



An Interview With Steve Shapiro:

The Art of Appellate Advocacy

*By Jeffrey Cole*¹

Appellate lawyers have never achieved the kind of celebrity accorded trial lawyers. Even John W. Davis, the preeminent appellate lawyer of his time, was known to the public through his political activities, not his extraordinary career in the Supreme Court, where he argued many landmark cases – the last of which was *Brown v. Board of Education*. What lawyer then, if given a choice, would opt to be a modern day Davis rather than a Darrow or a Dan Webb? Steve Shapiro would. In the rarified atmosphere in which appellate lawyers live, Steve Shapiro has become perhaps the most respected appellate lawyer of his generation. For 30 years, first as Deputy Solicitor General of the United States and later as founder of Mayer, Brown & Platt’s (now Mayer, Brown, Rowe & Maw) 50-lawyer appellate group, the largest in the country, Shapiro has devoted himself to appellate practice in the United States Supreme Court and the federal and state appellate courts.

Shapiro has argued 24 cases before the Supreme Court – many are instantly recognizable to commercial lawyers: *Hartford Ins. Co. v. State of California*, *Virginia Bankshares v. Sandberg*, *Edgar v. Mite Corp.*, *Arizona v. Maricopa County Medical Society*, *American Society of Mechanical Engineers v. Hydrolevel*, *Amchem v. Windsor*, and *Chiarella v. United States*--to name only a few. In 2004, the Supreme Court unanimously adopted Shapiro’s argument on behalf of all foreign vitamin manufacturers named as defendants in a global antitrust class action – which has been described in the ABA Journal as “the most important antitrust case in a generation” – that the federal antitrust laws do not extend to global conspiracies that injure plaintiffs in foreign markets. *F. Hoffman-LaRoche Ltd. v. Empagran, S.A.*, 524 U.S. 155 (2004).

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¹Jeffrey Cole is the Editor of the Circuit Rider and a United States Magistrate Judge in Chicago. He is the former Editor-in-Chief of LITIGATION.



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Last year, arguing on behalf of the estate of the late Burt Kanter, the Supreme Court accepted the argument that tax payers are entitled to disclosure of credibility determinations by Special Trial Judges of the Tax Court. The opinion led to an overhaul of the Tax Court’s procedural rules. *Kanter v. Commissioner*, 125 S.Ct. 1270 (2005).

In addition to the 24 cases he has argued in the Supreme Court, he has briefed hundreds more in that Court and in the federal and state courts of appeals across the country.

Among the more well known are *Parklane Hosiery v. Shore*, *Reiter v. Sonotone Corp.*, *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, *Dirks v. SEC*, *Celotex v. Catrett*, *Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp.*, and *H.J., Inc. v. Northwestern Bell Telephone Co.* His group has argued over 200 cases in the United States Supreme Court alone.

Shapiro’s clientele is as notable as it is immense and has included a cross section of major corporations in the country, the Board of Governors of the Federal Reserve System, the government of Japan, and the United States Court of Appeals for the Seventh Circuit, in a lawyer discipline case in which the court was named as a respondent after it issued an opinion from which the defendant sought certiorari. He is the author of numerous articles and publications, including the leading treatise on Supreme Court practice, Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, now in its 8th edition. Among the law schools at which he has lectured are Yale, Northwestern, University of Michigan and the University of Chicago, where he has served as an Adjunct Professor. He is a life member of the American Law Institute and a director of the Institute for Judicial Administration at NYU Law School.



