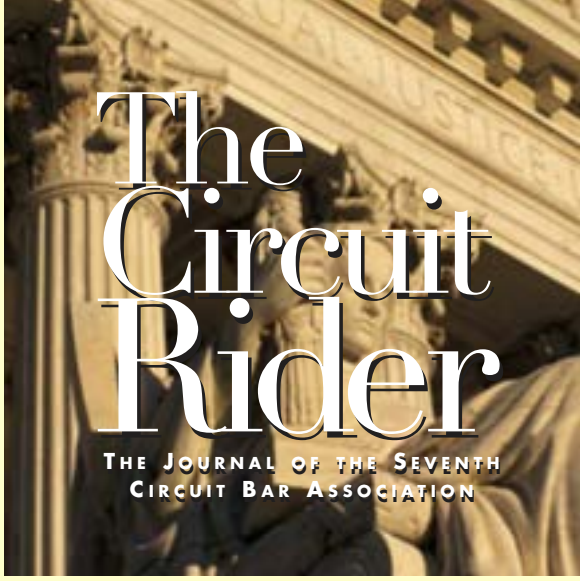
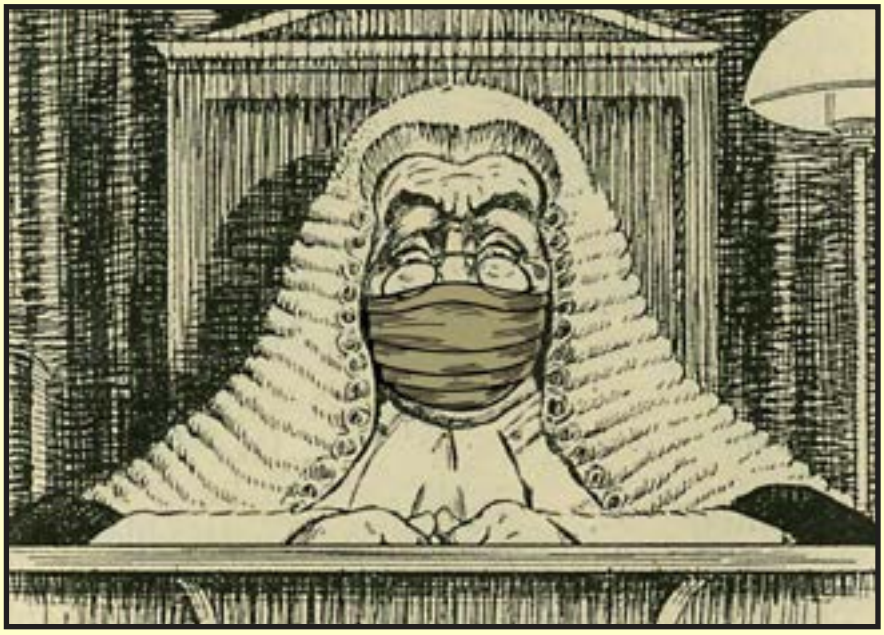
May 2022



Featured In This Issue

Reason and Restraint



The Circuit Rider

In This Issue

Letter *from the* President

President Brian J. Paul
Faegre Drinker Biddle & Reath LLP

Greetings, Members!

I want to take this opportunity to alert you to some changes to the way in which the Association will operate going forward. For many years now, the Association has done all of the planning for the annual meeting, which has included the circuit judicial conference. That planning will now be led by the Chief Judge of the Court of Appeals with court staff and others assisting. Over time bar members may be included to help plan the programming, at least in years where there will be a joint bench-bar conference.

In light of this change, and given that the pandemic has prevented us from having an in-person meeting for three years now, the Association leadership thought it time to rethink our value proposition to members. Traditionally, the Association's various committees and the leadership developed a full schedule of programs to present over the course of two days at the annual meeting. With the annual meeting on hold, beginning later this year our plan would be instead to commit to providing our members a similar lineup of CLE programs, which would include social and networking opportunities, spread out over the course of each year. The Association would present a regular slate of CLE programs, which may be organized around an annual theme. While the content of the programs would change from year to year, the structure would largely remain in place so that each committee, or groups of committees, would have the responsibility to present at least one program each year and the members would be assured of a certain amount of CLE content. So one month we might have a program on the latest U.S. Supreme Court term, in another month we might have a bankruptcy program, in yet another month we would have a criminal law program, and so on.

As conditions allow, programs could be conducted in person. Even as conditions return to normal, some programs are likely to be conducted virtually. Live programs may also be recorded and live-streamed by video, and all recordings may be included in the website CLE library. Our goal would be to present programs in each of the states of the circuit. Each program would likely be available to attendees in other states, either by broadcast to a location in one or more cities in the other states (such as a courthouse, law school, or law firm) or by Zoom or comparable technologies. We would also encourage networking opportunities before or after the programs, where possible.

Finally, programs would be free to members — yes, free! Non-members would pay to attend. CLE would be available for programs in all three states where possible.

So that's the plan. It's not set in stone, and therefore if you have any ideas on how we might improve upon the plan, we're all ears.

Special thanks to Mike Brody, Alexis Bates, Margot Klein, and Joel Bertocchi for envisioning the plan and putting it on paper. I have borrowed heavily from their proposal for this article.

Onward!

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.

AN AFTERNOON DISCUSSION WITH JUDGE ILANA ROVNER AND RETIRED JUDGE ANN CLAIRE WILLIAMS

Celebrating Their Historic Service *on the* Seventh Circuit

*By Jane Dall Wilson and Joan Akalaonu**

On a bright August 2021 afternoon, in a videoconference interview, the Hon. Ilana Rovner and the Hon. Ann Claire Williams (Ret.), now of counsel at Jones Day, graciously shared some of their thoughts and memories on attending law school, advancing their legal careers, and serving as judges in the Northern District of Illinois and on the 7th Circuit. Judge Rovner is the first woman to serve on the 7th Circuit. Retired Judge Williams is the first person of color to serve on the 7th Circuit.

Q: What inspired both of you to become a lawyer?

Judge Rovner: My family — my father, my mother and I — escaped the Holocaust. My father came to the United States in September of 1938. My mother and I followed in September of 1939. We were among the very few in both my parents' families who escaped. My father taught me that because I had been spared, I owed responsibility to the family members who did not escape and that I owed a duty to make sure that what happened to them would never happen to others. It was a lot of pressure for a child, but then again, I knew more about humankind's inhumanity at a young age than seems possible.

My father also taught me that if the constitutions and the laws in all of those countries had been followed, then these terrible atrocities never would have happened. He always held the belief that lawyers were the ones who could make certain that the laws were followed and such horrors were not repeated. We all know that one of Hitler's very first acts was to get rid of the judges in Germany and replace them with those who followed his tenets.

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Joan Akalaonu is a business litigation associate at Faegre Drinker Biddle & Reath LLP in Chicago where she practices commercial litigation, FCPA, and white-collar investigations. She is a cum laude *graduate of Yale University and a* magna cum laude *graduate Loyola University School of Law. Before practicing law, Joan, who also has a Master's in Social Work, worked for several years as a children's social worker in Chicago and London.*

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By the time I was seven, I had written my first essay on wanting to be a lawyer, and I never wavered although I had never met a lawyer, much less a woman lawyer. I remember when I was seven, my neighbors started to call me Portia because I always talked about being a lawyer when I grew up.

Judge Williams: I was a teacher, and I was inspired to apply to law school because a dear friend from high school was getting his Master's in Social Work. I was getting my Master's from the University of Michigan in Guidance and Counseling. My friend and I were a little competitive, and he asked me, "What are you going to do when you get your Masters?" I said, "I don't know." He said, "Well, I'm going to go to law school." I immediately responded, "Well . . . so am I."

From there, I signed up for the LSAT exam and took the test in February. There was only snail mail then, so you didn't get your results immediately. I applied to Notre Dame, Harvard, Yale, Wayne State, where I got my college degree, and Michigan. However, I applied too late and was told to apply again because, by the grace of God, I did very well on the LSAT. That same summer, a classmate of mine, Willie Lipscomb, was in a pre-law program at Notre Dame. Willie later became a judge in Detroit. Willie was walking with Granville Cleveland, a member of the admissions committee, who mentioned that someone had cancelled their acceptance in the class. Willie then talked about me. Unbeknownst to me, Granville Cleveland recommended that I fill that spot. To this day, I still have my rejection letter and my acceptance letters.

I came to think I could be a lawyer once I considered the fact that both teachers and lawyers teach. Lawyers teach judges, opposing counsel, and their own clients. Also, both teachers and lawyers counsel, persuade, and argue.

Also, this was occurring within the context of the civil rights movement. I knew about Justice Thurgood Marshall and Judge Constance Baker Motley, but I never saw myself doing what they were doing. My parents took me to a march in Detroit where Dr. Martin Luther King, Jr. spoke — this was a few months before his famous "I Have a Dream" speech in the March on Washington in 1963. So, I knew of these people, and their influence, and through them, I knew that lawyers could make a difference. This was all going through my mind as I took the LSAT.

But like Ilana, I did not know any lawyers or judges personally. I knew about Perry Mason because he came on TV in our house every week, and I decided I wanted to be a defense attorney. I also wanted to make the world a better and more just place, especially for African Americans. I knew lawyers had the tools to do that. So that's how I started.

Q: Do you have memorable moments from your law school days?

Judge Williams: My first days of law school were quite memorable. I was totally unprepared. I arrived at Notre Dame campus the day before classes started and was dropped off by my parents. I called my friend, Willie Lipscomb. I remember he asked me, "Ann Claire, have you done the reading?" I responded, "Willie, what are you talking about? Class starts tomorrow. I'll buy my books. I'll get the syllabus." Willie then informed me that we were in the same section and had assigned reading to complete before the first day of class. I immediately got in my Volkswagen convertible and found my way to Willie's home. Willie spent that evening explaining to me terms like "appellant" and "appellee." I remember taking notes in the margin. That is how I started law school.

I share this story particularly for people of color, young women, and potential first-generation lawyers who are thinking that the law is something they want to pursue. I always share this story when I speak to young people who are thinking about pursuing a legal career. I say, "Look at where I ended up in my legal career, and I knew nothing. You can aim just as high or higher. Just imagine how far you'll be able to go."

Judge Rovner: I attended Georgetown Law School, the largest law school in the country at the time. It also had a night school. There were three women in my section and we

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took seats together in the front row of class. I remember my first day of law school. My property professor told us, "I wore a black armband the day that women were admitted to this law school. You three do not have to worry because I will not call on you." When we left the class, I remarked "Isn't this wonderful, he's never going to call on us." And one of the other women said to me, "What are you talking about? What did you come here for? He's not going to call on us like we're not even here. He's not going to know anything about us." At the time, I still thought it was rather wonderful, but, truthfully, it was shocking. I had attended an all-women's high school and college. I had studied law in London and there were more women at King's College Law School at the University of London than there were at Georgetown, and the women had been treated very well there. So, this was a shock for me to experience. This was my first day. Welcome to law school.

Judge Williams: I was one of seven black students in my law class and there were two Latinos. I was the only woman. So, it was a very different environment for me. I'd gone to two public universities, Wayne State University for college and University of Michigan for my Masters. I worked my way through college as a grocery store cashier and substitute teacher, and then I worked full-time as a public school teacher in the inner-city schools. Coming to Notre Dame was a big shock even though I'd gone to Catholic middle school and an all-girls Catholic high school. It took a while for me to get adjusted to this new environment.

I had a full academic scholarship from Notre Dame, but it didn't cover room and board. My first year, I worked as a counselor for freshman undergraduates. I needed to make more money, and I was fortunate enough to get hired as an assistant rector at Farley Hall for my last two years of law school. It was the third women's hall, and a nun, Sister Jean Lenz, was the Rector. After a week of craziness getting the young women settled in and organized, Sister Jean looked at me and said, "Annie, when they told me I was going to have this gung-ho black woman as my assistant rector, I thought, 'Ugh.'" And, I said "And Sr. Jean, when they told me I was going to have this nun from Joliet as my rector, I said, 'Ugh.'" At that moment, we began a lifelong friendship and became the very best of friends. She became my sister of the heart. She was at both of my investitures. I came to all of her critical events. She eventually became Vice President of Student Affairs at Notre Dame.

Judge Rovner: This is why diversity is so important. And why we have to know each other. Why we have to break bread together. Why we have to communicate. Why we have to talk to each other. That is how we begin to understand each other.

Judge Williams: And why we have to take risks in the law. You have to put yourself out there. You have to know that your mentors and sponsors come in all colors and all shapes. Because for us, given the times, most of my early mentors were white men. Later on, some mentors were women, because Ilana certainly became one of my mentors and sponsors. But in the early days, there were not a lot of women and very few African Americans. We had one woman on the law school faculty, and she was the law librarian. She was a brilliant woman who actually helped me with my resume when I applied for my clerkship, who advised me on various things going on in law school. But that was one woman, the librarian.

Q: Did you aspire to become a judge?

Judge Rovner: I was beyond grateful to become a lawyer; becoming a judge never entered my mind. When I was in law school, only two women in the history of the United States had ever been federal judges. Given this, it just was not on my radar. It is the kind of thing where lightning has to strike, and it did. Lightning struck both of us.

Judge Williams: I agree with Ilana. I never imagined being a judge. When I was appointed to the bench, Ilana had already been appointed a year ahead of me. At that time, we had one woman in the district court, and she was appointed in 1980. Ilana was appointed in 1984, and I was appointed in 1985. So, I was the third woman on our district court bench. So, we just didn't have many female role models. I knew about Constance Baker Motley, but at the time, I didn't know her personally. Also, this was all pre-internet, so you couldn't just Google other female judges to find them. There were just a handful of black women who were on the bench, but none in my district or in the whole Seventh Circuit. So, I never envisioned or even thought about it. I remember I was approached by one of the former U.S. Attorneys for whom I worked, saying my name had come up and been brought to the attention of Senator Percy and his kitchen cabinet. I felt flattered and honored, but I never imagined that it would happen.

Q: Do you have any memorable moments with respect to your time as a judge?

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Judge Williams: There are two stories that immediately come to mind. One is really funny. Ilana and I were on a panel, and I asked a question. And the lawyer responded and addressed me as Judge Rovner. I responded, "Well, I'm Judge Williams, she's Judge Rovner [gesturing to Judge Rovner]. It must be the hair."

And the other story that we love is the first time that Ilana, Diane [Wood], and I sat on the panel together. It was the first time there was an all-female panel in the Seventh Circuit. That was amazing.

Judge Rovner: Yes, it was. One of my favorite stories is when I was on the district court. I called a very big important commercial case and four women stood up and came to the podium. I looked down and I said, "Oh my goodness, I cannot tell you how good you all look to me." And one of the women said, "You know Judge, it looks pretty good from where we're standing too." In the beginning, in 1984, when I first was on the district court bench, I would come into the courtroom and there would not be any women in the courtroom. So, you can imagine what a moment that was to see those four women. It was so special, and I have never forgotten it. I have come from a place where there were less than ten women in a class of 500 to a time where more than half of the students in law schools are women. Never in my wildest dreams, when I entered law school, could I ever have imagined the numbers or the opportunities, and I just hope that we keep growing that way. Keep the momentum going. But never at the cost of your personal life. I am very adamant about that. Every person is different, and we have to figure out ourselves how to balance work and life.

Judge Williams: Ilana and I never let the robe get in the way of our humanity. We never forgot who we were and where we came from and we never forgot to walk in the shoes of others.

When we were in the district court, we saw everybody, including the victims of crime and the people we sentenced and their families. We saw them crying, we saw their pain.

One of the greatest challenges of the Court of Appeals is that we hardly ever see any of the parties in person, and so maintaining that humanity in the Court of Appeals is so important, in my opinion. Plus, having been trial judges, we can understand and read between the lines. I'll never forget I was in conference at some point and we were talking about dismissing a case without prejudice. One of the judges who had never tried anything previously in the district court asked why the judges would do that as it is not a final order. I explained to him that every month we have to report our cases, and if the lawyers come in and say it's settled but that it's going to take several weeks to get the paperwork in, we dismiss without prejudice, and that is why that option is there. So the experience that we brought to the Court of Appeals was important. We were also able to help our colleagues better understand the pressures trial judges face in making tough decisions in very short timeframes, especially during trial. They don't have the luxury of time that appellate judges have.

I think it's important that the Court of Appeals judges are from a mix of backgrounds. The cases that you see are diverse and the buck stops at the Court of Appeals because the Supreme Court only takes about 80 cases a year, and there are 55,000 appeals filed throughout the United States. So it is the end of the line for most cases.

Judge Rovner: It is an unbelievable privilege that we have had being on the two courts, but it is also a great and difficult responsibility as well when you think about holding people's lives in your hands. So many of the decisions weigh so heavily because they have far-reaching consequences for individuals and often for the law in general.

Judge Williams: Again, that illustrates the difference between the district court and the Court of Appeals. In the district court, it's that individual case, and you see the consequences of your ruling. And certainly that is critical to everyone in that case. But the Court of Appeals, because it's the law in three states, being able to see the consequences of your ruling is one of the most difficult challenges. You want to be able to be proud of any decision two to three years down the line and not have the law take a bad turn because you didn't anticipate the impact it would have. I'm not saying that facts don't change because facts do change and we make the best call we can based on the facts and the law at the time and the impact it's going to have looking down the road. That's one of the hardest things about the Court of Appeals. It makes the mantle heavier than what you deal with in the district court.

Judge Rovner: Particularly when I view the law one way and the majority on the panel sees it another, it can be very disheartening. But the idea is to get your view out there. Writing dissents, which I have done a lot of, means that my

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chambers workload is far greater than it would have been had there been total agreement. Three of us go into conference having heard argument on six or nine cases, and if we agree on all of the cases, we each have to write two or three majority opinions. But if we disagree on any of the cases, we have to write a separate concurrence or dissent, and each separate opinion means more work for the author, but there are principles and human lives at stake, and so it is of the utmost importance to take on the extra work.

Q: Judge Williams, you spoke about teaching before coming to law school. Judge Rovner, you talked about studying the law in London, and we also understand that you took the bar some years after graduating from law school. How did your unique path to becoming a lawyer help you in your career? What advice would you give lawyers, especially women and diverse lawyers, who are on their own unique paths in the law?

Judge Rovner: There are three things. One is incredibly hard work. The others are timing and good luck. Good fortune and timing. I am able to advise about hard work but luck and timing are another story. I graduated from law school and immediately retired to have a family. By the time I went back to practice law, my desire was so enormous that I simply could not fail. You have to have the desire, but the other thing is the timing. At that time, the Civil Rights Acts had been passed. Everyone was looking for women so my timing just turned out by good fortune to be perfect. Many of the women that I knew who were lawyers at that time were without legal jobs, other than being legal secretaries. Being a legal secretary is a wonderful job, but these women had attended law school, passed the bar, and had not been able to be hired simply because they were women. We all have heard and witnessed so many of these stories – women being told if they had only come for an interview a week earlier, there would have been a place for them but these firms already had hired their one woman. This happened to so many of the early female judges at the beginning of their careers. There were so few places for us. If we were able to get a position at a law firm, it was to practice Trusts and Estates or Family Law. You did not see women litigators for a long, long, long time. So, it was certainly not an equal playing field in those days.

Judge Williams: Teaching broadened my perspective because I had worked in the inner-city schools. I was fortunate, and I'll talk about my parents a little later because they have been my inspiration throughout my life because of the struggles they went through being black and experiencing discrimination. Those early years, it's what Ilana said about the hard work . . . and let me tell you how the hard work really counts. While there was tremendous discrimination, there were also people that recognized hard work and recognized excellence. One had to keep in mind that you never know who's seeing you and watching you and your work. You have to do the very best you can and really get good at what you're doing so when a fair-minded person who has the opportunity to speak up for you because they have the power in the room where the decisions are made, they will speak up for you. That's what happened with me.

For my clerkship, it was Dean David Link of my law school who recommended me to Chief Judge Luther Swygert of the Seventh Circuit. Judge Swygert and our former Circuit Executive Collins Fitzpatrick interviewed me for a clerkship. Judge Swygert ended up wanting to hire three women that he interviewed as clerks but only had two spots, so he called his good friend Judge Robert Sprecher and encouraged him to hire me. And Judge Sprecher did. There had been about two or three women law clerks on the Seventh Circuit, but there had been no women of color. Judge Swygert called the Dean of my law school and told him that he was looking to hire a woman in his last term and asked if there was a woman, especially a black woman, who the Dean thought could do an outstanding job as his law clerk. The Dean called me into his office. At this point, I had had two classes with the Dean — tax class and another class. I didn't play basketball with the Dean like a lot of the men at the school did, and I didn't hang out at the beer parties at the lounge. I didn't network at all, but the Dean noticed me from my work in class and called me to his office and told me that Judge Swygert wanted to hire a woman and

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the Dean had thought of me. I never knew the Dean was looking at me or watching me and my work, but he recommended me.

I had also worked for the Director of the Center for Civil Rights, Professor Howard Glickstein, as a research assistant. He and the Dean vouched for my analytical, reasoning, and writing skills. That's why excellence matters so much. I believe when you work hard that you will find a way to open the door, and if one door doesn't open, you open another door, and you just keep banging on doors until you get one to open. That clerkship with Judge Robert Sprecher was the key that opened many doors in my career.

I was the ninth black woman appointed to the bench in federal district court, the third woman in the Northern District of Illinois, and the third judge of color in the Northern District. I stood on the shoulders of my mentors Judge James Parsons and Judge George Leighton. Judge James Parsons was the first African American and actually the first judge of color to ever be appointed to a United States District Court. Judge George Leighton was the second African American to be appointed to the Northern District of Illinois. He swore me in when I took the district court bench, gave me great advice, and continued to be an influence in my life until he passed at the age of 105.

I know Ilana will share her story about Judge Parsons.

Judge Rovner: I will, but before I do, I told you about one professor who did not want the women there, but I should tell you about one professor who did want the women at Georgetown. That was Walter Jaeger. And why did he care about us so much? Because his sister had graduated from law school and could not get a job as a lawyer, so she went to nursing school and became a nurse instead. And Professor Jaeger never got over the fact that she was not given the opportunity to be a lawyer. And so he wanted to give the women that opportunity, and he did.

As for Judge James Benton Parsons, I went to a dinner party and was seated next to him. He was lamenting the fact that, on Monday morning, he had to go into the office and go through hundreds of resumes because he had to hire a new law clerk. Although most district court judges in those days had two law clerks, Judge Parsons only had one. I told him I would be his law clerk and he responded, "My dear, you have to be a lawyer to be a law clerk." I said, "I am a lawyer." I had just passed the bar. He told me to come to his office on Monday morning, and I did. At the time, Judge Parsons had a legal secretary named Catherine Fitzgerald. Miss Fitzgerald had always wanted to be a lawyer herself, but because she graduated from high school during the Depression, she had to help support her family and never went to law school. I learned later that on that Monday morning of my interview, she reminded Judge Parsons about his appointment with me, and he said, "Oh, yes. I don't know what I was thinking. This young woman sat next to me at the dinner party on Saturday night, and I felt that I had to say, 'come in,' but I can't have a woman as a law clerk. If I said a bad word, she would get upset. If I take my jacket off and roll my sleeves up . . . well, I could not do that. If I said something to her that about her work not being quite right, she would cry." And Miss Fitzgerald said to him, "You should be ashamed of yourself — you who were given the opportunity to be the first African-American judge and now you are not willing to even give an interview to a young woman. Shame on you." So, he interviewed me and he hired me. And that was it. I got the job in large part because a woman wanted to see another woman fulfill the dream that was denied her.

Judge Williams: So, we've said dream big. Ilana had her dream when she was seven, and nothing got in the way of that dream. You have to have a dream. You have to dream big. You have to work hard, but you have to stand up for yourself. What would have happened if Ilana hadn't stood up and said, oh, I can be the clerk. You have to always be on the lookout for opportunities. Because opportunities come and sometimes you want to say "no," but you have to say, "yes," to get your foot in the door.

In the U.S. Attorney's office, Ilana was my first supervisor, which was a blessing. I had originally applied to be in criminal receiving and appeals where most lawyers start. So when they told me, I'd be in public protection and civil rights, I really wanted to be in appeals, but I knew I needed to get my foot in the door, so I said yes. Sometimes you can't get what you want when you want it, but it turns out that what you get is just what you needed. Because it was through Ilana being my supervisor as a deputy chief that our relationship developed. We have been lifelong best friends. My judicial career has followed hers. She was appointed to the district court in 1984, and I was appointed in 1985. She went on to the Court of Appeals as the first woman in 1992. Astounding that we didn't get our first woman on the Seventh Circuit until 1992. And I went on in 1999, seven years later.

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So you just never know who's going to be the one to give you what you need. And you just can't give up. So dream big, work hard. Don't give up. Stand up. And give back. Those are the principles my parents taught me.

Q: What inspiration did you draw from your parents?

Judge Williams: We are all blessed to be lawyers and to have become judges. Just like Ilana's father said, we have a responsibility to give back.

My parents, who participated in the civil rights movement, were fortunate enough to work their way through college and graduated. However, neither of them could get jobs in their chosen field. My mother had to serve in a school for delinquent kids for twelve years and as a substitute teacher for five years before black teachers were allowed a full-time contract to teach in the public schools. My dad drove a bus for twenty years. He applied to be a supervisor, but was told by the white person who interviewed him that he was not competent enough for such a position. Meanwhile, my father, college-educated, had been a staff sergeant in the Army. He got mad and got his retirement money and went back to school and ended up at Wayne State University, majoring in education, taking classes with me. I asked my dad how he could stand it, having to be a bus driver all those years with a college degree. My dad told me he did what he had to do. Being a bus driver was good, honest work, and he needed to support his family. He reminded me that nobody could take his education away from him and that he wanted to make things better for me, my sisters, and our community.

