



Know your appellate judges – tailor your argument

“Know your audience” is never more important than in the California appellate courts

BY GARY SIMMS

Just as real-estate professionals have their mantra of “location, location, location,” legal-brief writers should think, “audience, audience, audience.” Indeed, virtually every guide for good writing in any context emphasizes the adage, “Know your audience.” Likewise, every competent plaintiff’s attorney knows that the audience can matter as much as the message. That is why we file suit in the most favorable forum and why we have juror questionnaires, jury consultants, and voir dire. Too often, though, attorneys write their briefs for a generic, almost abstract, judge or panel of judges. But each judge is, of course, a real and specific person who will read a brief through the lens of the judge’s background and personal views.

This is inescapable human-nature. It is demonstrated by the bitter confirmation-fights over United States Supreme Court nominations and in California by the common judicial practice of timing retirement so that a governor of the judge’s political party has the opportunity to appoint the judge’s successor. These situations show that judges know as well as anyone that who the judge is greatly matters. It is thus equally important for an attorney to understand that the judge who reads the facts and law in a brief will be as or more important than the facts and law themselves. Therefore, you should want to know as much as you can about the judge or judges who will decide your case, and not just their legal views, but anything that may affect how they view your appeal.

Although this advice applies to judges at any level in either state or federal courts, this article will focus on appellate judges, in particular, California appellate-judges, but not federal appellate-judges. That is because in the Ninth Circuit, for example, you have no way of knowing until shortly before oral argument which of the court’s many judges will be assigned to decide your case. Moreover, any Article III judge, even a district court judge, can be assigned to a panel, so you might have a district court judge from New Hampshire. You thus cannot tailor your argument to specific judges when briefing a Ninth Circuit appeal. That aside, though, you should know your audience in a general sense. For example, if your Ninth Circuit appeal arises from federal diversity jurisdiction and involves a question of California law, you should assume that your judges may know nothing about the relevant law. You will need to educate them more than if you were in a California appellate court.

California appellate courts

How well you can know your judges in the California appellate courts depends on the court in which your action is pending. The easiest court in which to tailor your arguments is the California Supreme Court, in which you know who your seven justices will be except when there is a judicial recusal or vacancy. How much you can do this in the Courts of Appeal depends on your court. In some districts, for example, the First District and Second District, each division has only four justices, and you can reasonably tailor your arguments for that panel. Other

districts such as the Third, Fifth, and Sixth Districts are not divided into panels, so the pool of judges for your panel is larger, and it is not as practical to tailor your brief to specific justices.

Judicial research

An obvious starting point for your judicial research is to learn what your judges may already have said about your issue. Use LEXIS, Westlaw, or some other database to research whether your judges have previously dealt with your issue. Make sure to include unpublished opinions, which are the bulk of the judges’ work. (Of course, if you are in a trial court, detailed written-decisions by your judge will be less frequent.) If a judge has decided an issue in your favor, that is good news. If he or she has decided it adversely to your argument, your task is different, e.g., you will want to distinguish your case from the prior one. Also, look for any non-judicial writings by the judge. Perhaps he or she has written a law review article or, more likely, has been on a continuing-legal-education panel or been a guest lecturer at a bar association meeting or at a university. If you are in a district that is not divided into panels, your task is more difficult, but you can nonetheless research whether that court has dealt with the issue.

Subject to time and budget constraints, this legal research should be only the beginning. Indeed, it will likely be the least important part of your research. A judicial opinion is a justification for a decision, not the reason for it. As Justice Oliver Wendell Holmes, Jr. famously



observed, “The life of the law has not been logic; it has been experience.” (Holmes, *The Common Law* (1881), p. 1.)

This is absolutely true for how judges view and decide cases. Again, as Holmes put it, “You can give any conclusion a logical form.” (Holmes, *The Path of Law* (1898) 10 Harv. L. Rev. 457.)

What makes a judge tick?

