THE APPELLATE ADVOCATE

NEWSLETTER OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS ■ 2015 ISSUE 1

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IMPORTANT DATES

2015 Spring Meeting
Santa Fe, New Mexico
April 16–18, 2015

2015 Fall Meeting
Washington, D.C.
Novenmber 5–7, 2015

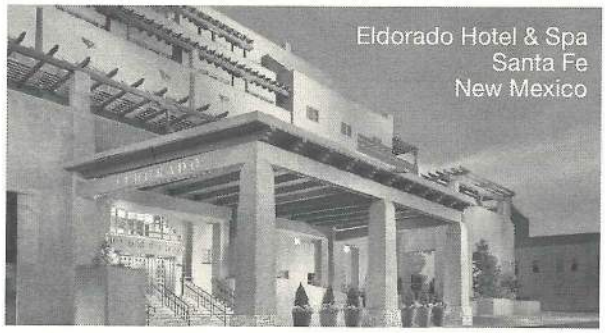
Spring Meeting in Santa Fe April 16–18, 2015

By David Herr
Maslon LLP, Minneapolis, Minnesota

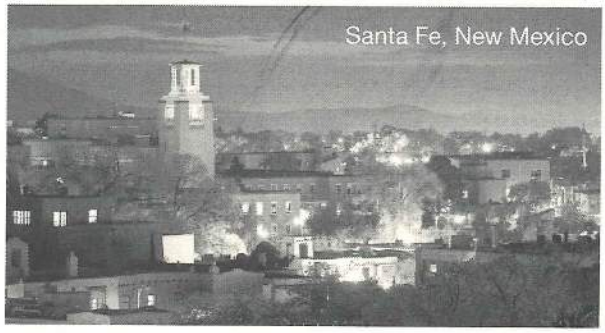
The Academy's next meeting promises to be a particularly informative and enjoyable one. We return to Santa Fe, one of the favorite venues for past meetings, this time to the Eldorado Hotel & Spa. The program will begin with the traditional opening reception on Thursday, April 16, and continue through "Dine Around" dinners on Saturday evening.

April is a lovely time to be in Santa Fe, and there will be lots to do and see aside from the Academy programs. And the Academy programs will be innovative and will engage the fellows in some new subjects.

Friday morning's program will begin with a report from the Academy's Oral Argument Task Force, chaired by **Nancy Winkelman**, and discussion about its recommendations. The second half of the morning will include the first of two programs on technology. This one will review technology as actually used by Academy fellows in their practices. Fellows **Robin Meadow** and **Eric Magnuson** will report on a survey being conducted in early 2015 of all fellows on their use of technology and for what they wish it could be used. Look for the survey in your mailbox and respond to it—the more fellows who respond, the more useful it will be.



Eldorado Hotel & Spa
Santa Fe
New Mexico



Santa Fe, New Mexico

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Sessions at the Fall Meeting 2014

Report on the Coral Gables Sessions

Fellows who gathered at the fall 2014 meeting in Coral Gables heard a wide-ranging assessment of the varied roles that appellate lawyers play in shaping the law, as well as reports on the forces shaping some of the established institutions of appellate practice. Thanks go to Fellows **Douglas Alexander, Mary Massaron, Jeffrey Babbin, Scott Stolley, Mike Wallace,** and **Sheryl Snyder,** who provided the individual session reports.

The Role of Appellate Lawyers in Vindicating the Rights of Wrongfully Accused Persons

