



# Federal Practice and Procedure Section Newsletter

Vol. 9, No. 1 — September 2014

## Chair's Message

by Kerri E. Chewning

Welcome to the first installment of the *Federal Practice and Procedure Section Newsletter* for the 2014-2015 year. I would like to introduce myself as the newest chair of the Federal Practice and Procedure Section. In addition to my assuming the position of chair, the other officers for the section this year are Christopher Walsh, Paul Marino, and Sharon King.

I have big shoes to fill. Our former chair, Jack O'Brien, led the section with enthusiasm. During Jack's time as chair the section presented several social and educational programs, and we expanded our membership. Jack was also instrumental in assembling and moderating a panel of experts on practice before the Third Circuit for the section's annual presentation at the bar convention in May. We cannot thank Jack enough for his tireless efforts.

This year, we will continue the section's mission of providing our members with the most up-to-date information about the U.S. District Court in the District of New Jersey and the Federal and Local Civil Rules, as well as providing social and educational programs. This edition of our newsletter embodies our mission. The contributors have worked hard to provide important content to enhance your experience as a practitioner in federal court. We thank the editorial staff for a job very well done, and we extend a special thank-you to Chris Walsh for coordinating their efforts.

We strongly encourage your active participation in the section. There are opportunities for you to contribute to the newsletter, participate in presentations and continuing legal education (CLE) programs, and continue supporting the section with your attendance at our events. If there is anything you would like to see from the section, please let us know. We are eager to make your membership a meaningful and valuable experience. We are looking forward to a very productive year. ■

## Inside this issue

**Chair’s Message** 1  
*by Kerri E. Chewning*

---

**An Interview with the Honorable Karen McGlashan Williams,  
United States Magistrate Judge** 3  
*by Maureen T. Coghlan*

---

**Forum-Selection Clauses Gaining Strength in Federal Cases** 7  
*by Jesse Ehnert*

---

**The Role of Local Counsel in the U.S. District Court for the  
District of New Jersey: Considerations and Responsibilities** 10  
*by Jonathan D. Klein*

---

**The Proposed Amendments to the Federal Rules of  
Civil Procedure** 12  
*by Michael C. Landis*

---

**The District of New Jersey Consults Bar for Sandy Litigation  
Recommendations and Issues Uniform Case Management Order  
for Sandy Cases** 15  
*by Nancy Todaro*

---

**Top 10 Dos and Don’ts of Appellate Brief Writing** 18  
*by Nancy Winkelman*

---

*Disclaimer: The articles appearing in this publication represent the opinions of the individual authors, and not necessarily those of the Federal Practice and Procedure Section or the New Jersey State Bar Association. Articles are prepared as an educational service to members of the Federal Practice and Procedure Section and should not be relied upon as a substitute for individual legal research.*

# An Interview with the Honorable Karen McGlashan Williams, United States Magistrate Judge

by Maureen T. Coghlan

(Editor's Note: This issue features our first interview with a magistrate judge for the United States District Court for the District of New Jersey.)

The Honorable Karen McGlashan Williams was appointed as a magistrate judge for the Camden Vicinage on May 1, 2009. Thus, this past May marked Judge Williams's fifth year sitting in Camden. Judge Williams sat down recently to share some personal history and practical advice for successfully navigating the federal court system.

## Where did you grow up?

I grew up in Freeport, New York, on Long Island. I grew up in a blended family with four siblings. I am the oldest. I graduated from Baldwin High School and attended college at Penn State University.

By the time I graduated college, my family was fully blended. My mother had remarried, and three of my four siblings were in high school, while the other was in middle school.

My mother and stepfather moved to South Jersey in 1986, when my mother took a position handling labor relations at the Golden Nugget in Atlantic City.

I did not initially relocate to South Jersey with the family, opting instead to stay in New York, working in human resources as an employment recruiter and wage and salary analyst at New York University Medical Center. After two years in that position, I decided it was time to go to law school. I moved to Egg Harbor Township with my family and attended Temple University James E. Beasley School of Law. It was an easy move for me because I had a few very close friends from Penn State who lived in the Philadelphia area.

## What inspired you to become a lawyer?

It is hard to say exactly what, or even who, inspired me to become a lawyer. My career actually is a merger of my parents' professions. I know that my mother's career in labor relations influenced my decision about practice area. I also recognize that my father's educational

background introduced me to the law. He received a law degree from New York University and a Masters in Business Administration from Columbia, although he never practiced law. Instead, he worked in the telecommunications industry.

Even though I took a three-year break between college and law school, I knew—or should I say hoped—that law school was in my future, and in fact took the LSAT before I graduated from college. My years at Penn State majoring in the administration of justice and being a student athlete are an integral part of who I have become. I attended Penn State on a track scholarship, and being a student athlete enabled me to develop the self-discipline and fortitude required to succeed in life. I chose not to compete my final year at Penn State and focused solely on academics, taking undergraduate courses that I thought would prepare me for law school. Honestly, mentally and physically I needed a break. I did not know how long of a break I needed, but before my LSATs expired, I applied and was accepted in law school.

## Why did you choose Temple?

I chose Temple because of the reputation of its evening program.

## Is there a person or mentor whom you credit with helping you with your career?

Many people helped me with my career. However, there are two whom I must give the most credit—my mom and David Jasinski. My mom is the person most responsible for the person I have become, and she opened doors for me to her professional network, which led to my first clients. David took me in as a law clerk the summer before my final year of law school. David, having tired of the big-firm environment, had just started a boutique employment and labor firm and hired me as a summer associate. After I graduated from Temple,

I began working for the firm full time and continued to work with David for the next 17 years—until I took my current job. David taught me most of what I know about being a trial lawyer and a businesswoman. I should mention that David and my mom were friends.

### **What do you count among your most notable life events or proudest professional accomplishments?**

My most notable life events are provided by my children. My husband and I have been married for 26 years. Our daughter is 19 and a junior in college. Our son is 16 and a junior in high school. My daughter aspires to be an attorney, while my son has an entrepreneurial spirit and is constantly trying to think of his own business. Given their ages and the work my husband and I still have to do as parents, I hope most of my notable life events are still to come.

