Appellate Practice

ELNUR VIA SHUTTERSTOCK

Copying in Brief Writing: Where Is the Line?

BY ADRIENNE B. KOCH

For litigators, copying is a tricky thing. Every lawyer has at least enough familiarity with the principles of plagiarism to know that, as a general rule, one should not copy another person's words and offer them as one's own.

Lawyers also generally know enough about copyright law to realize that extensive use of someone else's work—even with attribution—can be problematic. But originality is not exactly a virtue in brief writing. It's quite the opposite, in fact. The point of most legal briefs is to persuade a court that the applicable precedent offers straightforward support for the desired outcome, ideally without need for much innovative interpretation or extension. When a court calls an argument "imaginative," it tends to be the kiss of death. See, e.g., *Matter of Power Auth. v. Williams*, 60 N.Y.2d 315, 326 (1983); accord *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 380 (1999).

Are the rules about copying different in brief writing than elsewhere? To some extent, yes. But litigators should not mistake that for a license to copy freely. The accepted practices may be different, but there are limits.

Plainly, a certain amount of copying is valued (and indeed necessary) in brief writing. Briefs quote liberally from authority because arguments that are expressly based on the words of a judge, legislator, treatise writer, or other source that is *not* the lawyer writing the brief are generally considered the most persuasive. As well, lawyers often "recycle" arguments they or their colleagues have written before. As long as the language is adjusted and tailored to the extent necessary to fit the case at hand, this is considered efficient and desirable. And one would be hard pressed to find an attorney who minded seeing language from her brief imported into the judge's opinion—with or without attribution. In fact, most attorneys feel a sense of pride when this happens.

> Copying in brief writing can go too far. Because courts have found that **legal briefs are subject to copyright protection,** large scale copying of another lawyer's brief may be actionable as infringement.

But copying in brief writing can go too far. Because courts have found that legal briefs are subject to copyright protection, large scale copying of another lawyer's brief may be actionable as infringement. See *Newegg v. Ezra Sutton, P.A.*, 2016 WL 6747629 (C.D. Cal. Sept. 13, 2016); accord *White v. West Publishing*, 29 F. Supp.3d 396 (S.D.N.Y. 2014) (upholding a fair use defense). Moreover, plagiarism in legal briefs can lead to sanctions. In *Lohan v. Perez*, 924 F. Supp. 2d 447 (E.D.N.Y. 2013), for example, counsel was sanctioned for conduct that included filing a brief that consisted "almost … entire[ly]" of material "taken from unidentified, unattributed sources"—conduct that the court found "unacceptable and … sanctionable pursuant to [the court's] inherent powers" *even though* one of those "sources" was apparently "a legal memorandum plaintiff filed in an entirely different case." 924 F. Supp.2d at 458 n.6; id. at 460. The *Lohan* court opined that "plagiarism of the type at issue here would likely be found to violate New York State Rule of Professional Conduct 8.4, which prohibits a lawyer from 'engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation.'" Id. at 460 n.9 (alteration in *Lohan*).

Similarly, in *Dewilde v. Guy Gannett Publishing Co.*, 797 F. Supp. 55, 56 n.1 (D. Me. 1992), the court found that the plaintiff's brief in opposition to summary judgment "plagiarize[d] Defendants' memorandum [in support of the motion] in significant part," adding: "Plaintiff's counsel has inserted his own facts and conclusions, contrary to those written by defense counsel, but it is clear that he did no legal research and remained content to let defense counsel do all the work." The court determined that the claims were frivolous, granted summary judgment dismissing the complaint, and awarded the defendants their attorney fees "charged against the Plaintiff's attorney"—noting that this outcome was "particularly fitting" inasmuch as, "[s]ince Plaintiff's counsel appropriated the work of defense counsel, submitting it as his own, he should, at the very least, pay for the services unwittingly rendered." 797 F. Supp. at 64.

It appears, however, that to be truly sanctionable plagiarism in a legal brief must be not only extensive, but also accompanied by something more. In *Lohan*, the offending submission was so heavily copied that it failed to address the "salient points" in the case, and the copying was aggravated by other misrepresentations to the court. See 924 F. Supp. 2d at 458 and n.6; id. at 459-60. In *Dewilde*, the court's comments about plagiarism were ancillary to a finding that the claims themselves were frivolous. See 797 F. Supp. at 63-64. Other cases where lawyers have been sanctioned for copying in their briefs have likewise involved additional misconduct. See, e.g., *In re Ayeni,* 822 A.2d 420 (D.C. App. 2003) (attorney disbarred for conduct that included filing a brief "that was virtually identical to the brief filed earlier by his client's co-defendant" and submitting "a voucher for payment asserting that he expended more than nineteen hours researching and writing the brief"); *In re Steinberg*, 206 A.D.2d 232 (1st Dept. 1994) (attorney censured for conduct that included submitting memoranda written by someone else as his writing samples in connection with his application for a panel of assigned criminal defense counsel); accord *In re Mundie*, 453 Fed. Appx. 9, 16-19, 20 (2d Cir. 2011) (attorney reprimanded based on conduct that included copying a brief written by another attorney without adequately adjusting it to address the particular circumstances of the case; conduct amounted to an absence of care that "had the potential to prejudice his client").