It is difficult to accurately convey the kind of person Steve Shapiro really is. There are lots of smart lawyers. But few are blessed with both brilliance and character in equal measure. And even fewer have the kind of genuine humility possessed by Shapiro. Some years ago, LITIGATION magazine published an article by Christine Hogan, a lawyer in North Dakota, who recounted her first experience in the Supreme Court. As it turned out, one of Mayer, Brown’s clients had an interest in the issue in the case, although it was not a party. As it does from time to time, Mayer, Brown offered its assistance in preparing for the oral argument. Here is what Ms. Hogan, who had never before met Shapiro, had to say about him – and her comments reflect the feelings of literally everyone who has ever worked with him:

“One of the most helpful components of my preparation came from an unexpected source. I found out that once a new case hits the Supreme Court’s docket, new friends start to come out of the woodwork—friends of the court, that is. Lawyers for potential amici curiae call you up and volunteer to write a brief. Two amicus groups ended up writing briefs on our side of the case. Working with the counsel for the amici turned out to be a great experience. One of the amici was represented by the legendary appellate attorney

Stephen Shapiro, co-author of the premier treatise on Supreme Court advocacy, Supreme Court Practice. . . It turned out that Shapiro, in addition to being brilliant, is one of the kindest and most generous individuals one ever could hope to meet. His insight and expertise were a wonderful resource, and working with him was our great good fortune.

One of the things Shapiro recommends in his treatise is for arguing counsel to talk about the issues in the case with anyone who will listen and, if possible, to participate in a moot court session. I felt strongly that I would benefit from such a session, and Shapiro offered to arrange it at his Chicago law firm.”



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“Although the prospect of being interrogated by a roomful of brilliant and experienced appellate lawyers intimidated me more than the thought of actually appearing before the Supreme Court, I readily agreed. The exercise Shapiro devised for me was the best possible preparation for oral argument that a lawyer could have had.”

Christine Hogan, *May It Please The Court*, 27 LITIGATION 8-9 (Summer 2001).

In this interview, Steve Shapiro talks about his formative years in the Solicitor General’s office, where he served with Judge Easterbrook and Sam (now Justice) Alito. The Solicitor General’s office would ultimately serve as the model for the practice group he later formed at Mayer, Brown, and which itself, has become the template for other appellate practice groups around the country. His insights into and thoughts on effective brief-writing and oral argument are fresh and invaluable. He also reflects on a number of the notable personalities with whom he has worked over the years including Frank Easterbrook, Rex Lee, Wade McCree and others. Finally, he opines on the Supreme Court’s new Chief Justice and ventures some predictions about changes that may occur on his watch.

- Q.** After graduation from Yale Law School and a clerkship on the Ninth Circuit, you became a partner at Mayer, Brown & Platt in Chicago. But then, having achieved what, for many, would be the pinnacle of success, you left the firm for government service.
- A.** Right. I went to the Solicitor General’s office. I wanted to learn more about appellate litigation and argue cases in the Supreme Court.
- Q.** You started as an Assistant to the Solicitor General and later were promoted to the position of Deputy Solicitor General of the United States?
- A.** Yes.
- Q.** What makes the Solicitor General’s office unique and so desirable a place to work?
- A.** The Solicitor General’s office has about 20 lawyers who are responsible for briefing and argument in all cases in the Supreme Court in which the United States is either a party or an amicus. This includes petitions for *certiorari*

and briefs in opposition. The 20 lawyers process several thousand cases each year. The SG’s jurisdiction reaches all kinds of cases coming up from the divisions within the Department of Justice and federal administrative agencies.

The office also supervises government appeals from adverse decisions throughout the country. That continual involvement in Supreme Court cases is unique in law practice. Immersion in the work of the Court gives these lawyers an understanding of what the Court thinks and requires, which is a tremendous litigation resource for the federal government.