Professionally, my whole career has been an accomplishment. I attribute most of my professional success to having clients that trusted me to handle significant cases in the early years of my practice. One of those cases was *Karins v. City of Atlantic City*, 152 N.J. 532 (1998). This case involved an off-duty Atlantic City firefighter who directed a racial epithet toward an Atlantic City police officer. The fire chief disciplined the firefighter for his conduct, suspending him without pay. The Merit Board System reversed the fire chief's decision, and the New Jersey Appellate Division affirmed. I argued the matter before the New Jersey Supreme Court on behalf of Atlantic City. The Supreme Court reversed the Appellate Division, holding that the First Amendment did not protect a racial epithet, and the chief properly disciplined the off-duty firefighter for his conduct. This case merged my interests in employment law—the relative rights of employees and employers—with my defense work.

In addition, my representation of numerous municipalities in Atlantic County negotiating collective bargaining agreements enabled me to utilize all of my professional experience to essentially keep labor peace.

Of course, selection for my position as a magistrate judge is now my greatest professional accomplishment. I believe my current role represents the culmination of all of my life's experience—the discipline of a student athlete, the compassion of a human resources professional, the skill and experience of a trial lawyer, and the ability to negotiate over important issues required of a labor lawyer. Former Magistrate Judge Joel Rosen piqued

my interest in pursuing the position of magistrate judge in Camden. A few other people whispered in my ear about pursuing the opportunity when it presented itself. Then the final call came from Chief Judge Brown. I was with a client on my cellphone, I think Judge Brown's exact words were "it's yours if you still want it."

I think Denzel Washington is credited with saying "luck is when an opportunity comes along, and you're prepared for it." The magistrate judge opportunity presented itself, and my life's experiences prepared me for it.

### **What advice would you give to lawyers appearing before you for the first time?**

Always be prepared, know the rules governing this court, and understand the nature of your appearance. When I was practicing law, I was overly sensitive about being unprepared. Fear of the embarrassment, of others thinking I was not prepared or not knowing a file caused me to over prepare. I figured, win, lose or draw, no one could say that I was not prepared. Figure out what it is that drives you to excel and use it.

Generally speaking, the best advice that I can give to a lawyer is to find someone with whom you can work and develop as a professional. I had the opportunity of working with a partner who did not care if I was preparing for a deposition at 2 a.m., as long as I was prepared and ready. I would work in the middle of the night while the kids were asleep, and that was an acceptable professional accommodation for my life's requirements. Every lawyer needs to find the right fit.

Finally, exhibit professional courtesy at all times. Lawyers should treat both friend and foe with respect.

### **What would you caution a lawyer practicing before you not to do?**

Don't not show up. Surprisingly, this happens way too frequently. Don't be discourteous toward opposing counsel.

### **How would you describe your ideal settlement memorandum?**

An ideal settlement memorandum is forthright about the client's position. I allow memoranda to be submitted confidentially. I believe the best way for me to help the parties settle a case is to know the client's true position. Only then can I discern the actual compromise position and move the parties toward that compromise.

### **How would you recommend an attorney prepare for a settlement conference with you?**

Perform a cost-benefit analysis for the client. Know the facts of your case; know the law. Be prepared to have a frank discussion about both. Counsel must know whether his or her client wants to settle the case or not. Some clients want to settle; some clients want their day in court. You need to have spoken with your client to know where your client stands with respect to settlement.

Next, the attorney should determine at what particular juncture the case should or should not settle. Some cases present significant legal issues that need to be decided before settlement discussions should be undertaken. For example, settlement discussions may only be fruitful after a summary judgment motion is decided.

Finally, do research to support your valuation of the case. For example, don't tell me that the case is worth \$5 million when a similar case settled for \$5,000. Give me the reasons for your number, and support that number with concrete facts. In this day and age, settlements and verdicts are easily available on almost any type of case. You will need to provide some basis for your number.

### **What is your preferred procedure for settlement discussions during a conference?**

I require clients to be present. I outline for clients what their expectations should be with regard to a settlement conference with me. I explain that settlement is the only way that a litigant achieves control and finality. Resolving the case any other way means that someone else dictates the result, be it a jury or a judge. A settlement is also the only outcome that cannot be appealed.

I also explain to the client that he or she does not have to worry about settlement discussions hurting his or her case because I won't be the judge ultimately deciding the matter.

So typically, after I explain how the conference will work, I have a brief discussion with the attorneys. Then I have a discussion with each side's attorney and client alone. I typically rotate between the parties, and I may or may not include clients in those discussions. In a final session, if the matter has come to resolution, the parties exchange material terms of a settlement. If the parties were unable to resolve the case, a final session provides a foundation for further discussions.

### **How would you describe your ideal brief?**

A plain and concise statement of the issues to be decided, clearly setting forth how you would like me to decide. I prefer letter briefs because they force attorneys to be succinct about the issues, law and facts. Of course, attorneys must seek permission before submitting a letter brief. Also, attorneys must comply with Local Rule 37.1, and state that the parties have conferred and now seek permission to file a letter brief.

### **How would you recommend an attorney proceed if he or she thinks oral argument would be helpful to the court?**

An attorney can ask for oral argument, but the court will only hear oral argument if there is a need for it. I typically try to grant requests for oral argument. But an attorney should not ask for oral argument and then repeat the arguments in the brief. Oral argument should help explain why I should rule in your client's favor.

The request for oral argument should be part of the brief. Attorneys can send a separate letter requesting argument if something new comes up.

### **With regard to a motion to seal, do you prefer that materials subject to the motion be submitted to chambers in addition to being filed with the court?**

Materials should be sent to chambers. Only certain documents can be sealed. Attorneys should follow Local Rule 5.3, and there should be a notation on the docket indicating that sealed materials have been filed with the court.

### **What do you think are the most important attributes for a successful federal practitioner?**

Professionalism, being over-prepared, and the ability to articulate clearly your client's position.

### **What common mistake(s) do you see practitioners make and what remedies would you suggest?**

The most common mistake I see is not following Local Rule 37.1. For example, an attorney will file a motion to compel or present discovery disputes to the court without having first met and conferred, either formally or informally. Or, an attorney will bring up a dispute for the first time on a telephone call without having conferred with his or her adversary.

### **Is being a judge what you thought it would be?**

And more! Honestly, I don't know what I thought it would be but what I have learned is that every day poses a different set of challenges.

### **What do you find challenging about being a judge?**

The most difficult part of managing the responsibilities of a magistrate judge in New Jersey is the breadth of substantive law we have to be familiar with, coupled with the number of cases we have to manage. Sometimes in a single day I will address discovery issues that have arisen in a motor vehicle accident case, a patent case and an employment discrimination case. The scope of substantive law that federal judges have to be familiar with would make your head spin. Nonetheless, we are always prepared and ready to go, but it is a challenge to transition between such differing areas of law.

