FED. R. APP. P. 32(7)(B).

⁴⁰ DYSERT, *supra* note 3, at 139.

⁴¹ *Id.*

⁴² *Id.* at 160.

⁴³ GOLDSTEIN & LIEBERMAN, *supra* note 1, at 117.

case.”⁴⁴ Scalia and Garner agree, suggesting that “[a] judge who realizes that a brief is wordy will skim it; one who finds a brief terse and concise will read every word.”⁴⁵ They accordingly caution attorneys to “[a]void the temptation to think that your brief is concise enough so long as it comes in under the page or word limit set forth in the court’s rules—and more still, the temptation to insert additional material in order to reach the page or word limit.”⁴⁶

This is where editing comes in. One mistake that attorneys often make is to view editing as a unitary exercise. “There is an order to editing, just as there is an order to finishing your house. You cannot do all the tasks at once, and you should not do them wildly out of sequence.”⁴⁷

Instead, it is better to think of editing as a series of separate tasks that should be done in stages.⁴⁸ Begin on a macro level.⁴⁹ Focus first on cutting “unnecessary substantive discussion.”⁵⁰ Look also for “internal inconsistencies in the facts or in the argument.”⁵¹

Focus then on the brief’s organization, making sure that your argument “proceeds in the most logical manner.”⁵² “As a legal writer, you are often tasked with presenting highly complex factual scenarios and legal principles. The golden rule is to make the reader’s job as easy as possible, and this depends heavily on the order in which you present the material.”⁵³ Make sure that the brief proceeds in a logical order, supported and clarified by headings, subheadings, and transitions.⁵⁴

Once the substance and organization are clear, focus on the language itself, removing excess words and phrases that don’t add

⁴⁴ Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7, 10 (1999).

⁴⁵ SCALIA & GARNER, *supra* note 14, at 81.

⁴⁶ *Id.* at 24.

⁴⁷ GOLDSTEIN & LIEBERMAN, *supra* note 1, at 165.

⁴⁸ Wes Hendrix, *From Good to Great: The Four Stages of Effective Self-Editing*, 14 J. APP. PRAC. & PROCESS 267, 272 (2014); GARNER, *supra* note 36, at 68.

⁴⁹ GOLDSTEIN & LIEBERMAN, *supra* note 1, at 168.

⁵⁰ *Id.*

⁵¹ GARNER, *supra* note 36, at 68.

⁵² Hendrix, *supra* note 48, at 275.

⁵³ *Id.*

⁵⁴ *Id.*

meaning to the argument. The “English language has a vast potential for verbosity,” and “reversing this process” is something of a “rare art.”⁵⁵ But it’s worth doing. In Garner’s view, “[t]hree good things happen when you combat verbosity: your readers read faster, you crystallize your thoughts better, and your streamlined writing becomes punchier.”⁵⁶ Attorneys should thus remove “clutter, verbiage, obviousness, windy phrases, and redundancies.”⁵⁷

There are, of course, limits to this. The brief is often the only chance the attorney has to speak to the court, so if something needs to be said, it should stay. But King’s underlying point still holds true. Like a novel, most legal arguments are also “collapsible to some degree.”⁵⁸ If we can “get out ten per cent of it while retaining” the same substantive punch, the judges will likely appreciate it.⁵⁹

3. The importance of modeling

King stresses the importance of continually reading good writing as means of self-education. In his view, reading good writing “teaches the learning writer about style, graceful narration, plot development, the creation of believable characters, and truth-telling.”⁶⁰ “Being swept away by a combination of great story and great writing . . . is part of every writer’s necessary formation. You cannot hope to sweep someone else away by the force of your writing until it has been done to you.”⁶¹

Because of this, he suggests that a “sort of stylistic blending is a necessary part of developing one’s own style, but it doesn’t occur in a vacuum. You have to read widely, constantly refining (and redefining) your own work as you do so.”⁶² “Can I be blunt on this subject? If you don’t have time to read, you don’t have the time (or the tools) to write. Simple as that.”⁶³

This is true in legal writing as well. All of us have hopefully encountered good writing, whether it be from colleagues, opposing

⁵⁵ GARNER, *supra* note 32, at 25.

⁵⁶ *Id.* at 24.

⁵⁷ GOLDSTEIN & LIEBERMAN, *supra* note 1, at 168.

⁵⁸ KING, *supra* note 8, at 223.

⁵⁹ *Id.*

⁶⁰ *Id.* at 146.

⁶¹ *Id.*

⁶² *Id.* at 147.

⁶³ *Id.*

counsel, or from the courts. Also, several well-regarded legal writing books have come out in recent years that compile excerpts from well-written briefs and motions filed by prominent attorneys.⁶⁴

What King is suggesting is that we should actively look for such writing and then try to learn from it. This requires both conscious effort and a certain amount of humility, but doing so can pay off.

Think about the last really good brief you read, and then actively (rather than passively) assess what the author did that worked. Maybe it was the word choice or tone; maybe the writer used analogy in an unexpected way; maybe she did something unique with structure or formatting; or maybe it was something else entirely. Actively identifying particular techniques that worked is critical, because this is what facilitates the sort of “stylistic blending” that can improve your own style.⁶⁵

This is the thing that the law students I described at the outset are often trying to do. The difference is that, with the benefit of experience, we’re in a better position to find and recognize the good models.

Note again King’s reference to the “learning writer,” a description that contemplates deliberate and ongoing improvement. Attorneys can—and should—embrace this as an aspirational ideal too.

About the Author

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⁶⁴ Two that have resonated with my students are: ROSS GUBERMAN, *POINT MADE: HOW TO WRITE LIKE THE NATION’S TOP ADVOCATES* (Oxford Press, 2d ed. 2014), and NOAH A. MESSING, *THE ART OF ADVOCACY: BRIEFS, MOTIONS, AND WRITING STRATEGIES OF AMERICA’S BEST LAWYERS* (Wolters Kluwer 2013).

⁶⁵ KING, *supra* note 8, at 147.

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Making Every Word Count: Using Strategic Editing to Increase the Readability of Your Appellate Brief

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A quiet revolution is afoot. With every passing year, the legal world becomes increasingly dependent on technology. Changes have been coming for decades: computers have replaced typewriters; electronic filing has replaced hand-delivery; and trial presentation software has replaced exhibit binders. At the trial level, these changes are patent.

Although more latent in the appellate context, changes are happening there too.¹ Although some appellate judges still print and review briefs in hard copy, many primarily read briefs on tablets.² Despite these changes, many appellate lawyers produce briefs the “old fashioned way,” eschewing technological advances that could improve the writing and editing process.

Utilizing technology to edit appellate briefs will improve your brief writing. There are a myriad of such technologies. This article introduces a single technology you can use to write and edit appellate briefs. You will learn about the concept of “readability” as well as how you can use the readability analytics embedded in Microsoft Word to edit your appellate briefs.

¹ George Nicholson, *An Environment of Change: A Vision of the Future of Appellate Practice and Process*, 2 J. APP. PRAC. & PROCESS 229, 229–30 (2000).

² Wayne Schiess, *Bouncing and E-Bouncing: The End of the Citational Footnote?*, 26 APP. ADVOC. 409, 411 (2014); see also Ellie Neiberger, *Judge-Friendly Briefs in the Electronic Age*, 89 FLA. BAR J. 46, 46 (2015) (noting the trend of judges in Florida “transition[ing] from reading case materials in paper format to reading them primarily on computer and tablet screens”).

I. Why does readability matter?

Readers, including judges, prefer writing that is clear, concise, and engaging.³ Ideally, your briefs should meet this preference. Appellate briefs perform multiple functions. They convey legal argument. Where the court denies oral argument, they may be the advocate's only communication with the court. The brief even suggests information about the advocate. Most judges consider "readable" writers to be more reliable.⁴ Both the law clerk and the judge will repeatedly reference and rely upon the brief. The brief alone can shape the court's decision.

Moreover, skilled lawyers adapt their writing to the intended audience.⁵ Legal writing is effective when the audience can understand the writer's message and use that information to facilitate legal decision-making.⁶ Writing that is readable by your intended audience is effective writing. Remember that you are addressing not only the judge, who presumably has significant legal experience, but also a law clerk who may have little experience. A skilled lawyer writes an appellate brief that is pleasing to the judge but comprehensible to the law clerk. The key to satisfying these two very different audiences is readability. If your brief is readable, you need not simplify the *substance*—you simply present that substance in the clearest possible style. In fact, using a readable writing style may

³ Lance N. Long & William F. Christensen, *Does the Readability of Your Brief Affect Your Chance of Winning?*, 12 J. APP. PRAC. & PROCESS 145, 162 (2011); see, e.g., Sean Flammer, *An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain Language*, 16 LEGAL WRITING 183, 184 (2010) (explaining a survey demonstrating that most judges favor plain language rather than stilted legalese); Bryan A. Garner, *Judges on Effective Writing: The Importance of Plain Language*, 73 MICH. B. J. 326, 326 (1994); Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51, 68–71 (1994) (describing a study showing that law students and staff comprehended contract and statutory language more when the writing was edited for readability).

⁴ See Long & Christensen, *supra* note 3, at 162.

⁵ See Mark Osbeck, *What is "Good Legal Writing" and Why Does it Matter?*, 4 DREXEL L. REV. 417, 433 (2012).

⁶ See *id.* at 427–28; CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 3 (5th ed. 2006) ("The importance of clarity in legal writing should be obvious: Your legal memorandum will not enlighten, nor will your brief persuade, unless the reader of each can understand it.").

effectively communicate more sophisticated substance than might otherwise be possible.

II. What is readability?

Readability and reading comprehension are distinct concepts that impact each other. The term “readability” means:

the sum total (including the interactions) of all those elements within a given piece of printed material that affect the success a group of readers have with it. The success is the extent to which they understand it, read it at an optimal speed, and find it interesting.⁷

In plain language, readability describes a text’s level of difficulty. Readability rates a text’s complexity in terms of word choice, sentence structure, and paragraph length. Using these criteria, you can estimate the education level typically required for a person to read the text without significant difficulty.⁸ For example, you can analyze the text of a book and determine what level of student could easily read that book based on its objective qualities.

Reading comprehension, in contrast, depends on both a text’s complexity and the reader’s characteristics (intelligence, background, and education). It measures whether a reader can understand a text’s intended meaning and draw the correct conclusions from it.⁹

Readability and comprehension are intertwined—many readers can comprehend a “readable” text—but the author significantly controls only one of the two.¹⁰ Revising and editing affects the readability of your appellate brief and is entirely in your control. Whether the clerk and judge will comprehend your argument, however, is less under your control. The reader’s level of comprehension is already fixed when that reader receives your brief. Consequently, it is particularly important to evaluate the readability of the brief prior to filing. Regardless of who reads a brief, the drafter can make conscious

⁷ See JEANNE S. CHALL & EDGAR DALE, READABILITY REVISITED: THE NEW DALE-CHALL READABILITY FORMULA 80 (1995) (quoting Edgar Dale & Jeanne Chall, *The Concept of Readability*, 26 ELEMENTARY ENG. 23, 23 (1949)).

⁸ See *id.*; RUDOLPH FLESCHE, MARKS OF READABLE STYLE: A STUDY IN ADULT EDUCATION 9 (1943).

⁹ See, e.g., Mostafa Zamanian & Pooneh Heydari, *Readability of Texts: State of the Art*, 2 THEORY & PRAC. LANGUAGE STUD., no. 1, 2012, at 43.

¹⁰ See FLESCHE, *supra* note 8.

decisions about word choice, sentence structure, and paragraph length. As an appellate advocate, you cannot control the law, the facts in the record, or the knowledge level and experience of the law clerks and judges. You can, however, control how readable your brief is—contouring it to specific needs of your audience and conveying information in a coherent, effective manner.

III. Do judges care about readability?

Many in the legal community believe so. Writing is a highly emphasized skill within the legal field. Legal writing is one of the first classes young lawyers take in law school. This is no accident—the American Bar Association requires both first year and upper level writing as part of its law school accreditation standards.¹¹ Legal writing is the subject of countless textbooks, articles, and continuing education programs.

Moreover, judges demand clear, understandable writing. In a series of interviews with legal writing expert Bryan Garner, United States Supreme Court Justices confirmed the importance of appellate briefs and the need for clear written advocacy.¹² Chief Justice John Roberts noted, “[t]he oral argument is . . . the most visible part of the [appellate] process—but the briefs are more important.”¹³ Putting a finer point on this issue, Justice Samuel Alito commented not only that it was important that lawyers write well, but that the “first quality” of an appellate brief should be “clarity.”¹⁴ The late Justice Antonin Scalia felt so strongly about clarity that he advised advocates to “[v]alue clarity above all other elements of style.”¹⁵

The Supreme Court is not alone. A 2011 survey of 666 federal and state judges, appellate and trial court, found that judges generally viewed writing as equally important, if not more important, than oral

¹¹ ABA Standards and Rules of Procedure for Approval of Law Schools, Standard 303(a)(2) (2017–2018) (requiring a school’s program of legal education to include “one writing experience in the first year and at least one additional writing experience after the first year”).

¹² *Interviews with United States Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING, no. 13, 2010, at 1–182.

¹³ *Id.* at 6.

¹⁴ *Id.* at 170.

¹⁵ ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 107 (Thomson/West ed. 2008).

advocacy.¹⁶ If you agree that a responsibility of an advocate is to meet the audience's expectations, judges have made their demand known: be clear. And readability is the key to achieving clarity.

IV. How do I measure readability?

Researchers have created tests to predict the reading difficulty associated with reading texts.¹⁷ These tests typically calculate readability based on the relationship between aspects of the text (including the average number of syllables per word, words per sentence, and sentences per paragraph) and “text difficulty,” as measured by reading comprehension and speed.¹⁸ The theory behind readability tests is that “shorter words, shorter sentences, words with fewer syllables, and words that are used more frequently are easier to read.”¹⁹ The less mental gymnastics required of the reader, the easier a piece of writing is to read and the lower the grade level required to comprehend the writing.²⁰ Even where the subject matter is complex, the concept will be accessible to a wide array of readers if it is presented in a readable way.

Readability tests date back to 1975, when the United States Navy charged researcher J. Peter Kincaid and his team with assessing the

¹⁶ Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STANFORD L. REV. 317, 325 (2011); see also Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247 (2009).

¹⁷ See Long & Christensen, *supra* note 3; William H. DuBay, *The Principles of Readability* 1, 2–3 (Research, Aug. 25, 2004), <http://www.impact-information.com/impactinfo/readability02.pdf>; see also Jeanne S. Chall, *The Beginning Years*, in READABILITY: ITS PAST, PRESENT, AND FUTURE 2, 2–4 (Beverly L. Zakulak & S. Jay Samuels eds., 1988).

¹⁸ See Louis J. Sirico, Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, 26 QUINNIPIAC L. REV. 147, 147 (2007); CHALL & DALE, *supra* note 7, at 79–80.

¹⁹ John C. Begeny & Diana J. Greene, *Can Readability Formulas Be Used to Successfully Gauge Difficulty of Reading Materials?*, 51 PSYCH. IN THE SCHS. 198, 198 (2013); see also Bradford R. Connatser, *Last Rites for Readability Formulas in Technical Communication*, 29 J. TECH. WRITING & COMM. 207, 271–87 (1999).

²⁰ See generally RUDOLF FLESCHE, HOW TO WRITE PLAIN ENGLISH: A BOOK FOR LAWYERS AND CONSUMERS (HarperCollins eds., 1st ed. 1979).

difficulty of technical manuals.²¹ Manuals are of little use if sailors who read them could not understand them. The importance of readability soon infiltrated into other areas. States began to require that automobile insurance policies be written at a ninth-grade or below reading level.²² In 2010, President Obama signed the Plain Writing Act—a law obligating federal agencies to use “plain writing.”²³

You can assess the readability of your appellate brief as you write and edit. Microsoft Word contains two built-in readability tests: (1) the Flesch Reading Ease Test; and (2) the Flesch-Kincaid Grade Level Test. Although the two tests use the same core measures (word length and sentence length), the tests weigh various factors differently.

How do these two tests work? The Flesch Reading Ease Test measures “the number of syllables and the number of sentences for each 100-word sample.”²⁴ Scores range from 0–100. Scores from 0–30 indicate “very difficult” text, scores from 60–70 indicate “standard” text, and scores from 90–100 indicate “very easy” text.²⁵ The higher the reading ease score, the easier a text is to read and understand.

On the other hand, the Flesch-Kincaid Grade Level Test is a recalibration of the Flesch Readability Ease Test. The Flesch-Kincaid Grade Level Test rates a text’s readability on a United States grade school level.²⁶ Scores from 0–30 equate to a college graduate reading level, scores from 60–70 equate to an eighth-grade student reading level, and scores from 90–100 equate to a fifth-grade student reading level.²⁷

Translating these metrics into more familiar terms, *Reader’s Digest* magazine has a readability index of about 65, *Time* magazine scores about 52, and the Harvard Law Review has a general readability score

²¹ See J. Peter Kincaid et al., *Derivation of New Readability Formulas (Automated Readability Index, Fog Count and Flesch Reading Ease Formula) for Navy Enlisted Personnel* (CNTECHTRA Research Branch Report 1975).

²² See, e.g., FLA. STAT. § 627.4145.

²³ Plain Writing Act of 2010, Pub. L. No. 111-274, § 4(b), 124 Stat. 2861 (2010).

²⁴ See DuBay, *supra* note 17, at 21.

²⁵ *Id.* at 21–22.

²⁶ See Zamanian & Heydari, *supra* note 9, at 46.

²⁷ See DuBay, *supra* note 17, at 21–22.

in the low 30s. Legal writing experts recommend a readability score in the 30s for legal writing.²⁸

V. How does readability influence litigation?

Effective writing is accessible. A complicated or lengthy text will lose the reader. A simple text invites the reader in. Assessing readability scoring as you write and edit allows you to determine whether you are communicating your ideas as clearly, concisely, and accessibly as possible. When the brief is more readable, the law clerk and judge will continue to read and will engage with the text by agreeing or disagreeing with the text's thesis or by proposing new arguments.²⁹ In other words, readable briefs cause the law clerk and judge to *think*.

Problems occur when texts are not readable. Writing loses its impact and purpose if it is inaccessible to its intended audience. A contract loaded with legalese may lead to a person signing it without fully understanding her obligations or the contract's terms.³⁰ A reader may stop reading a news article within the first few sentences if he finds it too hard to read. A clerk may put down your brief and pick up your opponent's brief. A judge may miss the significance of your argument. Editing for readability can prevent these unsatisfactory outcomes.

Although readability tests only estimate a text's readability, the score signals when you may be missing the mark for your target audience.³¹ Readability is not indicative of a text's quality, organization, or substantive difficulty.³² At the very least, readability scores can be a helpful tool to judge the approximate difficulty of your

²⁸ Ross Guberman, *Can Computers Help You Write Better?*, LEGAL WRITING PRO, <https://cbaclelegalconnection.com/2011/08/ross-guberman-can-computers-help-you-write-better/> (last visited Mar. 5, 2019).

²⁹ Osbeck, *supra* note 5, at 442.

³⁰ See Kimble, *supra* note 3, at 69–72.

³¹ See Begeny & Greene, *supra* note 19.

³² AGENCY FOR HEALTHCARE RES. AND QUALITY, *Tip 6. Use Caution With Readability Formulas for Quality Reports*, <https://www.ahrq.gov/talkingquality/resources/writing/tip6.html> (last visited Dec. 19, 2018) (“A grade-level score tells you nothing about whether your quality report will attract and hold people’s attention, whether the content is organized in an effective way, or whether people will be able to understand and use it.”).

brief so you can consider reducing the difficulty as you edit your writing.³³

VI. How do I score my brief's readability?

Microsoft Word users can employ analytics available in the program to determine the readability level of text. The following instructions are for Word 2016 for Windows. Other versions work in a similar way. If you are using a different version of Word, simply type "Test your document's readability" in the help box for instructions.

First, click on "File" at the top-left of your screen.

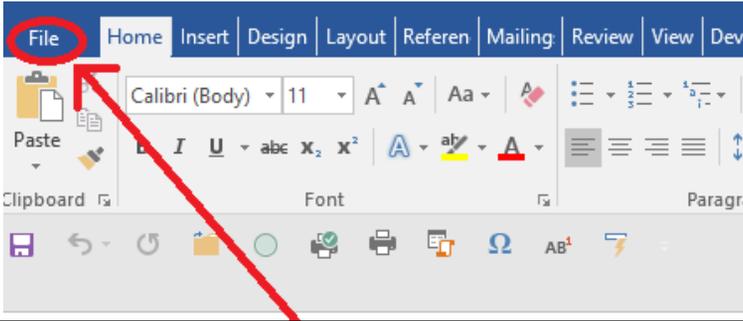
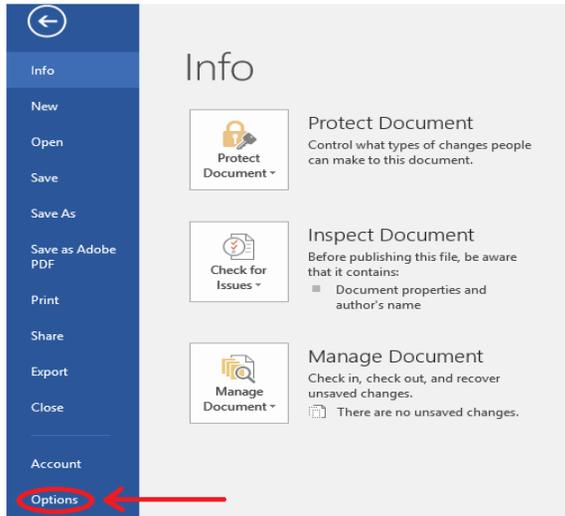


Image indicating how to access "File" menu in Microsoft Word

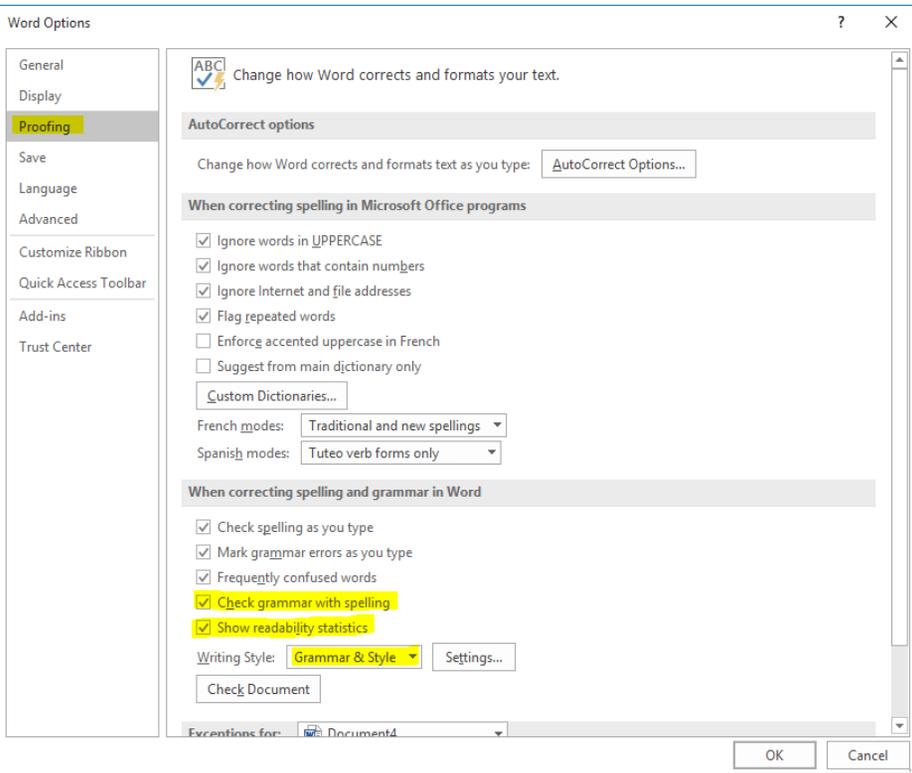
Then, click on "Options."



How to access "Options" from "File" menu in Microsoft Word

³³ Long & Christensen, *supra* note 3, at 152; Norman Otto Stockmeyer, *Using Microsoft Word's Readability Program*, 88 MICH. B. J. 46, 47 (2009).

Toggle to the “Proofing” tab. Your screen should look like the one below. Under the “When correcting spelling and grammar in Word” heading, make sure your settings are like these:



Screenshot outlining settings for “Proofing” in Microsoft Word

With the “Show readability statistics” option checked, you will get a readability report after you conclude a spell check.³⁴ To run a spell check, click on “Review” and choose “Spelling and Grammar” or, hit the F7 key. After the spell check concludes, Word will show you the readability report.

³⁴ Note that you must run a complete spell check to receive the report.

Below is an image of what this report will look like:

Counts	
Words	3
Characters	14
Paragraphs	1
Sentences	1
Averages	
Sentences per Paragraph	1.0
Words per Sentence	3.0
Characters per Word	4.3
Readability	
Passive Sentences	0%
Flesch Reading Ease	90.9
Flesch-Kincaid Grade Level	1.3

Screenshot of example report

VII. How can I edit to improve my brief's readability?

The key to readability is brevity. Brevity can be difficult, especially in a complex legal brief with multiple issues. The trick is to focus on removing unnecessary verbosity at every stage of writing—evaluating each paragraph, sentence, and word. Although this may seem arduous, focusing on a few simple techniques can immediately boost your readability score:

- Use simpler, shorter words. Scan through your brief looking for any word over two syllables long. Ask whether a simpler and shorter word would suffice. A longer word may be acceptable if it replaces a phrase. Avoid legalese and jargon that require explanation or cause confusion. Try to use simple words that convey a lot of meaning, including good active verbs in lieu of overusing adjectives and adverbs.

- Use simpler, shorter sentences. Scan through your brief looking for any sentence over two lines long. Challenge yourself to either reduce the number of words or to split the sentence into multiple, shorter sentences. Look for ways to move long sentences into shorter pieces of information, such as changing the sentence into a bulleted list.
- Convert passive voice to active voice. Passive voice can be intentional and effective but it should not be your default writing style. Passive voice inherently lengthens sentences because it adds a form of the verb “to be” to the sentence. Passive voice also creates confusion by hiding the action.
- Add headings. Headings create natural breaks in your writing. They make a long brief seem shorter, as they provide natural rest points for the reader. A ten-page brief becomes five two-page briefs. Headings also keep your writing organized. If you ramble or go on tangents, headings get you back on track. If you struggle to add a heading to a section of your brief, it may be because you have some off-topic material that you could delete or at least move to a different section of the brief.
- Use simpler, shorter paragraphs. Scan through your brief looking for any paragraph that is more than half a page long. Ask yourself what the thesis of that paragraph is. Read each sentence to see if it relates to the thesis. If it does not, reorganize or consolidate redundant sentences. Find natural breaks in your writing and mark them with hard returns.

If you apply just these five techniques to your appellate brief, you will see an immediate difference in your readability score. Test it and see! Take a brief you have filed, extract a few pages, set up Word to test readability, run spellcheck to get your readability score, edit the document, and then run spellcheck again to get the new readability score. You will be amazed how much more readable your brief is by using these simple editing techniques.

Of course, a score is just a score. It is only a general guideline to give you a sense of how easy your brief will be for the law clerk or judge to read. Put the edited section away and read it again a week later. Then read your original text. You will be surprised how much clearer that text is after editing. The real test is not the score in the abstract but the finished brief. If it is clearer, you have achieved your goal.

