Appellate Advocacy:
*Tips and Pitfalls for Pursuing or Defending Appeals of Your Automotive Case*

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**I. Introduction**  
Learn from experienced appellate counsel and an appellate judge about what works and what doesn't when handling appeals in your cases. Hear about traps for the unwary, as well as tips for writing and arguing to appellate judges.
Reflections on the Craft of Judging and the Art of Advocacy

BY MARY MASSARON ROSS

“What is it that I do when I decide a case?”
Benjamin N. Cardozo

“Every judicial act resulting in a judgment consists of a pure deduction.”
John M. Zane

“General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.”
Holmes, J.

“Jurisprudence is a ragbag.”
J.W. Harris

When describing the process of judicial decision making, appellate judges regularly allude to questions of jurisprudence and judicial philosophy, even though the analysis is not conducted in explicitly philosophical terms. See, e.g., Abrahamson, “Judging in the Quiet of the Storm,” 24 St. Mary’s L.J. 965 (1993). According to Benjamin Cardozo, “[t]here is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action.” The Nature of the Judicial Process 12 (1921). Every judge, even one “to whom the names and notions of philosophy are unknown,” id. at 12, makes decisions based on “basic juridical conceptions,” id. at 19, that are continually retested and reformulated using a number of different judicial techniques or methods. Id. at 31-141 (describing the use of history, tradition, and sociology as methods of deciding cases). “The working judge is not and never has been a philosopher,” but judges do search for neutral principles using accepted methodologies to reach consistent decisions. Kaplan, “Encounters with O.W. Holmes, Jr.,” 96 Harv. L. Rev. 1828, 1849 (1983). This process makes appellate decisions predictable and ensures a “reckonable result.” Llewellyn, The Common Law Tradition: Deciding Appeals 178-212 (1960).

Surprisingly, there is little public discussion about the craft of judging as a tool of advocacy. Nor is there much appreciation for the impact that differing judicial philosophies can have on the outcome of a given case. This lack of attention to the craft of judging may stem from the belief that if the “judicial process is kinetic, open-ended, and value-laden,… [then] the process is arbitrary, irrational, and dishonest.” Watts, “Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction,” 1983 U. Ill. L. Rev. 917, 927. Modern skepticism calls “into question our ability to ever know anything with certainty.” Winters, “Logic and Legitimacy: The Uses of Constitutional Argument,” 48 Case W. Res. L. Rev. 263, 264 (1998).

Even formalists no longer see the judge as oracle. No one today accepts Montesquieu’s view that the “judges of the nation are… only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor.” Montesquieu, The Spirit of the Laws 163 (Cohler et al., trans., 1989). No modern president agrees with Calvin Coolidge that “[m]en do not make laws. They do but discover them.” Coolidge, “Have Faith In Massachusetts” (1919), reprinted in Appellate Judicial Opinions 25 (Leflar ed. 1974). At the same time, few judges agree with the critical legal studies scholars who argue that decisions lack any principled basis, that the law is “only a wide and conflicting variety of stylized rationalizations from which courts pick and choose.” Rubin, “Does Law Matter? A Judge’s Response to the Critical Legal Studies Movement,” 37 J. Legal Educ. 307 (1987).

PICKING THE WINNER

Judge Alex Kozinski speaks for most appellate judges when he rejects the idea that judges “glance at a case and decide who should win, and they do this on the basis of their digestion (or how they slept the night before or some other variety of personal factors).” Kozinski, “What I Ate for Breakfast and Other Mysteries of Judicial Decision Making,” in Judges on Judging: Views from the Bench 71 (O’Brien ed. 1997). Kozinski explained that “if the judge has a good breakfast and a good night’s sleep, he might feel...
lenient and jolly, and sympathize with the downtrodden. If he had indigence or a bad night’s sleep, he might be a grouch and take it out on the litigants.” *Id.* Judge Frank M. Coffin, of the federal First Circuit Court of Appeals, agrees that “[j]udging is most certainly not a matter of mystical revelation.” Coffin, *The Ways of a Judge: Reflections from the Federal Appellate Bench* 245 (1980).

Like many modern judges, he also rejects the opposite, formalist view that judging is “all logic or all science.” *Id.*

Judges repeatedly pronounce that “legal doctrine is a real force, that judges follow legal rules in deciding cases, and that they decide all but a small fraction of cases that come before them in accordance with what they perceive to be controlling legal rules.” Rubin, “Doctrine in Decision-Making: Rationale or Rationalization,” 1987 Utah L. Rev. 357. Justice Cardozo, for example, said that most cases “could not, with semblance of reason, be decided in any way but one.” Cardozo, *The Nature of the Judicial Process* 164 (1921). Although judges are not “philosophers” in an absolute sense, they use traditional legal tools of analysis to arrive at a fair and predictable result, and they look to the advocates to assist them in this regard. See *United States v. Strickland*, 144 F.3d 412, 416 n.4 (6th Cir. 1998) (“[T]he usual job of the lawyer is to make arguments as to why the case at bar is more like one case than another based on inferred principles that appear to justify judgments in particular cases.”). It is clear that judges believe in a right answer and are genuinely seeking to discover it. The methods they use, the values and interests they consult, and the arguments they find compelling vary according to their philosophy and their understanding of the craft of judging.

**INCOMPETENT ADVOCACY**

But no matter how great the differences in their judicial philosophies, appellate judges have one thing in common: their complaints about poor appellate advocacy. See Marvell, *Appellate Courts and Lawyers: Information Gathering in the Adversary System* 28 (1978). They see “dangerously incompetent appellate lawyers.” Aldisert, “The Appellate Bar: Professional Responsibility and Professional Competence—A View from the Jaundiced Eye of One Appellate Judge,” 11 Capital U.L.Rev. 445, 455 (1982). They lament the poor quality of many briefs, even those from prestigious law firms. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 6 (1992). They express frustration at the routine failure of advocates to focus on the true flash point of controversy in a way that assists the court to reach the correct result. They suggest that modern briefs “no longer appear as instruments of persuasion or explanation; rather, they appear as instruments of commentary, resembling more a ritualistic exercise than a decision-making tool.” Aldisert, “The House of the Law,” 19 Loyola L.A. L.Rev. 755, 758 (1986). Such briefs—with pages and pages of discussion about the general principles of law, but no identification or discussion of the central issue or the reasons for deciding one way or the other—fail to assist the judges to reach a decision.

Former California Supreme Court Chief Justice Roger Traynor stumbled on one reason for these deficiencies when he asked, “How many lawyers have any real awareness of how courts arrive at a decision?” Traynor, “Badlands in an Appellate Judge’s Realm of Reason,” 7 Utah L.Rev. 157, 158 (1960). In Traynor’s view, “the process is one that should concern them, since they must reason in advising and representing clients much as a judge does except for their adversary emphasis.” *Id.* Other judges have echoed this view, emphasizing that the appellate lawyer must understand the distinction between “how a decision is justified and why it was made.” Aldisert, “The Appellate Bar,” *supra*, at 460.

**STUDYING JUDGES**

Studying the craft of judging helps an advocate understand why a decision is made; it focuses on the methodology judges use to reach the outcome. The study of opinions discloses how judges interpret and apply legal precepts, expanding or restricting them as exigencies demand. See Aldisert, *Opinion Writing* 28 (1990) (citing Pound, “The Theory of Judicial Decision,” 36 Harv.L.Rev. 641, 645 (1923)). The methodology or “techniques used by a judge give insight into the opinion writer’s method and possibly his motivation for each decision.” Aldisert, “The Appellate Bar,” *supra*, at 460. An appreciation for the craft of judging can also be found by studying the literature in which judges and academics discuss judicial techniques and the impact of various philosophies on judicial decisions.