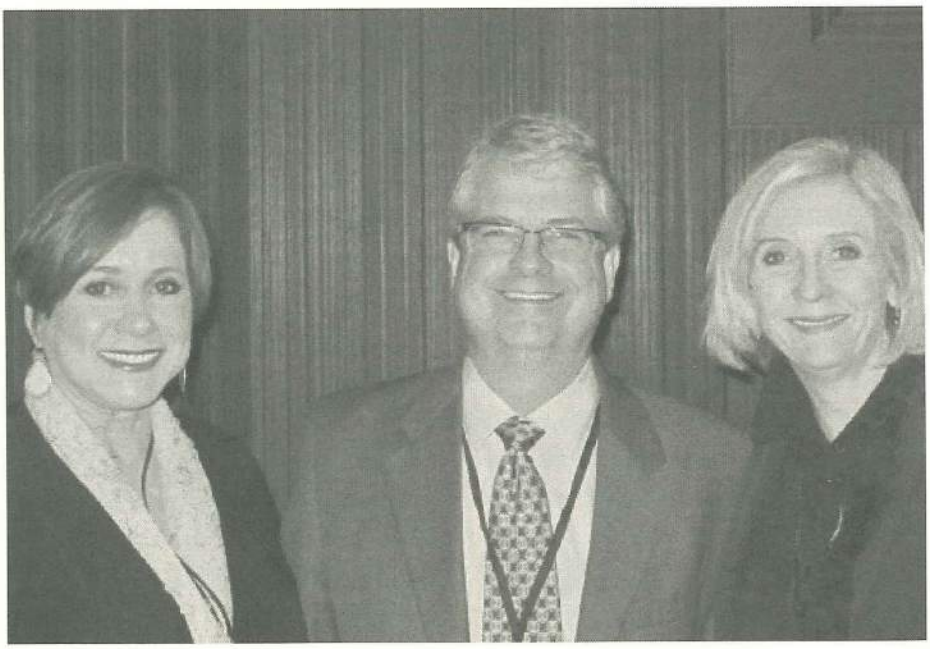
Speakers Sarah Mourer, associate professor of the University of Miami Law Innocence Clinic, and Craig Trocino, associate director of the Clinic, discussed the daunting challenges that face wrongfully accused persons, and the role appellate lawyers can play in vindicating their rights.

Professor Mourer explained that there is no way to know the precise extent of the problem. But reputable studies have concluded that 3.3–5% of people in the United States convicted of a felony are in fact innocent. For those on death row, the range is 4–5%. So, for example, of the 400 people on death row in Florida, 16-20 of them are likely innocent.

According to Professor Mourer, judges are not getting this message. Nor is there any legislation to get people back in court to litigate innocence. If anything, the problem is only getting worse. There is a one-year time limit for obtaining habeas-corpus relief, and a two-year time limit for obtaining post-conviction relief. In most cases, these time limits expire before innocence-project advocacy groups are even contacted.

To get past the time bars, it is necessary to come up with newly discovered evidence, which is often difficult to find. Courts will not even entertain newly discovered evidence unless the convicted felon still has a pending constitutional claim. No matter how meritorious the complaint might be, an assertion that a prisoner is purely innocent, and thus wrongly incarcerated, does not qualify as a constitutional claim.

In Professor Mourer's view, the judicial system's interest in finality eclipses free-standing claims of innocence; courts are very resistant to such



Fellow Beverly Pohl, with Craig Trocino and Professor Mourer

claims. The problem is exacerbated by the tendency of judges to believe that anyone who has been tried and convicted of a crime must be guilty. Yet, most wrongful convictions are based on factors susceptible to human error or influence, regardless of the apparent fairness of the trial. The number one cause of wrongful convictions is mistaken eyewitness identification—humans are notoriously susceptible to powers of suggestion. The number two cause is false confessions—studies show that protracted badgering can convince many individuals that they did something that they, in fact, did not do.

To confront these challenges, Professor Mourer and Mr. Trocino encourage collaboration between appellate counsel and innocence projects. Mr. Trocino described the network of organizations working on innocence efforts. A Google search of "The Innocence Network" can quickly lead appellate counsel to one of 66 member organizations that would welcome volunteer assistance. Examples of things appellate counsel can do include ensuring that filings are made before the expiration of deadlines preventing duplication of effort and assisting the Network's Amicus Committee.

The National Registry of Exonerations provides concrete examples of numerous successful efforts by lawyers to prevent wrongfully convicted persons from remaining in prison and, in many cases, being executed. Members of the Academy are particularly well qualified to contribute to these ongoing efforts, which not only save and restore lives, but also help encourage confidence in our judicial system.

Evolving Amicus Curiae Practice: Why, How, and When an Amicus Brief Is Helpful

Matthew H. Lembke moderated a panel discussion about amicus briefs at the AAAL fall meeting. He recounted some surprising statistics about amicus filings at the U.S. Supreme Court. The fact that they are up by 800% has important implications for the advocacy included within them. In addition, Lembke discussed a survey of 60 U.S. circuit judges that showed that only a relatively small, percentage of their dockets included cases in which amicus briefs were filed. Similarly, the New York Court of Appeals has seen a rise in amicus briefs, but the rise is small and such briefs are still filed in only approximately 28% of the cases. This pattern of relatively limited amicus briefs in state appellate courts was consistent throughout the country, with most states having amicus briefs filed in less than 20% of the cases.

