Fea t u re d I n T h i s I s s u e

Ra m m o n i o u s: J u s t i ce S c a li a, By Mark Filip
An Interview with Judge David Hamilton, By Laura McNally
Reflections on the Importance of Legal Aid in Recognition of the 50th Anniversary of LAF, By Robert M. Dow, Jr. and Elizabeth Haskins Dow
How to Succeed in Federal Court Without Really Trying or the Attorney’s Guide to Fame and Fortune in Federal Court, By Sara Ellis
Making the Case for Mediation, By Arlander Keys
Think Once, Think Twice...Then Backspace and Delete, By Pat E. Morgenstern-Clarrington
Every-Picture Tells a Story: A Visual Guide to Evaluating Opinion Evidence in Social Security Appeals, By Iain D. Johnston
Search Warrant Help Desk: Emergency Measures for Lawyer First-Responders, By Daniel Hartnett
An Annotated Guide to the Standards for Professional Conduct within the Seventh Federal Judicial Circuit, By Alexandra L. Newman
Consumer Data Encryption and the Autonomous Digital Self, By Matthew F. Prewitt
Friend or Foe: The New Patent-Challenge Procedures at the Patent Trial and Appeal Board, By Adam Kelly
A Modest Proposal to Measure and Manage Bad Behavior by Lawyers, By Thomas E. Patterson
The Post Wal-Mart Evolution of the Class Action, By Shankar Ramamurthy, Prof. Randall D. Schmidt
Seventh Circuit Bar Association Report on the Seventh Circuit, By Collins T. Fitzpatrick
Magistrate Judge Matthew P. Brookman, By Rozlyn Fulgani-Britton
Magistrate Judge M. David Weisman, By Marc Beem

Vi ew s f r o m t h e B e n c h

(f a n d O t h e r E q u a l l y I m p o r t a n t N o n j u d i c i a l M u s i n g s)
In This Issue

Letter from the President ....................................................... 1

Remembering Justice Scalia, By Mark Filip ........................................... 2-3

An Interview with Judge David Hamilton, By Laura McNally .................. 4-12

Reflections on the Importance of Legal Aid in Recognition of the 50th Anniversary of LAE, By Robert M. Dow, Jr. and Elizabeth Hoskins Dow .................................................. 13-16

How to Succeed in Federal Court Without Really Trying or the Attorney’s Guide to Fame and Fortune in Federal Court, By Sara Ellis .................................................. 17-23

Making the Case for Mediation, By Arlander Keys ................................ 24-26

Think Once, Think Twice...Then Backspace and Delete, By Pat E. Morgenstern-Clarent .................................................. 27


Search W arrant Help Desk: Emergency Measures for Lawyer First-Responders, By Daniel Hartnell .................. 34-38


Consumer Data Encryption and the Autonomous Digital Self, By Matthew F. Prewitt .................................................. 54-57

Friend or Foe: The New Patent-Challenge Procedures at the Patent Trial and Appeal Board, By Adam Kelly .................................................. 58-60

A Modest Proposal to Measure and Manage Bad Behavior by Lawyers, By Thomas E. Patterson .................................................. 61-62

The Post Wal-Mart Evolution of the Class Action, By Shankar Ramamurthy, Prof. Randall D. Schmidt .................................................. 63-67

Seventh Circuit Bar Association Report on the Seventh Circuit, By Collins T. Fitzpatrick .................................................. 68

Magistrate Judge Matthew P. Brookman, By Roslyn Fulgoni-Britton .................................................. 69

Magistrate Judge M. David Weisman, By Marc Beem .................................................. 70-71

Seventh Circuit Annual Statistical Report Summary for the Year 2015, By Gino Agnello, Clerk Seventh Circuit Court of Appeals .................................................. 72

Writers Wanted! ................................................................. 1

Upcoming Board of Governors’ Meetings .................................................. 12

Send Us Your E-Mail. ................................................................. 23

Get Involved. ................................................................. 71

Seventh Circuit Bar Association Officers for 2015-2016 / Board of Governors / Editorial Board .................................................. 73
Letter from the President
President Michael T. Brody
Jenner & Block, LLP

My family likes to tell the story of Henry O’Connell, one of our first ancestors to come to the United States. Henry was 13 years old, living with his family on a farm in the West of Ireland. His uncle, who had previously emigrated to the United States, returned to Ireland for a visit. On the day before he left Ireland to return to America, the uncle suggested to Henry’s father that Henry come to America with him. The next day, Henry left his family, his home, his friends, and his country. He never returned. His daughter was my great-grandmother.

It is a cliché to say that we are a nation of immigrants. While our personal stories differ, we are rightly proud of our immigrant ancestors, most of whom battled persecution, poverty, slavery, privation, or some other form of adversity. While immigration is at the core of our national identity, it is an increasingly divisive issue.

Against this backdrop, I am proud of the accomplishment of the Seventh Circuit Bar Foundation, which hosted a two-day seminar entitled “E Pluribus Unum: The Immigration Conundrum” on March 3 and 4. The symposium brought together lawyers, judges, political leaders, policymakers, and academics to discuss the past, present, and future of our immigration system. If you attended, I am sure you agree with me that it was a wonderful program. If you were not able to attend, there are two ways to learn from this groundbreaking program. First, the proceedings are available on the Bar Association’s website (www.7thcircuitbar.org). You may view any or all of the proceedings -- for free. Second, we will present highlights of the immigration symposium at the Annual Meeting’s Opening Program, to be held May 1, 2016 at the Preston Bradley Hall of the Chicago Cultural Center. (The rest of the Annual Meeting will be excellent as well. Details are on our website at www.7thcircuitbar.org).

Congratulations for the successful immigration symposium go to the Seventh Circuit Bar Foundation, its leaders, Tom Campbell and Doug Carlson, and all of the members of the symposium’s Planning Committee. I hope you can view the immigration program on the web, sample it at the Annual Meeting in Chicago, and become better informed on this important civic issue.

Writers Wanted!
The Association publishes The Circuit Rider twice a year. We always are looking for articles on any substantive topic or regarding news from any district — judges being appointed or retiring, new courthouses being built, changes in local rules, upcoming seminars.

If you have information you think would be of interest, prepare a paragraph or two and send it via e-mail to: Jeffrey Cole, Editor-in-Chief, at Jeffrey_Cole@ilnd.uscourts.gov or call 312.435.5601.
Many people have written at length about Justice Scalia’s impact on the law. That is not surprising, because he was one of the most influential jurists in American history. He was a gifted writer – worthy of inclusion among the strongest writers ever to serve on the Supreme Court. He also fundamentally changed the way cases are evaluated, ushering in a culture of vigorous questioning and debate at oral argument that is now ingrained in contemporary Supreme Court practice. And, as many have noted, he championed important, and once uncommon, approaches to judicial analysis, including statutory textualism and Constitutional originalism. Those modes of analysis now generally must be reckoned with, regardless of whether a particular jurist believes they are the exclusive methods, or even the best methods, of resolving questions before a court. In all those respects, Justice Scalia’s effect on American law was, and will continue to be, enormous.
Remembering Justice Scalia
Continued from page 2

I will not add to the extensive amount already written on these subjects. Not only because they have been canvassed in depth, but also because they are not among the things that I will remember most about Antonin Scalia. Instead, I will write about his more human side -- about aspects of him as a person that, for the most part, are not even related to his being a judge or a lawyer.

When I think of Justice Scalia, the first thing I remember is how fond he was of his beloved wife, Maureen. She is a remarkable person, and he was always quick to express his affection for and admiration of her. He knew (as do I) that he had “married up” in life, and he felt truly blessed to have her love and support during their 55 years of marriage. He readily credited his wife for being the foundation of the world for their children and for him, and as indispensable to his family’s well-being and his own work. As he used to say, “I do the Constitution, and Maureen is in charge of pretty much everything else.” He also was a devoted father. As much as he cared about the law, he cared manifestly more about his wife and kids, and later, his dozens of grandchildren.

I will also always remember how joyful Justice Scalia was as a person. He was quick to laugh, including at himself. He also often laughed and joked with those who disagreed with him most about the law. People are generally aware of the deep friendship of Justice and Mrs. Scalia with Justice Ginsburg and her husband Marty, and his regard and respect for Justice Elena Kagan. He also hired many clerks over the years who did not share most or even many of his views. He laughed and joked with them as well. He loved a good story, and there was a special glint in his eyes when he came to the punchline of one.

Justice Scalia also embodied what it meant to be a dedicated public servant. When I clerked for him, he worked very hard, and while he made it a priority to be home for dinner, it was clear he worked after others had gone to sleep. There were four of us clerking for him, including Paul Clement, who later would serve as Solicitor General of the United States, Emmet Flood, who would later serve as Deputy White House Counsel, and Louis Feldman, who is a brilliant tax attorney in New York. Collectively, if we were all working our hardest, and being as productive as possible, we struggled to keep up with the Justice’s own efforts working alone. We noted, as he would graciously thank us for a draft and then wholly rewrite it, that at least we were able to “format the document” for him in the Supreme Court’s opinion formatting program.

Another defining characteristic of Justice Scalia was his faith. It was undisguised and inspiring, including to others who lacked his conviction or found it difficult to believe at all. He was also genuinely respectful of other faiths, and enjoyed learning about other religious traditions. Others have written at length about the acts of quiet personal charity he performed -- genuine acts of compassion motivated by his faith, and done without expectation of recognition or praise. Those acts were real and palpable to those around him. So too was his commitment to make the world a better place through his labors -- consistent with the motto of the Jesuits who educated him: “Ad majorem Dei gloriam,” “For the Greater Glory of God.” It is commonplace to say that one need not agree with all his particular views (even spouses and siblings rarely agree on everything, and lawyers certainly disagree all the time), but what is universal was the fact that he worked, literally his entire adult life, motivated by a love of his country and a desire to try to serve as best he could.

To try to encapsulate these memories into one theme, perhaps the most enduring thing I will remember about Justice Scalia is what a fine role model he is, regardless of whether one is a lawyer or shared any view he espoused. By that I mean, he was a devoted family man, who genuinely tried his best to be a good spouse and parent. He was a deeply patriotic man, and devoted himself in service of our Nation. He worked hard, at a job that he found engaging and meaningful, even if (as is the case for almost everyone), he sometimes found the results of his efforts to be not entirely satisfying. He was a joyful person, and a patient person, who would indulge almost any shortcoming or error so long as he believed you were honest and trying your best. He also believed, more than anything else, that God loved him and cared for him and for the world.

If Justice Scalia were here, I believe he would say that people should not shed tears for him. He lived a wonderful and long life, blessed with his faculties and vigor until the day he died. He had a job he loved and found meaningful and rewarding. And he lived his life surrounded by a family and by friends who respected and cared for him. I will heed what I expect would have been his wish and shed no tears in this memorial. And I am confident that each of his colleagues on the Court, and those of us who clerked for him, will miss him and remember him.

The photo of Justice Scalia was graciously provided by the Collection of the Supreme Court of the United States.
In March 2009, President Obama announced his first circuit court nominee: Judge David Hamilton, then Chief Judge of the U.S. District Court for the Southern District of Indiana. The Senate confirmed his nomination later that year, and while he still remains the Seventh Circuit’s most junior member, Judge Hamilton has become a distinctive voice in a court known for its many remarkable voices.

Judge Hamilton grew up in Southern Indiana. His father was a minister, his mother was a singer, and his uncle is former Indiana representative Lee Hamilton. Politics, religion, and public affairs were always “front and center” in Judge Hamilton’s family life. He studied religion and philosophy in college at Haverford College and at the University of Tubingen in Germany while a Fulbright Scholar. After graduating from Yale Law School, Judge Hamilton began his legal career as a law clerk to Judge Richard Cudahy of the Seventh Circuit. He spent nine years in private practice at Barnes & Thornburg in Indianapolis, with a break between 1989 and 1991 to serve as legal counsel to Indiana Governor Evan Bayh. Judge Hamilton joined the district court bench in Indianapolis in 1994.

LM: You started your judicial career in the district court. Six of the 12 Seventh Circuit judges have been district court judges, and Judge Sykes was a state court trial court judge. How does trial court experience impact the job of an appellate court judge?

Judge: It brings a lot of familiarity with the kinds of problems that trial judges face. On appeal, it’s easy for what happened in the trial court to metamorphose from what it may have looked like to the trial judge into something that looks very different to the Court of Appeals: for example, in how you handle a problem that may arise in voir dire with respect to jurors or how you handle Batson challenges or how you handle issues that may arise during deliberations. Having some experience on the front lines of handling those very human kinds of problems can help inform the appellate review process.

Sentencing is another huge area. It’s so important as part of the work of district judges. It is a big part, in terms of volume, of our appeals. Frankly, I think it helps if at least one member

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of the panel has had that experience of being face-to-face with the defendant who is being sentenced: having had the experience of listening to the protestations of remorse and the promises to reform, and of trying to decide whether this is sincere and to be believed, or if the fellow has said this to seven judges before.

Also about sentencing — this is both a legal and personal comment — the federal sentencing statutes, particularly §3553(a) of Title 18, tell judges in essence to do contradictory things: to try to rehabilitate, to deter, to punish, to ensure respect for the law, and so on. In a lot of the sentencing decisions, those different factors will be tugging judges in different directions. The statute doesn’t tell you how to resolve that. I hope experience having been tugged in those different directions, by the instructions from Congress and by your own instincts about what is just in the particular case, gives us a better understanding of just how difficult those decisions can be.

LM: Many federal judges come to the bench with a background in government service, often from the U.S. Attorney’s office. It seems that there are fewer from the criminal defense bar. Do you believe that has any impact on the direction of the courts?

Judge: I don’t know. I do know that my good friend, John Tinder, who has recently retired, was one of the most aggressive enforcers of the Fourth Amendment in criminal cases that I know. That stemmed a lot from his familiarity with the subject area and his comfort levels in saying, from long experiences as both a prosecutor and trial judge, what’s allowed and what’s not allowed. Somebody like me, coming in from civil law practice, didn’t grow up professionally dealing with those issues, and so I haven’t lived those issues the way he did.

Where I’m headed with this is a pitch for diversity of professional experience on a multi-member court because we help and teach each other. In terms of government experience, for example, I was counsel to my state’s governor for several years. I can say that has shaped my approach to legal issues in that I think it gave me a deeper appreciation than I had before for the genius of American federalism and the role of states in our legal system. From the perspective of a federal bench, where we get to invoke the supremacy clause all the time, I think that it’s helpful to have had some on-the-ground experience working with the state government, and occasionally being annoyed by what seemed to be overly aggressive federal courts who weren’t sufficiently deferential to our role in the federal system.

Whether there should be more appointees with more criminal defense background or plaintiff’s personal injury or plaintiff’s civil rights and employment law is, I think, a decision for Presidents and Senators.

LM: Do you feel the system does a good job helping new judges learn new areas of the law?

Judge: I’ll say for new district judges, I don’t think anybody is fully prepared for that job. Usually there is a hole in almost everybody’s experience. Folks who come in from state courts either have not done a lot of work in substantive federal law, or may not have done it recently enough so that they are rusty in that. Folks who come in from criminal practices, often as you say, they’re prosecutors, just don’t have the experience of managing civil cases or are not as familiar with the dynamics and the economics of those cases, which are really critical. Somebody like me, I came in from a civil private practice, so I had to learn the criminal stuff from almost a standing start.
I also had to learn how to become a judge – how to manage the case system, preside over a trial. But almost everybody has some holes in their experience to fill in. I'm a big fan of the Federal Judicial Center, which is the formal educational arm of the federal judiciary, but I also benefitted from so many other colleagues as well, from mentors on the bench who took time to explain to new colleagues, to take phone calls during recess. I think there is a sense of collegiality in the Federal judiciary that smooths that out.

LM: Let's talk about the perception of the federal judiciary as a part of the political process.

Judge: Well, I don't want to comment on particular vacancies or choices, but I am very concerned, about maintaining the long-term institutional legitimacy of the federal judiciary. That is something that took generations to build. It can be destroyed too easily, and it is one of the great treasures of our system of government — a federal judiciary that is respected as independent and as deserving of the respect that we get. Justice Breyer has written about the long progress that was needed to win the public's confidence, and we have to work very very hard to maintain that.

I think we do that by working as hard as we can to find common ground with our colleagues on difficult cases. We do it with the tone of our rhetoric, which I think needs to be appropriately measured and non-personal so that people don't get distracted by the idea that these are personal feuds. They are not. But the wrong kind of rhetoric can be a problem. In the American political system since de Tocqueville’s original observation about every major controversy winding up in front of the courts, we do wind up with a lot of very divisive, controversial issues about which people have strong feelings. We need to do our best to assure the people who have to live with those rulings that they are given full consideration, that all sides are heard, and that something that we recognizes as legal reasoning underlies the final result, as opposed to whim or personal values.

In the work that I have seen here on the Seventh Circuit, I have been very impressed. My colleagues and I are talking through these issues at a level that even informally is consistent with the rule of law, and so I am troubled in some of the theoretical discussions and critiques about judicial review and theories of judicial review that try to mock those efforts as just expressions of individual judges’ whims and values. They are not. Even in some of the most difficult cases we deal with, we are trying to fit our decision in the particular case into a larger web of law and legal principles.

LM: Do concerns about not appearing political in your decision making influence your willingness to speak or write outside of your judicial rule?

Judge: They do, and I try to make my time available to talk with students or lawyers or public groups about these kinds of problems. But my message I’m afraid, is not very exciting. It is that, in essence, “We’re doing our job, we’re trying do it as well as we can, and we are not politicians with black robes on.” I think that sort of educational effort is an important part of our job.

LM: The Seventh Circuit has a practice of inviting district court judges to sit by designation. Have you found that to be useful process?

Judge: I have now sat on a number of panels with visiting district judges, and we’re grateful for the help. It’s intended to be an educational experience in two directions, and I think it is working reasonably well at that. A lot of district judges seem to enjoy the experience of being able to look at cases from a different perspective, and it’s helpful for district judges to know what their cases look like when they get here. And it is also an opportunity for us to learn from district judges about what is going on in the profession at the trial level today. Even things as basic as what hourly rates are you awarding in civil rights and employment cases these days? Or what difficulties are resulting from our recent supervised release cases on the ground? Can we fine tune that? Those discussions go on.

Continued on page 7
Judge David Hamilton

Continued from page 6

LM: You mentioned collegiality. You’re the newest member of the Seventh Circuit, and you have been here almost seven years now. You’re a member of a group that has worked together for a very long time. How do you maintain collegiality?

Judge: Let me tell you what I mean by collegiality. On the one hand, it’s collegiality at the most elementary levels, which you absolutely cannot take for granted. We talk to each other about personal matters, about professional matters. We spend time together. I think we like each other. But I remember Judge Posner’s line when Judge Wood was first appointed. He welcomed her to this court by pointing out that since we don’t get to pick our colleagues in the way law partners do, she had just joined a family in which everyone’s an in-law, and there is no divorce. So, we are with each other for a long time. And when you approach it with that kind of an attitude, it is a great privilege to do the work. These are really smart, hardworking people, and it’s a privilege to work with them.

But collegiality to me means a lot more than getting along, and this is one of the things that has impressed me and was a pleasant surprise when I got here. I have been very impressed by the quality of the communication: the preparation of cases, especially for oral argument, the communications in conference, and the quality of communications about one another’s draft opinions. When there are points of disagreement, there are efforts to try to find common ground, and when those are not successful, the disagreements are laid out. Nobody is holding back on the reasoning, but I think we all understand these are not personal disagreements, and they don’t take on that character. I write quite a few separate opinions, and I try to make sure, as best I can, that those are not understood in personal ways but simply as disagreements about how a particular case should be decided or how particular principle should evolve.

LM: Let me ask you about the Seventh Circuit’s approach to overruling past precedents or creating circuit splits.

Judge: Can you talk a little bit about how that works.

Judge: Yes. What you are referring to is Circuit Rule 40(e) which requires a panel that plans either to overrule circuit precedent or to create a circuit split to circulate the opinion within the court before the panel opinion is released. It helps us maintain a reasonable degree of uniformity in circuit law and makes sure that we don’t lightly but deliberately create a circuit split. I think that’s useful.

Most 40(e) circulations are approved because usually the panel has thought through things pretty carefully and has good reasons for doing what it plans to do. But on occasion there will be disagreements, and we’ll either take the case en banc or ask the panel to reconsider the issue. I’ve done some 40(e) circulations myself. It’s not something that we do lightly. It’s also not something I do with a hair trigger, in the sense that the fact that we might disagree with language in another circuits’ opinions is not enough. We’re trying to apply a stringent standard for when we really think the Supreme Court needs to decide this as an issue.

For overruling precedents, 40(e) gives us kind of low-budget way to do that. We’ve done it, for example, to eliminate circuit splits where we were the last one standing and somebody said maybe we ought to just fold on this issue.

LM: Many of your oral arguments involve appointed counsel. How much do you think such counsel assist the court?

Judge: Oh, their contributions are huge. We’re so grateful for the attorneys who are willing to do this. I should also add that those were my first opportunities to argue before this Court as a young lawyer. For me they were great learning experiences, both because of the issues and also as a young lawyer in a big firm learning the responsibility of being first chair for somebody’s liberty being at stake. That’s an invaluable step in professional growth.

In terms of how they help the court, I believe we recently passed the 50% threshold in terms of pro se cases, which is very sobering: criminal defendants, habeas corpus petitioners, prisoners who are challenging
their treatment in custody, and just average folks who just don’t have access to a lawyer and feel that they have been wronged in some ways. The court benefits enormously from the contribution of professional skill to address the fact situation and basically give it a legal framework so that we can all engage.

If you’re a person who feels you’ve been mistreated in the criminal justice system, or by an employer, you don’t know what the applicable law is but you feel victimized. And maybe you file an appeal that lays out the facts and somebody in the court says there may be something here that wasn’t recognized before or this actually is an example of a problem that is recurring. Let’s get counsel and let’s confront this issue and decide it. That’s our job. And we do it so much better when we have good, adversarial presentation by able counsel.

**LM:** In this circuit, almost 40% of the cases have oral argument, second only to the D.C. Circuit, which hears argument in 51%.

**Judge:** Well, I’m proud of the record that we have. The general rule is that if you have lawyers on both sides, and if at least one side wants oral argument, you get it. And I think that’s a good thing. I think it’s good for the judges and lawyers to come face to face and actually have to talk over the issues. It’s good for judges to have to confront, even if on a second-hand basis, the human side of what we’re deciding. And it’s good for lawyers to confront whether they want to put a particular issue in the brief if they are going to have to defend this face to face.