- Q.** The relationship between the Supreme Court and the Solicitor General’s office is quite different from that which exists between other courts and the lawyers who appear before them, isn’t it?
- A.** It is. The lawyers in the Solicitor General’s office are keenly aware that the office has a long-term relationship with the Court. Preserving credibility is important. Other lawyers who appear before the Supreme Court, or any other court, are concerned with the same thing, but nobody appears in case after case the way the SG’s office does, and it makes the SG’s office something of an extension of the Court, itself.
- Q.** The lawyers in the Solicitor General’s office have a particular dress code when they appear before the Court, don’t they?
- A.** Yes. By long tradition, they wear 19th-century garb — a cut-away jacket and striped pants, morning coat and a vest. The tie itself is gray and black striped, very somber and formal. As the Chief Justice once reminded one of our lawyers, traditional attire does not include a button-down collar.
- Q.** A number of federal appellate judges began their careers in the SG’s office, didn’t they?
- A.** Yes, Charles Fahy, Thurgood Marshall, Oscar Davis, Bob Bork, Dan Friedman, Dick Posner, Frank Easterbrook, Ray Randolph, Bill Bryson, Sam Alito and Michael McConnell became circuit judges. Our new Chief Justice was, of course, a Deputy Solicitor General, and Justice Alito was an Assistant to the Solicitor General.

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- Q.** Who was the Solicitor General when you started?
- A.** Wade McCree, who had been a judge on the Sixth Circuit until his appointment by President Carter.
- Q.** What was he like?
- A.** He was a wonderful gentleman, who was well respected by all his clients in the federal government. He had extraordinarily good judgment, a wonderful personal touch, and was really a joy to work for and work with. Everyone trusted his judgment completely. If he thought a matter should be handled in a particular way in the Supreme Court that was that. If he felt a case was not "certworthy," that judgment was accepted. He had a stately literary style, reflected both in his writing and in his arguments.
- Q.** What about Rex Lee?
- A.** I also worked under Rex Lee in the Reagan Administration. Rex was a much younger man. He had been a law school dean. He was a more spontaneous personality, bubbling over with humor. Everybody had a warm personal relationship with Rex Lee. Rex himself had been a Supreme Court clerk, which gave him a real understanding of the Court. He had a less formal and more humorous argument style in court. I think the Court appreciated that.
- Q.** You were the lawyer for the United States in the major commercial cases that were argued during your five years in the SG's office.
- A.** I was the Deputy Solicitor General in charge of the commercial cases, including antitrust, securities, commodities, communications, banking, and transportation.
- Q.** There's a certain irony in this since your family background was decidedly anti-commercial.
- A.** That's right. My grandfather was a labor union organizer and a politician in Chicago at the turn of the century. My father was a labor union lawyer himself, and I find myself representing the employer in many of our labor cases today. When I worked in the government I was the advocate for the NLRB in a number of cases.

- Q.** When you left the SG's office and returned to Mayer, Brown you conceived the idea of developing an appellate group modeled after the Solicitor General's office, didn't you?
- A.** Yes. It seemed to me that the Solicitor General's office had a unique advantage because of its familiarity with the Supreme Court and its close monitoring of developments in the courts of appeals. There was nothing analogous to that in the private sector. When I left the Solicitor General's office, I found that most of the firms felt that their litigators could handle a case in any court, and they prided themselves on not having a specialized appellate practice. I recommended that our firm hire senior people from the SG's office who were, in my opinion, the best of the brief writers and oral advocates — these people included Paul Bator, Andy Frey, Ken Geller, Phil Lacovara, Kay Oberly, Andy Pincus, Charles Rothfeld, and Michael McConnell. And since that time we hired several more. The firm was receptive to the idea, although there was some thought that we should start small and gradually increase the staff. But we decided to take exceptional talent when the talent became available.
- Q.** You were head of that department?
- A.** I headed it, organized it and recruited the lawyers. Today we have many senior members who are their own bosses. We have coordinators in Washington, New York, Houston, Palo Alto, and Chicago.
- Q.** How large is your appellate department?
- A.** More than 50 people work on appellate projects. We also take on trial court briefs that raise issues comparable to those in appellate cases, and the group also spends time on legislative advocacy. We expanded on the Solicitor General's model in several respects. Our group is larger than the SG's office, and today it includes former Supreme Court clerks and a number of law school professors who work with us as "of counsel" members in particular areas such as constitutional law, tort law, federal court procedure, intellectual property, and so forth. Our senior lawyers all have substantive specialties in particular fields of law.