So, whenever I run into a block or a closed door, I think about my mother and father and what they had to overcome, and I never give up. That's the other key principle — never ever give up. My parents inspired me to do everything that I've been able to do. Fortunately, both of them were blessed to attend my investiture ceremonies for both the District Court and the Court of Appeals. Ilana, I think both of your parents were there both times for your bench appointments?

Judge Rovner: My parents of blessed memory were there for both inductions. Absolutely. And my father's story is so similar. In Europe, in Latvia, my father was an opera critic with a Master's Degree in Economics and a life that people dream of having. In the United States, he was basically, upon arrival, a janitor. And he had to wear his white suit while he packed eggs and swept floors because he could not afford a pair of overalls. That white suit is still hanging in my closet. When I was a teenager, I asked him how he could have borne it. He told me that he was grateful to do anything because it meant we were saved and that we were going to survive. He told me that he would have worked at anything to give me a good life. I really get chills, even now, just talking about it and thinking about the sacrifices and the love. That is another thing that Annie and I have in common — incredible parents.

Judge Williams: Incredible parents. Think of all of us who are lawyers, especially those of us who are first generation, and all that our parents, prior generations, and extended family had to endure and suffer. For all of us, someone in our family had to sacrifice so that we could take the oath to be a lawyer or be a judge. We should never forget that. Like my father said, whatever our ancestors had to do was good, honest, decent work. We owe it to them to carry on and make a difference in the world. I really believe that. I reflect on my parents and their struggles every time I've faced a challenge and remind myself that any difficulty I face pales by comparison.

Q: What stories can you share about mentorship and opportunities?

Judge Williams: Ilana and I share several of the same mentors. Both of us have James Parsons, George Leighton, and then there is Judge Nicholas Bua, who had been a state court judge. Nick was a total rock star on the federal bench. I tried around five cases in front of him, and he was a source of inspiration and guidance. He had the best call in the building. When I was waiting to start on the bench, Nick briefed me. Judge Hubert Will, the father of the pre-trial order and a founder of the Federal Judges Association, is the one who got me on the path to join the Federal Judges Association and nominated me to become treasurer. Ultimately, I became president of that association. Never would that have happened without Judge Will seeing me in the hall and asking me if I was coming to the Federal Judges Association meeting because the national meeting only occurred every 4 years. I told him I couldn't go because I was swamped and too busy. He told me I needed to go and so I went. I had no idea he was going to nominate me for treasurer. But that put me on a trajectory where I was then president and got to know judges all over the country. When I ultimately moved on to the Court of Appeals, I had judges everywhere who were willing to speak up for me and that matters.

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Judge Rovner: As for mentorship and opportunities, I have tried to be a mentor throughout my career. I actually started the practice of job sharing when I worked in state government and have continued the practice with my law clerks. That has meant that mothers and fathers with young children could have the option to be a law clerk and also tend to their parental responsibilities. And I should note that I have had the great good fortune of having the most supportive and remarkable intelligent law clerks imaginable. They and my wonderful legal assistant are truly my family. I would like to tell you a wonderful story about Judge Nick Bua. I had been on the district court for less than three months when I was diagnosed with kidney cancer. I underwent surgery and had a very difficult recuperation period. Judge Nick Bua took my entire call and handled it along with his own. And one day, a group of lawyers came in and told him they were on my call and they wanted a trial date because they did not know if I was ever coming back. This happened on a Thursday. Judge Bua told them that the following Monday he would impanel a jury for their trial. The lawyers tried to tell him they did not need a trial that quickly, but Judge Bua told them, "You said you wanted a trial, well you are getting your trial. You will be here. There is not a witness that cannot be here from anywhere in the world. I am giving you four days to get them here." The lawyers went out in the hall and they settled the case.

Judge Williams: Nick was one of our mentors, one I had met in my early years. When I was a young judge, I actually got to meet Constance Baker Motley and became friends with her, and Judge Damon Keith, Judge Nathaniel Jones, Judge Leon Higginbotham, and Judge James "Skiz" Watson — all rock stars in the judiciary; they were just extraordinary. They all took me under their wing.

But, back to Nick Bua. There was a point in the office, I guess I had been there four years, that the women prosecutors noticed they were not being assigned the high-profile political trials. When you have a certain level of experience, some of them should be coming to you, and we noticed none of these cases were being assigned to women. So, I went to see the Chief of the Division of Criminal, and I named several trials and then asked him what they all had in common. He told me they were all political corruption cases. I told him the other thing these cases had in common was that no women were running them. He told me that he hadn't really thought about it because the way the cases were assigned is that two Assistant U.S. attorneys start the investigation and, as the case gets bigger, they ask their friends if they want to take over one case or another. Two weeks later, the chief called me, and he told me that he had a case of an electrical inspector who was taking bribes. It was against one of the most renowned criminal defense attorneys, and the chief wanted me to work on the case. Things began to change for women lawyers, slowly but surely.

This opportunity all occurred because Nick Bua said to me, "Have you told your supervisor that women haven't been assigned these cases?" And I told him no because I thought it should be obvious that women were not getting the cases. At that time, I had actually applied to go to the State's Attorney's Office as I had met Patti Bobb and Lorna Probst at a training for the National Institute for Trial Advocacy. They were first chairs in courtrooms at 26th Street. These women told me if I was at the State's Attorney's Office for a year, I would be first chair in trials there as well. Nick told me that if I was thinking of going to the State's Attorney's Office, I should first go to my supervisor and tell him about my issue of women not getting assigned these high-profile political cases. Nick reminded me that I belonged in federal court. And Nick was right. Nick Bua was not just a mentor to us, he was a sponsor.

Judge Rovner: This raises a wonderful point. You cannot expect people to do the work that you should be doing. You cannot expect that people are looking at you or the situation and realizing that it is terrible or unfair and that you or others have not been given an opportunity. It is like people who want to meet someone, but do not go anywhere or try to find other people. They seem to think someone will knock at their door. Well, nobody knocks at your door or if they do, it is very rare indeed. Basically, you have to do something to help yourself. There are very nice ways to do it — just go and say to a supervisor that you need advice and that you do not know what to do to get more exposure and be more involved in certain trials and cases. You cannot just sit there and hope to be noticed. You have to be proactive.

Judge Williams: I also remember another time I wanted to do appeals, and appeals didn't come to the section I was in. So, me and my little group — which consisted of three other white women and a black man who had come in at the same time and we all were in Ilana's section — none of us had a chance to do appeals. Around the same time, I heard the Deputy Chief complaining about some of the guys in the section that didn't really like writing and especially didn't like writing appeals. So I told my little group that I was going

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to propose that we take some of these appeals. So, I went in to see the Deputy Chief and made this request, and he was ecstatic. What does that mean? That means that all of us got to argue in the Seventh Circuit Court of Appeals and we got to be seen by the judges. That matters, that really matters.

I also went to the same Deputy Chief when I wanted to get our group duty days so we could do search warrants and arrest warrants because we were not getting that experience. In my opinion, civil rights cases are very difficult to put together and you need some foundation. He asked me if I had gone to the Chief, and I told him that I had and that the Chief had said no. I asked the Deputy Chief to go and speak with the Chief to get our group duty days. So, he went and met with the Chief and came back and told me that while he could not get me in the regular rotation, he got each of us three duty days. And I told him, "That's a start."

So, if you're not looking out for yourself, and you're not speaking up, like Ilana said, then you are toast and not going anywhere because no one is knocking on your door. I think that's really important to understand how to stand up and speak up for yourself and for others. Nobody will care about your career more than you.

Q: What advice can you share about personal and professional friendships and networks?

Judge Rovner: It is important to have a great buddy. You need a buddy. And that is what Annie and I have always been. We have watched each other's backs.

Through the years and for many, many years--I cannot count how many--there was not a day that we did not talk. If not in person, then on the telephone. We used to talk to each other every night. My late husband used to say, "What was left to talk about?" But there was always something.

Our families are very close. I was very close to Annie's mother and father.

Judge Williams: Oh, yeah, and I was close to Ilana's mother and her father. Our kids are also close. We truly are sisters of the heart, and you need people like that in your life.

And you also need what I would call a "kitchen cabinet," other women who are going through what you're going through. You need to join and be active in organizations where you get to meet other women. Like the Women's Bar Association. Or the Black Women Lawyers' Association, which I helped start. You need to bond and get nourishment from people who are like you. To me, that gives a person the strength to get into the bigger community. So that's the other thing. Get with your affinity group. I'm all for affinity groups. But you have to go beyond the affinity group as well to get where we are and where I have been and where Ilana is now. Because you have to get known in the community. If you're thinking about being a judge, and nobody knows your name and you haven't been engaged, or volunteered, or given back, or done anything in any leadership role — then it's pretty hard to make it to the federal bench.

For example, I remember once when I was on maternity leave and the Chief Judge, Frank McGarr, called me and said, "We're going to do a pilot program in Illinois and it revolves around the trial bar. And we know that you've been teaching trial advocacy at Northwestern for several years, and we want your help to set standards for lawyers who will be on the trial bar in the Northern District of Illinois." This is the chief judge talking to me. Still, I initially responded, "Well Chief, how much time will it be?" Yes, in my naivete, I said that. After I hung up the phone, I reflected on the fact that this was the Chief Judge in the Northern District of Illinois asking me to serve on this committee. I knew I needed to call back and say yes. So that's what I did. I called him the next day and told him I was flattered and would be honored to serve.

Who else was on that committee? Jim Holderman was on the committee, and he later became a district judge. There were a couple of people on the committee who ended up on the state court bench. That exposure on that committee had something to do with how I ultimately ended up as a nominee by Chuck Percy. I had never been a Republican or been in politics or anything like that. But Chuck Percy had a "kitchen cabinet," and all three U.S. attorneys that I served, who were appointed by Republican and Democrat presidents, recommended me because they knew me, and my work, and I was also out there doing things in the community.

So, you can be excellent, and work hard and do your absolute best, but you also have to give back. You have to give back. I think that is one of the hallmarks of a good judge. That's part of why Ilana has been so successful because they know her name and they know what she stood for.

Q: How have you juggled all of your professional and personal commitments?

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Judge Rovner: None of this is easy because you need to also have a life. You need to also consider how you can balance it all and have a life. That is the hard part. That is a decision that only an individual can make for herself and himself.

Judge Williams: And we were very fortunate because we hit the jackpot with our spouses. We had spouses who were proud of the fact that their wives were lawyers and had ambitions. Our spouses assisted us in so many ways, but I just think about my husband, David, when I first went on the district court. At the time, we had two children under the age of 2. David was the one doing the carpool in the middle of the day. I could do it in the morning, but David shared with the other moms and picked up the kids two days a week. He's also clearly the cook in our family, just like Ruth Bader Ginsburg's husband Marty. I remember this story when my son, Jonathan, was in kindergarten and his teacher went around the room and asked the kids to tell the class what was their favorite meal that their moms cooked. When it was Jon's turn, he told the class that his mom made the best Lean Cuisine linguine with clam sauce. It was so funny.

But the point is, we had that spousal support. Ilana is right that everybody has to find in their own journey and figure out where it does and doesn't work. From my experience, it's really hard when you have two people that work outside the home. There could be some trade off back and forth in terms of who is going to do what. Before I was appointed to the bench, my husband had been an international banker. When I was appointed to the bench, he took a different position so he would not have to travel internationally. Our family could not have functioned with me on the bench and him traveling internationally at the same time.

Judge Rovner: Now, I have a completely different story about cooking. My late husband would come in and would say things like, "Tell me again — which one is the stove and which one is the refrigerator?" That wonderful person never cooked a meal in our 47 years of marriage. He may not have known his way around a kitchen but in every other way Dick was the most supportive, helpful and loving partner imaginable. I know I could never have managed without him at my side. In that way, he was ahead of the times because whereas today partners share so many responsibilities, that was not always the case 50 years ago. And after Dick died, I was fortunate to meet and marry another remarkable doctor who supports me in my work and in my life. I will also add that my son, Max, has been my champion through the years and, interestingly, has become both a lawyer and a physician, thereby carrying on both of his parents' professions. Presently, he is practicing psychiatry full time.

Judge Williams: I think, COVID, in addition to just the general transition and general acceptance of men to be behind their women professionally has had an impact. COVID has also opened the eyes of many men of what they missed as they chased the golden ring. Several of my younger friends have said that their husbands are more involved, engaged, and willing to do things, and these friends want to keep those relationships going. There is not much of a silver lining in this nightmare of COVID, but I think that is one of them. And I do think you hear of more husbands, like my David, who are willing to be more flexible and to take a greater role in raising the family. But it has been a nightmare for many women who don't get support, particularly for single mothers. Balancing childcare and a job has placed a tremendous strain on women. It's a challenge for women lawyers, and it's much worse for women who are not in white-collar positions.

Judge Rovner: Something else that is very important for women, and men as well, is having a niche if you possibly can. Sometimes that means looking at what is not being done and figuring out what is needed. When I was going into the U.S. Attorney's Office, I requested the area of Civil Rights and the powers that ran the office were all too happy to give that to me because it was not quite as enticing to most of the men in the office. They wanted to do the very exciting criminal cases or high profile civil cases in order to make a name for themselves in a few years. In that era, we only had to

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promise to stay in the U.S. Attorney's Office for three years. As it happened, I stayed four years. If you can find a niche, an area in your particular organization, that is not as crowded as other areas, then you can make a name for yourself more easily. And it is amazing how you can get interested in something that might not seem quite as interesting. For example, I dreaded taking taxes in law school and then I found that I loved it. You do not know until you try. I think you can learn almost anything if you have the building blocks and law school gives you the building blocks. You are taught to think in a completely different way — we think more logically than many other people do because that is what we are basically taught in law school. If you take a chance, and really apply yourself, I think that with our education, most of us can learn just about any area of the law. You take the lessons learned in one area, and you bring them to another area.

Q: What advice would you share on the importance of giving back?

Judge Williams: When I was taking a bar review class, I found out about a bar prep class that Ron Kennedy had started for the African-American students at Northwestern University Law School because passage rates weren't as high as other groups. I met some students from Northwestern and asked if they could find out if I could join that class. These students asked Professor Kennedy, and he said no because I was a Notre Dame Law graduate and didn't attend Northwestern. But I never forgot about that class, and two years later, I was a young Assistant U.S. Attorney with Alfred Moran, who went to Northwestern. I asked him if the professor was still doing that supplemental bar review course, and he told me yes. He also said that the pass rate for those who took the course was still 100%. But it was still limited to only Northwestern law students. I wanted to expand this program, so I asked him to set up a meeting for me with Professor Ron Kennedy. At the meeting, I asked Professor Kennedy to expand the program. He said "no." I then told him I would get some of my friends, he could train us, and we would run a non-Northwestern group. I asked him, "If we got the non-Northwestern group to do just as well as those in his class, could we talk further?" He agreed. Sure enough, the non-Northwestern group did just as well and we formed the Minority Legal Education Resources, Inc. ("MLER"). MLER is still going on today — probably 5,000 lawyers have gone through it, and it was always open to everybody of every color, every background, and it was an all-volunteer program. The passage rate has always at least equaled the bar passage rate in Illinois.

I like MLER as an example because a lot of times when I talk about Just the Beginning[1] — A Pipeline Organization or the Black Women Lawyers' Association, both of which I helped start as a judge, people say that it was easier for me to do that because I was a judge. But MLER is something that I helped start when I was a young lawyer just two years out of law school. I believe in the power of one person with a really good idea to get others to join and before you know it you have a movement. Just the Beginning[2], this last year, we had about 112 interns in the chambers of federal judges. All from an idea, with our co-founder, Judge Gerald Bruce Lee (Ret.). All of that evolved after we started Just the Beginning to honor James Parsons. With the leadership of Judge Jack Schmetterer and the Federal Bar Association, a multi-racial group formed of people wanting to give back and see the next generation of lawyers of color, first-generation lawyers, and lawyers from underrepresented groups succeed in the profession.

That's what Ilana was talking about — that responsibility, that obligation. Find that niche. Everyone doesn't have to start an organization, but maybe in your church or synagogue, you work with the lawyers' group, or you join the PTA because your kids are in school. As Ilana said, lawyer skills matter in every respect. You help the person who's doing your hair, the person who's cleaning the streets. We couldn't give legal advice as judges, but we could certainly get them pointed in the right direction. We have that obligation. Because but for the grace of God, we could be cleaning the streets, we could be cleaning toilets. That's honest, decent work. But it was only because of our parents, grandparents, adopted parents, or whoever it was in our families, that inspired us and gave us what we needed to become who we are.

Giving back is also what my life after the bench has involved. I am very grateful for the opportunity Jones Day gave me to lead on a full-time basis its pro bono Rule of Law in Africa Initiative. Doing good in Africa — trainings, collaborations, building rule of law structures, and enhancing the rule of law by working with judges, prosecutors, defense attorneys, and NGOs and organizations like Lawyers Without Borders and BarefootLaw. I've always been a teacher at heart and bring

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those skills along with my legal background to help advance the rule of law in countries in Africa. I'm trying to do this every day. Africa is a huge continent with many countries, challenges, and opportunities. Because of colonialism, many are young countries, and some of the mistakes the U.S. has made in its system of justice, they can avoid. For example, when we talk about resolving cases efficiently through case management and cutting down on case backlog, I talk about how the U.S. judges initially resisted legislation that requires public reporting of cases that are more than three years old and motions that are more than six months old. The legislation, known as the Biden Act[2], also requires court-annexed alternative dispute resolution programs. Although U.S. judges had adamantly resisted these changes, Congress passed the statute, and it turns out the requirements were very useful and set a framework that has helped the federal courts resolve cases more efficiently and at lower cost.

Wherever I go in Africa, I see the light of justice burning brightly no matter the challenges that are faced. The openness I see to new ideas and the ability to contribute to making systemic changes — that's what keeps me going back. It's very exciting for me to have those opportunities and to help where I can. I have received so many blessings in my life, and so many hands extended to me, and I feel that with those blessings comes a responsibility to give back.

Judge Rovner: Our beloved friend of blessed memory, Judge Abraham Lincoln Marovitz, always said that one should do a good deed every day. He said if he did not do a good deed one day, he was forced to do two the next day. I really try to live those words. Try to do a good deed every day. Sometimes you have to search a bit to find that good deed. Think of something that you can do that would help someone somewhere. It feels so good. It is a wonderful way to live.

Notes:

[1] *See* https://jtb.org/.

[2] *See* Civil Justice Reform Act of 1990, Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990).

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:

September 10, 2022
December 3, 2022
Saturday, March 4, 2023

All meetings will be held at the East Bank Club, 500 North Kingsbury Street, Chicago at 10:00 AM

THE CASE FOR DRAWING REASONABLE — AND ONLY REASONABLE — FACTUAL INFERENCES IN

Analyzing Rule 12(b)(6) Motions *to* Dismiss

*By Hon. Iain Johnston**

I. INTRODUCTION

Carl Sandburg's saw about pounding the facts, law, or table teaches that the two most important elements of litigation are facts and law, because without those a party's position is nothing but bluster. Certainly, the facts and law are the cornerstones of litigation. But just as important are the inferences drawn from facts. How do we know this? Well, for one thing, judges tell juries this in every federal trial in the Seventh Circuit. *See* Federal Civil Jury Instructions for the Seventh Circuit 1.11 (2017) ("In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this 'inference.'"); The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit, Preliminary Instructions for Use at the Beginning of Trial (2020 ed.) ("People sometimes look at one fact and conclude from it that another fact exists. This is called an inference."). Typically, it is the inferences drawn from facts that drives a court or jury to a decision. Attorneys know this. For example, attorneys often engage in mortal combat of the Thunderdome variety in their summary judgment statements of material fact. They do so not because an actual dispute about a given fact exists but, instead, because of the inference a party attempts to draw from that fact.

In the context of summary judgment, factual inferences are drawn in the light most favorable to the non-moving party. *Cole v. Bd. of Trs. Of N. Ill. Univ.,* 838 F.3d 888, 895 (7th Cir. 2106). But, critically, those factual inferences must be reasonable. *Rand v. CF Indus.,* 42 F.3d 1139, 1146 (7th Cir. 1994); *Bank Leumi Le-Israel, M.M. v. Lee,* 928 F.2d 232, 236 (7th Cir. 1991). Courts do not draw any conceivable factual inference in the non-movant's favor, only *reasonable* inferences. *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.,* 994 F.3d 869, 876 (7th Cir. 2021); *Skiba v. Ill. Ceent. R.R. Co.,* 884 F.3d 708, 721 (7th Cir. 2018); *Argyropolous v. City of Alton,* 539 F.3d 724, 732 (7th Cir. 2008). Indeed, it is

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hornbook law that a court can only draw reasonable factual inferences when determining summary judgment motions. William W. Schwarzer, Alan Hirsch & David Barrons, *The Analysis and Decision of Summary Judgment Motions,* 139 F.R.D. 441, 493 (1992).

Unfortunately and quizzically, in the context of Rule 12(b)(6) motions to dismiss, the standard for drawing factual inferences is painfully confused, at least in the Seventh Circuit. And tracing the case law back to determine the source of the confusion only results in more confusion. Because the Supreme Court has never specifically and explicitly articulated the standard with respect to a complaint under Federal Rule of Civil Procedure 8, appellate court decisions must provide the standard. But the Seventh Circuit has articulated several different standards for drawing factual inferences, including (a) "all favorable inferences," (b) "all inferences," (c) "all possible inferences," (d) "all permissible inferences," and (e) "all reasonable inferences."

II. Types of Inferences That Can Be Drawn

A. "All Favorable Inferences"

In *Killingsworth v. HSBC Bank Nev., N.A.,* 507 F.3d 614, 618 (7th Cir. 2007), the Seventh Circuit stated that "all favorable inferences" were to be drawn in favor of the non-movant. But in doing so, the *Killingsworth* court cited *Savory v. Lyons,* 469 F.3d 667, 670 (7th Cir. 2006), which held that "all *reasonable* inferences" should be drawn in favor of the non-movant. The *Savory* decision was based on and cited to a long line of cases using the reasonable inference standard. *See Marshall-Mosby v. Corporate Receivables, Inc.,* 205 F.3d 323, 326 (7th Cir. 2000) *citing to Porter v. DiBlasio,* 93 F.3d 301, 305 (7th Cir. 1996) *citing to Travel All Over the World, Inc. v. Kingdom of Saudi Arabia,* 73 F.3d 1423, 1429 (7th Cir. 1996) *citing to City Nat'l Bank of Florida v. Checkers, Simon & Rosner,* 32 F.3d 277, 281 (7th Cir. 1994) (each stating that "all reasonable inferences" should be drawn in favor of the non-movant). So, the premise for the "all favorable inferences" standard is flawed. Moreover, to the extent that "all favorable inferences" were to include any conceivable favorable inference, that standard is not compatible with Supreme Court precedent. *See Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007).

B. "All Inferences"

In *Bielanski v. County of Kane,* 550 F.3d 632, 633 (7th Cir. 2008), the Seventh Circuit stated that "all inferences" (without any other adjective as a qualification) were to be drawn in favor of the non-movant. For those who — for some reason — need a definition of "all," it means "every." https://www.merriam-webster.com/dictionary/all. Strangely, in support of the "all inferences" standard, the *Bielanski* court cited to both *Baker v. Kingsley,* 387 F.3d 649, 660 (7th Cir. 2004) and *Marshall-Mosby v. Corporate Receivables, Inc.,* 205 F.3d 323, 326 (7th Cir. 2000). But both those cases explicitly stated that "all *reasonable* inferences" were to be drawn in favor of the non-movant. *Baker,* 387 F.3d at 660; *Marshall-Mosby,* 205 F.3d at 326 (emphasis added). So, the word "reasonable" was removed for some reason. Whether the removal was an oversight or intentional is unknown. Certainly, however, the word "reasonable" and the concept it encompasses is a big deal in the context reviewing a pleading being challenged by a motion to dismiss. "All inferences," without the modifier "reasonable," would include implausible and even impossible inferences. As explained later, that certainly can't be the standard after *Iqbal/Twombly.* Indeed, relying on *Twombly,* the Seventh Circuit itself stated as much in *EEOC v. Concentra Health Servs., Inc.,* 496 F.3d 773 (7th Cir. 2007) when it articulated the "two-easy-to-clear hurdles"

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of notice pleading:

> First, the complaint must describe the claim in sufficient detail to give the defendant fair notice of what the claim is and the grounds upon which it rests. Second, its allegations must *plausibly* suggest that the plaintiff has a right to relief, raising that *possibility* above a 'speculative level'; if they do not, the plaintiff pleads itself out of court.

Id. at 776 (emphasis added).

So, the "all inferences" standard is likewise based on at least two faulty premises: (1) the case law upon which it was based required the inferences to be reasonable, and (2) the notice pleading standard does not allow for speculative pleadings, which would be included under an "all inferences" standard. *Holman v. Indiana,* 211 F.3d 399, 407 (7th Cir. 2000); *see also Yasak v. Ret. Bd.,* 357 F.3d 677, 679 (7th Cir. 2004) (courts must draw reasonable factual inferences in favor of a non-movant, not inferences that while theoretically plausible are inconsistent with the pleadings).