The “accomplished appellate advocate… identifies and isolates, one by one, the tools of decision making used by the judges.” *Id.* Focused study of accepted techniques and philosophies will help the advocate frame arguments that speak directly to the judges’ concerns. At the same time, such study deters advocates from basing arguments on “thoroughly illegitimate leeways of action.” Llewellyn, *The Common Law Tradition: Deciding Appeals* 27 n.18 (1960). Such study reveals patterns of appellate decision making that illuminate the techniques employed to reach a particular result. See O’Connell, “Patterns of Decision-Making: A Device for Teaching Appellate Judges et al.,” 70 Oregon L.Rev. 57, 62-67 (1991). Justice Felix Frankfurter once wrote that “those who are steeped in … [opinions], whose ears are sensitive to literary nuances, whose antennae record subtle silences, can gather from their contents meanings beyond the words.” Frankfurter, “‘The Administrative Side’ of Chief Justice Hughes,” 63 Harv.L.Rev. 1, 2 (1949). It is this appreciation for the subtle nuances that marks a top-notch appellate specialist.

**THE IMPORTANCE OF PRECEDENT**

For the overwhelming majority of cases, judges agree that the advocate should begin by studying the record, the lower court decision, and the applicable body of precedent. Judge Ruggero Aldisert has suggested that 90% of federal court cases come within the category of “the disinterested application of known law.” Aldisert, “Philosophy, Jurisprudence, and Jurisprudential Temperament of Federal Judges,” 20 Ind.L.Rev. 453, 462 (1987) (quoting Jaffe, *English and American Judges as Lawmakers* 13 (1969)). Judge Harry T. Edwards estimated that easy cases—that is, those with a single right answer—make up about 50% of the cases. Edwards, “The Judicial Function and the Elusive Goal of Principled Decisionmaking.” 1991 Wis.L.Rev. 837, 856-57. In the easy case, the judge looks first to *stare decisis*—that is, to “readily available and singularly appropriate precedents for the disposition…. ” Traynor, “Badlands in an Appellate Judge’s Realm of Reason,” 7 Utah L.Rev. 157, 159 (1960). The judge “compare[s] the case before him with the precedents…. ” Cardozo, *The Nature of the Judicial Process* 19 (1921).

The advocate should do the same. But this step should be undertaken more carefully than simply setting forth the facts, announcing a rule of law, and then concluding that the litigant should...

A routine case “states no new principle” and involves “no unusual application of law to fact.” Coffin, On Appeal: Courts, Lawyering, and Judging 178 (1994). But often, precedents are not “ultimate sources of the law; supplying the sole equipment that is needed for the legal armory….“ Cardozo, The Nature of the Judicial Process 19 (1921). Matching “the colors of the case at hand against the colors of many sample cases spread out upon [one’s] desk” is not all there is to judging. Id. at 20-21. Rejecting the idea that a precedent “dictate[s] the decision in the current case,” Llewellyn’s discussion of the “leeways of precedent” identifies many judicial techniques available for dealing with arguably controlling precedent. Llewellyn, The Common Law Tradition: Deciding Appeals 77-91 (1960).

**DODGING PRECEDENT**

An appellate court may rule that (1) a precedent overrides a broader principle that would otherwise apply, (2) the explicit reason or theory rather than the holding is accepted and followed, (3) the prior rule is applied to a new fact situation, (4) the prior rule is kept from application because the reason does not fit, (5) an unnecessarily broad basis for the decision is applied to the edge of its language, or (6) a “pure dictum is quoted and consecrated as the authoritative rule…..” Llewellyn, The Common Law Tradition: Deciding Appeals 77-91 (1960). Llewellyn’s list reveals judicial techniques for following precedent, creating new rules while following authority, expanding or redirecting the use of precedent, avoiding the constraining effects of existing precedent, and limiting or killing the precedent.

By employing these judicial techniques, a brief that argues for an expansion or contraction of controlling authority would be more useful to the court than one that simply repeats the precedent and concludes with a request for a favorable ruling. Careful use of this knowledge about the craft of judging sometimes allows an advocate to turn an easy case into a hard one. When study of the “background and antecedents” of a precedent, or its “draftsmanship and effects,” calls it into question, a “new case, presenting a different aspect or throwing new light, results in overruling or in some other escape from it….“ Jackson, “Decisional Law and the Nature of the Judicature” 30 A.B.A. J. 334-35 (1944). Appellate judges confess that “[I]f the precedent is plainly unreasonable and inconvenient, the adherence thereto of the courts will at best be feeble and apologetic.” Pound, “Defective Law—Its Cause and Remedy” (1929), reprinted in Appellate Judicial Opinions 56 (Leflar ed. 1974). For this reason, doctrinal propositions alone do not control; only if a specific and unambiguous doctrinal rule addresses the factual situation and is well supported by the applicable social proposition can the case be seen as easy. Eisenberg, The Nature of the Common Law 75 (1988).

**INTERVENING PRECEDENT**

The advocate should look for an “intervening development of the law, either through the growth of judicial doctrine” or some legislative action. Aldisert, “Precedent: What It Is and What It Isn’t; When Do We Kiss It and When Do We Kill It?,” 17 Pepperdine L.Rev. 605, 629 (1990). The advocate should consider whether the precedent is “a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws.” Id. A precedent may also be attacked because it is outdated or fails to work as the earlier courts anticipated. See Easterbrook, “Stability and Reliability in Judicial Decisions;” 73 Cornell L.Rev. 422, 423 (1988).

Judges weigh and evaluate precedent according to known judicial techniques. They ask themselves whether the “precept emerged from the prior case originated in a thorough, well-reasoned opinion that was itself based upon clear and binding precedents” or whether “the precept [was] seriously weakened by a trenchant dissent, or by a concurring opinion that casts doubt onto the majority’s reasoning.” Aldisert, Winning on Appeal: Better Briefs and Oral Argument 241 (1992). Advocates must be prepared to discuss these points. Studying the craft of judging in the area of precedent reveals a host of subtle approaches for argument that would render briefs and oral arguments far more useful to the judges than many filed today.

**COMPETING PRECEDENT**

Cases involving the choice between competing legal principles are more difficult. See Edwards, “The Judicial Function and the Elusive Goal of Principled Decisionmaking,” 1991 Wis.L.Rev. 837, 857. Edwards estimated that 35-45% of the cases require the court to decide between plausible legal arguments for both sides. In these cases, judges are required to “consider which among competing legal principles and precedents are most applicable, analyze the purposes of various statutory and constitutional provisions, evaluate complex agency records and perform other similarly sophisticated decisionmaking tasks.” Id. The decision may involve line-drawing or determining a question of statutory construction where the text does not clearly and unambiguously dictate the outcome. See Coffin, On Appeal: Courts, Lawyering, and Judging 178 (1994).

Advocates occasionally omit or downplay the line of authorities relied on by their opponent. They may avoid any focused explanation about why the issue should be decided under one line of authority and not the other. Although this strategy is undertaken in the hope that the court will ignore the conflicting authority and apply the precepts that lead to a favorable result, it is a risky strategy, because the advocate ignores the linchpin of decision. See Llewellyn, The Common Law Tradition: Deciding Appeals 256-57 (1960). A better strategy is to acknowledge that the competing interests or lines of authority exist, and explain why the application or vindication of one makes more sense than the other.

