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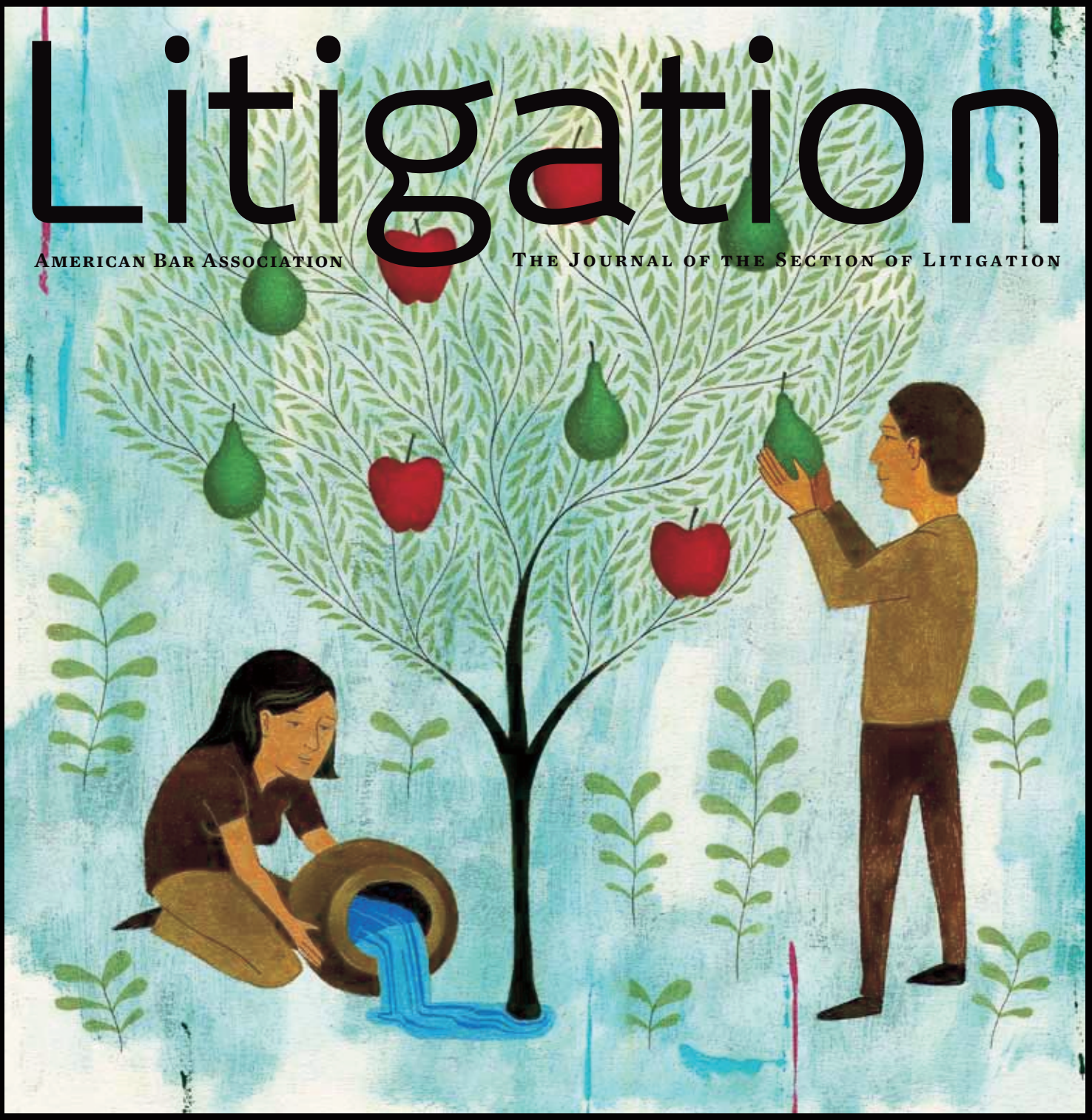

Good Deeds

Interview with Judge Jack Weinstein

Professional Courtesy Advances Your Cause

Transnational Crimes

Good Deeds

FEATURES

Vol. 39 No. 1 Winter 2013

Litigation

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COLUMNS

HEADNOTES

Opening Statement

THE BLACK BOX

WILLIAM R. BAY

Chair, Section of Litigation, and partner at Thompson Coburn, St. Louis.

I just returned from a trip to Nashville, where my daughter performed in her senior opera at college. I'm obviously biased, but I thought it was great. My kids were often part of theater productions in high school and college. There were musicals with orchestras, dramatic productions with big casts, and concerts in beautiful theaters. But my favorite shows took place in the black box.

It is a different kind of theater—smaller than the big stage. It's a simple performance space where the audience surrounds the actors on three sides. There's no raised stage, no velvet curtain, no orchestra pit, no balcony, and no mezzanine. The walls are black. The floor is bare. The sets and technical aspects are simple. The audience sits on chairs or small risers directly in front of the stage, often just a few feet from the performers. This is stripped-down, extremely intimate theater where the focus is on the story and the actors.

In the black box, the actors pace the stage just a few feet away. They are close enough to touch. If I stick my legs out, I could easily trip one. Under the bright lights, I can see the actors sweating as they tussle with each other and perform their pratfalls. When they deliver their rapid-fire punch lines and soliloquies, I see the spit fly.

This intimate theater facilitates a unique relationship between the actors and the audience. We see them literally at arm's length. It's remarkable. It can't be easy to perform in such close proximity to an audience. Every flaw is visible. Every flubbed line is exposed. The actors are surrounded by distractions. Just three feet away, audience members sneeze and cough. They whisper. They shift in their seats. But the actors have to maintain focus. They are close enough to view, hear, and even feel the instant reviews of their performances—apparent from the delight, discomfort, or boredom on the viewers' faces—and yet they must soldier on, remember their lines, and hit their marks. It's a transformative experience for both the actors and the audience.

It occurs to me that most litigators do their lawyering in conditions like the black box theater. The majority of the time, we're not handling high-profile cases where TV trucks swarm the courthouse steps. Our names don't appear above the marquee. No one is beating down our doors, asking us to appear on CNN and espouse our client's position. We practice off the main stage before small audiences with no orchestra or elaborate sets. Like a playwright, our clients simply want their stories to be heard. So we take on the roles of actor and director to give life to those stories. Through the witnesses we present and the cadence and power of the words we choose to narrate the story, a human drama plays out on a small stage.

We handle voir dire, evidentiary issues, motions in limine, and objections. Even in routine litigation tasks, the spotlight is on us. Our clients see us advocate for them. The judge listens and watches us from the bench. The jury picks up on every facial expression we make. Opposing counsel reacts to our every movement, argument, and nuance. Like the actors walking the stage in the black box, we are exposed.

But that exposure has its benefits. It forces us to be authentic and genuine. At such a short distance, fakery is easy to detect. It also builds incredible focus and discipline. We ignore squabbles over discovery or posturing by others. We drown out the distractions and focus on the task at hand. We remember the next line. We stay focused on doing our best for our client.

Despite the challenges and the pressure, the chance they could misstep and face immediate, unrelenting scrutiny from a wall of people just a few feet away, the experience in the black box was incredibly rewarding for my kids. It energized them. I think the same is true for litigators.

It's not easy representing clients in litigation. But it's a critical role we play in our society, one that we've been called to perform, day in and day out with pride and perseverance. Thanks for your dedication to your craft and for risking intense and personal scrutiny to bring your clients' stories to life. Our profession and world are better for it.

Break a leg. ■

From the Bench

GRAPPLING WITH LIBERIA'S LEGAL ISSUES

HON. VIRGINIA M. KENDALL

The author is a district judge in the Northern District of Illinois, Chicago.

We have not stopped sweating since we landed and walked into the tiny two-room airport past the guards with AK-47s. It is hot here in Liberia, a country that remains "off the grid" from years of internal conflict and strife. A small rectangular machine looking more like a water cooler than an air conditioner stands in one corner of the room, and three of us head there for the weak cool breeze it is attempting to emit in the steamy overcrowded waiting area. When we leave the airport for Monrovia, we pass the bombed-out buildings that have long since been abandoned during tougher years, their pockmarked façades broken down first by bullets and then by neglect. Our team is filled with enthusiasm and hope, even though we are wilting in the sun.

We are an interesting bunch traveling with Lawyers Without Borders (LWOB): federal judges, professors, trial advocacy instructors, big-firm lawyers, and volunteers. We come from across the country having left full dockets and piles of work. All of us try to keep the BlackBerry connected and answer the emails that will continue to come in—this is, after all, not vacation, and work must still be completed. Others wait until the later hours of the night when the city hums, literally, from the generators powering the strange blue-gray glow of fluorescent bulbs dotting the streets. The city comes to life at night as the temperature drops. Where were these people during the day?

Wearing Suits in the Heat

The morning brings the Liberian judges and lawyers to the hotel, some in cars with drivers, others walking up the dirt streets behind the building. They are coming for training on human trafficking. Dressed sharply in business suits with jackets and pressed shirts even in the oppressive heat, they respect their position and know how important it is to this country seeking to establish itself once again with a smart and efficient judicial system in the wake of such loss of life and the inevitable flight of those who could leave during the violence. Remarkably, or maybe not so much, many of the judges are women coming to learn how to protect their children and sisters. They politely file into chairs in a room where the instructors have gathered, greeting them as they enter, introducing themselves, learning names. Some are familiar faces from the last session, and hugs are exchanged.

The instructors have worked for months on the material, have researched

Illustration by Amane Kaneko

the country, have prepared the handouts and the materials along with the top-notch team from LWOB. Through some miracle of coincidence, LWOB—and, along with it, its trainers—is the only group in the world, other than Liberia's own Ministry of Justice, that has access to every court decision reported in the country, ever, and later the chief justice will express his gratitude when presented with copies of the case digests that he can now distribute to his judges. After work each night, the trainers have pored over the local laws, case decisions, the geography, the news—all of this will be critical in making the training relevant. Even after the weeks of preparation, the instructors crammed more into the arduous 15-hour plane ride across the ocean. As the rest of the passengers slept, a few lone lights dotted the plane—instructors tweaking PowerPoints, rewording a presentation, or merely cramming one more law journal article into an overly tired brain. Now it is game time.

We realize we are in a whole new world of problem solving.

Instantly, the discussions focus on Liberia's laws, Liberia's evidence, Liberia's issues. We are not here to teach U.S. law; we are here to empower, engage, and enlighten. We are here to share best practices across an ocean and a few time zones. We are here acknowledging that we too are learning this complex, confusing, maddening crime that we call human trafficking. We recognize that even with our training, our technology, our laws, and our abilities, we share the same concerns for victims. Animated discussion erupts when we discuss the psychology of the victimization—how girls are coerced, controlled, manipulated, and broken down. The trainers listen sadly to the real-life stories of young girls being taken from their homes and promised a better life across the border only to end up as prostitutes in a land far away. Even across this great difference in cultures, we see many of the same mechanisms being employed: debt bondage, parental manipulation, lies, confinement, isolation, denigration.

Theory and Reality

Over the lunch break, we share ideas about how certain problems might be solved. We talk about where the barriers are to erecting new models for effective prosecution, efficient victim resources, and public awareness. We talk about how trials might be more efficient and how trial judges might be more responsive to handling these kinds of cases in their courtrooms. During our talks, we recognize how fortunate we are back home to be able to turn to a network of colleagues who have shared interests in protecting women and children from human rights violations, and we are overwhelmed at our sisters and brothers in Liberia who have the same desire, the same passion to effectuate change, and yet have so few resources to do so. These faces of courage and determination are clearly the faces of a judiciary and a legal community committed to bringing Liberia to a new level of jurisprudence.

We laugh over some of them, like the police officer who transports a prisoner from jail to the courthouse while the prisoner holds on to the back of the officer's motorbike only until the prisoner rolls the bike and escapes. Clearly, we think we must be able to solve that problem. But as the list of possibilities diminishes as quickly as the government funds that might be able to solve the problem, we realize we are in a whole new world of problem solving. We cry too as we listen to the story of the father who walks 60 miles to bring his minor daughter to court to testify against her accuser only to have the court case rescheduled and the child brought home to her village. The likelihood of her father being able to leave his crops and bring her back to court again are small, and her chances of receiving justice even smaller if she does not return.

This is Lawyers Without Borders, founded in 2000 by Christina Storm. It has recruited a unique group of the world's smartest lawyers, experienced judges, professionals, and volunteers who dare to make a difference in a country that was once thought to be the promised land for freed slaves from the United States. The irony of conducting human trafficking training in this African country comprising ancestors of freed slaves is not lost on either the training team or the Liberians. Now many of the ancestors of those slaves have fled the internal wars that have left the country struggling to rebuild. Those who have stayed, however, are filled with hope and determination. They know that they are a beacon for other African countries. They have one of the highest literacy rates of any of the African countries, and in spite of the loss of academics and leaders during the civil war, they point to the return of some and the resurgence of the legal community as a leader in protecting the human rights of women and children. The LWOB team will provide as much training, support, and resources as it can to support that hope and that reality.

Day one is done in Liberia, and the exhausted trainers amble back to their rooms to start the day's work back home—the blinking red BlackBerry light demanding attention. There will be no rest until the "real job" is completed for the night. This is no vacation. There is much to be done tomorrow both here and abroad. ■

REPLY BRIEF

Response to "Fixing Discovery: The Judge's Job"

To the Editor:

Each of us in the litigation system has a specific job. Judges manage cases and resolve disputes. Yet, somehow, perhaps amid the crushing weight of busy dockets and complex matters, judges developed a disdain for hearing disputes about discovery.

Or maybe it was just the nature of those disputes—typically, "they won't give us what we're entitled to get" versus "they seek that to which they're not entitled"—that repelled otherwise well-motivated jurists.

Regardless, the judicial message has been clear: Don't bother us with your (petty) discovery problems; good (mature, reasonable) lawyers should be able to work these things out on their own.

That's part of what makes Judge James Carr's call to action to his judicial colleagues in "Fixing Discovery: The Judge's Job," published in the Summer 2012 issue of LITIGATION (Vol. 38, No. 4, at 6), so refreshing. There, a respected and experienced federal judge writes what trial lawyers have said for a long time: "What needs fixing is not the discovery rules; what needs fixing is how courts resolve discovery disputes."

The centerpiece to his proposed solution? "[A] willingness of judges to adjudicate discovery disputes informally and promptly." Implicit is a non-antagonistic reaction to being called upon to do so.

Judge Carr's view has been consistent. Ten years ago, he made a similar observation:

> [R]equiring counsel to contact the court to seek informal resolution of discovery disputes . . . results in a very substantial saving of time for the court and counsel, and of money for the litigants, because in almost no instance, except where a bona fide claim of privilege is being asserted, does such informal process fail to resolve the discovery dispute.

Uwaydah v. Van Wert Cnty. Hosp., 246 F. Supp. 2d 808, 809 n.2 (N.D. Ohio 2002).

To be sure, others have held his view, including the many courts that have adopted local rules or standing orders that wisely preclude the filing of formal discovery motions until sincere, good-faith efforts at direct resolution between adverse counsel and informal communication with the judge or magistrate have been completed.

But the larger "don't bother us" approach has been predicated on the ill-conceived notion that discovery—which in general should be trouble-free—magically should be self-executing in every instance. As another federal judge once observed:

> Some courts apparently operate under the philosophy that, "If I have to hear a discovery dispute, someone is going to have to pay." This attitude strikes the court as being a tad shy of judicious. Good, reasonable lawyers will have legitimate discovery disputes, and the court should quickly resolve those disputes so that the litigation can progress with all due speed.

Harp v. Citty, 161 F.R.D. 398, 402 (E.D. Ark. 1995).

That court went on to note that "[f]or some reason too many judges have no trouble restraining their enthusiasm for resolving discovery disputes (to put it mildly) . . . . Members of the bench should keep in mind that the word 'judge' is a verb as well as a noun." *Id.*

Informal judicial access and timely judicial responsiveness make all the difference in the world. Petty discovery issues fall away; substantive discovery disputes emerge, and are addressed, when necessary by formal motion and court decision.

We know it is "not the [c]ourt's role to micromanage all discovery," *Henderson v. Peterson*, 2010 U.S. Dist. LEXIS 70366 (N.D. Cal. 2010); that "the [c]ourt certainly does not enjoy being cast in the role of babysitter at the slightest discovery problem" and should not be "needlessly entangled in time-consuming discovery skirmishes," *Cleveland Indians Baseball Co. v. United States*, 1998 U.S. Dist. LEXIS 1459 (N.D. Ohio 1998); and that "the court has neither the obligation nor the inclination to act as a referee in every spat that may arise between the parties during discovery," *LoVora v. Toys "R" Us-Delaware, Inc.*, 2008 U.S. Dist. LEXIS 121312 (E.D. Wis. 2008).

But welcoming discovery disputes—rather than resisting and disparaging them—is a more effective and appropriate way of limiting and preventing them. "Many judges believe that making themselves available to decide discovery disputes informally discourages disputes and encourages quick resolution of those that are submitted." National Judicial College, *Resource Guide for Managing Complex Litigation* § 3.5 (2010).

True benefits come from the guidance that a judicial officer can provide informally. Those discussions also help to identify the instances that call for formal resolution, which is good. The jurisprudence of formal discovery motions formally decided provides guideposts that inform and influence our conduct as counsel. ■

—Steven J. Miller
Associate Editor LITIGATION
Miller Goler Faeges Lapine LLP, Cleveland

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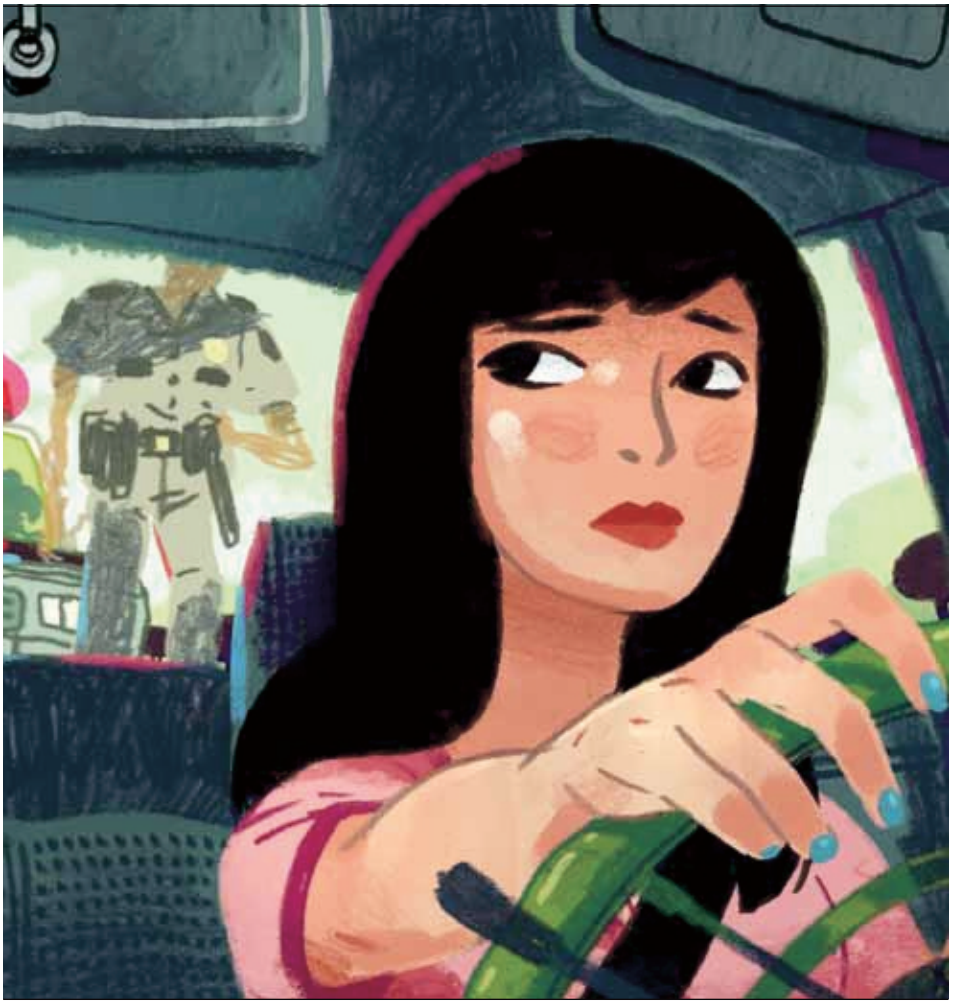

CIVIL RIGHTS

Suspicionless Strip Searches—What's Next?

DANIEL R. KARON

The author is with Goldman Scarlato Karon & Parry PC, Cleveland.

A flawless driver and exemplary citizen, Rosemary Munyiri never expected this nightmare to happen to her.

It was a rainy April night in 2008 when a Baltimore police officer stopped Rosemary, a petite 5' 2" Johns Hopkins Hospital cardiac nurse. The officer ordered her from her car at gunpoint, handcuffed her face down on the wet pavement, and arrested her.

The reason? On Rosemary's way home after a 12-hour shift—and while still in her pink nursing scrubs—she mistakenly drove past flares that the officer had placed, blocking her customary exit. When the officer pulled up behind her with lights flashing, Rosemary thought they were for someone else and she continued onward, looking for a safe place to park on the side the highway.

But the lights weren't for someone else; they were for her. So when Rosemary continued driving, the officer concluded she had taken flight. And though the officer found no weapons or contraband in Rosemary's car—indeed, he found nothing—he arrested her on three misdemeanor charges (negligent driving, failure to pull to the curb upon a police vehicle's signal, and attempt to elude uniformed police by failing to stop) and hauled her down to Baltimore's Central Booking and Intake Center. Once there, guards ordered her to strip naked in front of other detainees, to spread her buttocks, exposing her anus and vaginal areas, and to squat and cough.

After 24 hours in a holding cell, Rosemary was released on bond. Eventually, she entered a nolle prosequi plea, meaning the prosecutor voluntarily discontinued her criminal charges after the officer—the state's only witness—failed to appear for trial.

So was Rosemary's humiliating and suspicionless strip search, based on no probable cause to believe she possessed weapons or contraband, legal? According to the Supreme Court, yes.

In *Florence v. Board of Chosen Freeholders of County of Burlington*, 131 S. Ct. 1816 (2011), the Court held that detainees admitted to a prison's general population are required to submit to mandatory

Illustrations by Sam Bosma

strip searches in the name of "jail security."

But aren't searches of people arrested for minor offenses that involve neither drugs nor violence—like traffic offenses, regulatory offenses, or similar misdemeanors—unreasonable searches forbidden by the Fourth Amendment, given that prison guards lack reasonable suspicion to believe those people possess the weapons or contraband that are the very items that should justify the strip searches in the first place? The four-justice dissent thought so. After all, even prisoners have basic constitutional rights, including, of course, the Fourth Amendment right to be free of unreasonable searches and seizures.

As Justice Breyer explained for the dissent, "[A] strip search that involves a stranger peering without consent at a naked individual, and in particular at the most private portions of that person's body, is a serious invasion of privacy." Indeed, the harm to privacy interests is especially acute when the person searched has no expectation of being subject to such a search because, for example, she simply received a traffic ticket for failing to buckle her seatbelt.

What's more, when considering the empirical evidence supporting the extraordinarily low incidence of weapons or contraband actually discovered in prisoners' body cavities, little reason exists to permit blanket strip searches absent probable cause for suspecting weapons or contraband. And this conclusion is only amplified by the majority's failure to have identified any clear example of weapons or contraband smuggled into a jail during intake that could not have been discovered had the jail used a reasonable-suspicion standard.

Perhaps most frightening, though, is the prospect that prisons will use *Florence* to justify compulsory medical procedures by untrained, nonmedical prison guards for such things as diagnosing and treating lice and other physical conditions. But as broad as *Florence*'s decree undoubtedly is, it can't possibly be understood to legalize these additional practices. Compulsory medical diagnoses and treatment by nonexpert personnel—delousing, for example—do not trigger *Florence*'s concern with and focus on violence-inducing weapons and contraband because such diagnoses and treatment necessarily don't reveal weapons or contraband.

Florence legalized mandatory and suspicionless searches for weapons or contraband, and that's all that it did. *Florence* did not legalize compulsory medical diagnoses and treatment by nonmedical personnel, and such practices do nothing to advance the *Florence* Court's expressed directive. As a result, civil rights lawsuits for those offenses should remain viable.

Indeed, in his concurring opinion, Chief Justice Roberts cautioned "to leave open the possibility of exceptions [to the Court's new blanket rule], to ensure that we not embarrass the future." But allowing prison officials to broaden *Florence*'s already expansive, new pronouncement to legalize compulsory medical diagnoses and treatment by nonmedical personnel wouldn't merely embarrass the future; it would cause far worse damage than simply that. ■

FREEDOM OF SPEECH

First Amendment Caste System

CHARLES D. TOBIN

The author, a senior editor of LITIGATION, is with Holland & Knight, Washington, DC.

In decision after recent decision, courts have muddled generations of egalitarian constitutional jurisprudence that clearly told me my speech is as protected as CNN's or Fox's.

Consider what has happened in the past couple of years:

An Oregon federal court rejected any application of First Amendment principles in an investment firm's defamation trial against a blogger.

The U.S. Court of Appeals for the Second Circuit announced a complicated, multipart test to determine who may benefit under what was previously the simplest journalists' privilege law in the country.

An Iowa judge decided to send a publishing-on-demand company to trial under a strict liability standard in a defamation lawsuit.

Each of these cases is disturbing because the courts refused to balance the individual rights of the communicator against the plaintiff's right to redress. Collectively, they raise anew a basic question we thought the legal system had settled years ago: Does the First Amendment protect some more than others?

The U.S. Supreme Court has flatly told us that the First Amendment provides journalists with no preferred position. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), a majority of the Court supported the notion that "every man"—and that includes every journalist—must testify if a grand jury comes calling. In *Pell v. Procunier*, 417 U.S. 817 (1974), and in *Saxbe v. Washington Post*, 417 U.S. 843 (1974), the justices told us that the press has no special rights to interview prisoners. In *Cohen v. Cowles Media*, 501 U.S. 663 (1991), the Court said that if journalists violate commitments to sources, the law can punish them. And in *Wilson v. Layne*, 526 U.S. 603 (1999), it held that journalists accompanying police into people's homes are intruders.