By following these few simple suggestions, your readability scores will improve dramatically. More importantly, your appellate briefs

will be more effective. Take advantage of the technology to improve your written advocacy.³⁵

About the Authors

Veronica J. Finkelstein is a 2004 graduate, with honors, of the Emory University School of Law and 2001 graduate, with dual distinction and dual honors, of the Pennsylvania State University. Finkelstein currently works as an Assistant United States Attorney with the U.S. Department of Justice in Philadelphia, Pennsylvania. She has served as the Civil Division Training Officer and Paralegal Supervisor for the civil division prior to being selected as Senior Litigation Counsel. She has taught at the National Advocacy Center on ethics, appellate advocacy, legal writing, and trial practice. In 2014, she was awarded the Executive Office of United States Attorneys Director's Award for Superior Performance as a Civil Assistant United States Attorney. Finkelstein currently serves as adjunct faculty of law at Drexel Law, Emory Law, and Rutgers Law. She thanks Drexel Law student and United States Attorney's Office legal intern Nicole E. Crossey for her assistance on this article.

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³⁵ For those keeping score at home, this article scores a 45.6 on the Flesch Reading Ease Test, which equates to a tenth grade reading level. It was significantly less readable before we edited it using the discussed techniques, and we freely admit that we could continue to improve its readability!

Citational Footnotes: Should Garner Win the Battle Against the In-Line Tradition?

Peter M. Mansfield
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Eastern District of Louisiana

I. Introduction

Let's get the question of author bias out of the way at the outset. I really like Bryan Garner's advice on legal writing and oral advocacy. I attended his "Winning Brief" seminar more than a dozen years ago, purchased and read his books, recommended his work when teaching advocacy courses for continuing legal education, subscribed to his daily emails, and regularly relied on his advice to improve my own writing and edit the written work of my colleagues in the United States Attorney's Office. Perhaps in a subconscious effort to temper that otherwise unbridled enthusiasm, my high level of appreciation for Garner's expertise has always been more-than-negligibly offset by disagreement with one of his hallmark recommendations for brief writers—I've never liked *The Winning Brief*¹ tip, "Put all your citations in footnotes."²

¹ BRYAN A. GARNER, *THE WINNING BRIEF* 139 (2d ed. 2004) (tip #22; in the 2014 third edition, it is tip #24). And, yes, I appreciate the irony of criticizing this advice in a journal article that requires citational footnotes. The difference between footnoted academic writing and non-academic briefs and opinions is discussed *infra*, Sec. III. Since this citational footnote has now turned substantive, I'll also use this opportunity to register my disagreement with Garner's near-categorical rejection of substantive footnotes in brief writing. See ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 129–31 (Thomson/West ed. 2008) (debating pros and cons).

² As one law professor similarly explained: "Garner[']s *Winning Brief*] mixes ninety-nine excellent writing tips with one real clunker: he suggests that briefs should use footnotes instead of citation sentences." Mark E. Steiner, *Without Precedent: Footnotes in Judicial Opinions*, 12 APP. ADVOC. 3, 4 (1999); see also David W. Holman, *Citational Footnotes: Why Bryan Garner is Wrong*, 21 APP. ADVOC. 15 (2008) ("Although I agree with much that Mr.

So, who cares what I think? Just continue to use in-line citations, let judges and lawyers cite the way they like, and keep your inconsequential opinions to yourself, right? In the main, yes. I've never used citational footnotes in my own district- or appellate-court writing, nor returned an edited draft to a colleague to move citations from footnotes back into the body (though citational footnoters are, fortunately, in a small minority in the division I supervise). While tempted to continue in my in-line citation bliss and leave the citational-footnote criticisms to those who have already written cogently on the topic,³ several factors influenced the desire to explore the topic in greater detail.

First, in my own unscientific assessment, citational footnotes have begun appearing with greater frequency in the district-court opinions where I primarily practice, the Eastern District of Louisiana,⁴ and in

Garner has written about legal writing, I strongly disagree with what he has said about use of citational footnotes.”).

³ See Steiner and Holman, *supra* note 2; see also Richard A. Posner, *Against Footnotes*, CT. REV. 24 (2001); Betsy Brand Six, *In Defense of the Stick-in-the-Mud: A Case for In-Text Footnotes*, 85 J. KAN. B. ASS'N 12 (2016); Rich Phillips, *The Great Footnote Debate (A Response to Bryan Garner)*, TEX. APP. WATCH (Jan. 28, 2014), <https://www.texasappellatewatch.com/2014/01/the-great-footnote-debate-a-response-to-bryan-garner.html>.

⁴ By my count, one-quarter (3/12) of the active district court judges in the Eastern District of Louisiana use citational footnotes.

both unattributed, unpublished *per curiam*⁵ and attributed opinions⁶ from the Fifth Circuit Court of Appeals.⁷ Second, the footnote vs. in-line citation debate has evoked some strong opinions from talented and respected judges, professors, and attorneys;⁸ it doesn't appear to be going away any time soon either.⁹ Finally, as a matter of intellectual curiosity, I was drawn to re-examine, then hopefully articulate a rational basis for what has always been an instinctual, gut-level dislike of the citational footnote and, in the process, genuinely engage the arguments in its favor.

⁵ The following Fifth Circuit *per curiam* opinions from the first ten months of 2018 use citational footnotes. *See, e.g.*, *Wrecker Works, LLC v. City of Aberdeen, Miss.*, No. 17-60810, 2018 WL 4523157 (5th Cir. Sept. 20, 2018); *Waddleton v. Rodriguez*, No. 16-41154, 2018 WL 4292175 (5th Cir. Sept. 7, 2018); *Rowan Court Subdivision 2013 Ltd. P'ship v. Louisiana Hous. Corp.*, No. 17-30833, 2018 WL 4191027 (5th Cir. Aug. 31, 2018); *Rivas De Ortega v. Sessions*, No. 17-60443, 2018 WL 4191099 (5th Cir. Aug. 31, 2018); *United States ex rel. Jamison v. Del-Jen, Inc.*, No. 17-10409, 2018 WL 4055235 (5th Cir. Aug. 24, 2018); *Melancon v. Lamorak Ins. Co.*, No. 18-30113, 2018 WL 3612543 (5th Cir. July 26, 2018); *Kopp v. Klein*, 894 F.3d 214 (5th Cir. 2018); *Cadena v. Ray*, 728 F. App'x 293 (5th Cir. 2018) (unpublished); *United States v. Hill*, 716 F. App'x 327 (5th Cir. 2018) (unpublished); *Clark v. Deutsche Bank Nat'l Tr. Co.*, 719 F. App'x 341, 343 (5th Cir. 2018) (unpublished); *Kim v. Hospira, Inc.*, 709 F. App'x 287, 289 (5th Cir. 2018) (unpublished).

⁶ Approximately 20% of the current judges on the Fifth Circuit Court of Appeals (5/26) use citational footnotes. Interestingly, the court's Practitioner Guide counsels that "footnotes should be used sparingly," though that may, in context, refer exclusively to substantive footnotes. *Practitioner Guide to the U.S. Court of Appeals for the Fifth Circuit*, <http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/documents/practitionersguide.pdf>.

⁷ Coincidentally, Garner's preference for citational footnotes finds its root in the opinions of two former Fifth Circuit judges, John Minor Wisdom and Alvin Rubin, whose opinions Garner admired during his term as a clerk on that court. *See* Bryan A. Garner, *The Citational Footnote*, 7 SCRIBES J. LEGAL WRITING 97 (2000).

⁸ *See supra* note 3.

⁹ *See* William Glaberson, *Legal Citations on Trial In Innovation v. Tradition*, N.Y. TIMES (July 8, 2001), <https://www.nytimes.com/2001/07/08/us/legal-citations-on-trial-in-innovation-v-tradition.html> (summarizing the debate); Kristen J. Hazelwood, *Citations: Suggestions for Citing Authority Without Distracting the Reader*, BENCH & BAR MAG. 17 (May 2014).

In section II, this article addresses Garner’s justifications for citational footnotes, then examines in section III the counterarguments typically raised in response, followed by Garner’s rebuttals, if any. Next, in section IV, the article surveys guidance from the United States Supreme Court and the Department of Justice Solicitor General’s Office, statistical studies, and trends from the most recently confirmed circuit judges to gauge the degree of current acceptance or rejection of citational footnotes. Section V includes my own critiques of the practice. The article concludes in section VI with some practical brief-writing recommendations to enhance readability in the in-line tradition.

II. Why citational footnotes?

Over the past 18 years, Garner has extensively written in favor of citational footnotes.¹⁰ His own writings in spirited defense of the method are recommended reading for those previously unaware of the disputed tip, or perhaps now willing to reconsider a tried-and-true citation preference. While his numerical justifications for the practice have expanded and contracted over time, review of Garner’s published guidance on the topic reveals fairly consistent reliance on the following claimed advantages of citational footnotes.

Shortened sentence length: Citations appearing in-line between sentences or, worse yet, in the middle of a sentence unnecessarily elongate sentence length, bogging down the pace and flow of written work. Weakened connections between sentences due to in-line citations, according to Garner, tempt writers to “repeat the relevant part of the preceding sentence in the one that follows. The sentences get longer and longer and more and more repetitive.”¹¹ The overall quality of the work, in turn, suffers.

¹⁰ GARNER, *THE WINNING BRIEF*, *supra* note 1, at 139–47; SCALIA & GARNER, *supra* note 1, at 132–33; Garner, *The Citational Footnote*, *supra* note 7; Bryan A. Garner, *The Citational Footnote*, 13 APP. ADVOC. 2 (2000); Bryan A. Garner, *Clearing the Cobwebs from Judicial Opinions*, 38 CT. REVIEW 4 (2001); Bryan A. Garner, *Afterword*, 38 CT. REV. 28 (2001); Bryan A. Garner, *Textual Citations Make Legal Writing Onerous, for Lawyers and Nonlawyers Alike*, AM. BAR ASS’N J. (Feb. 2014), http://www.abajournal.com/magazine/article/textual_citations_make_legal_writing_onerous_for_lawyers_and_nonlawyers/; Bryan A. Garner, *The Future of Appellate Advocacy*, 54 DUQ. L. REV. 311, 338–43 (2016).

¹¹ GARNER, *THE WINNING BRIEF*, *supra* note 1, at 143.

More coherent and forceful paragraphs: Punchier sentences lead to shorter, more coherent and forceful paragraphs.¹² “Subordinating citations allows greater variety in sentence structure”¹³ “Variety adds interest. And the sentences connect smoothly, leading to paragraphs that are well-composed exposition rather than an assemblage of disjointed sentences.”¹⁴

*Greater efficiency in conveying ideas:*¹⁵ Shorter sentences and tighter paragraphs yield greater efficiency in getting the main point across to the reader.

Idea-focused, not number-focused arguments: Full citations consist of lots of numbers: reporter volumes, pin-cite pages, court identifiers, and dates. “When cases are cited in text, invariably the most prominent characters on the page are the numbers, which draw undue attention.”¹⁶ The proliferation of numbers throughout a paragraph of legal argument distracts from the underlying, important ideas the writer seeks to convey.¹⁷

Greater flexibility to use string citations: “With footnoted citations, the whole debate over string citations becomes moot.”¹⁸ This is so, Garner argues, because string citations in a citational footnote “become relatively harmless . . . if they’re out of the way” of the main text.¹⁹ Garner is himself ambivalent on string citations—“I don’t favor them, but I’m not adamantly opposed to them either”²⁰—but favors citational footnotes as a means of eliminating their perceived “sinfulness” in the eyes of some readers.²¹

Exposes poor writing and reasoning in the main text: “[P]utting citations in footnotes allows you to strip down an argument and focus

¹² Garner, *Clearing the Cobwebs from Judicial Opinions*, *supra* note 10, at 6.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ GARNER, *THE WINNING BRIEF*, *supra* note 1, at 142.

¹⁶ Garner, *Clearing the Cobwebs from Judicial Opinions*, *supra* note 10, at 7.

¹⁷ Garner, *Textual Citations Make Legal Writing Onerous, for Lawyers and Nonlawyers Alike*, *supra* note 10 (“[V]olume numbers and page numbers . . . clutter lawyers’ prose. These superfluous characters amount to useless detail that distracts the reader from the content.”).

¹⁸ Garner, *Clearing the Cobwebs from Judicial Opinions*, *supra* note 10, at 12.

¹⁹ Garner, *The Citational Footnote*, *supra* note 10, at 4.

²⁰ *Id.*

²¹ GARNER, *THE WINNING BRIEF*, *supra* note 1, at 142.

on what you're really saying."²² Brief writers "can't camouflage poor writing—or poor thinking—in a flurry of citations."²³ "Stripping out [citations] immediately reveals threadbare ideas and underdeveloped paragraphs, as well as other problems."²⁴

Fuller discussion of caselaw: Counterintuitive though it may seem, Garner asserts that "footnoting citations ordinarily results not in the subordination or even the hiding of caselaw, but in better discussions of it."²⁵ In the in-line tradition, "[c]itations have displaced reasoning."²⁶

Greater accessibility in legal writing: Citational footnotes help "make the law more accessible to more people"²⁷ and "more closely follow[] the practices of the most accomplished nonfiction writers of our day."²⁸ Garner also claims that, as an added bonus, citational footnotes encourage the author's clear thinking: "[I]f you can't explain the case to a nonlawyer, the chances are that you don't understand it yourself."²⁹

*Cleaner looking pages:*³⁰ This is self-explanatory.

III. Why not?

Garner's proposal for citational footnotes has yielded criticism from legal-writing instructors,³¹ judges,³² and practitioners.³³ The

²² *Id.* at 144.

²³ Garner, *The Citational Footnote*, *supra* note 10, at 4; Bryan A. Garner (@BryanAGarner), TWITTER (Dec. 13, 2017 @ 9:35am), <https://twitter.com/BryanAGarner/status/940996105311055872> ("For most legal writers, it's embarrassing to the point of mortification to move their citations to footnotes: the flaws in the prose come immediately into view. The bibliographic camouflage is removed.").

²⁴ Garner, *Clearing the Cobwebs from Judicial Opinions*, *supra* note 10, at 9.

²⁵ *Id.* at 10.

²⁶ *Id.* at 11.

²⁷ *Id.* at 17.

²⁸ SCALIA & GARNER, *supra* note 1, at 132–33.

²⁹ Garner, *Clearing the Cobwebs from Judicial Opinions*, *supra* note 10, at 17.

³⁰ Garner, *The Citational Footnote*, *supra* note 10, at 4.

³¹ Steiner, *supra* note 2; K.K. DuVivier, *Footnote Citations?*, 30 COLO. LAW. 47 (2001).

³² SCALIA & GARNER, *supra* note 1, at 133–35; Posner, *supra* note 3, at 24.

³³ Holman, *supra* note 2, at 15; Phillips, *supra* note 3; Jason Steed, "Rejecting the Guru's Advice," THOMSON REUTERS: LEGAL SOLUTIONS BLOG, PRACTICE OF

opposition points vary from critic to critic, but the common critiques—and, if available, Garner’s replies—follow.

Citations convey important source material worthy of in-line inclusion: In a book on advocacy co-authored with Garner, the late Justice Scalia asserted: “[T]he careful lawyer wants to know, while reading along, what the authority is for what you say.”³⁴ And again, he states: “[L]awyers must evaluate statements not on the basis of whether they make sense but on the basis of whether some governing authority said so.”³⁵ “In a brief, citations are not merely incidental to the main purpose of the documents; they are integral to that purpose.”³⁶ Given the importance of source authorities in legal writing, one practitioner argues that “moving citations to footnotes moves part of the argument to the footnotes.”³⁷

Citational footnotes cause bouncing back and forth: Because the “who” and “when” of your legal authorities are central to the strength and persuasiveness of your overarching argument,³⁸ subordinating citation information to footnotes “would force the eyes to bounce repeatedly from text to footnote.”³⁹ Instead of improving the readability of legal writing, citational footnotes force the reader “to go up and down on the page, jumping from text to footnote like a

LAW (Jan. 29, 2014), <http://blog.legalsolutions.thomsonreuters.com/practice-of-law/rejecting-gurus-advice/>.

³⁴ SCALIA & GARNER, *supra* note 1, at 134.

³⁵ *Id.*; see also Steed, *supra* note 33; Phillips, *supra* note 3 (“[T]he material in the citation is just as much a part of the argument as the statement of the law drawn from the source.”); Holman, *supra* note 2, at 16 (“If you strip away the authority [to footnotes], you strip away the legal reasons for the opinion.”).

³⁶ Bradley G. Clary, *To Note or Not to Note*, 10 PERSP. 84, 85 (2002); see also DuVivier, *supra* note 31, at 47 (“When the citation immediately follows a proposition, significant information about the weight of the authorities can be determined at a glance.”).

³⁷ Rich Phillips, *Whither Citations?*, TEX. APP. WATCH (Feb. 27, 2012), <https://www.texasappellatewatch.com/2012/02/whither-citations.html>; see also Alexa Z. Chew, *Citation Literacy*, 70 ARK. L. REV. 869, 875 (2018). (“[C]itations provide important information to legal readers using far fewer words than prose would to describe the provenance of each statement of law.”).

³⁸ See *supra* notes 34–37 and corresponding text.

³⁹ SCALIA & GARNER, *supra* note 1, at 134.

grasshopper.”⁴⁰ As Judge Posner argued, citational footnotes “prevent continuous reading” and “make the reader work harder for the same information” typically available in-line.⁴¹

Garner acknowledges the prior two criticisms, but counters that critical source information, such as the name of the case and deciding court, should be woven into the body of the main text.⁴² If executed correctly, important source information remains in the body of the text, while less-important, numerical, bibliographic information is subordinated to the citational footnote.⁴³

Judges do not like citational footnotes: Though the number of citational-footnoting judges may be growing, anecdotal evidence suggests that they remain in the minority.⁴⁴ “Judges are uncomfortable with change, and it is a sure thing that some crabby judges will dislike this one.”⁴⁵ Since appellate judges prefer in-line citations, lawyers should write briefs the way their audience wants to read them.⁴⁶ Garner reluctantly agrees: “[K]now your audience. Some judges say they don’t like citations in footnotes.”⁴⁷ If you know that’s the case, “heed the judge’s preference.”⁴⁸

In-line citations are not distracting and are typically skipped over: Justice Scalia disputed Garner’s assertion that in-line citations unduly tax the reader: “Lawyers are used to skipping over [citation] signals quickly and moving on to the next sentence.”⁴⁹ Judge Posner agrees: “Legal professionals are accustomed to reading citations in

⁴⁰ Holman, *supra* note 2, at 15.

⁴¹ Posner, *supra* note 3, at 24.

⁴² GARNER, *THE WINNING BRIEF*, *supra* note 1, at 144 (“[Y]ou generally shouldn’t just footnote naked propositions of law.”).

⁴³ Garner, *The Citational Footnote*, *supra* note 7, at 97; Garner, *Clearing the Cobwebs from Judicial Opinions*, *supra* note 10, at 15.

⁴⁴ *See infra* Sec. IV.

⁴⁵ SCALIA & GARNER, *supra* note 1, at 134–35.

⁴⁶ Steed, *supra* note 33; Phillips, *supra* note 3 (“If the judges are saying they’d prefer citations in the text, then legal writers should put them in the text. Otherwise, we risk annoying the only audience that matters.”); Clary, *supra* note 36, at 85 (“If a given judge likes citations in footnotes, use them. If the judge does not like citations in footnotes, then do *not* use them.”).

⁴⁷ GARNER, *THE WINNING BRIEF*, *supra* note 1, at 144.

⁴⁸ *Id.* at 145.

⁴⁹ SCALIA & GARNER, *supra* note 1, at 134; *see also* DuVivier, *supra* note 31, at 47 (“[L]egally educated audiences do get used to citations and skip over them when they interfere with readability.”).

text; moving citations to footnotes will not make reading opinions any easier for them.”⁵⁰ Garner counters that “it’s easier to skip over a superscript than to skip over two or three lines of number-laden type, especially when you know that nothing of any substance will appear in a footnote.”⁵¹

Citational footnotes hinder e-reading of briefs: This more-recent objection grows directly from the technological changes and improvements impacting how courts and judges’ chambers process and review legal writing. Many judges now read (or at least have available to them) electronic copies of briefs on portable tablet computers with hyperlinks generated for both record citations and legal authorities.⁵² This technological advance creates a problem for citational footnoters. Specifically, accessing citational footnotes on an e-reading device taxes the reader not only with a potential diversion of the eyes from the main text, but with a manual scroll-down as well.⁵³ One practitioner complained that “footnotes are even more annoying on a tablet than they are on paper.”⁵⁴ Another agreed that, for ease of

⁵⁰ Posner, *supra* note 3, at 24.

⁵¹ Garner, *Textual Citations Make Legal Writing Onerous, for Lawyers and Nonlawyers Alike*, *supra* note 10.

⁵² Phillips, *supra* note 3; Raymond P. Ward, *The Never Ending Debate Over Citational Footnotes*, THE NEW LEGAL WRITER (Feb. 7, 2014), <http://raymondward.typepad.com/newlegalwriter/2014/02/footnotes.html>; Hazelwood, *supra* note 9, at 16; Six, *supra* note 3, at 12; Peter W. Martin, *If the Judge Will be Reading My Brief on a Screen, Where Should I Place My Citations?*, CITING LEGALLY (Apr. 8, 2014, 9:35 PM), <http://citeblog.access-to-law.com/?p=149>; Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC: JALWD 1, 11 (2015) (“[T]here is growing evidence that judges are increasingly reading cases and briefs on screens.”); Mary Beth Beazley, *Writing (and Reading) Appellate Briefs in the Digital Age*, 15 J. APP. PRAC. & PROCESS 47, 48 (2014) (“In the future, more and more of us will be using more and more digital sources for our reading and writing, regardless of whether or not digital reading is more effective.”); Rory D. Cosgrove, *Here to Stay: Effect of Digital Technology on Reading and Writing Appellate Briefs*, DRI FOR THE DEFENSE, Feb. 2018 (“As appellate judges increasingly choose to read briefs digitally, lawyers must learn how best to write and design briefs to accommodate these differences.”).

⁵³ Six, *supra* note 3, at 12; Phillips, *supra* note 3.

⁵⁴ Phillips, *supra* note 3; Cosgrove, *supra* note 52 (“Avoid footnotes: They are even more distracting and difficult to track when reading digitally.”).

use, hyperlinks need to be “as close as possible to the material supported by the hyperlink.”⁵⁵ Readers “don’t want to scroll down the page to find the hyperlink.”⁵⁶

Garner responds: “There’s nothing about on-screen reading that makes in-line citations preferable. They’re as ghastly on the screen as they are on the page.”⁵⁷

Citational footnoting is more labor intensive: Given the importance of precedent in legal writing,⁵⁸ drafting with citational footnotes requires greater effort because “you can’t simply paste quotations and citations into your writing.”⁵⁹ Garner counters that this extra effort is offset by the clarity of purpose citational footnotes foster,⁶⁰ and the greater accessibility of the final written product.⁶¹

Legal writing for lay people is a quixotic pursuit: Since lay people don’t typically read legal writing, why bother with the extra effort to

⁵⁵ Ward, *supra* note 52.

⁵⁶ *Id.*; Martin, *supra* note 52 (In-line citations are “the only way, in an electronically filed brief, to assure that one’s citations are seen together with the textual material to which they relate.”); Margolis, *supra* note 52, at 25 (“Scrolling up and down between text and footnote is cumbersome on an electronic device, and hyperlinks are strongly preferable in the body of the text. Any legal writer who has considered the issue of electronic reading has concluded that citations are best placed in text.”).

⁵⁷ Garner, *The Future of Appellate Advocacy*, *supra* note 10, at 343. Garner’s response appears to focus more on the appearance of electronic citational footnotes, rather than the ease of utility for an e-reader. *See supra* corresponding text and *infra* Sec. V. In Garner’s defense, his somewhat dismissive and conclusory observation came in a 2016 lecture devoted to a number of writing tips, not in one of his articles devoted exclusively to citational footnotes.

⁵⁸ *See supra* notes 34–37 and corresponding text.

⁵⁹ GARNER, THE WINNING BRIEF, *supra* note 1, at 142; *see also* SCALIA & GARNER, *supra* note 1, at 133 (noting that citational footnoting “concededly makes greater demands on the writer . . .”); Wayne Schiess and Elana Einhorn, *Bouncing and E-Bouncing: The End of the Citational Footnote?*, 26 APP. ADVOC. 409, 418 (2014) (“So the real question is why few writers execute citational footnotes as Garner recommends. We think we know one reason: it’s hard.”).

⁶⁰ Garner, *Clearing the Cobwebs from Judicial Opinions*, *supra* note 10, at 12; SCALIA & GARNER, *supra* note 1, at 133.

⁶¹ *Id.*; GARNER, THE WINNING BRIEF, *supra* note 1, at 142.

make it more accessible to them?⁶² Former Fourth Circuit Judge J. Michael Luttig observed that “the lay public still won’t read legal opinions” because “[t]hey’re too complex, laborious[,] and uninteresting”⁶³ Lay readers with a particular interest in a legal matter are more likely to have the pertinent legal writing interpreted by their counsel or the media rather than read it firsthand.⁶⁴ Garner claims that Judge Luttig’s criticism is “a retrograde view—that lawyers deal with matters that surpass most people’s ability to understand.”⁶⁵ “If lawyers . . . write only for and among themselves, the result bodes ill for our legal system, which is supposed to be accessible to everyone.”⁶⁶

Some practitioners further criticize Garner’s lay-accessibility justification for conflating the purposes of opinion writing with brief writing.⁶⁷ While the former should be accessible and comprehensible to the lay public, the latter seldom is.⁶⁸ “To the extent that the purpose of a court opinion is at least in part to educate the general public as to how the law looks at a particular subject, . . . [t]he typical member of the general public does not need detailed citation knowledge.”⁶⁹ In contrast, a brief writer writes not for the general public, but rather for the judge or judges assigned to the case. The

⁶² Posner, *supra* note 3, at 24 (“[V]ery few [laypeople] read judicial opinions or ever will do so.”).

⁶³ Glaberson, *supra* note 9 (quoting former Judge J. Michael Luttig).

⁶⁴ Holman, *supra* note 2, at 16; Clary, *supra* note 36, at 84 (“Does the average lay person actually read court opinions? One would expect that the most avid lay readers would be persons who are parties to a given case. However, my own experience as a practicing lawyer for 25 years is that clients mostly want to know who won; they figure it is my job to determine the legal ‘why.’”).

⁶⁵ Garner, *Clearing the Cobwebs from Judicial Opinions*, *supra* note 10, at 16–17.

⁶⁶ Garner, *Textual Citations Make Legal Writing Onerous, for Lawyers and Nonlawyers Alike*, *supra* note 10.

⁶⁷ See Steed, *supra* note 33; Phillips, *supra* note 3 (“[T]he fact that some judges put citations in footnotes for their opinions does not mean that lawyers should do the same thing. Judges have a different audience than lawyers.”); Clary, *supra* note 36, at 84–85.

⁶⁸ Clary, *supra* note 36, at 84 (“Briefs and opinions are written for different purposes and for different audiences.”); Steed, *supra* note 33 (“[A] judicial opinion can be viewed as being written for the general public. The same cannot be said of the lawyer’s brief.”).

⁶⁹ Clary, *supra* note 36, at 84.

brief's purpose is primarily argumentative—"to persuade a court that a client's view of the law is correct, and should be applied to the specific facts to arrive at a particular pro-client result."⁷⁰

Citational footnotes are only appropriate in academic work: Judge Posner first lodged this complaint against citational footnotes: "Footnotes are the very badge of scholarly writing, and so they give a spurious air of scholarship to judicial opinions."⁷¹ In other words, citational footnotes can confuse the literary genre of legal scholarship with briefs and legal opinions.⁷² One legal-writing instructor suggests that making briefs and opinions look more like law-review articles would actually decrease the likelihood of lay interest in the writing: "When the general public thinks of documents with footnotes, they may well think of . . . [the] research papers they had to prepare and mostly want to forget."⁷³

Garner's reply is threefold. First, while legal briefs and opinions are not scholarship "their very essence is reasoning" and in-line citations "can obscure the reasoning for both the reader and writer."⁷⁴ Second, "the absence of substantive footnotes signals [to the reader] that [the writing] is not scholarship."⁷⁵ Third, "it hardly matters if lawyers' and judges' writing resembles a format traditionally associated with scholarship—as long as the result is more readable."⁷⁶

IV. Change is slow: surveying guidance and trends on citational footnotes

With the pros and cons summarized and outlined, it's time to see who is winning over the masses 25 years into the debate.⁷⁷

The latest edition of *The Bluebook* rejects citational footnotes: "In non-academic legal documents, such as briefs and opinions, citations generally appear within the text of the document immediately

⁷⁰ *Id.* at 85.