In doing so, advocates “must determine which variations make a difference in the interests at stake.” Aldisert, “The Appellate Bar: Professional Responsibility and Professional Competence—A View from the Judged Eye of One Appellate Judge;” 11 Capital U.L.Rev. 445, 463 (1982). Once the lawyer has discovered the values and interests underlying the conflicting precepts,
The judiciary’s task is “to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands….” Pound, supra, 57 Harv.L.Rev. at 39. Most judges agree that, even when reconciling “competing political interests,” the court will not do so “on the basis of the judges’ personal policy preferences.” Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 476 U.S. 837, 865 (1984). Instead, the judges will look to “the relevance of competing legal principles, seek to discern the purpose of statutory and constitutional provisions, determine the weight to be afforded past decisions, and so on.” Edwards, “Public Misperceptions Concerning the ‘Politics’ of Judging: Dispelling Some Myths About the D.C. Circuit,” 56 U.Colo.L.Rev. 619, 631 (1985). Judges who honestly confront complicated questions will “with some regularity reach judgments that conflict with … [their] private policy views…..” Levy, The Establishment Clause: Religion and the First Amendment 223 (1986). Perhaps it is the countless decisions in which judges have employed technical tools of analysis to consider the myriad values and interests implicated in legal disputes that prompted one writer to call jurisprudence “a ragbag.” Harris, Legal Philosophies 1 (2d ed. 1997). It is an analogy that sheds light on the advocate’s job, which is to search through that ragbag, containing scraps of multicolored, variably patterned, textured, and shaped cloth, and stitch together a harmonious whole that will appeal to the appellate court.

AN ILLUSTRATION: JUSTICE STEVENS

An extensive study of the craft of judging, judicial philosophy, and advocacy would fill far more than the few pages allotted to this article. But there is room for a quick illustration of how knowing a judge’s philosophy and perspective on the craft of appellate judging might be helpful. Two justices of the United States Supreme Court who rarely find themselves in agreement, John Paul Stevens and Antonin Scalia, exemplify distinctly different judicial approaches and provide a useful illustration of how an appreciation for the craft of judging can provide practical help in fashioning persuasive arguments. See “Voting Alignment on the Supreme Court,” The National Law Journal, August 10, 1998, at B8 (concluding that, of the nine justices on the court, Stevens and Scalia agreed least often in 1997). This disagreement is not surprising given their diametrically opposed views on the methodology or craft of judging, as well as their differing views on the interests and values to be afforded more weight when deciding cases.

Judicial pragmatists, such as Justice Stevens, believe that “good appellate judgments depend heavily on facts, and that on occasion one or a few facts are decisive, but that far more often it is necessary to perform a cost-benefit analysis of a larger number.” Sickels, John Paul Stevens and the Constitution: The Search for Balance 16 (1988). The preference for standards over rules can be seen among those who “more closely resemble common law judges, for whom legal interpretation rests less on pure reason than on the organic accretion of past history, precedent, and collective social practice.” Sullivan, “Behind the Crimson Curtain,” The New York Review of Books, October 8, 1998, at 15, 17. Judges in this camp tend to “think it more judicially modest to adhere to evolving social traditions than to assert the philosophical or interpretative certainty required to announce a single inflexible rule.” Id. at 17. Concerned about the consequences of decisions, judicial pragmatists are likely to focus on the subsequent use of the decision as precedent and its impact on social welfare.

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Justice Stevens’s opinions exemplify this application of legal principles with moderate discretion on a case-by-case basis. See, e.g., Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring); Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978). He has deferred to other decision makers, particularly to the government when the balance is close. Justice Stevens dislikes a mechanistic approach and avoids announcing broad rules that lack consideration of, or limitations based on, the facts. He tends to adopt compound balancing tests as a way to include a fact-based component in the decision making.

It is not only Justice Stevens’s methodology that differs from that of Justice Scalia. The values and interests identified as significant in his opinions also differ from those highlighted by Scalia. Stevens “shows concern about the consequences of his decisions.” Sickels, John Paul Stevens and the Constitution: The Search for Balance 4 (1988). He looks to history, tradition, and custom to resolve difficult questions. See Miller v. School District, 495 F.2d at 658, 663 (7th Cir. 1974). When deciding due process cases, for example, Justice Stevens considers the principle behind due process, the cost and benefits from adding further process, the need to defer to the lower courts, and other factors such as institutional concerns and the practical difficulties that might be created from expanding a cause of action. See Sickels, supra, at 71-97. This illustrates the type of analysis necessary for developing an appellate argument that might appeal to Stevens.

A CONTRAST: JUSTICE SCALIA

Justice Scalia’s approach, on the other hand, has been described as part of a resurgence of formalism. See Kelso & Kelso, “How the Supreme Court is Dealing with Precedents in Constitutional Cases,” 62 Brook. L. Rev. 973, 978 n.16 (1996). A judge who favors rules “descends from the legal positivists and codifiers of the nineteenth century—realists who sought to reduce legal controversies as much as possible to matters of fact, not value.” Sullivan, “Behind the Crimson Curtain,” The New York Review of Books, October 8, 1998, at 17. Typically, judges who embrace this approach see it as “more democratically legitimate because it ties judges’ hands, at least after a rule is announced, against the exercise of subjective discretion—.” Id.

And Justice Scalia is no exception. He deplores balancing tests, which he believes are too subjective and enmesh appellate courts in fact finding. Scalia, “The Rule of Law as a Law of Rules,” 56 U. Chi. L. Rev. 1175, 1186-87 (1989). Scalia applauds the use of general principles to announce a rule of law that will control in the case before the court and future cases as well; he avoids recognizing a cause of action that can only be decided “by a standardless balancing.” Id. at 1185. Justice Scalia applies this rule-oriented approach to his text-based method of statutory construction and constitutional interpretation.

Justice Scalia’s opinions therefore reflect a different list of interests and values. He focuses on institutional concerns, such as judicial deference vis-à-vis the other branches of government (see Lujan v. National Wildlife Federation, 497 U.S. 871 (1990)), and the need to constrain appellate discretion so that the judiciary is not free to make policy decisions more properly made by other branches of government. See Scalia, A Matter of Interpretation: Federal Courts and the Law 23-25 (1997). Justice Scalia has rejected value-based modes of interpreting either the Constitution or statutes, seeking as much as possible to adhere to a text-based approach.

THE UPSHOT

What does this analysis tell an advocate? It suggests that any analysis of broad-based, policy-type arguments is unlikely to persuade Justice Scalia. It makes clear that the advocate’s proposed holding should state a clear rule of law rather than a balancing or multifactorial test. It reveals the efficacy of searching for standing arguments and other modes of decision that will avoid the need for an open-ended decision on the merits if no clear answer is available. An advocate trying to appeal to Justice Scalia should spend little time looking to the consequences of the rule; instead, the argument would be grounded in logic. Although Scalia might not find that “every judicial act resulting in a judgment consists of pure deduction,” his philosophy and approach to judging tries to employ methods that, as much as possible, limit the judge to such deductive decision making.

An argument calculated to appeal to Justice Stevens would be fashioned quite differently. Stevens, like Holmes, would not decide the case by looking only at the general propositions of law. He is likely to be interested in the concrete, real world consequences of the decision. And he will steer clear of a broad rule to be applied in all cases; instead, the advocate should offer a multifactorial balancing test that will vindicate a variety of interests and will offer some discretion to courts. Because Justice Stevens dislikes rules without facts, he is much more likely to accept a narrow, fact-based distinction from an earlier rule of law. This discussion begins to show how the advocate can benefit from understanding the complexity of the craft of judging.

HONING THE ARGUMENT

Too few lawyers study these underlying questions of judicial philosophy. As a result, they overlook the concerns that are central to judicial decision making in the hard cases. Principles, values, and interests derived from a judge’s conclusions about these philosophical questions determine why the judge decides a hard case one way instead of another. By knowing the theory of judging accepted by the members of the court, the advocate can hone his or her arguments and offer the court a more instructive and persuasive argument. Although jurisprudence is “a ragbag,” its study will deepen every advocate’s understanding of appellate law and will improve every lawyer’s ability to serve as an advocate on appeal.
Establishing a Strategy

Managing High Stakes and Cutting Edge Litigation

By Mary Massaron Ross

F. Scott Fitzgerald said, “The test of a first-rate intelligence is the ability to hold two opposed ideas in mind at the same time and still retain the ability to function.” http://www.brainyquote.com/quotes/quotes/f/fscottfit169636.html.