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ADRIENNE B. KOCH *is a litigation partner with Katsky Korins in New York.* TIMOTHY J. HOLLAND, *an associate with the firm, assisted with this article.*

The Supreme Court Takes Aim at Deference to Administrative Agencies

BY REX S. HEINKE, JESSICA M. WEISEL AND DOUGLASS B. MAYNARD

In 1989, the late Justice Antonin Scalia authored one of the seminal opinions on deference to administrative agencies.

In *Auer v. Robbins*, 519 U.S. 452 (1997), he famously reaffirmed a long-standing rule of administrative deference dating back to *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945): When the meaning of an administrative regulation is in doubt, the agency's interpretation of the regulation is "controlling unless plainly erroneous or inconsistent with the regulation." Id. (internal quotations omitted). Deference will be given even to informal interpretations that are not adopted through rulemaking or formal adjudication under the Administrative Procedure Act (APA). By 2011, however, Justice Scalia had made an about-face: "[W]hile I have in the past uncritically accepted [the *Auer*] rule, I have become increasingly doubtful of its validity." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

Justice Scalia's doubts seem to have gained traction with the conservative Justices on the court. On March 27, 2019, the court heard argument in *Kisor v. Wilkie*, Case No. 18-15, a case that asks if the court should overrule *Auer* and *Seminole Rock*.

Undoubtedly, there are valid criticisms of how courts employ these cases. Critics of *Auer* deference maintain that deferring to agency interpretations of its own regulations: (1) gives administrative agencies incentive to promulgate vague regulations, thereby giving the agency maximum flexibility to issue later, informal interpretations; (2) permits agencies to evade the requirements of the Administrative Procedure Act's rulemaking and formal adjudication procedures; (3) makes it easier for agencies to change their interpretations, particularly when new administrations take office; and (4) violate separation of powers by effectively giving administrative agencies the power to create and interpret the law.

Auer's defenders counter that these criticisms are overblown. They argue that *Auer* deference encourages agencies to be specific in regulations to prevent subsequent administrations from reversing course; that it is inefficient and impractical to require formal rulemaking or adjudication for

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REX S. HEINKE *is a partner,* JESSICA M. WEISEL *is senior counsel, and* DOUGLASS B. MAYNARD *is partner and general counsel of Akin Gump Strauss Hauer & Feld.*

Moot Court Is Not Just For Law Students

BY DAVID B. SAXE AND DANIELLE C. LESSER

All of us can recall our law school moot court competitions that occupied our energies—learning how to write a persuasive brief and to argue its contents before a "court" often comprised of professors, teaching assistants and alumni.

But, the importance of the moot court experience does not stop at graduation. Practicing lawyers, especially appellate counsel can be significantly assisted by engaging in a law school style "moot court" exercise as they prepare for an appellate or motion court engagement.

Enlisting the assistance of those with a careful eye toward maximizing the effect of courtroom presentations—both the brief and the argument—should not be underestimated. While the trained ear of a colleague, a friend, perhaps a spouse or partner who takes some time out to listen to snippets of an intended argument can make a big difference in the effectiveness of an oral argument, to maximize the benefit of a moot court experience, the practitioner should consider a more exacting approach.

A compelling oral argument, supplementing a thoughtful and well-crafted brief can help persuade the court to rule in your favor in a close case. The opportunity to persuade the appellate panelists should not be squandered.

A good moot court approach for an appeal begins with the briefs, which are the most important part of the appeal. It is while drafting the appellate briefs that lawyers make strategic decisions on what arguments to advance, how they are prioritized and how to present them.

It is useful, even at the brief-writing stage, to engage the assistance of parties who are not as close as you are to your argument to review your brief and assess whether or not an argument should be made and how it should be structured and prioritized with other points. Remember, at the appellate stage, it is important to focus on the issue or issues on appeal not necessarily on the issues as they were presented in the lower court. This dispassionate third-party perspective is especially important if you were also counsel at the trial level because it may be difficult to extricate yourself from the factual details, themes and arguments made at the trial level. See Joseph W. Hatchett and Robert J. Telfer III, *Appellate Advocacy Symposium, Part II: The Importance of Appellate Oral Argument,* 33 Stetson L. Rev. 139, 146 (Fall 2003). By seeking outside help, you can focus on advancing the strongest arguments in your appellate briefs.

Briefs are where you set the stage for oral argument and evaluating how your brief frames the issues for oral argument should not be overlooked. See Gwen J. Samora, *Symposium: Preparing for Appeal: New Challenges: Oral Argument Tips for Trial Lawyers—Aim For The Good, Avoid The Ugly*, 76 The Advocate 23, 23 (Fall 2016).