**LM:** What is the value of oral argument to you?

**Judge:** Well, it depends. I met with a group of students recently in appellate practice who asked me in essence whether I approached oral argument fairly and objectively, and I said well, not really, no, because it’s rare for me to come in neutral. The expectation here among the members of the court is that you are sufficiently prepared to be ready to cast a vote after the arguments – a tentative vote but one that you are very likely to stick with – so that we want to do the hard thinking now while we’re all together for argument and for conference face-to-face. And so, what I get out of oral argument, regardless of the quality of the oral argument, is the opportunity to listen to and talk to my colleagues about the case for the first time. That’s really critical. As often as not, we’re talking to each other as much as we’re talking to the counsel in the case.

I try to go into an oral argument with both a preliminary view and some thoughts about what it might take to change my mind. Questions are usually aimed in that direction, as well as signaling to colleagues what I’m worried about, what I’m thinking about, particularly if you’re looking at a case that has multiple paths to different results or multiple paths to the same result. What’s most important? Should we do this on procedural grounds? Should we reach the substance of the dispute? The dialogue is pretty transparent, I think. You can watch our discussions and questions and probably make some pretty good guesses about likely votes.

I can tell you I always appreciated arguing in front of Judge Ripple because he would be quite explicit: “Counsel, here’s my biggest problem with your side of the case.” In essence, “Give me your best shot. What’s the best response you have to this potential weakness?” If I’m counsel in the case, those are the questions I want, and those are the questions that I try to ask as a judge.
But also, even if I’m not troubled about a case, I will frankly try to ask a question or two just so there’s some give-and-take discussion. We do ask counsel to come here to have a conversation about the cases, and I think we ought to go ahead and do that and not be a totally cold bench. Obviously there are times when we are way hotter than counsel may want or like.

This has come up in some particularly controversial cases where oral arguments may have been especially contentious. I would ask counsel to be a little patient with our impatience. I think I said this in an oral argument a year or two ago, in essence said, “Counsel, we’ve read everything you wrote for us. this is our turn.” I know it’s frustrating for counsel not to be able to give a prepared speech about the strongest points in their case. That’s what I wanted to do in oral argument too. But for our purposes, our job is to probe the softest spots in the argument. This is our chance to talk back and wrestle with the arguments in the briefs, so please don’t take the interruptions amiss. Time is limited, and if we are asking questions, it’s usually because it’s something we think is important.

LM: Every now and then there are arguments with no questions. Are there any rules of thumb for what one should take from an argument if there are no questions?

Judge: I wouldn’t say there are any rules of thumb, simply because different judges have such different approaches. There are some panels where I would think that’s impossible to happen and other panels where it could happen quite easily.

If I’m on the panel, it’s unlikely to happen. I guess I may be echoing some of my time as a district judge where I would be at least cognizant of an audience of parties, clients, witnesses and so on. I would sometimes ask a question or two just to signal to everybody: I am paying attention, I do understand what this is about even if I’m quiet right now. That would often happen, for example, in sentencing hearings where a plea in mitigation might have been very difficult for victims to listen to. I would listen but would also ask a question or two just to remind both the defendant and his counsel and also observers that I do remember what happened. I do remember why we’re here. Those kinds of questions can also be useful just in terms of acknowledging implications in this case, both for the parties and for other people who are similarly situated. So it’s just part of a public dialogue as part of our job.

LM: Prior to oral argument, do you ever discuss a case with fellow panelists?

Judge: I won’t say absolutely never, but it’s very rare. I may touch base with colleagues if I’m going to be raising an issue that’s not really developed in the briefs, such as a jurisdictional issue. Rather than catch everybody flat-footed, I’ll just let them know ahead of time that I’m going to be raising this particular issue.

LM: Do oral arguments ever change your determination of which side should prevail on the appeal, in addition to shaping the opinion?

Judge: Yes, it changes outcomes. It certainly shapes opinions, and somewhere between 2 and 10% of the time it will change outcomes. Now, is that change the result of the brilliance of oral advocacy, a mistake in my preparation, or questions from a colleague that get me to see the case in a different light? All of the above. It can be any of those things. I try to be well prepared for oral argument, but there’s a reason there are three of us. And there are also situations in which somebody who has a good case may just not have written a very good brief, and we just don’t quite get it until we hear the oral argument.

Oral argument also helps shape the opinions. It is the opportunity for a group dialogue. I realize it’s highly stylized and formalistic, but you’re bringing together several minds, the judges and the counsel, to focus on the questions: What are the implications if we agree with you about this? Or this is a very confusing area of state practice; help explain this to us so we don’t mess it up. All kinds of ways that we’re helped by that.

Continued on page 10
We are generalists, and one of the difficult challenges of this job is that we’re doing very public work in areas where counsel are far more expert than we are. Oral argument is really a chance for us to kind of ask some dumb questions and make sure we understand the larger context in which this dispute arises.

LM: I’d like to talk about outside factual research by appellate judges. Do you have a view on that practice?

Judge: I don’t claim to be a purist about this. I think that it is often helpful for judges to do a little bit of directed research to understand better the context of a particular case. I think the maps that Judge Posner often puts into an opinion are very helpful to understand the subject matter. And it can be helpful to know a little more about the background of the case. I’m not claiming moral high ground or principled purity here. But I do think that appellate courts are not in the business of finding adjudicative facts that are going to be decisive for the outcome of the appeal. We have district courts that are far better suited institutionally to do that work. District judges who think that a case is not being developed sufficiently for one side or another have plenty of tools to be able to encourage or push that side to develop additional facts.

Obviously, a lot of people noticed the different opinions in a case called Rowe v. Gibson. [798 F.3d 622 (7th Cir. 2015)]. That came out in the summer of 2015 where Judge Posner and I debated the appropriateness of independent factual research by an appellate court. I said I think most of what I had to say in that dissenting opinion.

LM: Do you have more concern relating to internet-based fact-finding than fact-finding from other sources?

Judge: No. It’s just that the internet is so convenient. You sit at your desk and Google topics and find reliable and unreliable sources on the internet without having to do what we used to do, which is trundle down to a public library or study the secondary literature or find the major text. It’s so easy and convenient that it’s a big problem.

There’s another interesting dimension to this that I think is more of an issue with the Supreme Court than it is with us. That has to do with facts coming in the form of amicus briefs. There has been some scholarly discussion of this practice in the Supreme Court. This line between background and context that I’m comfortable with and important and decisive facts is not necessarily a bright one, especially if you’re dealing with an opinion that has fairly sweeping implications.

LM: Do you see many amicus briefs in your cases?

Judge: It’s certainly nothing like the Supreme Court’s practice. Maybe one amicus brief in 10 to 15 cases. We try to discourage me-too amicus briefs, but it is sometimes helpful, particularly in cases where the individual stakes are low. This can come up for example, in bankruptcy or in consumer cases, or various kinds or immigration cases, where you’ve got limited resources for the parties but the opinion this court issues is going to have pretty sweeping effects on a lot of other people. Then, believe me, I’m happy to have amicus briefs from people who are really expert in the subject area to tell us, don’t do this, or even if you affirm, don’t do it this way, or if you’re going to reverse, make sure you do it this way, and so on.

LM: I’d like to talk now about supervised release and the changes within the Seventh Circuit that’s predominantly with Thompson and Kappes. I don’t think it would be an understatement to say there has been a seismic change in the approach to appellate review of supervised release.

Judge: What I can say about this is that virtually every sentence I imposed as a district judge would not have met the standard of Thompson and Kappes because I (and virtually every other district judge I know of in the circuit) simply imposed standard conditions of supervised release by reference to other documents, and typically without any detailed explanation.

Continued on page 11
If anybody had an objection, I would have been happy to deal with it, either to modify the condition, or to remove it or explain why I thought it would be appropriate. But those kinds of objections were very rare.

I think the problem stems from the fact that relatively few defendants I ever had any experience with cared about the terms of supervised release. Certainly at the time that a prison sentence is being imposed, the defendant is focused almost exclusively on what the prison sentence is going to be because that is by far the most onerous part of the sentence. And supervised release conditions also are very malleable. As we said in a decision about a month ago, U.S. v. Neal, 810 F.3d 512 (7th Cir. 2016), the conditions of supervised release can be modified at any time. That’s what the statute says. So if the conditions are a problem after the defendant has finished his or her sentence in custody, that’s a far more sensible time, in my view, to try to do the custom tailoring of those conditions.

Generally, defendants do not have appointed counsel to assist with supervised release challenges after the appeal process is finished.

LM: Generally, defendants do not have appointed counsel to assist with supervised release challenges after the appeal process is finished.

Judge: Generally, defendants do not have appointed counsel to assist with supervised release challenges after the appeal process is finished.

Judge: And the point you’re making about access to counsel is the best argument against waiting. I’m happy to acknowledge that. I’m drawing somewhat on my experience as a district judge, but I didn’t see probation officers with time on their hands available to spend harassing supervised releasees for no good reason. In my experience, people had their supervised release revoked only when it was mandatory or they committed a new crime, or when, and only in the very rare cases where they were so resistant to the conditions of supervised release that they were just impossible.

I understand that there may be different practices in different districts, and that’s part of my education in this process, and that’s why this is a group decision.

LM: Let’s talk about demeanor evidence. There is a fair amount of disagreement regarding the weight that should be given to demeanor-based credibility findings at the trial court level. What was your experience in the district court?

Judge: My experience on the district court was consistent with the psychological experimental research, which is that pure demeanor evidence is a very difficult tool. It’s very difficult to use demeanor evidence reliably to determine credibility. It’s not useless. There are situations where the signals may be strong enough that an attentive observer can reliably detect deliberate deception, but it’s very difficult to do reliably, especially across ethnic lines and cultural lines.
Take something as simple as eye contact. The myth that somebody can’t look you in the eye and lie is a myth, but at the same time, there are people in some cultures for whom direct eye contact, particularly to an authority figure like a judge or a jury, is in essence a rebellious or disrespectful act. If you don’t understand that, you’re going to have a hard time reliably interpreting somebody’s demeanor. I can think of some specific situations in which I did feel I could make that determination with enough confidence to base a decision on, but only as to specific facts, not the outcome of the whole case. Instead, as a trier of fact, my own experience was I would work just as hard as I could to figure out a basis other than demeanor for determining the overall credibility.

In terms of the role of an appellate court, we review a lot of credibility determinations, and the law I think is quite clear that we do that with great deference to the person in the front line, not because they are perfect but because we are not going to be any better.

That may be an immigration judge trying to evaluate a claim of asylum by somebody who says they’re very afraid of what may happen to them if they’re sent back to some corner of the world in which terrible things are happening to people of a particular ethnic group or gender or sexual orientation or social group. Or it may be a sentencing judge trying to decide how sincere the professions of reform are. It may be a district judge or magistrate judge who’s made findings of fact about an encounter between police and civilians having to do with Fourth Amendment issues or uses of force. They just have to decide whose account is most credible. And it’s very, very tough for somebody just looking at the proverbially cold record to substitute our judgment for theirs.

LM: And then last, I’d like to talk a little bit about civility and professionalism.

Judge: I can say we certainly see a spectrum of behaviors within the profession from judges and from lawyers. It’s something that we always have to pay attention to. To circle back to something that I said much earlier, society has entrusted legal institutions, the legal profession, lawyers and judges with enormous responsibilities for peaceful resolution of countless disputes in our societies. For that to work and for the rule of law to work, we have to always nurture and deserve respect. So we have to work at deserving respect, I guess is the better way to put that. And uncivil conduct by judges, by lawyers, whether it’s oral statements, the writing that we do, or the conduct we undertake can either contribute to or erode that public confidence in what we do. I think it’s very important that we try to behave towards each other in ways that convey the impression as well as the substance of the rule of law.

Upcoming Board of Governors’ Meetings

Meetings of the Board of Governors of the Seventh Circuit Bar Association are held at the East Bank Club in Chicago, with the exception of the meeting held during the Annual Conference, which will be in the location of that particular year’s conference. Upcoming meetings will be held on:

Tuesday, May 3, 2016*  
*at the annual conference, Radisson Blu Aqua Hotel, Chicago
Saturday, September 10, 2016
Saturday, December 3, 2016

All meetings will be held at the East Bank Club, 500 North Kingsbury Street, Chicago at 10:00 AM
From its inception, the United States has been a nation of laws. As John Adams wrote in framing the first state constitution, one of the by-products of the revolution was the opportunity to create “a government of law, and not of men.” Drawing on a legal tradition that has existed, in one form or another, for millennia, the Constitution and laws of the United States have enshrined ever-increasing measures to try to ensure that the strong do not injure the weak. Most notably, the Fourteenth Amendment’s guarantees of “due process” and “equal protection” apply regardless of race, religion, national ancestry, income, or any other distinguishing characteristic. And since those precepts became the law of the land shortly after the Civil War ended, Congress has from time to time enacted legislation to support the amendment’s majestic (though rather abstract) goals.

Laws, however, are inanimate. Even the broadest and best-intentioned do not protect the weak unless they can be enforced – and laws cannot enforce themselves. Lawyers are uniquely positioned to step in to assist the intended beneficiaries of laws in receiving what they are due.

This is especially true with laws meant to protect the most vulnerable in our society. In most instances, there is neither wealth nor fame to be earned by representing the indigent. Instead, civic duty and human decency motivate such lawyers. On the occasion of the 50th Anniversary of LAF, formerly the Legal Assistance Foundation of Metropolitan Chicago, we write this article as a tribute to that organization, the dozens of other legal aid groups in our community, and the thousands of public interest and

Continued on page 14

Robert Dow has been a District Judge for the United States District Court for the Northern District of Illinois since 2007. He is the current court liaison to the William J. Hibbler Pro Se Assistance Program. Elizabeth Hoskins Dow has been an Associate Judge for the Twelfth Judicial Circuit (Will County) since 2015, currently assigned to the Family Division. She is a former Senior Attorney for the Will County Legal Assistance Project and a former board member of the Lawyers Trust Fund of Illinois.
private lawyers in our community who provide pro bono legal services. These individuals and organizations play a vital role in making our legal system accessible to those in need regardless of their ability to pay for legal representation.

The law in America is omnipresent; at some point in our lives, virtually every person needs a lawyer. Whether for a will, divorce, adoption, business incorporation, traffic ticket, government benefit, order of protection, or myriad other circumstances, almost everybody comes into contact with the legal system. But lawyers, having special skills and education, can be expensive relative to the ability of their clients to pay. A recent law review article observed that “The typical legal services consumer in the U.S., makes approximately $25 per hour, and is priced out of the services lawyers provide even at low attorney rates of $125-$150 an hour.” (Denver University Law Review, Vol. 89:4, 894 (2013)). Many lawyers charge double, triple, or even ten times those rates to their paying clients. This means that wealthy American individuals and corporations can obtain the best lawyers that money can buy. Criminal defendants, of course, have a right to appointed counsel if they cannot afford to retain a lawyer with their own funds. However, there is no right to counsel in civil cases – even as to matters with severe consequences for the losing party such as eviction, loss of parental rights, or deportation.

Legal aid lawyers endeavor to fill the gap between legal services needed and legal services that those in need can afford. As judges in the state and federal courts, every day we see people who need a good lawyer but cannot afford one. Indeed, in many instances individuals in need of a lawyer do not recognize that their predicament can be (and in some cases must be) handled by a licensed attorney. For example, even the smallest corporation must retain a lawyer if it wants to prosecute or defend against a lawsuit in federal court. Moreover, in almost every case where a person can proceed on his or her own, their interests would be advanced more effectively and more efficiently by a lawyer. Non-lawyers often struggle to understand legal concepts such as statutes of limitations and contract formalities, and the consequences of failing to understand or waiving one’s rights can have a negative — and permanent — impact on the case.

The importance of organizations like LAF has never been more evident, as the demand for free legal services today is at an all-time high. Legal aid organizations provide services to individuals with a household income of no more than 125% of the poverty line – which amounts to just over $30,000 for a family of 4. According to the Legal Services Corporation, 63.4 million Americans were eligible for legal-aid services in 2014. In Cook County alone, LAF estimates that approximately 1.5 million people qualify for its services. Women, children, and new veterans make up a disproportionately high percentage of the indigent who need access to legal services.

Legal aid can assist in obtaining a divorce, establishing custody rights, securing government benefits, employment, and legal residency status, and putting in place an order of protection where necessary. According to LAF, among the more than 125,000 homeless persons in Chicago, more than half are families. About 35% of the homeless population consists of children and teens, and 86% of Chicago Public School students are economically disadvantaged. Legal aid assists those who are homeless to secure necessary social services, subsidized housing, and debt relief. Nearly 200,000 veterans live in Cook County. Just under half earn less than $30,000 and one in ten is homeless. Legal aid helps veterans gain access to VA benefits, entry into veteran specific assistance programs, and discharge upgrades.

Private lawyers too help fill the void, honoring their profession through discounted or pro bono services. Most, if not all, private
lawyers – from the largest firms to solo practitioners – donate some fraction of their time to helping those who cannot afford to pay for legal help. Sometimes courts facilitate the process of matching up individuals in need with lawyers willing to help. For example, the federal court in Chicago offers the Judge William J. Hibbler Pro Se Assistance Program through which individuals with cases pending in the Northern District of Illinois may schedule appointments to meet with lawyers who can explain the rules, assist with basic pleading mechanics, and offer advice and counseling on the presentation of the litigant’s claims. Sometimes the advice is as simple as explaining to the litigant how to serve a pleading or even whether he or she has filed in the right court. The Northern District also offers a Settlement Assistance Program through which lawyers volunteer their time and efforts in assisting the efforts of indigent parties to settle their cases. And when a judge in the Northern District concludes that an indigent civil litigant needs a lawyer to adequately litigate a potentially meritorious case, the judge may request that a member of the court’s Trial Bar take on the case without compensation. In short, there are a variety of ways through which private lawyers perform pro bono legal services for clients in need.

Of course, the true heroes of the Bar’s effort to provide legal services to those who cannot readily afford them are full-time legal aid lawyers and the range of people whom they serve is extremely diverse. To give just one snapshot of a recent client profile, in 2014, LAF represented 63% women, 27% disabled persons, 14% senior citizens; 5% immigrants, and 5% veterans. Moreover, legal aid lawyers operate across a staggering range of legal areas in their efforts to meet the needs of their clients across the full panoply of legal problems that they face. Here are just some of these areas:

- **Housing** - including loans, foreclosure, eviction, unsafe housing, and subsidized housing benefits
- **Family Law** - including child support, adoption, guardianship, and divorce
- **Veterans Rights** – including VA benefits, veteran-specific vouchers, and discharge benefits
- **Government Programs** – including SNAP, school lunch programs, SCHIP, TANF, SSI, disability, and FEMA
- **Healthcare/Disability** – including Medicaid, Medicare, Affordable Care Act, and accommodations for people with disabilities
- **Senior Citizens** – including access to medical care, assisted living, and instances of elder abuse
- **Immigration** – including citizenship issues, asylum, and relief from deportation
- **Human Trafficking** – including securing protection, residency, and shelter
- **Education** – including student discipline hearings and accommodations for disabilities
- **Personal Safety** – including domestic violence, orders of protection, stalking or other harassment, and child abuse and neglect
- **Employment** – including proper payment for work performed, safe working conditions, securing drivers/professional licenses, and enforcement of anti-discrimination provisions
- **Tax Liabilities and Benefits** – including filing returns and obtaining refunds and low-income tax credits
- **Consumer Protection** – including fraud and scams, predatory lending, unfair debt collection practices, and managing debt

As this list demonstrates, many of those who face the most daunting legal issues, some of which carry the most severe consequences, are those who can least afford to hire a lawyer. Full-time legal aid lawyers devote their careers to meeting those needs.

Capturing the benefits to society from legal aid work presents a challenging proposition because not all of the benefits are tangible or even measurable. Yet one recent study by the
Reflections on the Importance of Legal Aid

Continued from page 15

Chicago Bar Foundation concluded that seven legal aid providers in Illinois secured the following economic benefits for clients:

- $49.4 million in monetary awards to clients
- $5.4 million in household income
- 172 jobs
- $9.3 million in demand for goods and services added to the economy
- $1.9 million in savings to homeless shelters resulting from preventing or delaying foreclosures or assisting in other housing issues
- $9.4 million in administrative and legal costs avoided relating to domestic violence.

The same study found that, in total, legal aid providers helped to secure $1.80 in economic benefit per $1 spent by government and private donors.

Legal aid lawyers not only advance the interests of their individual clients but also bring tangible economic benefits to society as a whole. To give just one example, when a legal aid lawyer helps a client secure health care benefits, the client can turn to a network of local medical clinics and providers and avoid using the emergency room as a primary care facility. Legal aid also promotes stability in the lives of clients. This is especially true in family law matters such as divorces, custody issues, and child support. All of these topics can be handled efficiently with the help of a lawyer, but often are overlooked to be handled later in piecemeal fashion when the client attempts to proceed without legal assistance.

Often lost in the benefits of legal aid and pro bono work are the actual clients affected. Legal aid services enhance the dignity and self-worth of clients, simply by giving individuals access to a lawyer who can help them navigate a complicated legal system. When clients obtain access to government benefits to which they are entitled, they sometimes can avoid dire circumstances, including homelessness and malnutrition. And like the emergency room example above, when clients find greater stability in their lives – whether through a job, access to health care, child support, an order of protection, or any other means – they often are better able to provide for themselves and less reliant on social services from the government or non-profit providers such as Catholic Charities.

As former lawyers who found great satisfaction in our own pro bono work and who now see the selfless efforts of lawyers working for free in our courtrooms on a daily basis, we can say with confidence that the legal aid community in Chicago is alive and well. But there always is more to do, both in terms of supporting legal aid programs and providing legal aid services. Despite an all-time high demand for pro bono legal work, federal government funding for legal aid actually has declined in recent years from $420 million in 2010 to $385 million in 2016. (https://repository.library.georgetown.edu/bitstream/handle/10822/7 61858/Houseman_Civil_Legal_Aid_US_2015.pdf?sequence=1&is Allowed=y). Compounding the financial pressure on legal aid organizations, other sources of funding for legal aid programs also have lagged in recent years. To give one example, the Lawyers Trust Fund of Illinois provides millions of dollars annually to pro bono legal service providers around the state. However, since the source of LTFF’s funding is interest payments on funds deposited in IOLTA accounts holding client funds, the historically low interest rates in recent years have greatly reduced the overall pot of money available for LTFF to distribute. And despite the many thousands of pro bono hours provided by private and public aid lawyers in the Chicago area, there remains a sizable gap between services needed and the services provided. LAF, for example, estimates that it is only able to assist 15-20% of the individuals who request its services. So all of us in the legal profession must continue to step up in whatever ways we can to honor the noblest tradition in our profession – that of providing free legal assistance to those in our community who otherwise would not have access to our legal system.
In the book, later made into a musical, *How to Succeed in Business Without Really Trying*, J. Pierrepont Finch, a young window cleaner in New York City, reads the book *How to Succeed in Business Without Really Trying* as he works. Deciding to follow the book’s advice, he rises from working in the mailroom to being an executive at the World Wide Wicket Company. Satirical from start to finish, the book dispenses valuable advice to Ponty such as, “don’t stay working in the mailroom too long,” or “when you are the cause of a disaster, refer back to the first chapter of this book ‘How to apply for a job.’” Nevertheless, following the book’s advice catapulted Ponty from the mailroom to a corner office in a matter of weeks. Having been on the federal bench for over two years now, I humbly offer advice to federal litigators on how to manage a successful practice in federal court from a lawyer turned judge’s perspective. I can’t promise a meteoric rise to managing partner or agency director, but if you follow this little guide, I can assure you that without really trying, you can become a well-regarded attorney in the Northern District of Illinois on your way to a fulfilling career.