C. "All Possible Inferences"

In the past, the Seventh Circuit has articulated the "all possible inferences" standard, which allows the court to draw any possible inference in favor of the non-movant. *See Cole v. Milwaukee Area Tch. College Dist.,* 634 F.3d 901, 903 (7th Cir. 2011). This standard originates from *Tamayo v. Blagojevich,* 526 F.3d 1074, 1081 (7th Cir. 2008). *See Cole,* 634 F.3d at 903 *citing to Justice,* 577 F.3d at 771 *citing to Tamayo,* 526 F.3d at 1081; *see also Foxxxy Ladyz Adult World, Inc. v. Village of Dix,* 779 F.3d 706, 711 (7th Cir. 2015) *citing to Hecker v. Deere & Co.,* 556 F.3d 575, 580 (7th Cir. 2009) *citing to Tamayo,* 526 F.3d at 1081. But the *Tamayo* decision rests on a faulty foundation. *Tamayo* relies on two cases: *Killingsworth* and *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007). However, as noted previously, *Killingsworth* relies on *Savory,* which states that courts can only draw "all reasonable inferences" in favor of the non-movant. *Savory,* 469 F.3d at 670 (emphasis added). More importantly, nothing in the citation to *Twombly* supports the "all possible inferences" standard. Indeed, *Twombly's* holding is contrary to such an expansive standard. *Twombly,* 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."). *Twombly* held that complaints must meet a plausibility standard, not a possibility standard. *Twombly,* 550 U.S. at 570 (a complaint need "only enough facts to state a claim to relief that is plausible on its face"). And "possible" and "plausible" have very different meanings. *Twombly,* 550 U.S. at 557 (distinguishing between possibility and plausibility); *see also Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief'."). "Possible" means "something that may or may not be true or actual [or]. . . having an indicated potential." https://www.merriam-webster.com/dictionary/possible. In contrast, "plausible" means "appearing worthy of belief". https://www.merriam-webster.com/dictionary/plausible. Synonyms for "plausible" include "believable," "credible," "likely," and "probable." *Id.* Plausible means more than possible. *Carrero-Ojeda v. Autoridad DeEnergia Electrica,* 755 F.3d 711, 717 (1st Cir. 2014). Nearly anything is "possible," but "plausible" is a much narrower subset of outcomes. For example, when I purchase a single Powerball ticket, it's *possible* that I might become a multi-millionaire. But it's not *plausible.*

D. "All Permissible Inferences"

In another line of cases, the Seventh Circuit has stated that "all permissible inferences" must be drawn in favor of the non-movant. *See, e.g., Cmty. Bank of Trenton v. Schnuck Mkts. Inc.,* 887 F.3d 803, 811 (7th Cir. 2018). This line of cases can be traced back to *Fortres Grand Corp. v. Warner Bros. Entm't.,* 763 F.3d 696, 700 (7th Cir. 2014). For example, *Burton v. Ghosh,* 961 F.3d 960, 962 (7th Cir. 2020) relies on *Fortres.* Moreover, the only other "all permissible inferences" line of cases likewise leads back to *Fortres. See Bank of Trenton,* 887 F.3d at 811 *citing to West Bend Mut. Ins. Co. v. Schumacher,* 844 F.3d 670, 675 (7th Cir. 2016) *citing to Bible v. United Standard Aid Funds, Inc.,* 799 F.3d 633, 639 (7th Cir. 2015) *citing to Fortres,* 763 F.3d at 700. So, *Fortres* is the Typhoid Mary of the "all permissible inferences" standard. But tracing back from *Fortres* leads to a different standard; namely, the "all possible inferences" standard. *See Fortres,* 763 F.3d at 700 *citing to Active Disposal, Inc. v. City of Darien,* 635 F.3d 883, 886 (7th Cir. 2011) *citing to Justice v. Town of Cicero,* 577 F.3d 768, 771 (7th Cir. 2009) *citing to Tamayo v. Blagojevich,* 526 F.3d 1074, 1081 (7th Cir. 2008) ("We construe the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in her favor.") (emphasis added). So, the

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all permissible inferences" standard rests on a different standard, which is problematic — assuming that one were to understand that "possible" and "permissible" are very different, which they are. Just as "possible" and "plausible" are different so too are "permissible" and "possible." "Permissible" means "allowable." https://www.merriam-webster.com/dictionary/permissible. Again, "possible" means "something that may or may not be true or actual [or]. . . having an indicated potential." https://www.merriam-webster.com/dictionary/possible. In fact, the "all permissible inferences" standard is particularly unhelpful because "permissible" just means what's allowable, without stating what kind of inferences the district court can draw in favor of the non-movant. The "all permissible inferences standard" merely begs the question of what inferences may be drawn in favor of the non-movant. The "all permissible inferences" limits inferences based upon the substantive law at issue, which makes sense. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588 (1986) (in summary judgment context substantive law limited the range of permissible inferences to be drawn from ambiguous evidence). In this context, "permissible" goes to the type of substantive evidence that can be considered, not the kind of inference that can be drawn.

E. "All Reasonable Inferences"

For at least the last forty years, the Seventh Circuit has continually stated that "all reasonable inferences" were to be drawn in the non-movant's favor when determining a Rule 12(b)(6) motion to dismiss. *See, e.g., Calderone v. City of Chicago,* 979 F.3d 1156, 1161 (7th Cir. 2020); S*hipley v. Chicago Bd. of Election Comm'rs,* 947 F.3d 1056, 1060 (7th Cir. 2020); *Alarm Detection Sys. v. Vill. of Schaumburg,* 930 F.3d 812, 821 (7th Cir. 2019); *Powe v. City of Chicago,* 664 F.2d 639, 642 (7th Cir. 1981); *see also Roberts v. City of Chicago,* 817 F.3d 561, 564 (7th Cir. 2016); *Chaney v. Suburban Bus Div. of the Regional Transp. Auth.,* 52 F.3d 623, 626-27 (7th Cir. 1995); *Dawson v. General Motors Corp.,* 977 F.2d 369, 372 (7th Cir. 1992). Allowing district courts to draw "all reasonable inferences" in favor of the non-movant is the prevailing standard in the Seventh Circuit. For example, through the late 1990s into the early 2000s, the "all reasonable inferences" standard appears to be the only standard articulated by the Seventh Circuit. *See, e.g., Baker v. Kingsley,* 387 F.3d 649, 660 (7th Cir. 2004); *McCullah v. Gadert,* 344 F.3d 655, 657 (7th Cir. 2003); *Albany Bank & Trust Co. v. Exxon Mobil Corp.,* 310 F.3d 969, 971 (7th Cir. 2002); V*orhees v. Naper Aero Club, Inc.,* 272 F.3d 398, 401 (7th Cir. 2001); *Jones v. Simek,* 193 F.3d 485, 489 (7th Cir. 1999).

I. The Reasonable Inference Standard is the Correct Standard

As already shown, the other standards rely upon faulty premises, are inconsistent with *Twombly/Iqbal,* and are contrary to the rule applied during summary judgment. That should be sufficient to reject those standards. But the "all reasonable inference" standard is the correct standard when drawing factual inferences in deciding a Rule 12(b)(6) motion to dismiss for four other reasons, too.

First, although not dispositive, the research establishes that the "all reasonable inferences" standard is by far the most prominent standard used by the Seventh Circuit for decades. This is not surprising. Although history does not necessarily control, it certainly helps guide the determination absent a good reason to abandon the precedent. O. Holmes, *The Common Law,* p. 1 (1881) ('The life of the law has not been logic: it has been experience.")

Second, other courts agree that in determining a motion to dismiss, the court must draw all *reasonable* factual inferences, not all *conceivable* inferences, in favor of the non-moving party. *See, e.g., Centre-Point Merchant Bank v. American Express Bank,* 913 F. Supp. 202, 205 (S.D.N.Y. 1996) (*citing Correa-Martinez v. Arrillaga-Belendez,* 903 F.2d 49, 58-59 (1st Cir. 1990). In fact, the "all reasonable inferences" standard is used by every other circuit. *See Santiago v. Puerto Rico,* 655 F.3d 61, 72 (1st Cir. 2011); *Taylor v. Vt. Dep't of Educ.,* 313 F.3d 768, 776 (2d Cir. 2002); *DeBenedictis v. Merrill Lynch & Co.,* 492 F.3d 209, 215 (3d Cir. 2007); *Mays v. Sprinkle,* 992 F.3d 295, 305 (4th Cir. 2021); *Lormand v. U.S. Unwired, Inc.,* 565 F.3d 228, 232 (5th Cir. 2009); *Lipman v. Budish,* 974 F.3d 726, 746 (6th Cir. 2020); *Morton v. Becker,* 793 F.2d 185, 187 (8th Cir. 1986); *Brown v. Medtronic, Inc.,* 628 F.3d 451, 461 (8th Cir. 2010) (court not required to draw unreasonable inferences); *Doe v. United States,* 419 F.3d 1058, 1062 (9th Cir. 2005); *Doe v. Woodard,* 912 F.3d 1278, 1285 (10th Cir. 2019); *Randall v. Scott,* 610 F.3d 701, 705 (11th Cir. 2010); *In re Harman,* 791 F.3d 90, 99-100 (D.C. Cir. 2015); *CODA Dev. s.r.o. v. Goodyear Tire & Rubber,* 916 F.3d 1350, 1361 (Fed. Cir. 2019).

Third, the Seventh Circuit and district courts seem to instinctively recognize that the "all reasonable inferences" standard is the proper standard even when citing to Seventh Circuit precedent articulating one of the other standards. For example, numerous Seventh Circuit cases cite to *Bielanski* (which allows for "all

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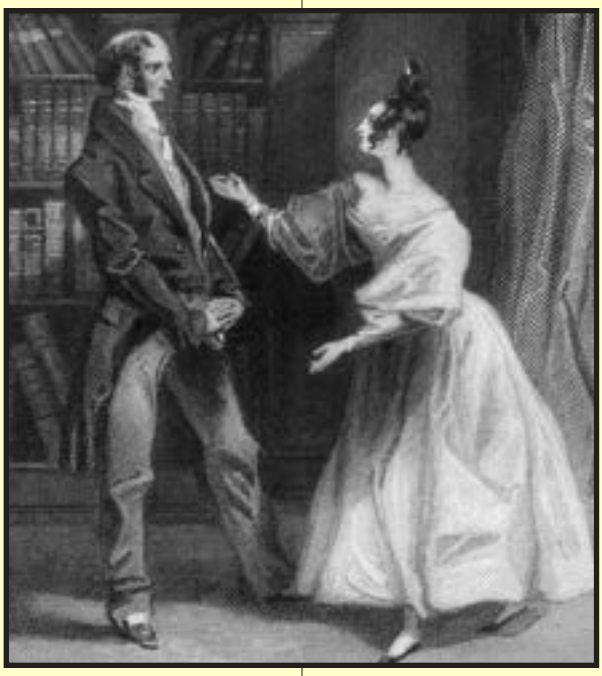
inferences") but add the word "reasonable" to create the "all reasonable inferences" standard. *See, e.g., Tobey v. Chibucos,* 890 F.3d 634, 645 (7th Cir. 2018); *Ray v. City of Chicago,* 629 F.3d 660, 662 (7th Cir. 2011); *Brooks v. City of Chicago,* 564 F.3d 830, 832 (7th Cir. 2009). Similarly, despite citing to cases using a different standard, district courts nevertheless state and use the "all reasonable inferences" standard. *See, e.g., Stough Assocs., L.P. v. Hage,* 2020 U.S. Dist. LEXIS 19044, *11 (S.D. Ind. Feb. 4, 2020) (*citing to Bielanski* but using "all reasonable inferences" standard); *In re Dealer Mgmt. Sys. Antitrust Litig.,* 362 F. Supp. 3d 510, 536 n.11 (N.D. Ill. 2019) (*citing to Killingworth* but using "all reasonable inferences" standard); *Johnson v. Paul,* 2019 U.S. Dist. LEXIS 129432, *2-3 (N.D. Ind. Aug. 1, 2019) (*citing to Bielanksi* but using "all reasonable inferences" standard); *Doe v. Purdue Univ.,* 281 F. Supp. 3d 754, 764 (N.D. Ind. 2017) (*citing to Tamayo* but using "all reasonable inferences" standard); *Johnson v. Melton Truck Lines, Inc.,* 2016 U.S. Dist. LEXIS 136451, *2 n.2 (N.D. Ill. Sept. 30, 2016) (*citing to Fortres* but using "all reasonable inferences" standard); *Evergreen Square of Cudahy v. Wis. Hous. & Econ. Dev. Auth.,* 105 F. Supp. 3d 907, 910 (E.D. Wisc. 2015) (*citing to Foxxxy Ladyz* but using "all reasonable inferences" standard); *Serv. By Air, Inc. v. Phoenix Cartage & Air Freight, LLC,* 78 F. Supp. 3d 852, 860 (N.D. Ill. 2015) (*citing to Killingsworth* but using "all reasonable inferences" standard). The most likely explanation for this happening is that courts intuitively understand that reasonableness is the correct standard.

Finally, the "all reasonable inferences" standard is consistent with American jurisprudence. The term "reasonable" is the bedrock of American law. The Constitution protects against "unreasonable searches and seizures." U.S. Const. Amend. IV.



Criminal defendants cannot be convicted unless the government establishes guilt beyond a reasonable doubt. *Leland v. Oregon,* 343 U.S. 790, 802-03 (1952); *Bartlett v. Battaglia,* 453 F.3d 796, 800 (7th Cir. 2006). The term is used in determining whether Constitutional rights have been violated. *See U.S. v. Bagley,* 473 U.S. 667, 682 (1985) (*Brady and Giglio* violated if failure to disclose had a "reasonable probability" of a different outcome). In tort law, reasonableness is the focus of parties' actions. *See, e.g., Kennedy v. Venrock Assocs.,* 348 F.3d 584, 592 (7th Cir. 2003) (reasonable reliance required for fraud). And, not surprisingly, the concept of reasonableness is strewn throughout the Federal Rules of Civil Procedure. *See, e.g.,* Fed. R. Civ. P. 11(b); 15(d); 16(c)(1); 23(c)(2)(B), (h); 26(g)(1), (3); 30(b), (d)(g); 34(a)(1)(B), (b)(2)(E)(ii); 36(a)(4); 37; 50(a). Reasonableness is the go-to standard in the law. *See* Michael D. Maurer Jr., *Desperate Times, Desperate Measures: The Need for Consistent Standards in the Treatment of U.S. Citizens Designated Enemy Combatants,* 5 Barry L. Rev. 153, 239 (2005) ("After all, 'reasonable' is probably the most commonly used word in American jurisprudence."); David W. Cunis, California v. Greenwood: *Discarding the Traditional Approach to the Search and Seizure of Garbage,* 28 Cath. U. L. Rev. 543 n. 4 (1989) ("'Reasonable' is one of the most indefinite but commonly used words in legal language.").

II. Conclusion

Federal district courts in the Seventh Circuit decide Rule 12(b)(6) motions on a nearly weekly basis, if not more often. The motions are filed constantly — probably much more often than district court judges would like. *See Turner v. Pleasant,* 663 F.3d 770, 775 (5th Cir. 2011) (motions to dismiss rarely granted). It is critical that the Seventh Circuit uses a consistent standard to guide the district courts in these determinations. And it is likewise critical that the consistent standard be correct. The correct standard is the "all reasonable inferences" standard.

Selected eDiscovery *and* ESI Case Law

FROM 2021-22

*By Philip J. Favro, ed.**

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Cloud

Fast v. GoDaddy.com LLC, 340 F.R.D. 326 (D. Ariz. 2022). The court imposed sanctions against plaintiff under Rule 37(e)(1) after determining that she failed to take reasonable steps to preserve relevant information on her iPhone 12. Plaintiff asserted that she preserved relevant information on her phone up until the time it was purportedly stolen during the litigation. Defendants contested this assertion, arguing that relevant information was lost from the phone because plaintiff failed to timely back up its data to her iCloud account. District Judge David Campbell agreed with defendants, finding that plaintiff had a continuing preservation duty and that she failed to regularly back up the contents of her iPhone. While plaintiff argued that she lacked sophistication to enable an iCloud backup and "did the best she could," Judge Campbell rejected this argument. Judge Campbell cited the 2015 advisory committee note to Rule 37(e), which observed that a court "should consider a party's sophistication in determining whether the party took reasonable steps to preserve ESI." Based on plaintiff's repeated written representations regarding her technical skills (*e.g.,* "I'm the smartest person technically in the room"), Judge Campbell held that plaintiff *had* the sophistication to back up her phone and that failing to do so constituted a failure to take reasonable steps to preserve relevant ESI. *See* discussion under **Ephemeral Messaging,** \pard fs24 **Ethics, Litigation Holds** and **Preservation, Sanctions — Other FRCP Provisions, Sanctions — Rule 37(e), Social Media,** and **Text Messages.**

Prudential Def. Sols., Inc. v. Graham, No. 20-11785, 2021 WL 4810498 (E.D. Mich. Oct. 15, 2021). The court held that defendants failed to take reasonable steps to preserve relevant smartphone communications and imposed sanctions on defendants pursuant to Rule 37(e). Among other things, the court found that defendant Jake Graham ("Graham") removed *all* data associated with the Apple iPhone his employer issued to him by wiping both his phone and his corresponding iCloud account to protect the personal information he had on the phone. In addition, Graham lost (or had stolen) a new iPhone he subsequently acquired and then — "just to be safe" — wiped his iCloud account again to protect his personal information. Sarcastically characterizing this and defendants' other spoliation as "a remarkable run of bad luck," the court criticized Graham for repeatedly wiping the data from his iCloud account, characterizing iCloud as "the very mechanism that would have allowed him to wipe his phone of private or personal information while properly preserving data relevant to this litigation." Regarding his spoliation of data from the second iPhone, the court opined that Graham could have taken any number of more effective steps to safeguard information on his phone other than wiping his iCloud account, such as activating the "Find My iPhone" geolocation feature; using the iPhone "Activation Lock;" "requiring an Apple ID and password to reactivate the iPhone;" or deactivating "Apple Pay" and disabling the availability of other financial data. *See* discussion under **Sanctions — Rule 37(e).**

Cooperation

Kinon Surface Design v. Hyatt Int'l Corp., No. 19 C 7736, 2022 WL 787956 (N.D. Ill. Mar. 15, 2022). In connection with cross-motions for discovery relief in this copyright infringement action, the court highlighted the need for cooperation to better ensure a "somewhat satisfactory" resolution of their discovery disagreements. Plaintiffs sought 19 categories of documents and ESI at the close of discovery, requests that Magistrate Judge Jeffrey Cole determined to be either lacking in relevance or disproportionate to the needs of the case given information plaintiffs already obtained from defendants. While Judge Cole granted several aspects of defendants' motion to compel further responses to various interrogatories and document requests, he did so only after admonishing the parties against reflexive motion practice on discovery issues. Judge Cole reasoned that judicial discretion — which occupies a range rather than a point on the spectrum of decision-making — could result in a viable order against a party whose positions are arguably meritorious and "right" under the circumstances. Rather than gambling on the outcome, Judge Cole encouraged the parties to consider cooperative advocacy resulting in a "negotiated outcome" to better secure sought-after discovery relief. *See* discussion under **Proportionality.**

Robinson v. De Niro, No. 19-CV-9156 (KHP), 2022 WL 229593 (S.D.N.Y. Jan. 26, 2022). In connection with denying defendants' motion to compel, the court chided the parties for

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***The editor wishes to recognize the following individuals for their contributions to this annotated bibliography of eDiscovery and ESI case law: Thomas Y. Allman, Michael Berman, the Honorable Allison Goddard, Ross Gotler, Ruth Hauswirth, the Honorable Iain Johnston, Robert Keeling, David Lumia, the Honorable Andrew Peck (ret.), the Honorable Michael Robinson, Robert Snow, the Honorable Elizabeth Stafford, the Honorable Thomas I. Vanaskie (ret.), and Kenneth J. Withers.*

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not engaging in more cooperative advocacy. The court observed that the parties "appear to have lost sight of the fact that zealous representation does not require motions to be filed on every minutiae of discovery" and that their mutual distrust had blinded them from recognizing the potential for informally resolving disputes such as defendants' motion to compel. *See* discussion under **Proportionality.**

Cross-Border

In re Valsartan, Losartan, & Irbesartan Prod. Liab. Litig., No. MDL 19-2875(RBK/KW), 2021 WL 3604808 (D.N.J. Aug. 12, 2021), *aff'd,* No. MDL 2875 (RBK), 2021 WL 6010575 (D.N.J. Dec. 20, 2021). The court affirmed a report and recommendation issued by the court-appointed special master, Thomas I. Vanaskie (ret.), regarding the production of 20 documents from the People's Republic of China that several defendants argued were protected from disclosure by the Chinese State Secrets Law. After evaluating the five factors from the Supreme Court's *Aérospatiale* decision, along with two additional factors from *Wultz v. Bank of China, Ltd.,* 910 F. Supp. 2d 548, 553 (S.D.N.Y. 2012), the court ordered defendants to produce the 20 documents to plaintiffs, subject to various restrictions on the circulation and disclosure of those documents.

Criminal ESI

United States v. Confer, No. 20-13890, 2022 WL 951101 (11th Cir. Mar. 30, 2022). *See* discussion under **Ephemeral Messaging.**

United States v. Cumbie, 28 F.4th 907 (8th Cir. 2022). *See* discussion under **ESI Evidence.**

Sec. & Exch. Comm'n v. Xia, No. 21-cv-5350, 2022 WL 377961 (E.D.N.Y. Feb. 8, 2022). *See* discussion under **Text Messages.**

Matter of Search of Info. that is Stored at Premises Controlled by Google LLC, No. 21-SC-3217 (GMH), 2021 WL 6196136 (D.D.C. Dec. 30, 2021). *See* discussion under **Nontraditional Sources of ESI.**

Discovery Process

Vasoli v. Yards Brewing Co., LLC, No. CV 21-2066, 2021 WL 5045920 (E.D. Pa. Nov. 1, 2021).

In this employment discrimination action, defendants unilaterally selected 27 search terms and a date range to identify relevant, responsive ESI. After this search proved demonstrably inadequate in later depositions, the court ordered defendants to make available for a Rule 30(b)(6) deposition a representative who could testify regarding how defendants conducted their search for relevant information. In response, defendants argued that such a deposition would intrude on privileged communications and attorney work product. The court found defendants' position unavailing and reasoned that "the practical steps taken by an attorney and/or her client to identify responsive documents do not necessarily encroach on the thought processes of counsel. Instead, the steps used to identify responsive documents go to the underlying facts of what documents are responsive to Plaintiffs' documents requests."

Ephemeral Messaging

United States v. Confer, No. 20-13890, 2022 WL 951101 (11th Cir. Mar. 30, 2022). In the context of a motion to suppress, the U.S. Court of Appeals for the Eleventh Circuit discussed the ephemeral features associated with Snapchat and the measures that a law enforcement officer took to bypass those features to preserve text messages and images that the accused exchanged with the officer. In particular, the Eleventh Circuit mentioned the ephemeral nature of content generally exchanged over Snapchat; that the Snapchat application would alert the accused if the officer used his smartphone's screenshot feature to capture message content; and that the officer used a digital camera to bypass the screenshot warning and thereby capture the accused's messages.

Fast v. GoDaddy.com LLC, 340 F.R.D. 326 (D. Ariz. 2022). District Judge David Campbell imposed sanctions against plaintiff for improperly disposing of relevant messages from Telegram, an ephemeral messaging application. Judge Campbell found that the circumstances surrounding plaintiff's use of Telegram to communicate with a former colleague ("Mudro"), who was helping plaintiff marshal evidence to support her discrimination claims against GoDaddy, suggested their messages would have reflected relevant, responsive information. For example, after plaintiff began using Telegram, plaintiff did not exchange messages with Mudro on Facebook Messenger (their preferred medium for communication) for five consecutive days.

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Nor were there Facebook Messenger messages between plaintiff and Mudro discussing the "stuff" plaintiff previously indicated she wanted to share with Mudro over Telegram. Finally, no messages were ever found on plaintiff's Telegram account. While plaintiff argued that the lack of messages ("no messages here yet") suggested she never communicated with Mudro on Telegram, Judge Campbell disagreed. In particular, the court spotlighted the automated disposition feature Telegram offers its users — "A hallmark of Telegram is that a user can delete sent and received messages for both parties" — and held that these collective details, supported by the testimony of defendant's forensics expert, met Rule 37(e)(2)'s intent-to-deprive requirement. The court additionally found plaintiffs' actions — deleting relevant text messages — prejudiced defendant and that Rule 37(e)(1) sanctions were likewise appropriate to remedy that harm. See discussion under **Clouds, Ethics, Sanctions — Other FRCP Provisions, Sanctions — Rule 37(e), Social Media,** and **Text Messages.**

Pable v. Chicago Transit Auth., No. 19 CV 7868, 2021 WL 4789028 (N.D. Ill. Sept. 13, 2021). The court refused to enter an order directing plaintiff to disable the "disappearing messages" feature on the Signal ephemeral messaging application on his mobile phone. Defendant had sought this relief through motion practice, arguing that plaintiff — who brought a whistle-blower lawsuit against defendant — had not properly preserved relevant text messages exchanged with his former supervisor over Signal and that disabling the ephemerality feature was essential to ensuring plaintiff satisfied his common law duty to preserve. Magistrate Judge Heather McShain rejected this argument, holding (among other things) that such an order would not be an effective means of preserving relevant Signal messages. Judge McShain observed that plaintiff's messages would not be retained irrespective of the sought-after order if the "disappearing messages" function was enabled on the former supervisor's Signal application. Nor could the court bind the former supervisor by such an order, as Judge McShain noted that he was not a party to the litigation.