Attorneys preparing for an appellate oral argument must practice delivery of their argument prior to the oral argument date. A good response to a tough question can make a difference to a judge who is on the fence. Practicing your argument aloud with experienced interlocutors, preferably through a formal moot court exercise, can give you an invaluable perspective on how to handle questioning. Even if you engaged in the brief writing stage without assistance, there is still value in mooting your argument with others. The moot court process provides the practitioner with a tough and thorough interrogation of the perceived weaknesses of your argument. See Dori Bernstein, *Feature, How to Construct an Effective Moot Court,* 44 Litigation 47, 47 (Fall 2017). During this process, your moot court panelist or panelists may ask you important questions that may not have occurred to you. They also may have ideas on how to better articulate what you are trying to say. Each question can help you refine your argument and prepare the best responses to potential questions. Because moot court questioning is often tougher that the actual oral argument, going through the moot court process can also boost your confidence and make you better prepared for an argument.

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Fordham Law School moot court

Finding the right moot court panelists is critical. Ideally, utilizing skilled appellate advocates is important, especially those who regularly argue in the court in which you are scheduled to appear. See id. at 48-49. You should also provide the panelists with the decision below, the appellate briefs and important excerpts from the record. Encouraging the panelists to be fully prepared will ensure that they can zero in on the critical issues in the case during the moot court questioning. Interlocutors who have not examined the briefs and the record may actually do you a disservice. There should be a structure to

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DAVID B. SAXE *is a former Associate Justice of the Appellate Division, First Department where he served for 19 years before becoming a partner at Morrison Cohen.* DANIELLE LESSER *is a partner at the firm and chair of its business litigation group.*

Inside

APPELLATE PRACTICE: Angela Turturro, Sections Editor | Monika Kozak, Design

Words With Conviction II: **Writing the Winning Brief**

"O for a Muse of fire that would ascend,
The brightest heaven of invention.
A kingdom for a stage, princes to act
And monarchs to behold the swelling scene."

BY WILLIAM B. STOCK

These opening lines from the Chorus of Shakespeare's *Henry V* have grabbed the attention of audiences for centuries, just as they now have attracted yours. Writing for a court requires similar skills to those of a good playwright. You must pull your reader into your world immediately, hold his or her interest while you set forth your arguments in a clear and concise manner and write so that the reader does not lose interest along the way.

The task may seem daunting at first blush, but it can be done.

In his book *Five Chiefs*, retired U.S. Supreme Court Justice John Paul Stevens revealed the fate of both good and bad briefs that were submitted to the nation's highest court. A poorly written brief would receive a one-time, perfunctory reading and then be put on a shelf to gather dust. As to a well-written brief submission, Stevens recalled that, while clerking at the court, he once saw Chief Justice Earl Warren copying from one side's brief directly into his draft of an opinion. What would you like the fate of your briefs to be?

The struggle to write well is never-ending, but the rewards will be great. This article will briefly discuss how to write in such a way that can effectively persuade an appellate court. But it will first review some principles of writing compelling English.

One of America's foremost appellate attorneys, and indeed one of its finest writers of prose, had only one year of formal schooling. His name was Abraham Lincoln. Yet he had an unquenchable thirst for knowledge and through hard work and self-education made himself a literate man and a fine lawyer.

Lincoln's prose is sparse and direct but he unquestionably had more than a touch of the poet. The Gettysburg Address is barely 300 words long, yet entire books have been written discussing the legal and linguistic artistry behind it. See Garry Wills' *Lincoln at Gettysburg: The Words That Remade America* (Simon & Shuster)

Several lessons can be gleaned from Lincoln's literary legacy. One first needs a desire to write well. After that must come a great deal of reading. Concentrate on books that have stood the test of time because they are generally the best written.

WILLIAM B. STOCK *maintains an appellate practice in Manhattan, specializing in civil litigation.*

A Few Words on the Basics

You must know the meaning of the words you write. Perhaps this may seem obvious, but it needs to be stressed. There is a tendency in our busy world to use words without being certain of their meanings. This can have a very unhappy effect because it creates the impression of sloppy writing and unclear thinking.

Two examples come to mind. This writer has seen too many briefs that use the word "incredibly" in place of the word "very." But the words have different meanings. Consider the original film version of *The Producers*. The jury foreman arises at the conclusion of the film to announce "We find the defendants incredibly guilty." The effect is a nice laugh arising from a misuse of words. Do you want to generate a similar reaction when someone reads your work?

Another example is the word "transpire." It is now freely used as a fancy way of saying "happen." But this is not the original meaning of the word. It once meant "to be revealed or to come to light." The desire to impress a reader with an ornate word may have the opposite effect.

Proper grammar and punctuation are the other keys to good writing. Besides the damage a badly written contract or brief can do, poor skills in this area can prove to be very costly. In Christopher Marlowe's *Edward II*, usurpers of the king's throne have imprisoned the monarch and wish him out of the way. However, they also want to be able to deny they ordered his murder. Their solution is to send his jailers an intentionally ambiguous message in Latin with a suspicious comma:

This letter, written by a friend of ours,
Contains his death, yet bids us spare his life;
'Edwardum occidere nolite timere, bonum est.'
Fear not to kill the king, 'tis good he die;
But read it thus, and that's another sense,
'Edward occidere nolite, timere bonum est.'
Kill not the king, 'tis good to fear the worst.
Unpointed [unpunctuated] as it is, thus shall it go.

