

The Electric Kool-Aid Judgment Test Making Your Papers Come Alive

FRANK SOMMERS AND ROB BUNZEL

Frank Sommers, an associate editor of *LITIGATION*, is with Sommers and Schwartz, LLP, San Francisco.

Rob Bunzel is with Bartko, Zankel & Bunzel, San Francisco.

Are we all, lawyers and judges both, modern-day Luddites? Although we may not be striding up and down our workplaces with crowbars smiting every workstation or laptop we see, we seem to be rejecting one of the best improvements that information technology offers our profession—the ability to sort rapidly through the huge mounds of paper we generate, in which we routinely drown juries and judges. We’re talking about putting together complex briefs, such as motions for summary judgment, with their exhibits from A to QQQ, using hyperlinks so that a reader (read “judge”) can *see* what the exhibit looks like without having to paw through two linear feet of paper and tabs.

Relax. We are not asking you to turn into R. Crumb and submit graphic novels in lieu of briefs (see an example at <http://bit.ly/17hC39y>). We are, however, telling you that you are missing the boat if you don’t “electrify” your briefs by submitting to the court your chambers copy on a compact disc (CD) on which your elegant, Cartesian, linear brief is at least made more accessible by hyperlinking your exhibits to the text. Wouldn’t it be a relief to know that the judge was actually able to see and read that killer cross-exam that you think makes your summary judgment motion a winner? (Or better yet, can click on and watch the video deposition segment itself?)

There are two ways to do this. One is to include the picture of the exhibit on the page of the brief itself. For example, here’s a

diagram inserted in a brief recently filed in California state court by the San Francisco firm Bartko, Zankel & Bunzel that summarizes the regulations affecting patient record confidentiality (see <http://bit.ly/18WnA3K>). It was offered as a graphic response to the plaintiff’s argument that there should be a private right of action attendant upon the loss of a laptop containing unencrypted patient files. It replaced several pages summarizing and discussing these same provisions. It kills. The problem with this approach, as any rule-crazed litigator knows, is page limits. Embedding multiple exhibits eats up your page count. So you need a method to show the judge your killer exhibit, or exhibits, that doesn’t reduce the space available for your deathless prose explaining why those same exhibits give you the win.

The Hyperlink Solution

The solution is to embed hyperlinks in the text of your brief, which point to files containing the exhibits. The judge can click on the “Exhibit 4234” reference and see the self-same exhibit. Your brief loses only the space necessary for the exhibit reference, not the entire document. Both the brief and a directory containing the exhibits are then submitted on a “chambers copy” CD (to the judge and to your opponents). Sound interesting?

A Judge Comments

HON. BERLE M. SCHILLER

The author is a senior district judge in the U.S. District Court for the Eastern District of Pennsylvania. He wishes to thank his clerk, Chad Cooper, for assistance with this article.

Motions come in, accompanied by briefs. Responses come in. Replies come in. Occasionally, surreplies come in. Opinions go out. The cycle continues. Even in this age of electronic filing, the paper mountain that Frank Sommers and Rob Bunzel alluded to can be a virtually unscalable Everest to a busy judge. Add to that the hundreds, sometimes thousands, of pages of exhibits included with the briefs and busy judges may simply turn off their computers. Too often, lawyers include with their briefs every paper exchanged in discovery and every utterance captured during depositions.

The briefs most helpful to me and my clerks in climbing the paper mountain include concise and well-reasoned legal arguments and guide me through the facts in a well-organized and thoughtful manner. Few things are more distracting than constantly flipping from a brief to portions of the record. So I would welcome any technique that will make it easier for me to parse the record.

Papers that come alive are an exciting proposition for a judge, but lawyers who wish to employ the tactics laid out by Sommers and Bunzel would be wise to heed a few pointers. First, make sure the judge is willing to review the product you submit. I think briefs with hyperlinks are a great idea. Some judges might disagree or believe that it creates an unfair advantage if only one side creates papers that come alive. Furthermore, as Sommers and Bunzel noted, this is largely uncharted territory not covered by local rules. There is no sense in delivering a package to chambers that will never be unwrapped.

