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The Right to Appeal: Are Its Days Numbered?

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In 1994, Professor Thomas E. Baker observed that the structure of the federal courts of appeals was no longer adequate to handle the tasks assigned to them:

> To deny that serious problems exist in the federal intermediate appellate courts — and that they are likely to become worse — is to ignore the enormous increase in the number and complexity of cases that these courts must now decide. For Congress, the federal judiciary, and the legal profession to fail to act to meet these problems would be a serious failure of public responsibility.

Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 Ga. L. Rev. 913, 976 (1994). The problem that Professor Baker and others identified more than a decade ago has not gone away. To the contrary, it has gotten much worse. This article reviews the current status of the crisis and a controversial proposal for addressing it: replacing appeal as of right with a discretionary-review system.

Federal Appellate Litigation: Fact vs. Fiction

Some attorneys have a vision of appellate adjudication amounting to what has been described as the "'Learned Hand Model' — a model in which cases are decided by a panel of collegial judges, following full briefing and oral argument, through a published opinion crafted by one of the judges after receiving considerable input from other circuit judges." Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 Brook. L. Rev. 685, 688 (2000-2001) (footnote omitted). As demonstrated by the statistics discussed below, "there is no doubt that the modern courts of appeals cannot and do not operate in this manner (to the extent that they ever did so)." *Id.* The current situation is aptly summarized in the comments of former

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Use a Picture to Tell Your Story

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Words have limits. In certain appeals, a picture – a chart or a diagram – can convey an argument with more impact than words.

One of the best brief writers ever, Colonel Fred Wiener, recommended "stressing any inconsistencies in the case against you . . . making full use of that most deadly of all comparisons, the parallel column technique." Frederick Bernays Wiener, *Briefing and Arguing Federal Appeals* 114-15 (2001). The opportunity to use the parallel-column technique arose in an *amicus* brief filed in support of an application for rehearing that addressed the award of mental anguish damages. One justice on the state supreme court had authored the opinion upholding a sizeable mental anguish award based on very little evidence of emotional distress. To illustrate to the other members of the state supreme court how excessive the mental anguish damages were, the *amicus* brief took a page out of Colonel Wiener's book. It included a chart that compared the opinion on rehearing, *Jackson*, with two prior cases authored by other justices who would be voting on that rehearing.

MENTAL ANGUISH AWARDS BY THE ALABAMA SUPREME COURT			
	Kyles (Alpha, J.)	***Oliver*** (Beta, J.)	***Jackson*** (Author, J.)
Cause of Action	Malicious Prosecution	Misappropriation of Funds	Insurance Fraud
Loss of Liberty	Arrested and jailed.	None.	None.
Public Humiliation	Home searched by officers in front of family, cursed at by officer.	None.	None.
Physical Symptoms/ Professional Treatment	Cried.	Sought counseling.	None.
Fear/Worry	No evidence.	About losing opportunity to buy home.	About paying unexpected future premiums for policies that were valuable and in effect.
Economic Damages	$4,000	$7,200	$2,340
Mental Anguish Damages	$11,000	$67,800	$97,660
Ratio of Economic to Mental Anguish Damages	**1:3**	**1:9**	**1:42**

On rehearing, the supreme court withdrew the old opinion that had affirmed the award of mental anguish and related punitive damages, reversed the trial court's judgment on the tort claims giving rise to those damages, and remanded for entry of a judgment as a matter of law for the defendant on those claims. *See Alfa Life Ins. Corp. v. Jackson*, 2004 Ala. LEXIS 118 (Ala. 2004) (affirming award of mental an-