MARIA SAVENKO VIA SHUTTERSTOCK

The literature on English grammar is vast and this essay does not wish to make it longer. The easiest introduction to studying grammar is Stephen King's memoir *On Writing*. It is a good first step for a busy reader.

The last thing to be said about the basics is that you must know what you want to say and say it clearly and directly. George Orwell's classic essay "Politics and the English Language" demonstrates how the English language, used improperly or with malicious intent, can make your prose as clear as mud.

The Brief Itself

Now we turn to the writing of a winning brief.

(1) Briefs have their name for a reason. They are supposed to be a distillation of a case down to its essential facts and legal arguments. Mark Twain once wrote in a long letter that he did not have time to make it shorter. Remember your ultimate audience is a busy judge who reads the equivalent of more than a novel a week. Don't bore the judge; keep your brief short and don't endlessly cite cases when you have a few that are "on point."

Writing for a court requires similar skills to those of a good playwright. **You must pull your reader into your world immediately,** hold his or her interest while you set forth your arguments in a clear and concise manner and write so that the reader **does not lose interest along the way.**

(2) Keep your arguments direct and concise.

(3) A show business motto is "Open big." Put your best arguments at the beginning of your brief when your reader's attention will probably be the most focused. Put your weaker arguments at the end or, better still, omit them completely.

(4) If you don't know how to express an idea clearly, consult the "Ancients." By Ancients I do not mean Chaucer and Milton (although it would not hurt to read them) but great legal writers like Cardozo and Lincoln. You might also want to download the winning appellant's brief from *Gideon v. Wainwright* and read it for sheer pleasure. It is a masterpiece. The prose style you develop is your own, but when I want to write a short ringing phrase I usually think of "Danger invites rescue." *Wagner v. International R. Co.*, 232 N.Y. 176 (1921) On the other hand, if I want to write a clear and straightforward description of something, I usually turn to the writings of George Orwell for inspiration.

(5) Keep your prose calm and clean. I have heard judges lament at seminars that some briefs seem to be more of an attorney's cry for emotional assistance than a plea for justice. If you cannot emotionally detach yourself from an appeal, perhaps you should give it to another lawyer. Further, do not put jokes, literary quotations or personal attacks on opposing counsel in your brief. The court will not appreciate them.

(6) Don't just simply list cases without at least a brief description of the point in citing them. Otherwise, you are imposing a burden on the court.

(7) Take time to think before you begin writing. Some lawyers start writing their briefs before their ideas have had time to coalesce. This is a waste of time, although, given the time pressures in our profession, it is sadly understandable.

(8) Truman Capote said that "Good writing is rewriting." The secret to writing well is to rewrite and rewrite until your point is clearly and concisely made. No more need be said on this point.

(9) While I have previously suggested that consulting the writing of the great appellate writers can be helpful, in the final analysis you must still do your own thinking on your case. Cutting and pasting to excess is the death knell of good appellate writing.

(10) Review your work and let others review it as well. Law is a collaborative enterprise and no lawyer lives who cannot benefit from appropriate outside comment.

(11) Remember there is no such thing as an obvious point of law. All points of law in contention must be addressed but that does not mean one has to go on endlessly about them. Use your judgment.

Good luck!

Copying

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Exactly where is the line? The New York City Bar Association's Committee on Professional Ethics grappled with this issue last summer in Formal Opinion Number 2018-3, where it answered the question: "Is it a violation of Rule 8.4(c) [which prohibits 'conduct involving dishonesty, fraud, deceit or misrepresentation'] for a lawyer to copy verbatim from other sources without attribution when drafting a litigation filing?" Following an extensive survey of case law (including most of the cases discussed above, together with many others) and other authorities, the Committee concluded that such copying "is not *per se* deceptive" and does not in itself violate any ethics rules. The Committee emphasized, however, that its conclusion was "based on [its] view of the norms of litigation practice and the purpose of litigation filings" and its belief that there is no "clear judicial consensus that copying without attribution is *per se* deceptive." "Over time," the Committee noted, as courts "continue to express opinions on the propriety of" such copying, "it is possible that these decisions will coalesce into" such a consensus. "If that consensus emerges," the Committee cautioned, "we would need to revisit this opinion." The Committee also stressed that it did not "condone copying source material without attribution in litigation filings," and that "many Courts … plainly believe" that such conduct is sanctionable.

At first blush, the Committee's conclusion—that copying someone else's work without attribution does not in itself appear to violate the ethics rules, but that its view on this might change and that such copying might meanwhile subject lawyers to sanctions—seems unsatisfying. It does not give the kind of comfort or assurance one might hope for in an ethics opinion. But it is important to recall that the question the Committee was answering was whether conduct that would in any other context be condemned as plagiarism violates the ethics rules. The question itself is somewhat shocking. The Committee's conclusion is, in essence, that copying someone else's work without attribution probably does not violate the rules if that is *all* the lawyer does (that is, if the conduct is not accompanied by other misdeeds such as an attempt to charge for work the lawyer did not actually do, or a failure to "tailor the brief to the situation before the court"), but it should be avoided.