⁷¹ Posner, *supra* note 3, at 24.

⁷² GARNER, *THE WINNING BRIEF*, *supra* note 1, at 142.

⁷³ Clary, *supra* note 36, at 84.

⁷⁴ Garner, *Afterword*, *supra* note 10, at 28.

⁷⁵ GARNER, *THE WINNING BRIEF*, *supra* note 1, at 142.

⁷⁶ Garner, *Textual Citations Make Legal Writing Onerous, for Lawyers and Nonlawyers Alike*, *supra* note 10.

⁷⁷ SCALIA & GARNER, *supra* note 1, at 132 (noting that Garner began recommending citational footnotes in 1992).

following the propositions they support. Footnotes should only be used in non-academic legal documents when permitted or required by local court rules.”⁷⁸ Garner claims this is “[n]ot really” a rule,⁷⁹ though it most certainly reads like one.⁸⁰ In any event, given the criticism of scrupulous adherence to *The Bluebook*⁸¹—a charge, ironically, led by an original critic of citational footnotes, Judge Posner⁸²—a deeper dive is required for a truly fulsome examination.

While the Supreme Court’s own style guide departs from *The Bluebook* for citation format, it also rejects citational footnotes.⁸³ In doing so, it appears to take a shot at Garner: “Certain legal writing ‘experts’ suggest that all citations be placed in footnotes in order to make judicial opinions more readable to the public [S]uch advice is misguided.”⁸⁴ In interviews with Garner, Justices Roberts, Thomas, and Alito expressed personal preference for in-line citations.⁸⁵ Also,

⁷⁸ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 3, B1.1 (Columbia Law Review Ass’n et al. eds., 20th ed. 2015).

⁷⁹ Garner, *Textual Citations Make Legal Writing Onerous, for Lawyers and Nonlawyers Alike*, *supra* note 10.

⁸⁰ Garner may be relying on the fact that “[t]he Bluepages [of the Bluebook] are a *guide* . . . to use” whereas “[t]he Whitepages provide *rules* for academic publications” THE BLUEBOOK, *supra* note 78, at 3 (emphasis added).

⁸¹ Bret D. Asbury & Thomas J.B. Cole, *Why the Bluebook Matters: The Virtues Judge Posner and Other Critics Overlook*, 79 TENN. L. REV. 95, n.1 (2011) (collecting critical articles).

⁸² Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343 (1986); Richard A. Posner, *The Bluebook Blues*, 120 YALE L. J. 850 (2011); Richard A. Posner, *What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable: Part II*, 19 GREEN BAG 2d 257 (2016).

⁸³ Scott Moïse, *Is Your Writing Good Enough for the Supreme Court?* (U.S. Supreme Court Style Guide), S.C. LAW., Nov. 2017, at 59–60.

⁸⁴ *Id.* at 59 (quoting Jack Metzler, THE SUPREME COURT’S STYLE GUIDE (2016)).

⁸⁵ *Interview of Chief Justice John G. Roberts, Jr.*, 13 SCRIBES J. OF LEGAL WRITING 5, 39 (2010) (“I find it more distracting to be looking up and down to the footnotes for the cite and a reference, as opposed to just reading along.”); *Interview of Justice Clarence Thomas*, *id.* at 121 (“I’m not bothered by the cites in the text [T]he briefs are fine the way they are.”); *Interview of Justice Samuel A. Alito, Jr.*, *id.* at 181 (“I made a decision when I became a judge that I would not write opinions in a form that made them seem like law-review articles.”).

Justice Breyer's refusal to use any footnotes, whether substantive or citational, is well documented.⁸⁶

Though lacking the specific rebuke of citational footnotes found in the Supreme Court's style guide, the United States Department of Justice Office of the Solicitor General Citation Manual also favors in-line citations.⁸⁷

A few judges have used written opinions to defend, or at least acknowledge, the legitimacy of citational footnoting.⁸⁸ The majority of judicial comments in written opinions directed to practice, however, are unflinchingly critical. Citational footnotes are "distracting to a reader,"⁸⁹ "strongly disfavor[ed],"⁹⁰ "make[] brief-reading difficult,"⁹¹ "make[] pleadings difficult to follow,"⁹² "ma[ke] . . . assertions more time-consuming to verify,"⁹³ "make for a disjointed and frustrating

⁸⁶ *Interview of Justice Stephen G. Breyer, id.* at 154–55; *In Justice Breyer's Opinion, a Footnote Has No Place*, N.Y. TIMES (July 28, 1995), <https://www.nytimes.com/.../us/in-justice-breyer-s-opinion-a-footnote-has-no-place.html>.

⁸⁷ UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF THE SOLICITOR GENERAL CITATION MANUAL B2 (2014).

⁸⁸ *See, e.g.,* *Ledet v. Seasafe, Inc. et al.*, 2000-1205 (La. App. 3 Cir. 4/4/01); 783 So. 2d 611, 615–19 (Woodard, J. concurring); *United States v. Frederick*, No. 10-30021-RAL, 2010 WL 3909989, at *4 (D.S.D. Sept. 3, 2010); *Dial X-Automated Equip. v. Caskey*, 826 N.E.2d 642, 643 n.1 (Ind. 2005); *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist.*, 237 F. Supp. 2d 988, 992 n.2 (E.D. Ark. 2002).

⁸⁹ *Mosholder v. Barnhardt, et al.*, No. 09-CV-11829-DT, 2010 WL 5559406, at *1 n.1 (E.D. Mich. Feb. 12, 2010).

⁹⁰ *Pilrang Bae Owa v. Fred Meyer Stores*, No. 2-16-cv-01236-RAJ, 2018 WL 2411754, at *1 (W.D. Wash. May 29, 2018); *Baumann v. Pub. Emps. Relations Bd.*, No. SX-11-CV-417, 2018 WL 1368290, at *7 n.4 (V.I. Super. Mar. 16, 2018).

⁹¹ *Wichansky v. Zowine*, No. CV-13-01208-PHX-DGC, 2014 WL 289924, at *1 n.1 (D. Ariz. Jan. 24, 2014).

⁹² *Czaja v. McDonald*, No. 15-2694, 2016 WL 5446212, at *1 n.2 (Vet. App. Sept. 29, 2016).

⁹³ *Burgess v. Tesoro Ref. & Mktg. Co.*, No. 10-5870-VBF (PLAx), 2011 WL 13217363, at *1 n.1 (C.D. Cal. Mar. 28, 2011).

reading experience,”⁹⁴ should be “discontinue[d],”⁹⁵ and “may be disregarded by the court.”⁹⁶ One federal judge in Michigan threatened to strike future pleadings with citational footnotes and required counsel to “notify their supervisor(s) in writing of this point of procedure.”⁹⁷ Another federal judge in Washington issued a standing order prohibiting citational footnotes under penalty of possible sanctions.⁹⁸ In an entertaining exchange, one state-court appellate judge used a concurring opinion to a unanimous decision on the merits to criticize a colleague’s use of citational footnotes, which, in turn, drew a rebuttal in a separate concurrence from the majority author.⁹⁹

Survey-based statistics on the degree of judicial acceptance or rejection of citational footnotes vary with the source. Garner has long claimed that “every time I teach a seminar on judicial writing, a vast majority of the judges finally conclude that they think it makes sense to put citations in footnotes.”¹⁰⁰ More recently, he has tempered that boast of widespread acceptance to claim more modestly that “[m]any judges around the country—not a majority, to be sure, but a worthy minority—have already adopted [citational footnoting].”¹⁰¹

⁹⁴ *Kuckelman Pump Serv.-Acculectric, Inc. v. Hacienda del Cerezo, Ltd.*, Nos. 32, 158, 32, 389, 2014 WL 890619, at *1 n.1 (N.M. Ct. App. Jan. 30, 2014).

⁹⁵ *In re Depakote Alexander v. Abbott Labs., Inc.*, No. 12-CV-52-NJR-SCW, 2016 WL 6563483, at *4 (S.D. Ill. Nov. 4, 2016).

⁹⁶ *India Brewing, Inc. v. Miller Brewing Co.*, 237 F.R.D. 190, 195 (E.D. Wis. 2006).

⁹⁷ *Mosholder v. Barnhardt et al.*, No. 09-CV-11829-DT, 2010 WL 5559406, at *1 n.1 (E.D. Mich. Feb. 12, 2010).

⁹⁸ Standing Order for Civil Cases Assigned to Judge Richard A. Jones.

⁹⁹ While that special concurrence was withdrawn before publication of the opinion, the authoring judge’s rebuttal remains available. *Ledet v. Seasafe, Inc. et al.*, 2000-1205 (La. App. 3 Cir. 4/4/01); 783 So. 2d 611, 615–19 (Doucet, C.J., concurring opinion withdrawn before publication) and (Woodard, J. concurring).

¹⁰⁰ GARNER, *THE WINNING BRIEF*, *supra* note 1, at 145; *see also* Garner, *The Citational Footnote*, *supra* note 10, at 5 (“In every state where I’ve spoken to judges, a majority have said that they would prefer footnoted citations.”); Joseph Kimble, *Where Should the Citations Go?*, MICH. BAR J. 50 (2014) (claiming that 111 of 192 (58%) practitioner-respondents preferred citational footnotes).

¹⁰¹ Garner, *Textual Citations Make Legal Writing Onerous, for Lawyers and Nonlawyers Alike*, *supra* note 10.

One legal blogger claimed to have “surveyed thousands of judges” to find that “78% prefer citations in the text.”¹⁰² Similarly, a Texas appellate practitioner noted that “a 2009 survey of Texas appellate judges showed that . . . only 20.7% said [footnotes] were appropriate for case citations.”¹⁰³ In a 2001 survey of one California intermediate appellate court, 18 respondents (both judges and staff attorneys) strongly disagreed with citational footnotes, with a total survey mean result close to “strong overall disagreement.”¹⁰⁴ A similar survey of eight Fifth Circuit judges a few years later also reflected an overall negative reaction to citational footnotes.¹⁰⁵ Appellate staff attorneys from state and federal appellate and supreme courts registered strong disagreement with citational footnoting in a 2003 survey.¹⁰⁶ Likewise, a 2006 survey of 135 federal and state judges also demonstrated an overall disfavor of the practice.¹⁰⁷ Finally, in an informal survey of three Illinois-based judges, “[n]one favor[ed] the full Garner” (that is, exclusively citational footnotes).¹⁰⁸

Garner concedes that the pace of change may be “glacial.”¹⁰⁹ “Reform is coming. It may take a generation or two, but it’s coming. Gradually, legal writers will learn to put all citations in footnotes”¹¹⁰

¹⁰² Ross Guberman, *Judges Speak Out Behind Closed Doors: How Your Briefs Might Bug Them, and How You Can Make Them Smile Instead*, LEGAL WRITING PRO, <https://www.legalwritingpro.com/blog/judges-speak-out/> (last visited Feb. 4, 2019).

¹⁰³ Phillips, *supra* note 3.

¹⁰⁴ Charles A. Bird & Webster Burke Kinnard, *Objective Analysis of Advocacy Preferences and Prevalent Mythologies in One California Appellate Court*, 4 J. APP. PRAC. & PROCESS 141, 148, 153 (2002).

¹⁰⁵ Charles A. Bird, *Advocacy Preferences and Prevalent Mythologies II The United States Court of Appeals for the Fifth Circuit*, 20 FIFTH CIR. REPORTER 333, 338 (2003).

¹⁰⁶ Joseph C. Merling, *Advocacy at Its Best: The Views of Appellate Staff Attorneys*, 8 J. APP. PRAC. & PROCESS 301, 306 (2006).

¹⁰⁷ David Lewis, *138 Appellate Judges Can't Be Wrong: What I Learned When I Asked Appellate Judges About Their Advocacy Preferences*, 31 CHAMPION 10, 12 (2007) (concluding that “[t]he safest course to follow, according to the data, is not to put any of your citations in footnotes”).

¹⁰⁸ Kathleen Dillon Narko, *Should You Move Citations To Footnotes?*, 28 CBA REC. 44, 45 (2014).

¹⁰⁹ Garner, *The Citational Footnote*, *supra* note 7, at 105.

¹¹⁰ *Id.*

Predicting future trends is inherently speculative, but the empirical evidence does not favor citational footnotes, at least in the federal circuit courts of appeals. As of February 21, 2019, the current presidential administration is responsible for 27 confirmed circuit judges that have authored published opinions.¹¹¹ Logically, one may conclude that this batch of newer judges will prospectively account for a growing share of appellate opinions nationwide as they replace longer tenured judges who take senior status, retire, or resign. Of those 27 new circuit judges, only one—Judge Don Willett of the Fifth Circuit Court of Appeals—uses citational footnotes.¹¹²

V. Some additional critiques

Over 4,700 words removed from the introduction, I am still not a fan of citational footnotes. I will not regurgitate in detail here each criticism identified in *supra* sections III and IV, many of which are compelling. Most resonant to me, however, are the direct relationship between the strength of cited authorities and the overall persuasiveness of a legal argument, the avoidance of the distracting eye bounce, and judges' stated and statistical preferences.¹¹³

Recognizing, however, that other justifications or criticisms may register more prominently with other readers, particularly those that favor citational footnotes, some further perspectives follow. These views, however, are subject to my admitted bias as a practitioner and brief-writer, not a judge/clerk opinion writer or lay reader.

In general, I am unmoved in either direction by critiques related to the aesthetic cleanliness of the page, confusion of the literary genres (academic vs. non-academic writing), or the ease of lay readership of legal writing.¹¹⁴ First, Garner's claim that citational footnotes create a cleaner-looking page is purely subjective. Even if a single page of three-to-five citational footnotes aesthetically rates higher than its in-line counterpart, an entire opinion or brief containing several hundred citational footnotes does not project readability to any

¹¹¹ This count excludes Justices Neil M. Gorsuch and Brett M. Kavanaugh, though neither used citational footnotes on the Tenth and District of Columbia Circuits, respectively.

¹¹² Judge Willett first began using citational footnotes in 2007 as a justice on the Texas Supreme Court. *See* *Norris v. Thomas*, 215 S.W.3d 851 (Tex. 2007).

¹¹³ *See supra* Secs. III & IV.

¹¹⁴ *Id.*

audience. In that instance, the “distracting” bibliographic numbers subordinated to footnotes are more than offset by the legion of superscript footnote numbers now populating the main text.¹¹⁵ Next, lawyers and lay people alike can easily differentiate between a brief, opinion, and scholarly article based on obvious visual identifiers (that is, caption/titling, author’s signature block, reporter or law-review publication, etc.) wholly unrelated to citation location in the respective document. On the final point, while the unlikelihood of lay readership arguably mitigates against a need to accommodate their assumed reading preferences, lay understanding or a lack thereof is ultimately inconsequential if citational footnotes significantly aid legally educated readers’ understanding and subsequent use of legal writing—a question central, if not dispositive, to the debate.¹¹⁶

On that point, Garner’s written articles on the topic always include several before-and-after examples of actual legal writing to illustrate the claimed benefit of citational footnotes.¹¹⁷ As expected, the changes are often striking. But therein lies part of the problem. As Judge Posner first noted, Garner’s rewrite is “edited to make it read better irrespective of where the citations are.”¹¹⁸ In doing so, Judge Posner charged, Garner “in the process has altered the[] meaning” of the original work.¹¹⁹ To that legitimate complaint, I would add that Garner’s “before” examples of in-line citations are often uncommonly clunky and opaque, whereas his revised short excerpts are the product of careful scrutiny from a writing expert nationally recognized as one of the best at his craft. While most legal writers are unlikely to develop Garner-level writing skill regardless of citation location, it is reasonable to expect that they can at least strive to improve upon his don’t-do-it-this-way examples of in-line citations.

The purposes for which lawyers usually consume legal writing—hint, it’s seldom for pleasure or to pass the time—and the

¹¹⁵ Indeed, a citationally footnoted brief or opinion will contain more total integers than an identically worded in-line counterpart.

¹¹⁶ Chew, *supra* note 37, at 877 n.52 (“At its core, the in-line/footnote debate in practical legal writing is a debate about audience needs and how best to meet them.”).

¹¹⁷ GARNER, *THE WINNING BRIEF*, *supra* note 1, at 145–58; Garner, *Clearing the Cobwebs from Judicial Opinions*, *supra* note 10, at 4–16; Garner, *The Citational Footnote*, *supra* note 7, at 99–102.

¹¹⁸ Posner, *supra* note 3, at 24.

¹¹⁹ *Id.*

manner in which they oftentimes do it are central to my additional objections to citational footnotes.¹²⁰ Lawyers read opinions and briefs for a number of reasons:¹²¹ to ascertain the holding and governing rule of law in an opinion, to distill the fundamental legal and factual premises of an opponent's argument, to analyze the supporting reasoning to the holding or opposition argument, to mine for quotes to support or refute, to use as a building block for an argument, and to find distinguishing points, to name just a few.

The "how" of the typical lawyer's read is just as important as the "why."¹²² While an opponent's brief or an opinion in a case an attorney is actively handling will get several probing, detailed reads start to finish, lawyers initially review legal writing in a bottom-line, skim-and-scan, cursory fashion.¹²³ Similarly, I'd posit that lawyers

¹²⁰ Michael J. Higdon, *The Legal Reader: An Exposé*, 43 N.M. L. REV. 77, 83–84 (2013) ("Although legal writers might labor under the impression that their work product will ultimately rival *Pride and Prejudice* as something to be slowly savored and frequently reread, sadly this will rarely (if ever) be the case." (citing JOHN C. DERNBACK ET AL., A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 188 (2d ed. 2009) ("People do not usually read legal writing for fun, so make the reader's job as easy as you can."))).

¹²¹ See generally James F. Stratman, *Teaching Lawyers to Revise for the Real World: A Role for Reader Protocols*, 1 J. LEGAL WRITING INST. 35 (1991) ("[L]ike most of us who read on the job, lawyers do so with specific goals in mind. They read in order to accomplish certain tasks"); Mary Beth Beazley, *Writing for A Mind at Work: Appellate Advocacy and the Science of Digital Reading*, 54 DUQ. L. REV. 415, 421 (2016) ("The active reader usually has a crowded agenda. . . . Attorneys [] may have a variety of goals for their reading."); Ann Sinsheimer & David J. Herring, *Lawyers at Work: A Study of the Reading, Writing, and Communication Practices of Legal Professionals*, 21 J. LEGAL WRITING INST. 63, 73 (2016) (observing that associate attorneys "had to read to learn, to educate themselves, and to inform themselves so that they could handle situations or solve problems that, at times, had no immediate solutions").

¹²² Stratman, *supra* note 121, at 36 ("Detailed knowledge of how legal prose is read 'on the job' is crucial . . . to become successful legal writers and, hence, successful lawyers.").

¹²³ Higdon, *supra* note 120, at 84 ("[T]he legal reader will see the legal writer's work product as being something very much akin to [an] owner's manual . . .—something that she would rather not have to read at all, but because she does, something she wants to move through quickly and with the ardent hope that she will only have to read it once."); Beazley, *supra* note 121, at 419 ("[L]awyers usually do not read in a linear fashion; indeed,

undertake the early stages of legal research—typically on a computer database¹²⁴—almost exclusively in this fashion.¹²⁵ Whether motivated by deadlines, budget/billing constraints, work volume, or an overarching desire for efficiency, lawyers are often required to read, understand, and synthesize a lot of material quickly.¹²⁶ I assert with

an appellate attorney at work on a brief, or a judge at work on an opinion, is probably juggling several documents at once.”); *id.* at 421 (addressing “rapid scanning with the goal of gaining an overview of a document”); Sinsheimer, *supra* note 121, at 72 (noting that associate attorneys “frequently read closely, but more often than not, we observed these attorneys skimming and scanning documents, trying to hone in on the most relevant information as quickly as possible”); Beazley, *supra* note 52, at 55 (distinguishing between legal-writing readers and “users” who “have already decided in some way what they want to get from the document and . . . scan through the document searching for it”); Cosgrove, *supra* note 52 (“[D]igital text has changed how our brains process information toward shallow learning, skimming, and decreased contemplation . . .”).

¹²⁴ See Ellie Margolis & Kristen E. Murray, *Say Goodbye to the Books: Information Literacy As the New Legal Research Paradigm*, 38 U. DAYTON L. REV. 117 (2012) (“The days of conducting legal research in books are over.”); Katrina Fischer Kuh, *Electronically Manufactured Law*, 22 HARV. J. L. & TECH. 223, 227 n.11 (2008) (“Law librarians and legal research instructors report that an overwhelming number of students trained in electronic research rely exclusively on electronic research—even those who are required to learn the mechanics of print research as well.”); Margolis, *supra* note 52, at 11 (“While it is safe to assume that lawyers have been writing on electronic devices for years, there is now little doubt that they are doing much of their reading electronically as well.”); Sinsheimer, *supra* note 121, at 84 (noting that “[r]eading from a computer screen was the norm” in a study of reading habits of associate attorneys).

¹²⁵ Beazley, *supra* note 52, at 55 (“I have distinguished between readers and what I call users: . . . [A] *reader* is reading text sequentially, while a *user* is skimming or scanning the text, looking for a particular bit of information or trying to decide whether a particular paragraph is worth reading.”); Cosgrove, *supra* note 52 (“[D]igital readers take more shortcuts: they spend more time browsing and scanning for keywords and are more likely to read a document only once.”).

¹²⁶ Sinsheimer, *supra* note 121, at 73 (noting that lawyers “were always aware of the need to read efficiently and time-effectively”); see also Leah M. Christensen, *The Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law*, 2008 B.Y.U. EDUC. & L. J. 53, 85–86 (2008); Jacob M. Carpenter, *Identifying Inefficiencies: Exploring Ways to Write Briefs More*

borderline Garner-like certainty that citational footnotes don't foster, but rather frustrate, the efficiency lawyers want—check that, need—when electronically consuming legal writing on a daily basis for the purposes outlined above.

Consider typical electronic legal research on Westlaw. Your opponent's brief, or the court's opinion, has cited older case authority that is relevant to your issue. You keycite the case, then use the "locate search term" toggle to jump directly to where that authority was cited in other cases. Typical in-line citations reward your research efforts with a highlighted case in immediate proximity to the proposition(s) of law it supports, located within a paragraph of relevant analysis. With citational footnotes, however, your highlighted case will appear in a morass of electronic endnotes with no contextual clues, quotes, or substance.¹²⁷ Sure, you can scroll or hit a hyperlink to jump back up into the body, but by that time, you'd have already known not only where a case was cited, but how extensively it was discussed, and for what purposes with in-line citations. "So long as the majority of caselaw services put greater rather than less distance between footnote calls and their notes than the printed page, inline citations seem the better choice"¹²⁸

Citational footnotes hinder not just lawyers' consumption of legal writing, but their subsequent use of it too. Consider another example. In the midst of that keycite review, you locate a particularly helpful and distinguishing discussion of the older authority. With Westlaw's cut-and-paste, copy-with-reference feature, a few quick clicks extract not only the relevant text, but also a ready-made pin citation of the source material. Citational footnotes within that source material,

Quickly Within the Time Demands of Legal Practice, 18 WYO. L. REV. 409, 411 (2018).

¹²⁷ Peter W. Martin, *Where Should Citations be Placed? An Old Debate, a Radically Changed Environment*, CITING LEGALLY (Mar. 28, 2014), <http://citeblog.access-to-law.com/?p=138> ("Importantly, having been moved from the bottom of the page to the end of the opinion, the citation can no longer be viewed together with the text to which it is attached—a distinct negative.").

¹²⁸ *Id.*; Beazley, *supra* note 52, at 52 ("Digital readers disrupt their mental processes when they click on link after link, or even when they click on a link, read for a while, and then navigate back to their original text."); Cosgrove, *supra* note 52 ("Following hyperlink after hyperlink often disrupts digital readers' mental process.").

however, complicate the quick importation of important text and its cited authorities for a “quoting” or “citing” signal. In the world of use-and-reuse, recycled legal argument, in-line citations are aluminum cans—probably a bit too common, but easy to find and use. Citational footnotes are lead—sunken to the bottom and unquestionably more difficult to extract.

Citational footnotes hamper not only the consumption and use of legal opinions, but briefs as well. While the searching/cutting/pasting features outlined above are usually associated with legal research into case precedent, it is no secret that “lawyers want judges to copy their work.”¹²⁹ One professor argued that “collaborative writing communities produce judicial opinions” and “[l]iteral, unattributed cutting-and-pasting, instinctively considered plagiarism in most contexts, is simply everyday professional practice” in opinion crafting.¹³⁰ Lawyers strive to write briefs that the court “can lift, verbatim, into the opinion taking care of all prior authority, phrasing the whole satisfactorily, and applying it to the case at hand.”¹³¹ Ultimately, “[j]udges . . . want briefs to organize and synthesize the information in case records and information relevant to judicial decisions . . . , so they may actively seek specific language in the briefs

¹²⁹ Douglas R. Richmond, *Unoriginal Sin: The Problem of Judicial Plagiarism*, 45 ARIZ. ST. L. J. 1077, 1079 (2013) (“As a clerk, I found the best briefs were the ones that were written almost like judicial opinions; the court could practically cut and paste the accurate, concise, and non-argumentative legal and factual discussions into the opinion.” (citing, *inter alia*, Rachel Clark Hughey, *Effective Appellate Advocacy Before the Federal Circuit: A Former Law Clerk’s Perspective*, 11 J. APP. PRAC. & PROCESS 401, 411 (2010))).

¹³⁰ Peter Friedman, *What Is A Judicial Author?*, 62 MERCER L. REV. 519, 520 (2011); *see also id.* at 529 (“Anecdotal evidence shows, and further inquiry is likely to show that, in producing their opinions, judges habitually cut and paste without attribution from lawyers’ briefs as freely as lawyers do in producing their briefs.”); Carol M. Bast & Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 CATH. U. L. REV. 777, 800–01 (2008) (“[P]racticizing attorneys are aware that it is a common practice for judges to borrow from the writing of attorneys and law clerks . . .”).

¹³¹ Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 638 (1962).

before them” to incorporate into opinions.¹³² If practitioners struggle to mine opinions with citational footnotes efficiently, one may safely surmise that judges—and, perhaps more importantly, their law clerks—also struggle to incorporate language and arguments from citationally footnoted briefs for many of the same reasons outlined in prior paragraphs.¹³³

While searching/cutting/pasting is less important to practitioners’ review of their opponents’ hard-copy briefing, citational footnotes remain an obstacle even in the adversarial context. With a quick skim, “a legal reader can tell how authoritative the cited sources are.”¹³⁴ In a brief, “citations to less authoritative sources like secondary sources, off-topic statutes or regulations, out-of-jurisdiction cases, or very old cases can chip away at the writer’s credibility unless the writer explains why she’s citing these particular sources and not more authoritative ones.”¹³⁵ A quick review of typical in-line legal writing, even in the absence of a table of authorities, should reveal the extent of reliance on binding authority, like circuit or Supreme Court precedent. An impatient reader is more likely to gloss over less-persuasive authorities buried in citational footnotes, even if the opponent has weaved source information into the body. In a sense, the “distracting” integers from the bibliographic information also serve as red-flashing, in-line signal lights to draw the reader into quick identification of the strength of an opponent’s source authority.¹³⁶

Finally, in my experience, citationally footnoted briefs are more difficult to edit when working as part of a collaborative team with co-counsel. Practically speaking, checking correct citation form in adherence to *The Bluebook* is part of a standard editorial process for court-submitted work. Citations broken up between main text (that is, case name and court) and related citational footnotes (bibliographic information, reporter, year, etc.) in Garner’s weave technique make for a disjointed and cumbersome cite-check review. More importantly,

¹³² Adam Feldman, *All Copying is not Created Equal: Borrowed Language in Supreme Court Opinions*, 17 J. APP. PRAC. & PROCESS 21, 107 (2016).