ESI Evidence

United States v. Cumbie, 28 F.4th 907 (8th Cir. 2022). The U.S. Court of Appeals for the Eighth Circuit affirmed the trial court's refusal to admit a certain text message as evidence in the criminal prosecution of defendant over his production of child pornography and extortion. The text message at issue was purportedly a communication from defendant's former roommate to defendant's wife in which the former roommate claimed responsibility for defendant's crimes. Defendant attempted to introduce the text message at trial multiple times despite the fact that the message was clearly hearsay without an applicable exception. The trial court rejected these attempts and additionally found the message was both "unreliable" and "untrustworthy" given the existence of evidence that defendant's wife got possession of the roommate's phone and sent the message to herself. The Eighth Circuit agreed, holding that the "proffered evidence demonstrated that [defendant's wife] sent the text message to herself to support [defendant's] trial defense."

Weinhoffer v. Davie Shoring, Inc., 23 F.4th 579, 580 (5th Cir. 2022). In *Weinhoffer,* the U.S. Court of Appeals for the Fifth Circuit held that a trial court committed reversible error when it admitted a paper printout of an auction ("Auction") website's terms and conditions that was not properly authenticated and did not satisfy the hearsay rule's business records exception. At trial, the court allowed defendant to present a paper printout of the Auction's terms and conditions over the trustee's objection, finding that subpoenaed testimony from the Auction's office manager satisfied Federal Rule of Evidence ("FRE") 901's sufficiency standard. The Fifth Circuit disagreed and instead found the office manager did not have sufficient "direct knowledge" to authenticate the paper printout, since the Auction's terms and conditions were hosted by a third party ("Proxbid"), and the office manager was unfamiliar with Proxbid's recordkeeping procedures. That same lack of familiarity with Proxbid's recordkeeping practices likewise doomed defendant's assertion that the office manager was a "custodian or another qualified witness" whose testimony could satisfy the business records exception to the hearsay exclusion rule. *See* Fed. R. Evid. 803(6)(D). Finally, the Fifth Circuit found that it was reversible error for the trial court to take judicial notice of the terms and conditions reflected on an archived copy of the Auction's webpage retrieved from the Wayback Machine "because a private internet archive falls short of being a source whose accuracy cannot reasonably be questioned as required by [FRE] 201."

Carolina v. JPMorgan Chase Bank NA, No. CV-19-05882-PHX-DWL, 2021 WL 5396066 (D. Ariz. Nov. 17, 2021). In connection with an order granting defendants' motion for summary judgment, the court held that an email was properly authenticated as evidence under FRE 901(b)(4) given its "distinctive characteristics."

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Those characteristics included the following: The email header of a forwarded copy of the message; "detailed signatures" from defendant JPMorgan Chase Bank's employees who were involved in the email string; plaintiff's former employee identification number; and a discussion memorializing various events confirmed by other admissible evidence. The court reasoned that as "all of this corroborating evidence has itself been separately found to be authenticated, the 'appearance, contents, [and] substance . . . of the item, taken together with all of the circumstances,' authenticate this exhibit under Rule 901(b)(4)."

ESI Protocols

In re Actos Antitrust Litig., ---F.R.D.---, 2022 WL 949798 (S.D.N.Y. Mar. 30, 2022). The court held that defendants had improperly used email threading to produce only the most inclusive messages from relevant email threads because they did so without disclosing or otherwise reaching an agreement with plaintiffs beforehand regarding their use of email threading. Magistrate Judge Stewart Aaron found that the method of email threading defendants used — which suppressed all but the most inclusive messages — violated Rule 34 because it impaired plaintiffs' "ability to conduct searches of the emails for senders and recipients." In particular, Judge Aaron observed that plaintiffs would have reduced ability to conduct searches by date range, and defendants' production had deprived plaintiffs from being able to identify certain email recipients, including, but not limited to, those who may have been blind carbon-copied on unproduced "lesser included" messages. Judge Aaron ultimately ordered defendants to produce responsive "earlier-in-time emails" that defendants had suppressed and, citing *The Sedona Principles, Third Edition,* generally encouraged litigants to negotiate "a comprehensive ESI protocol" to address issues such as email threading. *See* discussion under **Privilege Logging.**

Raine Grp. LLC v. Reign Cap., LLC, No. 21-cv-1898, 2022 WL 538336 (S.D.N.Y. Feb. 22, 2022). In this action involving trademark infringement and unfair competition, Magistrate Judge Katharine Parker evaluated a variety of disputed provisions for which the parties requested inclusion in an ESI protocol. Among other things, defendant requested that the ESI protocol declare that "each party has an independent obligation to conduct a reasonable search in all company files and to produce nonprivileged and responsive documents to pending document requests." Defendant also argued that the ESI protocol should assert that "both parties have an independent obligation to search all files from all employees that could reasonably contain responsive documents to the parties' document requests." Judge Parker rejected the proposed provisions, finding them unnecessary given that the parties' search obligations are memorialized by Rule 26(g)'s reasonable inquiry requirement. Judge Parker also held that provisions seeking to impose an obligation to search "all company files" or "all files from all employees" went beyond the scope of the Rules. Instead, the Rules require parties to first identify sources with relevant information in their possession, custody, or control and then determine the best way to preserve, collect, and search that information. As part of their effort to conduct a reasonable search, Judge Parker observed that parties may decide to remove sources of relevant information that could be superfluous or inaccessible and may impose a date range limiting the production of relevant information, all while encouraging parties to be cooperative regarding these and other discovery duties.

Ethics

Fast v. GoDaddy.com LLC, 340 F.R.D. 326 (D. Ariz. 2022). The court expressed concern regarding the actions of plaintiff's lawyer during the discovery process given both the prolific and blatant nature of plaintiff's spoliation of ESI. *See* discussion under **Clouds, Ephemeral Messaging, Sanctions — Other FRCP Provisions, Sanctions — Rule 37(e), Social Media,** and **Text Messages.** Even though the court did not impose sanctions on the lawyer, District Judge David Campbell observed that counsel "had an affirmative obligation to ensure that his client conducted diligent and thorough searches for discoverable material and that discovery responses were complete and correct when made."

Ondigo LLC v. intelliARMOR LLC, No. CV 20-1126, 2022 WL 798627 (E.D. Pa. Mar. 16, 2022). The court found that defendant and its counsel failed to conduct a reasonable search for relevant information *after* defendant turned over previously unproduced relevant emails in response to a request from the court for such information after the completion of a bench trial. Given the speed at which defendant was able to identify and produce the emails in question, the court held that the certification defendant's counsel made pursuant to Rule 26(g) when counsel previously signed the client's discovery responses was not reasonable and accordingly imposed sanctions on defendant. *See* discussion under Sanctions — **Other FRCP Provisions.**

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Nuvasive, Inc. v. Absolute Med., LLC, No. 6:17-CV-2206-CEM-GJK, 2021 WL 3008153 (M.D. Fla. May 4, 2021). In connection with the court's tentative determination to enter default judgment against defendants, the court found that one of defendants' lawyers failed to take reasonable steps to preserve relevant evidence and also helped defendants as they "*intentionally destroyed* vast amounts of evidence." *See Nuvasive v. Absolute Medical, LLC,* No. 6:17-cv-2206-CEM-GJK (M.D. Fla. Jan. 10, 2022), ECF No. 371) (emphasis in original). That evidence included an entire email domain hosted by Google that defendants shut down after the duty to preserve attached and which their counsel represented "was okay to close." The court expressed concern regarding counsel's advice to close the domain, observing that "a member of the Bar is expected to have significantly more legal sophistication than a litigant" and observed that "advocacy certainly does not include instructing a litigant that it is acceptable to destroy evidence." In setting a show-cause hearing to determine why defendant's counsel should not be sanctioned, the court declared that "[c]onduct such as that engaged in here must not, can not and will not be tolerated." *See* discussion under **Sanctions — Rule 37(e)** and **Text Messages.**

Mod. Remodeling, Inc. v. Tripod Holdings, LLC, No. CV CCB-19-1397, 2021 WL 3852323 (D. Md. Aug. 27, 2021). The court refused to impose sanctions on counsel for defendants despite their widespread spoliation of relevant emails, text messages, and other ESI. *See* discussion under **Sanctions — Rule 37(e)** and **Text Messages.** Plaintiff had argued that Rule 26(g) sanctions were appropriate given that counsel allegedly "took no action to place a litigation hold on their clients' text messages or emails." The court disagreed, observing that "while better practice is for counsel to instruct their clients to preserve their text messages, it is not necessarily their responsibility to ensure their client has done so." In support of its holding on this issue, the court cited *Paisley Park Enters., Inc. v. Boxill,* 330 F.R.D. 226 (D. Minn. 2019), which held that the client bore the ultimate responsibility for preserving relevant information.

Federal Rule of Evidence 502(d)

Sleep No. Corp. v. Young, No. 20-CV-1507 (NEB/ECW), 2021 WL 5644322 (D. Minn. Dec. 1, 2021). The court concluded that nonwaiver order provisions separately memorialized in the parties' Rule 26(f) report (limited to inadvertence), multiple pretrial scheduling orders (limited to inadvertence), a "stipulated e-Discovery order" (unlimited application), and protective order (limited to inadvertence) only provided protection under Federal Rule of Evidence ("FRE") 502(d) for documents the parties inadvertently disclosed in discovery. Based on its determination that the nonwaiver order was limited to inadvertent productions, the court ordered defendants to produce several privileged patent prosecution documents that it held defendants voluntarily disclosed to (and then clawed back from) plaintiff during discovery. In contrast, the court found that defendants could shield various other privileged documents from discovery because the evidence confirmed they were inadvertently produced in discovery. Finally, the court rejected plaintiff's contention that defendants' voluntary production of privileged documents and ensuing waiver had resulted in a subject-matter waiver of defendants' entire portfolio of privileged patent prosecution documents pursuant to FRE 502(a). According to the court, such a finding would be manifestly unfair under the circumstances.

Form of Production

Porter v. Equinox Holdings, Inc., No. RG19009052, 2022 WL 887242 (Cal. Super. Mar. 17, 2022). The court held that defendant, in response to plaintiffs' discovery requests, did not need to produce every communication that referenced a linked document in family relationships as a responding party ordinarily would do with emails and attachments. Instead, the court — following *Nichols v. Noom,* 20-cv-3677, 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021), *aff'd,* ECF No. 324 (S.D.N.Y. Apr. 30, 2021) — directed plaintiffs to notify defendant if they are unable to find "key" linked documents referenced in produced communications and ordered defendant, in response, to identify or produce the linked documents at issue from its Google Drive or SharePoint cloud sites.

Zhulinska v. Niyazov L. Grp., P.C., No. 21-CV-1348 (CBA), 2021 WL 5281115, at *4 (E.D.N.Y. Nov. 12, 2021). In this sexual harassment case, plaintiffs filed a motion to compel defendants to produce relevant emails with metadata after defendants represented they would produce PDF versions or printed copies of the requested emails. In response, the court found neither plaintiffs' nor defendants' positions were properly justified. On the one hand, the court indicated that plaintiffs had not established that the metadata they requested was relevant. And yet, the court reasoned that Rule 34 forbade defendants from producing responsive emails in a format that inhibited

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plaintiffs' ability to search the information. Against this backdrop, the court ordered defendants to produce the emails at issue "in a text-searchable format" and directed the parties to meet and confer regarding an appropriate form of production.

Litigation Holds and Preservation

Weatherspoon v. 739 Iberville, LLC, No. CV 21-0225, 2022 WL 824618 (E.D. La. Mar. 18, 2022). The court questioned the steps defendant took to identify and preserve relevant information for the instant litigation. Magistrate Judge Karen Wells Roby observed that the preservation efforts undertaken by defendant and its counsel were limited to an oral litigation hold instruction, which she reasoned was insufficient to safeguard the preservation of relevant information. Judge Roby also noted with disapproval that counsel did not issue a subsequent written hold instruction to defendant or take follow-up steps to confirm that defendant understood the nature of the relevant information that needed to be preserved. Fearing that relevant text messages, emails, electronic personnel records, and paper documents may have been spoliated (defendant's counsel blamed Hurricane Ida for the loss of relevant paper records), Judge Roby ordered the parties to submit additional briefing to determine the full nature and extent of defendant's preservation efforts and whether unproduced relevant information could still be identified and preserved. *See* discussion under **Rule 34 Objections and Responses.**

Alabama Aircraft Indus., Inc. v. Boeing Co., No. 20-11141, 2022 WL 433457 (11th Cir. Feb. 14, 2022). In affirming the district court's Rule 37(e) sanctions order against defendant The Boeing Company ("Boeing"), the U.S. Court of Appeals for the Eleventh Circuit confirmed that a litigant's duty to preserve relevant evidence arises "when litigation is 'pending or reasonably foreseeable' at the time of the alleged spoliation." Following that standard, the court affirmed the district court's ruling that Boeing should have reasonably foreseen litigation involving plaintiff before deleting relevant emails that resulted in the issuance of the adverse inference instruction against Boeing. The court observed there was no clear error in the district court's finding for, among other reasons, Boeing had previously determined that it could "expect an ugly, lengthy legal battle" if it terminated its business relationship with plaintiff. Once Boeing did so, the litigation Boeing anticipated with plaintiff became a reality, and it failed to take reasonable steps thereafter to preserve the emails in question. *See* discussion under **Sanctions — Rule 37(e).**

Fast v. GoDaddy.com LLC, 340 F.R.D. 326 (D. Ariz. 2022). *See* discussion under **Clouds.**

La Belle v. Barclays Cap. Inc., 340 F.R.D. 74 (S.D.N.Y. Jan. 2022). *See* discussion under **Sanctions — Rule 37(e).**

Medidata Sols., Inc. v. Veeva Sys., Inc., No. 17 CIV. 589, 2021 WL 4902462 (S.D.N.Y. Sept. 22, 2021). The court held that defendant took reasonable steps to satisfy its preservation duty despite suffering the loss of relevant data. In this trade secret dispute, defendant issued "a companywide litigation hold" to preserve relevant ESI on various information systems and computer devices. In an effort to limit the scope of preservation, defendant declined to search for relevant ESI that its employees might have in their personal repositories or devices and disclosed this to plaintiffs. Plaintiffs offered no objections and then adopted the same approach for their discovery responses. Two and a half years into the litigation, defendant's counsel learned that an employee had hundreds of thousands of documents belonging to plaintiffs on a personal hard drive at his home. Defendant immediately informed the employee that he must hold the documents, notified plaintiffs about the development, and jointly arranged with plaintiffs for a service provider to take possession of and then analyze the employee's personal hard drive. Nevertheless, the employee undertook certain actions in the meantime that eliminated "file metadata," which could have shown which of plaintiffs' documents he accessed for his work and the dates and times when he did so. With critical evidence for their claims now gone, plaintiffs sought an adverse inference instruction against defendant. In response, the court denied the sanctions motion, holding that defendant took proper steps to hold relevant ESI, including "general and individualized litigation holds." In addition, the court detailed the suitability of defendant's subsequent remedial measures to identify and preserve relevant ESI in the employee's personal possession. The court reasoned that plaintiffs had no evidence suggesting defendant instructed the employee to disobey the hold and eliminate the relevant file metadata. Indeed, the evidence reflecting defendant's remedial actions — which allowed for the recovery of "many details of specific instances when [the employee] accessed" plaintiffs' documents — all suggested otherwise. Finally, the court dismissed plaintiffs' assertion that

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defendant should have been more proactive at the outset of the litigation in identifying the documents in the employee's personal possession. With the benefit of "hindsight," the court reasoned that such a decision now, of course, made perfect sense. But without such hindsight and viewed from the perspective of a typical litigant in this situation, the court held that defendant's "actions are consistent with the normal discovery process in complex civil litigation, in which general document holds are imposed on party employees, and then a huge number of attorney hours are expended reviewing millions of documents from dozens of custodians."

Prudential Def. Sols., Inc. v. Graham, No. 20-11785, 2021 WL 4810498 (E.D. Mich. Oct. 15, 2021). *See* discussion under **Clouds** and **Sanctions — Rule 37(e).**

Metadata

Arconic Corp. v. Novelis Inc., No. CV 17-1434, 2022 WL 409488 (W.D. Pa. Feb. 10, 2022). In this trade secret action, plaintiff filed a recusal motion against District Judge Joy Flowers Conti and argued that metadata memorialized in Microsoft Word documents from several of her orders purportedly identified the court-appointed special master as the author of those orders. Because the documents' metadata appeared to indicate that the special master had authored orders affirming reports and recommendations issued by the special master, plaintiff asserted that Judge Conti abdicated her duty to independently review those reports and recommendations. In response, Judge Conti rejected plaintiff's assertion, confirmed that she authored the orders affirming the special master's reports and recommendations, and explained that the "author" metadata field is not evidence of the actual preparer of a document, does not support a reasonable inference that the court abandoned its role, or provide a basis for recusal. *See also Raiser v. San Diego Cty.,* No. 19-CV-00751-GPC, 2021 WL 4751199 (S.D. Cal. Oct. 12, 2021) (denying a recusal motion on similar grounds against District Judge Gonzalo P. Curiel).

Zhulinska v. Niyazov L. Grp., P.C., No. 21-CV-1348 (CBA), 2021 WL 5281115, at *4 (E.D.N.Y. Nov. 12, 2021). *See* discussion under **Form of Production.**

Nonparties

In re Pork Antitrust Litig., No. 18-CV-1776 (JRT/HB), 2022 WL 972401 (D. Minn. Mar. 31, 2022). The court ordered several nonparty employees of defendant Hormel Foods Corporation ("Hormel") to produce certain relevant text messages in response to plaintiffs' subpoenas in this antitrust lawsuit against large U.S. pork producers. Given the financial burden that the production order would impose on the subpoenaed employees, the court directed plaintiffs and Hormel to equally bear the costs of imaging, extraction, conversion, and storage of data from the employees' phones. *See* discussion under **Possession, Custody, or Control.**

Trellian Pty, Ltd. v. adMarketplace, Inc., No. 19-cv-5939(JPC)(SLC), 2021 WL 363965 (S.D.N.Y. Feb. 3, 2021). *See* discussion under **Relevance Redactions.**

Nontraditional Sources of ESI

Matter of Search of Info. that is Stored at Premises Controlled by Google LLC, No. 21-SC-3217 (GMH), 2021 WL 6196136 (D.D.C. Dec. 30, 2021). In this criminal case, the court granted the government's geofence warrant application, which asked Google to leverage its tracking capability of mobile devices to identify cell phones that were in an area at specified times when crimes occurred. This type of warrant is known as a "reverse-location" warrant; meaning that when "the perpetrator of the crime is unknown to law enforcement, the warrant identifies the geographic location where criminal activity happened and seeks to identify cell phone users at that location when the crime occurred." While the government obtained CCTV footage, which showed the suspects using cell phones as they engaged in criminal activity, and provided dates, times, and the location of the criminal activity, the government was unable to identify the suspects. Accordingly, the government requested a warrant from the court seeking a total of 185 minutes of geofence data ("split into segments ranging from 2 to 27 minutes on 8 specified days over a roughly five-and-a-half month period") for a specified 875 square meter geofence area in a further attempt to identify the suspects. The court approved the government's geofence warrant because the government met its burden of showing a crime occurred within the proposed geofences at the specified times and properly limited the scope of the geofence area and timeframe. Moreover, while "the geofences may reveal the location information of non-suspects[, this did] not render the government's warrant unreasonable given that the geofences

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and the two-step protocol ha[d] been crafted to minimize privacy concerns to the greatest degree possible while also preserving 'the fundamental public interest in implementing the criminal law.'" For example, per the court's "two-step" protocol, the government had to receive permission from the court before Google could reveal the identifiable information associated with the location data.

Possession, Custody, or Control

In re Pork Antitrust Litig., No. 18-CV-1776 (JRT/HB), 2022 WL 972401 (D. Minn. Mar. 31, 2022). In this multidistrict litigation involving price-fixing allegations against large U.S. pork producers, the court denied plaintiffs' motion to compel defendant Hormel Foods Corporation ("Hormel") to produce relevant, responsive text messages from its custodian employees and held that Hormel did not have possession, custody, or control over its employees' text messages. Plaintiffs had argued that Hormel's "bring your own device" ("BYOD") policy provided the company with the "legal right" to obtain employee text messages because Hormel could remotely wipe employee personal devices. Plaintiffs additionally asserted that Hormel had the practical ability to obtain text messages from its employees since several employees had already agreed to have their phones imaged for preservation. Magistrate Judge Hildy Bowbeer rejected both of these arguments. First, Judge Bowbeer found that Hormel did not have control over its employee text messages under the legal right test because the BYOD policy did not provide Hormel with express ownership rights over employee text messages, and Hormel did not require or expect that its employees would use text messages in the course of their employment. Judge Bowbeer next determined that Hormel did not have the "practical ability" to require its employees to turn over relevant, responsive text messsages. While Hormel could "*ask*" its employees to preserve and disclose relevant text messages, it could not "*demand*" that employees do so given the terms of the BYOD policy (emphasis in original). Relying on *The Sedona Conference Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations,* 19 Sedona Conf. J. 495 (2018), Judge Bowbeer reasoned that Hormel "should not be compelled to terminate or threaten employees who refuse to turn over their devices for preservation or collection." In connection with her opinion, Judge Bowbeer also discussed extensively *The Sedona Conference Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* 17 Sedona Conf. J. 467 (2016). *See* discussion under **Nonparties.**

Privilege Logging

In re Actos Antitrust Litig., ---F.R.D.---, 2022 WL 949798 (S.D.N.Y. Mar. 30, 2022). In this "complex antitrust class action," the court signaled its approval of categorical privilege logs. In doing so, the court reasoned that categorical logs must disclose "information about the nature of the withheld documents sufficient to enable the receiving party to make an intelligent determination about the validity of the assertion of the privilege." While encouraging the parties to meet and confer regarding the parameters for the categorical log, the court indicated that certain positions the parties had adopted regarding those parameters were not appropriate. For example, defendants as the responding parties would not be permitted to log only threaded emails that suppressed all but the most inclusive messages in an email thread. *See* discussion under **ESI Protocols.** Nor could plaintiffs insist that defendants limit the log's categories to emails with the same recipients and subject matter, since categorical logs do not require such a restrictive limitation.

Sec. & Exch. Comm'n v. Xia, No. 21-cv-5350, 2022 WL 377961 (E.D.N.Y. Feb. 8, 2022). *See* discussion under **Text Messages.**

Vegas Sun, Inc. v. Adelson, No. 2:19-cv-01667-GMN-VCF, 2022 WL 292976 (D. Nev. Feb. 1, 2022). In evaluating a dispute over whether plaintiff could claim as privileged certain communications with lay persons, the court-appointed special master directed plaintiff to submit a representative sample of 30 documents for his evaluation rather than the entire set of 383 documents. After reviewing the sample documents, the special master concluded the documents were privileged and properly withheld from discovery. The court subsequently affirmed this finding and rejected defendants' objection that the special master's findings were improper because plaintiff supposedly "cherry picked" the sample documents. The court found that plaintiff submitted a proper representative sample consistent with the special master's required specifications.

Rekor Systems, Inc. v. Loughlin, No. 19-CV-7767 (LJL), 2021 WL 5450366 (S.D.N.Y. Nov. 22, 2021). The court in Rekor found that plaintiff's categorical log satisfied Rule 26(b)(5)'s

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requirements because it disclosed "the persons who are on the communications, the date range of the communications, the document types, and the basis of privilege." For example, one category reflected communications between plaintiff and its lawyers regarding a specific property lease. Other categories revealed documents relating to plaintiff's sale of certain business entities and the activities of its attorneys regarding those transactions. In summary, the categorical log memorialized enough information to allow defendants to assess plaintiff's privilege claims.

U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC, No. 18-CV-4044 (BCM), 2021 WL 4973611 (S.D.N.Y. Oct. 25, 2021). The court in *U.S. Bank* held that "proportionality is an issue in evaluating privilege logs, just as it is with respect to other aspects of discovery." In adopting this view, the court observed generally that categorical logs further proportionality objectives by reducing the burdens of preparing document-by-document logs. In addition, the court specifically invoked proportionality to curtail certain aspects of defendants' logging obligations, finding they would be "disproportionately burdensome." For example, the court would not order defendants to memorialize in their categorical log (as plaintiff requested) "the representational history of every law firm," given the complexities of that litigation.