These decisions teach that the First Amendment is no more or less resilient for journalists or unaffiliated speakers. Yet last year, Crystal Cox learned that she had no shield at all against a $2.5 million defamation verdict for her Internet posts about an Oregon bankruptcy proceeding. Her confusing rants

on obsidianfinancesucks.com called the courts corrupt and accused the plaintiffs of serious wrongdoing. Because she is a one-woman crusader, the federal court barred her from any enhanced protections that usually apply in defamation cases involving media defendants. *Obsidian Finance Group v. Cox*, No. 3:11-CV-00057-HZ (D. Or. Nov. 20, 2011).

The judge found Cox was not "the media," as she had failed to demonstrate: that she had a journalism education; that she was affiliated with a "recognized news entity"; that she had followed "journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest"; that she kept notes; that she and her sources had agreed to confidentiality; that her blog was "an independent product rather than" an assembly of others' posts; or that she had "contact[ed] 'the other side' to get both sides of the story." Because Cox flunked his litmus test, the judge held that her writings warranted no heightened protection under the Constitution. She went to trial with no protections at all and with all legal presumptions against her, and she lost—big-time—against wealthy and powerful opponents.

The Oregon federal court is not alone in the recent wave of decisions creating a colossally confusing First Amendment caste system. Last year, the Second Circuit ordered an award-winning filmmaker to turn over outtakes of a commissioned documentary to lawyers in Ecuadorian civil and criminal litigation arising from accusations that an oil company polluted rain forests and rivers. *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011). Second Circuit journalists' privilege law has long been among the most protective in the federal courts. But here, the court distinguished away all prior privilege rulings on the ground that the law protects only "the role of the *independent* press." (The emphasis is the court's.) The shield might have protected the documentarian in other circumstances, but not here, because he had been "commissioned to publish" and could not demonstrate "editorial and financial independence."

The commissioned nature of a publisher's work is also the subject of a pending decision in the Iowa Supreme Court. In *Bierman v. Weier*, No. 10-1503 (Iowa, argued Jan. 25, 2012), the court will decide whether a publish-on-demand company hired to print memoirs deserves no First Amendment protections at trial. Because the vanity press "is a business which contracts to publish documents for private authors," the trial court held, it "is not the *New York Times* or any other media entity" and its rights "have nothing to do with the First Amendment." If the publisher loses, its trial will be governed under a strict liability standard.

Contrast these decisions with the decision in a criminal case in Maryland, *U.S. v. Cassidy*, No. RWT 11-091 (D. Md. Dec. 15, 2011), extending the First Amendment—and comparing the expression at issue to the *Federalist Papers*—to a really creepy speaker. The federal court dismissed an indictment brought under an anti-stalking statute that proscribes the use of an interactive computer service to "cause substantial emotional distress" to a victim. The defendant had been charged for anonymously blogging and tweeting disturbing statements about the leader of a religious group. The court held that because the posts and tweets were published to a mass audience, the victim could have averted her eyes to the expressions. Further, the court found, the subject matter touched on religion. For these reasons, the speech deserved the full protection of the First Amendment, and the indictment could not stand.

All of this has to leave us wondering: Under the courts' various litmus tests, does my speech occupy a higher First Amendment caste if I am less independent, or more mainstream? ■

PRIVILEGE

The Government Exception to the Fiduciary Exception

EDNA SELAN EPSTEIN

Edna Selan Epstein, an associate editor of LITIGATION, is with the Law Offices of Edna Selan Epstein in Chicago. She is the author of *Attorney-Client Privilege and the Work-Product Doctrine*, Fifth Edition, published by the American Bar Association.

Rarely does the U.S. Supreme Court weigh in on issues of attorney-client privilege. They are evidentiary in nature, not constitutional. Indeed, it has been 30 years since the Court did so in a case of substantial precedential value, in *Upjohn Co. v. United States*, 449 U.S. 383, 393, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). That seminal opinion kick-started the explosive growth of attorney-client privilege discovery disputes.

Nothing comparable is likely to occur as a result of the opinion in *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 180 L. Ed. 2d 187 (2011), upholding the privilege of government lawyers to withhold information from an American Indian tribe. The opinion was delivered by Justice Alito, joined by Justices Scalia, Kennedy, and Thomas, and concurred in by Justices Breyer and Ginsberg. It drew a vigorous dissent by Justice Sotomayor. Justice Kagan took no part in the consideration.

The opinion will offer you no ideas for arguments in your next attorney-client privilege dispute. Its precedential value is not likely to extend beyond the context in which it was decided: the fiduciary management of the assets of tribes for which the United States government is a statutory guardian. It is worth study in any event because of the way the majority elided clear precedent to reach a protectionist result for government lawyers.

To find that privilege applied to the government, acting as a trustee for the funds of the Jicarilla tribe, the court had to reverse the opinion of the Court of Appeals for the Federal Circuit. That court, in *In re United States*, 590 F.3d 1305 (Fed. Cir. 2009), had sustained the Court of Federal Claims' holding that the fiduciary exception required the United States to disclose attorney-client privileged communications dealing with its administration of tribal funds.

Anglo-Saxon law has long held that a trustee enjoys no privilege in the communications with legal counsel with respect to the administration of funds on behalf of beneficiaries. This fiduciary exception to privilege has been widely adopted and applied in American courts.

We all forget just how recently privilege law began to explode in the courts. In *Riggs National Bank of Washington, D.C. v. Zimmer*, 355 A2d 709 (Del. Ch. 1976), the Delaware Chancery Court permitted trust beneficiaries to compel trustees to produce a legal memo related to the trust's administration for two reasons: The trustees had obtained the legal advice as "mere representative[s]" of the beneficiaries, who were the "real clients" of the attorney; and the fiduciary duty to furnish trust-related information to the beneficiaries outweighed the trustees' interest in the attorney-client privilege. Later cases held that where the trustee seeks legal advice on an issue of trust administration, no privilege applies.

What is unusual about the holding in *Jicarilla* is that the majority did not dispute the basic *Riggs* criteria. The tribe was seeking trust-related information from the United States to determine whether the guardian and trustee of its funds had properly administered tribal assets.

Nonetheless, the majority held that the United States undertakes its role as a sovereign, under statutory authority. The competing interests for the sovereign might involve environmental or conservation obligations, or the interests of other tribes. Of course, there was no indication in this litigation that such was the case. Indeed, the majority did not believe a court needed to determine whether any of these conflicting interests were present—to do that in each instance, the Court said, would be too inefficient. The Court also gave great weight to the fact that congressional appropriations pay the legal bills.

What most troubled Justice Sotomayor, as she wrote in her long dissent, is that the majority overturned long-standing principles of governmental accountability to its "wards" in order to sustain a claim of privilege that, in other contexts, would not have been available to the fiduciary.

Jicarilla is therefore remarkable—and contrary to precedent—for its considerations of judicial efficiency and the identity of the payor as valid criteria for the determination of privilege issues. ■

FIRST-TIME LAWYER

Finding Bad Jurors

KELLEY BARNETT

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For the novice and veteran alike, voir dire makes lawyers more nervous than any other part of trial. The dwindling number of cases going to trial means fewer opportunities to participate in seating a jury. Many lawyers do not know how to expose a potential juror's bias. Others are just plain afraid to talk to people.

Yet, skillful, confident jury selection can mean the difference between

winning and losing. Surveys of jurors show that not only do many form lasting opinions about the case during voir dire but also that lawyers' success rate in altering juror bias is less than 15 percent. Anyone hoping to try cases needs to learn to root out bad jurors from the panel.

By "bad jurors," I don't mean bad people; rather, I mean those jurors whose life experiences and beliefs are adverse to your client's position. Don't waste time trying to persuade bad jurors to change their minds. Instead, focus on identifying and getting them off your jury. To do this, you need to get jurors talking about their beliefs.

The first step? Make a list of beliefs you don't want your jurors to have. If you're defending an employer sued for wrongful termination, you probably don't want a current or former worker who is really unhappy with his or her own employer. If you're representing a plaintiff demanding big money, identify jurors who are apt to be stingy because they think jury awards are excessive (think of the McDonald's hot coffee case). Defending an insurance company? Spot jurors who believe insurers unfairly deny claims.

When addressing your bad-juror topics, don't lecture or give speeches. Ask and listen. Ask open-ended questions to the group and to individual jurors. Listen as you let the jurors do the talking. In an insurance case, for example, ask the group how many have filed insurance claims; then ask them to keep their hands up if their claims were denied. Follow up with those jurors individually by finding out who thinks his or her claim was wrongly denied and why. In a wrongful termination case, ask how many have had a negative experience with an employer. (Notice I didn't suggest asking whether any juror has been fired. . . . More on this later.) Follow up with those who raise their hands.

How do you dig deeper into a juror's vague response? Start by repeating his or her answer. If a juror says "some people are greedy," ask the juror to tell you what he or she meant by "some people are greedy." A vague response like that usually signals a bad experience. So assume that juror has had one and ask the juror to tell you about an experience he or she has had with a greedy person. Ask the group if anyone shares that juror's view. Perhaps the juror thinks people file frivolous lawsuits for money or that insurance companies deny claims to save money or that manufacturers ignore safety mechanisms to maximize profits. Drilling down on a vague response like this is a good chance to expose a bad juror.

Throughout voir dire, your job is to make each potential juror feel safe in being truthful about his or her feelings—safe to show you that he or she will be a bad juror. Many jurors won't admit unpopular opinions. So if you ask, "Does everyone agree that . . . ," you will find many jurors looking around to see how the majority votes before they raise their hands. Also, avoid asking jurors whether they can be "fair and impartial," because most won't admit they can't be fair.

Instead, create the impression that whatever answer they give will be reasonable by acknowledging that people fall on both sides of the spectrum. For example, to pinpoint jurors who won't award a large verdict, you might say: "Some people think juries award too much money to injured parties. Others think juries don't award enough." Ask for a show of hands on each side of the issue and follow up individually. Remember to thank jurors who are honest. Praising jurors who come forward may encourage others to do the same.

Finally, some topics are too sensitive for jurors to discuss in front of strangers (e.g., being fired, sexual harassment, bankruptcy). To minimize the risk that jurors will withhold important information or punish you or your client for embarrassing them, consider submitting jury questionnaires (ask your judge) or find out whether the judge will ask certain questions. At a minimum, ask jurors to let you know whether answering your question would require them to divulge sensitive information, so you can stop and ask the judge whether he or she will permit a private voir dire. Even if the judge says no, you have shown all jurors, bad and good, that you are on their side. ■

Judge Jack Weinstein

on Life and Law

HON. JEFFREY COLE AND HON. ROBERT GETTLEMAN

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Befitting a life that is the embodiment of the American dream, Jack Weinstein went from working on the docks in Brooklyn to pay for college to becoming one of the most renowned judges in the history of the federal judiciary. For 45 years, he has served as a U.S. District Judge for the Eastern District of New York. He first achieved recognition as a professor at Columbia University where he authored nationally recognized textbooks and articles on evidence and civil procedure. He served as an advisor to Senator Robert Kennedy and to leaders of the Democratic and Republican Parties in New York on matters involving judicial improvements in the state court system; he was counsel to a number of New York state legislative committees and served as commissioner of the Temporary New York State Commission on Reform and Simplification of the New York State Constitution. He advised the New York State Constitutional Convention, and he revised New York Civil Procedure and wrote the definitive treatise on the subject. And while the judge would deny it, through his now classic treatise, Weinstein's Federal Evidence, for a whole generation of lawyers he has replaced Wigmore as the definitive authority on evidence. He revolutionized the way in which mass tort actions like the Agent Orange and asbestos cases are handled. A child of the Depression, he has worked since he was nine years old. Little wonder that at the age of 91 he maintains a full calendar and continues to express himself uninhibitedly, thoughtfully, and provocatively on those questions for which there are perhaps no right answers but which each generation seeks anew to resolve.

Q: Thank you, Judge, for taking the time to talk to us. You were born in Wichita but moved to Brooklyn as a child. How old were you?

A: Four or five. I was brought up in Brooklyn and worked on trucks in this very area for six years while I went to night school at Brooklyn College.

Q: You also worked on the docks, didn't you?

A: Partly on the docks, partly in the office, partly loading and doing various chores.

Q: How did your family get to Wichita?

A: My father was born in Hungary and came to this country when he was about four, around the turn of the twentieth century. My mother was born in Brooklyn a few doors from the courthouse. My aunt Sadie's husband had a clothing store in Wichita, and he died suddenly. So there she was, alone with two young boys and a store. My paternal grandfather sent my father out to keep Sadie and her boys safe. He married Mom and they went out there. They spent six or seven really wonderful years

and absorbed the sense of Middle America, which was quite different from what they had been exposed to. My mother's attitude was very different from her five sisters' and so was my dad's. I think it was a result of that Kansas experience. We enjoyed a different way of life than the kind we have now. Open, welcoming. That experience probably affected my life very strongly as well, because I picked up the flavor of Middle America. Some of us got that sense of another America in the war, being away for four years. But Mom wanted to see her family and show off her sons. So she insisted on coming back East. And what I saw here when I worked on the docks and around the trucks was the communication and relationships that harkened back to the 1890s. Transportation was by ship up and down the east coast and by railroad. We had a strike at one point, and we had 20 horse wagon carts coming over and delivering goods. The thirties were kind of interesting, bridging the time periods. I was lucky that way. Then I saw World War II, which was another bridge into the future.

Q: Where did you serve?
A: In the Pacific on a submarine.

Q: When did you decide you wanted to be a lawyer?
A: I had graduated from Brooklyn College, and had no conception of what I wanted to do. I had taken economic courses, but I enjoyed my philosophy and mathematics and physics courses more. So when it looked like the war was about to end, I wrote home that I had three options: medicine, as a Jewish boy with a good record in college; physics, because I'd studied some in the Navy and at college, and I was intrigued by this developing subject; and when you can't decide what you want to do, the law. So I wrote home, and my mother sent me Holmes' *The Common Law*, and I read it and couldn't understand it, but I decided law would be an interesting thing to study.

Q: Where did she get a copy of *The Common Law*?
A: She was a voracious reader. She won the gold medal at her grammar school in Williamsburg, near where her father had a shoe repair shop. When she graduated from eighth grade as the top scholar, the principal wanted my grandfather to let her go to high school. But women of her background were not permitted that luxury at that time. So he sent her off to pluck feathers in a factory where they made those hats with the bird feathers so popular at that time. But she remained a voracious reader. Her apartment was full of books, many of which had dollar bills stuck in them, the result of the phobia about savings banks that many people continued to have after the Depression.

Q: How did the Depression affect you?
A: I worked from the time I was nine; I was always trying to find ways to earn money. My father, who was very charming and bright, also was not permitted to go to school beyond the sixth or seventh grade. He was carrying men's clothing on his back when he was 13. He got a job when he came back from Wichita with the National Cash Register Company as one of their first Jewish salesmen. When the Depression struck, he lost his job. Like so many others, he tried to start a little business. After the war, he came back to National Cash Register and became a sales manager. He trained a whole core of people and helped introduce a lot of the modern technology in supermarkets. But in the thirties, we had to scrape together money to pay the mortgage and put food on the table.

Illustration by Tim Foley

Q: You were working 60 hours a week and going to night school at Brooklyn College?
A: Yes. All the drivers and my boss, Al Burns, were so helpful to me. None had any education, but they were supportive because I was the first person they knew to go to college. Al used

to give me time off to study for my exams, which I sometimes spent rowing in Prospect Park, and the others would drive me when I had to get to school fast. So very interesting, the way the poor often looked after the poor.

Q: By the time you started law school at Columbia, you were married, with a baby?

A: Yes. The baby was born the first week of law school—between the lecture on Development of Legal Institutions at 9:00 to 10:00 and the lecture on Civil Practice from 11:00 to 12:00.

Q: Were you taking care of your son when you were in law school?

A: Evie and I lived with my parents in a basement apartment my brother and I had built. She was a social worker who ran a program for World War II veterans with psychiatric problems. I came come home at 5:30; she'd hand the baby to me with the bottle, get on the train, come back at 1:00 in the morning. I would go up to Columbia, and she would have the baby. So that's the way we worked it.

Q: Were there quotas in those days for Jewish students?

A: Not at Columbia, as far as I'm aware. But in downtown New York, there was a great deal of anti-Semitism, and I couldn't get a job even though I was at the top of the class, lectured at Columbia, and had clerked for Stanley Fuld, who was then considered one of the preeminent common-law judges.

Q: That was Justice Frankfurter's and Justice Ginsburg's experience.

A: Well, she had a double problem. She was female and Jewish. So after I left Stanley, I set up practice for myself in a little hole in the wall at 42nd Street and Lexington Avenue, which I shared with about a half a dozen good lawyers. I had one partner when I started. I got overflow from the other people in the suite. I got appeals almost immediately because of my connection with Fuld. Probably through him and others, I became counsel to a Republican state senator, and then for some of the committees. The pay at that time for associates in the large firms was about $6,000 a year. My first year in practice I earned over $20,000, which was a huge sum of money for Evie and me. And then I got this call out of the blue from Dean Smith asking if I'd be interested in becoming a professor at Columbia.

Q: And so you gave up your practice to become a full-time professor at Columbia Law School.

A: Yes. But I still consulted with the legislators at the capital in Albany and did some private work and worked for the NAACP.

Q: What did you teach?

A: I taught some English history, the development of legal institutions, criminal law, civil procedure, and accounting. When Jerry Michael died, I took over his courses in evidence and civil procedure.

Q: Your first evidence book was with Professors Maguire and Edmund Morgan? How did that come about?

A: I started to put together materials as soon as I began to teach. I met Eddie Morgan of Harvard at NYU. We were both called to a conference on Israeli problems. We were to advise the Israeli mission with respect to a code of evidence for Israel. This was about 1954–55. Morgan was about my present age and I was in my thirties. But this little fellow—he was half my size—and I walked from NYU to the bar association where he was going to deliver a lecture, and we had fun together. He asked me if I would revise his casebook, and I did. It turned out pretty well.

My mother sent me Holmes' *The Common Law*, and I couldn't understand it, but I decided law would be an interesting thing to study.

Q: And Maguire?

A: Maguire was more passive in the operation. Morgan was very peppy. He was involved in writing on the *Sacco, Vanzetti* case. Then he defended his former student, Alger Hiss, who was in the State Department, later accused of treason. He couldn't believe Hiss would do anything wrong.

Q: How did you meet Robert Kennedy?

A: I was chairman of a state reapportionment committee for the Democratic Party on redistricting. Through that, I came into contact with Senator Kennedy and Bill Van der Hennel, his man in New York, and I did some work advising the senator on some criminal law issues. Then I was appointed to advise his committee revising the New York court system. This was '56, very shortly after I got up to Columbia. I was revising New York practice, which became the New York Civil Practice Law and Rules, N.Y.C.P.L.R. We revised the whole practice. I don't know

how it all happened. I was just a kid from Kansas and Bensonhurst, and these things were happening to me. And I did help him with some federal legislation. He took a shine to me. I don't know why. He wanted to run me for state attorney general, but they needed an Italian. Weinstein was not an Italian name, so they couldn't follow his wishes.

Q: But you did run for Chief Judge of the New York Court of Appeals while on the federal bench?

A: Fortunately, I didn't get the nomination. That was the last time a sitting federal judge ran for office while on the bench.

I ran for the state constitutional convention, and then I later ran for chief judge of the State of New York. The only two people who ever did that were Learned Hand and me. Hand did that in 1912 when he ran on the Bull Moose Party line. He ran because he was a great friend and admirer of Roosevelt.

Q: That cost him a seat on the Supreme Court?

A: Yes, because Taft, of course, hated him. Because of Roosevelt's run, Taft lost the presidency to Wilson. But I ran for a different reason. In the course of working for the Tweed Commission and working as a reporter on New York State practice, and as a judge, I was appalled by the New York State system of justice. The breakdown of the system was partly due to the fact that no one had any interest in administration. The quality of the judges was generally poor, whether appointed by the politicians in Brooklyn or the upstate Republicans. I called Bill Van der Hennel and asked him to tell the senator that I'd take that appointment he had offered me to the Eastern District. I had turned down an appointment to the Southern District earlier. I wasn't interested in that.

Q: Why not?

A: I was happy at Columbia and with all the other things I was doing.

Q: What year was that?

A: About 1965. I later discovered in kind of a strange way why, in addition to wanting to find a good way of getting away from Albany, I accepted the Eastern District appointment. Would you like to know how I discovered why, subconsciously, I finally took the opening in Brooklyn?

Q: Absolutely.

A: The dean at Harvard offered me a professorship. I said I wasn't interested. I loved Columbia. I didn't want to leave. I had a beautiful office in that old building overlooking The Thinker in the courtyard. I was doing a lot of writing on procedure and evidence. But my father's headquarters was on Atlantic Avenue, just down the street from the courthouse. Dad used to take me to lunch from time to time and point out the judges eating nearby. And that's why I became a judge in the Eastern District.

Q: Was your dad alive when you were appointed to the court?

A: No. My mom was. He was, I think, killed by the stresses of the way he was brought up, in the Depression, anti-Semitism, lack of good medical care. It was a very rough world.

Q: In an article in the *Cardozo Law Review*, you say: "Trial judges have a wonderful window on our fascinating, ever-changing world and its vastly different people. The most vulnerable persons I have seen were often the most abused. As trial judges we see the people who need our help. The court should step in where the law allows us to protect them politically and socially. The cases and issues are not abstract. So where does this all leave me after more than three score years as a member of the legal community? Clinging to the tiller—respect for the law and my colleagues on the bench, and the bar and at the academies. Fervently hoping that the Supreme Court's present majority will modify its dependence on rigid theory in favor of a more generous attitude toward the needs of the people we all serve." ["The Role of Judges in a Government Of, By, and For the People: Notes For the Fifty-Eighth Cardozo Lecture," 30 *Cardozo L. Rev.* 1 (2008)].

A: Well, I meant a little more flexibility. I think the right-leaning majority is more abstract than it needs to be and less flexible. I am brought back to the New Deal Supreme Court. They're all very good people, very bright, and it's not partisan in a political Republican-Democrat sense, but in its attitude towards life and its vagaries and difficulties. I think the very nature of the process now, including the fact that all have come up on an escalator from law school, to cushy law jobs, to appellate judgeships. They're not amenable to changes in public news. You see it in connection with the sodomy cases and the cases which will be coming up on homosexuality and "don't ask, don't tell." The whole nature of the attitude of the public has changed. So, they respond to some extent, but I think that they're out of touch with the needs of a very large portion of our population and more in tune with the population they knew coming up. It's not that I would be a better Supreme Court justice. I'm not bright enough to do that job, particularly now. But I do have a sense of people's problems, having come up and seen all the people in trouble. Seeing what I saw on the docks and what I felt being a kind of a misfit as a student. I was transformed by luck into this position. I saw things about the way the real world operates on people that is somewhat lacking on the Supreme Court. People like Hugo Black and other non-appellate judges are needed, I think.

Q: You've expressed some provocative and controversial views about sentencing in child pornography cases. Could you talk about that a little?

A: First of all, I think that the minimum mandatory penalties generally are dreadful. When I began as a judge, every sentence involved a meeting of three of the judges and the chief probation officer, and we'd discuss the sentence. The sentences were much lighter.

Q: Across the board?

A: Yes. Even where some were high, we had a parole service that cut off the high sentences. People don't realize that the earlier sentences were much more equitable because of that cutoff. We could, within 90 days, change our sentence. So we could whip the person in public, and then we'd let them think about it and take care of the family, and within 90 days drop it to a more reasonable figure. So, effectively, although the sentencing system was attacked, we had a system that didn't work too badly, and it gave us about 100,000 people in prison when I came in—both state and federal. Guidelines were abstractions, theoretically sound and designed for openness, transparency, uniformity, et cetera, but based upon criteria and minimums that raised the punishments enormously until today. We have the highest percentage of people in the penitentiary in the world. Individuals committing sexual crimes are going to be supervised for the rest of their lives. So you have an enormous percentage of our population subject to control under the criminal law. There has been a huge, unthinking expansion of the federal criminal law to include all kinds of new crimes, including a vast extension of pornography through the Internet. We have about 150 federal minimums, including minimums for drugs, minimums for guns, and minimums on pornography. The child pornography cases I've seen very often involve people with a proclivity for viewing this stuff in private, but provide no danger to acting out in society.

Q: Are you talking about child pornography or all pornography?

A: All pornography. There was one Supreme Court justice who, one of his clerks told me, had a good pornography collection, adult pornography I assume. Adult pornography can't be dealt with criminally anymore because it's so prevalent in our society. But it's child pornography that has become the focus of this intent to punish. Now, some of it is justified, at least indirectly, because if you look at this stuff and you buy it through the Internet, you encourage the industry. But that effect is relatively minor compared to the harm it does to individual cases such as some of those that I've had and that other judges have had. I think almost all the judges I've spoken to on this court are very much upset by some of the prosecutions. People who have done no wrong and will do no wrong except to watch in private. And they have this mandatory five years—some cases more—with a lifetime of supervision. In some cases, they can't live in communities, they can't get jobs. I have a whole series of heartbreaking letters from wives, mothers, and others whose families are utterly destroyed. The cases are very easy to make because the FBI can trace them, and most of this pornography comes from countries abroad—Russia, Ukraine, Philippines. It bounces back and forth. You almost never get the people who are responsible for whatever commerce there is. But the prosecution can pick up anybody who's involved here and make an indestructible case. For anybody who wants to run for office, this is an easy way to make a reputation. Taking into account the risks and benefits, in many instances the punishment involved is simply non-justifiable. Particularly when I knew because I asked them, the jury would have wanted a defendant treated rather than incarcerated. So, like so many of these cases, you have to make subtle distinctions based upon the nature of the case and the kinds of situations you want to deal with, and the mandatory minimums don't permit it. Many of them have, I won't say scientific, but no statistical basis. They are based upon the frenzy of the moment. A lot of the drug cases are themselves over-prosecuted and over-sentenced. A lot of it is racially motivated.

Q: Is not the difference between the mandatory minimums in the child porn cases and mandatory minimums in the drug cases the result of different motivations?

A: No. Because you visualize your own children or grandchildren and you think, God, it could have happened to us, and there's a frenzy.

Q: Didn't the Second Circuit in one of your cases suggest that you had the discretion to tell the jury about the mandatory sentence in advance of the verdict?

