Dean Kellye Testy:

Good afternoon everyone. I’m Kellye Testy the Dean of the University Of Washington School of law. It is indeed my great honor today to welcome you to the installation of Professor Eric Schnapper as the Betts, Patterson, Mines professor of law. And indeed that is a high honor. My regard for Professor Schnapper could not be any higher as a teacher and a scholar and as an amazing advocate before our US Supreme court. And days like this when we are able to install a professor in a distinguished professorship are days that are one of the most distinguished and fun and celebratory for the school of law. And the reason for that is that our faculty are the intellectual leaders of the school. Our students, our alumni hold them in such high regard and the recognition of that by our alumni and by our supporters in establishing chairs and professorships to recognize our faculty is a wonderful symbol of the excellence that we’re all dedicated and that we celebrate so much through events such as this. So I want to thank you all for being here today to recognize Professor Schnapper and let you know that you are very welcome here in Gates Hall and I’m thrilled that you could join us today.

It’s my pleasure at this time to introduce to you Mr. Larry Gottlieb. He will, on behalf of the firm of Betts Patterson Mines be making some remarks and introducing Professor Maureen Howard. So much of the history of Washington Law has been the history of this law school and this firm is a wonderful example of that given that two of our alumni played such founding roles in it and so many alumni of this school have played important roles in the firm as well. Mr. Gottlieb it’s my pleasure to introduce you. Thank you for being here today.

Larry Gottlieb:

Thank you. The Betts, Patterson, Mines endowed fund for trial advocacy was established in 1991 to support curriculum development and faculty work in the area of trial advocacy at the University of Washington Law School. Fred Betts a founding partner of our firm and a member of the law school class of 1933 was the impetus behind the establishment of the fund in addition to a gift that was made at the time the endowment was created, Fred also left a bequest to the endowment that provided a major portion of the funding. BPM which is Betts, Patterson, Mines and I didn’t give you a dictionary but that will be the acronym I’ll be using,, we’re proud to have a close association with the University of Washington School of Law and it’s my pleasure this afternoon to briefly tell you a few things about my favorite Seattle law firm and our legendary founding partner.

From a historical standpoint, we like to trace the origins of Betts, Patterson, Mines back to the John W. Roberts law firm which was formed in 1899. That was only five years after the board of regents of this university established the law school here. Our history overlaps not only the rich history of this law school, but also the industry and development of the city of Seattle. From logging, railroads, and the early days of the auto-space industry to biotech, nonprofits and the digital universe, the Pacific Northwest has provided our firm with clients and cases that have built our practice, our reputation and our business acumen.
Over the years BPM has maintained two primary, shared core values: teamwork and superior legal product. Our teamwork thrives in the commitment by our individual attorneys to succeed as group. That is an emphasis that we have over the long term and it is emphasized in the support and promotion of individual colleagues over the self. Superior quality is the substance of our professional work product in our legal services. It forms the foundation of our strong client relationships. Our collaborative process fosters the development of effective and efficient solutions that align us with our clients’ specific objectives. As private practitioners, the client relationship remains our highest priority. We try to offer a comprehensive slate of legal services informed by broad experience, deep expertise and skillful problem solving. Our firm counts among its clients well-known local businesses and individuals as well as major regional and national corporations and international entities. In addition, law firms across the nation have come to regard BPM as their go to partner in the Northwest.

At BPM we also believe that promoting diversity strengthens our ability to find unique solutions and act with efficiency on behalf of our clients. Our commitment to hiring a diverse team enhances our ability to serve clients and provides personal attention to their individual industries and needs. In that regard I invite you whether you have now become a proficient fact checker in today’s political arena or whether you are just curious to visit our website at ( and I don’t even know if I need to use the www part anymore) but we are www.bpmlaw.com. And you will see the distinguished list of clients and organizations and professional and civic affiliations in which our attorneys actively participate. That is part of the legacy of our firm and it’s also part of the legacy of Fred Betts.

And I’d like to tell you a little bit about Fred now. On another historical note, Fred Betts was a Seattle native, that’s historical enough. But he was born in 1908 up on Queen Anne in a house that he lived in until just a year before his death on, and I didn’t make this up, July 4 2002 at the age of 94 years old. He was a son of a banker and he attended the University of Washington for his undergrad and his legal education. He worked nights while attending his law school and he received his JD in 1933. And I did fact check that on Wikipedia, so I don’t know. I was concerned that you really couldn’t get a JD in 1933, but apparently according to the internet that’s a historical fact. He began his career as a trial lawyer with Roberts and Skeel. That firm evolved and as we say in today’s vernacular was rebranded as Betts, Patterson, Mines in 1979.