¹³³ See *supra* Sec. IV, notes 89–98 and corresponding text.

¹³⁴ Chew, *supra* note 37, at 880 n.64.

¹³⁵ *Id.*

¹³⁶ Six, *supra* note 3 (“When the citations are in the text, the reader can, with minimal effort, notice any deficiencies. Relegating citations to the footnotes implies a level of trust between the writer and reader that often is not present.”).

in-line citations help less-informed readers and editors piece together the fundamental building blocks of an argument. Oftentimes, those blocks are not jettisoned wholesale in the editorial process, but, rather, are reordered, reworded, and refined. A unitized block of legal proposition with in-line citation more easily slides around a brief as writers and their editors experiment with options to increase readability, flow, and impact.

VI. Striving for Garner’s end, but not adopting his means—some humble final recommendations

While my opposition to citational footnotes remains, it is indisputable that Garner’s objectives—shorter sentences, more forceful paragraphs, clearer ideas, and tighter reasoning—are ends to which all lawyers must strive in every piece of legal writing. I just don’t think citational footnotes are the means to accomplish them. The following recommendations, however, would work well in the established foundation of the in-line tradition.

First, eliminate mid-sentence citations. On this point, everyone from Garner,¹³⁷ to Scalia,¹³⁸ to Garner’s critics¹³⁹ agrees. Consider rewriting or rephrasing the offending clause into a stand-alone sentence, or using only the case name in the body of the sentence, with bibliographic information in a citation sentence afterwards. If all else

¹³⁷ GARNER, *THE WINNING BRIEF*, *supra* note 1, at 160 (“[A]lways arrange for the citation to fall at the end of the sentence, even if you mention the case in the text.”).

¹³⁸ SCALIA & GARNER, *supra* note 1, at 135 (“[A]void[], wherever possible, the insertion of lengthy citations in the middle of a sentence. That is easy to achieve, and certain not to offend.”).

¹³⁹ Hazelwood, *supra* note 9, at 16 (“Citation clauses . . . disrupt the flow of the writing and can be very distracting to the reader.”); DuVivier, *supra* note 31, at 48 (“There are simple techniques to keep citations from seriously interrupting the train of thought. One of the simplest is to move most citations to the end of sentences.”); Clary, *supra* note 36, at 86; Holman, *supra* note 2, at 17.

fails, consider an ad hoc use of a citational footnote so as not to break up sentence flow.¹⁴⁰

Second, get picky with your citations. “There’s no need to cite every case on point. Simply pick the most recent case from the court of last resort in your jurisdiction. Generally that case will serve as ample authority.”¹⁴¹ If making a weight-of-the-authority, developing-trend, or example-based argument where a string cite might be helpful, consider a bullet-point list¹⁴² or a footnote¹⁴³ to cut down on clutter from the main body of the argument.

Third, utilize all permissible rules to shorten citations.¹⁴⁴ *The Bluebook’s* instruction on abbreviations is mandatory: “Always abbreviate any word listed in table T6, even if the word is the first word in a party’s name”¹⁴⁵ It is “more economical” to use these abbreviations, “particularly if you’re citing cases in the text.”¹⁴⁶ Brief writers should also utilize short-form citations whenever possible, though this is discretionary guidance in *The Bluebook*.¹⁴⁷ Fewer characters, words, and bibliographic information utilizing less space make for a cleaner final written product.

Fourth, on the topic of cleanliness, start “cleaning up” your citations. This recommendation is a novel, but needed, departure from *The Bluebook*. Frustrated with the mess created by *The Bluebook’s* rules on quotes within quotes and alterations in proper citation form, practitioner Jack Metzler, a fellow government lawyer to boot, recently proposed a parenthetical signal to cover the full range of

¹⁴⁰ Posner, *supra* note 3, at 24 (noting that “the author always has the option of putting some [citations] in footnotes”). If used sparingly, the decision to do so ought not suggest citation schizophrenia to the court.

¹⁴¹ GARNER, *THE WINNING BRIEF*, *supra* note 1, at 160–61; *see also* Hazelwood, *supra* note 9, at 16.

¹⁴² GARNER, *THE WINNING BRIEF*, *supra* note 1, at 160–61.

¹⁴³ Posner, *supra* note 3, at 24 (“[A] judge who really thinks a very long string citation is necessary can put that string in a footnote without feeling obliged to put *all* his citations, or even the bulk of them, in footnotes.”); Holman, *supra* note 2, at 17.

¹⁴⁴ GARNER, *THE WINNING BRIEF*, *supra* note 1, at 359–60.

¹⁴⁵ *THE BLUEBOOK*, *supra* note 78, at 102, R10.2.2.

¹⁴⁶ GARNER, *THE WINNING BRIEF*, *supra* note 1, at 360.

¹⁴⁷ *THE BLUEBOOK*, *supra* note 78, at 78–81, R4 & 115–18, R10.9.

possible changes—“(cleaned up).”¹⁴⁸ Utilizing this simple parenthetical, legal writers now have “the option to drop superfluous material like brackets, ellipses, quotations marks, internal citations, and footnote references.”¹⁴⁹ The “(cleaned up)” signal serves to indicate “that such material has been removed and that none of it matters for either understanding the quotation or evaluating its weight.”¹⁵⁰ The goal of Metzler’s proposed signal is to avoid clutter and “citation baggage.”¹⁵¹ Sound familiar? Not only does Garner himself approve,¹⁵² but, as of March 31, 2018, the “(cleaned up)” parenthetical signal had been used in 37 state and federal courts, including four federal courts of appeals.¹⁵³ So even if *The Bluebook* never formally adopts Metzler’s proposal, many judges have already done so.¹⁵⁴ Go ahead and jump on the “(cleaned up)” bandwagon now.¹⁵⁵

Fifth, use the full power of your word processor and time-tested principles of typography for a cleaner, more aesthetically pleasing presentation of your final document. Garner has several common-sense, practical recommendations,¹⁵⁶ as do several other legal-writing specialists.¹⁵⁷ For more advanced and technical advice, pick up a copy of the excellent book *Typography for Lawyers*.¹⁵⁸ Stated preferences on formatting, layout, headings, margins, spacing, and

¹⁴⁸ Jack Metzler, *Cleaning Up Quotations*, 18 J. APP. PRAC. & PROCESS 143 (2017).

¹⁴⁹ *Id.* at 147.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 153.

¹⁵² *Id.* at 162.

¹⁵³ *Id.* at 160. By my count, that number had increased to six circuit courts of appeals as of November 14, 2018—the Fifth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (“That (*cleaned up*) has spread so quickly and been adopted so widely by the bench suggests that you will not be taking a great risk when you use the parenthetical in your own opinion or brief.”).

¹⁵⁶ GARNER, *THE WINNING BRIEF*, *supra* note 1, at 308–25.

¹⁵⁷ James D. Dimitri, *Best Practices in Document Design*, 61 RES GESTAE 11 (2018); Mark Sableman, *Typographic Legibility: Delivering Your Message Effectively*, 17 SCRIBES J. LEGAL WRITING 9, 15 (2017); Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ASS’N LEGAL WRITING DIRECTORS 108, 110 (2004).

¹⁵⁸ MATTHEW BUTTERICK, *TYPOGRAPHY FOR LAWYERS* (Jones McClure 2010).

fonts may seem minor and nit-picky at first, but when implemented in full, the aggregate effect enhances readability in the in-line tradition.

VII. Conclusion

Citation location is a matter of personal preference.¹⁵⁹ While citational footnoters remain in the minority, Garner’s influence is undoubtedly responsible for the steady uptick in usage in the last 20 years. At bottom, I suspect that attorneys who don’t mind reading and using legal writing with citational footnotes are most apt to include them in their own written work. The arguments of this article notwithstanding, heed Garner’s push to “make up your own mind on this issue. What you decide will affect almost every paragraph you write.”¹⁶⁰

About the Author

Peter M. Mansfield has served as Chief of the Civil Division for the United States Attorney’s Office in the Eastern District of Louisiana since 2013. Mr. Mansfield’s supervisory experience in the United States Attorney’s Office also includes previous service as First Assistant United States Attorney (2018) and Deputy Civil Chief (2008–2013). As a supervisory Assistant United States Attorney, Mr. Mansfield has been the lead editor and reviewer of the office’s civil appeals in the Fifth Circuit Court of Appeals since 2011. Mr. Mansfield has taught continuing legal education courses for the Department of Justice, Federal Bar Association (New Orleans Chapter), New Orleans Bar Association, and the 21st and 22nd Judicial District Court Bar Associations (Louisiana) on a variety of topics, including federal practice and procedure, legal writing, oral advocacy, and criminal restitution. He previously published articles on civil-litigation topics in *The Federal Lawyer* and *Loyola Law Review*.

The author thanks Marie-Thérèse Mansfield and Assistant United States Attorney Paige O’Hale for their editorial assistance.

¹⁵⁹ Garner, *Textual Citations Make Legal Writing Onerous, for Lawyers and Nonlawyers Alike*, *supra* note 10.

¹⁶⁰ *Id.*

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Structural Errors are Not Created Equal and are Not All Per Se Reversible

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I. Introduction

Appellate cases are not always won or lost on the question of whether the trial court committed error. A criminal defendant is entitled only to a “fair trial,” not a perfect one, “for there are no perfect trials.”¹ The first step in determining whether the trial court’s action constitutes legal error is determining the proper standard of review the appellate court will use to decide whether any deference is owed to the trial court’s decision. In appropriate cases, the appellate court may conclude that it would not have taken the same action as the trial court, but the trial court’s action was not so outside the bounds of its discretion as to constitute error. Even if the appellate court concludes that the district court’s action did constitute legal error, it still must determine the proper remedy for such an error. Some errors may not be reversible under harmless or plain error review. Structural errors, on the other hand, are often thought of as automatically reversible. A recent Supreme Court decision, however, demonstrates that this is not always so. In light of the Court’s decision in *Weaver v. Massachusetts*,² lawyers and judges will need to pay close attention to the particular structural error claim at issue in order to know whether the error, if established, is automatically reversible or, if unpreserved by a contemporaneous objection, must pass through plain error review.

Many a favorable decision below has been preserved, even when the district court committed error, because the error was not deemed reversible. In cases where a defendant raised a contemporaneous objection, the appellate court may still affirm the judgment if the

¹ *Brown v. United States*, 411 U.S. 223, 231–32 (1973).

² *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017).

government can establish that the error was harmless.³ Where the defendant did not contemporaneously object, the appellate court will affirm the judgment if the defendant cannot establish that the error constituted plain error.⁴ A showing of plain error requires the defendant to establish that (1) an error occurred, (2) the error was plain, and (3) the error affected his or her substantial rights.⁵ If each of those elements are found, an appellate court has discretion to grant relief under circumstances where a miscarriage of justice would otherwise result.⁶ Under either the appropriate harmless error or plain error analysis, the government is thus able to avoid a reversal and remand for further proceedings, even in the face of constitutional errors in the trial court.

In the years since the Supreme Court recognized the class of “structural errors,” the proper remedy for this category has often been misunderstood by both practitioners and lower courts. Recently, in *Weaver*, the Supreme Court clarified that this category actually consists of three different types of errors and that identifying the proper remedy in cases where the defendant did not raise a contemporaneous objection depends upon what type of structural error is at issue.⁷ While structural error “def[ies] analysis by harmless error standards,”⁸ it does not necessarily defy plain error analysis.

II. The structural error doctrine

Structural errors are often thought of as those that “so fundamentally infect the process that a new trial is required regardless of how strong the evidence against the defendant is.”⁹ What *Weaver* reminded lower courts and practitioners is that this broad

³ See generally *Chapman v. California*, 386 U.S. 18 (1967) (holding that an error is harmless if there is no reasonable probability that it contributed to the conviction, which, in the case of constitutional errors, the government must establish beyond a reasonable doubt).

⁴ *United States v. Olano*, 507 U.S. 725, 732 (1993).

⁵ *Id.*

⁶ *Id.* at 735–36 (explaining that such a miscarriage of justice would exist “if the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings”).

⁷ See generally *Weaver*, 137 S. Ct. at 1899.

⁸ *Id.* at 1908 (internal quotation omitted).

⁹ *Chamberlin v. Fisher*, 885 F.3d 832, 860 (5th Cir. 2018) (declaring that “structural error” is the legal term for such errors).

conception of the structural error doctrine masks the differences between different types of errors that we often lump together under the same “structural” label.

In *Weaver*, the petitioner asserted that the closing of the courtroom to the public during jury selection, before his trial on state criminal charges (because the courtroom was fully occupied by potential jurors), violated his Sixth Amendment right to a public trial—a structural error that he argued automatically required reversal of his conviction and remand for a new trial.¹⁰ The Supreme Court noted that “in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to ‘automatic reversal’ regardless of the error’s ‘effect on the outcome.’”¹¹ The question presented in *Weaver* was “what showing is necessary when the defendant does not preserve a structural error on direct review.”¹²

The Supreme Court explained that “[d]espite its name, the term ‘structural error’ carries with it no talismanic significance as a doctrinal matter.”¹³ The Court stated that “[i]t means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was harmless beyond a reasonable doubt.”¹⁴ That did not answer the question of what the defendant’s burden is with respect to unpreserved structural error claims.

Back in 1967, the Supreme Court announced in *Chapman* the general harmless error rule that even a constitutional error at trial does not necessarily entitle a defendant to a reversal of his conviction.¹⁵ “[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.”¹⁶ In cases involving such constitutional errors, in order to preserve the conviction on appeal it would be the government’s burden “to prove

¹⁰ *Weaver*, 137 S. Ct. at 1905–07.

¹¹ *Id.* at 1910 (quoting *Neder v. United States*, 527 U.S. 1, 7 (1999)).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* (internal quotation omitted).

¹⁵ *See Weaver*, 137 S. Ct. at 1907 (citing the Supreme Court’s description of *Chapman* in *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)).

¹⁶ *Chapman v. California*, 386 U.S. 18, 22 (1967).

beyond a reasonable doubt that the error complained of did not contribute to the verdict.”¹⁷

Subsequently, in *Arizona v. Fulminante*, the Court noted that “most constitutional errors can be harmless,” and it listed a series of constitutional errors at trial that are nevertheless susceptible to harmless error analysis.¹⁸ “The common thread” identified by the Court “connecting these cases is that each involved ‘trial error’—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.”¹⁹

The Court distinguished such errors from those that are “not . . . subject to harmless-error analysis,” which it deemed “structural defects in the constitution of the trial mechanism.”²⁰ These errors “defy analysis by ‘harmless-error standards,’” because “these constitutional deprivations . . . affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself.”²¹ Such structural errors violate “basic protections” without which “a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.”²² The Supreme Court has cited as examples of structural errors the complete denial of counsel, a biased trial judge, racial discrimination in selection of grand jury, the denial of self-representation at trial, the denial of a public trial, and a defective reasonable-doubt instruction.²³

¹⁷ *Id.* at 24.

¹⁸ *Fulminante*, 499 U.S. at 306–07 (listing cases applying harmless error analysis to errors such as issuing variously-flawed jury instructions, restrictions on a defendant’s right to cross-examine a witness, denial of a defendant’s right to be present at trial, commenting on a defendant’s silence at trial, failure to instruct the jury on the presumption of innocence, admission of identification evidence or out-of-court statements by a non-testifying co-defendant in violation of the Sixth Amendment Counsel Clause, and admission of improperly-obtained confessions or evidence obtained in violation of the Fourth Amendment).

¹⁹ *Id.* at 307–08.

²⁰ *Id.* at 309.

²¹ *Id.* at 309–10.

²² *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986)).

²³ See *Neder v. United States*, 527 U.S. 1, 8 (1999) (citations omitted).

III. Many have overstated the impact of structural errors

Although *Fulminante* held only that *the government* could not use a harmless error argument to defend on appeal a conviction obtained in a case involving structural error, such errors were sometimes generally described as automatically triggering new trials, without considering the defendant's burden or responsibility. For example, the Fifth Circuit, in *United States v. Stanford*, stated that the Supreme Court had “distinguished ‘structural’ errors, which are ‘subject to automatic reversal,’ from the ‘traditional harmless-error inquiry.’”²⁴ The Sixth Circuit broadly declared, in *United States v. Simmons*, that “[s]tructural errors require automatic reversal, despite the effect of the error on the trial’s outcome.”²⁵ The Ninth Circuit explained, without qualification, that “[b]ecause denial of the right to a jury trial is a structural error, it requires automatic reversal.”²⁶ In *United States v. Roy*, the en banc Eleventh Circuit’s majority decision responded to a counter-argument: “To the extent that the dissent cites . . . the proposition that structural error requires reversal, the answer is that of course it does but there was no structural error in this case.”²⁷ Even the Supreme Court, itself, broadly stated: “We have characterized as ‘structural’ ‘a very limited class of errors’ that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole.”²⁸

Some courts even expressly concluded that structural errors would necessarily preclude not just harmless error analyses but also exempt a defendant from his or her burden under plain error analyses (or, similarly, that structural errors automatically satisfy a defendant’s burden on plain error review). In *United States v. McAllister*, the Sixth Circuit explained that “plain error review is no obstacle to relief in this case” because “[w]hen the error in question is structural, the defendant is not required to show that the putative error affected his

²⁴ *United States v. Stanford*, 823 F.3d 814, 830 (5th Cir. 2016).

²⁵ *United States v. Simmons*, 797 F.3d 409, 413 (6th Cir. 2015) (internal quotation omitted).

²⁶ *Alvarez v. Lopez*, 835 F.3d 1024, 1030 (9th Cir. 2016).

²⁷ *United States v. Roy*, 855 F.3d 1133, 1152 (11th Cir. 2017).

²⁸ *United States v. Davila*, 569 U.S. 597, 611 (2013).

substantial rights.”²⁹ The Ninth Circuit, in *United States v. Yamashiro*, stated that while “[i]n most cases, the requirement of the plain error test that an error ‘affect substantial rights’ means that the error must have been prejudicial, . . . ‘a finding of structural error satisfies the third prong of the *Olano* plain-error test.”³⁰ Similarly, in *United States v. Syme*, the Third Circuit stated that, although it did not find there to be any structural errors in that case, if structural errors had been present, the court would “assume they would constitute per se reversible error even under plain error review.”³¹ In *United States v. Bradley*, the Fourth Circuit held that the claimed error was “not structural error, but rather is subject to plain error review,”³² as if the two could not both be true.

Yet, the Supreme Court recognized that it had “several times declined to resolve whether ‘structural’ errors . . . automatically satisfy [the defendant’s burden under] the third prong of the plain-error test.”³³ Indeed, even some lower courts acknowledged, prior to *Weaver*, that structural errors did not necessarily preclude or survive plain error review.³⁴ The requirements for a defendant

²⁹ *United States v. McAllister*, 693 F.3d 572, 582 n.5 (6th Cir. 2012).

³⁰ *United States v. Yamashiro*, 788 F.3d 1231, 1236 (9th Cir. 2015).

³¹ *United States v. Syme*, 276 F.3d 131, 155 n.10 (3d Cir. 2002).

³² *United States v. Bradley*, 455 F.3d 453, 461–62 (4th Cir. 2006).

³³ *Puckett v. United States*, 556 U.S. 129, 140 (2009).

³⁴ *See, e.g., United States v. Flores*, 677 F.3d 699, 712 n.8 (5th Cir. 2012) (stating that “just because a structural error ‘requires reversal when preserved does not mean that it likewise requires reversal when not preserved’) (internal quotation omitted); *United States v. Turner*, 651 F.3d 743, 748 (7th Cir. 2011) (“The Supreme Court, however, has specifically reserved the question of the application of the third plain error prong to structural errors.”); *United States v. Promise*, 255 F.3d 150, 161 (4th Cir. 2001) (“[T]his court is not obligated to notice even structural errors on plain error review, notwithstanding that structural errors are per se reversible when reviewed under a harmless error standard.”).

Third Circuit Judge D. Brooks Smith recognized, in dissent, that if an “error was not properly preserved, under plain-error review we may affirm a judgment even if there is a structural error that affects substantial rights,” but that “the Supreme Court ha[d] not yet resolved whether a structural error automatically affects the defendant’s substantial rights for the purposes of that review.” *United States v. Lewis*, 802 F.3d 449, 461 n.4 (3d Cir. 2015) (Smith, J., dissenting). Similarly, Eleventh Circuit Judge Gerald Bard Tjoflat acknowledged in a dissent from a denial of rehearing en banc that “[t]he

obtaining a reversal in structural error cases was not as clear as many cases suggested.

IV. *Weaver* clarified that not all structural errors are per se reversible

In *Weaver*, the Supreme Court reiterated that the “defining feature of a structural error” is that it “affect[s] the framework within which the trial proceeds,’ rather than being ‘simply an error in the trial process itself.’”³⁵ It was for this reason, the Court explained, that a structural error “def[ies] analysis by harmless error standards.”³⁶ What *Weaver* newly explained was that “[t]he precise reason *why* a particular error is not amenable to that kind of analysis—and thus the precise reason why the Court has deemed it structural—varies in a significant way from error to error.”³⁷ The Court stated that “[t]here appear to be at least three broad rationales” for deeming an error to be structural.³⁸

“First, an error has been deemed structural . . . if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest.”³⁹ The Court cited, as an example, a “defendant’s right to conduct his own defense.”⁴⁰ A defendant’s right “to make his own choices about the proper way to protect his own liberty” must be protected even though “when exercised, [it] usually increases the likelihood of a trial outcome

Supreme Court has never squarely addressed this issue,” though he asserted that “on several occasions it has suggested that structural errors are not subject to the substantial-rights prong of the plain-error test.”

United States v. Rodriguez, 406 F.3d 1261, 1291 (11th Cir. 2005) (Tjoflat, J., dissenting from denial of rehearing en banc).

As further explained, courts could, of course, reach too firm a ruling in the other direction, assuming that all unpreserved structural error claims would be subject to plain error analysis. *See United States v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 40, 47 n.5 (1st Cir. 2004).

³⁵ *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

³⁶ *Id.* at 1907–08 (quoting *Fulminante*, 499 U.S. at 309).

³⁷ *Id.* at 1908 (emphasis added).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

unfavorable to the defendant.”⁴¹ “Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error.”⁴²

“Second, an error has been deemed structural if the effects of the error are simply too hard to measure.”⁴³ The Court cited in this category a defendant’s right to select his own attorney, the effect of which “cannot be ascertained.”⁴⁴ “Because the government will, as a result, find it almost impossible to show that the error was harmless beyond a reasonable doubt . . . the efficiency costs of letting the government try to make the showing are unjustified.”⁴⁵

“Third, an error has been deemed structural if the error *always* results in fundamental unfairness.”⁴⁶ This category includes violations such as the complete denial of an attorney or a trial judge’s failure to give a reasonable-doubt instruction.⁴⁷ Because “the resulting trial is always a fundamentally unfair one,” it “would be futile for the government to try to show harmlessness.”⁴⁸

The Supreme Court cautioned that “[t]hese categories are not rigid” and that the critical point was that “[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case.”⁴⁹ To determine the proper remedy, “[i]t is relevant to determine why” an error is considered structural.⁵⁰ The question will be “whether [a particular] violation counts as structural because it always leads to fundamental unfairness or for some other reason.”⁵¹

In *Weaver*, the Supreme Court addressed why a deprivation of the right to a public trial is deemed structural. It concluded that “a public-trial violation is structural . . . because of the ‘difficulty of assessing the effect of the error’” and because “[t]he public-trial right also protects some interests that do not belong to the defendant.”⁵²

⁴¹ *Id.* (internal citation omitted).

⁴² *Id.* (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006)).

⁴³ *Id.*

⁴⁴ *Id.* (internal quotation omitted).

⁴⁵ *Id.* (internal quotation omitted).

⁴⁶ *Id.* (emphasis added).

⁴⁷ *See id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1910 (citations omitted).

“[A]n unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant’s standpoint.”⁵³

Regardless of the category, a case of structural error that was preserved by a timely objection “generally is entitled to automatic reversal regardless of the error’s actual effect on the outcome,” but *Weaver* held that the same is not true “when the defendant does not preserve a structural error on direct review but raises it later in the context of an ineffective-assistance-of-counsel claim.”⁵⁴ The Court emphasized that the issue before it did not “call[] into question the Court’s precedents determining that certain errors are deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process.”⁵⁵

The Supreme Court held that the petitioner had the burden of establishing prejudice, under a plain error analysis, both because “the nature of the [claimed] error . . . and the difference between a public-trial violation preserved and then raised on direct review and a public-trial violation raised as an ineffective-assistance-of-counsel claim.”⁵⁶ In *Weaver*, the claimed violation was not the denial of a public trial, itself, preserved by a timely objection to the trial court’s action in closing the courtroom, but the violation of the defendant’s right to effective representation by his lawyer who failed to contemporaneously object to the trial court’s action.⁵⁷ The Court stated that “when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically.”⁵⁸ In such cases, “the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or, . . . that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.”⁵⁹

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1911.

⁵⁶ *Id.* at 1912.

⁵⁷ *See id.* at 1905.

⁵⁸ *Id.* at 1911. *See Strickland v. Washington*, 466 U.S. 668 (1984) (requiring a defendant to show both deficient performance by his attorney and that the attorney’s actions prejudiced the defense).

⁵⁹ *Id.*

The *Weaver* decision applied to a pretty specific set of circumstances—an ineffective assistance claim raised on collateral review, arguing that the trial lawyer failed to object to a violation of the defendant’s right to a public trial. Yet, the Court emphasized the general importance of contemporaneous objections to allow the trial court the opportunity to cure errors or explain the reasoning behind its actions.⁶⁰ It also noted that when a claim is adjudicated on direct review, as opposed to collateral review, “the systemic costs of remedying the error are diminished to some extent.”⁶¹ The differences between the context of a preserved error raised on direct review and an unpreserved error raised on collateral review “justify a different standard for evaluating a structural error.”⁶² “When a structural error is preserved and raised on direct review, the balance is in the defendant’s favor, and a new trial generally will be granted as a matter of right.”⁶³ “When a structural error is raised in the context of an ineffective-assistance claim, however, . . . and in light of the other circumstances present in this case, petitioner must show prejudice in order to obtain a new trial.”⁶⁴

Outside of the particular context presented in *Weaver*, lower courts have begun to recognize the decision’s broader implications. In *United States v. Aguiar*, the District of Columbia Circuit cited *Weaver* and noted that “[w]hen . . . a defendant first objects to a voir dire closure in a collateral attack on his conviction, . . . notwithstanding a structural error, . . . ‘not every public-trial violation will in fact lead to a fundamentally unfair trial’ or ‘always deprive[] the defendant of a reasonable probability of a different outcome.’”⁶⁵ The Seventh and Eleventh Circuits have each acknowledged that the question of whether plain error is automatically established in every case involving structural errors remains unsettled.⁶⁶ The Eleventh Circuit

⁶⁰ *See id.* at 1912.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1913.

⁶⁴ *Id.*

⁶⁵ *United States v. Aguiar*, 894 F.3d 351, 356 (D.C. Cir. 2018) (quoting *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908, 1911 (2017)).