Orthopaedic Hosp. v. Encore Med., L.P., No. 319CV00970JLSAHG, 2021 WL 5449041 (S.D. Cal. Nov. 19, 2021). *See* discussion under **Sanctions — Other FRCP Provisions.**

Proportionality

Kinon Surface Design v. Hyatt Int'l Corp., No. 19 C 7736, 2022 WL 787956 (N.D. Ill. Mar. 15, 2022). The court held in this copyright infringement lawsuit that plaintiff's document requests ran afoul of Rule 26(b)(1) proportionality standards. In addressing proportionality considerations, the court emphasized the first ("the importance of the issues at stake in the action") and last ("whether the burden or expense of the proposed discovery outweighs its likely benefit") as being particularly determinative of plaintiff's discovery motion. The court also drew upon Chief Justice John G. Roberts' directive that parties and the court ascertain whether there is an "actual need" for the requested discovery. Against this backdrop, and considering that plaintiff already obtained relevant information in response to two prior rounds of document requests that focused on the same topic as the instant set of discovery, the court found plaintiff's discovery disproportionate and denied its motion to compel. *See* discussion under **Cooperation.**

Robinson v. De Niro, No. 19-CV-9156 (KHP), 2022 WL 229593 (S.D.N.Y. Jan. 26, 2022). In a lawsuit involving famed actor Robert De Niro and his "loan-out" company, the court denied De Niro's motion to compel production of relevant documents from plaintiff. De Niro filed the motion after determining that plaintiff had failed to identify an email account belonging to her that contained relevant information. While criticizing plaintiff for failing to disclose the existence of the email account, the court nonetheless found the omission to be harmless since the relevant information De Niro sought was accessible from another source that plaintiff had already produced in discovery. Under these circumstances, the court found it would be disproportionate to the needs of the case for plaintiff to reproduce the information in question. *See* discussion under **Cooperation.**

U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC, No. 18-CV-4044 (BCM), 2021 WL 4973611 (S.D.N.Y. Oct. 25, 2021). *See* discussion under **Privilege Logging.**

Relevance Redactions

U.S. Risk, LLC v. Hagger, No. 3:20-CV-00538-N, 2022 WL 209746 (N.D. Tex. Jan. 24, 2022). The court generally forbade defendant from producing relevant phone records with redactions. Defendant had argued that it should be permitted to redact data from the phone records reflecting where the parties were located during a particular communication. The court rejected this argument, finding instead that "piecemeal redactions to responsive documents based on relevance are disfavored under the discovery rules." The court generally ordered defendant to produce the relevant records without redactions, making a limited exception that allowed defendant to redact "irrelevant call and text activity specific" to defendant's family members.

Trellian Pty, Ltd. v. adMarketplace, Inc., No. 19-cv-5939(JPC)(SLC), 2021 WL 363965 (S.D.N.Y. Feb. 3, 2021). The court held that Resilion, LLC ("Resilion"), a nonparty and one of defendant's direct competitors, should be allowed to produce in response to a subpoena several categories of relevant documents with redactions to prevent the disclosure to defendant of irrelevant and competitively sensitive information. Defendant

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had argued that the general proscription against relevance redactions should be dispositive of Resilion's request and that, in any event, Resilion could safeguard the unredacted content by designating responsive records "attorney eyes only" under the court's protective order. The court disagreed with these positions, finding that the "commercially sensitive" nature of the requested information, the competitive relationship between Resilion and defendant, and Resilion's status as a nonparty all weighed in favor of allowing Resilion to redact irrelevant information. The court also found that the existence of the protective order was a non sequitur since the content Resilion sought to redact was irrelevant, and defendant had no right to obtain that information through discovery.

Rule 34 Requests for Production of Documents

Schmelzer v. Ihc Health Services, Inc., No. 2:19-cv-00965-TS-JCB (D. Utah Feb. 10, 2022), ECF No. 98 (Order Denying Plaintiff's Short Form Motion To Compel Discovery). The court denied plaintiff's motion to compel defendants to produce responsive documents and imposed monetary sanctions on plaintiff's counsel pursuant to Rule 26(g) for serving "overbroad discovery requests" that were inconsistent with Rule 34's "reasonably particularity requirement." The court found the requests to be problematic because they sought "all documents" including "correspondence of any kind" relating to or regarding various items that "potentially sweep in an astounding amount of paper documents, voice mail messages, texts, and emails . . . but have nothing to do with the claims and defenses in this action."

Rule 34 Objections and Responses

Weatherspoon v. 739 Iberville, LLC, No. CV 21-0225, 2022 WL 824618 (E.D. La. Mar. 18, 2022). In this Title VII action, the court struck general and boilerplate objections (except attorney-client privilege objections) that defendant interposed in response to plaintiff's document requests. In particular, Magistrate Judge Karen Wells Roby reasoned that vague, ambiguous, and overbroad objections (like those defendant asserted in its general objections and in response to plaintiff's particular requests) are "not really an objection at all" and fall well short of what the Rules require in terms of a substantive response. Judge Roby also took issue with defendant's "not reasonably calculated to lead to the discovery of admissible evidence" objection, which she found "improper" given the amendments to the scope of discovery under Rule 26(b)(1) over six years ago. According to Judge Roby, the correct objection — when properly substantiated — is "not relevant." *See* discussion under **Litigation Holds and Preservation.**

Sanctions — Other FRCP Provisions

Annie Oakley Enter., Inc. v. Amazon.com, Inc., No. 1:19-CV-1732-JMS-MJD, 2022 WL 456660 (S.D. Ind. Feb. 15, 2022). In this "unnecessarily contentious" trademark infringement litigation, the court issued multiple orders awarding defendant monetary sanctions in the amounts of $86,448.50 and $54,444. The court issued these orders after finding plaintiffs opposed multiple rounds of discovery motion practice without substantial justification. In the latter order, the court determined that plaintiffs' counsel should pay the entire $54,444 award and observed that counsel "adopted a 'never-say-die' approach to this litigation [that had] not served him well" and was "not in the best interests of his clients."

Fast v. GoDaddy.com LLC, 340 F.R.D. 326 (D. Ariz. 2022). The court imposed sanctions against plaintiff for, among other things, her production of modified and fabricated versions of relevant Facebook Messenger messages in response to defendants' discovery requests in violation of Rule 26(e)(1)(A)'s mandatory supplementation requirement. *See* discussion under **Text Messages.** Pursuant to Rule 37(c)(1)(B), the court ordered that defendants be permitted to apprise the jury at trial of plaintiff's discovery misconduct relating to the modified and fraudulent messages. *See* discussion under **Clouds, Ephemeral Messaging, Ethics, Sanctions — Rule 37(e), Social Media** and **Text Messages.**

Schmelzer v. Ihc Health Services, Inc., No. 2:19-cv-00965-TS-JCB (D. Utah Feb. 10, 2022), ECF No. 98 (Order Denying Plaintiff's Short Form Motion To Compel Discovery). *See* discussion under **Rule 34 Requests for Production of Documents.**

Orthopaedic Hosp. v. Encore Med., L.P., No. 319CV00970JLSAHG, 2021 WL 5449041 (S.D. Cal. Nov. 19, 2021). The court awarded monetary sanctions in favor of defendant and against plaintiff in the amount of $149,519.61 for the reasonable expenses and fees defendant incurred engaging in motion practice to address deficiencies relating to plaintiff's privilege log. Magistrate Judge Allison Goddard held that the imposition of monetary sanctions under Rule 37(a)(5)(A) was appropriate since plaintiff was unwilling to address improper privilege log claims and other

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deficiencies, such as redactions of nonprivileged content and "completely inaccurate" log descriptions, during the meet-and-confer process.

Ondigo LLC v. intelliARMOR LLC, No. CV 20-1126, 2022 WL 798627 (E.D. Pa. Mar. 16, 2022). After concluding that defendant and its counsel failed to produce relevant emails in advance of a bench trial (*see* discussion under **Ethics**), the court issued an evidence preclusion sanction under Rule 37(c) and imposed monetary sanctions on defendant pursuant to Rule 26(g).

Sanctions — Rule 37(e)

Paul v. W. Express, Inc., No. 6:20CV00051, 2022 WL 838121 (W.D. Va. Mar. 21, 2022). In a case where a Kia automobile was destroyed before inspection and downloading of data from the vehicle's electronic information systems, an insurer sought dismissal or an adverse inference instruction against plaintiff. The court denied the insurer's motion without prejudice, emphasizing that while the lost Kia data "may have been the only source" for the evidence that could establish when the Kia was fully stopped at the time of the accident, "it is also possible that similar evidence could be obtained through fact witnesses, photographs, data downloads from the other parties cars, post-accident report and accident reconstruction." As the parties were still conducting discovery, the court found the issue of whether sanctions should be imposed was premature, since the insurer could still obtain other evidence during discovery that serves the same purpose as the lost Kia data.

Alabama Aircraft Indus., Inc. v. Boeing Co., No. 20-11141, 2022 WL 433457 (11th Cir. Feb. 14, 2022). In this litigation between aerospace companies, the trial court informed the jury that certain ESI had been deleted, was unavailable as evidence, and that "it is for you to decide what happened and why it happened." If the jury found that defendant The Boeing Company ("Boeing") anticipated litigation and had deleted the missing ESI with an intent to deprive, the court further informed the jury that "you may infer that the lost information was unfavorable to Boeing." If the jury did not "make the necessary findings and draw the permissible inference," it could not make the inference. In contrast, if the jury did make the necessary findings, the court indicated to the jury that "it is for you to decide what force and effect to give it in light of all of the evidence in the case" since "you are the judge of the facts as to what happened in this case, including what happened to these electronic documents, and why it happened." After the jury returned a unanimous verdict against Boeing on the merits, Boeing argued on appeal that it was an error for the court to read the adverse-inference instruction to the jury. The U.S. Court of Appeals for the Eleventh Circuit found no abuse of discretion since it was Boeing that had asked the court to "instruct the jury to make the finding the district court had already made — that Boeing acted with the intent to deprive" before drawing the inference. The Eleventh Circuit held that the instruction "correctly stated the law and did not mislead the jury." It also reasoned that the trial court could have "imposed an even harsher sanction, allowing the jury to simply draw the adverse inference," noting that the advisory committee note provided that such a finding "may be made by the court" when ruling on a pretrial motion or when deciding whether to give an adverse inference at trial. *See* discussion under **Litigation Holds and Preservation.**

Fast v. GoDaddy.com LLC, 340 F.R.D. 326 (D. Ariz. 2022). The court imposed various sanctions on plaintiff pursuant to Rule 37(e)(2) and Rule 37(e)(1) for spoliating various categories of relevant ESI. *See* discussion under **Clouds, Ephemeral Messaging, Ethics, Social Media,** and **Text Messages.** District Judge David Campbell issued an adverse inference instruction under Rule 37(e)(2) arising from plaintiff's deletion of relevant Facebooks posts, together with the relevant Telegram messages and "unsent" Facebook Messenger messages exchanged with plaintiff's former colleague. Pursuant to Rule 37(e)(1), Judge Campbell directed plaintiff to compensate defendants for their attorney fees and costs incurred in connection with their motion for sanctions; ordered a forensic examination of plaintiffs' electronic devices; and permitted defendants to "issue up to four additional third-party subpoenas." *See* discussion under **Sanctions — Other FRCP Provisions.**

Marksman Sec. Corp. v. P.G. Sec., Inc., No. 19-62467-CIV, 2021 WL 6498217, at *6 (S.D. Fla. Oct. 12, 2021), report and recommendation adopted in part, 2021 WL 5832329 (S.D. Fla. Dec. 8, 2021). Defendants' deactivation of their Instagram account did not merit sanctions under FRCP 37(e) in this trademark infringement case. While plaintiff satisfied the predicate elements of Rule 37(e), the court ultimately found that defendants' actions did not constitute an intent to deprive, as they deleted the account after misconstruing their counsel's advice to "stop the account." Nor did defendants' actions result in prejudice to plaintiff. The

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court explained that the Instagram account was a parody, had little if any relevant information, and what harm (if any) plaintiff may have suffered was ameliorated by the fact that it had "requisite information required to establish its claims."

Garcia v. Alka, No. 19 CV 5831, 2022 WL 180750 (N.D. Ill. Jan. 20, 2022). In a motion filed shortly before trial on his Section 1983 action and related claims, plaintiff asked the court to issue Seventh Circuit Civil Pattern Instruction 1.20 to the jury at the close of evidence to address the loss of certain reports that two defendant police officers prepared regarding their use of force against plaintiff. The instruction at issue is designed to supply the jury with a structure "for drawing an adverse inference from missing evidence." The court ultimately declined to adopt the instruction because it required a predicate showing of bad faith — *i.e.,* "hiding adverse information" — which plaintiff had failed to establish. In response, plaintiff suggested that the instruction be modified such that the jury could draw an adverse inference if they found defendants were "at fault" in connection with the loss of the reports. Magistrate Judge Jeffrey Cummings also rejected that argument, finding it was inconsistent with Rule 37(e)(2), which clearly required a showing of intent or bad faith to warrant the issuance of an adverse inference instruction.

La Belle v. Barclays Cap. Inc., 340 F.R.D. 74 (S.D.N.Y. Jan. 2022). In this unlawful retaliation action against defendant Barclays Capital, Inc.'s ("Barclays"), the plaintiff had argued that defendant should have preserved relevant text messages that his former supervisors exchanged on their personal devices and that sanctions should accordingly issue against Barclays under Rule 37(e) for the loss of those messages. In response, the court found that Barclays did not act unreasonably when it decided not to search for text messages from its employees' personal devices based on a company policy that proscribed work-related communications over personal devices. While observing that it was "better policy" to conduct a "searching inquiry," the court nonetheless found that discovery's "enormous demands" militated against requiring Barclays to search employee personal devices. The court opined that plaintiff could have obviated this problem by specifically requesting that defendant preserve and produce text messages from its employees' personal devices. *See* discussion under **Litigation Holds and Preservation.**

Prudential Def. Sols., Inc. v. Graham, No. 20-11785, 2021 WL 4810498 (E.D. Mich. Oct. 15, 2021). The court determined that terminating sanctions on defendant Jake Graham ("Graham") were appropriate pursuant to Rule 37(e)(2) after finding that Graham intentionally spoliated relevant communications from his work-issued iPhone and his personal iCloud account. *See* discussion under **Clouds.** Before issuing an order of default judgment, the court agreed to set a show-cause hearing to address whether such an order would ultimately be appropriate.

Medidata Sols., Inc. v. Veeva Sys., Inc., No. 17 CIV. 589, 2021 WL 4902462 (S.D.N.Y. Sept. 22, 2021). *See* discussion under **Litigation Holds and Preservation.**

Mod. Remodeling, Inc. v. Tripod Holdings, LLC, No. CV CCB-19-1397, 2021 WL 3852323 (D. Md. Aug. 27, 2021). In this unfair competition case between business competitors involved wide-ranging accusations of spoliation, the court found that certain defendants deleted relevant data, including emails, text messages, and other ESI, and made tardy productions of other ESI. Pursuant to Rule 37(e)(1), the court imposed monetary sanctions against defendants and provided plaintiff with the option of reopening certain depositions "to ask questions that it has not already had occasion to ask about any documents produced late in the discovery process or after the close of discovery." The court also issued an adverse inference instruction under Rule 37(e)(2) to address defendants' intentional spoliation of emails and text messages. *See* discussion under **Ethics** and **Text Messages.**

Nuvasive, Inc. v. Absolute Med., LLC, No. 6:17-CV-2206-CEM-GJK, 2021 WL 3008153 (M.D. Fla. May 4, 2021). The court determined that defendants engaged in widespread spoliation of relevant ESI, including an entire email domain, separate email accounts, and text messages. The spoliated ESI was crucial to the determination of the disputed issues in this breach-of-contract and unfair competition case. Indeed, the court held that defendants deleted "nearly all of the evidence that would potentially resolve [the disputed] issues," and they did so intentionally. The defendants' actions easily satisfied Rule 37(e)(2)'s "intent to deprive" requirement as they deactivated their former company's email domain after the duty to preserve attached (*see* discussion under **Ethics**); eliminated email accounts belonging to two individual defendants after the court entered a preliminary injunction; and deleted various text messages from their smartphones (*see* discussion under **Text Messages**). All of which led the court to issue a mandatory adverse inference instruction to remediate the harm caused by defendants' spoliation. The court subsequently signaled its intention to enter default judgment against defendants. *See Nuvasive v. Absolute Medical, LLC,* No. 6:17-cv-2206-CEM-GJK (M.D. Fla. Jan. 10, 2022), ECF No. 371. The court did so in response to plaintiff's motion to vacate an arbitration award due to defendants' alleged fraud during the arbitration hearing and their repeated attempts to conceal that

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fraud following the award. During a defendant's (Hawley) video testimony in the arbitration proceeding, Hawley received text messages from another defendant (Soufleris) telling Hawley how to testify. The court also noted that in no less than four motions, defendants and their counsel sought to have the court "enforce their fraudulently obtained arbitration award and to use that award to legally bar most of the remaining claims in this case," which constituted an attempt to commit fraud on the court. These findings, together with the court's prior determination that defendants spoliated ESI, left the court with little choice but to consider default judgment as an appropriate sanction. Before doing so, the court set a show-cause hearing that would allow defendants to demonstrate why the court should not enter default judgment and award plaintiff its fees and costs. The court additionally ordered one of defendants' lawyers to show cause why he should not be held jointly and severally liable for any monetary sanctions awarded to plaintiff. *See* discussion under **Ethics.** Final determination of these issues has been stayed pending appeal by defendants to the U.S. Court of Appeals for the Eleventh Circuit.

Social Media

Fast v. GoDaddy.com LLC, 340 F.R.D. 326 (D. Ariz. 2022). In this discrimination lawsuit featuring widespread and brazen spoliation, District Judge David Campbell imposed sanctions against plaintiff for deleting relevant posts from three of her Facebook accounts. During her deposition, plaintiff acknowledged that she deleted a specific post directly relevant to the claims and defenses, along with "anything out there"—including comments, posts, and likes —"like that." Given the relevance of the deleted posts, plaintiff's knowledge that the deleted posts "could be useful" for defendants' positions in the litigation, plaintiff's decision to eliminate the posts rather than use the Facebook archiving function, and the implausible nature of plaintiff's justifications for deleting the posts ("they contained incorrect information or could adversely influence prospective employers"), the court found that plaintiff's actions satisfied Rule 37(e)(2)'s intent-to-deprive standard and caused defendant to suffer prejudice within the meaning of Rule 37(e)(1). *See* discussion under **Clouds, Ephemeral Messaging, Ethics, Sanctions — Other FRCP Provisions, Sanctions — Rule 37(e),** and **Text Messages.**

Warner Bros. Ent. Inc. v. Random Tuesday, Inc., No. CV 20-2416-SB (PLAX), 2021 WL 6882166 (C.D. Cal. Dec. 8, 2021). In this trademark and copyright infringement suit, plaintiff sought production of relevant Facebook messages from defendants. Defendants had apparently delayed producing those messages due to "technical challenges" associated with their attempt to "download" relevant messages from Facebook. After observing that those technical challenges had been addressed, the court ordered one of the defendants to produce relevant Facebook messages "in readable format" and instructed plaintiff to work with defendants and their electronic discovery service provider "to resolve any difficulties in production."

Marksman Sec. Corp. v. P.G. Sec., Inc., No. 19-62467-CIV, 2021 WL 6498217, at *6 (S.D. Fla. Oct. 12, 2021), *report and recommendation adopted in part,* 2021 WL 5832329 (S.D. Fla. Dec. 8, 2021). *See* discussion under **Sanctions — Rule 37(e).**

Text Messages

Sec. & Exch. Comm'n v. Xia, No. 21-cv-5350, 2022 WL 377961 (E.D.N.Y. Feb. 8, 2022). In this criminal enforcement action by the SEC, the court found that the work-product doctrine did not apply to communications made to third-party investors over WeChat. In his privilege log, an individual defendant (Xia) asserted that several communications he exchanged with a subset of investors "within a WeChat group of 214 individuals" in preparation for a certain show-cause hearing constituted work product. The court rejected Xia's claim of work product on multiple grounds, including that the communications were with third parties and lacked the confidentiality required for work-product protection to attach. As the court explained, the functionality of WeChat prevented Xia from knowing precisely *who* was in the WeChat group: "Defendants are unable to identify the name of every individual in the WeChat group, because an individual can be invited into the group by another individual already in the group without disclosing his or her name." Under these circumstances, the court determined it would be "patently frivolous" to suggest the communications were sufficiently confidential.

Fast v. GoDaddy.com LLC, 340 F.R.D. 326 (D. Ariz. 2022). Plaintiff exchanged hundreds of relevant messages with a former colleague ("Mudro") on Facebook Messenger regarding plaintiff's strategy for pursuing her discrimination claims against defendants, without producing those messages in discovery. Over three years into the litigation, plaintiff finally produced Facebook Messenger messages involving Mudro that she previously withheld from discovery. Rather than produce all relevant messages, plaintiff used Facebook Messenger's "unsend" feature to recall 109 messages she previously sent to

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Mudro. Plaintiff's action effectively prevented Mudro from producing the original, unaltered messages in response to a GoDaddy subpoena. Nevertheless, Mudro produced timestamps indicating the dates when she received the 109 "unsent" messages from plaintiff, the contents of which were no longer accessible and replaced by the wording "this message has been unsent." After GoDaddy filed its motion for sanctions against plaintiff, plaintiff finally produced 108 of the 109 "unsent" messages in their original, complete form just days before Mudro's scheduled deposition — with one notable exception: Plaintiff permanently deleted a message memorializing an analysis she conducted with Mudro evaluating the strength of evidence supporting her claims. Judge Campbell concluded that plaintiff's elimination of this key message resulted in prejudice to GoDaddy under Rule 37(e)(1). Moreover, all of the circumstances surrounding plaintiff's deletion of the message — including the implausibility of plaintiff's explanation for the message's deletion (it was purportedly a personal message to her husband) — satisfied Rule 37(e)(2)'s intent-to-deprive standard. The court also found that plaintiff violated Rule 26(e) by withholding 487 relevant Facebook messages in response to defendants' discovery requests until after discovery closed and only in response to defendants' motion for sanctions against plaintiff. Plaintiff additionally violated Rule 26(e) by producing various Facebook Messenger messages with "undisclosed modifications" to the original wording of those messages, together with a fraudulently created Facebook Messenger message. See discussion under Clouds, Ephemeral Messaging, Ethics, Sanctions — Other FRCP Provisions, Sanctions—Rule 37(e), and Social Media.

Mod. Remodeling, Inc. v. Tripod Holdings, LLC, No. CV CCB-19-1397, 2021 WL 3852323 (D. Md. Aug. 27, 2021). In this unfair competition case between business competitors involved wide-ranging accusations of spoliation, the court determined that certain defendants failed to preserve relevant text messages because they did not disable the 30-day automated disposition feature on their smartphones. *Citing Paisley Park Enters., Inc. v. Boxill,* 330 F.R.D. 226 (D. Minn. 2019), the court reasoned that those defendants could have easily disabled the automated disposition feature that eliminated relevant text messages and that the failure to do so was both unreasonable and evidence of "intent to deprive" under Rule 37(e)(2). In addition, the court found that defendant Kimball selectively deleted other relevant text messages as evidenced by the existence of "tapback" messages. The "tapback" feature, available on devices running Apple iOS software and "which allows users to like or to emphasize a text message," will duplicate the recipient's text message when tapped on devices outside the Apple iOS ecosystem. To address the harm caused by the spoliation, the court issued an adverse inference instruction that would inform the jury that certain defendants deleted relevant text messages that were unfavorable to them. *See* discussion under **Ethics and Sanctions — Rule 37(e).**

Nuvasive, Inc. v. Absolute Med., LLC, No. 6:17-CV-2206-CEM-GJK, 2021 WL 3008153 (M.D. Fla. May 4, 2021). As part of defendants' widespread spoliation of ESI, the court found that three of the individual defendants eliminated relevant text messages from their smartphones. One defendant (Soufleris) asserted that the automated disposition feature on his phone deleted text messages after 30 days. The other defendants (Hawley and Miller) indicated they lost text messages after replacing their phones or deleting message strings to conserve memory on their devices. The court found these assertions to be lacking merit given evidence suggesting that defendants had selectively eliminated text messages during the six-month period leading up to the filing of the lawsuit: "A new phone or auto-delete function would delete all text messages prior to a certain date, not just messages within a timeframe crucial to the issues in this litigation." All of which led the court to conclude that defendants destroyed the relevant messages with "an intent to deprive." *See* discussion under **Ethics and Sanctions — Rule 37(e).**

Workplace Collaboration Tools

Warner Bros. Ent. Inc. v. Random Tuesday, Inc., No. CV 20-2416-SB (PLAX), 2021 WL 6882166 (C.D. Cal. Dec. 8, 2021). In this trademark and copyright infringement suit, plaintiff sought production of relevant Slack messages from defendants. Defendants had apparently delayed producing those messages due to "technical challenges" associated with their attempt to "download" relevant messages from Slack. After observing that those technical challenges had apparently been resolved, the court ordered one of the defendants to produce relevant Slack messages "in readable format" and instructed plaintiff to work with defendants and their electronic discovery service provider "to resolve any difficulties in production."

The Post-Pandemic Practice of Law – *for* Better *or* Worse

By J. Thaddeus Eckenrode[*]

Few people would say that anything good has come out of the COVID pandemic; however, it cannot be denied that the pandemic has changed the practice of law, and in many ways, permanently.

In the early days of 2019, most lawyers had never heard of "Zoom" or used "Webex." Now these are everyday terms, and those technologies are as commonly used as our laptops, cell phones and tablets were just two years ago (which, to us older lawyers, were also technologies we couldn't have envisioned back in the days when all pleadings and letters were typed with carbon paper and Wite-out, and it took several days (not seconds) to get a reply from an opponent to legal correspondence). By this point in time, of course, we should have come to expect that technology would constantly evolve and change the way business is conducted and how law is practiced…we just didn't expect it to be thrust upon us so suddenly and vigorously.