Second, please exercise discretion when adding links to a brief. It is more useful to the court that lawyers embed a few links to key documents and testimony rather than bog down the brief in a sea of blue, underlined text. Over-linking strikes me as the electronic equivalent of providing the court with every piece of discovery collected during the litigation. Remember, a living brief is not an opportunity to evade page limits. A lawyer who over-links also runs the risk of having the key document overlooked amid the slew of exhibits already highlighted. Select a few key exhibits that you want to highlight. For example, if you have the plaintiff making a key concession in a videotaped deposition, allowing the decision

(Continued on page 4)

IMAGE NOT
AVAILABLE

How do you create links that do not fail when you put all the documents on a CD and send them to the judge? When you create a link to the key exhibit, unless you are careful the link is “absolute,” meaning it always points to where the exhibit was originally stored; for example, “Frank’s hard drive on his San Francisco Computer/File 1.” So when the judge slots it into her computer in Chicago, reads the brief, and, *mirabile dictu*, actually clicks on the link for that exhibit, she gets a message along the lines of “Can’t find link reference to (Frank’s hard drive in San Francisco)” because Frank’s computer is not part of her network.

What you need are “relative” references, meaning links that “move” along with the brief, so that when the judge puts your chambers copy CD in her computer, your links translate from “Frank’s hard drive in San Francisco/Exhibit 1” to “The CD in the judge’s computer in wherever/Exhibit 1.” As a result of the

Illustration by Jon Krause

relative link, the judge actually sees your exhibit and keeps reading, instead of taking your CD out of the drive and using it as a coffee mug trivet.

You can do this with Adobe Acrobat and the portable document format (PDF) files it creates. Chances are you already create them to use Pacer. Either your word-processing program creates them, or you give them to your secretary to scan using your copier, and you save them into a directory for uploading to Pacer. So you end up with several files: “Brief P&As,” “Exhibit 1,” and “Exhibit 2.”

To make the chambers copy CD we’ve been talking about, put all three PDF files—Brief P&As, Exhibit 1, and Exhibit 2—in the same directory: “Chambers Copy.” Then create links in the brief such that clicking on the link to Exhibit 1 produces that document. You also want to make sure that it’s easy for the judge to get back to the place in the brief where she left from. Finally, this magic has to work not only on your computer but also for the judge on another system.

There are two discrete steps: connecting the exhibits to the brief and creating the links in the brief at the right place for the judge to be able to click through to the text of the exhibit itself. In Acrobat, the first is called “Attachments,” and the second appears in the Help index under “Links.”

Step 1: Creating the attachments. Open the main document that you expect the court to be reading—in this case, “Brief P&As”—using Acrobat. (Double-clicking on the PDF will do it.) You then need to add the “Exhibit 1” and “Exhibit 2” files as attachments to the brief. You do this as follows:

1. Select “Document” from the list on the menu bar on top.
2. Select “Attach File” from the pull-down menu. (A window will open across the bottom of the page, and the file name of your attachment will appear in a list.)
3. Repeat for as many exhibits as you want to attach. (We recommend that you attach the exhibits in the order in which they appear—Exhibit 1, Exhibit 2, etc. This will make your Bookmarks list more user friendly.)
4. Save the original PDF. No need to change its name; just save the file. This stores your newly created group of documents and pointers.

Step 2: Creating the links.

1. Open “Tools” from the top menu.
2. Choose “Advanced Tools” from the pull-down menu.
3. Choose “Link Tool” from second pull-down list. (Your cursor now turns into crosshairs.)
4. Scroll down to the exhibit reference that you wish to link, put the cursor at the upper left corner, left-click, and hold the button while you pull the resulting rectangle around the exhibit reference. When it fits, let go of the button and a dialogue box appears.

5. The list at the top of the dialogue box has to do with how the link will look in the main brief—thick lines, thin lines, dashed, etc. The list at the bottom has to do with how the target document will appear. Pick “Go to a page view” from the top of that list.
6. When you click on “Next” at the bottom of the dialogue box, another window appears: “Set Link.” Now you must select what you want the judge to see when she clicks on the link you’ve just set up. Assuming that you’ve marked “Exhibit 1, ¶5” in your brief, go down to the list of attachments and click on Exhibit 1 in the list. That document will open at page 1. Scroll down to paragraph 5, and put your cursor at the top left corner of the paragraph, drag the resulting box around the paragraph you want to appear, and release the button when the frame fits. Then click on “Set Link” in the dialogue box. The dialogue box disappears, and the link is set.

Close the exhibit screen (by clicking “X” in upper right, by one author’s preference) and you’re back in your main document. The exhibit reference now has a box around it, indicating the link is active. Test that it works. Clicking on the box should invoke the exhibit document and display what you have linked—in our example, paragraph 5.

Practice Tip No. 1. Getting home is simple: Hold down “Alt” and hit the left arrow twice—the first takes you to the first page of the exhibit; the second takes you back to where you left the main document.