⁶⁶ *See United States v. Nelson*, 884 F.3d 1103, 1108 (11th Cir. 2018) (“Whether the structural-error doctrine modifies a defendant’s burden to satisfy all four plain-error factors remains unsettled.”); *United States v. Anderson*, 881 F.3d 568, 573 (7th Cir. 2018) (“[T]here is a question as to

acknowledged the question of “what happens if a structural error occurs, but, as happened here, no one complains about it,” but it concluded that it could leave the answer for another day, because no deprivation of the right to counsel had occurred in the case before it.⁶⁷ Two other cases have used *Weaver’s* analysis of the three different types of errors that can be deemed structural error, depending on the nature of the violation, without addressing what different remedies, if any, would be triggered by each category of structural error.⁶⁸ As this body of law develops, practitioners should keep an eye out in their respective jurisdictions for how their courts address the impact of *Weaver* on the review of unpreserved structural error claims.

V. Watch out for overbroad language in cases treating all structural error claims the same

Even after *Weaver*, some courts have continued to use overly-broad language to describe the impact of structural errors. Appellate attorneys must be on guard against relying on language that does not distinguish between preserved and unpreserved error claims or between different types of structural errors that may trigger different analyses under *Weaver*.

Although one post-*Weaver* Seventh Circuit opinion recognized that a structural error finding does not necessarily resolve a case under plain error review,⁶⁹ another, post-*Weaver* Seventh Circuit opinion generally described structural errors as those that “affect basic protections” and declared that such errors “are so intrinsically harmful as to require automatic reversal regardless of their effect on the outcome.”⁷⁰ As of the time of this article, it does not appear that the Seventh Circuit has reconciled these positions.

whether the third prong of the plain error test is met automatically in cases of structural error.”).

⁶⁷ *Nelson*, 884 F.3d at 1108–09.

⁶⁸ See *United States v. Nepal*, 894 F.3d 204, 212 (5th Cir. 2018); *United States v. Kleinman*, 880 F.3d 1020, 1033–34 (9th Cir. 2017).

⁶⁹ *Anderson*, 881 F.3d at 573 (noting that “there is a question as to whether the third prong of the plain error test is met automatically in cases of structural error”).

⁷⁰ *United States v. Wiman*, 875 F.3d 384, 387 (7th Cir. 2017) (internal quotations omitted).

Also since *Weaver*, the Eleventh Circuit, in *United States v. Watts*, cited the Supreme Court’s decision in *Gonzalez-Lopez* for the proposition “that ‘structural errors’ . . . require automatic reversal.”⁷¹ While *Gonzalez-Lopez* addressed a structural error’s effect on harmless error review, it did not actually discuss the circumstances of plain error review.⁷²

The Ninth Circuit recently stated, in *United States v. Chavez-Cuevas*, that “[a] finding that [the trial court’s alleged] failure was ‘structural’ would require automatic reversal.”⁷³ Noting the requirements for reversal under plain error review, the court assumed that “[w]hen an error is constitutional in nature and implicates a ‘structural’ right, the error affects substantial rights.”⁷⁴ Ultimately, the court held that the district court had not committed structural error.⁷⁵

The Tenth Circuit has similarly stated, generally, that “constitutional errors that rise to the level of ‘structural error’—in contrast to ordinary ‘trial error’—require automatic reversal.”⁷⁶

It is possible that, in using such broad language to describe the nature and effect of structural errors, the courts are simply not recognizing that the issue requires greater precision. In light of *Weaver*, not every structural error will lead to automatic reversal in every case.

VI. Conclusion

When drafting appellate briefs or presenting appellate arguments, we must be careful not to rely on overly-broad language in decisions that may not have restricted their holdings to the precise contexts presented. Broad generalizations from the courts may lead us astray and result in conceding that automatic reversals are at stake in cases where they are not warranted.

The Department of Justice has taken the position, before the Supreme Court, that “even errors that are deemed structural can be

⁷¹ *United States v. Watts*, 896 F.3d 1245, 1253 n.5 (11th Cir. 2018) (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006)).

⁷² See *Gonzalez-Lopez*, 548 U.S. at 148–49.

⁷³ 862 F.3d 729, 735 (9th Cir. 2017).

⁷⁴ *Id.* at 734.

⁷⁵ *Id.* at 735.

⁷⁶ *Underwood v. Royal*, 894 F.3d 1154, 1176 (10th Cir. 2018).

forfeited and subject to plain-error review.”⁷⁷ Department lawyers have also recognized that the *Weaver* decision did not settle the question of whether plain error analysis is entirely unnecessary (or that a defendant’s burden will be automatically satisfied) in every situation involving an unpreserved structural error claim.⁷⁸ It is important, especially given this present uncertainty, to make it as clear as possible to the courts in our briefs and arguments what remedy may be at issue in each case.

While all structural error claims preserved by contemporaneous objections put at issue the remedy of automatic reversal, not all unpreserved structural error claims do. Where the claim was not preserved, we must specify for the court which type of structural error is being claimed, and, as *Weaver* guides us, *why* a particular purported violation would constitute a structural error, before we can discuss the applicability of plain error review.

Although *Weaver* did not provide a definitive breakdown of which structural errors will be amenable to a defendant’s plain error argument, it did preserve the Court’s precedents establishing that “certain errors are deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process.”⁷⁹ Such structural errors include, at least, the failure to give a reasonable-doubt instruction, trial by a biased judge, and the exclusion of grand jurors on the basis of race.⁸⁰ *Weaver* left open the question of appropriate plain error requirements for other structural errors, based not on fundamental unfairness, but on the inherent unknowability of the effect of the violation or the protection of interests beyond those of the defendant—not just the violation of the right to a public trial, but also

⁷⁷ Brief for the United States in Opposition to Petition for Writ of Certiorari at 10, *Roy v. United States* (No. 17-6110), 2018 WL 994501 (2018).

⁷⁸ See Brief for the United States at 15, *United States v. Lindell and Hoaeae* (No. 16-10418, 10422), 2018 WL 1928021 (9th Cir. 2018) (recognizing the “unclear” question, after *Weaver*, of “whether structural errors automatically satisfy the third prong of the plain-error test”).

⁷⁹ *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017).

⁸⁰ *Id.* The Court also noted that it had “granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury, . . . though the Court has yet to label those errors structural in express terms.” *Id.*

violations such as the exposure of a petit jury to pretrial publicity and the denial of a defendant's right to self-representation or the representation of his counsel of choice.⁸¹

What we do know and must make sure is clear to the courts is that in cases involving unpreserved structural error claims, a plain error analysis is still required, and an effect on the defendant's substantial rights should not be presumed. Where an unpreserved structural error claim arises from the established fundamental unfairness of a proceeding that cannot reliably serve its function as a vehicle for determination of guilt or innocence,⁸² the plain error doctrine's requirements of an effect on the defendant's substantial rights and a potential miscarriage of justice may be satisfied. Defendants raising other unpreserved structural error claims should be required to carry their burden, and the courts should be amenable to affirming convictions where they are unable to do so, even when structural errors have been found. Both courts and appellate practitioners should learn from *Weaver* that a structural error does not always require automatic reversal.

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⁸¹ See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006); see also *Weaver*, 137 S. Ct. at 1911–12 (expressly reserving the question of whether other structural errors not preserved by a contemporaneous objection and raised on direct appeal should lead to automatic reversals).

⁸² See *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

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The Potential Implications of the Supreme Court’s Decision in *Pereira v. Sessions* on Prosecutions for Illegal Reentry Under 8 U.S.C. § 1326

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I. Introduction

A Notice to Appear (NTA) is the document that initiates removal proceedings in immigration court. In *Pereira v. Sessions*,¹ the Supreme Court held that service of a NTA that omitted the time and place of the initial removal hearing was insufficient to “stop-time” for purposes of accruing the requisite continuous physical presence for a form of relief from removal called cancellation of removal. The Court’s ruling has created significant problems for removal proceedings on the civil/administrative side, and recently criminal defense attorneys have sought to expand the scope of *Pereira* to seek dismissal of indictments under 18 U.S.C. § 1326 for illegal reentry. Defense attorneys are using *Pereira* to argue that if a notice to appear in immigration proceedings failed to specify the time or place of removal proceedings, it did not meet the statutory definition of a “notice to appear.”² The argument follows that, therefore, jurisdiction never vested in the immigration court and any resulting removal order is invalid for purposes of a section 1326 illegal reentry prosecution.

II. Prosecutions for illegal reentry under 8 U.S.C. § 1326

Aliens who are removed and reenter the United States are criminally prosecuted for illegal reentry under 8 U.S.C. § 1326. A prosecution for illegal reentry under section 1326(a) generally requires the government to prove two things: (1) that the alien “has

¹ 138 S. Ct. 2105 (2018).

² See 8 U.S.C. § 1229(a) (outlining notice to appear requirement).

been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding”; and (2) that the alien thereafter has “enter[ed], attempt[ed] to enter, or is at any time found in, the United States[.]”³ One of the common defenses raised in section 1326 cases is a collateral attack on the prior removal proceedings. If the attack is successful, the pending prosecution is typically dismissed because the removal element necessary for a conviction has been deemed invalid.⁴ Section 1326(d) permits an alien to mount a collateral attack against a prior deportation order in response to an illegal reentry prosecution, but only in certain circumstances. An alien may challenge the legality of a deportation order if he can show that:

- (1) [he] exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review; and
- (3) the entry of the order was fundamentally unfair.⁵

III. Statutory and regulatory provisions addressing notices to appear and vesting of jurisdiction with the immigration courts

The Immigration and Nationality Act (INA) provides that “[a]n immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”⁶ To assist the immigration judge in the discharge of this obligation, the INA also gives the immigration judge broad authority to conduct the proceeding,⁷ while providing flexibility in the form the proceeding may take.⁸

³ 8 U.S.C. § 1326(a)(1)–(2).

⁴ *Id.* § 1326(a), (d).

⁵ *Id.* § 1326(d).

⁶ *Id.* § 1229a(a)(1).

⁷ *See id.* § 1229a(b)(1).

⁸ *Id.* § 1229a(b)(2)(A).

The INA also provides that “[i]n removal proceedings under section 1229a . . . written notice (in this section referred to as a ‘notice to appear’) shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien’s counsel of record, if any), specifying” certain information, including, inter alia, the factual allegations and charge of removability against the alien, the nature of the proceeding and legal authority under which it is conducted, and “[t]he time and place at which the proceedings will be held.”⁹ By its terms, however, this section refers only to a notice provided to the alien;¹⁰ nothing in section 1229 directs that such notice must be filed with the immigration court in order to vest jurisdiction with the agency. Moreover, no other subsection of the statute provides any mechanism or framework for the vesting of jurisdiction with the immigration court.

The issue of when and how jurisdiction vests with the immigration court is addressed not by statute, but by regulation. Congress, through the INA, expressly conferred upon the Attorney General the authority and responsibility to conduct removal proceedings,¹¹ as well as the authority to “establish such regulations . . . as [he] determines to be necessary for carrying out” his responsibilities under the INA.¹² Pursuant to that statutory delegation of authority, the Attorney General established a comprehensive framework governing immigration court proceedings,¹³ including when and how jurisdiction vests with the immigration court.¹⁴ “Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the [Department of Homeland Security (DHS)].”¹⁵ For proceedings “initiated after April 1, 1997,” the charging document is defined by regulation to “include a Notice to Appear, a Notice of Referral to Immigration Judge, and a Notice of Intention to Rescind and Request for Hearing

⁹ *Id.* § 1229(a)(1)(A)–(D), (G)(i).

¹⁰ *Id.* § 1229(a)(1) (providing “written notice . . . shall be given in person to the alien”).

¹¹ *See id.* § 1229a(a) (outlining removal proceedings).

¹² *Id.* § 1103(g)(2).

¹³ *See generally* 8 C.F.R. §§ 1003.12–1003.47 (Immigration Court—Rules of Procedure).

¹⁴ *Id.* § 1003.14.

¹⁵ *Id.* § 1003.14(a).

by Alien.”¹⁶ The regulation does not cross-reference the statutory definition of “Notice to Appear,” found at 8 U.S.C. § 1229(a)(1).¹⁷ Rather, the regulation directs that the Notice to Appear include certain information.¹⁸ This list largely duplicates the statutory definition of “Notice to Appear,”¹⁹ but does not include any reference to the time and place of the initial hearing.²⁰ The contents of a “Notice to Appear for removal proceedings” must also include additional information, including the “alien’s name and any known aliases,” his or her address, “[t]he alien’s registration number,” the “alleged nationality and citizenship of the alien,” and “[t]he language that the alien understands.”²¹ Section 1003.15(b) information is mandatory, while the “[f]ailure to provide” any of the information under section 1003.15(c) “shall not be construed as affording the alien any substantive or procedural rights.”²²

¹⁶ *Id.* § 1003.13.

¹⁷ *Id.*

¹⁸ Pursuant to regulation, the Notice to Appear must include the following information:

- (1) The nature of the proceedings against the alien;
- (2) The legal authority under which the proceedings are conducted;
- (3) The acts or conduct alleged to be in violation of law;
- (4) The charges against the alien and the statutory provisions alleged to have been violated;
- (5) Notice that the alien may be represented, at no cost to the government, by counsel or other representative authorized to appear pursuant to 8 C.F.R. 1292.1;
- (6) The address of the Immigration Court where [DHS] will file the Order to Show Cause and Notice to Appear; and
- (7) A statement that the alien must advise the Immigration Court having administrative control over the Record of Proceeding of his or her current address and telephone number and a statement that failure to provide such information may result in an in absentia hearing in accordance with § 1003.26.

Id. § 1003.15(b)(1)–(7).

¹⁹ *See* 8 U.S.C. § 1229(a)(1)(A)–(F).

²⁰ *Compare* 8 C.F.R. § 1003.15(b), *with* 8 U.S.C. § 1229(a)(1)(G)(i) (requiring specification of “time and place at which the proceedings will be held”).

²¹ 8 C.F.R. § 1003.15(c)(1)–(5).

²² *Id.* § 1003.15(c).

IV. The Supreme Court's decision in *Pereira*

On June 21, 2018, the Supreme Court issued a decision in *Pereira*, addressing the question of whether a NTA that did not specify the time and place of the immigration court hearing triggered the “stop time” rule for purposes of a form of relief called cancellation of removal.²³ The Supreme Court held that the answer is no. “A notice that does not inform a noncitizen when and where to appear for removal proceedings is not a ‘notice to appear under section 1229(a)’ and therefore does not trigger the stop-time rule.”²⁴ In so holding, the Court considered “the intersection of” two statutory provisions:²⁵ (1) 8 U.S.C. § 1229b(d)(1), the stop-time rule, which is triggered “when the alien is served a notice to appear under section 1229(a) of” the INA, and (2) 8 U.S.C. § 1229(a)(1), which specifies the information that must be included in the NTA that is served on the alien. The Supreme Court concluded that Congress’s specific reference to the statutory “definition” of an NTA in the stop-time rule plainly indicated its intent that the stop-time rule would be triggered only by an NTA specifying all of the statutorily required information.²⁶ Thus, the Court’s decision turned on explicit reference to the INA’s definition of what constitutes a NTA,²⁷ which the statute, in turn, defines as that document which is served on the alien to apprise him or her of the intent to commence removal proceedings.²⁸

²³ The stop-time rule is part of section 240A of the INA and provides that “[f]or purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a)[.]” 8 U.S.C. § 1229b(d)(1). “[T]his section,” *i.e.*, section 240A of the INA, authorizes cancellation of removal, a form of relief aliens may seek in removal proceedings. *Id.*

²⁴ *Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018) (quoting 8 U.S.C. § 1229(a)).

²⁵ *Id.*

²⁶ *See id.* at 2114–15.

²⁷ *Id.*

²⁸ 8 U.S.C. § 1229(a).

V. Potential implications of the *Pereira* decision for section 1326 unlawful reentry charges

While the Supreme Court's holding in *Pereira* appears limited to the cancellation of removal context, it could have much wider implications for both civil and criminal immigration law. In particular, criminal defense attorneys are beginning to use *Pereira* to argue that if a notice to appear in immigration proceedings fails to specify the time or place of removal proceedings, it does not meet the statutory definition of a "notice to appear." Therefore, jurisdiction never vested in the immigration court, rendering any resulting removal order invalid for purposes of a section 1326 illegal reentry prosecution.

The Board of Immigration Appeals (the Board) rejected this argument in *Matter of Bermudez-Cota*.²⁹ There, the Board distinguished *Pereira*, holding that an NTA that does not specify the time and place of the removal hearing vests an immigration court with jurisdiction over the removal proceedings so long as two conditions are met. First, a subsequent notice of hearing specifying this information is later sent to the alien and second, the alien attends the removal hearing.³⁰

The district courts are split on the question of whether the holding in *Pereira* is limited to cases involving the stop-time rule for cancellation of removal. Some district courts have rejected the expansion of *Pereira* to section 1326 illegal reentry prosecutions.³¹ One example is *United States v. Munoz-Alvarado*. There, the district court concluded that the defendant's motion to dismiss the indictment "seeks to broaden the scope of *Pereira* far beyond that evidenced by the carefully crafted language of the opinion."³² The court concluded that the defendant's argument that the NTA is invalid "any time [it] fails to include a date or time, regardless of the underlying circumstances," "that Notice would be invalid[,]" and "any further

²⁹ 27 I. & N. Dec. 441 (B.I.A. 2018).

³⁰ *Id.* at 443.

³¹ See, e.g., *United States v. Munoz-Alvarado*, No. CR-18-171-C, 2018 WL 4762134 (W.D. Okla. Oct. 2, 2018).

³² *Id.* at *1 (noting that "each time Justice Sotomayor discussed the errors in the Notice to Appear, she was careful to also limit application of the issue to the so-called stop-time rule").

proceedings against the alien would have been invalid. . . . simply distorts [*Pereira*] beyond recognition.”³³ Rather, the court considered the fact that the defendant “appeared at his hearing and unequivocally waived any further notice or hearing and agreed to deportation . . . sufficient to overcome the deficiencies noted by the Supreme Court in *Pereira*.”³⁴ Similarly, in *United States v. Hernandez-Velasco*, the district court denied defendant’s motion to dismiss, holding that the defect in the defendant’s notice to appear provided an insufficient basis to invalidate the removal order under section 1326(d).³⁵ Relevant factors included the fact that he appeared for his deportation hearing, waived his right to appeal the deportation order, and did not object on other occasions to being removed from the United States under the original order.³⁶

Other district courts, however, have expanded the application of *Pereira* to dismiss section 1326 illegal reentry prosecutions. For example, in *United States v. Zapata-Cortinas*, the district court held that the holding in *Pereira* is not limited to immigration cases involving the stop-time rule.³⁷ Rather, the court concluded that an NTA that does not contain the time and date of removal proceedings is void for all purposes under the INA.³⁸ In so holding the court reasoned that “the plain reading of § 1229(a) and *Pereira*—in conjunction with the regulations governing federal immigration courts—demonstrate that a NTA that fails to include the time and date of the hearing fails to vest jurisdiction for a removal proceeding in an immigration court.”³⁹ Because the NTA provided to the defendant did not contain the time and date of defendant’s prior removal hearing, the district court concluded that “it was deficient under the statute.”⁴⁰ The court

³³ *Id.*

³⁴ *Id.*

³⁵ No. CR-18-82-D, 2018 WL 5622285 (W.D. Okla. Oct. 30, 2018).

³⁶ *Id.* at *2–*4; *see also* *United States v. Saravia-Chavez*, No. 3:18-cr-00016, 2018 WL 5974302 (W.D. Va. Nov. 14, 2018) (denying motion to dismiss indictment); *United States v. Mendoza-Sanchez*, No. 17-cr-189-JD, 2018 WL 5816346 (D.N.H. Nov. 5, 2018) (denying motion to withdraw plea agreement and dismiss indictment).

³⁷ No. SA-18-CR-00343-OLG, 2018 WL 4770868 (W.D. Tex. Oct. 2, 2018), *superseded by* 2018 WL 6061076 (W.D. Tex. Nov. 20, 2018).

³⁸ *Id.* at *5.

³⁹ *Id.* at *2.

⁴⁰ *Id.* at *5.

held that “[a]s a result, the immigration court did not have jurisdiction with respect to Defendant’s prior removal, and Defendant’s prior Removal Order was void.”⁴¹ Given that the removal was void, the court held it could not “be the basis for the pending charge against Defendant.”⁴²

In reaching its ruling, the district court rejected the United States’ argument that an incomplete notice can be cured if the alien actually receives notice of the time and date of the removal hearing such that he may attend.⁴³ The district found that “the Supreme Court implicitly rejected the premise underlying the Government’s argument by holding that a putative ‘Notice to Appear’ lacking the hearing date and time is not merely an ‘incomplete’ NTA, but is instead not a NTA at all.”⁴⁴ Accordingly, the district court dismissed the defendant’s section 1326(a) illegal reentry indictment.⁴⁵ Similarly, in *United States v. Virgen-Ponce*,⁴⁶ the district court for the Eastern District of Washington held that “[l]ack of a statutorily compliant Notice to Appear in Defendant’s case means that the immigration court did not have jurisdiction[,]” and granted the defendant’s motion to dismiss the indictment.⁴⁷

In a hybrid decision, the district court in *United States v. Sandoval-Cordero* concluded that *Pereira* applied to a section 1326 illegal reentry prosecution, such that the defendant’s NTA was defective and, as a result, the immigration judge lacked jurisdiction to issue the removal order.⁴⁸ The court further noted, however, that although the

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at *3.

⁴⁴ *Id.* at *3 (“Section § 1229(a) does not say a ‘notice to appear’ is complete when it specifies the time and place of the removal proceedings. Rather, it defines a ‘notice to appear’ as a ‘written notice’ that ‘specifies,’ at a minimum the time and place of the removal proceedings.” (citing *Pereira v. Sessions*, 138 S. Ct. 2105, 2113–14, 2116–17 (2018))).

⁴⁵ *Id.*

⁴⁶ 320 F. Supp. 3d 1164, 1166 (E.D. Wash. 2018).

⁴⁷ *Id.* at 1166; *see also* *United States v. Lopez-Urgel*, No. 1:18-CR-310-RP, 2018 WL 5984845 (W.D. Tex. Nov. 14, 2018) (granting motion to dismiss indictment and dismissing indictment with prejudice); *United States v. Pedroza-Rocha*, No. EP-18-CR-1286-DB, 2018 WL 6629649 (W.D. Tex. Sept. 21, 2018).

⁴⁸ No. 18-CR-2370-KC, 2018 WL 6253251, at *2–*6 (W.D. Tex. Nov. 29, 2018).

immigration judge lacked jurisdiction to order the defendant removed, the defendant still had to satisfy 8 U.S.C. § 1326(d) to collaterally attack the removal.⁴⁹ The court ultimately concluded that the defendant failed to satisfy 8 U.S.C. § 1326(d) because he did not show that he had exhausted his administrative remedies or that the underlying removal proceedings improperly deprived him of the opportunity for judicial review.⁵⁰ The court did not address whether the removal order was fundamentally unfair as the defendant failed to satisfy the first two elements of 8 U.S.C. § 1326(d).⁵¹ Because the defendant did not meet the requirements to collaterally attack his removal order, the court denied his motion to dismiss the indictment.⁵²

To date, the circuit courts that have considered the issue have rejected the argument that a deficient notice to appear deprived an immigration judge of jurisdiction over an alien's removal proceeding. In *Karingithi v. Whitaker*, a Ninth Circuit panel dismissed the alien's invocation of *Pereira*, stating that "Pereira simply has no application here."⁵³ Noting that jurisdiction "is governed by federal immigration regulations, which provide that jurisdiction vests in the Immigration Court when a charging document, such as a notice to appear, is filed[.]" and that "[t]he regulations specify the information a notice to appear must contain; however, the time and date of removal proceedings are not specified[.]" the panel concluded that "[b]ecause the charging document in this case satisfied the regulatory requirements, we conclude the Immigration Judge ('IJ') had jurisdiction over the removal proceedings."⁵⁴ The Sixth Circuit has also ruled, in line with the Ninth Circuit, that an immigration judge is not divested of jurisdiction because of a notice to appear that does not specify the time and date of removal proceedings.⁵⁵

VI. Conclusion

Should the courts expand *Pereira* beyond the stop-time rule for cancellation of removal, the potential implications for section 1326

⁴⁹ *Id.* at *6.

⁵⁰ *Id.* at *6–*7.

⁵¹ *Id.* at *7.

⁵² *Id.*

⁵³ 913 F.3d 1158, 1161 (9th Cir. 2019).

⁵⁴ *Id.* at 1159–60.

⁵⁵ *Santos-Santos v. Barr*, 917 F.3d 486 (6th Cir. 2019).

illegal reentry prosecutions could be enormous. While a few district courts have been receptive to defendants' arguments and dismissed criminal illegal reentry indictments where the NTA did not contain the time and date of removal proceedings, it is too soon to tell whether other district courts, and any of the appellate courts, will be similarly persuaded. It may be that, in the end, it will be up to the Supreme Court to clarify the scope of its holding in *Pereira*. In the meantime, post-*Pereira* jurisprudence is moving swiftly across the country. Prosecutors desiring assistance with arguments opposing the application of *Pereira* to section 1326 illegal reentry prosecutions should contact Criminal Appellate.

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Preserving the Record for Restitution Issues

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I. Introduction

Determining the amount of restitution owed to victims is often left until the very final step in a criminal prosecution. For many victims, however, this can be one of the most important parts of the process. It is their only meaningful opportunity to recover their losses. Further, victims, prosecutors, and even judges are often surprised to learn who is entitled to restitution, what is and is not recoverable, and what information is required to prove restitution under the statutes.

Mistakes in the trial court can mean lengthy appellate delays and increased uncertainty for crime victims.¹ Accordingly, there are three critical takeaways:

- (1) early planning will save time in the long run and inure to the victims' benefit;
- (2) carefully documenting victim losses along the way, rather than trying to recreate history, will aid recovery efforts; and
- (3) taking the time to determine which statute applies, what exactly is recoverable, and making sure victims understand the benefits and limitations afforded under the relevant laws is of utmost importance.

Failure to establish a sufficient record supporting a restitution order can delay or extinguish any chance the victims have of receiving payments. To preserve a restitution judgment, a prosecutor must know, from the beginning of the case, what losses victims might be able to recover so agents can collect restitution information as they investigate the crime.

District judges must make many decisions over the course of a case. For the restitution issue alone, judges must consider which restitution statute applies to the crime of conviction; who qualifies as a victim under the statute; what is the recoverable loss; and the defendant's

¹ See *United States v. Galan*, 804 F.3d 1287, 1289 (9th Cir. 2015).

payment schedule based on his ability to pay. It is the government's burden to establish the necessary facts by a preponderance of the evidence.² Prosecutors must provide the judge enough information to make educated, reasoned, and defensible decisions to bolster against attack on appeal.

II. The legal framework for restitution

On first glance, restitution can appear to be universal to all victims of federal crimes. Yet, the crime of conviction matters a great deal as to whether restitution is mandatory, whom the court may consider a victim, and what types of losses may be counted. Thus, the first decision the court must make is which restitution statute, and accompanying limits or duties, applies.

When determining which restitution statute applies, it is important to look at the charge, not just the conduct. While an event may involve a victim—like an armed robbery for example—the charge of conviction may not fit within the mandatory restitution statute. A defendant convicted of the offense of using a firearm during a crime of violence (armed robbery) would owe mandatory restitution to the robbery victims. In contrast, a defendant convicted of being a felon in possession of a firearm might not.³ Prosecutors can save themselves unnecessary headaches later, by considering the victims and restitution in charging and plea decisions.