**How to Plan Your Day**

**Step 1: Be Prepared**

As a district judge, if I am not on trial, I hold a court call three days a week and spend the remaining time preparing for the court call, writing opinions, or participating in other court-related activities. I prepare for the court call by reading my notes from prior court appearances, any motions that are noticed for that day, and any new filings in the case. I come prepared with a list of questions for the attorneys to answer so that I can understand the current status of the case as well as identify any issues before they can derail the progress of the case toward a resolution. I always prepare for the court call in

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advance because I want to be efficient on the bench, it is my responsibility to the parties to be well prepared, and frankly, I really hate surprises.

Unfortunately, I have noticed that some attorneys do not share in my aversion to surprises or my love of efficiency. Some lawyers will come to court and will not have spoken with each other since the last status hearing or if they have spoken, it was out in the hallway that morning. Invariably, the parties will not be in a position to discuss how the case has progressed since the last court appearance because they have not put in the time to follow through on any tasks or work through any issues. The preparation for the court hearing consisted of coming to court and basically winging it. Ultimately, this lack of preparation results in delay for the clients and we all know that justice delayed is justice denied. Another by-product of this litigation strategy is that lawyers are often surprised by what they hear in the hallway or at the lectern and are caught flat-footed, which in turn creates distrust and fosters animosity.

Instead, I suggest spending a few minutes at the start of the week reviewing what is coming down the pike for that week and what should be done to prepare for it. In my case, that means reviewing a spreadsheet that contains upcoming ruling dates, sentencings, settlement conferences, pretrial conferences, outstanding opinions, and outstanding drafts. This spreadsheet allows me to view what I must accomplish that week as well as see how I should allocate my time for the week. It is basically my “to do” list which helps keep me organized and avoids last minute surprises. Lawyers can create a similar tool that tracks their cases and what specifically the judge wants to know at the next hearing. Reviewing that list will ensure that you call opposing counsel and/or your client in advance of the court hearing to discuss what should be on the agenda for the next hearing and have sufficient time to resolve any problems or distill any issues you want the judge to address. The judge, your client, and everyone else sitting in the courtroom waiting for their case to be called will appreciate your preparation.

**Step 2: Manage Up**

Identifying problems or issues early can save a lot of time and energy in the long run. The same can be said for being prompt and upfront about what you need and why you need it. I understand that there are very good reasons why a lawyer cannot meet a previously set deadline. Your case before me is not the only case you are handling at any given time. Things may come up in those other cases that take time away from the case before me. Life is complicated and illness, personal issues, or other commitments may interfere with your best intentions. When that happens to you, as I can assure you it will, you should “manage up.” Be proactive; call opposing counsel to explain the situation, and be specific and realistic about what you need moving forward. (If you are on the receiving end of this type of phone call or email, remember the old adage, “what comes around goes around,” and be generous of spirit.) Once you have squared things away with opposing counsel, bring the judge into the loop by filing an agreed motion, asking the judge to enter an order memorializing your agreement with opposing counsel. If for some reason, opposing counsel will not agree with your request, bring the issue up to the judge, clearly explaining the reason for your request and providing a specific proposal.

What you should not do is stick your head in the sand and pray that the judge won’t notice that you completely blew past the deadline she imposed and will just grant your motion to file your brief or motion instanter. Believe me, my colleagues and I notice. Even if we grant your motion without comment, your reputation takes a hit. Ignoring deadlines makes you appear sloppy, disorganized, and incompetent. In reality, you are none of those things. Human nature being what it is,
judges like to be asked if it is alright to modify their orders, even if they have no intention of denying your motion. Being proactive will help align how you are as an attorney with how you appear to opposing counsel and the judge.

It is also important to spend time identifying what issues might arise in your case and be prepared to let the judge know about them. Will your case require the judge to enter a protective order before discovery can proceed? How do you plan to manage ESI? Are there discovery disputes brewing that you cannot resolve without judicial intervention? When you are preparing for the next court hearing, create an agenda of items to discuss with the judge in concert with opposing counsel. Identify any potential problems, propose your solution(s), and ask for any judicial guidance, if needed. This process will show the judge that you are on top of your case and can work collaboratively with opposing counsel. Additionally, your court hearings will be productive meetings that move your case forward to an eventual resolution.

Finally, if you are going to be late or will need to miss a court appearance, pick up the phone and let the judge and opposing counsel know. Many times, I can make an accommodation by placing your case at the beginning or the end of the call. There are judges, including me, who will allow you to participate by phone. If everyone is agreement, I can reset the court hearing to a more convenient date. What never goes over well is when you simply fail to appear in court and no one knows where you are. Again, that behavior diminishes your reputation and delays your case.

**Step 3: Read Those Standing Orders**

Of course, creating an agenda for a court hearing will not be as effective if you don’t know how the judge manages certain issues, like the entry of a protective order or discovery disputes. Fortunately, all judges have standing orders on their webpage. Want to know how a judge handles discovery disputes? Look it up on the website. Almost every type of common issue or problem is addressed in a judge’s standing orders. If you cannot find the answer to your question, then call the judge’s courtroom deputy, who will answer your question or direct you to someone else who can.

Do not assume that all judges have the same standing orders. Each judge handles issues differently. Some judges prefer that you use the Model Confidentiality Order for routine protective orders. Other judges have specific procedures to follow for discovery disputes or summary judgment motions. It will serve you well to review the judge’s specific standing order regarding your issue before coming into court. For example, you will know whether that judge only hears discovery disputes when brought by a motion and avoid being rebuked when trying to argue those disputes at a routine status hearing. Or, you will know that I require a joint statement of undisputed facts to accompany a motion for summary judgment and be prepared to incorporate the time it takes to draft that statement when you are proposing a summary judgment briefing schedule. Taking a few minutes to review the standing orders will help you know how to best present these issues to the judge. Plus, you can use the court hearing to clarify any questions you have about a judge’s particular preferences and idiosyncrasies (does she want motions bound at the top or along the side? does she like the exhibits tabbed?).

**How to Write in Order to be Heard**

**Step 1: Be Clear, Concise, and Comprehensive**

Remember, that federal judges are generalists and carry a caseload of hundreds of cases. You should know your own case better than the judge. You have an important role in educating the judge and guiding her to rule in your favor. Many case-determinative decisions made in federal court are based primarily on the written submissions of the parties. How do you make your brief or motion stand out? Follow the three Cs of good writing: be clear, concise, and comprehensive.

Clarity requires that you understand your facts, legal arguments, and applicable case law so that you can tell the judge what you want, why you should have it, and how the judge will reach that result. Every written submission should have a summary paragraph on the first page so that the reader understands your roadmap. This summary will also serve the purpose of helping you organize your thoughts and arguments...
in a logical fashion. You will see whether you have missed any key points or building blocks of your argument. It is important to place these points up front and not bury them in the middle of the brief. You want to make it easy for the judge to rule in your favor without having to hunt through your brief to piece together your argument. When your argument is not laid out in a clear way, the judge is bound to miss something and may not fully understand your position. That reduces the likelihood that she will rule in your favor.

Being concise also aids in focusing your argument. Many times, we can say what needs to be said in a shorter, more direct way. It just takes some editing. I find that page limits help to discipline arguments. Building in time to edit a brief assists in making the final product easier to read and more persuasive. A rambling, unfocused brief takes less time to write than a direct, concise, and on point one. However, the latter tends to carry the day. Simply put, time spent in editing with a strong hand will pay dividends down the line in achieving successful results for your clients.

A clear and concise brief or motion will not be successful, however, if you have left out important information. Your brief should be comprehensive. If the judge should apply a legal test to your facts, lay out the test in its entirety and focus him on the factors that are most relevant to your case. If there are arguments you want the judge to consider, place them, fully developed, in the body of the brief. Waiver is a real and significant consequence of failing to put forth arguments in your brief, relegating them to a footnote, or including them for the first time in your reply brief. Being comprehensive does not mean throwing everything plus the kitchen sink into your brief. But if an argument is important, make sure you include it.

**Step 2: Be Honest**

A corollary to being comprehensive is being honest. You should be prepared to address cases and facts that are not beneficial to your case. Most of the time, the judge will find those cases or facts on his own or because your opponent raised them. As stated earlier, sticking your head in the sand and hoping for the best is not the route to success. Ignoring legal precedent or facts that hurt your case leads a judge to believe that you either failed to understand the applicable law, cannot distinguish it based on the facts of your case, or are just plain sneaky. You don’t want a judge believing any of those things about you. When you are asking a judge to rule in your favor, you are asking him to believe what you say and trust in you. Just as lawyers talk about judges, judges discuss with each other lawyers’ performances and reputations, both positive and negative. You want to be known as a straight shooter who deals with obstacles head on.

**Step 3: Proofread**

It may seem basic, but nothing shouts, “I couldn’t care less about my case,” any louder than a sloppily filed brief or motion. Written submissions convey a lot about the lawyer filing them. Submissions that are missing pages, page numbers, citations, containing typographical errors, or are sloppily put together do not engender confidence in the filer. While these types of errors may have very little to do with the substance of what is written, they create a distraction for the reader and invariably, detract from the substance. You want to make it easy for the judge to rule in your favor and when she has to battle feelings of irritation before focusing on your arguments, you have created unnecessary roadblocks to your success. Devote a few extra minutes to make sure your submission reflects the impression you want to leave on the judge. This is a simple step that will reap exponential rewards.

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**How to Appear in Court**

**Step 1: Be a Good Listener**

You have followed this little guide and have come prepared to court with your agenda. The judge, however, has other plans and begins asking questions. Be a good listener, pay attention to those questions, and answer them directly. For example, when setting a new closing date for fact discovery, I will ask the parties how much longer they think they need to wrap everything up. What I am looking for is a direct answer with a specific period of time – say, 90 days. Instead, lawyers sometimes see this as an opportunity to discuss chapter and verse how the other side
has failed to cooperate in discovery and attempt to turn a simple status hearing into a hearing on a motion to compel. Not only is this tactic unfair to opposing counsel, who had no idea this was coming, it places me in the position of having to rule on an oral motion with one-sided, scant information. Additionally, it wastes the time of all of the other lawyers who are waiting for their case to be called. Generally, if I want additional information to support your answer, I will ask for it in follow up questions.

Once the judge has asked his questions, you can then turn to your agenda and cover the issues his questions did not address. Being a good listener in this context means that you pay attention to what the judge has to say about these issues and follow his directions. If he gives you a list of tasks to accomplish by the next court hearing, write them down and make sure to follow through.

Being a good listener during oral advocacy will also clue you in to what the judge thinks is important regarding a specific issue. You can tailor your argument to address his concerns and make it easier for him to rule in your favor. Be forthright in your answers to his questions. When a lawyer is evasive or non-responsive during oral argument, the judge will take note and that may affect his ruling. It is often said that oral argument may not persuade the judge to decide in your favor, but a poor showing during oral argument will definitely hurt you. If there are questions from the judge that you are not prepared to answer, tell him and ask for an opportunity to respond in writing. Remember, you are there to educate the judge about your position. If you are honest about what you do not know, rather than disingenuous or evasive, the judge will appreciate your candor and allow you to create a full record. In the end, the judge wants to come to the right answer and will allow you to help him get there.

Step 2: Have Good Manners

During this particular Presidential election cycle, where candidates routinely “talk smack” about each other’s physical prowess or the relative beauty of their wives, it can appear that civility is a quaint notion that has gone out of style. The old adage, “you catch more bees with honey than vinegar,” however, still holds true. Remembering to treat others, including opposing counsel and the judge, with respect and courtesy is a key to your success.

Federal court should not resemble a cage match in an Ultimate Fighting Championship fight where the lawyers are clawing, scratching, and biting each other. A UFC fighter can gain the upper hand with wild expressions of passion and by lying in wait to strike her opponent when she isn’t looking. What works in a UFC match, however, does not work in federal court. Judges do not appreciate when lawyers get carried away with their emotions and begin talking over each other (and, at times, the judge) at louder and louder volume. Likewise, judges are not fans of lawyers sucker punching opposing counsel during court hearings or in writing with nasty, irrelevant commentary. Good advocacy can co-exist with civility; parties can disagree without being disagreeable.

Similarly, lawyers should remember to be respectful to the judge, no matter what you think of him or her. It is important to respect the office, even if you do not necessarily respect the occupant. I have been surprised how attorneys have reflected a perhaps unconscious gender bias when appearing before a female judge. I have observed behavior and a lack of decorum in the courtroom that would not occur if the presiding judge were male instead of female. It bears repeating that judges talk amongst themselves; you do not want to garner a reputation as a sexist boor.
Fame and Fortune in Federal Court

Continued from page 21

If you decide to engage in acts of uncivil disobedience, be prepared for a reprimand. Some judges prefer to do it privately, while others will call you out in front of a courtroom full of your peers. Either way, most judges will not allow bad behavior to pass by without comment or worse, without a sanction. Nipping incivility in the bud establishes firm guidelines of acceptable behavior and allows cases to proceed more efficiently, without being bogged down by the detritus of gamesmanship, negative emotions, and distorted thinking. Being civil permits the parties to focus on the legal and factual issues with clarity of thought.

Having good manners extends to judges as well. Judges have a responsibility in keeping litigation focused on solving problems rather than creating them. I have a framed list of twenty-six principles of a disciplined life that serves as a visual reminder to always act in a manner becoming of a federal judge. Some of these principles include: accept only quality work from yourself, think critically and be inquisitive, demonstrate honesty, integrity, and decency, be generous, communicate effectively, listen actively, solve conflicts peacefully, and respect each other’s differences. When tempted to lose my patience, or say or write something unkind, I stop to reflect on what I am about to do and whether that action comports with the twenty-six principles. Taking a moment to reflect on my behavior gives me the space to make a better choice. This is not to say that I always choose the better option. But when I fail, I apologize, learn from my mistake, and try not to repeat it.

There are many opportunities to model good manners while litigating in federal court. Tools we learned in school are still useful: play fair, wait your turn, be generous. At every turn, whether it is responding to email correspondence (which is inevitably attached as an exhibit when you are reflected poorly in it), writing a brief, or appearing in court, think about what your behavior says about you. If what you are about to do or say reflects you in a good light, then do it. If not, then think about what you could do that would accomplish the same thing but in a manner that is more consistent with showing yourself in a positive way. Spending a few minutes in reflection will help cement your reputation as a “civil” litigator and ease the path to your success as a lawyer.

Step 3: Think About Your End Game

Cases come and go. All cases reach some sort of resolution, whether it be through settlement, motion practice, or trial. At each stage of the litigation and each court appearance, you should consider how your strategy is furthering the goal you have identified as the successful resolution of your case and whether the goal remains reasonable in light of what has developed in the case. Lawyers who constantly assess how these two factors interrelate are the most effective and successful.

What this means in practical terms is to thoughtfully consider settlement at every juncture and structure the litigation of the case to allow you to make that assessment at the earliest stage. When determining how to conduct discovery, communicate this...
strategy with opposing counsel. Determine what documents, interrogatory responses, and depositions you need to have enough information to make a decision about what the case is worth and whether you should settle it; then create a discovery plan that minimizes costs and maximizes information. Many, if not all, judges will be open to this type of discovery plan and work with you to implement it.

It is worthwhile to think about the endgame of your career as well. Following these simple guidelines will increase your reputation among the bench and bar, alike. You will develop an aura of competence, confidence, and respect. There may come a time in your career when you are interested in transitioning from the bar to the bench or your current position to something with greater responsibility. It will be ever so important that your colleagues, opponents, and the judges before whom you have appeared are able to evaluate you positively. If you have followed these simple guidelines, there is no doubt that everyone will have something favorable to say. But if you wait too long to incorporate these guidelines into your practice, you may stumble over petty mistakes and silly missteps that you could have easily corrected along the way. Your reputation is built slowly over time with small demonstrations of grace, courtesy, and competence that form a mosaic, illustrating your true character. While you should follow the steps in this guide because it is good to do them in and of themselves, a successful and fulfilling career is a positive side benefit.

I hope that you have found this little guide helpful. Without much effort, you can have a successful career in federal court. I find being a federal judge to be such a rewarding career and will be ever grateful for the opportunity to serve. I am constantly challenged to learn, think, and grow, both intellectually and personally. Most of the lawyers I see before me already follow the steps outlined here. It is an engaging and satisfying experience to work with those lawyers to see that justice is served. The legal profession, as well as our system of justice, will continue to improve as we all keep these steps in mind and reflect on how we can each better implement them.

Send Us Your E-Mail

The Association is now equipped to provide many services to its members via e-mail. For example, we can send blast e-mails to the membership advertising up-coming events, or we can send an electronic version of articles published in The Circuit Rider.

We are unable to provide you with these services, however, if we don’t have your e-mail address. Please send your e-mail address to changes@7thcircuitbar.org.
Due in part to the steady increase in the filing of civil cases in the United States courts — both federal and state — and the resulting delays in achieving dispute resolution, many have come to the realization that there is a better, speedier and more economical way to resolve legal disputes than through traditional full-blown litigation. The exponential growth of private mediation to resolve disputes reflects an important change in the legal culture. While counsel and client may desire to have their day in court, the fact is that a very small percentage of cases filed in court advance beyond the discovery or dispositive motion stages of litigation. This is especially true in personal injury, labor and employment, civil rights, breach of contract cases and more. It makes perfect sense, then, for the parties, through counsel, to seek early mediation of such cases rather than engaging in cost-prohibitive discovery, followed by motion practice and/or trial, with its uncertain outcome. In this regard, there is no inconsistency between being a zealous advocate for the client’s position and approaching opposing counsel about seeking private mediation in a manner that avoids the costs of litigation — or further litigation — and which also provides the parties with certainty of outcome. At first blush, the idea of conferring with opposing counsel about early resolution might be considered counterintuitive to the manner in which counsel are accustomed to doing because of the perception that it might be interpreted as a sign of weakness in counsel’s case. However, such efforts, in the long run, usually result in an outcome that is in the best interest of the client, which is, of course, counsel’s primary objective. While there are numerous benefits to choosing private mediation over litigation, only five are highlighted below:

1. **Time and Cost Saving**
These two benefits are discussed together because they are closely related. In litigation parlance, time is money. Considering the current caseloads of our courts, with their emphasis being on hearing and resolving discovery disputes, dispositive motions, conducting trials and considering and ruling on

*Hon. Arlander Keys (Ret.) served as a United States Magistrate Judge for the Northern District of Illinois from 1995-2014. Since his retirement, he has been affiliated with JAMS in Chicago as a mediator and arbitrator.*

Continued on page 25
Making the Case for Mediation

continued from page 24

post-trial motions, it would be unrealistic to expect trial judges to be able to interrupt their busy schedules and to set aside the amount of time necessary to devote to settlement negotiations with parties in the typical case. Even in those instances where judges are more proactive in encouraging parties to attempt voluntary resolutions, with the assistance of the court, many times their heavy caseloads dictate that such settlement attempts cannot be scheduled until several months down the road. This results in the loss of valuable time, during which the settlement positions of the parties might harden or change due to interim developments, such as the obtaining of additional evidence through discovery. In this regard, the advantage of private mediation is that, typically the mediator is available to meet with the parties as soon as the parties are ready. This is particularly important where there is an underlying case pending in court and a dispositive motion deadline or trial date is looming. Experience has shown that, even in those instances where litigation has not yet ensued, but where there is a strong likelihood of such action, counsel would be well-advised to consider private mediation rather than expose the client to the prospect of litigation. The costs involved in prosecuting and defending civil cases cannot be overstated and, in many cases, exceed the value that the parties have placed on the case. However, because of the reluctance of parties — counsel and clients — to acknowledge and consider the relative strengths and weaknesses of the client’s position and those of the opposing party, without the assistance of a neutral third party, many of these cases are needlessly litigated and the attendant costs (discovery, motion practice, trial and appeal) are prohibitive for both parties. Therefore, counsel should avail themselves of every opportunity to seek mediation, considering the costs of going forward with litigation and its uncertain outcome.

2. Confidentiality

One of the undesirable aspects of litigation is its public nature. The public has a right to know what is occurring in its courts. What is alleged in a complaint, answer and counterclaim, and the evidence presented in support of and against those pleadings at the pleading, motion and trial stages, all become part of the public record. Many of these pleadings and much of the evidence presented in support of and in opposition to them, may contain scurrilous or at least embarrassing allegations that one would not want to be aired in public, for various personal or business reasons. The final outcome of the litigation also becomes public, including a settlement agreement approved by the court, unless the settlement terms are placed under seal by the court, which is not automatic. Unlike litigation, the entire mediation process is confidential as to all participants, including the mediator, all of whom typically sign pre-mediation agreements committing not to disclose anything communicated during the process to non-participants. It allows the parties to speak freely, often in private with the mediator, without concerns that what they disclose to the mediator — and even to each other — might later be used against them in the current or later litigation. Most states and the federal government, by statute and/or case law, encourage the use of private mediation by providing for and enforcing the confidentiality provisions of mediation agreements, including the protection of mediators from having to give testimony regarding the mediation when they are directed to do so by subpoena.

Continued on page 26
Making the Case for Mediation
Continued from page 25

3. Experienced Mediators
Many clients, especially in personal injury, civil rights and labor and employment cases, having read or seen media reports of huge court settlements or jury verdicts in cases similar to theirs, sometimes have unrealistic expectations about what they can expect if they proceed through the court system. In such cases, counsel would do well by the client by seeking mediation with someone with a great deal of experience with the court and jury system, to provide a reality check to the client. Experienced mediators — many of whom are retired judges with many years of service on the bench — are great resources for counsel and clients in providing a dose of reality to their expectations as to the costs going forward and as to what is likely to occur if they proceed with litigation.