A: Yes. But they made sure that I didn't do it. There I went back to Justice Scalia's theory about the original meaning of the jury. It's clear that in 1790 juries knew what the punishment would be, and if they didn't, the judge would tell them: If you find over five shillings, it's a mandatory death sentence. Under five shillings, it's not. And you have case after case where they're told that, and they'd come in just under five shillings. It was historically a valid argument. And up to 1890, the jury had enormous discretion. Now nobody knows what's going to happen, and you have a different kind of a jury than in colonial times. You have a professionalization of the law. What is now happening is that the control of criminal cases primarily by the jury, which is what we had when we began, was attenuated. First, it was expanded during the Jackson period. Then it was attenuated in order to prevent juries from hurting the railroads

and others, which was important to expand our commerce. And then about 1890, you had the Supreme Court saying flatly you can't tell the jury about punishment. And that is a continuing process. We have summary judgment. We have very strong jury charges. We have *Twombly* with respect to what you have to allege in order to go forward with your case. And now people asking why we don't have more jury trials. Well, there are a lot of things that happened: expense, discovery, et cetera. What's happened to the jury trial is that we, the judges, have murdered the jurors over a period of years by making them irrelevant and taking away whatever power we could because we wanted to control what the law was. We didn't want the wild card of the jury in there. So the process has made the jury somewhat irrelevant in what is a basic use of criminal law to control society.

Q: Do you find a drop-off in jury trials in criminal cases over the years?

A: Sure. That's partly due to another factor in this homicide of the jury.

Q: We are sliding into jury nullification here.

A: I think it has to be controlled. There are excessive verdicts and things like that, and there should be new trials to protect defendants against prejudice or miscarriage of justice. Within a large area, we should depend upon the jury to bring to bear what happens and is happening in our culture because judges, more than anybody else, are cut off. We're generally old. Our children are grown up so we don't see what's going on in their world. Our friends are rich and successful. We don't have to worry about income. We're out of touch with what's going on. What is appropriate in the workplace? Can you, as an employee or supervisor, put your arm around a woman and say how are your kids, how are you feeling? Squeeze her arm, squeeze a man's arm? Can you touch a child? Can you make an off-color joke and refer to something on TV? I don't know what's accepted anymore. You need a jury for that kind of stuff. So too with the changing attitudes with respect to homosexuality. We have to take account of all of that, and we judges are not in a position to do it. That's the great benefit of the traditional jury system.

Q: All the things you've just talked about are among the themes you touched on in the 2008 Cardozo Lecture, "The Role of Judges in a Government Of, By and For the People." How did you come up with that title and what did you mean by it?

A: I'd been reading about Lincoln. I'd gone to Gettysburg and spent three days there going over the battlefield. The first books I bought as a teenager were the four volume set of *The Prairie Years*; I still have it. I didn't have much money, but I bought that. I'd been fascinated by Lincoln.

Q: You draw a distinction between sympathy and empathy and the "struggl[e] to steer a straight course in the tumultuous narrow seas between the hard rock of unfeeling abstraction and the treacherous whirlpool of unrestrained empathy and compassion for those who come before me" [30 *Cardozo L. Rev.* at 232].

A: Well, the Bible and our sense of morality. But it's embodied in our oath of office, stating that you can't have sympathy for the rich or the poor. But you have to have some empathy in order to understand where people come from. Walk in their shoes, in a sense, to understand their feelings, what motivates them, what their aims are, in order to adjudicate. So there is this kind of subtle distinction as we apply it.

My family suffered because I'd spend so much time at the city bar library and the NAACP.

Q: You were on the *Brown v. Board of Education* team. How did that come to be and what was your role?

A: I did very little. I was then in my second year of teaching at Columbia. Walter Gellhorn was giving a course in which students would go out to various civil rights organizations such as the NAACP, the ACLU, and others, and they would write a short paper for discussion with Walter. Walter asked me to come with him to a conference being run by Thurgood Marshall at the city bar association. He said he thought I would find the case they were working on interesting. There was a little subgroup talking about some aspect of the brief. And I sat in, and Thurgood asked if I would take over the chairmanship of the group. I didn't know anything about any of this stuff. I'd never taken constitutional law, even after law school. So I took over the group in the usual way a chairman does, and after an hour or so, I called in a secretary (who later became Thurgood's second wife—she accused me of always dictating too fast). I dictated a consensus. Everybody agreed. And that's how I started. Poor Evie and the kids suffered, because I'd spend so much time at the city bar library, at the NAACP legal defense headquarters, and often overnight at the Algonquin Hotel, across from the city bar.

Q: What was your impression of Marshall?

A: Superb. Absolutely superb.

Q: You have been quoted as saying that the expansion of federal crimes has compromised the capacity of the federal courts to adjudicate the kinds of cases that traditionally have been the staple of federal practice. Is a partial solution to increase the number of federal judges?

A: That is an option with costs. When you expand a court substantially, you change the nature of the court system, and you risk making the job somewhat less interesting, which can have an influence on the quality of people who might otherwise aspire to be federal judges. So what I'm saying is expansion is often desirable but it has limitations.

Q: What is your view of having specialized judges in the federal system?

A: I agree with Judge Friendly's view that it is desirable that federal judges be generalists. It makes the job more exciting and gives the judge a breadth of vision and understanding that he or she wouldn't get in a system with a specialized judiciary.

Q: You conduct certain proceedings without your robe?

A: All of them.

Q: Have you always done it that way?

A: Pretty much from the outset. The only time I didn't do it was when my mother was alive. Her apartment overlooked the Statute of Liberty down the street, and the marshals would call up and tell my secretary, "tell the judge his mother is coming up." And I'd have to put my robe on.

Q: What prompted you not to wear a robe?

A: Because if I'm working across the table, particularly in a bench trial, the witness is here, you're talking to me so you're not talking at the top of your lungs trying to browbeat your opponent but we're discussing things, and what's the point of my having a robe on? When there's a jury, I don't use the robe because very often I'll walk up and sit in the jury box to see what the jury is seeing. I've never used a gavel once. I'll sometimes hold my finger up to signal quiet. What do I need a gavel for? Also, I don't allow people to come in in shackles or anything like that. It doesn't affect security. I just have the marshals sit behind the defendant.

Q: Is there any other judge you know of who does not wear a robe?

A: There was the famous Judge Johnson of Alabama. And they didn't use robes in the Massachusetts courts until about the turn of the twentieth century. The robe was all part of the professional elevation of judges.

Q: How has legal practice changed most in the 60-some years since you came to the bar?

A: I think it's probably more venal than it used to be. People don't have any sense of proportion anymore.

Q: You're not a fan of sanctions in the form of attorneys' fees are you?

A: No. It creates all kinds of ancillary litigation, which is more trouble than it's worth. Rule 11 was a mistake, in my judgment. It seems to me unnecessary as a tool to help with the control of a case. The rule, itself, is based on the notion that there is abuse by the lawyers, which, in my view, doesn't exist on any substantial basis.

Q: So lawyers here know not to make those motions before you?

A: I haven't had a motion like that in 25 years. What's the point of it?

Q: How do you work with your clerks in terms of drafting the opinion?

A: Some things I write out myself in longhand or dictate parts of. Sometimes I write a few introductory pages or an outline for the clerk. My clerks and I exchange drafts back and forth which will be expanded, revised, expanded, revised, expanded. The district court has a lot more flexibility than the court of appeals. I can devote six months or eight months to one case. As the drafts get exchanged, we may see new issues and may ask for further briefing on an issue.

Q: Are you ever "overruled" by your law clerks?

A: Sure. Where that doesn't ever happen, you can make mistakes. You've got to be particularly careful if you think you know the subject. Herbert Wexler once told me that the cases Justice Stone's clerks had the most difficulty with were the ones Stone had taught at Columbia. So I have to be very careful when I'm dealing with areas I'm perhaps most familiar with. I have to pick up the rule, look at it, and not just trust my memory.

Q: Thank you, Judge. It's been a real privilege for us. ■

iWitness

THE ADMISSIBILITY OF SOCIAL MEDIA EVIDENCE

JOSH GILLILAND

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A lawyer recently expressed to me serious doubts about using evidence from social media websites. According to him, electronically stored information (ESI) can never be trusted without the proffering party proving each step of creation to guarantee its authenticity. But that would be the equivalent of requiring a team of experts to authenticate a hard-copy document. You'd start with a lumberjack to explain how a tree was cut down. An expert on how trees are made into paper would follow. Another expert would detail how ink works, and so on and so on.

The law simply does not require such a metaphysical discussion of existence for social media information to be admissible. It is treated no differently than any other evidence. For admission in court, a party must: show that the ESI is relevant; authenticate it; address issues of unfair prejudice and probative value; address hearsay (show an exception or non-hearsay use of the ESI); and demonstrate that the ESI conforms to the original writing (the best evidence rule).

Federal Rule of Evidence 401 states that evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and if the fact is of consequence in determining the action.

There has been a mad dash by some attorneys to introduce social media evidence against an opposing party at trial. Such evidence, however, must first be deemed relevant to the litigation, either in support of the plaintiff's case or the defense's case. In a case involving emotional distress, photographs posted on a social media site were relevant to both. In *Quagliarello v. Dewees*, 2011 U.S. Dist. LEXIS 86914, at *9–10 (E.D. Pa. Aug. 4, 2011), the court held that the defendants could show up to three pictures of the plaintiff from a social media website if she testified on direct examination regarding her emotional distress after the incident alleged in the lawsuit. The plaintiff then would have the opportunity to rebut the photographic evidence on redirect by introducing up to three additional social media photographs from the same time period.

Authenticating Evidence

But what about authentication? "[A] piece of paper or electronically stored information, without any indication of its creator, source, or custodian may not be authenticated under Federal Rule of Evidence 901." *United States v. O'Keefe*, 537 F. Supp. 2d 14, 20 (D.D.C. 2008).

The authentication of electronically stored information involves the following questions, at a minimum:

- How was the evidence collected?
- Where was the evidence collected?
- What types of evidence were collected?
- Who handled the evidence before it was collected?
- When was the evidence collected?

Michael R. Arkfeld, *Arkfeld on Electronic Discovery and Evidence* § 8.11(C), at 8–63 (3d ed.).

That sounds easy enough, but how do these questions apply to social media? A criminal case provides a helpful example. In *People v. Valdez*, 201 Cal. App. 4th 1429, 1434–37 (Cal. App. 4th Dist. 2011) (section on authentication not published), a police expert printed copies of the defendant's profile on a social media website that contained photographs of and biographical information about the defendant. The expert went on to explain that although the profile is accessible to the public, only the individual who created the profile, or one who has access to that person's login ID and password, has the ability to upload or manipulate content on the page. As a result, the court held that a reasonable

trier of fact could conclude from the information posted—including personal photographs, communications, and other details—that the social media profile belonged to the defendant.

Blogs are not self-authenticating. Precedent holds that the authentication of Internet printouts requires a witness declaration in combination with a document's circumstantial indicia of authenticity (i.e., the date and web address that appear on them) to support a reasonable juror in the belief that the documents are what the declarant says they are. Without either, authentication fails. *Kennerty v. Carrsow-Franklin (In re Carrsow-Franklin)*, 456 B.R. 753, 756–57 (Bankr. D.S.C. 2011).

Hearsay Rules

To use the hearsay rules to exclude, or the exceptions to admit, social media, lawyers need only apply the rules and exceptions in the same way they apply them to other evidence. Consider *People v. Oyerinde*, 2011 Mich. App. LEXIS 2104, at *26–27 (Mich. Ct. App. Nov. 29, 2011). In this first-degree murder and carjacking case, the court held that the defendant's Facebook messages were not hearsay, but rather a party admission, because he sent them to another person. Just because the evidence was available on social media does not mean the test for a party admission changed. The rule states that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is the party's own statement, in either an individual or representative capacity." The judge applied the test as it would be applied to any other out-of-court statement and determined that such messages were not hearsay. The same court also admitted Facebook messages sent to the defendant and another individual under the "state of mind" exception.

Also instructive is *Miles v. Raycom Media, Inc.*, 2010 U.S. Dist. LEXIS 122712, at *7–9, n.1 (S.D. Miss. Nov. 18, 2010), which held that a Facebook page containing unsworn statements made by third parties that were offered to prove the truth of the matter asserted constituted inadmissible hearsay under Federal Rule of Evidence 801.

Social media is a new area of evidence to consider, but lawyers will soon use the rules to their advantage.

So, although social media is a new area of evidence to consider, I imagine lawyers will soon use the rules to their advantage and argue that individuals "checking in" to locations on sites such as Foursquare are not hearsay but "present sense impressions," and that tweets are admissible under the "state of mind" exception.

There is great risk that social media can be used purely for prejudicial, and arguably irrelevant, reasons in litigation. So, just like other evidence, its probative value must be weighed against its potential prejudice. In *Rice v. Reliastar Life Insurance Co.*, 2011 U.S. Dist. LEXIS 32831 (M.D. La. Mar. 29, 2011), the court did just that. In this civil suit concerning a police shooting, the plaintiff included in the complaint a screen shot of the officer's social media page. The image, captured a week after the shooting, included a 1960s photo of Clint Eastwood in old west gunslinger attire with the caption, "How I feel most of the time!!!!" The court struck paragraphs of the complaint related to the screen shot and the image itself, stating that they were "merely argumentative and prejudicial" and did not "add to the substantive allegations of the complaint."

Similar to the issue of prejudice is the attempted use of social media to demonstrate bad character. Simply put, photographs from social networking sites cannot be admitted only to prove bad character. *Quagliarello v. Dewees*, 2011 U.S. Dist. LEXIS 86914, at *7–8 (E.D. Pa. Aug. 4, 2011).

Many attorneys rightfully ask what is the original writing of a status message? While technology is available to capture social media at a forensic level, most attorneys will likely obtain mirror images of hard drives and screen shots of web pages as evidence. Such images and screen shots can be printed. Therefore, Federal Rule of Evidence 1003 is likely the most useful tool in admitting such ESI as a duplicate. *United States v. Nobrega*, 2011 U.S. Dist. LEXIS 55271, at *20–21 (D. Me. May 23, 2011) (holding that a printout of an instant message chat was admissible as a duplicate under Rule 1003). The rule states:

> A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

The Rules of Evidence do not update like an app whenever a new smartphone or electronic device is released. For that reason, courts apply the evidence rules similarly to all evidence, including social media. Although it might seem unnerving to use the *Hillmon* doctrine on a tweet, apply the rules to your advantage—you already know them. ■

On the Papers

WHO DONE IT? CONTROLLING AGENCY IN LEGAL WRITING—PART I

GEORGE D. GOPEN

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When Agatha Christie writes an engaging mystery, the question of agency is so compelling that we refer to the book as a "Who Done It?". Where agency is concerned, the aim of a legal brief should be quite the opposite—not to mystify, but rather to clarify. It is probably obvious that the macro-issues of who was responsible for doing the major actions in a case must be attended to with energy and care. It may be far less clear how important the question of agency is in every clause of every sentence. This article begins a discussion of how to control a reader's perception—or non-perception—of agency at the micro-level of clauses and sentences.

The agent of a clause or sentence is quite simply the person or thing that performs the action. If the sentence is written in the active mode, the agent and the grammatical subject are one and the same; if it is written in the passive mode, the agent may be elsewhere or missing altogether. Most often, but not always, writers need to let the reader know who is doing what. In other words, writers have to name the agent explicitly and, even more important, they have to place that agent in the right location in the sentence.

In a previous article (Whose Story Is This Sentence? Litigation 38:3, Spring 2012, at 17), I have argued that readers of English perceive the grammatical subject of a sentence as the agent that performs the action, and they perceive the action as being whatever the verb announces it to be. While this may not be the case 100 percent of the time for 100 percent of readers, it is, I argue, the default value expectation, happening more than 90 percent of the time. If that is the case, you, as a writer, are identifying the agent of the action every time you use the active voice: The agent is the grammatical subject of your sentence. For your readers to understand your thought, that subject-verb combination must represent the agent-action you are trying to convey.

This poses a real problem for writers, because they tend to know in their own minds quite clearly who did what. It seems obvious to them that a reader will perceive the proper agency as long as a sentence contains all the correct information. However—repeating something I have said before in this series of articles—it is insufficient to produce a sentence that is merely capable of being interpreted the way you wish. You must structure the sentence so that it will be highly likely to lead most readers to perceive your thought. To do that, you have to know what readers expect to find where. You have to know what I call "reader expectations."

When you use the passive, you are in danger of having the identification of agency become ambiguous. The passive is not bad; it is only dangerous. (I will later devote a whole article to the good uses of the passive.) For now, we can define the passive as a mode through which the object of an action can become the grammatical subject of a sentence that describes it.

1a. Jack loves Jill.
1b. Jill is loved by Jack.
1c. Jill is loved.

In (1a), Jack is the agent—the lover; and Jill is the object of that action of loving—the lovee. When that which might have been the grammatical object of a verb becomes the subject of that sentence, the agent can remain present through the use of the word "by"—as in (1b); or the agent can disappear altogether—as in (1c).

Look what can happen when writers are so aware of agency that they lose sight of what readers will perceive. Consider this example:

2a. A study was performed on the causes behind the decrease in the identification of child abuse among emergency room service by the social services staff.

I have used this example hundreds of

times in legal writing workshops. I ask the participants "who is the agent?" and "what action is the agent doing?" Their response is invariably the same. Take a moment before reading further to answer those questions yourself.

There is always general agreement that the agent here is the Social Services staff. That is correct. There is also overwhelming agreement (usually more than 95 percent) that the action done by that staff was either "to perform a study" or "to study" something: The social services staff studied why hospital staff were not identifying child abuse in the ER.

That is perfectly possible. It is also perfectly probable. But equally possible, and equally probable, is that someone from the outside studied why the social services staff were decreasing their identification of child abuse in the ER. And equally possible—but we hope less probable—would be that someone from the outside was studying why someone from the inside was decreasing in identifying the fact that social services staff were abusing children.

This ambiguity can be neatly resolved by making the social services staff the grammatical subject of whatever verb would express the action they actually performed:

> 2b. The social services staff studied the causes. . . . [or]
> 2c. X [from outside] studied why the social services staff were decreasing their identification of . . . [or]
> 2d. X [from outside] studied why Y [from inside] were not noticing that the social services staff were abusing children. . . .

If all three of these are equally possible, and two of the three are equally probable, why then do 95 percent confidently vote for only the first of the three interpretations? I suggest this is the case because in English we read from left to right and through time. People begin trying to answer my question—"What did the agent do?"—by starting at the beginning of the sentence. Immediately they encounter "A study was performed." Because that constitutes a reasonable answer to my question, they tend to cease searching.

I believe this signals an important general tendency we have as readers: We tend to cease any act of interpretation as soon as we are allowed to do so. The moment a sentence makes some sense, we presume that is the sense it was intended to make. We are often wrong to assume that whatever interpretation we come upon first is the one the writer intended; but we are safer in making that assumption when we are reading the prose of an excellent writer. Alas, there are precious few excellent writers among us these days.

Excellent writers control when agency should be made clear and when it should be repressed altogether. There are good, logical, ethical, and sensitive reasons for not stating agency:

- No one knows or cares who did the action.
- The identity of the agent is irrelevant and would be a distraction if mentioned.
- Everyone knows who did it, even without your telling them.
- To mention who did the action would be unkind, insensitive, impolitic, or downright cruel.

Most of the time, however, your reader will do well to know precisely and without much effort who is doing what.

Sometimes agency is not the issue of the moment and would act as a distraction if suggested. This is often the case when the agent is not known:

> 3a. The window was broken.
> 3b. Somebody broke the window.

If the broken state of the window is the issue to be considered, (3a) is superior to (3b). Articulating the agency of "somebody" raises the mystery of who that somebody was: "Somebody—I don't know who, but will they ever hear from me when I find out—broke the window." If that mystery is a distraction from the importance of the broken state of the window, the agency should be suppressed, as it is in (3a).

In English, we have two main ways of suppressing agency:

> (a) We can articulate the action not as a verb but as a noun. Then no one has to be around to do that action: It just happens.

- Then X and Y discussed the issue.
- Then discussion ensued.

> (b) Alternatively, we can substitute the passive for the active, which will then allow for the jettisoning of the agent:

- X broke the window.
- The window was broken by Chris.
- The window was broken.

(There is a third possibility, known as the "ergative" mode, in which the action is described by its effect instead of by its being done: "The door opened." This occurs so rarely that we need not further attend to it here.)

Whenever you need to suppress agency, I urge you to use the passive. (This is only one of a number of excellent uses for the passive.) That will allow you to keep the action articulated not by a noun but rather by a verb. Readers will far more easily perceive what the action is if, when they go to the verb to find it, it is still there.

In the next article in this series, I will explore the damage that can occur to the identification of agency when we articulate action in nouns instead of verbs. I will also consider the ethical questions that arise when agency is suppressed by any means: "Mistakes were made." ■

Sun Tzu
and the Art of Trial

BY WILLIAM N. SHEPHERD AND THOMAS D. SMITH

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The first trial manual was written thousands of years ago by a military strategist responsible for training his king's troops during the Warring States period in sixth century B.C. China. Although Sun Tzu wrote *The Art of War* as a manual for training warriors, its lessons and principles apply equally to preparing for the conflict of trial in the adversary system. The good deed at trial is receiving the asked-for verdict. The good deed for Sun Tzu was preparing for war so that victory was assured or, better yet, war was averted.

Sun Tzu's principles have been taught in military academies around the world for decades and more recently have seen themselves applied to the fields of business and sales. But the lessons of defeating an adversary are equally applicable to the "us versus them" and "good versus evil" confrontations that make up modern litigation. A good trial plan must be well conceived, properly investigated, strategically charged, well rehearsed, and precisely executed. The veteran trial lawyer is prepared for eventualities and is able to adapt nimbly as his adversary changes the conditions. If you prepare your case for trial as a wise general prepares troops for battle, you can have the success Sun Tzu delivered his trained commander.

Some of Sun Tzu's principles follow.

"If you know the enemy and you know yourself, you need not fear the result of a hundred battles." You have to know your case to plan your trial effectively. If you have not taken the steps to evaluate your case properly, you will, in Sun Tzu's words, "succumb in every battle." As a commander would routinely evaluate his troops, you must assess the claims and simultaneously assess the evidence. Fact evidence must be gathered just as a commander would gather munitions. Witnesses must be prepared as troops would be drilled.

A thorough vetting of your claims and evaluation of evidence will prepare you for the conflict ahead. As a threshold matter, you must, of course, have done the legal research to support your work and must have examined your case from all sides and without a bias for your position.

"In war, then, let your great object be victory, not lengthy campaigns." When you enter into the foray of trial, you must define your goal or goals at the outset. While some use the courts to hinder a competitor's business progress or challenge a competitive advantage, a true trial lawyer begins his or her planning with an eye toward jury deliberations. The ultimate goal of the practitioner steeped in the adversary trial system, after all, is the absolute resolution of claims with a favorable verdict.

Siege of an enemy teaches you nothing about the enemy's skill and serves to dull your own troops. A long, protracted discovery process leading to trial likewise offers little value to the plaintiff, who must be ready to engage from the filing of the ini-

tial complaint, or the prosecutor upon indictment. Delay becomes the strategy of defense.

For a defense lawyer, however, delay is a tactic that can reap some very real benefits. If resources permit, delaying attack on the other party may create opportunity for defense victory. A delay fogs witness memory and provides a greater chance for miscalculation and missteps. Taken to the extreme, however, this tactic will also result in a challenge to morale, reputation, and the willingness to continue the litigation fight. It is not a tactic that should form the basis of your overall strategy; instead, it should be employed in discrete situations where its benefits are tangible.

"Military tactics are like unto water; for water in its natural course runs away from high places and hastens downwards. So in war the way is to avoid what is strong and to strike at what is weak." The authors believe this has come down to us from 3,000 years to mean "Keep it simple, stupid." This familiar notion reminds us of the one goal or one objective that is the sine qua non of all legal matters: What is the one thing we want ultimately to achieve? Civil War historians tell us that in the early morning of July 3, 1861, at Gettysburg, Pennsylvania, after two days of bloody battle, General Lee and his corps commanders debated whether an attack on the Union center would be advisable. This had been Lee's conviction, but he was becoming irritated with the pushback of his commanders. Finally, Lee, tired and impatient, pointed to the center of the Union line and said, "Attack those people." Union General U.S. Grant was of a similar mind, for upon investing the Confederate positions at Fort Donelson, Tennessee, he was asked by the opposing general about his terms of surrender. Grant answered simply, "No other terms than unconditional and immediate surrender. I propose to move immediately upon your works." Always keep in mind the one outcome-determinative goal you want and need to accomplish.

"Bring war material with you from home, but forage on the enemy." When you know your case and your opponent's case, you will see opportunities to forage. The most clear-cut of these opportunities comes in the criminal context, where an active forfeiture practice goes hand in hand with criminal prosecution. The government agency that does not strengthen public safety by decreasing criminal resources is missing an important strategic advantage it owes the public. More specifically, a seizure of critical assets that may be used by the government in future investigations against the same criminal enterprise or its rivals is at the heart of the admonition that a "cart of your enemy's goods is worth twenty of your own."

In the civil context, a court's order freezing assets is a powerful moment that shifts momentum. The amount itself may not be as significant as the early court ruling in favor of your case and prejudgment seizure.

SUA SPONTE

A Judge Comments

HON. M. MARGARET MCKEOWN

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Whatever Sun Tzu may have been thinking in the sixth century B.C., he surely was not considering legal ethics and professionalism. And for good reason—the battlefields of war do not parallel the front lines of litigation. War is armed conflict; litigation is civilized dispute resolution, or at least it should be. But endless discovery disputes, years of Rambo tactics, and a blizzard of filings may cause some to disagree. Indeed, the war analogy has spawned "war rooms" for trial preparation, the divorce battle in the movie *The War of the Roses*, and briefs spouting "warring" legal arguments.