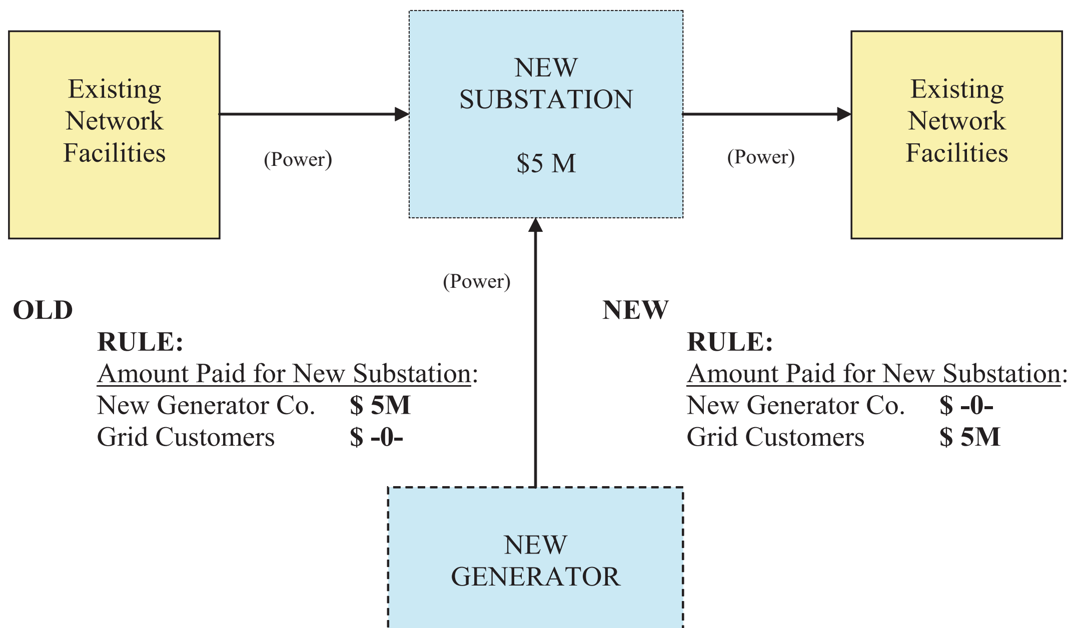
guish and punitive damages), *withdrawn on rehearing*, 2004 Ala. LEXIS 311 (Ala. 2004), *corrected on rehearing*, 2005 Ala. LEXIS 5 (Ala. 2005).

In a case dealing with an intervening cause issue, the plaintiff/appellee, David Moore, argued that the record said what it did not. The defendant/appellant's reply brief compared Moore's assertions with the record in a chart that included the following:

MOORE'S BRIEF	RECORD
"As previously shown, David Moore did not intentionally sever the guy wire." Appellee's Br. at 51-52 (no citation to record).	David Moore's cross examination: Q. So that if you grabbed the guy wire like this and you start twisting, it's going to break off a little piece of that grip wire just this long, isn't it? A. Yes, sir. It's apparent that one piece did break off. Q. **And that you, David Moore, broke it off?** A. **Yes, sir**. R. Supp. II at 278-279 (emphasis added).

The court agreed that Moore's action did constitute an intervening cause and reversed and rendered judgment for the defendant. *See Alabama Power Co. v. Moore*, 899 So. 2d 975 (Ala. 2004).

In an administrative case before the D.C. Circuit, two energy companies argued that the Federal Energy Regulatory Commission ("FERC") had changed its rule regarding who had to pay for a new substation used to connect a new generator to an existing transmission grid. FERC argued that it had not made any change and tried to bury the court in complex engineering classifications for various types of equipment, including substations. The energy companies responded with a diagram, similar to the one below. The diagram showed that a new substation, regardless of the engineering label placed on it, functioned to connect a new generator to an existing transmission network. The diagram also showed that FERC's new approach changed who paid for the new generator from the company that owned the new generator to the customers of the transmission grid:



The D.C. Circuit vacated FERC's order, which had held that there was no change, and remanded for a further explanation. *See Entergy Servs. v. FERC*, 391 F.3d 1240, 1251 (D.C. Cir. 2004).

In each case, it is important that a picture be simple and legible so that it conveys your intended message to the judges. Having another lawyer in your firm who is unfamiliar with the case look at your chart or diagram and state what it conveys to him is prudent.

Judges read hundreds of briefs every year. They, like any human being, notice a picture simply because it stands distinct amidst an endless sea of words. If what they notice is convincing, that picture could win your case.

It is dangerous to be right when the government is wrong.
— Voltaire