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- Q.** In your system, brief writing appears to be a collaborative effort.
- A.** The brief writing is a collaborative effort. Most clients expect our senior lawyers to roll up their sleeves and dig into the brief, not just advise young lawyers, direct research, and fine-tune the rhetoric.
- Q.** You have represented some of the most powerful commercial interests in this country and even the world, haven't you?
- A.** Our clients include large corporations, but the list also includes smaller companies, government units, individuals, and a number of charitable institutions including churches that have constitutional questions.
- Q.** You were actually asked to represent the United States Court of Appeals for the Seventh Circuit in one case, weren't you?
- A.** Yes. This may surprise you, but in attorney discipline cases lawyers subject to discipline sometimes petition the Supreme Court for review and they name as the respondent not their opponent in the court below, but the court of appeals itself. A lawyer who was sanctioned by the Seventh Circuit did just that and the Seventh Circuit asked us to file a brief in opposition to the certiorari petition.
- Q.** Successfully?
- A.** Successfully, although there were three Justices who would have heard the case. So it was viewed in Washington as a close matter.
- Q.** How much time is devoted to argument preparation in a major case?
- A.** In a big case with a large record and voluminous briefing, I typically spend a month in argument preparation.
- Q.** What do you do that takes so much time?
- A.** I have always made a point of reading the entire record, which includes the transcript, the exhibits, and the pleadings. The briefs will cite multitudes of opinions, which you have to be prepared to discuss during

argument. On top of this, we go through moot court sessions in which we try to anticipate questions the court might ask.

- Q.** Could you describe your moot court process?
- A.** It varies from case to case, but in a large matter where a lot is at stake, we will have a moot court group that includes not only the lawyers who have worked on the case and the clients, but outside attorneys who are expert in the area.
- Q.** How do they help prepare you?
- A.** Initially, I present the argument without interruption to get reactions to substantive points. Then we run throughout the argument with the clock running — 30 minutes, 20 minutes or 15 minutes, depending on the time allotted for the real argument, with questions. We see how much of the argument can be delivered while responding to questions. The final session has no time limitations, and we take up every question that anyone can think of. By the way, Chief Justice Rehnquist gave a well-known speech about oral argument technique, and he made the point that the art of oral argument is spontaneity, but he added that meaningful spontaneity depends on complete familiarity with the law and the record. Chief Justice Roberts, an experienced advocate, has made the same point.
- Q.** Judge Easterbrook was legendary for the speed at which he worked, wasn't he?
- A.** Frank Easterbrook, who will be the next Chief Judge of this Circuit, was the quickest study I ever knew. He could write a brief even in the most complex case in a day or two — often without leaving his desk because he remembered the major precedents, had a photographic memory. Frank was also able to prepare for oral argument very quickly. This is in the tradition of Robert Jackson, the Solicitor General many years before my time, who was able to prepare a major case in just a day or two.

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- Q.** What are the ingredients of an effective appellate argument?
- A.** I think the most important ingredient is thorough preparation so that all the information about the case and legal authorities is at your fingertips. After all, your main purpose for participating in the argument is to answer the court's questions. The second ingredient is condensation and simplification of the case so that the few critical considerations that are needed to decide the case correctly can be presented in a few minutes, if the questioning is intensive. The third ingredient is flexibility in responding to the court's questions, giving the court a full answer, but then using the question as a stepping-stone to return to the critical points in the case. One problem I see frequently in argument is that questions can cause counsel to lose any sense of direction. Effective argument means that you answer the court's questions but use the answer as a transition to return to the winning ideas.
- Q.** Is it ever appropriate in responding to a question to say, "I'd like to answer that later" or "I'm going to get to that later in my argument?"
- A.** That is a mistake because it irritates the court. You don't have control over what you are going to be able to say later, so you are never in a position to keep that kind of a promise. Sometimes you can get away with giving a brief response and then say that you would like to enlarge on that point later in the course of the argument with a little more background. But the best policy is to give at least a concise answer immediately.
- Q.** Have you ever seen a case where as a consequence of questions a lawyer does not have a chance to make any meaningful argument, and thus asks the court for additional time?
- A.** I see that all the time, and depending on the court, you may get a little extra time. In the U.S. Supreme Court there is no mercy. If your red light goes on, that's the end unless a Justice is asking a question, then you can answer the question fully — until the Chief Justice stops you.
- Q.** In the courts of appeals?
- A.** In the courts of appeals, occasionally the presiding judge will enlarge your time and permit you to continue to argue