The authors of the article "Sun Tzu and the Art of Trial" persuasively demonstrate that a strategic plan is essential in both trial and warfare. To be sure, war is cloaked in a legal regime under various Geneva and Hague conventions. But these

(Continued on page 27)

Illustration by Tim Foley

The corollary to the forage instruction is that when the opportunity arises, you must seek additional fronts on which to challenge your opponent. ***"If the enemy is taking his ease, harass him; if quietly encamped, force him to move. Appear at points which the enemy must hasten to defend; march swiftly to places where you are not expected."*** A parallel civil investigation is a troubling and complicated matter for a criminal defendant whose counsel is not versed in both fields. Likewise, copycat suits or suits filed in multiple venues challenge the civil defendant to split his or her resources and remain consistent in his or her defense. But seasoned counsel on the attacking side are careful not to allow hubris to extend beyond available resources or beyond the theory of the case solely for the purpose of maximizing the opponent's challenge, lest such efforts prove to be their undoing.

Trial lawyers must pore over the maps of their battlefield to protect against weaknesses and exploit advantages.

Sun Tzu tells us the clever general ***"avoids an army when its spirit is keen, but attacks it when it is sluggish and inclined to return to camp. It is a military axiom not to advance uphill against an enemy, nor to oppose him when he comes downhill—camp in high places, facing the sun."*** To the prosecutor or plaintiff's counsel, these principles offer great wisdom about the selection of "terrain," made up of the nooks and crannies of precedent, the steep incline of the jury pool, and the soft marsh of state or federal rules.

Starting at the beginning, the selection of venue is perhaps the most critical decision you make in filing your case. If there is not a choice, then you fight on the ground you are given. But if there is a choice to be had, you must make it wisely. As a commander would pore over the maps of his battlefield to protect against weaknesses and exploit advantages, so, too, must the trial lawyer. This is not a decision to be rushed or dictated by the client. A past practice of venue selection, moreover, does not dictate an automatic renewal of that strategy every time you are charged with a new case to command. Think through the discovery and the trial as you choose your terrain. Each phase may carry an advantage or disadvantage, but don't rush to embrace an initial decision. An innovative choice at this stage may make all the difference as the battle progresses.

"The opportunity of defeating the enemy is provided by the enemy himself." Great military victories have come at the expense of adversaries who made a costly misstep. Anyone who has seen the movie *Patton* remembers U.S. Army General George Patton saying, "Rommel, you magnificent bastard, I have read your book." *Infanterie Greift An* (published in English translation as *Infantry Attacks*) was based on Erwin Rommel's experiences as a German captain of infantry in World War I and is a classic tutorial of infantry tactics that was required reading at Fort Benning's U.S. Army Infantry School at a time when instructors and students included George Patton, Dwight Eisenhower, Matthew Ridgway, Omar Bradley, Joseph Stillwell, and George C. Marshall. In a sense, then, Rommel was the victim of his own (publishing) success.

"Use of spies—'divine manipulation of the threads'—is the sovereign's most precious faculty." Sun Tzu sees wise sovereigns and good generals enabled to greatness by knowledge of the enemy's dispositions that can only be obtained from others familiar with the subject. These others are spies. Sun Tzu's five classes of spies able to aid the sovereign are local spies, inward spies, converted spies, doomed spies, and surviving spies. It is in the interpretation of the gathered intelligence from these classes of spies that the sovereign and his general are able to best plan their strategy.

Every criminal prosecution should engage spies. Undercover agents, cooperating informants, and cooperating witnesses provide a level of insight into operations that cannot be garnered merely from a historic recitation of facts. Wire intercept orders that record conspirators' conversations and emails and texts are invaluable sources of information that secure conviction of the guilty and can serve to exonerate the falsely accused. But an over-reliance on spies ignores Sun Tzu's admonition that it is in the "divine manipulation" of the spies that the truth is uncovered.

If the prosecution can make use of spies, so too must the defense. Obviously there are legal limitations on how this can be accomplished. The temporal challenges of post-arrest investigation are formidable, but the overarching concept of gathering intelligence about your opponent is true in any context.

The civil context lends itself to the use of spies as well. What cannot be underestimated, since the time of Sun Tzu, is how our emails, voice mails, search histories, GPS locations, text messages, and electronic calendars all turn us into unwitting spies on ourselves. Government public records are a treasure trove of spied information there for the avid investigator. Obtaining court records, no longer an inordinate challenge now that they are stored online, has become routine in a full investigation of

the facts, as you gather your army to prepare for the coming courtroom battle.

"He who can modify his tactics in relation to his opponent and thereby succeed in winning, may be called a heaven-born captain." Of course, the best stratagems are subject to change and improvement as battle develops. And all who practice law know even the best-laid plan generally does not survive the first bullet fired.

Modification of tactics in the middle of a court case is not the best way to build your client's confidence. A useful example of the challenge faced when changing tactics, and the moral courage needed to do so, can be found in the early stages of World War II. Even before France fell to the Germans, British Prime Minister Winston Churchill was concerned that the Germans would seize the French fleet and critically damage the British effort to control the seas. He made numerous flights to France to determine what the British could do assist the French, and he sent infantry, tanks, and fighter squadrons to their aid in exchange for the promise that if the Germans defeated it, France would turn over its naval fleet to the British before the Germans could seize it.

As negotiations between these allies continued, the French fleet moved to the port of Mers el Kebir in French Algeria. In July 1940, it became clear the French efforts were doomed to failure. The German-sponsored Vichy French government would in the end seize the French fleet in Algeria for the German fleet. Churchill had spent months and precious British forces and, at the end, had nothing. But Churchill was not about to give up. Then and there, he decided to adapt his plan to his opponent's maneuver.

With great secrecy, Churchill ordered the British Navy attack to destroy the French Navy at its port in Algeria. This new course of action was an abrupt and extreme change in plans, but this ability to apply flexible thinking to a situation was the key to Churchill's success in this instance (and more generally). On July 3, 1940, the British fleet, in a surprise attack, destroyed the French fleet in the Algerian port with the attendant loss of 1,500 French sailors. The British, in stark contrast, suffered no causalities. The decision must have been a difficult one, but as Churchill saw the battlefield changing right before him, he knew he had to change his tactics radically to meet his objective and protect Britain.

Although the power of military strategy is a useful tool in the practice of law, the two do not compare in severity or sacrifice. But adversarial conflicts do have certain universals. Those who understand the dynamics will be well served. Sun Tzu was an artful tactician, and his skills can be used to help us all—whether in battle or trial. ■

SUA SPONTE

A Judge Comments

(Continued from page 25)

rules do not elevate ethical conduct over victory. The regime governing lawyers—the rules of professional conduct and extensive discovery rules—does exactly that. Any trial plan should be supported by three principles: fair disclosure, professionalism, and candor to the court.

Sun Tzu's advice that "all warfare is based on deception," designed to win at all costs, is anathema to the courts. Unfortunately, discovery disputes are a fertile battleground. These disputes are the bane of a trial judge's existence and fare no better on appeal. Any trial strategy must account for the consequences of bloody discovery battles and their long-term implications. Deceit, hiding the ball, and unnecessary delay are tantamount to shooting yourself in the foot. Failure to curb these practices leads to another Sun Tzu truism: "The opportunity of defeating the enemy is provided by the enemy himself." Diplomatic discovery is not an oxymoron. Sincere professionalism brings along respect from the court and may even pay off with an amicable resolution of the litigation.

Absent a negotiated resolution, there is a postscript for fans of Sun Tzu. Sun Tzu was well aware of the hazard of winning the battle but losing the war. So, too, should trial lawyers treat the trial as a precursor to appeal. The result of winning at trial but losing on appeal is, no matter how you put it, losing. The specter of appellate proceedings should serve as a shadow consideration throughout trial, and special thought should be given to these common pitfalls:

- endeavoring to win every mini-skirmish during trial, critical or not, only to undermine the judgment on appeal;
- pushing for the admission of unnecessary evidence that may unravel on appeal;
- failing to make clear objections or leaving murky continuing objections in limbo by failing to tie up loose ends;
- ignoring motions in limine that are never ruled on;
- holding off-the-record conferences that are unreviewable;
- pushing for legal rulings on close calls that may net a reversal;
- offering surprise evidence without justification;
- acquiescing in confusing jury instructions or verdict forms; and
- fudging facts and not offering complete candor to the court.

Legal conflict resolution cannot live by trial strategy alone, nor solely by principles of war; rather, legal conflicts by their very nature require us to invoke, and ultimately rely on, the rules, principles, and higher values that we share as legal professionals. ■

No Good Deed Goes Unrewarded:

Why Professional Courtesy Advances Your Client's Cause

ANDRA BARMASH GREENE

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I may be the only attorney who hears the words "professional courtesy" and immediately thinks of my mother's funeral. The reason is that back in 1998, I had a case in which my opposing counsel refused to agree to continue a motion hearing so I could attend the funeral in Chicago, 1,700 miles away. It seems unbelievable, but it happened. To make matters worse, the motion the lawyer refused to continue was a motion for attorney fees for winning an anti-SLAAP motion that dismissed the case, hardly an emergency. But his approach to the litigation was take no prisoners, extend no courtesies—no exceptions. As a consequence, I went straight from the cemetery after the burial to Kinko's to sign and fax a declaration supporting our ex parte request for a continuance that my associate had to argue back in California. (My father could never understand that.) Not surprisingly, the court granted our request for a continuance.

After that episode, the tide of the litigation turned decidedly against my opponents, who up to that point had won everything. The court of appeals reversed the dismissal, ruling that our client's case could proceed, and when the case returned to the trial court, our client was awarded its attorney fees. The trial judge said that she never wanted to have another case in which a lawyer was so unprofessional that he would not agree to a continuance due to a death. With the handwriting on the wall, our client received a large settlement. While the case's merits had a great deal to do with the favorable outcome, I will always believe that my opponent's utter lack of professional courtesy was a significant contributing factor.

This unfortunate episode remains indelibly imprinted on my mind. I have come to believe that engaging in professional courtesy makes sense, for many reasons. I no longer think, "No good deed goes unpunished." To the contrary, in my view, "No good deed goes unrewarded." Extending professional courtesies is a smart litigation strategy. It will advance your client's cause and conserve the client's resources. Hence, I make it a point to educate clients on why professional courtesy is a sound litigation strategy, one worth employing.

What is "professional courtesy"? It applies to myriad behaviors, including being civil in communications, granting appropriate continuances when necessary, cooperating in discovery to the extent possible, admitting what you have to admit, and being truthful in papers filed with the court. Professional courtesy does not equal weakness. To the contrary, it is a sensible approach to litigation. As I explain to my clients, extending professional courtesies makes litigation more manageable, avoids "tit for tat" disputes, pleases the court, is often required by local court rules, helps everyone's reputation, and, more often than not, saves expenses for the client.

I also make clear what I am not talking about. Professional

courtesy is not about simply rolling over and doing whatever your adversary wants. Lawyers must advocate zealously for their clients—that is our duty. If your opponent does something and you can take advantage of it ethically, by all means you can and should. Professional courtesy does not mean being soft or letting people off the hook when it may hurt your client's position. This point is important to share with clients who like fire-breathing lawyers—that being professional does not mean you are weak.

I have been practicing law for more than three decades. Many people who have been practicing law much longer decry the demise of civility among members of the bar. I do not know when that era of civility reigned, but I have not seen it in my career. Instead, I have seen or experienced a great deal of bad behavior on the part of litigators. (And I am sure that there are cases in which my opponents would say the same about me.) The genesis of such conduct comes from a variety of sources: a client's directive, the desire to appear tough, concern about being taken advantage of, or a belief that such a "tough guy" strategy will force the other side into submission. These motivations are misguided. In the long run, bad behavior is harmful to your client and to the litigation process.

The following are areas where issues of professional courtesy (or lack thereof) frequently arise: communications with adverse counsel, extensions, discovery, and court filings.

Communications Between Counsel

Lawyers are often rude to each other in correspondence or court filings. The proliferation of email communications has only made it worse. Despite short-lived ego gratification, I do not believe endless nasty correspondence is the proper way to communicate with opposing counsel.

I continue to be surprised at what people put in writing. Don't they know that what they write may end up as an exhibit in a court filing that will not cover them in glory? Two of my favorite pieces of unprofessional correspondence that were sent to me are a copy of someone's middle finger and a letter I sent to opposing counsel returned to me torn into about 300 pieces.

I confess that I have succumbed to a client's desire to include language in letters that is, to put it mildly, not the language I would have chosen. When I sign such a letter, of course, I own it. I almost lost a client as a result of doing this. Here is what happened: I represented a company in contentious litigation over patent licensing. The general counsel was very aggressive and typically rewrote the letters I proposed sending to opposing counsel to be more accusatory and colorful. I signed and sent out the revised letters. Ultimately, my client was acquired by a large Fortune 500 company and a new in-house counsel took over the matter. When we met for the first time, she told me candidly that she had read the case file and she did not believe in

Illustration by Jon Krause

sending the kind of letters I had been sending to our adversaries. She said that if that was my style, it might be better for another firm to represent the company going forward. I told her that, of course, the letters were mine—I had signed them—but the reason for the tone was the direction I had received from the previous general counsel. I told her that I was fully comfortable toning down the language and that I hoped that she would give me a chance to work with her. Luckily, she did, and I went on to represent the new company for many years. But it was a sobering reminder of the collateral consequences of uncivil communications with opposing counsel. I now explain to clients why I do not believe sending nastygrams is worth the price they will pay.

Another unfortunately common practice is endless letter writing battles, which often degenerate into name calling and ad hominem attacks. Clients can end up spending a great deal of money on these letters, which do little to advance the litigation in any meaningful way. These letter campaigns bad enough, but some lawyers go further and try to rewrite history or create fiction in their correspondence. Such tactics have to be addressed, but that is best when done without sinking to the same low level in response. When I find myself in a letter-writing battle that is devolving into a "did not, did too," I typically send a letter stating that it is not a productive use of my time or my client's resources to dispute all the inaccuracies in the letter, that I will not be responding further, and that my lack of response should not be construed as any sort of agreement with or admission to the assertions in the letter. The poison pen letters typically stop after that, along with the charges to the client for each piece of correspondence.

Emails live forever. They need to be written with as much care as a letter. They are just as likely to be used as exhibits to filings as are letters. Thus, flip or rude remarks should be excised, even if they feel good at the time. I recall an opposing counsel who was especially obnoxious in email correspondence. He also had issues with women lawyers, which seemed amplified in emails. During a discovery dispute, he was fond of writing to the "ladies" (sprinkling the word "ladies" throughout his emails) and saying that we were becoming "hysterical" and needed to "calm down and control our emotions." Invariably, we ended up in court. We made sure to attach the "ladies" emails and quote liberally from them in our briefs. Our female judge was particularly irritated when she read the emails. I will never know whether that is why we won the discovery disputes we had, but my opponent did not do himself any favors with such language.

I wish I could create software or an app that would review an email I'm drafting and then respond with "Really? You actually want to send this?" It would be helpful. If I have written a harsh email, I make a practice of waiting before I send it. More often than not, I tone it down or delete it when I have cooled off. I tell my clients about this practice and explain how emails sent in anger rarely accomplish anything positive for a case. Several have told me they have now incorporated this into their own practices and wait before sending an email created when they are mad.

Extensions and Continuances

I know clients who direct their lawyers never to give extensions or agree to continuances. I always tell my clients that such a position at the outset of a case is dangerous, because there could come a time when we may need an extension or continuance. Rarely have I had a case in which the client did not need some extension. Unless one has a crystal ball, it is impossible to predict how events will unfold in the course of litigation. Therefore, it is wise to give reasonable extensions when doing so does not harm the client's position. (However, when seeking a temporary restraining order, for example, granting an extension is generally not possible.)

Even after my experience with my mother's funeral, I remain surprised by how many lawyers refuse to give routine extensions or extensions necessitated by extenuating circumstances. If the request is reasonable and the court is likely to go along with it, you will have burned a bridge by opposing it. For example, I recall a lawyer who opposed continuing the start of a trial by a few days so that his opposing counsel, an observant Jew, could attend services during the High Holy Days. When presented with the motion for a brief continuance for religious reasons, the court granted it and expressed concern that the matter was even contested.

Last year, I was scheduled for a continued arbitration and a jury trial simultaneously. On top of that, I broke my foot and could not put any weight on it. I was in a full cast and could only maneuver using a scooter. I asked that the arbitration's continued session (its third session at that) occur after my jury trial concluded and that there be some time in between the two actions so that I could deal with my injury. Not only did our arbitration adversaries refuse to agree, but in opposing the request, they accused me of exaggerating my injury to gain an advantage. Hardly. I would have much preferred trying the case on two feet sans scooter. We ultimately obtained the continuance. Ironically, after so vigorously opposing the requested continuance, my adversaries later wanted to further extend the date for their own convenience. We reached an accommodation without involving the arbitrator, but I must admit I took great pleasure in making them sweat a bit by quoting their own vitriolic words back at them.

Of course, professional courtesy in granting extensions should not be limitless. Many lawyers use repeated requests for

continuances simply as a tactic to delay an inevitable bad result. When this happens, clients become frustrated and often direct that their lawyer not agree to any further continuances. This makes sense. If someone is using requests for an extension as a litigation tactic, I am the first one to say no. I have found that having previously given extensions enhances my credibility with the court when I oppose a request for yet another continuance.

Sometimes, however, even requests for continuances made by abusers of the system should be honored due to the circumstances. I represented a client who sought to attach $5 million in assets, and there was no question that the writ of attachment would be granted when the petition was heard. Opposing counsel used every trick in the book to delay the attachment hearing. After two months of delay, the hearing date was finally approaching. My opposing counsel called me shortly before the hearing and requested a continuance because his wife had just been diagnosed with breast cancer and had to undergo a mastectomy. My client instructed me to oppose it. I told him that I did not agree, especially knowing our female judge. My client angrily told me I was being had. I explained that we would lose all credibility with the judge if we refused the request. Again, my client was upset with my advice, convinced that my opposing counsel was making the story up. I knew that the court would be mad if we refused the request and this could affect the ruling on the writ of attachment. Ultimately, I devised a solution that was beneficial for the client even with the continuance. We entered into a stipulated order that stated that the hearing date would be continued for 10 days, but there would be no further continuances. There were none, and the court granted our writ of attachment.

Discovery

Discovery is an area fraught with opportunities for bad behavior and gamesmanship. Much has been written about "Rambo" tactics. Frivolous objections, scheduling games, refusal to produce documents, and refusal to admit the obvious are all part of the territory. Discovery fights prolong litigation and add to the expense, often substantially. This is another area where professional courtesy can advance your client's position and save costs, often hundreds of thousands of dollars. It, too, requires client education.

Clients, especially corporate clients, typically hate discovery. They find it intrusive, time-consuming, burdensome, and expensive. Discovery is all that and more. As a result, most clients would prefer not to submit to depositions (although they want the other side deposed), answer interrogatories and requests for admissions, or produce documents. Clients are especially loath to turn over documents that they perceive as sensitive or harmful, understandably worried about how the materials might be used by the other side. There are clients who instruct their attorneys to play hardball in discovery, object to every interrogatory, produce nothing, and fight tooth and nail over everything. These are also often the same clients who later wonder why their legal bills are so high. Discovery is, however, often the most expensive part of litigation, and professional courtesy can go a long way in controlling those costs.

Therefore, at the outset of a case, I typically go over my discovery strategy and practice, and why cooperation can help meet the client's interest. First, the fact of litigation means that there is a certain amount of discovery to which the other side is entitled. That is part of the process, like it or not. Second, courts hate discovery disputes. Courts do everything to avoid them or to punish those who do not cooperate in discovery. Discovery fights can be expensive and the loser can be subject to sanctions. Sometimes, a court will delegate discovery disputes to a discovery referee, thereby increasing the costs of discovery and typically ensuring that more discovery is ordered rather than less. I explain that hardball discovery tactics usually backfire. Being cooperative makes the litigation easier and less expensive for all sides. Of course, where there are reasons to object or limit, we will do so. Where a protective order or motion is appropriate, we will seek one. I also explain that if possible, it is better to deal with the issue with opposing counsel than to put it in the hands of the court, which could have unintended consequences.

> Being professional does not mean you are weak.

Deposition Scheduling

One area fraught with opportunities for discovery battles is deposition scheduling. Everyone wants priority and to set the schedule of depositions for his or her own convenience. Often, there is much letter writing or motion practice about who is deposed and in what order. Eventually, however, everyone is going to get deposed, so it makes sense to work it out, if possible. Cooperation in scheduling can also have numerous benefits. A number of years ago, I had a case in which we had 60 depositions to schedule in a short period of time. My opposing counsel was a single father and candidly asked if we could arrange the schedule to coordinate with his custody schedule. I was pleasantly surprised by his recitation of the reason for his request and agreed, because there was not going to be any prejudice to my client as a result of doing that. The depositions all went smoothly, saving time and money for both sides. My opposing

counsel was extremely grateful for this courtesy. A few years after the case resolved, he referred a client to me.

Responses to Discovery

Responses to written discovery frequently result in gamesmanship. I cannot count the number of times I have been the recipient of boilerplate objections that are baseless. Such tactics result in numerous rounds of meeting and conferring and then motions to compel. Typically, we get the discovery, but each side has spent a lot more time and money to get to this inevitable result. When responding to discovery, I encourage clients to respond to questions that must be answered, and I make tailored objections to those that are improper or overbroad. Such an approach makes it much easier to oppose a motion to compel and to defend the objections that have been asserted. It also means that discovery sanctions are much less likely to be imposed because the position is defensible. It takes great skill to argue with a straight face that responses consisting entirely of boilerplate objections were made in good faith.

Document Production

Document production is another area fraught with opportunities for unprofessional behavior. No one likes to turn over documents that are harmful or contain sensitive business information. Of course, we all know the risks if a client does not do so or if relevant documents are lost or destroyed.

Because I represent defendants in class actions, I typically represent the side that has hundreds of thousands, if not millions, of pages of documents, much of it stored electronically. I am constantly looking for ways to cooperate with the other side to minimize the scope and cost of such document production. Every case is unique, but I have been successful in suggesting sampling and narrowed keyword searches. When the other side is unreasonable and will not work with me, I have had some success in getting the court to shift some or all of the cost of the expanded discovery to the opposing party. I find that I am most likely to get such a motion granted when I can show that I have made efforts to cooperate with the other side before invoking the aid of the court.

Sometimes, however, I find that the "be careful what you wish for" approach is the only thing that works. That strategy means giving the other side literally everything that they have asked for, which means that some poor soul or souls on both sides have to spend weeks in a warehouse or at a computer screen reviewing documents. I recently took this approach in a case in which the other side would simply not agree to any sort of limit. I produced about 1.5 million pages. When they then complained to the judge that we had "buried them" and should direct them to the relevant documents, the judge had no sympathy.

Candor in Court Filings

When I first began practicing as a lawyer, it never occurred to me that people would not be truthful in court filings. After all, there is a duty of candor to the court. In reality, however, shading the truth or outright lying happens all too often. A frequent source of lying is declarations filed in court that attest to what was supposedly said between counsel or to sequences of events. Typically, the truth comes out and the person who lied loses credibility. While I understand advocacy, misrepresenting the facts is beyond the pale. I will give my opposing counsel the benefit of the doubt at the outset of a case and assume that they are being truthful. When they prove me wrong, I do not trust them again.

It is very frustrating to both clients and counsel when an adversary is untruthful. Clients have a hard time understanding how people can get away with that. Then they ask what the point is if one side is truthful and the other side is not. I tell them that, more often than not, such lies get exposed and it is hard for a lawyer or party to recover from that blow to credibility. Clients often get impatient as the lies mount up and there is seemingly no consequence for the adversary. But most of the time, such behavior is exposed and punished. Let me give you some examples.

About 14 years ago, I was litigating against an opposing counsel in a $200 million breach of contract action in state court. "Mr. N," my opposing counsel, did not feel constrained by the actual facts or evidence in the case. He would constantly make representations to the court about why certain things in our case had to be scheduled at particular times because of his supposed schedule in a case in federal court where he represented the plaintiff. Our court was very accommodating to his requests. One day, I received a call from the lawyer representing the defendant in the federal case that Mr. N had so frequently mentioned. I had never met this lawyer before, but because we shared the same opposing counsel (and had the same opinion of him), we formed an instant bond. He asked about dates in our case. It turns out that Mr. N was making representations in the federal case about the schedule in my case that were flat-out falsehoods. As we compared notes, we realized that Mr. N had been lying to the court in both cases. We made sure to bring this to the attention of both courts, much to our common opponent's dismay. Mr. N's attempt at schedule manipulation abruptly ended. As a bonus, I became good friends with the defense lawyer in the federal case. He went on to become a justice on the court of appeal.

Making misrepresentations about scheduling matters is bad, but lying about the substance of a case is worse. The potential negative consequences are substantial. Two years ago, I represented a defendant in a putative representative action in federal

court. The plaintiff asserted a claim under a California statute that required sending a letter to a particular government agency as a prerequisite to pursuing that claim. This claim was dangerous for our side because it was the claim that could have resulted in the most damages if the plaintiff was successful at trial. We did not receive the letter in the Rule 26 disclosures, nor was the letter produced in discovery, despite a specific request for it. In responding to all of our document requests, the plaintiff only produced 46 pages, all sequentially Bates-stamped, and stated repeatedly that these 46 pages were all the documents he had. We met and conferred about it. Nothing was supplemented.

Discovery is an area fraught with opportunities for bad behavior and gamesmanship.

Accordingly, we moved to dismiss that claim shortly before trial because the prerequisite to filing the claim had not been satisfied. Suddenly, the letter (without any Bates stamp) miraculously appeared. We filed a motion in limine to exclude the letter, along with numerous other motions in limine. Opposing counsel, apparently forgetting the discovery responses and 46 pages of documents produced, filed a declaration stating that the letter had been produced in connection with their document production months before. We were able to show that these representations were false. The court excluded the letter and dismissed the claim, with some very harsh words for plaintiff's counsel. The court then proceeded to grant all of our motions in limine. At midnight on the night before the trial on the few remaining claims was to begin, opposing counsel dismissed the case. It was clear that he did not want to face the wrath of the judge.

