

Letter from  
the President

“A firm grows not on who it knows but what it knows.”

“Lawyers will be hired and promoted on the basis of legal acumen, not on business production.”

These were two of the items described by the *Wall Street Journal* recently as part of “The Cravath Way,” the traditional



Karen Kaplowitz

ways maintained by one of the premier firms, and the second most profitable firm in the United States, according to *American Lawyer* magazine.

As an organization, ABTL has thrived because its programs boost the expertise of its members. Our dinner meetings and annual seminars have always focused on knowledge and skills to enhance our abilities, including our knowledge of and the preferences of our judiciary. The hallmark of ABTL has been the emphasis on professional excellence.

But, is “The Cravath Way” an anachronism? Is “The Cravath Way” enough in the highly competitive environment in which we practice.

I raise the issue to elicit feedback from you on whether we should vary our emphasis. Historically, most of our programs have been substantive in nature: new trends in the law, new procedures and rules in the court, trial practice and litigation skills. For several years, our annual seminars have been heavily demonstrative in nature, with the best trial lawyers in the state. Only occasionally have we had programs which focus on client relationships, like a

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Oral Argument *et al.*: An Interview with Justice Norman Epstein

In an interview with *ABTL Report*, Justice Norman Epstein advises that it is generally foolish to waive oral argument — the Court is swayed more often than you might think. When you do show up for oral argument, don’t just ask for questions and then sit down if there are none. Say something that will start a dialog with the court. He offers other practice tips and insights in this interview, conducted by Associate Editor Robin Meadow. Justice Epstein was appointed in 1990 to the Second District Court of Appeal. He was previously appointed in 1980 to serve on the Los Angeles County Superior Court.



Hon. Norman Epstein

**ABTL:** Let’s begin by discussing your personal approach to working up appeals. Can you describe the process?

**Justice Epstein:** Practices differ from judge to judge and from panel to panel. Ours is an informal group in which give and take is the norm. What follows is how I approach the work-up. There are other ways to do it and they may be equally valid, or better. But this is the way that has worked for me.

Many justices begin with a memo prepared by staff. My view is that the appellant is entitled to the first shot at the judge before anyone else, so I read the appellant’s opening brief first. If it’s clear from that brief that the appeal is utterly lacking in merit, I probably won’t spend a lot of time on the respondent’s brief because the appellant is not going to succeed in any case. Otherwise, I read the remaining briefs and write a memo summarizing what seem to be the principal issues and their resolution and my tentative call as to the result. After doing this for all the cases on which I am assigned as the lead justice, I read the briefs on the cases where I am a member of the panel and do the same for them. Then I meet with my three research attorneys, and all four of us go through the whole calendar for the matters on which I am lead and we talk about them. I assign most of the cases to one of the research attorneys, and usually keep some for myself to work up from scratch. During the ensuing weeks, we work through the cases; everyone is in and out of everyone else’s office on a fairly constant basis.

**ABTL:** After your initial review, what do you do with the cases on which you are not the lead?

**Justice Epstein:** After I read the briefs, if I think I may have something in particular to contribute, I’ll mention it to the judge

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who is the lead on that case, or give that judge a copy of my notes. Otherwise, I wait to read the circulating draft from that judge.

**ABTL:** Do you always conference before oral argument?

**Justice Epstein:** Yes. By that time, the lead judges have circulated bench memos. If the bench memo of the lead judge disagrees with the conclusion I reached from my initial impression based on the briefing, I re-examine my earlier conclusion. If I still disagree, I usually discuss it with the assigned judge. The day before argument, we have a conference and the judges go through the whole calendar. At that point, any serious questions will be talked about. If we don't agree, the resolution often is, "Let's hear argument." After argument, the lead judge circulates a draft opinion, and if the other judges on the panel agree with it, they sign it.



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If not, and if the differences aren't resolved, there will be a separate concurring opinion or a dissenting opinion. That happens in a very small number of cases.

**ABTL:** There has been some press recently about how overwhelmed the appellate courts have become. Has that limited your ability to delve into all of your division's cases in the way you've described?

**Justice Epstein:** I have two answers to that. First, although we do have a heavy caseload, I believe things have leveled off. The Court

now has some additional judicial and staff positions. Also, the statistics suggest that we should not expect a significant increase in the caseload. From time to time, very large and significant cases may seem to gang up on a particular calendar. But, no, I don't think we're overwhelmed by the workload.