Initially Fred was denied entry into the military during World War II, so he worked the swing shift at Boeing from 4pm till midnight so he could do his part in the war effort while he continued practicing law during the day. When he was finally accepted into the army he served as a lawyer at camp Lewis, it has a different name Fort Lewis, and he represented soldiers who were returning from the South Pacific.

Fred had a long career as a trial attorney specializing in the defense of civil cases and was one of the hardest working lawyers in the state throughout his more than sixty years in practice. He tried cases in all 39 counties in the state. He earned the respect of lawyers, judges and clients for his expertise in the courtroom and his high ethical standards. Throughout his career, Fred also assisted many students who came to UW but his gifts were made anonymously as a tribute to his modesty.

In 1979 he served as the president of the Washington Defense Trial Lawyers Association and he was also elected a fellow of the International Academy of Trial lawyers and the American College of Trial Lawyers. In 1996, Fred was named the 1996 Outstanding Lawyer by the King County Bar Association and he also received the UW School of Law distinguished alumni award. In receiving of these honors it was noted among many things (and I just tried to pick what I thought were the most essential and important things to have said about you as a trial lawyer in this state.) It was said that his word was always absolutely and completely to be relied upon. That’s pretty amazing. His
trial skills were excellent and he had the highest tradition of ethics in the bar. Fred tried cases all of the way until his last one in 1991 at the age of 85. And then for the next eight years, he kept coming to work and worked at Betts 4 days a week. This, parenthetically, I came to this town and started working also in 1991. I was just a few blocks away from Betts. I don’t know that Fred knew me but he always said hi to me walking down the street. He was approachable and available to everybody in our legal community. Today, his legacy lives through the reputation of our firm and the lawyers that practice there and also through the Betts Patterson and Mines endowed fund for trial advocacy. As such, we hope to honor his legacy as we also hope to make the UW Law School proud that it’s associated with our firm.

I think that was seven minutes. Does that seem like seven to you? It seemed like seven to me. My secretary said it was six and a half but I tried to just stretch it out a little bit. Those are my remarks again this is an important relationship for us and again we are honored to have the association with the university. And now it’s also my great honor to introduce Professor Maureen Howard who will be speaking about and who will be introducing Professor Schnapper.

Professor Howard joined the UW law faculty in 2005. She is the director of the trial advocacy program as well as teaching civil procedure, evidence, pretrial litigation, prosecutorial ethics and trial advocacy. She is a 1982 graduate of Gonzaga University and a 1986 graduate of the University of Washington School of Law. Professor Howard.

Professor Maureen Howard:

Good afternoon. When Eric Schnapper asked me a couple of weeks ago if I would introduce him this afternoon I was thrilled and I was honored. I was excited because I thought it would be so easy and then I was told I had seven minutes to do it. Where does one begin? How do I cut a portion of a career that has given so much to the jurisprudence of this country? How do I begin in seven minutes to talk about someone that has degrees from Johns Hopkins and Oxford and Yale law school? For someone who has taught at Columbia Law School and Yale Law school. For someone that has educated an entire generation of practitioners, scholars, jurists on issues of employment discrimination and constitutional law through his writings, through his work, and through his advocacy in front of the United States Supreme Court. Someone that has handled over 80 cases before the United States Supreme Court and personally argued so many of them.

Eric Schnapper had 25 years with the NAACP doing trial and appellate litigation. His first appellate brief was in defense of Bobby Seal, infamously of the Chicago 7. And from there he has done so much over the decades of work that he has devoted to the law and to the constitution.

So where do I begin? I have three points to touch on about what I know about Eric Schnapper and to tell you a little bit with respect to each. And that is on his preparation, with respect to his US Supreme Court work, his relationship with the justices on the court and with his relationship with the individual litigants that he represents when he goes to Washington DC and he argues on their behalf.

First with respect to preparation, I was so lucky to be invited in March of 2011 to accompany professor Schnapper to DC for his third, his third oral argument, his third case in front of the United States Supreme Court in that term. And we flew out for a moot on a Friday before the Tuesday oral argument. And I knew from the months before in talking with Professor Schnapper and having to go down to the law library and sift through all of the cases that he had had issued from Westlaw, all of the hours and hours and hours and drafts and drafts of preparation he had done in writing that brief. And I knew that he had collaborated nationally on that brief. And so I thought the moot would be somewhat perfunctory and we walked in and there were scholars, clinical law professors, practitioners and there were law students who spent the entire afternoon with Professor Schnapper
who welcomed their hard questions, who welcomed their comments and their suggestions. He spent hours listening, taking notes and he started right there incorporating the feedback.

When left and headed back to the hotel I said, how can you do this hours before you are about to take the floor and argue and you have a perfect product? And he said, “When you do this work you have to leave the ego in the hall.” He said it’s about the work, it’s about the cause and you can always make it better. And it was in fact the following Tuesday, perfection.