My goal is always to help move the case to the district judge for disposition. I want to make sure attorneys have everything they need to either settle the case or try it. To help parties do that requires me to understand or at least be conversant on a wide variety of substantive law.

### **What do you find rewarding about being a judge?**

I love that in my current role, I have the opportunity to work for a greater good and have a broader impact on our community than my law practice afforded me. As a practicing lawyer, I could achieve a good outcome for a single client at a time. As a judge, I can work to achieve good outcomes for many. ■

*Maureen T. Coghlan practices with Archer & Greiner, P.C.*

# Forum-Selection Clauses Gaining Strength in Federal Cases

by Jesse Ehnert

Imagine you have recently filed a contract action for your client. The action concerns financial losses to your client's New Jersey business, resulting from activity within the state. Witnesses, as well as books and records, are located in the state and may be unavailable in another state. Your client's financial situation makes it difficult to travel elsewhere to litigate. Furthermore, New Jersey's choice-of-law principles will likely determine that New Jersey law—which favors your client—will apply to all claims.

The only problem: The parties' agreement contains a valid<sup>1</sup> forum-selection clause requiring they litigate in Oklahoma. The defendant responds to the complaint by filing a motion under the federal transfer provision, at 28 U.S.C. §1404(a), seeking to transfer the case to Oklahoma. Your client asks: Any chance the motion can be defeated?

Under those facts, there may have been a chance... until recently. But today, avoiding a contractual forum-selection clause has become far more difficult because of *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas*,<sup>2</sup> a Supreme Court case decided in Dec. 2013. As a result of that case, factors that had previously weighed in the balance against a valid forum-selection clause, in the District of New Jersey and elsewhere, no longer play a role in the analysis.

## The Old Rule: A Flexible Standard

The general rule in the Third Circuit for deciding a motion to transfer under 28 U.S.C. §1404(a) is a fact-sensitive analysis of numerous factors, categorized as private interests and public interests, to determine in its discretion whether transfer is appropriate. Generally, the plaintiff's choice of forum—New Jersey in the above hypothetical—should be determinative unless “the balance of convenience of the parties is strongly in favor of defendant.”<sup>3</sup> The moving party bears the burden to show that the factors weigh in favor of transfer.<sup>4</sup>

### Private interests include:<sup>5</sup>

- The plaintiff's choice of forum
- The defendant's preference
- Where the claim arose
- “The convenience of the parties as indicated by their relative physical and financial condition”
- “The convenience of the witnesses—but only to the extent that the witnesses may actually be unavailable for trial in one of the fora” and
- “The location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum)”

### Public interests include:<sup>6</sup>

- The enforceability of the judgment
- “Practical considerations that could make the trial easy, expeditious, or inexpensive”
- “The relative administrative difficulty in the two fora resulting from court congestion”
- “The local interest in deciding local controversies at home”
- “The public policies of the fora” and
- In diversity cases, the court's familiarity with the applicable state's law

Prior to *Atlantic Marine*, courts in the Third Circuit considered all of the above factors, even where the case involved a forum-selection clause. The determination required an “individualized, case-by-case consideration of convenience and fairness.”<sup>7</sup> A forum-selection clause was part of the overall ‘convenience’ analysis; it was not dispositive, but was viewed as “a significant factor that figures centrally in the district court's calculus.”<sup>8</sup> Under that doctrine, a party could argue that the contractually preselected forum was less appropriate than another forum, based on all factors, including private interests.

## The New Rule: Forum-Selection Clauses are Determinative Except in Extraordinary Cases

In *Atlantic Marine*, a case involving a dispute between a construction contractor and a subcontractor, the plaintiff filed suit in a federal court in Texas despite a

forum-selection clause in the parties' agreement requiring litigation to be brought in the Eastern District of Virginia. The defendant moved to transfer the case.<sup>9</sup> In applying the transfer analysis, the district court considered the forum-selection clause to be only one factor to be considered among the private and public interest factors.<sup>10</sup> The district court found the defendant had not met its burden of showing the balance of factors weighed in favor of transfer, particularly in light of the expense to witnesses and the inability to compel them to travel to the transferee forum.<sup>11</sup> The Fifth Circuit denied the defendant's *writ of mandamus* seeking to undo the district court's decision.<sup>12</sup>

In a unanimous decision, the Supreme Court reversed the Fifth Circuit, stating it had "fail[ed] to make the adjustments required in a §1404(a) analysis when the transfer motion is premised on a forum-selection clause."<sup>13</sup> The Court then laid out three adjustments that must be made in such cases: "First, the plaintiff's choice of forum merits no weight."<sup>14</sup> Second, the district court "should not consider arguments about the parties' private interests," which include the availability of witnesses.<sup>15</sup> Third, where a case is transferred under §1404(a), the original venue's choice-of-law rules will not be retained in the transferee venue as they would have where no forum-selection clause was present.<sup>16</sup> The Supreme Court also noted that, where a party seeks transfer based on a valid forum-selection clause, the burden shifts to the non-moving party to show why transfer was *not* appropriate.<sup>17</sup>

As a result of these adjustments, a party may still argue, under §1404(a), in favor of a venue other than that set forth in the forum-selection clause, but only on the basis of the public interest factors. Success is highly unlikely, however. The Supreme Court acknowledged that public factors "rarely defeat a transfer motion" and, as a result, "forum-selection clauses should control except in unusual cases."<sup>18</sup> In short: "Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied."<sup>19</sup>

### The Result: Less Flexibility and More Certainty

Before *Atlantic Marine*, federal courts in New Jersey and elsewhere had viewed a forum-selection clause as an *important* consideration in determining whether to transfer a case, but also considered other private interest factors.<sup>20</sup> On occasion, a district court found that other

factors, including private interests, weighed against it. In one case, for instance, where the plaintiff filed suit in New Jersey under a contract containing a New Jersey forum-selection clause, the court found the private and public factors weighed in favor of transfer to the defendants' preferred venue in Indiana.<sup>21</sup> The court considered the defendant's preferences, the location of books and records, and the place where the claims arose, and found the forum-selection clause did not constitute "a waiver of their right to claim Indiana as their preferred forum."<sup>22</sup>

After *Atlantic Marine*, courts can no longer rely on private factors. Even considerations about third-party witnesses, which the Third Circuit had previously viewed as third-party interests,<sup>23</sup> are now irrelevant where a forum-selection clause is present.