4. Flexibility in Settlement Terms
In reaching privately mediated settlement agreements, the parties maintain the ability to agree to terms that an administrative agency or court might be reluctant to or refuse to agree to or approve because of policy reasons. Such settlement agreements, negotiated through private mediation, might be more palatable if executed at the pre-litigation or very early stage of litigation. Further, mediation affords the client, who has the most skin in the game, the opportunity to become intimately involved in the give and take of the negotiations and a feeling of involvement in the ultimate outcome of the case. The importance of the feeling of control by the client over the final outcome of the case should not be minimized.

5. Finality
One of the advantages of private mediation is that the parties may obtain a resolution that, while perhaps not perfect, is one that they can live with, within a relatively short period of time and without the anxiety and uncertainty inherent in litigation. With the decision to litigate, a victory for either side at the summary judgment or trial stage will not necessarily resolve the matter, as appeals may add even more time and expense to that already expended in the case. On the other hand, when parties agree to resolve their disputes through client-involved mediation, the matter is likely to be resolved, with finality, faster and more economically.

Conclusion
Considering the advantages of mediation over litigation, enumerated above, counsel are encouraged to forego their natural inclination to engage in litigation and to seriously consider seeking private mediation, after appropriate investigation; to do so may be in the best interests of the client in appropriate cases.
Think *Once,*
*Think Twice...*
*Then Backspace and Delete*

*By Pat E. Morgenstern-Clarren*

Many years ago I studied at the London School of Economics which is part of the University of London system. The university suggested that each LL.M. candidate meet with the head of her program, and so I appeared at my appointed time and spoke for a few minutes with an individual who shall remain nameless for reasons which will soon become apparent. At the end of my allotted time, he briskly assured me he had confidence that I could resolve any difficult situations that might come my way during my year-long studies, but if not – here he paused for effect – I should “think once, think twice” and only then contact him for assistance. Needless to say, I never called him. The “think once, think twice” incantation, though, stuck with me and even became part of our family lore. I want to suggest that while the advice was not useful to me as a law student, it can actually be quite useful in the practice of law. In a world where clients are looking at legal fees with a fine tooth comb, and where lawyers feel pressure to complete work in the least amount of time possible, the fine art of editing sometimes gets lost. This can lead to briefs that stray from the persuasive into the vituperative because in doing a first (and often the only) draft authors lose sight of the goal: to persuade the trier of fact, not to punch back at an adversary.

These are some of the words and phrases I have seen in briefs that distract me from the legal argument:

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<th>Absurd</th>
<th>Incongruous</th>
<th>Ludicrous</th>
<th>Sophomoric</th>
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If as you are writing a brief you use one of these words: think once, think twice. And then? Back space and push “delete.”

*Pat Morgenstern-Clarren is a Bankruptcy Judge in the Northern District of Ohio. She was Chief Judge of the U.S. Bankruptcy Court from January 2012 to January 2016.*
Introduction

Under the Social Security Act, an individual with a “disability” is generally entitled to benefits. 42 U.S.C. § 423(a)(1). But determining disability can be difficult. Social Security jurisprudence is Byzantine. Newcomers to the process of Social Security appeals might start their education by analyzing the underlying statutes. Unfortunately, like nearly all things related to Social Security, that common sense approach would result in almost instantaneous frustration. Other than providing the definition of “disability,” the Social Security Act is barren of guidance, leaving the law and process to be fleshed out by the Social Security Administration’s regulations. 42 U.S.C. §§ 405, 416(i)(1), 423(c)(4)(A). But even the Administration’s regulations do not fully address all the basic issues. In addition to the regulations, the Hearings, Appeals and Litigation Law manual (HALLEX), Program Operations Manual System (POMS) and Social Security Rulings (SSR) fill in statutory blanks. Throw case law on top of the jurisprudential pile and the result is a puzzle that would make Erno Rubik proud.

This article attempts to distill these authorities into a visual guide (essentially a flow chart) for one of the most important aspects of Social Security appeals; namely, evaluating opinion evidence relating to a disability. When the Administration fails to properly determine the weight of opinions, on appeal, courts are likely to remand the case. Remand rates in Social Security appeals are extremely high. See, e.g. Dettloff v. Colvin, 2015 U.S. Dist. LEXIS 80285, *7 (N.D. Ill. June 22, 2015) (identifying a 70% reversal rate); Freismuth v. Astrue, 920 F. Supp. 2d 943, 945 (E.D. Wis. 2013) (identifying reversal rates in the Eastern District of Wisconsin ranging from 73% to 84%). A coin flip provides better odds of success.
Many of those remands result from improperly weighing opinion evidence, particularly the opinions of treating sources. 78 Fed. Reg. 41352, 41353-54 (July 10, 2013). The following flow chart shows how the Administration should properly determine the weight of opinion evidence.

**Weighing Process**

The Administration is required to “consider” all opinions regarding a claimant’s disability. See POMS DI 24515.002.4 (“Always consider opinion evidence when it is in the case file.”); 20 C.F.R. § 404.1527(d); Young v. Barnhart, 362 F.3d 995, 1001 (7th Cir. 2004) (“Weighing conflicting evidence from medical experts . . . is exactly what the ALJ is required to do.”). But not all opinions are equal. 20 C.F.R. § 404.1527(c). Some opinions are given more weight, usually based on the source of the opinion and the relationship between the claimant and the opinion’s source. 20 C.F.R. § 404.1520b; 20 C.F.R. § 404.1527. Properly weighing the various opinions is critical to correctly determine whether a claimant is disabled. The following is a step-by-step explanation providing the legal authority to support the flow chart.

**Step #1**
The first step is to cull from all the evidence the various opinions. 20 C.F.R. § 404.1513(d); 20 C.F.R. § 404.1527(a)(2),(b),(c); SSR 06-03p. This step identifies the universe of all opinions in the record. With all the opinions identified, the sorting and resulting weighing process can start.

**Step #2**
The next steps focus on the source of the opinion. Initially, the Administration must determine whether the opinion is being offered by a “medical source.” 20 C.F.R. § 404.1502; SSR 06-03p. A “medical source” includes licensed physicians, licensed or certified psychologists, licensed optometrists, licensed podiatrists, qualified speech-language pathologists, nurse practitioners, physicians’ assistants, naturopaths, chiropractors, audiologists and therapists. See SSR 06-03p; 20 C.F.R. § 404.1527(a)(1)-(5), (d)(1). If the opinion is from a “medical source,” the Administration must decide what type of medical source provided the opinion. SSR 06-03p; 20 C.F.R. § 404.1527; 20 C.F.R. § 404.1513(a)(1)-(5), (d)(1). If the opinion is not offered by a “medical source” it is an opinion from, not surprisingly, a “non-medical source.” SSR 06-03p. Examples of a “non-medical source” include educational personnel, such as teachers, counselors, early intervention team members, developmental center workers, and daycare center workers; public and private social welfare agency personnel; and other non-medical sources, such as spouses, parents, caregivers, siblings, relatives, friends, neighbors, and clergy. 20 C.F.R. § 404.1513(d)(2)-(4); SSR 06-03p. An opinion from a “medical source” is generally, but not always, given more weight than an opinion from an “other source.” See 06-03p (non-medical opinions cannot be used to establish existence of medical impairment); Stetz v. Colvin, 2013 U.S. Dist. LEXIS 120917, *34-37 (N.D. Ohio Aug. 26, 2013) (affirming despite non-medical opinion being given more weight than treating source opinion).
If the opinion is not from a “medical source” and is instead from a “non-medical source,” then the opinion is weighed by considering the “checklist factors.” 20 C.F.R. § 404.1527(c)(2)(i)-(ii),(c)(3)-(6); SSR 06-03p. These factors and how they are to be applied are discussed in detail at Step #7.

**Step #3**

Once an opinion has been identified as being offered by a “medical source,” the Administration must determine if the “medical source” is an “acceptable medical source.” An “acceptable medical source” is a licensed physician, licensed or certified psychologist, licensed optometrist, licensed podiatrist, and qualified speech-language pathologist. 20 C.F.R. § 404.1513(a)(1)-(5). Only an “acceptable medical source” can be considered a “treating source,” “nontreating source,” and “nonexamining source.” 20 C.F.R. § 404.1502. Additionally, only an “acceptable medical source” can offer a “medical opinion.” 20 C.F.R. § 404.1527(a)(2); SSR 06-03p. A “medical opinion” is a statement from an acceptable medical source that reflects judgments about the nature and severity of the claimant’s impairments, including symptoms, diagnosis, prognosis, physical and mental restrictions, and activities the claimant can perform despite the impairment. 20 C.F.R. § 404.1527(a)(2). If the opinion is not from an acceptable medical source, then the opinion is characterized as coming from (again – not surprisingly) a “not acceptable medical source.” SSR 06-03p. Examples of “not acceptable medical sources” include nurse-practitioners, physicians’ assistants, naturopaths, chiropractors, audiologists, and therapists. 20 C.F.R. § 404.1513(d)(1). An opinion from an “acceptable medical source” is generally, but not always, given more weight than an opinion from a “not acceptable medical source.” 20 C.F.R. § 404.1513(a); SSR 06-03p; Garcia v. Astrue, 2012 U.S. Dist. LEXIS 107576, *36 (N.D. Ind. Aug. 1, 2012). If the opinion is from a “not acceptable medical source,” then, again, the opinion is weighed by considering the “checklist factors.” SSR 06-03p (“Factors for Considering Opinion Evidence”); see also 20 C.F.R. § 404.1527(c)(2)(i)-(ii), (c)(3)-(6) (the checklist factors).

**Step #4**

Once it is determined that a “medical opinion” has been offered by an “acceptable medical source,” the next step is to determine the relationship between the “acceptable medical source” and the claimant. The Administration must determine if the “acceptable medical source” examined the claimant. See 20 C.F.R. § 404.1527(c)(1). Strangely, although the regulations define “examining relationship,” the regulations do not define “examining source.” 20 C.F.R. § 404.1502. Instead, the regulations simply define “nonexamining source,” which means “a physician, psychologist, or other acceptable medical source who has not examined [the claimant] but provides a medical or other opinion in [the claimant’s] case.” 20 C.F.R. § 404.1502 (emphasis added). Consequently, in a classic example of the reflexive property, an “examining source” examined the claimant. See 20 C.F.R. § 404.1527(c)(1). A doctor hired by a state to review a claimant’s claim for disability (often referred to as a “state-agency physician”) is an example of a “nonexamining source” that offers “medical opinions.” SSR 96-6p. A medical expert is another common example of a “nonexamining source” that offers a “medical opinion.” Medical experts are physicians, mental health professionals, and other medical professionals who provide impartial expert opinions at the hearing level. HALLEX I-2-5-32A. A medical expert is not allowed to exam the claimant. HALLEX I-2-5-36A. Indeed, a medical expert is disqualified if the expert has previously treated or examined the claimant. HALLEX I-2-5-32C. Medical experts review the claimant’s medical record and listen to the hearing testimony. HALLEX I-2-5-36A. Medical experts are

Continued on page 31
supposed to be selected based upon their expertise that is most appropriate to the claimant’s diagnosed impairments. HalleX I-2-5-36A. But experience shows that the Administration sometimes uses medical experts who have no expertise in the area of the claimed impairment. See, e.g., Turkyilmaz v. Colvin, 2014 U.S. Dist. LEXIS 94095, *10 (N.D. Ill. July 11, 2014) (medical expert was expert in internal and pulmonary medicine when claimant suffered from cervical radiculopathy and treated by a spine specialist). Importantly, “medical opinions” from “examining sources” generally, but not always, receive more weight than “medical opinions” from “nonexamining sources.” 20 C.F.R. § 404.1527(c)(1). If the “medical opinion” is offered by a “nonexamining source,” then, once again, the opinion is weighed by considering the “checklist factors.” 20 C.F.R. § 404.1527(c); 20 C.F.R. § 404.1527(c)(2)(i)-(ii), (c)(3)-(6) (the checklist factors) (Are you noticing a pattern?).

Step #5

Once it has been determined that a “medical opinion” has been offered by an “examining source,” the next step is to determine if the “examining source” treated the claimant, which would make the “examining source” a “treating source.” 20 C.F.R. § 404.1502; 20 C.F.R. § 404.1527(c)(2). A “treating source” is the claimant’s physician, psychologist, or other acceptable medical source that provides the claimant with medical treatment or evaluation and who has an ongoing treatment relationship with the claimant. 20 C.F.R. § 404.1502. A “treatment relationship” means the claimant is seeing or has seen the source “with a frequency consistent with acceptable medical practice for the type of treatment and/or evaluation required for [the claimant’s] medical condition(s).” Id. An examining source that solely provides a report to support the claimant’s disability claim is not a “treating source.” Id. Critically, “medical opinions” offered by “treating sources” generally, but not always, receive greater weight than opinions from those with simply examining relationships. 20 C.F.R. § 404.1527(c)(2); Clifford v. Apfel, 227 F.3d 863, 870 (7th Cir. 2000). If the “examining source” does not have a treating relationship with the claimant, then – you guessed it – the opinion is weighed by considering the “checklist factors.” 20 C.F.R. § 404.1527(c)(2)(i)-(ii), (c)(3)-(6) (the checklist factors). If the opinion is offered by a “treating source,” then the Administration must determine if that opinion is given “controlling weight.” 20 C.F.R. § 404.1527(c)(2).

Step #6

A “medical opinion” offered by a “treating source” can be given “controlling weight,” meaning the opinion outweighs all other opinions on the particular issue and, therefore, must be adopted. POMS DI 24515.004.B.1. But “controlling weight” does not mean that the claimant is necessarily disabled. That is a decision for the Administration’s Commissioner. 20 C.F.R. § 404.1527(d)(1); Johansen v. Barnhart, 314 F.3d 283, 287-88 (7th Cir. 2002).

To be given “controlling weight,” the “medical opinion” must be both (a) well-supported by medically acceptable clinical and laboratory diagnostic techniques and (b) not inconsistent with other substantial evidence in the record. 20 C.F.R. § 404.1527(c)(2). Both these requirements must be met for the “medical opinion” to be given “controlling weight.” POMS DI 24515.004.B.1. The Administration has provided guidance on several aspects of this mandatory two-part test. For example, the opinion need only be “well-supported,” not “fully supported.” Id. Additionally, the opinion need only be “not inconsistent” with other substantial evidence, not that the opinion be “consistent.” Id. Here’s how the Administration tries to explain this apparent double negative: The opinion need not be supported by all other evidence; there only needs to be no substantial contradictory evidence. Id. Further, the quantum of “not inconsistent” evidence is low – just more than a scintilla. Id. A “scintilla” is a trace. Black’s Law Dictionary 1464 (9th ed. 2009).

If the “medical opinion” from the “treating source” survives this two-part test, the Administration must adopt the opinion. POMS DI 24515.004.B.1. Courts rarely, if ever, hear appeals in which a treating source’s medical opinion has been given controlling weight. If, on the other hand, the “medical opinion” fails the two-part test, then – and you know what’s coming next – the opinion is weighed by considering the “checklist factors.” 20 C.F.R. § 404.1527(c)(2)(i)-(ii), (c)(3)-(6) (the...
Every Picture Tells a Story
Continued from page 31


Step #7
As shown by the flow chart, after distilling all the statutes, regulations, rulings, manuals and case law, determining the weight of any opinion can be simply capsulized: Unless the opinion is given controlling weight, the opinion is weighed by considering the “checklist factors.”

The regulations enumerate six “checklist factors,” but because the last enumerated factor is a catch-all, there are more. 20 C.F.R. § 404.1527(c)(2)(i)-(ii),(c)(3)-(6).

• **Length of the Treatment Relationship and the Frequency of Examination**
  A medical opinion by a “treating source” that has seen the claimant on many occasions for a long period of time is given more weight. 20 C.F.R. § 404.1527(c)(2)(i).

• **Nature and Extent of the Treatment Relationship**
  A medical opinion from a “treating source” that has more knowledge of the claimant’s impairments is given more weight. 20 C.F.R. § 404.1527(c)(2)(ii).

• **Supportability**
  A medical opinion that is supported by medical signs and laboratory findings as well as more fulsome explanations for the opinion is given more weight. This factor is critical in determining the weight of opinions of “nonexamining sources.” 20 C.F.R. § 404.1527(c)(3).

• **Consistency**
  A medical opinion that is consistent with the record as a whole is given more weight. 20 C.F.R. § 404.1527(c)(4). But this factor seems difficult to apply and is subject to “cherry picking.” All cases are going to involve conflicting evidence (or as the Administration puts it, “inconsistent evidence”). Indeed, the very existence of the “inconsistent evidence” triggers the hearing and the weighing process. 20 C.F.R. § 404.1520b(b). Therefore, the Administration can always focus on those evidentiary materials that support a medical opinion over the conflicting or “inconsistent” evidence.

• **Specialization**
  A medical opinion from a source that has a specialty in the medical issues relating to the claimant is given more weight. 20 C.F.R. § 404.1527(c)(5). For example, the opinion of a psychiatrist should be given more weight than the opinion of a doctor of internal medicine in a case involving mental health. See, e.g., Kelly v. Colvin, 2015 U.S. Dist. LEXIS 104301, *16-17 (N.D. Ill. Aug. 10, 2015) (psychiatrist opinion discounted over doctor of internal medicine regarding mental health opinion).

• **Other Factors**
  The regulations provide a “catch all” factor. The regulations state that the Administration will consider “any factors” that “tend to support or contradict the opinion.” 20 C.F.R. § 404.1527(c)(6). But the regulations only give two examples of “other factors.” One example is “the extent to which an acceptable medical source is familiar with the other information in [the claimant’s] case record.” *Id.* This example is

Continued on page 33
redundant with the “nature and extent” factor, at least when the opinion is of a “treating source.” This “other factor” example makes sense. An opinion provided by a witness who has knowledge of the claimant’s entire record should be given more weight. But the only other example of “other factors” the regulations provide – “the amount of understanding of [the Administration’s] disability programs and their evidentiary requirements” – makes less sense.

20 C.F.R. § 404.1527(c)(6). The Administration does not explain why this particular “other factor” is important. Likewise, the case law addressing this “other factor” is almost nonexistent.

Moreover, the factor will almost always weigh in favor of the state-agency physicians and consultants. They are hired by the Administration, so they should have an “understanding of [the Administration’s] disability programs.” Additionally, a claimant is at a distinct disadvantage with regard to this factor. How would the claimant introduce evidence that the “treating source” is knowledgeable about the Social Security program? Treating physicians do not testify, and they certainly do not state in medical records their knowledge of disability programs and the basis for that knowledge. In theory, a claimant’s attorney could obtain a statement from the treating source stating that the source is familiar with the Administration’s programs.

example, the first two factors do not apply to “medical opinions” from a “nontreating source” or a “non-medical source,” which is why the supportability, consistency and specialization factors are so important when considering opinions from these sources. See, e.g. Brooks v. Astrue, 2011 U.S. Dist. LEXIS 14574, *16 n.2 (E.D. Tenn. Jan. 26, 2011); Johnson v. Astrue, 2009 U.S. Dist. LEXIS 62524, *9 n.1 (E.D. Tenn. June 23, 2009). Moreover, “non-medical source” opinions do not exactly match with the “checklist factors.” But they are a useful analog. SSR 06-03p.

This author has already argued that the administrative law judges must explicitly address the checklist factors. Johnston, Understanding the Treating Physician Rule in the Seventh Circuit: Good Luck!, The Circuit Rider 29, 36-37 (November 2015); but see Oldham v. Astrue, 509 F.3d 1254, 1258 (10th Cir. 2007) (explicit application unnecessary). District courts in this Circuit have routinely remanded cases when an administrative law judge fails to provide a clear explanation of the weight given to opinions. See, e.g., Barnes v. Colvin, 889 F. Supp. 3d 881, 889 (N.D. Ill. 2015) (“The ALJ must clearly state the weight he has given to the medical sources and the reasons that support the decision.”); Herrold v. Colvin, 2015 U.S. Dist. LEXIS 33351, *22 (N.D. Ind. Mar. 17, 2015) (requiring a thorough explanation of the weight given to each medical source opinion). In fact, even the Administration’s own rulings require that decisions denying benefits “must contain specific reasons for the weight given to a treating source’s medical opinion and the reasons for that weight.” SSR 96-2p. With luck, the Seventh Circuit will decisively resolve the issue of whether an explicit application of the “checklist factors” is required.

### Conclusion

Hopefully, the flow chart will help in understanding the proper procedure in weighing opinion evidence in Social Security cases. A visual guide is often more comprehensible than stacks of regulations, rulings, and manuals.
It’s a low-probability-of-occurrence event, I acknowledge. But it happens. It really does. To clients just like yours: physicians, manufacturers, financial institutions, service providers, brokers.

It starts something like this. A shaken-sounding client calls you to report that there are federal agents at her home with a warrant to search her office. They want her to produce the keys. What, she asks, should she do?

Involving a criminal defense attorney may not be a workable response because the client needs help now, and there’s not a moment to spare. Search and seizure might not be your professional focus, but with an awareness of the basics, you can function quite effectively. That’s why we’re having this conversation.

You don’t need a brilliant précis on the law of search and seizure; you just need a very simple explanation of what will be happening in the execution of the warrant and what you can do to be the most help to the client.

You Already Know Just About Enough of the Relevant Law

Anyone who’s been admitted to the bar already knows enough law to function effectively: The agents need a search warrant, signed by a judge, based on probable cause established in an affidavit; those Fourth Amendment requirements become unnecessary if the search is conducted with the consent of an appropriate person.

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There’s three more bits of law to keep in mind. First, the law invests the agents with the power to take drastic action to carry out the search. They get to decide if they need to break down doors or break open cabinets.⁴ Second, it’s a criminal offense to interfere with agents executing a search warrant.⁵ Third, it’s also a crime to take any action which impairs the agents’ authority to take property described in the warrant.⁶ And here’s a really important part, that crime occurs without regard to when the agents execute the warrant: impairing the agents’ access to the property is the offense, whether it occurs before the search, during the search, or after the search. Don’t forget that.

Be Aware of What You Don’t Know

The Agents

Understand who you’ll be encountering. Federal agents are bright, they’re trained, they’re experienced, they’re tough, and they’re brave. For starters, respect them. Treating them with respect, besides being the right thing to do, is likely to induce them to respond in kind. Besides, they carry guns. Loaded guns. And lots more loaded weapons in their vehicles.