After surviving the initial shutdown of society in March and April, 2020, when the words "COVID-19" and "Coronavirus" first entered our lexicon, lawyers were anxious to get back to work, especially those who felt stifled and insulted by being classified as "non-essential." However, despite that desire to get cases rolling again, limitations on personal meetings, travel restrictions, fears of the still developing virulent spread of COVID and a lack (at that time) of a vaccine nevertheless essentially ground the otherwise slow but steady wheels of justice to a halt. Courthouses remained closed and cases stacked up like shipping containers on a dock. Ever creative, however, legal professionals started to improvise. The first steps toward moving those wheels came by cranking lawsuit discovery back into gear. Traveling for depositions, whether to opposing counsel's office or across the country to an expert's location, was out, so

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Zoom depositions quickly became the norm. Courts across the country entered orders encouraging and authorizing depositions by remote technologies. As written discovery moved forward and depositions were being scheduled and taken, cases started to slowly progress out of the muck towards some hopeful future trial date. Eventually mediators, also interested in getting back to work but unwilling to risk their own health by sitting in stuffy closed conference rooms with equally skittish litigants, embraced the notion of remote ADR sessions. Courts likewise started to slowly re-open, albeit using remote technology for many hearings and conferences initially. Ultimately, depending on the jurisdiction, and as pandemic statistics seemed to be improving, some courts also reopened in person, utilizing masks, socially distanced marks on the floor and/or plexiglass dividers throughout courtrooms. A few courts and judges concluded as well that, like depositions and mediations, there was no reason a trial couldn't take place remotely, and experimented with completely remote trials as all-Zoom affairs.

What one invariably notices now, 24 months after the start of the pandemic, is that there is no uniformity to any part of the litigation process. Perhaps that is not unusual, as procedural rules have always varied wildly from state-to-state as it is. Yet it is not uncommon now to find that one courthouse requires every litigant, attorney and witness to wear masks at all times, to seat jurors widely around the courtroom instead of just in the jury box, and to use plexiglass dividers to place every person in their own version of vacuum-sealed packaging, while a mere 50 miles away, a rural courthouse in the same state looks and sounds no different than it did five or ten years ago, without masks or spacing restrictions, etc.

Remote Depositions, Meetings and Court Appearances

Despite everyone's desire to return to a pre-pandemic lifestyle, utilizing pre-pandemic procedures and practices, it is now obvious that many of these Coronavirus-inspired changes will be with us for a long time, and perhaps some will become permanent parts of the process. We've learned that remote depositions allow for easier scheduling, as attorneys need not worry about travelling to a distant location, weather interruptions, flight cancellations or delays, etc., and can, in fact, simply take a deposition from the comfort of their own office -- or home. Finding time on their calendars has become easier, since they only have to schedule the actual time necessary for the deposition and need not find a two-day window to fly to or from another locale for that deposition. That makes scheduling multiparty case depositions much easier, as well. Clients have likewise quickly realized that such videoconference depositions save them significant expense, as they don't incur the cost of airfare and lodging for counsel, and now only have to pay for the attorney's time in the deposition itself and not their hours of roundtrip travel or their meals, rental cars and other expenses incurred.

Similarly, a significant number of routine court proceedings are, and will likely continue to be, handled remotely. Many judges see the merit of sitting at their own desks to handle scheduling or status conferences with counsel, instead of on the bench in a courtroom full of people waiting their turn. Criminal arraignments, non-evidentiary hearings, arguments on civil motions and even appellate oral arguments can be handled just as effectively using remote technology as they might be in person. To that end, even more involved matters to be decided solely by a judge, including evidentiary hearings and actual bench trials, can probably be handled as judiciously via teleconference as in person. While the medical profession had a bit of a head start on legal professionals with the advent of telemedicine visits and teleradiology interpretations, lawyers quickly caught up and have likely overtaken doctors at this point with the use of remote technologies.

Technical (and Other) Problems

Notwithstanding the technical marvels that are Zoom or Webex depositions and hearings, like any equipment we use, some catastrophic problem lurks just a nanosecond away. The most immediate issue commonly seen by legal professionals utilizing teleconferencing technology for depositions or hearings is being dropped from the call. Internet connection speed is the probable culprit, so any attorney planning ongoing use of these technologies should invest in the highest speed internet connection they can get. It will be worth the investment. Hardware is also a problem. Old computers should be replaced with faster and up-to-date models, preferably with multiple and wide screens (to accommodate the multitude of postage stamp sized windows for the faces of all participants and to properly see exhibits or documents being utilized or displayed). While the convenience of teleconferencing technologies can't be overstated, an attorney who tries to attend

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an event via the camera on his or her cell phone is doing a disservice to themselves and others on the call (not only are there likely to be the connection issues noted above, but the small size of the screen makes it almost pointless to bother trying to see all the other participants in "gallery" mode). Needless to say, of course, anyone attempting to actually attend a Zoom event on their phone while driving is not only doing a disservice to others on the call but is likely putting their own life (and those of others) at risk.

Other technical problems with Zoom technology includes the use of inappropriate or distracting background screens and forgetting to "mute" one's screen when trying to speak off camera (several attorneys have slipped and been caught cursing at judges in Zoom court hearings by failing to realize that their camera and microphone were still on) – or neglecting to "unmute" their microphone when attempting to articulate an objection on a deposition record. Sound quality on Zoom calls can vary wildly, and feedback, audio "cut-out" and volume issues abound. In some situations, sound trails the video picture slightly, making the deposition look more like a poorly dubbed foreign language movie. Likewise, lighting issues and the participants' camera angles are important. Often the camera is in such cockeyed positions that other viewers may be looking up someone's nose, down from above, etc. Camera quality is also an issue, as cheaper cameras make the person in the shot look faded or even appear out of focus. It is certainly worth investing in an HD computer camera, which are not that expensive. Most importantly, any attorney using these remote formats needs to have spent time, *in advance,* learning and mastering them, and developed an understanding of how to control the system functions – camera, microphone, screen sharing, window size, participant list, etc. Unfortunately, few can forget the poor attorney who made a remote court appearance at the height of the pandemic looking like a cat, since he did not know how to turn off the cat "filter" that someone had set up on his Zoom screen. Likewise, it goes without saying that although the camera is usually focused on the Zoom participant's head or upper body, wearing pants is still strongly encouraged.

As the use of Zoom technology for court appearances has increased and become more commonplace, it is also notable that judges who were once accommodating to some of the aforementioned "rookie" problems encountered by attorneys new to the technology last year have started to lose patience with those who still struggle with it. As courts return to busier dockets, judges have no time to waste on counsel who can't figure out how to turn on their sound.

Anyone who has secured a deposition by Zoom also realizes that the use of exhibits is a challenge. While one can mark dozens, if not hundreds, of documents and use them easily in a traditional deposition, using exhibits via the "shared" screen method of a Zoom deposition is tricky and time-consuming. Documents being displayed via Zoom screen-sharing are usually seen smaller than they are "live," so as a further consequence, the smaller the screen being used by witnesses or counsel, the harder documents are going to be to read. Likewise, the witness (and other counsel) can't read through multiple pages of a document at their own pace but can only go as fast as the "sharing" participant wants to scroll. Zoom technology, therefore, may present obstacles in depositions that are document-intensive.

Zoom Deposition Suggestions

While we rely upon and expect our opponents to conduct themselves ethically, when one secures a deposition by Zoom (or in the past when telephone depositions were utilized as an occasional alternative), the taking attorney may have no clue who else is in the room with the witness, who is probably the only person who will actually be seen on camera. There may even be notes, books, or other helpful materials available to

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the witness off camera. It behooves the taking attorney, therefore, to inquire on the record about who else is in the room and to ask the witness to describe the surroundings. I suggest going a step further and "Zoom the room," by asking the witness to take their camera and briefly pan the room to get a sense of the environment in which the witness sits.

Zoom Trials and Pandemic-Influenced in Person Jury Trials

At this point, everyone has heard of jury trials that moved forward with pandemic-inspired changes or have taken place entirely via Zoom. As to COVID-restricted in-person trials, there are certainly unique issues presented to trial counsel. Experienced litigators realize that convincing a jury at a trial almost always requires more than a dry recitation of facts and testimony. Trial work is a performance, by witnesses and by attorneys, and "show and tell" with exhibits and demonstratives is important. Attorneys must adjust their game plan during a trial just as a football team has to revise their offensive scheme mid-game to adjust to their opponent's defensive strategies. An important part of that is "reading" the jury – do they believe this witness, like this witness, or are they even listening? That is certainly easier to do when the jurors - whether there are six or twelve or some number in between - are seated next to each other in a close jury box, a mere few feet away from counsel. However, when jurors are spaced around a courtroom, and especially if they are wearing masks that cover their faces, trial attorneys cannot as easily read the pained grimaces, see the smiles of acceptance, or interpret facial expressions that may expose one's true feelings (think of the McKayla Maroney's "not impressed" expression, now a famous meme, when she was on the podium accepting her silver medal in the 2012 Olympics). Likewise, witnesses compelled to wear masks may be harder to comprehend, and questioning attorneys face an additional burden themselves to make sure they can be heard and understood. In that regard, an attorney trying to make a good appellate record and otherwise prevail in the case at hand will come to realize that he or she must slow their questioning down significantly, articulate themselves clearly, and enunciate each word carefully so that the witnesses and jurors can hear. Court reporters, therefore, might actually find mask-wearing attorneys to be a Godsend, as opposed to the attorneys who otherwise ramble on at mach speed.

More worrisome are trials conducted by Zoom. While, in theory, trying a case before jurors watching on their computer **should** work just as well as being there in person, the notion that everyone tuned in is focused and paying close attention is invariably untrue. Moreover, anyone who has themselves sat at their computer to attend a Zoom event also knows that the distractions in the room with you are numerous. Jurors in a courtroom jury box have had their cell phones taken from them and are essentially compelled to either listen to the evidence or daydream, but they don't have the option to watch a TV show, text their friends, surf the internet, pet their dog or deal with their kids while empaneled. Jurors at home watching a trial via Zoom could easily be researching the case facts or information about the participants on another screen, have their computer sound off, or might have noisy distractions (kids, pets, deliveries, trash collection, etc.) that take their focus away from the evidence and testimony, none of which will be apparent to any of the trial litigants or the court. When they render their verdict, the winning litigant will assuredly say that they did a great job and justice was served, but the prevailing parties always believe that, no matter how a trial was conducted. If one were to ask the losing party about the process in a Zoom trial, one might expect them to have a very different opinion about the fairness of the process, especially if they feel the jury wasn't focused. Quite obviously, our founding fathers never envisioned remote trials as they crafted our Constitutional right to trial by jury. Can one whose legal issue, whether property or liberty, is decided by jurors watching a trial on a screen, feel satisfied that justice was appropriately served?

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Legal Issues

As with all issues, lawyers have a myriad of opinions about the merits of remote depositions or trials and the pandemic-influenced restrictions in place in many courtrooms. Some vigorously argue that the "normal" way of doing things (live depositions and trial testimony, freedom from masks and distancing) is the only appropriate way for justice to be effectively achieved. To that end, although Zoom depositions became the "norm" in 2020 at the height of the pandemic, it is not surprising that some deposing attorneys desire to see a witness in person – to "size up" the individual as he or she will actually appear when present in person at trial. They strongly believe that is the only way to truly evaluate a witness. Likewise, there are other practical reasons to secure a deposition in person, including the potential use of numerous documents, the possible complexity of the testimony, and the need for a clear record (as anyone taking Zoom depositions is aware, having the court reporter attend remotely from his or her own home computer creates the same distraction or technical risks referenced above, and the official transcripts from Zoom depositions are often not up to normal standards). Beyond these issues, of course, there are strategic issues to consider -- not the least of which is the potential for the process being more intimidating to a witness who may otherwise be evasive or play games, since having several attorneys surrounding him closely in a conference room, and facing direct inquiry by an aggressive and skilled cross-examiner across the table, may bring out more honesty and candor than one would get from a witness who sits alone hundreds of miles away with opposing counsel restricted to a 12" screen that can be easily turned aside.

In those cases where an attorney **wants,** for whatever reason, to secure a deposition of a witness in person, can they do so? If told that the witness will only appear remotely but deposing counsel vehemently objects to conducting the deposition by Zoom and demands to attend in person, are there any remedies? Is there a "right" to physically attend and take a deposition? The Federal Rules of Civil Procedure actually say nothing specifically about "in-person attendance" at depositions, of course. However, one could argue that it is clearly implied in the rules, given the need several years ago for the rules committee to articulate a specific rule addressing the option of "remote depositions" (FRCP 30(b)(4)). Since that rule states that "The parties may stipulate — or the court may on motion order — that a deposition be taken by telephone or other remote means," it seems to suggest that **unless** the parties stipulate or the court orders to the contrary, depositions **are** to be taken in person. If opposing counsel or the witness' attorney state that their witness will only appear if the deposition is secured by Zoom, is a Motion to Compel personal attendance meritorious? In fact, it would seem that the burden is actually on the party who wants the witness to be deposed remotely to file a motion under Rule 30(b)(4) to seek an alternative if a deposition is properly noticed to take place in person.

Since the start of the pandemic in March, 2020, several courts have addressed these issues and have leaned substantially towards authorizing remote depositions in a continued belief that safety trumps other reasoning. In *Pursley v. City of Rockford*[1], plaintiff sought a protective order to prevent being compelled to attend a deposition in person, as it had been noticed. The court granted that request, citing *In Re Broiler Chicken Antitrust Litig*[2], which held that leave to take remote depositions per FRCP 30(b)(4) should be liberally allowed. Notably, of course, many of the initial requests in the early days of the pandemic under Rule 30(b)(4) were made by the **deposing** parties seeking authority to conduct depositions via Zoom and not by the witness whose deposition was sought. The *Pursley* court noted that the Rule gives the court "broad discretion to determine whether there is a legitimate reason to take a deposition by remote means".[3] In that case, plaintiff cited health risks to both himself and his counsel (who worried about endangering her own family and others if she contracted Coronavirus). The court noted that numerous courts had been and were then authorizing remote depositions, and specifically stated that the health risks of COVID-19 and increasing positivity rates met the "legitimate reason" criteria.[4] Interestingly, the attorneys seeking plaintiff's deposition in that case posited the very rationale discussed above, i.e., that it was important for them, in a "high-stakes" case, to have the right to evaluate the plaintiff's demeanor and non-verbal responses, but the court was unpersuaded, finding that taking the plaintiff's deposition by remote video conference would not prejudice them.

Similarly, another court[5] addressed the issue of the possible burden of using numerous exhibits via Zoom, stating that would not inhibit the effectiveness of a remote deposition. Whether one accepts that conclusion or not, it should be obvious that using numerous exhibits will presumably lengthen the deposition time. As such, a litigant constrained by the Federal "seven hour" deposition time limit (FRCP 30(d)(1)) might consider seeking

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leave in advance for additional time, citing the "other circumstance that impedes…the examination" language of the rule.

For the foreseeable future, it would appear that remote video conference depositions may be authorized over a party's desire to secure a deposition in person, but those determinations will assuredly not be uniform, as courts can evaluate the relative risks that COVID-19 presents to litigants in their own back yards, and some may feel that the risk does not outweigh a litigant's right to an in-person deposition. The *Pursley* court nicely summarized this, stating:

> *This Court is certainly aware that many litigants prefer to take depositions in person. It would be ideal for litigants to be able to proceed with depositions in their chosen format. However, that is not the world we currently live in. Defendant's allegations of prejudice and hardship do not outweigh the serious health risks posed by COVID-19.*[6]

In the "good for the goose" approach to judicial rulings, if one party's witnesses are all willing to be deposed in person, should the other party be compelled to produce their own clients and witnesses similarly (at least unless counsel work out reasonable stipulations as to some witnesses)? To the contrary, if one party insists that depositions of opposing parties be secured in person, can they legitimately argue that their own clients' depositions only be conducted via Zoom? Finally, if the taking attorney in a Zoom deposition does ask the witness at a remote location to take his camera and display the room (as we suggest above), what legal recourse or relief is available if the witness or his attorney refuse to do so? The Rules certainly do not address that particular issue. Since a refusal to actually display or show the room might raise suspicions about a potentially inappropriate situation on the other end of the video, should deposing counsel stop the deposition and re-notice it as an in-person deposition or seek an immediate court ruling? I wonder how a judge would react to a call from litigants in the midst of a deposition under FRCP 30(d)(3) over this issue.

As if remote video conference depositions don't upset normal litigation procedures enough, trial issues present an even greater challenge. Whether a trial is conducted by Zoom or in person with masks and social distancing, does a party who objects to those procedures have legitimate grounds to do so? Perhaps more clearly stated than the issue of in-person depositions, FRCP 43 states that trial testimony "must be taken in open court" unless a statute, rule or a Supreme Court rule state otherwise. Because of the pandemic, some temporary emergency rules have been enacted allowing for remote attendance, as the further language of Rule 43 contemplates: "For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." While this rule clearly appears to authorize remote attendance by a testifying witness, does it – or any rule or statute -- actually authorize a **completely** remote trial and remote jurors? Likewise, no rule addresses the "live" trial issues of masked jurors and witnesses, socially distances spacing, etc. While the Court certainly has the inherent authority to set up the courtroom as it sees fit and can, therefore, seat jurors in any setting – from a neatly constructed jury box to haphazardly around the courtroom – it seems apparent that nobody ever really contemplated masked jurors.

Many of the concerns raised hereinabove about trial issues, including video presentations and masked jurors, were addressed in *United States v. Trimarco,*[7] in which a criminal defendant sought postponement of his trial until it could be conducted "in a manner that is as close to normal as possible." After summarizing the local judiciary's approach to courthouse re-openings after the initial continuation of all jury trials, the court held that although a criminal defendant has many rights, they "do not include an ironclad veto that allows defendants to postpone their trials until some indeterminate point in the future because of the COVID-19 crisis." The court rejected all of the strong arguments posited regarding the pandemic-imposed changes to trials, stating that even though many prospective jurors and trial attendees would be unable to attend (older people and those with health risks would likely stay away from a public event or seek to be excused from jury service), those problems neither denied the defendant his Sixth Amendment right to a

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public trial or a fair jury from a cross section of the community. The court likewise rejected the argument (as we suggest hereinabove) that masked jurors would prevent counsel from assessing their credibility or seeing their reactions to evidence, noting specifically that "there is no constitutional right that requires a defendant to see a juror's facial expression." It also suggested that juror demeanor could be assessed by observing a juror's general body language. In response to defendant's argument that key witnesses might be reluctant to appear in a public courtroom during the pandemic, the court noted its willingness to accommodate such witness by utilizing live two-way video conferencing, citing *United States v. Saipov*[8] in holding that there is "no constitutional right to present evidence through live, in-person testimony only."[9]

While there have been several cases handed down that authorize remote video conferenced hearings in a variety of settings (parental right termination hearings[10], inventorship hearing[11], etc.), these all appear to be in the context of a non-jury setting. It does not appear that a ruling has been handed down as of this writing over the issue of a full-blown jury trial being conducted by Zoom. To the extent that judges handling bench trials feel that they can give the litigants a fair trial and pay attention to the evidence, it is hard to argue with that notion. However, for the reasons stated herein, it would seem that courts may be skating on potentially thin legal ice in trying to force a litigant in a civil or criminal **jury** trial to go forward with all litigants, jurors and witnesses attending remotely. Even where that has taken place with the agreement of the parties, the losing side would assuredly have buyer's remorse thereafter, likely wondering if they might have seen a different outcome with a "normal" live trial. At that point, however, after an adverse verdict has been rendered, such a complaint is just sour grapes. Faced with the prospect of a Zoom trial (or even a pandemic-influenced live trial) a party opposed to that idea should lodge their objection on the record or by written motion well **before** trial so that the point is not considered to have been waived. If the trial judge grants no relief, however, what is one to do? Prepare for trial and make as careful a record as possible about any questionable juror conduct or technical issue that impacts your case presentation. One can only wonder what the appellate courts might think about the fairness of a Zoom trial.

In United States v. Donzinger,[12] Judge Preska noted that "nobody has a crystal ball, and nobody can predict if/when the so-called 'new normal' of life in the time of COVID-19 will improve to the point that trials can proceed as they did before the 'old normal' disappeared."[13] What is clear is that pandemic-influenced changes to the practice of law have drastically impacted the litigation process. Are any of these changes things that will foster a better system, more efficient processes, or make outcomes more just? That depends on who you ask…but many of these changes might be here to stay.

Notes:

[1] *Pursley v. City of Rockford,* 18 CV 50040, 2020 WL 6149578 (N.D. Ill. October 20, 2020).

[2] *In Re Broiler Chicken Antitrust Litig.,* 16 CV 08637, 2020 WL 3469166 (N.D. Ill. June 25, 2020).

[3] *Pursley, supra,* at 2.

[4] *Id.*

[5] *Mosiman v. C & E Excavating, Inc.,* 319 CV 00451DRLMGG, 2021 WL 1100597 (N.D. Ind. March 23, 2021).

[6] *Pursley, supra,* at 3.

[7] *United States v. Trimarco,* 2020 WL 5211051 (E.D. N.Y., September 1, 2020).

[8] *United States v. Saipov,* 412 F. Supp. 3d 295 (S.D.N.Y. 2019).

[9] *Id.,* at 299.

[10] *In re R.D., O.W., et al., v. N.D., M.F.,* et al., 2021 IL App (1st) 201411, (August 27, 2021)

[11] *Raffel Systems v. Man Wah Holdings LTD.,* 18 CV 1765, 2020 WL 8771481 (E.D. Wisc., November 13, 2020).

[12] *United States v. Donzinger,* 11 CV 691, 2020 WL 4747532 (S.D.N.Y. August 17, 2020)

[13] *Id.,* at 4.

International Rule *of* Law Work

Pro Bono and Teaching - from Clinical Teaching to Establishing a Large Firm Pro Bono Program

*By Marc Kadish**

I was a clinical professor at IIT – Chicago Kent College of Law from 1979 through the spring of 1999. I taught in Kent's fee generating criminal defense clinic. I also taught one of the regular sections of Evidence. In June 1999, I joined Mayer Brown LLP to establish the firm wide Pro Bono Program. My position was designed to combine pro bono and litigation training. I was the Director of Pro Bono Activities until the end of 2015. My title is now Pro Bono Advisor. I have no administrative responsibilities for the operation of the pro bono program. My current practice is entirely pro bono and is primarily in criminal defense, immigrant and inmate civil right matters.

Rule of Law Programs

Shortly after joining the Firm, one of the senior corporate partners asked for my assistance in opening several pro bono matters. He was active with a program established by the American Bar Association called CEELI (Central and Eastern European Law Initiative). He was involved in drafting corporate statutes in several Eastern European Counties. I knew nothing about CEELI or formal rule of law programs. But since Mayer Brown had offices in Europe, I thought that this might provide me with the opportunity to establish pro bono projects for those offices. My first visit to the London office was in conjunction with an invitation to give a speech at one of the first pro bono conferences to be held in England.

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** Mr. Kadish graduated from Rutgers Law School in 1968.He spent a year in Detroit as a VISTA lawyer. In 1969 he received a Reginald Heber Smith Poverty Law Fellowship and moved to Chicago. While a Clinical Professor at Chicago-Kent he taught ethics classes to commodity traders at the Chicago Mercantile Exchange and the Chicago Board of Trade. He established and taught a course at Northwestern Law School called "Large Firms and Pro Bono." He has spoken at many law schools and conferences about pro bono work. He is currently a member of the Board of Directors at the Lawndale Christian Legal Center, a member of the Advisory Board at the National Immigrant Justice Center and is active with the Center for Practice Engagement and Innovation at Northwestern Law School.*

He established Mayer Brown's "Seventh Circuit Project" which has accepted over 170 pro bono appeals in the Court. Together with retired Magistrate Judge, Morton Denlow, they established the Settlement Assistance Project, a limited representation program, to assist pro se litigants in resolving their legal claims.

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Later that year I was introduced to Steve Austermiller, a former Chicago lawyer, who was heading the ABA ROLI (CEELI had evolved into Rule of Law Initiative) office in Zagreb, the capital of Croatia. While in Croatia on a family vacation we met Steve in Zagreb. Steve and I traveled to the firm's office in Frankfurt where we put on a program on pro bono and rule of law initiatives. Steve and his family eventually moved to Phnom Penh, the capital of Cambodia, to continue his rule of law work. In 2009, he invited me to participate in a trial advocacy program for undergraduate law students. The program continued annually until the grant ended in 2014 and the Cambodian government ceased cooperation with law reform programs.

In 2011, after the Cambodian program ended, I was invited to visit the Asian University for Women in Chittagong, Bangladesh. That was also the year that I later returned to SE Asia to participate in a two week ABA-ROLI sponsored trip to Vietnam. In 2015, Kent Law School asked me to teach a two week course on international human rights law to judges and bar leaders in Bangkok.

In 2015, I was invited to speak about clinical legal education and pro bono at a new law school in Paris. It had been organized by Jean Philippe Lambert, Managing Partner of the Paris office. He wanted to encourage the use of the Socratic Method and the development of clinical education and pro bono in the French University system. During that same trip I traveled to Brussels to speak at a class in a Belgium University. The class was taught by a partner from our Brussels office. Again both teaching opportunities allowed me to speak at our Paris and Brussel offices.