Being candid, even if it means having to bring bad news to the attention of the court and opposing counsel, makes sense. It is often the only way to preserve your and your client's credibility. Although it might be tempting to play ostrich and hope no one finds out, that is a very risky strategy, and one I counsel clients against. About five years ago, I represented a defendant in a wage-and-hour class action. We settled the case for $7.5 million to be paid to the class in three separate installments over an 18-month period. Under the court order approving the settlement, the client was to provide a list of its employee class members that would be the basis for calculating and making the settlement payments. The client produced a list, and the first of the three payments was made. Shortly thereafter, the client brought to our attention that due to a glitch in their computer system, it believed that some people who should have been included in the class were inadvertently left off the list and had never received notice of the action at any time. Alarmed, we had an independent audit conducted. The audit determined that a large number of people had been omitted from the list. We were worried that once the plaintiffs found out about this mistake, they would seek to increase the settlement amount by millions of dollars. There was, of course, a good chance that no one would ever find out. Nevertheless, we determined that we had no choice but to bring this mistake to the court's and opposing counsel's attention.

We did so. The plaintiffs screamed bloody murder and demanded that the settlement amount be increased. They claimed that our client had acted intentionally and in bad faith in providing an inaccurate class list and that the settlement therefore had to be substantially increased. Much litigation over this issue ensued. However, although the problems were caused by the mistake in the original list, we were always able to point to the fact that we had brought the issue to everyone's attention and were thus acting in good faith. If we had engaged in bad behavior, why would our client have conducted an expensive audit and alerted the court to the problem? This good deed was rewarded. Ultimately, the court folded the omitted class members into the existing settlement, and our client did not have to pay more money to the class. When the order granting our motion came out, our client thanked us for advising that they come forward with the bad news early on.

Good things happen when lawyers are professionally courteous. Engaging in professional courtesy should be part of your overall litigation strategy. If you do so, you will find that by being professionally courteous, your clients' money is not wasted. You will avoid incurring the wrath of the court. You and your clients can focus on the real objectives of the case. Your reputation will remain intact. You may even find, as I did, that being professionally courteous can lead to more business in the future. When clients understand that professional courtesy is a sound litigation approach that will save them expense and enhance their position with the court, they may even thank you for suggesting it. ■

Attorneys Help Parents Keep Families Intact

Amid Misplaced Child Protection Allegations

DIANE L. REDLEAF

The author is the founder and executive director of the Family Defense Center, Chicago.

Esther T., a resourceful and articulate mother of two children, was stuck. Her increasingly churlish husband did not appreciate the successful and popular craft classes she was running in the basement of their suburban home. He also did not support her pursuit of becoming a teacher's aide—a goal she was close to realizing since her coursework was completed. Esther's husband demanded that she stop the craft classes, and when she refused, he threw a remote control at her. Even though the incident was quickly over and Esther was not physically hurt, she took precautions and called the police for assistance.

This telephone call led to the Department of Children and Family Services (DCFS), Illinois's child protection agency, being called in to investigate, despite the fact that Esther's children were playing in another room upstairs and were not present during the argument. DCFS accused Esther and her husband—and found them "guilty"—of creating an "environment injurious" to the children. The form of the guilt determination was an "indicated" finding that registered both parents as neglect perpetrators in the State Central Register, the Illinois database that maintains indicated findings of child abuse and neglect. Because Illinois child protection authorities, as well as those in many other states, are authorized to make indicated or substantiated findings before notifying parents of their rights to an administrative appeal, all of this occurred without any neutral decision maker reviewing the evidence and determining whether the State had met its burden of proving Esther was a child neglector.

Suddenly, Esther's plans to obtain a teacher's aide job were at grave risk, even though her children were not endangered in any way and she took prompt steps to separate from and then divorce her husband after the incident. This is because the Illinois State Central Register functions as an employment blacklist. All Illinois schools planning to hire new teachers are first required to search the applicants' names against the register. Therefore, the indicated finding for allegedly causing an "environment injurious" to her children was very likely to stop any school from hiring Esther. To make matters worse, Esther lived in constant fear that the state investigators or caseworkers might take her children, just as many other children are separated from their parents under so-called "safety plan" directives or removed into protective custody based on very limited information.

Esther had done everything a conscientious parent would do to protect her children: She had called 911, cooperated with police, taken steps to ensure that her children would stay out of harm's way, and arranged for counseling when necessary. Yet, despite all her best efforts, Esther was treated unfairly and had her livelihood threatened by the erroneous indicated finding.

Illustration by Amane Kaneko

This, combined with the hurdles she needed to clear to have that finding reversed, left Esther overwhelmed. Esther, who had done nothing wrong, was caught in a legal nightmare.

Handling a Legal Nightmare

Unfortunately, few lawyers know much about how to handle a case like Esther's. Many criminal and family lawyers, including those who very skillfully exonerate their clients from criminal charges and from charges related to domestic disputes, find themselves at a loss when it comes to a child protection investigation or administrative hearing to clear a wrongly accused parent who has not been criminally charged or brought before a juvenile court judge. Very few lawyers in the United States work in the field of law in which Esther suddenly found herself entangled. Child protection law combined with civil rights and administrative law is an unusual combination of specialized expertise that is not practiced by more than a handful of lawyers, even in large urban areas.

Suddenly, Esther's plans to obtain a teacher's aide job were at grave risk.

But the absence of experienced counsel in this special niche area of law doesn't mean the problem Esther faced was unique. In Illinois alone, more than 100,000 calls are made to the Child Abuse Hotline every year. And 13,000 cases of "environment injurious" allegations are registered in the State Central Register, often for reasons similar to those that brought Esther's family life to the attention of child protection authorities. In the United States, hotline calls are made concerning an estimated 3.2 million children a year (2009 figures). Many states and local child protection authorities are now reporting a surge in hotline calls after the publicity from the recent Penn State scandal, which involved the non-reporting of a serious, witnessed act of child sexual abuse. Although there has been a call for increasing child abuse reporting so that the horror of real child abuse is detected and investigated, more than three-quarters of hotline calls involve claims of neglect, not physical or sexual abuse, and most of these neglect cases are connected to poverty or health-related conditions like mental illness or substance abuse. Allegations of serious physical or sexual abuse make up a very small fraction, estimated to be between 1 percent and 3 percent, of hotline calls, and the numbers of sexual abuse cases, fortunately, are dropping. Because millions of adults care for those 3.2 million children, and many others are professionally mandated to report suspicion of child abuse, it is fair to conclude that tens of millions of Americans have had some contact with the child protection system.

Of the calls concerning those 3.2 million children, only a quarter of them are considered serious enough to be substantiated by child protection authorities. Even when hotline calls are indicated and registered in a child abuse database, a shockingly high percentage of those findings are erroneous. In Illinois, I challenged the high rates of error in a 13-year-long epic class action suit, *Dupuy v. McDonald*, 141 F. Supp. 2d 1090 (N.D. Ill. 2001), aff'd in part and rev'd in part, 397 F.3d 493 (7th Cir. 2005). In *Dupuy*, an error rate of 74.5 percent, or three out of four cases reviewed in the hearings unit, was demonstrated in a painstaking analysis of all the appeals for a particular year. The district court labeled this rate of error "staggering." 141 F. Supp. 2d at 134. In a significant victory for mothers like Esther, the *Dupuy* court ratified the vastly improved notice and hearing procedures Illinois adopted to provide quick hearings to parents and caregivers subject to child protection investigations. Hearings are now conducted within 35 or 90 days, depending on whether the case is expedited due to the potential career impact of an indicated finding. In addition, the *Dupuy* final ruling requires DCFS to gather and consider all available exculpatory evidence before entering a finding. Despite these system improvements, as Esther's case demonstrates, the DCFS rules aren't always followed.

The *Dupuy* error rate is not an anomaly. In *Valmonte v. Bane*, it was reported that 75 percent of the registered findings in New York were erroneous and an astonishing 2 million individuals were registered as child abuse perpetrators. 18 F.3d 992 (2d Cir. 1994). The Second Circuit Court of Appeals found the number shockingly high and evidence of an unacceptably high risk of error due to a too-low burden of proof under the "some credible evidence" standard that had been used to register findings of child abuse. *Id.* at 1004.

Although the remaining states vary in the adjudication of child abuse and neglect, many of their systems are even more flawed than those of Illinois and New York. For example, until very recently, California had no functioning appeal system for individuals accused of abuse. *See* Diane L. Redleaf & Steven L. Pick, "Part I: Challenging a Listing in a Child Abuse Registry," *Children's Rights*, Vol. 12, No. 4 (Summer 2010), at 3, *available at* apps.americanbar.org/litigation/committees/childrights/content/newsletters/childrens_summer2010.pdf; Redleaf & Pick, "Part II: Challenging a Listing in a Child Abuse Registry," *Children's Rights*, Vol. 13, No. 1 (Fall 2010), at 1, *available at* apps.americanbar.org/litigation/committees/childrights/content/newsletters/childrens_fall2010.pdf.

Family Defense Center

To address the perplexingly high rates of error, the scant number of attorneys practicing in this area, and defective state systems across the country, I founded the Family Defense Center in 2005. Based in Chicago, the center opened its doors to clients in 2007 to provide assistance to families who find themselves the targets of erroneous hotline calls and misplaced investigations. The center also assists attorneys across the country who are representing clients and attempting to reform state systems for adjudicating child abuse and neglect. In 2008 the center started to build its pro bono program with attorneys from large and small law firms, as well as solo practitioners, volunteering to represent parents and caregivers who are the victims of erroneous indicated reports of abuse or neglect.

Unfortunately, most jurisdictions do not have well-developed pro bono programs for representation of wrongly accused parents of the sort that the center has worked hard to develop in Illinois. Although the center's network of attorneys with experience in this area is small, it is developing into a stronger network of national resources to assist attorneys who might want to take on a case challenging an improper registry. In the meantime, for attorneys who lack experience but who wish to assist clients like Esther, the center has published a pro se manual, Self-Representation in DCFS Administrative Expungement Hearings (Indicated Report Appeals): A Manual for Self-Help (May 2010), *available at* www.familydefensecenter.org/manual-for-self-representation-in-dcfs-expungement-appeals.html. It should be borne in mind that procedures for challenging registries vary significantly from state to state. Many parents and employees represent themselves in these cases, and they often prevail by dint of preparing witnesses and exhibits that demonstrate the registry is factually and legally erroneous. It follows then that attorneys with trial and other advocacy skills should be able to handle these cases as long as they first look carefully at the agency procedures and examine the case file supporting the agency's decision to adequately prepare their evidence for the hearing.

In early 2011, Esther contacted the Family Defense Center where she obtained legal services and benefited from the center's knowledge of the precarious position many mothers face in the child protection system. Mothers are particularly vulnerable to child neglect allegations even when the sole basis for the allegation is that the mother is a victim of abuse herself. As a result of its representation of many mothers who came to the attention of the hotline solely because they were in specially vulnerable categories, including being domestic violence victims, in 2009 the center started to identify "gender-plus" discrimination as a root cause of investigations that wrongfully put children at risk of being taken from their families and put their mothers at risk of false allegations of abuse or neglect. *See* Diane L. Redleaf, "Protecting Mothers Against Gender-Plus Bias: Part 1," Children's Rights, Vol. 14, No. 1 (Fall 2011), at 2 (part one of a three-part series concerning the center's Mother's Defense Project), *available at* apps.americanbar.org/litigation/committees/childrights/content/articles/fall2011-protecting-mothers-gender-plus-bias.html.

Esther's experiences presented a classic mother's-defense case. The Family Defense Center, Sidley Austin partner Erin Kelly, and two associates, Maria Post and Julie Weber, investigated the factual background of the matter, revised the witness list Esther had first prepared, examined the DCFS records available in every administrative hearing, and prepared all witnesses. Because Illinois administrative appeals from indicated reports are subject to speedy hearing requirements, pursuant to *Lyon v. DCFS*, 209 Ill. 2d 264 (2004), extended discovery is not available in these cases. But direct and cross-examination opportunities are available in abundance. The pro bono Sidley Austin team took full advantage of their opportunity to cross-examine the DCFS investigator at the one-day hearing on July 18, 2011. Surprisingly, they learned that the investigator herself had not wanted to indicate Esther but had been directed to do so by her superiors.

On September 1, 2011, the DCFS director affirmed an administrative law judge's decision in Esther's favor, meaning that Esther's entanglement with the Illinois child protection system, and the registry of her name in the list of child neglectors, was over. The administrative law judge found that Esther had provided a "good home" and that Esther and her husband were "concerned parents." Moreover, the judge found that the parents handled their eventual divorce well and that Esther had not exposed her children to risk.

Thanks to the center's expertise and the outstanding legal advocacy of the Sidley Austin team, this Kafkaesque story ended well for Esther and her team of lawyers. The legal team received one of the 2011 Thomas Morsch Awards for Pro Bono Service at Sidley Austin. Esther's story is only one of many. Altogether in 2011, 57 Chicago-area attorneys in major firms and small practices, including 10 Sidley Austin lawyers, worked with the center's staff to help exonerate wrongly accused parents, keep families together, and help them to avoid the career-shattering consequences of erroneous child abuse or neglect determinations. Overall, the center won exoneration for 83 percent of the clients it represented in 2011. ■

The Litigator's Role in the World Bank's Fight Against Fraud and Corruption

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Litigators strive to protect their clients' interests, whether those are strictly legal—for example, avoiding an indictment—or involve ensuring a client's prospective ability to continue doing business. For many clients in the business of providing goods and services to governments, being formally "debarred" (that is, being put on the "we don't do business with these people" list) can have dire consequences. But debarment is also a tool increasingly used by international organizations to discipline companies involved in fraud and corruption and to send the message to the global business community that certain conduct simply will not be tolerated. Findings of misconduct, moreover, are increasingly shared between organizations and governments and can lead to legal and regulatory actions being taken in many places at once.

Understanding the threat of debarment, and appreciating how debarment proceedings work as a practical matter, is therefore important for any litigator representing a business or organization's interests, whether in the United States or abroad. Using the World Bank to illustrate these points, this article will consider how debarment works and what today's litigators need to know about debarment, whether at the World Bank or elsewhere. Although some of the information that follows at times might get "into the weeds" of the World Bank's operations, an appreciation for the organization's functional nuances can be useful to other audiences.

In the most basic terms, the World Bank is an international financial institution dedicated to reducing poverty, primarily by promoting economic growth. It is currently involved in more than 1,800 individual projects in virtually every sector and developing country. These projects are exceptional in their breadth and ambition, ranging from providing microcredit loans in Bosnia and Herzegovina, raising AIDS-prevention awareness in Guinea, and supporting education for girls in Bangladesh, to helping India rebuild the state of Gujarat after a devastating earthquake.

The World Bank's mandate and its on-the-ground activities are, in short, uniquely forward-looking and complex. U.S. and foreign lawyers assisting businesses in their efforts to "do business" with the World Bank—and counsel representing businesses who have run afoul of the World Bank's anticorruption rules—may be well advised to take careful note of where the World Bank is, and where it is going, when it comes to its global fight against fraud and corruption.

Litigators counseling and representing businesses and organizations doing business with institutions such as the World Bank need to be familiar with the frameworks the institutions use to sanction parties who have engaged in prohibited practices, the range of serious consequences threatening those who

engage in misconduct, and the way these processes fit within the organizations' broader efforts to combat corruption. In the context of the World Bank, creating conditions for sustainable economic and social development requires an ongoing effort to promote good governance and fight corruption and fraud. Indeed, corruption is one of the greatest obstacles to development, as it jeopardizes the success of long-term initiatives by diverting scarce public resources, distorting the rule of law, and weakening the institutional foundation on which economic growth depends. In response to this challenge, the World Bank has developed a robust anticorruption prevention and deterrence framework.

In 2007, the World Bank's board of executive directors unanimously endorsed a new governance and anticorruption strategy that increased the World Bank's engagement in governance and anticorruption in three key areas: supporting country efforts, addressing fraud and corruption in World Bank operations, and building global partnerships.

In addition to its prevention efforts, the World Bank has also developed a comprehensive legal mechanism to deter fraud and corruption in World Bank–funded projects. In 2006, the World Bank established a two-tier administrative process for sanctioning firms and individuals found to have engaged in misconduct in projects financed by the World Bank. This sanctions system can declare private entities ineligible to be awarded future World Bank–financed contracts, a step commonly known as "debarment." This sanctions regime is intended to uphold the World Bank's fiduciary duty by excluding corrupt actors from accessing World Bank financing, while serving as a deterrent both for the sanctioned firm and for others, and at the same time offering an incentive for rehabilitation.

Administrative Sanctions Process

The administrative sanctions process at the World Bank is rooted in the legal framework set out in the Articles of Agreement, the treaty that established the World Bank. The Articles of Agreement require that the World Bank ensure its funds are used for their intended purpose, with due attention paid to economy and efficiency. This fundamental requirement is often referred to as the World Bank's "fiduciary duty," which forms the legal and policy basis for much of the World Bank's anticorruption efforts. In furtherance of that fiduciary duty, the World Bank incorporates by reference its Procurement and Consultant Guidelines into loan agreements between the World Bank and

Illustration by Matthew LaFleur

its borrower countries. Loan agreements also incorporate by reference the World Bank's Anti-corruption Guidelines, which outline the obligations of both borrowers and recipients "to prevent and combat fraud and corruption" in projects financed by the World Bank. Each of the Procurement, Consultant and Anti-corruption Guidelines reference the World Bank's powers to impose sanctions on firms and individuals competing for or executing World Bank–financed contracts.

Moving from structure to enforcement, the Integrity Vice Presidency (INT) is the unit at the World Bank charged with, inter alia, investigating allegations of misconduct in connection with World Bank–financed projects. INT learns about sanctionable conduct from a variety of sources, such as World Bank staff, local governments, and competing bidders, and it investigates these allegations through myriad internal investigation techniques, including interviewing witnesses, interviewing the firms or individuals who allegedly engaged in the misconduct, gathering documents, and visiting project sites.

This discussion of procedure raises the substantive question of what qualifies as a sanctionable practice. The definitions have changed somewhat over the years. Prior to 2004, the Procurement and Consultant Guidelines referred only to "corrupt practice" and "fraudulent practice," with collusive practice included within the definition of fraudulent practice. In 2004, the World Bank added a separate definition of "collusive practice" and also added "coercive practices" (such as threatening others) to the list of sanctionable practices. And in 2006, the World Bank added "obstructive practice," encompassing actions that impede an INT investigation, such as destroying evidence or not allowing the World Bank to exercise its audit rights. Today, these five prohibited actions (fraud, corruption, collusion, coercion, and obstruction) are what the World Bank refers to as "sanctionable practices."

The Two-Tier System

If INT believes it has found sufficient evidence of sanctionable misconduct by a firm or individual, INT presents the case to the Evaluation and Suspension Officer (EO), which constitutes the first tier of the World Bank's sanctions system. There are four EOs in the World Bank Group, one for the International Bank for Reconstruction and Development and the International Development Association, who is full-time, and one EO each for the International Finance Corporation, Multilateral Investment Guarantee Agency, and World Bank guarantee operations. These latter three EOs hold their positions in addition to other duties.

INT submits to the EO a Statement of Accusations and Evidence, which summarizes the accusations of sanctionable misconduct and attaches the relevant evidence, both exculpatory and inculpatory. The EO evaluates the Statement of Accusations and Evidence and the evidence presented by INT and determines whether there is sufficient evidence to support a finding that an individual or firm has engaged in a sanctionable practice. If the EO determines that there is not enough evidence to proceed, the EO notifies INT. INT may edit and resubmit the Statement of Accusations and Evidence. If the EO determines that sufficient evidence does exist, the EO issues a Notice of Sanctions Proceedings to the individual or firm (referred to as the respondent). The notice includes all evidence presented by INT and a sanction recommended by the EO.

> The World Bank is accepting the voluntary cooperation of firms prior to the opening of any World Bank investigation.

At the time of issuance of the notice, the EO temporarily suspends the respondent from eligibility to be awarded contracts for World Bank projects. The temporary suspension is posted on the World Bank's internal website and on its extranet website, "Client Connection," which is accessible to certain personnel in World Bank member countries but not to the general public. The limited distribution of temporary suspensions allows the appropriate parties to give effect to the suspension while allowing respondents to appeal the sanction before their ineligibility is made known to the general public. Some respondents choose to be represented by counsel; others do not.

After delivery of the notice, the respondent is given 30 days to send the EO an explanation as to why the notice should be withdrawn or the recommended sanction revised. Within 30 days of receiving an explanation, the EO may decide to terminate the temporary suspension imposed on the respondent, withdraw the notice, or revise the recommended sanction in light of the evidence or arguments presented by the respondent.

If the respondent does not contest the accusations or recommended sanction by filing a response with the Sanctions Board within 90 days (see below), the sanction recommended by the EO is imposed, and information about the sanction imposed, along with the EO's determination (in cases in which a notice

was issued by the EO on or after January 1, 2011), is posted on the World Bank's public sanctions website.

If the respondent appeals INT's accusations, the EO's recommended sanction, or both, the case is referred to the World Bank Group Sanctions Board. This is the second tier of the sanctions process. The Sanctions Board is an independent body within the World Bank and is supported by a permanent secretariat. The Sanctions Board is made up of three World Bank staff and four non–World Bank staff, and is chaired by one of its non–World Bank staff members. The external members are well-known jurists appointed by the executive directors of the World Bank from a roster of candidates nominated by the president of the World Bank. The internal members are appointed by the president of the World Bank from among senior World Bank staff. The respondent has the opportunity to contest the accusations or the sanction recommended by the EO by filing a written response with the Sanctions Board within 90 days of receiving the notice. The respondent may present evidence to refute or mitigate the accusations. This response is forwarded to INT; INT then has 30 days to submit a reply to the arguments and evidence contained in the response. Either INT or the respondent may request a hearing before the Sanctions Board; a hearing may also be held upon decision of the chair of the Sanctions Board. Respondents are often represented by counsel at the hearing.

Before making a decision, the Sanctions Board considers the accusations and evidence contained in the notice, the arguments and evidence submitted by the respondent in its response, INT's reply, and any other materials contained in the record. The Sanctions Board reviews the case de novo and is not bound by the EO's determination or recommended sanction. After completing its review, the Sanctions Board determines whether it is more likely than not that the respondent engaged in sanctionable misconduct. If it finds that the respondent has engaged in sanctionable misconduct, the Sanctions Board imposes an appropriate sanction. Decisions of the Sanctions Board are final and non-appealable. The Sanctions Board's decisions regarding cases in which a notice was issued by the EO on or after January 1, 2011, are available on the World Bank's public sanctions website.

Possible Sanctions

There are five possible sanctions within the World Bank's sanctions system: debarment with conditional release, indefinite or fixed-term debarment, conditional non-debarment, public letter of reprimand, and restitution. In determining the appropriate sanction, the EO and the Sanctions Board are guided by the World Bank's Sanctioning Guidelines, which are not prescriptive but set forth the considerations relevant to the sanctioning decision. The Sanctioning Guidelines provide information regarding aggravating and mitigating factors to be considered. The general categories of aggravating factors are as follows:

- the severity of the misconduct
- the magnitude of the harm caused by the misconduct
- interference by the sanctioned party in the Bank's investigation
- the sanctioned party's past history of misconduct as adjudicated by the World Bank or by another multilateral development bank

The general categories of mitigating factors, in turn, are as follows:

- the sanctioned party's minor role in the misconduct
- voluntary corrective action taken
- cooperation with the investigation or resolution of the case

Lawyers should note that a three-year debarment with conditional release is the default or baseline World Bank sanction, subject to increase or decrease or the choice of an alternative sanction in view of the facts and circumstances of a given case. The purpose of a conditional release is to encourage respondents' rehabilitation and to mitigate further risk to World Bank–financed activities. Accordingly, a respondent who receives a sanction of debarment with conditional release will be released from debarment only after it has complied with specified conditions, typically including the establishment, and implementation for an adequate period of time, of an integrity compliance program satisfactory to the World Bank. In September 2010, the World Bank appointed its first Integrity Compliance Officer to work with respondents to monitor integrity compliance by sanctioned parties and to decide whether the conditions for release established by the World Bank have been met.

To amplify its anticorruption efforts and enhance the effects of its sanctions work, the World Bank has also agreed to honor certain debarments imposed by other multilateral development banks (MDBs). In 2010, the World Bank and four other leading MDBs—the Inter-American Development Bank, the African Development Bank, the Asian Development Bank, and the European Bank for Reconstruction and Development—signed a landmark agreement to cross-debar firms and individuals found to have engaged in wrongdoing in MDB-financed development projects. The agreement provides for some limited exceptions to this general rule, including an exception for debarments of less than one year. MDBs also have the right to opt out of recognizing particular debarments for legal or policy considerations. That said, under this agreement, the debarment decisions of one MDB are recognized and enforced by the other

participating MDBs, no longer allowing parties that had been debarred by one MDB to continue obtaining contracts financed by other MDBs. Cross-debarment unites international financial institutions around one common enforcement objective: strengthening efforts to prevent fraud and corruption.

Settlements and Voluntary Disclosure

In some circumstances, sanctions may be imposed on a respondent through a settlement, which is referred to as a Negotiated Resolution Agreement. At any time during the sanctions proceedings, INT and one or more respondents (who may be assisted by counsel), acting jointly, may ask the EO for a stay of sanctions proceedings for up to 90 days for the purpose of conducting settlement negotiations.

Settlements, so familiar to U.S. attorneys, were until recently somewhat of an international rarity. At the World Bank, the use of settlements has enhanced the sanctions system by potentially resolving disputes in less time and with fewer resources while providing certainty of outcome for all parties. Under this mechanism, which was established in 2010, settlements are subject to certain procedural and substantive safeguards to ensure fairness, transparency, and credibility. The World Bank general counsel clears all settlement agreements. The EO is also charged with reviewing settlement agreements to verify that the terms of the agreement do not manifestly violate the World Bank's Sanctions Procedures and Sanctioning Guidelines. Parties may (and generally do) submit a certification by both INT and the respondent(s) that they entered into the settlement agreement freely, fully informed of the terms thereof, and without any form of duress.

Beyond deterring corruption through debarment, the World Bank is engaging in proactive anticorruption efforts by accepting the voluntary cooperation of firms prior to the opening of any World Bank investigation. In 2007, the World Bank established the Voluntary Disclosure Program (VDP) with the goal of providing firms and individuals an incentive to disclose their sanctionable practices and comply with World Bank rules and guidelines. Managed by INT, the program allows entities who have engaged in past fraud and corruption to avoid administrative sanctions if they disclose all prior wrongdoing and satisfy standardized, nonnegotiable terms and conditions.

Under the VDP, participants commit to not engage in misconduct in the future, disclose to the World Bank the results of an internal investigation into conduct subject to sanction by the World Bank involving projects or contracts financed or supported by the World Bank, and implement a comprehensive internal compliance program. A compliance monitor approved by the World Bank typically observes the compliance program for three years and reports annually to the World Bank.