His relationship with the court is amazing because of the years, because of the briefs, because of the oral arguments he has had. I want to talk a little bit about the rapport he has with the bench and about the credibility he has earned over the years both in his written work and in his oral advocacy. With respect to his rapport, I not only saw it in his masterful parry of the questions he received from the bench back in March of 2011 but there is a form of witty repartee and exchange that happened and I was unaware of that before I saw Professor Schnapper and various members of the bench. But he actually had something similar happen just this very month. He was back in DC arguing a case this month and he did something. He used a technique that I’ve heard tell of. I’ve never seen it in person, but he expanded the technique. And the technique is when a petitioner in rebuttal references a question not asked of that lawyer but it was a question asked by one member of the bench of another advocate and then the orator answers that question. But Professor Schnapper did something unusual. He didn’t reach back to a question asked of the other advocate in that case, or even a question asked earlier that day. He reached back to the day before and so when Justice Roberts said, “Mr. Schnapper you have four minutes for rebuttal.” He said, “Your honor” (and I’ve got the transcript) “I’m happy to do that your Honor. You pointed out; I’d like to answer a question that the Chief Justice answered yesterday morning in Lodesman.” And Justice Roberts stopped him and said, “You’d better remind me.” And the entire court erupted in laughter. And Professor Schnapper said, “I’m happy to do so your Honor.” And he went to articulate the question about subject matter jurisdiction and the standard needed to be clear and simple. Then he went on to enumerate how his client’s standard was in fact extremely crystalline and simple. And he said, “first, second, third, fourth,” and when he finished fourth he couldn’t remember where he was and he said “fourth or fif…” And Justice Robert jumped in and said, “Fifth”. And he said, “I’m so sorry your Honor, I’m so sorry.” And then Justice Scalia piped up and said, “He’s just keeping score.” And they all laughed.

The other relationship he has though comes with the credibility of his writing of advocacy. And I want to read something that so powerful that justice Kennedy has cited to these words on numerous occasions and I’m told has put them into a time capsule because Justice Kennedy so believes that they represent so much of the importance of the work the court does. These are words that were authored by Professor Schnapper in the brief of Edmonson versus Leesville Concrete in 1991. The case where the Supreme Court extended the constitutional protection to perspective jurors not to be discriminated against on racial discrimination extending from Batson versus Kentucky from a criminal setting to a civil setting and these words were also in the argument and I read them to you now, the words that Justice Kennedy have so embraced.

“This appeal also concerns two men who are not represented by counsel and are not here today, Willie Combs and Wilton Simons. They are the two black jurors who were excused from jury service by Judge Vera. We don’t know much about Mr. Combs and Mr. Simmons. We don’t know much about them because respondance trial counsel saw no need to ask any questions before he challenged them as jurors. We don’t know where combs and Simmons were born. We don’t know where they were educated. We don’t know whether they would have been fair. We don’t know whether they would have been partial. But we can be sure that July 27, 1987 the day that jury selection took place was a special one in their lives. For many people in this room jury selection would be an inconvenience. But for a black man or woman in Louisiana, the right to serve as a
juror is as new and as great an honor as the right to vote. Mr. Combs parents and his grandparents could not have served on the jury in Louisiana not because they weren’t fit or qualified or competent to do it but because they would not be allowed to do so because of the color of their skin. On that day in 1987, Willie Combs and Wilton Simmons entered the federal courthouse in Lake Charles Louisiana believing times had changed. They were confident that justice in a federal courtroom would be guided by the promise made in this city twenty-five years ago and that they would be judged not by the color of their skin but by the content of their character and we urge this court to keep that promise.”

That is the nature of the timeless work that Eric Schnapper has put before the court and that has built his credibility. The last thing that I’ll leave you with are Eric Schnapper’s own words. When it comes to the importance of an individual litigant’s rights, although much of his life’s work has championed causes that are near and dear to all of us and have benefited all Americans, Professor Schnapper does not lose sight that there is a person behind the lawsuit and these are his words. He says that he wants the litigants to be at the argument and as a general rule he tries to have dinner with them the night before. And I quote, “I really want the clients there for argument. These just aren’t issues. These are real people. These cases take a real toll on the clients. These are very real people in my life. I want them to be part of this uniquely precious American experience.” Please help me in welcoming Eric Schnapper.