Steve Austermiller and I kept in touch. Eventually he and his family returned to the United States. He is now the Deputy Director of the Rule of Law Collaborative at the University of South Carolina. He asked me to participate in a rule of law program in Yerevan, the capital of Armenia. Vance Eaton, an Assistant United States Attorney in Puerto Rico, Nick Mansfield, Director of Legal Programs from the East-West Management Institute, Steve and I worked with several Armenian law professors to produce written materials and lectures on three modules: 1) the presumption of innocence and the concept of guilt beyond a reasonable doubt; 2) electronic evidence; and 3) cybercrimes. In addition I led a workshop on judicial management of media involvement in covering trials. The participants were Armenian judges, prosecutors and investigators. The program took place at the Armenian Academy of Justice from October 3rd through 9th.

The Programs - What You Teach and What You Learn

Cambodia

Each overseas experience enabled me to learn something about the host countries history and culture. In Cambodia I learned about the Khmer Rouge genocide. I visited one of the Killing Fields where human skulls were heaped in a pyramid. Exposed bones were scattered all around. I spent an entire afternoon in the Tuol Sleng Genocide Museum where torture devices were still present along with photos of the torture victims.

After the 2009 program, Steve and I invited Matt Rooney, a now retired Mayer Brown litigation partner, to participate in the program. One year, students and a professor from Northwestern Law School's International Travel Program were in Phnom Penh at the same time as our program. They helped us run the program. We introduced them to Steve's assistant, a Cambodian lawyer. The connection led to her receiving a scholarship to attend the LLM program in international human rights at the school.

The trial advocacy program was designed to introduce the university students to the adversarial system of justice. We used the famous film, "To Kill a Mockingbird" as a teaching device. We showed portions of the film to demonstrate how directs and cross examinations and closing arguments take place. The students participated in a short mock trial involving an arrest for drunk driving. We asked them to vote on whether the prosecution had proven their case.

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We also asked them to act as jurors to determine whether Tom Robinson, the defendant, was guilty or innocent. They found him not guilty. They were very disappointed to learn that the jury in the movie found him guilty. They were concerned that if Tom could not find justice in the United States how could the system lead to justice in Cambodia. The subsequent discussion permitted an examination of sexual assault charges, changes in the jury system so that twelve white male farmers could no longer constitute a jury. It also permitted us to explain that Atticus Finch represented the defendant pro bono and that he was willing to represent a poor defendant in a controversial case in the south during the Depression. We asked them to note that the black citizens who were relegated to the balcony stood in respect to Atticus as he left the courtroom.

Bangledesh

One of Mayer Brown's long standing pro bono projects has been transactional work on behalf of the Asian University for Women. The school is an independent regional institution dedicated to women's education and leadership development. To reach the University, I flew from Phnom Penh to Bangkok and then to Dhaka. From Dhaka I flew to Chittagong. Flying into the airport I noticed a large number of old oil tankers sitting off shore. I remembered a story from the CBS show "Sixty Minutes" which explained how these ships constituted the basis of the country's steel industry. The ships were run aground and dismantled by acetylene torches by workers with no protective clothing – not even work boots. There were frequent casualties because of the oil residue at the bottom of the ships. The story brought unwanted publicity but no changes. The workers did not receive work uniforms, nor were their survivors provided any compensation. The response was to put up large walls to hide the industry from the public.

I spent three days at the University sitting in on classes and meeting with administrators. I made a presentation on pro bono and international human rights. I even met one of the students who had participated in one of the Cambodian trial advocacy programs. I returned to Dhaka to meet with judges, bar leaders and law professors. The time spent in Chittagong and Dhaka exposed me to the extreme poverty and class differences that existed in both cities.

Vietnam

This was an educational program designed to observe the development of legal aid programs in Hanoi and the countryside. We spent six days in Hanoi, and two days in Ho Chi Minh City. We met with leaders of the Vietnamese Bar Foundation, faculty members from two law schools and members of the Judicial Academy, a government agency in charge of educating lawyers and judges. We also visited a clinical law program at one of the law schools in Hanoi.

Opposition to the war had helped forge my political identity. I had no idea how I would react to daily life in Hanoi and Ho Chi Minh City. Meeting with Vietnamese lawyers my own age in some of our informal dinners, I was curious about their experiences during the war. They did not want to dwell on the subject. A few of them had fought in the war and had been wounded. While the war remains a topic of concern to me, it was the past to them.

Mayer Brown has offices in Hanoi and Ho Chi Minh City. We visited the office in Hanoi. After the program ended I remained in Ho Chi Minh City to make a presentation at our office which is a ten minute walk from the location of the former Presidential Palace.

Bangkok

This was the trip sponsored by Chicago - Kent Law School. The professor who normally taught the class was unavailable. Teaching a formal class on international human rights was more intensive than any previous programs I had participated in. I had to develop a syllabus and materials for a two week class. I had to give a final exam and grade the papers before I left.

My most memorable classes were the two where we discussed genocide. For the first class we watched parts of the movie

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"Judgment at Nuremberg" and discussed the definition of genocide and the Holocaust. For the second class we discussed the Armenian Genocide which took place during WWI. The class was divided into three sections: the "Armenian diplomats" argued that the actions of Turkey fit the definition of genocide; the "Turkish Diplomats" argued that it was not genocide; the representatives of the non-governmental human rights organizations had to take a position – was it genocide or the product of the resettlement of Armenians during WWI.

Armenia

I knew little about Armenia, save for the Genocide and the dispute with Azerbaijan about the disputed territory of Nagorno-Karabakh. It is a young country, which was established after the dissolution of the Soviet Union in 1991. While it is a young country, it is built on the foundations of an ancient culture. It is landlocked and wedged between Azerbaijan, Turkey, Iran and Georgia. It is close to Russia, Iraq and Syria. Its total population is about the same as Chicago. I knew even less about the capital, Yerevan. It is a modern city with a population of about a million residents.

The program took place at the Academy of Justice, which was funded by the U.S. government. There is a large fairly new American embassy in the city. The embassy was involved in the program. The Armenian law professors who had participated in the drafting of the materials were also present. Of all the programs I have participated in this was the most interactive and sophisticated despite the necessity of using a translator. I was very impressed with the participants – especially some of the female judges.

Armenia follows the civil law system of justice. Judges play an active role in the investigation of cases. I still find the division of labor between a judge and a prosecutor to be confusing. But of course that stems from practicing for over 54 years in the American adversarial system. There are no juries. The Armenian constitution and code of criminal procedure contain clauses on the presumption of innocence and the burden of persuasion in criminal cases. But it was initially unclear to me whether the burden was guilt beyond a reasonable doubt. After Zoom discussions with the Armenian professors I learned the burden was the same as in the United States.

Since the presumption and burden were assigned topics, I wondered how they would be applied to real cases in the country. During the Summer I tried a two witness commercial burglary case at 26th street. The evidence was such that if there had been a guilty verdict I would have surrendered my license. But it proved to be an interesting way to see how the Armenian judges and prosecutors would rule. We discussed the case without revealing the judge's decision. We had the transcript translated into Armenian. The judges voted. Their verdict was the same as the judge at 26th Street.

Conclusion

Overseas rule of law programs and pro bono work are an excellent way to visit interesting places in the world. My role at Mayer Brown provided me with these opportunities. Even family vacations involved some interactions with my interests and my work. On a safari vacation in Africa we spent an afternoon meeting with a lawyer working for the Rwanda Tribunal. That did not lead to a pro bono project but it provided a connection so I was able to help a Summer Associate take a sabbatical from school to work at the Tribunal. In return he wrote an article for our magazine, "Pro Bono Update," on his experience in investigating a massacre at a church. The opportunity to speak at the law school in Paris provided an opportunity for my wife and I to visit the D Day sites in Normandy. A trip to Bangkok involved a visit to the Bridge on the River Kwai and to see the military cemetery where the soldiers who built the bridge were buried.

You will not become wealthy by teaching at the rule of law programs. You will receive a modest stipend and reasonable reimbursement for hotel rooms and meals. But you meet interesting people who are sincerely interested in developing the rule of law in their countries. You develop a lasting interest in events in the countries you have visited and some lifelong friendships.

Thinking Hard:

A Modest Step on Qualified Immunity

By Donnie Morgan[*]

In recent years, qualified immunity has attracted perhaps more attention than any other issue in civil-rights litigation.

This article does not seek to add to the growing body of commentary debating the doctrine's merits or its legal underpinning. Instead, it acknowledges present reality. Neither Congress nor the Supreme Court appears likely to upend qualified immunity any time soon. Given that reality, it proposes a modest step that our circuit can take now to blunt one of the modern doctrine's more worrisome consequences.

The proposal is straightforward. The Fifth Circuit in recent years has been reluctant to skip the qualified-immunity inquiry's first question — whether a federal right has been violated — to answer the easier question whether that right was clearly established. The Seventh Circuit should follow that example. Doing so will mitigate the risk of constitutional stagnation. And mitigating the stagnation risk can prevent an already-powerful doctrine from morphing into a Catch-22 for many plaintiffs. It will also prevent the Fifth Circuit from claiming an outsized role in the development of constitutional law.

The Now-Familiar Standard and the Struggle to Sequence It

Although seemingly entrenched today, qualified immunity dates back only to 1982.[1] A judicially created gloss on Section 1983 liability, the doctrine seeks to balance "the need to hold public officials accountable when they exercise power irresponsibly" with the need "to shield officials from harassment, distraction, and liability when they perform their duties reasonably." [2]

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[*]*Donnie Morgan is an appellate advocate and public-sector lawyer at Taft, Stettinius & Hollister in Indianapolis. He is a member of the Seventh Circuit Bar Association's Board of Governors and an Indiana editor of* The Circuit Rider. *Before returning to private practice, Donnie served as Indianapolis's chief litigation counsel and later as its corporation counsel. He is an Order of the Coif graduate of Berkeley Law School. Donnie thanks his Taft colleague Nadine McSpadden for her generous feedback on a draft of this article.*

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The Supreme Court seeks to balance those concerns by allowing public officials room for "reasonable but mistaken judgments about open legal questions" through a two-step qualified-immunity inquiry.[3] To maintain a civil-rights claim against a government official, a plaintiff must show a violation of some federal right (typically a constitutional violation).[4] But that is not enough. The plaintiff must also show that the violated right was clearly established when the official engaged in the challenged conduct (typically by pointing to an analogous court decision holding that similar facts amount to a violation).[5]

The test is simple enough. One step asks whether the defendant violated a federal right. The other asks whether that right was clearly established when the violation occurred. But the Supreme Court has struggled to decide which of those questions courts should answer first. After a period of silence, then a period encouraging courts to resolve the federal right first, then a period mandating that courts resolve the federal right first, it finally settled on a discretionary approach.[6] Although it "is often beneficial" to resolve a constitutional question before deciding whether the law was clearly established, lower courts have discretion to skip ahead to the clearly-established-law inquiry "in light of the circumstances in the particular case at hand."[7]

Two years after adopting that discretionary approach in *Pearson,* the Court cautioned that, "[i]n general, courts should think hard, and then think hard again, before turning small cases into large ones" by deciding the constitutional question first.[8] Five days later, it framed that guidance as a matter of judicial economy: "[c]ourts should think carefully before expending scarce judicial resources to resolve difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case."[9]

Thinking Hard, not a Mandate

The Court's admonition to "think hard" is not a mandate to skip step one simply because a case could be resolved at step two. "[I]t remains true that following the two-step sequence — defining constitutional rights and only then conferring immunity — is sometimes beneficial to clarify the legal standards governing public officials."[10] The Supreme Court itself has refused to skip ahead when deciding step one would be "beneficial in developing constitutional precedent" in an area of law that often comes up when defendants claim qualified immunity.[11]

But skipping to step two is often the most straightforward way to resolve a case, meaning busy courts have a strong practical incentive to skip ahead any time the alleged constitutional right was not yet clearly established. And skipping ahead is more than an act of self-preservation for busy courts. It also reflects long-established constitutional-avoidance principles.[12]

Yet coupling qualified immunity with consistent constitutional avoidance creates a serious problem. Qualified immunity generally withholds a remedy even in the face of proved constitutional violations unless the Supreme Court or the relevant circuit has already happened to decide a factually analogous case.[13] So if courts consistently skip step one, they limit civil-rights plaintiffs to a pre-2009 body of constitutional law — a moribund body of law providing redress for only those injuries already recognized in closely analogous cases decided before *Pearson.*

Judges and academics label this concern one of "constitutional stagnation."[14] Fifth Circuit Judge Don Willett colorfully (but powerfully) explains the dilemma that plaintiffs face when qualified immunity pairs with constitutional stagnation:

> [M]any courts grant immunity without first determining whether the challenged behavior violates the Constitution. They avoid scrutinizing the alleged offense by skipping to the simpler second prong: no factually analogous precedent. Forgoing a knotty

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> constitutional inquiry makes for easier sledding, no doubt. But the inexorable result is "constitutional stagnation"— fewer courts establishing law at all, much less *clearly* doing so. Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.[15]

The Seventh Circuit has acknowledged some of these stagnation concerns too — albeit in a case where it still skipped ahead to hold that the law was not clearly established.[16]

Judge Willett's concern about constitutional stagnation is not merely theoretical. One empirical analysis concluded that some stagnation concerns are overstated but that the sort of concern later reflected in Judge Willett's *Zadeh* concurrence is "well founded."[17] Before *Pearson,* courts clearly established a previously unrecognized constitutional right in between 6.5% and 13.9% of qualified-immunity cases.[18] After *Pearson,* that sort of clarification of the law has been nearly halved.[19]

Professors Aaron Nielson and Christopher Walker rightly note that some areas of constitutional law will continue to develop regardless because the qualified-immunity defense is unavailable in many contexts. For example, courts will keep answering certain Fourth Amendment questions when deciding motions to suppress in criminal cases.[20] And they will keep resolving the merits of civil claims in cases where plaintiffs can meet the high bar for imposing municipal liability.[21] But those alternatives bring their own subject-matter and procedural limitations.[22] Those limitations led Nielson and Walker to conclude that individual-capacity claims under Section 1983 play a "pivotal role" in the development of constitutional law.[23] Or at least they can if courts do not skip ahead to the clearly-established-law inquiry as a matter of course.

Qualified Immunity Today — Under Siege yet Seemingly Entrenched

In recent years, the sequencing debate has taken a back seat to arguments about whether qualified immunity should exist at all. A growing body of scholarship debates both qualified immunity's merits and its legal underpinning.[24] Meanwhile, heightened attention in popular media and among police-reform advocates following George Floyd's murder has spurred efforts to abolish the doctrine.[25]

At least seven bills and two resolutions directly addressing qualified immunity were pending when the 116th Congress drew to a close at the end of 2020.[26] They ranged from calls to reform or abolish qualified immunity to an effort to codify a strengthened version of it. The George Floyd Justice in Policing Act, a bill that would abolish qualified immunity, was re-introduced in 2021 and passed the House.[27] But more than halfway through the 117th Congress, significant legislative reform appears unlikely to pass the Senate and reach the President's desk anytime soon.[28]

Significant judicial reform appears no more likely. Justices Sotomayor and Ginsburg argued that the Supreme Court insists on too precise a fit with the facts of previous cases before recognizing a right as clearly established.[29] They also juxtaposed the Court's willingness to grant certiorari and summarily reverse qualified-immunity *denials* with its apparent disinterest in committing the Court's resources to correcting erroneous *grants* of immunity.[30] But Justice Ginsburg is no longer on the Court, and those views appear unlikely to garner five votes anytime soon. For his part, Justice Thomas has hinted that he might be open to Professor Baude's arguments that the doctrine is altogether unlawful.[31] But thus far he appears to be the only justice interested in reconsidering whether the doctrine should exist at all. In the meantime, the Court has explicitly or implicitly reaffirmed the qualified-immunity test more than twenty times in the past decade alone.[32]

All of that points to an inescapable reality. Qualified immunity remains firmly entrenched despite growing criticism among academics, the public, legislators, and even some Supreme Court justices. With the doctrine here for the foreseeable future, the sequencing and stagnation debate is central to avoiding Judge Willet's Catch-22.

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A Modest Proposal

This article proposes a modest step that lower courts can take now to guard against that Catch-22: resist the temptation to routinely skip ahead to the clearly-established-law inquiry.

Pearson itself dismissed stagnation concerns precisely because courts have this flexibility. The Court's discretionary approach "does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts have the discretion to decide whether that procedure is worthwhile in particular cases."[33] *Pearson* even acknowledged that deciding whether a federal right has been violated before reaching the clearly-established-law inquiry "is often beneficial."[34] And skipping ahead often preserves no judicial resources (and avoids no constitutional dicta) because courts must often determine what a constitutional right is before they can decide whether it has been clearly established.[35]

Pearson likewise acknowledged that *Saucier* "was certainly correct" in one respect.[36] Deciding constitutional questions without skipping ahead to the clearly-established-law inquiry guards against constitutional stagnation — something the Court called "especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."[37] Despite those words, many courts appear to treat the Court's later "think hard" guidance as something akin to a reverse-*Saucier* mandate to skip ahead.[38]

Here at home, the Seventh Circuit sometimes exercises its discretion to define the scope of a federal right when it could have granted immunity by skipping to the clearly-established-law inquiry.[39] But recent Seventh Circuit decisions suggest that approach has largely fallen out of favor. During the past three years, the Seventh Circuit was far more likely to grant immunity by skipping ahead to the clearly-established-law inquiry.[40]

The recent trend here in the Seventh Circuit also appears to track findings from a 2015 study concluding that, when courts do decide to resolve the first step, they disproportionately do so in cases where no constitutional violation occurred.[41] According to that study, "in the overwhelming majority of cases in which courts opt to use their discretion to decide the constitutional merits, they are concluding that no right has been violated."[42] Those findings suggest courts may be willing to address step one when it is obvious that no federal rights were violated but tend to skip ahead to avoid the sorts of thorny questions or close calls that might amount to violations.

It would be hard to fault courts if that hypothesis is right. Judges and law clerks are busy, and nearly every demand on their time is an important one. But while hesitating to clarify murky areas of constitutional law might be understandable as a matter of judicial economy, it creates real costs. Consistently skipping ahead gives life to Judge Willett's Catch-22. Over time, the resulting stagnation will systematically deprive deserving plaintiffs of a remedy. It also deprives government officials (and the government lawyers who advise them) of clear guidance where they need it most — on the difficult issues.

Another circuit is taking a different approach. The Fifth Circuit's growing body of post-*Pearson* decisions often encourages courts to resolve step one as a check on constitu-tional stagnation.[43] And the Fifth Circuit mostly follows its own guidance. To be sure, it does not exercise its *Pearson* discretion uniformly. But while the recent trend in the Seventh Circuit has been to routinely skip ahead to step two, the Fifth Circuit routinely resolves step one before reaching step two.[44] In doing so, the Fifth Circuit continues to clarify important questions of civil-rights law likely to remain less-than-clearly established in other circuits like ours.

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Professors Nielson and Walker note that such a disparity risks elevating the views of one circuit over all others in the development of constitutional law.[45] And elevating the views of the Fifth Circuit, in particular, could have a meaningful long-term impact. The Fifth Circuit clearly establishes previously unresolved constitutional rights at a rate "substantially below" the national average.[46] In other words, although the Fifth Circuit resists the temptation to reflexively skip to step two, it is far more likely than the national average to decide at step one that no federal right exists.

Our circuit can mitigate both the risk of constitutional stagnation and the risk that the Fifth Circuit will exert an outsized role in the development of constitutional law. But it can do so only if it resists the understandable but problematic temptation to routinely skip ahead to the clearly-established-law inquiry.

To be sure, I do not propose returning to *Saucier's* "rigid order of battle."[47] Exercising Pearson discretion to skip ahead makes good sense in some circumstances discussed in *Pearson* itself. For example, skipping ahead is wise where "woefully inadequate" briefing risks bad decision-making at step one.[48] It may also be wise to skip to the clearly-established-law inquiry if a constitutional determination would rest on an uncertain in-terpretation of state law rather than a clarification of federal law.[49]

But by resisting the temptation to skip ahead as a matter of course, the Seventh Circuit can achieve both greater fairness to plaintiffs seeking to remedy civil-rights violations and greater clarity for government officials seeking to follow the law.

Conclusion

Constitutional remedies ought not be a game of chance turning on whether a previous in-circuit litigant happened to litigate closely analogous facts before the Supreme Court decided *Pearson* in 2009. Our circuit should guard against constitutional stagnation by embracing the Fifth Circuit's cautious approach toward skipping ahead. Adopting the Fifth Circuit's approach will provide greater clarity to government officials and the lawyers who advise them (and over time greater clarity can reduce the number of constitutional violations). It also prevents a single circuit from claiming an outsized role in the development of constitutional law.

Avoiding the Catch-22 that results from pairing qualified immunity with consistent constitutional avoidance ought to find support across ideologies and judicial philosophies. For the most part, it already has in the Fifth Circuit. There is no good reason why it cannot here too.

Notes:

[1] *See Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

[2] *Pearson v. Callahan,* 555 U.S. 223, 231 (2009).

[3] *Ziglar v. Abbasi,* 137 S. Ct. 1843, 1866 (2017) (quoting *Ashcroft v. al–Kidd,* 563 U.S. 731, 743 (2011)).

[4] *Pearson,* 555 U.S. at 232.

[5] *Id.*

[6] *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity,* 89 S. Cal. L. Rev. 1, 15-22 (2015). Professors Nielson and Walker trace the Supreme Court's post-*Harlow* sequencing approach from silence (1982-1991), to suggesting that step one be decided first (*Siegert v. Gilley,* 500 U.S. 226, 232 (1991)), to mandating that step one be decided first (*Saucier v. Katz,* 533 U.S. 194, 200 (2001)), to criticizing *Saucier's* mandated sequencing (*e.g., Bunting v. Mellen,* 541 U.S. 1019, 1019 (2004) (Stevens, J., respecting denial of certiorari)), to reversing *Saucier* and holding that lower courts have discretion to skip to step two.

[7] *Pearson,* 555 U.S. at 236.

[8] *Camreta v. Greene,* 563 U.S. 692, 707 (2011).

[9] *Al-Kidd,* 563 U.S. at 735 (cleaned up).

[10] *Camreta,* 563 U.S. at 707.

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[11] *Plumhoff v. Rickard,* 572 U.S. 765, 774 (2014) (cleaned up).

[12] *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta,* 81 N.Y.U. L. Rev. 1249, 1275-79 (2006) (calling *Saucier's* command to decide step one before reaching step two "a puzzling misadventure in constitutional dictum" that required courts to decide thorny constitutional questions that were not outcome-determinative). Such critiques cut across ideologies and judicial philosophies. *See, e.g., Brosseau v. Haugen,* 543 U.S. 194, 201-02 (Breyer, J., joined by Scalia and Ginsburg, JJ., concurring).

[13] *See, e.g., Lovett v. Herbert,* 907 F.3d 986, 992 (7th Cir. 2018) (noting that, in most cases, a right is clearly established only if Supreme Court or in-circuit authority has already held that analogous conduct violates the right).

[14] Nielson & Walker, *supra* n.6, at 12-13; *see also Eves v. LePage,* 927 F.3d 575, 591 (1st Cir. 2019) (en banc) (Thompson, J., concurring) ("reflexively granting qualified immunity without first deciding whether the complained-of conduct offends the Constitution (*i.e.,* resolving cases solely at step (2)) results in fewer and fewer courts establishing 'constitutional precedent,' let alone the kind of clearly-established precedent needed to overcome a qualified-immunity claim — a phenomenon known as 'constitutional stagnation.'").

[15] *Zadeh v. Robinson,* 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., concurring in part), *cert. denied,* 141 S. Ct. 110 (2020).

[16] *Thompson v. Cope,* 900 F.3d 414, 421 n.1 (7th Cir. 2018) (citing Brief for Scholars of the Law of Qualified Immunity as Amici Curiae Supporting Petitioner, *Almighty Supreme Born Allah v. Milling* (No. 17-8654), 2018 WL 3388318, at *3–4 ("Current doctrine thus forces § 1983 plaintiffs to thread a narrowing gap: to find existing precedent that puts the statutory or constitutional question *beyond debate,* while the Court has all but halted the development of new precedents to rely on in the future." (cleaned up))).

[17] *See* Nielson & Walker, *supra* n.6, at 35-38.

[18] *Id.* at 37-38.

[19] *Id.*

[20] *Id.* at 12-13.

[21] *Id.*

[22] *See id.; see also* Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences,* 113 Mich. L. Rev. 1219, 1244-50 (2015) (arguing that the Supreme Court's application of the Antiterrorism and Effective Death Penalty Act and qualified immunity seriously limit development of constitutional law).

[23] *See* Nielson & Walker, *supra* n.6, at 13.

[24] *Compare* William Baude, *Is Qualified Immunity Unlawful?,* 106 Calif. L. Rev. 45 (2018) (arguing that qualified immunity is unlawful for "a mix of historical, conceptual, and doctrinal reasons"), and Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity,* 93 Notre Dame L. Rev. 2093 (2018) (identifying qualified immunity's shortcomings and suggesting reforms), and Joanna C. Schwartz, *How Qualified Immunity Fails,* 127 Yale L.J. 2 (2017) (arguing that qualified immunity does not achieve the goals purportedly justifying it), with Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism,* 109 Geo. L.J. 229 (2020) (defending qualified immunity on federalism grounds), and Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity,* 93 Notre Dame L. Rev. 1853 (2018) (arguing that qualified immunity should be preserved as a matter of statutory stare decisis), and Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude,* 9 Cal. L. Rev. Online 40 (2018) (defending qualified immunity against Professor Baude's critiques).