The notion that a lawyer who copies someone else's work without attribution acts at his or her peril is hardly an unreasonable one. But by stopping short of condemning the practice, Formal Opinion 2018-3 leaves room for it to continue. Perhaps this also leaves room for development of the "clear judicial consensus" the Committee found lacking. But it might be better if lawyers did not provide the fodder for such a "consensus," even if that means the question continues to go without a clear answer.

While a lawyer's job in brief writing is to fashion arguments based largely on precedent, relating that precedent to the case at hand is in fact a creative process. Doing it well is the skill of our craft. A lawyer who skips that step in favor of simply copying someone else's work without permission or attribution does the profession a disservice, regardless of whether or not that conduct rises to the level of an ethics violation.

Deference

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every interpretation of a regulation; that the ability of agencies to change positions is limited by the language of regulations and the statutes they interpret; and that courts reject arbitrary changes in interpretation, including changes that upset interests that relied on previous interpretations and that are not adequately explained.

Kisor is just one example of current members of the court attacking established rules of statutory and regulatory construction. Last year, Justice Clarence Thomas, joined by Justices Samuel Alito and Neil Gorsuch, criticized the majority's reliance on legislative history materials—a committee report—to interpret a federal statute in *Digital Realty Trust v. Somers*, – U.S. –, 138 S.Ct. 767, 783-84 (2018) (Thomas, J. concurring). Several Justices, including Justices Thomas, Gorsuch, and Brett Kavanaugh, as well as former Justice Anthony Kennedy, have expressed doubts about the continuing application of *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), so-called *Chevron* deference, which requires courts to defer to "reasonable" agency interpretations of statutes.

Overlooked in the criticisms is a pragmatic concern. Rules governing how to interpret statutes and regulations are critically important. While appellate litigators focus on such rules because they play a major role in any brief centered on statutory and regulatory interpretation, the rules of construction help everyone predict the outcome of a dispute over the meaning of a law. Thus, an employer uncertain about the meaning of a recent Department of Labor regulation governing the calculation of wages can rely on an interpretive bulletin that details how the calculation should be made. Knowing that the interpretive bulletin is likely to be the tie-breaker in a wage dispute provides more certainty than being forced to wait for a court to interpret the regulation in the future.

The critics of *Auer* and the other rules of construction often maintain that the rules give administrative agencies too much power and take away the power of interpretation from the courts. That argument misses three salient points.

First, administrative agencies are given deference because of their perceived expertise in a field, e.g., labor and employment, transportation, financial oversight, etc. Judges without such expertise may overlook important considerations.

Second, it is not feasible to expect that courts through litigation will handle the sheer volume of interpretations that administrative agencies must issue. It is impossible for agencies to fully anticipate every question that might arise, which is why informal guidance is helpful.

Third, the notion that courts will be able to interpret regulations begs the question of how. If the language of the regulation is ambiguous, how is a judge in a better position to ascertain the meaning of the regulation than the agency that promulgated it.

This last problem also illustrates a fundamental concern with the attacks on *Auer* and the other rules of construction. If we do not apply the existing rules, what replaces them? No alternatives other than claiming the meaning of statutes and regulations should be determined solely from their text have been offered.

Suggesting that all ambiguities can be resolved by textual analysis defies reality. When unanticipated questions arise or drafters use ambiguous language, established rules of construction allow people subject to those laws to reasonably predict how the uncertainty or ambiguity will be resolved long before courts can resolve such problems.

At oral argument in *Kisor*, the court appeared unlikely to do away with *Auer* deference entirely. Several Justices emphasized the importance of agency expertise. Justices Ginsburg and Breyer expressed concern about delay if only regulations issued through formal APA rulemaking are given deference, while Justice Sotomayor questioned how regulated parties would know how to act without agency interpretations. She and Justice Kagan also expressed concern for stare decisis, citing the court's prior decisions that have deferred to informal agency interpretations—some dating back to the 1800s—while Justice Ginsburg expressed concern about the potential chaos that might result if lower court decisions predicated on *Auer* deference would have to be relitigated. And Justice Breyer expressed doubt about leaving all interpretations to judges, quipping, "this sounds like the greatest judicial power grab since *Marbury v. Madison* … ."

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Even some of the conservative justices seemed concerned about eliminating *Auer* deference entirely. For example, Justice Alito seemed to share Justice Ginsburg's concern about relitigation in the lower courts and questioned whether eliminating *Auer* deference would mean agencies are entitled to no deference, despite their expertise. On the other hand, he pointed out that some questions of interpretation required no expertise at all, offering as an example whether "the FCC knows a lot more about the meaning of the word 'relevant' than federal district judges[.]"

Justice Kavanaugh was similarly equivocal, rejecting petitioner's counsel's argument that deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), could fill any gaps left by overturning *Auer*. Justice Kavanaugh dismissed the argument, because *Skidmore* deference, which is decided on a case-by-case basis, applies only if the agency's interpretation is "persuasive, which is true of any argument." But he also emphasized that agency rulemaking was the preferred approach to establishing an agency's interpretation, and questioned whether delays that concerned other Justices were the result of courts making formal rulemaking too slow and difficult a process.