The Supreme Court viewed such considerations as falling under the private interests of the parties:

[W]hen [the plaintiff] entered into a contract to litigate all disputes in Virginia, it knew that a distant forum might hinder its ability to call certain witnesses and might impose other burdens on its litigation efforts. It nevertheless promised to resolve its disputes in Virginia, and the District Court should not have given any weight to [the plaintiff's] current claims of inconvenience.<sup>24</sup>

So, returning to the hypothetical: What do you tell that client? The answer is that the chances are probably slim you will prevail against the motion to transfer. Previously, you could have argued that the forum-selection clause was outweighed by numerous factors—your client's decision to litigate in New Jersey and financial difficulty in litigating elsewhere, the fact that the cause of action arose here, and the availability in New Jersey of witnesses and records. Now, courts in the District of New Jersey, in line with *Atlantic Marine*, will consider those factors irrelevant.<sup>25</sup> As for public interest factors, they rarely alter the analysis.<sup>26</sup> And your client will not benefit from New Jersey's choice-of-law principles once the case is transferred, as they would have in other transfer cases, due to the third adjustment set forth in *Atlantic Marine*.<sup>27</sup> Unless your client's case is one of the extraordinary circumstances warranting an exception, you're heading to Oklahoma. ■

*Jesse Ehnert is a senior associate at Paris Ackerman & Schmierer LLP.*



## Endnotes

1. In federal court, the validity of a forum-selection clause is determined under federal law. *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988). The issue of validity is outside the scope of this piece, but discussions of the relevant factors can be found in the following cases: *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995), *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 202 (3d Cir. 1983), and *Cadapult Graphic Systems, Inc. v. Tektronix, Inc.*, 98 F. Supp. 2d 560, 565 (D.N.J. 2000).
2. 571 U.S. \_\_\_, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013).
3. *Shutte v. ARMCO Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970).
4. *Id.*
5. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995).
6. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879-80 (3d Cir. 1995).
7. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29, 108 S. Ct. 2239, 2244, 101 L. Ed. 2d 22 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622, 84 S. Ct. 805, 812, 11 L.Ed.2d 945 (1964)).
8. *Id.*
9. 134 S. Ct. at 576. The defendant also argued for dismissal under 28 U.S.C. §1406(a). That aspect of the case did not affect the §1404(a) analysis and is outside the scope of this piece.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 581.
14. *Id.*
15. *Id.* at 582-84.
16. *Id.* at 582.
17. *Id.* at 581 (“[A]s the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted.”). This was already the rule, at least in some courts, including those in the Third Circuit. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995) (“Where the forum selection clause is valid...the plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum.”).
18. *Id.* at 582.
19. *Id.* at 581. It is worth noting that, in setting forth its reasoning strongly favoring forum-selection clauses, the *Atlantic Marine* Court adopted Justice Kennedy’s short concurrence (joined by Justice O’Connor) in *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33, 108 S. Ct. 2239, 2245, 101 L. Ed. 2d 22 (1988).
20. E.g., *Hoffer v. InfoSpace.com, Inc.*, 102 F. Supp. 2d 556, 577 (D.N.J. 2000); *Danka Funding, L.L.C. v. Page, Scrantom, Sprouse, Tucker & Ford, P.C.*, 21 F. Supp. 2d 465, 474-75 (D.N.J. 1998).
21. *Days Inns Worldwide, Inc. v. Ram Lodging, LLC*, Civil Action No. 09-2275, 2010 WL 1540926 (D.N.J. April 14, 2010).
22. *Id.* at \*6. It is worth noting, however, that the court drew a distinction between mandatory and permissive forum-selection clauses, a distinction not considered in *Atlantic Marine*, where the clause (disputes “shall be litigated”) used “mandatory” language. For discussion on this distinction, see *Cancer Genetics, Inc. v. Kreatech Biotechnology, B.V.*, Civil Action No. 07-273, 2007 WL 4365328 (D.N.J. Dec. 11, 2007).
23. *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 758 (3d Cir. 1973) (“the convenience of witnesses and the interest of justice—are third party or public interests that must be weighed by the district court; they cannot be automatically outweighed by the existence of a purely private agreement between the parties”).
24. *Atlantic Marine*, 134 S. Ct. at 584.
25. E.g., *Hawthorn Suites Franchising, Inc. v. Meriden One Lodging, LLC*, Civil Action No. 13-5893, 2014 WL 2926533, at \*2 (D.N.J. June 27, 2014) (“A court must deem the private-interest factors to weigh entirely in favor of the preselected forum.”); *Ross Univ. Sch. of Med. v. Amini*, Civil Action No. 13-6121, 2014 WL 29032 (D.N.J. Jan. 2, 2014).
26. E.g., *Cadapult Graphic Sys., Inc. v. Tektronix, Inc.*, 98 F. Supp. 2d 560, 568 (D.N.J. 2000); but see *Caldis v. Starbucks Coffee Co.*, Civil Action No. 14-1394, 2014 WL 2571557, at \*4 (D.N.J. June 9, 2014) (“the public interests decidedly favor transfer”; this case does not, however, involve a forum-selection clause).
27. *Atlantic Marine*, 134 S. Ct. at 584.

# The Role of Local Counsel in the U.S. District Court for the District of New Jersey: Considerations and Responsibilities

by Jonathan D. Klein

The role of local counsel is an important function for attorneys admitted to practice in the District of New Jersey. In taking on a local counsel position, attorneys must be mindful that such a designation carries important responsibilities, enumerated in Local Civil Rule 101.1(c), which must be strictly followed.

## Conflicts of Interest

Before looking to the Local Civil Rules for the District of New Jersey, a key first step in deciding whether to accept any new matter is to determine if there is a conflict of interest that would prevent representation. Questions of attorney ethics in the District of New Jersey are governed by Local Civil Rule 103.1(a), which states that “[t]he Rules of Professional Conduct of the American Bar Association [(RPC)] as revised by the New Jersey Supreme Court shall govern the conduct of the members of the bar admitted to practice in this Court.” Chief among the RPC’s are general conflict-related prohibitions if a matter: 1) involves a concurrent conflict of interest;<sup>1</sup> 2) is adverse to a client;<sup>2</sup> or 3) is adverse to the interests of a former client.<sup>3</sup> A routine conflicts check should be performed and, if a conflict is discovered, a waiver, as permitted by the RPCs, should be pursued if so desired. Firms should also be mindful that assent to acting as local counsel may conflict it out of future, more long-term matters.