because of the volume of questions. This varies from Circuit to Circuit. But when the presiding judge says "thank you, the case is submitted," it is time to sit down.

- Q.** What are the elements of a winning brief?
- A.** The virtues of a good brief, in my opinion, are clarity, selectivity, and simplicity of writing, including the headings of the arguments. I remember the words of advice I got from so many of the outstanding people with whom I worked at the SG's office, which I continue to use, and I recommend to others: use short sentences, use active verbs, use short paragraphs and avoid footnotes. Briefs that are written in this fashion are clear, simple and direct, and are rarely boring.
- Q.** One of Cardozo's great attributes as a judge, it was said, was that he could present facts so persuasively that the legal conclusions seemed inevitable. How important is the Statement of Facts in a brief?
- A.** Except for those rare cases that turn on an abstract point of law, the statement of facts is generally the most important and challenging part of a brief. The facts are the one thing that the appellate judges know nothing about. The factual statement must be forceful, but not one-sided or argumentative. I think fact statements of that kind turn off appellate judges and undermine the credibility of the brief. Judge Aldisert has good advice on composition of the statement of facts in his volume, *WINNING ON APPEAL*. He says that the statement is "designed to inform. But a good statement does more; it engages the reader's interest, making the judge look forward to working on the case." Of course, in the body of the argument, it is entirely proper to elaborate on factual points and argue their legal significance. *SUPREME COURT PRACTICE* goes into this in some detail.
- Q.** What makes this so challenging?
- A.** It is challenging because the fact statement has to be short enough to be read and understood even if the transcript fills 40 boxes. The whole matter has to appear in a sympathetic light as a result of your statement even though you don't hide from or disregard adverse facts or findings. It is true that the court should have a good sense about how to decide the case after finishing the statement of facts and yet the statement of facts can't be argumentative or the court will lose confidence in the presentation. It's a difficult line to walk.



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- Q.** It is your view, isn't it, that a summary of argument section, regardless of how it's captioned, is very important in all appellate briefs?
 - A.** It is and, of course, it is required by the federal rules of appellate procedure. It serves several purposes. If a case is complicated and there is a lengthy statement of facts and a complex set of arguments to follow, it is very hard to understand the significance of particular parts of the argument unless you see the big picture first. It is much easier to follow the details of the argument if you have an overview of where the argument is headed. Also, some judges may need that summary as a refresher before argument.
- Q.** One sees in briefs statements about how meritless and worthless the other side's argument is. Does that serve any useful purpose?
 - A.** Invective directed at the opponent and epithets characterizing the arguments as frivolous are largely wasted. I think this is too often a signal to the judges that you are in trouble.
- Q.** How do you deal then with arguments that indeed are frivolous and briefs that misrepresent the facts, the governing law, and the case authority that purports to support the argument?
 - A.** Point out the mistake emphatically, but do so more in a spirit of sorrow than anger. Let the judges castigate the offender.
- Q.** Is oral argument important or has it become an obligatory formality with fewer and fewer cases being assigned to the oral argument calendar.
 - A.** The Justices of the Supreme Court say it is, and so do the appellate judges. It is all the more important given the huge caseloads today. It gives the judges an opportunity to get answers to questions the answers to which remain unclear even after reading the record and the briefs.
- Q.** How do you capture a court's attention in a short argument?
 - A.** The task is to reduce the case to its bare essentials and to pick out the one or two points that the case really turns on.