Of the remaining conservative Justices, Justice Gorsuch advocated against retaining *Auer* deference and Justice Thomas, though silent at oral argument, is likely to support eliminating the doctrine, which he has criticized in the past.

Chief Justice Roberts, who could be the deciding vote, did not indicate any strong view on the subject. He did, however, wonder if the court's post-*Auer* decisions have whittled away the doctrine so much that eliminating *Auer* deference might not effect much of a change.

At this point, it is impossible to predict how the court will rule. A decision in *Kisor* is expected before the court recesses at the end of June.

Why We Should Argue About **How We Argue in Courts**

BY DARRYL M. VERNON

The Supreme Court Argument in the Affordable Health Care Case: A Good Decision But a Flawed Procedure? Imagine that a thoroughly prepared, highly seasoned U.S. Supreme Court appellate lawyer is unable to answer a question posed by a Supreme Court justice during argument.

Precisely this scenario unfolded in a Supreme Court case that would have significant impact on health care in the United States. At oral argument in the Supreme Court in the case challenging the Affordable Health Care Act, a case in which the lawyers on all sides were as prepared as anyone is likely to be, a question was asked by a Supreme Court justice that the government lawyer did not expect. And he couldn't answer it. At least not right then and there. So the question went unanswered because there was no other opportunity to give the court an informed answer after argument had ended.

The lawyer was of course one of the best in the field of Supreme Court argument. Supreme Court argument, the way it is done now and the way most all oral argument is done, takes more than just being analytical and proficient in the subject being argued. You have to be good at anticipating what the court wants to know as well as good on your feet at argument.

But important decisions in our society, such as who gets lifesaving health care, who is protected from discrimination, and so forth, should not be decided like a sporting event with the quickest being the winner. Perhaps these important decisions should be done more like scientific research, or more along the lines of how academics study if housing policy laws are good for the public, or even like the heated exchanges in the British Parliament. Or are the pressures and time constraints of deciding countless cases just too overwhelming to allow for anything but shooting from the hip?

In short, while scientific methods, data sampling, and the like have advanced over the years, the method of arguing a case in court, particularly appeals where crucial issues are often decided, has changed very little. Nor has there been much discussion of alternative ways to argue cases.

The current state of argument in courts in the United States. Give me a Break: Providing Lawyers Time to Adjust During Argument. The tax appeals court in New York City is a specialized court that in many ways is like most other appellate courts. There are three judges. Both sides (the government and the taxpayer) submit written briefs in advance of argument. Both sides get oral argument of the case and arrive hoping each knows what the court will want to hear, what questions they will ask, and hoping to supply responsive and persuasive answers.

When I argued in this court I had similar expectations. Argument started as usual. Since I was appealing, I argued first. I was prepared and fortunately able to answer the questions. The government argued next, made good points, and gave reasonably informed answers. But often, even when argument goes well, both sides upon reflection think they could have given better answers. That is when the chief judge said something I never heard before.

Normally, when argument ends, the judge will typically say something ranging from "thank you for a well-argued case to simply "next case." Not this time. In this tax court the judge said (to the best of my recollection), "Counsellors, we asked you many questions, some of which you expected, some of which you may not have expected, and some of which you'd like some time to think about." This was unheard of—and why had I never heard this before? Was there no "next case" breathing down our necks? The chief judge was even more revolutionary when he added that they too, as judges, had listened to our answers and argument and wanted to think about and discuss our points to see what further questions they might have for us.

We took a break of about 15 minutes. Not long, but longer than I ever had experienced.

JIRAPONG MANUSTRONG VIA SHUTTERSTOCK

When we went back in to the courtroom, we fine-tuned our points, discussed other points and ramifications, and quite simply took the argument and resulting decision to a more thoughtful level.

A 15-minute break is not a lot of time. If the government had decided whether to upgrade the safety systems on the railroads in that amount of time someone would be sued after the next crash. But even this amount of time was significantly helpful. Perhaps if the government attorney in the Affordable Health Care argument had just a 15-minute break he would have been able to answer the court's inquiry. Surely someone on his dream team of many lawyers would have simply told him the answer.

A collateral issue here is why courts almost always allow only one lawyer for each party to argue. Having another lawyer available for the one or two questions you may not know or understand seems simple, and with little downside. A court could limit this to allowing other lawyers to speak only when the lead lawyer defers to that lawyer. And as a more technological solution, the courts could consider allowing lawyers to have an earpiece so that a colleague who knows the answer could rapidly send it to the lawyer standing in court.

Didn't Know That Question Was Coming: Court Questions in Advance for Better Answers. When you argue in New York's highest court—the Court of Appeals—there are seven judges, one podium for the lawyer arguing, and a series of lights on the podium giving you warnings as to when your time is about to end. It works like a traffic light, except that you generally run red lights because a judge is still asking you questions.