Dean Testy:

What do I say? Please approach the bench. I want to just note as I present Professor Schnapper with his medal recognizing this professorship that your firm has established just a couple additional points. Professor Howard has well captured the distinguished career that Professor Schnapper has had as a lawyer and as an academic and the spectacular work he has done particularly before our nation’s highest court. But I want to say today as I give him this that we all recognize those things and we admire you for them, but there are some other things that I want to note today, too. And first it would be easy for someone of your stature to be somewhat disengaged from our law school to be always in DC and always focused upon those cases and all of the incredible attention that gets focused today on supreme court litigation. But instead, you are here in every sense of the word. Professor Schnapper comes into my office frequently with an idea for how we can make this school better or just an idea about recognizing an individual that he might be concerned that we would miss in the hectic pace that this law school often experiences. Second I want to note that you love this institution that way but you also love your students and I hear that from them all the time, all of the time. He invests so much in bringing his students into the life of the lawyer that he has led and has led in such a distinguished. And then lastly, as I give you this medal I want to say that we need people with your expertise who do what you do in looking at the world from the bottom up. In thinking about the people in the world who don’t have power and thinking about how law gives voice, helps those persons have a voice and that is something you have dedicated your whole career to. And I admire you for that deeply. So congratulations on this professorship, the Betts, Paterson, Mines Professor of Law to Professor Eric Schnapper.

Professor Eric Schnapper:

Thank you Dean Testy, Larry Gottlieb, Maureen Howard. Let me start by joining the Dean in expressing my appreciation to Betts, Patterson, Mines for this professorship. Every endowed professorship adds to the stature and the visibility of the law school. But this one is really special because it recognizes the importance of litigation to the profession and to the rule of law. There are very few professorships like this anywhere in the country and it fits exceptionally well with the work of the law school because the school has that commitment to litigation skills and the
importance of litigation in the rule of law. It’s also a law school which values the kind of work that I do as not all law schools would. And I’m always grateful for that.

Larry talked about the importance of teamwork at BPM. It is every bit as important here. One of the things about this professorship the most is this opportunity to thank so many of the people that have helped with this work over the years. I want to start with my colleagues in the front row, Trinny Tai Parker, Judy Davis, Elena Wolotera, Paige Erret, Cheryl Nagra, Mary Wistner, Jonathan Franklin, where’s Michael?

Audience:

He’s out East right now.

Schnapper:

Okay.

They have been absolutely essential to everything I have done here over the last seventeen years. They go by misleading benign title of reference librarians. I think of them more as reference Special Forces or reference commandos. If there is some critical bit of information hiding out there in the Abad Abad of the World Wide Web, they will find it and deliver it to my door the next morning still quivering. They can do this no matter how badly I’ve misspelled the name of the case or gotten the date or the century wrong or how ill-defined the project. They have just been partners every step of the way in this work and I cannot thank you enough for all that you have done.

My colleagues on the faculty have been invaluable as well. Almost everybody has had the experience of having me show up outside their door looking fairly desperate on the time frame that is always far too short to ask what is really a very fundamental and uninformed question. And they manage to enlighten me without humiliating me in the least. You’d have thought that a few people would have been spared this, but few people have and all of you are at risk. I see Ron Gorth over there thinking. Well Ron was probably the one person who thought, “I’m never going to have to deal with this.” And then I got a tax case and I was at his door virtually everyday. I also benefitted a great deal from our colleague Paul Miller whose laughter I think still is resonating in some corner of the fourth floor and brought so much to this institution.

In recent years I’ve benefitted a great deal from three particular colleagues as I worked on the process of trying to persuade the Supreme Court to take a case. I told someone the other day that I let the younger lawyers back East get to take the cases with the real circuit conflicts and I take the more challenging cases. And Liz Porter and Lisa Manheim (Liz is here) and Katherine Watts have just been incredibly helpful in helping me take some farfetched idea and turned it into apparently tolerable surpetitions. Although, we’ll know later in the end.

I’ve also benefitted enormously from just quiet words of encouragement and support, people who remind me everyday why this work is important and encourage me on those darker days when cert’s denied or things don’t work out quite as we’d have hoped.

I also want to put in a word of thanks to people whose work has not been involved in any of the cases I’ve worked in, who’s courage and selfless service protects the legal system and indeed the whole society. Today from Joint base Lewis McChord and Naval Station Everett to Camp Leatherneck in Hunan Province, hundreds of thousands of men and women are serving in the armed forces of the United States. Their courage and dedication and sacrifice makes possible the lives that we lead and the work that I’m privileged to do. Their families are sacrificing everyday. Their children are raised sometimes without mothers and fathers around. IN the years since I’ve
I'd like to talk for a little bit today on a substantive basis about summary judgment. When Fred Betts started practicing law, summary judgment was not terribly important. When I started practicing law which is before Celotex and Mitsubishi and Anderson summary judgment was not very important. Today, it is an absolutely essential part of litigation, maybe for good, maybe for ill. There’s a lot of fighting about that but there is no question about its importance. For some kinds of cases, summary judgment is the critical event. There are some kinds of cases in some parts of the country where summary judgments really pass a gauntlet through which very few cases make. The ninth circuit’s rather different but if you had an employment discrimination case as in many districts of the South, you could litigate for years and never get passed summary judgment. It’s a very, very important development.