Those representing corporate litigants in high stakes and cutting edge appeals surely must have this capacity. They need to focus simultaneously on short and long-term litigation strategies as they affect the corporate client’s interest. Other institutional goals and interests may transcend or be in tension with the goal of winning the litigation. The advocate must make litigation decisions in light of these dual, and sometimes contradictory, goals.

Decisions based on the litigation counsel’s expertise about the specific lawsuit and the corporate counsel’s knowledge of corporate goals and needs better reflect the first-rate intelligence that Fitzgerald described. Too often, an outside lawyer offers recommendations regarding the handling of litigation in a vacuum. Advice improves enormously when the lawyer considering the litigation options knows something about a client’s business, institutional goals, and ongoing problems. A proactive outside lawyer will study his or her corporate client by checking out the corporation’s website, doing research on past litigation in Westlaw or Lexis, searching for news and magazine articles about the corporation, and obtaining public filings and reports. A lawyer handling litigation should also ask the corporate client about the ultimate goals for the litigation. But if the lawyer does not think to take these steps, in-house counsel can help by offering appropriate
information to a lawyer retained to handle specific litigation.

**One Idea: Evaluate Procedural and Substantive Issues within the Appeal**

Appellate strategy depends on the answer to basic questions such as whether the procedural rules afford the corporation an appeal as a matter of right or only discretionary review. Both federal and state courts have extensive sets of rules and doctrines governing appellate jurisdiction, defining final orders, and establishing various other grounds for an appeal. See generally, Robert L. Stein et al., *Supreme Court Practice* 65-218 (8th ed. 2002) and David G. Knibb, *Federal Court of Appeals Manual* 25-126 (3d ed. 1997). A case may be a strong candidate for an appeal as a matter of right to an intermediate appellate court focused on error-correction and a poor candidate for review by a court of last resort. The likelihood of success on appeal depends heavily on whether the standard of review is deferential to the trial judge or more favorable to the appellant. Judge Ruggero J. Aldisert, prolific author and appellate judge, has explained that “[t]he error that may be a ground for reversal under one standard of review may be insignificant under another.” Ruggero J. Aldisert, *Winning On Appeal: Better Briefs and Oral Argument* 57 (1992). The strength of a potential appeal also depends on whether the issues to be raised on appeal were preserved. Robert J. Martineau, et al., *Cases and Materials on Appellate Practice and Procedure* 91-220 (2005). A third significant question to consider is whether the error was harmless. Federal Rule of Civil Procedure 61 bars relief on appeal unless “refusal to take such action appears to the court inconsistent with substantial justice.” Fed. R. Civ. P. 61. Relief is allowed only if the appellate court concludes that the “error affected the judgment.” Justice Traynor, *The Riddle of the Harmless Error* 26 (1970), See also, *Kotteakos v. United States*, 328 U.S. 750, 761-62 (1946). The rule poses a formidable hurdle for the appellant since it allows appellate courts to affirm a judgment even if based on error.

Consider the available relief. If the only relief is a new trial, think about whether the plaintiff may get a higher adverse verdict during the second trial. This possibility is not merely theoretical. A second trial affords the opposing party the opportunity to learn from mistakes in trial strategy and to hone the presentation. Witnesses may not hold up under a second cross-examination. Sometimes the additional time will allow the opposing party to learn additional adverse facts about which to inquire. Witnesses who once worked for the corporation may have been laid off or fired. In addition, consider whether the opposing party will take a cross appeal and, if so, the likely outcome. Study the substantive law to evaluate the likelihood of success on the merits. How are the authorities on which the trial court and opposing party relied? How strong are the adverse authorities? Is there any trend in appellate court decisions in the area? Do the facts create sympathy for or against the appellant’s position? Is a successful outcome dependent on winning on more than one independent issue? The panel’s judicial philosophy may affect the court’s approach in close cases. This makes it difficult to predict the outcome in an intermediate court because it depends on the panel assigned to the case.

An appeal to the highest court raises different questions. Review in courts of last resort is typically available at the discretion of the court, not as a matter of right. These courts tend to be more focused on law development than error correction. They look for issues of jurisprudential significance. They hear cases involving unsettled areas of law, conflicts between lower courts, or matters of significant public interest. Courts of last resort avoid cases with unusual facts or procedural intricacies. Courts of last resort do not often hear cases with preservation problems. They can wait to decide the issue when it is squarely presented. Courts of last resort tend to avoid cases with multiple difficult issues that may complicate their review.

Appellate strategy depends on the amount of the judgment together with any applicable interest. When a large judgment is challenged in an appellate forum with substantial delay, the increased exposure due to increasing interest owed while the appeal is pending may be substantial. The calculation should also include direct cost outlays associated with the appeal. This includes filing fees and any other potential court fees. It also includes the cost of preparing the transcript, which can be substantial. In an appeal from a lengthy trial, preparation of the transcript may amount to thousands of dollars. The appellant is also responsible for obtaining any supersedeas bond or other security required to avoid execution on the judgment during the pendency of the appeal. This can be costly. And it may tie up the client’s funds, a non-economic but significant cost. Miscellaneous litigation expenses such as copying, delivery, telephone expenses, travel costs, and costs for preparation of the appendix, add to the cost, though typically not enough to affect strategy.

Attorney fees vary tremendously depending on the complexity of the case, the size of the record, and a host of other factors. Procedural complexities may increase the cost of the appeal. Fee-shifting statutes or court rules may substantially increase the potential risk of any appeal. The risk of increasing the attorney fee award as a result of the appeal may be significant enough to tip the balance against an effort to overturn the judgment in some cases.

**A Second and Possibly Opposed Idea: Evaluate Overarching Institutional Interests Including the Goal of Making New and Better Law**

It is critical to assess the litigation in light of the long and short-term goals of the client, many of which transcend the specific lawsuit. This is, in reality, one of the most difficult tasks of an appellate lawyer and one that requires the highest level of skill. Non-economic factors may be more important than the likelihood of success. An appeal may tie up financial resources, which could be put to other uses. The uncertainty may pose problems for the cli-
ent while the appeal is pending. For some clients, the potential continued publicity is problematic. The possibility of an adverse published opinion may be a significant negative factor for some clients. Cases may have political overtones that require evaluation. Clients may lack the emotional stamina to continue with litigation. Litigation involving large judgments may require disclosure by the corporation in borrowing documents and other filings. The potential judgment may affect a corporation’s ability to borrow. It may have a negative impact on the value of corporate stock. It may harm the corporation’s relationship with other entities with whom it needs to deal.

Far too often, lawyers blithely recommend an appeal, sometimes based on outrage at what they consider to be an uninformed trial court decision or a verdict from a runaway jury. Taking an appeal without properly evaluating the risks, the cost, and the potential benefits is foolhardy. While clients may initially be impressed with the aggressive stance of an attorney urging full-speed ahead, if the result is poor, second thoughts about the quality of advice may follow.

Settlement may be the best strategy if proceeding with the lawsuit threatens other corporate interests. The risk of causing difficulties in financial markets, creating problems with corporate disclosure obligations, harming customer relations, or engendering poor publicity may alter the strategy. These elements often play a significant role in assessing strategy in insurance coverage litigation, where an adverse ruling interpreting a policy in a published opinion may cost untold sums in other litigation as well as the suit being litigated. We have all heard stories of companies successfully defending product liability suits only to find that the product has lost its market share due to the negative publicity from the litigation.