At an argument I had at the Court of Appeals, my plan was to put my papers on the podium in a very organized way. My main notes—sort of a home page—would be front and center, the statutes on my left, the case law summaries on my right, and the key cases forming a top row. Before I could set up my great idea of podium design, I was asked a question by the chief judge for which I had to look up, of course, and answer. The next thing I knew my 30 minutes of argument was over and the podium looked like my college dorm room.

Fortunately, despite not having my court of appeals world organized like my desk, I was able to answer the questions and make my points. But should this really depend on some combination of on-your-feet skills and, quite frankly, some luck?

In a NYLJ article titled "Five Lessons from a 'Bizarre' Argument Over First Amendment" NYLJ (Jan. 19, 2016), examples of several difficult moments for litigants upon questioning the court are discussed. For instance, at argument in a First Amendment case discussed in the article, Justice Anthony Kennedy asked one of the lawyers "how would you define the right at issue in this case?" The lawyer, as the article points out, "made a halting try," but Kennedy was not satisfied and answered the question for him. The lawyer hastily agreed with Justice Kennedy's formulation of the question but that formulation got him into difficulties later. Of course, had the lawyer known that this question was coming, or that it was an important topic for argument, it is likely that the lawyer would have provided a better answer.

In the same case, Justice Elena Kagan expressed her disagreement with one of the First Amendment arguments and told the lawyer that his argument was "one strange doctrine." All the lawyer could do to respond was say that "it may be that I have not persuaded you in this case." Although the article says "waving the white flag" might be the right thing to do, a better response for the argument may have been given had this lawyer known Justice Kagan's particular objections. More points like this are raised in the article and virtually all of them could be ameliorated to some extent by the changes to the method of argument.

While many lawyers do very well at argument, it takes a lot of preparation to make sure you think of every question that might come up. Someone pays for that time. If you knew ahead of time the key, or at least the likely questions that the court wants to discuss, the time preparing would be diminished. There will always be follow-up questions and issues that arise at argument, but far fewer using this method. Our current method of argument has inefficiencies for which clients pay.

Technology and Court Design: Why Must I Shut Down My Mobile Devices? One time when I argued in a Manhattan appeals court, long after the inventions of laptops, tablets, and smart phones, a lawyer waiting to argue sitting next to me had his iPad out. The court officer came over and told him that, like phones, iPads had to be put away (this has now changed at least in the First Department). The lawyer said his notes for argument were on it. The court officer looked at him like it was the first time he had ever heard that. iPads had been around for about five years. Yet the court not only didn't offer Wi-Fi, it didn't even have a procedure in place to allow arguing attorneys access to the benefit of notes on a device, let alone the ability to look up case law or, for example, depositions in a case. The point is that the method of argument has not evolved. It's true that some things are tried and true, but procedures should reflect technological progress.

Important decisions in our society, such as who gets lifesaving health care, who is protected from discrimination, and so forth, **should not be decided like a sporting event with the quickest being the winner.**

There are also many courts where you go up to the bench where the judge sits, and argue without having any place to put your notes, case law, or even your bag. So there is also a physical aspect to argument, worthy of some thought as to the optimal court layout for argument. Newer court rooms often have bigger spaces to spread out your materials. Separation from noise and distractions in the area where argument occurs is helpful. Wi-Fi so lawyers and the judges can connect to quickly look up, for example, case law adds to efficiency. Some of these improvements have already been implemented.

The courts' dockets are often congested. Time is short for argument. Time is even short for deciding cases. Indeed, these facts have stood as an argument against allowing too much back and forth at argument, and certainly against allowing a break between argument or having more than one lawyer argue a side. But if done right, certain changes can make the courts more efficient. If after a break the court gets better answers, and even answers to questions the court may have neglected to ask, that can cut down on the time it takes to ultimately decide the case by reducing the time the court needs to do further research. A lawyer who is quickly given an answer to a court question by a colleague will only speed up the time of argument. A lawyer who has her argument notes kept on a computer may access them faster at argument. In short, if used well, procedural changes and increased use of technology can help a court get through their often excessive workloads.

Dialogue Between the Court and Litigants: Encouraging It Versus Diminishing It. It may seem like heresy to even suggest that judges should also be subject to questioning. But why aren't judges asked questions? Often judges will say "we ask the questions." As Chief Justice John Roberts said when a lawyer asked no more than a rhetorical question "usually we have the questions the other way." But consider a recent Supreme Court argument in *King v. Burwell*. This was a complicated argument in a second Supreme Court case about the Affordable Health Care Act. Several times during argument Justice Samuel Alito argued (more than questioned) that the various references to state exchanges in the Health Care Act demonstrated that a federal exchange can't have the same benefits as a state exchange, effectively defeating portions of the Act. The Solicitor General rebutted the argument persuasively, arguing why Justice Alito's point was fairly baseless. It would have been beneficial to all if the Solicitor General could have followed up to ask Justice Alito what his response would be to the Solicitor General's rebuttal. Did Justice Alito have an argument in response? Was Justice Alito's point driven by a bias? All of this is reasonable inquiry for both the court and lawyers. It could be that some of the other judges, or the public, will change their mind if they see that a judge's point is either baseless and biased, or compelling and objective. An analogy is cross examination. It may seem inappropriate that a judge would be cross examined, but why not? It is a proven method to bring out the truth in many circumstances.