With most courts being as well prepared as they are today, there is no need in a ten-minute argument to start describing the facts and the procedural posture of the case. The court expects you to turn immediately to the central consideration. And of course you need to answer the court's questions flexibly, give them an accurate answer but return to the main affirmative points in the course of answering those questions so that your ten minutes do not disappear without any explanation of the reason why you should win.

- Q.** How do you deal with the judge who uses oral argument as a vehicle for his or her own amusement or to argue a point through you?
 - A.** I think you have to recognize that this is part of the process. And sometimes it is an opportunity. If you can explain to the skeptical judge why the apparent defect is not real, you may win over that judge and you will certainly strengthen the hand of those who are on your side.
- Q.** Do you believe oral argument can actually change votes?
 - A.** I do and the judges who have written on the subject acknowledge that it can. Justice Scalia has said that he will ask one or two questions that are critical to his thinking about the case, and if you satisfy him on those questions, you will have his vote. I had that experience in an antitrust case where he seemed very hostile to our position at the outset and then he asked his pivotal question. We gave the answer that he ultimately accepted. He ended up writing the opinion for the 5-4 majority in our favor.
- Q.** This is also an example of the worth of thorough preparation for oral argument, is it not?
 - A.** That was a case where we had spent literally a month on argument preparation involving dozens of lawyers. We thought we had covered most of the questions that could come up. But we decided to ask one more lawyer in our group to look at the case and see if he could raise any new and significant question. He read the briefs, and he posed the very question asked by Justice Scalia, and it turned out to be the question on which the whole case revolved.

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- Q.** Has appellate practice changed in the time since you were a young lawyer?
- A.** There has been a lot of change in the 30 years that I have been practicing in this field. When I first began appearing in the Supreme Court in the '70s, there was no limit on the size of briefs, and lawyers in a big case might submit 200-page briefs. Today, briefs in the Supreme Court are limited to 50 pages. Oral arguments then were a half hour per side; arguments had been one hour per side in the '50s.
- Q.** Before then, arguments were much longer, weren't they? For example *Martin v. Hunter's Lessee*, was argued for 3 days and *McCulloch v. Maryland* consumed 9 days.
- A.** Yes. If you go back to the 19th century, oral argument in the Supreme Court was unlimited, and it wasn't unusual for arguments to go on for 3 days and as you say, other cases consumed even more time. Nowadays, of course, in the appellate courts arguments may be limited to 10 minutes or 15 minutes per side. Even in the largest cases, you have constraints on time and word count. All of this puts a tremendous premium on condensation, simplification, getting to the heart of the case, being able to communicate what is really telling and critical in a few words, and being able to answer questions very quickly.
- Q.** Given the constraints imposed on briefs is there a role for literary style?
- A.** I think good style is more important than ever simply because the judges and clerks have so much to read. If you want to be noticed, the brief has to be elegantly written. It has to be interesting. So I think that good writing style, just like oral argument technique, is essential.
- Q.** So when you talk about simplicity, you are not talking about a lack of style and art and elegance. You are simply talking about elegant simplicity?
- A.** Yes, that's the idea. There is certainly room for good metaphors, for references that are colorful, and epigrams that convey important truths. On top of this I think that as the briefs get shorter, it is all the more important to convey to the reader the reason "why" your side should prevail. Recitation of case law without explanation why a particular result is consistent with statutory purpose, consistent with the needs of the judicial system, and consistent with the needs of society is going to be a dry

and unimpressive presentation. That dimension of the brief is critical to making it interesting and persuasive. My main criticism of briefs today is that there is insufficient attention to that dimension. Justice Breyer commented in a speech that if he reaches a result through application of legal reasoning that is not good for society, that is an indication to him that he needs to start over again and rethink the matter.