On the other hand, the case may involve principles so important that the client will proceed at all costs. Some corporations have a policy of refusing to settle suits seeking to undermine these principles because the corporate interest in vindicating them is too important to be compromised. A corporation may choose to proceed because it believes in the justice of its position.

### Don’t Accept Bad Law as Fixed

One aspect of appellate strategy that is too often given short shrift is the opportunity to advance the law. Jonathon Swift satirized lawyers for placing too much weight on precedent:

It is a maxim among these lawyers, that whatever hath been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind.

Jonathan Swift, *Gulliver’s Travels* (1726) available at: http://www.nonstopenglish.com/reading/quotations/k_Precedents.asp. Sati-rists are not the only ones to criticize an over-reliance on precedent. Justice Holmes called it “revolting” to “have no better reason for a rule of law than that so it was laid down in the time of Henry IV.” Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897). Judge Aldisert explained that the “doctrine of precedent is everyone’s dragon.” Ruggero J. Aldisert, *Precedent: What It Is and What It Isn’t: When Do We Kiss It and When Do We Kill It?*, 17 Pepperdine L. Rev. 605 (1990). But the dragon of precedent can be slain or avoided in appropriate cases.

Finding adverse precedent should mark the beginning of the lawyer’s work; not the end. Too often, lawyers conclude that an adverse precedent means the case is lost. This amounts to a “basic false conception... that a precedent or the precedents will in fact... simply dictate the decision in the current case.” Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 62 (1960). Multiple techniques exist for working within “the leeways of precedent” to achieve a favorable outcome. Id. at 77–91. Precedent can be narrowed, expanded, weakened, strengthened and overruled. Skillful use of techniques for working with precedent often allows victory despite seemingly adverse precedent.

Some precedent may be vulnerable to challenge from its inception, some becomes vulnerable over time, and some remains strong, but can be expanded or narrowed to achieve a favorable outcome. Precedent is vulnerable when it has defied consistent application by the lower courts. It is vulnerable when a series of exceptions have undermined or swallowed the original rule. It is vulnerable when the premises on which it was originally based can now be challenged—by a change in the law, or by changing societal circumstances, or because additional information shows that the premises on which it was based were always erroneous. Precedent is more vulnerable when it was adopted over a narrow margin and in the face of strong dissents. Precedent is vulnerable when issued by an intermediate appellate court, rather than the court of last resort.

If precedent is weak, it may be challenged directly in a bid for an appellate reversal. If precedent is too strong to attack directly and “slay” as Judge Aldisert suggested, then the use of reasoning techniques to expand, contract, or avoid it make more sense as a strategy.

question of Plessy’s continued validity.” Richard Kluger, Simple Justice 588 (2004). Once Plessy had been weakened, it was easier to overrule in Brown. It was only then that a direct challenge was made.

More recently, the plaintiffs’ bar has pursued long-term litigation strategies to overturn existing precedent and persuade courts to recognize new causes of action or theories of liability in areas such as tobacco litigation, fast food, and lead paint. The plaintiffs’ bar has learned from its success in these areas that mounting a long-term litigation strategy can dramatically change the law. The defense bar needs to do the same.

**Develop a Strategy for Advancing the Law**

Once a legal issue is identified as a candidate for change, sample motions and briefs can be prepared for use at the trial court. National coordinating counsel (whether an outside lawyer or firm or inside counsel) can ensure that all lawyers handling litigation in which the issue may arise know about the strategy and have access to the sample motions and briefs. Early strategic decisions must be made. Sometimes, the best strategy is to chip away at a rule until it is undermined by exceptions and inconsistencies. Other times, it may be better to mount a direct attack urging the court to overrule existing law. In either case, legal research should be prepared dealing with existing precedent, including discussing *stare decisis*, retroactivity, and techniques for working with precedent. All counsel handling such litigation can be prepared for use at the trial court. But handling such litigation can be told to forewarn the issue at the trial court level. But if at all possible. Cases in which a huge verdict resulted at least in part from poor lawyering at the trial court level poses particularly difficult choices because the issues may not be clearly presented but the desire to salvage the case and avoid the adverse judgment is strong. A relatively ineffective trial presentation does not necessarily mean an adverse outcome on appeal. Take a look at *Gilbert v. DaimlerChrysler*, 470 Mich. 749, 685 N.W.2d 391 (2004), a case in which a state court reversed a huge plaintiff’s verdict despite a relatively weak record of objections because the integrity of the process demanded this outcome. The blatant attacks on a German corporation, coupled with repeated references to the Holocaust, and scientific evidence that should have been excluded under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) were enough to warrant a new trial.

**Mine the “Ore” in Published Opinions to Discover the Methodology of Decision-Making Accepted by Judges in the Forum**

The well-known academic, Cass Sunstein, said that “knowledge of the law consists in large part of an understanding of prevailing interpretative practices within a legal community.” Cass R. Sunstein, Legal Reasoning and Political Conflict 33 (1996). The best way to identify these practices is to “mine the ore in the published opinion.” Karl Llewellyn, The Common Law: Deciding Appeals 56 (1960). This means examining opinions to learn the “processes of deciding which remain constant enough to be reckoned with, at least by an artist.” Id. at 58. It is that artistry that allows a skilled advocate to find cracks in the law through which to achieve change.

This does not mean ignoring legal doctrine. Judges repeatedly pronounce that “legal doctrine is a real force, that judges follow legal rules in deciding cases, and that they decide all but a small fraction of cases that come before them in accordance with what they perceive to be controlling legal rules.” Judge Alvin B. Rubin, “Doctrine in Decision-Making: Rationale or Rationalization,” 2 Utah L. Rev. 357 (1987). Justice Cardozo, for example, said that most cases “could not, with any semblance of reason, be decided in any way but one.” Benjamin N. Cardozo, The Nature of the Judicial Process 164–65 (Yale Univ. Press 1923). It means looking behind the doctrine to the methodology to find the best avenue for obtaining change. Judges use traditional legal tools of analysis to arrive at a fair and predictable result, and they look to the advocates to assist them in this regard. *United States v. Strickland*, 144 F.3d 412, 416 n.4 (6th Cir. 1998) (“The usual job of the lawyers is to make arguments as to why the case at bar is more like one case than another based on inferred principles that appear to justify judgments in particular cases”). The legal methods or tools of analysis that judges use, the values and interests they consider, and the arguments they find compelling, vary according to their philosophy and their understanding of the craft of judging.

This idea of looking behind substantive law to find judicial methodology sounds abstract and highly theoretical. But an example can help make it concrete. Michigan offers a good example because, in a relatively short time, a majority of the state supreme court was replaced with new members who followed a dramatically different philosophy and used significantly different decisional techniques. Institutional litigants such as local governments, insurance companies, and corporations have been able to use their knowledge of this methodology to achieve numerous changes in law. During the 1980s and early 1990s (and earlier), justices on the seven-person court used multiple approaches to statutory interpretation. The court freely exercised its common-law powers to modify the common law in areas such as contract, tort, and equity. The court often used an eclectic, legal-process approach to judicial decision-making. See William N. Eskridge, Jr. and Philip P. Frickey, An Historical and Critical Introduction to the Legal Process, included in Henry M. Hart, Jr. and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (1994).