## Scope of Representation

Expectations and the scope of representation should thereafter be clearly laid out with out-of-state counsel regarding the highly involved role of local counsel in the district to minimize missteps and lead to a good result for the client. As set forth more fully below, the role of local counsel in this district is not simply that of a ‘mail-drop,’ but contains important duties that, if not followed, could be detrimental to both local and *pro*

*hac vice* counsel and the case. This includes discussions about joint responsibility, reduced duplication of effort, billing, and, most notably, how much communication local counsel will have with the client. It is imperative that local counsel define and memorialize the scope of representation in a written agreement that clearly spells out these responsibilities.

## Pro Hac Vice Admission

Once it is determined that there is no conflict, an out-of-state attorney must gain temporary admission to the district. The procedures required for an out-of-state attorney to appear and represent a client in the district are set forth in Local Civil Rule 101.1. To be admitted *pro hac vice*, an attorney must be: 1) a member of the bar of another federal court or of the highest court of any state; 2) in good standing before such court; 3) not under suspension or disbarment by any court, state or federal; 4) not admitted to practice by the New Jersey Supreme Court; and 5) make a payment to the New Jersey Lawyer’s Fund for Client protection.<sup>4</sup> The Local Rules also require that where an attorney is admitted *pro hac vice*, “an appearance as counsel of record shall be promptly filed by a member of the bar of this Court upon whom all notices, orders and pleadings may be served....”<sup>5</sup> Appearance as counsel of record establishes local counsel status.

## Role of Local Counsel

Once an attorney is designated local counsel in a matter within the District of New Jersey, his or her role is not to be taken lightly and ought not to be *de minimis*. Indeed, the local counsel rule serves a number of purposes: 1) “members of our Bar are familiar with the rules and customs of this Court and are expected to both educate *pro hac vice* attorneys on, and enforce, those rules and customs”; 2) “members of the Bar of this Court are more readily available than *pro hac vice*

attorneys for conferences or other matters which arise in the course of litigation”; and 3) “the Court looks to members of its Bar to serve as liaison between it and *pro hac vice* attorneys and to ensure effective communication between the Court and *pro hac vice* attorneys.”<sup>6</sup>

Thus, local counsel cannot merely act as a conduit for out-of-state attorneys to direct New Jersey-based litigation. This is particularly true since an attorney admitted *pro hac vice* under L. Civ. R. 101.1(c) is, by definition, not counsel of record in a given case.

That role, under this rule, must be filled by an attorney who is a member of the District’s bar....Only such a member of the Court’s bar may file papers, enter appearances, sign stipulations, or sign and receive payments resulting from the case.<sup>7</sup>

As a consequence, because every submission to the court must bear the signature of local counsel, it is imperative to review the pertinent arguments to ensure compliance with Third Circuit precedent. Failure to do so can result in damage to counsel’s reputation and sanctions.<sup>8</sup>

Local counsel should, therefore, be mindful of his or her obligations under the Local Rules to: 1) supervise *pro hac vice* counsel’s conduct (including pleadings, tone, argument); 2) appear for all proceedings unless otherwise excused; 3) be prepared to go forward with all aspects of the case, including trial and face potential sanctions for attempting to get out of a case at the time of trial; and 4) bear primary responsibility to serve as the contact point for the court and other counsel (a party’s failure to act on a timely basis will not be excused where local counsel received notice but *pro hac vice* counsel did not). The role of local counsel is not as narrow as often perceived. Before taking on such a position, attorneys admitted in this district should weigh the various considerations and ensure sufficient time and resources to dedicate to a matter. ■

*Jonathan D. Klein practices with Gibbons P.C.*

---

## Endnotes

1. RPC 1.7.
2. RPC 1.8.
3. RPC 1.9.
4. *Barlow v. United States*, No. 3:10-cv-02770, 2010 U.S. Dist. LEXIS 73547, at \*4 (D.N.J. July 21, 2010) (citing L. Civ. R. 101.1(c)(1)).
5. L. Civ. R. 101.1(c)(4).
6. *Ingemi v. Pelino & Lentz*, 866 F. Supp. 156, 162 (D.N.J. 1994) (citations omitted).
7. Allyn Z. Lite, *New Jersey Federal Practice Rules*, comment d to L. Civ. R. 101.1 (2014); see also L. Civ. R. 11.1 comment 2 (“[W]here a civil litigant wishes to retain an out-of-state attorney who will appear *pro hac vice* pursuant to L. Civ. R. 101.1(c), he or she must still secure the services of a member of the District Court’s bar as counsel of record”).
8. See, e.g., *Zdrok v. V Secret Catalogue Inc.*, 215 F. Supp. 2d 510, 517-19 (D.N.J. 2002), *vacated on other grounds*, 108 F. App’x 692 (3d Cir. 2004).

# The Proposed Amendments to the Federal Rules of Civil Procedure

by Michael C. Landis

As most federal practitioners already know, the process is underway to amend the Federal Rules of Civil Procedure (FRCP). On May 29-30, 2014, the Judicial Conference's Standing Committee on Rules of Practice and Procedure took the next step in that process by approving the package of proposed amendments.<sup>1</sup> About one month prior, on April 10-11, 2014, the Advisory Committee on Rules of Civil Procedure approved the proposed changes, but not before completely rewriting the proposed amendment to Rule 37(e).<sup>2</sup>

The latest movement to amend the FRCP began back in May 2010, when a conference was held at the Duke University School of Law to "explore the current costs of civil litigation, particularly discovery, and to discuss possible solutions."<sup>3</sup> Two subcommittees were formed to draft proposed amendments the FRCP that would remedy the problems identified during the Duke conference: the Duke Conference Subcommittee and the Discovery Subcommittee. The Duke Conference Subcommittee drafted the amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37; the Discovery Subcommittee drafted the amendment to Rule 37. On Aug. 15, 2013, the advisory committee released the proposed amendments for public comment.<sup>4</sup> The advisory committee also organized three public hearings: Nov. 7, 2013, in Washington, D.C.;<sup>5</sup> Jan. 9, 2014, in Phoenix, Arizona;<sup>6</sup> and Feb. 7, 2014, in Dallas, Texas.<sup>7</sup> When the public comment period ended on Feb. 18, 2014, the advisory committee had received a total of 2,359 comments<sup>8</sup>—the most ever.