There are two types of restitution orders. First, Congress, through the Mandatory Victim Restitution Act (MVRA), made restitution mandatory for most federal offenses where there is an identifiable victim.⁴ In cases involving crimes of violence, crimes against property, and other crimes in which an identifiable victim has suffered a physical or pecuniary loss, the courts are required to order full restitution for a victim's losses without consideration of a defendant's ability to pay or any third-party compensation a victim may have recovered.⁵

² 18 U.S.C. § 3664(e).

³ *United States v. Reid*, No. 18-20023, 2018 WL 4853542 (E.D. Mich. Oct. 5, 2018).

⁴ 18 U.S.C. § 3663A(c).

⁵ 18 U.S.C. § 3663A. For mandatory restitution to apply, crimes against property must be Title 18 offenses. *See id.*

Depending on the type of crime, the victim may be entitled to more restitution than provided under the MVRA. The MVRA limits recovery for things like lost income and medical and psychological expenses to only cases involving bodily injury.⁶ Other statutes remove such limits⁷ and expand the scope of a victim's recovery for cases involving sex offenses,⁸ stalking and domestic violence,⁹ and telemarketing fraud.¹⁰ Thus, it is important to determine not only if there is restitution available for the charged crime, but which restitution provisions apply. Failing to identify the appropriate restitution provisions could result in less than full recovery for the victim.¹¹

Second, if the offense of conviction does not qualify under the MVRA or another mandatory restitution provision, get creative.¹² Another statute authorizes the court to order restitution for any crime as a condition of probation or supervised release.¹³ Yet another statute allows a court to order restitution as agreed to in a plea agreement even if it is not otherwise required.¹⁴ A plea agreement could, therefore, afford restitution when it would not otherwise be required.¹⁵

The very first decision a district court must make in ordering restitution is which restitution statute applies. Instead of just

⁶ A victim may also be reimbursed for "lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. § 3663A(b)(4).

⁷ Compare 18 U.S.C. § 3663A(b)(2), with 18 U.S.C. § 2259(c)(2).

⁸ 18 U.S.C. §§ 2248, 2259.

⁹ *Id.* § 2264.

¹⁰ *Id.* § 2327.

¹¹ See *United States v. Fu Sheng Kuo*, 620 F.3d 1158 (9th Cir. 2010) (remanding restitution order where it was erroneously based on defendant's ill-gotten gains where defendant was charged with a civil rights violation rather than a violation of the Trafficking Act).

¹² For those Title 18 offenses not covered by the mandatory provision, 18 U.S.C. § 3663 provides discretionary restitution.

¹³ *Id.* § 3563(b)(2) (noting a discretionary condition of probation is to "make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A))"); § 3583(d) (outlining conditions of supervised release)

¹⁴ *Id.* § 3663(a)(1)(B)(ii)(3).

¹⁵ *United States v. Reid*, No. 18-20023, 2018 WL 4853542, at *6 (E.D. Mich. Oct. 5, 2018).

assuming the MVRA applies, take the extra time to look into whether the crime of conviction qualifies under the MVRA and, if not, whether conditions of supervision or a plea will accomplish the same goal and protect your order on appeal.

A. Who is entitled to restitution?

After determining if restitution is permitted, the court must consider whether the identified victims are victims for the purpose of restitution. What seems like a simple process can often lead to a lot of confusion.

A defendant must pay restitution to any victim who is “directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered[.]”¹⁶ A victim can be a person, corporation, government, or the victim’s guardian or estate (in the case of a victim who is a minor, incapacitated, or deceased).¹⁷ A victim is not typically someone who is voluntarily performing illegal activities, whether charged or not (for example, a victim of burglary is not going to get restitution for the value of his stolen cocaine).

The most important thing to remember in identifying victims is that a victim for purposes of relevant conduct for sentencing may not be a victim for restitution purposes under the MVRA.¹⁸ Consider a felon in possession case. If the defendant committed a burglary with a firearm, the burglary (and the associated victim) would be a victim for sentencing purposes because there is an enhancement for using the firearm in the commission of another crime. But the burglary victim would not be entitled to restitution under the MVRA.¹⁹

Even if a criminal statute qualifies for mandatory restitution, courts must consider whether the victim is a victim of the charged crime. In an identity theft case, certainly the victims of the charged identity theft would be victims entitled to restitution. But if the defendant had committed an extensive identity theft scheme, the victims of the uncharged offenses might not be entitled to mandatory restitution.²⁰

¹⁶ 18 U.S.C. § 3663A(a)(2).

¹⁷ *Id.*

¹⁸ See *United States v. Huff*, 609 F.3d 1240, 1247–48 (11th Cir. 2010).

¹⁹ *Reid*, 2018 WL 4853542, at *6.

²⁰ *Cf. United States v. Llamas*, 599 F.3d 381, 390–91 (4th Cir. 2010) (finding that “[b]ecause the MVRA focuses on the offense of conviction rather than on relevant conduct, ‘the focus of [a sentencing] court in applying the MVRA must be on the losses to the victim caused by the offense.’”) (alteration and

Do not forget that a victim who might not otherwise be entitled to restitution might be able to recover losses if the restitution is included in the plea agreement. Where there are numerous victims or particularly complicated loss issues, keep in mind that the court has 90 days from the date of sentencing to enter a restitution order.²¹ This is particularly crucial in large fraud schemes. Err on the side of caution and use the extra time to put together more details for the court or request a separate restitution hearing to ensure the court has the opportunity to carefully consider the issue and make a defensible record on appeal.

B. What is the recoverable loss?

After the court makes a record identifying the victims of the crime, the next step is to determine what type of losses are recoverable. In addition to the statutory language, each circuit has a body of case law specifying what types of losses are recoverable and how to value those losses. Although it seems like loss should be easy to determine, in many cases the law is confusing. Prosecutors need to make sure the district court is aware of that law and considers it in its decision-making. For example, in a fraud case, loss for sentencing purposes can be very different from loss for restitution purposes.²² When this occurs, prosecutors need to make sure to explain the different loss calculations on the record or risk issues with both the sentence and the restitution amount on appeal.

Issues also arise when the victim asks for restitution for items that may not be recoverable or the request exceeds what is legally recoverable. This can lead to a very confusing restitution hearing, especially if victims attempt to submit documents for losses that are not recoverable. Because victims have their own rights, the prosecutor may need to present all of the victim's requests to the district court. In those instances, prosecutors should also use briefing to outline which expenses the government believes are recoverable and which are not. Failure to do so could result in a confusing record on appeal.

emphasis in original) (citation omitted). *Llamas* also held that, in a conspiracy, restitution is "limited to the losses attributable to the specific conspiracy offenses for which the defendant was convicted." *Id.* at 391.

²¹ 18 U.S.C. § 3664(d)(5).

²² *See, e.g.,* United States v. Stoupis, 530 F.3d 82, 84, 85 & n. 4 (1st Cir. 2008) (recognizing that "value" for MVRA purposes is distinct from "loss" for Sentencing Guidelines purposes).

1. Did the victim suffer recoverable losses?

Remember, loss for sentencing purposes is different from recoverable loss for restitution purposes. In the case of fraudulent loans, when proving loss for purposes of sentencing, it may be possible to determine a guideline-range based on the number of loans. Once a certain threshold is reached, there is no longer a need to prove additional fraud since it will not likely increase the guideline range. To calculate restitution, however, requires proof that each loan was fraudulent and that the victim actually incurred each loss. Failure to adequately explain the loss may result in reversal of the restitution order.²³

Sometimes losses that occurred after the crime was complete may be recoverable as well. Prosecutors should prepare a plan to collect post-crime loss records on an ongoing basis. Under the MVRA, the court must order a defendant to “reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.”²⁴ If during the course of the investigation, a victim has to hire a babysitter and then drive to the local law enforcement agency for an interview, she may be able to recover those costs. Unless the prosecutor or the agent asks about those expenses, they may not be identified or the victim may not keep the adequate records and receipts that are needed to prove the losses in court.

It can be particularly difficult to discern which post-crime (and sometimes pre-detection) expenses are recoverable. Expenses need to be “incurred during participation in the investigation” in order to be recoverable.²⁵ The expense of hiring a babysitter for an interview requested by the government is recoverable because it was requested and necessary for the prosecution. Recoverable expenses do not include costs victims incur to investigate the case or identify assets on their own. The Supreme Court recently held in *Lagos v. United States*²⁶ that the scope of the words “investigation” and “proceedings” in the MVRA is limited only to government

²³ *United States v. Singletary*, 649 F.3d 1212, 1217 (11th Cir. 2011) (reversing restitution order in mortgage fraud case).

²⁴ 18 U.S.C. § 3663A(b)(4).

²⁵ *Id.*

²⁶ 138 S. Ct. 1684 (2018).

investigations and criminal proceedings, and do not include private investigations, civil actions, or bankruptcy litigation.²⁷

In *Lagos*, which involved a large fraud scheme, the victim-company hired investigators, lawyers, and other consultants to uncover the fraud and to recover assets when the defendant's company declared bankruptcy. The victim-company sustained over \$26 million dollars in losses from the scheme and spent another \$4 million investigating the fraud and collecting available funds. The district court ordered restitution for the remaining loss and the investigatory expenses, and the court of appeals affirmed. The Supreme Court reversed. The Court reasoned that a "broad reading [of the MVRA] would create significant administrative burdens,"²⁸ and concluded that the MVRA only covers expenses incurred *during* the government's investigation. In *Lagos*, the victim-company's expenses were incurred *prior* to the investigation. Although the Court ruled that the MVRA did not permit recovery, it noted that its interpretation of the statute does not leave victims without remedy for additional losses. The victim-company in *Lagos* was still able to obtain an over-\$30 million judgment in its related civil case.²⁹ When discussing restitution with the victim, it is important to make clear that expenses incurred during and as result of the investigation are the only costs that are recoverable.

Even if an individual does not qualify as a victim under the statute, a prosecutor may be able to include that individual in a restitution amount in a negotiated plea agreement. Typically, the MVRA requires bodily injury for recovery of medical expenses. Some people, however, may not have bodily injury resulting from the crime, but require psychological care because of the crime. A plea agreement may include the costs of psychological care even though those harms are not compensable under the MVRA.

2. Did the defendant cause the loss?

Even if there are records documenting a victim's loss, a prosecutor must prove the defendant caused the loss. The MVRA provides that a defendant must pay restitution to a person "directly and proximately harmed as a result of the commission of an offense for which

²⁷ *Id.* at 1688.

²⁸ *Id.* at 1689.

²⁹ *Id.* at 1690.

restitution may be ordered[.]”³⁰ Other statutes require similar proof of causation.³¹ In some cases, this is obvious—the defendant stole a car so he caused the victim’s loss of that item. But in other areas, it can be complicated.

In prosecutions involving the possession, receipt, and distribution of child pornography there was, for a long time, a question as to how to prove restitution for “any [] losses suffered by the victim as a proximate result of the offense.”³² Many courts struggled with holding a single defendant responsible for losses suffered as a result of the trade in images by tens of thousands of people—charged and uncharged. The Supreme Court, in *Paroline v. United States*, clarified that proximate cause in this context may be satisfied by proof that a defendant contributed to a victim’s aggregate, general losses, even if contribution to the underlying losses was “very minor.”³³ Thus, defendants (like Paroline), whose only contribution to the harm was to possess pornographic images of the victim, could be liable for a portion of losses for victims who suffer harm as a result of the continued circulation of the illegal images.³⁴ The question that perplexed prosecutors was how to prove those losses. Faced with court decisions that effectively made it impossible for victims to recover,³⁵ Congress passed a statutory provision setting a minimum recovery for victims.³⁶ Unfortunately, it is unlikely that Congress will pass similar statutes for other crimes.

Causation in other contexts can be similarly complex and ever-changing. The shifts in the housing market made restitution in mortgage fraud cases a dynamic process. Needless to say, verifying the current method for determining loss in more complex cases is an important part of the restitution process. While the amount of restitution must only be reasonably determined, failure to identify the proper method for calculating restitution could result in a confession

³⁰ 18 U.S.C. § 3663(a)(2).

³¹ *See, e.g.*, 18 U.S.C. § 2248(c) (defining a victim as “the individual harmed as a result of a commission of a crime under this chapter” in mandatory restitution for certain sex offenses).

³² 18 U.S.C. § 2259(b)(3)(F).

³³ *Paroline v. United States*, 572 U.S. 434, 454 (2014).

³⁴ *See id.*

³⁵ *See Galan*, 804 F.3d at 1289.

³⁶ Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115–299, 132 Stat. 4383 (2018).

of error in calculating restitution.³⁷ Imagine explaining to the victim that a restitution award was reversed on appeal. This is not a position any prosecutor wants to be in.

III. Proving the amount of restitution owed

After identifying the legal framework for restitution in a case, a prosecutor must prove the amount of restitution owed. Even given the favorable abuse of discretion standard of review for restitution calculations,³⁸ it is still incumbent on the prosecution to create a sufficient record for appeal.

The statute outlines the procedures for determining restitution.³⁹ The amount of restitution should be included in the presentence report (PSR).⁴⁰ In some districts, the probation office takes an active role in determining restitution,⁴¹ but, in many cases, the probation officer simply looks to the investigative agency to notify the victim, and for the victim or the government to provide the loss amount. The government bears the burden of proving the amount of restitution by a preponderance of the evidence.⁴² Therefore, the government must verify the information contained in the PSR and determine if it can meet this burden at sentencing or during a separate restitution hearing.

On a practical note, many times after a long sentencing proceeding, no one, including the judge, wants to spend significant time on restitution. By compiling all the records supporting restitution, summarizing them, and submitting them in advance along with a short brief on the legal issues surrounding the specific type of restitution involved, a prosecutor can avoid unnecessary issues on appeal.

Regardless of when the hearing is held, the government must present sufficient evidence to allow the district court to make adequate findings. Although the abuse of discretion standard that

³⁷ *United States v. Kasprovicz*, 447 F. App'x 821 (9th Cir. 2011) (unpublished).

³⁸ *See Galan*, 804 F.3d at 1289.

³⁹ 18 U.S.C. § 3664.

⁴⁰ *Id.* § 3664(a).

⁴¹ *See id.* § 3664(a) and (d).

⁴² *Id.* § 3664(d)(5).

governs the amount of restitution is typically a prosecutor's friend on appeal, the "district court must explain its findings with sufficient clarity to enable this court to adequately perform its function on appellate review."⁴³ This is where spreadsheets, exhibits, and summary testimony become critical. A district court may have a very good understanding of the facts of the case and the losses suffered by the victims, but the appeals court will not have the same benefit. Being able to offer exhibits or point to summary testimony in the record will aid the trial prosecutor (or the appellate Assistant United States Attorney) in explaining how the restitution amount was determined.

Unfortunately, in many instances, when it comes time to request restitution, the records of losses might not be available or no one has pulled them together. Thus, the most important part of making a record for restitution is planning. Depending on the type of crime, restitution amounts might be collected as part of the underlying investigation. In large fraud cases, loss information is often a critical part of the investigation. But in a sexual assault case, the investigators may not have had reason to collect counseling bills, investigate lost wages, or inquire about a victim's attorney's fees during the course of the investigation.⁴⁴ Indeed, they may not even know the victim is entitled to restitution for such costs. For all of these reasons, it is important to collect potential restitution information at the beginning of the case.

It is easy to imagine that in a case that requires a lengthy investigation and prosecution, a victim would no longer have the necessary records by the time sentencing arrives. Even if they have the records, in a case with hundreds of victims, it may not be practical to collect the information between a plea and sentencing. Prosecutors and investigators should always consider restitution issues at the outset of their cases and with the assistance of victim witness specialists, inform victims of potential restitution recovery. Most victims will receive general information about restitution from victim services,⁴⁵ but investigators also need to be encouraged to mention

⁴³ *United States v. Huff*, 609 F.3d 1240, 1248 (11th Cir. 2010) (citations omitted).

⁴⁴ 18 U.S.C. § 2259(b)(3) (listing types of expenses that are recoverable).

⁴⁵ It is important that prosecutors are aware of what information the Victim Services Unit is providing to victims about restitution.

restitution to victims and collect receipts and other loss information. Even better, have the agent or an analyst input potential restitution into a spreadsheet so that at the restitution hearing, the court has access to an easy summary of all the requested items. Clearly explaining the amount of restitution sought may even result in the defendant's agreement, thereby obviating the need for a restitution hearing.

The evidence supporting a restitution order must be specific and reliable, meaning an unauthenticated spreadsheet is not going to suffice on appeal.⁴⁶ Nor are unsupported declarations by victims.⁴⁷ The person who prepared the spreadsheet can be an excellent witness regarding how the information was collected and what type of expenses are included, if restitution is ultimately contested. An agent who can establish how the numbers were calculated and provide the corresponding documentation would be sufficient on appeal. With a reliable agent, a prosecutor may not have to call multiple victims to testify at a restitution hearing. The agent's spreadsheet may also make it easier for the district court to identify each individual victim and his corresponding losses, as required by statute.⁴⁸

Of course, these recommendations assume that determining loss is just a matter of collecting receipts or valuing an asset. Many cases are much more complex and may need people with specific expertise to determine loss. In a complex fraud case, such as the mortgage fraud cases mentioned above, an agent or analyst with accounting training may be necessary.

IV. The restitution order and collection

As a final matter, restitution must be ordered in the full amount of the loss and should be due and payable immediately.⁴⁹ The latter ensures that if the defendant receives a windfall, like an inheritance, he or she has to pay the victim more than just whatever minimal payments the court set. The former makes sure that if a victim receives some of the restitution in advance of sentencing from, for

⁴⁶ See *United States v. Tsosie*, 639 F.3d 1213, 1221–23 (9th Cir. 2011).

⁴⁷ See *United States v. Hai Waknine*, 543 F.3d 546, 557 (9th Cir. 2008).

⁴⁸ 18 U.S.C. § 3664(f)(1)(A).

⁴⁹ *United States v. Holden*, 897 F.3d 1057, 1066 (9th Cir. 2018), *amended and superseded by* 908 F.3d 395 (9th Cir. 2018) (affirming forfeiture order, but vacating restitution schedule).

example, an insurance payout or even the defendant, the court must still order the full amount, distinguishing between the amount owed the victim and the amount owed the insurance company.⁵⁰ Payments made by the defendant prior to the order of restitution are deducted from the total amount ordered. Failure to order full restitution when the defendant has made payments in advance could result in the defendant receiving double credit for those payments. The clerk of court's office may later credit those payments against the already-reduced judgment. If there are concerns about whether a defendant will receive credit for restitution paid in advance, the judgment can note that payments were already made and, therefore, should be credited against the restitution order.

In some cases, the payment from the defendant is an attempt to settle the debt. A victim may have the incentive to “settle” with a defendant for a lesser amount than the full amount legally owed in order to obtain money immediately, either before or after restitution is ordered. This type of arrangement—negotiating for less than the full amount of restitution—is inconsistent with the clear language of the MVRA.⁵¹ It could also create other troublesome issues in cases.

Victims could be pressured to settle, or a single victim in a multi-victim case could recover more than a pro rata share of the available assets. Every circuit to address this issue has held that a victim's settlement with a defendant prior to or after restitution is ordered does not discharge a defendant's obligation to pay full restitution pursuant to the MVRA.⁵² Thus, in most circuits, neither the victim, nor the victim's assignee, has authority to settle, release, satisfy, or otherwise modify a restitution judgment under the MVRA.⁵³

The more vexing question is what to do with the remaining restitution if the victim and the defendant reach a settlement and the victim (or victim's assignee) no longer wants to or is no longer entitled to receive restitution. In the Ninth and Second Circuits, a district court can sua sponte redirect the remaining restitution to the Crime

⁵⁰ 18 U.S.C. § 3664(f)(1).

⁵¹ See *United States v. Hankins*, 858 F.3d 1273, 1281 (9th Cir. 2017).

⁵² *Id.* at 1277–78 (citing cases).

⁵³ *Id.* at 1277.

Victim's Compensation Fund.⁵⁴ But in the Seventh and Tenth Circuits, they cannot.⁵⁵

V. Conclusion

The responsibility to pursue restitution for crime victims begins before charging a case and does not end when restitution is ordered, but remains a continuing obligation until the restitution to victims has been paid in full, or the liability to pay terminates.⁵⁶ Congress emphasized victims' rights to restitution and the United States Attorneys Offices' duties in the Crime Victims' Rights Act of 2004 (CVRA), which expressly entitles crime victims to "full and timely restitution as provided by law," and imposes an affirmative duty on Department employees to make their best efforts to see that crime victims are accorded this right.⁵⁷

Early preparation is key. A better understanding of what losses can be recovered results in making it easier to collect evidence of those losses, which in turn results in a better record supporting the restitution order. This will not only make an appeal easier, it will benefit victims. And, of course, remember that if figuring out restitution issues is impossible given the other issues in your case, contact your office's Financial Litigation Coordinator (FLC). Most offices have attorneys with specialized knowledge on restitution issues

⁵⁴ See *id.* at 1279; *United States v. Johnson*, 378 F.3d 230, 245 (2d Cir. 2004).

⁵⁵ See *United States v. Speakman*, 594 F.3d 1165, 1175–76 (10th Cir. 2010); *United States v. Pawlinski*, 374 F.3d 536, 540–41 (7th Cir. 2004). In *Speakman*, the result is that a defendant may avoid a restitution judgment if the victim refuses to participate in the restitution hearing. The Tenth Circuit is in the minority and appears to contradict both the statute and the spirit of the MVRA. The Tenth Circuit's conclusion in *Speakman* is most likely based on the fact that the Tenth Circuit views restitution as strictly compensatory. See *United States v. Nichols*, 169 F.3d 1255, 1278 (10th Cir. 1999).

⁵⁶ See JUSTICE MANUAL § 9-143.205 ("The collection of [restitution] owed to victims of crime . . . is a shared responsibility among criminal AUSAs, the Financial Litigation/Asset Recovery Unit, Asset Forfeiture Unit, and victim-witness professionals.").

⁵⁷ See 18 U.S.C. §§ 3771(a)(6), (c)(1); see also U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE (2011 ed., Rev. May 2012).

(and who may also have the assistance of investigators too!). They can help.

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Human Trafficking Appeals: Strengthening Coordination with the Civil Rights Division

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I. Introduction

Combatting human trafficking is one of the Justice Department's top priorities. On February 27, 2017, the Department established the Task Force on Crime Reduction and Public Safety, with subcommittees "focus[ing] on immigration enforcement and human trafficking to ensure that the federal government has an aggressive and coordinated strategy to deter those who violate our borders and subject others to forced labor, involuntary servitude, sex trafficking, and other forms of modern-day slavery."¹ The Department has recognized human trafficking as "a nationwide public health and civil rights crisis" and is committed to using "every lawful tool" to bring traffickers to justice.²

Through strong partnerships between United States Attorneys' Offices (USAOs), the Civil Rights Division's Human Trafficking Prosecution Unit (HTPU), and the Criminal Division's Child Exploitation and Obscenity Section (CEOS), the Department is prosecuting record numbers of human trafficking cases.³ In fiscal year

¹ Memorandum from Attorney Gen. Jefferson B. Sessions to Head of Department Components and United States Attorneys on Update on the Task Force on Crime Reduction and Public Safety (Apr. 5, 2017), <https://www.justice.gov/opa/press-release/file/955476/download>.

² Press Release, U.S. Dep't of Justice, Attorney General Issues National Slavery and Human Trafficking Prevention Month Proclamation (Jan. 31, 2018).

³ HTPU serves as the Department's subject matter experts in human trafficking cases involving forced labor and adult and transnational sex trafficking, and CEOS serves as the Department's subject matter experts in child sexual exploitation, including sex trafficking of minors. *See generally* Hilary Axam & Steven J. Grocki, *The Civil Rights Division's Human Trafficking Prosecution Unit (HTPU) and the Criminal Division's Child*

2018, the Department charged 386 defendants and secured a record 526 convictions in such cases.⁴ As a result, the Department can expect a significant increase in human trafficking-related appellate litigation.

Human trafficking cases present unique challenges and legal issues. The November 2017 issue of the DOJ Journal focused on some of those recurring challenges, such as dealing with evidence of sex trafficking, victims' prior and subsequent prostitution, and proving trafficking cases without a testifying victim.⁵ Defending human trafficking convictions on appeal likewise can present specialized challenges and legal issues, from defending the constitutionality of the trafficking statutes themselves to balancing evidentiary rules against Confrontation Clause concerns.

The Civil Rights Division's Appellate Section (CRT Appellate) is available to help USAOs navigate the complexities that arise in human trafficking appeals. CRT Appellate has extensive experience handling appeals in trafficking cases involving forced labor, sex trafficking of adults, and transnational sex trafficking in jurisdictions nationwide. It can bring added resources, expertise, and insights to help guide development of the law and ensure consistency in the Department's legal positions. This experience includes working collaboratively with USAOs in a variety of roles, depending on the USAO's needs and the particularities of the case.

This article addresses the ways in which CRT Appellate can assist USAOs with human trafficking appeals. It begins with an overview of CRT Appellate, including the kinds of cases the Section handles and the particular expertise it brings to human trafficking appeals. The article then discusses the procedures set forth in the recently updated Justice Manual for reporting appeals in civil rights cases, including human trafficking cases.⁶ It explains key factors that the Civil Rights Division typically considers in deciding which entity—CRT Appellate or the USAO—will have lead responsibility for the appeal. It then

Exploitation and Obscenity Section (CEOS): An Overview, 65 U.S. ATT'YS BULL., no. 6, 2017, at 17–23.

⁴ Press Release, U.S. Dep't of Justice, Department of Justice Recognizes Human Trafficking Prevention Month and Announces Update on Efforts to Combat this Violent Crime (Jan. 31, 2019).

⁵ See generally *Human Trafficking*, 65 U.S. ATT'YS BULL., no. 6, 2017.

⁶ See JUSTICE MANUAL § 2-1.000 *et seq.* (updated July 2018); § 8-1000 *et seq.* (updated Mar. 2018).

discusses the USAO's continuing role in shaping and reviewing appeals led by CRT Appellate and the ways CRT Appellate can offer specialized assistance in USAO-led appeals.

II. The Civil Rights Division's Appellate Section: role and expertise

The Civil Rights Division's Appellate Section has jurisdiction over appeals in all civil rights cases, both civil and criminal, in which the United States is a party.⁷ This includes human trafficking cases involving forced labor, sex trafficking of adults, and transnational sex trafficking, whether prosecuted by HTPU, by an individual USAO, or by the HTPU and a USAO jointly.⁸ Located in the Main Justice Building in Washington, D.C., CRT Appellate has a staff of experienced, full-time appellate advocates who work closely with attorneys in the Solicitor General's Office and other Department appellate offices, including the Criminal Division. CRT Appellate has successfully defended human trafficking convictions in courts of appeals throughout the United States and frequently assists USAOs with trafficking appeals nationwide.

Because CRT Appellate handles human trafficking cases from all over the country, it can draw on experience and expertise from similar cases in other circuits to anticipate and navigate issues that may arise on appeal. As set forth below, CRT Appellate can assist USAOs in human trafficking appeals, either by providing consultation and review or, in appropriate cases, by assuming lead responsibility for the appeal. Regardless of which component takes the lead on appeal, CRT Appellate will work closely with the USAO to develop the Department's positions and advance its enforcement priorities.

⁷ JUSTICE MANUAL §§ 2-3.210; 8-2.150.

⁸ *Id.* § 8-1.100. Like the HTPU, CRT Appellate does not handle cases involving sex trafficking of only minors. *Id.* A USAO should report an adverse decision in a trafficking case involving a minor victim to its Appellate Section liaison in the Criminal Division.