In executing the warrant, the agents are translating into action a carefully formulated plan. They’ve surveilled the premises. They know who is likely to be present. They’ve assigned agents on the raid team to specific duties like perimeter security, search teams, computer teams, and interview teams. They’ve rehearsed. They picked the time of their arrival to capitalize on the element of surprise. Their primary concern is the safety of the agents. They will assume that persons on the premises have the same weapons as the search warrant party.

Your Training and Experience Are a Hindrance

Every lawyer wants to persuade. Endlessly. But never forget that the execution of a search warrant is a law enforcement activity, not an opportunity for advocacy. Your instinct, and the client’s expectation, is that you can somehow persuade the agents to stop the search.

Forget it. The first lines of the search warrant say it all. “To: [Special Agent Jones] and any authorized law enforcement officer . . . YOU ARE HEREBY COMMANDED to execute this warrant on or before [a specified date] . . .” If you try to talk the agents out of the existence of probable cause, or to advocate what the client has just told you on the telephone, you will be written of initially, (1) as an amateur, then (2) as a nuisance, and finally (3) as someone who is interfering with the execution of the warrant. Don’t go there.
The Information Imbalance

You are hopelessly overmatched. You don’t know what information the investigators have. The investigation didn’t just start with the preparation of the Affidavit and the Warrant; it’s been underway for some time – is it hours, or weeks, or months? What’s the subject matter of the investigation? The target(s)?

Are there confidential informants among the workers?

Your (hurried) conversation with the client might have given you some glimmer. Whether the glimmer is reliable is something else entirely.

You Don’t Know the Agents’ Specific Objectives

But experience teaches they want to do four things: to carry out the warrant’s command to execute the search; to gain consent to search places or seize things that might not be described in the warrant; to gain admissions from the target; and, to obtain interviews of workers. Notice that except for the first, these objectives lie outside the authorization conferred by the warrant.

Understand Your Objectives

You have objectives, too, but they’re much more limited. Your basic objective is to avoid catastrophe.

• Do caution the workers on the need to be truthful and do inform the workers of their rights to counsel; and
• Do gather as much information about the investigation as you possibly can.

So here are the action steps. Remember: You don’t need to be perfect, just effective.

Get Off the Phone and Get There

There is no substitute for being present. You can’t coach the client through this by talking on the telephone. Understand that this is a shocking situation for the client. The client is frightened and likely embarrassed that the image of the cool, calm, competent professional they have cultivated with you is now mush. Asking a client to absorb and follow detailed instructions is asking too much.

Inevitably, clients talk too much – and they’re indiscriminate. They’ll talk to anyone within earshot. The first thing you should tell the client is to stop talking – to the agents, to anyone else and even to you.

Next, tell the client not to impede the search, but also not to consent to any searches beyond what’s permitted by the warrant.

Tell the client not to destroy any evidence, and to communicate that message to the workers. Get some idea of whether there is an office manager or a site supervisor or some other reliable person who can meet you at the premises.
Then, hang up; grab your attorney identification, your cell phone, a pad of paper and a pen, and start driving.

**When You Get to the Scene, Find the Raid Leader**

This person will be your primary point of contact during the execution of the warrant.

Exhibit your attorney identification. Say that you represent the [corporation], [partnership], [sole proprietorship], as the case may be. Say that the entity will cooperate with the execution of the search authorized in the warrant.

Ask for a copy of the warrant. Take five minutes to study it closely, paying particular attention to the description of the premises to be searched and the documents to be seized.

Ask for the Assistant U.S. Attorney’s contact information. Ask for the identities of the agents conducting the search; it’s a legitimate question because the warrant is to be executed by law enforcement officers, but you may get some resistance here.

Ask for the basis of the search – sometimes the agents can’t help showing off and will explain quite a bit. Then ask for a copy of the search warrant Affidavit. The answer will almost certainly be “you gotta talk to the AUSA,” but ask.

Ask for the opportunity to talk to the employees. If the Raid Leader refuses, call the AUSA. You represent the entity and the entity’s lawyer has the right to talk to its workers. If someone objects that you can’t represent the entity and the employees, insist that for today you can and you do.

**Cooperate, But No Consents**

Appropriate cooperation includes identifying the location of the items described in the warrant, and providing IT information and assistance to enable acquisition of any ESI described in the warrant.

Identify essential employees. The office manager is likely one, and knowledgeable IT personnel likely others. Tell the Raid Leader the entity is dismissing for the day all but essential employees, right now, and ask for assistance in accommodating that. Communicate to the non-essential workers that they’re done for the day. Deputize the office manager and a finite group of subordinate managers to document how the agents are conducting the search.

Understand the bounds set in the warrant and insist that they be honored. Don’t consent to an expansion of the limits specified in the warrant, either as to the areas to be searched or the kinds of materials to be seized.

*Continued on page 38*
If you find the agents are exceeding the scope of the warrant, invite the Raid Leader’s attention to the situation, read aloud the relevant part of the warrant, and ask if the search activity is outside the scope of the warrant. If that meets with no success, increase the directness of your objection. If a more pointed objection falls on deaf ears, call the USA.

Resist the impulse to argue the existence of probable cause; that’s already been decided.

**Deal with the Workers**

Tell the workers to leave computers, documents, and everything else alone. Do nothing that could be considered destruction of evidence.

Tell the workers that any statements they make to the agents must be true; that those statements may bind the company; that false oral statements are punishable as a crime; and that they have the right to review any written statement before signing.

Tell them that they have the right to talk to the agents or to decline to; that they can request the interview occur at a time and a place convenient to them; that they have the right to consult with an attorney before making the decision; that free of charge to them the entity will provide an attorney to consult with and be present in the making of any statements to law enforcement agents; and that they can hire any attorney they chose to advise them.

**Soak Up as Much Information as You Can**

Ask every agent you encounter about the basis for the search. What’s this case about?


Document the search activity. Cell phone photos are lawful, but the agents will be touchy. Best to clear this with the Raid Leader. As an inducement, offer to provide copies. Abide by an instruction not to photograph.

Take as many notes as you can. Criminal defense counsel will be desperate for information.

Finally, if one of these situations occurs, embrace it as an opportunity to be a part of something important. The Fourth Amendment has guided us since 1791. Each time we insist that it be observed, even in seemingly small cases, we keep alive an idea that is deeply important to our Nation.

You’ll do fine. Now, get going.
Are you familiar with the Standards for Professional Conduct within the Seventh Federal Judicial Circuit? All attorneys seeking admission to practice within the Seventh Circuit — which includes the federal district courts and the bankruptcy courts in Illinois, Indiana, and Wisconsin, and the Seventh Circuit Court of Appeals — must certify under penalty of perjury on their applications for admission that they have read the Standards and that they agree to conduct themselves in accordance with them. The Standards apply not only to licensed attorneys who are admitted to practice within the Seventh Circuit, but also to attorneys admitted pro hac vice and pro se litigants.

The Standards, which the Seventh Circuit adopted nearly 25 years ago, are divided into five sections: (1) Preamble; (2) Lawyers’ Duties to Other Counsel (thirty duties); (3) Lawyers’ Duties to the Court (eight duties); (4) Courts’ Duties to Lawyers (twelve duties); and (5) Judges’ Duties to Each Other (three duties).

Practitioners within the Seventh Circuit should review the Standards regularly. The Preamble instructs that the Standards “should be reviewed and followed by all judges and lawyers participating in any proceeding, in this Circuit,” and “[v]oluntary adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this Circuit.” Although the Preamble instructs that the Standards are not to be used as “a basis for litigation or for sanctions or penalties,” courts within the Seventh Circuit have publicly admonished attorneys who failed to comply. Courts have also stricken briefs that did not adhere to the Standards’ expectations of civility. In addition, each jurisdiction has rules of professional conduct for attorneys and codes of judicial conduct that

Continued on page 40

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regulate the same types of conduct that are covered by the Standards. Although these professional and judicial rules do not form the bases for independent causes of action, violations of these rules may lead to investigations and possible disciplinary actions by the appropriate disciplinary authorities. This article offers a brief history of the Seventh Circuit’s adoption of the Standards along with an annotated guide discussing case law, where available, that illustrates the meaning and application of the Standards. In doing so, this article seeks to promote the Standards’ purpose: to encourage lawyers and judges to “be mindful of [their] obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.”

I. A Brief History of the Standards

In 1971, then-Chief Justice Warren E. Burger of the U.S. Supreme Court identified a modern civility crisis in the legal profession, lamenting that “overzealous advocates seem to think the zeal and effectiveness of a lawyer depends on how thoroughly he can disrupt the proceedings or how loud he can shout or how close he can come to insulting all those he encounters.” By 1989, then-Chief Judge William J. Bauer of the U.S. Court of Appeals for the Seventh Circuit called Judge Marvin E. Aspen of the U.S. District Court for the Northern District of Illinois into his chambers and, as recalled by Judge Aspen, “solemnly advised me that the word was about that there were civility problems in the courtroom.”

Upon their meeting, Chief Judge Bauer appointed Judge Aspen to chair a new nine-member Civility Committee — comprised of judges and lawyers — that would examine problems of civility in litigation in the Seventh Circuit. Upon convening, the Committee settled on a definition of “civility”: “professional conduct in litigation proceedings of judicial personnel and attorneys.” As Judge Aspen recalled, “[t]he Committee did not limit the term to good manners or social grace. It examined judicial as well as lawyer incivility.” Over the next year, the Committee reviewed legal literature and the law in other jurisdictions; conducted informal surveys of judges and lawyers from within the Seventh Circuit; and received candid feedback that reflected both “the nature of the adversary system” and the “natural tension inherent in the different roles that judges and lawyers assume in the litigation process.”

After evaluating survey results from more than 1,500 respondents, the Committee learned that a “widespread dissatisfaction exist[ed] among judges and lawyers with the gradual changing of the practice of law from an occupation characterized by congenial professional relationships to one of abrasive confrontations.” In particular, respondents identified discovery abuses and Rule 11 sanctions as “incivility flash points.” The Committee determined that the decline of civility was due to several factors, including a “bottom-line mentality aimed at winning at all costs”; increased economic pressures and client demands; the decreasing frequency of repeated interactions between counsel and the same opponent or the same judge; the influence of the media’s “dramatic, abrasive” portrayal of the legal industry; and a declining training relationship between the older and younger members of the bar, among other factors.

The Committee published its Interim Report in April of 1991. It proposed ways that “the organized bar, the courts, our law schools, lawyers, and law firms should tackle the civility problem” and included proposed Standards for Professional Conduct for both judges and lawyers. Notably, the Preamble to these proposed Standards stated expressly that violation of the Standards would not be sanctionable and that the Standards could not be used in an attorney disciplinary proceeding, contempt of court, or as a basis for civil litigation. Judge Aspen explained that “[t]he Standards...
An Annotated Guide...
Continued from page 40

were aspirational, that is, a reaffirmation by judges and lawyers as to what constitutes professional conduct for our working environment. The Committee was careful to avoid making the Standards fodder for satellite litigation of any sort.24

After receiving comments on the Interim Report, the Committee fine-tuned its recommendations and published its Final Report in December of 1992.25 The Final Report recommended (1) adopting the proposed Standards; (2) providing a copy of the Standards to each lawyer admitted to practice in any court within the Seventh Circuit and requiring each lawyer to certify that he or she has read and will abide by them; (3) implementing civility training at law firms and judicial workshops; (4) forming mentor relationships; and (5) encouraging law schools to incorporate the Standards into their curricula.26 The Final Report explained that the Standards set forth a voluntary, aspirational, and educational code of civility.27

Following their adoption, Judge Aspen offered his view of why the Standards are so important: “They represent the first time that judges and members of the Bar have come to a common understanding regarding how they should behave and the behavior that they may expect from their fellow officers of the court.”28 “Equally important,” he maintained, “the principles embodied in them will be passed from one generation of attorneys to the next, as every new attorney who is sworn in to practice in the Seventh Circuit must sign a statement certifying that he or she has read the Standards and promises to abide by them.”29

Six years after the Standards’ adoption, Judge Aspen acknowledged two common objections that opponents of civility codes typically leveled against the Standards: first, that the Standards “conflict with, or at least encroach on, the territory of another value, the ‘traditional ethic of zealous representation’”; and second, that “civility codes could result in a great deal of ‘satellite litigation’ or could be used ‘as professional standards in malpractice claims.’”30 Responding to these objections, Judge Aspen asserted that case law supported his view that “the duty of zealous advocacy cannot trump the duty of professionalism.”31 He also determined that judges in fact do not treat the Standards as a basis for additional litigation.32

II. An Annotated Guide to the Standards

The Standards are set forth below in italic text, along with commentary about case law that illustrates their meaning and applicability. Courts within the Seventh Circuit frequently invoke the Standards’ Preamble, Lawyers’ Duties to Other Counsel, and Lawyers’ Duties to the Court to remind attorneys of these duties. Notably, there are no published opinions or orders discussing Courts’ Duties to Lawyers. Only one opinion discusses Judges’ Duties to Each Other.

A review of this case law demonstrates that, consistent with Judge Aspen’s first conclusion, courts within the Seventh Circuit have invoked the Standards to stress that the duty of zealous advocacy cannot trump the duty of professionalism: the Seventh Circuit Court of Appeals has asserted that “[t]here is a difference between zealously advocating for one’s clients and unnecessarily disparaging opposing counsel,” and the court has advised counsel to review the Standards when counsel employed an inappropriate tone or leveled “unfounded accusations” against opposing counsel.33 Parties to a lawsuit are entitled to “zealous representation of counsel,” wrote one district court, but “sometimes zealous representation crosses the line into unacceptable conduct” that can approach the “danger zone” with respect to compliance with the Standards.34 Regarding Judge Aspen’s second conclusion, it appears correct that courts do not sanction lawyers solely under the Standards, although some ambiguity has arisen because some courts have formally incorporated the Standards into their local rules.35

Preamble

¶ 1 A lawyer’s conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.

A district court invoked ¶ 1 of the Preamble to admonish counsel whose briefing in the case was “unnecessarily scathing” and warned counsel that “the tone of both briefs undermines not only professional civility but also effective advocacy.”36

¶ 2 A judge’s conduct should be characterized at all times by courtesy and patience toward all participants. As judges we owe to all participants in a legal proceeding respect, diligence, punctuality, and protection against unjust and improper criticism or attack.

Continued on page 42
Paragraph 6 of the Preamble explicitly states that the Standards do not serve as an independent basis for litigation, sanctions, or penalties. The Standards are merely “aspirational,” and they do not “trump” the Federal Rules of Civil Procedure or other applicable court rules. 

Where there is already an independent statutory basis for sanctions, courts will sometimes point to the Standards to further justify the sanctions. Thus, in Matter of Maurice, the Seventh Circuit Court of Appeals affirmed an award of sanctions in a bankruptcy proceeding in which the attorney representing the debtor was sanctioned “pursuant to Federal Rule of Bankruptcy Procedure 9011” for, among other reasons, violating several of the Standards.

Even when they do not impose sanctions, courts within the Seventh Circuit often invoke the Standards to publicly admonish attorneys who do not conduct themselves in a civil and courteous manner. For example, in In re Horsfall, a bankruptcy court declared that it had “never had a more unpleasant day in court than the day this trial was held” due to “the truculent conduct” of trial counsel. Nonetheless, the court concluded that trial counsel’s behavior did not give rise to sanctions under Federal rule of Bankruptcy Procedure 9011(b), 28 U.S.C. § 1927, or 11 U.S.C. § 105. Still, the court admonished the attorneys to observe the Standards and follow the Preamble’s instructions that conduct “should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms.” Indeed, courts within the Seventh Circuit expect “judges and lawyers to make a mutual and firm commitment to these standards, which encourage us to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.”

Even though uncivilized behavior may not result in sanctions, attorneys practicing within the Seventh Circuit should be aware that the Standards have been incorporated into the local rules of some courts within the circuit to “govern the conduct of those practicing in the court.” In fact, at least one district judge has adopted the Standards into his own court rules in order to “call additional attention to them even though they apply to anyone practicing within the confines of the Seventh Circuit.” It is therefore possible that a court could impose sanctions upon counsel for failing to comply with the Standards, even though the Standards themselves do not contemplate this.

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An Annotated Guide
Continued from page 42

Copies may be made available to clients to reinforce our obligation to maintain and foster these standards.

Lawyers’ Duties to Other Counsel

1. We will practice our profession with a continuing awareness that our role is to advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications.

Courts have invoked Duty 1 to admonish counsel that has behaved uncooperatively, disrespectfully, abusively, or violently towards opposing counsel. For example, in In re Silverman, defense counsel informed the bankruptcy court that he and debtor’s counsel were “unable to cooperate”; that debtor’s counsel “telephoned his office between twenty and thirty times in one day” as a form of harassment; and that debtor’s counsel had repeatedly “threatened physical violence” against him. The court declined to strike the debtor’s motion for summary judgment on the basis of these allegations. Nonetheless, the court stated that “the mere fact that these allegations were even made demonstrates the lack of civility that has too often permeated the legal profession over the years.”

Although these duties did not form an independent basis for sanctions, the magistrate judge cautioned that “parties’ counsel should be forewarned that any witness coaching, speaking objections, uncivil behavior, interruptions of witness, or efforts to delay either deposition will result in sanctions.”

Under Duty 2 and Duty 4, it is improper for an attorney to accuse another attorney of being a “liar.” Invoking these duties, one magistrate judge warned an attorney who had called opposing counsel a liar during a deposition that “[a]ccusations and characterizing opposing counsel as ‘liars’ has no place in a judicial proceeding.” Although these duties did not form an independent basis for sanctions, the magistrate judge cautioned that “parties’ counsel should be forewarned that any witness coaching, speaking objections, uncivil behavior, interruptions of witness, or efforts to delay either deposition will result in sanctions.”

Courts have also admonished counsel under Duty 4 that it is improper to accuse opposing counsel of “distorting,” “misquoting,” or “misconstruing” the facts and the law of a case. Such attacks are not only unnecessary and distracting, but they “do not assist the court in resolving the matter and give the impression, whether accurate or not,” that the party resorting to such attacks is itself taking a position that is “unsupported by the law or facts because it has resorted to such distractions.” Arguments by counsel accusing opposing counsel of misconstruing the facts or law are “rude” and “ill serve their clients and adversely affect counsels’ credibility.”

At least one court has opted not to make a discretionary fee award to a party whose conduct offended the standards set forth in Duty 4.

It is also improper under Duty 4 for an attorney to use “innuendo” or “speculation” to suggest, without any factual support in the record, that opposing counsel has engaged in improper communications or relationships with third parties.
5. We will not seek court sanctions without first conducting a reasonable investigation and unless fully justified by the circumstances and necessary to protect our client’s lawful interests.

In one case interpreting Duty 5, Borom v. Town of Merrillville, the district court denied defendants’ motion for sanctions against plaintiffs’ counsel for her violation of procedural rules relating to service of subpoenas. The defendants’ motion had acknowledged that plaintiffs’ counsel had in fact “conceded her error and promised to correct the problem [with the subpoenas] when the parties had conferred.” Citing to Duty 5 and denying the motion, the court remarked: “This is how the system is supposed to work: when a conflict arises, the parties’ counsel work together to solve it.” Because no conflict existed as acknowledged in the defendants’ own motion, sanctions were not warranted against plaintiffs’ counsel.

6. We will adhere to all express promises and to agreements with other counsel, whether oral or in writing, and will adhere in good faith to all agreements implied by the circumstances or local customs.

In Salmeron v. Enterprise Recovery Systems, Inc., the Seventh Circuit Court of Appeals pointed to Duty 6 to emphasize that “a lawyer is permitted to rely on opposing counsel’s promises and agreements.” Thus, where an attorney agreed to keep the opposing party’s documents confidential for “attorneys’ eyes only” and to get back to opposing counsel about his proposed changes to their draft protective order, the opposing counsel was entitled to take that attorney “at his word.” Indeed, the appellate court in Salmeron affirmed the district court’s dismissal of the plaintiff’s entire case as a sanction for plaintiff’s counsel’s violation of the “attorneys’ eyes only” agreement, noting that counsel should be held to their word.

7. When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely. The drafter will provide the opportunity for review of the writing to other counsel. As drafts are exchanged between or among counsel, changes from prior drafts will be identified in the draft or otherwise explicitly brought to the attention of other counsel. We will not include in a draft matters to which there has been no agreement without explicitly advising other counsel in writing of the addition.

8. We will endeavor to confer early with other counsel to assess settlement possibilities. We will not falsely hold out the possibility of settlement as a means to adjourn discovery or to delay trial.

9. In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.

10. We will not use any form of discovery or discovery scheduling as a means of harassment.

A magistrate judge suggested, in Musa-Muaremi v. Florists’ Transworld Delivery, Inc., that Duty 10 protects parties from the improper public disclosure of documents that are produced during discovery, even when the documents do not have any confidentiality designations.

In that case, the defendant had voiced concern that the plaintiff or her counsel would make certain documents a matter of “public record,” thereby “implying that the documents might be made public (perhaps on the internet) for some improper purpose.” The magistrate judge determined that the disputed documents were not “entitled to protection,” but nonetheless reminded the parties that under Duty 10, “discovery may not be used for an improper purpose.”

11. We will make good faith efforts to resolve by agreement our objections to matters contained in pleadings and discovery requests and objections.

Continued on page 45
Under several duties of Lawyers' Duties to Other Counsel, including Duty 11, it is improper for counsel to engage in gamesmanship to adversely impact the efficiency, timeliness, and truth-seeking function of the discovery process. Courts have required counsel to formally certify or declare that they have reviewed the Standards when they observe counsel engaging in such gamesmanship.

For example, in *Boehm v. Scheels All Sports, Inc.*, the district court sternly invoked Duty 11 in responding to a defendant’s discovery motion accusing the plaintiffs of discovery abuse. Before addressing the merits, the court scolded that “the motions before me fall short of the standards of professionalism and courtesy that I expect.” In particular, the court recited Duty 11 and remarked that defense counsel’s “obligation to try to resolve discovery disputes by agreement” under Duty 11 was “not satisfied by an email demand that discovery requests be withdrawn or that additional disclosures be made, which draws only a point-blank refusal.” The court instructed that “counsel must confer by live, voice-to-voice communication in a sincere and diligent effort to resolve their disputes before filing any discovery motion, and any motion must so certify. Good faith does not require that negotiations drag on; court assistance should be sought promptly when sincere efforts fail.” Finally, in its order, the court required certain counsel to formally certify that they reviewed the Standards and that they would “scrupulously follow them going forward.”