Per the VDP Guidelines, a VDP participant conducts an internal investigation of all its World Bank–related contracts that were signed or in effect in the five years before entering the VDP. The participant reports the results of its investigation to the World Bank, and the World Bank verifies the completeness and accuracy of that investigation. In exchange for full cooperation, entities and individuals enrolled in the VDP remain anonymous and avoid the reputational damage of public debarment.

> The World Bank developed a comprehensive legal mechanism to deter fraud and corruption in World Bank–funded projects.

Conclusion

Diversion of funds from development projects through fraud and corruption presents a significant challenge to economic and social development, but the World Bank has taken this challenge head-on by developing a robust, multipronged approach to promote good governance and deter corruption. Through its sanctions system, the World Bank has publicly sanctioned more than 500 firms and individuals, and has honored more than 80 cross-debarments, as of September 30, 2012. These numbers are the result of clear-eyed enforcement strategies and a desire to ensure that development dollars are used in the most effective way as part of the World Bank's mission to overcome poverty and boost economic growth and opportunity. Litigators representing individuals, companies, and organizations doing business with the World Bank must take care to understand the World Bank's anticorruption rules and must remain proactive in their efforts to ensure that their clients closely monitor potential misconduct. ■

The findings, interpretations, and conclusions expressed herein are those of the author and do not necessarily reflect the view of the World Bank Group, its board of directors, or the governments they represent.

Another Bite at the Apple:
Transnational Crimes Face Repeat Punishment

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Some say that "no good deed goes unpunished." What a positively cynical—indeed, unhealthy—way to go through life. But what isn't cynical, or for that matter hypothetical, is that in today's international anticorruption sphere, certain transnational bad deeds (such as paying bribes to foreign officials) risk punishment over and over and over again. The concept is called "carbon copy" prosecutions. The term describes successive, duplicative prosecutions by multiple sovereigns for conduct offending the laws of each of those nations but arising out of the same common nucleus of operative facts. Stated differently, carbon copy prosecutions are situations in which prosecutors in different countries each punish transnational conduct that violates *their* own laws and they elect to do so *after* an offender has admitted to the wrongful conduct in an earlier foreign proceeding. The concept is still largely under-recognized, but its occurrence has increased in frequency, so much so that today's criminal and civil litigators should be alert to it whenever they are called upon to handle a case involving transnational conduct.

Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act (FCPA) makes it a federal crime for an "issuer," "domestic concern," and certain others corruptly to offer, promise, or provide anything of value to a foreign government official for the purpose of improperly obtaining or retaining business. The classic paradigm is an unlawful quid pro quo: A non-U.S. third-party agent pays a bribe to a foreign official while on foreign soil in exchange for that official awarding the company a lucrative contract or granting it an essential license. Given the international nature of the crime, the FCPA's extraterritorial reach prohibits precisely this type of conduct, so long as it is committed by issuers, domestic concerns, or others having a statutorily defined connection to the United States.

In addition to the anti-bribery provisions, the FCPA contains two important bookkeeping-related provisions: (1) the books-and-records provision and (2) the internal controls provision. The books-and-records provision requires issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." The internal controls provision requires issuers to "devise and maintain a system of internal accounting controls sufficient" to prevent improper payments and to promote accepted accounting methods. The Department of Justice and the Securities and Exchange Commission (SEC) pursue suspected FCPA violations, the former possessing the authority to bring criminal

charges against wrongdoers and the latter the power to bring administrative charges.

As Tyler Hodgson demonstrates in his article on page 47 of this issue, the sort of bribery the FCPA forbids is typically illegal not only under U.S. law but also under the local laws of the foreign sovereign country where the bribe was offered, paid, or received. Thus, a person or company held to violate the FCPA—especially in the context of admitting such violations in the public record by way of a plea or pretrial diversion agreement, for example—risks successive prosecution both by the United States and another government for largely similar, if not identical, conduct.

In fact, with more and more countries including extraterritorial provisions in their national laws prohibiting international bribery, a single improper payment can trigger liability not only in the United States (under the FCPA) and the place where the bribe was made or offered but also in every nation that prohibits foreign bribery by citizens and others that carry on a business, or part of a business, within its territories or otherwise benefit from its capital markets, including, for example, countries such as the United Kingdom and China. In this regard, a multinational U.S. company with operations in China and the United Kingdom that resolves an FCPA case with U.S. authorities for overseas bribes in Jordan and Nigeria faces the potential of successive prosecution in the United States, China, Jordan, Nigeria, the United Kingdom, and any other country that has applicable extraterritorial jurisdictional provisions, absent, of course, some applicable limiting legal principle such as a country's double jeopardy doctrine.

This phenomenon, which is gaining international traction, teaches two key lessons:

- **Resolutions with authorities must be carefully tailored.** A corporation that enters into a negotiated resolution with a sovereign on international bribery-related charges—whether through a nonprosecution agreement, deferred prosecution agreement, guilty plea, or civil resolution—faces a bona fide risk that other countries will initiate prosecutions based on the same core facts and admissions underlying the original resolution.

- **Even nonparties to agreements have a strong interest in how agreements are worded.** An individual corporate officer who is even tangentially involved or implicated in a negotiated resolution—even though not named at all in the resolution—faces potential prosecution by other sovereigns and therefore has a strong incentive to ensure that the resolution either does not identify him or her or that it describes the officer's conduct positively, or at least neutrally.

Take, for example, a corporate executive who works for a U.S.-based multinational company with operations in Nigeria. The executive works in the United States and has not visited Nigeria, much less met with, bribed, or even known of bribes being paid to Nigerian officials. It turns out, though, that on the executive's watch, third-party agents were bribing Nigerian officials to win the company highly lucrative billion dollar contacts from the Nigerian government. The conduct is discovered, a long and grueling investigation is initiated, and after years of investigating and negotiating, the U.S. parent companies and their subsidiary admit their bad deeds and pay more than half a billion dollars to settle with U.S. authorities for violating the FCPA, which prohibits these sorts of quid pro quo bribes made to foreign officials.

A single improper payment can trigger liability in every nation that prohibits foreign bribery by citizens.

Things are finally over, right? The company and its executives can put this difficult chapter behind them, correct? After all, the companies have admitted guilt and been punished. But not so fast: What about Nigeria? The bribes were paid on Nigerian soil, to Nigerian officials, in exchange for billions of dollars of valuable Nigerian contracts. Maybe Nigeria has an interest in vindicating its own laws.

Nigeria Charges Dick Cheney

On December 7, 2010, Nigerian anticorruption authorities tossed their hats in the apocryphal anticorruption ring, definitively answering these questions in the affirmative when they released a 16-count criminal complaint charging Halliburton Company, several related companies, and many of their current and past executives for conduct that mirrored—and that the companies publicly admitted to less than two years earlier as

part of—their resolved U.S.-based enforcement actions. A foreign government levying charges against a multinational U.S. company and its executives alone would be enough to make headlines in a newspaper's financial section. But what garnered worldwide news was that in bringing charges, the Nigerian authorities included none other than former U.S. Vice President Richard Cheney, the one-time Halliburton chief executive officer (CEO), in the charging instrument. And upping the ante even more, news outlets reported that Nigerian authorities would seek the arrest and extradition of Cheney and others, invoking Nigeria's 1930s extradition treaty with the United States.

The Nigerian government charged Cheney even though, according to Cheney's lawyer, "[t]he Department of Justice and the Securities and Exchange Commission investigated [the conduct at issue] extensively and found no suggestion of any impropriety by Dick Cheney in his role of CEO of Halliburton." Similarly, the charges against KBR's current CEO were lodged notwithstanding KBR's unequivocal statement that its new CEO joined KBR after the conclusion of the conduct giving rise to both the U.S. and Nigerian actions: "No one on KBR's current executive team was involved in the FCPA violations." KBR insisted that it would "continue to vigorously defend itself and its executives if necessary, in this matter," and it described the actions of the Nigerian government as "wildly and wrongly asserting blame."

But in less than two weeks, KBR's battle ended when news surfaced that Halliburton had agreed to pay the Nigerian authorities $35 million to settle bribery allegations of "distribution of gratification to public officials." Halliburton made the following announcement:

> Pursuant to [the settlement] agreement, all lawsuits and charges against KBR and Halliburton corporate entities and associated persons have been withdrawn, [the Federal Government of Nigeria (FGN)] agreed not to bring any further criminal charges or civil claims against those entities or persons, and Halliburton agreed to pay $32.5 million to the FGN and to pay an additional $2.5 million for FGN's attorneys' fees and other expenses.

Halliburton further "agreed to provide reasonable assistance in the FGN's effort to recover amounts frozen in a Swiss bank account" of a former agent associated with underlying conduct and "affirmed a continuing commitment with regard to corporate governance."

The threatened arrest and extradition of Cheney put the carbon copy prosecution of KBR/Halliburton in a league of its own, but there are many other notable examples. In fact, in the past two years, at least five other companies have faced FCPA-based carbon copy prosecutions. Three of those actions involved successive prosecutions arising in Nigeria; and the other two, serial U.S. prosecutions:

1. In December 2008 Siemens AG paid $800 million to U.S. authorities to resolve the largest-ever FCPA matter in U.S. history. It simultaneously payed an additional $569 million to the Public Prosecutor's Office in Munich, Germany, for a total payment of nearly $1.4 billion, followed by an additional $46.5 million to Nigerian authorities, $336 million to the Greek government, and $100 million to World Bank Group.
2. In a reversal of the typical order of enforcement proceedings, in January 2010 the French-based telecommunications equipment and services provider Alcatel-Lucent S.A. paid $10 million to the Costa Rican government, followed by an additional combined $137.4 million in criminal fines and disgorgement to U.S. authorities in December 2010 covering bribe payments that included those resolved previously by Alcatel-Lucent in Costa Rica; two days after the U.S. resolution, Honduran authorities announced that they would reopen their investigation against Alcatel-Lucent, more specifically, into the now-admitted conduct that gave rise to Alcatel-Lucent's U.S.-based liability for bribe payments in Honduras.
3. In July 2010 the Italian energy company ENI S.p.A. and its Dutch subsidiary Snamprogetti Netherlands B.V. paid $365 million in criminal fines and disgorgement to U.S. authorities, followed by an additional $32.5 million to Nigerian authorities in December 2010.
4. In November 2010 Royal Dutch Shell PLC paid $48.15 million in criminal fines, disgorgement of profits, and interest to U.S. authorities, followed by an additional $10 million to Nigerian authorities in December 2010.
5. In another reversal of order in the sequence of carbon copy prosecutions, in January 2011 JGC Corporation paid $28.5 million to Nigerian authorities followed by an additional $218.8 million in criminal fines to the Department of Justice in April 2011.

Increasing Pressure for Prosecutions

Indeed, a petition filed last year with the Nigerian government by the Socio-Economic Rights and Accountability Project (SERAP) points to increased pressure on foreign authorities to continue to bring duplicative, successive prosecutions in cases of transnational crimes. As SERAP openly stressed, the Nigerian government must "urgently take steps to seek adequate damages and compensation against multinational corporations who have been found guilty in the U.S. of committing

foreign bribery in Nigeria. . . ." Suffice it to say, although SERAP's petition to its local government is directed at the past, the principle it seeks to establish is forward looking, with a focused eye on increased serial international enforcement activity.

But SERAP has not stopped at petitioning the Nigerian government; SERAP also reached out to the Securities and Exchange Commission (SEC) as a means to supplement its call for Nigerian carbon copy prosecutions. In a letter filed in March 2012, SERAP asked the commission to "establish an efficient case-by-case process for the payment of some or all of

A petition filed last year points to more pressure to continue to bring duplicative, successive prosecutions in cases of transnational crimes.

[the FCPA] civil penalty and disgorgement proceeds to or for the benefit of the victimized foreign government agency or the citizens of the affected foreign country like Nigeria." In SERAP's view, although "local law can, in theory, provide for a remedy, litigation in the local courts is often fraught with political risk, and can be time-consuming and expensive in the best of circumstances; even if such cases are eventually successful, enforcement of judgments, locally and internationally, present formidable challenges as well." Therefore, SERAP proposed a variant of the carbon copy prosecution concept:

> [A]fter, and only after, publication of an FCPA settlement agreement, the victim foreign government entity [should be allowed to] file a request that the Enforcement Division pay some or all of the agreed payment proceeds to or for the benefit of the victim government entity or to a U.S.-based NGO. . . .

In SERAP's own words, its "proposal would only come into play *after* an FCPA matter has been resolved, typically as a result of a settlement with the company." The Securities and Exchange Commission responded to SERAP's proposal in April 2012 and stated briefly that the "framework of [U.S.] securities laws requires a proximate connection to the harm caused by a particular violation."

Carbon copy prosecutions may be unfamiliar today, but in the months and years to come, litigators can expect them to factor into criminal or civil settlements involving transnational conduct, whether those settlements concern individuals, companies, or other organizations. Copycat prosecutions have modified the equation for conducting and resolving international anticorruption investigations.

There is certainly room for healthy debate over whether—to borrow from this issue's "good deeds" theme—the phenomenon is a good or bad development in international law. Whatever the normative view, it would be a bad deed, indeed, for companies and their executives and agents to ignore the international community's more-than-mere-hypothetical enforcement powers in responding to a transnational offense. A corporation under investigation by one sovereign ought to give due consideration to the interests of other governments in vindicating their own laws and the timing of when those jurisdictions might decide to do so. Similarly, nonparties implicated in a resolution in one country would do well to be mindful of that resolution's impact in another jurisdiction where an investigation and follow-on enforcement action might blossom at a moment's notice. In the international anticorruption environment, increasingly, more than one government is getting a bite at the same apple. ■

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Limiting Liability
for Crimes Committed Abroad

TYLER HODGSON

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A South Korean telecommunications provider bribes U.S. Armed Forces officials and is convicted and sentenced by a South Korean court for his crime. Can he later be prosecuted by U.S. authorities for the same offense?

A British sea captain is tried and acquitted for the murder of a fellow captain in South Africa. Can he be subsequently tried for the same offense by the British authorities?

As we will see, the answer is both "yes" and "no."

In his article elsewhere in this issue, Andrew S. Boutros discusses the increasing frequency of "carbon copy" prosecutions, a term he coined to describe the initiation by two or more jurisdictions of prosecutions based on the same set of operative facts, with the second jurisdiction simply adopting—or "carbon copying"—the facts the corporate or individual defendant admitted in the first jurisdiction's plea or deferred prosecution agreement.

Committing any crime—bribery included—cannot easily be described as a "good deed." That said, doing your best to ensure that your client is not repeatedly punished for the same act or wrongdoing can be. After all, as counsel you are not helping anyone escape punishment altogether; rather, you are helping your client avoid excessive, duplicative punishment. To provide sound advice, however, litigators must recognize and adapt to the reality that "double jeopardy" means different things in different countries.

There may be limiting legal principles in countries enjoying concurrent jurisdiction over the same criminal act that would prevent carbon copy prosecutions. One example is the application of a statute of limitations; another is the operation of the double jeopardy doctrine in each respective country.

"Double jeopardy," it turns out, is not a legal term having an standard international meaning. For example, while the United States has followed one model, Canada and Britain have taken a decidedly different path. When advising a client in relation to a criminal offense that is subject to the jurisdiction of more than one prosecuting authority, it is crucial to know which "version" of double jeopardy applies: Get the answer wrong, and your client's legal troubles will not end with the first guilty plea.

Crime Is No Longer Only Local

In the not too distant past, lawyers could count on at least one certainty: A client only had to worry about being prosecuted in the country where the crime had actually been committed. Referred to as the "territoriality principle," it was perhaps most famously summed up in Lord Halsbury's Victorian-era pronouncement that "[a]ll crime is local." Barring a cumbersome extradition, if a felon had absconded from the jurisdiction

where he or she had committed the crime, chances were that person had also evaded prosecution.

The legal landscape with respect to criminal jurisdiction has changed considerably since Lord Halsbury's time, especially in the past 25 years.

Following the Second World War, Western legal systems became increasingly receptive to the concept of asserting criminal jurisdiction over defendants in relation to a select group of especially deplorable crimes committed entirely abroad. Such crimes often involved human rights violations. The doctrine of "universal jurisdiction" allowed courts to prosecute individuals for crimes against humanity, regardless of where the crimes physically occurred. Perhaps one of the most celebrated examples of the exercise of universal jurisdiction in recent history involved the 1998 arrest of elderly Augusto Pinochet in London on an arrest warrant issued by the now-notorious Spanish judge, Baltasar Garzón (who, on February 9, 2012, was convicted of illegally ordering wiretapping and suspended from the judiciary).

A client does not have to be the former head of a military junta, however, before you need to be concerned about his or her criminal activity abroad. Nor do the foreign crimes have to involve atrocities or serious human rights violations. Today, the exercise of cross-border justice is a common occurrence.

Somewhere between the two stark extremes of the territoriality principle (you can be prosecuted only where you actually committed the crime) and the doctrine of universal jurisdiction (you can be prosecuted anywhere in the world for committing a particular offense) is a concept allowing countries to assert jurisdiction over their citizens for crimes committed entirely abroad. This "nationality principle" of criminal jurisdiction—which is, in fact, a common feature of civil law legal systems (such as those of France or Germany)—holds that a country can prosecute one of its citizens for criminal activity committed by that citizen anywhere in the world. In short, you can leave your homeland, but your homeland never leaves you.

In the United States, as in Britain and Canada, there are crimes over which the government will assert jurisdiction on a universal basis, such as piracy (consider *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820)), as well under the nationality principle, such as bribery of a foreign public official (consider the Foreign Corrupt Practices Act). As discussed below, because of the U.S. judiciary's somewhat narrow interpretation of the doctrine of international double jeopardy, any global resolution of a crime over which the U.S. authorities enjoy concurrent jurisdiction must involve the consent and blessing of the American authorities up front. The British and Canadian prosecutors, by contrast, can often be invited to the table last.

Illustration by Stephanie Cowan Dalton

Consequently, as a general rule, the litigator's first round of negotiations for multinational offenses must involve American prosecuting authorities.

For international double-jeopardy purposes, British and Canadian courts tend to view verdicts by foreign courts relating to the same crime or conduct as a categorical bar to any further proceedings by domestic prosecutors. As early as 1726, it was recognized under British law that "where a foreign court has jurisdiction, and the persons are within it, the sentence of that Court must bind." In 1775, Captain Roche was tried in London for the murder of John Ferguson at the Cape of Good Hope. The sea captain had already been tried and acquitted for the same crime in South Africa. In preventing any further prosecution for the same crime in the United Kingdom, the court noted as follows:

> It is a bar, because a final determination in a Court having competent jurisdiction is conclusive in all Courts of concurrent jurisdiction. Therefore if A, having killed a person in Spain, were there prosecuted, tried and acquitted, and afterwards were indicted here, at Common Law, he might plead the acquittal in Spain in bar.

Today, the exercise of cross-border justice is a common occurrence.

Different Countries, Different Models

Under the British common law, as the Captain Roche case illustrates, provided certain preconditions are met, if an accused has already been prosecuted in a foreign court for the same matter or set of facts for which he or she later stands trial, the accused can plead that he or she has already been acquitted (*autrefois acquit*) or convicted (*autrefois convict*) for this conduct, as the case may be. If successfully invoked, these special pleas bar any further criminal proceedings by the state.

More recent decisions of the House of Lords, such as that of Lord Diplock in the case of *Treacy v. Director of Public Prosecutions*, have continued to recognize that the special pleas of *autrefois acquit* and *autrefois convict* remain available to an accused whether the prior verdict was delivered "by an English court or a foreign court."

In Canada, on the other hand, the Supreme Court has yet to squarely address the issue of whether the verdict of a foreign court is sufficient to act as a bar to any further prosecution for the same offense. Nonetheless, there is persuasive appellate-level authority that holds that it would. Further, in relation to offenses over which Canada asserts universal jurisdiction, the Canadian Criminal Code explicitly recognizes that the decision of a foreign court over the same factual conduct *can* bar further proceedings in Canada.

In 2009, Canada was in the process of amending its Corruption of Foreign Public Officials Act to allow for the prosecution of Canadian citizens and companies for bribery crimes committed abroad on the basis of the nationality principle. For reasons that are still something of a mystery but need not concern us here, these amendments were never passed into law. Nevertheless, the government summary for the proposed amendments contained very clear language indicating an intent to adopt the British approach to international double jeopardy:

> The new provisions also provide safeguards . . . for a person who has already been tried and dealt with outside of Canada for . . . [the same] act or omission . . . . This addresses the concern that someone could be tried twice for the same offence, once by a court exercising jurisdiction on the basis of territory and once by a court exercising jurisdiction on the basis of nationality.

As we will see, this is precisely what happened to the unfortunate defendant in the case of *United States v. Jeong*.

The Fifth Amendment to the U.S. Constitution provides in part that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." Focusing on the word "offence," U.S. jurisprudence created the dual-sovereignty doctrine, which holds that a citizen of the Unites States owes dual allegiance to his or her state government, as well as the federal government. Under the dual-sovereignty doctrine, the same criminal act can violate the "peace and dignity" of these two separate sovereigns, thereby creating two separate and distinct "offences."

As the now-familiar dual-sovereignty doctrine emerged from its origins in the federalist system, the judiciary has not restricted the application of the doctrine to successive federal-state action. Instead, U.S. courts have applied it wherever two different legislative or law enforcement bodies derive their authority from distinct sources of power. For example, multiple prosecutions for the same transaction have been held not to violate the double-jeopardy principle in the Fifth Amendment for successive state-state prosecutions for the same crime (*Heath v. Alabama*, 474 U.S. 82 (1985)) or successive federal-Native American tribal prosecutions (*United States v. Billy Jo Lara*, 541 U.S. 193 (2004)).

Heath provides perhaps one of the most poignant illustrations of the application of the dual-sovereignty doctrine, permitting successive prosecutions for the exact same criminal conduct. The defendant, who lived in Alabama, hired two men to kill his pregnant wife. His plan succeeded (at least in part). Her body was discovered in a car in the neighboring state of Georgia.

A Georgia grand jury indicted Heath for the crime of "malice" murder, and notice was served that the prosecution intended to seek the death penalty. The defendant entered a guilty plea with the State of Georgia in exchange for receiving a sentence of life imprisonment. As you probably have guessed, this was not the end of Heath's problems.

Approximately three months later, a grand jury in Alabama indicted Heath for capital murder (murder during a kidnapping). Compounding Heath's woes was the fact that some 75 of the 82 prospective jurors were already aware that Heath had previously entered a guilty plea for the same crime in Georgia. Clearly, Heath was facing an uphill battle. Not surprisingly, then, Heath was convicted in short order and sentenced to death.

Dismissing his appeal to the U.S. Supreme Court, Justice O'Connor for the majority noted that successive prosecutions are barred by the Fifth Amendment only if the two offenses "are the 'same' for double-jeopardy purposes." Because Georgia and Alabama are two separate sovereigns, the Court reasoned, the two charges of murder cannot be considered the same for Fifth Amendment purposes.

The recent case of *United States v. Jeong*, 624 F.3d 706 (5th Cir. 2010), provides a no-less-dramatic application of the doctrine of dual sovereignty, but this time in the international context.

United States v. Jeong

In *Jeong*, a South Korean national was charged and convicted in a South Korean court of bribing two U.S. Armed Forces officials in relation to a procurement contract for telecommunications equipment supplied to U.S. military installations in South Korea. Jeong received a sentence of 58 days of detention and a $10,500 fine.

Later the same year, the United States submitted a formal request for evidentiary material under the Mutual Legal Assistance Treaty between the two countries, assuring the South Korean government that it was "not seeking to further prosecute Jeong." When Jeong, living in South Korea, later requested payment from the U.S. Armed Forces for money that was owed to another of his companies, he was invited to travel to the United States to negotiate any outstanding claims. Over the objections of the South Korean government, Jeong was promptly arrested upon arrival. He ultimately was sentenced to five years of imprisonment and a $50,000 fine. In dismissing his claim that the double-jeopardy doctrine prohibits successive prosecutions by different nations for the same conduct, the Fifth Circuit Court of Appeals noted that Jeong's claim would not succeed in a domestic context and that there was no reason to deviate from established Fifth Amendment jurisprudence in the international context.

It is at some level counterintuitive to think that the doctrine of double jeopardy may not protect a party who has already been tried by a court of competent jurisdiction (whether domestic or foreign) against subsequent prosecutions for the exact same criminal conduct. Certainly, the traditional common-law position and the one maintained by Canada and the United Kingdom is that the principle of double jeopardy would effectively bar successive prosecutions for the same crime.

The lesson for litigators advising a client on a potential resolution of a crime where the United States enjoys potential concurrent jurisdiction is that counsel must always think a few steps ahead. Counsel must ask himself or herself whether the United States will likely seek to assert jurisdiction: If the United States is not a party to the global resolution, then there can be no finality to the settlement. Put simply, where multiple competing claims of jurisdiction exist for the same transaction, excluding the American authorities from consideration only runs the risk that a party will, in fact, be placed in double jeopardy.

To avoid this risk litigators must ask themselves the following questions when dealing with a crime committed abroad:

1. What are the possible ways a country could assert jurisdiction over the defendant? Which countries enjoy potential jurisdiction (the territoriality principle, nationality principle, or universal jurisdiction being the most common)?
2. Do the countries follow the British model of international double jeopardy or the American model of double jeopardy?

Answering these questions before engaging in a global or local resolution will ensure that your client receives finality when entering a settlement agreement. ■

The Courage of a Lawyer

HON. JOHN CANNON FEW

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Courage is the defining quality of great lawyers. Good lawyers think deeply, speak eloquently, and write persuasively. They are creative, persistent, and dedicated. Good lawyers combine an extraordinary work ethic with compassion for ordinary people. However, no good lawyer, no matter how talented and skilled in these respects or in others, can be great unless the lawyer has courage.

This essay reflects a lifelong admiration for the courage of a lawyer. I grew up under the tutelage of a tenacious lawyer. My first job was law clerk to a principled judge. In all of my early experiences as a lawyer, I worked with people who held firm in the face of adversity. I came to believe every lawyer was courageous, so I worked to define myself by courage. Through 23 years of practicing law and holding court as a judge, I have reached two inescapable conclusions: Not all lawyers are courageous, and I have far to go before I reach that ideal for myself.