Two of the most significant and widely discussed rule amendments address issues created by the rapid growth of electronic discovery in modern-day litigation. First, the proposed amendment to Rule 26 would move the concept of "proportionality" to a more prominent position in the definition of the scope of discovery—an attempt to regain control of the scope and, therefore, the cost of electronic discovery. Second, the proposed amendment to Rule 37 would create a uniform standard for federal courts to apply when faced with motions for sanctions based on

the alleged spoliation of electronically stored information (ESI), which would reduce uncertainty for litigants and decrease unnecessary and costly over-preservation.

The Duke Conference Subcommittee drafted the proposed amendment to Rule 26, which defines the scope of discovery. The most important change is to Section (b)(1), which defines the scope of discovery and its limits. The text of the proposed amendment to Rule 26(b)(1) is as follows (added language in underlined and deleted language is struck out):

## (b) DISCOVERY SCOPE AND LIMITS.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. ~~—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(c).~~

Notably, the proposal moves the concept of proportionality directly into the definition of the scope of discovery. Although the current Rule 26(b)(1) does state that all discovery is “subject to the limitations imposed by Rule 26(b)(2)(c),” which is where the proportionality language currently is located, moving the language to a more prominent position in the rule clearly evinces the intent to make proportionality a more important consideration of the parties and the court. The proposal would also remove discovery of “any matter relevant to the subject matter involved in the action,” as well as the instruction that relevant information “need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” The hope is that these changes will narrow the scope of discoverable information and curb the practice of issuing overly broad discovery requests, thereby lessening the burden on and cost to the parties.

The proposed amendment to Rule 37 is perhaps the change that has garnered the most attention. In a somewhat unexpected development, the advisory committee completely rewrote the text of the proposed amendment following the public comment period and before approving it and sending it to the standing committee. This was in response to the large number of comments received on this proposal. The text of the proposed amendment to Rule 37(e) as it currently stands is as follows:

(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may:

(1) upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

This revised version of the amendment to Rule 37(e) explicitly limits the application of the rule to ESI and removes any reference to “sanctions” or Rule 37(b)(2) (A) as a source of sanctions. The revised version also reinstates some of the inherent judicial discretion in imposing sanctions that had been removed by the previous version.

The remaining proposed amendments deal primarily with case management, and attempt to expedite and streamline the discovery process. Some of the more significant proposed changes include:

- The proposed amendment to Rule 4(m) would decrease from 120 days to 60 days the time period for serving a defendant.
- The proposed amendment to Rule 16(b)(2) would require judges to issue the scheduling order within 90 days after the defendant has been served (as opposed to 120) or within 60 days after any defendant has appeared (as opposed to 90), whichever is earlier.
- The proposed amendment to Rule 16(b)(3)(B) would expand the explicitly recognized contents of the court’s scheduling order to include the preservation of ESI and any agreement reached by the parties under Federal Rule of Evidence 502.
- The proposed amendment to Rule 26(c)(1) would add language explicitly recognizing the court’s ability to issue a protective order allocating expenses for the disclosure or discovery of certain information.
- The proposed amendment to Rule 26(d) would clarify when a party may seek discovery prior to the Rule 26(f) conference, which would facilitate the parties having a more informed and focused discussion at the Rule 26(f) conference.
- The proposed amendments to Rules 30, 31, 33, and 36 would lower the limits for the number of depositions, interrogatories, and requests for admission as follows: the number of depositions would be lowered from 10 depositions of seven hours each to five depositions of six hours each; the number of interrogatories would be lowered from 25 to 15; and the number of requests for admission would be limited to 25.
- The proposed amendment to Rule 34(b)(2) would add the requirement that the responding party, if objecting to a request, state “the grounds for objecting to the request with specificity.” The proposed amendment would also explicitly permit the responding party to state that it will be producing

copies of documents or ESI and that production “must then be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.” The proposed committee note recognizes that in some instances, a “rolling production” is necessary and that in such instances, “the response should specify the beginning and end dates of the production.”

The full Judicial Conference will consider the proposed amendments during its next meeting in September. If approved, they will then be submitted to the U.S. Supreme Court, which is authorized to promulgate the FRCP by the Rules Enabling Act of 1934. If adopted by the Supreme Court before May 1, 2015, the proposed changes would take effect on Dec. 1, 2015, unless Congress intervenes and enacts legislation. ■

*Michael C. Landis practices at Gibbons P.C.*

---

## Endnotes

1. The agenda book from the standing committee’s May 29-30, 2014, meeting in Washington, DC, is available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf#pagemode=bookmarks>.
2. The agenda book from the advisory committee’s April 10-11, 2014, meeting in Portland, Oregon, is available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf>.
3. See the Duke conference website, available at <http://www.uscourts.gov/RulesAndPolicies/rules/archives/projects-rules-committees/2010-civil-litigation-conference.aspx>.
4. The preliminary draft of the proposed amendments is available at <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>.
5. The transcript of the Washington, DC, public hearing is available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2013-11-07.pdf>.
6. The transcript of the Phoenix public hearing is available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-01-09.pdf>.
7. The transcript of the Dallas public hearing is available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-02-07.pdf>.
8. The comments are available at <http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002>.

# The District of New Jersey Consults Bar for Sandy Litigation Recommendations and Issues Uniform Case Management Order for Sandy Cases

by Nancy Todaro

More than 600 flood cases have been filed in the District of New Jersey by Superstorm Sandy victims seeking benefits from insurance companies. With even more cases expected to be filed in the future, the District of New Jersey has taken steps to efficiently manage the large caseload. In February, Chief Judge Jerome B. Simandle issued a notice on behalf of the court soliciting comments from members of the bar regarding case management proposals and inviting attorneys to attend a public meeting on March 6, 2014, at the Clarkson S. Fisher U.S. Courthouse to discuss proposals.<sup>1</sup>

Similar to efforts made by the Eastern District of New York, the court considered the bar's input, both written comments and the statements made at the March 6 meeting, and then issued a Hurricane Sandy case management order (HSCMO) on March 24, 2014.<sup>2</sup>

## The March 6 Meeting

The March 6 meeting was directed by a panel of eight judges led by Chief Judge Simandle. The other members on the panel were Judges Peter G. Sheridan, Mark Falk, Tonianne J. Bongiovanni, Anne Marie Donio, Joel Schneider, Lois H. Goodman, and Douglas E. Arpert. The panel's six magistrate judges all reside in the Trenton vicinage, which was purposeful because the majority of Sandy litigation had been filed in that vicinage.<sup>3</sup> Of the issues discussed, discovery and arbitration received the most attention and were perhaps the most contested.