Not all courts require a formal certification or declaration of compliance with the Standards in order to achieve a more civil tone in discovery. For example, in *Vukadinovich v. Hanover Community School Corp.*, the district court denied the plaintiff’s motion to admonish defendants’ counsel to comply with the Standards; instead, the court ordered the parties to confer about discovery by “back-and-forth email or other written communication.” In its order, however, the court criticized the parties for resorting to “calling each other names and including snarky comments in their filings,” and so the court nonetheless urged the parties and their attorneys to “adopt a more civil tone.”

12. We will not time the filing or service of motions or pleadings in any way that unfairly limits another party’s opportunity to respond.

13. We will not request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.

14. We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.

Local Rule 30-1(d) for the Southern District of Indiana explicitly incorporates Duty 14, stating that under Duty 14 “attorneys will make a good faith effort to schedule depositions in a manner that avoids scheduling conflicts.” A magistrate judge for the Southern District of Indiana, in *Slabaugh v. LG Electronics USA, Inc.*, interpreted what constitutes a “good faith effort” under Local Rule 30-1. The magistrate judge explained that “to discuss what constitutes a ‘good faith effort’ under Local Rule 30-1, the Court looks to Local Rule 37-1, which also addresses the measure of good faith necessary to resolve deposition disputes. Specifically, Local Rule 37-1 requires that ‘prior to involving the court in any discovery dispute, including disputes involving depositions, counsel must confer in a good faith attempt to resolve the dispute.’” In determining that the plaintiffs “did not fail to make a good faith effort” in scheduling depositions, the magistrate judge observed that plaintiffs’ counsel had “instructed defense counsel to ‘please let me know’ if defense counsel ‘would like to discuss alternative locations, date, times, or means of taking the depositions.” “This instruction alone,” the magistrate judge reasoned, “given the fact that the close of discovery was just over two weeks away at the time that notice was served, fully complies with the Rule 30-1 requirement that attorneys make a good faith effort to avoid scheduling conflicts when scheduling depositions.”

15. We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars, or other functions that produce good faith calendar conflicts on the part of other counsel. If we have been given an accommodation because of a calendar conflict, we will notify those who have accommodated us as soon as the conflict has been removed.

16. We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings, or conferences are to be canceled or postponed. Early notice avoids unnecessary travel and expense of counsel and may enable the court to use the previously reserved time for other matters.
In *Harrington v. City of Chicago*, the Seventh Circuit Court of Appeals strongly admonished a plaintiffs’ attorney who failed to comply with Duty 16. The plaintiffs’ attorney had filed a suit on behalf of his clients, but his “repeated inattention” to the case caused the district court to dismiss it for want of prosecution. The appellate court affirmed the district court’s denial of the attorney’s motion to vacate the dismissal. In doing so, the appellate court noted that the plaintiffs’ attorney had failed to appear before the district court at a status conference. The plaintiffs’ attorney attempted to excuse this absence with the fact that, on the date of the conference, he was in trial on another matter. He also pointed to his status as a sole practitioner as an excuse for his absence. Citing Duty 16, the appellate court determined that the plaintiffs’ attorney’s “failure to notify the district court and opposing counsel about his conflicting trial date before the status conference [was] inexcusable.” “Sole practitioner or not,” the court admonished, the plaintiffs’ attorney, “as a member of the bar, had duties to his clients, to opposing counsel, and to the district court — not the least of which was respect.”

17. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients’ legitimate rights will not be materially or adversely affected.

18. We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity.

A district court interpreted Duty 18 in *Sullivan v. General Plumbing, Inc.* In that case, the defendant moved to vacate a default judgment under Federal Rule of Civil Procedure 60(b)(1). The district court denied the motion, determining that the defendant’s conduct did not constitute “excusable neglect” under Rule 60(b)(1). The court rejected the defendant’s argument that the plaintiffs’ attorney was “well aware that [the defendant] was represented by counsel yet did not contact counsel to inform him that Plaintiffs were seeking entry of a default judgment.” The court acknowledged that although there are “civility standards that address this situation” — namely, Duty 18 — “there is no legal duty to serve opposing counsel with the request for default.” “[B]ecause there was no legal requirement to notify counsel,” the court declined to grant the defendant’s motion to vacate on that basis.

Interestingly, the district court’s interpretation of Duty 18 in *Sullivan* conflicts with a decision issued nearly 10 years earlier in *Grun v. Pneumo Abex Corp.*, in which the Seventh Circuit Court of Appeals determined that the “spirit” of Duty 18 “required” a lawyer to alert opposing counsel of a dismissal notice even though there was not an “explicit rule” requiring the lawyer to do so. The court criticized defense counsel’s decision “to remain silent when he admittedly knew that Grun [the plaintiff] was unaware of the dismissal order, and that neither party had received notice of the trial date.” The court noted with dismay that defense counsel admitted that he had researched whether he had a duty to inform the plaintiff’s lawyer of the dismissal notice and, when he found no such affirmative duty in the rules, “he chose to remain silent.” Citing to Duty 18, the court recognized that defense counsel “did not affirmatively ‘cause’ the case to be dismissed, but counsel was well aware that things were amiss and chose not to fix them even though doing so would have promoted the interest of fair play.” Defense counsel had no affirmative duty to alert the plaintiff’s lawyer of the dismissal; nonetheless, “the spirit of the rules required such a result.” Commentators have written that *Grun* illustrates that the Seventh Circuit Court of Appeals “seriously takes a lawyer’s duty to improve civility among the members of the bar and, by criticizing uncivil conduct by lawyers who appear before it, is willing to guide lawyers toward the aspirational goals of civility and professionalism.”

19. We will take depositions only when actually needed to ascertain facts or information or to perpetuate testimony. We will not take depositions for the purposes of harassment or to increase litigation expenses.

20. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.

21. We will not obstruct questioning during a deposition or object to deposition questions unless necessary under the applicable rules to preserve an objection or privilege for resolution by the court.

Duty 20 and Duty 21 were both invoked in *Alford v. Aaron Rents, Inc.*, in which the magistrate judge recommended that the district court impose monetary sanctions upon certain counsel for particularly uncivilized behavior during depositions.
The attorneys “failed to heed warnings of uncivil conduct” by the district judge who supervised the depositions and the attorneys “spoke over one another and the Judge.” Indeed, the attorneys’ contentious behavior was so extreme that it required the district judge “to take time out of his schedule,” including during jury trial recesses, “to resolve the repetitious, ongoing arguments of the parties,” and one deposition became so “combative” that the judge “personally observed the deposition for approximately an hour in an effort to get the parties to conduct themselves professionally.”

Recommending that monetary sanctions be imposed on the attorneys under Federal rule of civil procedure 37, the magistrate judge also invoked several rules of the Illinois Rules of Professional Conduct, Duty 20, and Duty 21 to justify the sanctions. In doing so, the magistrate judge emphasized that “[c]ivility is simply an integral component of the contentious legal process,” and admonished that the attorneys’ “complete lack of civility is disgraceful.”

22. During depositions we will ask only those questions we reasonably believe are necessary for the prosecution or defense of an action.

23. We will carefully craft document production requests so they are limited to those documents we reasonably believe are necessary for the prosecution or defense of an action. We will not design production requests to place an undue burden or expense on a party.

24. We will respond to document requests reasonably and not strain to interpret the request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents.

25. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary for the prosecution or defense of an action, and we will not design them to place an expense or undue burden or expense on a party.

26. We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.

27. We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information.

28. When a draft order is to be prepared by counsel to reflect a court ruling, we will draft an order that accurately and completely reflects the court’s ruling. We will promptly prepare and submit a proposed order to other counsel and attempt to reconcile any differences before the draft order is presented to the court.

29. We will not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel’s statements or conduct.

Duty 26, Duty 27, and Duty 29 — which concern attorney conduct during discovery — were all invoked in Thompson v. Fajerstein, in which the district court awarded attorneys’ fees and costs to the plaintiff relating to discovery disputes. The plaintiff had asked the court to impose such sanctions because the defendants had improperly refused to respond to discovery requests. Defense counsel resisted the sanctions, responding that they did not violate any court orders or advise their client to violate any court orders. In awarding attorneys’ fees and costs to the plaintiff under Federal Rule of Civil Procedure 37, the district court acknowledged that defense counsel technically did not violate court orders in failing to respond to discovery. Citing to the Preamble, Duty 26, Duty 27, and Duty 29, the court emphasized, however, that “even if Defendants requested that their attorneys not fully respond to discovery, attorneys have an obligation to the Court and other attorneys.” In other words, defense counsel’s duty to comply with
discovery pursuant to counsel’s professional responsibilities trumped any desire by defense counsel’s clients to not fully respond to the discovery requests.

30. Unless specifically permitted or invited by the court, we will not send copies of correspondence between counsel to the court.

Notwithstanding the directive of this duty, courts have held that it is not a violation of Duty 30 to attach counsel’s correspondence as an exhibit to a complaint or a motion.

**Lawyers’ Duties to the Court**

The Seventh Circuit Court of Appeals has stated that under this section of the Standards, all attorneys and pro se litigants “have a professional duty” to conduct themselves “courteously before all courts.” Accordingly, if anyone appearing before a court within the Seventh Circuit “thinks that he is entitled to meet a judge’s use of intemperate language” with “mud-slinging of his own,” he is “mistaken” and should pursue “other remedies for alleged judicial misconduct” to the extent it has occurred. In addition, the duties in this section apply to attorney and party conduct before judges during settlement conferences.

1. **We will speak and write civilly and respectfully in all communications with the court.**

An accusation that a court within the Seventh Circuit “either recklessly ignored or willfully refused to apply Circuit precedent” is a violation of Duty 1. Courts may well publicly admonish lawyers and strike briefs that do not comply with the expectations of civility set forth in this duty.

2. **We will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time; if delayed, we will notify the court and counsel, if possible.**

3. **We will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.**

4. **We will not engage in any conduct that brings disorder or disruption to the courtroom. We will advise our clients and witnesses appearing in court of the proper conduct expected and required there and, to the best of our ability, prevent our clients and witnesses from creating disorder or disruption.**

5. **We will not knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities in any oral or written communication to the court.**

Pursuant to Duty 5, “under no circumstances is twisting the evidence or misrepresenting the record considered advocacy.”

For example, in *Gross v. Town of Cicero, Ill.*, the Seventh Circuit Court of Appeals admonished an attorney under Duty 5 who, in his reply brief, sought to withdraw an argument that he had fully developed in his opening brief. The attorney contended that a new court decision came down in between the time he filed his opening and reply briefs, but the appellate court noted that the new decision had actually been decided almost two months before the opening brief had been due. Pointing to Duty 5, the appellate court determined that the attorney’s failure to withdraw the argument earlier and to cite “adverse controlling authority” made his argument “frivolous,” “imprudent and unprofessional.”

Similarly, invoking Duty 5, a district court admonished an attorney who argued, in misrepresentation of the trial record, that her cross-examination of a witness was “unfairly denied or limited” when in fact “any limitation of her inquiry” of the witness “occurred on recross-examination, not an initial cross-examination.”

6. **We will not write letters to the court in connection with a pending action, unless invited or permitted by the court.**

7. **Before dates for hearings or trials are set, or if that is not feasible, immediately after such date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.**

8. **We will act and speak civilly to court marshals, clerks, court reporters, secretaries, and law clerks with an awareness that they, too, are an integral part of the judicial system.**

**Courts’ Duties to Lawyers**

There are no published opinions or orders discussing Courts’ Duties to Lawyers as set forth in the Standards. It appears that, by and large, the Seventh Circuit Court of Appeals strives to comply
with the Standards. As summarized in lawyers’ comments about the Seventh Circuit in the Almanac of the Federal Judiciary, the Seventh Circuit Court of Appeals generally “treats attorneys well”; the judges “are well prepared and professional in oral argument”; the judges write opinions that are “practical, clear, and offer guidance to the attorneys”; and the court is usually “cordial and collegial.”

Joel N. Shapiro, who serves as the Chief Circuit Mediator for the Seventh Circuit, has noted that “[c]ollaboration and congeniality” are “the norm for bench/bar relations.”

There have been some instances, however, in which practitioners before the Seventh Circuit Court of Appeals have questioned the court’s civility. For example, the court has been criticized on some popular internet blogs for issuing so-called “benchslaps” — statements in written opinions or during oral argument that may embarrass, humiliate, or otherwise criticize an attorney. Some commentators find benchslaps to be funny, entertaining, or even well-deserved by the attorneys receiving them. As one commentator wrote, “[i]t may seem like the Seventh Circuit issues lots of benchslaps, but when you look at the kind of conduct they are admonishing”— such as lack of preparation, lying to the court, or acting like an “ostrich” by intentionally ignoring dispositive authority — “it seems like they just call problems out when they see them.”

Collins T. Fitzpatrick — who serves as the Circuit Executive for the Seventh Circuit — has proposed several informal approaches to address judicial incivility. He has noted that “[j]udicial temperament — the way judges treat parties, witnesses, jurors, lawyers, and staff — colors how those people view justice.” Informal solutions to judicial incivility that he has proposed include:

1. We will be courteous, respectful, and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to ensure that all litigation proceedings are conducted in a civil manner.

2. We will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.

3. We will be punctual in convening all hearings, meetings, and conferences; if delayed, we will notify counsel, if possible.

4. In scheduling all hearings, meetings and conferences we will be considerate of time schedules of lawyers, parties, and witnesses.

5. We will make all reasonable efforts to decide promptly all matters presented to us for decision.

6. We will give the issues in controversy deliberate, impartial, and studied analysis and consideration.

7. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice.

8. We recognize that a lawyer has a right and a duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.

9. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.

10. We will do our best to insure that court personnel act civilly toward lawyers, parties, and witnesses.

11. We will not adopt procedures that needlessly increase litigation expense.

12. We will bring to lawyers’ attention uncivil conduct which we observe.
(1) the use of anonymous surveys in which lawyers evaluate judges on their integrity and judicial temperament; (2) intervention by chief judges or other court personnel when necessary to address an issue of judicial conduct; and (3) formation by the organized bar of a committee that would be “willing to receive complaints from lawyers and others reluctant to file formal complaints about a judge.” These ideas deserve further discussion among stakeholders throughout the Seventh Circuit.

Judges’ Duties to Each Other

It appears that judges within the Seventh Circuit widely comply with Judges’ Duties to Each Other as set forth in the Standards. Indeed, Judge Richard A. Posner has identified “a durable tradition in the Seventh Circuit” regarding the judges’ collegial conduct amongst themselves:

[D]isagreements are not personalized, and ideological and other clashes, even when they engage the deepest beliefs of the judges, do not produce anger, rancor, or incivility. This triumph of civility not only makes the lives of the judges more pleasant but also improves the quality of the court’s work. Time is not lost in nitpicking colleagues’ opinions or refusing to resolve differences by deliberation and compromise; there are still dissents but they are not multiplied by mutual suspicion and antagonism. Recall that in the Sunstein-Epstein database of published opinions, the dissent rate in the Seventh Circuit is substantially below the average for all the courts of appeals.148

Since the Seventh Circuit adopted the Standards, it appears that the Seventh Circuit Court of Appeals reserves its harshly worded criticism of lower courts for particularly egregious errors of legal reasoning — for example, where the lower court “fails to mention highly pertinent evidence” or “fails to build a logical bridge between the facts of the case and the outcome” because of “contradictions or missing premises.”153 Personal attacks are not the norm. The civility amongst judges on the Seventh Circuit Court of Appeals contrasts with widely publicized instances of incivility154 — or even violence155 — amongst judges on other state and federal courts.

Given this widespread culture of civility amongst the judges in the Seventh Circuit, it is not surprising that there is only one published opinion — written before the formal adoption of the Standards in 1992 — in which a court addressed Judges’ Duties to Each Other. In that opinion, United States v. Lopez, the district judge acknowledged that the Seventh Circuit Court of Appeals had previously cautioned him in its earlier appellate opinion not to refer to criminal defendants by possibly offensive “slang” terms during sentencing hearings.149 In response, the district judge stated that he would accept the appellate court’s admonition against the use of slang at sentencing.150 However, the district judge, invoking Judges’ Duties to Each Other, scolded the appellate court that “the unduly harsh tone of that admonition was unnecessary. The opinion’s brutal style does not serve the interests of civility.”151 Thus, the district judge in Lopez raised the question — which has reappeared in other courts outside of the Seventh Circuit — whether a judge can enforce civility by being uncivil.152

1. We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge’s earnest effort to interpret the law and the facts correctly.

2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.

3. We will endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.

Continued on page 51
An Annotated Guide...  
Continued from page 50

III. Conclusion

Since the Seventh Circuit’s adoption of the Standards, many commentators have applauded the Standards and have encouraged their wide application. Indeed, dozens of state and local bar associations and other courts have adopted similar civility codes. Others, however, have questioned whether the Standards are truly voluntary and unenforceable as a basis for sanctions and whether the Standards are superfluous given the preexisting rules that are already supposed to guide attorney behavior.

Still other commentators have explored the philosophical, economic, and political roots of the civility problem itself. These commentators have asked, for example, whether the quest for civility is at odds with the goal of zealous advocacy in the American litigation system; whether “the focus of these discussions [about civility] should shift to the underlying foundational dilemmas that exist concerning the role of the attorney and the purpose of the trial” and the “underlying goals and purposes of the profession”; whether the legal profession should “re-educate our lawyers on the actual goal — not to win the battle but to further the clients’ interests”; and whether so-called incivility is actually detrimental to the profession. These fascinating questions, among many others, about the Standards and the value of civility continue to be debated and are worthy of ongoing consideration.

Notes:


2. See U.S. Ct. of Appeals for the Seventh Cir., Application for Admins. to Practice (Feb. 2016), available at https://www.ca7.uscourts.gov/forms/applictpn.pdf, for generally the attorney applications for admission to the U.S. District Courts and U.S. Bankruptcy Courts for the N. Dist. of Ill., Cent. Dist. of Ill., S. Dist. of Ill., N. Dist. of Ind., S. Dist. of Ind., E. Dist. of Wis., and W. Dist. of Wis., which are available on the courts’ respective websites.


5. Standards, supra note 1, at Preamble, ¶ 7.

6. Id. at Preamble, ¶ 5.

7. Id. at Preamble, ¶ 6.

8. E.g., Polson v. Cottrell, Inc., No. 04-0882-DRH, 2007 WL 518652, at *4 (S.D. Ill. Feb. 15, 2007) (not reported) (“The Court previously admonished the parties as to their litigation practices and now heeds the parties to act professionally and to follow the Standards while practicing in this Court.”); E&B Real Estate Servs., Inc. v. First Advantage Realty, Inc., No. 3:04-CV-055-RLY-VSS, 2005 WL 1397397, at *1 n.1 (S.D. Ind. June 3, 2005) (not reported) (“Counsel is admonished to be mindful of [the Standards] in its future briefing on this case.”).


14. Id. at 514.

15. Id. at 514-15.

16. Id.

17. Id.


19. Id. at 516.

20. Id. at 516-19.


23. Id. at 520.

24. Id.


26. Id. at 447.


28. Aspen, A Response to the Civility Naysayers, supra note 12, at 256.

29. Id.

30. Id. at 257.

31. Id.

Continued on page 52
An Annotated Guide
Continued from page 52

99 Harrington v. City of Chicago, 433 F.3d 542, 548 (7th Cir. 2006).
100 Id.
101 Id. 548-49.
103 Id. at *5.
104 Id. at *4 n.2.
105 Id.
106 Sullivan, 2007 WL 1030236, at *4 n.2.
107 163 F.3d 411, 422 & n.9 (7th Cir. 1998).
108 Id. at 422 n.9.
109 Id.
110 Id.
111 Id.
112 Kidd & Anderson, supra note 27, at 1371.
114 Id. at *8.
115 Id. at *3.
117 Id.; see also United States ex rel. Baltazar v. Wardan, 302 F.R.D. 256, 259 n.1 (N.D. Ill. 2014) (granting in part plaintiff’s motion for relief to remedy defense counsel’s deposition misconduct where plaintiff relied in part on Duty 20).
118 No. 08 CV 3240, 2010 WL 4628515, at *8 (N.D. Ill. Nov. 8, 2010) (not reported).
119 Id. at *5.
120 Id.
121 Id.
122 Id.
123 Fair Hous. Ct. of Cent. Ind., Inc. v. Brookfield Farms Homeowners’ Ass’n, 4:14-CV-58-PPS-JEM, 2015 WL 4077247, *1 (N.D. Ind. July 6, 2015) (slip) (stating that the court “cannot conclude that attaching to the complaint the communication that identifies the source of the disagreement between the parties is ‘sending’ copies of counsel correspondence within the meaning of Rule 30”).
124 Loparex, LLC v. MPI Release Techs., LLC, No. 1:09–CV–01411–JMS, 2012 WL 6094141, at *9 (S.D. Ind. Dec. 7, 2012) (not reported) (“Defendants did not ‘send’ copies of the letters and email messages to the court, but rather attached them as exhibits to a motion which related to their claim of [plaintiff]’s counsel’s unprofessional conduct. The Court does not believe that the language or intent of Rule 30 prohibits the [Defendants’ submission of that correspondence in this context].”).
125 In re Troutt, 460 F.3d 887, 895 (7th Cir. 2006).
126 Id.
131 619 F.3d 697, 703 (7th Cir. 2010).
132 Id.
133 Id.
138 United States v. Clark, 657 F.3d 578, 585 (7th Cir. 2011).
139 Id.
140 Gonzalez-Servin v. Ford Motor Co., 662 F.3d 931, 934 (7th Cir. 2011).
141 Khorasanee, 5 Tips, supra note 137.
143 FINAL REPORT, supra note 25, at 446.
144 Id.
146 Id. at 18.
147 Id. at 19-20.
150 Lopez, 799 F.Supp. at 924.
151 Id.
153 Parker v. Astrue, 597 F.3d 920, 921 (7th Cir. 2010), as amended on reh’g in part (May 12, 2010).
154 E.g., Lat, Judicial Diva, supra note 152.
156 E.g., David C. Weiner, Civility, 21 No. 1 LITIGATION 1 (Fall 1994).
157 See generally Michael B. Keating, Formal Reactions to Incivility, 6 BUS. & COM. LITIG. FED. CTS. § 66:3 (3d ed.); Brenda Smith, Civility Codes: The Newest Weapons in the “Civil” War over Proper Attorney Conduct Regulations Miss their Mark, 24 U. DAYTON L. REV. 151, 159 (Fall 1998).
158 See generally Kathleen P. Browe, A Critique of the Civility Movement: Why Rambo Will Not Go Away, 77 MARY. L. REV. 751, 780 (Summer 1994); Smith, Civility Codes, supra note 157.
159 E.g., John Wesley Hall, Jr., Professionalism and Zealous Advocacy, PROF. RESP. CRIM. DEF. PRAC. 3d § 34.6 (Oct. 2015) (collecting sources).
160 Browe, supra note 158, at 782.
162 Browe, supra note 158, at 773, 775-77.
Earlier this year, the courtroom of United States Magistrate Judge Sheri Pym briefly became the focal point of a national debate about consumer access to robust data encryption technology. The United States’ investigation of the San Bernardino mass shooting incident became a test of Apple’s right to sell to ordinary consumers encryption technology that might place the contents of their iPhones beyond the reach of federal law enforcement. At present, the dispute appears to have been resolved not by legal argument but by science; despite Apple’s claims about the iPhone’s security, the Federal Bureau of Investigation recently has informed Judge Pym that its technicians have found a way to defeat Apple’s security measures without the company’s assistance.