[25] *E.g.,* Adam M. Taylor & Ayanna Alexander, *Calls to End Qualified Immunity Boosted by Chauvin's Conviction,* Bloomberg Law (Apr. 21, 2021, 2:37 p.m.), https://news.bloomberglaw.com/social-justice/calls-to-end-qualified-immunity-boosted-by-chauvins-conviction.

[26] Restoration of Civil Rights Act of 2019, H.R. 7115, 116th Cong. § 6 (2019); Ending Qualified Immunity Act, H.R. 7085, 116th Cong. § 4 (2020); George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. § 102 (2020); Qualified Immunity Act of 2020, H.R. 7951, 116th Cong. § 3 (2020); Justice in Policing Act of 2020, S. 3912, 116th Cong. § 102 (2020); Reforming Qualified Immunity Act, S. 4036, 116th Cong. § 4 (2020); Ending Qualified Immunity Act, S. 4142, 116th Cong. § 4 (2020); H.R. Res. 702, 116th Cong. (2019); S. Res. 602, 116th Cong. (2020).

[27] George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102 (2021).

[28] *See* Marianne Levine & Nicholas Wu, *Lawmakers scrap qualified immunity deal in police reform talks,* Politico (Aug. 17, 2021, 5:38 p.m.), https://www.politico.com/news/2021/08/17/lawmakers-immunity-police-reform-talks-505671.

[29] *Kisela v. Hughes,*138 S. Ct. 1148, 1158–61 (2018) (Sotomayor, J. joined by Ginsburg, J., dissenting).

[30] *Salazar-Limon v. City of Houston,* 137 S. Ct. 1277, 1278-83 (2017) (Sotomayor, J. joined by Ginsburg, J., dissenting from denial of certiorari).

[31] *Hoggard v. Rhodes,* 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of certiorari); *Ziglar,* 137 S. Ct. at 1870-72 (Thomas, J., concurring in part).

[32] *See Rivas-Villegas v. Cortesluna,* 142 S. Ct. 4, 7-9 (2021) (per curiam); *City of Tahlequah v. Bond,* 142 S. Ct. 9, 11-12 (2021) (per curiam); *Torres v. Madrid,* 141 S. Ct. 989, 1003 (2021); *Taylor v. Riojas,* 141 S. Ct. 52, 53-54 (2020) (per curiam); *City of Escondido v. Emmons,* 139 S. Ct. 500, 503-04 (2019); *Kisela,* 138 S. Ct. at 1152-53 (per curiam); *Dist. of Columbia v. Wesby,* 138 S. Ct. 577, 589-90 (2018); *Hernandez v. Mesa,* 137 S. Ct. 2003, 2007 (2017) (per curiam); *Ziglar,* 137 S. Ct. at 1866-67; *White v. Pauly,* 137 S. Ct. 548, 551 (2017) (per curiam); *Mullenix v. Luna,* 577 U.S. 7, 11-12 (2015) (per curiam); *Taylor v. Barkes,* 575 U.S. 822, 135 S. Ct. 2042, 2044 (2015) (per curiam); *City & Cnty. of San Francisco v. Sheehan,* 135 S. Ct. 1765, 1774 (2015); *Carroll v. Carman,* 574 U.S. 13, 16-17 (2014) (per curiam); *Lane v. Franks,* 573 U.S. 228, 243 (2014); *Wood v. Moss,* 572 U.S. 744, 757-58 (2014); *Plumhoff,* 572 U.S. at 778-79; *Tolan v. Cotton,* 572 U.S. 650, 656-57 (2014) (per curiam); Stanton v. Sims, 571 U.S. 3, 5-6 (2013) (per curiam); *Reichle v. Howards,* 566 U.S. 658, 664-65 (2012); *Filarsky v. Delia,* 566 U.S. 377, 389-90 (2012); *Messerschmidt v. Millender,* 565 U.S. 535, 546 (2012); *Ryburn v. Huff,* 565 U.S. 469, 473-74 (2012) (per curiam); *al-Kidd,* 563 U.S. at 741.

[33] *Pearson,* 555 U.S. at 242.

[34] *Id.* at 236.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Cf. Camreta,* 563 U.S. at 707.

[39] *E.g., Siler v. City of Kenosha,* 957 F.3d 751, 758 (7th Cir. 2020) ("In the case before us, we believe that our obligation to provide further guidance to the bench and bar and to the law enforcement community counsels that we employ the *Saucier* sequential protocol and address the merits of the constitutional question presented."); *see also Dix v. Edelman Fin. Servs., LLC,* 978 F.3d 507, 513 (7th Cir. 2020) (declining opportunity to resolve case by skipping to step two even though relevant law was not clearly established), *cert. denied,* 141 S. Ct. 2658 (2021); *Lund v. City of Rockford,* 956 F.3d 938, 943-48 (7th Cir. 2020) (same); *Holleman v. Zatecky,* 951 F.3d 873, 882 (7th Cir. 2020) (same); *Ybarra v. City of Chicago,* 946 F.3d 975, 978 (7th Cir. 2020) (same); *Doe v. Purdue Univ.,* 928 F.3d 652, 659 (7th Cir. 2019) (same); *Lewis v. Henneman,* 752 F. App'x 365, 367 (7th Cir. 2019) (same).

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[40] *See Gaddis v. DeMattei,* --- F.4th ----, 2022 WL 986440, at *5 (7th Cir. Apr. 1, 2022) ("Because Gaddis cannot identify the required clearly established law, we need not inquire whether the officers here violated the constitution."); *Lopez v. Sheriff of Cook Cnty.,* 993 F.3d 981, 987 (7th Cir. 2021) ("Like the district court, we begin and end with the second step of the analysis: determining whether Officer Raines violated Fernando Lopez's clearly established Fourth Amendment right to be free from an unreasonable seizure."); *Calderone v. City of Chicago,* 979 F.3d 1156, 1162 (7th Cir. 2020) ("Because prong two — the requirement that there be a clearly established right — is dispositive in this case, we will begin with prong two and dispense with prong one — whether the City's conduct amounts to a constitutional violation."); *Siddique v. Laliberte,* 972 F.3d 898, 903 (7th Cir. 2020) ("We elect to resolve this case on the second part of the qualified immunity test — whether the right was clearly established."); *Harris v. Manlove,* 799 F. App'x 423, 425 (7th Cir. 2020) ("The second prong here is dispositive: Even if we accept Harris's argument at face value . . . there is no clearly established law that such conduct violates the Fourth Amendment."); *Leiser v. Kloth,* 933 F.3d 696, 701 (7th Cir. 2019) ("Because the second prong is dispositive here, we will address only whether the right at issue was clearly established under the circumstances the defendant faced."); *see also Cibulka v. City of Madison,* 992 F.3d 633, 639-40 (7th Cir. 2021) (appearing to grant immunity on at least one claim without deciding first prong because the law was not clearly established); *Gysan v. Francisko,* 965 F.3d 567, 570 (7th Cir. 2020) (same); *Littler v. Wallace,* 803 F. App'x 15, 20 (7th Cir. 2020) (same); *Day v. Wooten,* 947 F.3d 453, 460-64 (7th Cir. 2020) (same), *cert. denied,* 141 S. Ct. 1449 (2021); *Johnson v. Rogers,* 944 F.3d 966, 968-70 (7th Cir. 2019) (same); *Stewart v. Parkview Hosp.,* 940 F.3d 1013, 1016 (7th Cir. 2019) (same); *Wonsey v. City of Chicago,* 940 F.3d 394, 400-01 (7th Cir. 2019) (same); *Weiland v. Loomis,* 938 F.3d 917, 920-21 (7th Cir. 2019) (same); *Riley v. Ewing,* 777 F. App'x 159, 161-62 (7th Cir. 2019) (same); Campbell v. Kallas, 936 F.3d 536, 545-49 (7th Cir. 2019) (same); *Torry v. City of Chicago,* 932 F.3d 579, 586-88 (7th Cir. 2019) (same); *Clark v. Reed,* 772 F. App'x 353, 355 (7th Cir. 2019) (same); *Royal v. Norris,* 776 F. App'x 354, 357-58 (7th Cir. 2019) (same); *Kozlowski v. Van Rybroek,* 771 F. App'x 662, 663-64 (7th Cir. 2019) (same); *Dale v. Agresta,* 771 F. App'x 659, 660-61 (7th Cir. 2019) (same); *Mathews v. Brown,* 768 F. App'x 537, 539-40 (7th Cir. 2019) (same); *Holm v. Casiana,* 759 F. App'x 500, 501-02 (7th Cir. 2019) (same); *Neely-Bey Tarik-El v. Conley,* 912 F.3d 989, 997-1000 (7th Cir. 2019) (same).

[41] Nielson & Walker, *supra* n.6, at 35-36.

[42] *Id.* at 36.

[43] *See Timpa v. Dillard,* 20 F.4th 1020, 1029 (5th Cir. 2021) ("Although we may begin with either prong of qualified immunity, we turn first to the merits of the excessive force claim to provide clarity and guidance to law enforcement."); *Roque v. Harvel,* 993 F.3d 325, 332 (5th Cir. 2021) ("But we have repeatedly emphasized that there is value in addressing both questions to develop robust case law on the scope of constitutional rights." (cleaned up)); *Cope v. Cogdill,* 3 F.4th 198, 204 (5th Cir. 2021) ("often the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all" (cleaned up)); *Joseph ex rel. Est. of Joseph v. Bartlett,* 981 F.3d 319, 331 n.40 (5th Cir. 2020) ("For years, our court has found value in addressing the constitutional merits to develop robust case law on the scope of constitutional rights."); *Walsh v. Hodge,* 975 F.3d 475, 481 (5th Cir. 2020) ("While courts should 'think hard' before addressing the constitutional question, 'it remains true that following the two-step sequence — defining constitutional rights and only then conferring immunity — is sometimes beneficial to clarify the legal standards governing public officials.'"), *cert. denied,* 141 S. Ct. 1693 (2021); *Sims v. City of Madisonville,* 894 F.3d 632, 639 (5th Cir. 2018) ("Because this is a question unique to section 1983 First Amendment claims brought against individual defendants, we conclude that clarifying the liability question is important to provide guidance to public employees who may find themselves on either side of the 'v' in these lawsuits that can raise important issues of whether employees who challenge corrupt governmental practices are protected in exercising First Amendment rights."); *Morgan v. Swanson,* 659 F.3d 359, 385 (5th Cir. 2011) (en banc) (noting Supreme Court's admonition to "think carefully" in *al-Kidd* and to "think hard, and then think hard again" in *Camreta* but still proceeding to "clarify[] some of the law's uncertainties"); *but see Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.,* 942 F.3d 258, 264-65 (5th Cir. 2019) (noting *Camreta's* "think hard" admonition and skipping ahead to clearly-established-law inquiry).

[44] *See, e.g., Betts v. Brennan,* 22 F.4th 577, 582-84 (5th Cir. 2022); *Craig v. Martin,* --- F.4th ----, 2022 WL 457446, at *3-*4 (5th Cir. 2022); *Grant v. LeBlanc,* No. 21-30230, 2022 WL 301546, at *5 (5th Cir. Feb. 1, 2022) (per curiam); *Timpa,* 20 F.4th 1020, 1029; *Evans v. Lindley,* No. 21-20118, 2021 WL 5751451, at *4 (5th Cir. Dec. 2, 2021) (per curiam); *Harmon v. City of Arlington,* 16 F.4th 1159, 1163-65 (5th Cir. 2021); *Perez v. Collier,* No. 20-20036, 2021 WL 4095263, at *2-*4 (5th Cir. Sept. 8, 2021) (per curiam); *Davis v. Hodgkiss,* 11 F.4th 329, 333 (5th Cir. 2021), *cert. docketed,* No. 21-947 (2021); *Rombach v. Culpepper,* No. 20-30554, 2021 WL 2944809, at *4 (5th Cir. July 13, 2021) (per curiam); *Cope,* 3 F.4th at 209-10; *Haddock v. Tarrant Cnty.,* 852 F. App'x 826, 830-34 (5th Cir. 2021), *cert. denied,* No. 21-564, 2021 WL 5763137 (U.S. Dec. 6, 2021); *Hinson v. Martin,* 853 F. App'x 926, 930-32 (5th Cir. 2021) (per curiam); *Roque,* 993 F.3d at 332; *Pearce v. Doe,* 849 F. App'x. 472, 475 (5th Cir. 2021) (per curiam); *Ramirez v. Guadarrama,* 3 F.4th 129, 134 (5th Cir. 2021) (per curiam).

[45] Nielson & Walker, *supra* n. 6, at 39-42.

[46] *Id.* at 40-41.

[47] *Pearson,* 555 U.S. at 234 (noting criticisms of *Saucier's* rigid order of battle).

[48] *Id.* at 239.

[49] *Id.* at 238.

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.

What to Do When You're *Appointed* Counsel
(or If You Want to Be)

*By Daniel Pulliam and Emily Kile-Maxwell**

Although there is no statutory or constitutional right to court-appointed counsel in federal civil litigation, including habeas corpus litigation,[1] federal courts in this Circuit often recruit attorneys to serve as counsel for otherwise-*pro se* litigants. The federal in forma pauperis statute, 28 U.S.C. § 1915, empowers courts to "request an attorney to represent any person unable to afford counsel." Sometimes, *pro se* litigants file motions asking courts to recruit counsel to represent them.[2] Other times, courts may recruit counsel *sua sponte*.[3] Serving as appointed counsel can be a rewarding experience and an opportunity for attorneys to provide valuable services to pro se litigants and to courts. But it can also be a daunting experience with its own substantive learning curve and ethical curveballs. If you've just been appointed as pro bono counsel, or if you're interested in being appointed as pro bono counsel, this article is for you.

Initiation of Representation

Your representation will begin with a court order appointing you as your client's counsel. Depending on its language, the order appointing you as counsel may also serve as your appearance. If you anticipate co-counsel needing to appear with you, they may be able to enter their own appearance, or, depending on

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You're *Appointed* Counsel

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local rules, they may need to file a motion to be appointed as additional recruited counsel. (If you are volunteering for an appointment, you may be able to request that your co-counsel be named in the order as co-appointed counsel in the first instance.)

You'll also need to contact your new client. Depending on your client's circumstances, for example, if your client is incarcerated, this may present logistical challenges. Many correctional facilities may require you to schedule a secure phone call, i.e., one that your client takes in a setting allowing for confidential communications with you, in advance. If you send documents or correspondence to your client in the mail, be sure that the return address prominently identifies you as an attorney, and label the envelope with "legal mail" or some other indication that the mail is from an attorney; otherwise, prison officials may open the mail for inspection outside of your client's presence.[4] You should ensure that your client understands the scope of your representation and the terms of your engagement (especially if you were appointed for a limited-scope engagement, such as a limited appointment to represent a client at a settlement conference or specific hearing), and that those terms are memorialized in an engagement letter.

Evaluating Your Client's Claims

You may have been appointed as counsel in a case involving a practice area that is unfamiliar to you. To address this, the Seventh Circuit publishes a *Guide for Attorneys Recruited to Represent Plaintiffs in Section 1983 Cases*[5] with resources for appointed counsel representing litigants in civil rights litigation, with specific subject matter advice regarding prisoners' claims for inadequate medical care and other claims regarding the conditions of confinement, as well as non-prisoner Fourth Amendment claims. Many district courts also publish substantive resources for appointed counsel.[6]

As you learn about your client's case, you may discover substantive problems with the merits of the issues potentially triggering ethical obligations to ask the Court to relieve you from your appointment. Appointed counsel may move to withdraw from a case, but the procedure varies depending on the nature of the appointment:

- **Direct criminal appeals** – Defendants in criminal cases are constitutionally entitled to be represented by competent counsel on appeal.[7] An attorney who determines that a defendant's appeal presents "no nonfrivolous grounds for appealing" has an ethical obligation to move to withdraw while at the same time preserving this constitutional right to counsel.[8] The attorney balances these competing obligations by submitting an "*Anders* brief," named for *Anders v. California,* 386 U.S. 738 (1967), that serves as the attorney's motion to withdraw, "explains the nature of the case," "intelligently discusses the issues that a case of the sort might be expected to involve," and "in essence[] offer[s] an expert opinion that the appeal is devoid of merit."[9] If the Seventh Circuit, after reviewing the *Anders* brief, has "a sufficient basis for confidence in the lawyer's competence," it will "grant the attorney's request to withdraw as counsel and dismiss the appeal as meritless."[10] The brief must intelligently discuss the issues counsel considered as well as "indicate that he made a reasoned decision not to raise the issues he has omitted."[11] If it does not, the Seventh Circuit may deny the motion to withdraw.

- **Habeas corpus petition appeals** – Unlike direct criminal appeals, prisoners have no constitutional right to counsel on collateral review of their convictions (through petitions for habeas corpus).[12] Habeas corpus petitioners must also obtain a certificate of appealability before appealing a denial of a habeas corpus petition.[13] A petitioner is not entitled to a certificate of appealability unless they make "a substantial showing of the denial of a constitutional right."[14] If counsel representing a habeas corpus petitioner on appeal concludes

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that their client's claims lack merit and, therefore, do not satisfy that standard, the attorney should "inform the court via motion before the start of briefing" rather than move to withdraw or file an *Anders* brief.[15] Of course, you should consult with your client first, and the client may disagree with you, ask you to withdraw, and represent themselves.[16]

- **Civil litigation** – In all other cases in which *pro se* litigants are not constitutionally or statutorily entitled to counsel, federal courts generally apply "the ethical rules of the states in which they sit," so counsel should consult those ethical rules in determining whether the circumstances of a case trigger their ethical obligation to move to withdraw.[17] Civil appointments in district courts "do not carry over on appeal."[18]

SIDEBAR: Being Appointed

Every district court in this Circuit, and the Seventh Circuit Court of Appeals, accepts volunteers for pro bono appointments, and some districts also have established mandatory pro bono appointment panels by local rule:

- **Northern District of Illinois** – Local Rule 83.35 establishes a panel of pro bono attorneys comprising all members of the Northern District of Illinois's trial bar.[19] The clerk may assign members of the pro bono panel to represent *pro se* litigants on a pro bono basis, or members of the panel may volunteer.[20] The district also sponsors a Settlement Assistance Program through which attorneys may volunteer to provide limited scope assistance to *pro se* litigants pursuing constitutional and civil rights claims by representing them in settlement negotiations and at a judicial settlement conference.[21]

- **Central District of Illinois** – Attorneys may volunteer to be considered for pro bono appointments through a form on the Court's website.[22] All participating attorneys pledge to accept at least one pro bono appointment at a time. The Central District of Illinois also posts available pro bono appointments on its website for interested attorneys.[23]

- **Southern District of Illinois** – Local Rule 83.1(i) requires all members of the bar of the Southern District of Illinois to be available for pro bono appointments. Local Rule 83.8 creates a pro bono panel of all members of the bar of the Southern District of Illinois from which attorneys may be appointed to represent *pro se* litigants. Attorneys may also volunteer to be considered for pro bono appointments through a form on the Court's website.[24]

- **Western District of Wisconsin**[25] – Attorneys may volunteer to be considered for pro bono appointments by completing a form available on the Court's website.[26] The Western District of Wisconsin also posts available pro bono appointments on its website for interested attorneys.[27]

- **Eastern District of Wisconsin**[28] – The Eastern District of Wisconsin posts available pro bono appointments on its website for interested attorneys.[29] The Court also sends a monthly email of pro bono opportunities to attorneys who have recently appeared in the Eastern District of Wisconsin.

- **Northern District of Indiana**[30] – Attorneys may volunteer for the Northern District of Indiana's Volunteer Attorney Panel for Civil Rights Cases for the opportunity to be appointed as counsel.[31] Participating attorneys pledge to assume responsibility for up to one appointment a year.

- **Southern District of Indiana**[32] – The Southern District of Indiana has established a Voluntary Panel of attorneys who are willing to be appointed as counsel in civil cases. Local Rule 87 also establishes an Obligatory Panel comprising attorneys who have entered a certain number of appearances in the Southern District of Indiana from which the Court will appoint counsel if it cannot recruit counsel from the Voluntary Panel.

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- **Seventh Circuit Court of Appeals** – The Seventh Circuit often recruits counsel to represent *pro se* litigants in civil rights or habeas corpus litigation, as well as direct criminal appeals. If you are interested helping with those appeals, you should contact the Circuit Executive's office.

Notes:

[1] *James v. Eli,* 889 F.3d 320, 326 (7th Cir. 2018); ("In federal civil litigation, litigants possess neither a constitutional nor statutory right to a court-appointed attorney."); *Lavin v. Rednour,* 641 F.3d 830, 833 (7th Cir. 2011) ("[P]risoners do not have the right to counsel on collateral review.").

[2] *See, e.g., Pruitt v. Mote,* 503 F.3d 647, 650 52 (7th Cir. 2007).

[3] *See, e.g.,* Order, *Jenkins v. Kallis,* No. 19-1071 (7th Cir. Apr. 16, 2021), Doc. 12 (order granting habeas corpus petitioner a certificate of appealability and *sua sponte* appointing counsel); Order, *Sanders v. Radtke,* No. 20-1451 (7th Cir. Apr. 9, 2021), Doc. 23 (same).

[4] *See, e.g., Kaufman v. McCaughtry,* 419 F.3d 678, 685-86 (7th Cir. 2005).

[5] *Guide for Attorneys Recruited to Represent Plaintiffs in Section 1983 Cases,* United States Court of Appeals for the Seventh Circuit (2017), *available at* https://www.ilcd.uscourts.gov/sites/ilcd/files/7th%20Circuit%20Guide%20for%20Recruited%20Counsel.pdf.

[6] *See, e.g., Recruited Counsel's Handbook for Prisoner Litigation,* United States District Court, Southern District of Indiana (Nov. 7, 2016), *available at* https://www.insd.uscourts.gov/sites/insd/files/RCPLHandbook.pdf.

[7] *United States v. Wagner,* 103 F.3d 551, 552 (7th Cir. 1996); *Anders v. California,* 386 U.S. 738 (1967).

[8] *Wagner,* 103 F.3d at 551.

[9] *United States v. Tabb,* 125 F.3d 583, 584 (7th Cir. 1997).

[10] *Id.*

[11] *Id.* at 585.

[12] *Lavin,* 641 F.3d at 832 33.

[13] 28 U.S.C. § 2253(c)(1).

[14] *Id.,* § 2253(c)(2).

[15] *Lavin,* 641 F.3d at 832 33.

[16] *Id.* at 834.

[17] *Bey v. Haines,* 802 F. App'x 194, 198 (7th Cir. 2020) (quoting *Watkins v. Trans Union, LLC,* 869 F.3d 514, 519 (7th Cir. 2017)).

[18] *DiAngelo v. Ill. Dep't of Public Aid,* 891 F.2d 1260, 1261 (7th Cir. 1989).

[19] *Northern District Pro Bono Programs: Trial Bar Pro Bono Program,* United States District Court, Northern District of Illinois, *available at* https://www.ilnd.uscourts.gov/Pages.aspx?BQuMZcPiD1N2onwVG/J4/Q==.

[20] N.D. Ill. L.R. 83.35(b).

[21] *Northern District Pro Bono Programs: Settlement Assistance Program (SAP),* United States District Court, Northern District of Illinois, *available at* https://www.ilnd.uscourts.gov/Pages.aspx?BQuMZcPiD1N2onwVG/J4/Q==.

[22] *Pro Bono Attorney Registration,* United States District Court, Central District of Illinois, *available at* https://www.ilcd.uscourts.gov/content/pro-bono-attorney-registration; *see also Pro Bono Attorney Information,* United States District Court, Central District of Illinois, *available at* https://www.ilcd.uscourts.gov/content/pro-bono-attorney-registration.

[23] *Civil Prisoner Cases Needing Pro Bono Counsel,* United States District Court, Central District of Illinois (Nov. 2021), *available at* https://www.ilcd.uscourts.gov/ sites/ilcd/files/pro%20bono%20opportunities%20November%202021.pdf.

[24] *See* https://www.ilsd.uscourts.gov/AttyProBono.aspx.

[25] *See* https://www.wiwd.uscourts.gov/pro-bono-representation.

[26] *See* https://www.wiwd.uscourts.gov/sites/default/files/Pro_Bono_Registration.pdf.

[27] *See* https://www.wiwd.uscourts.gov/available-pro-bono-cases.

[28] *See* https://www.wied.uscourts.gov/pro-bono-program.

[29] *See* https://www.wied.uscourts.gov/recruiting-pro-bono-attorneys.

[30] *See* https://www.innd.uscourts.gov/volunteer-attorney-panel-civil-rights-cases.

[31] *See* https://www.innd.uscourts.gov/sites/innd/files/ND%20IND%20Attorney%20Panel%20Plan.pdf.

[32] *See* https://www.insd.uscourts.gov/pro-bono-opportunities.

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.

Important Notice *of* Rescission

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
219 South Dearborn Street, Room 2722
Chicago, Illinois 60604

Christopher Conway
Clerk of Court
312-435-5850

October 28, 2021

Notice of Rescission of Circuit Rule 57

On September 20, 2021, this court issued notice of its intent to rescind Circuit Rule 57. No comments were received. The court hereby rescinds Circuit Rule 57 effective immediately.

/s/ Christopher Conway, Clerk

2021-2022
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