Fellow Matt Lembke (standing), with Fellow Thomas Hungar, Judge Jordan, and Fellow Alan Morrison

Lembke also reported that the survey of U.S. circuit judges offered insight into when amicus briefs are perceived as helpful. Approximately 70% of the judges surveyed said that they are helpful in offering arguments that are absent from the parties' briefs. Another 73.7% said they are helpful in focusing the court's attention on matters that impact a direct interest that is likely to be materially impacted by the case. Focusing the court's attention on matters that impact the ideological interest of the amicus was perceived as far less helpful, with only 30.9% of the judges identifying it as useful. The judges saw amicus briefs as very helpful (78.6%) in facilitating the advocacy of a party who is not adequately represented. Slightly more than half of the judges (58.2%) saw

amicus briefs as helpful in emphasizing factual information or legal arguments already present in the record or parties' briefs. While only 33.3% thought it helpful to offer factual information absent from the record or the parties' briefs. More than half of the judges (54.5%) thought a financial relationship between a litigant and the amicus curiae was relevant to the decision to grant leave to appeal. And the judges overwhelmingly rejected the idea that stricter procedural rules were needed to limit amicus participation, with 87.7% answering no to this suggestion.

Lembke also reported that there were 606 citations to amicus briefs in 417 opinions decided in 2008–2013. More than 100 of these were to support assertions of legislative fact, a statistic that seems to this writer to belie the judges' assertion that amicus briefs referencing nonrecord facts are not helpful.

Other panel members included Thomas G. Hunger, Judge Adelbert Jordan, and Alan B. Morrison. Panel members agreed that in probably a handful of cases, additional amicus filings would be helpful. But the problem with providing that assistance is that it is difficult for those who might participate as amici to find out about the important cases in time to participate. Amicus briefs at rehearing are sometimes helpful, but even if the decision is wrong, most judges are reluctant to alter it that late in the process. Amicus briefs will have the most impact if they are offering a different perspective than the parties about why one rule is better than another. The amicus brief can discuss the broader ramifications of the rule. Panelists agreed that too many "me too" amicus briefs are filed. Such briefs are not helpful to the court, and are not always read because they offer nothing new.

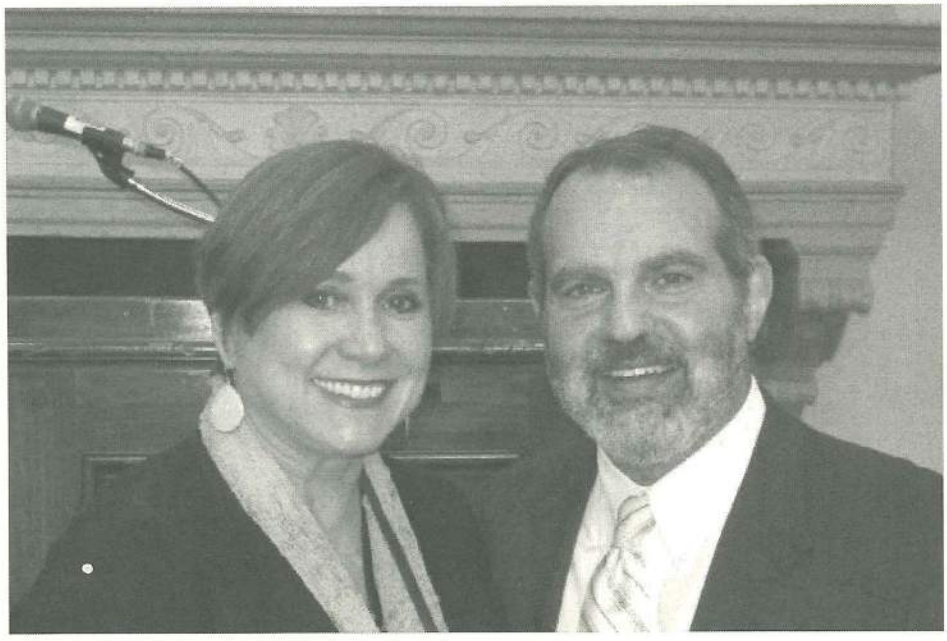
The impact that amicus briefs have at the petition for certiorari stage is hard to quantify. The panelists note that studies show a correlation between the filing of amicus briefs and a cert grant; but this does not necessarily mean that the filing of such briefs causes the grant of certiorari.