We have hundreds of years of experience, we’ve developed institutions and practices and law. We’ve learned skills. And we have great teachers like Maureen Howard who are importing them to new generations. We have associations of trial lawyers. We have NYDA training. And yet summary judgment is in many respects at least as important, in some places more important as a method of presenting fact bound controversy and we have almost none of that. We don’t have associations of summary judgment lawyers. I’m embarrassed to say we don’t even have politicians denouncing summary judgment lawyers. We don’t have the insurance industry calling for summary judgment reform.

I think as an academy and as a profession the time the time has come to start thinking out and learning and learning how to teach our students and our colleagues the methods, the art of presenting facts at summary judgment. For most lawyers that process is you sit down, you have a pile of papers, you write it out. For law clerks, I don’t know if we have many people who are district court clerks. But I’m told the experience is you’re welcomed to chambers, you’re given a desk and you’re handed this pile of papers you have no idea what to do. And I think as a profession is we need to begin to learn how to do these things better, what the skills are so we can impart them to our colleagues and our students.

Let me start by mentioning something that’s only of a historical note but it’s important in understanding why the structure of the rule, Rule 56 imports so little of this because we have a lot of law a lot of rules and the like about trials and very little about summary judgment. The answer is that rule 56 was written really a hundred years ago in New York to do something completely unlike what we do today. I don’t say that to object to what we’re doing today. We’re doing what we’re doing. But you would look in vain at rule 56 for a structure for doing much of this that was thought out because what we do with rule 56 today is so different from what was originally envisioned.

Originally rule 56 existed almost exclusively for plaintiffs and it was a device for avoiding trial in an action on a note. Prior to the invention of summary judgment if I claimed somebody had borrowed money from me and hadn’t paid me back. I’d file a complaint, they’d file an answer. They’d deny it all. The denials would be untrue but it didn’t matter. There was nothing to do then but go to trial and this had gone on for centuries. So summary judgment was devised as a quick method for resolving it. And that explains a couple of features that if you think about them don’t make a whole lot of sense. The most important one is the word genuine. We’ve learned as lawyers to speak words that have meanings have completely different meanings in law. So we say, “No genuineication of material fact.” And we say it and to a non-lawyer that would seem a kind of strange phrase. We don’t hear the word genuine. We barely hear the word material. It really means something else. But in 1912 when this was written in New York, genuine was the operative word.
because when the defendant denied having borrowed the money that wasn’t genuine the opposite of genuine would be fake. Most people don’t think that an unsuccessful opponent of summary judgment has fake answers, they just don’t have enough evidence. And that folks also explains why there’s such a focus in summary judgment on affidavits which in current context is really quite problematic but as a method of advancing the original purpose judgment made perfectly good sense. Because the goal was to force the defendant to sign the affidavit under oath swearing that he hadn’t borrowed the money or that she had paid it back. And it worked wonderfully. There were thousands of these motions that were successful in New York. In federal courts in 1940, the overwhelming majority of summary judgment motions were filed by plaintiffs, which of course is very different from what happens today.

So what I want to do is talk about two general kinds of things. First of all the procedural structure of summary judgment and the issues that litigants have to master and the problems of the structure and the opportunities that they create.

Let me start with something that colors what goes on and has made it very difficult to change the rule. Summary judgment is used for at least half a dozen different kinds of motions. They all have the same title but the problems they present are radically different which makes it very difficult to change the rule because a change that would work for one kind doesn’t work for the other. Two, the kinds of summary judgment motion concern issues which if they got past summary judgment would to trial before typically a jury and one of those is the most controversial form of summary judgment where the nonmoving party (I’m going to say defendant because that’s how we all think of it, it’s usually what’s going on) where the defendant claims the plaintiff doesn’t have enough evidence. And there are a lot of these motions and employment discrimination, which I work on they are the most common. The question there is not of course whether the judge thinks that the plaintiff ought to win, but whether the judge thinks the plaintiff has enough evidence to warrant going to trial.

We have a second kind of summary judgment analogous to that where the dispute isn’t about historical fact like why was the plaintiff fired. The dispute is about evaluating undisputed facts and the clearest example would be deciding whether there is negligence. Juries decide whether there’s negligence and they might it even in a case where everyone agreed what had happened. In some instances a court would take that question from a jury and could do so at summary judgment. So in these two categories of cases, the judge is stepping in if the judge thinks this isn’t a dispute a jury could reasonably hear.