My second response is a little more cautionary. We are oriented toward deciding the cases we have, not toward fulfilling an agenda of wrongs to be righted whenever an appropriate vehicle to do so can be found. I recall reading an article in which the author discussed an opinion I had written and tried to read into it long-range ideas that I had never considered and which went well beyond the issues of the case.

**ABTL:** Let's turn to oral argument. Does it matter?

**Justice Epstein:** Yes. There's a widespread view among lawyers that oral argument is a waste of time. But I recall Otto Kaus saying at an ABTL forum that in his view, it's close to malpractice for an attorney to waive argument. I think that's pretty close to the mark if you're the appellant. You're trying to get a court to do something it is institutionally reluctant to do — overturn the trial court. We don't do that lightly. We've got to be convinced, not only that there was error, but *prejudicial* error. Usually that means we have to be satisfied that the appellant probably would have done better if the error had not occurred, or, as some courts say, the error has to undermine our confidence in the correctness of the result. That's serious business. And if that's your burden, I think it's generally foolish not to show up at oral argument to urge the position.

**ABTL:** But isn't it usually true that the opinion is largely written before argument and rarely changes?

**Justice Epstein:** Yes to the first part of your question. The answer to the second part is: not as often as you might think. In our division, as in most, by the time of oral argument, we already have a bench memo that often serves as the basis of the opinion, and we already have discussed the case. But we may not all be in

agreement. Counsel have no way of knowing in advance whether we are or not. It's not common that the oral argument turns an opinion around 180 degrees, but it happens enough. I've seen it. Certainly if the court asks you anything, it will be pointing you to something that's bothering one or more of the judges. It may be that the lead author didn't quite get the point you were trying to make and wants an explanation. That gives you one last chance to try to explain it, perhaps a little better or differently than you did in the brief. This is particularly important if the panel is divided, since if one of the judges is on your side, the oral argument may give you the opportunity to help that judge persuade one of the other two to join him or her.

Even if you don't change the result, sometimes the language that you get is much different than it would have been without argument. And that ties into something else. The decision to publish is often made after argument, and I've seen any number of cases where we weren't going to publish, but we decided to do so as a result of points made at the argument.

It seems to me that, unless the court indicates that it does not want oral argument, an appellant has nothing to lose by showing up for argument and presenting a very brief statement, giving the court an opportunity to ask questions if it wishes to do so. For respondent, it's different. You've won in the trial court. If the appellant wants to waive oral argument, you may be well advised to do so as well — or not, depending on your assessment of the briefing, the issues, and the panel.

**ABTL:** We've been talking about oral argument in appeals. What about writ petitions?

**Justice Epstein:** They follow a completely different process in our court. Although we didn't used to do so, we now have regular writ conferences to evaluate writ applications. Most courts do that. The process moves fairly quickly. When a truly urgent writ (it's called a "hot writ") comes along, we get together to discuss it within hours or even minutes after it arrives.

What lawyers must recognize is that granting an alternative writ or an order to show cause so that we reach the petition on the merits is the exception, not the rule. We do it without the opportunity for detailed study that we have in a regular appeal. If the court agrees to hear the case and the issue doesn't become moot, I would never, ever waive argument. The same is probably true for the respondent, unless you're essentially prepared to concede. Yet lawyers do sometimes waive oral argument even in these cases.

**ABTL:** Do parties sometimes waive argument when you would prefer that they appear?

**Justice Epstein:** Yes. Sometimes we alert counsel to issues we're particularly concerned about in a case by sending a letter focusing them on issues we would like them to address at argument. We probably should do that more often. We can insist on oral argument even though the parties wish to waive. We have done that a few times, but it's rare. There have been cases in which I've wondered why an appellant waived argument in light of the significance of the issues or other factors. But generally, that's their decision.

There's another problem, a bit tangential to your question, that concerns last minute waivers. By the week the case is set for argument, we have prepared for it and expect to hear it. A last-minute waiver is discourteous to opposing counsel, and perhaps to the court as well. I have seen cases where one party waived argument without notifying the other side in advance, and the other attorney might have been prepared to waive but instead ended up appearing.

**ABTL:** What about that situation? If your opponent waives, should you appear nevertheless?

**Justice Epstein:** It's hard to generalize, but I don't think the opponent's absence changes the possibility that oral argument may

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be useful for your case. If the court has a question for you, your opponent's absence won't make the court any less interested in the answer. As I said, I would rarely waive if I were the appellant and the respondent wanted to waive; and I'd think about it twice even if things were the other way around.