The meeting was well attended by counsel for the insured and insurers. Notable among those present was attorney Gerald Nielson, from Nielson, Carter & Treas, LLC of Metairie, Louisiana, counsel for the majority of insurance carrier defendants involved in Sandy cases. Along with submitting two letters and a proposed case management order during the comment period, Nielson spoke up several times on behalf of the insurance carriers. Counsel for the insured were also in attendance,

including attorney Martin Mayo from Houston, Texas, who has experience litigating flood cases against Nielson. Additionally, Ramoncito DeBorja, deputy associate chief counsel for the Federal Emergency Management Agency (FEMA), also attended the meeting.

In his opening remarks, the chief judge noted that the uniform case management order would govern flood, not wind, cases in which an insured is seeking benefits from a National Flood Insurance Program (NFIP)<sup>4</sup> standard flood insurance policy<sup>5</sup> issued by write-your-own (WYO)<sup>6</sup> insurance carriers.

Initial conferences and discovery were the first items on the agenda. The chief judge suggested postponing initial conferences so parties could begin exchanging discovery immediately. The panel also stressed the importance of identifying legal and factual issues early on. Nielson agreed with the panel's recommendations, while some plaintiffs' attorneys feared being overwhelmed by discovery requests. Unlike some of the plaintiffs' attorneys, however, Mayo did not object to producing documents early on in a litigation. Having litigated many NFIP cases, Mayo noted the documents, not the pleadings, drive these cases. Further, he stated the more information that is in Nielson's hands, the faster these cases get resolved.

The second major topic was whether the parties should participate in alternative dispute resolution if cases do not settle after the exchange of mandatory and plenary discovery. The chief judge touted the District of New Jersey's arbitration program and explained that, unlike mediation, arbitration results in an actual award, albeit non-binding. Nielson disagreed with the suggestion, calling it "counter-productive" for cases to be arbitrated too early. In the alternative, he requested the court allow him one year to "whittle down" the caseload, presumably through dispositive motions, before cases are sent to arbitration, a suggestion the chief judge did not express agreement with. According to Nielson's letter to

the court, dated Jan. 31, 2014, 99 percent of the Hurricane Katrina NFIP cases were resolved through motion practice or settlement. After the discussion, although no definitive decision was reached, the chief judge maintained the position that arbitration was a viable option for the flood cases, especially after FEMA's attorney, DeBorja, stated that FEMA would likely consider an arbitration award persuasive evidence of a claim's strength.

### The Hurricane Sandy Case Management Order

On March 24 the court adopted the Hurricane Sandy case management order, which is intended to govern Sandy cases involving standard flood insurance policies sold and administered by participating WYO insurance carriers in accordance with the NFIP, as well as direct claims against FEMA pursuant to the National Flood Insurance Act.<sup>7</sup> The HSCMO will be entered in each of these suits after the filing of an answer unless, upon a showing of good cause, a case is exempted.<sup>8</sup> The HSCMO "reflects the Court's commitment to resolving these cases promptly, fairly, and efficiently, with a median time from filing to disposition of six (6) months..."<sup>9</sup>

Pursuant to the HSCMO, certain claims are subject to automatic dismissal, such as jury demands, state law claims, punitive damages claims, and claims against FEMA and its directors and officers in WYO actions,<sup>10</sup> which was a suggestion advanced at the March 6 meeting that the attendees appeared to agree with. Additionally, discovery deadlines are measured from the date the HSCMO is issued in a litigation. All discovery, including expert discovery, is scheduled to be completed within 210 days of the issuance of the HSCMO.

As for automatic discovery procedures, the HSCMO

aligns with the panel's suggestions from the March 6 meeting. Specifically, plaintiffs and defendants must exchange uniform automatic disclosures within 30 days of the entry of the HSCMO in order to facilitate the early evaluation of an action prior to the initial case management conference.<sup>11</sup> Defendants are required to disclose whether the dispute concerns the scope of coverage under the policy and/or the value of the claimed losses, which was a recommendation made by the bar.<sup>12</sup> In order to assist with the early identification of legal issues, parties are also required to submit a statement of contentions outlining the parties' legal, factual, and monetary contentions regarding the litigation within 45 days of the issuance of the HSCMO.<sup>13</sup> Parties may also conduct additional written discovery, depositions, and expert discovery.<sup>14</sup>

Additionally, initial case management conferences will be postponed and take place within 120 days after the issuance of the HSCMO.<sup>15</sup> At that point, unless a time extension is granted, all discovery, except expert discovery, should have been completed. After that conference, a scheduling order will be issued addressing remaining discovery issues; a referral to arbitration and/or mediation, if appropriate; a deadline for the final pretrial conference; and/or a date within which to submit dispositive motions.<sup>16</sup> Importantly, the chief judge's arbitration recommendation is reflected in the HSCMO, which states that arbitration is the "preferred option" for resolving these cases.<sup>17</sup> In fact, if the dollar value of the claim is the dispositive issue, the parties must either partake in loss appraisal pursuant to their standard flood insurance policy or the case will be referred to arbitration.<sup>18</sup> ■

*Nancy Todaro practices with Day Pitney LLP.*

---

### Endnotes

1. The court published the comments submitted by attorneys on its website. See *Notice of Public Meeting—Superstorm Sandy Flood Litigation*, found at <http://www.njd.uscourts.gov/news/notice-public-meeting-super-storm-sandy-flood-litigation>.
2. The Hurricane Sandy Case Management Order, found at <http://www.njd.uscourts.gov/sites/njd/files/SandyCaseManagementOrderNo1.pdf>.
3. On July 15, 2014, Chief Judge Simandle issued a notice to the bar stating that due to the large number of Hurricane Sandy cases pending in the Trenton vicinage, "Trenton Sandy cases filed from April 1, 2014 through July 15, 2014 will be reallocated to and evenly split between Camden and Newark." Further, "[a]ny new Sandy cases filed July 16 onward that would be allocated to the Trenton vicinage" will be sent to Camden and Newark. See Notice to the Bar, found at <http://www.njd.uscourts.gov/sites/njd/files/NoticeToBarSandy.pdf>.