Finally, panelists discussed at length the difference between legislative and case facts, the potential problems of allowing an amicus brief to add to the record, and yet the helpfulness of offering a discussion of social facts that shed light on the issues before the court.

Luncheon Presentation: "Judicial Independence —The Myth and the Ideal"

Judge Milton Hirsch of the Eleventh Judicial Circuit Court of Florida spoke to us on the subject of judicial independence. He began with introductory remarks to remind us of the misimpression that our country has traditionally valued and exalted judicial independence. Judge Hirsch argued that, since the Revolution, the American people have in fact exalted the popular will, with the independent judiciary of the federal government often at odds with the treatment of judges in the state courts.

Judge Hirsch focused most of his remarks on the story of one courageous federal district court judge, Julius Waties Waring of South Carolina, as a way of illustrating concretely and personally the ideal of an independent judiciary. President Bird has dedicated his inaugural column



Fellow Beverly Pohl with Judge Hirsch

to the subject of Judge Hirsch's talk, so make sure you read it.

Appellate Judges' Thoughts on the State of Appellate Courts and the Appellate Process

Our appellate panel for this program consisted of the Hons. Robin Rosenbaum (U.S. Eleventh Circuit), Melanie May (Florida District Court of Appeals), and Scott Makar (Florida District Court of Appeals), along with Fellows **Jane Kreusler-Walsh** and **Laurie Webb Daniel**. The panel provided a lively and candid discussion on nine broad topics.

Electronic Tablets. The judiciary's growing use of electronic tablets was the first topic. Judge Makar likes to have his iPad at the bench during oral argument. He uses it to find record cites, which enables him to instantly check what the lawyers are saying. None of the three judges has ever used a tablet to send notes to the other panel members during oral argument. but Judge Makar has used his iPad to email questions to his clerks during oral argument.

Judge May uses a Surface Pro tablet during oral argument, but makes an effort to show the lawyers that she is paying attention to them. She commented that reading footnotes is a problem on an iPad, but not on a Surface Pro.

Visual Aids. Judges Rosenbaum and May were enthusiastic about visual aids in briefs. Judge Rosenbaum mentioned an example of an architectural plan that was very helpful when included in a brief. Judge May mentioned a comment by Judge Richard Posner that lawyers don't use enough visual aids.

The judges were less enthusiastic about visual aids at oral argument, since lawyers often don't use them well. Judge May commented that visuals are most often used by trial lawyers who don't understand what court they are in. Judge Makar commented that it's better to have visuals that can be handed to the court at the bench. If you use a poster-board-sized visual, you need to remain near the microphone.

Working Remotely. Although Judge Rosenbaum usually works at her office, she doesn't think that collegiality among the court suffers when judges work remotely. She noted that the work she does remotely is solitary work anyway. She finds that there is plenty of time to build collegiality at conferences and dinners with her colleagues.

Judge May is a strong believer that working in the office is important for collegiality. She commutes an hour each direction for that reason but noted that most of her colleagues don't think this way. She believes that staff morale suffers when the judges are absent.

Judge Makar was, by necessity, less critical of working remotely. He lives in Jacksonville, while his court sits in Tallahassee. He thinks it's important for him to have a presence in his home community. His clerks work in Tallahassee, so he has found it is important to hire clerks who are self-starters.

New Arguments on Appeal. Another topic was whether it is acceptable for a party to raise new arguments on appeal as opposed to new issues on appeal. The judges were surprisingly lenient about new arguments on appeal, but disfavored new issues

Fellow Laurie Webb Daniel with Judges Rosenbaum and May and Fellow Jane Kreuzler-Walsh (not pictured: Judge Makar)

on appeal. In general, they seemed to favor more information, because the goal is to get to the right result, as long as each party has the opportunity to address any new arguments.

One distinction they thought was important is the difference between new arguments about purely legal matters and new arguments that require factual development. They did not favor the latter. Judge Makar seemed especially willing to do his own legal research on a new argument if it would help to get to the right result.

Necessity of Oral Argument. Both Judge Rosenbaum and Judge May like to err on the side of granting oral argument. They have both seen cases in which oral argument affected the outcome, or at least changed the court's reasoning for the outcome that the briefing indicated. A unique comment by an advocate for example, can spark an idea that the court did not get from the briefing.