Thus, knowing your judge’s experience, personal traits, and inclinations – in other words, what makes him or her “tick” – can be crucial. The paramount importance of the judge’s personal background was recognized in scholarly writing almost a century ago. (Theodore Schroeder, *The Psychologic Study of Judicial Opinions* (1918) 6 Cal. L.Rev. 89.) As Schroeder put it, judicial conduct is determined “by a chain of causation running back to earliest infancy.” (*Ibid.*) More recently, federal appellate judge Richard Posner has addressed the issue. (Posner, *How Judges Think* (Harvard University Press 2008).) Indeed, some recent neuroscience questions how much free will we have. We may believe we are making a conscious, deliberate choice when, in fact, our choice is a pre-determined response to a given set of circumstances.

A few years ago during a seminar at a California State Bar annual meeting, former appellate judge and United States Solicitor General Kenneth Starr provided a useful and practical example of the importance of a judge’s personal experience. Starr described his work in *Granholt v. Michigan* (2005) 544 U.S. 460, in which the Supreme Court struck down laws in New York and Michigan that prohibited out-of-state wineries from shipping wine to consumers in New York and Michigan. Starr successfully coordinated the challenges to those laws. As he explained the briefing strategy, it seemed clear that the bans on interstate sales violated the Constitution’s Commerce Clause (Art. 1, § 8, clause 3). But the States would argue that their statutes were saved by the Twenty-first Amend-

ment, which repealed Prohibition, i.e., the Eighteenth Amendment.

Counting the likely votes, Starr and his colleagues were confident that four moderate to liberal justices would rely on the Commerce Clause and that four, more conservative justices would rely on the Twenty-first Amendment. The pivotal vote would be Justice Scalia. On the surface, it seemed likely that Justice Scalia would join his fellow conservatives. But being in the small world of Supreme Court practitioners and Washington insiders, Starr and his colleagues knew something: Justice Scalia is an avid wine fan and collector. So they tailored their briefs to him. It worked. In what surprised many observers, Justice Scalia joined the Court’s liberal wing and voted to strike down the bans on interstate wine-shipments. In short, Starr knew that his target audience was Justice Scalia, and Starr’s team successfully briefed the appeal accordingly. Principle did not trump pragmatism for Justice Scalia.

Making it personal

Another example from California demonstrates how a judge’s life experience can matter. A young woman had been paralyzed in an accident. The jury awarded her slightly more than \$700,000 in noneconomic damages. The plaintiff’s trial attorney, though, was aware that the judge’s wife had suffered a debilitating spinal injury in an accident. Presumably, the judge could thus sympathize with the plaintiff’s future lifetime of pain and suffering. The plaintiff’s attorney moved for a new trial on the ground of inadequate damages. The judge granted the motion and added more than \$5 million to the judgment.

As the foregoing case shows, a judge’s family and personal relationships can be very useful information for the obvious reason that the relationships which are most important to us are also the most likely to affect our views. What if you knew the following about a judge? Her husband is a retired police officer. Her

husband is a physician. His wife is a retired school teacher. Those lifelong relationships almost certainly will affect how the judge sees issues.¹

Even judicial hobbies are relevant. For example, California Supreme Court Justice Carol Corrigan is a self-described avid golfer. Thus, it should be no surprise that her majority opinion in *Shin v. Ahn* (2007) 42 Cal.4th 482, which applied the doctrine of primary assumption of the risk to golf, reflected an intimate understanding of the rules and nuances of golf.

These examples and many others that could be listed are not meant to suggest any improper bias or self-interest by judges. Not at all. Rather, they are meant to demonstrate the universal truth that each of us is inevitably shaped by our experience, probably even by genetics, to view things a certain way. Psychologists and other scientists have written extensively on how humans make decisions, specifically, how emotion affects the decision-making process. This intuitive, almost unconscious, sense by your judge may be overcome by deliberation, but the intuitive view is the starting point for every decision. (Hon. John Irvin and Daniel Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity* (2010) 43 McGeorge L.Rev. 1.) Your goal is to motivate the judge to rule in your favor. Of course, you must provide a legal analysis. But your arguments and the authorities that you cite are largely tools that you are providing for the judge to use after he is persuaded, i.e., tools for him to use in justifying his decision to himself and others. Your first task is to persuade the judge to want to use those tools on your behalf.