Although a judicial proceeding provided the forum for the parties’ dispute, both Apple and the Justice Department addressed their arguments to a broader audience, apparently seeking to build public support for a political resolution. In fact, the one point on which both Apple and the Justice Department agreed was that the encryption debate ultimately should be resolved by Congress and not by the courts. That both prosecutors and big business should have a preference for legislative solutions is not surprising. Business plans and prosecutor handbooks both favor certainty over subtlety and clear rules over evolving concepts. Neither Apple nor the Justice Department appear to have the patience for the slow and uncertain process by which legal doctrine gradually emerges from judicial labor.

Continued on page 55

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Patience, reflection, and caution, however, may be exactly what is required here. The law of data privacy and data security in the United States is at present a confusing jumble of statutes lacking any unifying conceptual framework, precisely because Congress repeatedly has taken the same *ad hoc* approach that both Apple and DOJ seem to be advocating here. Responding to the encryption debate simply by adding yet another federal statute to the alphabet soup of HIPAA, SCA, FCRA, etc., would be at best a lost opportunity.

The broad public interest in the case before Judge Pym demonstrates a readiness for a law of data privacy that is based upon a set of simple and robust first principles grounded in fundamental personal freedoms. At the height of the press coverage of the dispute, polling data showed a public almost evenly divided between Apple and the Justice Department. This polling data is remarkable because of the particular iPhone user whose personal data was at issue. This test case involved the iPhone of no ordinary consumer but instead a reviled mass-murderer who appeared to have committed his crimes in support of international jihad. Yet, a substantial part of the American public was able to put aside the heinous particulars of the case and instead view the dispute as a battle of competing legal principles directly relevant to the lives of ordinary consumers. It is doubtful that very many of Apple’s customers have an interest in excluding government access to encryption keys because they want to engage in crime or plan terrorist attacks. Instead, a fundamental impulse of our liberal democracy seems to be at work here – ordinary citizens experiencing vicariously as an affront to their own individual dignity a government intrusion upon the rights of a reviled criminal whose conduct and motivations make him very different from most of us. Capturing that intuition and articulating it as an expression of first principles of personal freedoms in a way that connects with the broader context of our established rights is an essential function of the courts. The good news, then, is that that the dispute before Judge Pym is almost certainly a harbinger of future opportunities for litigants and the courts to contribute to this civic dialogue. When this opportunity next arises, hopefully the participants will address themselves to the bench so that this important task may be undertaken in earnest.

What then, is this intuition shared by so many smartphone users who find themselves united in common interest with Apple in protecting the privacy of a reviled, dead terrorist? The smartphone is a powerful symbol of the digitization of personhood. Its small size, tremendous computing power, and broad range of applications have made it an ever-present tangible mediator between our organic and our digital selves. A smartphone user is both the creator and curator of a collection of personal data that is more extensive, more comprehensive, and more intimate than even the most motivated diarist or revealing correspondent could have ever created using pre-digital modes of expression. Because of its unique role in mediating between thought and expression and between intention and action, the smartphone offers a window to the user’s inner life that exceeds any prior tangible device or medium.
The ability to choose what part of our thoughts we reveal to others, and how and when and to whom we do so, is an essential part of our modern conception of individual autonomy and personal dignity. Although the right of each individual to act as the gatekeeper of her own thoughts may seem self-evident in our modern liberal democracy, such personal autonomy is not an inevitable part of what it means to be human. Imagine for example a pre-literate clan of hunter-gatherers who lived communally as part of a single extended family. The intimacy of such a culture probably allowed a transparency that might seem oppressive to a contemporary urban dweller. Or, consider the means of monitoring and control exercised by a twentieth-century totalitarian police state that used urban life and the technology of the industrial revolution to attempt and at least partially achieve an eradication of the autonomous inner self. The digitization of our civilization is a transformative event that is at least equal to the industrial revolution and perhaps even the development of agriculture or discovery of fire. In the face of such profound technological change, preserving a civilization that respects the autonomy of the individual’s inner life will be the product of deliberate action by our political, educational, and religious institutions as well as by commercial actors such as Apple, who seek to meet the demands of the consumers who purchase their products.

The most important lesson of the recent skirmish in Judge Pym’s courtroom between Apple and the Justice Department is that technology and commerce alone are not sufficient safeguards of digital privacy. The notion of an unbreakable code made available to ordinary consumers on a mass basis, no matter how appealing that idea might be, ignores the repeated lessons of history. All codes eventually are broken. And of course true digital autonomy would require not just an unbreakable code but a strongly held belief that the code is in fact unbreakable. The perception that we are subject to digital monitoring can be corrosive of personal autonomy regardless of the extent to which such monitoring actually occurs. An unbreakable code has very little value if its intended users believe it is vulnerable to compromise. This same intuition explains at least in part the broad alarm caused by the Justice Department’s attempt to coerce Apple’s cooperation in compromising its own security measures, and why those expression of alarm were most vocal from law abiding citizens who are exceedingly unlikely ever to do anything to pique the interest of the FBI, much less the NSA.

Apple is part of an industry whose business model is premised on persuading large numbers of consumers that they should purchase products that require them to digitize their lives in ever more pervasive and invasive ways. At some point, fear of the loss of personal autonomy may define the outer limits of this business strategy. Confidence that our society will respect the autonomy of the digital self is thus, for at least some segment of consumers, essential to the continued success of this business model. The reaction to Judge Pym’s case suggests that this may be true of a very large portion of Apple’s entire consumer base.

If technology alone cannot meet the needs of Apple’s consumers, where then can these iPhone users find the security that they seek? What history teaches, or at least the supposed lesson of history that is a cornerstone of our national political philosophy, is that the most reliable guarantors of personal freedom are simple, robust, widely accepted, and deeply held

Continued on page 57
principles limiting the power of government. And, for better or worse, the judiciary is the American institution tasked with articulating and protecting these first principles. Although Apple may be tempted to look to Congress for a quick fix, a viable long-term solution for its business model is probably more dependent upon the active support of the courts for Apple’s vision of fully integrated digital and organic personhood.

Where should a judicial system rooted in the methods of the common law look for relevant guidance? It may be tempting to argue that data associated with a smartphone should be treated no differently from any other information, whether maintained digitally or on paper, and that the device or the medium is irrelevant. However, this approach ignores the unique nature of smartphones and similar personal digital devices that record and aggregate such extensive and intimate collections of data because of their constant and pervasive involvement in almost all aspects of daily life for many users. It is quite literally true that many of us grant our smartphones greater access than we allow even our spouses, our priests, or our psychotherapists. Each of these relationships is typically protected by a privilege against disclosure, and perhaps there is a credible argument for a smartphone privilege. However, in some ways coerced disclosure of a smartphone’s contents may be more harmful even than disclosure of a psychotherapist’s notes. Unlike the psychotherapist, the smartphone records precisely and without the filter of judgment, empathy, or context, each data point associated with its use. The mirror these devices present of ourselves may thus be so harsh in its exacting objectivity as to cast not just an unflattering light but one that is so glaring in the details it reveals that it ceases to tell the truth.

This is but one example of the challenges that lie ahead for the bench and bar as we grapple with the task of protecting the autonomy of the digital self. There are no quick and easy solutions here, and developing answers that are worthy of our liberal democracy will take time, labor, and patience. The judge craft of skilled jurists trained in the traditions of the common law is essential for this enterprise. Although Congressional legislation may offer a quick fix, enduring solutions require a more solid foundation based on a broad public faith in simple and robust principles rooted in a jurisprudence of personal freedom.
The Circuit Rider

Friend or Foe
THE NEW PATENT-CHALLENGE PROCEDURES AT THE PATENT TRIAL AND APPEAL BOARD

By Adam Kelly

Patent controversies are no longer solely the province of technology companies and patent trolls. Many businesses, big and small alike, have recognized the tremendous value that patents deliver and have incorporated patent registration and enforcement into their revenue-generating strategies. While disputes between patent owners and challengers historically have been resolved in federal court, that framework has shifted in recent years with the passage of the Leahy-Smith America Invents Act (AIA). Among other changes to the patent system, the AIA allowed the establishment of alternative mechanisms within the U.S. Patent and Trademark Office to resolve patent validity disputes. Those PTO mechanisms have increasingly become the battleground for contesting patent validity challenges as more parties shift their disputes away from federal court.

Signed into law by President Barack Obama in September 2011, the AIA was intended to amend and reform federal patent law to bolster innovation, reduce inefficient litigation in the courts and harmonize American patent law with international laws. (For background and legislative history of AIA, along with the text of the bill (Public Law 112-29), see USPTO resources available at http://www.uspto.gov/patent/laws-and-regulations/america-invents-act-aia/resources.) In addition to establishing a “first inventor to file system,” the AIA empowered the PTO to establish mechanisms for resolving patentability disputes through a newly created Patent Trial and Appeal Board. The PTAB — now comprised of more than 200 administrative patent judges — came into effect in September 2012 and immediately began to review petitions challenging patent validity. The board’s work encompasses four separate classes of proceedings, which differ in procedural respects — including when a challenge may be brought and what arguments may be advanced — and subject matter.

Continued on page 59

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First, the AIA provides for Inter Partes Review (essentially, a reincarnated version of the pre-AIA inter partes re-examination procedure), which has emerged as the hottest means for challenging patent validity. Under the amended IPR procedure, at any time between patent issuance and expiration, a challenger may base an attack on existing publications or issued patents (otherwise known as “prior art”). 35 U.S.C. § 312. The second proceeding is Post-Grant Review. PGR offers a new way to challenge patent validity, but it is only available for patents issued under the AIA’s first-inventor-to-file system. And the challenger must seek review within nine months of the patent’s issuance. 35 U.S.C. § 321.

The AIA also created a transitional program to review “covered business method” patents -- the so-called CBM review. These patents “claim[ed] a method or corresponding apparatus for performing data processing or other operations used in the practice, administration, or management of a financial product or service,” but are not for “technological” inventions. AIA § 18, (d)(1). The patentability of “business methods” is currently uneasily following the U.S. Supreme Court’s (post-AIA enactment) decision in Alice Corp. v. CLS Bank Int’l., 134 S. Ct. 2347 (2014). In Alice, a unanimous Court held that patents for a computer-implemented, electronic escrow service for facilitating financial transactions were invalid, reasoning that the claims were drawn to an abstract idea. Using a computer to implement that abstract idea was not enough to transform the invention into something patentable. CBM review creates a dedicated space for contesting the types of patents such as those in Alice, which normally relate to software and other automated processes operating within the financial services sector. But it also includes restrictions on a petitioner’s qualifications and, as an expressly transitional program, it comes with a sunset clause specifying a 2020 self-repeal date. See AIA § 18(a)(1)(B), (a)(3). Finally, the AIA provides for a fourth class of proceeding, not specific to any type of patent, called “Supplemental Examination,” which creates another forum for patentees to correct deficiencies in their patent(s). 35 U.S.C. § 257.

These PTAB proceedings contemplate two stages of examination: a petition stage and a trial stage. The different PTAB proceedings require different standards to progress from petition to trial. For example, for an IPR proceeding, there must be a “showing that there is a reasonable likelihood that a petitioner would prevail with respect to at least one of the claims challenged.” 35 U.S.C. § 314. Based on recent available statistics, more than 2,200 IPR petitions had been filed as of November 30, 2015, with just under half (49 percent) of those petitions instituted at the trial stage. See Patent Trial and Appeal Board Statistics (November 30, 2015), p. 9, available at http://www.uspto.gov/sites/default/files/documents/2015-11-30%20PTAB.pdf (accessed on March 24, 2016).

By contrast, challengers seeking PGR and CBM proceedings must demonstrate “it is more likely than not that at least one of the claims challenged in the petition is unpatentable or [makes] a showing that the petition raises a novel or unsettled legal question that is important to other patents or patent applications.” 35 U.S.C. § 324. Similar to IPRs, CBM petitions currently enjoy about a 49 percent chance of advancing to the trial stage. See PTAB Statistics, p. 10. Due to the small number of patents issued under the first-inventor-to-file system, no PGR petitions have been instituted yet. See id., p. 11. Notably, the PTAB’s decision whether to institute proceedings is not appealable — although that same issue has been accepted by the U.S. Supreme Court for review this term. In Cuozzo Speed Technologies, LLC v. Lee, No. 15-446, the Court will hear arguments on 1) whether the court of appeals erred in holding that, in an IPR proceeding, the PTAB may construe claims in an issued patent according to their broadest reasonable interpretation rather than their plain and ordinary meaning; and 2) whether the court of appeals erred in holding that, even if the board exceeds its statutory authority in instituting an IPR proceeding, the board’s decision whether to institute an IPR proceeding is judicially unreviewable.

Continued on page 60
Once the PTAB institutes a review proceeding, an IPR, PGR or CBM will proceed at the trial stage in an adversarial fashion presided over by a three-judge panel. Panels exert a heavy hand in directing the parties' conduct; the AIA promotes efficiency and requires that the PTAB wrap up proceedings within 12 months from their inception date, although a six-month extension for good cause is available. 35 U.S.C. §§ 316 and 326.

The PTAB has issued rules to streamline procedures and parties' conduct, including setting page limits to the parties' briefs, restricting the number of expert witness declarations or live testimonies, and limiting motion practice. The PTAB's judges tend to be active in the proceedings and receptive to parties' efforts to keep cases moving, such as by conducting telephone conferences on short notice.

Substantively, petitioners in these proceedings bear the burden of proving unpatentability only by a preponderance of the evidence — a lower standard than the clear and convincing evidence standard required before a district court. 35 U.S.C. § 316. Another key difference is that the standard applied to patent claims before the PTAB is the "broadest reasonable interpretation," not the "plain and ordinary meaning" standard employed before a district court. 37 C.F.R. § 42.100(b). (This issue is also on appeal to the U.S. Supreme Court in Cuozzo.) These standards result in about 70 percent of all instituted claims being found unpatentable in IPR trials reaching final written decisions, and about 81 percent in CBM trials reaching final written decisions. See PTAB Statistics, p. 9, 10. As for supplemental examination, if the PTAB determines that the patentee has raised a "substantial new question of patentability," the board will institute an ex parte re-examination, a pre-existing procedure from before the enactment of the AIA.

Whether you're a patent owner or a challenger, these new proceedings should be part of your overall IP planning and strategy. For example, if your business is accused of infringing a patent issued before March 16, 2013, the date of the first-inventor-to-file system according to the AIA, an IPR or a CBM could be part of your arsenal, depending on the nature of the patent. In these proceedings, both the burden of proof and the claim construction threshold for patent invalidity is lower (at least for now, until the Court says otherwise later this term). On the other hand, if you find yourself defending your patent in an IPR, you may launch an ex parte re-examination proceeding to enjoy somewhat more relaxed rules to amend your patent if needed. Whatever the procedural posture, consider the financial and strategic costs. These proceedings come with front-loaded costs — in particular, significant USPTO fees and associated attorney fees. But those costs are still generally lower than those you would incur in the district court. Other strategic "costs" may include whether the estoppel effects created by these proceedings may result in strategic disadvantages in later USPTO, district court or ITC actions. See also 35 U.S.C. § 315 for IPR, 35 U.S.C. § 325(e) for PGR and AIA § 18(a)(1)(A) for CBM.

Between September 2012 and November 2015, the PTAB received a combined 4,232 petitions for IPR, PGR and CBM review — and the proliferation of cases shows no indication of declining anytime soon. See also USPTO AIA Trial Statistics, FY2016 (November 2015), p. 2, available at http://www.uspto.gov/sites/default/files/documents/2015-11-30%20PTAB.pdf (accessed on January 5, 2016). As with any new proceeding and new administrative board, questions as to legality and rule-making authority of the PTAB are bound to occur. Once the dust settles, the PTAB will retain authority over these proceedings and the signals indicate that the PTAB could become another mainstream patent dispute forum. For an increasing number of businesses, across a range of industries, being well-versed in PTAB proceedings could be critical to ensuring the most robust and cost-efficient strategy for protecting your patents — or for effectively busting others' patents.
Bullying, boorish, and unethical behavior works, sometimes.

And if it works sometimes, say, if out of 100 negotiations, motions, depositions or trials, a competent and professional lawyer wins 50 and the unprofessional lawyer wins 51, he is ahead of the game. It isn’t necessary that he win every time to justify such behavior; it is just essential that he win one more than he would have without such behavior, and not lose any because of it.

Currently, only sanctions motions and private retaliation are available for punishment. Sanctions motions only hit the most extreme misbehavior. They often implicate hefty penalties, usually attorney fees, so this remedy can be both too narrow and too heavy.

It fails to cover all instances of bad behavior, and the remedy can be too extreme for the defalcation, and so heavy that some lawyers file bogus sanctions motions for their in terrorem effect.

Judges hesitate — as they should — to impose a big dollar sanction. Sanctions have been available for years, but uncivil behavior has not stopped and is probably on the rise.

A judge may lose respect for a lawyer who acts unprofessionally. But other than that, what does it really cost the lawyer? Will he or she actually lose a good motion because she acted unprofessionally? Has anyone heard of a judge who has ruled against a lawyer on a good motion simply because that lawyer acted unprofessionally?

In public discussions about the value of professionalism, there are hints that this occurs in that gray area where a motion could be won or lost, but if a judge won’t articulate that as the basis for the ruling, and I have never heard of that happening, we can’t be sure it occurs, can’t explain it to our clients and can’t show any tangible benefit to professionalism.

Continued on page 62

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Years ago I faced a lawyer who introduced himself as a “straight shooter.” Under circumstances that need not be related, we obtained a document that was improperly withheld from production by this straight shooter. We brought it up at a deposition, at which point it was admitted that the document had been in their files and was reviewed by the in-house and outside counsel. They had made a decision to withhold it that lacked any justification. The case settled before a hearing on our motion to enter judgment in our favor.

If that firm or that client withholds a document in every case, will every opponent discover it? I doubt it. They will lose or settle those cases in which they are discovered, but if they are not discovered all the time, they will win some cases that they should lose and win more cases than they would if they were honest.

Private retaliation might work, especially in instances of bullying or boorishness, but it drags the retaliator down to the level of the original perpetrator — the equivalent of a hockey fight.

Examined as part of the legal “system,” it creates a “reinforcing loop set up by competing actors trying to get ahead of each other.” The competition in litigation is not just to win the case, moreover, but to impress clients, many of whom have no idea whether unprofessional behavior is advancing their case or not: They just know that they want a bulldog or a street fighter or someone who is aggressive.

Examples of reinforcing loops outside the legal profession include the following:

- **Negative political campaigning.** “One candidate smears another, so the other smears back … until the voters have no idea that their candidates have any positive features, and the whole democratic process is demeaned.”

- **Price wars.**

- **Advertising.** It becomes “increasingly louder, bigger, brasher . . . more garish, more noisy, more intrusive.” (See D. Meadows, “Thinking in Systems,” pp. 124-125.)

Escalation is sometimes referred to, paradoxically, as a race to the bottom. States might vie with each other to attract corporations by eschewing regulations, for example, so the competing states outdo each other to remove regulations until there are none. Charles W. Murdock, “Squeeze outs, Freeze-outs and Discounts: Why Is Illinois in the Minority in Protecting Shareholder Interests?” 35 Loy. U. Chic. L. J. 737 & n.2 (2004).

The lack of sanctions for unprofessional behavior escalates the misbehavior; it produces a race to the bottom. Even if many civil lawyers are adept at defeating bullies, the bullies will defeat other lawyers that they shouldn’t defeat, giving them a higher winning percentage. Bromides about professionalism and exhortations to be civil will never work unless a system is put in place to punish the behavior that we don’t want to infest the justice system.

I suggest a point system leading to suspension or disbarment. Unprofessional behavior should be recorded by judges and tabulated, akin to calling a foul in a basketball game. A certain number of points should be permitted before any sanction is imposed. The points should be assessed in a summary fashion: no hearings or arguments on them. A certain number of points should be accumulated without adverse consequences, recognizing that some of the assessments might have been erroneously imposed and that no one is perfect.

But at a certain threshold there needs to be a sanction, just as after a certain number of fouls, a basketball player gets kicked out of the game.

There are details to be worked out. Lawyers are adept at gaming any system. It wouldn’t be perfect, especially at first.

But what gets measured gets managed. If points are allocated, statistics can reveal points per lawyer appearance or per lawyer deposition, for example. Adjustments can be made as experience is obtained. First we have to measure the problems.

Over time, the points will accumulate among those who deserve them. Those are the people that have to face sanctions of some type: Kick them off a case, off a court call or out of the circuit or district courts for a period of time. Implement sanctions progressively.

Until and unless there are workable sanctions, the need to compete will incentivize lawyers who would otherwise be professional to act in unprofessional ways, and disadvantage the civil and professional lawyers.

If we measure and then sanction misbehavior, over time we have some hope of managing it. Until then, those of us advocating civility and professionalism will continue to exhort this ideal — lacking any practical basis to ensure its success.
The tectonic plates of the law shift slowly. Rarely does a single case fundamentally and permanently alter the practice of law. The Supreme Court’s 2011 decision in *Wal-Mart v. Dukes*, however, was the epicenter of a dramatic change in legal procedure that reverberated across the legal and political landscape. *See* 564 U.S. 338 (2011). Five years later the class-action topography has changed, though not in the way most expected.

Betty Dukes, a former Wal-Mart employee, filed the case in 2001 on behalf the 1.5 million women who had worked in any Wal-Mart store since 1998. Ms. Dukes claimed that Wal-Mart committed gender discrimination by denying women equal pay and promotions in violation of Title VII of the Civil Rights Act of 1964. To bring a case on behalf of not just herself, but the other 1.5 million women who she claimed had also suffered discrimination, Ms. Dukes needed the trial court to certify her proposed class. *Wal-Mart* took up the issue of what must be proven to meet the requirements of class action certification.