In *Schmidt v. Dep’t of Education*, 441 Mich. 236, 490 N.W.2d 584 (1992), for example, Justice Patricia J. Boyle set forth an analytical method for determining the meaning of a constitutional provision. She

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concluded that the text was indeterminate. In order to decide the case, the court needed to examine many factors to select one of several possible interpretations:

The opinions filed today reflect what must honestly be acknowledged as an attempt to fill the gap in the text of Headlee. Thus, each illustrates the juridical reality that a commitment to judicial restraint and a desire to give effect to the meaning as understood and ratified by the voters does not end the process of constitutional construction where the text is indeterminate. We must examine a host of factors such as the common meaning of the text, the structure of the provision, and the historical context in which the amendment was passed. Legal argument founded on multiple factors can be characterized as “cable-like.” Eskridge & Frickey, *Statutory interpretation as practical reasoning*, 42 Stanford L. R. 321, 351 (1990). The writers observe that “[t]he text, one probable purpose, some legislative history, and current policy each lend some—even if not unequivocal—support to the result. Each thread standing alone is subject to quarrel and objection; woven together, the threads” persuade that a particular result is in order. *Id.* The cable metaphor aptly describes the arguments in this case. The text, purpose, structure, and historical context all suggest that the strongest “cable” is woven from a state-to-local method. The theme of a single state obligation measured during the base year and the theme of state obligation owing to each local government are not logical alternatives but combinable strategies. So viewed, the strongest cable is that which winds together the Headlee Amendment’s dual focus into a single strong whole—the state-to-local method.

490 N.W.2d 596. In *Schmidt*, the court approved numerous tools for statutory interpretation, the text of which was only one, and not the most important. *Id.* Likewise, in *Luttrell v. Dep’t of Corrections*, 421 Mich. 93, 365 N.W.2d 74 (1985), the court looked at the plain language of the statute but concluded that it did “not require” a particular construction. 421 Mich. at 101. The court observed that it was “certainly arguable that the plain language rule is applicable, but it would be useful to examine the statute in light of the normal rules of legislative interpretation.” *Id.* These rules included examination of legislative history, consideration of the doctrine of legislative acquiescence, weight to the doctrine of avoiding absurd or unreasonable results, and the effect of the rule “*expression unius est exclusio alterius*.” *Id.* at 101–108. The court embraced an approach that did not base meaning on the text, but rather noted that the meaning selected was not precluded by the text, and then looked to legislative history, legislative acquiescence, and avoiding an absurd or unreasonable result for the outcome.


Knowledge of the prevailing judicial methodology is key to deciding the appropriate legal issues to raise. The trio of decisions that now govern the standard for summary judgment in federal court offered a huge advance in the law for constitutional provision without strong textual support is unlikely to be successful before the court. An argument grounded on plain meaning of a statute, even in the face of long-standing precedent reading it differently, may well be victorious. The court’s reluctance to announce a new common law rule of any kind has created difficulty for both defendants and plaintiffs. See, e.g., *Ghaffari v. Tierner Const. Co.*, 473 Mich. 16, 699 N.W.2d 687 (2005) (rejecting expansion of open and obvious doctrine in context of construction litigation); *Henry v. Dow Chemical Co.*, 473 Mich. 63, 701 N.W.2d 684 (2005) (refusing to expand common law negligence principles to recognize a cause of action for medical monitoring). The court’s refusal to announce any new rule of common law stems from its belief that change is better achieved by the legislature. See generally, Robert P. Young, *A Judicial Traditionalist Confronts the Common Law*, 8 Tex. Rev. Law & Politics (Spring 2004). Thus, a corporate litigant seeking to obtain a precedent-setting victory to recognize a new common-law defense to a claim of products liability, for example, would be better served raising the new defense in other more favorable jurisdictions first. At the same time, if a litigant seeks to raise the issue in Michigan, an effort should be made to find some legislative policy to support the argument. See, e.g., *Maiden v. Rozwood*, 461 Mich. 109, 597 N.W.2d 817 (1999) (no special duty on the part of medical examiner where recognition of the duty would conflict with statute).

This abbreviated discussion of Michigan jurisprudence exemplifies the “ore” that can be mined by studying judicial methodology. The skillful advocate can then craft arguments on appeal in light of the prevailing legal framework. Although dramatic changes in legal philosophy occur infrequently, more subtle changes are taking place all the time. Studying the decisions for these deeper themes reveals whether the court will be receptive to a change in the law and how best to seek it.

**Defense Victories of the Past**

**Off Success Stories and Reveal Some Issues to Raise in the Future**

The trio of decisions that now govern the standard for summary judgment in federal court offered a huge advance in the law for

Another example of an advance in the law for the defense bar came with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). The *Daubert* court held that under the Federal Rules of Evidence, trial judges must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. According to the Court, use of the word “scientific” implies that testimony must have a grounding in methods and procedures of science. The Court also explained that “knowledge” connotes more than subjective belief or unsupported speculation. An inference or assertion must be derived by scientific method to qualify as “scientific knowledge” within meaning of Federal Rule of Evidence. If not, then it does not amount to scientific, technical, or other specialized knowledge that will assist the trier of fact to understand evidence or to determine fact. *Daubert* gave content to language in the rule in a man- ner that helps keep junk science out of evidence. Although federal courts have altered their practice and taken seriously their role as gatekeepers, many state courts have not yet done so. The war against junk science continues, with important battles yet to be fought and won in state courts. In Michigan, for example, several impor- tant victories followed the *Daubert* deci- sion. See *Craig ex rel. v. Oakwood Hosp.*, 471 Mich. 67, 684 N.W.2d 296 (2004); *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 685 N.W.2d 391 (2004). But further steps can be achieved by carefully and consistently rais- ing *Daubert* issues on appeal in state and federal courts.

In addition to issues involving expert testimony, class action certification, and punitive damages, corporate defendants may consider trying to change the law regarding relevant information that is tra- ditionally kept from a jury although it would be helpful to the defense. Steven B. Hantler, Victor E. Schwartz, *Moving toward the Fully Informed Jury*, 3 Georgetown J. Law & Public Policy 21 (2005). Courts have often developed “substantive rules of law that exclude useful information from the jury’s consideration.” *Id.* at 24. These rules have their grounding in conditions or law that has been abrogated or altered. Thus, the rules may now be ripe for challenge.

Creative lawyers can find many ways in which the law can be advanced over time. Identifying these legal theories, ensuring that they are well-developed at the trial court level and then advanced in appro- priate cases on appeal, are among the most gratifying and creative tasks of an appellate lawyer. Working together, lawyers manag- ing corporate litigation can achieve victory in advancing the law, meeting corporate goals, and winning specific cases.

**Seek Help in the Right Places**

When corporate and institutional litigants try to make new law, the strength of their efforts can be dramatically enhanced by seeking amicus help. Numerous defense-oriented groups file amicus briefs on a regu- lar basis. DRI has an active amicus program to assist members of the defense bar achieve favorable decisions of importance to de- fendants. Most state and local defense or- ganizations also have an amicus committee that is prepared to offer support in appro- priate appeals. Other national groups, such as the National Association of Manufactur- ers, the National Chamber Litigation Center, Inc., the American Chemistry Council, and the American Tort Reform Association, may be interested in the legal issues raised in the appeal. Having amicus support is particularly useful in obtaining the attention of a court of last resort. It may mean the differ- ence between a grant or denial of discretion- ary review. Amicus support is also helpful in elaborating on the impact of the poten- tial decision on interests that are broader than those of the parties. When trying to change the law, don’t forget to discuss the issues with groups that may be able to sup- port the corporation’s position.
Because confidential information is not always a trade secret, the stories are legion of companies that fail the initial requirement of demonstrating a trade secret exists, regardless of whether the information has been “misappropriated.” In addition, this realization often comes too late—after the company sues for misappropriation only to have its opponent show how reasonable steps were never taken to maintain the information’s secrecy. In other words, if a company is going to allege trade secrets, it must be proactive from the start. Long before a lawsuit is filed to protect them.