As I strive to move forward in my own journey, these questions resonate within me: What is courage? How can we learn courage, and from whom? Does the courage we learn from others play out in the lives of the men, women, and children we as lawyers represent? The answers to these questions go to the heart of why we chose to become lawyers. Exhibitions of courage by great men and women in our history teach us to be courageous. Their examples enable each of us to be the best lawyers we can be. In turn, our courage plays itself out over and over again in the lives of those we touch.

Millions of men and women throughout our history have demonstrated courage. Many of them have shown such extraordinary courage that they have become emblems of courage in our society. Three of those emblems illustrate the manner in which courage is passed down to us and, in turn, passed on to the people lawyers represent. They are Frederick Douglass, Thurgood Marshall, and Waties Waring.

Frederick Douglass

One of the first acts of courage in Frederick Douglass's life was teaching other slaves to read the New Testament, with as many as 40 people attending his classes. His master retaliated against his courage by sending him to another owner who had a reputation for breaking courageous slaves. After several years of severe beatings from this new master, 16-year-old Douglass fought back. He later wrote: "At that moment—from whence came the spirit I don't know—I resolved to fight." The "spirit" was his courage. Douglass said, "I seized him hard by the throat, and as I did so, I rose." Seizing adversity by the throat his entire life, Douglass rose to become one of the foremost antislavery advocates of his time. At age 27, still technically a slave although he had long since escaped, he published *Narrative of the Life of Frederick Douglass, an American Slave*, a compelling autobiography of courage in a lifelong struggle for racial equality. Douglass went on to become internationally known, serving as minister general to Haiti and running for vice president of the United

States. Douglass defined his life by courage and became an emblem of courage in his time and today.

Thurgood Marshall

The struggle for racial equality reached a milestone in 1967 when Thurgood Marshall joined the Supreme Court. In the six years before that, he had been solicitor general of the United States and a judge on the Second Circuit Court of Appeals. Understandably, many people believe Justice Marshall was famous simply because he was the first African American to serve on our highest court. Those who have carefully studied his life might be aware that lawyer Marshall argued *Brown v. Board of Education* before the Supreme Court. Hardly anyone alive today, however, remembers that young Thurgood Marshall was the principal lawyer in the trials of two of the five cases consolidated for appeal in *Brown*. In actuality, Marshall was already a national celebrity in 1951 when he tried the first of those cases, *Briggs v. Elliott*, which arose near Summerton, South Carolina. The story of how *Briggs* became one of those important cases illustrates how the courage of one lawyer changed not only the lives of the plaintiffs and their families and the lives of millions of school children since, but also the lives of many lawyers and the clients they represent even to this day.

Briggs arose in an atmosphere of extreme adversity, even terror, surrounding the question of racial inequality and school segregation. The social and political establishment throughout the South, particularly in South Carolina, created this atmosphere through threats and violence. The efforts of the National Association for the Advancement of Colored People (NAACP) to recruit parents to sue schools always included a warning that they might lose their jobs and face violence against their homes, themselves, and their families. The NAACP tried to bring a case in Louisiana, but no parents were willing to be plaintiffs. Marshall's courage made it different in South Carolina. Marshall sent his cocounsel, Robert Carter, to Summerton to meet with 20 parents to discuss Marshall's plan for success. After that meeting, inspired by Marshall's involvement, Harry Briggs and 18 others agreed to join the case. *Briggs* and *Brown* happened because the courage of a lawyer enabled ordinary people like Harry Briggs to take the risks necessary to stand up and make history. As we look back in time, we see easily they were right. But to roll up their sleeves and confront injustice in the early 1950s took guts. It took courage! Thurgood Marshall is an emblem of that courage.

Before *Briggs*, Marshall and the NAACP avoided challenging the constitutionality of segregated schools because they believed the time was not right. In every case before *Briggs*, the plaintiffs argued that the separate schools were not equal, and thus were illegal, instead of arguing that the separate nature of the schools was unconstitutional in the first place. Marshall carefully drafted the complaint in *Briggs* to exclude the argument that separate-but-equal was unconstitutional. However, when Marshall and his co-counsel arrived in Charleston for pretrial hearings in front of U.S. District Judge J. Waties Waring, Judge Waring challenged Marshall in open court to attack the constitutionality of segregated schools.

Judge J. Waties Waring

Very few people today have heard of Judge Waring, even in his home state of South Carolina. Yet Waties Waring was fully capable of exerting influence over the giant young Thurgood Marshall had become. Judge Waring made bold decisions in several early civil rights cases that shook the foundation of segregated society and shocked the political and social leadership of the South and of the nation. One of those decisions was *Elmore v. Rice*, in which Judge Waring ruled that the Democratic Party in South Carolina must open its primaries to black voters. Another was *Wrighten v. University of South Carolina*, in which Judge Waring ordered the state to provide legal education opportunities to blacks.

In retaliation for these and other decisions, Waring was ostracized by his friends, his city, and his state. He and his wife were verbally abused, and their home was vandalized. The animosity became so public that two congressmen called for Waring's impeachment, leading to an impeachment petition signed by 20,000 South Carolinians. In one seemingly humorous incident, when lightning struck the house next door to Waring's vacation home on Sullivan's Island, his neighbor put a large sign on the roof that said, "Dear God, Judge Waring Lives Next Door." In another incident not humorous at all, a nighttime mob burned a cross in front of Waring's home. Despite all this, Judge Waring boldly and publicly pushed Marshall to attack separate schools on a constitutional basis, knowingly putting himself in a position of being further ostracized, perhaps endangering his life.

In recognition of the same decisions, however, Judge Waring was known nationally for his courage. On August 23, 1948, *Time Magazine* published a story on Judge Waring entitled "The Man They Love to Hate." The article describes Judge Waring as "cold-eyed" in the face of the bitterness his own city "spent" on him. The article quotes him from the *Elmore* trial: "It is a disgrace when you have to come . . . and ask a judge to tell you how to be an American." *Time* predicted that history would "remember . . . Judge J. Waties Waring as a man of cool courage."

The National Lawyers Guild honored Judge Waring for his courage with the 1948 Roosevelt Award. In a speech

commemorating the award, prominent Alabama lawyer Clifford Durr drew a comparison between the courage shown by Judge Waring in the face of retaliation and the courage shown by heroes on the battlefield. Durr, who would later represent Rosa Parks, remarked that soldiers, like lawyers, "draw courage from each other." He went on to say:

> Courage of a greater and rarer kind is required to face the disapproval of society in defense of a basic democratic principle. . . . It takes real courage for a judge, in opposition to the deepseated folkways of those with whom he lives . . . to say, "This is the law. It is my duty to enforce the law and I will do my duty."

Judge Waring was praised and criticized in major newspapers from New York to California. In both the praise and the criticism, Judge Waring was recognized as an emblem of courage.

Moral Courage in Action

What is this quality that is the hallmark of these great leaders and lawyers? In a general sense, courage is "the state or quality of mind or spirit that enables one to face danger or fear with self-possession, confidence, and resolution." This abstract definition, however, has little practical meaning until heroic and ordinary people give it character through their actions. We have seen heroic people demonstrate acts of courage in battle and in other arenas of physical danger. From the flag raisers atop Mount Iwo Jima to the firefighters racing back into the World Trade Center, our heroes have painted images of courage as a vivid scene in our national portrait.

Courage can be described as physical or moral. Physical courage drove the flag raisers and firefighters to their heroic acts. Moral courage might be less vivid in its imagery, but it is no less heroic. Moral courage is the determination to take action, to hold firm in the face of adversity, terror, or retaliation, despite the risk of adverse consequences. Moral courage is the foundation for physical courage, but it has a separate identity particularly applicable to lawyers and legal ethics. Seemingly ordinary lawyers become heroic as the actions they take on behalf of clients every day give character to moral courage.

It took both physical and moral courage for Douglass, Marshall, and Waring to live the lives they chose. They defined their lives, however, primarily by moral courage. Many of the rules of legal ethics call upon lawyers to embrace the same moral courage these men and others have shown us. Rule 1.6(b) of the Model Rules of Professional Conduct provides an excellent example. This rule allows an exception to the prohibition against disclosing a client's confidences if "necessary . . . to prevent reasonably certain death or substantial bodily harm; [or] to prevent . . . a crime or fraud that is reasonably certain to result in substantial injury to . . . another." A lawyer who believes that keeping a client's confidence will endanger another person faces a difficult test of moral courage.

The preamble to the Model Rules contains another call upon lawyers to demonstrate moral courage: "A lawyer . . . is a public citizen having special responsibility for the quality of justice." Although it may be rare that a lawyer must make a courageous choice between allowing a crime to be committed and disclosing a client's confidences, it is not rare that a lawyer has an opportunity to exhibit this "special responsibility for the quality of justice." We are fortunate to have compelling images in literature of lawyers fulfilling this special responsibility. Atticus Finch demonstrates the courage of a lawyer in Harper Lee's *To Kill a Mockingbird*, not only in representing his clients but also in raising his children and leading his community. Lee reminds us that Atticus demonstrates moral courage when Scout says, "It was times like these that I thought my father, who hated guns and had never been to any wars, was the bravest man who ever lived."

> Moral courage is no less heroic than physical courage.

These compelling images of courage are not limited to literature. We also have local images of courageous lawyers. Communities large and small remember men and women whose lives became legend as stories of their courage were retold. In South Carolina, one of those legendary figures is the late Frank Eppes. Over his 38 years of service as a trial judge, Judge Eppes touched thousands of lives all over the state. The stories told about Judge Eppes are inspirational, but South Carolina remembers Judge Eppes not simply because he inspired us. Every legal community remembers its legendary figures because their lives embodied courage and because they demonstrated dedication to the duty of a lawyer to fulfill our "special responsibility for the quality of justice."

As images of courage from literature and local lore replay themselves in our courtrooms every day, they show us the courage of a lawyer. Six years ago, when I served as a trial judge, the state called to trial a defendant accused of shooting his former girlfriend's new boyfriend. Long before trial, the state offered a plea bargain of 9 years out of the 20 the defendant faced. The

defense lawyer never told his client about the plea bargain, and the state withdrew the offer. The defendant pleaded guilty on the morning of trial, and I sentenced him to 20 years.

The courtroom was full of people that day, many of whom were lawyers. Everyone grieved for the victim as he explained from his wheelchair that he would never walk again. Everyone raged at the defense lawyer as it became clear that he failed to communicate something as important to his client as this offer. Everyone struggled with which of these terrible injustices should more forcefully guide my sentence.

Nobody struggled, however, with whether the defense lawyer had done an injustice to his client. That much was clear. Another lawyer in the courtroom resolved to do something about that injustice. I watched him fidget while I deliberated over the sentence, and wince when I announced it would be 20 years. I watched him get up from his chair and walk over to speak to the defendant. As I watched them talk, and as I struggled within myself as to whether I had done the right thing, I saw the courage of a lawyer play itself out. The lawyer volunteered to file a post-conviction relief action and got the sentence changed to nine years, because the defendant had been denied his right to the effective assistance of counsel under the Sixth Amendment.

The lawyer who stepped up to do this was Frank Eppes. However, the lawyer was not the legendary Judge Eppes who died before this crime was committed. Rather, illustrating my point that the courage of a lawyer lives on in the lives we touch, the lawyer was Frank Eppes Jr., a man who inherited at least two things from his father: a keen sense of his "special responsibility for the quality of justice" and the courage to step up and fulfill that responsibility.

Frederick Douglass, Thurgood Marshall, and Waties Waring illustrate the courage of great leaders and lawyers. However, their lives represent more than that to us. Just as Judge Eppes's courage inspired and influenced his son, the courage demonstrated by Douglass inspired Marshall, who influenced Waring, who in return inspired and influenced Marshall. The courage of all three has trickled down to each of us. Their lives teach us the reverberating effect courage can have and, thus, the effect our courage will have on those who follow us.

Douglass was an important role model in Marshall's life, even though he died eight years before Marshall was born. Douglass's life, his writings, and his courage influenced who Marshall became and how Marshall influenced the lives he touched along the way. It was purely coincidental that Marshall graduated from Frederick Douglass High School in Baltimore. It was not coincidental, however, that a bust of Douglass stood on Marshall's desk at the Supreme Court. Marshall placed the bust as a reminder of the man Douglass was, what he stood for, and how Marshall's life had grown in part out of Douglass's courage.

In similar fashion, Marshall and Waring influenced each other's lives. Many of the civil rights cases Judge Waring heard in the 1940s were brought and tried by Marshall. Waring's views on the world were influenced by the issues raised in those cases and the lawyer who tried them. Judge Waring derived the courage he brought to the challenge of making these difficult rulings in part from the courage Marshall demonstrated.

Waring's influence over Marshall was even more direct. Every other white southern judge in a civil rights case had treated Marshall with disrespect, but Judge Waring was different. Marshall later joked that he went through his first trial with Judge Waring with his mouth hanging open in disbelief, not only because he was respected but also because he was winning. That trial was the beginning of a lifelong friendship through which Waring pushed Marshall to mount a direct attack on the constitutionality of school segregation.

Waring's long-standing efforts culminated in an unlikely conversation that illustrates Waring's influence over Marshall. While Marshall was preparing his pretrial brief in *Briggs*, Judge Waring invited Marshall to his house in downtown Charleston and insisted over dinner that Marshall rewrite his brief to include the constitutional attack. Waring told Marshall "it's time to make law by making history," and reportedly made Marshall rewrite the brief twice before Waring was satisfied the constitutionality of segregation was squarely challenged. Waring's stature as a man of courage enabled him to influence Marshall and, thus, change the course of history.

The influence of the courage demonstrated by these men continued to trickle down.

Courage Spreads

South Carolina had hardly ever seen a case of such moral significance as *Briggs*. Young people throughout the South chose legal careers because of it. Young lawyers throughout the nation modeled their careers on the courage demonstrated by Marshall and Waring. Because of that significance and also for its potential financial impact, South Carolina government, particularly the legislature, closely followed the trial.

It cannot be simply a coincidence that one of the legislators following *Briggs* was a young law student and freshman member of the South Carolina House of Representatives named Frank Eppes. Marshall and Waring's public demonstration of moral courage in the face of that social and political landscape profoundly shaped Eppes's career. At least indirectly, their courage influenced who Judge Eppes would become and how he, in turn, would influence the lives he touched along the way.

Their influence on Judge Eppes, however, was not merely indirect. There is a direct path from Douglass all the way down. Judge Eppes's most significant role models included the late

Matthew Perry, a courageous civil rights lawyer and later United States district judge. Perry's many successes as a lawyer include *Edwards v. South Carolina*, one of the most cited First Amendment cases the Supreme Court has decided. Perry, who died in August 2011 after 23 years of practicing law and 32 years of distinguished service as a federal judge, was heavily influenced by Marshall.

Like Marshall, Matthew Perry was heavily influenced by Waties Waring. Young Matthew was not even a lawyer yet in 1947 when he attended the trials in *Elmore* and *Wrighten*. After those trials, future civil rights lawyer Perry went door to door encouraging black men and women to vote in the first-ever open primary required by Judge Waring's decision in *Elmore*, and future judge Perry attended the law school created as a result of *Wrighten*. Professor Robert Moore wrote an essay on Perry's development as a young man in which he states that the *Elmore* and *Wrighten* decisions "elevated Judge Waring to Matthew Perry's pantheon of heroes."

From Frederick Douglass to Thurgood Marshall; from Marshall to Waties Waring and back again to Marshall; from Waring and Marshall to the icons of your state like Matthew Perry is to South Carolina; to local legends like Frank Eppes Sr.; to the people they touch like Frank Eppes Jr.; to your entire legal community and to mine; to you; and to me. In the words of Clifford Durr praising Judge Waring, we draw a great and rare courage from each other.

Robert Hayden wrote a poem entitled "Frederick Douglass." It describes a man who died 117 years ago, but the poem is about what this essay is about. It suggests that what we—as courageous abolitionists or as courageous lawyers—live on in the lives we touch. The "it" in the poem is "freedom" and "liberty." Originally, "it" meant freedom and liberty in a different context from today. Even then, however, and especially reading the poem and reflecting on the life of this great man now, "it" might just as well mean justice for the people lawyers represent.

> When it is finally ours, this freedom, this liberty, this beautiful and terrible thing, needful to man as air, usable as earth; when it belongs at last to all, when it is truly instinct, brain matter, diastole, systole, reflex action; when it is finally won; when it is more than the gaudy mumbo jumbo of politicians: this man, this Douglass, this former slave, this Negro beaten to his knees, exiled, visioning a world where none is lonely, none hunted, alien, this man, superb in love and logic, this man shall be remembered. Oh, not with statues' rhetoric, not with legends and poems and wreaths of bronze alone, but with the lives grown out of his life, the lives fleshing his dream of the beautiful, needful thing.

Most lawyers have no idea of the connection from Douglass to Marshall, to Waring, and beyond. However, every lawyer is the beneficiary of our connection to these heroic people. On the one hand, their courage and that of thousands like them has grown out of their lives to enable lawyers today to represent their clients effectively. On the other hand, the connection circles back up. Don't you know that in those dark, lonely moments when all men and women want to quit their work and take the easy path—perhaps for the night, perhaps for the rest of their lives—don't you know that Frederick Douglass and other heroic men and women found the strength to go on in their vision of how their work would play itself out, and how their courage would live itself out, in the lives of people years from where they were? From our heroes down to us, on to our clients, and back again to our heroes, goes courage!

Every white southern judge in a civil rights case had treated Marshall with disrespect, but Judge Waring was different.

Every lawyer has touched and improved the life of some person. Great lawyers have touched many lives, and their courage has changed the world many times over. All lawyers should aspire to demonstrate courage and strive to achieve greatness. In doing both, we find strength in the courage those before us have shown and in the courage we can show to those around us. As we reflect on the good we have done, let us visualize the good we are yet to do. Let us seize adversity by the throat and rise to be an example of courage for others. In every community, an ordinary person is crying out for the extraordinary courage of a lawyer.

As men and women, but particularly as lawyers, we are armed with more than the heritage of courage those before us have shown. We are also armed with hope that the lives of those we touch will be strengthened and enabled by our courage and our work. Our courage lives on. What more could we want out of a professional life than that? ■

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Advance Sheet

PARTNERSHIP BLUES

ROBERT E. SHAPIRO

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"Not honesty alone, but the punctilio of an honor the most sensitive."

We have Justice (then Judge) Benjamin Cardozo to thank for this pithy and memorable summary of the fiduciary obligations owed by one partner to another. It conveys its meaning in an instant, doesn't it? Even those who have never bothered to look up the word "punctilio" have a pretty fair understanding of what Cardozo's archaism must mean. Partnership obligations are serious and exacting—something more demanding and exquisite than those of a mere contracting party. The latter may honor her promise, or not, as her interests may dictate, so long as she recognizes the need to reimburse the other contracting party for any loss incurred as a result of a promise unfulfilled. Partnership obligations are different. A partner owes her counterpart something more than what's calculated to be in her own best interest. Indeed, she probably needs first to consider what's in his.

In the world of law firms these days, Cardozo's adage and partnership obligations have about the same status as the phrase "the American people" has in political commentary. Ever notice that when pundits, not to mention politicians, refer to "the American people," they are always referring to someone other than themselves? A politician may have set out to fool "the American people," but the commentator professes to have been too savvy to have been taken in. The American people are some distinct, abstract, and seemingly unthinking mass of somebodies who conform to the biases, and theories, of the commentator in question. They are decidedly different from the commentator himself and of no real value insofar as his own personal life is concerned.

Obligations Are for Someone Else

So, too, are partnership obligations, at least in the minds of lawyers. These are the province of someone else—a client—whose circumstances must be managed but never shared, whose obligations are his, but never the lawyer's own. A partnership matter is something remote— someone else's case to be litigated or position to be managed. Yet strangely, many, if not a majority of American lawyers practice in partnerships. They should themselves live and breathe the very honor Cardozo articulated for partners, treating their senior colleagues and those colleagues' interests with special deference and respect. A law partnership should be as much about loyalty, teamwork, and collective success as anything you encounter in a business partnership. Indeed, in some respects, it should command even more of these things. But just to say this at all will strike most lawyers as a bit odd. Who, us?

So foreign now is Cardozo's punctilious honor to the thinking of most lawyers about the organizations in which they practice that they seldom call them partnerships at all. Instead, we tend to refer to them as "firms." This term has been around for decades, of course, no doubt adopted from those old businesses that prided themselves on patriarchal leadership and close working relationships. Except in the law context, the term has become largely outmoded in a business world dedicated to superefficient, just-in-time responses by anonymous cubicle-ensconced employees. But it continues to serve lawyers well. It reassures them that there is still collegiality and common concern within their organizations, even as they have grown and grown (and grown) to become vast business enterprises themselves with hundreds, if not thousands, of employees serving the interests of contemporary clients spread across the world. To their clients, they can hold themselves out as huge reservoirs of effective and efficient legal resources while still comfortably referring to their colleagues as "partners," even if the term seems now to have been drained of any real substance. They

can even, without thinking about the paradox, designate certain colleagues as nonequity or "junior" partners, designations that cut against the grain of an understanding of a partnership in which obligations are viewed as in any way "sensitive," as many junior partners can attest.

In short, not too many law partners these days think they owe their colleagues "a punctilio of an honor" or really any "honor" at all, advancing the good of their colleagues above their own. And so there was something extraordinary about the vote of a majority of the now-defunct Dewey & LeBoeuf partners to accept a plan to pay off much of that firm's debt on a "rough justice" basis. There seemed to be a sense here of obligation beyond the separate interests of the individual partners, a kind of collective responsibility to each other and the outside world all at once. This is not to say, of course, that some or perhaps even most of the participants did not calculate in their own interest in choosing to join in the plan, regardless of its shortcomings

A lawyer's mindset should already be outward-looking rather than inward-looking.

on the side of fairness. Justice Cardozo hardly requires that partners reject a common plan solely because it also serves individual interests. And, even if there were deep sighs of reluctance, or even regret, by the partners in adopting the plan, there was still at least the hint of a collective sense that this is what was needed to be done.

A cynic might observe that, had the partners breathed more such collective sighs at an earlier date, the deep ones at the end might have not have been necessary all. For if a collective mindset at Dewey & Leboeuf allowed the firm to avoid some of the various uglinesses and indignities suffered by the partners at such firms as Heller Ehrman and Howrey & Simon as those firms disintegrated, such thinking was in too short supply earlier to avoid that disintegrative fate itself. Does this tell us something about how such once-honored and highly regarded partnerships ended up in such a tangle in the first place?

The Demise of Dewey & Laboeuf

The prevailing explanation for the demise of Dewey, like its predecessors, coheres with the contemporary view of law firms. These, it is said, are businesses, and if Dewey was brought low, surely it was because of business errors. It is easy to support such a thesis. Reports out of Dewey were that huge guaranteed contracts were given to "superstar" lawyers, who, like professional athletes, were paid top dollar to deliver big results for these firms. And like some of these free agent gambles in the sports world, some of the lawyers went bust, unable to produce annually on their exceptional promise. Bad contracts led to bad financial results and a last place or defunct franchise rather than the expected championship team.

Surely, with these facts in mind, there has been much self-satisfied tut-tutting heard in the legal world, along with a less fully admitted schadenfreude, over the way Dewey managed, or mismanaged, itself internally. Dewey, it is said, should never have made these uneconomic arrangements. It trusted too much in the idea that past production necessarily meant future performance. No one can guarantee what legal business tomorrow will bring , no matter a lawyer's reputation. And it is folly to mortgage the future of the firm on the performance of a few individual superstars. And so the observers of Dewey's implosion can, once having felt their souls purged and purified by watching the Greek tragedy of Dewey's demise, continue on in the confidence that they face no similar risk of ruin themselves, at least until the next spectacular law firm collapse disturbs, however briefly, their own sense of complacency.

These criticisms may be true enough, as far as they go, but are they really the correct lessons to be drawn from Dewey's failure? Only a sense of poor financial decisions and misjudgments about the earning capacities of its "superstar" lawyers? Perhaps. But taking Cardozo's comment less as a moral or legal doctrine, and more as a precondition of partnership success, might we not see more in the Dewey saga than just business decisions gone awry? Perhaps the problem arises more from how law firms have chosen not to appreciate what a partnership is all about. If so, it is possible that Dewey might be more avatar than aberration.

Why do lawyers practice in partnerships to begin with? Part of the answer lies in the nature of the legal profession and of professions in general. The idea behind a profession is the pursuit of a goal that transcends one's own interest. Doctors, for example, take the Hippocratic oath to acknowledge that their first obligation is to their patients, not themselves. Not for nothing does Plato's Socrates describe a doctor qua doctor as someone necessarily devoted to the advantage of someone else—the patient. In receiving compensation, he is a wage earner, not a doctor in the precise sense.

Lawyers have a double obligation outside themselves. Like doctors, they serve an "other" before themselves, which is called a "client" in this instance. The client's interests come before any interests, of favor or financial gain, the lawyer may have for herself. But lawyers are also officers of the court, which denotes an obligation beyond that even to the client, let

alone themselves. The interests of the legal system are paramount, superseding those of client and lawyer alike.

Once properly taught in this way to serve interests above and beyond themselves, lawyers would tend to find a law partnership a most welcome form of organization. A lawyer's mindset should already be outward-looking rather than inward-looking. The partnership model reinforces and is reinforced by an understanding of lawyering as a professional undertaking that does not have as its first goal the individual enrichment of any one participant or even all the participants. Lawyers are professionals first, and moneymakers no more than second.

A partnership also coheres with a second element of lawyering, which lawyers do—or at least should—know well. This is that legal problems are knotty in a unique or at least unusual way. It seems that no one lawyer, even the most brilliant, can solve a legal problem as successfully as two. This is the real reason lawyers are like nuns, always traveling in twos, because the work of the law, no less than the word of God, can be difficult to know. Add to that the fact that many legal tasks—briefs, trials, negotiations, closings, etc.—require multiple hands to be successful, and a law partnership of loyalty and trust seems particularly well suited to the provision of legal services.