III. The Justice Manual: applicable provisions

A. Human trafficking appeals: reporting and procedures

Pursuant to the recently revised Justice Manual, when a USAO becomes aware of a potential appeal in a human trafficking case in its office, it must notify CRT Appellate, even if it expects to handle the appeal internally. This ensures that CRT Appellate is aware of the appeal and can work with the USAO to ensure consistency with positions taken in other trafficking appeals and offer specialized resources and expertise. To report an appeal in a trafficking case, USAOs may contact the Chief of CRT Appellate at (202) 514-2195.⁹ Below are the types of decisions that the Justice Manual directs USAOs to report to CRT Appellate.

- *Appeals of convictions and sentences.* A USAO should alert CRT Appellate as soon as a defendant files a notice of appeal in a human trafficking case, whether the defendant challenges his conviction or only his sentence.¹⁰ The USAO should forward to CRT Appellate a copy of the notice of appeal, as well as the district court's opinion (if any) and final judgment. The USAO should also notify CRT Appellate of any motion by the appellant for a stay or injunction pending appeal or for any other emergency relief, and provide CRT Appellate with copies of related filings.¹¹
- *Adverse district court decisions.* A USAO should report all appealable adverse district court decisions (that is, those made over the United States' objection) in human trafficking cases to CRT Appellate as soon as the court issues the order.¹² The USAO

⁹ CRT Appellate currently is led by Chief Tom Chandler (Thomas.Chandler2@usdoj.gov).

¹⁰ JUSTICE MANUAL § 2-3.210.

¹¹ *Id.* §§ 2-2.200; 8-2.150.

¹² *Id.* § 2-2.110. Subject to the Solicitor General's authorization, *see infra* p.169, the government may appeal a district court's adverse ruling in a criminal case in limited circumstances: (1) an order dismissing all or part of an indictment; (2) an order granting a new trial; (3) an order setting aside a guilty verdict; or (4) an order suppressing evidence constituting substantial proof of a material fact. 18 U.S.C. § 3731.

also must report any order holding a federal statute unconstitutional.¹³ The USAO's report to CRT Appellate should contain basic information about the case, as well as reasons for and against seeking review, as set out in Justice Manual § 2-2.111.

- *Adverse court of appeals decisions.* A USAO should report all adverse court of appeals decisions, *except* unpublished or non-precedential decisions in cases where the United States was appellee and the USAO does not recommend further review.¹⁴
- *Certain sentencing orders.* A USAO should report a sentencing order if it is outside the statutory limits or if the district court sentenced the defendant based on a prohibited factor, such as race, religion, or national origin. For all other sentencing orders, the USAO must report it only if the USAO would like to appeal.¹⁵

As set forth below, all appeals in civil rights cases (including human trafficking cases) taken *by the Department*, including cross-appeals, interlocutory appeals, petitions for rehearing en banc, petitions for the issuance of extraordinary writs, and petitions for certiorari, must be approved by the Solicitor General.¹⁶

- *Appeals and cross-appeals.* A USAO wishing to appeal or cross-appeal should first contact CRT Appellate, which will review the USAO's recommendation and coordinate the process of seeking authorization.¹⁷ If a USAO seeking to appeal or cross-appeal has not received authorization from the Solicitor General, and the time for filing an appeal or cross-appeal is about to expire, the USAO should file a "protective" notice of appeal. The USAO should then report the filing to CRT Appellate. The USAO should file such "protective" notice of

¹³ JUSTICE MANUAL § 2-2.110. Additionally, a USAO may wish to seek mandamus review of a non-appealable order, to seek a stay in the court of appeals, or to appeal a district court's order releasing a defendant pending trial. In such cases, the USAO must report the ruling to CRT Appellate and obtain authorization from the Solicitor General. *Id.* § 2-2.124.

¹⁴ *Id.* § 2-2.110.

¹⁵ *Id.*

¹⁶ *Id.* §§ 2-2.1000; 2-2.121; 2-2.122; 2-2.124; 2-2.311.

¹⁷ *Id.* §§ 2-1.000; 2-2.121.

appeal no sooner than five days before time to appeal or cross-appeal expires.¹⁸

- *Petitions for rehearing en banc.* A USAO wishing to seek rehearing en banc should first contact CRT Appellate, which will review the USAO's recommendation and coordinate the process of seeking authorization.¹⁹ The USAO's memorandum recommending further review should explain why the matter satisfies the requirements of Federal Rule of Appellate Procedure 35(b)(1).²⁰
- *Petitions for writ of certiorari.* If a USAO believes that a court of appeals' decision in a human trafficking case warrants Supreme Court review, it should notify CRT Appellate and follow the procedures set forth in Justice Manual § 2-2.111. In consultation with the USAO and CRT Appellate, the Solicitor General will decide whether to petition for certiorari. All briefing in Supreme Court civil rights cases is handled by the Office of the Solicitor General, with assistance from CRT Appellate, regardless of which component handled the briefing in the court of appeals.²¹

B. Staffing decisions

The Justice Manual recognizes that the Civil Rights Division maintains a "strong interest in ensuring that the Department of Justice presents consistent arguments nationwide on civil rights issues."²² To further this interest, the Justice Manual sets forth a process for the Civil Rights Division to follow in deciding whether appeals in civil rights cases prosecuted by USAOs, including human trafficking cases, will be handled primarily by a USAO or by CRT Appellate.

Specifically, the Justice Manual provides that the Assistant Attorney General for the Civil Rights Division (or his designee, typically the Section Chief of CRT Appellate) will decide whether CRT

¹⁸ *Id.* § 2-2.132.

¹⁹ *Id.* §§ 2-1.000; 2-2.122.

²⁰ *Id.* § 2-2.122. Though it is not necessary to seek authorization from the Solicitor General before seeking rehearing before the same panel that originally heard the case, *id.*, the USAO should consult with CRT Appellate before doing so.

²¹ *Id.* § 2-2.510.

²² *Id.* § 8-2.150.

Appellate or the USAO will have lead responsibilities in any particular appeal.²³ Factors to consider in making that decision include (1) the complexity of the civil rights issues presented and their importance to the Civil Rights Division; (2) the availability of resources; and (3) the extent of the USAO's participation in the district court and its interest in handling the appeal.²⁴ With respect to the first criterion, the Civil Rights Division will pay particular attention to whether the appeal involves the interpretation of a human trafficking statute, raises constitutional issues, may set important precedent, or raises other novel or recurring issues specific to human trafficking cases.²⁵

1. Procedures when CRT Appellate has lead responsibility

Where the Civil Rights Division decides that CRT Appellate will have primary responsibility for an appeal, the USAO still will retain an important role. The assigned CRT Appellate attorney will consult closely with the USAO at all stages, beginning with which issues to raise on appeal or, in the case of an appeal by an adverse party, strategies for responding to the arguments presented. In addition to initial consultation on issues and strategies, the USAO will have the opportunity to review and comment on the draft brief and other substantive pleadings before they are filed, and CRT Appellate will carefully consider and incorporate the USAO's comments whenever possible. Finally, if the case is set for oral argument, the USAO will be invited to participate in all moot court sessions and provide feedback on the CRT Appellate attorney's oral advocacy.

Recent cases illustrate the success of this collaborative approach. In *United States v. Groce*,²⁶ a matter prosecuted jointly by HTPU and the USAO for the Western District of Wisconsin, CRT Appellate was designated to lead the appeal, and it coordinated closely with the USAO throughout the appeal on revising the draft brief and mooting

²³ *Id.*

²⁴ *Id.*

²⁵ A disagreement between a USAO and the Civil Rights Division regarding the assignment of appellate responsibility may be resolved by the Solicitor General. *Id.* §§ 2-3.100; 2-3.210. The Justice Manual provides, however, that “[r]esort to the Office of the Solicitor General should be used sparingly.” *Id.* § 2-3.100.

²⁶ No. 16-3845 (7th Cir. 2016).

the oral argument. Consistent with the Department's request, the Seventh Circuit affirmed seven of the defendant's eight counts of conviction and remanded for resentencing.²⁷ Similarly, in *United States v. Roy*,²⁸ CRT Appellate successfully defended a sex trafficking conviction obtained in a joint prosecution by HTPU and the USAO for the District of Maryland. On appeal, the defendant, among other things, challenged on vagueness grounds the constitutionality of 18 U.S.C. § 1594(c), which criminalizes conspiracy to violate the federal sex trafficking statute. The USAO reviewed and commented on all drafts of the brief. The Fourth Circuit affirmed the convictions without oral argument.²⁹ In *United States v. Baston*,³⁰ a case prosecuted primarily by the USAO for the Southern District of Florida, the USAO handled the appeal in the Eleventh Circuit, but CRT Appellate took the lead after the defendant filed a petition for a writ of certiorari. The petition presented the question of whether 18 U.S.C. § 1596(a)(2), which provides extraterritorial jurisdiction over sex trafficking cases, is a valid exercise of Congress's powers under the Foreign Commerce Clause. CRT Appellate, in consultation with the USAO, worked with the Solicitor General's Office to oppose the petition and defend the constitutionality of the statute. The Supreme Court ultimately denied the petition.³¹

2. Procedures when the USAO retains lead responsibility

Where the Civil Rights Division designates the USAO to take the lead in handling an appeal, the Justice Manual requires that CRT Appellate review and approve all substantive pleadings. This review ensures that the brief does not contradict positions the Department has taken in other cases and that it reflects the most recent and relevant law from other circuit courts of appeals. To ensure that CRT Appellate has sufficient time for its review and for the USAO to consider its suggestions, the Justice Manual provides that USAOs

²⁷ *United States v. Groce*, 891 F.3d 260, 271 (7th Cir. 2018).

²⁸ No. 14-4623 (4th Cir. 2014).

²⁹ *United States v. Roy*, 630 F. App'x 169 (4th Cir. 2015) (unpublished).

³⁰ No. 16-5454 (11th Cir. 2016).

³¹ *Baston v. United States*, 137 S. Ct. 850 (2017).

should submit a draft brief to CRT Appellate at least seven days before the filing deadline.³²

As set forth in the next section, where the USAO takes the lead in a human trafficking appeal, CRT Appellate is available to assist in addressing challenging legal issues and ensuring consistency with other Department positions.

IV. CRT Appellate can assist USAOs handling human trafficking appeals

When the USAO retains primary responsibility for an appeal, CRT Appellate stands ready to assist in any way that it can, depending on the nature of the case and the particular needs of the USAO. For example, CRT Appellate can provide sample briefs from other human trafficking appeals involving similar issues, identify favorable precedent in other circuits, brainstorm ways to distinguish potentially adverse cases, and consult on appellate strategy. For appeals involving complicated or novel issues, CRT Appellate can conduct independent research and draft legal memoranda summarizing relevant case law or suggesting an appropriate course of action. CRT Appellate also is available to review and provide comments on draft briefs and to participate remotely in oral argument moot courts.

At the USAO's request, CRT Appellate also can provide drafting assistance. For example, in *United States v. Marcus*,³³ CRT Appellate assisted the USAO for the Eastern District of New York by drafting the response to the appellant's constitutional challenges, while the USAO drafted the remainder of the brief. After the Second Circuit reversed the defendant's conviction, CRT Appellate successfully worked with the Solicitor General's Office to petition for a writ of certiorari to the Supreme Court to restore the defendant's conviction.³⁴

CRT Appellate also can provide other types of legal support and assistance to USAOs in their trafficking appeals. For example, CRT Appellate recently assisted a USAO with a human trafficking appeal by researching relevant case law on hearsay exceptions and by reviewing drafts of the brief as appellee. In addition, CRT Appellate currently is consulting with a USAO on the obstruction provision of the sex trafficking statute, 18 U.S.C. § 1591(d), which Congress added

³² JUSTICE MANUAL § 8-2.150.

³³ No. 07-4005 (2d Cir. 2007).

³⁴ See *United States v. Marcus*, 560 U.S. 258 (2010).

to the statute in 2008. The Department is increasingly using this provision to hold trafficking defendants accountable for witness tampering and other obstructive behavior, and defendants have challenged the statutory language on vagueness and First Amendment grounds. CRT Appellate can offer recommendations on how to respond to these types of challenges at both the trial and appellate levels and how to formulate jury instructions to avert appellate issues.

V. Conclusion

Enforcement of the human trafficking laws is a top Department priority.³⁵ Through strong partnerships between USAOs, the Civil Rights Division's HTPU, and the Criminal Division's CEOS, the Department is prosecuting record numbers of human trafficking cases and handling an unprecedented volume of human trafficking appeals, with particularly challenging issues arising in coercion-based trafficking crimes involving forced labor, sex trafficking of adults, and transnational sex trafficking. As this momentum continues to build, it is critical that USAOs and the Civil Rights Division work closely together to ensure that the Department takes consistent positions on issues that arise across the country and that it coordinates effectively to guarantee the strongest possible appellate advocacy in human trafficking cases. The Civil Rights Division's Appellate Section looks forward to working with USAOs nationwide as the Department continues to seek and obtain justice for human trafficking victims.

About the Author

Elizabeth Parr Hecker is a senior attorney in the Civil Rights Division's Appellate Section, where she briefs and argues appeals of civil rights cases, including human trafficking cases. Before joining the Appellate Section, she was a Senior Counsel in the Department of Justice's Office of Legal Policy, where she focused on formulating and advancing the Department's major policy initiatives. From 2008–2013, Ms. Hecker was a trial attorney in the Civil Rights Division's Housing and Civil Enforcement Section, where she litigated cases dealing with discrimination in housing and lending. She serves as an Adjunct Professor at George Washington University Law School, where she coaches a moot court team. Prior to joining the

³⁵ See *supra* notes 1, 2.

Department, Ms. Hecker worked as an associate at two national law firms. Ms. Hecker clerked for the Honorable Marjorie O. Rendell on the United States Court of Appeals for the Third Circuit.

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Uncounseled Tribal Court Convictions as Predicate Offenses Under *United States v. Bryant*

Bob Bullock
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I. Introduction

In state and federal criminal proceedings, the Sixth Amendment guarantees indigent defendants the right to appointed counsel whenever a term of imprisonment is imposed; and a conviction obtained in violation of that right cannot be used in a subsequent proceeding. That right does not apply, however, in Tribal court. Instead, the Indian Civil Rights Act of 1968 (ICRA), as amended, requires appointed counsel in Tribal court only in cases when a term of imprisonment of one year or more is imposed. In *United States v. Bryant*, the Supreme Court held that a Tribal court misdemeanor conviction can be used as a predicate offense for a federal habitual offender prosecution under 18 U.S.C. § 117, even if the previous conviction was uncounseled.¹

II. The right to counsel in Tribal courts

Under the Sixth Amendment, indigent defendants in federal or state court must be appointed counsel before they can be sentenced to any term of imprisonment.² However, when an Indian is criminally

¹ *United States v. Bryant*, 136 S. Ct. 1954 (2016). Section 117(a) targets habitual domestic abusers, making it a federal crime to assault an intimate partner after having been convicted at least twice of domestic violence in “Federal, State, or Indian tribal court proceedings.” 18 U.S.C. § 117.

² *See Powell v. Alabama*, 287 U.S. 45, 71 (1932) (finding that an Alabama state court’s failure to assign counsel to indigent defendants on capital rape charges constituted “a denial of due process within the meaning of the Fourteenth Amendment”); *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963) (extending the right to court-appointed counsel to indigent felony defendants in state court); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that courts may not sentence either misdemeanor or felony indigent defendants to imprisonment without giving them an opportunity to

prosecuted in Tribal court, the Tribe acts as an independent sovereign not governed by the U.S. Constitution.³ A Tribal court must instead comply with ICRA, which accords Tribal defendants many rights provided in the Bill of Rights, but not the right to appointed counsel in misdemeanor cases.⁴

For many years, ICRA provided that “[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person in a criminal proceeding the right . . . *at his own expense* to have the assistance of counsel for his defense.”⁵ With the enactment of the Tribal Law and Order Act of 2010 (TLOA), Tribes must now provide a defendant with a right to counsel “at least equal to that guaranteed by the United States Constitution,” but only in cases where a Tribal court sentences an individual to a prison term of more than one year.⁶ Under these statutory provisions, and unlike state or federal courts, Tribal courts may impose a sentence of imprisonment of up to one year without providing counsel to indigent Indian defendants.

III. The context of *Bryant*

Michael Bryant, Jr., was likely the type of defendant Congress had in mind when it created a felony offense for domestic assault by a habitual offender in Indian Country. Responding to the high rates of domestic violence in Indian Country, the statute provides for a fine or imprisonment of up to five years, or both, for a federal offense of domestic assault when the defendant has at least two prior final convictions for domestic violence; it also provides for a sentence of up to 10 years “if substantial bodily injury results.”⁷ The statute also

have legal representation at trial); *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (clarifying that the right to counsel turns on actual, rather than potential, imprisonment).

³ *See* *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (“The Bill of Rights does not apply to Indian tribes.”); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”).

⁴ 25 U.S.C. § 1302(a).

⁵ *Id.* § 1302(a)(6) (emphasis added).

⁶ 25 U.S.C. § 1302(c)(1).

⁷ 18 U.S.C. § 117(a).

allows Tribal court convictions to count as predicate offenses for criminal prosecutions in federal court for this violation.

Bryant, an enrolled member of the Northern Cheyenne Tribe and a resident of its reservation in Montana, had multiple such Tribal court convictions.⁸ Those convictions were uncounseled and the sentences for each did not exceed imprisonment of one year.⁹ In federal district court, with the assistance of appointed counsel, Bryant entered a conditional guilty plea to domestic assault by an habitual offender, reserving the right to appeal whether his prior uncounseled Tribal court convictions qualified as predicates under 18 U.S.C. § 117(a).¹⁰

Were Bryant not an Indian, the case would have been different. Tribal courts generally have jurisdiction over Indian defendants, but their jurisdiction over non-Indians is limited.¹¹ With the enactment of the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), Tribal courts may exercise “special domestic violence criminal jurisdiction” over some domestic violence offenses committed by a non-Indian against an Indian,¹² but to do so requires that a non-Indian defendant be provided counsel regardless of the length of the sentence.¹³

The Ninth Circuit held that, because Bryant’s uncounseled convictions could not have served as section 117(a) predicates if obtained in state or federal court, the Sixth Amendment prohibited the use of uncounseled Tribal court convictions as well.¹⁴ The decision created a circuit split; the Eighth and Tenth Circuits had ruled that valid Tribal court convictions may be used as section 117(a) predicates.¹⁵

The Supreme Court reversed. Writing for a unanimous Court, Justice Ginsburg found that convictions, like Bryant’s, that are valid when rendered “retain that status when invoked in a subsequent

⁸ *United States v. Bryant*, 136 S. Ct. 1954, 1963 (2016).

⁹ *Id.*

¹⁰ *Id.* at 1963–64.

¹¹ *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

¹² 25 U.S.C. § 1304.

¹³ *Id.* § 1304(d).

¹⁴ *United States v. Bryant*, 769 F.3d 671 (9th Cir. 2014).

¹⁵ *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011), *cert. denied*, 565 U.S. 1229 (2012); *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011), *cert. denied*, 565 U.S. 1263 (2012).

proceeding.”¹⁶ The Court reasoned that the Sixth Amendment was inapplicable to Bryant’s prior convictions, and that his 46-month sentence for violating section 117 “punishes his most recent acts of domestic assault, not his prior crimes prosecuted in tribal court. Bryant was denied no right to counsel in tribal court, and his Sixth Amendment right was honored in federal court.”¹⁷

The Sixth Amendment cases that apply to the states note that lack of counsel can call into question the reliability of convictions. But in *Bryant*, the Supreme Court rejected the argument that such reliability concerns render an uncounseled decision categorically unreliable for use in a recidivist prosecution.¹⁸ The Court found the various protections in ICRA—including the right to habeas review in federal court, the right against self-incrimination, the right to confront witnesses, protection against double jeopardy, and a prohibition on unreasonable search and seizure—“sufficiently ensure the reliability of tribal court convictions.”¹⁹ Federal and state courts rely on Tribal court convictions and orders in a variety of cases,²⁰ and the statute at issue in *Bryant* is another example.

Since the Supreme Court’s decision in *Bryant*, a few federal courts have decided cases with similar facts. Citing *Bryant*, an Eighth Circuit case affirmed the defendant’s conviction as a domestic violence habitual offender using prior uncounseled Tribal court convictions as predicates.²¹ Before the *Bryant* decision, the District Court in Montana dismissed an indictment in a section 117 habitual offender case based on the use of uncounseled Tribal court convictions as predicates, but post-*Bryant* the Ninth Circuit Court of Appeals reversed.²² Finally, a defendant in the District of South Dakota argued that a previous Tribal court conviction could not be used as a predicate offense because his counsel did not advise him as to that

¹⁶ United States v. Bryant, 136 S. Ct. 1954, 1965 (2016).

¹⁷ *Id.*

¹⁸ *Bryant*, 136 S. Ct. at 1966.

¹⁹ *Id.*; see 25 U.S.C. §§ 1302(a), 1303.

²⁰ See, e.g., 18 U.S.C. § 2265.

²¹ United States v. Drapeau, 827 F.3d 773, 777 (8th Cir. 2016), *aff’g* 73 F. Supp. 3d 1086 (D.S.D. 2014).

²² United States v. Stewart, 670 F. App’x 465 (Mem) (9th Cir. 2016) (unpublished), *rev’g* No. 14-20-BLG, 2014 WL 12629380 (D. Mont. May 22, 2014).

possibility, but the court concluded that a conviction consistent with ICRA could be used, based in part on *Bryant*.²³

IV. Conclusion

Tribal courts can be viewed as one exercise of Tribal sovereignty and self-governance. Many Tribal courts base their procedures on the adversarial system, but some are more traditional and may be based on restorative or restitution models. Some Tribes with sufficient resources fund indigent defense. Both TLOA and VAWA 2013 require Tribes to provide additional due process safeguards for defendants if they make use of the enhanced sentencing authority and expanded jurisdiction granted to them, respectively.

In searching for previous convictions of criminal defendants, federal prosecutors should consider Tribal court convictions in appropriate cases. AUSAs designated as Tribal liaisons for their respective districts can help interact with Tribal courts to obtain the necessary evidence to establish the fact of such underlying convictions.

The felony offense of domestic assault by a habitual offender, codified at 18 U.S.C. § 117, specifically includes Tribal court convictions in the list of possible predicate offenses. Under *Bryant*, even uncounseled Tribal court convictions for domestic violence (that otherwise comply with the Indian Civil Rights Act) can be used as predicate offenses for habitual offender prosecutions under section 117.

About the Author

Bob Bullock is Senior Counsel with the Office of Tribal Justice. He was previously with the Department of Justice Office for Access to Justice where he worked on a range of issues related to civil legal aid and criminal indigent defense. Before that, Mr. Bullock worked at the White House Office of Management and Budget (OMB) on budget and policy issues, managing a portfolio of Department of Justice programs (and before that, a portfolio that included the Bureau of Indian Affairs). He began his career as a civil legal aid attorney, specializing in housing and consumer protection law.

²³ United States v. Gillette, No. 3:17-CR-30122, 2018 WL 1446410 (D.S.D. Mar. 23, 2018), *adopting* No. 3:17-CR-30122, 2018 WL 3151642 (D.S.D. Jan. 29, 2018).

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Higher Ground

Paul Farley

Assistant United States Attorney

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Wiley Blount Rutledge, Jr.'s tenure on the United States Supreme Court was fairly brief—only about six and a half years. Accordingly, his jurisprudential legacy is limited: although he joined the majority in the notorious *Korematsu* decision,¹ he also authored a notable dissent in *In re Yamashita*.² The latter case involved the commanding general of the Japanese Imperial Army in the Philippines during the last year of World War II. Convicted of war crimes and sentenced to death by a military commission, Yamashita filed a habeas corpus petition arguing that he was not subject to the jurisdiction of the military commission. The Supreme Court denied the petition, but Rutledge took issue in soaring terms:

More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.³

After detailing the manifold deficiencies in Yamashita's trial,⁴ Rutledge concluded by quoting Thomas Paine: "He that would make

¹ *Korematsu v. United States*, 323 U.S. 214 (1944), *abrogation recognized by Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

² 327 U.S. 1 (1946).

³ *Id.* at 41–42 (Rutledge, J., dissenting).

⁴ Trial commenced just three weeks after arraignment. *Id.* at 57. "[T]he prosecution presented evidence to show that the crimes were so extensive

his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself.”⁵



Justice Rutledge

What may have been Justice Rutledge’s most significant contribution to the law came via a circuitous, if not fortuitous, route. He dissented in *Ahrens v. Clark*,⁶ in which the majority held that a federal district court lacks jurisdiction to issue a writ of habeas corpus

and so widespread, both as to time and area, that *they must* either have been *willfully permitted* by the accused *or secretly ordered* by him.” *Id.* at 50–51 (emphasis in original) (footnote omitted). General MacArthur’s order authorizing the military commission provided that it could receive “anything which in the commission’s opinion ‘would be of assistance in proving or disproving the charge’ without any of the usual modes of authentication.” *Id.* at 49. Consequently, “[e]very conceivable kind of statement, rumor, report, at first, second, third or further hand, written, printed, or oral, and one ‘propaganda’ film were allowed to come in.” *Id.*

⁵ *Id.* at 81 (footnote omitted).

⁶ 335 U.S. 188, 192–93 (1948), *abrogated by* *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973).

if the person detained is not within the territorial jurisdiction of the court when the petition is filed—even if the custodial *was* in the territorial jurisdiction.⁷ Rutledge foresaw that there “may be instances arising in the future where persons are wrongfully detained in places unknown to those who would apply for habeas corpus in their behalf.”⁸ He asked, rhetorically, “may the jailers stand in defiance of federal judicial power, and plead either the accident of the locus of detention outside the court’s territorial limitations, or their own astuteness in so selecting the place, to nullify judicial competence?”⁹

Ahrens was substantially narrowed by *Braden v. 30th Judicial Circuit Court of Kentucky*, where the Court said that “we can no longer view that decision as establishing an inflexible jurisdictional rule, dictating the choice of an inconvenient forum even in a class of cases which could not have been foreseen at the time of our decision.”¹⁰ Three decades later, the Supreme Court went on to further repudiate *Ahrens* in *Rasul v. Bush*, which concerned whether 28 U.S.C. § 2241 conferred jurisdiction over claims by detainees at Guantanamo Bay, Cuba.¹¹ Writing for the Court, Justice Stevens discussed *Ahrens* at length, quoting approvingly from Rutledge’s dissent,¹² concluding that *Ahrens* “is strictly relevant only to the question of the appropriate forum, not to whether the claim can be heard at all.”¹³

Justice Stevens also fought a pitched side battle with Justice Scalia regarding whether *Braden* actually overruled *Ahrens*’ jurisdictional holding, or merely distinguished it. Although not essential to the disposition of the case before him, Stevens insisted that *Ahrens* was abrogated,¹⁴ and with four other votes behind him, he carried the day. Not coincidentally, Stevens had clerked for Rutledge during the 1947–48 term, and it was his memo that formed the basis of

⁷ *Id.* at 192.

⁸ *Id.* at 210.

⁹ *Id.* at 195.

¹⁰ 410 U.S. 484, 500–01 (1973) (footnote omitted).

¹¹ 542 U.S. 466 (2004), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, *as recognized in* *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014).

¹² *Id.* at 477 & n.7.

¹³ *Id.* at 479 (citation omitted).

¹⁴ *Id.* at 479 n.9.

Rutledge's dissent in *Ahrens*.¹⁵ *Rasul* "turned on dissenting views developed by a law clerk who just happened to serve as a Justice when, over fifty years later, the opportunity arose to vindicate those views, and he alone perhaps had the peculiar insight to seize it."¹⁶

But his jurisprudence aside, there are a number of interesting aspects of Justice Rutledge's life, and in one respect he remains decidedly above and beyond every other justice to serve on the High Court.