With this in mind, you should first try to learn as much as you can about your judge’s background and potential perspectives. Of course, you must do so ethically, e.g., it is probably not advisable to go snooping in the judge’s trash can. If you do not get arrested, you might at least find yourself in the State Bar disciplinary system. But there are many public sources of useful information.



Depending on your time and resources, you can learn a great deal.

You can begin with other attorneys (or even non-attorneys) who know the judge or his reputation. Put simply, ask around. I had an appeal in another state on behalf of a personal-injury plaintiff. As I was beginning my briefing, I asked a former colleague in a different case in that state if she knew anything about the judges who would be deciding my new appeal. As chance would have it, she was a neighbor of one of the judges and knew her socially. My former colleague explained that, even though the judge was politically conservative and would likely view my appeal with skepticism, she was also very practical in her personal life. My former colleague thus advised me to focus on the practical aspects of my case. I did so. I won the judge's vote. (Unfortunately for my client, it was a dissenting opinion.)

Use biographical notes

Odds are, though, that you will not have such a personal source of information. Where can you turn? One source, especially for California appellate judges, is their authorized biographical notes that are available on the court's Web sites. These biographies vary in the amount of information they provide. But they can be a good starting point. Also, because they are what the judge wants to say about himself, this information can provide more than raw data; it can provide a window into the judge's view of himself. For example, if the list is larded with every award the judge seems to have won since grade school, that may not tell you much about his preferences, except for himself, but that sense of self-importance is worth knowing.

Also consult judicial profiles published by independent sources. There are several such as *California Courts and Judges* by James Publishing; judicial profiles published by the Daily Journal Corporation, The Recorder, and judgopedia.org; and the *Know Your Judge* and *Judge in a Flash* services provided by the Los Angeles County Bar Association. Lexis/Nexis® also provides several databases for researching judges, such as Lexis/Nexis Analyzer and SmartLinx®. (See, David Dilenschneider, *Researching a Judge*, at lexis/nexis.com.) An extensive list of such sources is also provided by the library at the Hastings College of Law. (*Research Guide: Judicial Directories*.)² To dig a bit deeper, review the judge's Statement of Economic Interests filed with the California Fair Political Practices Commission (FPPC). (After a dispute with the California Judges Association over posting this information online, the FPPC has recently begun posting the information, although in a somewhat redacted form. The full documents are available from the Administrative Office of the Courts.)

Social networking sites?

And let us not forget the Internet. Google and a bit of patience can yield a trove of information. As Facebook founder Mark Zuckerberg is reported to have observed, privacy is no longer a social norm. Certainly, social-media sites are fair game. One can only wonder why a judge would post anything on such sites – indeed, the practice is controversial – but some judges do so. (Dahlia Lithwick and Graham Vyse, *Tweet Justice: Should Judges Be Using Social Media?*, *Slate Magazine*, April 30, 2010.) So check Facebook, LinkedIn, and Twitter for possible information.

In summary, it behooves any brief writer to research his judges as carefully as he researches the law. Ask yourself this simple question: would you rather have favorable facts and law or a favorable judge? You know the answer, but of course, you cannot choose your judge. If you know him, though, you can tailor your briefs to him as a specific person and thus increase your chances of leading him or her to a favorable result.



Simms

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Endnotes

¹ Each of these situations is present on the California Supreme Court. Chief Justice Tani Gorre Cantil-Sakauye's husband is a retired police lieutenant. Justice Kathryn Mickle Werdegar's husband is a physician. Justice Marvin R. Baxter's wife is a retired teacher.

² www.uchastings.edu/site_files/CSO/ResearchGuideJudicialDir.pdf.