Many in the legal profession are familiar with the class action litigation tool used to allow many plaintiffs with similar or identical claims to bring their claims together rather than in individual cases. Lesser understood, however, is the process by which a case becomes a class action. Class actions – if certified – can assert nearly any civil claim on behalf of a group of litigants, making the tool broadly applicable albeit only to a narrow subset of cases.

*Continued on page 64*

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Before a group of individual plaintiffs can be considered a “class,” the trial court must certify that the group meets the four essential requirements established by Federal Rule of Civil Procedure 23(a). The proposed class must be so numerous that joinder is not practical (“numerosity”). There must be questions of law or fact that are common to the class (“commonality”). The individuals representing the entire class must have claims that are typical of the rest of the members of the class (“typicality”). And finally, the representatives of the class must be found to fairly and adequately represent the interests of the rest of the individuals in the class (“adequacy”). After satisfying the Rule 23(a) requirements, the plaintiff must also satisfy one of the three requirements of Rule 23(b), which defines the type of class to be certified.

Wal-Mart was a 5-4 decision authored by Justice Antonin Scalia. While the Court was in unanimous agreement on certain class certification requirements set forth in Rule 23(b), the principal issue that divided the Court was the standard needed to prove “commonality,” under Rule 23(a)(2). Plaintiffs argued that common questions of law and fact emanated from Wal-Mart’s practice of giving local managers discretion over pay and promotion, resulting in women being paid and promoted less than men; in other words, the practice of giving managers discretion was applied equally across the country and had a disparate impact on women across the country. The Court disagreed, establishing a high threshold for proving “commonality,” already considered the most difficult element to prove.

Simply raising questions that are common to the class is insufficient to establish commonality. Instead, according to Wal-Mart, plaintiffs must show that the claims depend upon the same contention and that the resolution to the contention is equally applicable to each class member. There must be “some glue holding the alleged reasons for all those decisions together.” In essence, plaintiffs must be able to show that examination of the claims on a classwide basis will “produce a common answer to the crucial question why was I disfavored.”

The Court held against the Plaintiffs, finding that no class could exist because Plaintiffs failed show that Wal-Mart operated under a general policy of discrimination. Wal-Mart’s decision to leave discretion to local managers was “just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices.” Interestingly, the Court offered an example of a “common contention” it felt would meet the litmus test: “the assertion of discriminatory bias on the part of the same supervisor.”


Evolution Rather Than Extinction

Rather than becoming a relic, the class action has seen a renaissance. A recent report estimates the value of class action settlements trended upward in 2015, with settlements in employment-related cases reaching an all-time high. See Seyfarth Shaw LLP, Annual Workplace Class Action Litigation Report: 2016 ed., 1 (Jan. 2016). The top ten settlements totaled $2.48 billion. In employment discrimination cases, the value of the top settlements increased from $48.65 million in 2012, the year after the Wal-Mart decision, to $295.57 million in 2015.

While the report attributes the increase in class action success to smaller classes, aimed at financially discrete targets, a large part of the success must be attributed to the willingness of courts to search the contours and crevices of Wal-Mart for justification to certify classwide relief. Faced with extinction, the class action has evolved, and no more so than in the Seventh Circuit. In a pair of cases, McReynolds and Chicago Teachers Union, the court has significantly shaped the post-Wal-Mart standard concerning proof needed to establish commonality.

In the 2012 case of McReynolds v. Merrill Lynch, the court overturned a trial court’s denial of class certification in a case concerning policies implemented by Merrill Lynch that had a negative economic impact on its black brokers. See 672 F.3d 482 (7th Cir. 2012). In 2015, the court’s decision in Chicago Teachers Union v. The Board of Education of the City of Chicago reversed the trial court’s class certification denial in a case alleging that the Chicago school district’s “turnaround” policy of wholesale displacement of all staff from selected schools disproportionately affected black teachers and support staff. See 797 F.3d 426 (7th Cir. 2015).

Continued on page 65
Four principles have emerged from these cases to guide litigants arguing commonality in the context of class certification.

1. Common questions at any step in the decision-making process allow for certification

The Supreme Court’s reasoning in Wal-Mart relied heavily on the discretion given to local supervisors to make promotion and pay decisions. Each supervisor could make those decisions based on innumerable subjective factors that may not be the same in small-town Missouri as in inner-city Chicago. The Court focused on the decision by the local supervisor, the final step in the decision-making process, in concluding that the factors used to make pay and promotion decisions throughout the country were not common.

The Seventh Circuit made clear in Chicago Teachers Union that commonality is not applied so narrowly. The court took a more holistic view of the decision-making process. It looked beyond the factors used to make final decisions, and established that commonality can be proven by showing that any step in the process leading to the adverse outcome was common to the class.

The school district in that case engaged in a multi-step process to identify ten schools to be subject to “turnaround.” In the first step, 226 schools were identified as being initially eligible because they had been on probation. In the second step, the list of 226 schools was reduced to 74 through the application of objective characteristics, such as standardized test scores and the five-year graduation rate. In the third step, the 74 schools were narrowed to ten by a small group high-level officials, including the CEO of the school district. During that final narrowing, the school officials heard from lower-level supervisors and considered a number of subjective factors.

Importantly, the court distinguished between the second and third step of the selection process; specifically, in that the narrowing from 226 to 74 schools relied on objective factors.

2. “Discretion” is not synonymous with denial

Many scholars and litigators believed that a likely consequence of the Court’s reliance on discretion delegated to low-level supervisors in Wal-Mart would be companies adopting policies that expressly delegated discretionary decision-making to avoid class action litigation. The Seventh Circuit addressed this fear in McReynolds, holding that an express policy to delegate decision-making authority can itself be the basis for establishing commonality if that policy applies equally to all potential class members.

In Chicago Teachers Union, while the answer to why employees were ultimately disfavored was that their school was one of ten chosen subjectively from 74 for “turnaround,” each employee could also answer that they were disfavored because their school was one of 74 selected objectively from 226 as candidates for turnaround. Said another way, each plaintiff would not have been disfavored had their school not been one of the 74 selected based on common application of objective factors.

Wal-Mart’s commonality standard is still a burden for parties seeking class certification. However, in cases where the claims arise from a multi-step decision-making process, a party seeking certification is not limited to assessment of whether common questions arise from the final decisions, but can instead prove commonality by pointing to common questions arising from an intermediate step.

The court explained that where plaintiffs’ allege class-wide injury as a result of objective factors at any stage of the decision-making process, common questions exist as to how the application of those factors affected the class members. This is true even if subjective factors were used in later steps to make the final decisions.

The Seventh Circuit, in essence, believes that the Supreme Court’s litmus test of “why was I disfavored” does not require a common answer to the more narrow question of “why was I ultimately disfavored.” Instead, proof of commonality may focus on intermediate decisions, taken with respect to every class member, which at the very least increase the likelihood of injury to all class members.
Post *Wal-Mart* Evolution

*Continued from page 65*

The court rightly distinguished *McReynolds* from *Wal-Mart* on one key fact – Wal-Mart had no policy expressly delegating discretion to local supervisors. Instead, it had no policy at all, making it difficult to establish any single action at the highest levels that applied to all employees. In *McReynolds*, however, Merrill Lynch had two policies that applied to all brokers: a teaming policy, that allowed the brokers to join into self-picked teams, and an account distribution policy, that allocated former employee accounts to the most successful teams based in large part on revenue generated.

Though discretion was left to the brokers to put together teams, the court found that the firm-wide policies allowed brokers to select teams based on race. The court compared the teaming policy to a hypothetical police department allowing officers to choose junior partners, resulting in white male officers never choosing female or black juniors. The court reasoned “[t]here would be no intentional discrimination at the departmental level, but the practice of allowing police officers to choose their partners could be challenged as enabling sexual and racial discrimination.”

Taking its analysis a step further, the court held that if the teaming policy resulted in black brokers being excluded from high-revenue generating teams, it would necessarily result in these brokers losing out on opportunities from account distribution.

Unlike in *Wal-Mart*, “top management” established the teaming and account distribution policies resulting in the alleged injuries. The Seventh Circuit distinguished the case from one in which the firm left to the local offices the decision of whether and how to implement teaming or account distribution policies. Thus, discretion amongst individual brokers, but in the context of company-wide policies, could form the basis for answering the question “why was I disfavored.”

Importantly, *McReynolds* allayed the concern that courts in the wake of *Wal-Mart* would view “discretion” as a mandatory trigger for class certification denial. Instead, the court requires parties and trial courts assessing commonality to look beyond the delegation of discretion, and to assess how the discretion was delegated. Where discretion is allowed pursuant to a policy that applies equally to all injured parties, commonality may be met.

3. Subjective factors in decision-making do not preclude class certification

Like discretion, “subjective” decision-making was considered a post-*Wal-Mart* class action killer. The Court reasoned that commonality could not be established if the local managers not only had discretion, but could also make decisions on pay increases and promotions for any number of reasons that could be different for each plaintiff. In the aftermath, many believed the *Wal-Mart* decision established a per se rule against class certification where the decision causing the injury was made subjectively.

The Seventh Circuit in *Chicago Teachers Union* effectively ended the over-reliance of opponents of class certification on subjective decision-making as a *de facto* basis for denial of class certification. It held plainly “[t]he *Wal-Mart* decision simply does not preclude class certification where subjective decision-making and discretion is alleged.”

The school district in the case argued that it selected the final ten schools based on several enumerated factors, but claimed that the factors were given varying weight depending on the school. That the factors were given weight and applied subjectively is, in the opinion of the Seventh Circuit, irrelevant. The court explained “subjective, discretionary decisions can be the source of a common claim if they are, for example, the outcome of employment practices or policies controlled by higher-level directors, if all decision-makers exercise discretion in a common way because of a company policy or practice, or if all decision-makers act together as one unit.”

The court’s decision suggests that commonality could have been established in *Wal-Mart* had Wal-Mart given discretion to its local managers to determine pay increases and promotions, but distributed company-wide a list of factors upon which those decisions had to be made. In the hypothetical, while local managers would have discretion and the authority to apply the factors subjectively, because the same factors would have been applied company-wide all potential class members would be able to allege they were disfavored by the same set of factors.

*Continued on page 67*
Post *Wal-Mart* Evolution

Continued from page 66

As the court noted, commonality was proven in the selection of the final ten schools because “it is clear that the Board applied the same set of criteria to all of the schools evaluated for” turnaround.

4. Commonality established by a single decision-maker

Importantly, *Chicago Teachers Union* recognized that commonality can be established where the challenged decision is made by a single individual or a small group of individuals – a hypothetical posited in *Wal-Mart* itself – regardless of the process. The Seventh Circuit explained “[w]hen a small group of decision-makers sits together in a room comparing and contrasting the success of schools in order to evaluate their ultimate fate, the concept of a uniform criteria and single decision-maker merge. They are of one mind, using one process. In short, we do not have myriad actions of individual managers.” The court found the case “worlds away from that in *Wal-Mart* where a court could have no way of knowing why each of the thousands of individual managers made distinct decisions regarding promotions and pay in millions of employment decisions.”

Proof of a single decision-maker, or small group of decision makers working in concert, offers a significant method of establishing commonality distinct from identifying a commonly applied policy or specific criteria. Citing its own *dicta* in *Bolden v. Walsh Construction* the court explained that even “Walmart observes that it may be possible to contest, in a class action, the effect a single supervisor’s conduct has on many employees.” Commonality, in such cases, is established not through common exercise of authority but through exercise of authority by a common decision-maker, regardless of the considerations underlying each decision.

**Conclusion**

To the extent that rules have spirits, the rule establishing the class action was and is meant to allow for efficient resolution of common claims. By heightening the standard needed to establish commonality, *Wal-Mart* triggered an avalanche of analysis predicting the death of the class action. Some lawyers representing plaintiffs and defendants believed the decision created a bright line rule for proving commonality whereby any injury caused by discretionary decision-making, or decision-making based on subjective factors, would be disqualified from the benefit of class-wide relief. This analysis proved too simplistic. Aided by courts taking a more thoughtful and nuanced approach to the application of *Wal-Mart*, the class action has evolved and continues to be a viable method for injured parties to seek relief in concert. Courts have made clear that commonality will be determined in the context of the facts of the particular case without reference to bright line rules. The Seventh Circuit, in particular, has provided clarity on the post-*Wal-Mart* application of commonality. The court has made clear that discretion and subjective decision-making alone do not form a sufficient basis to deny certification. Going further, the court has recognized that commonality can be established by showing that all plaintiffs were injured by the actions of a single decision-maker, regardless of the reasons for those actions. And, finally, the court has recognized that commonality can be established at any step in a multi-step process, not just at the final step. As a result of these rulings, and despite the near unanimous predictions of its demise, the class action continues to be a productive mechanism for serving judicial economy.
Deaths
Southern Illinois District Judge William D. Stiehl died on February 8, 2016

Court of Appeals
Attorney Donald K. Schott has been nominated to replace Judge Terrence T. Evans who took senior status in January 2010 and died on August 10, 2011.
Attorney Myra C. Selby has been nominated to replace Circuit Judge John Daniel Tinder who took senior status on February 18, 2015 and retired October 9, 2015.

Northern District of Illinois
Chief Bankruptcy Judge W. Black will retire on January 5, 2017. The committee is in the process of reviewing applications.
Northern District Bankruptcy Judges Pamela S. Hollis, Jacqueline P. Cox, and A. Benjamin Goldgar have applied to be reappointed when their current terms expire next year.
Magistrate Judge Maria Valdez was appointed presiding magistrate judge on January 27, 2016, to succeed Geraldine Soat Brown.
Attorney M. David Weisman has been selected to replace Magistrate Judge Geraldine Soat Brown who will retire on June 15, 2016.

Central District of Illinois
Recalled Magistrate Judge David G. Bernthal will retire on May 1, 2016.

Southern District of Illinois
Federal Public Defender Phillip J. Kavanaugh will retire on February 13, 2017. A committee is receiving applications.

Northern District of Indiana
District Judge Robert L. Miller will take senior status on January 11, 2016, and will continue to take cases. There is no nominee.
Magistrate Judge Christopher A. Nuechterlein will retire on August 10, 2016. The court is in the process of selecting a successor.

Southern District of Indiana
Assistant United States Attorney Winfield D. Ong was nominated to replace District Judge Sara Evans Barker who took senior status on June 30, 2014 and continues to serve the court as a senior judge.
Matthew P. Brookman was appointed on February 1, 2016 as magistrate judge to replace William G. Hussman in Evansville.

Eastern District of Wisconsin
District Judge Rudolph T. Randa took senior status on February 5, 2016. There is no nominee to replace him.
The Federal Defender of Wisconsin program will be seeking applicants for that position as Dan Stiller has given notice of his intention to resign.

Western District of Wisconsin
Bankruptcy Judge Robert Martin is retiring October 1, 2016.
Matthew P. Brookman, formerly a member of the United States Attorney’s office in Evansville, Indiana, has been selected to be a United States Magistrate Judge for the Southern District of Indiana. Judge Brookman assumed office on February 1, 2016, and while he is primarily based in the Evansville Division, he will frequently travel to other divisional offices. He has chambers in both Evansville and Indianapolis.

Judge Brookman began his legal career in Missouri after graduating from the Washington University School of Law in May 1993. He first practiced in the private sector, and then moved to the Office of the Prosecuting Attorney of Jefferson County, Missouri. After one additional stint in a private firm, Judge Brookman realized his passion for the criminal practice, and in 1999, he joined the Office of the United States Attorney for the Western district of Missouri.

In 2002, a branch of the United States Attorney’s office opened in Evansville, Indiana. As a DePauw University alum, Judge Brookman gladly pursued the opportunity to return to Indiana, and he practiced in the Evansville office for nearly 15 years. Judge Brookman served as the Chief of the Office’s Drug and Violent Crime Unit, Lead Organized Crime and Drug Enforcement Task Force Attorney, and Capital Case Coordinator for the Southern District of Indiana. He also was a member of the United States Attorney’s Executive Committee. In 2010, Judge Brookman received the Director’s Award from United States Attorney General Eric Holder for superior performance as an Assistant United States Attorney for his work on the United States v. Jarvis Brown, et al. quadruple homicide prosecution.

When the Honorable William G. Hussmann announced his retirement, Judge Brookman recognized the unique opportunity to further invest in the courthouse community and continue to enjoy and build the relationships he had established in the local federal bar. After two months as magistrate judge, Judge Brookman reports that one of the most fulfilling parts of his new role is the opportunity to meet new lawyers throughout the Southern District.

*Rozlyn Fulgoni-Britton is an Associate at Faegre Baker Daniels in Indianapolis who devotes her practice to representing employers in employment litigation. Ms. Fulgoni-Britton received her undergraduate degree from Michigan State University and graduated from Indiana University Robert H. McKinney School of Law, summa cum laude, where she was a member of Order of the Barristers, as well as Note Development Editor on the Indiana Law Review. She is the author of numerous articles on employment law.
On February 19, David Weisman was selected by the Judges of the Northern District of Illinois to serve as Magistrate Judge in the vacancy created by the retirement of Magistrate Judge Geraldine Soat Brown. He will take office in June of this year. The selection is the latest step in Weisman’s long career of public service and involvement with virtually all aspects of practice in the federal courts.

Weisman grew up outside Cleveland with his three siblings. His father was a teacher turned attorney, and his mother worked full-time as a nurse. His mother’s professional career ensured that Weisman and his siblings grew-up responsible and independent at relatively young ages.

That independence prepared Weisman for his post-secondary education. Weisman attended University of Virginia, where he received a Bachelor’s degree in Commerce, with a concentration in accounting, and the University of Texas School of Law in Austin, Texas, where he graduated with honors in 1989.

During his law school education, Weisman had several public sector experiences, including a summer at the Federal Defender’s Office in Washington, DC, and a variety of volunteer experiences. These experiences led him to pursue a position as a special agent with the Federal Bureau of Investigation. Following his graduation from law school, Weisman attended the FBI academy in Quantico, VA, and was eventually assigned to the Omaha Division of the FBI, where he worked in the Waterloo and Cedar Rapids, Iowa offices. After spending a year investigating frauds stemming from the savings and loan crisis of the 1980’s, Weisman spent the rest of his time with the FBI leading a drug task force investigating drug trafficking in eastern Iowa.

Continued on page 71
While life in rural America was a change of pace for Weisman, but for that assignment, he would not have met his wife, Lisa Parker Weisman. Lisa who grew-up in Arlington, VA, attended Northwestern University, started her career as a TV news reporter in Waterloo. Lisa’s career dictated the geography of Weisman’s career path, as he left the FBI to follow her to Norfolk, Virginia and then to Chicago.

After arriving in Chicago, Weisman began working at the City of Chicago Law Department. His first assignment there included work in the Englewood and Bronzeville neighborhoods where he worked with community members and the Chicago Police Department to address community concerns through municipal enforcement efforts. Weisman then was assigned to represent city employees sued for civil rights violations. This assignment resulted in extensive exposure to federal court. In addition to significant motion and discovery practice, Weisman also had the opportunity to try three civil cases to juries.

During this time, Weisman was working towards another goal which was to work at the U.S. Attorney’s Office. In 2001, Weisman was hired by then-U.S. Attorney Scott Lassar to serve as an assistant United States attorney. His career at the U.S. Attorney’s Office included several significant gang prosecutions, as well as the opportunity to serve as lead trial counsel in the prosecution of Matthew Hale, a white supremacist who sought to retaliate against a federal judge for her handling of a case Hale had pursued, as well as the prosecution of former Chicago Police Commander Jon Burge. Weisman also served in several supervisory positions during his ten years at the U.S. Attorney’s Office.

Following the U.S. Attorney’s Office, Weisman entered the private sector, and most recently practiced at Miller Shakman & Beem. During his four years in the private sector, in addition to criminal defense, Weisman worked on a variety of civil cases, including employment issues and False Claims Act matters.

Weisman’s colleagues at Miller Shakman & Beem will miss his many contributions to the firm but believe “the Northern District and those who practice in the court will benefit greatly from David’s broad experience, talent, judgment and hard work,” said Michael Shakman. Shakman also noted that the firm is honored that the court has selected David to fill the vacancy of Judge Brown, another of the firm’s former partners.

Get Involved!

Interested in becoming more involved in the Association? Get involved with a committee! Log on to our web site at www.7thcircuitbar.org, and click on the “committees” link. Choose a committee that looks interesting, and contact the chair for more information.
### Seventh Circuit Annual Report Summary

By Gino Agnello, Clerk
Seventh Circuit Court of Appeals

#### Statistical Report Summary for the Year 2015

This report will review the caseload statistics for the United States Circuit, District and Bankruptcy Courts. This is a summary comparing the national averages in each category with the Seventh Circuit’s numbers. The focus will be on the number of cases commenced, terminated and pending for the time period of January 1, 2015 to December 31, 2015.

#### Courts of Appeals

Throughout the nation, appellate case filings have dropped 1% to 53,266 cases. In the Seventh Circuit, the 2,977 new cases filed represent a slight (2.1%) increase over last year. The numbers of bankruptcy, prisoner and agency appeals heard in the Seventh Circuit are very close to the national average. However, the Seventh Circuit hears more civil but less criminal cases than the national average. Across the country, about 51% of last year’s filings were pro se cases. The percentage of pro se cases commenced in the Seventh Circuit was 58%.

Nationally, about 20% of the appeals are set for oral argument. In the Seventh Circuit, almost 38% of the cases have oral argument. On average, only 12.8% of appellate opinions are published across all the courts of appeal compared to the 36% publishing rate in the Seventh Circuit.

The median time for a case progressing from the initial filing in the lower court to the final disposition in the Court of Appeals is 29.4 months in the Seventh Circuit. The national average median disposition time is 28.9 months.

#### District Courts

In the nation’s District Courts, new civil case filings numbered 277,290 cases. This is a decrease of 4.5% compared to last year. The national average for “Terminated” cases went up 4.8% and the number of “Pending” civil cases dropped 7.9% to 26,965 cases.

New criminal case filings dropped almost 1.8% nationally compared to the 2.2% decrease in the courts of the Seventh Circuit.

#### Bankruptcy Courts

U.S. Bankruptcy new case filings have dropped consistently since 2010 and fell further in 2015 to 844,495 cases. This was a decline of almost 10% as compared to the previous year.

In the Seventh Circuit, total bankruptcy case filings dropped 8.1%, down to 102,718 cases from last year’s 111,818 cases. Bankruptcy case terminations decreased 9% and pending cases were also down 6% from last year’s totals.

Statistics for the first half of 2016 indicate that caseload levels are lower than the 2015 numbers. However, the courts of the Seventh Circuit remain busy and productive.

#### 2015 Case Filing Summary:

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# 2015-2016

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