Born in 1894 in the small Ohio River town of Cloverport, Kentucky, Wiley Rutledge had a distinguished lineage. His great-great-grandfather Edward Rutledge was a signer of the Declaration of Independence and governor of South Carolina.¹⁷

Edward's brother John was one of George Washington's original nominees to the Supreme Court; thus, the Rutledges are in that exclusive club of consanguineous justices, along with the more famous John Marshall Harlan(s).¹⁸

When Wiley Rutledge was six, his family moved to Asheville, North Carolina; they later moved back to Kentucky before settling in Maryville, Tennessee. While attending Maryville College as a classics major he met, and eventually married, his young Greek teacher, Annabel Person. After receiving a chemistry degree from the University of Wisconsin in 1914, he taught high school in Bloomington and Connersville, Indiana, while concurrently studying law at Indiana University. He then served as secretary to the Board of Education in Albuquerque, New Mexico, for two years.¹⁹

¹⁵ BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 74–75 (2010).

¹⁶ *Id.* at 78 (quoting Joseph T. Thai, *The Law Clerk Who Wrote Rasul v. Bush: John Paul Stevens's Influence From World War II to the War on Terror*, 92 VA. L. REV. 501, 529 (2006)).

¹⁷ See Theodore S. Needels, *Family Connection Found Between Justice Wiley Rutledge and the Second Chief Justice of the United States, John Rutledge*, 28 SUP. CT. HIST. SOC'Y Q. 6, 7 (2007).

¹⁸ John Rutledge also has the distinction of being the only Chief Justice seated via recess appointment (by George Washington). But more dubiously, he is also the only Chief Justice nominee ever rejected by the Senate. SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–2012 8 (Clare Cushman ed., 2013).

¹⁹ See JOHN M. FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT 14, 17–18, 25–27, 30–32, 34–37 (2004).

In 1920, Rutledge moved to Boulder, Colorado, to finish work on the law degree he had begun eight years earlier in Indiana. He and Annabel fell in love with the area, beginning a family and over the following years returning most summers to vacation in the mountains. Graduating in 1922, he spent two years in private practice before becoming a member of the University of Colorado law faculty.²⁰ In 1926, he joined the faculty of Washington University School of Law in St. Louis, Missouri, becoming Dean in 1931. In 1935, he was Dean of the University of Iowa College of Law.²¹ An ardent supporter of FDR, he was appointed to the D.C. Circuit in 1939.²² When Justice James F. Byrnes resigned in the fall of 1942, Rutledge was nominated in January and confirmed four weeks later.²³

On August 27, 1949, while driving to a church potluck in Ogunquit, Maine, Rutledge suffered a massive stroke. Taken to a hospital in nearby York Harbor, he lingered for two weeks before passing away on September 10.²⁴ After services in Washington, D.C., he was buried in Green Mountain Cemetery in his erstwhile hometown of Boulder, Colorado.

Here, Justice Rutledge is notable in three respects. First, he holds the record (if you can call it that) for the greatest distance between a justice's place of death and final resting place—2,260 miles. In this, he is the beneficiary of a quirk of history. In 1845, President Polk nominated George W. Woodward, but he was not confirmed by the Senate.²⁵ Undeterred, Woodward went on to be an associate and chief justice of the Pennsylvania Supreme Court from 1852–1867.²⁶ After his public career ended, he travelled abroad, and died of pneumonia in Rome in 1875.²⁷ He was interred over 6,700 miles away, in Hollenback Cemetery in Wilkes-Barre, Pennsylvania.²⁸ But for five senators,

²⁰ *Id.* at 40–41, 47–49.

²¹ *Id.* at 57, 66–67, 80–81.

²² *Id.* at 107–08, 168–69.

²³ *Id.* at 208, 218–21.

²⁴ *Id.* at 416.

²⁵ BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774–1989, 2086 (Kathryn Allamong Jacob & Bruce A. Ragsdale eds., 1989).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Woodward would enjoy an even larger footnote in the history of the Supreme Court.²⁹

Second, Rutledge has the distinction of occupying the westernmost final resting place of any justice. He edges out Byron White, whose cremated remains can be found at the Episcopal Cathedral of St. John in the Wilderness in Denver, some 30 miles to the southeast.³⁰ For those who share a fascination with such things, the *easternmost* interment of a justice is that of Nathan Clifford (1803–1881), in Portland, Maine’s Evergreen Cemetery.³¹

And on this point, Justice Clifford owes a debt to Judah Benjamin (1811–1884). Benjamin was offered a Supreme Court seat by Millard Fillmore *and* Franklin Pierce, but turned down both of them—perhaps the only time a putative nominee rebuffed both the outgoing president of one party and the incoming president of another.³² Instead, Benjamin served as U.S. Senator from Louisiana from 1853–1861, when he resigned to become, in quick succession,³³ Attorney General, Secretary of War, then Secretary of State of the Confederacy.³⁴ When ultimately that career choice didn’t turn out so well, he escaped from

²⁹ But while we’re footnoting such things, it bears mentioning that Justice David Brewer (1837–1910) holds the overall record from starting gate to finish line. Born to missionary parents in Smyrna, Ottoman Empire (now İzmir, Turkey), he is buried in Mount Muncie Cemetery in Lansing, Kansas—almost 8,900 miles away. MICHAEL J. BRODHEAD, DAVID J. BREWER: THE LIFE OF A SUPREME COURT JUSTICE 2, 184 (1994).

³⁰ Author’s personal observation.

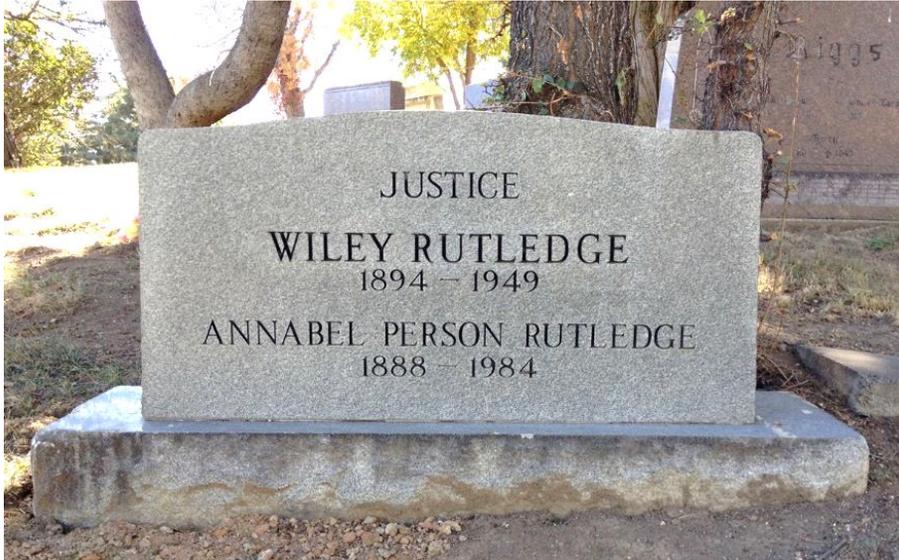
³¹ BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, *supra* note 25, at 794.

³² ELI N. EVANS, JUDAH P. BENJAMIN: THE JEWISH CONFEDERATE 83–84 (1988); PIERCE BUTLER, JUDAH P. BENJAMIN 118–19 (1980).

³³ If not secession.

³⁴ EVANS, *supra* note 32, at 116, 121, 155.

south Florida to Nassau, Havana, and eventually England.³⁵ He died in Paris in 1884 and is buried in the Père Lachaise Cemetery.³⁶



Justice Rutledge's Grave

Third, by virtue of his interment in the Colorado foothills, Justice Rutledge occupies the highest final resting place of any justice—5,338 feet above sea level. In this, he remains unsurpassed, and probably will be for some time to come.

About the Author

Paul Farley is an Assistant United States Attorney in the District of Colorado.

The author gratefully acknowledges the persistence and tenacity of Elizabethanne Stevens, Assistant United States Attorney (D-Utah), without which this article would not have been written.

³⁵ *Id.* at 318–21.

³⁶ *Id.* at 399.

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Top Ten Books for Your Legal Writing Bookshelf (With Apologies to David Letterman)

Christian A. Fisanick
Assistant Director for Publications
Office of Legal Education

Legal writing: a subject that inspires dread in many attorneys because it involves—shudder—*writing*.¹ There are hundreds upon hundreds of books and articles dealing with legal writing.² But let's face it. Not much changes over the years, except perhaps things like hyphenation and comma usage. So why then is there so much writing on legal writing?

Throughout my career, I've come to attribute this to two things: (1) Many think that legal writing is difficult, mysterious, and scary so there is always a market for books on the subject; and (2) Many who have written a brief or two are laboring under the delusion that they can write a book on legal writing. So in the end, much of the literature on legal writing trods the same old dusty ground of those who have gone before: Minimize your use of the passive voice, bullet lists look cool, and it's okay to use contractions and to regularly split infinitives (really). Yawn. Or it's just downright silly advice from someone who is clueless.

So with that in mind, I offer this, dear legal writer, my choices for books that should be on your bookshelf. Reference books are tools used by legal writers to build an effective argument, in the same way that

¹ American Journalist Gene Fowler famously said, "Writing is easy; all you do is sit staring at the blank sheet of paper until the drops of blood form on your forehead." Randolph Hogan, *Book Ends: Writers on Writing*, N.Y. TIMES, Aug. 10, 1980, at BR9.

² See, e.g., Almas Khan, *A Compendium of Legal Writing Sources*, 50 WASHBURN L.J. 395, 396 n.4 (2011) (listing bibliographies of legal writing publications).

forensic investigators use a Wood’s lamp³ or super glue⁴ to build a criminal case against a suspect.⁵ Some of the picks here are specific books on legal writing, others on writing in general. And a few are variegated miscellaneous works.

I’ve chosen these tools for a clichéd top ten list.⁶ Over the years, I’ve found these books to be the most educational, useful, and interesting, and I hold them all in high regard with great affection. YMMV⁷—and you may find other vehicles more to your liking—but these will be a good foundation for improving your library.

1. ALWD Guide to Legal Citation (6th ed. 2017)

For those of you who don’t know the history, almost 20 years ago, some upstart legal writing professors (the Association of Legal Writing Directors) got together to challenge the dominance over citation form held by *The Bluebook*.⁸ Their book, the *ALWD Guide to Legal Citation*, had a few better citation forms, was better formatted and typeset, and was overall easier to use.⁹ The only disadvantage was that it “wasn’t *The Bluebook*,” the only thing law firms knew from

³ A technique using ultraviolet light to “demonstrate the existence of sperm.” See, e.g., 1 FRED LANE, LANE GOLDSTEIN TRIAL TECHNIQUE § 1:53 (3d ed. 2018).

⁴ A technique called cyanoacrylate fuming using the ubiquitous substance to visualize fingerprints. See, e.g., DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, ch. 32, App’x 32A (2018–19 ed.) (defining “cyanoacrylate fuming”).

⁵ These techniques are often depicted in popular television programs. See, e.g., *CSI: Crime Scene Investigation* (CBS television broadcasts 2000–15).

⁶ *Late Show Top Ten List*, WIKIPEDIA, https://www.wikipedia.org/wiki/Late_Show_Top_Ten_List (last visited Dec. 17, 2018) (popular feature of television programs hosted by David Letterman).

⁷ YMMV, *your mileage may vary*, THE ONLINE SLANG DICTIONARY, <http://onlineslangdictionary.com/meaning-definition-of/your-mileage-may-vary> (last visited Dec. 17, 2018).

⁸ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass’n et al. eds., 20th ed. 2015).

⁹ ASS’N OF LEGAL WRITING DIRECTORS & COLEEN M. BARGER, ALWD GUIDE TO LEGAL CITATION (6th ed. 2017).

decades of use. Despite the existence of *ALWD*, *The Maroon Book*,¹⁰ *The Indigo Book*, and other citation systems,¹¹ for Big Law, it was always, “Use *The Bluebook*, and accept no substitute.”¹²

Around 2014, the ALWD folks capitulated, and the *ALWD Guide* now completely mimics *The Bluebook* in citation form for court documents.¹³ And it’s still better looking, has better examples, and is easier to use. If you’ve never seen it, you owe it to yourself to try it out. (You’ll thank me later.)

2. Bryan A. Garner, *The Redbook: A Manual on Legal Style* (4th ed. 2018)

Bryan A. Garner is widely regarded as one of the top legal writing gurus in the United States, and he is quite prolific.¹⁴ I think that his style manual is the best of his publications. Inside is common sense advice for all those tricky usage, punctuation, and style questions that crop up daily. (Q. How do you make “Jones” possessive? A. It’s

¹⁰ Book Note, *Manual Labor, Chicago Style*, 101 HARV. L. REV. 1323, 1324 (1988) (criticism of Maroon Book’s “creativity in citation form” by editors of Harvard Law Review—who, not surprisingly, are a part of the team for *The Bluebook*).

¹¹ See Charlotte Stichter, *Rethinking Legal Citation: A Bibliographic Essay*, 44 INT’L J. LEGAL INFO. 274 (2016) (discussing alternative citation systems, such as *The Indigo Book*, including those by Peter Martin, Larry Tepley, the U.S. Supreme Court, and others).

¹² See Fred. R. Shapiro & Julie Graves Krishnaswami, *The Secret History of the Bluebook*, 100 MINN. L. REV. 1563, 1587–88 (2016).

¹³ Stephen Paskey, *Conveying Titles Clearly: Thoughts on the Fifth Edition of the ALWD Guide to Legal Citation*, 15 J. APP. PRAC. & PROCESS 273 (2014); see also Stichter, *supra* note 11, at 277 (noting “major revisions” to ALWD to acknowledge “certain scholarly traditions in legal citation”).

¹⁴ See, e.g., BRYAN A. GARNER, GARNER’S MODERN ENGLISH USAGE (4th ed. 2016); BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014); JEFFREY S. KUHN & BRYAN A. GARNER, THE RULES OF GOLF IN PLAIN ENGLISH (4th ed. 2016); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (Thomson/West ed. 2008).

“Jones’s,” just the way you’d pronounce it, as in *Bridget Jones’s Diary*.¹⁵)

Garner is persnickety. While his choices are generally similar to the stylistic advice in *The Bluebook*, you can always tell when someone is using *The Redbook*: The rules for numbers—words vs. numerals—are different.¹⁶ Using *The Bluebook*, it would be “*ninety-nine* bottles of beer on the wall,” while *The Redbook* gives you “*99* bottles.”¹⁷

3. Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* (3d ed. 2014)

Here’s another well-reviewed Garner best seller, his big book o’ briefing tips.¹⁸ It’s filled with mostly great advice on brief writing. Garner, however, has been on this mission for years now trumpeting his notion that all citations should be in footnotes. I think that’s a silly idea for several good reasons. (The late Justice Scalia agreed.)¹⁹ And if your court hasn’t bought into that approach then you will want to ignore that tip.²⁰ In any event, it’s a heavy hardback that if the zombie apocalypse comes, you can always use it as a weapon.

¹⁵ BRIDGET JONES’S DIARY (Miramax Films 2001). *But cf.* TWO WEEKS NOTICE (Warner Bros. 2002) (incorrect punctuation).

¹⁶ BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* § 5.3 (4th ed. 2018).

¹⁷ *99 Bottles of Beer*, WIKIPEDIA, https://en.wikipedia.org/wiki/99_Bottles_of_Beer (last visited Dec. 17, 2018) (discussing origins and variants of the anonymous folk song).

¹⁸ Heidi Boghosian, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts*, 2nd Edition by Bryan A. Garner Oxford University Press, New York, NY, 2004. 516 Pages, \$50.00, 52 *FED. LAW.* 58 (Feb. 2005) (book review) (favorable review of previous edition).

¹⁹ J.H. Huebert, *How to Persuade Judges in the Real World*, 35 *OHIO N.U. L. REV.* 829, 831–32 (2009) (discussing pros and cons of “all citations in footnotes”).

²⁰ David Lat, *Benchslap of the Day: Don’t You Dare Put Citations in the Footnotes*, *ABOVE THE LAW* (Aug. 30, 2016, 3:57 PM), <https://abovethelaw.com/2016/08/benchslap-of-the-day-dont-you-dare-put-citations-in-the-footnotes/>.

4. Jeremy Butterfield, *Fowler's Concise Dictionary of Modern Usage* (2016)

There are many terrific usage books.²¹ (Garner wrote one too.²²) Fowler's book has been around for ages.²³ This is the latest edition from the good folks at the Oxford University Press. So if you want to snootily use "perspicacious" and "perspicuous" correctly, then you will be thrilled with this book. (I don't worry about the correct usage because I can't remember what they mean and never use them.) Note: Older editions are good too.²⁴

5. Strunk and White, *The Elements of Style* (4th ed. 1999)

You know it. You've read it. It's timeless.²⁵ This little book ("S & W") is so good that I try to re-read it once a year just to keep in touch with

²¹ See, e.g., PAM PETERS, *THE CAMBRIDGE GUIDE TO ENGLISH USAGE* (2004); MERRIAM-WEBSTER'S *DICTIONARY OF ENGLISH USAGE* (1994); *THE AMERICAN HERITAGE BOOK OF ENGLISH USAGE: A PRACTICAL AND AUTHORITATIVE GUIDE TO CONTEMPORARY ENGLISH* (1996).

²² BRYAN A. GARNER, *GARNER'S MODERN ENGLISH USAGE* (4th ed. 2016).

²³ Henry Watson Fowler's original work, *A Dictionary of Modern English Usage*, has been around in various forms with different names since 1926. The current edition is *FOWLER'S DICTIONARY OF MODERN ENGLISH USAGE* (Jeremy Butterfield ed., 4th ed. 2015).

²⁴ I'm disappointed that this edition does not have the entry for "yclept," my favorite word in the English language. In case you were wondering, yclept is a real word even though it looks like someone hit random keys on the keyboard. It's the past participle of "yclepe," an Old English verb meaning "named" or "styled." *Yclept*, *OXFORD ENGLISH DICTIONARY*, <http://www.oed.com/view/Entry/231389?redirectedFrom=yclept#eid> (last visited Dec. 17, 2018). To use yclept in the supposedly amusing way, you should combine it with a modernism, to wit: "The teenage jam band tragically yclept 'Fruitful Dave' is awfully exciting." *In Rotation: Robbie Fulks on One of the Greatest Soul Singers Alive*, CHICAGOREADER, (Aug. 11, 2014), <https://www.chicagoreader.com/chicago/aadam-jacobs-robbie-fulks-senyawa-boredoms-hushdrops-norvus-carrack/Content?oid=14561089> (And, yes, I did use yclept in an appellate brief once.).

²⁵ Though not without its detractors, *The Elements of Style* has been called "the mother of all grammar and style authorities." Judith D. Fischer, *A Contemporary Take on Strunk and White for Legal Writers*, 15 *SCRIBES J. LEG. WRITING* 127, 127 (2013) (citation omitted).

the fundamentals. A modern answer to S & W is *Adios, Strunk and White* by Gary and Glynis Hoffman.²⁶ It's a fun read, and it includes a chapter on how to use profanity effectively like Joe Eszterhas, the screenwriter of *Basic Instinct*, did in a letter to his turncoat agent. But *Adios* is much longer. (S & W would have advised, "Omit needless words. Omit needless words!")

6. Steven Stark, Writing to Win: The Legal Writer (Rev. ed. 2012)

Steven Stark is a slick writer with a winning style, who makes some excellent points about legal writing. My favorite of his practical suggestions is to study cookbooks and things clearly and concisely written that explain difficult concepts, like the instruction sheet for the board game Monopoly, to get a feel for how to structure a legal argument. Good advice indeed.

7. Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument (2d ed. 2003)

The late Judge Aldisert was a colorful character—and an exceptionally good writer.²⁷ His book on brief writing is terrific because he surveyed many judges and got their “likes” and “dislikes.” In addition, he points out some salient facts that we tend to overlook, such as advocates are really writing for the smart law clerks from the good schools who were on law review. Citation form *does* matter, lest the clerks think that we are idiots for not knowing how to cite to Westlaw. He's also not afraid to admit that he doesn't always follow his own advice, for example, breaking the prohibition against using showy, obscure Latin phrases. Overall, I like this book even more than Garner's *100 Tips*.

²⁶ GARY HOFFMAN & GLYNIS HOFFMAN, *ADIOS, STRUNK AND WHITE: A HANDBOOK FOR THE NEW ACADEMIC ESSAY* (6th ed. 2017).

²⁷ See, e.g., *United States v. Desmond*, 670 F.2d 414, 420 (3d Cir. 1982) (Aldisert, J., dissenting) (“‘Basta!’ This is an Italian exclamation which, freely translated, means ‘Enough!’ I now say ‘Basta!’ on the question of special verdicts in criminal cases.”).

8. Ruggero J. Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking* (3d ed. 2001)

A confession of sorts: Ever since the first edition of the late Judge Aldisert’s book, I have been annoying appellate courts by citing it in footnotes to briefs. But let me back up. This is the *ne plus ultra* of explanations of both formal and informal logic for lawyers, without all those dense and complicated symbols that logicians love.²⁸ It’s a fascinating book, and if you are unfamiliar with logic, I guarantee it will make you a better lawyer. That said, when I wrote appellate briefs, I had what I called my “patented show-off footnote.” The show-off footnote was to impress upon the court that, I, as government counsel, was really on the ball. The footnote might reference some slip opinion of a case decided three days before I filed my brief that, at first blush, looked relevant but wasn’t. Or it might cite to something colorful in the transcript. Or perhaps it might have a pithy quote from Blackstone.²⁹ But usually it had a citation to Aldisert for a rule of logic that my opponent had violated. For years, nay decades, I had included these exotic academic (some might say “nerdy”) footnotes to no response until one day I was rewarded!³⁰ Thank you, Judge Aldisert.

9. Matthew Butterick, *Typography for Lawyers* (2d ed. 2015)

This is, without doubt, the nerdiest book on my list. There are few absolutes in this world, but this is the absolute best thing ever written on the arcane subject of typography for lawyers. The lawyer-author, who has a degree in graphic design, tells you everything that you ever

²⁸ See, e.g., IRVING M. COPI ET AL., *INTRODUCTION TO LOGIC* (14th ed. 2016). For a more accessible introduction to symbolic logic—although that’s like saying “I’d rather read Shakespeare’s poetry in German rather than Russian” when I speak neither language—I recommend HARRY J. GENSLER, *INTRODUCTION TO LOGIC* (3d ed. 2014).

²⁹ WILLIAM BLACKSTONE, *COMMENTARIES* (1765).

³⁰ *United States v. Davenport*, 775 F.3d 605, 610 (3d Cir. 2015) (“Davenport’s argument also falls prey to the logical fallacy of the inverse—the incorrect assumption that if P implies Q, then not-P implies not-Q” (citing RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 161 (3d ed. 1997))).

wanted to know about making aesthetically pleasing legal documents (an oxymoron in itself). If you like things such as fonts and en-dashes—and who doesn't?—this is wonderful. But then again, if you like those things, you probably already have this book.

10. Stephen King, *On Writing: A Memoir of the Craft* (2000)

You might rightly ask why I included a book by a fiction writer. First, I like the way Stephen King writes. He's not just one of the great horror writers of all time; he's one of the best writers, period.³¹ (*The Shawshank Redemption*, need I say more?³²) Second, part of this book is autobiographical and details his battles with addiction. It's quite inspiring. Third, in the section on writing advice, he includes a rough draft of his short story "1408" marked up with proofreader's marks and fully annotated to explain his revisions.³³ It's great to see how persistent—and ruthless—you must be with edits to be a good writer. I highly recommend this modern classic on the subject of writing.

So there you have it, an eccentric selection of books designed for ready reference on your legal writing bookshelf. All these books are available at online sites, and you might even find some at your favorite brick-and-mortar store too. If you have any others that you like, I'd love to hear from you. And if you are thinking of writing your own book on writing—legal or otherwise—I refer you to footnote 27, *supra*.

³¹ Stephen King received the Presidential National Medal of Arts as "deserving special recognition" for his "outstanding contributions to the excellence, growth, support, and availability of the arts in the United States." Announcement, Nat'l Endowment for the Arts, President Obama to Award 2014 National Medals of Arts, (Sept. 3, 2015).

³² THE SHAWSHANK REDEMPTION (Columbia Pictures 1994), based on a novella by Stephen King, is the top-rated film of all time according to The Internet Movie database. *The Shawshank Redemption*, INTERNET MOVIE DATABASE, https://www.imdb.com/chart/top?ref_=tt_awd (lasted visited Dec. 17, 2018).

³³ The story was later expanded considerably into a film screenplay. 1408 (Dimension Films 2007).

About the Author

Christian A. Fisanick is presently Assistant Director for Publications at the National Advocacy Center, a position he has held since December 2017.

His previous positions include Chief of the Criminal Division for the United States Attorney's Offices in the Middle District of Pennsylvania and the District of the Virgin Islands; Coordinator of Legal Research & Appellate Review for the Pennsylvania District Attorneys Institute; Chief Deputy District Attorney for Cambria County, Pennsylvania; Special Deputy Pennsylvania Attorney General; Curriculum Specialist with the Traffic Institute for Police Services; Adjunct Professor of Law, Thomas M. Cooley Law School; and Adjunct Professor of Law, Vytautas Magnus University, Kaunas, Lithuania.

Mr. Fisanick's professional publications include three treatises: *Vehicle Search Law Deskbook* (Thomson/West 2018–19) and two books on Pennsylvania evidence law, as well as a casebook, *Cases, Statutes, and Materials on White Collar Crime* (with Tadas Klimas). He has written several law review articles and contributed a chapter to an Eastern European book on white collar and economic crime. One of his articles was selected to appear in an American Bar Association anthology of the best legal writing from *Litigation*.

He received his Juris Doctorate with honors in 1984 from the William Mitchell College of Law. He graduated Phi Beta Kappa, summa cum laude, receiving his Bachelor of Science degree in chemistry from the University of Richmond.

In 2011, he received the Attorney General's Award for his work on civil rights cases and the Director's Award for his performance as Criminal Chief in the Middle District of Pennsylvania.

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Note from the Editor-in-Chief

Although a long time coming, the publication of this issue on Appeals is the fulfillment of a promise I made to Kelly Zusman when she approached me in April 2016 about publishing an issue dedicated to appeals. As many of our readers know, Kelly is one of the leading authorities on appellate advocacy in the Department. She not only teaches appellate advocacy here at the National Advocacy Center and in law school settings but also serves as the Appellate Chief in the District of Oregon. Kelly's vision of this issue was to inform the practicing trial attorneys in the Department and the United States Attorneys' Offices how to work at the trial court level to avoid issues on appeal and if they had to handle an appeal, how to handle it with the level of quality expected of a Department of Justice attorney. It was easy to catch Kelly's enthusiasm for the project and I promised her we would publish such an issue. But then the crush of business and pressing assignments from leadership intervened and we re-scheduled and re-scheduled the publication of the issue. Here in April 2019, three years later, we are finally able to keep that promise to Kelly with the publication of this issue. We believe we have captured Kelly's vision. Handling appeals is extremely important work. And doing it with the highest level of competence is expected of Department of Justice attorneys. We hope this issue contributes to that effort. Again, it has been a long time coming, Kelly, but I hope you are happy with the end-result.

I would like to extend a sincere thank you to Elizabethanne Stevens, the Appellate Chief in Utah, for serving as our Point of Contact for this issue. Working with Kelly, the Appellate Chiefs Working Group, and others, she recruited several top-level authors and articles, including an Introduction by the Solicitor General, for this issue. During the editing, her mentoring was invaluable. Thank you Elizabethanne. Your hard work brought this issue home.

I hope you enjoy this issue and that it serves Kelly's goals to help you, the practicing trial attorney, avoid issues on appeal and if you have to handle an appeal, help you handle it with the level of quality expected of an attorney from the Department of Justice.

Thank you,

K. Tate Chambers