**ABTL:** *On the subject of last-minute changes in the case, how do you handle cases that settle at the last minute — perhaps even after argument, but before you have issued the opinion?*

**Justice Epstein:** Those are difficult situations. Settlement after we have devoted a lot of time to working up a case may rankle a little, but we recognize that the parties cannot always control the timing of settlement. Any judge who has sat on a law and motion calendar is used to this. In theory, we have the right to proceed to write an opinion despite the settlement if we think the issues are important enough — the parties do not have the power to yank the case out of our court if we believe it should be decided and possibly published. But I've never wanted to do that. It's likely to create mischief. The lawyer for the party who would have won has now got some real explaining to do to his or her client. It's different from a trial, because if you settle before trial, no one knows how the case would have come out.

**ABTL:** *Since you've suggested that lawyers should think twice before waiving oral argument, do you have any words of wisdom for those lawyers who do appear?*

**Justice Epstein:** Volumes have been written on this subject, and I don't have anything really new. But I do have a couple of short suggestions. First, don't simply stand up and ask if the court has any questions, and then sit down if it does not. If the judges have misunderstood one of your arguments, they may not see the need to ask a question. Say something, even if you take less than a minute. That's the opening. If somebody's bothered, hopefully he or she will give you a clue. And once you have that clue, you can go with it.

Second, lawyers shouldn't attempt a jury argument. Flamboyance and ringing pronouncements are usually not effective. Cogent explanations and direct — and scrupulously honest — responses to the court's questions are much more likely to help. Finally, in presenting an argument, don't read or, even worse, mumble. Speak directly to the justices.

**ABTL:** *If a lot has been written on oral appellate argument, even more has been written about writing briefs. Do you have any suggestions?*

**Justice Epstein:** None you probably don't know. But let me catalogue a few "dos" and "don'ts" that I see violated with too much frequency.

It's always a good idea to start the brief with an introductory statement — usually a page or two — that carefully sets out what you think is the main point to be made for your side. The dispositive issue, as you see it, may be point four or five in an outline, but the introductory statement lets you put it out up front, with all the force it ought to command.

Don't start by jumping into the middle of a complicated fact situation with an argument that presumes the judge already is entirely familiar with the case.

Don't spend a lot of space on off-the-shelf unassailable points.

And try to leave some white spaces — don't confront the reader with pages of unbroken argument without surcease.

It's never a good idea to argue *ad hominem* — the judge is likely to think name-calling is all you have to say. A well-presented and forceful argument is likely to be at least as hard hitting, and far more effective.

—Robin Meadow

## The Care and Feeding of Experts

In the May 1996 *ABTL Report*, James Plummer and Gerald McGowin list as the number two error in litigating business damages "Not hiring an economic damages expert early enough to assist in discovery." Whether they intended to prioritize their recommendations is unknown, but most experts will tell you their biggest, most consistent, problem is the early evening call from some harried associate — "Ms. Partner told me to call you, we have to designate experts tomorrow."

### Call Early

Put yourself in the expert's shoes. Like most industry and damages experts, he has numerous past and present client relationships; maybe one reason you called him was that he has testified before, either with or against Ms. Partner. He has to check for conflicts before he can even discuss the issues in the case with you. He won't know if he's the best person in his firm to testify on a subject until he knows the issues and the subject area of intended testimony. In fact, maybe you actually need more than one testifying expert, or separate experts for consulting and testimony. How much can you realistically expect between tonight and the end of the day tomorrow?

This approach does no favors for your expert or your client. The only saving grace is that it is more common in smaller cases and in circumstances where Ms. Partner is already reasonably certain that he's the right expert for the assignment. But even then it's not likely to endear you to the expert or produce the best results.

The usual explanation for this scenario is the attorney's well-intentioned effort to keep litigation expenses in check — don't incur the cost until it is absolutely necessary. But proper planning, together with good communication with the expert, can keep your timely call to the expert from running up any significant costs while allowing him to check conflicts and consider the nature of the assignment. Besides, there are almost always benefits to an early discussion of the issues that can result in reduced costs farther down the road.

Late-in-the-game calls also signal that discovery is probably very far along — depositions have been taken, documents exchanged and interrogatories propounded and probably answered. The expert's work may be more difficult and expensive because the best, or most direct, or most useable, information or testimony isn't there. In contrast, an early call to the expert allows him to assist with discovery to ensure that you ask for the information he's going to need for the assignment. The expert can assist you in using industry specific or technically correct terminology that will not only elicit information necessary for the expert's work but will also withstand "overly broad and not likely to lead to the discovery of admissible evidence" objections. (Do you really want all those checks and bank statements that are difficult to read and



Neill W. Freeman, C.P.A.

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