We’ve also got kinds of summary judgment where the decision really was for the judge all along. For example there are some cases which involve sort of a fact framed legal question. For example what’s the relevance period of limitations? If you don’t know from the complaint when a case arose, when for example a car accident happened, you couldn’t resolve on a 12B6motion whether the case should go forward. You need summary judgment. The defendant would use summary judgment to put before the court the date of the accident. And from there on we’d be litigating a traditional question of law. Which category of statute of limitations does the case fit into?

We also have what may be better characterized as fact bound questions of law. Where there is an established legal standard but you have to apply it to complicated facts and the most common example of that are police misconduct cases, excess force cases where we’ve got a three or four part legal standard and the courts are called upon on summary judgment to look at the facts which may well be undisputed and decide on what side of the line the case falls.
We also have a significant number of cases resolved on summary judgment involving the interpretation of contracts. Again, that’s a question for a judge but if the contract isn’t attached to the pleadings, you have to do it by summary judgment.

So we’ve got at least these five different kinds of summary judgment. The differences are at times very important to how summary judgment gets litigated. First of all it’s important for litigants to know which thing they’re doing. And most of the time litigants actually do. In fact, what I’ve discovered talking to people is the people who do one kind of summary judgment are surprised to find there’s another kind. The people who only do contracts haven’t seen the other thing. And that was sort of a surprise to me. Almost all of the summary judgment cases I work on are evidence sufficiency cases. When I started reading all summary judgment cases I found that they’re not a majority of the cases. All this other stuff is.

Secondly, there is developing legal disputes about the category into which a particular dispute would fall. And there are at least three of those fights going on right now about employment discrimination. Let me give you an example. In the case of sexual harassment the harassment is only unlawful if it creates what’s called a hostile work environment. That’s assessed based on how serious the harassment was, how frequently it was happening and perhaps one or two other things. The courts when summary judgment is sought are divided as to whether that’s like negligence where it would normally go to the jury unless the evidence is one-sided. Or it’s like police brutality where it’s for the court to decide in light of whatever the evidence is. The difference matters a great deal Judges I think probably have a somewhat different view on how serious sexual harassment is depending on the circumstances. But if you read these cases you find both kinds of decisions. You find decisions saying the plaintiff didn’t establish a hostile environment. That must have meant the judge decided. Or sometimes we hold there was no hostile environment .ON the other hand you have cases saying there’s enough evidence here under which a jury could find there was a hostile environment. So the courts can’t figure out what category to put this in. Figure out is perhaps not the right word. They are putting it in different categories.

And there is at least two or three other areas of employment discrimination law where the same thing is going on. It’s not really well developed yet. I haven’t seen a case saying, for example on the hostile work environment issue, this is of course a question for a judge to decide not a jury and therefore we will do it. It’s just what judges are doing. It’s also a peculiar development in that if the court finds the evidence was sufficient, it doesn’t grant partial summary judgment for the plaintiff, it sends the plaintiff of to convince the jury a second time. So we have a requirement of concurrent findings by the court and the jury. And the only precedent I can think of for that is a death penalty where sometimes in criminal law both the judge and the jury have to agree on capital punishment. In the civil law I don’t know if we have any analog to that. But it’s a really important part of what’s happening in the law and it’s just beginning to emerge.

The other recurring problem we have that’s related to these categories is that many cases involve more than one kind of problem. So you can have a situation where summary judgment is sought on the grounds of evidence insufficiency. And buried in the debate, the fight between the two parties is actually a dispute about some question the law. What’s the standard of proof? What kind of evidence do you need? Who’s got the burden of proof, stuff like that? Now if that case went to trial the odds are that both sides would focus on that because we have a process. We’re singling out and addressing legal questions of standards and it’s the jury instructions. And if someone walked into trial and put seventeen instructions on the table you can be sure the other side would look at them with a jaundiced eye and ask carefully whether those are the rules that you want. But it doesn’t happen like that in summary judgment. In summary judgment this stuff is just scattered through the briefs in occasional cites. And as an appellate which would make me sort of a forensic coroner I see case after case in which a really important issue was teed up, was embedded in the controversy.
And yet the parties didn’t see it because we don’t have a process at summary judgment like the jury instruction process.

So that’s in terms of the skills that one needs to develop as a litigant in handling these cases looking for embedded questions of law in what seems to be summary judgment about evidence is important. And the reverse can happen. You can have what looks like a summary judgment motion about a legal standard and in fact there is some factual dispute between the parties and one or the other of them loses track of that. That problem is active before the supreme court right now in a case called Vance versus Ball State in which there is a dispute about what the standard ought to be and the litigants understood that at the trial court level but they didn’t look far enough ahead, the plaintiff didn’t, to make a proffer of evidence that would satisfy the better standard. So they are not in the Supreme Court that the seventh circuit got the standard wrong and the other side is arguing the issue was effectively weighed because the plaintiff didn’t put in any evidence that the plaintiff would prevail even under the other standard. Again it was an embedded issue. We don’t have anything in summary judgment that alerts us to this. And so it’s an important part of what goes on.