The goal of questioning is not, and should not be, to show up either the lawyers or the court. The point is to establish a dialogue between counsel and the court that will hopefully lead to a better understanding of the court's and counsel's positions. That would lead to better questioning, and ultimately better decisions.

Another example from the same Supreme Court case was when Justice Scalia quoted from the Affordable Health Care Act the words "set up by the State" to make his point that federal exchanges don't get the same benefits. But no one could ask Justice Scalia why he wasn't following his own "harmonious interpretation doctrine," that would have compelled him to consider the Health Care Act as a whole, including certain key words ("under 1311") that followed his quoted provision. Those words, the Solicitor General had argued, showed why a federal exchange should be treated just like a state one. Justice Scalia may very well have had an argument in response. But even if he did and remained unconvinced, you'd want to hear it. And if he didn't have a good response, you would surely want to know that too.

Now that it is much easier to communicate because of email, blogs, Facebook, and so forth, it is also easier to communicate with the court. We already have easier filing of court papers by which motions, briefs and all court submissions can be filed on the court's website. Upon filing, the papers are automatically given to counsel for all parties. Thus, when briefs are filed, it wouldn't be hard for the court to post on the court's website, or email counsel, questions that the court may have after reading the briefs, or reading a motion. Those questions could then be addressed either in reply papers submitted to the court, or at argument. This method would have avoided the problem of the Solicitor General not being ready for a question at oral argument.

Conclusion

Improved communication with the court during briefing can make the briefs, argument and results better. A halftime break may be productive in some cases. Better use of technology in the court room could include the use of mobile devices, and ways to communicate with others who may have a good answer. Change the process of questioning to allow at least some dialogue. And design courts and their computer access with all of this in mind.

Last, consider these ideas as a jumping-off point for improving the process of argument from methods that have for too long been accepted as the only way. The goal, of course, is to give our court system the best tools and processes to decide issues that will guide our society, help those that are unfairly treated, and improve commerce and regulation. The time to consider some change is overdue.

DARRYL M. VERNON *is a founding partner of Vernon & Ginsburg.*

Moot Court

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the moot court; the first part is the question and answer portion where the lawyer presents the case and the panelists ask questions, probe weaknesses and push the strongest points supporting the opposite side.

Additionally, unlike the actual argument itself where judges often interrupt a counsel's response to a prior question, moot panelists should allow the lawyer to fully complete each answer. Bernstein, 44 Litigation at 50. That way, the mooting panelists can evaluate the effectiveness of the lawyer's response.

After the question-and-answer part is concluded; the feedback portion begins in which panelists get to share their reactions to the form and substance of the presentation. Here, there should be a frank discussion of what aspects of the oral argument worked, what did not work, what improvements or modifications may be needed and how to deal with problematic issues. Bernstein, 44 Litigation at 50. We feel that ideally, the moot should be held only a few days to two weeks ahead of the scheduled appeal or motion argument.

Give yourself plenty of time prior to the oral argument to engage in the moot court process. If time allows, follow up with your panelist or panelists to vet new responses to questions you were having trouble with during the moot court process. And, continue to practice. If you cannot arrange for a formal moot court session, practicing before other colleagues is still valuable. Just remember, the more you prepare in advance, the better prepared you will be when it's show time.

Arguments in any of the departments of the Appellate Division are live-streamed and archived. These archives are a treasure trove of information as to how appellate judges interact with counsel and think through legal issues. Many judges have distinct approaches which are regularly displayed during oral argument. Studying these variations can be useful even if, as is the case in the First Department, the make-up of the panel you are arguing before is announced on the preceding afternoon. Your preparation is not complete without a review of past oral arguments in order to get a feel for the judges, the court room, the tempo of questioning and the like.

After all that practice, it is now your oral argument date. What some practitioners forget is that each question from the court is an opportunity to persuade the court. Start off strong. Don't waste time reciting facts; immediately state what relief you are seeking and why you should win. It may be the only time you can present your argument without interruption. Answer the courts questions in a direct, professional and non-aggressive manner. Because you practiced extensively prior to the oral argument, you will be well-prepared to address the weaknesses in your argument, while using each opportunity to advance your argument. Do not assume that all questions are hostile; it may be a softball question intended to give you an opportunity to make your point. If you encounter a judge who appears to be taking you on an unrelated tangent, answer the question directly as best as you can and try to pivot back to your argument. If it is not directly on point, do not be afraid to say that you could look into it and submit supplemental briefing post-argument if the court would like. If one judge ties up your time with a series of off-point questions, ask the Justice Presiding for some additional time, noting you were stymied by the need to respond to Judge X's questions. Who knows, a sympathetic Justice Presiding might recognize you were unfairly held hostage and allow some limited time.

Extensive preparation for oral argument with the assistance of skilled moot court preparation, will give you the confidence and the experience to tackle the hard questions and facilitate your effort to persuade an undecided appellate panel. It can be all the difference between winning and losing.