Practice Tip No. 2. Getting rid of mistakes is easy. Click on the link rectangle you want to get rid of, and it will change color and appear with dots along the lines. Then click “Delete” and the box vanishes.

So now that it’s all set up, simply copy the entire “Chambers Copy” directory, containing all three files, onto two CDs—one for the judge and one for your opponents. Both get a brief cover letter that says something like: “Here’s a copy of our brief with all the exhibits linked to the brief. If you read this on your computer and click on ‘Exhibit X,’ you will see the exhibit. Click on ‘Alt’ plus the back arrow two times and you’ll return to the place in the brief you left from.”

The Rules on E-Documents

You may be wondering what the rules say about all this. We have been unable to find any rules in California state courts or federal courts that directly address the issue. An unscientific survey of the clerks for randomly selected judges in the Ninth Circuit, U.S. District Court for the Northern District of California, California Superior Court, and the Federal Judicial

Center have produced the following helpful data: Not one court indicated that it had any rules prohibiting the practice, and every judge replied through chambers clerks that he or she thought it was a great idea.

This is new territory. In anticipation of skepticism, we point out the following: The CD is in addition to the chambers copy, not a substitute; you are already filing the “normal” copy with the court, either through Pacer or on paper; and if you give your opponents a copy, what are they going to do? Object that you’re making it too easy for the court to follow your argument?

For a more nuanced judicial view, see the accompanying *Sua Sponte* by Judge Berle Schiller of the Eastern District of Pennsylvania, who is guardedly interested, provided we exercise some discretion in what we link to.

Sample Letter to the Court

Dear Judge []:

As part of the chambers copy of our [Motion/Opposition/Reply], we are providing a copy of the brief in PDF format that contains links to the exhibits cited therein. We hope that being able to click to the referenced exhibit may make it easier for Your Honor to deal with this large mass of material.

What follows assumes that you have Adobe Acrobat’s Reader program on your computer. If not, your clerk can download it for free from Adobe’s website.

Simply put the enclosed CD in your computer’s CD drive. All the documents are contained in the folder named “Chambers Copy.” When you click on that directory, you will see the main brief, entitled [P&As in Support, etc.], plus copies of all the exhibits, named as they are in the brief.

When you click on the brief, it will open on the top of your screen. As you read the brief, you will see that [some of] the exhibit references have a rectangle surrounding them. If you click on that rectangle, the named exhibit will open at the referenced paragraph.

You can move around in the exhibit freely. When you wish to return to the spot where you left the brief, hold down the “Alt” key and tap the left arrow key twice. The first tap will move you to the first page of the exhibit, and the second will take you back to the place you left the brief.

We hope this electronic copy is helpful.

Very truly yours,

—Attorneys for [] ■

(Continued from page 25)

maker to witness the plaintiff make your case for you would be very persuasive.

Finally, make sure to include, in a cover letter, some basic direction about how to use the living brief you are submitting to the court. The whole point of this exercise is to make it easier for the judge to get to the important material. If he or she needs a manual to get there, the judge may skip the living brief and just start reading a paper copy, which of course requires no additional instruction.

Assuming the judge in your case is on board with a living brief, what is the best method to use when creating your living brief? Generally, I believe that lawyers would be wise to embed links in the text of the brief. This method helps maintain the flow of the argument and leaves to the reader control over when to examine the exhibit. And, of course, embedded links have the advantage of taking up less space than including a picture of the exhibit on the page of the brief. Circumstances exist, however, when it makes sense to include the actual exhibit in the brief. Trademark and patent cases, for example, may require judges to examine drawings and trademarks to determine the likelihood of confusion and possible infringement. Embedding visuals directly into the brief makes sense here. Similarly, damage calculations and petitions for attorney fees are situations in which it may be best to show your work directly in the body of the brief.

And let us not overlook the law. If you have controlling precedent on your side, consider linking a case directly from your brief. You should even consider highlighting a particularly important legal quote or analysis that succinctly makes the point you are trying to convey to the court.

The living brief can ease a judge’s burden and help your arguments. A living brief also can keep your opponent honest. If you believe your adversary is playing fast and loose with the record, you could link to the specific offending page in your adversary’s brief as well as the statement or piece of evidence that proves your point. You could undercut your opponent’s argument, show the judge the evidence that supports your position, and highlight the legal proposition that helps you win the motion. The lawyer who can accomplish this all on the same page and without the need for constant flipping will have a persuasive brief.

Used properly, a brief with some well-placed links presents a golden opportunity to place your best evidence before the judge and simultaneously ease the burden on the reader. This judge says go forth and create living briefs. Be careful, though, not to create a Frankenstein. ■