In terms of the presentation of materials in summary judgment there is a tendency I think on the part of both sides to just sort of tell their story and which often it’s very hard for the court to figure out. I think that one of the most important skills in litigating these motions and certainly law clerks tell me this is getting the high ground of clarity. From the point of view of a law clerk, law clerks tell me you sometimes wonder if the two parties are talking about the same case. The defendant will have one account; the plaintiff will have another account. There could be some names in common but it really doesn’t seem to be about the same lawsuit. And so the clerks are sent to sort of try to piece this thing together to figure out where the parties agree and don’t agree and what’s going on. And that’s compounded by the fact that all of these papers come in with not a whole lot of guidance as to where the relevant materials are. My sense is that developing techniques for clarity, for helping a law clerk see how the pieces fit together is really important. If the clerk, if the judge, I said the judge, but the clerks are the people the judges look to to tell them what’s going on and the party that has the law clerk buying their account of at least what the questions are I think has a real advantage in selling their underlying contentions.

There are also fundamental questions about presentation that I think we need to be thinking about and teaching but we don’t. For example, how do you structure a motion? Do you put all of the facts at the beginning and then have a brief argument at the end? Or you desault the facts into the argument? Those are really important questions in terms of what’s effective presentation. That’s undoubtedly analogous to what you teach in trial advocacy about how to question a witness. But we don’t have really any thoughts about how to do this.

I see these briefs organized in different ways. Sometimes the evidence is organized by witness the way it would at trial. Sometimes it’s organized in terms of the chronology of the story which sort of helps initially. But then when you get down to sort of parsing out each of the subsidiary issues that forces the clerk to go back and match up page three with page seven to see how things fit together. So in terms of presentation it’s a really important issue and we’re still learning how to do that.

48:06 There are two major problems in the structure of summary judgment that I wanted to say a few things about. The first one is what I’ve come to refer to as ambush affidavits. Now ambushes are good or bad depending on whether you’re the party that sprung it or the party on whom it got sprung. But the phenomenon is inherent in the way summary judgment works and in the way plaintiffs right now are litigating. In the normal course of discovery a plaintiff typically would be looking for inculpatory evidence, a smoking gun, something belying what they’ve heard before, you depose the other side’s predecision maker and try to wheedle out of them some confession of wrong doing or something like that. So that’s how discovery goes. Discovery closes. The defendant
moves for summary judgment and files an affidavit full of exculpatory stuff which often the
plaintiff has never seen before because that wasn’t what the plaintiff was looking for. Well what
happens now? What happens now is the plaintiff is in trouble because you can’t engage in
discovery to test that new information. And you can’t even question the person who signed the
affidavit. In trial that would be impossible. I don’t know maybe Warren could tell me, I don’t think
there’s a trial procedure into which a party could present a witness and not have them subject to
cross examination but it is built into summary judgment. And time and again you see this
happening in actual litigated cases.

This scenario where plaintiffs have to change the way, or any defending a summary judgment
motion, has to change the way they do discovery to try to make it impossible to do that sort of
thing. And there are a couple of things I think that would advance that. One of them is to
deliberately look for exculpatory information. Another one is to take all the evidence that the
plaintiff has and put it up to the witness for the other side and say what do you say to this and what
do you say to that? Because you want to find out now. You don’t want to find out at summary
judgment. There is something that could work particularly in a 30B6 deposition which would be a
mirror image of something that’s done to plaintiffs all of the time. In employment discrimination
cases at the end of the deposition a good defense lawyer would say do you have anything else to
tell me that supports your position. And of course they’ll say no and that just pushed the plaintiff’s
lawyer in a real pickle down the road.

I think that a plaintiff’s lawyers could do the same thing, to get the 30B6 witness for the defendant
who is supposed to know everything go through everything else is there anything else you want to
tell me now that supports your position that you didn’t fire my client because he’s whatever. To try
to create a situation where if the defense lawyer then produces an affidavit that has anything in it
that’s new you have a ground for objection. How easy that would work, I don’t know but it’s a
problem and the plaintiffs’ bar has to develop some method of dealing with it.