- Q.** Despite your work on appellate projects, you have managed to save time for academic work, haven't you?
- A.** Yes. The biggest project is our Supreme Court practice treatise which was last published in 2002 and soon to be released in a new edition. This is Stern, Gressman, Shapiro and Geller, *SUPREME COURT PRACTICE*. It describes the procedural and jurisdictional rules, and the techniques necessary to bring a case to the Supreme Court, to brief it, and to argue it.
- Q.** We've talked about briefs and oral argument. Let's talk about preparation of a certiorari petition.
- A.** The first thing to do is to get a sample of a good certiorari petition. Sample petitions are appended to our treatise, so that's one source. The second thing you should do is to look at the Supreme Court's rules, and our treatise discussion of the content of the certiorari petition. The Court receives thousands of certiorari petitions every year but hears less than a hundred cases, so you have to persuade the Court that your case is one of those few that really demands a national binding decision and that the time is ripe to hear this case—that it is truly "certworthy" under the Supreme Court's own criteria. The Court usually looks for cases in which there is a pervasive conflict among the circuits that has percolated, with differences of opinion illuminating the issues, so that the matter is really ripe for Supreme Court review. Conflicts with past Supreme Court opinions are rare but they too are an occasion for a grant of certiorari.
- Q.** Is there any one criterion that seems to engage the Court's attention?
- A.** Conflict among the circuits is usually the main focus, but the general public importance of the issue is also key. A conflict can be relatively minor in practical significance, but sometimes conflicts among the circuits create great practical problems. Although apparent error is important to the presentation, the lawyer needs to think beyond the question of whether there has been error.

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The Supreme Court does not sit to correct errors made by the courts of appeals. The real issue is whether this is a case that calls for a nationally binding pronouncement from the Supreme Court that clears up the confusion in the lower courts.

Q. How important is the Statement of the Question Presented?

A. It may be the most important part of your petition.

Q. More than the facts?

A. I would say so in the case of a certiorari petition. Justice Brennan used to say he could decide whether a case was “certworthy” simply by reading the question presented. The object is to capture both the issue and its importance, without becoming too argumentative. Sometimes a short preceding paragraph is used to give background needed to understand the question. The whole thing may not exceed one page. Here is an example from the *BMW* punitive damages case [*BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)] in which Andy Frey of our group represented the defendant: “Whether the \$2,000,000 punitive exaction in this case, which is 500 times respondent’s compensatory damages, is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment.”

Q. What is your view on the Supreme Court’s certiorari pool?

A. Lawyers petitioning for Supreme Court review need to keep in mind, first and foremost, that the Court receives between 7,000 and 9,000 petitions every year. It hears less than 100 of these cases. Each case includes a petition, with opinions of the courts below, a brief in opposition to certiorari, and often a reply brief and amicus briefs. To deal with this flood of paper, the Justices adopted the “certiorari pool” as a screening mechanism.

This began small over 30 years ago but today includes all of the Justices except for Justice Stevens, who does his own screening. In the certiorari pool, the Justices share their law clerks, who divide up the petitions and produce a “pool memorandum” summarizing the case and recommending a grant or denial of certiorari. Each Justice’s chambers receives the pool memorandum, where other clerks may annotate the memorandum with their own comments. Individual Justices may or may not examine the underlying certiorari papers, depending on the comments of the screeners. Only a small fraction of cases make the Court’s discuss list at conference.



In a recent interview in *LITIGATION*, Justice Stevens criticized the certiorari pool as both inefficient and also negatively biased toward denial of certiorari because the author of the pool memorandum is institutionally committed to the most risk averse recommendation. [See Jeffrey Cole and Elaine E. Bucklo, *A Life Well Lived: An Interview With Justice John Paul Stevens*, 32 *LITIGATION* 8, 13, 15 (Spring, 2006)]. In my view, the screening process would be improved if more Justices opted out, providing more independent perspectives.