Judges Rosenbaum and May also commented on how important it is for advocates to give specific reasons when requesting oral argument. If the lawyer does not care enough to give specific reasons, why should the court care?

Preview of Court's Thinking. Another topic was whether courts should be more upfront by disclosing what they are thinking before a case is argued. For example, should courts send letters asking the lawyers to focus on certain issues at oral argument? Judge Makar's court has sometimes done that.

The panel did not have much appetite for the idea of courts issuing draft opinions before argument. Judge Rosenbaum commented that she thinks it is best for the court to conference a case right after argument, although there are times when she requests a short break to have her clerks look for something pertinent.

Opinion Style. The question is whether opinions should be formulaic or based on the author's individual style. Both Judge Makar and Judge May strive for an individual style, but find that their colleagues don't always appreciate creativity. All three judges expressed that they want their opinions to be enjoyable reading. Judge May always tries to put something interesting in the opinion's first sentence.

Internet Sources. The panel was asked whether they are willing to cite Internet sources such as Wikipedia. Judge Rosenbaum is uncomfortable with this, because with Wikipedia, for example, the information is too changeable and the real sources are unknown. Judge May has never cited Internet sources, while Judge Makar has done so only in concurrences or dissents. He commented that the source should be close to uncontestable for him to use it.

Judge Makar also commented about the problem of Internet links disappearing. He says that 50% of all U.S. links have disappeared.

En Banc Review. Judges May and Makar commented that *en banc* requests can become divisive within the court. They have seen judges get emotional and have their feelings hurt. Collegiality can suffer as a result. Judge May has seen panels change their result when they perceive that they would otherwise lose *en banc.*

Fellow Raoul Cantero, with Justice Lewis, Bert Brandenburg, and Paul Sherman

Citizens United and Judicial Elections: Implications for Judicial Independence?

On Saturday morning of this fall's meeting in Coral Gables, the fellows heard a panel discussion concerning the effect of the *Citizens United* decision and other recent campaign developments on judicial independence. AAAL fellow and former Florida Supreme Court Justice **Raoul Cantero** moderated the discussion. Participants included Florida Supreme Court Justice Fred Lewis; Bert Brandenburg, the executive director of Justice at Stake; and Paul Sherman from the Institute for Justice. The discussion also induced widespread participation from members of the audience.

Mr. Brandenburg explained that Justice at Stake is a consortium of several organizations, including the American Bar Association and the League of Women Voters; AAAL Fellow **Mark Harrison** is a member of its board. Mr. Brandenburg believes that the infusion of large sums of money into state judicial campaigns began around 2000. He cited an appellate race in Southern Illinois in 2004 in which the two candidates together spent $9.3 million. The *Citizens United* decision did not create the current situation, but Mr. Brandenburg described it as pouring gas on the fire. Much of the latest increase in funding goes into the sort of independent expenditures that *Citizens United* protects. Funds have recently started pouring into retention elections in states like Iowa, where three justices were recently defeated. Efforts are being made in several states to abolish merit selection plans in favor of straightforward elections. Mr. Brandenburg reported that 90% of people polled believe that the infusion of cash affects courts' decisions.

Mr. Sherman litigates First Amendment issues for the Institute of Justice, which was founded in 1991 to promote constitutional rights from a libertarian perspective. He explicitly agreed with Mr. Brandenburg's statement of the facts. However, he found the controlling legal question to be under what circumstances the government should limit peaceful political expression. He agreed that money is not speech, but he observed that money facilitates speech as well as other constitutional rights; the right to obtain an abortion would be of little use if there were no right to pay money to get one. Mr. Sherman does not believe that corporate political expressions will necessarily corrupt the political process; the rule announced in *Citizens United* was already the law in half the states, and there is no evidence that those states were any more corrupt than the other half. Mr. Sherman acknowledged that judges, unlike other public officials, are expected to be impartial; while that might be a good argument against electing judges, the First Amendment should fully apply whenever elections take place.