4. Congress created the National Flood Insurance Program through the National Flood Insurance Act of 1968 because standard homeowners insurance did not cover flooding. The NFIP, which is administered through FEMA, offers flood insurance to property owners, renters, and business owners in participating communities. In turn, those communities adopt and enforce ordinances that comply with FEMA requirements aimed at reducing the risk of flooding. *See About the National Flood Insurance Program*, available at [https://www.floodsmart.gov/floodsmart/pages/about/nfip\\_overview.jsp](https://www.floodsmart.gov/floodsmart/pages/about/nfip_overview.jsp).
5. Standard flood insurance policy forms are found at: <http://www.fema.gov/national-flood-insurance-program/standard-flood-insurance-policy-forms>.
6. The Write-Your-Own Program is a cooperative endeavor between FEMA and the insurance industry. Beginning in 1983, the NFIP began allowing private insurance companies to write and service the standard flood insurance policy in their own names. The WYO Program operates as part of the NFIP, and is thus subject to NFIP rules and regulations. The federal government reinsures 100 percent of the coverage for these programs. The WYO Program allows the government to increase the NFIP policy base and geographic distribution. *See What Is The Write Your Own Program?*, available at <http://www.fema.gov/national-flood-insurance-program/what-write-your-own-program>.
7. HSCMO at § 1.
8. *In re Hurricane Sandy Cases*, Standing Order No. 14-2, dated March 24, 2014, at page 2, available at <http://www.njd.uscourts.gov/sites/njd/files/SandyStandingOrderNo14-2.pdf>.
9. *Id.*
10. HSCMO at § 3.
11. *Id.* at § 4.
12. *Id.*
13. *Id.* at § 5.
14. *See generally* HSCMO.
15. *Id.* at § 12.
16. *Id.*
17. *Id.* at § 14.
18. *Id.*

# Top 10 Dos and Don'ts of Appellate Brief Writing

by Nancy Winkelman

When it comes to writing appellate briefs, there is no doubt that every appellate lawyer has his or her own top 10 list. After all, appellate lawyers think about briefs a lot, especially in this age of diminishing opportunities for oral argument. Today, the brief often doesn't carry most of the weight—it carries *all* of it!

But don't just take my word for it. Listen to what esteemed justices and judges say:

**Chief Justice William Rehnquist:** “An ability to write clearly has become the most important prerequisite for an American appellate lawyer.”

**Justice Ruth Bader Ginsburg:** “As between briefing and argument, there is nearly universal agreement among federal appellate judges that the brief is more important.”

**Third Circuit Judge Ruggerio Aldisert:** “Ninety-five percent of appellate cases are won or lost on the basis of written briefs.”

To add to this on-going conversation, this article provides what the author believes to be the top 10 dos and don'ts of appellate brief writing, developed and honed over 25 years of appellate practice.

## Top 10 Dos

1. Set aside uninterrupted blocks of time to write your brief. Expect that it will take longer than you think it will, because if you do it right, it will. It is far more difficult and time consuming to write a short, concise, well-organized brief than it is to write a long one.
2. Always keep your audience in mind. In today's appellate environment, that audience is busy judges who have far too much reading to do. Think about the limited stage time your brief will have. Judge Jane R. Roth estimates that federal appellate judges read on average 300,000 pages of briefs annually; thus, Judge Roth's advice—“The main goal when writing a brief is to persuade the judge that the advocate's argument is the correct one to resolve the parties' dispute. This persuasion must be done *quickly* because judges read mountains of briefs every year.” Also, think about when (late at night?) and how (on an iPad?) your brief will be read.
3. Shorter is *always* better. Short brief, short paragraphs, short sentences, short words. Make every word count. Put its Latin origin—“*brevis*”—back into the word “brief.” As D.C. Circuit Judge Patricia Wald puts it: “Many judges look first to see how long a document is before reading a word. If it is long, they automatically read fast; if short, they read slower. Figure out yourself which is better for your case.”
4. Write in plain English. Avoid acronyms. Avoid legalese. Avoid technical terms. If you can't translate your brief into plain English, find someone who can.
5. Make your organization logical, and make that logic transparent. The best briefs flow almost seamlessly from one point to another.
6. Be aware of the standard of review and make it work for you to the extent possible.
7. Be 100 percent true to the record and case law. Exaggeration not only hurts your case, it hurts your credibility—the most important commodity a lawyer has.
8. Edit, edit, then edit some more. Edit wearing different ‘glasses’—once for substance, once for organization, once to cut unnecessary words/sentences/paragraphs, once for typos and blue-booking, and so on.
9. Plan to finish your brief several days before its due date. Put it down for a few days. When you pick it up and read it with a fresh eye, you will find ways to improve it. Even better, have a colleague who has had no involvement in the case read the brief. Give him or her only a cursory preview of what the case is about. In other words, ‘moot’ the brief.
10. Have fun!

## Top 10 Don'ts

1. Don't start with a brief you wrote at the trial level and attempt to turn that into your brief on appeal. What was important at the trial level may not be important (or even material) on appeal. Whether you are the appellant or the appellee, the district court's opinion and the appellate standard of review should be focal points of your brief.
2. Don't assume the judge/law clerk knows anything about your case or about the area of the law. Your job is to teach; if the judge can't understand your brief, he or she isn't going to be persuaded by it.
3. Don't raise too many issues; two to four is ideal. If your strongest issues aren't convincing, your weaker ones won't be either.
4. Include only what the reader needs to know to understand your case and decide the issues raised on appeal. Don't include unnecessary facts, dates, or procedural history. There is no such thing as harmless surplusage. Any surplusage is harmful because it takes away from your limited stage time. Put another way, every word that does not count detracts from the words that do count.
5. Don't use adjectives or adverbs.
6. Don't say negative things about opposing counsel or his or her client, or about the trial judge. Doing so will only annoy the appellate judges and diminish your own credibility.
7. Avoid lengthy case descriptions unless the case is important to your argument.
8. Avoid lengthy string cites unless they are necessary—for example, to show the weight of authority on a controlling point. In Justice Ruth Bader Ginsburg's words, "a first rate brief uses citations to fortify the argument, not to certify the lawyer's diligence."
9. Avoid block quotes unless they are necessary. The reader's eye tends to gloss over them.
10. Cut out overt emotional appeals. If you let the facts speak for themselves, the conclusion the reader draws will be far more powerful than if you tell the reader what his or her conclusion should be. ■

*Nancy Winkelman practices with Schnader Harrison Segal & Lewis LLP.*