Lone Heroes

Contrast this, however, with what's happening to the legal profession and you may see why Dewey might be viewed as more warning than wastrel. Certainly, Dewey's view that there are "superstar" lawyers is no real aberration. Everything in the legal world has conspired to accentuate the tendency of lawyers to view themselves as free agents. Our celebrity culture encourages such notions, and lawyers have swallowed the bait of promoting themselves as lone star heroes. Indeed, the road signs outside law firms all point in the same direction. Read any lawyer's bio on the Internet and you will find a list of individual accomplishments, from trials won seemingly by themselves, to deals made without the help of others. Then there are the less subtle forms of advertising, everything from glossy rag sheets promoting "superstar" or "leading" lawyers, to legal publications that feature the separate feats of first-chair lawyers, to public relations blasts on pending matters that never fail to promote this lawyer or that.

Even internally, where lawyers depend on the good will and hard work of their colleagues, bad thinking has set in. Unusual is the firm that does not tout within its own ranks the individual achievements of this rising star or that. If the press reports are to be believed, fights over compensation are becoming fiercer, as lawyers focus on their comparative standing more than the overall success of their firms. This particular distortion was especially prominent during the economic downturn, where partners seemed to take any economic woes out of their associates' and lesser partners' hides. Whatever happened to the idea that the economic fortunes of partners would rise and fall with the profits of the firm, and that it was senseless to make long-term partnership decisions on the basis of six-month financial results? Is it really true that lawyers could not do without the income, relatively as well as absolutely, they had not thought of enjoying five short years of prosperity earlier?

Little wonder then that the legal world has become rife with sensational partnership defection from one firm to another. Believing their own press notices, not to mention lured by and endorsing the celebrity culture that has invaded the legal world, many lawyers have sniffed at notions of loyalty as old-fashioned, and cast about for and attached themselves, however briefly, to the highest bidder for their superstar services. Rare is the firm that does not find itself worrying, for reasons it unaccountably fails to understand, that the lawyers whose reputations it has gone out of its way to promote will pack up their bags and settle somewhere else that promises to make them richer. In this environment, Dewey may have made the right choice, trying to lock up by contract what partnership loyalty no longer could ensure. Its immediate failure was only in the details.

Most lawyers really know better than all of this—or they should. Particularly in litigation, where losses are inevitable, whether because of the facts or the unpredictability of the legal system, lawyers know that cases are won through some uncertain combination of hard work, teamwork, and dumb luck. You have to wonder about a trial lawyer who promotes himself as having an unbroken winning streak. Did he only take sure winners? Or might he be particularly adept at shifting blame to others? Or is he just deluding himself? Whatever the reason, such talk does the lawyer, the system, and the profession itself a disservice, making it appear that the law, always intractable, might actually be something that can be held within the grasp of a single lawyer.

But it is difficult to know how to relearn some of the old lessons amid the hard-pressing facts of the new order. Somehow the idea that the individual lawyer's worth is something different from the clients and dollars that he or she supposedly controls or supports needs to be reinvigorated. And the encouragement given to the pursuit of individual glory and riches needs to be gainsaid, if it is not to make the profession—if not the lawyers themselves—so much the poorer. Perhaps further reflection on Cardozo's great aphorism is the best place to begin. ■

Sidebar

MEDIATION

KENNETH P. NOLAN

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I've been lucky all my life. Well, mostly. I was born after the Greatest Generation conquered the Depression and Hitler, and I grew up, at least in my sliver of Brooklyn, in an era of relative peace and prosperity. When I started practicing in the late seventies, the legal profession was exciting and expanding, plenty of jobs, trials galore. The future was promising, enticing.

If I did what I was taught—work like an ox, be respectful, don't complain—success was likely. It didn't matter if you cleaned toilets or walked a beat, you would live better than your parents—own a new Chevy, a house with a yard, take a real vacation, like to Florida.

Of course, life was and is never perfect, not with every second woman undergoing chemo for breast cancer and with so many kids battling leukemia. And even I realize that others weren't as fortunate since I was raised in a wonderful family, if you didn't mind being sprinkled with holy water for divine protection whenever lightning lit the sky.

But I feel like echoing a line from HBO's *Girls* when a nurse tells Hannah, while checking her for sexually transmitted diseases, you couldn't pay me enough to be 24 again. Maybe I'm just an old fart, but life seems much more onerous today. And it's not only the shrinking legal world and law firms going bankrupt—it's a loss of confidence, of optimism, of the assurance of a brighter future. Even the technological marvels of texting, Twitter, Facebook, and the like have made communication more challenging, relationships more fragile.

Our profession has changed as well. I tried an injury case nine months after I was admitted. Now the civil trial is a dinosaur, nearly extinct—a loss of the soul of the profession, some maintain. Almost time, perhaps, for a proper Irish wake. Yet, those ancient days of picking jury after jury and battling adversaries and judges were the joy that made the law exhilarating and rewarding.

But no more. Instead of inspiring a lethargic jury, we sit in lifeless conference rooms and advocate before restrained, thoughtful mediators with nervous eyes. We argue with all the passion of an accountant at tax time. It's business, everyday business, lacking the fervor of cross-examination, the thrill of closing argument.

Now, every case is mediated—and some numerous times. After all, mediation settles cases, efficiently and frugally. Parties walk from those rooms without exhilaration or despair, but with relief that the contentious dispute will no longer consume their thoughts.

Mediation is the present and future. A few guidelines on how to handle one effectively:

Prepare. It seems this is the first point I make in every column. Yet, there's a tendency to treat mediation cavalierly, informally. Jot a few notes, grab the file, and wing it. Mistake. If you don't know the intricacies of the family tree or the medical history, then you're immediately and silently seen as a lazy bum to be fleeced like some gullible goober staring at the neon billboards in Times Square.

Take mediation seriously. If there's an issue of what damage law applies, failure to know the elements in all potential jurisdictions broadcasts that you're not a player, won't try the case. Hence the low offer and meager settlement. There's not a worse feeling than leaving money on the table. I know.

Better to respond: Yes, I realize the judge can apply New York law, which allows only pecuniary loss and pre-death pain and suffering. Let me tell you why I believe Pennsylvania law, which will allow significant recovery for noneconomic damages, will apply. And then rattle off your theory. Even if it has little chance of success, the other side will be impressed with your diligence.

Anticipate your adversary's argument and be ready to refute. If liability is contested, whip out the photos and expert reports to prove you've considered their contentions and they are easily countered. If your client bounced from job to job, or did time for drugs, toss out names of

character witnesses and offer, "You want to depose them? When?"

Don't forget Facebook, LinkedIn, and other social media. A touch embarrassing to argue that the devastated widower needs decades of therapy, only to be shown a video of his singing "Born to Run" at a karaoke bar. Screaming "It's not admissible" will only fill the room with laughter.

The net knows everything. Use it. So, before you sob that your client's poverty was caused by this deliberate breach of contract, make sure you're aware of the $32,125.98 in taxes paid on his Hamptons summer home.

Most mediators insist that clients (or those with authority) be present. So sit down and go through the process so there are no outbursts—"I don't want your effing money," screamed by an upper crust suburbanite, is a classic. Forewarn your clients that your adversary will belittle their claim, expose a wart or two, or simply treat them with patronizing callousness.

Occasionally, I ask my client or a family member to detail how an incident has affected her life. A five-minute presentation by a credible and sympathetic mother who lost her daughter is much more moving than any words you could spout. I want the insurer or CEO to hear the pain, the loneliness, the fear. This also allows a client to convey her loss to those she feels are responsible. Very important psychologically.

Defendants, whether insurers or executives, may also wish to express regret or explain that they were not at fault. Because mediations are often free-flowing, without rigid procedures, your client must be prepared for all possibilities.

Use brochures, photos, videos. Usually, the mediator will request a submission in advance. A short, simple booklet, loaded with photos, diagrams, charts, is preferred. No retired judge will read another boring legal brief or thumb through 100 pages of medical records. Succinct excerpts of depositions, critical contractual language, the "smoking gun" email are all that's necessary.

Mike Holland of Condon & Forsyth, who has defended serious injury and death claims for decades, tells of a plaintiff's attorney who recorded a video on his iPhone the day before and showed it as proof of continuing disability. It did the trick. Save the expensive accident reconstruction video and "day in the life" film for impressionable juries.

You can't bluff your way to a large settlement.

Be realistic. Your adversary and the mediator won't be swayed by glitzy visuals or tear-jerking harangues. To convince savvy attorneys, you need substance, not flash. A straightforward presentation while acknowledging weakness is effective. You can't bluff your way to a large settlement. Exaggerated claims and emotion will only be met by skepticism and derision. As Mike Holland reminded me, eloquence is overrated.

Retired Judge Gerard H. Rosenberg, who spent 27 years on the trial bench in the Supreme Court, Brooklyn, wants parties to be flexible. Making outrageous demands or beginning negotiations with a settlement number that is set in stone often leads to failure. Mediation is not trial, Judge Rosenberg notes. You're there to settle the case. Good-faith negotiations by both sides assisted by an impartial mediator who facilitates, but doesn't force, settlement will allow the process to succeed.

Be aware of the interpersonal dynamics. If your adversary has to beat you up to impress her client, remain cool. "Obviously, I disagree. But I thought we were here to discuss settlement." Everyone in the room has differing agendas. The plaintiff may need an acknowledgment of regret. The defendant may require confirmation that the damages are real. A skillful, strong mediator can navigate the emotional currents and guide the parties toward discussing numbers.

Be patient. A decision to pay an extra 20 grand or to end a three-year war of nasty accusations is not easy. Sure, you can grab your briefcase and stomp out, slamming the door behind you. Your client will beam—man, he's tough. Everyone else will smirk, wondering when you will grow up.

Be cordial. Hard for callous counsel who don't believe a word. At least wait until only attorneys are present. A recent mediation failed when the defendant's offer was insultingly low. I politely ended the session and walked my client to her car. When I returned, the defense attorneys loudly and emphatically let me know that my decedent wasn't knocking on the pearly gates. They lit into me but good. I responded as I was taught in the schoolyard, using words that are probably still venial sins. I was used to such venom, but my innocent forwarding attorney from the neat farmlands of Ohio was livid. I patiently explained that they were just venting, that they weren't serious. A joke, a disparaging remark said to the wrong person can have disastrous consequences.

You must want to settle. If you insist on a trial, tell the other side. I seethe when I drag my client to a mediation only to be told that an offer can't be made because additional records are needed. Advance notice avoids resentment and mistrust.

Don't adjourn the mediation. Once negotiations commence, momentum builds. Sure, you have to sit and discuss your next move, but that shouldn't take hours. Close the deal. Once everyone steps into the sunshine, then nosy relatives or know-it-all colleagues inject doubt and uncertainty.

Ultimately, the decision to settle is a business one. Can I do better at trial? Few cases allow you to answer affirmatively and definitively. The overwhelming majority should be mediated. Not that much fun, but it works. ■

Global Litigator

UNDERSTANDING FOREIGN STATES' MANDATORY CORPORATE SOCIAL RESPONSIBILITY REPORTING

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Henry Thoreau once mused, "What we call wildness is a civilization other than our own." Understanding other countries' national mores, standards, and priorities as they relate to human rights, the environment, labor practices, and other social and governance issues used to be the purview of the inquisitive scholar or traveler. For litigators representing business interests in the "wilderness" of other nations, in contrast, it was solely corporation law that dictated behavior. Little attention was paid to the positive or negative effects a foreign organization might have on the local population, rule of law, or ecosystem until the idea of corporate social responsibility (CSR) took root.

CSR has undergone a dramatic revolution—a revolution that should be front-of-mind for litigators working with transnational clients. The practice has evolved from a nice idea or marketing opportunity to a business imperative mandating compliance. Today's CSR is characterized by enactments such as the California Transparency in Supply Chains Act, the Foreign Corrupt Practices Act, the UK Bribery Act, the pending Dodd-Frank Conflict Minerals Rules, the European Union's transparency and disclosure rules, and various other environmental and social laws and regulations. And with these new laws come new disclosure regimes.

CSR reporting is variously referred to as environmental, social, and governance reporting; integrated reporting; or Global Reporting Initiative compliance. Issues of nomenclature aside, they all share a similar focus on laws and business behavior at the intersection of three key areas: human rights (broadly defined), impact on the environment, and how a company conducts itself with regard to corporate behavior such as bribery and labor laws. Disclosure is thus the name of today's CSR game.

Benefits and Risk of an Annual CSR Report

Compulsory or not, publishing an annual CSR report can both be beneficial and pose pitfalls. What is included in a company's CSR report may trigger government investigations, civil tort claims, and other actions. Failing to file, however, is in most countries a rapidly disappearing option. For example, in India, France, Brazil, and Malaysia, a listed company failing to file a CSR report runs the risk of being delisted. Those counseling companies doing work in these geographies must be particularly attuned to these evolving issues. Consider the following scenario.

Protestors amassed on Wednesday outside your client's headquarters in Paris. Their placards decried human rights abuses and called for an end to "the slave trade" at one of your client's Asia-based assembly plants. You had just finished a call with the general counsel when they phoned back to tell you that they had just been served with process by a nonprofit at their corporate offices in California. The suit was alleging that one of the company's most popular products, frequently touted for its green credentials because it was made with "90 percent recycled materials," was deceptive and that the client was engaged in "green washing."

The client prides itself on its reputation in the marketplace as an environmentally conscious corporation that is a great place to work. The company's annual report even had a section in it regarding efforts to source and incorporate recycled material into its products and touting its commitment to "treating all employees fairly" and its "effort to monitor its third-party

manufacturing operations in Asia."

Later in the week, the senior vice president of Asian operations contacted general counsel to say that they had just received notice from an overseas securities regulator where their subsidiary was listed, informing them that because the company had failed to file the new mandatory CSR report, they were being investigated. Meanwhile, workers in the Asian assembly plant had gotten wind of the demonstrations in Paris and taken their story to the international press, alleging that local labor officials had been bribed to look the other way, allowing children to be hired on the assembly lines. By Monday, the company share price had dropped and appeared to be on the decline.

Consumer groups or human rights activists are frequently the first to raise a question or make an issue out of something a company has reported on, or failed to mention, in its CSR report. But those inquiries can in turn prompt questions by authorities or regulators in host countries. An allegation of labor officials being paid to look the other way when children are involved or working conditions failing to meet standards can turn into a bribery investigation, prompting the interest of U.S. regulators as well as those in the host country. Conversely, an investigation into allegations of corruption may identify potential violations of labor rights or evidence of human trafficking. If a company has incorrectly claimed in its annual CSR report to have examined its supply chain and determined it clean, this could be grounds for a shareholder or consumer claim against the company for publishing false or misleading information. Corruption, human rights, environmental practices, and labor policies all roll up under CSR and increasingly are having material financial impacts on corporate balance sheets.

Truth or Consequences

If the company's annual report touches on its CSR policy but fails to make mention of problems, boycotts can ensue and shareholder class actions may be launched against the company for failing to disclose critical information. (Consider, for example, 2012's landmark $100 million class action against cosmetic companies Estée Lauder, Avon, and Mary Kay over allegedly misleading "cruelty-free" claims). Attorneys counseling organizations issuing CSR disclosures must therefore ensure that the disclosures can be backed up by hard data.

In addition, if a company is listed on one of the exchanges that now require transparency but has failed to report fully and accurately the efforts it has made to meet CSR international norms (or has downplayed challenges in meeting CSR obligations), the company could be facing possible delisting,

Illustration by Jon Krause

prompting perhaps yet another shareholder lawsuit.

For example, in April 2010, the discount retailer Lidl was accused of false advertising over its claims that it promoted fair working conditions for workers in its supply chain. The Hamburg Consumer Protection Agency (Germany), supported by the European Centre for Constitutional and Human Rights and the nonprofit Clean Clothes Campaign, filed a civil suit against Lidl. The lawsuit alleged that the working conditions in Bangladeshi textile plants supplying Lidl did not meet internationally recognized standards and violated labor laws. Shortly after the lawsuit was launched (and, undoubtedly, after the company had expended significant resources on attorneys to conduct an internal investigation), Lidl agreed to retract its advertisements.

Mandatory CSR-related reporting already exists in Argentina, Austria, Belgium, Brazil, Denmark, China, France, Germany, Greece, India, Indonesia, Italy, Malaysia, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. Many directives of international institutions are now ratified by countries—for example, the United Nation's Guiding Principles on Business and Human Rights, ratified in 2011 (stating that all businesses have direct responsibility for *all* of the ways in which they have an impact and for preventing human rights abuses their actions may cause, while obligating them to ensure that adequate remedies exist to address reported abuses); mandatory environmental, social, and governance reporting efforts by the European Union (expected to be passed in 2013), the World Economic Forum, and the United Nations Declaration on the Rights of Indigenous Peoples. This means that between local country law and international treaties, many multinationals are obligated to comply with and report under multiple CSR reporting laws. That wilderness of differing values in different countries can mean operating under conflicting and overlapping regulations, increasing the chance for violations of the disparate laws and follow-on investigations and litigation.

Increasingly, CSR policies have a direct impact on the legal department.

Many of the most recent international CSR reporting requirements have emanated from securities regulators. By way of illustration, in May 2008, the Shanghai Exchange issued the Shanghai CSR notice, informing all listed companies that, henceforth, they were expected to establish a CSR strategy and to file an annual report detailing what steps each company has taken to achieve its CSR elements (such as employee health and safety, and environmental quality). More recently, the Chinese Government's Assets Supervision and Administration Commission (SASAC) issued a directive in early January 2012 for sustainability reporting by all state-owned enterprises. Although the SASAC has not as yet specified a regime or framework for these companies to follow, Peng Hugang, head of the commission's Research Bureau, said the government expects all state-owned enterprises to publish CSRs by 2012. Spain, too, has just passed a Sustainable Economy Law (effective January 1, 2012), requiring all state-owned companies to produce sustainability reports and requiring all businesses with more than 1,000 employees to produce an annual CSR report and file it with the State Board of Corporate Social Responsibility.

Familiarity with the CSR reporting standards required of businesses in the country or countries where your client is conducting business is crucial to building an advance defense via the CSR report. Corporate culture has typically removed both the general counsel's office and its external litigation team from CSR departments, lodging them in marketing, public relations, or even human resources. But increasingly, the CSR policies and the way in which a company discloses how it implements those policies have a direct impact on the legal department and, ultimately, the matters on which external litigators will defend the company. Stakeholders are increasingly sophisticated with respect to CSR reports and are checking internationally accepted reporting guidelines for comparison and benchmarking, meaning that companies and their counsel need to be cognizant of international norms of expected CSR behaviors and reporting.

The uptick in "name and shame" campaigns, consumer boycotts, shareholder lawsuits, and states willing to prosecute companies means that the risks involved in inaccurate disclosures cannot be ignored. Business trial lawyers as well as corporate counsel need to become conversant with human rights law, including anti-trafficking efforts, environmental law, and international mandatory CSR reporting standards, among other things. ■

Scruples

COMMUNICATING WITH AN UNREPRESENTED ADVERSARY

MICHAEL DOWNEY

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Paradox cornered Ethox at the coffee machine. "Nemesis is back," Paradox started. "You won't believe his tricks this time."

Ethox objected, "The Jay-Kaye partnership dispute settled, didn't it?"

"Yes, we settled the Friday before trial and signed the settlement agreement last week. I thought I was done with Nemesis for a while." After a brief pause, Paradox pressed on. "We haven't even wired the settlement payment to Kaye. And Senior Partner just received a call on a new suit—and Nemesis is the opposing counsel."

"What type of case is it?" Ethox queried.

"It is a product liability lawsuit," Paradox responded. "Our client is Acme Company, a rocket sled manufacturer. I don't know much yet. But I just spoke to Acme's CEO, Marvin Acme. Apparently, after the suit was filed, Nemesis called Acme. Nemesis spent an hour asking Acme all sorts of questions about the case. That's not permitted, is it?"

"Did we represent Acme in pre-suit negotiations?" Ethox asked. "Did some other lawyer?"

"No," Paradox answered. "Acme was dealing with a long-time customer, WEC Limited. WEC complained a lot over the years but kept buying more Acme products. So Acme kept its lawyers away. Then, just when Acme Company thought negotiations were going well, Nemesis filed suit and called Marvin Acme to learn all Acme's secrets."

"If there was no lawyer representing Acme during those earlier negotiations, the ethics rules do not prohibit Nemesis's call," Ethox explained. "ABA Model Rule 4.2 prohibits a lawyer from discussing a matter with another lawyer's client, but only if the lawyer knows the other person is represented. Otherwise, a lawyer like Nemesis may speak directly with that party—whether there is a pending lawsuit or not."

"Nemesis interrogated Acme about almost every aspect of the lawsuit," Paradox protested. "Aren't there limits on what Nemesis can do?"

"It may seem surprising," Ethox answered, "but there are relatively few limits on what Nemesis could ask. Rule 4.4(a) prevents Nemesis from learning privileged information from Marvin Acme. But you said that Acme Company had no lawyers involved, so this is probably not an issue."

Setting down the coffee mug, Ethox continued, "Rule 4.1—as well as Rule 8.4(c)—barred Nemesis from making false statements. So Nemesis needed to be careful that Acme was not misled in any way."

"I doubt Nemesis would be so sloppy!" Paradox interjected. "But Nemesis would get pretty close to the line, particularly if Acme had helpful information."

"Even a misleading statement might be enough to get Nemesis into trouble," Ethox responded. "In addition, since Nemesis was representing WEC, Rule 4.3 prevented Nemesis from acting disinterested. Do you think Acme realized why Nemesis was calling?"

"I certainly hope so," Paradox responded. "Marvin Acme heads a very large, profitable company."

"Well, Acme might have asked Nemesis if Acme Company needed its own lawyer," Ethox offered. "Perhaps Nemesis tried to discourage Acme from involving a lawyer. Then, Nemesis may have violated Rule 4.3."

"It sounds like I need to learn exactly what happened," Paradox offered.

"Definitely," Ethox affirmed. "Also, knowing Nemesis, there might be a tape of the conversation. Some states permit one person on a telephone conversation to record the conversation without the other party's consent. Other states, like ours, require all parties' consent for recording."

"Oh, if there is a tape, I would love to get my hands on it," Paradox stated.

"That's why we have civil discovery," Ethox responded.

"I guess I should call Acme back. Will you join me on the call?" Paradox asked.

"I would be happy to," Ethox responded, abandoning the coffee mug and following Paradox down the hall. ■

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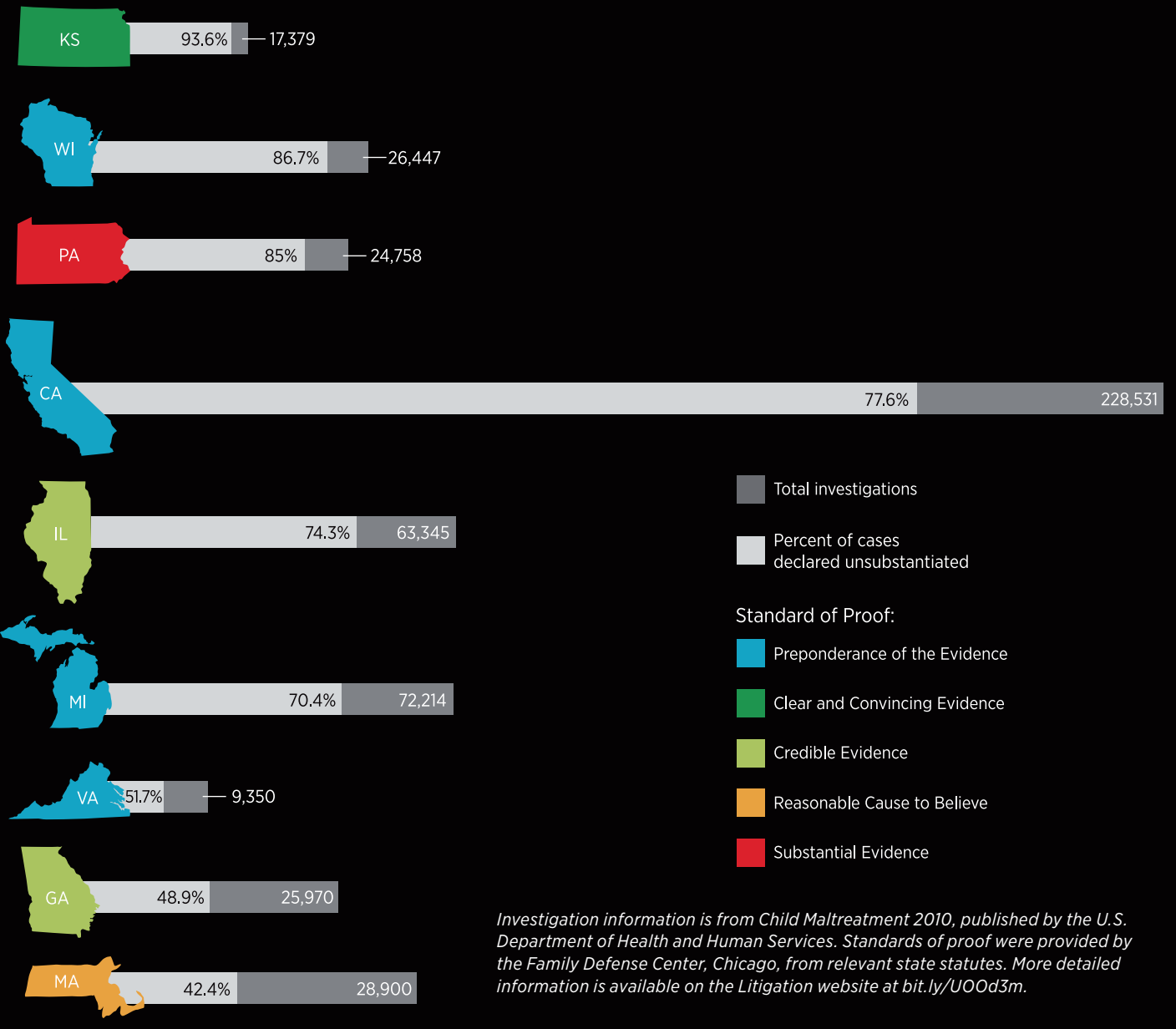
CHILD ENDANGERMENT INVESTIGATION RESULTS COMPARED

(See article by Diane L. Redleaf, page 34)



Investigation information is from Child Maltreatment 2010, published by the U.S. Department of Health and Human Services. Standards of proof were provided by the Family Defense Center, Chicago, from relevant state statutes. More detailed information is available on the Litigation website at bit.ly/UOOd3m.