Conclusion
Although much more can and should be considered about covenants not to compete and implementing a trade secret protection program, this article provides a general overview of what these steps might involve. Each company’s situation is different, and should be analyzed separately with agreements and programs tailored to its specific needs. Although the burden is squarely on employers when enforcing noncompete agreements or prosecuting trade secret claims, the good news is that unfair competition can be avoided, and that customers, marketing strategies, financial data and other confidential information can be protected. The key is doing it in the right manner at the right time—and unlike Benedict Arnold, for all the right reasons.

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responses to interrogatories or permitting the taking of additional depositions.

Conclusion
The proposed amendments to the FRCP are a creative and useful effort to improve the current atmosphere. The Advisory Committee deserves substantial credit for their patience and dedication to the effort. While the amendments are not perfect—much remains to be worked out about the interrelationship among “preservation” obligations and the “safe harbor”—they provide an encouraging antidote to the unfortunate tendency of some to assume that corporations are unwilling or unable to fully meet their discovery obligations.
Down the Rabbit-hole

In-House Litigation Strategies in a Difficult Forum

By Mary Massaron Ross and Robert W. Powell

Lewis Carroll’s marvelous story, Alice’s Adventures In Wonderland, offers a vivid depiction of the arbitrary exercise of power. Who can forget when the Queen of Hearts told Alice, “Sentence first. Verdict afterwards.” Alice objected, “Stuff and nonsense.” Despite her pro-

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A corporate defendant may not immediately place where “nothing would be what it is.” Almost immediately after she fell down the rabbit-hole into a place with strange rules of its own—rules with which she was unfamiliar and which offered no fair chance for her to prevail. Unlike in Wonderland, this country is justifiably lauded for its rule of law. But not every jurisdiction adheres to its basic precepts with the same consistency. Litigating in a difficult forum offers special challenges to in-house lawyers managing strategy in a high-stakes case.

Curiouser and Curiouser: The Rule of Law Is Not What It Should Be Almost immediately after she fell down the rabbit-hole, Alice realized that she was in a place where “nothing would be what it is because everything would be what it isn’t.” A corporate defendant may not immediately realize that defending a lawsuit in a particular forum poses problems beyond those apparent on the surface. The signs that all is not as it should be are not as dramatic as those Alice encountered when she ate a mushroom that made her shrink or grow. But corporate defendants can, and should, assess the situation in an unfamiliar place just as Alice did, by looking around, asking questions, and learning how things operate. Longstanding definitions of the rule of law offer guidance for analyzing whether this local court will be a difficult forum.

The concept of the rule of law has been defined as “the application of clear and settled laws to those who govern so as to constrain their power.” Kristen E. Boon, “Open for Business: International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law, 39 N.Y.U. J. Int’l L. & Pol. 513, 517 (2007). The English legal system traces the origins of the rule of law to the occasion on which King John was forced to surrender to his barons’ demand for legal rights. King John agreed to recognize that the barons had various rights, which were set forth in writing. Since then, the English legal system has exerted some measure of restraint on government conduct that would deprive citizens of their property or liberty. Alfred H. Knight, The Life of the Law: The People and Cases That Have Shaped Our Society, From King Alfred to Rodney King, 16–20 (1996). The Magna Carta limited the king’s rights, and established the principle that “No free man shall be taken or disseised or exiled or in any way destroyed, nor will we go upon him, nor send upon him, except by the lawful judgment of his peers, or by the law of the land.” Id. at 21–22, quoting Magna Carta, Chapter 39. It offered protections for barons from a king’s arbitrary decisions. It called for the king to be bound by the written agreement he made with the barons. The struggle to safeguard and expand the protection offered by the rule of law continues today, both in this country and around the world.

If a judicial system may fairly be said to effectuate the rule of law, it operates by “a principle of governance in which all persons, institutions and entities, public and private including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards.” The Secretary-General, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, at 6, delivered to the Security Council, U.S. Doc. S/2004/616 (Aug. 23, 2004) quoted in Boon, 39 N.Y.U. J. Int’l L. & Pol., at 517. A system fails to achieve the rule of law if it fails “to achieve rules at all, so that every issue must be decided on an ad hoc basis.” Lon L. Fuller, The Morality of Law, 39 (rev. ed., 1969). Other ways for a judicial system to depart from the rule of law include: (2) a failure to publicize, or at least make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes to the rules that the subject cannot orient his action by them; (8) a failure of congruence between the rules as announced and their actual administration.

Id. When these qualities mar a system, “it results in something that is not properly called a legal system at all.” Id. Of these qualities, some argue that “[r]equesting consistency in judicial decision-making is by far the most important.” Knight, supra at 41.

When she fell down the rabbit-hole, Alice found herself in a land that did not operate under the rule of law. Alice could not figure out the rules; she struggled to protect herself from arbitrary and whimsical decisions of those in power. The King of Hearts told Alice to leave the courtroom on the basis of Rule 42, the rule that all persons more than a mile high must leave the court. Alice objected, arguing “that’s not a regular rule: you invented it just now.” “[P]laces where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits” more closely resemble this literary kingdom than a country operating under the rule of law. See generally American Tort Reform Association, Judicial Hellholes 2006, [http://www.atra.org/reports/hellholes]. Such jurisdictions lack the qualities associated with the rule of law. Instead, they have an Alice-in-Wonderland-like quality about them. Litigants do not know the rules in advance. And, worse still, the rules as announced are not the rules administered and enforced in litigation. Alice’s complaint that “they don’t seem to have any rules in particular: at least, if there are, nobody attends to them,” is true of such jurisdictions. The process is fundamentally unfair—and even nonsensical. The judiciary may not be accountable to the law. Verdicts are rendered based on “logic” that is incomprehensible. Indeed, it may seem entirely “mad.” The Queen of Hearts asked Alice, “Are you ready for your sentence?” And although Alice protested that “there has to be a verdict first,” her protest did not help. Once down the rabbit-hole—the rule of law does not apply.

Lawyers, academics, politicians and scholars may debate whether a particular jurisdiction operates under the rule of law, and like any continuum, some jurisdictions fall squarely within it, others fall at the edges, and some fall far outside of it. The well-known plaintiffs’ attorney, Dickie Scruggs, conceded that some jurisdictions

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A “magic jurisdiction” may result from venality and corruption, but it often reflects a populist philosophy.

Trying to Get Home: Some Strategies for Getting Out of Difficult Jurisdictions

Almost as soon as she realized she was in a strange and scary place, Alice began to search for ways to get home. She did so after rejecting the notion that “when one’s lost, I suppose it’s good advice to stay where you are until someone finds you.” She did so because “who’d ever think to look for me here?” That same reasoning applies to corporate defendants. Staying “lost” is not generally good advice. Corporate defendants should consider pursuing steps that allow them to get out of the forum altogether and into another one more like home. Typically, such efforts involve seeking to remove a case, attacking venue as improperly laid, or arguing for dismissal on the basis of the forum non conveniens doctrine. Each of these strategies should be considered immediately upon receipt of the complaint.

A civil case commenced in state court may, as a general matter, be removed by the defendant to federal district court, if the case could have been brought there originally. 28 U.S.C. §1441 (2000 ed. and Supp. II). If it appears that the federal court lacks jurisdiction, however, “the case shall be remanded.” §1447(c). The removal statute grants defendants a right to a federal forum. See 28 U.S.C. §1441 (2000 ed. and Supp. II). Thus, it affords a powerful remedy for corporate defendants when litigating in a forum that poses problems for them.

