THE JOURNAL OF
APPELLATE PRACTICE
AND PROCESS

FOREWORD

WORDS MATTER

Tessa L. Dysart

Words have been on my mind. I suspect that this is for several reasons.

First, I am writing a book, or rather trying to write a book. I spend an inordinate amount of time staring at my computer screen looking for the right words to convey certain concepts.

Second, I am working on a CLE presentation to judges on legal writing. Part of what I plan to talk about is how judges, at times, fail to follow their own advice on writing, a topic I blogged about recently.[1] Since this might be viewed as a sensitive topic, I am thinking about how best to present it respectfully to my audience, while still getting my point across.

Third, my two junior associates keep me on my toes when it comes to words. In the last few months, I have heard my two-year-old repeat words I would rather she not say, and I have had to apologize to my four-year-old for using the "s" word—"stupid."

1. Tessa L. Dysart, *Do as I Do*, APPELLATE ADVOCACY BLOG (May 16, 2022), https://lawprofessors.typepad.com/appellate_advocacy/2022/05/do-as-i-do.html.

Fourth, and finally, I have been thinking about this issue of the *Journal* and the three articles that it contains that focus on words and how those words are interpreted. I didn't plan to have an issue that centered so heavily on interpretation, but I am happy that we ended up with such complementary articles.

The first article on words and interpretation is from Judge Randall H. Warner. Building on two earlier articles,[2] one of which was published in the *Journal*, Judge Warner discusses the difference between statutory application and statutory interpretation. He explores whether judges or juries should be deciding "whether a statute applies to the circumstances of a particular case,"[3] and he posits a standard for distinguishing between questions of statutory application, which are suited for the fact-finder, and questions of statutory interpretation that call for a legal determination.

Next, Professor Joseph Kimble takes a critical look at the Michigan Supreme Court's overuse of dictionaries to ascertain ordinary meaning. He argues that dictionaries should play a limited role in judicial decision making, and he points to fifteen examples of how the Michigan Supreme Court's use of dictionaries has been arbitrary and narrow.[4]

Justice D. Arthur Kelsey provides a different look at interpretation. He explains why the "Historical Tradition Model" of interpretation, which "requires the judge to look at the text of the Constitution, and if it is unclear, . . . discover not what the text ought to mean but what it *did mean* to those who wrote the words and,

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2. Randall H. Warner, *All Mixed Up About Contract: When Is Contract Interpretation a Question and When Is It a Fact Question?*, 5 VA. L. & BUS. REV. 81 (2010); Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101 (2005).

3. Randall H. Warner, *All Mixed Up About Statutes: Distinguishing Interpretation From Application*, 22 J. APP. PRAC. & PROCESS 163, 163 (2022).

4. Joseph Kimble, *Dictionary Diving in the Courts: A Shaky Grab for Ordinary Meaning*, 22 J. APP. PRAC. & PROCESS 209, 214 (2022).

more importantly, to those who voted for those words to become law."[5]

The issue then moves from matters of interpretation to matters of procedure, with two articles that focus on distinct procedural decisions appellate courts can make that profoundly impact the cases before them. Professor Bryan Lammon offers an empirical look at class-action appeals with a focus on Federal Rule of Civil Procedure 23(f), which allows parties to immediately appeal class-certification decisions. As Professor Lammon notes, the rule has been subject to much criticism, despite the limited data on its impact. Thus, Professor Lammon's study sheds light on the veracity of the criticisms against Rule 23(f).

Ziv Schwartz also looks at an issue that could be said to fall under the umbrella of procedure—the decision to order supplemental briefing in a case. And while the decision to order supplemental briefing might be a procedural act, Mr. Schwartz focuses on supplemental briefing in cases where an appellate court wants to decide an issue *sua sponte*. Mr. Schwartz provides a detailed account of *sua sponte* action in appellate courts and suggests a framework for courts to consider when deciding whether to ask for supplemental briefing before acting *sua sponte*.

The issue ends with two book reviews on appellate practice. First, Raffi Melkonian reviews Mark D. Harris's appellate practice treatise, *Principles of Appellate Litigation: A Guide to Modern Practice*. Next, I review a book edited by Ronald H. Clark—*The Appellate Prosecutor*. Both books offer tremendous practical advice to appellate attorneys.

5. D. Arthur Kelsey, *Bracton's Warning and Hamilton's Reassurance*, 22 J. APP. PRAC. & PROCESS 263, 266 (2022).

As we enter the hot days of summer, I hope that you enjoy these articles and the interesting issues that they raise.

Until next time!

TLD
Tucson, Arizona
June 30, 2022