The second procedural problem I want to talk to you about and the last thing I’ll say has to do with
what I’ve come to call the missing brief. And again this follows from the structure of summary
judgment and the way that lawyers for plaintiffs and defendants, but particularly for defendants,
would normally proceed. Imagine a typical summary judgment motion of the first kind, about
challenging the sufficiency of the evidence of the plaintiff. The defendant will file a brief, the
opening brief and it will include the defendant’s account of what happened. The plaintiff was a no
good ne’er do well, he didn’t come to work on time. She broke all the widgets on the plant floor.
She couldn’t get along with anybody. The defendant bent over backwards to accommodate her but
eventually just couldn’t take it anymore. And then the court said well under those circumstances,
no reasonable jury could rule for the plaintiff in fact no reasonable lawyer would have even taken
that case and summary judgment should be granted. The plaintiff will then file a brief saying
among other things, I’ve got this evidence. They called my client a whatever. They treated her this
way and they treated the men this other way. And the day they filed her they fired all the other
women in the plant which of course you didn’t hear about on the other side. And that will often be
the first presentation of the plaintiff’s evidence. And then the defendant will file the third and final
brief which for the first time in the motion will announce to the court what it thinks is wrong with
the plaintiff’s evidence. And it will say well this isn’t persuasive for this reason, this isn’t
persuasive for this reason, this isn’t admissible and they left something out. Their affidavit left
something out their affidavit is missing some key little point. And that’s the end of the process.
That is the first presentation of the actual argument for summary judgment and it comes in the last
brief which means that the plaintiff in the district court has no opportunity to argue in opposition
and the argument in opposition first happens in the court of appeals and never has an opportunity to
offer evidence in response to these objections. All of which would be very different if the defendant
in its opening brief would have raised these things. But it makes no sense for the defendants to do
that. I’m not faulting defendants for acting this way. This is the sensible way to act. But the process then ends at a point as I’ve described it. And I’ve talked to judges whose practice is to read the third brief first because there is nothing useful in the first brief. It doesn’t tell you what the problems in the case are. But of course the third brief is the last brief and it creates these fundamental problems.

Again, I think it’s incumbent on plaintiffs or whoever the non-moving parties are to develop tactics and techniques to deal with this. You could rewrite rule 56 but that is not going to happen. One of the things I think is to ask file a fourth brief called a sur-reply. It’s strongly disapproved by most courts. They really hate sur-reply briefs. But I think that effective representation may require that. The second thing is to focus on objecting to the appearance in the third brief of new arguments. Because there is a new provision in rule 56, rule 56F which says a court can’t grant summary judgment on a ground other than a ground that was the basis for the motion. Well the basis for the motion has to refer to the first brief not the last brief because the purpose of this rule is to give the plaintiff an opportunity to respond. There is no opportunity to respond to an argument that’s only made for the first time in the third brief. So rule 56 seems to objecting to this and to providing another basis for argument for the lead to file another brief.

Finally, I think that one of the things that plaintiffs ought to be doing in this regard is to carefully note whether the evidence to which the defendants object to in the third brief was known to the defendant at the time of the first brief and a fair amount of the plaintiff’s evidence will have been know. Because there it seems to me the plaintiff’s got a pretty good argument that he or she has been sandbagged. That the defendant knew all along about this affidavit of name calling and simply deliberately postponed saying anything in the first brief and waited until it was too late.

But this is a whole new area of the law. There is very little law about this, very little practice. I talk to plaintiffs lawyers and it’s like a little light goes on. They go; yeah that’s really not fair is it? But it’s what everybody is used to. Plaintiffs lawyers are used to things coming up for the first time in the last brief. They’re used to affidavits that have things they’ve never seen before. So I think these are a couple of the areas where we’ve got a lot to learn about how to do this. And regarding which over time I think we’ll be seeing development in the law.

Dean Kellye Testy:

That’s what I love so much about the range of professor Schnapper. He just outlined three or four law review articles. He just taught us something about what we should be teaching our students and maybe what we should be emphasizing a little bit more. For all of us in the room who actually are litigating cases we just learned a lot about how we ought to be thinking about that right? Your influence is indeed profound. And I want to just thank you again for the wisdom that you shared today and thank you so much for all of the contributions that you make to this law school, to our students, to our generations of students and to the rule of law itself. Please join me again in recognizing Professor Schnapper.

I also want to take a moment to thank Larry Gottlieb for being here on behalf as the managing partner of the BPM firm; I believe you’re calling it now. As my colleagues know, I’m a believer in marketing so I am going to go with that new logo. I do want to thank the firm for its generosity and for its support of the school of law. We’re deeply grateful. And please join me in recognizing the firm.

And I’m happy to let you know that the party continues. Because we have a lovely reception planned in room 115 and so I hope that you all will join us and enjoy each other’s company and have an opportunity to talk with Professor Schnapper and congratulate him in person. So please let’s adjourn to room 115. Thank you very much for coming today.