Justice Lewis described his experience in contesting a retention election in 2012. Although no appellate judge had ever lost a retention election since Governor Askew persuaded the legislature to establish merit selection, an Internet campaign produced a close result in 2012. A Republican group in central Florida promptly announced the beginnings of an effort to replace the three justices up for consideration in 2012. Independent advertising concentrated on a criminal case requiring retrial of a death sentence; although Justice Lewis had dissented from the opinion, he was grouped together with the other two justices who had joined the majority. Despite the campaign against them, all three justices were retained. Justice Lewis focused his primary criticism not on *Citizens United*, but on *Republican Party v. White*, which recognizes that the First Amendment places limits on state ethical rules governing the speech of judicial candidates. He also noted that the Supreme Court of the United States had agreed to review a Florida prohibition against the solicitation of funds by judges and candidates for judgeships.

The panel then entered a general discussion of the use of disclosure rules concerning contributions to organizations engaged in independent expenditures under *Citizens United*. Mr. Sherman disfavored such disclosure requirements. He saw no evidence that disclosure affects voters' decisions in any way, and he feared adverse effects of publicity upon contributions. Mr. Brandenburg, on the other hand, favored disclosure because it may facilitate recusal motions. The *Caperton* opinion of the Supreme Court required recusal of a judge receiving a multi-million dollar contribution from a litigant, although Mr. Brandenburg noted that it has not been used to require recusal in less extreme cases. Justice Lewis did not believe that recusal presents a

solution to the problem; because many associations provide contributions, such a rule might require a judge to recuse himself from every case involving the plaintiffs' bar or any insurance company.

Fellows in the audience commented on the public perceptions engendered by such advertising. Mary Massaron described a television commercial in a recent Michigan race in which a lawyer was portrayed as reaching into his pocket to pull out certain incumbent justices. Roger Townsend said that one law firm in Texas actively advertises that it gives more money to Texas Judges than any other firm, presumably believing that clients will regard the firm as having exceptional influence.

The wide-ranging discussion achieved remarkable consensus on the facts. What to do about those facts, particularly in light of the established constitutional limitations, was not so obvious. The Supreme Court's upcoming decision on the Florida contribution case may shed more light.

Report of the Oral Argument Task Force

The Report of the Oral Argument Task Force concluded the meeting. The report was presented by Nancy Winkelman, chair of the Task Force, together with Matthew H. Lembke, Alan Morrison, and Roger Townsend, members of the Task Force. They led a lively discussion with considerable audience participation.

The work of the Task Force included interviews with more than 50 judges concerning the importance of and decline in oral argument in appellate courts. One frequent comment from judges was that oral argument rarely changes their opinion and is therefore often a waste of time. Several fellows noted that implicit in that statement is that oral argument does sometimes change a judge's opinion. Some judges said that better briefs increase the likelihood of oral argument, while others said that better briefs reduce the need for oral argument, while a bad brief is predictive of an unhelpful oral argument.

The report discussed the reasons for having oral argument, including the views that participation by the advocates improves the deliberative process, that oral argument brings the judges on the panel together for an in-person meeting rather than a "join" in an opinion via email, and that having a public oral argument enhances the transparency of the appellate process.

Alan Morrison discussed his research of published data on the number of cases in the federal courts of appeal in which oral argument is held. Because of the change in the composition of the courts' caseload over several decades, a precise comparison is difficult. For example, the increase in *pro se* post-conviction petitions and immigration cases increased the number and percentage of cases in which oral argument is not held. By deleting certain categories of cases, the Task Force estimates that oral argument is conducted in approximately 40% of the cases nationally, and that this represents a decline in the percentage of cases orally argued over the last few decades.

The fellows discussed several suggestions for improving the frequency of oral argument. The Task Force recommends efforts to improve the quality of oral argument by teaching oral advocacy skills. Several judges told the Task Force that requests for oral argument should be less boilerplate and more case-specific. A notice from the court in advance of the oral argument of issues of interest to the panel would focus the advocates and improve the value of the argument to the judges. Expanding the use of videoconferences could reduce the expense of oral argument to the parties. It was noted that the Ninth Circuit guarantees oral argument in cases in which it appoints an attorney to serve *pro bono*, and it was suggested that the Academy encourage other circuits to follow suit. Concern was expressed by some fellows that more oral arguments might reduce the time allotted for oral argument, making oral argument less effective.

The session concluded with the Task Force stating that its report will be revised to reflect the input from the session and will be discussed at future Academy meetings. Included in this discussion will be next steps in an effort to obtain buy-in by appellate judges to the value of oral argument, hopefully increasing the percentage of cases in which oral argument is conducted. ❖