Occasionally, a case brought in a problematic jurisdiction will raise a federal question that allows removal to federal court, although this is probably rare in the cases that this article addresses. Plaintiffs seeking the “magic” benefits of such a jurisdiction will typically avoid invoking a federal cause of action. Whether a particular case arises under federal law, permitting removal to federal court, turns on the “well-pled complaint” rule; it must necessarily appear in the plaintiff’s statement of its own claim in bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses, which it is thought defendant may interpose. 28 U.S.C.A. §1441(a). This requirement places control of removal, at least in part, in the hands of the plaintiff, who may strategically plead a claim so that it may not be removed.

Most of the time, removal will have to be based on the federal court’s diversity jurisdiction. Again, plaintiffs often will seek to defeat this means of relief by naming a non-diverse defendant. But, the law is clear that the fraudulent joinder of a non-diverse defendant does not destroy the diversity jurisdiction of the federal court. Alexander v. Electronic Data Sys. Corp., 13 F.3d 940, 949 (6th Cir. 1994). Therefore, if the plaintiff includes a local defendant—perhaps an alleged local agent of the target defendant or a friend or family member of the plaintiff—without a legal basis for a claim against that defendant, removal is still possible. When the only obstacle to removal is the presence of a dubious local defendant, early investigation of the facts and law supporting the purported claim against that defendant is important to determine whether removal under the fraudulent joinder rule is available.

In addition, and also problematic, is the rule that does not allow appellate review of the federal district court’s decision to remand a case back to state court. Where
a remand order as to the removed case is based on a defect in the removal procedure or lack of subject matter jurisdiction, review of that order is unavailable no matter how plain the legal error in ordering the remand. 28 U.S.C.A. §1447(c, d). Any time rules offer no chance for appellate review, the odds increase that a judge will decide the question on a basis that cannot be justified under neutral legal principles. Removal of class action litigation is easier now because of CAFA, the Class Action Fairness Act, 28 U.S.C. §1332(d)(2), and this step should be evaluated whenever CAFA applies.

Another strategy for trying to get home is to examine challenges to venue. Careful study of a jurisdiction’s venue rules may allow for an attack on the forum. If the rules permit, this approach might help. Both state and federal venue statutes are intended to bar forum shopping and to direct the permissible places for filing suit. See generally Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d §§3801–3855 (2007) (discussing history and purpose of venue provisions, procedures for transfer and appellate review).

The doctrine of forum non conveniens provides another potential method for getting home. Under federal law, when an alternative forum has jurisdiction to hear case, and when trial in the chosen forum would establish oppressiveness and vexation to the defendant out of all proportion to the plaintiff’s convenience, or when the chosen forum is inappropriate because of considerations affecting the court’s own administrative and legal interests, the court may, in the exercise of its sound discretion, dismiss the case, even if jurisdiction and proper venue are established. American Dredging Co. v. Miller, 510 U.S. 443, 114 S. Ct. 981 (1994). Justice Jackson described some of the factors relevant to a forum non conveniens determination:

An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability [sic] of a judgment if one is obtained. . . .

Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin, a defendant may have to be willing to invoke procedures for mandamus, supervisory writs, and interlocutory appeals to the extent they are available under state procedure. Careful consideration of the availability of these remedies to enforce venue and forum non conveniens rules is critical.

Let’s Go On With The Game: Strategies for Defending the Litigation

If getting home proves impossible, then a corporate defendant, like Alice, will have to play the game under the local rules as best it can. After realizing she could not immediately get home, Alice decided “I simply must get through!” She sought help from the Cheshire Cat, explaining, “Would you tell me, please, which way I ought to go from here?” Alice repeatedly sought advice from those who seemed to know where they were and what was happening. She asked the Cheshire Cat, the White Rabbit, and the Doorknob for advice. Corporate defendants likewise need help from those more familiar with the local rules and practices. A critical step in finding the way is to hire good local counsel. This involves a delicate balance between an attorney’s strong relationships with the local court and plaintiffs’ attorneys and the attorney’s willingness to take on the local judge and plaintiffs’ attorneys when the need arises. It is particularly important to give local counsel a meaningful role in the litigation in these jurisdictions, even if national counsel also is being used.

Corporate defendants should also obtain an early assessment of the legal and factual issues in the case. The Cheshire Cat told Alice, “[S]ome go this way, some go that way. But as for me, myself, personally, I prefer the shortcut.” Given the difficulties to be anticipated in pursuing litigation and a trial, corporate defendants should carefully consider the “shortcut” of an early settlement. At the earliest possible stage, the corporation should require litigation counsel to provide an extensive and thoughtful evaluation of the factual and legal claims, as they will be presented in that forum. If appropriate, based on this analysis, steps should be taken at the outset to resolve the litigation. Settlement is often far cheaper at the beginning of the litigation than it will be at or after trial.

However, in “magic jurisdictions” where the plaintiff’s attorney can simply write a...
number on the blackboard regardless of the facts and law, settlement may be difficult, if not impossible. Paying more than the true settlement value of the case based on the rule of law only encourages efforts to suck the overpaying defendant down the rabbit-hole again and again. When a defendant is subject to frequent lawsuits because of the nature of its business, long term considerations must influence settlement decisions. This necessarily involves the willingness of a defendant to take a verdict when a fair settlement proves impossible—even in a magic jurisdiction.

The relevant facts and law often make little difference in a magic jurisdiction because the parties are viewed as inherently “good”—the injured plaintiff—and “bad”—the corporate defendant with deep pockets. But, populist judges and juries still may be influenced by inconvenient facts that shift this paradigm, making the discovery and investigatory side of the case particularly important in these jurisdictions. Discovering that the plaintiff has made inconsistent statements or admissions about his or her own conduct, fault, or motivation for bringing the lawsuit to family, friends, co-workers, or acquaintances can radically shift the moral authority of the lawsuit. And discovering inappropriate relationships between the plaintiffs, the witnesses, the lawyers, the judge, or the potential jurors can affect who decides the case and the outcome. Thorough knowledge and questioning of potential jurors is particularly important in small jurisdictions where many people know each other. This is another area where the knowledge of local counsel is critical.

Appellate strategy can become a key consideration in some jurisdictions. Sometimes a local county or district court poses grave problems for corporate defendants, but the statewide appellate courts offer a fair and neutral forum, which decides cases on the basis of the rule of law. The initial evaluation of the case should involve careful consideration of the appellate courts to determine whether they are likely to enforce the law consistently. If so, then a key part of the litigation will be to file appropriate motions and make appropriate objections to set the case up for a successful appeal. Increasingly, corporate defendants retain appellate counsel at the outset of the litigation to ensure that the case is properly presented for the appeal. In addition, corporate defendants should use interlocutory appeals if necessary or to seek mandamus to require a local court to follow nondiscretionary requirements.

Finally, the corporate defendant should consider whether deviations from the rule of law are so serious as to constitute a violation of due process. A due process claim on the basis of egregious discovery, evidentiary, or other trial rulings is difficult to bring. But just as in the punitive damages arena, the court has recognized limits to what states can do, so too might it find a violation on the basis of other violations of due process. For example, the exclusion of critical evidence may be so arbitrary and prejudicial that it deprives a party of the due process right to be heard—particularly if punitive damages are being sought. Although this type of due process violation, so far, appears to have been recognized only in criminal cases, see, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973), the due process clause also applies in civil cases. These issues should be preserved so that, if necessary, the corporate defendant is well-positioned to petition the United States Supreme Court for a writ of certiorari on due process grounds.

Since One Good Turn Deserves Another: Finding Your Way Safely Home

Alice’s story resonates with lawyers because it mirrors the difficulties we face when dealing with an imperfect judicial system. The ideal is rarely to be found, even in a judicial system correctly lauded for being the envy of the world. Jurisdictions like those in Wonderland are also rarely found. But when a corporate defendant is sued in a difficult jurisdiction, normal strategies will not work. Still, there are steps that can help to manage and reduce the risk of a bad outcome.