Ken Starr has suggested that at least two pool memos should be prepared by different clerks to decrease the chance of overlooking an important case. I agree.

Q. What interesting cases have you argued in the Supreme Court recently, and what are you working on now?

A. I might mention *Hoffmann-Laroche v. Empagran*, 524 U.S. 155 (2004). In that case the Supreme Court ordered dismissal of a class action filed against my clients by consumers of vitamin products in nations outside of the United States. The Court held that it would be an act of “imperialism” to extend federal antitrust laws to the regulation of foreign markets. Of more local interest, I argued *Kanter v. Commissioner of Internal Revenue Service*, 544 U.S. 40 (2005), on behalf of the estate of Burton Kanter.



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In that case the Court required the Tax Court to divulge opinions of its special trial judges that had been concealed from the courts of appeals. This resulted in changes in the Tax Court's rules, which were long overdue. I am co-counsel for the defendants in *Verizon v. Twombly*, the most recent antitrust conspiracy case. The Solicitor General filed a brief in that case a few weeks ago advocating a more exacting approach to antitrust pleading. I am waiting now for the Solicitor General's brief in *Credit Suisse v. Billing*, an antitrust class action aimed at underwriters of initial public offerings. The SEC and the Antitrust Division filed dueling and completely inconsistent briefs in the court of appeals. We hope the SG's office will advocate a grant of our petition for certiorari to resolve this conflict.

Q. What is your impression of the televised confirmation hearings for Supreme Court nominees in recent years.

A. I was frankly heartened by Senator Biden's comment that it might be wise to greatly curtail the entire procedure. It is hard for me to envision anything as pointless as these debates over whether a judicial nominee's views are within the "mainstream" of opinion. The abbreviated hearing proceedings of prior decades look very good by comparison.

Q. What are you impressions of the new Chief Justice?

A. History will record, I believe, that John Roberts was one of our best Chiefs. He is incredibly bright and personable. He was a star advocate in the Solicitor General's office and in private practice, with a diverse docket of appeals. His questions from the bench are incisive and his opinions crystal clear. Gossip from Washington indicates that his conference style — which allows more time for discussion of cases — is popular with the other Justices. At the recent Seventh Circuit Judicial Conference, Justice Stevens spoke very enthusiastically about the new Chief. I don't know any lawyer who ever worked with him, in the government or private practice, who has a different view.

Q. What will Justice Alito bring to the Court?

A. I remember Justice Alito when he was a new lawyer in the Solicitor General's office. Everyone recognized that he

was a brilliant lawyer. But he was very soft-spoken and courteous to a degree not common within a cantankerous office like ours. We wondered how he would stand up to the hurly-burly of oral argument. There was no reason to worry. His first argument was a huge success. I would anticipate that Justice Alito's influence within the Court will be significant precisely because he is such a courteous, unassuming, and personable man. In brainpower he is right up there with the new Chief.

Q. Any predictions about the Court under its new leadership?

A. Over time I predict an increase in the number of grants of certiorari, something John Roberts advocated when in private practice. We may see more summary dispositions (without full briefing and oral argument), which doubled in the last Term under Chief Justice Roberts. I predict that John Roberts, while maintaining the tradition of Socratic dialogue, will find ways to allow arguing counsel more air-time during even the hottest arguments in the Court. The new Chief also has called for more unanimity in the Court's opinions, a difficult objective to achieve but we may see some movement in that direction. Justices Roberts and Alito are both believers in concise opinions, so I expect fewer massive opinions of a kind that delight professors but confuse consumers of law — lower court judges and ordinary citizens who must comprehend and comply with it.

Writers Wanted!

The Association publishes *The Circuit Rider* three to four times a year. We always are looking for articles regarding news from any district — judges being appointed or retiring, new courthouses being built, changes in local rules, upcoming seminars.

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